大成 DENTONS

A Guide to **Doing Business in Canada**

October 2019

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Beth Wilson
Canada Chief
Executive Officer

The Dentons Canada 2019 Doing Business in Canada guide is an invaluable tool for companies considering Canada as part of their growth strategy.

As Canada's business landscape is constantly evolving, this guide helps companies navigate the changing climate, and while there are many opportunities for companies interested in doing business here, there are legal and operational complexities to consider. This easy-to-use guide highlights current issues, regulatory and policy changes, legal precedents and trends affecting business owners.

Our team of legal professionals have provided thoughtful analysis, clear explanations and concise summaries for numerous business topics, including:

- Income and commodity tax considerations for businesses
- Canada's bilateral and regional trade agreements
- Foreign investment protection and promotional agreements
- Import and export considerations for businesses
- Protection of intellectual property
- Privacy laws in Canada
- Labour and employment law
- Federal consumer product and labelling standards.

WE ARE HERE TO HELP

Canada is a great place to do business.

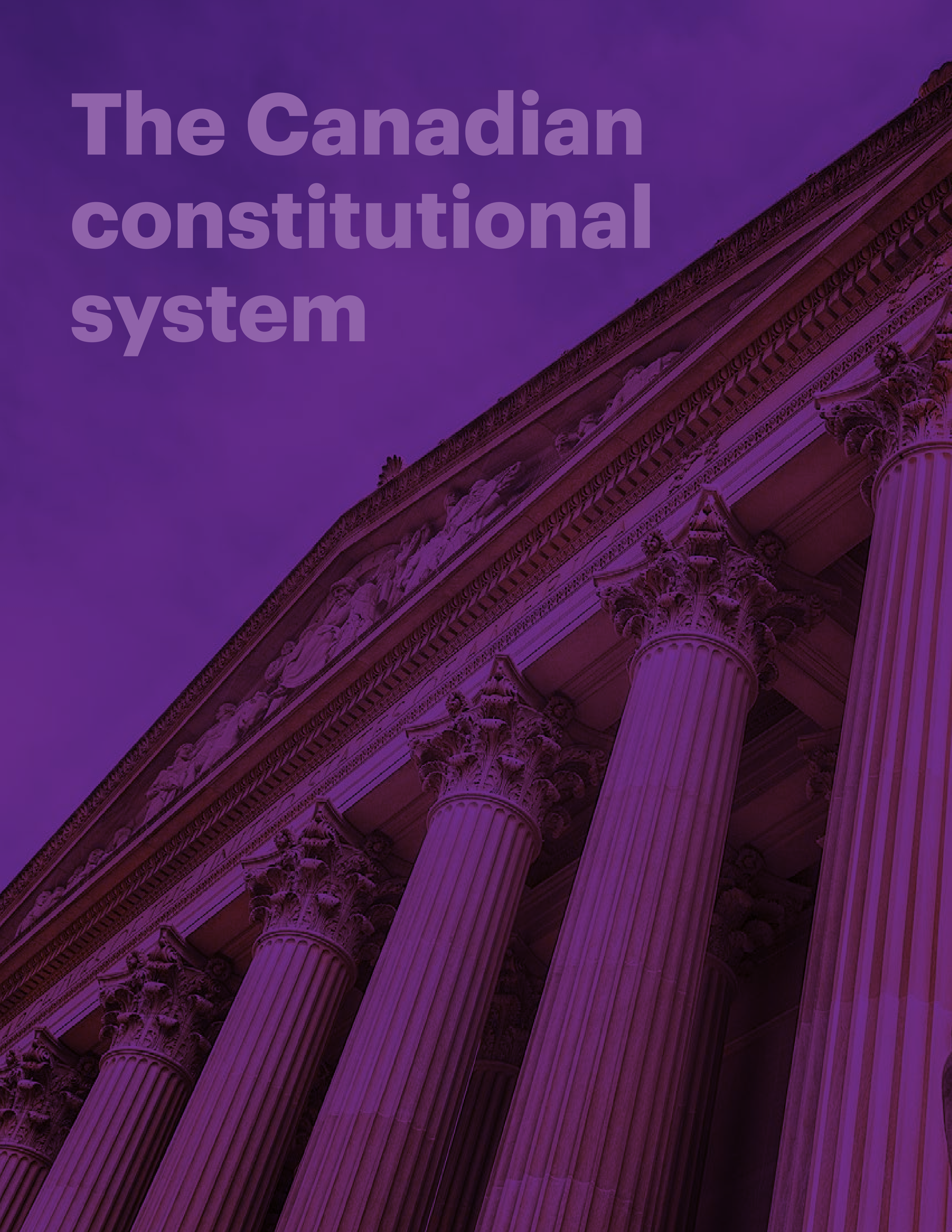
If you are interested in learning more, our talented team of legal professionals are located in Canada's six major business centres and are ready to help you explore "why Canada?"

Sincerely,

Beth Wilson

If you have any questions regarding the content of this guide, please email us at doingbusiness.incanada@dentons.com.

The Canadian constitutional system



Overview of political organization and legal heritage

Canada is a parliamentary democracy influenced by the British form of government. There is a federal level of government responsible for matters of national interest and international affairs. There are 10 provincial governments whose legislative powers are discussed below. In addition, the federal government has established three northern territories—the Yukon, the Northwest Territories and Nunavut—each with a government that has substantial control over local matters within their respective territories. Although these territories operate similarly to provinces, they are creatures of federal delegation of powers. Finally, there are municipal corporations established by provincial statutes, which govern matters such as land use planning and other matters of strictly local concern, as delegated by the provinces. In addition to these levels of government, Canada's Indigenous populations may have the right to be consulted with respect to matters that affect their asserted or proven Indigenous or treaty rights and, as a result of treaties or other types of agreements or treaties, may exercise self-government in certain areas.

A substantial part of Canada's history is that of French colonization. The French civil law system continues to inform Canada's legal system today. The civil law system continues to govern matters of private law in the Province of Québec. Federally, Canada is a bijural nation, which means that both the common law and civil law coexist as authoritative sources when interpreting and applying federal legislation.

There are three branches of federal and provincial/territorial government in Canada: the Executive, the Legislature and the Courts. At the federal level, the Executive is composed of the Crown, represented in Canada by the Governor General, the Prime Minister and Cabinet Members chosen from the elected members of the federal Parliament. There are two legislative bodies forming the Canadian Parliament – the House of Commons and the Senate. Members of the House of Commons are elected by a majority of the electorate in their ridings. Senators are appointed by the Governor General on the advice of the Prime Minister. A similar political structure exists at the provincial/territorial levels, though the legislative component is comprised only of a legislature (or parliament); provinces and territories do not have a senate. Courts are independent of the Executive and Legislature in Canada. Judicial appointments to provincial superior courts of justice, to the Federal Court and to the Supreme Court of Canada are made by the Governor General on the advice of both Cabinet and advisory committees who assess the qualifications of lawyers for appointment. Appointments to provincial courts that are not superior courts of justice are made by the governments of the provinces. Most civil litigation is within the jurisdiction of the superior courts of justice. Certain provincial offences and criminal matters may be adjudicated in the provincial courts.

All levels of government are active in the procurement of products and services from the private sector, including through public-private partnerships. Furthermore, all levels of government frequently consult with the private sector on policy issues.

Distribution of legislative powers

Canada has a constitution that distributes law-making powers between different levels of government and imposes limits on the authority of all branches of government. The statute that performs these roles is the *Constitution Act, 1867*.

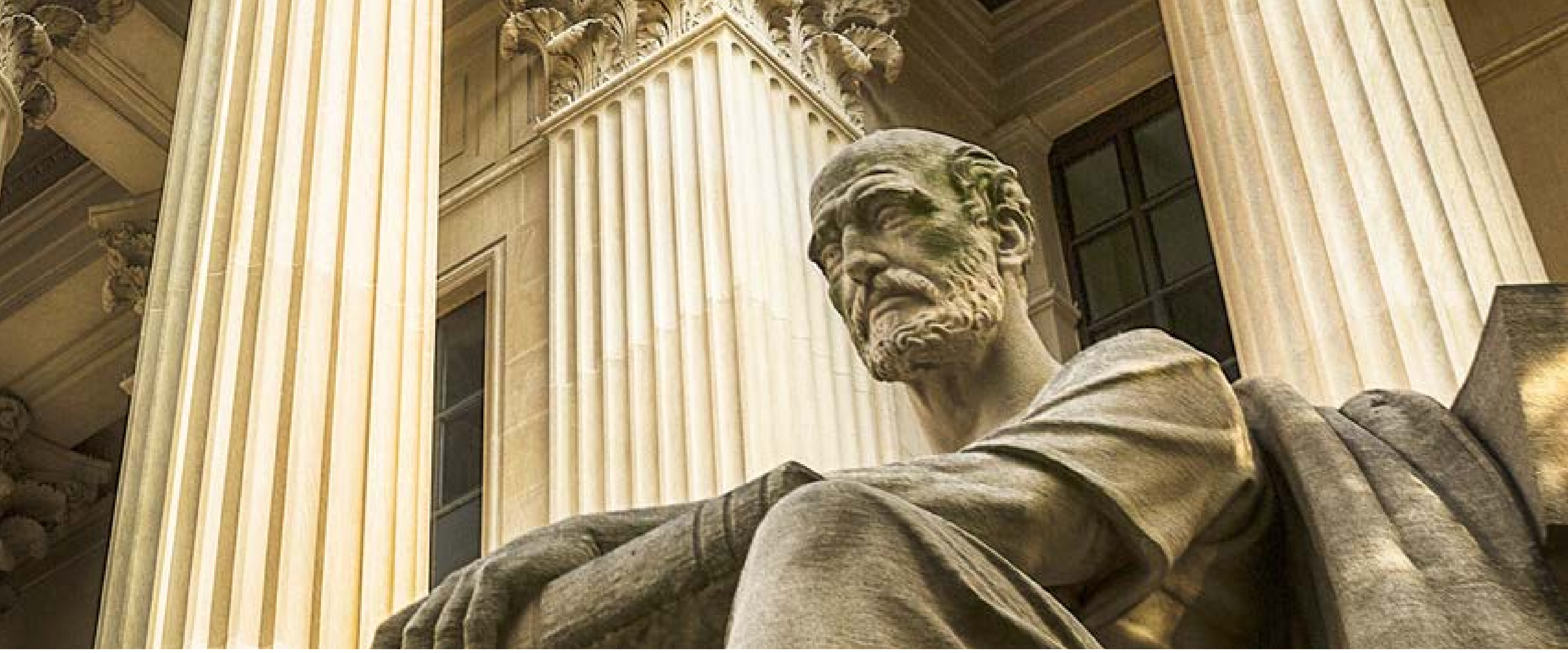
The areas of federal and provincial jurisdiction are, by and large, intended to be mutually exclusive. In practice, however, many activities may be regulated to some degree at both the federal and provincial levels. In the event of an operational conflict between valid federal and provincial legislation, the federal will prevail. The courts serve as referees of the division of powers through their authority to declare any law that is beyond the jurisdiction of the enacting body to be of "no force and effect."

There are several subjects upon which the federal Parliament may pass laws that are likely to impact business activities, namely:

- The regulation of foreign investment;
- The incorporation of federal companies;
- Direct and indirect taxation;
- The regulation of interprovincial and international trade;
- Competition (antitrust) law;
- Patents and copyright;
- Immigration;
- Bankruptcy and insolvency;
- Banking and bills of exchange;
- Interprovincial undertakings in the transportation field; and
- Telecommunication and broadcasting.

The provinces may also exercise control over certain business activities through their authority to make laws in relation to:

- The incorporation of provincial companies;
- Direct taxation within the province; and
- The regulation of trade and commerce within the province.



The Canadian Charter of Rights and Freedoms

Canada's constitution includes the *Canadian Charter of Rights and Freedoms* (the Charter), which imposes limitations on federal and provincial authorities in their legislative and administrative capacities. Among other things, it guarantees:

- Fundamental freedoms (i.e., beliefs, expression, opinion, conscience, religion and association);
- Democratic rights;
- The basic legal rights of persons subject to law enforcement processes (i.e., the right to legal counsel, and freedom from unreasonable search and seizure); and
- The equality of individuals before and under the law.

Human rights legislation

The Charter is designed to protect against human rights violations by government actors. However, all Canadian jurisdictions have enacted or adopted human rights legislation designed to ensure equal treatment in relation to employment, and the provision of goods and services by the private sector. These statutes may prohibit discrimination on a number of grounds, including, among others: gender, sexual orientation, disability, religion, national origin and race. This legislation has been described by the courts as "quasi-constitutional," since it usually prevails over other inconsistent laws.

Electoral process

FEDERAL AND PROVINCIAL ELECTORAL PROCESSES

Members of the House of Commons and provincial legislatures are elected for terms that may last not more than five years. On average, general elections are conducted every four years.

Members may be re-elected for multiple terms. Vacancies are filled through by-elections. Members elected in by-elections will face re-election during the next general election.

Most Members of Parliament (MP) and members of the provincial legislatures are members of registered political parties. The leader of the political party, whose members hold a majority of the seats in the legislature, will ordinarily be asked to form a government. Should no party hold a majority, the leader of the party holding the largest plurality of seats in the legislature will normally be invited to attempt to form a minority government.

Only citizens and permanent residents of Canada may make political donations to registered federal political parties and federal candidates. Corporations and trade unions are not permitted to make political donations. In the case of citizens and permanent residents, there are federal monetary limits. Québec also prohibits political contributions from corporations and trade unions, and imposes monetary limits for contributions from individuals. Other provinces that ban contributions from corporations and trade unions are: Alberta, Manitoba, Ontario and Nova Scotia. Some provinces, such as Ontario, Alberta and New Brunswick, impose monetary limits on contributions. While there are no monetary limits on contributions in British Columbia, there are limits on the amount of anonymous contributions that a candidate, and other eligible recipients, can accept.

MUNICIPAL ELECTORAL PROCESS

Provincial governments have delegated certain legislative powers to municipal governments. These powers permit municipal governments to enact by-laws, usually on issues such as land use planning and certain business licensing functions.

Municipal governments typically consist of a mayor, reeve, or other head of council elected at large across the municipality, and a number of councillors elected either at large or as representatives of smaller electoral divisions within the community. Elected municipal officials serve for set terms, which typically vary from province to province between two and four years.

A number of provinces have created two tiers of local government consisting of a regional government, which includes several municipal governments.

LOBBYING

Lobbying is a legitimate activity in Canada that plays an important role in ensuring public officials have the necessary information to make decisions on complex issues. Lobbyists though, have legal and professional obligations to follow under certain federal, provincial and municipal lobbying legislation when they work on behalf of clients or employers.

For example, at the federal level, the *Lobbying Act*, (R.S.C., 1985, c.44 (4th Supp.)) (Act) regulates lobbying activities directed federally at the Government of Canada. Lobbyists are subject to registration and reporting requirements, as well as rules governing their conduct. The purpose of these provisions is to promote public transparency and to ensure lobbyists do not circumvent free and open access to government business.

Lobbying generally refers to any communication with public servants regarding a government decision. The Act applies to any oral or written communication with a public office holder or a designated public office holder regarding the development, defeat or amendment of federal laws, policies and programs, and the awarding of government grants, contributions or other financial benefits. For consultant lobbyists (see below), communications regarding the awarding of government contracts, as well as simply arranging a meeting between a public office holder and another person, may constitute lobbying.

However, not all such communications are considered lobbying activities; the Act does not apply to oral and written submissions made during parliamentary proceedings, consultations and hearings that are of the public record or communications regarding routine dealings with respect to the enforcement, interpretation or application of statutes or regulations.

The Office of the Commissioner of Lobbying (the Commissioner) is responsible for conducting reviews and investigations of lobbyists to ensure compliance with the Act and the Lobbyists' Code of Conduct. It also maintains the Registry of Lobbyists, which contains and makes public the registration information disclosed by lobbyists.

There are two types of lobbyists governed under the Act: **Consultant Lobbyists** and **In-house Lobbyists**.

- **Consultant Lobbyists** are individuals who lobby on behalf of a third party for payment (i.e., money or anything of value). They can be self-employed or work at firms that deal in government relations, law, accounting or strategic advice.
- **In-house Lobbyists** are individuals who lobby on behalf of their employer. This includes employees of a corporation, trade union, industry association, charity, partnership, trust, interest group and non-share capital corporation.

Every Consultant Lobbyist and In-house Lobbyist that fails to file a return, or knowingly makes a false or misleading statement on any return or document submitted to the Commissioner, may be guilty of an offence and may be liable:

- On summary conviction to a fine not exceeding CA$50,000 or to imprisonment for a term not exceeding six months, or to both; and
- On indictment, to a fine not exceeding CA$200,000 or to imprisonment for a term not exceeding two years, or to both.

Any other contravention of the Act may be an offense and may be punishable by a fine not exceeding CA$50,000.

Each province has lobbying legislation, which must be consulted prior to engaging in lobbying activities. While the provincial legislation may differ between jurisdictions, lobbying legislation generally seeks to ensure all communication the private sector has in attempt to influence municipal, provincial or federal government follows certain rules or codes of conduct, and is disclosed publicly to ensure transparency.

Regulation of foreign investment

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The Canadian government is anxious to foster a business climate that is receptive to investment from outside the country.

The Investment Canada Act

OVERVIEW

The Canadian government is anxious to foster a business climate that is receptive to investment from outside the country. At the same time, it is determined to monitor the level of new foreign investment in Canada and to screen a limited number of larger investments, as well as investments in certain sectors such as cultural businesses. When such screening occurs, government officials will consider the plans for the Canadian business to determine whether the investment is likely to be of net benefit to Canada. The screening process may also involve meetings with government officials, as well the requirement to provide undertakings. The government also has the power to screen investments of all sizes for impacts on national security. The *Investment Canada Act* provides the statutory framework for the monitoring and review processes. While it remains rare for Canada's government to block foreign investments, it has exercised that power in a number of cases in recent history.

The general provisions of the *Investment Canada Act* apply to the establishment of new Canadian businesses and the acquisition of control of existing Canadian businesses (the triggering events) by non-Canadians. The *Investment Canada Act* also has a national security review process, as discussed below.

For the purposes of the *Investment Canada Act*, a "non-Canadian" is an individual, government, government agency or entity that is not Canadian. An individual is "Canadian" under the *Investment Canada Act* if he or she is a Canadian citizen or a permanent resident of Canada who has not been ordinarily resident for more than one year after he or she first became eligible to apply for Canadian citizenship. The determination of whether a corporation is "Canadian" under the *Investment Canada Act* can be more complex and requires a determination of whether the individual or individuals who ultimately control the corporation are "Canadians".

ESTABLISHMENT OF NEW BUSINESS

The establishment of a new business, regardless of size, generally requires no more than the filing of a notification by the foreign investor and may be given at any time up to 30 days after the new business becomes operative. The two possible exceptions to the notification-only requirement on the establishment of a new business are:

1. The establishment of a new "cultural business", such as film production or book publishing, which can be made subject to full review within 21 days after the notice is filed; and
2. A new business that triggers a national security review.

DIRECT ACQUISITION OF A CANADIAN BUSINESS

In the event that control of an established Canadian business is directly acquired through a purchase of assets or voting interests of a corporation, partnership, trust or joint venture, the foreign acquirer may be required either to file a notification or an application for review and approval, depending on whether the applicable thresholds are exceeded.

Neither obligation will arise if the transaction falls within one of the general exceptions under the *Investment Canada Act* (which general exceptions are, in turn, subject to specific exceptions for certain types of business). These general exceptions include, among other things:

- The purchase of less than one-third of the voting shares of a corporation carrying on a Canadian business;
- The acquisition of control of a Canadian business through the realization of security for a loan; and
- A change, through a corporate reorganization, in the immediate control of a Canadian business, but not a change in ultimate control.

If none of the exceptions applies, and if the Canadian business has assets in excess of the relevant thresholds, the direct purchase of control of an active Canadian business by a foreign investor will be subject to pre-closing review under the *Investment Canada Act*. The 2019 review threshold for investors from countries that are members of the World Trade Organization (WTO), other than for Canadian cultural businesses, is CA$1.045 billion in "enterprise value" of the target Canadian business. "Enterprise value" is equal to the market capitalization of a publicly listed target entity (or the purchase price for the acquisition of a private company or for an asset acquisition) plus liabilities (excluding operating liabilities) and minus cash or cash equivalents. The review threshold is adjusted annually.

For investors whose countries of origin have certain trade agreements with Canada, the 2019 threshold is CA $1.568 billion in enterprise value, calculated in the same manner as described above for WTO investors. The higher threshold trade agreement investors include investments that originate from the EU, the United States, Mexico, Australia, Japan, New Zealand, Singapore, Vietnam, Chile, Peru, Colombia, Panama, Honduras, and South Korea.

Where neither the seller nor the investor is controlled by WTO or trade agreement nationals, the threshold for pre-closing review is CA$5 million. This lower threshold also applies to direct acquisitions of control, whether by WTO investors or not, of Canadian businesses that are cultural businesses.

State-owned enterprises (SOE) are subject to a different review threshold from non-SOE investors, as well as Ministerial discretion with respect to certain determinations such as whether control has been acquired. For an SOE investor from a WTO country, the review threshold for a direct acquisition in 2019 is CA$416 million in the book value of assets of the target business.

INDIRECT ACQUISITION OF A CANADIAN BUSINESS

If control of an entity (a corporation, partnership, trust or joint venture) carrying on a Canadian business is acquired indirectly as a result of the sale of its larger foreign parent corporation and if either the seller or the purchaser is controlled by a WTO or trade agreement investor (unless the acquisition of control of a Canadian business is a cultural business), the transaction is not reviewable.

Where neither the seller nor the investor is controlled by a WTO or trade agreement investor or the target is a cultural business, the review threshold is CA$50 million in book value of assets of the Canadian business (provided that if the assets of the Canadian business represent more than 50 percent of the assets involved in the total international transaction, in which case, the review threshold is CA$5 million in book value of assets).

NATIONAL SECURITY

Amendments to the *Investment Canada Act* in 2009 established a national security review process similar to the national security screening for foreign investment that exists in the US under the authority of the Committee on Foreign Investment in the United States. The government has the authority to review foreign investments to assess whether they are "injurious to national security" and may order a divestiture if the investment has been completed, prohibit the investment before closing or approve the investment subject to terms and conditions. To date, sectors that have been subject to national security review include those in the defence/military and

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The government has the authority to review foreign investments to assess whether they are “injurious to national security” (...)

telecommunications sectors. In addition, there has been at least one example of a government prohibition of the establishment of a Canadian business based on proximity to a sensitive government installation.

NOTIFICATION AND REVIEW PROCEDURES

An acquisition of control by a foreign investor of a Canadian business that falls below the relevant threshold will simply require notification, as will the establishment of a new Canadian business. However, notifiable investments can be subject to full review, if they fall into a limited class of culturally sensitive businesses, such as publishing, or become subject to national security review. Acquisitions of control by a foreign investor of a Canadian business above the relevant review threshold will require review and approval by the Minister of Innovation, Science and Economic Development (or the Minister of Canadian Heritage, when a review is concerned with a cultural investment).

If an investment is reviewable, the foreign investor is obliged to complete an application providing certain prescribed information about the investor and the Canadian business in which the investment is to be made. In most cases, this application must be filed prior to the transaction being completed. There are, however, certain exceptions:

1. Applications concerning indirect acquisitions, which may be filed up to 30 days after the investment is implemented.
2. Applications concerning investments in culturally sensitive sectors for which the federal cabinet has ordered a review.

There is, moreover, provision for the federal cabinet minister responsible for the *Investment Canada Act* to permit an investment to be implemented prior to completion of the review, if the Minister is satisfied that delay would cause undue hardship to the investor or jeopardize the operations of the Canadian business which is being acquired. The application for review must incorporate a description of the investor’s plans for the Canadian business relating to the following factors, where relevant:

- The effect of the investment on the level and nature of economic activity in Canada, including the effect on: employment; resource processing; the utilization of parts, components and services produced in Canada; and on exports from Canada;
- The degree and significance of participation by Canadians in the Canadian business, and in any industry in Canada of which it forms a part;
- The effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;
- The effect of the investment on competition within any industry or industries in Canada;
- The compatibility of the investment with national industrial, economic and cultural policies, taking into consideration industrial, economic and cultural policy objectives enunciated by the federal government, or the legislature of any province likely to be significantly affected by the investment; and
- The contribution of the investment to Canada’s ability to compete in world markets.

To satisfy these criteria, the Minister generally requires undertakings from the foreign investor, committing the investor to certain courses of action or expenditures.

For investors who are SOEs, the investment will also be subject to the government’s guidelines on SOE investments, which outlines criteria for such investments, including the investor’s adherence to free enterprise principles, the foreign state’s degree of influence over the investor and the commercial orientation of the Canadian business to be acquired.

TIME LIMITS FOR REVIEW

To ensure prompt review and decision, the *Investment Canada Act* sets certain time limits for the Minister to conduct a review and make a decision. Within 45 days after a complete application has been received, the Minister must notify the investor either that:

- The Minister is satisfied that the investment is likely to be of net benefit to Canada;
- The Minister is unable to complete his or her review, in which case the Minister shall have a further 30 days to complete his or her review, or if such 30 day review period has already been used, such longer period as agreed by the investor; or
- The Minister is not satisfied that the investment is likely to be of net benefit to Canada.

The Minister is deemed to be satisfied that the investment is likely to be of net benefit to Canada if 45 days have elapsed from the date of receipt of a complete application without such a notice, or where 30 further days (or the number of further days agreed) have elapsed after notice that the Minister is unable to complete his or her review and no decision has been taken.

The applicant has the right to make representations and submit undertakings within 30 days of the date of the notice (or any further period that is agreed between the applicant and the Minister) if the Minister advised the applicant that he or she is not satisfied the investment will be of net benefit to Canada (either within the initial 45-day period or any extension period).

On the expiration of the 30-day period (or agreed extension), the Minister must notify the applicant that:

- The Minister is now satisfied that the investment is likely to be of net benefit to Canada; or
- The Minister is not satisfied that the investment is likely to be of net benefit to Canada.

In the latter case, the applicant may not proceed with the investment or, if the investment has been implemented, must relinquish control of the Canadian business. Information obtained in the course of the administration of the Act is treated as confidential.

Restrictive federal policies and statutes for special business sectors

There are certain business sectors for which the Canadian government has maintained policies that are, to a greater or lesser extent, restrictive of foreign investment. These policies apply whether or not the investor is from a country that is a member of the WTO or a country with a trade agreement with Canada. In some cases, the policies are effectively implemented through the review process under the Act.

In other cases, the policies take specific statutory form and, as such, operate of their own force and without reference to the Act. For example, there are a number of policies issued by the Department of Canadian Heritage, which has jurisdiction for review of all investments in Canadian businesses involving activities related to Canada's national heritage or cultural identity. These policies include limitations on foreign investment in such businesses and outline factors considered during the review process. Specifically, there are policies relating to the publication, distribution or sale of books, magazines or periodicals, as well as the distribution of film and video products, which must be considered when the target Canadian business is involved in any of these business activities.

The restrictive rules on foreign investment that have been incorporated in federal statutes include those in relation to broadcasting, telecommunications and certain types of financial services. The level of permitted foreign investment through an acquisition in one of these businesses can be even less than the one-third that would be permitted, without approval, by the terms of the Act. There are no procedures for obtaining approval for investments above the statutory limit because the foreign investment rules for these businesses do not involve a review process, but rather an absolute prohibition of foreign investment above a fixed level.

There are certain business sectors for which the Canadian government has maintained policies that are, to a greater or lesser extent, restrictive of foreign investment.

Provincial legislation

Provincial laws on foreign ownership may also have to be considered by a foreign investor in a Canadian business. However, in most cases, they are not likely to prove relevant. Such laws are apt to be specific to narrow ranges of business activities, such as operating a collection agency, serving as a mortgage broker or, in Alberta for example, ownership of agricultural and recreational land.

Exchange controls

Once a Canadian business has been established or acquired, any profits from that business can be freely paid out to the foreign investor, as Canada has no system of exchange controls. Therefore, Canadian dollar income can be freely exchanged into another currency at the best available rate of exchange and sent out of the country. The only restriction on these payments is the requirement to satisfy Canadian withholding tax obligations. For more information concerning withholding tax obligations, see the discussion under the section below, entitled "Income tax considerations".

Once a Canadian business has been established or acquired, any profits from that business can be freely paid out to the foreign investor, as Canada has no system of exchange controls.

The *Competition Act* – Canada's antitrust legislation

The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy.

Introduction

The *Competition Act* is Canada's general antitrust statute. Its purpose is set out in the Act as follows:

"The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices."

The *Competition Act* provides for the review of certain matters by the Competition Tribunal (the Tribunal) on application by the Commissioner of Competition (the Commissioner) or, in some cases, by private parties. These civil reviewable matters include mergers and restrictive trade practices, such as refusal to deal, resale price maintenance, exclusive dealing, tied selling, market restriction and abuse of dominant position. In addition, the *Competition Act* defines a number of activities that constitute criminal offenses, including cartel conspiracy, bid-rigging, deceptive marketing, deceptive telemarketing, and serious instances of deliberate or reckless misleading advertising. The Director of Public Prosecutions prosecutes these matters in the courts. Private parties may bring civil actions to recover damages suffered as a result of conduct that violates the criminal provisions of the *Competition Act*, or conduct that violates an order of the Tribunal.

The Commissioner of Competition

The *Competition Act* is administered by the Commissioner, who heads the Competition Bureau, Canada's antitrust law enforcement agency. The Commissioner has the jurisdiction to conduct inquiries regarding matters that may be subject to the criminal and civil provisions of the *Competition Act*. The Commissioner also has the primary responsibility for initiating proceedings regarding civil reviewable conduct before the Competition Tribunal.

INVESTIGATIVE POWERS

Once an inquiry has been commenced under the *Competition Act*, the Commissioner may use a number of different investigative tools, including seeking court orders for oral examinations, production of records, written returns of information, search warrants and, in the case of criminal conduct, wire-tapping. The *Competition Act* contains provisions that protect the confidentiality of information filed or seized, and to protect the identity of informants. There is also a provision prohibiting an employer from taking reprisals against employees who report conduct contrary to the *Competition Act* (i.e., whistleblowers).

The *Competition Act* permits the Commissioner to seek *ex parte* judicial orders that authorize the oral examination of individuals under oath or affirmation, the compulsory production of documents, and written responses to questions on oath or affirmation. The Commissioner regularly uses these orders in inquiries into both alleged criminal and civil reviewable conduct, including mergers.

The Commissioner may also seek search warrants *ex parte*.

Similar to "dawn raids" in other jurisdictions, executions of search warrants by the Commissioner are typically initiated without warning by staff of the Competition Bureau, who may sometimes be assisted by police.

The Commissioner may seek *ex parte* judicial authorization to intercept private communications (wiretapping) to assist the Commissioner in investigating cartel conspiracies, bid-rigging and deceptive telemarketing. In order to obtain such authorization, the Commissioner must convince the court that other investigative powers available to him or her are inadequate to obtain the necessary evidence. The Commissioner requires the consent of one party to wiretap as part of an investigation of all other suspected violations of the *Competition Act*.

In addition to the powers listed above, the Commissioner may request that a party voluntarily respond to a "Request for Information".

In addition to its powers of investigation, the Commissioner may issue binding written options to parties, on application for a fee. Such written opinions are binding on the Commissioner if all the material facts have been submitted and the facts remain accurate.

The Competition Tribunal

The Tribunal is comprised of judges of the Federal Court and lay members (non-judge, non-lawyer members). The Tribunal hears civil reviewable practice matters, generally upon the application of the Commissioner. The judicial members alone may determine questions of law, while lay members may join in the determination of questions of fact, or mixed questions of fact and law. Appeals from decisions of the Tribunal are made to the Federal Court of Appeal.

A private party granted leave of the Tribunal may intervene in some proceedings before the Tribunal to make relevant representations in respect of any matter that affects that person.

Private parties may seek leave from the Tribunal to launch an application against a party for allegations of refusal to deal, resale price maintenance, exclusive dealing, tied selling and market restriction, where the private party demonstrates a reason to believe that he or she is directly, or substantially, affected in his or her business by the alleged conduct.

Neither the Commissioner nor private parties granted leave may obtain compensation for damages from the Tribunal, as remedies for civil reviewable practices are generally limited to prohibition orders and other injunctive relief intended to restore competition.

Merger law

INTRODUCTION

Any merger can be challenged by the Commissioner in the Tribunal prior to the merger's implementation or within a one-year limitation period following substantial completion. Furthermore, larger mergers (that exceed certain size thresholds) must be notified to the Bureau before closing, providing the Commissioner an opportunity to determine its position regarding those mergers' effects on competition prior to closing.

The definition of "merger" in the *Competition Act* is broad, applying to any "acquisition or establishment of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person." A merger may be effected by means of a purchase or lease of shares or assets, an amalgamation, a business combination (such as the formation of a partnership to which parties' assets are contributed), or an acquisition of an interest in such a combination.

The Commissioner reviews mergers and may apply to the Tribunal for a remedy in respect of a merger he or she considers has (or will be likely to have) prevented or lessened competition substantially in a market. The Tribunal may prohibit a proposed merger, or order full or partial divestiture or dissolution following a consummated merger, if it finds that the merger "prevents or lessens, or is likely to prevent or lessen, competition substantially" in a relevant market. In deciding whether competition would be so affected, the Tribunal is expected to consider several enumerated factors, including:

- The extent of foreign competition faced by the merging parties;
- Whether the business of one of the parties has failed or is likely to fail;
- The extent to which acceptable substitutes to the products of the merging parties are or are likely to become available;
- Any barriers to entry into a market (including tariff and non-tariff barriers to international trade, interprovincial barriers to trade and regulatory controls over entry), and the effect of the merger on such barriers;

- The extent of effective competition remaining post-merger;
- The likelihood the merger may result in the removal of a vigorous and effective competitor; and
- The nature and extent of change and innovation in a relevant market.

The Tribunal is also directed not to find a substantial lessening of competition based only on "evidence of concentration or market share." This provision ensures that the Tribunal does not develop a mechanistic or arithmetical rule when deciding which mergers should be prohibited. Nonetheless, the *Merger Enforcement Guidelines* issued by the Competition Bureau do set out certain presumptive safe harbors, based on percentage market share that will influence its response to given mergers.

There are two important exceptions to the authority of the Tribunal to prohibit a merger. First, the Tribunal cannot make such an order if the merging parties can demonstrate that there would be efficiency gains from the merger sufficient to offset the effects resulting from any lessening of competition. Second, certain joint ventures will also be exempt if certain criteria are met.

The substantive standards of the merger provisions are based on economic principles. In some circumstances, there may be a degree of uncertainty regarding whether the Commissioner would have competitive concerns regarding a merger. Such uncertainty can be addressed by the ability of merging parties to request an Advance Ruling Certificate (ARC) from the Commissioner, which request contains the parties' submission regarding the competitive impact of the proposed merger. An ARC indicates that the Commissioner does not have sufficient grounds to make an application to the Tribunal. In the alternative, a "no-action" states that the Commissioner does not, at that time, intend to challenge the proposed transaction before the Tribunal.

In cases involving substantive antitrust concerns by the Commissioner, the inquiry may result in negotiations between the Commissioner and the merging parties, involving conditions to satisfy the Commissioner that the merger will not result in a substantial lessening or prevention of competition. These conditions may be embodied in a consent agreement registered with the Tribunal. As mentioned, the Commissioner has published *Merger Enforcement Guidelines* that describe the Competition Bureau's enforcement policy with respect to mergers.

PRE-NOTIFICATION OF CERTAIN TRANSACTIONS

The *Competition Act* contains compulsory pre-merger notification requirements for transactions that exceed the relevant thresholds.[1]

The two notification thresholds, both of which must be exceeded in order to trigger the notification for requirement, are:

i. Size of the Parties Test: The parties to the transaction, together with their affiliates, must have assets in Canada or annual gross revenues from sales in, from or into Canada, which exceed CA$400 million

ii. Size of the Transaction Test: Differing transactions thresholds apply depending upon the transaction method employed, with monetary values subject to annual, inflation-based adjustments pursuant to a statutory adjustment mechanism (note that each of the CA$96 million values below are as of 2019):

    - Acquisition of assets: Where a proposed transaction involves the acquisition of assets of an operating business in Canada, the size of transaction threshold is exceeded where the aggregate value of the assets to be acquired, or the annual gross revenues from sales in or from Canada generated from those assets, would exceed CA$96 million.
    - Acquisition of shares: Where a proposed transaction involves the direct or indirect acquisition of voting shares of a corporation carrying on an operating business in Canada, the size of transaction threshold is exceeded, where the aggregate value of the assets in Canada of the corporation, or the annual gross revenues from sales in or from Canada generated from those assets, would exceed CA$96 million, and the person or persons acquiring the shares, together with their affiliates, would own more than either 20 percent of the voting shares (in the case of a public corporation), or 35 percent of the voting shares (in the case of a private corporation).
    - Where the acquiring party, together with its affiliates, already owns more than 20 percent of the voting shares of a public corporation or more than 35 percent of a private corporation, notification is required only where the proposed acquisition would result in the acquiring party, together with its affiliates, owning more than 50 percent of the voting shares of the corporation.
    - Amalgamation: Where a proposed transaction involves a corporate amalgamation in which one or more of the corporations involved carries on, or controls a corporation that carries on, an operating business in Canada, the size of transaction threshold is exceeded if the aggregate value of the assets in Canada of the continuing corporation, or the annual gross revenues from sales in, from or into Canada generated from those assets would exceed CA$96 million and the value of the assets in Canada that would be owned by the continuing corporation that would result from the amalgamation or by corporations controlled by the continuing corporation, (other than assets that are shares of any of those corporations), would exceed CA$96 million. The size of transaction threshold is also exceeded if the gross revenues from sales in or from sales in or from Canada generated from those assets would exceed CA$96 million.
    - Combination: Where a proposed transaction involves a combination of two or more persons to carry on business otherwise than through a corporation, the size of transaction threshold is exceeded if the aggregate value of the assets in Canada that are the subject matter of the combination, or the annual gross revenues from sales in or from Canada generated from those assets, would exceed CA$96 million.
    - Acquisition of an interest in a combination: Where a proposed transaction involves the acquisition of an interest in an existing combination that carries on an operating business otherwise than through a corporation, notification is required if the aggregate value of the assets in Canada that are the subject matter of the combination, or the annual gross revenues from sales in or from Canada generated from those assets, would exceed CA$96 million and where, as a result

1 Similar requirements exist in the merger laws of many jurisdictions, such as the *Hart-Scott-Rodino Act* in the US.

of the acquisition of the interest, the person or persons acquiring the interest, together with their affiliates, would hold an aggregate interest in the combination that entitles them to receive more than 35 percent of the profits of the combination or more than 35 percent of its assets on dissolution. Where the person or persons acquiring the interest already hold the above interest, this threshold is exceeded where the acquiror transactions to acquire more than 50 percent of such profits or assets.

NOTIFICATION PROCEDURE, ADVANCE RULING CERTIFICATE REQUESTS, WAITING AND REVIEW PERIODS, AND FILING FEES

Where both the size of parties threshold and the size of transaction threshold are exceeded, the parties to the transaction are required, before completing the transaction, to notify the Commissioner that the transaction is proposed and to supply the information required under the *Competition Act* and the *Notifiable Transactions Regulations*.

In addition, where the parties believe there will be little or no adverse competitive impact resulting from the transaction, they may, instead of or in addition to the notification filing, prepare and submit a request for an Advance Ruling Certificate from the Commissioner certifying that there are not sufficient grounds to apply to the Tribunal under section 92 of the *Competition Act*. The issuance of an Advance Ruling Certificate by the Commissioner exempts the transaction from the notification requirements under the *Competition Act*.

A notifiable transaction may not be completed until after the expiry of a 30-day statutory waiting period, unless the Commissioner terminates its review earlier. The Commissioner may, within the 30-day period, require additional information, commonly called a Supplementary Information Request (SIR), from applicants.

Where a SIR has been issued, the initial 30-day review period is extended by another 30 days, which run from the date on which all the SIR information has been provided to the Commissioner. Compliance with a SIR can be intensive and time consuming, typically taking several months.

The Tribunal may issue an interim order of short duration (generally up to 30 days, with the possibility of an extension to 60 days), prohibiting completion or implementation of a merger where the Commissioner requires additional time to complete his or her inquiry, and where the Tribunal finds that action may be taken in the interim, which would substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition.

The Commissioner's review of a transaction may extend beyond the applicable waiting period, particularly where the transaction is competitively complex (e.g., involves substantial competitive overlap between the businesses of the parties). The Competition Bureau has published non-binding service standards for the review of notifiable transactions and preparation of ARCs for mergers, with maximum turnaround times determined by the complexity of the transaction. The maximum turnaround times are 14 calendar days for "noncomplex," and 45 calendar days for "complex" transactions, except where the SIR is issued, in which case it will be 30 calendar days commencing the day on which the Commissioner has received a complete response to the SIR from all SIR recipients. There is a CA$73,584 filing fee (as of 2019 and subject to annual, inflation-based adjustments) applicable to a pre-merger notification and/or ARC Request. Where both a notification and an ARC Request are filed with respect to the same proposed transaction, the fee only needs to be paid once. While parties to a transaction are not prohibited from closing after the expiry of the statutory waiting periods (unless the Tribunal has issued an interim order preventing closing), in the absence of an ARC or "No Action Letter", they do so at their own risk.

Upon completion of the Commissioner's review of a transaction, he or she may decide to:

i. Issue an ARC, which bars the Commissioner from challenging the transaction, provided the facts were accurately represented to the Commissioner by the parties.

ii. Issue a "no-action" letter indicating that the Commissioner does not, at that time, intend to make an application under section 92 of the Competition Act in respect of the proposed transaction;[2] or

2 While a no-action letter does not legally prevent the Commissioner from challenging a transaction, the receipt of a no-action letter is commonly considered a satisfactory closing condition in merger transactions.

iii. Challenge the transaction, ultimately before the Tribunal if the parties insist on proceeding with the transaction without addressing the Commissioner's concerns

It is important to note that even if a transaction does not trigger the merger notification provisions under the *Competition Act*, the Commissioner may still review it under the Act's substantive merger provisions up to one year following substantial completion.

EXEMPTIONS FROM PRE-NOTIFICATION

There are a number of exemptions from the pre-notification requirements. All transactions between affiliated parties are exempt, as are those transactions where the Commissioner has issued an ARC. Also exempt from the pre-notification requirements are:

i. Acquisitions of real property or goods in the ordinary course of business, if the acquiring person or persons would not hold all or substantially all of the assets of an operating segment of a business;

ii. Acquisitions of voting shares or of an interest in a combination solely for the purpose of underwriting the shares or the interest;

iii. Acquisitions of voting shares or of an interest in a combination where the acquisition would result from a gift, intestate succession or testamentary disposition;

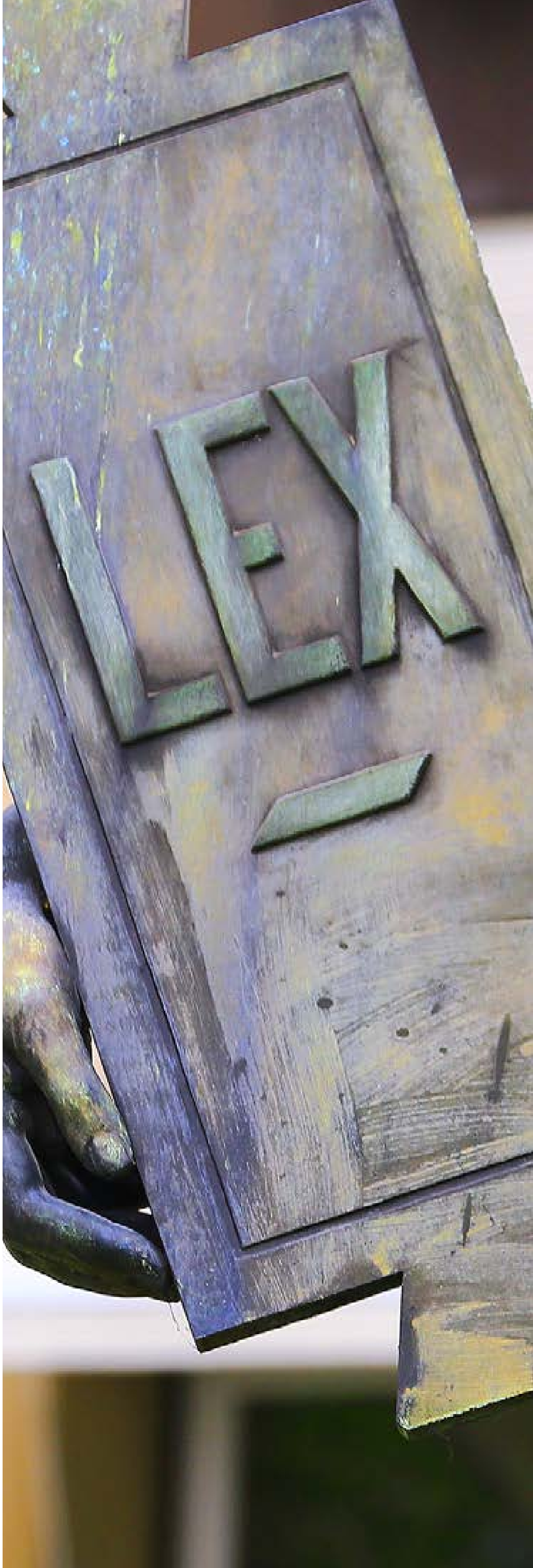
iv. Acquisitions resulting from foreclosures by a creditor in the ordinary course of business;

v. Acquisitions of certain Canadian resource property where the acquirer intends to carry out exploration or development activities;

vi. Asset securitization transactions; and

vii. Certain limited classes of joint ventures.

Certain mergers in Canada may be subject to requirements outside the *Competition Act* provisions. For example, financial institution mergers may be subject to approval of the federal Minister of Finance, and transportation sector mergers and acquisitions may be subject to merger review under the *Canada Transportation Act*.



Forms of business organization

Once established, a corporation can obtain additional funds by the issuance of treasury shares or debt.

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

Introduction

A business may be carried on in Canada in various forms. Most commonly, a business being carried on in Canada by a foreign corporation would be conducted using a corporate vehicle, either a Canadian incorporated subsidiary or a branch operation of the foreign corporation. Depending on the nature and scope of the activity, the degree of limited liability required, certain tax and other considerations, the business activity could also be conducted through a sole proprietorship (for an individual), a partnership or a joint venture. It is also possible, in some cases, to supply goods and services to Canadians through various contractual arrangements, such as distributorship agreements, without actually setting up a business in Canada. The legal implications of the respective vehicles available for carrying on business in Canada are summarized below.

Corporations

GENERAL

A corporation is the most common form of business organization. In Canada, the words "corporation" and "company" are largely synonymous. A corporation is a separate legal entity constituted by one or more persons who become its members or shareholders. Corporations have perpetual existence and may own property, carry on business, possess rights and incur liabilities. Generally, shareholders of a corporation have no authority to deal with the assets of the corporation and cannot make legal commitments that bind the corporation. The shareholders maintain control of the corporation by voting their shares to elect the directors who are, in turn, responsible for the management of the corporation. The liability of the shareholders is usually limited to the amount of their capital investment or the supervision of management in the corporation. A corporation is taxed as a separate legal entity. The income or loss generated by the corporation accrues to the corporation and not to the shareholders. For more information concerning the taxation of income earned by corporations in Canada, see the section below entitled "Income tax considerations".

The corporate form is a flexible structure for business organizations. It is possible to use various classes of shares and share conditions to provide different levels of participation, control and risk-taking in the corporation. Once established, a corporation can obtain additional funds by the issuance of treasury shares or debt. Most corporations in Canada are private corporations, generally having fewer than 50 shareholders, with restrictions on share transfers (the most common restriction is obtaining the consent of a majority of the directors or the shareholders to any proposed sale or transfer), and a prohibition on any invitation to the public to subscribe for securities of the corporation. Non-private or public corporations are generally more widely held and the shares of such corporations are often listed on a stock exchange. For more information concerning the financing of Canadian operations, including the legislative framework governing the distribution of securities in Canada, see the section below entitled “Financing Canadian operations”.

CANADIAN SUBSIDIARY CORPORATION

If a company decides to operate in Canada through a Canadian subsidiary, there is a choice of jurisdictions for the incorporation between the federal *Canada Business Corporations Act* (CBCA) and the equivalent legislation of the provinces and territories. Where the principal activities are, at least initially, to be carried on in any of British Columbia, Alberta, Ontario and Québec, the choice would be between the CBCA and the *British Columbia Business Corporations Act* (BCBCA), the *Alberta Business Corporations Act* (ABCA), the *Ontario Business Corporations Act* (OBCA) or the *Québec Business Corporations Act* (QBCA). In each of these jurisdictions, the new entity will have the flexibility and the facility to carry on business throughout Canada, subject to complying with registration and/or licensing requirements of any particular province in which the corporation proposes to carry on business.

In deciding whether to incorporate under the CBCA or provincial legislation, one of the factors to be considered is the type of business that the corporation will be conducting. For example, a corporation wishing to register as a venture capital corporation in British Columbia, as a railway company in Alberta, or as a small business development corporation in Ontario, must be incorporated under the relevant provincial legislation.

The principal distinction between a federal and a provincial corporation is that a federal corporation is usually entitled as of right to carry on business under its corporate name throughout Canada. A provincially incorporated corporation, on the other hand, is required to obtain an extra-provincial license or become registered in each province in which it proposes to carry on business. Such extra-provincial license or registration can be refused by another province if the name of the provincial entity conflicts with the name of an existing incorporated corporation, licensed or registered in the other province. In Québec, corporations are also required to adopt a French trade name in conformity with the *Charter of the French Language*. Accordingly, especially with provincially incorporated corporations, it may be advisable to clear the name and seek registration or licensing in the provinces in which the corporation expects to carry on business in the foreseeable future at the time the business is first established in Canada. A federal

corporation is also required to register in each province in which it carries on business, however, no province (except Québec in very limited circumstances), can refuse to register the corporation. For more information on extra-provincial licensing, please read the "Foreign corporation - branch operation" section below.

The incorporation fee ranges from CA$200 to CA$1000, depending on the jurisdiction. More information concerning the incorporation and organization of corporations in Canada is set out below under the heading "Incorporation and organization of corporations". The tax consequences of using a Canadian subsidiary are outlined below under the section "Income tax considerations".

FOREIGN CORPORATION - BRANCH OPERATION

If a branch operation is to be established, the foreign corporation is required to register or become licensed as an extra-provincial corporation in each province in which it carries on business. The question whether any particular activity or group of activities will constitute "carrying on business" is not specifically defined in most cases, and is to be determined by reference to the particular facts and circumstances. Registration will clearly be required in any province in which the corporation maintains an office or other fixed place of business. The registration in any particular province will be subject to the acceptability of the name of the corporation, and registration will be denied if such name is the same as, or closely resembles, the name of another corporation already incorporated or registered in the province.

However, a corporation with an unacceptable corporate name may sometimes be registered to carry on business in a province under a different business name or style that is acceptable, without having to change its corporate name. In Québec, foreign corporations are also required to adopt a French trade name in conformity with the *Charter of the French Language*. The fee payable for registration of an extra-provincial license is generally similar to that payable in respect of incorporation.

INCORPORATION AND ORGANIZATION OF CORPORATIONS

A. INCORPORATION

To incorporate a business under the CBCA, ABCA, OBCA or QBCA, articles of incorporation must be filed in the appropriate office along with the required fee. The articles of incorporation must provide certain information, including:

- The name of the proposed corporation;
- The proposed corporation's registered office;
- A description of the classes of shares;
- Any restrictions on share transfers;
- The number of directors; and
- Any restrictions on the business that the corporation may carry on.

The filing is an over-the-counter procedure and registration can usually be completed on the same date that the articles of incorporation are filed.

To incorporate a company under the BCBCA, a notice of articles, together with an incorporation application and the required fee, must be filed electronically with the Registrar of Companies. The incorporation application sets out the name of the company, the desired effective incorporation date, and the name and address of the incorporator, and includes a certification confirming that the incorporator has signed an Incorporation Agreement relating to the company. The notice of articles sets out:

- The name of the company;
- The translation of the name (if applicable);
- The names and addresses of the initial directors of the company;
- The addresses of the company's registered and records offices;
- A description of the authorized share structure of the company; and
- Whether there are any special rights or restrictions attached to the shares.

B. BY-LAWS

Following the incorporation of a business under the CBCA, ABCA, OBCA or QBCA, a general by-law to regulate the affairs of the corporation is passed. If desired, further by-laws relating to the regulation of the business and affairs of the corporation may be passed. Under the BCBCA, the articles are the general regulations which govern the internal affairs of the company (similar to the general by-law of a CBCA, ABCA or OBCA corporation). They set out:

- The terms of any special rights and restrictions attaching to shares of the company;
- Any restrictions on the businesses to be carried on by, or the powers of the company; and
- Any restrictions on share transfers.

They may also contain special provisions permitted by the BCBCA.

C. DIRECTORS

The directors of a corporation are required to manage or supervise the management of the business and affairs of the corporation. The officers of a corporation undertake the day-to-day operations and affairs of the corporation. Directors and officers have a fiduciary duty to act honestly, in good faith and with a view to the best interests of the corporation, and must also exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Each of the CBCA, BCBCA, ABCA, OBCA and QBCA, permit a corporation to have a flexible number of directors, being not less than one, or in the case of a reporting company/public corporation, no fewer than three. Under the CBCA, OBCA and ABCA, in general at least 25 percent of the directors need be resident Canadians. CBCA corporations engaged in certain sectors (including uranium mining, book publishing or distribution, book sales, and film or video distribution) are required to have a majority of resident Canadian directors. There are no director residency requirements under the BCBCA or the QBCA.

A "resident Canadian" is defined in the CBCA as:

- A Canadian citizen ordinarily resident in Canada;
- A Canadian citizen not ordinarily resident in Canada who is a member of a prescribed class of persons; or


TOTAL INCOME
37.91%
31.86%

- A permanent resident within the meaning of the *Immigration and Refugee Protection Act (Canada)* and ordinarily resident in Canada, except a permanent resident who has been ordinarily resident in Canada for more than one year after the time at which he or she first became eligible to apply for Canadian citizenship.

The corresponding definitions in the ABCA and the OBCA are essentially the same, except that they do not contain the exception found in the last clause of the third bullet point above.

Under the CBCA, 25 percent of the directors (or, if there are less than four directors, at least one of them) present at any meeting must be resident Canadians. Under the ABCA, at least one-quarter of the directors present must be Canadian residents.

Directors may incur personal liability under the common law and under an increasing number of statutory provisions, including the *Income Tax Act* (Canada), and legislation in the areas of environmental protection, employment, and occupational health and safety. For example, under the CBCA, BCBCA, ABCA, OBCA and QBCA, directors are liable to the corporation if they vote for, or consent to, a resolution authorizing certain corporate action contrary to those Acts, such as the declaration of a dividend or other distribution, at a time when there are reasonable grounds for believing that the corporation would be unable to satisfy a solvency test.

D. AUDITORS

Both federal and provincial corporations are required to appoint an auditor, unless exempted. Generally, a corporation may be exempt from this requirement if the corporation is not a public corporation, and if all the shareholders consent to the exemption.

E. SHAREHOLDERS' AGREEMENTS

The shareholders of a corporation may enter into an agreement that provides for the conduct of the business and affairs of the corporation, among other things. Under the CBCA, ABCA, OBCA and QBCA, all of the shareholders may agree, under a "unanimous shareholder agreement," to restrict, in whole or in part, the powers of the directors to manage the corporation, and to give to the shareholders the rights, powers and duties they have removed from the directors. The directors are thereby relieved of such duties and liabilities. This type of agreement might be used in a subsidiary corporation so that it is managed directly by the parent company with an active board of directors. Under the BCBCA, the articles of the company may restrict the powers of the directors and may transfer those powers, in whole or in part, to one or more other persons.

F. SHARE CAPITAL

A share is a fractional part of the capital of a corporation which confers upon the holder a right to a proportionate part of the assets of the corporation, whether by way of dividend or upon a distribution on the dissolution of the corporation, and governs the right to vote at shareholder meetings. The corporation may issue more than one class of shares and may designate the shares in any way, unless restricted by the constating documents. There is no restriction on the number of shares of each class that may

be issued by a corporation, again subject to the constating documents.

Under the BCBCA and QBCA, the authorized capital of a company may consist of shares with or without par value. Under the CBCA, ABCA and OBCA, the concept of par value shares does not exist and, therefore, shares are not expressed as having a nominal or specified value in dollars or other currency. The share capitalization of a corporation may be very flexible and can be tailored to meet specific requirements. Very simple share provisions will usually suffice in the cases of a small or closely-held corporation.

If the share capitalization of a corporation consists of only one class of shares, all the shareholders will have equal rights to:

- Vote at any shareholders' meeting;
- Receive any dividend declared by the corporation; and
- Receive the remaining property of the corporation on dissolution.

If the constating documents provide for more than one class of shares, the above rights must be attributed to at least one of the classes of shares, but it is not necessary that one class have all of these rights. If there is more than one class of shares, or if there is only one class of shares with rights, in addition to the fundamental rights described above, these rights must be set out in the constating documents. The rights that may be attached to the shares of a class are virtually limitless, but some of the common provisions are as follows:

- The right to cumulative, non-cumulative, partially cumulative or fully participating dividends;
- A preference over another class or other classes of shares as to the payment of dividends;
- A preference over another class or other classes of shares as to the repayment of capital upon the dissolution of the corporation;
- The right to elect a specified number of directors, or other special voting rights or restrictions;
- The right to convert a certain class of shares into another class of shares or a debt obligation;
- The right of the corporation to redeem all or part of the shares of the class; and
- The right of the shareholder to require the corporation to redeem its shares (this form of redemption is known as retraction).

It is also possible to have several series of shares within one class of shares. The use of series is advantageous where the directors wish to issue shares with certain differing characteristics over an extended period of time, without obtaining the shareholders' approval of the particular characteristics of each series when the series is issued.

UNLIMITED LIABILITY COMPANIES

In recent years, the unlimited liability company (ULC) has become popular as a hybrid entity that can offer US investors certain tax advantages. As a company, a ULC will be treated as a taxable Canadian corporation under the *Income Tax Act* (Canada) and must, therefore, file Canadian income tax returns. However, it also is eligible for partnership tax treatment in the US, thereby affording US shareholders the same US tax treatment as US limited liability companies. The "check the box" rules adopted by the US Internal Revenue Service on January 1, 1997, provide that any Canadian corporation or company formed under any federal or provincial law, which dictates that the liability of all the members of such corporation or company will be unlimited, can qualify for partnership treatment, regardless of what other "corporate characteristics" it may possess.

Under the "check the box" process, ULCs can, for US tax purposes, elect either corporate or flow-through status by checking the appropriate box on the election form. There are a number of US tax advantages to opting for the flow-through treatment, including enabling the US investor to use any anticipated start-up losses in the Canadian operation for US tax purposes.

ULCs, which exist only under the ABCA, the BCBCA and the *Companies Act* (Nova Scotia), are incorporated in a manner similar to limited liability corporations under those statutes. It is also possible to convert an existing corporation into a ULC by, in the case of Alberta, having such corporation continued under the laws of Alberta as a ULC and, in the case of British Columbia or Nova Scotia, having such corporation continued under the laws of either province and then amalgamated with a newly incorporated shell ULC (or, in the case of British Columbia, having such continued corporation alter its notice of articles). The costs for registering a ULC in Alberta are lower than in British Columbia or Nova Scotia.

As with ABCA corporations, one quarter of the directors of an Alberta ULC must be resident Canadians. There are no restrictions on the residency of directors of British Columbia or Nova Scotia ULCs.

The main difference between ULCs and other federal and provincial corporations is that the shareholders of a ULC have unlimited joint and several liability for the obligations of the ULC upon its dissolution. Therefore, prospective shareholders should consider carefully whether or not to use these vehicles, or whether intervening liability entities could or should be used to reduce their exposure. For example, a US investor could interpose a "stopco" holding corporation between it and the ULC, and thereby effectively limit the US investor's liability for the ULC's obligations. Shareholders of Alberta ULCs may enter into unanimous shareholder agreements, whereas Nova Scotia and British Columbia do not recognize unanimous shareholder agreements. As a result, any limitations on directors' authorities of Nova Scotia ULCs must be set out in the publicly filed articles of association, and any limitations on directors' authorities of British Columbia ULCs must be set out in its articles.

Under each of the ABCA, BCBCA and the *Companies Act* (Nova Scotia), the shareholders of a ULC can convert the ULC into a limited liability company and, if desired, continue the company under the CBCA or the laws of another provincial jurisdiction. Shareholders of a ULC may choose to change the nature of the company in circumstances where it has become profitable and there is no further need to have it taxed on a flow-through basis for US tax purposes.

As a result of recent amendments to the Canada-US tax treaty, the use of a ULC does create certain complexities under the Canada-US Tax Convention.

Other types of business organizations

In addition to the corporation, other forms of business organization may be used as vehicles to carry on business in Canada, some of which are briefly discussed below.

SOLE PROPRIETORSHIPS

A sole proprietorship exists where an individual is the sole owner of a business and there is no other form of business organization, such as a corporation, used as a vehicle to carry on the business.

All benefits gained and all obligations incurred from the sole proprietorship accrue to the sole proprietor. All income and losses of the proprietorship accrue to the individual and are taxed at the tax rate applicable to the individual.

In contrast with the limited liability of shareholders of a corporation, there is no limited liability for sole proprietorships. The personal assets of the sole proprietor may be seized to satisfy any obligations of the proprietorship.

The sole proprietorship is a simple arrangement for carrying on business. There are few legal formalities required to create or operate a sole proprietorship. Before beginning to carry on a business as a sole proprietorship, attention should be given to any federal, provincial or municipal licensing requirements. In addition, a sole proprietor who engages in certain businesses in British Columbia, or in any business in Alberta, Ontario or Québec, using a name or designation other than the individual's own name, must register a declaration in prescribed form with the relevant government authority.

PARTNERSHIPS

In British Columbia, Alberta, Ontario and Québec, general partnerships and limited partnerships may be formed to carry on a business enterprise. In a general partnership, the liability of each of the partners is unlimited. In a limited partnership, the liability of one or more of the partners (general partners) is unlimited, and the liability of one or more of the partners (limited partners) is limited to the amount that the limited partner contributes (and, additionally in British Columbia and Québec, and alternatively in Alberta, the amount the limited partner agrees to contribute) to the business of the partnership. A contribution may be one of money or property, but not services.

Generally, for both limited and general partnerships, the income or losses of the partnership are determined, for income tax purposes, at the partnership level and then allocated to the members of the partnership. The income or losses are then taxable in the hands of the partners.

A. GENERAL PARTNERSHIPS

To be considered a general partnership, there must be a relationship between persons carrying on a business in common (which can be in the nature of an ongoing business or a specific transaction), with a view to profit (which excludes charitable and cultural organizations). The relationship between the persons may be established by written or verbal agreement, or be implied by the circumstances. A general partnership carries on business under a firm name and can sue or be sued under the firm name. Much like a sole proprietorship, the business is carried on directly by the partners and a partnership does not form a separate legal entity. However, for certain purposes, a partnership is treated as a unit. All property contributed by the partners, or purchased by a partnership, becomes partnership property. All partners in a partnership are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses, unless otherwise agreed by the partners. The applicable partnership legislation in each of British Columbia, Alberta and Ontario, and the *Civil Code of Québec*, contain a set of mutual rights and duties, such as the sharing of profits and losses, which may be varied by agreement. Such legislation also provides a framework to govern the relationship of partners and third parties, which may not be varied by agreement.

In a general partnership, each partner is jointly liable with the other partners to the full extent of the partner's personal assets. The estate of a deceased partner remains liable for partnership debts incurred when the partner was alive. However, a partner can be discharged from a partnership by an agreement and will not be responsible for debts incurred after the signing of such an agreement. General partnerships created under the laws of Québec or carrying on business in Québec are bound in law to file a declaration of registration in the prescribed form with the Registraire des entreprises.

B. LIMITED PARTNERSHIPS

In British Columbia, Alberta and Ontario, a limited partnership is created by complying with the relevant provisions of the applicable partnership legislation, and is governed by that legislation and general partnership law. In Québec, a limited partnership is created by complying with the relevant provisions of the *Civil Code of Québec*. The limited partnership must consist of one or more general partners, and one or more limited partners. One person can be both a general and a limited partner. A "person" includes an individual and a corporation.

A limited partner is much like a passive investor in a corporation, sharing the profits of the limited partnership in proportion to the contribution made by the partner. This form of partnership is used primarily for public financing where passive investors are involved, and it is desirable for profits and losses to flow through to the investors. It is also used by investors that are non-taxable entities, such as government-related bodies (e.g. some public utilities or provincial development agencies), where the investor wishes to avoid holding its investment in a company that is required to pay taxes before distributing its income to its shareholders.

In British Columbia, Alberta and Québec, if a limited partner takes part in the control or management of the business, that person will no longer be considered a limited partner and will be subject to the unlimited liability of a general partner. In Ontario the limit on liability is lost only if the limited partner takes part in the control of the business, and a limited partner is specifically permitted to advise the partnership as to its management, or act as an agent or employee of the limited partnership.

Generally, the interest of a limited partner is assignable if all the partners consent to the assignment or if the partnership agreement permits it.

General partners in a limited partnership have the same rights and obligations as in general partnerships, except that certain actions of the general partner may require the prior consent of the limited partners. It is common to have a corporation as the general partner because of the limited liability feature of the corporation.

In British Columbia, Alberta and Ontario, a limited partnership is only legally created when a declaration or certificate in prescribed form, signed by all of the general partners (and in Alberta, all of the limited partners), is filed with the relevant registrar. In Québec, the partnership is created upon the formation of the contract, if no other date is indicated in the contract, and the partnership must file a declaration in prescribed form with the Registraire des entreprises. In British Columbia, the certificate includes the name of the limited partnership, the nature of its business, the term for which it is to exist, the full name and address of each general partner, the aggregate amount of cash and property contributed and agreed to be contributed by all of the limited partners, and the basis on which limited partners are to be entitled to share profits or receive other compensation. In Alberta, the certificate states the firm name, character of the business, name and address of each partner (and whether they are a general or limited partner), term for which the partnership is to exist, and certain other details of the structure of the partnership. In Ontario, the declaration states the name of the limited partnership, the name and address of each general partner and the general nature of the business of the limited partnership, among other things. In Québec, the declaration states, among other things, the object of the partnership, the name and domicile of each general partner and the three greatest contributors to the partnership.

JOINT VENTURES

A joint venture is not a specific type of business organization but rather is more aptly described as an association of two or more individuals, corporations or partnerships, or some combination of these, for the purpose of carrying on a single undertaking or a specific business venture. A joint venture may take the form of a partnership, a limited partnership, a co-ownership of property or a corporation. Generally, the parties to a joint venture will enter into a written agreement (whether a joint venture agreement, partnership agreement, limited partnership agreement, co-ownership agreement or shareholders' agreement), which establishes the respective rights and obligations of the parties in respect of the venture.

CANADIAN DISTRIBUTORS AND SELLING AGENTS

A foreign organization can enter into contracts to supply goods or services to Canadians without being considered to be carrying on business in Canada. The distinction is sometimes referred to as doing business with Canada, as opposed to doing business in Canada. This can also extend to a long-term distributorship arrangement under which a Canadian individual or corporation markets the products of a foreign business in Canada, either on an exclusive or non-exclusive basis. In this way, a foreign business can have an independent sales representative organization in Canada without being liable to Canadian income tax on its profits from such sales. For more information concerning the income tax consequences of such activity, see the discussion below in the section entitled "Income tax considerations."

Franchising

OVERVIEW

Franchising, as a method of business expansion and organization, represents one of the most dynamic commercial sectors in Canada across multiple industries, including quick and full service restaurants, hospitality, retail, travel, homecare, health and wellness, education, automotive, real estate, telecommunications and many others. Statistics from the Canadian Franchise Association, report approximately 1,300 franchise brands in operation in Canada, through 78,000 franchised units, employing over one million Canadians and generating approximately CA$68 billion in revenue. The importance of franchising to the Canadian economy therefore should not be understated.

In a typical franchise relationship, the franchisor grants the franchisee the right to sell products and/or services in association with the franchisor's trademark(s) under the franchisor's prescribed business format. In return, the franchisee is required to make a payment or continuing payments to the franchisor and to comply with the standards of the franchise system. Franchise arrangements can take many different forms, from area development and master franchise relationships involving multiple locations to single unit franchise agreements for individual locations.

FRANCHISE LEGISLATION IN CANADA

Franchising is regulated at the provincial level in Canada. Currently, six provinces have enacted franchise-specific legislation: British Columbia, Alberta, Manitoba, Ontario, Prince Edward Island and New Brunswick (Regulated Provinces). While there are subtle differences between the franchise statutes of the Regulated Provinces, they are substantially the same, focusing primarily on pre-sale franchise disclosure and the manner in which parties perform and enforce rights afforded to them under the franchise agreement. All of the franchise statutes in the Regulated Provinces also contain a very broad definition of what constitutes a "franchise". As a result, many other business formats not traditionally considered a franchise arrangement, such as distributorships and dealership for example, may be deemed a "franchise", and subject to the applicable provincial franchise legislation.

Subject to certain specific prescribed exemptions, discussed below, any franchisor seeking to operate in one of the Regulated Provinces must comply with applicable provincial franchise legislation. Where a franchisor operates or intends to operate in more than one Regulated Province, it is common for the franchisor to prepare and deliver a national franchise disclosure document (FDD) encompassing the franchise laws of all Regulated Provinces. As a best practice, many franchisors will also voluntarily deliver a national FDD to prospective franchisees in unregulated provinces to ensure transparency and uniform treatment of all prospective franchisees.

A franchisor granting franchises in one of the Regulated Provinces must provide a prospective franchisee with an FDD not less than 14 days before the earlier of: (i) the signing by the prospective franchisee of the franchise agreement or any other agreement relating to the franchise; and (ii) the payment of any consideration by or on behalf of the franchisor or franchisor's associate relating to the franchise.

An FDD must contain all "material facts", which includes all information specifically prescribed in the provincial franchise statutes of the Regulated Provinces, plus any other information that would reasonably be expected to have a significant effect on the value or price of the franchise to be granted or the prospective franchisee's decision to acquire the franchise.

The FDD must also include all agreements relating to the franchise. Where the location of the proposed franchise is known, courts have required franchisors to also include information that is material to the specific location being contemplated, such as a copy of the head lease and the past performance of the location in the event of a re-sale of an existing franchise.

Additionally, every FDD must include the franchisor's financial statements for the most recently completed fiscal year, prepared in accordance with generally accepted auditing standards or review engagement standards prescribed by the Canadian Institute of Chartered Accountants Handbook. Where the franchisor has been operating for less than one year or less than 180 days have passed since the end of the franchisor's first fiscal year, the FDD must include the opening balance sheet for the franchisor. Similarly, if 180 days have not yet passed since the end of the most recently completed fiscal year, and financial statements have not yet been prepared for the current year, the FDD shall include financial statements for the previous fiscal year prepared in accordance with the prescribed standard. There is an exemption to the requirement to produce financial statements available for large or mature franchisors that meet the prescribed statutory requirements.

Once all material facts have been compiled, the Franchisor must swear a certificate certifying that the FDD is compliant with the applicable franchise statutes, contains all material information and contains no misrepresentation. The FDD may then be delivered to the prospective franchisee. The franchise statutes prescribe the following methods for delivery of an FDD: (i) in person, (ii) by registered mail, (iii) by courier or (iv) by electronic mail. Upon receipt of the FDD the prospective franchisee must sign a receipt acknowledging it received the FDD. Where the FDD is delivered electronically, the FDD must be in a form that enables the prospective franchisee to view, store, retrieve and print the FDD. The FDD must contain an index for separate electronic files, but must not include any links to external documents or content. Furthermore, an FDD delivered electronically is not effective until the franchisor receives either a written or electronic acknowledgement of receipt from the prospective franchisee.

If a "material change" or new material facts come to bear between the delivery of the FDD and the signing of the franchise agreement or payment of any consideration to the franchisor, the franchisor must, depending on the significance of the additional information, either re-disclose the prospective franchisee afresh or deliver a Statement of Material Change describing all new material facts and changes. The Statement of Material Change must be delivered as soon as practicable after the franchisor becomes aware of the additional information. Unlike with delivery of the FDD, there is no prescribed time the parties must wait to sign the franchise agreement or pay consideration following delivery of a Statement of Material Change. Best practice is to afford the prospective franchisee a reasonable period to consult with its advisors, review and consider the information contained in the Statement of Material Change.

As noted above, there are a few exemptions from the requirement to deliver an FDD, however, the courts have historically interpreted these exemptions very narrowly, and thus, relying on them is not without some risk. Although there are some differences among the franchise statutes of the Regulated Provinces, the exemptions are generally available in three circumstances:

1. The prospective franchisee already has intimate knowledge of the franchise system;
2. The financial risk to and investment by the prospective franchisee is very small; or
3. The prospective franchisee independently acquires the franchise from a third party without any active involvement on the part of the franchisor other than approval of the transaction.

In addition to pre-sale disclosure, Canadian franchise statutes also grant franchisees the right to associate with one another. Franchisors are prohibited from interfering with or restricting in any way with a franchisee's right to associate with other franchisees, and any provision in a franchise agreement that attempts curtail or interfere with that right shall be void. The courts have interpreted the right to associate to extend to the right of franchisees to join together in litigation, including class action litigation, against the franchisor.

The Regulated Provinces also impose on both parties a reciprocal common law and statutory duty of good faith and fair dealing. The duty of good faith requires the franchisor to duly consider the legitimate interests of the franchise network as a whole and holds both parties to a standard of commercial reasonableness in the exercise of their rights under the franchise agreement. However, the duty of good faith is not a standalone duty; it does not amend or replace express contract terms of the franchise agreement, nor does it require the franchisor to prefer the interests of the franchisees to its own, there are no fiduciary duties. A franchisor need only demonstrate that it honestly and reasonably considered the interests of the franchisees. Further, the duty is mutual and equally applicable to franchisees. Whether a party has breached the duty of good faith and fair dealing will be a case-by-case, factual and contextual assessment.

REMEDIES

The primary remedy available to a franchisee who never received an FDD from a franchisor or who receives a materially deficient FDD is statutory rescission. Statutory rescission entitles the franchisee to rescind all franchise and ancillary agreements entered into with the franchisor without any further obligation or penalty and financially returns the franchisee to its pre-sale position. There are two limitation periods applicable to rescission claims:

1. A 60-day period for minor or non-material deficiencies in the FDD or Statement of Material Change or for failure to provide the FDD or a statement of material change within the time required by the governing statute; or
2. A two-year period for failure to provide an FDD altogether or for material deficiencies so egregious so as to constitute no disclosure.

Additionally, if a franchisee suffers a loss because of a misrepresentation contained in the disclosure document or in a Statement of a Material change or as a result of the franchisor's failure to comply in any way with the disclosure provisions of the applicable franchise statute, the franchisee has a right of action for damages against the franchisor. The general limitation period of two years applies in this instance.

Finally, all Regulated Provinces expressly prohibit all parties to a franchise agreement from contracting out of, waiving or otherwise seeking to override any of the rights or obligations contained in the governing franchise statutes. This restriction is particularly important to foreign franchisors seeking to sell and operate franchises in a Regulated Province, who may wish to have their native law apply to the interpretation and enforcement of the franchise agreement.

QUÉBEC

Franchising in Québec is different from in the other provinces, in that the *Civil Code of Québec* governs the law. One interesting feature of the *Civil Code of Québec* is the concept of contracts of adhesion, where the essential provisions are imposed by one of the contracting parties and are not negotiable. The consequences of a contract being qualified as a contract of adhesion are that if one of its provisions is incomprehensible, unreadable or abusive, that provision may be nullified or modified by a court. The same principle applies to "external" clauses (i.e., clauses that are not contained in the contract but to which the contract refers such as provisions contained in operations manuals or other documents). The courts of Québec have often characterized a franchise agreement as an adhesion contract, when it has been shown that its essential provisions could not be negotiated.

"Franchising, as a method of business expansion and organization, represents one of the most dynamic commercial sectors in Canada across multiple industries.

Franchise businesses intending to operate in Québec must also comply with French language laws and, in particular, the *Charter of the French Language*. Franchisors should realize that they will be expected to carry on business in French, especially outside Montreal, and have all of their materials (operations manuals and other documentation for use by employees) translated into French, although the franchise agreement itself need not be translated provided it specifically stipulates that the parties have agreed that it be drawn up in English. For more information on some of these topics, please refer to the corresponding sections in this publication.

OTHER AREAS OF LAW AFFECTING FRANCHISING ARRANGEMENTS

In addition to complying with the specific franchise legislation, businesses expanding into Canada by way of franchising will also want to ensure that they comply with other laws of general application affecting franchising arrangements. These include ensuring that their trademarks are protected under Canadian trademark legislation, that their products and practices comply with applicable product labelling (e.g., for food and drugs), and consumer protection legislation, and that their arrangements comply with Canadian competition laws (which deal with matters such as exclusive dealing, market restriction and tied-selling), and applicable tax requirements.

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Environmental class actions are available for claims involving a reduction in property values because of pollution.

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Directors may incur personal liability under the common law and under an increasing number of statutory provisions.

Director and officer liability in Canada

In Canada, directors and officers of corporations may be subject to personal liability while acting within their corporate capacity. Such personal liability ensures that directors are accountable both to the company and to certain third parties, as well as being responsible for the failure of a corporation to meet its legal obligations.

Director liability

GENERAL DUTIES UNDER COMMON LAW AND CORPORATION STATUTES

The common law and business corporation statutes each impose duties on directors that may affect personal liability.

Fiduciary duty

Directors are considered "fiduciaries" of the corporations they serve. This principle requires directors to act honestly and in good faith with a view to the best interests of the corporation, and to put the corporation's interests ahead of their own. It is important to note that case law indicates there may be instances where the best interests of the corporation and its shareholders diverge, such as when a corporation is nearing insolvency, or in the context of a change in control. In such cases, it is the duty of the directors and officers to act in the best interests of the corporation over those of the shareholders (as well as the creditors).

A director's fiduciary duty also requires that he or she avoids conflicts of interest. Typical conflicts arise when a director holds a personal interest in a material contract with the corporation or gains an opportunity because of information learned in the course of his/her position. Generally, directors are required to disclose all such conflicts and refrain from voting on any related resolution. Failure to disclose a conflict may make a director liable for any gain earned from the conflicting interest. Directors are generally prohibited from taking advantage of a business opportunity that the corporation either had or was seeking. Taking advantage of such opportunity may attract personal liability even where a director resigns prior to engaging in the opportunity and the corporation suffers no demonstrable loss from the breach of fiduciary duty.

Duty of care

Directors are required to meet a minimum standard of care in carrying out their responsibilities. This minimum standard is generally described in the corporation statutes as exercising "the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances." This duty imposes a legal obligation upon the directors and officers of a corporation to be diligent in supervising and managing its affairs. The requisite standard required varies from province to province. As well, there are several provincial corporation statutes that do not define the minimum standard of care. In these provinces, the common law governs the minimum standard, which requires that a director exhibit the degree of care and skill that might be expected of a person with the knowledge and experience of the director in question. In Québec, the *Business Corporations Act* requires directors to "act with prudence and diligence, honesty and loyalty, and in the interest of the corporation."

Courts in Canada have suggested directors may need to consider the interests of all stakeholders (including employees, creditors and communities), in addition to the shareholders, in carrying out this duty. Inside directors (individuals who hold other positions within management), may also be held to a higher standard of care than outside or independent directors since they are generally better informed about the corporation's affairs.

Courts may apply the "business judgment rule" in evaluating whether a director or officer has met the standard of care. Deference will be afforded to directors when making business decisions if they are taken in good faith, are "reasonable" and the decisions are made in a manner consistent with the performance of the functions the directors were elected to perform by shareholders. The rule generally focuses on the process applied in making a decision, rather than on the results of such a decision.

Delegation and reliance

While directors may delegate authority and responsibility to management, special committees and, in certain cases, independent advisors, directors must generally supervise all the work. Directors are entitled to rely on the information provided by such parties, provided the director has verified the relevant party is qualified and provided the director makes proper inquiries when the work product is presented to them. However, under certain corporation statutes, directors are statutorily prevented from delegating certain responsibilities.

Directors should keep in mind they are liable for any acts or omissions of the board of directors carried out in their absence since they are deemed to have consented, unless they register their dissent according to the procedures set out in the governing corporation statute.

SPECIFIC STATUTORY DUTIES

When assessing the potential liabilities that may attach to the directors of a corporation, it is important to review the entire regulatory regime applicable to the business of the corporation. The following are examples of the provincial and federal statutes that impose personal liability on directors while acting in their corporate capacity. Depending on the business of the corporation, there may be others.

Environmental legislation

Directors may be held liable for environmental offenses committed by the corporations they serve. Directors may be charged both as principals under environmental legislation for their personal involvement in the activity constituting the offense, and as indirect actors on the basis that control over the corporation and its employees has been improperly exercised. Directors face both common law and statutory liability for environmental offenses. Common law liability can arise out of, among others, nuisance, negligence, trespass and strict liability actions. Statutory liability can arise under the federal *Canadian Environmental Protection Act* (CEPA) or any of a number of provincial statutes.

Under CEPA, a director may incur liability for offenses committed by the corporation that the director "directed, authorized, assented to, acquiesced in or participated in." Provincial environmental legislation often extends beyond CEPA's provisions and imposes a higher standard. In Ontario, for example, directors have a statutory duty to "take all reasonable care" to prevent the corporation from committing environmental offenses. The penalties imposed under environmental statutes are particularly onerous. In Ontario, fines can reach as high as $6 million for each day on which the offense occurs on a first conviction, and/or imprisonment for up to five years less a day. In fact, a recent tribunal decision suggests that environmental legislation is now sufficiently broad in Ontario that former directors and officers of bankrupt companies can be found liable to pay clean-up costs for contaminated sites, even where the contamination occurred before their tenure. Directors may also face civil liability for damages suffered by third parties as a result of an environmental offense committed by a corporation. The defence of due diligence may be available to directors in respect of certain environmental liabilities.

Employee-related legislation

Directors are exposed to a number of employee-related liabilities, including compensation, unpaid employee wages and vacation pay, as well as for a corporation's failure to remit source deductions, such as Canada Pension Plan and Employment Insurance on behalf of its employees. In practice, a director's liability for wages is only relevant in cases of corporate insolvency, as an employee must first attempt to satisfy a claim out of the assets of the corporation. Directors may only be held liable if they were a director when the employee services in question were performed.

Directors may also be held personally liable when a corporation commits an offense under provincial pension benefits legislation, provided the director participated in the commission of the offense. An example would include the failure by a corporation to submit payment to a pension fund or insurance company on behalf of employees. Directors may also be held liable even if they have not directly participated in the commission of the offense. However, in such a situation they are entitled to a due diligence defence.

Directors may also be held personally liable for a corporation's failure to comply with provincial occupational health and safety legislation requirements.

Tax legislation

Personal liability arises for directors as a result of a variety of offenses under federal and provincial tax statutes. Most commonly, directors are responsible for a corporation's failure to remit any prescribed amounts under the federal *Income Tax Act* (Canada) and *Excise Tax Act* (Canada) (covering the Goods and Services Tax), which is considered to be held in trust for the Crown. There is also a general liability section in the *Income Tax Act* (Canada), which applies when a corporation has committed an offense. Under that provision, a director "who directed, authorized, assented to, acquiesced in, or participated in commission of the offense" is considered a party to it. Both the *Income Tax Act* and the *Excise Tax Act* provide a due diligence defence.

DUTIES SPECIFIC TO PUBLIC CORPORATIONS

Directors of public corporations are subject to additional potential liabilities not present in private corporations. Where a corporation has issued securities to the public, directors are responsible for ensuring that their actions are consistent with the duties listed above, as well as requirements imposed by provincial securities legislation and regulators.

Directors may be held liable for incorrect information (i.e., misrepresentations) distributed by the corporation to the public and for the failure to comply with continuous disclosure requirements (i.e., the failure to make timely disclosure of material events).

Each of the provincial securities regimes has extended liability for directors of public companies to investors purchasing securities in the secondary market. According to these provisions, such investors need not prove reliance on a misrepresentation to make a claim.

Directors may also be held personally liable for insider trading (trading in securities of their corporation with knowledge of material information that is not generally disclosed), where they pass on such undisclosed material information to another party who trades with knowledge of the information or even where they acquiesce to trading offenses of another director or officer.

The number of regulations that allow directors and officers to be found personally liable for decisions and actions of a corporation has increased significantly in recent years.

Canadian securities regulators have not been as eager as their US counterparts to adopt new regulations exposing directors and officers to increased liability. However, directors should still be aware that changes to Canadian securities regulation, and an increased sensitivity to corporate malfeasance, imposes a higher standard of care and potentially exposes them to liabilities that did not previously exist in Canada.

Officer liability

Senior officers have the same fiduciary relationship to the corporation as the corporation's directors. The minimum standard of care applies equally to directors and officers. As such, much of what is discussed in the context of director liability above, applies equally to officer liability. However, since most of an officer's powers and responsibilities derive from the delegation by the board, corporate statutes impose fewer specific liabilities on officers. Many of the statutory liabilities of a director, such as under environmental and tax legislation, apply to officers as well. Similar obligations also exist for officers in public companies.

It is sometimes difficult to determine whether a particular employee is an officer in the legal sense. This determination is generally linked not to an individual's job title, but to the individual's role in the corporation. Employees who occupy positions involving the power and ability to direct and guide the affairs of the corporation may be considered officers and face the same liability.

Shareholder, stakeholder and regulatory remedies

There are various options for shareholders and stakeholders bringing an action against directors and officers of a corporation, pursuant to business corporations' statutes. The most significant of these options include:

- The oppression remedy, the most common source of shareholder litigation may be sought for parties who believe that management or the board have acted in a manner which was oppressive or unfairly prejudicial to, or unfairly disregards, their interests;
- A derivative action, for parties seeking redress on behalf of the corporation for a breach of the corporation's rights; or
- Compliance orders, for parties seeking to compel a certain action of the corporation or its directors or officers; or seeking to restrain a breach of a duty owed to the corporation.

Orders made as a result of successful actions can include compelling a director or officer to give up any benefit gained in the course of wrongful conduct, or appointing directors in place of the directors then in office, among other remedies.

Directors may also be held liable to third parties for actions taken in their capacity as a director by way of common law actions. In certain cases, courts have held directors personally liable for (a) a breach of trust by the corporation where they had full knowledge of a breach of trust by the corporate trustee, and (b) their own tortious conduct even though they pursued the conduct on behalf of the corporation.

In addition, regulators may take action when directors or officers of the corporation fail to meet the standards of corporate governance set out by a variety of regulatory agencies. Many of these agencies have the power to take action against directors and officers directly, including imposing fines under the legislation noted under the "Specific statutory duties" section above.

Risk management: Protection from liability

Apart from the diligent discharge of their duties, there are of number of ways that directors and officers can manage the risks associated with their personal liability.

A unanimous shareholder agreement can be used to shift some or all of the directors' responsibilities and liabilities to the shareholders of a corporation. Trust accounts and letters of credit can also be set up to ensure that the corporation does not default on payment of sums for which the directors and officers are personally liable. As well, resignation can protect directors and officers from liability for any events that occur subsequent to such resignation.

Corporations are also permitted to indemnify their directors and officers for various actions taken on behalf of the corporation, subject to certain criteria. Generally, the director or officer must have acted honestly and in good faith with a view to the best interests of the corporation. In the case of a criminal or administrative action or proceeding that is enforced by a fine, the director or officer must have had reasonable grounds for believing that his or her conduct was lawful. Indemnification may also be prohibited in any circumstances where the court determines it is unenforceable for reasons of public policy. Although indemnities provide significant protection to directors and officers, it is important to remember that, in the context of insolvency, an indemnity is only as good as the corporation's ability to honour it (and a director or officer will generally rank as an unsecured creditor). Additionally, there must be documentary evidence of the director/officer indemnification, as the courts have refused to infer it.

Most corporation statutes in Canada allow companies to obtain liability insurance for a director or officer against any liability incurred. Director and officer liability insurance is typically negotiated between the corporation and the insurer. However, it should be noted that Alberta's *Business Corporations Act* prohibits obtaining insurance covering events where a director or officer did not act honestly and in good faith with a view to the best interests of the corporation. While insurance provides important protection, there are many exclusions from typical insurance policies, including:

- Actions involving fraud, conspiracy, criminal acts, human rights violations or other intentional acts;
- The obtaining of a personal profit or advantage to which the recipient was not legally entitled;
- Claims arising out of statutory liabilities;
- Claims against a director by an insured under the same policy;
- Claims for fines or penalties imposed by law, punitive or exemplary damages; and
- Matters that the law may determine to be uninsurable.

As well, for some corporations, the premiums for such policies may be prohibitive.

Defences

The due diligence defence is the most common defence available to officers and directors for personal liability claims. This defence is, generally, established where the individual can prove, on a balance of probabilities, either that he/she:

- Reasonably believed in a mistaken set of facts that, if true, would render the conduct innocent; or
- Took reasonable care to avoid the event giving rise to the liability.

This defence is available under a variety of statutes that govern corporate activity. However, the specific provisions of such legislation may qualify or limit the application of this defence and may require certain actions to have been taken by the person to avail him or herself of it. For example, the due diligence defence is only available to a director under the *Income Tax Act* if he or she exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances.

Some statutory provisions, however, expressly preclude the use of a due diligence defence. Under the *Business Corporations Act* in Ontario, for example, this defence is not available for liability for employee wages and vacation pay. In addition, directors and officers of Ontario corporations are prevented from relying on the defence of due diligence in the case of a breach of their basic fiduciary duty and/or duty of care.

There will be instances where the range of defences available to an officer diverges from those available to a director. Officers are often considered to be better informed than directors and may be held to a higher standard in the exercise of their duties.

There are a number of other situation-specific defences that may be available to directors and officers, which are often outlined in the statutory provisions that create the liability.

Financing Canadian operations

Debt financing

New business ventures invariably need financing and, more often than not, require sources of funding separate from the equity contributed by shareholders, partners or other owners. While debt financings can take a variety of forms, the sources of such financings for most Canadian businesses include banks and other institutional lenders. To a lesser extent, debt financing is also sourced from parent companies or other shareholders or related persons, and even from trade creditors, who frequently offer their products and services on customary trade or payment terms.

DEBT FINANCING BY BANKS AND OTHER INSTITUTIONAL LENDERS

Most banks and institutional lenders generate the largest portion of their revenues from interest, and fees payable to them on loans and other credit by their customers. Such lenders are in the business of investing in their customers and managing the risks of loan losses resulting from customer defaults.

Recently in Canada, banks and other institutional lenders have been experiencing an increase in competition for corporate and commercial customers, and the investments they represent. To some extent, this increased competition is a result of the banking and financial institution industry reforms adopted by the Canadian government, which may allow for new opportunities for foreign banks to acquire or set up financing businesses in Canada.

Perhaps largely, the level of competition here in Canada is a result of economic factors, including a spillover into Canada of industry concentration and increased competition originating in the US, Europe, Japan and elsewhere in the Far East. For whatever the reason, borrowers in Canada are generally well-advised to shop around for financing proposals from those lenders (or investors) that are willing to extend credit on the best available terms.

Once the most attractive financing proposal is obtained from a particular bank or financial institution, and the requisite formal credit application has been submitted and accepted, a written offer to finance, in the form of a term sheet or commitment letter, is normally prepared and delivered to the borrower. The term sheet or commitment letter will summarize the terms and conditions upon which the bank or other financial institution will advance credit, including the list of the loan and security documentation required before any advance of the credit will be made. Once the borrower accepts the term sheet or commitment letter by signing it, a binding agreement is created (unless the document provides otherwise). In the case of larger or more complex loan arrangements, a formal loan or credit agreement is normally required, which, when settled and executed, will supersede the term sheet or commitment letter.

Although a loan may either be secured or unsecured (generally determined based on a lender's assessment of the relative credit-worthiness of the borrower and the reduction in the interest rate and fee pricing, which can often result when security is made available), in most instances, security for borrowings will be required and, in certain cases, guarantees of the shareholders, subsidiaries or other related parties will be requested. The form of the required security will depend upon a number of factors, including whether the loan is payable on demand or in instalments over a specified term, or at a specified maturity date.

Operating loans are sometimes payable on a demand basis, whereas term loans are usually paid in instalments over time, subject to the lender's right to accelerate the entire loan balance upon the occurrence of one or more specified events of default. In Canada, the customary practice of banks is to take and hold a number of different forms of security.

The following is a list of common types of security that banks and other institutional lenders in Canada may require:

- A general security agreement creating a security interest in all of the borrower's (or guarantor's) present and after-acquired property, assets and undertaking;
- A security agreement creating a security interest in only certain of the borrower's (or guarantor's) property, assets and undertaking (i.e. inventory, equipment, accounts receivable or serial numbered goods);
- A mortgage charging certain specified real property of the borrower (or guarantor);
- A debenture charging all present and after-acquired property, assets and undertaking of the borrower (or guarantor), which can include a specific mortgage and charge of real property;
- A pledge of securities or equity interests whereby the shares (or other securities) of the borrower or guarantor are taken as collateral;
- Security under Section 426 or 427 of the *Bank Act* (Canada), which provides for the creation and granting of special inventory security, can only be taken by a Canadian chartered bank and can only secure direct indebtedness (as well as certain contingent obligations in respect of bankers' acceptances and letters of credit); such security can only be taken from specific classes of borrowers; and
- In Québec, security can also be taken on any type of asset, whether real (immovable) or personal (movable), tangible or intangible, in the form of a hypothec.

DEBT FINANCING BY SHAREHOLDERS AND OTHER BUSINESS OWNERS

It is generally recommended that shareholders or other owners of businesses, when making loan advances to their company, obtain security for any and all such advances to the company. Where security is taken, the shareholders or owners who advance the loans will generally have claims that, in the event of an insolvency or bankruptcy, will have priority over the claims of unsecured creditors (including most claims of trade creditors).

However, banks and other institutional lenders normally require that shareholders or owners who have made shareholder loans (whether or not such loans are secured), enter into agreements to postpone and subordinate their indebtedness and security in favor of the indebtedness and security held by the banks or institutional lenders.

NON-TRADITIONAL FINANCINGS

Banks and other financial institutions, in addition to the conventional types of credit facilities offered to corporate/commercial borrowers, offer other less traditional forms of credit, including derivative or other treasury products or services, to assist borrowers to hedge currency, interest rates or other market risks, to which they may be susceptible. In fact, now, many banks and institutional lenders often require as a condition of their loan or credit facilities, that their borrowers enter into these types of hedging facilities in order to manage their risk, and the risk which the bank or lender indirectly assumes through their investment in the borrower.

Since many of the Canadian banks now own or are affiliated with merchant banks and investment dealers active in the capital markets, the types of credit and advisory products and services that are now available from a single source have become quite broad. In Canada, as in other countries, this trend has translated into an increase in hybrid forms of financings, incorporating both debt and equity components, such as through the use of convertible debt instruments or warrants.

PARTICIPATING DEBT

Lenders may be persuaded to assume a greater degree of risk or to accept a lower assured yield on a loan, by using a debt instrument that makes the lender's return on investment dependent upon the success of the business. In addition to the interest on the loan, the lender would also share in the profits of the business when they exceed a certain specified level.

Alternatively, the lender may be granted the right to convert the debt instrument into shares of the corporation if the shares appreciate (for example, by way of a convertible debenture).

Equity financing

INTRODUCTION

A corporation seeking to raise capital may choose equity financing as an alternative to debt financing. Corporations seeking equity financing often cannot look to banks and other financial institutions to make equity investments, in part due to the greater risk associated with equity investments. Instead, equity investments in private corporations are generally made by persons connected with the business and operations of the corporation, or by certain investment corporations that are less risk averse, and that have been established to provide merchant banking, mezzanine financing or venture capital investments for start-up and early stage or otherwise higher-risk corporate ventures. In the case of public corporations, equity financings are either made by way of an offering to the public using a prospectus, or pursuant to a private placement exemption under applicable securities legislation in Canada. In either case, corporations that issue securities are required to comply with the registration and prospectus requirements (or the exemptions therefrom), of applicable provincial securities legislation in Canada.

SECURITIES LEGISLATION IN CANADA

Federal laws

Generally speaking, there are no federal laws of general application governing securities transactions in Canada. Although corporations incorporated under the *Canada Business Corporations Act* (CBCA) are subject to certain of its securities provisions relating to insider trading, the CBCA does not set forth a comprehensive regulatory scheme for the distribution of securities by federal corporations. The federal *Bank Act* also has requirements relating to insider trading, as well as the distribution of securities of chartered banks, as does the federal *Trust and Loan Companies Act* in relation to federally chartered trust and loan companies. Accordingly, in any transaction involving such federally regulated institutions, the special requirements of the governing legislation must be considered.

Provincial laws

Each province of Canada has enacted its own securities legislation. Although such laws are not yet uniform, the basic regulatory concepts are common. Accordingly, a discussion of the *Securities Act* (British Columbia) (the BC Act), the *Securities Act* (Alberta) (the Alberta Act), the *Securities Act* (Ontario) (the Ontario Act) and the *Securities Act* (Québec) (the Québec Act), assists in understanding the securities legislation of the other provinces of Canada.

A securities commission or equivalent regulatory body in each province enforces compliance with securities legislation. The provincial bodies coordinate regulatory initiatives through the Canadian Securities Administrators (CSA). In fact, the CSA, a voluntary umbrella organization, has made progress in pursuing a national system of harmonized securities laws. The CSA has implemented a national passport system in every province other than Ontario, which allows issuers and registrants to deal with only the regulator in their principal jurisdiction, and exempts such issuers and registrants from certain legal requirements in other provinces and territories.

Securities regulation in most provinces has the same broad objectives of protecting the investing public, the integrity of the capital markets and the confidence of investors. This is accomplished through comprehensive sets of rules that aim to ensure equal access to information, to provide for a level playing field for market participants, and to set qualifications and standards of conduct for persons in certain fiduciary and other positions.

PRINCIPAL MECHANISMS

The principal mechanisms employed in each of the BC Act, the Alberta Act, the Ontario Act and the Québec Act to achieve their respective objectives are the following:

Registration: The requirement that participants in the capital markets who trade in securities, underwrite securities or advise with respect to investing in securities, be appropriately registered in order to do so. The definition of trading extends not only to original issues of securities, but also to secondary market activity. There is a limited list of exemptions from the registration requirements that are applicable to certain types of trades and to trades in certain types of securities.

Disclosure requirements: Detailed rules governing the disclosure of information which must be made available to investors in order to ensure that they have adequate information available to them upon which to base their investment decisions. These disclosure requirements can be broken down into two categories: (i) prospectus disclosure requirements; and (ii) continuous disclosure requirements, each of which is discussed briefly under the corresponding subheading below.

Take-over bid/issuer bid requirements: A set of rules governing the acquisition of significant interests in a public corporation and acquisitions by a corporation of its own securities.

Enforcement powers and remedies: Penal sanctions in respect of contraventions of the relevant securities laws, as well as certain enforcement powers granted to the relevant Securities Commissions, and civil remedies available to investors who have suffered a loss because of a breach of the relevant Act.

PROSPECTUS REQUIREMENTS AND EXEMPTIONS

An essential feature of Canadian securities laws is the requirement to prepare and have approved by the relevant Securities Commissions, a preliminary prospectus and a final prospectus in respect of a distribution of securities. A "distribution" includes:

- A trade in securities that have not been previously issued;
- A trade in previously issued securities from a control block; and
- Trades in previously issued securities that were originally issued in reliance upon an exemption from the prospectus requirements, and remain subject to certain resale restrictions.

A "prospectus" is a comprehensive disclosure document relating to the affairs of the entity issuing the securities, and to the particulars of the securities being distributed. It must be prepared in accordance with, and contain the information required by, the relevant securities laws and the rules and regulations promulgated thereunder. In Québec, the prospectus must be prepared in French only, or in French and English.

Each of the BC Act, the Alberta Act, the Ontario Act and the Québec Act, and the rules and regulations promulgated thereunder, contain certain specific exemptions from this prospectus requirement. National Instrument 45-106 - *Prospectus and Registration Exemptions* (NI 45-106), creates a national set of exemptions with only a few provincial differences.

In the case of private placements of securities, some of the most commonly relied upon exemptions are as follows:

- The accredited investor exemption permits an unlimited number of purchasers to buy securities as principal if they fall within the definition of an "accredited investor". This includes, among other categories of investors:
    - An individual who owns, or together with a spouse owns, financial assets having an aggregate realizable value, before taxes but net of any related liabilities, exceeding CA$1 million;

  - An individual whose net income before taxes exceeded CA$200,000, or whose net income before taxes combined with that of a spouse exceeded CA$300,000 in each of the last two years, and who in either case reasonably expects to exceed such net income level in the current year;
  - A corporation, partnership, trust, fund and an association, syndicate, organization or other organized group of persons, whether incorporated or not (other than an investment fund) that has net assets of at least CA$5 million, as shown on its most recently prepared financial statements; and
  - Certain banks and trust institutions, certain types of insurers, the Crown and Canadian municipal corporations, public boards and commissions;
- The minimum amount investment exemption allows a purchaser buying as principal, to acquire securities for an aggregate acquisition cost to such purchaser of not less than CA$150,000 paid in cash at the time of the trade;
- The employee, executive officer, director and consultant exemption permits an issuer to distribute its securities to its directors, executive officers, employees and consultants without a prospectus;
- The private issuer exemption permits a private issuer, that meets certain requirements, to make sales to purchasers in circumstances where each purchaser purchases as principal, and is not a member of the public in relation to such private issuer (e.g. directors, officers or employees of the company and certain of their relatives, close personal friends and close business associates, as well as any person who currently holds securities of the issuer), or to accredited investors; and
- The offering memorandum exemption available in each of the provinces except Ontario, permits an issuer to sell its securities to purchasers who are purchasing as principal, as long as certain requirements are met. These requirements, which vary depending upon the province, include:
  - A purchaser must be delivered an offering memorandum and sign a risk acknowledgement form, at either at the same time or prior to entering into an agreement to purchase such securities; and
  - An offering memorandum is a disclosure document similar to a prospectus, which must be prepared in accordance with a prescribed form. In British Columbia, there are no limits on who can purchase securities under this exemption, while in Alberta and Québec, unless the purchaser qualifies as an eligible investor, the issuer may rely on this exemption only if the purchaser's acquisition cost does not exceed CA$10,000.

It is also necessary to consider resale restrictions applicable under provincial securities legislation to securities issued in reliance upon an exemption. Under the "closed system" of securities regulation in Canada, the first trade in securities issued in reliance upon a prospectus exemption must generally either be made under a prospectus, pursuant to a further prospectus exemption, or in compliance with the relevant resale restrictions (including hold period requirements) of provincial securities legislation. In contrast, when securities are distributed by way of a prospectus, they are thereafter freely tradeable, unless they form part of a control block.

If a corporation intends to seek the listing of its securities on a Canadian stock exchange, it is also necessary to comply with the additional requirements of such exchange, including initial and continuous listing requirements.

REGISTRATION REQUIREMENTS AND EXEMPTIONS

Canadian securities law requires that any market participant that conducts trading activity as a business, or holds itself out as being in the business of trading, comply with the dealer registration requirements in National Instrument 31-103 – *Registration Requirements and Exemptions* (NI 31-103). The regulation requirements are intended to protect investors and ensure that market dealers have the necessary proficiency, insurance requirements, internal controls and meet the continuing compliance requirements for registrants.

To determine whether registration is required, a market participant must assess whether its activities amount to trading and then consider whether it is carrying out the trading as a business. NI 31-103 outlines a number of factors to be considered in determining whether this "business trigger" has been established.

There are a limited number of exemptions from the registration requirements available to certain types of market participants. The most commonly relied upon exemptions are as follows:

- Trades through a registered dealer: An exemption exists for a trade being conducted through a registered dealer. This exemption is only available where a trade is made solely through a dealer or if a registered dealer is purchasing a principal.
- Mobility exemption: This exemption is available to allow a registered participant to continue to deal with clients who move to a different jurisdiction without the requirement to register in that other jurisdiction. A registered firm may use this exemption for a maximum of 10 clients and an individual may use this exemption for up to five clients.

CONTINUOUS DISCLOSURE REQUIREMENTS

Securities legislation applicable in each of British Columbia, Alberta, Ontario and Québec contains provisions requiring public entities that are "reporting issuers" under such legislation to promptly report any material changes in their affairs. They are also required to prepare quarterly interim and comparative annual financial statements, with accompanying notes and management discussion, and analysis of financial condition and results of operations.

In addition, such legislation requires any person or company that solicits proxies from voting certain shareholders of reporting issuers to supply an information circular to such shareholders. Further, most reporting issuers are required to file an annual information form that provides supplemental analysis and background material relating to the issuer. As well, such legislation imposes obligations on insiders of reporting issuers to report their shareholdings and to refrain from trading when they have knowledge of material undisclosed information concerning an issuer's affairs.

Certain foreign reporting issuers who have a *de minimis* number of shares held by Canadian residents, and who are subject to foreign disclosure requirements of certain designated jurisdictions, as well as certain foreign reporting issuers who are registrants under US securities legislation, are afforded relief from Canadian continuous disclosure requirements, provided that they comply with applicable foreign disclosure requirements. Reporting issuers are able to file "short form" or "simplified" prospectuses that incorporate their continuous disclosure documents by reference.

MULTIJURISDICTIONAL DISCLOSURE SYSTEM

The CSA has implemented a multijurisdictional disclosure system, permitting those US issuers that meet certain eligibility criteria (which include market value, public float and US reporting history tests, depending on the nature of the offering), to distribute securities in Canada using disclosure documents prepared according to the requirements of US regulatory authorities. In turn, the US Securities and Exchange Commission has implemented reciprocal measures that allow Canadian issuers meeting similar criteria to register securities in the US using disclosure documents prepared according to the requirements of Canadian regulatory authorities. The multijurisdictional disclosure system also facilitates compliance with proxy, insider reporting, third party, issuer, exchange and cash take-over bid/tender offer requirements, by generally recognizing the documentation of the home jurisdiction.

Government assistance

Federal, provincial and municipal government assistance is available to businesses in a wide variety of forms and can play a critical role in determining whether, when, where and how to establish or expand a business. No financial or business development plan for a Canadian business should be regarded as complete until the opportunities for assistance from all three levels of government have been thoroughly explored.

Government assistance at the federal and provincial level can take a variety of forms, including cash grants, cost sharing, forgivable loans, loans repayable in accordance with future sales or profits, equity participation, tax exemptions or preferential rates, technical assistance (including specific expertise and work force training assistance), and government procurement from the business. Municipal assistance can include reduced taxes or development fees (particularly for plant and office location in municipally-owned industrial and commercial parks), and amendment of existing land use controls.

Government assistance programs at all levels of government are constantly evolving, and so are the types of businesses and geographic areas targeted for assistance. Applicants should not be completely discouraged if an attractive proposal might initially appear not to meet stated eligibility criteria; special exemptions or related assistance programs may be found upon further exploration.

Within the federal government, assistance programs are administered by a number of departments, with the principal source of assistance and the general point of interdepartmental assistance program coordination being the Department of Industry, Science and Technology.

When presenting proposals to assistance program managers, applicants should generally be prepared to demonstrate the same quality of business planning and skill necessary to persuade private sources of financing. Additionally, they will want to highlight any potential benefits to Canada, the province or the municipality, as the case may be, such as increased employment, industrial linkages, technology transfer, use of domestically manufactured goods and expansion of exports. Finally, applicants should be prepared to demonstrate some long-term commitment to the area in question.

Income tax considerations

Canada imposes corporate and personal income tax on its residents and on non-residents who carry on business in Canada, are employed in Canada, or sell property situated in Canada.

Canada has entered into tax treaties with numerous countries to prevent double taxation of the same income in two countries.

Canada imposes corporate and personal income tax on its residents and on non-residents who carry on business in Canada, are employed in Canada, or sell property situated in Canada. Canadian resident individuals and corporations are taxable on their income, which includes capital gains earned anywhere in the world. Non-residents of Canada are generally only taxable on their income from Canadian activities and investments. All of the provinces of Canada also impose income taxes on corporations and individuals residing or carrying on business within the province. Provincial income taxes are not deductible in computing taxable income for federal purposes.

Federal capital tax is imposed on the taxable capital of certain financial institutions. Saskatchewan, Manitoba, Québec, Newfoundland and Labrador, Prince Edward Island, Nova Scotia, and New Brunswick currently impose an additional limited capital tax on specific entities, including, in some cases, financial institutions, insurance corporations and provincial commercial Crown corporations.

Canada also imposes a 25 percent withholding tax on non-residents who receive dividends, certain interest payments, rents, royalties or management fees from Canada. The Canadian payor of any such amounts is liable for withholding and remitting this tax on behalf of the non-resident recipient. Canada has entered into tax treaties with numerous countries to prevent double taxation of the same income in two countries. Generally, tax treaties address which country is entitled to tax particular forms of income in a variety of specific situations.

Tax treaties may also eliminate or reduce withholding tax. For example, the Canada-US Tax Convention (the Canada-US Treaty) eliminates withholding tax on most interest, and reduces the rate on dividends to 15 percent or 5 percent, depending on the circumstances.

The Canada-US Treaty facilitates treaty relief for hybrid entities (such as partnerships and limited liability companies) in certain circumstances while ensuring that hybrid entities do not take undue advantage of the Canada-US Treaty.

In June 2017, Canada, along with 67 other jurisdictions, signed the Organisation for Economic Co-operation and Development's (OECD) Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI). The MLI allows signatory nations to incorporate the OECD's anti-base erosion and profit shifting (BEPS) provisions into their bilateral tax treaties, bypassing the need for extensive treaty renegotiations. On May 28, 2018, Canada took steps to enact legislation to ratify the MLI.

Federal tax rates are uniform across the country, with certain reductions and credits intended to encourage the development of business activity and employment in certain industries of the economy, and in certain regions of Canada. Tax incentives are also available to encourage research and development in Canada. The provinces establish their own rates of tax and, in some cases, rules for the computation of taxable income. For 2019, the combined federal and provincial tax rate on general active business income, including surtax, for corporations ranges between 26 and 31 percent, depending upon the province.

Individuals pay taxes in accordance with a progressive rate structure, which imposes higher rates of tax on higher levels of taxable income. For 2019, the maximum combined federal and provincial rate for individuals ranges between 47.5 and 54 percent, depending on the province.

Canadian subsidiary corporation

A subsidiary incorporated in Canada is considered a Canadian resident for income tax purposes. It will be subject to Canadian income tax on its income earned anywhere in the world from any source, subject to a credit for foreign taxes paid on non-Canadian income.

The income of the Canadian subsidiary that will be subject to Canadian income tax is generally calculated in accordance with acceptable principles of business (such as accounting standards like GAAP and IFRS). There are, however, certain inclusions and deductions that are specifically required or disallowed. The Canadian tax rules treat capital gains more favourably than ordinary business or trading income.

Under the current provisions of the *Income Tax Act* (Canada), taxable income includes one-half of realized capital gains net of capital losses. Subject to certain restrictions, a net capital loss of a given year can be used to offset the capital gain of another year. Subject to certain restrictions, business losses incurred by a subsidiary in a year may be used to reduce taxable income in other years.

Where a corporation carries on business through a permanent establishment in a province, the rate of federal tax imposed on a corporation's taxable income (including surtax) is 15 percent. In addition, the subsidiary generally will be subject to provincial income taxes on income earned in each province in which it carries on business through a permanent establishment. The rate of provincial tax varies among the provinces from 11.5 to 16 percent. Certain provinces provide lower tax rates for corporations that qualify for the federal small business deduction. In general, the taxable income on which provincial tax is imposed resembles the taxable income computed for federal purposes, but special rules in provincial corporate income tax legislation can result in a different measure of taxable income in certain circumstances.

The fact that a foreign business enterprise has a Canadian subsidiary carrying on business in Canada will generally not subject the foreign entity itself to Canadian income tax. For that reason, a Canadian subsidiary can be useful when a partnership or joint venture is to be entered into with a Canadian participant. See the discussion below under the subheading "Joint ventures and partnerships". However, after-tax profits of the Canadian subsidiary distributed to the non-resident parent organization by way of

A subsidiary incorporated in Canada is considered a Canadian resident for income tax purposes.

dividend will be subject to Canadian withholding tax. The withholding tax rate is reduced to between 5 percent and 15 percent under most of Canada's tax treaties. For instance, the Canada-US Treaty and other treaties provide that the rate will be further reduced to 5 percent where the beneficial owner of the dividends is a company that owns at least 10 percent of the voting stock of the company paying the dividend.

Particular consideration should be given to loan transactions between the Canadian subsidiary and its foreign parent, and to interest charged in respect of such loans. Under the current "thin capitalization rule," a portion of any interest that the Canadian subsidiary might pay to its foreign parent on amounts owing by it to the parent may be disallowed as a deduction in computing the subsidiary's income. In general terms, if the ratio of the debt (owing to the parent or other non-resident affiliate) to the equity (paid-up capital, surplus and retained earnings) of the Canadian subsidiary does not exceed 1.5-to-1, no amount of interest expense will be disallowed. On the other hand, if the debt to equity ratio exceeds 1.5-to-1, the interest on the excess debt will be disallowed and treated as a dividend to the non-resident, which would be subject to withholding tax at the applicable rate for dividends. The subsidiary could borrow from arm's length financial institutions without offending the thin capitalization rule; however, in these cases, specific anti-avoidance rules are in place to prevent back-to-back loans using an arm's length intermediary lender. These new rules are worded broadly and can capture many arms' length lending arrangements for Canadian corporations with specified non-resident shareholders.

Because the profits of a Canadian subsidiary or branch can be affected by the cost at which it buys from or sells to related parties, the *Income Tax Act* (Canada) provides transfer pricing rules governing the accounting of such transactions for tax purposes. In general, transactions between non-arm's length persons (such as a parent and its wholly-owned subsidiary), are deemed to take place at fair market value, without regard to what is in fact paid.

"The fact that a foreign business enterprise has a Canadian subsidiary carrying on business in Canada will generally not subject the foreign entity itself to Canadian income tax.

For instance, if a parent sells goods or provides services to its subsidiary at more than the fair market value of the goods or services, or if the subsidiary sells goods or provides services to its parent at less than fair market value, the subsidiary is deemed to have paid or received fair market value for income tax purposes.

The rules relating to Canada's transfer pricing regime conform to the OECD's arm's length principle, which, in general, requires that each transaction between parties not dealing at arm's length be carried out under terms and conditions that one would have expected, had the parties been dealing with each other at arm's length. Pursuant to this principle, requirements in the *Income Tax Act* (Canada) obligate taxpayers who are parties to such non-arm's length transactions to contemporaneously document their transfer pricing transactions and the steps taken to ensure that the terms and conditions of such transactions satisfy the arm's length principle. A significant penalty may be imposed for failure to comply with the arm's length principle.

Canada has also enacted "foreign affiliate dumping" rules to dissuade the use of Canadian corporations in structures where the Canadian resident corporation has both a non-Canadian parent and a non-Canadian subsidiary. In such cases, if the Canadian corporation does not have a sufficient level of Canadian management and is not financed with a sufficient amount of equity, its investment into the non-Canadian subsidiary could result in dividends being deemed to be paid to its non-Canadian parent.

Canadian branch operation

A foreign corporation that is not resident in Canada is subject to Canadian income tax on income earned from any business carried on in Canada. If a business is carried on in Canada through a branch operation, the income attributable to that branch will be subject to income tax in much the same way as if it had been earned by a subsidiary. The method of calculating income subject to tax and the applicable rates will be as outlined above. However, the majority of Canada's bilateral tax treaties provide, generally, that the business profits of a foreign enterprise carrying on business in Canada will only be taxable in Canada if they are attributable to a permanent establishment (PE) situated in Canada. PE is defined to include branches, offices, agencies and other fixed places of business of an enterprise. Under the Canada-US Treaty, the provision of services in Canada may constitute a permanent establishment in Canada commonly referred to as a "services PE."

An additional tax, commonly referred to as "branch tax", will also be payable. Branch tax is payable at the rate of 25 percent of the after-tax profits of the branch operations not being reinvested in Canada. Branch tax is roughly equivalent to the withholding tax, which would be payable on dividends paid by a Canadian subsidiary to its foreign parent organization. The rate is reduced under certain tax treaties to 10 percent or 15 percent. Under the Canada-US Treaty, the rate has been further reduced in certain circumstances to 5 percent of after-tax profits. In addition, certain treaties, such as the Canada-US and Canada-UK treaties, provide for an exemption from branch tax. Under the Canada-US Treaty, the exemption is in respect of the first CA$500,000 of branch profits net of prior years' losses. Under the Canada-UK Treaty, the exemption is in respect of the first CA$500,000 or £250,000, whichever is greater, of branch profits net of prior years' losses.

A foreign entity should determine whether its own jurisdiction would permit a foreign tax credit in respect of Canadian income tax payable, including branch tax.

"A foreign corporation that is not resident in Canada is subject to Canadian income tax on income earned from any business carried on in Canada.

Choosing between subsidiary and branch operation

If business is to be carried on in Canada through a branch operation having a permanent establishment, it will be subject to income tax in much the same way as if it had been earned by a subsidiary, as outlined above. However, it is important to note that, generally, in the case of a resident of a country with which Canada has a tax treaty, that person may carry on business in Canada without attracting Canadian income tax, provided no permanent establishment is maintained in Canada subject to the withholding tax discussion below. See also the discussion below under the subheading "Canadian distributors and selling agents". In addition, whether a non-resident decides to carry on business in Canada through a subsidiary or through a branch, appropriate federal and provincial income tax returns will need to be filed and, in support of these filings, the Canadian operation will be required to keep appropriate books and accounting records in Canada.

On a long-term basis, the use of a subsidiary is often found to be preferable, if for no other reason than the existence of a separate legal entity in Canada serving to encourage and facilitate both the separate accounting necessary for Canadian purposes, and the determination of acceptable cross-border pricing. On the other hand, the ability of the non-resident to use Canadian source start-up losses may encourage the use of a branch operation, until the Canadian business becomes profitable. Subsequently, branch assets, other than real property, can be transferred to a Canadian subsidiary on a tax-free basis for Canadian purposes, provided the appropriate tax elections are made. Caution should be taken before a foreign corporation transfers assets to a Canadian subsidiary, as doing so could trigger taxes in the foreign corporation's country of residence.

Whether a business comes to Canada as a branch or subsidiary could have an impact on the valuation of imported goods. For customs purposes, it is generally the transaction value (the value at which goods are sold to the Canadian importer), that forms the value for duty (i.e. the base upon which customs duties are calculated). However, where goods are transferred to a Canadian branch, a sale has not taken place and, consequently, the transfer price may not form the value for duty. Instead, another value, such as the selling price in Canada less certain adjustments, may become the value for duty. Likewise, since the federally imposed Goods and Service Tax (GST), Québec Sales Tax (QST) or Harmonized Sales Tax (HST) is payable on the duty-paid value of imported goods, the tax payable depends on the customs valuation of the goods. For more information regarding these taxes, see the discussion below under the section "Commodity tax considerations".

In certain circumstances, where the parent corporation is a US corporation, an "unlimited liability company" (ULC) is often considered. A ULC is a hybrid entity for US tax purposes, and as a result may enable the tax attributes, such as start-up losses, of the ULC to be used for US tax purposes. Particular consideration needs to be made regarding the application of the Canada-US Treaty where a US entity wishes to incorporate a ULC in Canada.

Joint ventures and partnerships

A foreign business enterprise may choose to enter into a joint venture to carry on a business or a particular activity in Canada. The structure of such a joint venture may be accomplished in a number of ways, and the Canadian tax consequences will depend upon the particular structure chosen.

The Canadian joint venture may take the form of a Canadian corporation, the shares of which are owned by the Canadian and foreign participants in agreed proportions. In such a case, the Canadian corporation will be taxable on its income as a Canadian resident corporation, as outlined above under the heading "Canadian subsidiary corporation". If the Canadian participants are at least equal partners in the Canadian joint venture corporation, it may qualify for a reduced rate of tax as a "Canadian Controlled Private Corporation" (CCPC). The combined federal and provincial tax rate on CCPCs in Ontario is 13.5 percent and ranges from 10 percent in Manitoba to 18 percent in Québec.

For corporations that have more than CA$10 million of taxable capital employed in Canada, the portion of taxable income eligible for the small business rate is reduced on a straight-line basis. No portion of the taxable income of corporations with more than CA$15 million of taxable capital employed in Canada is entitled to the small business rate. Taxable capital is generally the sum of shareholders' equity and long-term or secured debt, less debt and equity investments in other corporations.

Alternatively, the joint venture may take the form of a partnership between the Canadian and foreign participants. Canada taxes the profits of partnerships at the partner level and does not tax the partnership directly. Each of the partners of a partnership carrying on business in Canada is considered, for tax purposes, to be carrying on the business of the partnership in Canada. Accordingly, if the foreign enterprise is a partner and the partnership has an office, factory or other permanent establishment in Canada, the foreign partner will generally be taxable in Canada on its share of the partnership profits as if it carried on the partnership business directly as a Canadian branch of the foreign enterprise. The tax consequences of a branch operation are set out under the subheading "Canadian branch operation" above. If, on the other hand, the foreign enterprise has its Canadian subsidiary corporation enter into the partnership, the tax consequences would be as set out above under the subheading "Canadian subsidiary corporation".

Canadian distributors and selling agents

Generally, a foreign business resident in a country with which Canada has a tax treaty can have an independent sales representative organization in Canada by way of distribution arrangements, or it can enter into sales contracts to supply goods or services to Canadians without being liable to Canadian income tax on its profits from such sales. Care must be taken to ensure that the foreign entity does not maintain a permanent establishment in Canada. In addition, its Canadian broker or agent must be independent

of the foreign business organization and must not devote all or almost all of its efforts to representing the foreign business.

A foreign business will be liable for Canadian income tax if it has a dependent agent or broker in Canada with authority to negotiate and conclude contracts in its name.

In addition, certain bilateral tax treaties provide that a foreign business can store its products in Canada for purposes of display or delivery, or to maintain an office in Canada solely for the purpose of purchasing Canadian goods, or for collecting information, all without becoming liable for Canadian income tax.

Non-resident trusts

A non-resident trust can be used to carry on business in Canada. A non-resident trust carrying on business in Canada will be subject to ordinary Canadian income tax on any trading profit as if it were an individual with the highest marginal tax rate. The advantage of using a non-resident trust is that, unlike a corporation, there is no Canadian branch tax or withholding tax on the distribution of after-tax profits by a non-resident trust to its beneficiaries. Additionally, a trust is not subject to federal or provincial taxes on capital. However, a non-resident trust does not qualify for certain withholding tax exemptions that are available to corporations.

Withholding taxes

Amounts paid by a Canadian to a non-resident as interest, dividends, rents, royalties or most any other form of income from property may be subject to Canadian withholding tax. As noted above, the rate is 25 percent but may be reduced under an applicable tax treaty. However, in the case of rents in respect of Canadian real property, the rate may remain at 25 percent.

Canada has also eliminated withholding tax on interest payments to non-residents who deal at arm's length with the payor to the extent that the interest does not constitute "participating debt interest" as defined in the *Income Tax Act* (Canada).

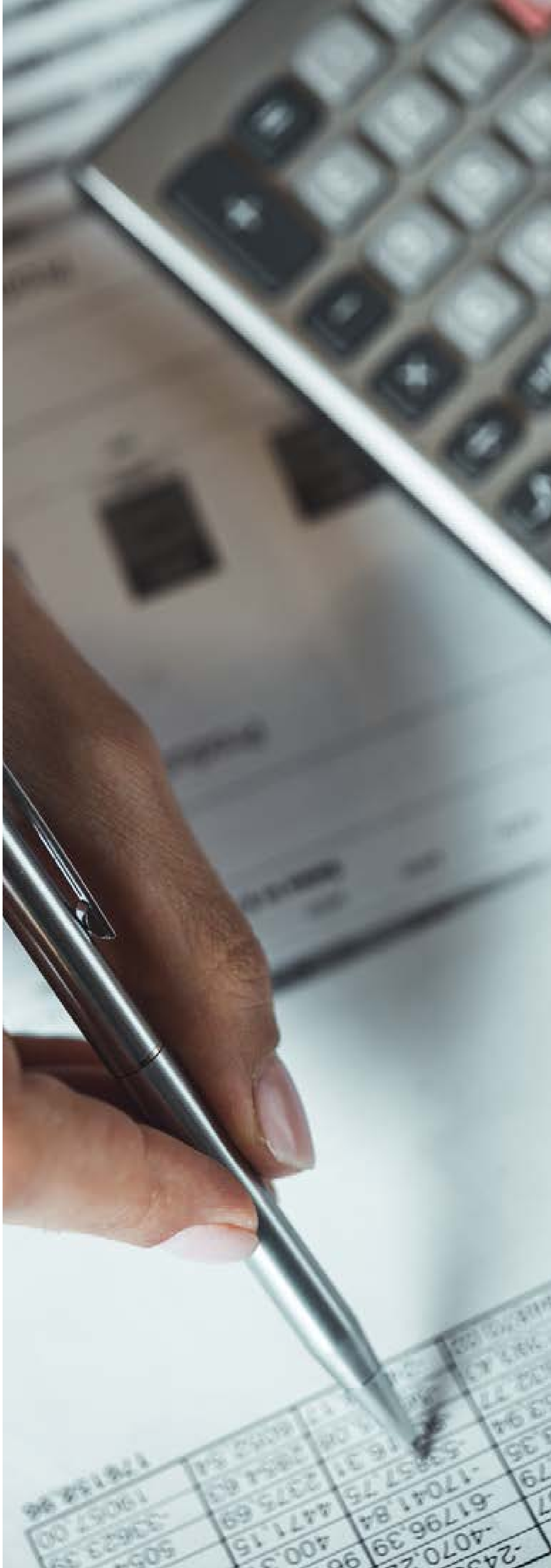
Amounts paid to a non-resident for services rendered in Canada (other than in the course of regular and continuous employment) are subject to a withholding tax of 15 percent of the gross payment. The payor must deduct and withhold 15 percent for federal income tax and, in some cases, an additional 9 percent for Québec income tax. This withholding is commonly referred to as "Regulation 105 withholding" and is considered a pre-payment of the tax that the non-resident may (or may not) otherwise owe in Canada. Since no tax may be owing as a result of benefits afforded under one of Canada's income tax treaties (because the business is not carried on through a Canadian permanent establishment), it may be possible to obtain a waiver from the Canada Revenue Agency for withholding requirements in advance of payments being made for the services rendered in Canada. Furthermore, some or all of this tax may be refunded to the non-resident upon the filing of an income tax return in certain circumstances.

Certain withholding obligations also apply to payments made to non-resident individuals who perform their employment duties in Canada. This withholding is commonly referred to as "Regulation 102 withholding" and it generally applies at the normal Canadian rates on the portion of the payments related to the employment duties performed in Canada. Waivers may be granted where benefits may be available under one of Canada's income tax treaties, and in addition, certain non-resident employers may apply for and be granted relief from withholding by applying to become a "qualifying non-resident employer". In addition, an employee that has been subject to this withholding tax may file a Canadian income tax return and may obtain a refund of all or some of the taxes where applicable.

A non-resident who owns certain types of Canadian real property has the option under the *Income Tax Act* (Canada) of paying tax on rental income, as if the non-resident were a resident taxpayer. This alternative method of payment may result in a lower tax rate, since the non-resident is thereby allowed to deduct his or her expenses, including permitted depreciation costs connected with earning rental income. The non-resident would not otherwise be allowed to deduct expenses, since withholding tax is payable on gross amounts received as interest, dividends and other income from property, without deductions. This special alternative to payment of withholding tax also applies to tax on royalties paid to the non-resident for the use of timber resource properties.

Withholding taxes will be payable in respect of income earned by a non-resident on its investments in Canadian property, whether the Canadian payor is a subsidiary or is unrelated to the non-resident receiving the payment. The tax is imposed on the non-resident, but is required to be collected by the Canadian payor and remitted by it to the Canadian authorities. Property or investment income which would normally be subject to withholding tax, but which is attributable to a Canadian business carried on by the non-resident directly, is generally included in the branch's business income. As a result, this income is not subject to withholding tax, although the Canadian payor is required to obtain the consent of Canada Revenue Agency not to withhold.

Payment of withholding tax will usually allow the non-resident to claim a foreign tax credit for its own income tax purposes, although this should be confirmed by a foreign entity's domestic tax advisors.



Personal income tax considerations

If a foreign enterprise finds it necessary to transfer an individual to Canada, the individual's Canadian tax consequences will depend upon whether or not the individual becomes resident in Canada for tax purposes.

Canadian residents are taxable on their income from all sources earned anywhere in the world. Income includes one-half of realized capital gains net of realized capital losses, subject to an exemption for a capital gain realized on the sale of a principal residence. Employment income includes the value of most employee benefits, including housing, automobiles, low-interest or interest-free loans, stock options, profit sharing plans and insurance benefits. If an individual becomes or ceases to be resident in Canada part-way through a year, he or she will only be taxed in Canada on worldwide income earned while resident in Canada in that year. Upon ceasing to be a resident in Canada, the individual may also be taxed on unrealized capital gains arising from an increase in value of certain capital property while the individual was a resident.

A non-resident of Canada, on the other hand, is taxed only if the non-resident was employed in Canada, carried on business in Canada or disposed of "taxable Canadian property" (in general terms, real estate, resource properties, or, in some cases, shares of a corporation that primarily derive their value from such sources). If an individual is subject to Canadian tax, he or she will pay income tax at a marginal rate, which increases with the amount of taxable income. Basic federal income tax rates range from 15 percent to 33 percent. In addition to federal income tax, each province levies its own income tax.

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Commodity tax considerations

> Some provinces have combined their respective provincial sales taxes with the federal tax to create a harmonized sales tax that is administered centrally by the Government of Canada.

In addition to income, the supply of most goods and services is taxed in Canada. A consumption tax is levied at each of the federal and provincial levels, except in Alberta where no consumption tax is imposed by the province. Some provinces have combined their respective provincial sales taxes with the federal tax to create a harmonized sales tax that is administered centrally by the Government of Canada. In addition, most provinces levy a tax when land is transferred. In all circumstances, each province has its own regime by which land transfer taxes are levied. This section provides a broad overview of the federal and provincial regimes.

> The current GST rate is 5 percent and the federal government has not announced any plan to further decrease or increase this rate.

Goods and Services Tax

The federal Goods and Services Tax (GST) is a value-added tax imposed on the final domestic consumption of most goods and services supplied in Canada. Specific rules apply to determine whether a supply is deemed to be made in Canada.

The current GST rate is 5 percent and the federal government has not announced any plan to further decrease or increase this rate. GST is not imposed on all supplies; "zero-rated" supplies (e.g., exported goods and services, prescription drugs, medical devices and basic groceries) are taxed at zero percent and "exempt" supplies (e.g., health care services, educational services and most financial services) are not subject to GST at all.

Entities and individuals that are involved in making taxable supplies in Canada in the course of a commercial activity are required to register for charge, collect and remit GST on such supplies. As the GST is intended to be a consumption tax, which is ultimately borne by the final consumer, each registrant that makes taxable supplies (including zero-rated supplies) is generally entitled to recover any GST paid on its inputs by means of the input tax credit (ITC) mechanism. Entities and individuals involved in making exempt supplies are not entitled to claim ITCs with respect to taxable expenses to the extent they are incurred in the course of making such supplies.

Non-residents are required to register for and charge GST if they are making taxable supplies in the course of a business carried on in Canada and the total revenues from such supplies is higher than CA$30,000 a year. For GST purposes, a non-resident with a permanent establishment in Canada is deemed to be a resident of Canada with respect to its activities carried on through the establishment.

Québec Services Tax

The Québec Sales Tax (QST), like the GST, is a consumer-level tax not borne by businesses, aside from the administrative costs to administer the QST. Most of the concepts existing under the GST legislation have been adopted by the Government of Québec with respect to the QST. Nonetheless, the QST remains a distinct tax and is not to be confused with the harmonized sales tax (HST) discussed below.

Moreover, by virtue of an agreement with the federal government, the Government of Québec administers both the GST and the HST in the province of Québec, in addition to administering the QST. The QST rate is currently 9.975 percent on both goods and services supplied in Québec. It should be noted that since January 1, 2019, businesses that have no physical or significant presence in Québec but make taxable supplies of incorporeal movable property and services in Québec to Québec consumers, may be required to register to a new mandatory registration system and to collect and remit the QST applicable on such supplies. This new registration requirement applies only for QST purposes.

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The harmonized sales tax (HST) combines the 5 percent GST with a provincial sales tax component.

Harmonized Sales Tax

The Harmonized Sales Tax (HST) combines the 5 percent GST with a provincial sales tax component. The HST is federally administered (except in the province of Québec), and has the same basic operating rules as the GST, with certain exceptions. However, each participating province to the HST regime (referred to as “participating provinces” in the GST legislation) (HST provinces) has the ability to decrease or increase the provincial component of the tax.

The current list of participating HST provinces includes Ontario, Nova Scotia, Newfoundland and Labrador, New Brunswick and Prince Edward Island. The HST currently applies at a rate of 13 percent in Ontario and 15 percent in Prince Edward Island, Nova Scotia, New Brunswick and Newfoundland and Labrador.

All GST registrants who provide taxable supplies to customers in one of these HST provinces, including supplies shipped or mailed from outside these provinces to recipients in one of these provinces, are required to collect and remit the HST. A taxable supply that is not made in a HST province continues to be subject to GST, as are supplies shipped or mailed from any of the HST provinces to recipients in one of the other provinces.

To determine the province in which a supply is made (and hence the correct rate of tax), it is necessary to review the place of supply rules. These rules provide for both general and specific rules, which depend on the nature of the supply. Registered GST/HST suppliers who make taxable (including zero-rated) supplies are entitled to recover the HST they pay on their taxable business inputs through the ITC mechanism.

Provincial Sales Tax

A provincial sales Tax (PST), which is a single incidence sales tax imposed on end-users or consumers of tangible personal property and certain services in the province, is currently imposed in Saskatchewan, Manitoba and British Columbia at general rates of 6 percent, 7 percent and 7 percent, respectively (note: in some cases, such as sales of accommodation and liquor, the rates vary).

Relief from these taxes is available in certain circumstances. For example, most provinces provide tax exemptions for certain goods, such as basic groceries, medicines and books. In addition, most provinces also provide exemptions for certain purchases made by identified classes of purchasers, such as production machinery and equipment purchased by manufacturers, and certain purchases made by farmers, diplomats and hospitals. Also, the PST provinces provide PST exemptions in respect of tangible personal property acquired solely for resale or lease, provided certain conditions are met.

The sales tax bases (i.e., what is taxed) and exemptions vary between the PST provinces. Accordingly, each provincial taxation statute needs to be considered separately when determining if a transaction will be subject to PST in any of the PST provinces.

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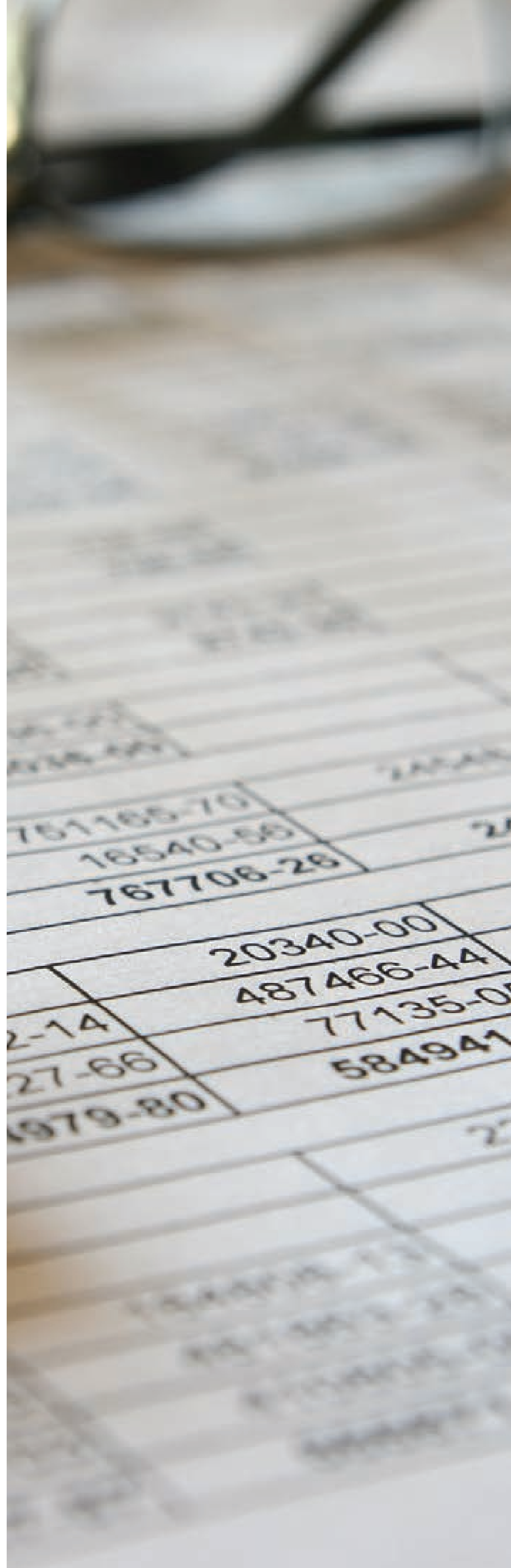

Provincial land transfer tax

The Provinces and Territories levy land transfer tax or some form of registration fee on any acquisition of real property within their territory.

With respect to land transfer tax, in British Columbia, the general rate is 1 percent on the first CA$200,000 of the fair market value of the property, 2 percent on the fair market value of the property that exceeds CA$200,000 and up to CA$2 million, and 3 percent on the fair market value of the property that exceeds CA$2 million, subject to possible exemptions for first time home buyers or those purchasing a newly built home. If the property is residential, a further 2 percent land transfer tax is imposed on the portion of the fair market value greater than CA$3 million. Higher rates may apply to non-resident purchasers on certain residential property situated in designated areas.

In Manitoba, the general rate is 0 percent on the first CA$30,000 on the fair market value of the property, 0.5 percent on the fair market value of the property that exceeds CA$30,000 without exceeding CA$90,000, 1 percent on the fair market value of the property that exceeds CA$90,000 without exceeding CA$150,000, 1.5 percent on the fair market value of the property that exceeds CA$150,000 without exceeding CA$200,000, and 2 percent on the fair market value of property that exceeds CA$200,000.

“The Provinces and Territories levy land transfer tax or some form of registration fee on any acquisition of real property within their territory.

In Nova Scotia, the land transfer tax, called a deed transfer tax, payable on the sale price depends on the municipality in which the property is located. The applicable rate ranges from 0 percent to 1.5 percent, the latter being the maximum allowed by law.

In New Brunswick, the land transfer tax payable is 1 percent of the assessed value of the property, or consideration for the transfer, whichever is greater.

In Ontario, the general rate is 0.5 percent on the first CA$55,000 on the value of consideration of the property and 1 percent on the value of consideration that exceeds CA$55,000 without exceeding CA$250,000. An additional tax of 0.5 percent (i.e., 1.5 percent) is payable on that portion of the value of consideration that exceeds CA$250,000 without exceeding CA$400,000. An additional tax of 0.5 percent (i.e., 2 percent) on that portion of the value of consideration that exceeds CA$400,000. If the amount exceeds CA$2 million and the land contains at least one and not more than two single-family residences, an additional 0.5 percent tax (i.e., 2.5 percent) applies to the value of the consideration that exceeds CA$2 million. It should be noted that there are exceptions available for first time homebuyers. The City of Toronto levies an additional land transfer tax, also subject to possible exemptions for first time homebuyers. In addition, higher rates may apply to non-resident purchasers on certain residential property situated in designated areas.

In Prince Edward Island, the tax is computed at the rate of 1 percent if value is higher than $30,000 of the greater of the consideration for the transfer and the assessed value of the real property. The tax is payable when the deed is tendered for registration. First time homebuyers are exempt from payment of the real property transfer tax.

In Québec, the rate is 0.5 percent on the first CA$50,900, 1 percent on the amount exceeding CA$50,900 without exceeding CA$254,400 and 1.5 percent on the excess. If the transferred property is located in the City of Montréal, an additional tax of 0.5 percent (i.e., 2 percent) is payable on that portion of the amount that exceeds CA$508,700 without exceeding CA$1,017,400. A rate of 2.5 percent is applied on any portion of the amount that exceeds CA$1,017,400. It should be noted that for other municipalities situated in Québec, an additional tax up to 1.5 percent could apply on the portion of the amounts that exceed CA$500,000 depending on the municipality in which the property is located. The tax in Québec is computed based on the highest of either consideration paid, the consideration agreed for, or the fair market value of the property. This tax is payable upon the registration of the transfer of the property.

Canada’s trading regime

> Canada has pursued an ambitious strategy to expand its network of bilateral and regional trade agreements.

> Canada offers an ever-expanding positive trading environment, presenting market access and other trade liberalizing opportunities that can be leveraged.

Canada, by necessity, facilitates one of the most liberal trading environments in the world. Although an ardent supporter of the World Trade Organization (WTO), since the Doha Round of negotiations at the WTO faltered, Canada has pursued an ambitious strategy to expand its network of bilateral and regional trade agreements. Thus, Canada offers an ever-expanding positive trading environment, presenting market access and other trade liberalizing opportunities that can be leveraged.

Implementation of Canada's international obligations

International obligations entered into by Canada, such as those contained in trade agreements, are not automatically incorporated into domestic law. Canada's international obligations are incorporated into the domestic legal structure through the passage of specific implementing legislation, which typically amends existing legislation as required to comply its international obligations. Further, certain customary international law obligations are directly incorporated into Canadian law.

Canada is a federal state where treaty-making power is vested in the federal government. Implementation of international obligations may require the cooperation of the provinces. Although the power to enter international treaties is exclusive to the executive branch of government, the ability to implement obligations undertaken is necessarily limited by the division of powers between the federal government and the provinces, as set out in the *Constitution Act* (Canada). See the discussion under the heading "Canadian constitutional system."

If an obligation affects a matter that belongs exclusively to the provinces' jurisdiction, compliance will require the province to pass implementing legislation. Given the wide breadth of provincial powers, compliance with international obligations may not be entirely within the federal government's control. Whether failing to adhere to an international obligation occurs at the federal or the provincial level, only the federal government can defend Canada in an international forum.

The World Trade Organization (WTO)

Canada, in addition to the majority of other nations in the world, is a member of the WTO. The purpose of the WTO is to foster a multilateral trading environment by establishing global rules to ensure that trade flows as smoothly, fairly and predictably as possible. The basic premise of the WTO is non-discrimination. Thus, most of the agreements administered by the WTO are founded on the core non-discrimination principles of most favoured nation status (MFN) and national treatment.

The agreements administered by the WTO cover many areas related to trade and investment in a member's territory. In addition to the more commonly known agreements covering trade in goods and services, Canada has undertaken certain obligations related to such things as government procurement, intellectual property protection, subsidies, standards and agriculture, among others.

To facilitate further trade liberalization, the WTO permits members to depart from the core concept of MFN and enter into regional preferential agreements. Canada has availed itself of this right and has entered into numerous international trade agreements. iStock-172864341

Mega-Regional Trade Agreements

THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)

NAFTA defines Canada's most comprehensive trading relationship. It complements and expands upon the overriding international trade rules established under the WTO and governs trade relations between Canada, the US and Mexico. NAFTA was built upon the framework of the Canada-US Free Trade Agreement by adding Mexico to the trading area, creating new specialized rules of origin and content requirements, ensuring protection for intellectual property rights, and linking environmental and labour market regulation to trade issues. NAFTA also facilitates the trading relationship by providing privileged access to each member's country by business and professional travelers.

Although NAFTA covers many areas of trade and investment, the bulk of the Agreement is focused on trade in goods. Rules of origin particular to NAFTA are established for each specific good. These rules ensure that preferential tariff treatment is only accorded to goods produced, substantially transformed or whose major component is produced in the free trade area, inducing economic activity within the area.

In addition to dealing specifically with trade in goods, NAFTA also addresses trade in services, customs procedures and specific obligations related to such matters as energy, the automotive sector, agriculture, textiles, technical barriers to trade, government procurement, intellectual property and investment.

Further, NAFTA provides preferential status for its parties in anti-dumping and safeguard proceedings. In addition, chapter 19 of the NAFTA contains a mechanism to bring a party's decision in front of a bi-national panel review mechanism for private parties involved in anti-dumping and countervailing duty investigations. The NAFTA's chapter 11 contains investment rights and protection for investors from both discrimination and government measures that are tantamount to expropriation. This chapter provides rights that are enforceable by investors directly through international arbitration.

On November 30, 2019, Canada, the US and Mexico entered into the Canada-United States-Mexico Agreement (CUSMA also referred to as USMCA or T-MEC). CUSMA includes nearly all of the same features of the NAFTA. Notable aspects of the CUSMA that change include updated rules of origin, specifically for the automotive sector, increased dairy market access into Canada, increased protections for intellectual property, increased *de minimis* thresholds for sales tax and customs duties on imports for Canada and Mexico, and a new chapter on digital trade. Further, investor protections are modified, with no access to dispute resolution between Canada and the US, and limited access to dispute resolution between the US and Mexico.

The CUSMA needs to be ratified in all three countries before entering into force. In the meantime, the NAFTA remains in force and continues to be applicable, notwithstanding the domestic implementation process that each country is currently undertaking. Any party seeking to withdraw from the NAFTA is required to provide six months' notice to the other NAFTA parties.

THE COMPREHENSIVE ECONOMIC TRADE AGREEMENT (CETA)

CETA provisionally entered into force in September 2017, and save for certain investment, financial services and intellectual property provisions, the entire agreement has been operational since that time. CETA contains 30 chapters covering many of the subject areas of other mega-regional agreements such as including market access, sanitary and phytosanitary measures, customs and trade facilitation, trade in services, investment, subsidies, entry for business people, competition, telecommunications, financial services, state owned enterprises, procurement, intellectual property, among other chapters.

CETA's provisional application and entry into force has resulted in a significant reduction of customs duties, specifically some 98 percent of duty rates on both sides of the Atlantic will be affected. Early reports indicate increases of 6.3 percent and 5.4 percent in trade in goods and services, respectively, from October 2017 until July 2018. Significant opportunities remain for Canadian businesses given the increased market access in the EU. European businesses have been more proactive in seeking out opportunities and have correspondingly seen greater growth as a result of CETA to date. Notably, should the UK leave the EU through the "Brexit" process they will no longer be entitled to preferential treatment under CETA.

CETA will fully enter into force once ratified by all EU member states.

COMPREHENSIVE AND PROGRESSIVE TRANS PACIFIC PARTNERSHIP (CPTPP)

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) entered into force on December 30, 2018, for Australia, Canada, Japan, Mexico, New Zealand and Singapore. On January 14, 2019, CPTPP came into force for Vietnam. The expansive 30-chapter trade agreement covers digital trade and ecommerce, investment, procurement, supply chain goods and rules of origin, and services, including financial services, among others.

The CPTPP opens several markets for which Canada did not previously have preferential trading.

Prior to the CPTPP, Canada only had free trade agreements with Chile, Peru and Mexico, through the North American Free Trade Agreement (NAFTA). It is expected that the CPTPP will produce opportunities for growth in the financial services, fish and seafood, forestry, and the metals and minerals sectors. Canada is well poised to take full advantage of the CPTPP as an access point to North America.

The CPTPP will enter into force for the remaining CPTPP Parties (Brunei Darussalam, Malaysia, Chile and Peru) 60 days after they have notified the Depositary (New Zealand) of the completion of their applicable domestic legal procedures. Notably, the CPTPP may continue to expand its reach over the coming years with various countries—including Colombia, Indonesia, the Philippines, South Korea, Taiwan, Thailand and the UK—having expressed an interest in joining the agreement.

Bilateral and regional trade agreements

Although a proponent of free trade, Canada has, until recently, lagged behind its trading partners in negotiating a network of bilateral and regional trade agreements. In 2007, Canada enunciated a "Global Commerce Strategy," which signaled a re-invigoration of its efforts to engage in bilateral and regional trade negotiations as a means of securing Canada's growth and prosperity. This strategy continues to be a key plank in the current government's economic plan to maintain Canada's comparative global advantage. Canada is currently a party to bilateral trade agreements with the following countries:

- Ukraine (in force as of August 1, 2018)
- South Korea (in force January 1, 2015)
- Honduras (in force October, 1 2014)
- Panama (in force as of April 1, 2013)
- Jordan (in force as of October 1, 2012)
- Colombia (in force as of August 15, 2011)
- Peru (in force as of August 1, 2009)
- The European Free Trade Association (in force as of July 1, 2009)
- Costa Rica (in force as of November 1, 2002)
- Israel (in force as of January 1, 1997)
- Chile (in force as of July 5, 1997)

Canada is currently at various stages of pursuing preferential trading arrangements with Morocco, the Caribbean Community (CARICOM), MERCOSUR, the Dominican Republic, El Salvador, Guatemala, Nicaragua, Japan Singapore and India.

The scope of Canada's trade agreements and negotiations vary from comprehensive to merely incorporating the substantive obligations of the WTO with hortatory language regarding future negotiations. While all of Canada's recent trade agreements address such issues as investment, the environment and labour standards, the manner by which these obligations are imposed differ from agreement to agreement.

Foreign investment protection and promotion agreements

In addition to entering into and negotiating free trade agreements, some of which, like the NAFTA, contain specific obligations pertaining to investor protection and dispute resolution. Canada has also been very active in negotiating agreements that specifically promote and protect foreign investment through legally binding obligations. Canada has executed Foreign Investment Protection and Promotion Agreements (FIPAs) with 38 countries. A full list of these agreements are available here.

Although Canada's original FIPAs are based on the Organization for Economic Co-operation and Development (OECD) model, the bulk of Canada's FIPAs were entered into after 2003 and are modeled on the more comprehensive NAFTA model, and the Canadian model BIT. These later agreements include a more mature and comprehensive investor-state dispute mechanism. Canada is in the process of updating its model BIT in light of continual developments in international investment law.

Import and export considerations

Canada has implemented the Administrative Monetary Penalty System (AMPS). AMPS is a civil penalty regime designed to secure compliance with Canada's import and export obligations.

Introduction

In addition to the various forms of commodity taxes previously discussed, firms importing goods into Canada are required to pay customs duties, and Goods and Services Tax (GST), or Harmonized Sales Tax (HST), as well as abide by a number of federal laws, which regulate customs procedures, quotas, product standards and labelling requirements within Canada. See the section titled, "Federal consumer product and labelling standards" for additional reference.

Companies contemplating Canada for manufacturing/exporting purposes are also subject to certain regulations, including reporting requirements. Further, certain goods are subject to export controls, including all goods imported from the US that are not substantially transformed in Canada.

In addition to specific long-standing legislative deterrents, Canada has implemented the Administrative Monetary Penalty System (AMPS). AMPS is a civil penalty regime designed to secure compliance with Canada's import and export obligations. AMPS provides a monetary penalty to be levied for a violation of obligations related to either importing to, or exporting from, Canada, as set out in three pieces of federal legislation: the *Customs Act*, the Customs Tariff and the *Special Import Measures Act*, and the regulations promulgated thereunder. The scheme is designed so that the level of penalty increases each time an importer or exporter repeats an infraction.

The correct classification of goods is a critical first step in determining the amount of customs duties payable upon importation.

Customs duties

The amount of customs duties levied on the importation of goods into Canada is calculated by reference to their classification and applicable duty rate, which is set out under the List of Tariff Provisions in the Schedule to the Customs Tariff. The duty rate is calculated upon the value for duty, which is determined in accordance with the *Customs Act*.

Classification

As a signatory to the International Convention on the Harmonized Commodity Description and Coding System, the classification of goods for customs duty purposes in Canada generally follows the classification and rules used by most countries. The List of Tariff Provisions in the Schedule to the Customs Tariff is divided into 99 chapters and contains a comprehensive list of goods intended to cover the range of all possible products that could be imported into Canada (Tariff Schedule). The correct classification of goods is a critical first step in determining the amount of customs duties payable upon importation.

Origin – the applicable rate of duty

Canada applies different duty rates (preferential and non-preferential) to the same goods on the basis of their origin. The origin of goods is usually determined by reference to where they are manufactured, grown or extracted. For goods originating from most countries, the Most Favoured Nation (MFN) rate of duty will apply. For goods that qualify as originating from a country with which Canada has a trade agreement, the rules and rates arising from that specific agreement will apply.

In addition, Canada has unilaterally instituted preferential tariff treatment for certain groups of countries, such as the Least Developed Country Tariff. Where goods qualify as "originating goods" under such agreements or preferential treatment, lower duty rates typically apply. Preferential and non-preferential duty rates are set out for each tariff item in the Tariff Schedule to the Customs Tariff. This is an exception to the WTO principle of "non-discrimination".

Valuation

The valuation of goods imported into Canada is governed by the *Customs Act* and regulations passed thereunder. Value for duty determinations establish the basis upon which customs duties are levied. In a majority of cases, customs duties on goods imported into Canada will be calculated based on their transaction value. The transaction value is the price paid or payable for the goods that are exported to a purchaser in Canada, subject to a number of adjustments, which take into account factors such as royalties, the costs of shipping, transportation and commissions. Where a price cannot be determined on the basis of the transaction value, the *Customs Act* provides for other methods of valuation to be used, including the transaction value of identical or similar goods, deductive, computed ("cost-plus") or residual value.

Anti-dumping and countervailing duties

Certain products may be subject to anti-dumping or countervailing duties at the border. These duties are levied pursuant to the *Special Import Measures Act* (SIMA), which establishes certain procedures for the imposition of anti-dumping duties for goods exported to Canada at prices below home market prices or below the total cost of production, and for countervailing duties where goods sold to Canada are subsidized by the exporting country. These procedures are available to domestic producers to protect them from unfair import competition. Anti-dumping and countervailing duties are additional charges imposed on the goods over and above standard tariffs. These additional duties can only be imposed once a detailed inquiry has taken place.

SIMA is administered by the Canada Border and Services Agency (CBSA), which investigates complaints, makes dumping determinations and enforces duties imposed under the legislation and by the Canadian International Trade Tribunal, an independent quasi-judicial tribunal that adjudicates the question of whether dumped or subsidized imports have materially injured or threaten to injure Canadian producers materially. SIMA also provides for several levels of re-determinations and appeals.

Customs duty relief

Relief from the payment of customs duties is available through a number of mechanisms designed to promote trade and support Canadian industries. Duty drawback (refund), duties relief and remission programs may be used to reduce, eliminate or defer the payment of customs duties on certain goods.

The drawback program allows certain importers to obtain full or partial drawback on customs duties paid on goods that were imported for use in the manufacturing of goods in Canada, that are subsequently exported. Additional drawbacks are available in respect of goods imported for specified purposes.

There is additional relief in respect of imported goods that are damaged, and goods that are imported and used as manufacturing inputs.

As well, numerous remission orders are granted in favour of specific goods or producers. Canadian customs law permits duties on certain imported goods to be refunded to specified businesses, on condition that these businesses meet certain performance requirements related, for example, to production, exports or employment. These are known as "remissions," which can be full or partial waivers of duty and/or taxes, on a permanent or temporary basis, and can be enacted to apply to particular products, industries or companies. In addition to pre-existing remission orders, there are various legislative provisions that allow an importer to apply for remission orders.

Excise duties

Persons who produce, package, store, transport or sell spirits, beer, tobacco and related products, are regulated by the *Excise Act*, 2001, which levies a special form of tax called excise duties. Some of these goods are subject to a duty under the Customs Tariff, in place of the excise duty, when imported to Canada. Exemptions from excise taxes are available under certain circumstances.

Packaging and labelling

Prepackaged goods sold in Canada are subject to federal and provincial packaging and labelling requirements. The *Consumer Packaging and Labelling Act* sets out general obligations with respect to the type of product company information that must be displayed, as well as bilingual labelling requirements. Additional requirements for goods, such as drugs, foods and textiles, are imposed under the *Food and*

Drug Act, the *Safe Food for Canadians Act* and the *Textile Labelling Act*. Issues relating to misleading consumer information are dealt with under the federal *Competition Act* and various provincial consumer protection statutes. Finally, additional labelling and packaging obligations are imposed under the *Canadian Consumer Protection Act*, the *Hazardous Products Act*, the *Québec Charter of the French Language*, and under regulations passed pursuant to trade agreements, such as the North American Free Trade Agreement (NAFTA).

The *Safe Food for Canadians Regulations* (SFCR) consolidates all food-labelling, standards of identity and grades requirements from the *Consumer Packaging and Labelling Act, Canada Agricultural Products Act,* and a number of other regulatory regimes. It is important to note that even with the coming into force of the SFCR, the current requirements under the *Food and Drugs Act (*FDA) and its regulations will continue to apply to all food.

Under the SFCR, the most significant changes to labelling, standards of identity and grade requirements include:

- Definition of "prepackaged" and "consumer prepackaged," which makes the distinction between food sold to persons versus individuals;
- Preventive control plan content for consumer protection to ensure labelling standards are met;
- Traceability-specific labelling requirements throughout the supply chain;
- Ministerial exemptions for the purpose of test marketing and to alleviate a shortage of food; and
- Trade of fresh fruits and vegetables.

For more information, see the discussion under the heading, "Federal consumer product and labelling standards."

In addition, there may be other product-specific requirements that attach to specific imports. These requirements are administered by a variety of government departments pursuant to related statutes and are enforced at the border by the CBSA.

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The *Consumer Packaging and Labelling Act* sets out general obligations with respect to the type of product company information that must be displayed.

Food-specific regulatory requirements

The *Safe Food for Canadians Act* came into force in 2012. The Act governs food commodities, and establishes a detailed regulatory framework with respect to food inspection, safety, traceability, labelling and advertising, and number of licensed activities including importing, distribution and sales.

The SFCR is intended to streamline, consolidate and align Canada's food safety regime. To this end, the SFCR consolidates 13 food commodity-based regulations plus the food-related provisions of the *Consumer Packaging and Labelling Regulations* into a single governing regulatory instrument.

The licensing requirements are now expanded to different prescribed activities such as import food; manufacture, process, treat, preserve, grade, or label food for export or interprovincial trade, export food; slaughter food animals; and store and handle meat products. Additionally, the SFCR has incorporated a traceability component, which requires that documents be prepared and kept in order to track food forward to the immediate customer, whether it is a retailer or another food business, and backwards to the immediate supplier. However, this obligation does not extend to retailers to trace forward to consumers, nor will, traceability requirements apply to restaurants and similar businesses.

Import permits

The importation of goods into Canada can be restricted for international reasons, including human rights, embargoes, and conservation, or in protection of domestic industries subject to Canada's international obligations. In addition, certain goods require import permits for monitoring purposes. Pursuant to the *Export and Import Permits Act* (EIPA), goods that appear on the Import Control List may not be imported into Canada unless an import permit is acquired.

The goods on this list include clothing and textiles for which Canada has entered into bilateral restraint agreements with certain countries. Such bilateral restraint agreements restrict the quantity of imports of these goods, usually through the establishment of export quotas for the exporter. Import permits will only be granted if the exporter has an export quota and an export license. The importation of certain other goods, such as firearms, steel and animal and agricultural products, are also on the list as a result of regulation pursuant to other specific legislation. Other products such as drugs and plants are subject to import controls under product specific legislation.

Export permits

Canada's export controls are designed to prohibit or limit the export of strategic goods and technologies to unstable or unfriendly countries, through a permit system. Under the EIPA, the export from Canada of goods specified in the Export Control List, and all exports from Canada to certain countries specified in the Area Control List, require an exporter to obtain a Canadian Export Permit to lawfully export. The relevant country for Canadian export control purposes is the country in which the exports will ultimately be consumed. The exporter or its agent, and satisfactory review thereof by the Trade Controls Bureau of the Global Affairs Canada issue export permits following a written application. All goods originating in the US that are exported from Canada to any country other than the US also require an export permit to prevent circumvention of US export controls.

The Export Control List consists primarily of weapons and munitions; nuclear goods, high technology goods, goods having potential military applications and related technical information; cultural goods; lumber and certain agricultural products; US origin goods; and many chemical goods that could be used for either warfare or the production of illegal drugs. The Area Control List consists of countries that Canada has determined to be hostile. Currently, North Korea is the only country on the Area Control List.

Often, to export a good, a General Export Permit is available, which can be used without an application. If one is not available, then specific application for an export permit must be made. Depending on the strategic importance of the controlled goods or the destination country, an export permit application may be refused or granted, subject to a provision of an import or end use certificate, or a delivery verification certificate. In some instances, multiple shipment and multiple consignee permits may be available.

Controlled goods

Through the *Defence Production Act* and the creation of the Controlled Goods Directorate, Canada has implemented the Controlled Goods Program (CGP). The CGP is a registration system designed to control the examination, possession and transfer of goods and related technology defined as "controlled goods" within Canada. Controlled goods are defined in relation to Canada's Export Control List and include military, nuclear weapon-related and missile technology-related goods. Failure to register under the CGP, where required, can result in civil or criminal penalties, including imprisonment.

Economic sanctions

Canada implements various international economic sanctions in an effort to bring about a change in behavior of specific states or individuals. Canada principally implements these sanctions through two acts: the *United Nations Act* (UN Act) and the *Special Economic Measures Act*. Certain terrorist organizations are also sanctioned under the *Criminal Code of Canada*. The *Justice for Victims of Corrupt Foreign Officials Act* came into force in 2017 as a measure to implement sanctions focused primarily on the imposition of asset freezes.

The *UN Act* is the legislative vehicle by which Canada gives effect to decisions passed by the United Nations Security Council. Canada implements its specific United Nations (UN) obligations into Canadian law by adopting regulations pursuant to this Act. For the most part, the sanctions implemented are directed towards specific countries, entities or individuals, and may establish an embargo against certain goods or impose an asset freeze. There are currently a number of countries against which Canada has imposed such measures. These measures also impose restrictions against engaging in enumerated activities with designated persons.

Further, following September 11, 2001, the UN implemented a resolution directed specifically at identified individuals. The *United Nations Suppression of Terrorism Regulations* place a freeze on the dealing of property with listed persons, and impose an ongoing duty on Canadian financial institutions to determine and report monthly whether they are in possession or control of the property of a listed person.

The *Special Economic Measures Act* (SEMA) authorizes the Canadian government to impose sanctions on foreign states, either of its own accord or as a result of an obligation undertaken in an international organization other than the UN (for example, NATO). The sanctions imposed under SEMA can be very far-reaching and go beyond merely the control of imports and exports.

Currently, there are *UN Act* or SEMA sanctions in place against Libya, Myanmar (Burma), North Korea, Central African Republic, Democratic Republic of Congo, Eritrea, Iran, Iraq, Lebanon, Russia, Somalia, South Sudan, Sudan, Syria, Ukraine, Venezuela, Yemen and Zimbabwe.

Foreign Extraterritorial Measures Act

The *Foreign Extraterritorial Measures Act* (FEMA) was enacted to counter certain countries' attempts to apply their laws extraterritorially. It is largely an enabling statute to protect Canadian interests against foreign courts and governments. FEMA authorizes the Attorney General to make orders relating to measures of foreign states or foreign tribunals affecting international trade or commerce.

The Attorney General has only issued one order under FEMA, known as the Cuba Order. The Cuba Order is directed at extraterritorial measures of the US aimed at preventing trade and commerce between foreign states and Cuba. More specifically, the Cuba Order was issued to address specific US legislation, which aims to prohibit the activities of US-controlled entities domiciled outside the US, as they relate to Cuba (e.g., Canadian affiliates of US companies).

The Cuba Order requires every Canadian corporation, and every director and officer of a Canadian corporation, to provide notice to the Attorney General of Canada of any directive, instruction, intimation of policy or other communication relating to an extraterritorial measure of the US. This can be in respect of any trade or commerce between Canada and Cuba that the Canadian corporation, director or officer has received from a person who is in a position to direct or influence the policies of the Canadian corporation in Canada.

Beyond the notice requirement, the Cuba Order prohibits any Canadian corporation from complying with any extraterritorial measure of the US, or with any directive or other communication relating to such a measure that the Canadian corporation has received from a person who is in a position to direct or influence the policies of the Canadian corporation in Canada.

The result of these two jurisdictions' competing legislation is conflicting and unless properly managed, can result in legal liability for both individuals and corporations.

Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)

The Justice for Victims of Corrupt Foreign Officials Act (JVCFO), also known as the *Magnitsky Act,* came into force on October 18, 2017. The JVCFO created a new legal framework to provide for the taking of restrictive measures in respect of foreign nationals responsible for gross violations of internationally recognized human rights, and amended other legislation, including the *Special Economic Measures Act* and *the Immigration and Refugee Protection Act*.

The JVCFO allows the Governor in Council to make orders and regulations to restrict dealings in property and freeze the assets of foreign nationals. Some of the circumstances in which the Governor in Council may take action are:

- A foreign national is responsible for or complicit in, gross violations of internationally-recognized human rights;
- A foreign national acts as an agent of or on behalf of a foreign state in a matter relating to a violation of internationally-recognized human rights;
- A foreign public official, or an associate, is responsible for or complicit in ordering, controlling, or otherwise directing acts of significant corruption; and
- A foreign national has materially assisted, sponsored or provided financial, material or technological support for, or goods or services in support of an act of significant corruption by a foreign public official or their associate.

On November 3, 2017, Canada imposed sanctions pursuant to the JVCFO by enacting regulations to the JVCFO. The Regulations prohibit Canada and Canadians outside Canada from:

- Dealing, directly or indirectly, in any property, wherever situated, of the listed foreign national;
- Entering into or facilitating, directly or indirectly, any financial transaction related to a dealing described above;
- Providing or acquiring financial or other related services to, for the benefit of, or on the direction or order of the listed foreign national; and
- Making available any property, wherever situated, to the listed foreign national or to a person acting on behalf of the listed foreign national.

The JVCFO authorizes the Minister of Foreign Affairs to issue permits and general permits to persons in Canada and Canadians outside Canada to carry out a specific activity or transaction, or class of activity or transaction that is otherwise prohibited by the JVCFO or its Regulations. A foreign national who is subject of an order or regulation made under the Act may apply in writing to the Minister of Foreign Affairs to cease being the subject of such order.

Currently, Canada has orders on individuals from four countries and 70 individuals: 19 individuals from Venezuela, 30 individuals from Russia, 17 individuals from Saudi Arabia, three individuals from South Sudan and one individual from Myanmar (Burma).

Protection of intellectual property

Intellectual property is protected in Canada under the laws relating to trademarks, copyright, patents, industrial designs, integrated circuit topography and trade secrets.

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The information contained in this guide is current as of August 2019.

Trademark law

RECENT AMENDMENTS

On July 17, 2019, the Government of Canada made significant amendments to Canada's *Trade-marks Act* (as it was then known). The specific amendments include the removal of "use" as a condition for registration, the adoption of the Nice international classification system, changes in filing fees, the recognition of colour, sound, and scent marks, reduction of the registration term from 15 to 10 years, and participation in the Madrid Protocol international filing system.

We strongly recommend that you consult with legal counsel prior to using a new trademark in Canada and review your brand protection strategy in light of the recent changes to Canadian trademark law.

GENERAL

The *Trademarks Act* (Canada) defines a "trademark" as a mark that is used for the purpose of distinguishing goods or services manufactured, sold, leased, hired or performed by the owner of the trademark, from the goods or services of others.

A trademark may take the form of a word or phrase, a picture or logo, a letter or number, a colour, a sound, a scent, a taste, a texture, a hologram, a 3D shape, a moving image, the mode of packaging goods, the position of a sign, or anything that is capable of distinguishing goods and services from the goods and services of others.

A trademark need not be registered, but an unregistered trademark can only be enforced by an action for passing off. To successfully pursue such an action, one must prove that they have established goodwill or reputation in their trademark, and it can only be enforced in the geographic area in which such goodwill or reputation is proven. A registered trademark empowers the owner to enforcement rights across all of Canada without the need to establish any goodwill or reputation. It is, therefore, advantageous to register the mark, assuming it meets the criteria for registration.

REGISTRATION

Generally, a trademark cannot be registered if it is:

- Primarily the name or surname of an individual;
- Clearly descriptive or deceptively misdescriptive of the character, quality or place of origin of the related goods or services, or of the conditions of, or the persons employed in, the production of such goods or services;
- The name in any language of the related goods or services;
- Confusing with a registered trademark; or
- One of the special types of marks specifically prohibited by the *Trademarks Act*.

An applicant is entitled to the registration of a (registrable) trademark if the applicant has used or proposes to use the trademark in Canada in association with goods or services, and meets various formal requirements in an application submitted to the Canadian Registrar of Trademarks.

RIGHTS CONFERRED BY REGISTRATION

Valid registration of a trademark in Canada gives the owner the right to exclusive use of such trademark throughout Canada for 10 years in respect of the goods and services for which it was registered. Registration may be renewed indefinitely for further periods of 10 years.

The owner of a registered trademark can bring an action for infringement and/or passing off against a person who, without authorization, sells, distributes or advertises goods or services in association with a confusing trademark or trade name. The remedies available for infringement of a registered trademark or for passing off include preliminary and permanent injunctions, damages or an accounting for profits, destruction of infringing materials, and costs.

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Valid registration of a trademark in Canada gives the owner the right to exclusive use of such trademark throughout Canada for 10 years in respect of the goods and services for which it was registered.

LICENSING OF TRADEMARKS

A third party may be licensed to use a trademark by, or with the authority of, the trademark owner, provided the owner retains under license the direct or indirect control of the character or quality of the goods or services associated with the trademark. Such control will be presumed where public notice is given regarding: (i) the fact that use of the trademark is a licensed use; and (ii) the identity of the owner. Subject to any agreement to the contrary, the licensee may call on the owner to take proceedings for infringement of the trademark. If, within two months of being called on by the licensee, the owner refuses or neglects to take action, the licensee may institute proceedings for infringement in its own name, as if the licensee were the owner. The owner must be made a defendant to proceedings commenced by the licensee and the owner may be liable for costs.

MARKING

Canada’s *Trademarks Act* does not contain any marking requirements. However, it is best practice for trademark owners to indicate their registration through certain symbols, namely, ® (registered), “TM” (unregistered trademark), “SM” (service mark), “MD” (marque déposée (registered)) or “MC” (marque de commerce (unregistered)). The symbols TM, SM or MC may be used prior to or in the absence of registration (common law use). The ® or MD, on the other hand, may only be used if the mark is registered.

Copyright law

GENERAL

In Canada, copyright is governed solely by the *Copyright Act*, and means the sole right to produce or reproduce in any material form, perform, or deliver in public, or publish a work or any substantial part of the work. Copyright arises upon the creation of a particular work and registration is not required to enforce copyright. Generally, copyright subsists for the life of the author and for 50 years after his or her death.

Copyright subsists in Canada in every original literary, dramatic, musical and artistic work, if:

- The author was, at the date of the making of the work, a Canadian citizen or resident of Canada, a citizen or subject of a foreign country that has adhered to the Berne Convention or universal copyright convention, Rome convention or a country that is a WTO member; or
- In the case of a published work, 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.

The Minister of Industry Canada (formerly Consumer and Corporate Affairs) may extend copyright protection to nationals of other foreign countries. The Universal Copyright Convention provides copyright protection in Canada to nationals of the US and other contracting countries. Nationals of certain countries do not have copyright protection in Canada pursuant to any of the foregoing.

In Canada, copyright is governed solely by the *Copyright Act*, and means the sole right to produce or reproduce in any material form, perform, or deliver in public, or publish a work or any substantial part of the work.

Computer software is considered a literary work and hence amenable to full copyright protection in Canada.

The relationship between copyright and industrial design in Canada is complex. Advice should be sought before relying on the assumption that copyright subsists in a work, where such work is applied to an article manufactured by hand, tool or machine.

It is also important to note that there are reversionary interests in any copyright license or assignment granted by the first author, which, in some circumstances, may automatically void the license/assignment 25 years after the author's death.

RIGHTS CONFERRED BY REGISTRATION

Although registration is not a prerequisite to protection, it is deemed to give a potential infringer reasonable grounds for suspecting that copyright subsists in the material. This is important to a copyright owner because if it can be shown that an infringer was not aware (or did not have reasonable grounds for suspecting the subsistence) of the copyright, the owner can only obtain an injunction and damages may not be recoverable.

REMEDIES

An owner of copyright can bring an action for infringement against any person who, without the consent of the owner, does anything that only the owner of the copyright has the statutory right to do. In general, infringement involves copying the whole or a substantial part of a copyrighted work. Copyright is also infringed by any person who sells, leases, distributes, exhibits by way of trade, or imports for sale or hire into Canada, any work that to his or her knowledge infringes copyright, or would infringe copyright if it had been made in Canada. Remedies to which the owner of a copyright may be entitled for infringement of the copyright include an injunction, an order for the detention of imported infringing copies, damages, accounting for profits, recovery of infringing copies and costs.

MARKING

Although marking is not required in Canada, it is advisable to mark a protected work with the © symbol or the word "copyright," followed by year of first publication and the name of the copyright owner.

Patent law

RECENT AND FUTURE AMENDMENTS

On December 13, 2018, the Government of Canada made significant amendments to Canada's *Patent Act*. The specific amendments include an expansion of the scope of prior user rights; a revision to licensing commitments on standard-essential patents, which now bind subsequent patent owners; codification of an experimental use exception to infringement; admissibility of prosecution histories as evidence in a patent action or proceeding; and the establishment of a regulation-making authority concerning the requirements for cease and desist letters.

We can expect further changes to Canadian patent law coming into force later this year, including changes to timelines associated with the patent application process. New *Patent Rules* and amendments to the *Patent Act* are set to come into force on October 30, 2019.

We strongly recommend that you consult with legal counsel prior to using a new patent in Canada and that you review your intellectual property protection strategy in light of the recent and upcoming changes to Canadian patent law.

GENERAL

Under the *Patent Act* (Canada), an inventor or an assignee of the inventor may apply for a patent. It is the first person to file an application (not the first person to invent), in respect of an invention, who would be entitled, subject to certain qualifications, to the grant of a patent.

"Invention" is defined as any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement thereof. To be patentable, the invention must be novel and not have been obvious to a person skilled in the art or science to which the invention relates. Public disclosure of the invention bars the grant of a patent, but is subject to a one-year grace period for the applicant. A patent application is laid open to the public 18 months after filing.

Any inventor who has applied for a patent in any other country may be able to obtain a patent in Canada for the same invention and claim priority of the foreign application.

FOREIGN AND CONVENTION APPLICATIONS

Any inventor who has applied for a patent in any other country may be able to obtain a patent in Canada for the same invention and claim priority of the foreign application. Canada is party to patent treaties and conventions with other countries, including the Patent Cooperation Treaty and the World Trade Organization Agreement, which may give priority to applicants from such countries with respect to the effective date of filing, and for some countries, may allow the 12-month period for the filing of an application in Canada (from the date of filing of the first application) to be extended to 30 months. Any applicant for a patent who does not reside or carry on business in Canada must appoint a representative in Canada.

RIGHTS CONFERRED BY A PATENT

For 20 years from the date of filing the application, a patent confers on the patentee the exclusive right of making, constructing, using and selling the invention. A patent is non-renewable. The remedies available for infringement of a patentee's rights include an injunction, damages or an accounting for profits, destruction of infringing materials and costs. In addition, certain remedies may be available after the application has been laid open to the public.

MARKING

No marking of any kind is required to indicate that an article is patented. In addition, penalties may be imposed if an unpatented article is falsely marked as patented.

Industrial design law

RECENT AMENDMENTS

On November 5, 2018, the Government of Canada enacted new *Industrial Design Regulations* (Canada). Notable provisions include simplification of application requirements, and filing date requirements that now align with international standards. Amendments to Canada's *Industrial Design Act* came into force when the new *Industrial Design Regulations* (Canada) were effective. A notable amendment is the revision of the previous requirement that the design not be "confounding" with a design already registered, to use of the term "novelty" to describe a design. This aligns with international terminology. Another notable amendment is the increase to the maximum term of exclusive rights from 10 years beginning on the date of registration, to the later of 10 years from the registration date and the end of 15 years after the filing date of the application.

We strongly recommend that you consult with legal counsel prior to using a new industrial design in Canada and that you review your brand protection strategy in light of the recent changes to Canadian industrial design law.

GENERAL

Under the *Industrial Design Act* (Canada), an original "design" of an article ("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") may be registered as an industrial design. Registration does not extend to methods or principles of construction, or to the mere configuration of the article; there must be some form of ornamentation to which the protection of this statute may apply.

REGISTRATION

To protect an industrial design, the design must be applied for within one year from the date of first publication in Canada. Offering or making the design available to the public constitutes publication.

RIGHTS CONFERRED BY REGISTRATION

Registration gives the proprietor the exclusive right to apply an industrial design to an article for purposes of sale. The duration of an exclusive right for an industrial design is the later of 10 years from the registration date and the end of 15 years after the filing date of the application, subject to the payment of such periodic maintenance fees as may be prescribed (presently, due at the fifth anniversary of the registration date).

If any person without authorization applies or imitates any industrial design for the purpose of sale, the registered proprietor may maintain an action for damages. A court may also award an injunction, recovery of infringing material and an accounting for profits. In addition to civil actions, fines may be imposed for criminal offenses under the *Industrial Design Act*.

MARKING

In the event that a design is applied to an article or imitated by a third party without the consent of the proprietor, the proprietor's remedy will be limited to an injunction (in other words, no damages will be recoverable), unless all (or substantially all) of the proprietor's articles to which the industrial design registration pertains, or the packaging or labels for such articles, were marked with the capital letter "D" in a circle, and the name or the usual abbreviated name of the proprietor.

If any person without authorization applies or imitates any industrial design for the purpose of sale, the registered proprietor may maintain an action for damages.

Integrated circuit topography law

Canada has specialized legislation for the protection of integrated circuit topographies, which provides for the registration of original topography designs. The three-dimensional configuration of electronic circuits (contained in an integrated circuit product) is known as topography. An integrated circuit product is a product intended to perform an electronic function and in which the electronic circuits are integrated. The protection under the legislation does not extend to the functions performed by the integrated circuits.

Trade secrets

In Canada, there is no legislation that protects trade secrets. At common law, information may be protected as a trade secret if:

- It is not publicly available or otherwise generally known within the relevant industry or trade; and
- Its owner treats it as secret or confidential at all times, and takes adequate steps for this purpose.

To make an effective claim, the plaintiff must show that there has been unauthorized use of the information to his or her detriment.

Employees have an implied obligation not to divulge their employers' trade secrets. After termination of employment, employees may not use confidential information acquired during their employment. Senior management also has a fiduciary duty to their current or former employer, which increases their accountability for improper use of confidential information.

Combating Counterfeit Products Act

The *Combating Counterfeit Products Act* (CCPA) aims to combat two types of intellectual property infringement: copyright piracy and trademark counterfeiting.

The CCPA amends both the *Trademarks Act* and the *Copyright Act* by expanding the list of infringing trademark and copyright infringing actions, and to further prohibit the importation or exportation of infringing copies and counterfeit trademarked goods on a commercial scale (import/export for personal use is excepted by the CCPA). Rights holders may now file "requests for assistance" (RFA) with the government to pursue remedies against infringers at the border. In response to an RFA, a Canada Border Services Agency (CBSA) officer may detain goods and provide a rights holder with a sample of or information relating to detained copies/goods. However, detentions are very short-term: five working days for perishable goods and up to 20 working days for non-perishable copies/goods after a sample is made available to the rights holder. Detentions can be continued if court proceedings are filed.

The CCPA provides that it is a criminal offence (with significant fines and/or imprisonment attached) to knowingly sell counterfeit goods on a commercial scale; manufacture, import or export such goods; or sell or advertise services in association with an infringing trademark. The manufacturing or trafficking of labels or packaging bearing an infringing trademark also becomes an offence.

To take advantage of the RFA procedure, trademark owners must have their trademarks registered. Rights owners should review their portfolios to ensure they obtain registrations for their core trademarks and others that could be targeted by counterfeiters.

Privacy laws in Canada

PIPEDA attempts to balance the needs of organizations to collect, use and disclose information from and about individuals in Canada, with the obligation to respect the individual's right to control the collection, use and disclosure of information about the individual.

Introduction

Canada's privacy laws fall into three categories: comprehensive private sector privacy laws, comprehensive public sector privacy laws, and sectoral laws. The most important sectoral laws are those dealing with unsolicited commercial electronic communications (SPAM), unsolicited telemarketing, and specific privacy laws regulating the collection, use and disclosure of personal health information.

In addition, Canada has a system regulating access to information in the custody or control of governments, agencies, Crown corporations and other regulated entities, such as public hospitals. In this section, we focus on federal private sector privacy laws, and laws regulating SPAM and telemarketing.

Federal private sector privacy legislation

The *Personal Information Protection and Electronic Documents Act* (PIPEDA) is the main statute regulating the collection, use and disclosure of personal information in Canada. PIPEDA attempts to balance the needs of organizations to collect, use and disclose information from and about individuals in Canada, with the obligation to respect the individual's right to control the collection, use and disclosure of information about the individual. The law applies to organizations that engage in the collection, use or disclosure of such information in the course of a commercial activity; unless a substantially similar provincial law applies. Apart from the healthcare sector, the only laws of general private sector application that have been declared substantially similar are those in British Columbia, Alberta and Québec.

WHAT IS PERSONAL INFORMATION?

Personal information is commonly defined in Canada to be information about an identifiable individual. There remains considerable debate regarding what falls within that definition. The definition includes, but is not limited to, information such as home address, telephone number, age, sex, marital status, education, social insurance number, credit history, race and ethnic origin. However, PIPEDA excludes 'business contact information' from the application of the statute if it is used solely for the purpose of communicating or facilitating communication with the individual in relation to his or her employment, business or profession. 'Business contact information' is defined as any information that is used for the purpose of communicating or facilitating communication with an individual in relation to his or her employment, business or profession, such as an individual's name, position name or title, business address, business phone number, business email address and business fax number.

Other types of data that may appear to be anonymous may be considered personal information if the data is used in connection with a purpose relating to an individual. Accordingly, an Internet Protocol (IP) address may be considered personal information.

APPLICATION OF PIPEDA

PIPEDA applies to all organizations in Canada involved in the collection, use or disclosure of personal information in the course of commercial activity, unless provincial privacy legislation exists that is substantially similar to PIPEDA. In addition, PIPEDA applies to foreign organizations that have a real and substantial connection to Canada based on their activities in Canada, including through contracting with Canadian organizations or marketing to Canadian consumers.

GENERAL PRINCIPLES OF PIPEDA

In addition to its provisions, PIPEDA sets out a list of general principles that form part of the legislation and with which organizations are required to comply. These 10 fair information principles are based on the Canadian Standards Association's *Code on the Protection of Personal Information*.

PIPEDA applies the following fair information principles to the collection, use and disclosure of personal information:

i. Accountability: An organization involved in the collection, use or disclosure of personal information is responsible for the information it controls, and shall appoint an individual to ensure compliance with the established principles. This person is generally referred to as the Privacy Officer in an organization.

ii. Identifying the purpose: Before an organization obtains an individual's consent to use personal information, that organization must identify (and obtain that person's consent relating to) the purpose(s) for which the information is being collected and used.

iii. Consent: collection, use or disclosure of an individual's personal information without that person's consent is prohibited. However, PIPEDA provides for exceptions to the general rule of informed consent. The exceptions are generally related to information that is necessary to be disclosed in the event of an emergency and/or legal investigation.

iv. Limiting collection: The personal information collected must be limited to that which is needed to satisfy the identified purposes originally agreed to.

v. Limiting use, disclosure and retention: The personal information collected must not be used or disclosed for purposes other than those for which it was originally collected, unless the organization obtains the consent of the individual in relation to the new purpose or as required by law. Organizations are also required to implement policies for the retention and destruction of that information when it becomes no longer required to fulfill the purposes identified to the individual at the time of collection.

vi. Accuracy: Organizations must ensure that the personal information they retain is both accurate and recent, as is necessary for the purposes for which that information will be used.

vii. Adequate security: Organizations involved in the collection, use, or disclosure of personal information are required to adopt security measures to protect personal information against loss, theft, unauthorized access, disclosure, use, modification or copying.

viii. Openness of policies: An organization's practices and policies with respect to the management of personal information should be made accessible to those individuals providing information.

ix. Individual access: An individual who provides personal information shall, upon request, be provided accurate information as to the existence, use and disclosure of their information. In addition, that individual must be given access to that information, as well as the opportunity to correct any inaccuracies that may exist.

x. Contesting compliance: An individual must be afforded the opportunity to challenge an organization's compliance or lack thereof, of the principles, by addressing the person(s) appointed by that organization for ensuring such compliance.

CONSENT AND REASONABLENESS AS KEY PRINCIPLES

One of the key principles of PIPEDA is consent. The meaningful, informed consent of an individual is required for the collection, use and disclosure of his or her personal information.

There are, however, exceptions to the requirement to obtain consent. Among the most important exceptions are disclosure to law enforcement and other government institutions in response to production orders and other lawful demands. In addition, personal information may be disclosed on the initiative of the organization to law enforcement or a government institution if there are reasonable grounds to believe that the information relates to a breach of the laws of Canada, a province or a foreign state.

Another key principle is appropriateness. Consent is, in most cases, a necessary, but not sufficient condition to the collection, use or disclosure of personal information. Irrespective of consent, an organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances.

To determine whether an organization's purposes are appropriate in the circumstances, Canadian courts have traditionally considered whether the collection, use or disclosure of personal information is directed to a bona fide business interest, and if the loss of privacy is proportional to the benefit gained. Some examples of what is considered an inappropriate purpose include collection, use or disclosure that is otherwise unlawful, profiling or categorization that leads to unfair, unethical or discriminatory treatment contrary to human rights law, and collection use or disclosure for purposes that are known or likely to cause significant harm to the individual.

Since January 1, 2019, the Office of the Privacy Commissioner of Canada (OPC) has applied its new guidelines that aim to improve the current consent model under PIPEDA, noting that long and legalistic privacy policies may fall short. The guidelines require organizations to provide clear, simple and readable privacy notices and policies that must emphasize key elements, including the specific information collected, the purposes for processing the information, which party's personal information is being shared and any meaningful risk of harm or other potential consequences to the individual.

The guidelines also provide insight on when express consent is required and how to obtain consent from children. Organizations will be expected to demonstrate that they have complied with these guidelines, ideally by pointing to a process they have put in place to ensure compliance.

EMPLOYEE PERSONAL INFORMATION

PIPEDA applies to federally regulated employers with respect to their collection, use and disclosure of employee personal information in connection with the management of the employer-employee relationship. Federally regulated employers include federal works, undertakings and businesses, which include all organizations operating in the Yukon, the Northwest Territories, and Nunavut as well as organizations falling within federal jurisdiction such as banks, railways, interprovincial pipelines, and airlines.

PIPEDA does not apply to provincially regulated employers with respect to their employee personal information that is used in connection with management of the employer-employee relationship. As described below, personal information of employees in the provinces of British Columbia, Alberta and Québec are governed by provincial private sector legislation.

PROVINCIAL LEGISLATION

Currently, Alberta, British Columbia and Québec are the only provinces in Canada that have enacted general private sector privacy legislation that is "substantially similar" to PIPEDA. Most provinces have enacted legislation to regulate personal health information, although only the personal health information protection legislation of Ontario, New Brunswick and Newfoundland and Labrador have been declared substantially similar.

ALBERTA AND BRITISH COLUMBIA

The privacy principles of PIPEDA are reflected in both the British Columbia *Personal Information Protection Act* (British Columbia PIPA) and the Alberta *Personal Information Protection Act* (Alberta PIPA). Alberta also has a separate *Health Information Act*.

QUÉBEC

Québec's private sector privacy law, *An Act Respecting the Protection of Personal Information in the Private Sector* (the Québec Act) predates PIPEDA and reflects Québec's unique legal and cultural heritage. The Québec Act governs the Québec private sector's collection, use and disclosure of personal information, and provides individuals with the right to access such information. There is still debate as to whether provisions of PIPEDA that exceed the scope of the Québec Act will apply in Québec (for example, the collection of information outside the Province of Québec by a Québec-based entity).

BUSINESS TRANSACTIONS

On June 18, 2015, the *Digital Privacy Act*, SC 2015, c 32, came into force making the first major amendments to PIPEDA since that statute came into force in 2002. Among other things, the *Digital Privacy Act* amended PIPEDA to permit the transfer of personal information in connection with business transactions without the consent of an affected individual if certain criteria are met. A business transaction includes a wide variety of transactions, including acquisition or disposal of all or a part of a business, and financing and securitization transactions.

An organization may share personal information without consent during the due diligence period if the following conditions are met:

- The personal information being shared is necessary to determine whether to proceed with the transaction and, if the determination is made to proceed with the transaction, to complete it; and
- The parties have entered into an agreement limiting the recipient's use of the personal information solely for purposes related to the transaction, requiring the recipient to safeguard the personal information, and to return or destroy the information if the transaction is not completed.

If the transaction closes, the recipient organization must also agree:

- To only use the personal information for the purposes for which consent was originally obtained (unless additional consent is provided by the individual); and
- To give effect to a withdrawal of consent. In addition, one of the parties must give notice to the affected individual of the transfer of the personal information.

Alberta PIPA and British Columbia PIPA contain similar provisions. However, these statutes do not expressly require notice to the individual.

BREACH NOTIFICATION

Canada has had mandatory breach reporting obligations at the federal level since November 1, 2018. Organizations subject to PIPEDA are required to make a report to the OPC and notify affected individuals if there is a real risk of significant harm as the result of a breach of an organization's safeguards. Notification must be given as soon as feasible, after the organization determines that the breach has occurred, as well as include the prescribed information. Organizations must also maintain records of any breach of an organization's safeguards irrespective of whether the breach creates a real risk of significant harm. There are potential fines for failing to comply with these provisions. The fines are up to CA$100,000 for a corporation.

Alberta is currently the only jurisdiction in which there is mandatory data breach reporting to a provincial oversight authority (the Information and Privacy Commissioner of Alberta) for private sector privacy breaches. Similar to the PIPEDA amendments, Alberta PIPA requires that a report be made, without unreasonable delay, of any incident involving the loss of, or unauthorized access to or disclosure of, the personal information where a reasonable person would consider there exists a real risk of significant harm to an individual because of the loss, or unauthorized access or disclosure. The Alberta Commissioner may then order individual breach notification containing prescribed information. There are potential fines of up to CA$100,000 for failure by a corporation to provide such a notice to the Alberta Commissioner. The potential fine is CA$10,000 in the case of an individual.

“Organizations subject to PIPEDA are required to make a report to the OPC and notify affected individuals if there is a real risk of significant harm as the result of a breach of an organization's safeguards.

Oversight and enforcement

The federal data protection regulator (the OPC) may investigate a formal complaint under PIPEDA, or initiate a Commissioner-led investigation. The OPC may then issue a report of the findings of the investigation, which may include recommendations for compliance. The findings may be made public by the OPC. The new mandatory breach reporting regulations are similarly enforced. The Federal Court has the authority to make orders, including orders to correct an organization's practices and award damages to the complainant for any "humiliation that the complainant has suffered." In addition to these powers, the OPC may enter into compliance agreements with organizations, and these compliance agreements may be enforced in the Federal Court of Canada. The OPC is very active and aggressive in enforcing PIPEDA.

Regulatory oversight is similar under the BC PIPA, Alberta PIPA and the *Québec Act*. However, in these provinces there are circumstances where organizations can be subject to fines for non-compliance with obligations in their respective legislation (e.g., see above Alberta PIPA fines for failure to provide notice to the Alberta Commissioner of a specified breach).

Transformative technologies and evolving legal areas

Please see our chapter on Transformative Technologies and Data Strategy to learn about the developments in privacy and other areas with respect to autonomous vehicles, artificial intelligence and other transformative technologies.

Future privacy law developments

In 2013, Manitoba passed its own private sector privacy legislation. This statute is not yet in force and contains a number of legislative gaps that will require regulations before the legislation could come into force. The timing of when the legislation might come into force and whether it would be declared substantially similar to PIPEDA is uncertain.

Alberta PIPA and British Columbia PIPA are currently under review. The British Columbia PIPA review may potentially result in the introduction of mandatory breach reporting for that province.

PIPEDA is currently under review, and in 2018, the Standing Committee on Access made several recommendations to Information, Privacy and Ethics. Many of the proposed recommendations, if enacted, would overhaul PIPEDA in line closer with the European Union General Data Protection Regulations (GDPR), including granting the OPC with additional enforcement powers. In May 2019, the Minister of Innovation, Science and Economic Development announced the introduction of Canada's Digital Charter, which states that the government will ensure the ethical use of data to create value, promote openness and improve the lives of peoples. The government has taken, or will be taking, a number of actions pursuant to the Digital Charter, including reforming PIPEDA, which may include providing similar individual rights as those found under GDPR, introducing new exceptions to consent, defining "de-identified information" and expanding powers of the OPC.

One key change to PIPEDA might involve trans-border data flow, which is currently under a consultation review. The OPC's consultation paper proposes a reversal of its two-decade-old existing policy on requirements for consent with respect to transfers for processing. The OPC proposes to reinterpret PIPEDA such that transfers, traditionally considered a "use" of the personal information (and which, therefore, do not require additional consent), now be considered a disclosure (which would require additional consent). In light of the publication by the federal government of its Digital Charter, the OPC has invited stakeholder views on how the current law should be interpreted and applied in these contexts, and how the future law should provide effective privacy protection in the context of transfer for processing.

Anti-spam and telemarketing rules

Since July 1, 2014, Canada's Anti-Spam Legislation (CASL) has been governing the sending of commercial electronic messages and the installation of computer programs. The law applies to business-to-business communications as well as business-to-consumer communications.

Global organizations may already be aware of and compliant with the US *Controlling the Assault of Non-Solicited Pornography and Marketing Act* of 2003 (CAN-SPAM). However, CASL differs in important respects. These differences are important in designing a compliance program. The differences are:

- **Opt-in is the default**: The default in CASL is express consent for commercial electronic messages and the installation of computer programs.
- **Applicable to more than just email**: CASL applies to all forms of electronic messaging, including email, instant messages, and messages over social media platforms.
- **Broader range of messages**: The definition of what constitutes a commercial electronic message is very broad. CAN-SPAM's exceptions for transactional or relational messages were not replicated in CASL. There is no "primary purpose" rule in CASL.
- **Unsubscribe functions**: CASL contains similar (but not identical) rules for unsubscribe functions. One difference is that an unsubscribe feature may need to be included even where consent may be implied or not required for certain types of transactional or relational message.
- **Higher penalties**: The administrative monetary penalties for an organization violating CASL are up to CA$10 million per violation.
- **Computer programs**: CASL will also apply to the installation of computer programs.

CASL has extraterritorial effect. If an organization sends email, text messages, or direct messages over social media to electronic addresses in Canada or from Canada to anywhere in the world, CASL applies to the organization.

CASL's provisions requiring consent to the installation of computer programs came into force on January 15, 2015. These provisions impose an obligation on an organization to obtain consent before installing or causing the installation of software on another person's device in the course of a commercial activity. These provisions do not apply to an owner or an authorized user-installing software on their own devices. Prescribed programs, such as, cookies, html, JavaScript and software to fix bugs, consent is deemed if the person's conduct is such that it is reasonable to believe that they consent to the program's installation.

Although there are a number of enforcement options for the principal regulator, the Canadian Radio-television Telecommunications Commission (CRTC), CASL does contain provisions allowing for administrative monetary penalties against organizations of up to CA$10 million per non-compliance. The CRTC is active in its enforcement of CASL, announcing several investigations and fines since CASL's inception, with respect to both commercial electronic messages and the installation of computer programs.

The Government of Canada is currently reviewing CASL, with potential changes to the legislation in the near future. Some of the proposed recommendations include clarifying certain definitions and provisions around consent. CASL previously announced provisions for a private right of action back on July 1, 2018. However, this has been suspended while CASL is under review.

Canada also has rules relating to telemarketing. The Unsolicited Telecommunications Rules apply to all persons who make calls or send faxes to sell or promote a product or service and consist of the Telemarketing Rules; the National Do-Not-Call List Rules; and the Automatic Dialing and Announcing Device Rules.

All telemarketers are required to register with the CRTC. A telemarketer is a person that conducts telemarketing either on its own behalf or on behalf of one or more other persons. Telemarketing is the use of telecommunications to facilitate unsolicited telecommunications for the purpose of solicitation.

There are two types of telemarketers: (i) regular and (ii) exempt. A regular telemarketer uses telecommunication technologies to make telemarketing calls or send faxes to consumers for the purpose of selling or promoting a product or service. A consumer is a person who does uses the telecommunications line primarily for personal or household purposes. Regular telemarketers must subscribe to and screen telephone numbers against the National Do Not Call List and maintain an internal do not call list.

Exempt telemarketers are companies who (a) only make telemarketing calls and send faxes to businesses, or (b) make telemarketing calls or send faxes only to consumers with whom they have an existing business relationship. Exempt telemarketers only need to maintain an internal do not call list.

The CRTC also created rules related to equipment that store and dial telephone numbers automatically. These devices may be used alone or with other devices to deliver a pre-recorded or synthesized voice message to the telephone number called. These are known as Automatic Dialing-Announcing Devices (ADAD) and their use is subject to the ADAD Rules. The ADAD Rules apply whether or not the telemarketing telecommunication is exempt from the National Do-Not-Call List Rules.

ADADs may not be used for telemarketing unless the consumer has given express consent to accept an ADAD telemarketing call. ADADs are permitted for calls when there is no attempt to sell, such as calls made for public service reasons, including calls made for emergency and administration purposes by police and fire departments, schools, hospitals, or for calls to schedule appointments. ADADs must contain prescribed information.

Sequential dialing for making a telemarketing telecommunication is prohibited. Predictive dialing using technology that automatically initiates outgoing telecommunications from a pre-determined list of telecommunications numbers to initiate telemarketing telecommunications is permitted if the use of predictive dialing

- Does not exceed, in any calendar month, a five percent abandonment rate;
- The telemarketer maintains records, on a calendar month basis, with respect to the actual telecommunication abandonment rates for a period of three years from the date each monthly record is created.

An abandoned call is defined as a telecommunication that, when answered by the consumer, has no live telemarketer available to speak to the consumer within two seconds.

The CRTC's enforcement process for violations of the Unsolicited Telecommunications Rules includes the authority to issue warnings and citations, conduct inspections and issue notices of violation. The CRTC may also impose administrative monetary penalties of up to CA$15,000 for each violation by a corporation and for each day that the violation is continued.

If found guilty of an offense punishable on summary conviction, a person that contravenes any prohibition or requirement of the CRTC related to the Unsolicited Telecommunications Rules, may be liable, in the case of a corporation, to a fine not exceeding CA$100,000 for a first offense or CA$250,000 for a subsequent offense.

Fintech

While Canada may not be an internationally recognized Fintech leader, it has begun to emerge as a hub for innovation, seeing tremendous growth in recent years. This growth is putting pressure on Canada's traditional financial institutions to innovate in their own right, either through partnerships with Fintech companies, or by setting up their own incubators and accelerators. The collaborative environment, high-level of incumbent investment and ready access to high-calibre talent makes Canada an attractive market for Fintech development.

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(...) not all Fintech activity is regulated simply by virtue of carrying on business in the financial technology sector. Some aspects of Fintech activity fall outside of the regulatory framework currently in place.

What is Fintech?

While there is no agreed upon definition of "Fintech," it can broadly be thought of as innovative financial technology that can lead to new products or processes, business models or applications relating to the provision of financial services. More specifically, Fintech can be thought of as belonging to various sectoral innovations, including:

- Deposit, credit and capital-raising services, such as:
  - Mobile banks;
  - Lending marketplaces; and
  - Crowdfunding.
- Payments, clearing and settlement services, such as:
  - Peer-to-peer transfers;
  - Digital exchange platforms;
  - Digital currencies (including cryptocurrency); and
  - Whole foreign exchange services.
- Investment management services, such as:
  - Robo-advising; and
  - High-frequency trading.

Additionally, other support services may be classified broadly as "Fintech". These services include innovations relating to security, artificial intelligence and distributed ledger technology.

Given its breadth, it is unsurprising there is no sole "Fintech regulator" in Canada. The services provided and risks these services could introduce to a particular sector vary so widely that no one regulator or legislative response could adequately "regulate" Fintech. As a result, Canada has an overlapping, but uneven and often complex, Fintech regulatory landscape. However, not all Fintech activity is regulated simply by virtue of carrying on business in the financial technology sector. Some aspects of Fintech activity fall outside of the regulatory framework currently in place.

Regulatory framework

In Canada, the federal, provincial and territorial governments share in the regulation of financial services. As a result, various regulators are involved in different financial services sectors, including the regulation of:

- Banks and other financial institutions (trust and loan companies, credit unions, etc.);
- Securities and investor protection;
- Payments and payment-related services;
- Consumer protection; and
- Privacy and data security.

Banks and other financial institutions

In Canada, the federal government has exclusive jurisdiction over banks and banking. Entities that wish to establish a Canadian bank, trust or loan company, must be prepared to endure a rigorous application process that favours established, sophisticated businesses. Because of the stringent requirements, Canada has one of the world's soundest banking systems. However, that highly conservative, closed environment means that, unlike countries like the UK, there has been little appetite for "competitor" and "mobile" banks to challenge the status quo. Indeed, the barriers to entry are seen as so high, that many Fintech companies wishing to carry out the "business of banking" or deposit-taking choose instead to partner with established financial institutions.

As is discussed in more detail below, the federal government, through its proposed Retail Payments Oversight Framework, is considering allowing non-traditional financial institutions to provide and maintain payment accounts. This development would allow payment service providers to accept customer funds for the purposes of making electronic fund transfers, allowing for a broader range of participants in the Canadian financial system.

Securities regulation and investor protection

The regulation of securities, which is managed by Canada's provincial and territorial governments, regulates the issuance, sale and trading of securities. Because the term "securities" is broadly defined by provincial legislation, a broad range of investments are captured, including equity, asset-backed securities, derivatives, investment funds and debt.

For Fintech companies, this breadth means a variety of business models could be subject to securities regulation in Canada, including:

- Peer-to-peer lending platforms: These platforms allow individuals and businesses seeking loans to be matched directly with investors.
- Crowdfunding platforms: These platforms allow individuals and businesses to fund a venture or other project by securing small investments from many people.
- Initial Coin Offerings/Initial Token Offerings: These are types of funding that allow companies to raise funds in exchange for a cryptocurrency token specific to that offering. The company holding the offering uses the funds collected to fund the business.
- Cryptocurrency exchanges and cryptocurrency-based products (such as cryptocurrency derivatives): Much like a traditional financial exchange, a cryptocurrency exchange allows for the trading of cryptoassets. They may also permit the trading of cryptoassets for fiat currencies.
- Robo-advisors: These are digital platforms that provide financial advice or investment management services with minimal human intervention.

WHAT IS THE EFFECT OF REGULATION?

There is no specialized securities regime for regulating cryptocurrency and cryptocurrency-related products. As a result, Canadian securities regulators to date have largely carried out a "traditional" analysis when determining whether a novel product constitutes a security, applying existing terms/definitions/concepts to new business models and offerings.

However, within the existing legislative framework, regulators have demonstrated flexibility in addressing the novel challenges Fintech companies present, both with respect to cryptocurrency-related products and others. For example, Manitoba, Ontario, Québec, New Brunswick and Nova Scotia together published a "crowdfunding exemption," by way of a multilateral instrument. This exemption allows start-ups and small- and medium-sized enterprises to use certain crowdfunding platforms to distribute their securities through a registered portal without a prospectus, subject to certain conditions.

Additionally, the some provinces have introduced regulatory "sandboxes," such as the OSC LaunchPad, which, "engages with fintechs, provides them with guidance and flexibility in navigating the requirements, and works to keep securities regulation in step with digital innovation. [The LaunchPad] also work[s] to ensure that investor protections are addressed in a way that makes sense for this evolving landscape." By working with companies through the LaunchPad, the OSC can provide time-limited relief from certain securities requirements (such as registration and prospectus filing), while ensuring suitable investor protections, like Know-Your-Client, remain in place.

Consumer protection

Consumer protection is regulated at the provincial and territorial levels, and covers aspects of the relationship between Fintech companies and their customers, including the regulation of:

- Credit, including credit cards, open and fixed credit, and vehicle leases.
- Debt collection and credit reporting; and
- Payday loans, which are usually small value, short-term, expensive, unsecured loans available to individuals.

Some provinces require the licensing or registration of lenders, while others do not. Generally, consumer protections regulation covers matters such as:

- The cost of credit and credit disclosure documents;
- Unfair practices, false, misleading or deceptive practices; and
- Collection and reporting practices.

Additionally, some provinces have additional regulatory requirements for businesses that provide high-cost credit to consumers, including the requirement to obtain a specific license.

Anti-money laundering and anti-terrorist financing

If a Fintech company carries on business as one of Canada's "reporting entities" under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA), then they will have certain reporting and identification obligations. These reporting entities include financial entities, securities dealers, casinos, life insurance companies, brokers and agents, certain real estate professionals and money services businesses.

Because the majority of Fintech companies are engaged in some type of payments-related service, there is often a concern that they are carrying on as a money services business, which, in Canada, encompasses foreign exchange dealing, money transferring, and the cashing

"Because the majority of Fintech companies are engaged in some type of payments-related service, there is often a concern that they are carrying on as a money services business.

or selling of money orders, traveller's cheques, or similar instruments. Companies carrying on a money services business must register with FINTRAC, and are subject to developing and maintaining an appropriate compliance program, verifying the identity of clients for certain activities and transactions, and certain reporting and record-keeping requirements.

Depending on the products and services they offer, a Fintech company could also be considered to be carrying on business as a securities dealer, in which case they must fulfill similar obligations regarding compliance, Know-Your-Client, reporting and record keeping.

Note that there are upcoming changes to the PCMLTF regime that include cryptocurrency and virtual currency. These changes, which take effect June 1, 2020, will apply to "dealers in virtual currency," and will extend reporting and record keeping requirements to virtual currency transactions carried out by reporting entities.

Payments and related services

In Canada, members of Payments Canada (banks are mandatory members, other financial institutions may be eligible) are subject to Payments Canada's rules governing the exchange, clearing and settlement of domestic payments, including pre-authorized debits, point-of-service debit transactions, and domestic wire payments. These rules predominantly govern bank-to-bank transfers, and do not extend to consumer protection issues or credit card payment networks. One exception to this generalization is Payments Canada's rule that governs the establishment of pre-authorized debit agreements, which allow companies to access consumer deposit accounts. Fintech companies that have built a business model based on "pulling" funds from a customer account will need to ensure they comply with the rather idiosyncratic process set out in the rule.

Payment processing, a service that an increasing number of Fintech companies offer, is not regulated explicitly as a standalone service in Canada. The *Payment Card Network Act* regulates national payment card networks and network card operators (such as Visa, MasterCard

and Interac – Canada's domestic debit solution. However, the Act simply appoints the Financial Consumer Agency of Canada as responsible for supervising payment card network operators and outlines some of the Agency's powers; there is little in the way of substantive requirements for the regulated networks. More important for Fintech companies involved in payments are the various codes of conduct and standards that apply to the Canadian payments system. These standards and codes include the *Code of Conduct for the Credit and Debit Card Industry in Canada,* which provides merchants with increased flexibility around pricing and payment-option acceptance.

Note that Canada is currently exploring important changes to the payments and banking systems by way of two initiatives: the Retail Payments Oversight Framework, and a consultation into the merits of open banking. The Retail Payments Oversight Framework would allow for increased participation in the payments system by non-banks, while open banking would introduce a framework allowing people and businesses to authorize a third party financial service provider to securely access their financial transaction data. While both of these initiatives are under advisement, their implementation in Canada could represent an exciting opportunity for Fintech companies to offer a wide-range of new financial products and services.

Privacy and data security

PRIVACY

So much of Fintech is driven by new, novel uses of data. From biometrics for consumer identification, to methods for assessing consumer credit risk, to identifying fraud and money laundering, to developing new products and services, data is big business for Fintech companies.

Moreover, the online and mobile means of communication used by these companies indicates they could be collecting detailed, sensitive personal information about their customers' spending habits, payment history, credit score and purchasing preferences. In Canada, the *Personal Information Protection and Electronic Documents Act* (PIPEDA), enforced by the Office of the Privacy Commissioner (OPC), governs the collection, use or disclosure of personal information by private-sector organizations in the course of commercial activities. Under PIPEDA, companies are generally required to obtain meaningful consent for the collection, use or disclosure of their personal information. Central to meaningful consent is for people to understand to what they are consenting. Additionally, consent can only be required for collections, uses or disclosures that are necessary to fulfil an explicitly specified and legitimate purpose. In all other instances, an individual must be given a choice to consent. Express consent is required when the information involved is sensitive, its collection, use or disclosure is outside of the individual's reasonable expectations, or creates a meaningful residual risk of significant harm.

PIPEDA does not prohibit the transfer of personal information from Canada to another jurisdiction for processing. However, organization are held accountable for the protection of personal information transfers under outsourcing arrangements, regardless of whether the transfer is within Canada or to another jurisdiction.

Note that, while transborder dataflows (as the OPC calls these transfers) were historically considered by the OPC to be a "use" and not a "disclosure" of information (therefore not necessitating additional consent for the transfer), in 2019, the OPC proposed a significant change to this policy. The Commission released a stakeholder consultation on transborder dataflows, and proposed a view in opposition to its original position:

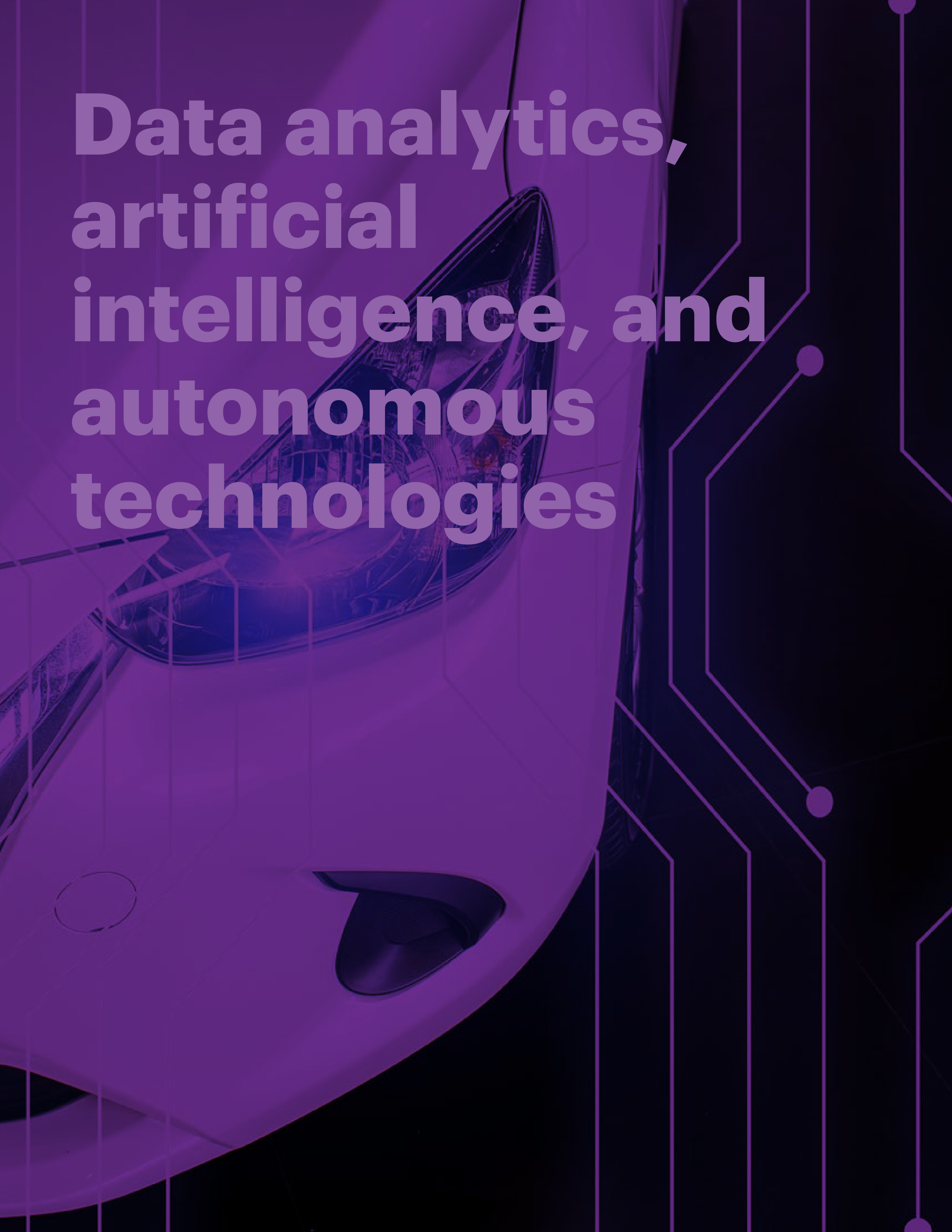
> *In the absence of an applicable exception, the OPC's view is that transfers for processing, including cross border transfers, require consent as they involve the disclosure of personal information from one organization to another.*

Unsurprisingly, this reversal prompted an outcry from those in the industry. The OPC promptly reframed its discussion document, asking for comments on both the interpretation and application of the current law, as well as suggestions on how a future law should provide effective privacy protection in the context of transfers for processing. The public's reaction was not the only reason for the OPC's about-face. In May 2019, the federal government released its Digital Charter, an ambitious plan to revise PIPEDA and build a foundation of trust on "which [Canada's] digital and data-driven economy will be built." Among the themes explored in the Digital Charter are the concepts of control and consent over personal data and transparency, portability and interoperability of that data. While the Digital Charter does not have the force of law, it represents an important signal of the possible direction data protection will take in Canada.

SPAM

While not strictly related to privacy and cybersecurity, Canada's Anti-Spam Legislation (CASL) is relevant to Fintech companies that communicate with prospects and customers electronically. Created in 2014, CASL introduced a complex framework of implied and express consent for sending "commercial electronic messages" – messages that encourage participation in a commercial activity regardless of whether there is an expectation of profit, and the installation of certain software on someone's device. Penalties for violating CASL can be steep; up to CA$1 million for an individual and CA$10 million for a business. Moreover, directors, officers and agents of a corporation can be liable if they directed, authorized, assented to, acquiesced in, or participated in the commission of a violation, regardless of whether the corporation is investigated.

Data analytics, artificial intelligence, and autonomous technologies



Autonomous vehicles

In Canada, the regulation of motor vehicles, including autonomous vehicles (AVs), is divided between the federal and provincial governments, and their respective agencies. The federal government has jurisdiction over motor vehicle safety standards, import and export. The provinces are responsible for driver licensing, vehicle registration, traffic laws and motor vehicle insurance. In addition, any vehicles incorporating wireless technologies must meet technical standards and licensing requirements established by Innovation, Science and Economic Development Canada.

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(…) the main obstacle for future AVs to comply with today’s regulations will be a lack of human driver controls.

MOTOR VEHICLE SAFETY ACT

The *Motor Vehicle Safety Act* (MVSA) and the *Motor Vehicle Safety Regulations* (MVSR) set out standards for the importation of motor vehicles and designated motor vehicle equipment, as well as the shipment of newly manufactured motor vehicles and designated equipment across provincial boundaries. The *Canadian Motor Vehicle Safety Standards* (CMVSS), included within Schedule III of the MVSR, sets out the minimum performance level vehicles and equipment must meet.

Each standard includes—either directly or by reference to other documents—the performance requirements against which regulated vehicles and equipment are to be measured to determine compliance. Companies must self-certify that all new vehicles and equipment manufactured, shipped inter-provincially or imported in Canada, comply with the applicable safety standards as of the date of manufacture.

There are currently no standards that deal specifically with automation features, such as automatic emergency braking, automated steering systems and adaptive cruise control. Additionally, a number of the standards in the CMVSS reference user interfaces that must be available to a human driver, such as driver control features and requirements. Therefore, the main obstacle for future AVs to comply with today’s regulations will be a lack of human driver controls. Accordingly, several standards will need to be temporarily or permanently amended before AVs may be imported or sold to the public in Canada.

IMPORTATION FOR TESTS OR TRIALS

The MVSA’s section 7(1)(a) importation exception allows companies to temporarily import a vehicle that does not otherwise comply with the MVSA if the vehicle is being imported only for exhibition, demonstration, evaluation or testing. Companies may use this provision for vehicles that may not comply with existing motor vehicle standards, such as those lacking human driver controls.

To import a vehicle for one of these purposes, the applicant must complete and submit a Schedule VII declaration form to Transport Canada for approval. If the information is accurate and complete, Transport Canada will authorize the vehicle to enter Canada for the reason stated by the applicant. The Schedule VII process allows for temporary importations for periods of up to one year, or other periods specified by the Minister of Transport.

In addition to the Schedule VII permit, if the company intends to use the temporarily imported vehicle on public roads, they must complete a Vehicle Import Form 1, which they need to present to the Canada Border Services Agency and the relevant provincial/territorial department responsible for vehicle licensing and registration.

EXEMPTION FROM PRESCRIBED STANDARDS

On March 1, 2018, the *Strengthening Motor Vehicle Safety Act* came into force, introducing substantive amendments to the MVSA. In particular, it introduced provisions for exempting, modifying or suspending vehicle safety standards and regulations. Where existing standards and newly manufactured or imported vehicles that are planned for temporary or permanent use in Canada do not align, a company may now apply for an exemption from a prescribed standard.

Section 9 of the MVSA provides the Minister of Transport with authority and discretion to grant exemptions from current standards in order to promote the development of new kinds of vehicles, technologies, vehicle systems or components, including vehicles with automated features. A company seeking an exemption must provide information and documentation as per sections 13 and 14 of the MVSR, demonstrating that the exemption would not greatly diminish the overall safety performance of the model.

Companies may use this exemption to manufacture or import the vehicle model specified in the exemption order for as long as the exemption is valid. An exemption will only apply to the model of the vehicle specified in the exemption order. Even with an exemption, companies are still responsible for all requirements in the MVSA and its accompanying regulations throughout the lifecycle of the vehicle, including any notices of defect or non-compliance requirements.

NATIONAL GUIDELINES AND STANDARDS FOR AVS

In June 2018, the Canadian Council of Motor Transport Administrators, made up of representatives from Canada's federal, provincial and territorial governments, published the *Canadian Jurisdictional Guidelines for the Safe Testing and Deployment of Highly Automated Vehicles*. These guidelines provide a set of voluntary recommendations for Canadian jurisdictions to use in developing testing programs and preparing for the overall deployment of AVs.

In January 2019, the Policy and Planning Support Committee Working group on Automated and Connected Vehicles, made up of a number of governments and other stakeholders, published the *Automated and Connected Vehicles Policy Framework for Canada*. This framework provides a set of policy principles for the testing and deployment of AVs, among them the principle of promoting policy and regulatory alignment within Canada, and with the United States and international partners.

In addition, Transport Canada has also issued guidelines, such as the *Safety Assessment for Automated Driving Systems in Canada*, which contains a safety assessment tool aimed at organizations testing AVs. Transport Canada has also issued *Testing Highly Automated Vehicles in Canada: Guidelines for Trial Organizations*, which seeks to clarify for trial organizations the various roles and responsibilities of federal, provincial and territorial levels of government involved in facilitating trials (not permanent market deployment). It also establishes set of voluntary minimum safety requirements that trial organizations are expected to follow when operating in Canada. Provincial and territorial jurisdictions are still responsible for approving requests from trial organizations, based on their respective laws and regulations, and building upon these minimum requirements as they deem necessary. The guidelines address such things as notifications to local authorities and law enforcement, requirements for data recording devices, insurance, cross-border trials, and other considerations.

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Ontario currently has the most robust regulatory framework in place for the testing of autonomous vehicles.

ONTARIO

Among the provinces, Ontario currently has the most robust regulatory framework in place for the testing of autonomous vehicles. In 2016, the province enacted Regulation 306/15 under the *Highway Traffic Act*, which initiated a 10-year pilot project for testing AVs on public roadways. The scope of this pilot program was expanded in January 2019 through amendments to the Regulation.

Currently, auto manufacturers, technology companies, academic and research institutions, and manufacturers of parts, systems, equipment or components for AVs are eligible to apply to participate in the program. If accepted, the participant may operate a highly to fully automated vehicle on a public roadway without a human driver in the car. Additionally, AVs equipped with conditional automation are no longer restricted to pilot participants, and can be driven on public roadways, provided a human driver is in the vehicle and able to take control if prompted by the vehicle.

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Canada does not have a regulatory framework specific to artificial intelligence.

Artificial intelligence (AI)

Canada does not have a regulatory framework specific to artificial intelligence, although to the extent such applications use or process personal information, they will be regulated by privacy laws.

Canada has, however, made a number of commitments in respect of AI.

G7 COMMITMENTS

In March 2018, under Canada's G7 presidency, the G7 Innovation Ministers issued a *Statement on Artificial Intelligence*. As per the Statement, the G7 members will:

- Adopt a policy approach that includes opposition to data localization requirements that are unjustifiable, taking into account legitimate public policy objectives, as well as generally applicable polices that require access to, or transfer of, source code of mass market software as a condition of market access.
- Advance appropriate technical, ethical and technologically neutral approaches by: safeguarding privacy, including through the development of appropriate legal regimes; investing in cybersecurity, the appropriate enforcement of applicable privacy legislation and communication of enforcement decisions; informing individuals about existing national bodies of law, including in relation to how their personal data may be used by AI systems; promoting research and development by industry in safety, assurance, data quality and data security; and exploring the use of other transformative technologies to protect personal privacy and transparency.
- Support the free flow of information through the sharing of best practices, and use cases on the provision of open, interoperable and safe access to government data for AI programming, support approaches to improve the quality of datasets, and promote international cooperation in data sharing protection. Furthermore, we support industry-led voluntary international technical standards, developed in an open, transparent and consensus-based manner, and in market-led approaches to promote interoperability.

The G7 leadership restated these commitments at the January 2019 meeting of the G7 in Charlevoix.

CANADA-FRANCE COLLABORATION

In August 2019, the governments of Canada and France launched an International Panel on Artificial Intelligence (IPAI). The IPAI's mandate is to support and guide the responsible development, use and adoption of AI that is "human-centric and grounded in human rights, inclusion, diversity, and innovation, while encouraging economic growth." The IPAI will operate through a series of working groups dedicated to specific AI-related topics, and will convene an annual conference of AI experts. Among the values espoused by the IPAI are:

- Supporting an open environment for AI systems that includes the transparency of AI-based decisions, and encourages investment in open datasets, open models and open source software;
- Increasing accountability in AI development, use and adoption through sound data protection, digital security, and robust privacy and ethical frameworks;

DIRECTIVE ON AUTOMATED DECISION-MAKING

The federal government has begun to use automated decision-making systems (ADM Systems) in its administrative processes. ADM Systems are technologies that assist or replace the judgement of a human decision-maker, including through the use of machine learning and predictive analytics. For example, Immigration, Refugees and Citizenship Canada now uses ADM Systems as part of the visa approval process.

In recognition of the increasing role of these systems, the Government of Canada has introduced a *Directive on Automated Decision-Making* (Directive), which took effect on April 1, 2019. The Directive imposes a number of requirements on the federal government's use of ADM Systems. The Directive applies to systems used by federal government departments to provide services to a client external to the Government of Canada, and to systems, tools or statistical models used to recommend or make an administrative decision about a client or federal government department.

Under the Directive, departments using ADM Systems are now responsible for:

- Validating that any data collected and used for the ADM System is relevant, accurate, up-to-date and in accordance with the *Privacy Act*;

"ADM Systems are technologies that assist or replace the judgement of a human decision-maker.

- Developing processes so that data and information used in the ADM System is tested for unintended data biases;
- Conducting risk assessments during the development cycle and establishing appropriate safeguards; and
- In the case of software components that are made available using a proprietary license, ensuring the federal government retains the right to access and test the ADM System, including all released versions of proprietary software components, as well as ensuring the federal government retains the right to authorize external parties to audit these components as necessary.

In addition, the Directive requires an algorithmic impact assessment for each ADM System, the results of which must be publicly released. Depending on the impact assessment level, the department will be responsible for:

- Having the ADM System peer reviewed;
- Ensuring the ADS System allows for human intervention; and
- Providing adequate employee training in the design, function and implementation of the ADM System to be able to review, explain and oversee its operations.

Many of these requirements will require specific functionality, disclosures or other assistance that could only be or could be most efficiently provided by the vendor or developer of the ADM System. Businesses that intend to provide ADM System technologies to the federal government should be alive to obligations imposed by the Directive.

Data

OPEN BANKING

Open banking refers to the practice of allowing consumers to direct the sharing of certain of their financial account information, electronically and securely, with approved organizations of the consumer's choice. While this has been enabled in some jurisdictions, Canada does not currently have a regulatory framework that supports this. However, "screen scraping" is used in the absence of regulations requiring a secure connection, such as an application program interface (API). Screen scraping has fallen into disfavour, and some of the impetus for a move towards an open banking framework is encourage a swift move away from screen scraping.

In September 2018, Canada's Minister of Finance appointed an Advisory Committee on Open Banking. Following the appointment of the Advisory Committee, the Department of Finance released a consultation paper, *A Review into the Merits of Open Banking*, in January 2019. The Consultation Paper provided a high-level overview of the concept of open banking, and sought the views of various stakeholders on the following questions:

- Would open banking provide meaningful benefits to and improve outcomes for Canadians? In what ways?
- In order for Canadians to feel confident in an open banking system, how should risks related to consumer protection, privacy, cybersecurity and financial stability be managed?

For stakeholders of the view that Canada should move forward with open banking, the Consultation Paper also asked what role and steps would be appropriate for the federal government to take in the implementation of open banking.

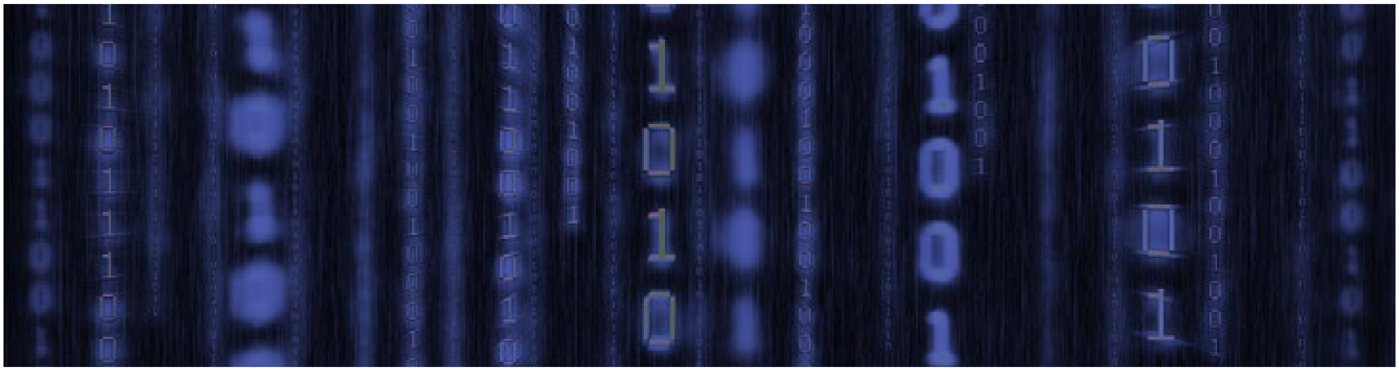
Submissions generally highlighted the pro-competitive benefits of introducing open banking, the security benefits of reducing the use of 'screen scraping', and the increased access to data as a driver of innovation, and utility and convenience for consumers.

Submissions also highlighted the need for appropriate measure to ensure concerns regarding consumer protection, data privacy and confidentiality, financial crime and the stability of the financial system were met.

As of October 2019, the Advisory Committee is considering the submissions received.

In June 2019, the Standing Senate Committee on Banking, Trade and Commerce issued a report, *Open Banking: What it Means for You*. The report advocates for the implementation of open banking regulations as soon as possible, to reduce the use of screen scraping, provide greater choice, improve financial products and services, and enhance the strength and competitiveness of the Canadian financial sector. The report also offers a number of specific recommendations:

- The development of an industry-led open banking framework that would identify the scope of data to be accessible and how the existing payments sector would be included in the framework;
- Modernizing PIPEDA to include a right to consumer data portability;
- Creating a registry of accredited third-party providers for the open banking framework, and establishing an innovation 'sandbox' to allow new third-party providers to safely test and develop new open banking technology;
- Introducing any relevant legislative changes to financial sector legislation when implementing an open banking framework to confirm the prohibition of the use of consumer banking data for insurance underwriting purposes, ensure continued stability of the financial sector and provide any necessary bank-specific consumer protection measures; and
- Legislative changes to designate the Privacy Commissioner of Canada and the Canadian Commissioner of Competition as the co-regulatory and enforcement authorities for open data frameworks.



DATA AND COMPETITION LAW

In February 2018, the Competition Bureau published a paper, *Big data and innovation: key themes for competition policy in Canada*. The paper synthesizes the results of a year-long consultation on how big data should affect competition law enforcement under the *Competition Act*, and sets out the Bureau's position that the existing competition law enforcement framework is suited to the new commercial practices and technologies accompanying big data:

- The Bureau will apply its usual analysis of market definition, market power and competitive effects, when assessing mergers and monopolistic practices involving big data;
- The Bureau takes the position that the use of computer algorithms that rely on big data does not change its analysis under enforcing cartel law, and that such an analysis will continue to be case and fact specific; and
- The Bureau's current deceptive marketing provisions can be applied to cases involving big data.

On September 4, 2019, the Competition Bureau published a call-out for information from Canadian businesses about conduct in the digital economy that may be harmful to competition. The Bureau said it is "seeking information from businesses and other interested parties regarding certain strategies that firms may use to hinder competition in certain core digital markets, such as online search, social media, display advertising, and online marketplaces." It indicated that any such information shared would be used to help further the Bureau's efforts to detect, investigate and remedy anti-competitive conduct in the digital economy.

COMMITTEE ON ACCESS TO INFORMATION, PRIVACY AND ETHICS

In December 2018, the House of Commons Standing Committee on Access to Information, Privacy and Ethics (Committee) released a report with several recommendations for legislators aimed at addressing emerging issues related to big data. The Committee recommended that:

- PIPEDA be amended to incorporate principles of data portability and system interoperability;
- PIPEDA and the *Competition Act* be amended to establish a framework allowing collaboration between the Competition Bureau and of the Office of the Privacy Commissioner, where appropriate;
- A new or existing regulatory body be provided with the mandate and authority to study and audit algorithms; and
- The government enact legislation requiring social media platforms to clearly label content produced automatically or algorithmically.

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OPEN DATA MOVEMENT

Compared to other jurisdictions, Canada has suffered from what commentators have labelled as a "data deficit", i.e., a lack of high-quality government-held data that is readily available for use by third parties. Critics have blamed this on data silos created by Canada's federal system of government, a lack of resources and risk aversion on the part of Statistics Canada (Canada's federal statistics agency), and the fact that federal and provincial departments have often been incentivized to withhold data that would illuminate their own failings.

In response to the data deficit, various stakeholders have called for a move towards open data. The Government of Canada has responded by introducing the 2018-2020 National Action Plan on Open Government. The Plan outlines several commitments, such as expanding the proactive disclosure of internal documents, improving the quality and accessibility of data sets available on the government's website, and developing a platform for accessing publications by federal scientists.

In February 2019, the Ontario government launched public consultations for the purpose of developing a new strategy for data use (Data Strategy). The Data Strategy will address non-personal information held by the government. Pursuant to the Data Strategy, the province has appointed a Digital and Data Task Force that will provide advice and recommendations on the implementation of the Data Strategy. Consultations are still in progress, and the province is aiming to finalize the strategy in the autumn of 2019.

In addition, many larger municipalities have also created portals of open data for municipal operations.

DIGITAL CHARTER

In May 2019, the Minister of Innovation, Science and Economic Development announced the introduction of Canada's Digital Charter, which states that the government will ensure the ethical use of data to create value, promote openness and improve the lives of peoples.

Pursuant to the Digital Charter, the Minister is exploring the introduction of policy proposals to reform PIPEDA, specifically:

- Introducing standard language for obtaining consent, introducing new exceptions to consent, defining 'de-identified information', and revising the definition of 'publicly available information';
- Provide a right for individuals to direct that their personal information be moved from one organization to another in standardized digital format;
- Provide individuals with the explicit right to request the deletion of information, require organizations to communicate changes or deletion of information to any other organizations to whom it has been disclosed, and exploring the use of defined retention periods;
- Establish a regime whereby de-identified information could be processed without consent under the oversight of a data trust; and
- Expand the powers of the Office of the Privacy Commissioner, including by granting the Commissioner cessation and record-preservation orders, and expanding the existing regime for fines for non-compliance.

The Standards Council of Canada has launched a new Data Governance Standardization Collaborative to better coordinate the development and compatibility of data governance standards in Canada.

Electronic commerce law

Like many other countries and jurisdictions around the world, all of the provincial and territorial legislatures in Canada, have enacted e-commerce legislation to address certain contractual formalities and procedural aspects of the formation of contracts.

In Canada, electronic commerce legislation is generally considered to be a matter of provincial jurisdiction. There is federal legislation dealing with electronic documents and related electronic filings, however, these generally apply to matters dealing with the federal government. Although there are certain central features of electronic commerce legislation, there are some differences between the provincial statutes, and it is therefore necessary to refer to the legislation of the province in which one is doing business to ascertain the specific requirements applicable in that province. Companies doing business in Canada should be aware that, in addition to e-commerce legislation, other federal and provincial laws, such as those relating to privacy, advertising, language and consumer protection, also apply to online businesses. For example, in Ontario, certain provisions of the *Consumer Protection Act* (Ontario) apply to internet agreements with consumers, and the legislation imposes stringent disclosure obligations on vendors and provides various cancellation rights for consumers. Vendors also have to disclose certain information to consumers and provide the contract in a manner that enables it to be printed. If vendors to not disclose the required information, the consumer will be able to cancel the agreement upon notice to the vendor. The Ontario legislation applies if either the business or the consumer is in Ontario. In terms of Internet advertising, the Canadian Competition Bureau has issued an Information Bulletin on the application of the *Competition Act* (Canada) to representations on the Internet, to assist those who are making representations on the Internet in understanding their obligations under provisions of the *Competition Act* dealing with misleading advertising and deceptive marketing practices.

Canadian e-commerce legislation

In an attempt to resolve the legal uncertainties that surround many aspects of electronic commerce, the Uniform Law Conference of Canada (ULCC) developed the *Uniform Electronic Commerce Act* (Canada), and, in September of 1999, the ULCC recommended it for adoption by provincial legislatures. The *Uniform Electronic Commerce Act* is modeled on the United Nations *Model Law on Electronic Commerce*.

UNIFORM ELECTRONIC COMMERCE ACT

The *Uniform Electronic Commerce Act* attempts to expand some of the basic rules of commercial law to cover documentation and transactions that exist or occur in electronic form. As the UN's *Model Law on Electronic Commerce* served as a platform for the *Uniform Electronic Commerce Act*, the *Uniform Electronic Commerce Act* has served as its own platform for corresponding provincial legislation. As a result, electronic commerce legislation in Canada is similar in each province and territory, with the exception of Québec's *An Act to Establish a Legal Framework for Information Technology*, which is considerably different than the *Uniform Electronic Commerce Act*.

CENTRAL FEATURES OF E-COMMERCE LEGISLATION

A central feature of the e-commerce legislation in Canada is the principle of "Electronic Equivalence". E-commerce legislation aims to provide both businesses and consumers with peace of mind that online transactions and contracts will be as legally enforceable as ordinary paper-based equivalents, provided specific requirements are met.

Functional equivalency rules

The e-commerce legislation establishes several rules that provide the means by which electronic information and documentation will be considered functionally equivalent to their respective paper counterparts:

- **Legal recognition of electronic information and documents:** Information or documents, including contracts, are not invalid or unenforceable by virtue of their being in an electronic format.
- **Legal requirement that information or documents are in writing:** If the document or information is in electronic format, this "in writing" legal requirement will be satisfied so long as that information or document is accessible to be usable for subsequent reference. In addition, where information is required to be provided to another person in writing, it must be capable of being retained by that other person.
- **Legal requirement to provide information or document in specified non-electronic form:** This requirement will be satisfied when the information in electronic form is accessible, capable of being retained by the recipient and organized in the same, or substantially the same, form as its paper equivalent. Essentially, the display of the information should be recognizable as being the form required by law.
- **Legal requirement to provide original documents:** If there is a reliable assurance as to the integrity of the information (complete and unaltered) contained in the document, and the information is accessible and capable of being retained by the person for whom the document was intended, an electronic document will satisfy this requirement.
- **Legal requirement of original signature:** If, at the time an electronic signature[1] is affixed to a document, it is reliable to identify the person making it, and there exists a reliable association between the electronic signature and the relevant electronic document, then this method of signing will satisfy the legal requirement. Certain statutes require compliance with any prescribed electronic signature requirements as to methods or information technology standards. In certain provinces, there are

1 "Electronic signature" refers to information in an electronic format that an individual has created or adopted in order to sign a document, and that is in, attached to, or associated with that document. Canadian courts have taken a flexible approach to the interpretation of what constitutes a signature. The electronic signature does not have to "look like" an actual signature, but rather can exist as a sound or symbol, or as code, so long as the intention is clear.

additional requirements if the document signed is being presented to a public body.

Formation and operation of contracts and the use of electronic agents

E-commerce legislation confirms that valid contracts can be formed by means of electronic information or electronic documents, and actions (i.e., clicking or touching a computer icon) to communicate intention (i.e., offer and acceptance). Electronic agents[2] are permitted to form contracts with individuals; however, such transactions will be unenforceable against the individual if:

- The individual makes a material error in the electronic document or information used in the transaction;
- The electronic agent does not give the individual an opportunity to prevent or correct that error;
- The individual promptly notifies the other person on becoming aware of the error; and
- Where consideration is received as a result of the error, the individual takes reasonable steps to return such consideration or destroy the consideration (if so instructed), and the individual has not used or received any material benefit or value from the consideration.

Although there may not be a legal requirement that an electronic contract be in writing or that it be signed, to enforce the contract against the other party, the traditional requirements for enforceable contracts (i.e., offer, acceptance, consideration), will have to be satisfied. In particular, it will be necessary to ensure that the terms of the contract are clear and unambiguous (and unaltered), and that the signatures are reliable to identify the parties and to indicate a clear intention to be bound.

Sending and receiving electronic information

Electronic information or documents are considered sent when they enter an information system outside the sender's control, or if the sender and addressee use the same information system, then the information is sent when it becomes capable of being retrieved and processed by the addressee. Electronic information or documents are presumed to be received by an addressee when:

- The information or documents enter the addressee's information system (used to receive the type of information or documents sent), and they are capable of being retrieved and possessed by the addressee; or
- The addressee does not have such a system, but becomes aware of the information or documents in his or her information system, and it becomes capable of being retrieved and possessed by the addressee.

Exclusions

It is important to note that, in some provinces, certain documents and contracts cannot be formed electronically, such as wills, certain powers of attorney and negotiable instruments.

INTERNATIONAL ELECTRONIC COMMUNICATIONS CONVENTION ACT

In 2017, Ontario passed the *International Electronic Communications Convention Act* into law. This legislation is based on the United Nations' *Convention on the Use of Electronic Communications in International Contracts*. The United Nations introduced this legislation to complement the *Model Law on Electronic Commerce* and the *Model Law on Electronic Signatures*. Its purpose is to remove obstacles that prevent the formation of electronic contracts between individuals in different countries and add uniformity to electronic communications. As mentioned above, e-commerce legislation is a matter of provincial jurisdiction. At present, only Ontario has adopted the Convention.

2 "Electronic agent" means a computer program or any other electronic means used to initiate an act or to respond to an electronic document or act without review by an individual at the time of the response or act.

.ca domain names

Canada's country code top-level domain is ".ca". The Canadian Internet Registration Authority (CIRA) administers registrations for .ca domain names. To secure the registration of a .ca domain, the Canadian Presence Requirements established by CIRA must be satisfied. Only certain specified individuals and entities are permitted to apply to CIRA (through a CIRA-certified registrar) for the registration of, and to hold and maintain the registration of, a .ca domain name.

These specified individuals and entities include:

- A Canadian citizen or permanent resident (or legal representative);
- A corporation incorporated under the laws of Canada, or any province or territory of Canada;
- A partnership registered under the laws of any province or territory of Canada (more than 66 percent of whose partners meet one of the preceding requirements);
- Unincorporated organizations, associations or clubs with a significant majority of members who are Canadian residents;
- Trade unions and political parties recognized or registered under the applicable laws of Canada; and
- The owner of a trademark registered in Canada (in this case, registration is limited to a .ca domain name consisting of, or including, the exact word component of the registered trademark).

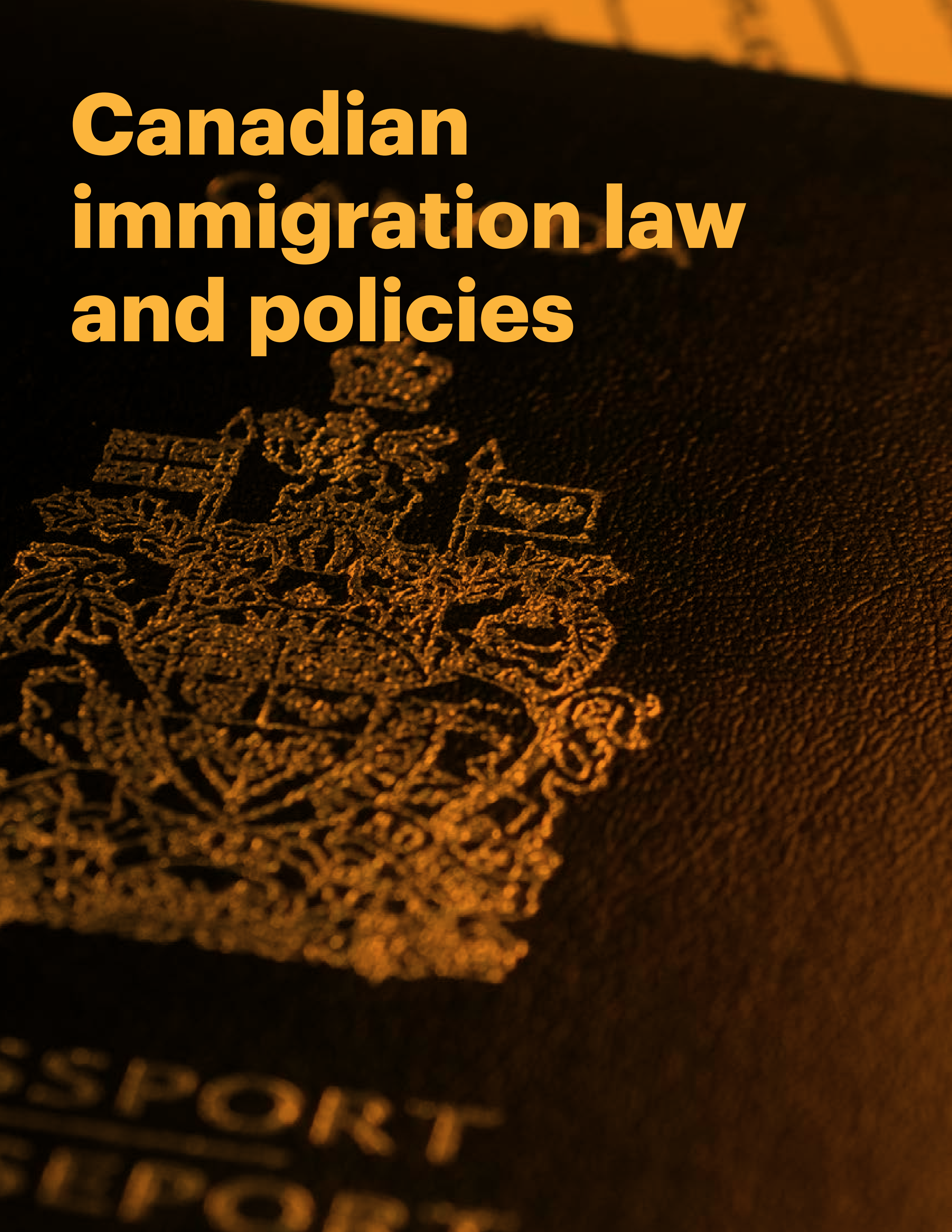
Where an entity does not have any physical connection to Canada, one of the most effective ways for it to secure a .ca top-level domain name is for the entity to secure a trademark registration for the mark that will comprise the Internet domain name. Because of the relatively low cost of securing and maintaining a .ca domain name registration, it may be wise to secure a .ca domain name registration, if possible, rather than risk that the domain name will subsequently be unavailable. An up-to-date list of CIRA-certified registrars can be obtained at the CIRA website at www.cira.ca. The .ca top-level domain is often used by Canadians searching the Internet for information, services, products and prices specific to the Canadian market and/or in Canadian dollars.

In June 2008, CIRA released the CIRA Domain Name Dispute Resolution Policy (CDRP), which has been updated as recently as August 2011. The CDRP provides for mandatory arbitration of disputes relating to .ca domain name registrations. It is intended to be a relatively low-cost and quick administrative process for cases where alleged bad faith .ca domain name registrations can be adjudicated.

The process is not binding upon the courts, and recourse to formal legal proceedings remains available for bad faith registration and other domain name-related disputes. While the spirit of the CDRP is the same as the Uniform Dispute Resolution Policy (UDRP), which governs .com, .net, .org and other top-level domain disputes, there are several procedural and substantive differences between the CDRP and the UDRP.

Other top-level domains such as .com, .net, .org and .biz are available as well to Canadian businesses and foreign businesses operating in Canada. Registration of those domain names must be done through the appropriate registrar or registration authority.

Canadian immigration law and policies



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Work is defined as any activity for which wages are paid or commission is earned, or that is in direct competition with the activities of Canadian citizens or permanent residents in the Canadian labour market.

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It is worthwhile to note that Canada’s immigration policies are ever-evolving.

Temporary foreign workers

There are restrictions on the ability of individuals who are not Canadian citizens or permanent residents to work in Canada. Subject to very limited exceptions, individuals must first apply for and receive a work permit to work in Canada, or apply for and become a permanent resident of Canada.

Work is defined as any activity for which wages are paid or commission is earned, or that is in direct competition with the activities of Canadian citizens or permanent residents in the Canadian labour market. An individual need not be paid in Canada (e.g. if remuneration is paid by a foreign entity) for the activity to be considered work. The *Immigration and Refugee Protection Act* (IRPA) and its corresponding *Immigration and Refugee Protection Regulations* (Regulations) form the general framework for Canadian immigration policy, while operational manuals and bulletins form the specific features of the same policy. It is worthwhile to note that Canada’s immigration policies are ever-evolving.

Within this policy framework, Canada’s immigration is administered via the dynamic interaction between various federal government agencies. More information about immigration to Canada is accessible at these agencies’ websites:

- Immigration, Refugee and Citizenship Canada (IRCC) (www.cic.gc.ca)
- Canada Border Services Agency (CBSA) (www.cbsa-asfc.gc.ca)
- Employment and Social Development Canada (ESDC) (http://www.esdc.gc.ca/eng/jobs/foreign_workers/index.shtml)

Strategizing to bring foreign workers into Canada typically involves technically challenging and time-sensitive considerations within an often-changing policy framework across various administrative regimes.

In some cases, what may initially seem like a straightforward process may not necessarily be so. For instance, ownership or control of a Canadian business does not include the right to hire citizens of another country to staff the business. While free trade agreements, such as the North American Free Trade Agreement (NAFTA) (soon to be replaced by USMCA), the General Agreement on Trade in Services (GATS), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) provide greater options and faster processing times to foreign nationals wishing to work in Canada, such applicants are restricted by factors such as their job position, education and experience requirements, and such applicants must also meet the general admission criteria set out in Canada’s immigration laws.

A full analysis of the foreign national’s intended activities in Canada, potential employer, as well as background and qualifications must be completed prior to determining the best work permit and/or permanent residence option(s) for each foreign national’s situation. This chapter provides an overview of some key immigration considerations for doing business in Canada.

BASIC DEFINITIONS

A citizen of a country other than Canada is referred to as a foreign national. Foreign nationals are not entitled to work in Canada, even temporarily, unless they are permanent residents/citizens of Canada, or are authorized to work under IRPA. In most cases, a work permit, which is a written authorization to work in Canada, will be required.

TEMPORARY RESIDENT VISA REQUIREMENTS

Foreign nationals must apply for a temporary resident visa (TRV) before coming to Canada for any reason, unless they are from a visa-exempt country. Applicants for TRVs are submitted to visa offices abroad and each visa office has different document requirements to support a TRV application. Generally, the applicant must show proof of significant ties outside Canada as evidence of their intent to remain in Canada temporarily. The IRCC website provides a list of countries whose citizens require a TRV.

As of November 10, 2016, most visa-exempt foreign nationals are now required to obtain an Electronic Travel Authorization (eTA) before flying to or transiting through Canada. An eTA is similar to the ESTA program implemented by the United States Customs and Border Protection, which is required for foreign nationals entering the United States under the Visa Waiver Program. However, some exemptions to the eTA requirement exist, including an exemption for United States citizens. An eTA is also not required for entry at a land port of entry. Once an eTA has been issued, it is valid for a period of five years.

CANADA'S BIOMETRIC REQUIREMENTS

Most foreign nationals are now subject to biometric processing as part of their application to travel to or work/study in Canada. Subject to limited exceptions, foreign nationals applying for a TRV, work permit, or permanent residence must provide their fingerprints and photo.

Exceptions to Canada's biometric requirements include: (1) United States citizens, (2) visa-exempt foreign nationals who hold an eTA, (3) applicants younger than 14 years or older than 79 years, (4) refugee claimants or protected persons who have already provided biometrics and are applying for a work permit, and (5) temporary resident applicants who

> **“Strategizing to bring foreign workers into Canada typically involves technically challenging and time-sensitive considerations within an often-changing policy framework across various administrative regimes.**

already provided biometrics in support of a permanent resident application that is still in progress. To facilitate repeat travel to Canada, applicants for a work permit are only required to provide their biometrics once every 10 years.

IRCC publishes official processing times for many types of applications on its website. However, the time allotted for the collection and screening of biometrics is not considered part of the application processing time for a work permit. Therefore, the time required for biometrics collection must be added to the official processing times.

Foreign nationals should provide their biometrics as quickly as possible after receiving the Biometric Instruction Letter, as it will allow IRCC to begin processing the application sooner. If there is no biometric service available where the foreign national lives, they may need additional time to travel to a service location.

BUSINESS VISITORS

Business visitors are foreign nationals who seek entry to Canada for international business reasons, but do not enter the Canadian labour market directly. Typically, business visitors are admitted to Canada to engage in activities involving international business where the main source of their payment for business activities and the principal place of the business are outside of Canada. Business visitors are an exception to the usual work permit requirement for limited work activity performed in Canada.

By way of example, business visitors include:

- Executives attending a board of directors meeting;
- Foreign representatives buying Canadian goods or services for a foreign business or government;
- Foreign nationals receiving training for Canadian goods or services; and
- Foreign nationals receiving or giving training within a Canadian parent or subsidiary of the international business that employs them outside of Canada, as long as any production of goods or services that results from the training is incidental.

CRIMINAL INADMISSIBILITY

Foreign nationals who wish to enter Canada must meet security standards before being admitted to the country. Depending on the person's nationality, country of residence, and the length of their stay in Canada, the foreign national may need to provide a security background check, involving police clearances from their past countries of residence.

Foreign nationals who have committed or been convicted of a criminal offence in any country may not be allowed to enter Canada if such offence is equivalent to a Canadian crime. If a foreign national is criminally inadmissible, they may need to apply to IRCC for a temporary resident permit (to waive the inadmissibility temporarily), or a criminal rehabilitation (to waive the inadmissibility permanently). Once these applications are approved, they may seek entry to Canada.

Foreign nationals who wish to enter Canada must meet security standards before being admitted to the country.

Foreign nationals who have committed or been convicted of a criminal offence in any country may not be allowed to enter Canada if such offence is equivalent to a Canadian crime.

MEDICAL INADMISSIBILITY

Foreign nationals must also meet public health and safety standards before being admitted to the country. Depending on the person's nationality, past countries of residence, and the length of their stay in Canada, the foreign national may need to complete a medical examination, with a panel physician designated by IRCC, before entering Canada.

For instance, temporary foreign workers who intend to work in jobs where the protection of public health is essential, or temporary workers who plan to work as agricultural workers, must first undergo a medical examination regardless of their nationality or country of residence. Furthermore, foreign nationals who have lived in countries where there is a high risk of communicable disease, for at least six months during the preceding year, and who want to come to Canada for more than six months, must first undergo a medical examination. The IRCC website provides a list of the countries for which medical examinations are required. Additionally, foreign nationals may be medically inadmissible if they have a condition that might reasonably be expected to cause excessive demand on Canadian health or social services.

Temporary Foreign Worker Program

LABOUR MARKET IMPACT ASSESSMENTS (LMIA)

Canada's immigration laws allow Canadian employers to access foreign workers in certain situations, where Canadians/permanent residents are not available in the Canadian labour market, through the Temporary Foreign Worker Program (TFWP). Before a work permit is issued to a foreign national, the prospective Canadian employer must usually obtain a Labour Market Impact Assessment (LMIA) from ESDC. The reason for this policy is to limit the negative impact on work opportunities for Canadians.

ESDC considers several factors when deciding whether to approve an LMIA. These factors include the occupation, wages that will be paid, working conditions, employer's recruitment efforts to hire Canadian citizens and permanent residents (often including specific minimum advertising requirements), current labour market conditions (including an assessment of unemployment rates), existing outsourcing or offshoring of positions by the Canadian employer, transfer of knowledge to Canadian employees and plans to transition the position to a Canadian or a permanent resident. If ESDC decides that hiring the foreign national will not negatively affect the Canadian labour market, and confirms the employer has complied with substantially the same terms of employment offered under previous LMIAs, the employer may be issued a positive LMIA to support a work permit for the particular position. Once an LMIA is obtained, a foreign national may then apply for a work permit.

A regular LMIA usually takes approximately two-to-three months, and requires the employer to conduct recruitment efforts to hire Canadians and permanent residents before offering a job to a temporary foreign worker for a minimum of four consecutive weeks. The recruitment requirements generally require the employer to advertise the position on the Government of Canada's Job Bank in addition to two other acceptable methods of recruitment.

Additional information on the minimum recruitment requirements for "high wage" occupations can be found on ESDC's website. Additional information on the minimum recruitment requirements for "low wage" occupations can also be found on ESDC's website.

LMIA – GLOBAL TALENT STREAM (GTS)

The TFWP also allows Canadian employers to hire eligible top foreign talent with two-week processing under Category A and Category B of the GTS. Further, in contrast to a regular LMIA, employers are not subject to any minimum recruitment or advertising requirements with respect to the occupation for which they are hiring a foreign national.

Employers may hire foreign nationals under Category A if a designated partner has referred them to the GTS, and the employer is hiring a foreign national with unique and specialized talent. Alternatively, an employer may hire a foreign worker under Category B if they are seeking highly skilled foreign workers to fill positions in occupations on the Global Talent Occupations List.

If an employer hires a temporary foreign national through the GTS, they must develop a Labour Market Benefits Plan demonstrating their employer-specific commitment to activities having lasting positive impacts on the Canadian labour market. For example, an employer hiring a foreign national under Category A must commit to creating jobs as a mandatory benefit, either directly or indirectly for Canadians and permanent residents. Alternatively, an employer hiring a foreign national under Category B must commit to increasing skills and training investments for Canadians and permanent residents as a mandatory benefit. In addition to the mandatory benefit, the employer must also commit to achieving a minimum of two complementary benefits with at least one activity for each benefit.

The Labour Market Benefits Plan is then subject to progress reviews conducted every 12 months to assess whether commitments are being met and whether any adjustments must be made. The progress reviews are completely separate and distinct from all compliance-related activities under the TFWP.

Employers hiring under the GTS must comply with the GTS program requirements, and uphold the conditions and rules set out in IRPA and the Regulations. The TFWP has measures in place to verify and ensure employers' compliance with these requirements, and employers who fail to do so will be subject to consequences for non-compliance.

The International Mobility Program (IMP)

The IMP is an employer-specific work permit that allows foreign nationals to work in Canada without an LMIA. Instead, the IMP is governed by an employer compliance regime.

Under the International Mobility Program, a foreign national may be allowed to work in Canada without the employer having to apply for an LMIA. Exemptions from the requirement to obtain an LMIA are set out in IRPA. Common exemptions include intra-company transferees, spouses of certain foreign workers, working holiday or international exchange participants, as well as professionals specified in NAFTA, GATS, CPTPP, CETA, and other free trade agreements under which Canada is a member.

Once eligibility is confirmed, the first step requires the employer to submit an offer of employment directly to IRCC via the Employer Portal before the foreign national makes an application for a work permit. The Regulations provide that a work permit must not be issued if the offer of employment has not been received by IRCC.

The second step involves the actual work permit application. At this stage, it is crucial that the offer of employment contains accurate and detailed information in case a compliance inspection is initiated. In the event that a compliance inspection is initiated and it is determined that information provided is inaccurate, the work permit may be revoked and the employer may be penalized.

During the work permit application processing, officers will review the offer of employment and confirm that it is completed fully and accurately. If the offer of employment is incomplete, the officer may refuse the work permit application.

WORK PERMIT PROCEDURE AND PROCESSING TIMES

Applications for work permits may need to be submitted to the Canadian visa office in the foreign national's country of origin or habitual residence, particularly if a visa is required for travel to Canada. Some foreign nationals may be eligible to apply for a work permit at a Canadian port-of-entry (an airport or border crossing). Processing times vary significantly based on the requirements of the visa office, type of application, and background of the applicant. Each application is assessed by IRCC on a case-by-case basis.

GLOBAL SKILLS STRATEGY

The Global Skills Strategy (GSS) is an initiative by IRCC to assist employers in quickly accessing highly skilled foreign workers in an expedited manner. There are four main pillars of the GSS as follows:

1. For IMP work permits in NOC Code 0 or A, visa office applications will process within two weeks
2. There is a short-term work permit exemption for highly skilled workers to work in Canada for on a limited basis without a work permit. They must be in NOC 0 or A positions and can be exempted from a work permit for only two weeks (14 days) within in a six-month period, or four weeks (30 days) in a 12-month period (consecutive, not cumulative).
3. There is a short-term work permit exemption for researchers performing research at a publically funded Canadian institution for up to four months (120 days) without a work permit.
4. For the GTS (recruitment exempt, but requires a Labour Market Benefit Plan), applicants receive two-week processing for GTS LMIA and two-week processing for a visa office work permit.
5. A dedicated service channel is available for employers bringing significant investment to Canada. This service allows Referral Partners (designated by IRCC) to provide a referral under the Global Talent Stream to support expedited LMIAs for Category A occupations.

WORK PERMIT VALIDITY, CONDITIONS, RENEWALS, AND IMPLICATIONS FOR FAMILY MEMBERS

Work permits are issued for specific periods, typically ranging from six months to three years. Generally, there are no restrictions on a work permit holder's ability to enter Canada multiple times during the validity of their work permits, particularly where no temporary resident visa is required. Nonetheless, each separate entry is adjudicated by CBSA, and is subject to an evaluation of the reasons for entry and admissibility of the foreign national.

Foreign nationals entering Canada on a temporary work permit in a skilled position may apply to bring their spouse or common-law partner and dependent children to Canada.

Work permits usually contain details such as the occupation of work, location of work, employer, expiry date, as well as restrictions and conditions on the type of work authorized. Some work permits are considered "open" in that the holder of the work permit may work for any employer and location in Canada with few restrictions outlined specifically on the work permit.

Foreign nationals entering Canada on a temporary work permit in a skilled position may apply to bring their spouse or common-law partner and dependent children to Canada. Generally, family members will be admitted to Canada for the same length of time as the applicant. Spouses may also be eligible for an open work permit depending on the skill level of the principal applicant. Dependent children may be issued open study permits for the same duration as the principal applicant. However, depending on whether they are visa-exempt or entering Canada before they reach primary or secondary school age, they may be issued visitor records instead. A separate study permit will be required for a dependent child who wishes to pursue post-secondary education at a college or university.

INSPECTIONS, GENUINENESS AND COMPLIANCE

Employers who hire temporary workers may be inspected or audited to ensure they meet their responsibilities as an employer during and after the work permit application. Currently, approximately 25 percent of work permit applications under the TFPW or IMP are inspected and/or audited. In the event that an employer is found to be in violation of the IRPA and the corresponding Regulations, and the violation is not justified under the Regulations, the employer can be subject to an administrative monetary penalty and/or can be designated as ineligible to employ a foreign national for whom a work permit is required.

When an administrative monetary penalty is imposed on an employer, the amount due under the penalty is determined based on the total number of points applicable to the violation(s) as calculated under the Regulations. The amount of points varies based on the type of violation, the number of violations, whether the employer made an acceptable voluntary disclosure, and whether an individual, a small business, or a large business commits the violation(s), as defined in the Regulations.

When an employer is designated as ineligible to employ a foreign national for whom a work permit is required, the number of points calculated under the Regulations also determines the length of the period of ineligibility for a violation. During the period of ineligibility, the employer is strictly prohibited from employing a foreign national for whom a work permit is required.

Employers who have been found non-compliant are publicly listed on Service Canada's website along with the penalty imposed for their violation(s).

> **Permanent residents of Canada can live, work, and study in Canada without prior approval from federal immigration authorities.**

Permanent residence

Previously referred to as "landed immigrants", permanent residents have almost all the same rights as Canadian citizens. For example, permanent residents of Canada can live, work, and study in Canada without prior approval from federal immigration authorities.

Permanent residents are subject to a minimum residency obligation limiting the number of days they can be outside of Canada. Although there are exceptions to this rule, a permanent resident must normally be physically resided in Canada for at least 730 days (two years) within the preceding five-year period.

Permanent Resident Cards are issued by IRCC as proof of permanent resident status. Valid Permanent Resident Cards are required for international travel on commercial transportation services.

Outlined below are some application categories for foreign workers to obtain permanent residence status:

FEDERAL SKILLED WORKERS

Canada's Federal Skilled Worker Program allows foreign nationals to apply for permanent residence based on their ability to become economically established in Canada. To qualify, foreign nationals who hold occupations that are specifically qualified for this program are evaluated on a point system with respect to various factors including their education, work experience, knowledge of English and/or French, and other criteria that have been shown to help them become economically established in Canada.

SKILLED TRADESPERSONS

In 2013, the Federal Skilled Trades Program was introduced to address labour shortages of skilled tradespersons. To qualify, applicants must demonstrate sufficient experience in an eligible trades occupation and have their credentials assessed through a provincial trades accreditation body.

CANADIAN EXPERIENCE CLASS

The Canadian Experience Class provides a permanent residency option for successful temporary foreign workers in Canada who have completed a minimum of one year of full time work experience in Canada. This program requires proof of 52 weeks of full time

skilled work experience in Canada while holding a valid work permit, a good command of English or French language, and evidence of the ability to successfully establish permanently in Canada.

PROVINCIAL NOMINEE PROGRAMS

Nearly all provinces and territories in Canada have a program that allows their jurisdiction to nominate individuals for federal immigration based on local economic needs. The province or territory establishes its own selection criteria and has a limited number of nomination certificates it may issue each calendar year. A foreign national must first apply to the provincial or territorial government to obtain a nomination certificate, which is then used to apply for permanent residence through IRCC.

EXPRESS ENTRY

Express Entry is the online immigration application system for those applying for permanent residence through the Federal Skilled Worker Program, Canadian Experience Class, Federal Skilled Trades Program and a portion of the Provincial Nominee Program. Under Express Entry, applicants are placed into a pool of candidates, who wish to be considered for Canadian permanent residence.

Applicants included in the pool of candidates are assigned a score under the Comprehensive Ranking System (CRS), based on a number of criteria including: (1) language skills, (2) education, (3) experience, (4) age, (5) other adaptability qualities, and (6) the demand for workers in the particular occupation. Those applicants who receive the highest CRS score will then receive an Invitation to Apply for permanent residence through the electronic Express Entry system.

The CRS Scores required to receive an Invitation to Apply are constantly fluctuating based on the government's quotas and the scores of the applicants in the pool. The historical list of required CRS scores and the number of invitations sent out can be found on the IRCC website.

To qualify for Express Entry, foreign nationals are required to produce additional documentation as part of their application. This includes, but is not limited to, the following documentation:

- Documents regarding medical examinations and records;
- Police certificates and criminal background checks;
- Language test results; and
- Documents containing details of the foreign national's education, work history and personal background.

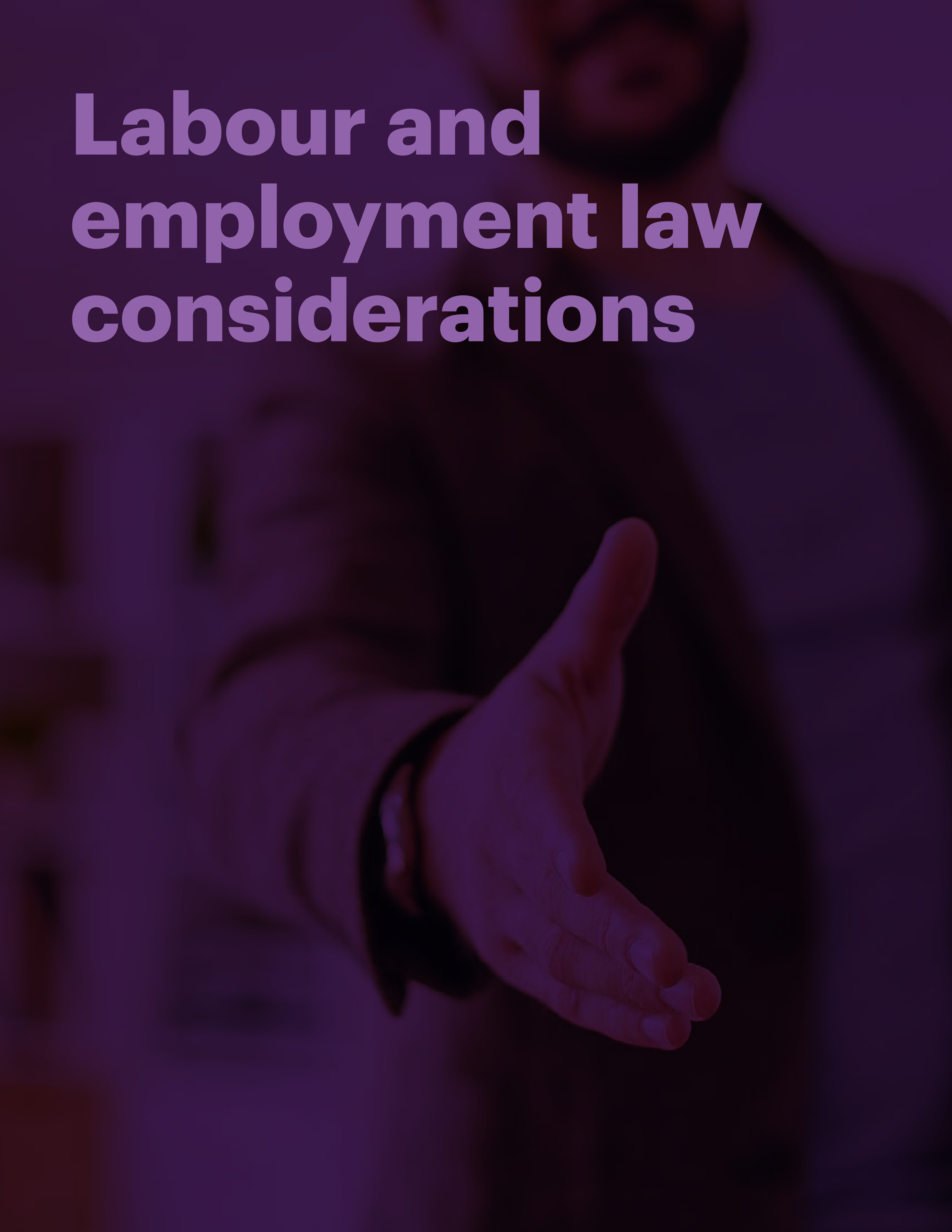
SELF-EMPLOYED PERSONS

Foreign nationals with experience in the areas of culture or athletics can apply for permanent residence to Canada as a self-employed person. This category of permanent residence is intended to bring to Canada applicants who will make a significant contribution culturally or athletically to Canada.

START-UP VISA PROGRAM

The Start-up Visa is a special immigration category that targets high-potential entrepreneurs who will operate a business in Canada that is innovative, will create jobs for Canadians and that can compete on a global scale. The entrepreneur applicants must obtain support from a "Designated Organization" appointed by IRCC in one of three categories: Venture Capital Fund, Angel Investor Group, or Business Incubator. The monetary amounts that the Designated Organization must invest to support the entrepreneur's business vary depending on the category. Once an entrepreneur receives a Commitment Certificate and Letter of Support from a Designated Organization, an application can be made to IRCC for permanent residence. In some instances, a temporary work permit application can also be submitted, which will allow the entrepreneur applicant to begin working on their business in Canada while the permanent resident application is in process.

Labour and employment law considerations



Federal jurisdiction in the labour and employment field is limited to federal works or undertakings, including interprovincial transportation, pipelines, telecommunications, broadcasting and banking.

Pay equity requires equal pay for women who perform equal work of equal value, or of comparable worth, to work typically performed by men.

Jurisdiction

In Canada, labour and employment relations, for the most part, are governed by the laws of the province in which an employee works. The term “labour relations” is used to refer to the union context, while “employment relations” is a general term covering employment laws and practices, which are not specific to trade unions. Federal jurisdiction in the labour and employment field is limited to federal works or undertakings, including interprovincial transportation, pipelines, telecommunications, broadcasting and banking. All other businesses are provincially regulated. A manufacturing operation, for example, with plants in different provinces may, find itself subject to the laws of several jurisdictions.

Notwithstanding the different jurisdictions, generally, all Canadian jurisdictions are consistent in overall direction. However, the specifics of legislation and the administering agencies vary greatly from province to province.

In some jurisdictions, directors and officers of a corporation may be held personally liable for a variety of matters relating to labour and employment law. For example, in Ontario, directors of a corporation may be jointly and severally liable to the employees of the corporation for up to six months’ unpaid wages and 12 months’ vacation pay. In Alberta, directors of a corporation may be jointly and severally liable to the employees of the corporation for up to six months’ unpaid wages, while in British Columbia directors are personally liable for two months. Directors may also be exposed to liability under occupational health and safety legislation for failure of a corporation to comply with safety regulations. In Québec, they can be jointly liable for up to six months unpaid wages (including vacation pay).

Basic employment standards

Each province in Canada enacts comprehensive minimum standards, which are the basis for all labour and employment relations, including the employment of salaried managers. These standards generally cannot be lowered or contracted out of by private negotiation.

British Columbia, Alberta, Ontario and Québec, all have employment standards legislation. These acts are long and complicated by numerous exceptions, and important details are found only on review of the companion Regulations. The key areas covered include the following:

A. PAYMENT OF WAGES

Wages must be paid regularly (at least semi-monthly and within eight days after the end of the pay period in British Columbia, at intervals of not over 16 days in Québec, and monthly in Alberta), at the workplace or otherwise, if mutually agreed, such as by direct deposit in a bank. Unilateral deductions are only permitted as required by law, such as income tax, Canada (or Québec) Pension Plan and Employment Insurance, or as otherwise agreed to by the employee, generally, to pay in whole or in part for such benefits as life insurance or a drug plan.

B. MINIMUM WAGES

The minimum hourly wage rates are set by regulation. The general minimum wage in Ontario is CA$14/hour (CA $12.20/ hour for persons who serve liquor directly to customers/ patrons) or CA$13.15 for students, as of January 1, 2018. In British Columbia, the general minimum wage for most employees is CA$10.25/hour (CA$9/hour for persons who serve liquor directly to customers/patrons). In Alberta, the minimum wages for all employees is CA$10.20 per hour (CA$9.20 for persons who serve liquor directly to customers/ patrons), since September 1, 2014. Some salespeople and professional employees are entitled to a weekly minimum wage of CA$406. In Québec, the minimum wage is CA$12.00/hour, as of May 1, 2018.

C. RECORD KEEPING

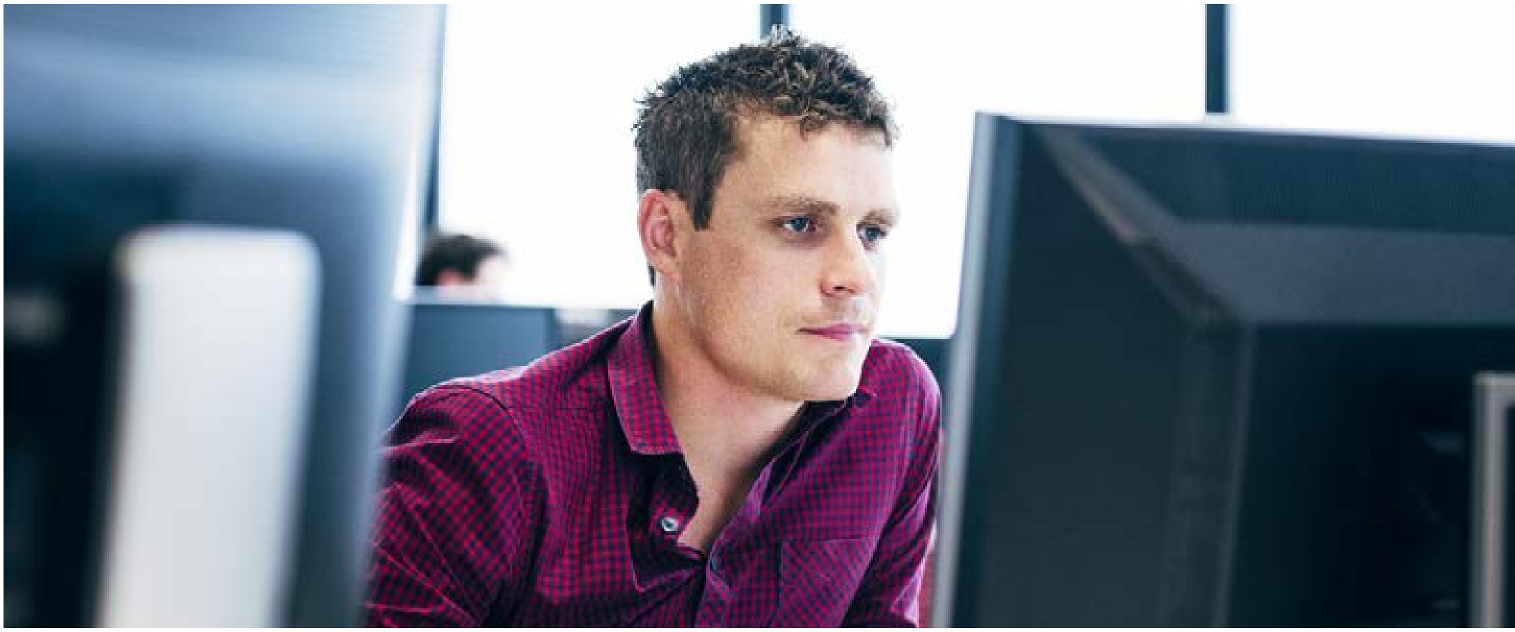
Often neglected by small businesses or with respect to salaried staff, it is nevertheless a requirement that records be made and retained after the employee ceases employment (for two years in British Columbia, and at least three years from the date the record is made in Ontario and Alberta). In Québec, the register for a given year must be kept during a three-year period. It is especially important to keep records of hours worked.

D. HOURS OF WORK

Generally, an employee cannot work more than eight hours in a day to a maximum of 40 hours per week in British Columbia, 48 hours per week in Ontario, or 12 hours per day to a maximum of 44 per week in Alberta. In British Columbia and Alberta, an employee may work longer hours if there is compliance with the statutory requirements for the payment of overtime wages and the hours of work limitations. Certain professionals are exempt from the hours of work restrictions, including managers, residential care workers and high technology professionals.

In Québec, the regular work week is 40 hours per week, although an employee may work longer hours if there is compliance with the statutory requirements for the payment of overtime pay. Employees and the Director of Employment Standards may also approve flexible work schedules. In Québec, flexible work schedules can be authorized by the Labour Standards Commission, or by the provision of a collective agreement or decree. Also in Québec, employees may refuse to work more than 50 hours per week or more than four hours (or two hours as of January 1, 2019) over their regular daily schedule, or more than 14 hours per 24-hour period.

In Ontario, an employer may permit an employee to work beyond the maximum number of hours per week, where the employee has made an agreement with the employer to work up to a specified number of hours in the day, or work week, in excess of the limit, and the employees' hours of work do not exceed the number specified in the agreement. Additional hours are also permissible in the event of an emergency in Ontario, as well as Alberta, to the extent necessary to avoid serious interference with the ordinary working of the employer's operations.



E. OVERTIME

In Ontario and Alberta, overtime is payable for hours worked in excess of 44 hours in a week at one and one-half times the regular wage rate. In Alberta, it is also payable for hours worked in excess of eight in one day. Ontario and British Columbia also allow employers and employees to enter into averaging agreements.

In Québec, any work performed in excess of 40 hours in a week is payable at one and one-half times the regular wage rate. In Alberta, overtime pay of one and one-half times the employee's wage must be paid for any hours worked in excess of eight in a day or 44 in a week, whichever is greater.

In British Columbia, unless the employee is exempt from the overtime requirements or is otherwise subject to an approved flexible work schedule, overtime is payable for hours worked in excess of eight in a day and 40 in a week, at one and one-half times the regular wage rate. Double the regular wage rate must be paid for all hours worked in excess of 12 in a day and 48 in a week. Overtime may generally be banked and time taken off in lieu of payment subject to certain regulatory requirements.

In each province, management employees and other designated employees are exempt from the overtime pay requirement.

In Québec, the employer may still have to pay management employees their regular salary for all hours worked, including those in excess of the regular workweek, if they are paid by the hour or if an hourly rate can be determined.

F. PAID PUBLIC HOLIDAYS

Employees are entitled to regular pay without working for certain statutory holidays per year (nine in Alberta and Ontario, 10 in British Columbia and eight in Québec,).

G. VACATION WITH PAY

In British Columbia, Alberta, Ontario and Québec, an employee is entitled, after the completion of each year of employment, to at least two weeks' vacation leave per year, with one additional week where the employee has completed five continuous years of employment (three in Québec, as of January 1, 2019). Vacation pay is calculated at four percent of the previous year's wages for the first four years of employment (five in British Columbia, three in Québec, as of January 1, 2019) and six percent thereafter.

H. BENEFIT PLANS

In Ontario, differentiation based on age, sex or marital status is generally disallowed. In British Columbia, differentiation based on age, sex, marital status, physical or mental disability, is allowed, only if it relates to the operation of a *bona fide* retirement, superannuation, and pension or employee insurance plan or, in the case of age, a *bona fide* seniority system. In Québec, it is prohibited for an employer to offer a different treatment with respect to the benefits and pension plans to employees who have the same duties within the same establishment **solely based on their hire date**.

I. PREGNANCY AND PARENTAL LEAVE

Pregnant employees are entitled to pregnancy leave (18 weeks in Québec; 17 weeks in Ontario and British Columbia; and 15 in Alberta), followed by parental leave (52 weeks in Québec; 61 weeks if pregnancy leave was taken in Ontario or British Columbia; 63 weeks if pregnancy leave was not taken in Ontario; 62 weeks if pregnancy leave was not taken in British Columbia; 37 weeks in Alberta), with the assurance of reinstatement in the same job, if it exists, or a comparable position. In Québec, if the same position no longer exists, the employer must recognize all the rights and privileges to which the employee would have been entitled if she had been at work at the time the position ceased to exist.

In Québec, fathers are entitled to a five-week paternity leave. Parental leave is also available to fathers and adoptive parents. Both pregnancy and parental leaves are unpaid by the employer, although employees may apply for government-paid Employment Insurance benefits.

As of January 1, 2006 in Québec, the pregnancy, paternity, parental and adoption benefits paid by the federal Employment Insurance Plan, have been replaced by the Québec, Parental Insurance Plan, where parents may opt between a basic plan and a special plan, depending on the length of their leave and the rate of income replacement. In Québec, the benefits for pregnancy leave may vary from 15 to 18 weeks; the benefits for paternity leave may vary from three to five weeks, while those for parental leave will vary from 25 to 32 weeks. The plan is also available to self-employed individuals.

J. OTHER LEAVES

In British Columbia, employees are entitled to five days' unpaid leave each year to attend to family responsibilities, as well as three days' unpaid bereavement leave on the death of a member of the employee's immediate family. In Ontario, employees with at least two consecutive weeks of service are entitled to two days' unpaid bereavement leave on the death of a member of the employee's immediate family, as well as three days' unpaid leave to attend to family responsibilities. Employees are also entitled to three days' unpaid leave for personal illness, injury or medical emergency.

In Alberta and British Columbia, compassionate care leave for up to eight unpaid weeks is available to attend to a family member who has a medical condition with a significant risk of death. In Ontario, an employee of at least six consecutive months is entitled to an unpaid leave of up to 37 weeks to care for a critically ill child or up to 17 weeks to care for a critically ill adult. In Québec, employees are entitled to 10 days' unpaid leave (as of January 1, 2019, two out of 10 days are paid), per year to attend family responsibilities. Provided they are credited with at least three months of uninterrupted service, they can be absent for up to 26 weeks per 12-month period if they are sick, have effectuated an organ or tissue donation for transplant, or are the victim of an accident. They can be absent for up to 104 weeks if they suffered serious injuries following a crime.

Québec, employees can also be absent from work, without pay, for a maximum of 16 weeks per year, to take care of a relative or a person for whom he/she acts as a caregiver, and up to 36 weeks if this relative or person is a minor child. An employee may be absent up to 27 weeks in a 12-month period when his/her presence is required with a parent, other than his/her minor child, or a person for whom the employee acts as a caregiver, because of a serious and potentially mortal illness. Where the minor child of an employee has a serious and potentially terminal illness, the unpaid leave may be extended to 104 weeks.

Also in Québec, an employee can be absent from work for a period of up to 104 weeks, without pay, if his or her minor child has disappeared or upon the death by suicide of his/her spouse, child of adult age, father or mother. If the death of the spouse or child of a Québec employee occurs during, or results from, a criminal offense, he or she may be absent from work, without pay, for a period of up to 104 weeks. In Québec, employees are entitled to five days' unpaid and one paid day (two paid days as of January 1, 2019) of bereavement leave on the death of a close relative as well.

K. TERMINATION

Absent a serious fault (in Québec), or just cause for dismissal requires minimum statutory written notice or pay in lieu of notice for every terminated employee with more than three consecutive months (in British Columbia and Québec), or three months (in Ontario and Alberta) of service on a scale increasing with service up to at least eight weeks of notice.

Greater notice and administrative requirements exist in the event of group terminations of 50 or more employees effected within short periods. In Ontario, the employer must give notice to the Director of Employment Standards. In Québec, an employer must give a notice to the Minister of Labour in case of collective dismissal of 10 employees or more over a period of two months.

L. REINSTATEMENT

It should be noted that in Québec, the *Act Respecting Labour Standards* provides for administrative complaints where an employee can specifically seek reinstatement. For example, employees credited with two years or more of continuous service may not be terminated without just and sufficient cause. Federally regulated employees can also be ordered to reinstate employees with at least one year of service that were dismissed without cause in certain circumstances.

M. SEVERANCE PAY

In addition to the statutory notice requirements in Ontario, severance pay is payable to terminated employees with five or more years of service in certain group termination situations, and in individual terminations if the company's Ontario payroll is greater than CA$2.5 million per annum. In Ontario, severance pay is calculated as the employee's regular work wages per week multiplied by the sum of the number of years of employment completed (including months of employment within incomplete year). Statutory severance pay is not required in any other province, but is payable in the case of federally regulated employees with one or more years of service. This amount is calculated as the greater of five days' pay or two days' pay per year of service.

N. COMMON LAW NOTICE

As the legislative requirements set minimum standards only, substantially greater notice periods may be expressly set out in the employment contract or, in the absence of an enforceable termination provision, an obligation to provide reasonable notice will be implied by the courts. This period of "reasonable notice" is assessed by the courts on a case-by-case basis, depending on an employee's age, position, length of service and the availability of alternate employment together with other relevant factors as may be considered important in the circumstances. For a long service managerial employee, the reasonable notice period can be as high as 24 months. The *Civil Code of Québec* contains similar provisions.

O. OTHER LEGISLATIVE REQUIREMENTS IN RESPECT OF REMUNERATION AND BENEFITS

a. Canada Customs and Revenue Agency: Deductions at source are required for the federally administered Canada Pension Plan (or the provincially administered Québec, Pension Plan), Employment Insurance and income tax payable by individual employees. Employers are also required to pay Canada (or Québec,) Pension Plan and Employment Insurance premiums.

b. Ontario Employer Health Tax (EHT): Employee health coverage is provided by revenues collected under the EHT, a tax on an employer calculated as a percentage of its payroll. This "medicare-type" plan exists in some other provinces, including Québec, although the employer is not required to fund them in British Columbia or Alberta.

c. Workers' Compensation: New employers in almost all industries must register immediately with the British Columbia or Alberta Worker's Compensation Board, the Ontario Workplace Safety and Insurance Board, or la Commission des normes, de l'équité, de la santé et de la sécurité du travail in Québec, and will be assessed a premium on payroll according to their industry group. An employee who is injured at work generally rely on the collective accident fund, and is prohibited from commencing separate legal action against his or her employer.

P. PSYCHOLOGICAL HARASSMENT

In addition to the existing protection against discrimination and harassment based on prohibited grounds in human rights legislation, employees in Alberta, British Columbia and Ontario will also benefit from Occupation Health and Safety legislation stipulations requiring workplace policies for violence and harassment. In Québec, employees will also benefit from stipulations prohibiting workplace psychological harassment.

Employment contract

An employer may enter into a written employment contract with an employee. This is often the case with senior management personnel. Letters of hire, formal legal memoranda or even general policy booklets setting out wages and benefits, will all form part of an employee's contract of employment.

In addition to identifying the terms and conditions of the employment bargain, written contracts can limit employer liability in the event employment is terminated (although such terms may not be valid under the *Civil Code of Québec,* as an employee may not renounce his or her right to a reasonable notice in an employment contract), and include covenants limiting competition after dismissal and guarding against solicitation of the employer's customers and employees.

Without a written contract, the employer is deemed to have entered into an oral contract, generally of indefinite hire, which can be terminated on provision of reasonable notice only, which would be determined by the courts, and, in Québec, by administrative tribunals if the claim is filed before the Commission des normes, de l'équité, de la santé et de la sécurité du travail. Pursuant to the *Civil Code of Québec,* a stipulation of non-compete and/or of non-solicitation may not be enforceable where the employee is terminated without just and sufficient cause.

The organization and operation of trade unions

All Canadian jurisdictions have labour relations legislation, enacted to promote the practice of collective bargaining between employers and trade unions as representatives of non-managerial employees. Although the construction industry is organized along traditional craft lines, general industry and the provincial public sector are typically organized based on employees who may be in various classifications, but share a community of interest and who work in the same plant, or at least the same municipality, and for the same employer.

An employer can have more than one bargaining unit in a single plant. As well, an employer with several plants may have different plants organized by different unions or not organized at all.

Organizing and certification

Trade unions have considerable freedom to organize employees, with limited rights of employer interference or opposition. There are essentially three stages to an organizing drive, which are:

A. THE ORGANIZING CAMPAIGN

This stage consists of signing memberships, with a view to signing at least 45 percent of employees in British Columbia, 40 percent in Ontario and Alberta, and 35 percent in Québec, thereby entitling the union to a vote.

A union may be certified without a vote in Québec, and in the federally regulated sector if more than 50 percent of the employees have signed membership cards and in the construction sector in Ontario if more than 55 percent of the employees have signed membership cards or in the case of unfair labour practices. Most jurisdictions are similar in procedure, including the ability to obtain certification without a vote. However, in British Columbia and Ontario, a union cannot be certified without a representation vote.

B. FILING THE APPLICATION FOR CERTIFICATION

Once an organizing campaign has begun and particularly after an application is filed, the employer must be careful not to commit any unfair labour practices in communicating opposition to the union. Employers must comply with the legal procedures of the appropriate labour relations board that are charged with certifying unions as bargaining agents and regulating labour relations in the province. It is considered an unfair labour practice to threaten, coerce or intimidate employees in an effort to influence their votes, or to participate in the formation of a trade union.

C. THE VOTE

As noted above, in Ontario, a vote is required where support for the union appears to be 40 percent or more in the bargaining unit proposed by the union. This vote is generally held five business days after the application for certification is filed. In British Columbia, a vote is ordered when 45 percent or more of the members of the proposed bargaining unit are members of the union.

In the federal jurisdiction, a vote will be ordered if between 35 percent and 50 percent of the employees in the proposed bargaining unit have signed membership cards. Upon an application for certification by a trade union, the board must determine if the unit is appropriate for collective bargaining. In making this determination, the board must examine records and make other inquiries it considers necessary, including the holding of hearings. Commission of an unfair labour practice may lead to certification of a trade union without a vote, except in Québec, where there is no automatic certification in case of employer misconduct.

If a simple majority of the employees cast a ballot vote for the union, the union will be certified. If a union is certified, the union has absolute and, generally, indefinite rights as the bargaining agent for all employees in the determined bargaining unit. The employer and the individual employees, therefore, lose their right to bargain individual contracts of employment.

Collective bargaining

If a trade union is certified, the employer must bargain in good faith with the union as the representative of the employees in the bargaining unit, in an attempt to reach a collective agreement. Inadequate or obstructive bargaining by the employer may result in further litigation before the board. Where a first agreement is not negotiated, upon application to the appropriate division of the British Columbia, Alberta or Ontario labour relations board, as the case may be, a collective agreement may be imposed through arbitration. A similar mechanism exists in Québec.

Strikes, pickets and lockouts

In British Columbia, Alberta, Ontario and Québec, except as specifically set out in the relevant legislation, work stoppages are strictly prohibited at all times during the currency of a collective agreement and during negotiations up to and beyond conciliation.

In British Columbia and Alberta, if private negotiations do not result in a collective agreement, members of the bargaining unit may commence strike action or the employer may commence lockout procedures. A vote must be conducted in accordance with the legislation prior to commencing a strike. If the vote favours a strike, written notice of the strike must be served on the employer and on the board. Then, there is a minimum 72-hour period before the union can legally strike or the employer can legally lockout employees. Québec, legislation is similar, except that the only notice required is a written notice to the Minister of Labour within 48 hours following the declaration of the strike.

Ontario requires the parties to submit to a Ministry of Labour-supervised conciliation process if private negotiations do not result in a collective agreement. If conciliation is not successful, then the Minister of Labour must issue a "no-board" report and the parties must wait 17 days before the union can legally strike, or the employer can legally lock out employees. A vote must be conducted prior to commencing a strike.

Peaceful picketing of a struck employer is permissible. In Ontario, it must be off the employer's premises and for communicating information, rather than for preventing access to the premises. Replacement workers may generally be employed.

In British Columbia and Alberta, picketing is permissible at or near the site where a member of the trade union performs work under the control and direction of the employer, if the work is an integral part of the employer's operations and the site is the site of the lawful strike or lockout. In British Columbia, replacement workers may not be employed in any circumstances. In Québec, replacement workers may not be employed, except in specific circumstances.

Arbitration and judicial review

During the term of a collective agreement, all disputes between the union and the employer, including employee discipline and discharge, are submitted through a compulsory grievance procedure and, if not settled, to binding arbitration. Arbitrators, typically senior lawyers or professors, are either privately selected or appointed by the responsible minister.

Ontario, Alberta and Québec, do not provide for appeal of arbitral decisions. In British Columbia, the *Labour Relations Code* provides for a limited right of appeal to the Labour Relations Board. There is another parallel right of appeal to the British Columbia Court of Appeal for matters or issues of general law not covered by the right of appeal to the Labour Relations Board.

Otherwise, in British Columbia, Ontario and Québec, arbitral decisions may only be judicially reviewed. Judicial review empowers a court to quash a decision and return the case to arbitration, but only if an arbitrator has exceeded his or her jurisdiction, or interpreted or applied the collective agreement in an unreasonable manner. Labour Relations Board decisions in British Columbia, Alberta and Ontario are also exempt from appeal and can only be judicially reviewed (and only limited purposes).

Occupational health and safety

The existing provincial and federal legislation and regulations concerning occupational health and safety provides information to workers and allows for some worker participation in health and safety matters. As well, a worker has the right to refuse unsafe work.

While the specific language of each piece of legislation may slightly differ, they all have the intent to ensure that employers provide a safe and healthy workplace for their employees. The acts or regulations will specify minimum health and safety standards, including requirements that employers must conduct hazard assessments before beginning work, and develop policies and procedures respecting potential workplace violence. The relevant acts and regulations also provide a mechanism for identifying hazardous materials in the workplace.

Employers have a duty to provide safe work places, enforced by administrative compliance orders and/or prosecution. Employees or the public have the ability to submit complaints regarding unsafe working conditions to the regulator. In egregious cases, corporations and individuals may be subject to criminal conviction for breach of health and safety standards, with possible fines and imprisonments under the *Criminal Code of Canada*.

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Employers have a duty to provide safe work places, enforced by administrative compliance orders and/or prosecution.

Human rights

British Columbia's *Human Rights Code,* Ontario's *Human Rights Code,* the *Alberta Human Rights Act* and Québec's *Charter of Human Rights and Freedoms,* each have detailed provisions prohibiting discrimination on the basis of a list of grounds, including race, creed, sex, sexual orientation, age, and physical and mental disability.

In Ontario's Code, harassment, including sexual harassment and sexual solicitation, is prohibited separately. In Alberta, harassment is part of discrimination. Discrimination, in fact or in result, is prohibited, even though an improper intent may not be present. Qualifications in employment advertisements or written inquiries on application forms, which lean towards the possibility of a discriminatory result, are prohibited. In British Columbia, Alberta, Ontario and Québec, this prohibition does not apply if it can be established that the qualification is based on a *bona fide* occupational requirement. In order to justify such a requirement, the employer is required to show that the needs of an individual cannot be accommodated without undue hardship.

A Human Rights Commission or Council, which both investigates and potentially litigates complaints before independent dedicated human rights tribunals, administers human rights legislation. In British Columbia and Ontario, complaints now proceed directly to a tribunal for resolution.

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a worker has the right to refuse unsafe work(...)

Pay equity

Pay equity should not be confused with "equal pay for equal work" or with "employment equity". The latter refers to legislation for large federal employers or contractors designed to break down barriers in the employment of women, persons with disabilities and visible minorities.

By contrast, pay equity requires equal pay for women who perform equal work of equal value, or of comparable worth, to work typically performed by men, even though in an entirely different classification. In Ontario and Québec, such legislation requires that to identify inequities and to work towards pay equity, an employer must use a gender-neutral job evaluation system. If inequities are identified, an employer must gradually advance the wages of the underpaid predominantly female classification until pay equity is achieved.

Although the *Ontario Pay Equity Act* phases in compliance requirements, new employers in Ontario with more than 10 employees are immediately bound. In Québec, the *Pay Equity Act* only applies to employers with at least 10 employees. British Columbia and Alberta do not yet have separate pay equity legislation; however, there is a pay equity provision in 5.6 of the *Alberta Human Rights Act,* which indicates where employees of both sexes perform the same or substantially similar work for an employer in an establishment, the employer shall pay the employees at the same rate of pay. In Alberta, the prohibition against discrimination based on gender serves to prohibit systemic gender-based or race-based pay inequity. (Note there is a pay equity provision at 5.6 of the AHRA).

Acquiring an existing business

While the above summary outlines the various labour and employment law consequences of commencing a new business in Canada, and more specifically in the provinces of British Columbia, Alberta, Ontario and Québec, purchasers of an existing business have an additional reason for being cautious and informed.

The successor rights provisions, which are typical in labour relations legislation, create a very wide definition of a "sale of business," such that various types of dispositions may leave the purchaser in a bargaining relationship with the vendor's trade union or unions, and thereby a party to a current collective agreement or agreements. A purchaser may, by virtue of a transaction such as a substantial asset purchase, a lease or even a purchase from a trustee in bankruptcy, become indefinitely bound to the same collective bargaining relationship to which the predecessor employer was bound. This includes the obligation to honour existing collective agreement terms and, upon its expiry, to negotiate a new agreement.

In addition, a purchaser in either a union or non-union situation must determine whether there are outstanding employee lawsuits, unpaid wages, grievances, labour relations board complaints, human rights complaints, Workers' Compensation Board claims, or health and safety orders that could affect the ongoing business, and for which the purchaser should negotiate indemnification for damages and expenses, or a reduction in the purchase price.

Finally, due to employment standards legislation, an employee of the vendor who continues with the purchaser retains credit for his or her past service, which could become very important in the event of a subsequent termination from employment. A purchaser must fully investigate the nature of the vendor's labour and employment relations and liabilities in the context of the applicable successor rights provisions.

Land ownership in Canada

> **Two different systems of registration for conveyances, mortgages and other rights and interests affecting land exist in the common law provinces: the *Registry Act* system and the Land Titles system.**

How land is conveyed

Transferring ownership or title to land in Canada from one person to another can be accomplished by a number of methods. Registration of a transfer of land or deed of sale can be done at a Land Registry Office, for example, or by operation of law. The most common method of conveying ownership in land in common law provinces (all provinces except Québec) is a transfer or deed done in accordance with an agreement of purchase and sale entered into between a vendor and a purchaser. Such agreements must be in writing to be enforceable, and should clearly set out the rights and responsibilities of those involved.

REGISTERED INTERESTS IN LAND

Two different systems of registration for conveyances, mortgages and other rights and interests affecting land exist in the common law provinces: the *Registry Act* system and the Land Titles system. The *Registry Act* was established in Upper Canada (now the Province of Ontario) in 1795, prior to Canada's Confederation. Under that system, title to a specific piece of realty must be examined in the registry office where the property is located. To establish sufficient chain of title requires a review of all the instruments affecting title for at least 40 years.

The Land Titles system is much simpler than the *Registry Act* system. It is predicated upon the issuance of a certified statement of title that reveals the registered owner(s) of the land and all encumbrances to which title is subject (subject to certain statutory exemptions).

British Columbia, Alberta and Saskatchewan adhere exclusively to the Land Titles system, while Nova Scotia, Prince Edward Island and Newfoundland continue to adhere to the *Registry Act* system. Ontario, Manitoba and New Brunswick maintain both systems in varying degrees, depending upon the location of the land in question. However, almost all land in Ontario has now been converted from the Registry System to the Land Titles System. In both systems, mortgages and other land charges are registered in order to establish the lender's priority to the real property security. Lenders will typically require a legal opinion as to the borrower's title to the land, and the position of the lender's mortgage against others claiming a registered interest in the land. If advances are to be made periodically under the mortgage security, the lender will generally require an update as to the status of title by way of a sub-search or updated title search, before making the advance. If the lender advances knowing of a prior registration against title, or knowing of a subsequently registered builder's lien, the lender's priority against the prior registrant or lien claimant with respect to that advance may be lost.

In Québec, the system of registration is governed by the *Civil Code of Québec,* and it functions similarly to the *Registry Act* system. The registration of rights at the land register allows such rights to be set up as against third parties, establishes their rank and, where the law so provides, gives them effect. All deeds affecting real property have, in principal, been computerized and are now available online through the Registre foncier du

Québec en ligne online services. In Québec, purchasers and lenders rely upon title searches performed by lawyers or notaries going back sometimes more than 100 years. In Québec, immovable hypothecs must be:

- On pain of absolute nullity;
- Granted by notarial act; and
- Registered, as in common law provinces, to be set up against third parties.

In certain jurisdictions and areas, regulations limit the ownership of certain types of land such as agricultural, classified heritage immovable or site, and recreational land by non-Canadians. However, provided certain regulatory criteria are met, the joint ownership of such land between non-residents and Canadian companies or individuals may still be permissible.

RECORD KEEPING AND DISCLOSURE REQUIREMENTS

In Ontario, the *Forfeited Corporate Property Act* (FCPA), which came into force on December 10, 2016, requires corporations incorporated under the *Ontario Business Corporations Act* to maintain a register of their ownership interests in land. Corporations are required to identify each property in which they have an ownership interest, and show the date on which the corporation acquired and/or disposed of such property.

In British Columbia, a draft bill was published on June 2018 regarding disclosure of beneficial or indirect interests in real estate. The new law, known as the *Land Owner Transparency Act* (LOTA), will require disclosure of the ultimate owners of the "interest in land". LOTA is expected to come into force in 2020. On January 1, 2019, the first pre-sale register in Canada, the Condo and Strata Assignment Integrity Register (CSAIR) came into effect in British Columbia. The CSAIR requires developers to collect and report certain information regarding all assignments of purchase agreements of residential condominiums and strata lots.

In Quebec, the Ministry of Finance announced new fiscal measures requiring that nominee agreements must be disclosed to the Quebec Revenue Agency no later than ninety (90) days after the date on which the nominee agreement has been concluded. The new rules apply to any nominee agreement concluded on or after May 17, 2019.

Security

Due to Canada's constitutional framework, real property security is primarily a matter of provincial concern. Accordingly, real property security is largely governed by the laws of the province where the real property is situated. With the exception of Québec, the various land registration systems in place throughout Canada, and the types of real property security available to creditors, are largely uniform. It is possible then to view the issue of real property security in Canada by looking at the common law provinces together.

MORTGAGE

The most common form of real property security in the common law provinces is the mortgage (or charge). In this context, borrowers grant a mortgage of their real property and related assets to lenders as security for indebtedness, liabilities and/or other obligations. There are two general types of mortgages:

- **Conventional mortgages**, which generally evidence the debt secured and include a repayment schedule; and
- **Collateral mortgages**, which secure a debt that is typically evidenced elsewhere (for example, by a covenant to pay in a credit agreement), and may also secure other liabilities and obligations (such as guarantees).

Should a mortgagor (borrower) fail to meet its obligations as secured by a mortgage, the mortgagee (lender) has a number of remedial measures at its disposal. The list of available remedies include:

- Self-help remedies, such as taking possession or selling the property by power of sale procedures (which are not available in Alberta); and
- Court proceedings, such as obtaining title to property by initiating a foreclosure action, or suing the mortgagor(s) and any guarantor(s) on the covenant for payment.

In British Columbia, the availability of self-help remedies on default has been severely limited by court decisions, to the extent that virtually all realizations proceedings under land mortgages now proceed by way of a court-sanctioned foreclosure process. In Québec, the usual security given on immovable property is the

> **Due to Canada's constitutional framework, real property security is primarily a matter of provincial concern.**

immovable hypothec, which may be granted to secure any obligation whatever (including, but not limited to, securing the payment of a sum of money). The immovable hypothec effectively confers to the creditor the right to follow the property into whatever hands it may come. In addition to having personal recourse against the borrower, the hypothecary creditor has four potential remedies at its disposal should the borrower default, including:

1. Taking the property in payment of their claim, in which case taking in payment extinguishes the obligation;
2. Causing the property to be sold under judicial authority;
3. Selling it privately themselves; and
4. Taking possession of the property for purposes of administration, most of which would require court proceedings.

LEASE

A lease of land results in the transfer of occupation rights in the land from a landlord to a tenant for a specified term, rent and purpose. In the common law provinces and Québec, notice of a lease (often in the form of a short form version of the lease, or a summary of its terms) may be registered on title for the purpose of preserving priority on title and providing notice to future interest holders. Under the common law, a tenant's interest in leased lands is freely transferable (and thus may be mortgaged), unless the lease provides otherwise. Commercial leases generally limit a tenant's right to transfer the lease without the express written consent of the landlord, and often subject to other reasonable restrictions. This is based on the idea that the tenant contracted with the landlord to lease the premises for a specified term, and any requested changes to the nature of the lease (especially a term as fundamental as the tenant entity), should therefore require the consent of the landlord.

Typically, the lease agreement will specify that the landlord's consent will not be unreasonably withheld, conditioned or delayed. In common law provinces, mortgages of leasehold interest are an attractive form of security to creditors, where the lease has particular value in itself, or is of inherent importance to the operation of the tenant's (borrower's) business.

At common law, a lease grants both a contractual right and an interest in the property, providing the landlord and the tenant with both a privity of contract and a privity of estate under the lease, respectively. Pursuant to the privity of contract, the landlord and the tenant are bound by the terms of the lease and can each enforce the obligations under the contract. The privity of estate exists between the current tenant and the landlord, and pertains to matters that run with the property itself (and therefore binds certain subsequent assignees). Since covenants under a lease that relate to the use and enjoyment of the premises often run with the land, the landlord and the tenant are thus liable for the breach of such covenants in accordance with the privity of estate, in addition to the privity of contract. In contrast, in Québec, a lease only creates a right of personal enjoyment in leased lands, but does not give rise to a property interest in such lands.

DEBENTURE

In a security context, debentures are frequently used to provide combined security over real and personal property of corporate borrowers. They are also useful in taking security over assets located in several provinces. Where several lenders are involved, debentures are frequently issued for the benefit of each lender pursuant to a trust deed. Debentures typically provide security through charges and security interests over all present and future property, and assets of the borrower and its undertaking or business. Security over existing real property is generally established by way of a fixed charge, similar to a mortgage and providing similar remedies to the lender.

Land transfer tax

A land transfer tax or registration "tax" (often in the form of a registration fee, or, in the case of Québec, transfer duties), is payable on any registered conveyance of land in all of the provinces in Canada. In the provinces of New Brunswick and Prince Edward Island, the tax is levied on the basis of the higher of the purchase price of the property and the assessed value of the real property, and in Nova Scotia, up to a maximum of 1.5 percent of the sale price of the land. Manitoba requires a value-based tax and registration fees. In Alberta, Saskatchewan, Newfoundland and Labrador, and the federal territories, a registration fee (as opposed to a formal tax) is levied based on the value of the land and fixtures at the time of the conveyance. In Québec, the basis of imposition for duties on the transfer of any immovable is the higher of the consideration paid and the market value (deemed the municipal assessment value) at the time of its transfer. These duties are payable on any transfer of land, whether registered or unregistered, although multiple exemptions from the payment of transfer duties do exist.

British Columbia and Ontario are the most aggressive provinces in taxing transfers of land. Since 1989, land transfer tax in Ontario has been payable on any transfer of land, whether registered or unregistered, and also on certain other transactions, including long-term leases. An additional municipal land transfer tax is applied to real property transfers in the City of Toronto.

In British Columbia, the tax is triggered by, among other things:

- Registration of a transfer of an estate in fee simple;
- A life estate or a right to occupy land under an agreement of purchase and sale;
- A lease; or
- A right to require a transfer of land under an agreement of purchase and sale.

There may be exemptions, for example in cases where the transfer is of a principal residence or the transfer is to a registered charity. In addition, for leases in British Columbia, there may be an exemption for registration of a lease with a term of 30 years or less.

Additional transfer tax may be triggered in British Columbia if the purchaser is a "foreign entity" and the residential property is located in the Greater Vancouver Regional District, the Fraser Valley, the Capital Regional District, the Central Okanagan, or the Nanaimo Regional District. A "foreign entity" is defined in the British Columbia *Property Transfer Tax Act* as a foreign corporation or a foreign national. The additional tax is levied at a rate of 20 percent of the fair market value of the foreign entity's share of the property, and is payable in addition to the general transfer tax. In Ontario, the government has instituted a 15 percent tax on the purchase or acquisition of an interest in residential property located in the Greater Golden Horseshoe Region (GGH) by individuals who are not citizens or permanent residents of Canada or by foreign corporations (foreign entities) and taxable trustees.

RESIDENTIAL SPECULATION TAX

In light of rising house prices, a speculation tax has been under consideration, if not already implemented, in different provinces across Canada. The speculation tax applies higher rate of land transfer tax for non-residents purchasing residential properties. There is currently no speculation tax eligible on commercial properties in Canada (please also refer to the section "Commodity tax considerations – Provincial land transfer tax" on page 49 above).

In British Columbia, there are two speculation taxes: the *Speculation and Vacancy Tax Act,* which applies to residential properties located in certain areas within British Columbia, and the *Vacancy Tax (Empty Homes Tax) Bylaw 11674,* which only applies to residential properties located in the City of Vancouver. The *Speculation and Vacancy Tax Act* imposes a tax of two percent of the assessed value of the property for foreign owners and satellite families, and half of a percent for British Columbians, and other Canadian citizens or permanent residents who are not members of a satellite family. There are several exemptions from the *Speculation and Vacancy Tax Act,* including properties that are the owner's principal residence, properties that are rented for a period of at least six months of the year for periods of 30 consecutive days, and land that is under development. Owners of residential property in the specified areas where the tax applies must complete an annual declaration claiming an exemption, or the tax will automatically be assessed at the maximum rate of two percent.

A land transfer tax or registration "tax" (often in the form of a registration fee, or, in the case of Québec, transfer duties), is payable on any registered conveyance of land in all of the provinces in Canada.

The City of Vancouver's *Vacancy Tax (Empty Homes Tax) Bylaw 11674*, applies to residential properties in the City of Vancouver that are determined to be vacant, and is levied at one percent of a property's taxable assessed value. The tax does not apply to properties that are principal residences or that are rented out for at least six months of the year for periods of 30 consecutive days. Owners are required to make an annual property status declaration in order to claim an exemption from the tax. Residential properties in the City of Vancouver are subject to both the *Speculation and Vacancy Tax Act* and the *Vacancy Tax (Empty Homes Tax) Bylaw 11674*.

PIPS5 FORM

Where a transaction involves land with one to six residential dwellings or agricultural land in Ontario, the Prescribed Information for Purposes of Section 5.0.1 of the *Land Transfer Tax Act* Form (PIPS5 Form) must be completed. The information required includes, but is not limited to, information about the corporate purchaser's incorporation, ownership and control.

Land use planning and development

The object of all planning legislation in Canada is to regulate the use and development of land in an orderly and controlled way.

The object of all planning legislation in Canada is to regulate the use and development of land in an orderly and controlled way. Wide ranges of planning functions exist in the provinces involving the private sector, and both local and regional municipalities. To encourage maximum efficiency and output, plans of subdivision, and site and development plans are made with regard to the provision of municipal services, such as water, transportation and emergency services. Municipal planning is constructed around official plans and through the implementation of zoning by-laws, which are commonly based on community and district plans. Through various forms of studies, planners examine changes in the population, the economic base and social characteristics of the community that may lead to the need to formulate new plans for revitalization, preservation or use change in urban areas.

How land development is regulated

The legislative approach taken by the majority of the provinces is to deal with planning in a separate act or regulation. Power to enact regulations or zoning by-laws is established in the planning statutes of all provinces except Alberta, British Columbia and Québec, where it is located in the general municipal enactment. In British Columbia, such powers can also be found in the Vancouver Charter, the Community Charter and the *Local Government Act*. The planning instruments, the procedure for their creation and enforcement, and the agencies instituted to administer policy and procedures vary across the provinces. However, the vast majority of planning statutes are similar in that they provide for community planning and management over the subdivision and development of land.

In most provinces, implementation of a plan is in part carried out through zoning regulations, which stipulate the ways in which the land included in the plan may or may not be used. Another way of effecting a plan is through development control, whereby approval must be procured from the planning official before any development proposal can progress. Subdivision control is yet another method of ensuring that landowners proposing to subdivide and sell parcels of land follow the plan.

AUTHORITY

Planning is not purely a municipal function. The provincial government plays an important role in ensuring that municipalities make proper plans. For local policies to remain in line with central government policies, some provincial control is necessary. The degree and type of central supervision vary across the provinces, but provincial government policy is often considered in the formulation of local planning decisions.

In Ontario, the Minister of Municipal Affairs and Housing has broad supervisory jurisdiction in the area of planning, although many of its powers under the *Planning Act* have been delegated to municipalities. In British Columbia and Alberta, planning has been left to the local authorities with very little interference from the province. Except for specific aspects of official settlement plans, provincial approval of plans is not required. In Québec, the provincial government does not play a material role, as most planning controls are delegated to the municipal and regional authorities.

Legislation in all provinces, with the exception of British Columbia, Newfoundland and Québec, has created a special agency to advise on planning issues. In British Columbia, planning matters are dealt with solely at the municipal level.

Land use approvals may also be required from federal/provincial agencies (such as the National Energy Board, or the Alberta Energy and Utilities Board), where pipeline or oil and gas projects are being contemplated.

In Ontario, as of April 3, 2018, the Local Planning Appeal Tribunal (LPAT) replaced the Ontario Municipal Board (OMB) as the adjudicative tribunal hearing cases pertaining to various land use planning law disputes, including, but not limited to:

- Official plan;
- Zoning by-law;
- Plans of subdivision;
- Site plan;
- Consent; and
- Variance appeals (with the exception of consent and variance matters in the City of Toronto, which are now heard by the Toronto Local Appeal Body).

“Planning is not purely a municipal function. The provincial government plays an important role in ensuring that municipalities make proper plans.

The LPAT will continue to hear matters relating to development charges, heritage and expropriation matters. The LPAT powers and jurisdiction were curtailed when the Tribunal was initially created, with a focus on whether the decision made by the approval authority conforms to and is consistent with provincial plans and policies (and where applicable, upper and lower tier official plans). However, subsequent legislative changes that came into force on September 3, 2019, have restored in the LPAT many of the powers of the former OMB, including the power to make any decision on an appeal that the approval authority or municipality could have made.

OFFICIAL PLAN

Most of the provinces establish planning areas for which planning commissions or boards are created to prepare a plan known as an official plan. An “official plan” is basically a high level proposal for controlling the use of land, and typically involves a public process where input is received before the plan is approved. This plan must be proposed to the local municipal council(s) for approval. A plan must be approved by a provincial authority or must at least have regard to provincial planning policy. Any person affected by such a plan may formally object to it, and any amendments to the plan must go through the same approval process as the comprehensive official plan. The legislative approach common to most of the provinces is to provide for regional, district and local plans. In Québec, the official plan is prepared at the regional level. In Alberta, these “statutory plans,” as they are referred to, are prepared by municipal or regional authorities, and do not require consent of any provincial authority to become law.

ZONING

In the majority of the provinces, the official plan must be implemented through a zoning by-law before it becomes effective in the control of development. Zoning is a means by which local governments regulate the use of land. Specifically, zoning involves the division of a municipality into areas, and in each area either prohibiting certain uses and allowing others, or permitting the uses which may be carried on to the exclusion of all others. Zoning control allows local governments to regulate the use of land, and the erection of buildings and other structures. In Ontario, the zoning by-laws must conform with the official plan. In Alberta, a zoning by-law should be consistent with the municipality's statutory plans. In Québec, local municipalities enact planning by-laws and a planning program is in place.

SUBDIVISION/SALE OF LAND

Both provincial and local level authorities have vast powers to control the subdivision of land. In the majority of provinces, provincial authorities work in tandem with local authorities to determine the necessity for additional roads, buildings, school sites and recreational facilities, and such matters will be addressed by the authorities as part of the subdivision approval process. In Alberta, land subdivision is almost exclusively a job for local authorities. In Québec, land subdivision requires changes to the provincially controlled cadastre, and has to be approved by both local authorities and the Minister of Energy and Natural Resources.

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Zoning is a means by which local governments regulate the use of land.

REDEVELOPMENT

Both new development and redevelopment must be planned. Express provisions have been incorporated into Ontario's *Planning Act*, authorizing redevelopment strategies and methods of fulfilling them. Generally, redevelopment in Canada is undertaken by private developers. Before a local authority can designate an area for redevelopment, it must first prepare a plan and have a public hearing to discuss the delineation of the area and the fitness of the plan. This process may require a rezoning application. The redevelopment plan must also align with any official plan of the municipality or regional authority, unless an application is made to amend the official plan as well. In Alberta, redevelopment plans, along with area structure plans and municipal development plans comprise the statutory plans meditated by provincial statutes.

Federal consumer product and labelling standards

The federal government has enacted a number of laws directed at preventing deceptive marketing practices, preventing health and safety problems, and generally improving fairness towards consumers in the marketplace.

The federal government has enacted a number of laws directed at preventing deceptive marketing practices, preventing health and safety problems, and generally improving fairness towards consumers in the marketplace. The *Federal Competition Act*, which governs a wide variety of activities, from misleading advertising to mergers, is discussed separately in a previous section. This section reviews some of the more important federal product standard laws. Note that this review concentrates on consumer products. Producers of industrial products, particularly products used in agriculture, and those involved in the transportation of toxic or environmentally harmful chemicals and other substances, will generally have to review other federal (and provincial) regulatory laws affecting the importation and sale of their specific products.

CONSUMER PACKAGING AND LABELLING ACT

The purpose of the *Consumer Packaging and Labelling Act* is to protect consumers from misrepresentation in packaging and labelling, and to assist the consumer in differentiating between products. The legislation applies to dealers who are defined as including retailers, manufacturers, processors or producers of a product. The *Consumer Packaging and Labelling Act* broadly defines "product" to mean any article that is, or may be, the subject of trade or commerce, including both food and non-food items.

The *Consumer Packaging and Labelling Act* prohibits a dealer from selling, advertising or importing into Canada any pre-packaged product, unless a label is attached declaring the net quantity of the product in the form prescribed by the *Consumer Packaging and Labelling Act* and Regulations. Generally, the mandatory information required on a label must be in both English and French, and the quantity must be expressed in metric units. The label must also state the common name of the product and the principal place of business of the person by whom, or for whom, the pre-packaged product was manufactured.

The *Consumer Packaging and Labelling Act* also regulates the standardization of containers, to prevent consumers from being misled or confused by the undue proliferation of container shapes and sizes. Products that must be in standardized containers include peanut butter, wine, glucose syrup and refined sugar syrup.

FOOD AND DRUGS ACT

The *Food and Drugs Act* regulates the advertising, sale and importation of foods, drugs, cosmetics and medical devices.

The *Food and Drugs Act* prohibits the advertising of foods, drugs, natural health products, cosmetics or medical devices for the treatment, prevention or cure of certain diseases listed in a Schedule of the *Food and Drugs Act*. This Schedule lists 29 diseases, including acute alcoholism, cancer, hypertension and congestive heart failure.

The *Food and Drugs Act* defines "food" to include any article manufactured, sold or represented for use as food or drink for human consumption, including chewing gum and any ingredient that may be mixed with food for any purpose.

"Drugs" are defined to include substances or mixtures of substances manufactured, sold or represented for use in:

- Diagnosing, preventing or treating a disease in man or animal;
- Restoring or modifying organic functions in man or animal; or
- Disinfecting premises in which food is manufactured or kept.

Any product may become a drug for the purpose of the *Food and Drugs Act* if a manufacturer through labelling or advertising makes therapeutic claims.

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The *Food and Drugs Act* defines "food" to include any article manufactured, sold or represented for use as food or drink for human consumption.

With respect to pre-market control, the *Food and Drugs Act* treat foods and drugs differently. There is no pre-marketing approval required for any food, although certain foods require pre-marketing notification. Drugs must be approved for importation and sale by the Therapeutic Products Directorate (TPD) of Health Canada and be given a Drug Identification Number (D.I.N.), which signifies the drug's compliance with federal regulations. The Food and Drug Regulations set out the information that is required in the application for a D.I.N., such as the name of the manufacturer as it will appear on the label, quantitative list of the medicinal ingredients, the recommended dosage, a sample label and other information concerning testing.

Canadian drug manufacturers, packagers, distributors and wholesalers, and drug testing laboratories, must hold an establishment license that certifies that their facilities meet applicable Good Manufacturing Practices (GMP). For drugs manufactured by foreign manufacturers, the onus is on the Canadian importer to demonstrate that the drugs meet Canadian GMP standards. While not required, foreign manufacturers have the option of applying for Canadian certification of GMP compliance.

The packaging, sale and production of drugs are regulated according to their nature and purpose. Drug regulation is tailored towards the two separate and distinct markets, which exist, namely, the public and health professionals. Any over-the-counter drug that does not fall into a category of prohibited or restricted drugs, as set out in the *Food and Drugs Act*, may be advertised and sold to the public under certain restrictive guidelines. The Code of Marketing Practices of the Pharmaceutical Manufacturers Association of Canada governs advertising to health professionals. In both cases, labelling must be clearly and prominently displayed and readily discernible to the purchaser, in accordance with the *Food and Drugs Act* and the Regulations and Labelling Guide.

"Natural and non-prescription health products" are regulated as drugs, but are subject to less strict controls. These categories include vitamins and minerals, herbal remedies, homeopathic medicines, traditional medicines like traditional Chinese and Ayurvedic (East Indian) medicines, probiotics, other products like amino acids and essential fatty acids.

> **To be sold legally in Canada, all natural health products must have product licenses and site licenses in order to market, manufacture, or package natural health products in Canada.**

To be sold legally in Canada, all natural health products must have product licenses and site licenses in order to market, manufacture, or package natural health products in Canada. These licenses are obtained from the Natural and Non-prescription Health Products Directorate of Health Canada, and require the submission of detailed information about the safety and effectiveness of a product, as well as distribution, handling, storage and delivery methods. Note that many products that classify as "cosmetics" in other jurisdictions would be regulated as natural health products (or even drugs) in Canada. The *Natural Health Products Regulations* came into effect in 2004 and they take into account the unique nature and properties of these products.

The *Food and Drugs Act* prohibits the sale of certain foods, unless they have been prepared according to very detailed Canadian standards. The Act also prohibits misrepresentation and deception in relation to labelling, advertising and packaging of all food and drug products.

The *Food and Drugs Act* establishes detailed requirements for mandatory nutrition labelling, nutrition claims and diet-related health claims. For example, most pre-packaged foods must carry a "Nutrition Facts" table, unless the food qualifies for an exemption. Exemptions include all fresh fruit and vegetables, raw meat and poultry (except when ground), raw fish and seafood, alcoholic beverages, foods served or sold in restaurants, individual servings sold for immediate consumption, pre-packaged confections sold individually, and milk sold in a refillable glass container.

While the format for nutrition labelling may be similar to US requirements, companies cannot use a US label to satisfy Canadian requirements. For example, some of the elements of the Nutrition Facts table, such as servings per container and calories from fat, are mandatory in the US, but not in Canada.

The *Food and Drugs Act* prohibits the sale of cosmetics containing substances that may be injurious to health. Cosmetics must be manufactured, labelled, packaged, stored and advertised pursuant to prescribed standards. Notification of any new cosmetic must be made to the HPB. The Act also prohibits any misleading labelling, packaging or advertising of medical devices. Medical devices that present substantial risks, such as invasive devices, must be approved for sale in Canada.

If a food, drug, cosmetic or medical device intended for importation into Canada does not comply with Canadian standards, it may have to be relabelled or repackaged.

SAFE FOOD FOR CANADIANS ACT

The *Safe Food for Canadians Act* came into force in 2012, and governs food commodities, including their inspection, safety, labelling and advertising, import, export, and interprovincial trade, and establishes standards and licensing requirements. The Act's regulations, the *Safe Food for Canadians Regulations* (SFCR), require businesses that import, export or sell food commodities among provinces to have licenses and preventive control plans that anticipate potential risks to food safety and outline the steps to control those risks.

CANADA CONSUMER PRODUCT SAFETY ACT

The *Canada Consumer Product Safety Act* is a statute which regulates the manufacture, advertising, labelling, sale and importation into Canada of "consumer products," broadly defined as products, including their components, parts or accessories, that may reasonably be expected to be obtained by an individual to be used for non-commercial purposes, such as domestic, recreational and sports purposes, and their packaging. The *Canada Consumer Product Safety Act* does not apply to those consumer products identified in the Schedule 1 to the Act that are regulated elsewhere. For example, this includes food, drugs, natural health products, cosmetics and medical devices, feeds and fertilizers.

To this end, the *Canada Consumer Product Safety Act* establishes consumer product safety standards, and product bans for identified products, many of which have been imported from the Hazardous Products Act. Examples of products, which are subject to prescribed safety standards, include children's toys, cribs and car seats, and certain flammable textiles. Banned products, which are set out in Schedule 2 to the *Hazardous Products Act* include baby bottles that contain bisphenol A, and certain textiles treated with or containing flame retardant tris (2,3 dibromopropyl) phosphate. As is discussed below, the *Hazardous Products Act* no longer addresses consumer products, but continues to regulate controlled products for use in the workplace.

Significantly, the Canada *Consumer Product Safety Act* contains general prohibitions against the manufacture, importation, advertising or sale of consumer products that are deemed a danger to human health or safety, or that have been the subject of a recall (mandatory or voluntary) in Canada or other corrective measures ordered under the Act, and against misleading consumer product safety representations.

The *Consumer Product Safety Act* further creates an obligation for persons that manufacture, import, advertise, sell or test consumer products for commercial purposes to maintain records of supply chain information. Similar record keeping and tracking measures have been in place in Canada for food, drugs and agricultural products for some time.

The *Canada Consumer Product Safety Act* also requires manufacturers, importers and retainers of consumer products to report any incidents respecting consumer products to Health Canada. An "incident" is defined as:

- An occurrence in Canada or elsewhere that resulted or may reasonably have expected to result in an individual's death or serious adverse effect on their health;
- A defect or characteristic that resulted or that may reasonably have expected to result in an individual's death or in serious adverse effect on their health;
- Incorrect or insufficient information on a label or instruction, or lack thereof, that resulted or may reasonably have expected to result in an individual's death or in serious adverse effects on their health; or
- A recall or measure initiated by a foreign entity (which may include a foreign corporation), a provincial government, a provincial public body, an aboriginal government, or an institution of a provincial government, public body or aboriginal government.

While the *Canada Consumer Product Safety Act* largely resembles the United States Consumer Protection Act, these statutes differ in a number of respects. Notably, unlike its US counterpart, the Canadian Act does not require regulatory compliance or general safety tests to be conducted as a prerequisite for Canadian sales. However, certain consumer products may be subject to testing requirements under product specific federal or provincial legislation, and, as a general rule, it is advisable for Canadian suppliers subject to express safety standards to require proof of compliance with the standards as a condition of the supply contract.

HAZARDOUS PRODUCTS ACT

The *Hazardous Products Act* regulates the advertising, labelling, sale and importation into Canada of controlled products.

Schedule 2 of the *Hazardous Products Act* lists "controlled products," being products for use at the workplace that are toxic, flammable or corrosive, according to scientific tests set out in the regulations. The importation of any controlled product intended for use in a workplace in Canada by a supplier is prohibited, unless the supplier or importer provides a Material Safety Data Sheet on the product, and labels the product as specified in the Regulations. A Material Safety Data Sheet must contain details on the product's hazardous ingredients, risks, injury prevention and treatment procedures. Suppliers, however, may apply to have confidential ingredient information exempt from disclosure to competitors or the public.

OTHER PRODUCT-SPECIFIC LEGISLATION

The federal government has also enacted legislation to regulate the marketing and sale of a number of other products. For instance, the purpose of the *Textile Labelling Act* is to inform consumers as to which textile fibers are contained in fabrics and articles made from fabric and yarns.

A textile fiber is any natural or manufactured matter that can be made into yarn or fabric, including feathers, kapok, human hair and animal fur. Products such as clothing, floor coverings, towels, linens and draperies, are covered by the *Textile Labelling Act*. These types of articles must have a disclosure label setting out specific information relating to the article.

Consumer textile articles may be imported into Canada without a disclosure label, if a dealer gives certain product information to a federal government inspector at the port of entry, on or before the importation. Before the sale of the imported article, the dealer must then apply a disclosure label, notify the inspector that this has been done, and give the inspector a reasonable opportunity to inspect the article.

The *Textile Labelling and Advertising Regulation* exempt a number of articles from all labelling requirements. In addition, articles do not have to be labelled in certain transactions, such as sales to a Crown, education, religious or business entity, if the articles are made in compliance with specifications supplied by the buyer, and if the articles are not going to be re-sold.

Similarly, the *Precious Metals Marking Act* (Canada) and the *Precious Metals Marking Regulations* establish rules for the sale of articles made from precious metals, by setting standards for quality marks. More specifically, the *Precious Metals Marking Act* provides for the uniform description and quality marking of precious metal articles (articles made with gold, silver, platinum or palladium), to help consumers make informed purchasing decisions.

The *Precious Metals Marking Act* also prohibits the making of false or misleading representations related to precious metal articles, and requires that dealers who choose to mark their articles with representations related to the precious metal quality, do so as prescribed by the Act and the Regulations.

The *Seeds Act* regulates the inspection, testing, quality and sale of seeds in Canada. Pursuant to this legislation, seeds developed through biotechnology must meet the same requirements as those developed through traditional methods. The products regulated under the Act include new crop varieties produced by biotechnology with genes novel to the crop species.

Pesticides imported into, or sold or used, in Canada, are regulated under the *Pest Control Products Act and Regulations*. The Pest Management Regulatory Agency (PMRA) is responsible for administering this legislation, registering pest control products, re-evaluating registered products and setting maximum residue limits under the *Food and Drugs Act*. Companies that wish to have the right to sell a pest control product in Canada must submit detailed information and data to be evaluated by the PMRA. The *Pest Control Products Act* creates a Register of Pest Control Products that makes certain information, including certain pest control product test data, available to the public. It is incumbent upon the registrant to request that any confidential test data or confidential business information be designated as such and exempted from the access to information regime.

NAFTA and harmonization of product standards

NAFTA contains provisions aimed at ensuring that product standards, certification and testing procedures, do not create unnecessary barriers to North American trade in goods and some services. The basic principle is that a NAFTA country is not to maintain or introduce any standards-related measures or procedures of product testing, or certification that would create unnecessary obstacles to trade. Measures or procedures designed to protect health, safety, environmental or consumer interests are deemed not to be unnecessary obstacles to trade, as long as they do not operate to exclude products of a NAFTA country, where those products would otherwise meet the permitted domestic regulatory objectives.

NAFTA does not require that Canadian, US and Mexican standards be identical, only that domestic standards and product approval procedures be applied equally to goods originating in any NAFTA country.

A foreign country's requirements for testing and approval of products are often of great practical importance to the introduction of those products into new markets. Under the Canada-US Free Trade Agreement, those two countries agreed not to require that testing facilities, inspection agencies or certification bodies, be located or established within the importing country. NAFTA contains a similar provision, albeit more qualified, vis-à-vis Mexico.

After approximately 15 months of negotiations, on November 30, 2018, Canada, the US and Mexico signed the new Canada-United States-Mexico Agreement (CUSMA), an agreement that will replace NAFTA once coming into force. The Parties must undertake their domestic process towards ratification and implementation of CUSMA.

CUSMA preserves key elements of NAFTA and incorporates new provisions that seek to address 21st century trade issues, such as the growing need for harmonized product standards. For instance, Chapter 28 of CUSMA seeks to promote the adoption of "good regulatory practices" aimed at reducing or eliminating burdensome or duplicative regulatory requirements amongst the three trading partners. In particular, the Parties agreed under Chapter 28 to maintain central regulatory coordinating bodies, such as Treasury Board Secretariat in Canada, to promote good regulatory practices across government, including limiting inconsistent requirements and ensuring compliance with international trade and investment obligations. Chapter 28 also promotes greater transparency in the regulation-making process. Amongst other things, it requires the Parties to publish annually a list of regulations that are expected to be introduced within the next year; stipulates that the Parties disclose details about domestic regulation-making processes and mechanisms; and mandates that newly introduced regulations, and details on the justification for such regulations, be promptly publicized.

In order to streamline regulations across North America, Chapter 28 of CUSMA also requires the Parties to conduct a retrospective review of its existing regulations to determine whether modification or repeal is necessary. Chapter 28 also streamlines the regulatory process by providing interested persons with an opportunity to comment and suggest improvements to proposed and current regulations. Finally, Chapter 28 promotes harmonization by establishing a Committee on Good Regulatory Practices, which has the objective of encouraging regulatory compatibility and cooperation, with the view of facilitating trade between the Parties.

It is important to note that while Chapter 28 is binding upon the Parties (it is subject to CUSMA's dispute regulation process), the chapter does not prevent a Party from pursuing its public policy objectives, including in relation to health, safety and the environment, through regulation.

Anti-corruption

Canada signed the *Convention on Combating Bribery in International Business Transactions of the Organisation for Economic Co-operation and Development* (OECD Convention) on December 17, 1997. In 1998, the Government of Canada passed the *Corruption of Foreign Public Officials Act* (CFPOA) to implement Canada's obligations under the OECD Convention into Canada's laws.

The OECD Convention's goal is to stop the flow of bribes and to remove bribery as a non-tariff barrier to trade to ensure an even playing field in international business. The OECD Convention came into force on February 15, 1999, following Canada's ratification. So far, 44 states have ratified the OECD Convention, including the 35 member states of the OECD and eight non-member states: Argentina, Brazil, Bulgaria, Colombia, Costa Rica, Lithuania, Peru, Russia and South Africa.

CORRUPTION OF FOREIGN PUBLIC OFFICIALS ACT

The CFPOA is an Act respecting the corruption of foreign public officials and the implementation of the OECD Convention. In June 2013, Parliament amended the CFPOA to increase the maximum penalty for convicted individuals, to create a new books and records offence and to expand jurisdiction based on nationality. This amendment also allowed for the removal of the exception regarding facilitation payments. Facilitation payments are those made to foreign public officials to secure or expedite the performance of acts of a routine nature that are within the scope of the official's duties. This exception was removed from the Act and came into force October 31, 2017.

JUSTICE FOR VICTIMS OF CORRUPT FOREIGN OFFICIALS ACT (SERGEI MAGNITSKY LAW)

The Justice for Victims of Corrupt Foreign Officials Act (JVCFO), also known as the *Magnitsky Act*, came into force on October 18, 2017. The JVCFO created a new legal framework to provide for the taking of restrictive measures in respect of foreign nationals responsible for gross violations of internationally recognized human rights, and amended other legislation, including the *Special Economic Measures Act* and *the Immigration and Refugee Protection Act*.

- The JVCFO allows the Governor in Council to make orders and regulations to restrict dealings in property and freeze the assets of foreign nationals. Some of the circumstances in which the Governor in Council may take action are:
- A foreign national is responsible for or complicit in, gross violations of internationally-recognized human rights;
- A foreign national acts as an agent of or on behalf of a foreign state in a matter relating to a violation of internationally-recognized human rights;
- A foreign public official, or an associate, is responsible for or complicit in ordering, controlling, or otherwise directing acts of significant corruption; and
- A foreign national has materially assisted, sponsored or provided financial, material or technological support for, or goods or services in support of an act of significant corruption by a foreign public official or their associate.

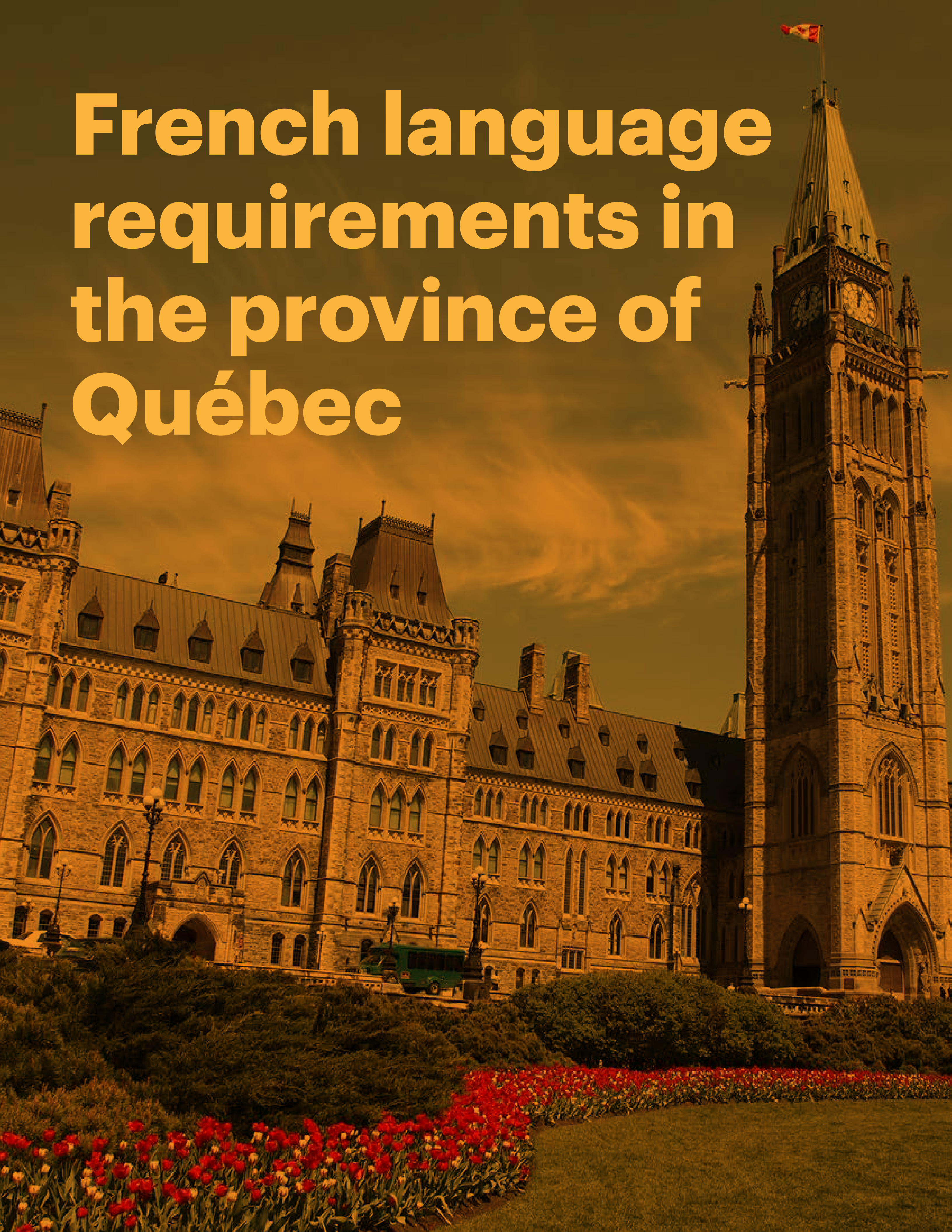
On November 3, 2017, Canada imposed sanctions pursuant to the JVCFO by enacting regulations to the Act. The Regulations prohibit Canada and Canadians outside Canada from:

- Dealing, directly or indirectly, in any property, wherever situated, of the listed foreign national;
- Entering into or facilitating, directly or indirectly, any financial transaction related to a dealing described above;
- Providing or acquiring financial or other related services to, for the benefit of, or on the direction or order of the listed foreign national; and
- Making available any property, wherever situated, to the listed foreign national or to a person acting on behalf of the listed foreign national.

The JVCFO authorizes the Minister of Foreign Affairs to issue permits and general permits to persons in Canada and Canadians outside Canada to carry out a specific activity or transaction, or class of activity or transaction that is otherwise prohibited by the Act or Regulations. A foreign national who is subject of an order or regulation made under the Act may apply in writing to the Minister of Foreign Affairs to cease being the subject of such order.

Currently, Canada has orders on individuals from four countries and 70 individuals: 19 individuals from Venezuela, 30 individuals from Russia, 17 individuals from Saudi Arabia, three individuals from South Sudan, and one individual from Myanmar (Burma).

French language requirements in the province of Québec



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The *Charter of the French Language* (the Charter) guarantees French language rights and requires the use of French in business situations.

The Charter of the French Language

The official language in Québec is French. The *Charter of the French Language* (the Charter) guarantees French language rights and requires the use of French in business situations. Given the broad scope of the Charter, this analysis will only touch upon some of the Charter's highlights and is not intended to be exhaustive. Since there could be a language component in any Québec business transaction, each such transaction merits an analysis of the Charter's impact. Provisions of the Charter are of public order. However, the Charter also provides certain exceptions to its general application.

CONTRACTS

Contracts pre-determined by one party, as well as standard printed form contracts, must be drafted in French. However, they may be in another language exclusively at the express request of the parties (in such case, a clause is written into the contract). Thus, standard forms, such as purchase orders and printed leases, must be in French unless the parties have expressly requested that the contract be written in another language.

Consumer contracts are governed by both the *Consumer Protection Act* (CPA) and the Charter, and, by virtue of the CPA, must be drawn up in French. However, they may be drawn up in another language if the parties expressly agree. Where consumer contracts are drawn up in French and another language, and there is a divergence between the texts, the interpretation more favourable to the consumer prevails.

LABOUR RELATIONS AND COLLECTIVE AGREEMENTS

Collective agreements, including annexes and schedules to those agreements, must be in French. An accompanying English version of the agreement is permitted.

CATALOGUES AND BROCHURES

As a general rule, catalogues, brochures, folders, commercial directories and other similar written publications, including websites, where the entity carries on business in the Province of Québec, must be in French. Such documents may also be bilingual or may be in two separate versions; one exclusively in French and the other exclusively in another language, provided the French version is available under no less favourable conditions of accessibility and quality than the version in the other language. It should be noted that the version exclusively in another language may be inserted in a news publication published exclusively in that language.

COMPUTER SOFTWARE

All computer software, including games software and operating systems, whether installed or offered separately, must be available in French, unless no French version exists. Software can also be available in languages other than French, provided the French version is available on no less favourable terms and that it has technical characteristics that are at least equivalent to the version of another language.

PRODUCT LABELLING

Every inscription on a product (on its container or its wrapping), and all documents that accompany a product (including warranties, directions for use, etc.) must be in French. The French inscription may be accompanied by a translation or translations, as long as an inscription in another language is not given greater prominence than the French text. Exceptionally, there are situations where product labels and the documents accompanying a product do not have to be in French. For example, inscriptions relating to products intended for a market outside Québec, do not have to be in French; neither do the inscriptions relating to a publication, book, record, tape, film or any other similar cultural or educational product, to the extent that such inscriptions are written in the language of the product or the product has no language content. Other exceptions are set out in the relevant regulations.

“The French inscription may be accompanied by a translation or translations, as long as an inscription in another language is not given greater prominence than the French text.

PUBLIC SIGNS AND POSTERS, AND COMMERCIAL ADVERTISING

As a general rule, most public signs and posters may be both in French and in another language, as long as French is “markedly predominant,” as such expression is defined by regulation.

There are two circumstances provided by regulation in which commercial advertising must be exclusively in French. Commercial advertising displayed on billboards, signs or posters of 16 square meters or more, and visible from any public highway (unless the advertising is displayed on the very premises of an organization), and commercial advertising on or in any public means of transportation, and on or in accesses thereto, must be exclusively in French.

CORPORATION NAMES

In order to incorporate a corporation under the *Business Corporations Act* (Québec), a French corporate legal name is required. An English name may be used in addition to the French name, but an English name not accompanied by its French equivalent is not acceptable.

Every corporation, partnership and other legal person carrying on an activity in Québec must register in accordance with *An Act respecting the legal publicity of sole proprietorships, partnerships and legal persons.* Every registrant whose name is in a language other than French, must declare either a French version of the name or a French business name to be used to carry on business activities in Québec.

Under the Charter, the name of an enterprise must be in French, but it may be accompanied with a version in another language, provided the French version appears at least as prominently on any inscription or signage. However, on public signs and posters, and in commercial advertising, the use of a version of a name in a language other than French is permitted to the extent that the other language may be used in such public signs and posters, or in such advertising, pursuant to the applicable regulation. In addition, in texts and documents drafted only in a language other than French, a firm name may appear exclusively in the other language.

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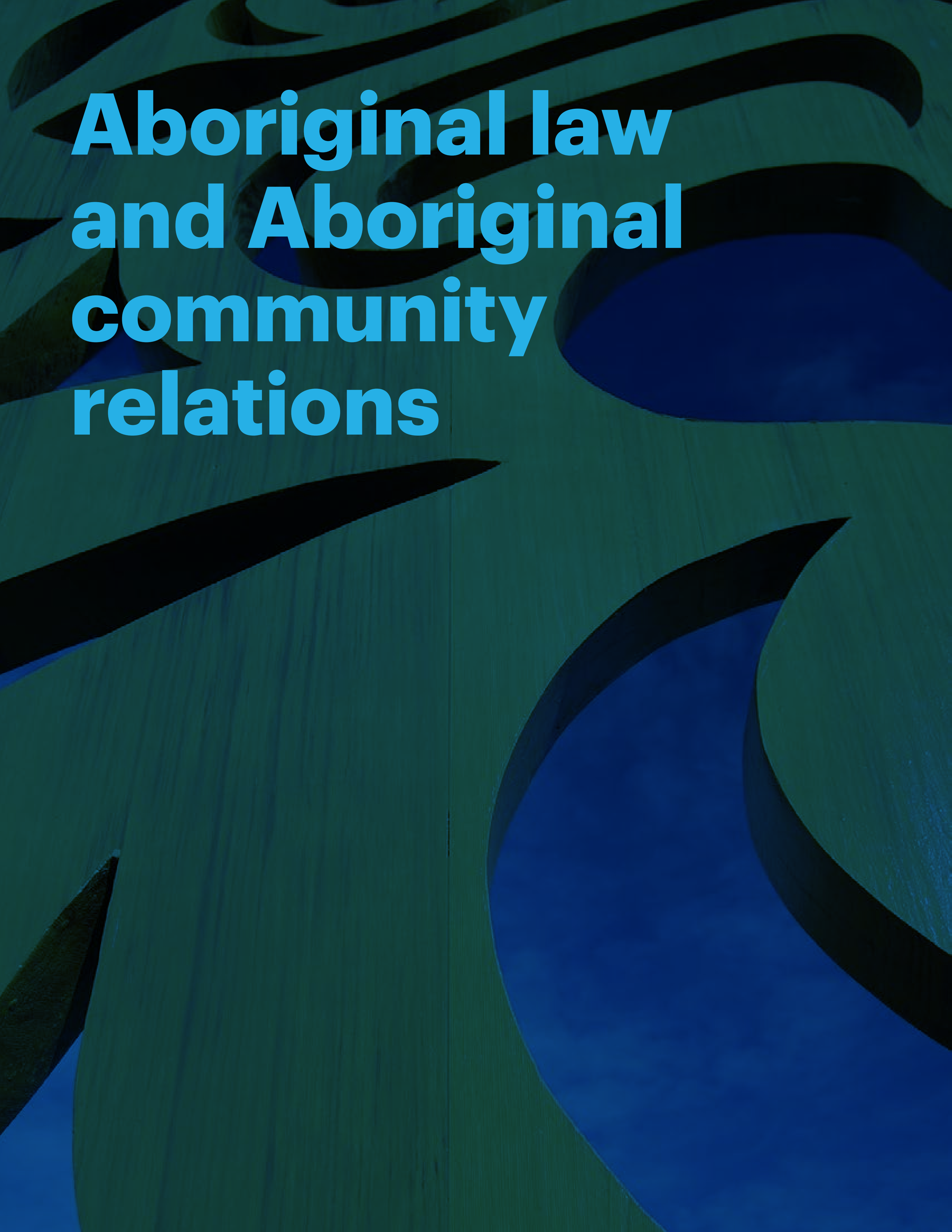
FRANCIZATION OF BUSINESS

A firm that employs 50 persons or more for a period of six months must register with the Office Québécois de la langue française (the Office). If the Office considers that the use of French in the organization is generalized at all levels of the firm (for example, written communications between employer and employees in French), the Office will issue a “francization certificate.” If the Office does not issue a certificate, it will notify the firm that it must adopt a francization program.

The implementation of francization programs in head offices and research centres may be the subject of special agreements with the Office to allow the use of a language other than French as the language of operation.

For those firms employing 100 or more persons, the firm must form a francization committee composed of six or more persons. The francization committee is responsible for the monitoring of the firm’s language situation, as well as devising and implementing the firm’s francization program, and ensuring that the use of French remains generalized at all levels of the firm.

Aboriginal law and Aboriginal community relations



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In the last few years, Aboriginal issues have attracted growing public and governmental attention in Canada, a trend that is likely to continue in the future.

Introduction

Section 35 of the *Constitution Act, 1982* protects "existing Aboriginal and treaty rights of the Aboriginal peoples of Canada". It defines "Aboriginal peoples of Canada" as including the "Indian, Inuit and Métis peoples of Canada".

Aboriginal rights exist in relation to lands, practices, customs and traditions of Canada's Aboriginal peoples. These rights need to be considered when doing business or investing in Canada, particularly when planning large energy, mining, forestry, pipeline, railroad and other infrastructure projects. Business transactions and the development of projects that seem simple at the outset may become increasingly complex when such rights are involved.

As described below, the precise nature of the protection afforded by the Constitution depends upon whether the rights are "Aboriginal rights" or "treaty rights." Also for consideration is whether these rights are merely asserted, or have been formally recognized and defined by the final judgment of a court, or through the conclusion of a treaty or land claims agreement with the Crown.

Moreover, the manner in which these constitutional rights are implemented is deeply influenced by the practical realities of the various regions of Canada, as well as the specific cultural identity of each Aboriginal group.

Aboriginal peoples are the fastest growing population in Canada, the country being home to more than 630 First Nations and 53 Inuit communities. Based on the 2016 Census, as well as statistical information published by Crown-Indigenous Relations and Northern Affairs Canada, there are more than 1.67 million persons in Canada who identify themselves as Aboriginal people. This represents about five percent of the total population of the country.

It is also worth noting that Aboriginal law is constantly evolving, notably in light of judicial pronouncements. In the last few years, Aboriginal issues have attracted growing public and governmental attention in Canada, a trend that is likely to continue in the future.

Aboriginal rights and title

Aboriginal rights protect practices, customs and traditions that are integral to the distinctive culture of each Aboriginal group. They are collective rights held communally by the Aboriginal group in question.

To establish an Aboriginal right, the claimant must prove the existence of a modern practice, custom or tradition that has a reasonable degree of continuity with the practices, customs or traditions that existed prior to contact with European settlers. Moreover, this practice, custom or tradition must have been integral to the distinctive culture of the Aboriginal group, and must be a defining feature of this Aboriginal society, such that its culture would be fundamentally altered without it.

The nature and scope of Aboriginal rights are contextual and site specific, and thus vary considerably throughout Canada. These rights may include, for example:

- The right to fish a particular body of water for food, social or cultural purposes; or
- The right to harvest wood for shelter, transportation, tools or fuel.

It is also worth noting that Aboriginal rights are not "frozen in time", and may be exercised in their modern form.

Aboriginal title is a specific type of Aboriginal right: it is a right to the land itself. It confers on the title holder an exclusive right to occupy the land, to decide how the land will be used, and to benefit economically from such uses.

To establish Aboriginal title, the Aboriginal group must prove that, at the time of assertion of Crown sovereignty, it exclusively occupied and exercised effective control over the land in a manner sufficient to ground its claim. If current occupation is relied upon to establish title, the Aboriginal group must also prove that it continuously occupied the land in question since the assertion of Crown sovereignty.

In 2014, and for the first time in Canadian history, the Supreme Court of Canada recognized a specific claim to Aboriginal title land occupied by the Tsilhqot'in Nation in an isolated part of interior British Columbia.

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Aboriginal rights protect practices, customs and traditions that are integral to the distinctive culture of each Aboriginal group.

In its decision, the Court confirmed that Aboriginal title is not necessarily confined to specific village sites or farms. It concluded that regular use of territories for hunting, fishing, trapping and foraging could be sufficient to ground Aboriginal title, provided that such use "evinces an intention on the part of the Aboriginal group to hold or possess the land in a manner comparable to what would be required to establish title at common law" (*Tsilhqot'in Nation v British Columbia*, [2014] 2 SCR 256 at para 42). Nomadic and semi-nomadic groups could therefore prove title to land, provided they establish sufficient physical possession.

Métis

Unlike other Indigenous peoples, who occupied the land that is now known as Canada prior to the arrival of European explorers, the Métis became a distinct Aboriginal people as the result of unions between European explorers, traders and settlers, and Canada's original inhabitants. As indicated by the Supreme Court of Canada, "Métis communities evolved and flourished prior to the entrenchment of European control, when the influence of European settlers and political institutions became pre-eminent" (*R v. Powley*, [2003] 2 SCR 207 at para 10).

The term "Métis" as used in Section 35 of the Constitution, does not encompass all Aboriginal individuals with mixed heritage with the Europeans. Rather, in order to establish historical, community-held Aboriginal rights, Métis claimants must demonstrate they belong to an identifiable Métis community, defined as a "group of Métis with distinctive collective identity, living together in the same geographic area and sharing a common way of life" (*Powley*, para 12).

In particular, the following three criteria have been identified as relevant in this context:

1. Self-identification as Métis;
2. An ancestral connection to an historic Métis community; and
3. Acceptance by the modern Métis community.

The general test for establishing the existence of Aboriginal rights (discussed above) also applies to Métis claimants, but with some adjustment made to take into account the post-European contact ethnogenesis of the Métis. The constitutional protection of Métis Aboriginal rights extends to customs and traditions that persist in the present day, and that were distinctive and integral features of Métis historical communities prior to the time of effective European control.

Treaty rights

Treaties are agreements between Aboriginal groups and the Crown. In this context, the "Crown" refers to the Government of Canada, as well as that of the particular province where the treaty lands are situated, as the case may be.

Though the agreements are referred to as "treaties", they are not considered agreements between sovereign nations such that the rules of international law apply. They are unique agreements governed by Canadian domestic law. Treaty rights differ somewhat from Aboriginal rights in that their scope and content are directly tied to the content of the agreement. Courts will interpret the often-sparse text of historic treaties in a manner which is realistic, and which reflects the parties' common intentions at the time the treaty was made. In contrast, modern treaties are meticulously detailed documents and courts will interpret them deferentially, paying close attention to the specific terms, and taking into account the treaty text as a whole. In both cases, interpretation will be conducted in light of the "integrity and honour of the Crown" (*R v Badger*, [1996] 1 SCR 774, para 41) and the necessity to reconcile the interests of both parties.

Every treaty is different and serves to acknowledge different Aboriginal rights. Some early treaties, like the "Peace and Friendship Treaties" in Eastern Canada, were meant to encourage cooperation between the Crown and Aboriginal groups, but also provided for Aboriginal hunting and fishing rights. Later treaties, such as the "Numbered Treaties" in Ontario, Central and Western Canada, provided express protection for Aboriginal hunting and fishing rights, or set aside reserve lands for Aboriginal groups in exchange for their surrender of all other rights and land claims to the Crown. Finally, "modern treaties" or "land claims agreements," which have been concluded more recently in connection with large parts of Northern Canada, and some areas of Québec, British Columbia and Labrador, are wide-ranging agreements that may set out rights over various categories of lands, (including title), rights to resources, harvesting rights, (such as hunting, trapping and fishing), management rights, economic development rights, and self-government rights.

There are also large parts of Canada, including most of British Columbia and a significant portion of Québec, where no treaty has been signed. Some of these territories are currently the subject of comprehensive land claims negotiations.

Aboriginal rights are protected, but they are not absolute.

Limits to Aboriginal and treaty rights

Aboriginal rights are protected, but they are not absolute. They may be infringed, but the infringement must be justified. The constitutional protection of these rights seeks to reconcile Canada's prior occupation by Aboriginal peoples with the assertion of sovereignty by the Crown. In effecting this reconciliation, the Crown must balance competing interests and act honourably. The "Crown" in this context refers to the branch of government contemplating action that may affect Aboriginal people.

ESTABLISHED ABORIGINAL RIGHTS AND TITLE

Established Aboriginal rights and title are considered to be infringed where the action would limit the right-holder's ability to exercise the rights. An infringing action is one that is unreasonable, imposes undue hardship or denies the right-holders of their preferred means of exercising the right.

Justifying an infringement of constitutionally-protected Aboriginal rights requires the federal or provincial government, as the case may be, to demonstrate that it has a compelling and substantial legislative objective, and that the action is consistent with the Crown's fiduciary duty toward Aboriginal peoples. The Crown must show that it acted honourably by consulting with and, where appropriate, accommodating the affected Aboriginal group.

Whether an objective is compelling and substantial is determined on a case-by-case basis, and involves balancing the benefits to the broader public with detrimental effects on Aboriginal and treaty rights. Some examples of compelling and substantial objectives include, but are not limited to, economic development initiatives such as agriculture, forestry, mining and building infrastructure.

The Crown must also show that it has met its fiduciary obligation to the affected Aboriginal groups. To do this, the Crown must give Aboriginal rights priority over other interests, and it must show that the proposed infringement goes no further than necessary to further its objective.

TREATY RIGHTS

Many treaties, including the Numbered Treaties, expressly provide that the Crown may "take up" unoccupied treaty lands for development purposes. However, not every taking up under a treaty is an infringement that needs to be justified. When the Crown exercises its right to take up treaty lands, it has a duty to act honourably by consulting with the affected Aboriginal group and accommodating its interests. If, after the taking up, there is no meaningful treaty right (e.g., to hunt, fish or trap) left for the Aboriginal group to exercise, this constitutes an infringement that must be justified.

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The Supreme Court of Canada has identified modern treaties as playing a critical role in fostering reconciliation.

Modern treaties sometimes address questions of infringement and consultation expressly. Those agreements may include or exclude a duty of consultation in different circumstances. In other circumstances, the agreement may be silent on the issue of consultation. Courts will generally uphold the wording in these agreements rather than rely on the common law duty to consult. However, because the Crown cannot contract out of its duty to act honourably, additional consultation may be necessary in some cases. The Supreme Court of Canada has identified modern treaties as playing a critical role in fostering reconciliation, and has affirmed the importance of courts in safeguarding the rights enshrined within such agreements.

Duty to consult and, if appropriate, accommodate Aboriginal peoples

Where the Crown has real or constructive knowledge of the existence of a potential Aboriginal right or title, and contemplates conduct that might adversely affect this asserted but as yet unproven right or title, it has a constitutional duty to consult the Aboriginal group and accommodate it, where appropriate.

The duty to consult can arise in various situations, including the issuance by governmental departments, in application of their statutory powers, of permits or authorizations allowing third parties to proceed with specific activities affecting the land and resources.

The duty to consult can also be triggered when the government engages in any conduct having an immediate impact on land and resources (e.g., as proponent of a land development project), or when it makes "strategic, higher level" decisions or structural changes to the management of a resource that may have an impact on Aboriginal claims and rights (e.g., approval of forest management plans, approval of license transfers, issuance of certificates of public convenience and necessity, etc.).

The specific content of this duty varies with the particular circumstances of each situation. It depends on the strength of the case supporting the asserted Aboriginal right or title, and on the severity of the adverse effects the contemplated conduct might have upon the right or title claimed. In the case of weak claims or minor anticipated impacts, the obligation might be as simple as giving notice to the Aboriginal group, disclosing relevant information and discussing concerns. However, where the claims are stronger and the anticipated impacts are serious, the Crown may have to engage in deeper consultation. This may entail:

- Providing sufficient time and appropriate funding to the Aboriginal group to review the project features and their impacts;
- Providing an opportunity to make submissions for consideration;
- Allowing formal participation in the decision-making process; or
- Giving written reasons to show that Aboriginal concerns were considered and duly taken into account.

In certain circumstances, the duty to consult may give rise to a separate "duty to accommodate", where consultations suggest that modifications are required to the Crown's contemplated actions. This latter duty may not be triggered in every case. When it arises, however, the Crown's duty to accommodate entails a good-faith process of balancing the interests identified by the Aboriginal group with other societal interests to find a reasonable compromise.

Although the ultimate legal duty to consult and accommodate rests with the Crown, the Crown can also delegate procedural aspects of consultation to industry proponents. Several provincial and territorial governments in Canada have adopted Aboriginal consultation guidelines setting out how they intend to fulfil their duty to consult and what role they expect project proponents to play in that regard (often a major one). Governments may also rely on general environmental assessment processes or regulatory processes to fulfil their duty to consult, provided that the regulatory agency's statutory powers enable it to provide an appropriate level of consultation in the particular circumstances. Regulatory processes are often well suited to address mitigation, avoidance and environmental issues, given the extensive expertise of the participants. The Supreme Court of Canada has indicated that the Crown, to fulfill its duty to consult, should always be clear to affected groups when it intends to rely on a regulatory process. Where the regulatory process relied upon is not constitutionally sufficient, the Crown bears the responsibility to take further measures.

As confirmed by Courts, the duty to consult has some limits. First, the duty to consult does not confer any veto or require the government to reach any agreement with the Aboriginal group. Rather than guaranteeing any particular outcome, it obliges the government to consider Aboriginal rights in good faith with a view to maintaining the "honour of the Crown", and effecting meaningful reconciliation between the Crown and the Aboriginal peoples. Second, it requires the Aboriginal group not to frustrate the Crown's reasonable and good faith attempts, or take unreasonable positions. Third, there is no duty to consult if the adverse impacts on the asserted Aboriginal right or title are merely

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The duty to consult does not confer any veto or require the government to reach any agreement with the Aboriginal group.

"speculative", or if the contemplated Crown conduct would not cause any novel adverse effects. Finally, the duty can only be owed to an Aboriginal group: dissenting members of such a group cannot, without the group's political authorization, assert that a separate duty is owed to them. Finally, the duty to consult is not triggered by the legislative process.

Where the Crown fails to comply with its duty to consult, the affected Aboriginal group can institute legal proceedings and seek appropriate remedies. Such remedies will vary with the situation and may include:

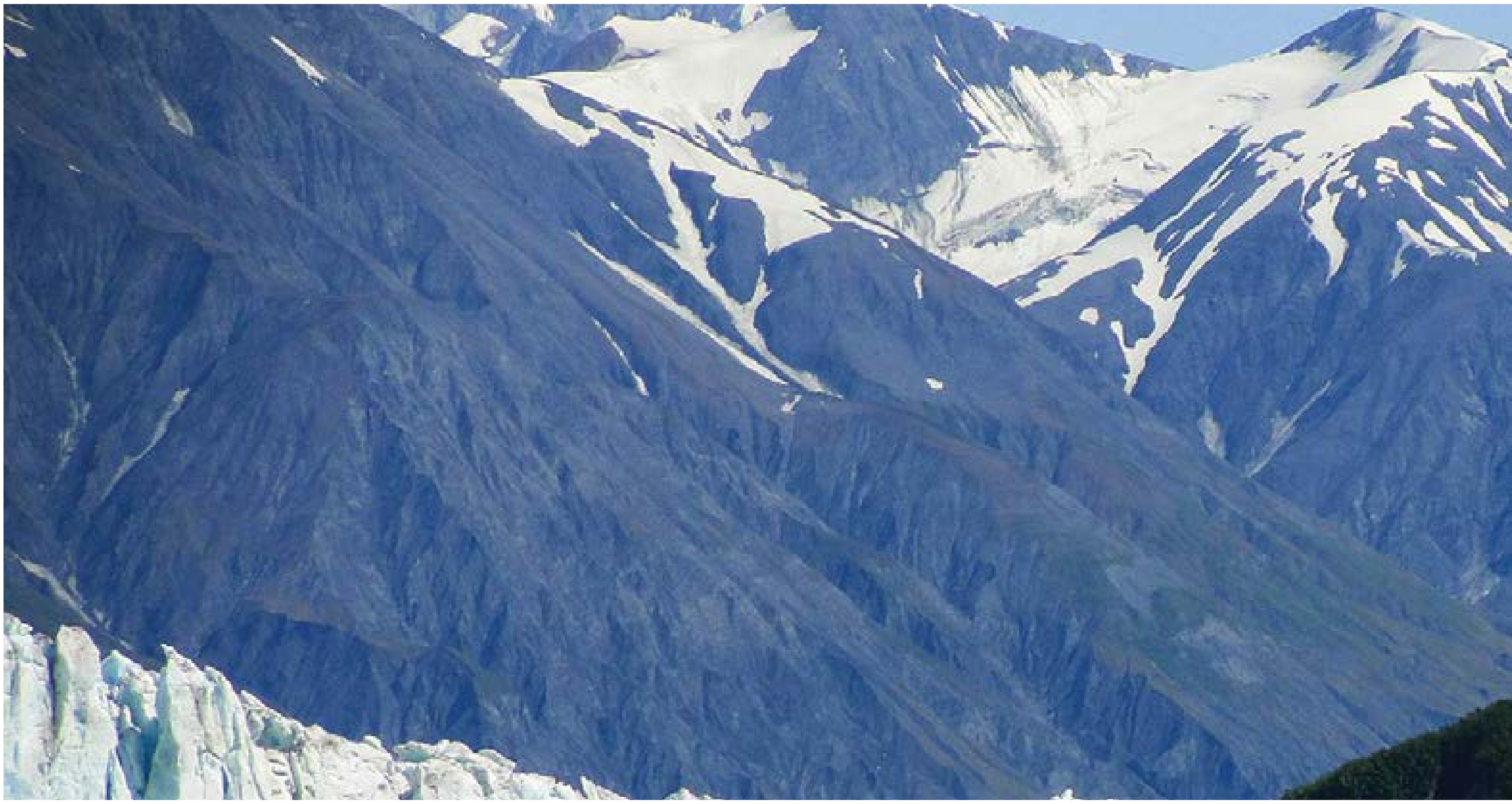
- A judicial declaration confirming the Crown's failure to consult Aboriginal peoples;
- A quashing of the impugned governmental authorization; and
- An order to carry out additional consultation prior to proceeding further with the proposed government conduct, damages, etc.

While these remedies would essentially be directed towards the government(s), they may have significant indirect consequences on project proponents. It is therefore important that project proponents assist the Crown in discharging its duty to consult.

Building relationships with Aboriginal communities

One of the most challenging aspects of new project development is reconciling Aboriginal and treaty rights, whether established or asserted, with the use and occupation of public lands necessary to conduct a project's operations. Governments involved in authorizing these operations prefer to see industry proponents build respectful working relationships with potentially affected Aboriginal groups, rather than the parties having to resort to courts. So does the Canadian judiciary. This form of reconciliation takes place at a more practical level in the form of engagement and information-sharing.

A healthy working relationship with the affected Aboriginal group often leads to the negotiation of mutually beneficial agreements, including "cooperation agreements" and "impacts and benefits agreements." These negotiations aim to reconcile the interests of the project proponent and those of Aboriginal groups by addressing the environmental, socio-economic and cultural impacts on Aboriginal groups that are either located nearby or impacted by a particular project.

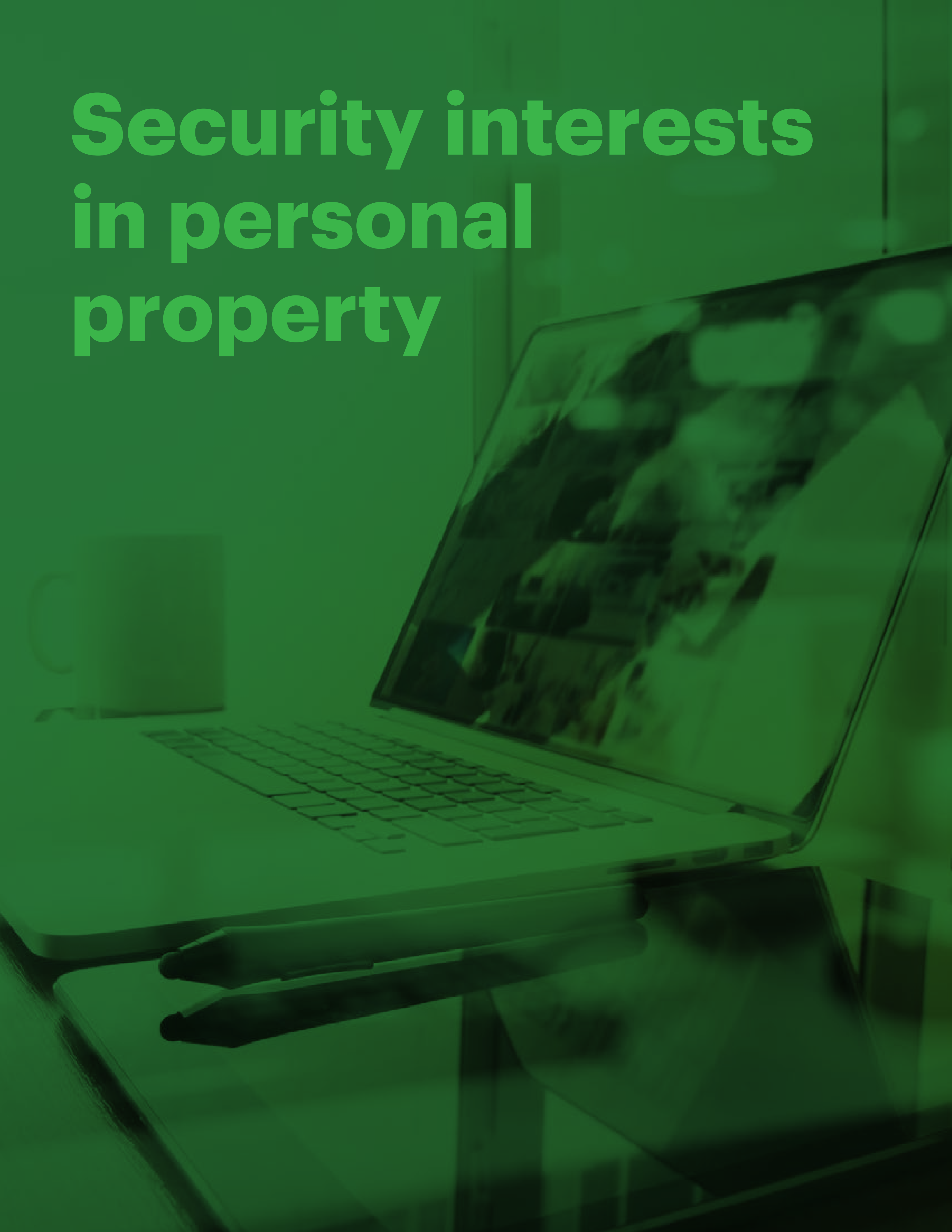


Some of the modern treaties provide for the negotiations of these types of agreements. Engaging Aboriginal groups and entering into agreements is also a sound business practice that can lead to timely, cost-effective solutions for proponents, and form the basis of a solid relationship with local Aboriginal communities. Many Aboriginal groups are in favour of development on their lands and are eager to participate. Engaging potentially affected Aboriginal communities at the early stages may give proponents a better understanding of community concerns, as well as how the communities wish to benefit from the project. In addition, proponents will know where there is flexibility in a development plan and are, therefore, in the best position to address concerns or, where necessary, revise a proposed project.

Interactions with Aboriginal communities can be complex in both law and fact. It is important to recognize that the protections and views held by Aboriginal groups can vary considerably throughout Canada, depending on the nature of the proposed development, and the nature and scope of the rights claimed. As a result, engaging Aboriginal groups must be approached on a case-by-case basis to achieve a tailor-made solution.

“Many Aboriginal groups are in favour of development on their lands and are eager to participate.

Security interests in personal property



In Canada, the power over the creation, perfection and priority of security interests in personal property primarily rests with the individual provinces. This right arises from the provinces' constitutional authority to legislate in respect of property and civil rights.

There are two basic regimes in Canada under which the provinces maintain and regulate the protection of security interests in personal property:

- In the province of Québec, a civil law jurisdiction, a security interest may be taken over personal property under the *Civil Code of Québec* by way of a "hypothec", which must be published or registered in order for the secured party's interests to be effective as against third parties; and
- In all other provinces in Canada, each such province has enacted a *Personal Property Security Act* (each referred to as a PPSA). Each PPSA provides defined rules with respect to creating, perfecting, prioritizing and enforcing security interests granted by debtors in personal property to secured parties. Each province maintains a personal property registry, a computer-based registration database that records and maintains security interests of creditors in various collateral of debtors.

Security regimes

PPSA JURISDICTIONS

All of Canada's provinces and territories, other than Québec, have enacted specific *Personal Property Security Acts* (PPSA). Generally, the PPSA in each of these jurisdictions is comparable in terms of form and substance. Modelled after the original Article 9 of the US *Uniform Commercial Code*, the PPSAs provide defined rules with respect to creating, perfecting, prioritizing and enforcing all forms of security interests granted by debtors against personal property they have an interest in to creditors.

Moreover, each PPSA uses a computer-based registration regime wherein a central registry database records and maintains notice of security interests granted in favour of creditors by debtors. In this way, the personal property registry of each province provides notice of security interests to people who deal with debtors and their personal property. With specific exceptions, priority is measured by the order of registration. This chapter focuses primarily on security taken in PPSA jurisdictions.

CIVIL CODE OF QUÉBEC

The Province of Québec, a civil law jurisdiction, permits security to be taken under the *Civil Code of Québec* (CCQ). The CCQ came into force in 1994 and requires security to be taken over "movable" or personal property by way of a hypothec. The CCQ requires all hypothecs to be published or registered in order for the secured party's interests to be effective as against, or opposable to, third parties. Although the terminology, concepts and procedures are somewhat different, the Québec regime operates in a manner that is in many respects similar to the personal property security systems in place in other jurisdictions.

OTHER RELEVANT LEGISLATION

There is other legislation applicable in all provinces that may also be relevant to lenders and other creditors. For example, fraudulent preference legislation deals with assignments and other transfers intended to defeat, hinder, or delay creditors; repairers' and storers' lien legislation gives protection to repairers and storers of personal property; and consumer protection legislation may regulate borrowing charges and disclosure.

Bankruptcy legislation is a federal responsibility that expressly recognizes the rights of secured creditors under provincial laws, but may alter unsecured creditors' priorities from their pre-bankruptcy status. Bankruptcy legislation also sets out provisions regarding preferential or reviewable transactions, and the ability of a trustee or affected parties to reverse such transactions.

BANK ACT SECURITY

In addition to using the various types of security available to lenders generally, Canadian chartered banks have a special form of security they can take under the *Bank Act* (Canada). This form of security is also available to Canadian branch operations of foreign banks licensed to carry on business in Canada under the *Bank Act*.

Canadian banks may only take *Bank Act* security from specific classes of borrowers, such as wholesale and retail purchasers or shippers of, and dealers in, farm, mine, and sea products and manufacturers. This type of security is available to charge the borrowers' inventory and certain other property, such as receivables generated from the sale of their products. Canadian banks are also able to obtain special security rights under the *Bank Act* with respect to loans and advances made on the security of hydrocarbons and minerals, a form of security that may be useful in the oil and gas, and mining sectors. Security taken in this context covers related rights, such as licenses or permits, and equipment used in the extraction, mining, production or storing of such hydrocarbons or minerals.

One of the big advantages the *Bank Act* security offers is the ease with which the security can be taken and perfected throughout the entire country.

Types of security

The type of security taken in any given set of circumstances will depend upon a number of factors, often relating to the specific debtor, the nature of its assets, the structure of the transaction or any institutions imposed by law. Personal property security can be taken over items specifically identified in the security document, or can cover all present and future personal property of a debtor. Types of security agreements include, but are not limited to:

- **General Security Agreements (GSA)**, which provide creditors with a security interest in all of a debtor's present and future personal property, including its undertaking (or business), inventory, equipment, accounts receivable and other property. While a GSA normally charges all present and after-acquired personal property, a GSA can easily be modified to be limited to (or to exclude) specific items of personal property. The equivalent of the GSA in Québec is the hypothec on a universality of present and future movable property.
- **Debentures** are frequently used to obtain security over real and personal property of debtors. Much like GSA, debentures usually include language providing for security interests in present and after-acquired property of the debtor. However, unlike GSA, debentures are in a form that can readily be modified to be registered in real property title registry offices. In Québec, security over real property (or immovable property) is taken by way of a notarial hypothec over immovable property.
- **Pledges** require debtors to deliver specific assets to the creditor, such as securities (shares, bonds and other securities), or negotiable instruments, such as promissory notes. The creditor will ensure that the items pledged are negotiable and properly endorsed or accompanied by any necessary power of attorney to transfer. In the context of a pledge of securities, the creditor will normally retain possession of the pledged items for as long as the security is required, to the extent that the pledged securities are certificated.

Chattel mortgages, conditional sales contracts and leases are examples of specific security agreements.

In 2007, the *Securities Transfer Act* (Ontario) (the STA) came into effect in Ontario. Since then, every province and territory in Canada, other than Prince Edward Island, has adopted similar legislation. The STA is modeled after Article 8 of the *Uniform Commercial Code* (the UCC). The STA has modernized commercial practices regarding pledging of investment collateral as security for loan obligations. Although there are differences between the STA and the UCC, one of the main objectives of the STA was to make the laws regarding the pledging of investment collateral similar to comparable laws in the US, and in other countries with advanced legislation regarding a pledging of investment collateral. At the same time as the implementation of the STA in Ontario and other provinces, various amendments were made to the PPSA in applicable provinces, so that the PPSA in such provinces would complement the terms and concepts implemented by the STA.

THE PPSA: APPLICATION

Subject to specific exclusions, PPSAs apply to every transaction that, in substance, creates a security interest. A transaction will be within the scope of the PPSAs if it meets certain requirements: the transaction must create a security interest or an interest in personal property and, in most provinces, the grant of a security interest secures the payment or performance of an obligation. The substance, not the form of the transaction, will determine whether a PPSA applies. For example, the PPSA in most Canadian provinces provides that the PPSA will apply to a personal property lease for a term of more than one year. The definition of debtor in many PPSAs also includes a person who owns or has rights in collateral, and makes the collateral available as security without assuming any obligation for the principal borrower's obligations.

PERFECTION AND ATTACHMENT OF SECURITY INTERESTS

Each PPSA requires the "attachment" of a security interest to the collateral, in order for a security interest to be enforceable against a third party. There are specific provisions in the PPSAs that enumerate the requirements of attachment and determine when attachment occurs. Once a security interest has attached, a creditor must ensure that its security interest is perfected, either by registration of a financing statement or, with certain types of collateral, by obtaining possession or control of the collateral. Similarly, in Québec, security by way of a hypothec is perfected:

- By publishing (i.e. filing) a notice at the office of the Register of Personal and Movable Real Rights maintained in the Province of Québec, in the case of security over movable property without possession;
- By publishing the hypothec at the land register in the jurisdiction where the immovable property is located, in the case of security over immovable property; or
- By possession of the collateral, in the case of movable property that is tangible (i.e. "corporeal") or representative in nature, as the case may be.

PERSONAL PROPERTY SECURITY REGISTRATION (PPSR)

Each PPSA jurisdiction maintains its own separate and distinct personal property registry where registrations (and searches) may be made in each province or territory in which the borrower has assets, or in which a debtor is "located". Note, most PPSAs means the chief executive office location of the debtor, and in Québec means where the domicile (i.e. head office) is located.

The Ontario PPSA has recently been amended so that the location of a debtor is now the jurisdiction of organization of the debtor (unless it is a federally incorporated corporation, in which case the location is the registered office or head office of the debtor, as stated in its constating documents or by-laws).

A financing statement is registered in respect of the security agreement, and the information is then recorded and maintained in a database, which is available for searching by potential lenders, other creditors or purchasers. Strict rules govern the contents of a financing statement. Secured creditors are also required in a timely fashion to correct any errors in a registration, or file notices of changes to the essential elements of the registration, failing which the secured creditor's security interest may be defeated by a competing creditor with an interest in the same collateral. The registry system in Québec is very similar to the PPSA jurisdictions in this regard.

PRIORITIES WITHIN THE PPSAS

The general rule under each PPSA is that the "first to perfect" will usually have priority over other security interests. This "first to perfect" rule, however, is subject to specific exceptions and super-priority for certain situations and types of collateral in specified circumstances. For example a "purchase-money security interest" (PMSI) has such super-priority status, as does, in the majority of provinces, perfection of a security interest by "control" in investment collateral such as securities.

A PMSI is a security interest taken or reserved in collateral to secure payment of all or part of its purchase price, or a security interest taken by a creditor who gives value for the purpose of enabling the debtor to acquire rights in or to the collateral, to the extent that the value is applied to acquire those rights by the debtor. If a PMSI creditor complies with all the prerequisites for perfecting a PMSI set out in the applicable PPSA, the creditor will achieve priority in such collateral over any other security interest that other creditors may have in the same collateral granted by the same debtor, regardless of the order of registration or the "first to perfect" rule. PMSIs, however, may not have priority over *Bank Act* security. The "first to perfect" rule is also applicable in Québec. Similar to the PPSAs, the CCQ also provides for certain exceptions to the rule, such as the rules regarding how security over monetary claims (for example, the funds contained in a bank account) is perfected.

RIGHTS AND REMEDIES UPON DEFAULT

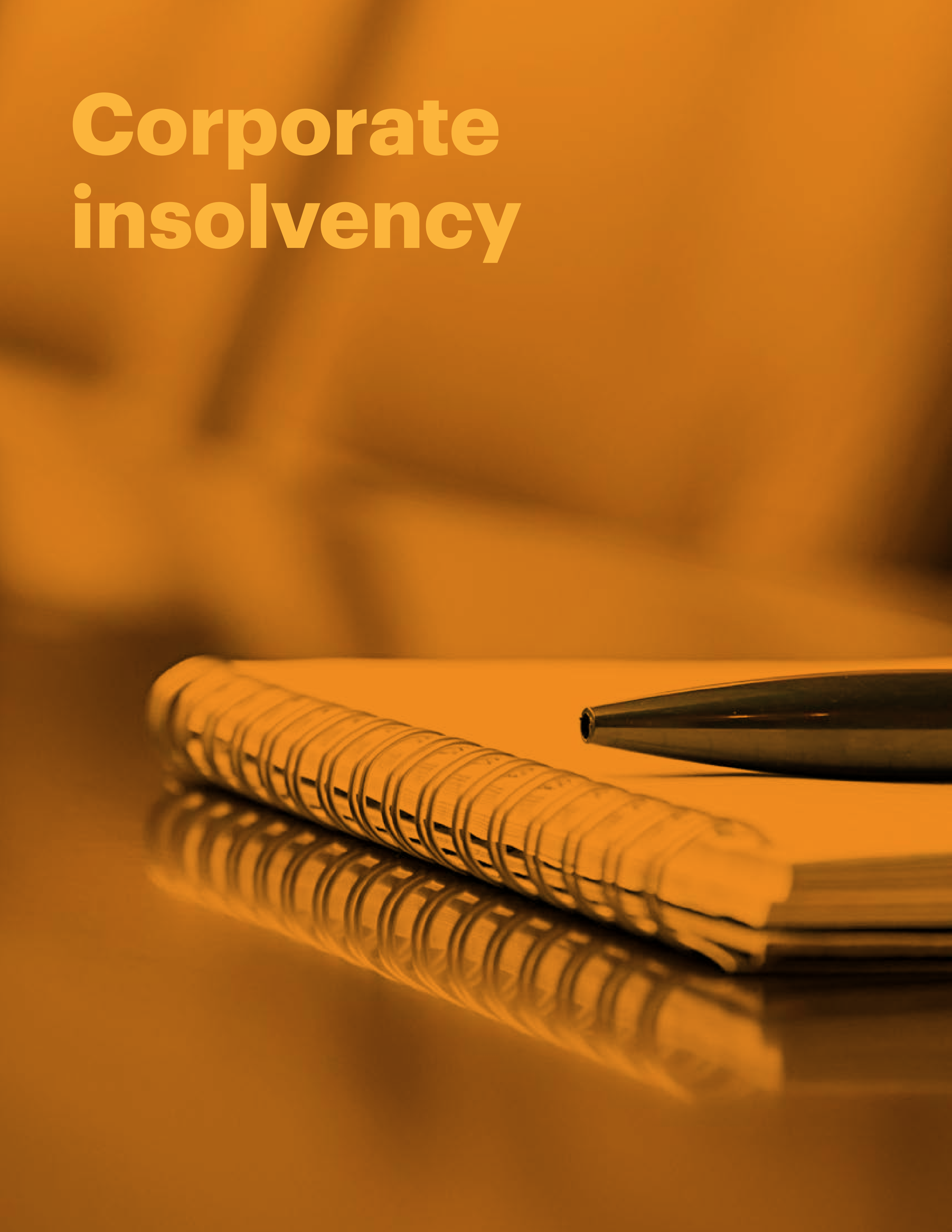
The PPSAs and the CCQ also contain comprehensive rules dealing with rights and remedies of creditors following default by their debtors. The rights of a secured party include, but are not limited to, the right to take possession of the collateral, the right to retain the collateral or the right to dispose of the collateral.

The PPSAs also enumerate rights and remedies of the debtor. These include, but are not limited to, the right to redeem the collateral or a right to reinstate the security agreement, and the right to receive notice of the intentions of the creditor(s) upon default.

Each PPSA also specifies that, in addition to the rights and remedies enumerated in the PPSA, the principles of law and equity continue to apply, unless they are inconsistent with the express provisions of the legislation.

The PPSAs have been in place in several jurisdictions in Canada for at least 25 years. Now that all jurisdictions, with the exception of Québec, are using essentially the same statutory provisions and principles, there is considerably more certainty and consistency in commercial transactions. Despite the differences in terminology, practices and procedures between Québec and the PPSA provinces, in most cases, substantially the same or similar rights and remedies are available to creditors in Québec, as those that apply in PPSA jurisdictions.

Corporate insolvency



The primary federal legislation governing corporate insolvency in Canada is the *Bankruptcy and Insolvency Act* (BIA), and the *Companies' Creditors Arrangements Act* (CCAA). As Canada is a federation, both federal and provincial statutes may be relevant to corporate insolvencies.

Under the *Constitution Act*, provincial governments have jurisdiction over property and civil rights. As such, they have enacted statutes to deal with fraudulent conveyances and preferences, and the perfection of security interests in property. All of these statutes affect bankruptcy and insolvency in Canada, which is federally regulated.

Notwithstanding this jurisdiction, provincial statutes often complement federal insolvency legislation. For instance, corporate statutes of the provinces provide for the dissolution or winding-up of the affairs of companies having provincial objects, as well as the distribution of corporate assets. Yet, these provisions are not available to corporations in circumstances of insolvency. If a corporation is insolvent, the proper mechanism for the distribution of its assets is through federal insolvency legislation. Whenever there is conflict between federal and provincial enactments, federal legislation will be paramount.

There are three main types of insolvency proceedings in Canada:

1. Proceedings under the CCAA;
2. The appointment of a receiver under provincial law and/or under the BIA; and
3. Proceedings under the BIA.

Insolvency

A corporation may be insolvent without being bankrupt. By legal definition, a company is "insolvent" if:

- It is unable to meet its obligations as they generally become due;
- It ceases to pay its current obligations as they generally become due in the ordinary course of business; or
- The aggregate of its property is not sufficient to enable payment of all of its obligations if disposed of at a fairly conducted sale under legal process.

Arrangements under the *Companies' Creditors Arrangement Act*

A corporate debtor can seek protection from its creditors by making an application under the CCAA. The CCAA is not a detailed code like the BIA, but is a relatively brief and flexible statute that is driven by court orders. Because of its flexibility, the CCAA has been used in most complex insolvencies for large Canadian corporations.

In order to qualify for protection under the CCAA, the debtor corporation must be insolvent and have at least $5 million of indebtedness (secured/unsecured). When a court grants the debtor corporation protection under the CCAA, the court also appoints a monitor to oversee the operations of the corporation during CCAA protection and to report to the court on the corporation's activities and any major events. The initial court order in a CCAA proceeding typically establishes a stay of proceedings against the debtor in order to maintain the status quo while the debtor formulates a restructuring plan. The CCAA may also be used to facilitate the sale of a debtor company's assets. However, its primary and overriding purpose is to allow a debtor company to propose a plan of arrangement or compromise to its creditors. All affected classes of creditors must approve any plan proposed by a debtor to its creditors by a vote of 50 percent in number and two-thirds in value of the indebtedness. The plan must also be sanctioned by the court.

Receiverships

Receivership is a remedy primarily used by secured creditors to recover collateral over which they have been granted a security interest by the debtor. In the common law provinces of Canada (i.e., excluding Québec), there are two types of receivers:

1. **Privately-appointed receivers**; and
2. **Court-appointed receivers**.

A privately appointed receiver is appointed by a secured creditor pursuant to an appointment letter, in accordance with the contractual rights granted to the secured creditor by the debtor in a security agreement that provides for the appointment of a receiver. A privately appointed receiver is deemed to be the agent of the secured creditor for realizing the collateral secured under the security agreement executed by the debtor, and an agent of the debtor for operating the business. A privately appointed receiver has the powers granted to it under the security agreement.

A court-appointed receiver is appointed pursuant to a court application made, generally, by a secured creditor, under provincial law where it is "just and equitable" to do so, or under the BIA. As court officers, receivers are required to act in a commercially reasonable fashion and in good faith. A court-appointed receiver has only those powers granted to it pursuant to the court order under which it was appointed. Court-appointed receivers may seek directions from the court with respect to issues such as sales of assets.

Receivership and bankruptcy may occur simultaneously.

Proceedings under the *Bankruptcy and Insolvency Act*

INVOLUNTARY AND VOLUNTARY BANKRUPTCY

Creditors may force a company into bankruptcy by filing a "bankruptcy application" with the court. To be successful, the creditor must be owed CA$1,000 or more on an unsecured basis and the debtor must have committed an "act of bankruptcy" within the preceding six months. Once satisfied that the debtor should be adjudged bankrupt, the court may issue a "bankruptcy order". However, the court retains the discretion not to grant a bankruptcy order if the motivation of the applicant creditor is found to be improper.

Alternatively, an insolvent company may voluntarily assign its property to a trustee in bankruptcy for the general benefit of its creditors. The board of directors of the debtor company must resolve to assign the company into bankruptcy, complete the prescribed form and file it along with the directors' resolutions with the office of the "Official Receiver," which is part of the federal government.

ADMINISTRATION OF THE BANKRUPTCY

Once in bankruptcy, a debtor ceases to have the capacity to dispose of or otherwise deal with its property. Subject to the rights of secured creditors, the property of the debtor vests solely in the trustee in bankruptcy (the Trustee) who is charged with the administration of the estate.

The primary responsibility of the Trustee is to deal with the property of the bankrupt. The Trustee must immediately take possession of all books, records and other documents of the bankrupt, to create an inventory of property.

At the meeting of creditors, the Trustee advises the creditors on the details of the causes of the bankruptcy, the assets of the bankrupt and the claims of creditors. The creditors who have filed a valid proof of claim with the Trustee prior to the meeting, may vote whether to confirm or replace the Trustee and appoint inspectors of the bankruptcy estate (the Inspectors), who instruct the Trustee in the administration of the estate on behalf of the general body of creditors.

With few exceptions, all of the property of the bankrupt at the date of the bankruptcy, or that may be acquired before a discharge from bankruptcy, is divisible among its creditors. Generally, the Trustee may sell the property of the bankrupt or, more rarely, lease property. A Trustee is also permitted to carry on the business of the bankrupt, bring legal proceedings, retain a solicitor, borrow money, compromise claims made against the estate, and divide and distribute property to the creditors. However, to do any of these tasks, the Trustee must first obtain the permission of the Inspectors or the court.

In order to participate in the administration of the bankruptcy estate and to receive payment of a dividend from the estate, a creditor must file a proof of claim with the Trustee in the form prescribed by the BIA. Subject to appeal to the court, the Trustee may disallow any claim in whole or in part. If the claim is approved, that creditor will share in the recovery from any realization on the property of the bankrupt. A scheme of distribution of funds realized from the disposition of the property of the bankrupt is set out in the BIA.

SCHEME OF DISTRIBUTION

The BIA allows very little flexibility in the distribution of any proceeds from the sale of assets of the bankrupt. Certain priority claims must first be dealt with in both a bankruptcy and a receivership (as discussed below). Subject to those priority claims, with limited exceptions, secured creditors are unaffected by a bankruptcy and are permitted to enforce their security over the assets of the bankrupt, once the Trustee and its counsel review the security documentation held by the secured creditor to ensure it is valid and enforceable. The BIA provides that some kinds of unsecured creditors are given priority in payment. These preferred creditors include the fees of the Trustee and its counsel, and some claims for rent. After preferred claims are paid in full, all other unsecured claims provable in bankruptcy are paid proportionately to the amount of the indebtedness.

PRIORITY CLAIMS

There are a number of claims in both a bankruptcy and a receivership, which have priority over all other creditors of a debtor company:

- Governmental claims against the debtor for certain tax liabilities;
- Employee claims for unpaid wages related to services rendered in the six months preceding the bankruptcy/receivership, up to a maximum amount of CA$2,000 per employee;
- Claims relating to unpaid employee pension plan contributions and the "normal" employer pension contributions; and
- Claims of unpaid suppliers to repossess all goods that they have delivered to a debtor within the 30 days prior to the bankruptcy or receivership, and for which they have not received full payment.

Unpaid suppliers must give notice in a prescribed form to the Trustee or Receiver within 15 days of the commencement of the bankruptcy or receivership in order to qualify for this remedy. As well, the goods must:

- Be in the possession of the Receiver or Trustee;
- Remain identifiable,
- Not be sold or subject to a sale agreement with an arm's length purchaser; and
- Not have been altered from the state in which they were shipped.

PROPOSALS

A business debtor may also gain protection from creditors if it appears likely that it may create a viable proposal to deal with the debts. To do so, the company may file with the Official Receiver and the court a "Notice of Intention to Make a Proposal." Upon filing the notice, the debtor is given a 30-day stay against all proceedings by unsecured creditors and, in certain circumstances, secured creditors. The court may grant extensions on this stay for periods of up to 45 days at a time, so long as there is no material prejudice to creditors.

These extensions, however, cannot exceed a total period of five months following the initial 30-day stay. This allows the debtor to adequately prepare a proposal for its creditors. The notice of intention names a Trustee to monitor the affairs of the debtor, and prepare a projected cash flow statement upon which the creditors must ultimately base their decision whether or not to accept the proposal.

Within 21 days of filing the proposal, the Trustee must call a meeting of all creditors. At this time, a further stay is imposed on all creditors to whom the proposal is made. A proposal is deemed accepted by creditors if all classes of creditors vote in favor of its acceptance by a majority in numbers holding two-thirds of the indebtedness for such class of creditors. Moreover, one class of creditors voting against the proposal results in a deemed assignment into bankruptcy. On deemed assignment, the Trustee must file a report of the deemed assignment (in the prescribed form) with the Official Receiver. Within five days of the creditors voting in favor of a proposal, the Trustee must apply to the court for a hearing of the application. In the absence of approval by the court, a proposal will not become binding on the creditors. If a proposal is accepted by the requisite number of creditors and approved by the court, then those creditors affected by it are bound by its terms, whether or not they voted in favor of the proposal.

Ultimately, the court has the final say in the approval of a proposal. Even in circumstances where the creditors have approved a proposal, if the court is not satisfied that the terms of the proposal are for the benefit of all creditors, the court may still refuse to approve it.

REVIEWABLE TRANSACTIONS

The BIA gives the Trustee the right to examine certain transactions by a debtor prior to bankruptcy, and to set these transactions aside in certain circumstances. Insolvency legislation in Canada have recently been amended to modify the reviewable transaction remedies, and to make these remedies available in proceedings under the CCAA.

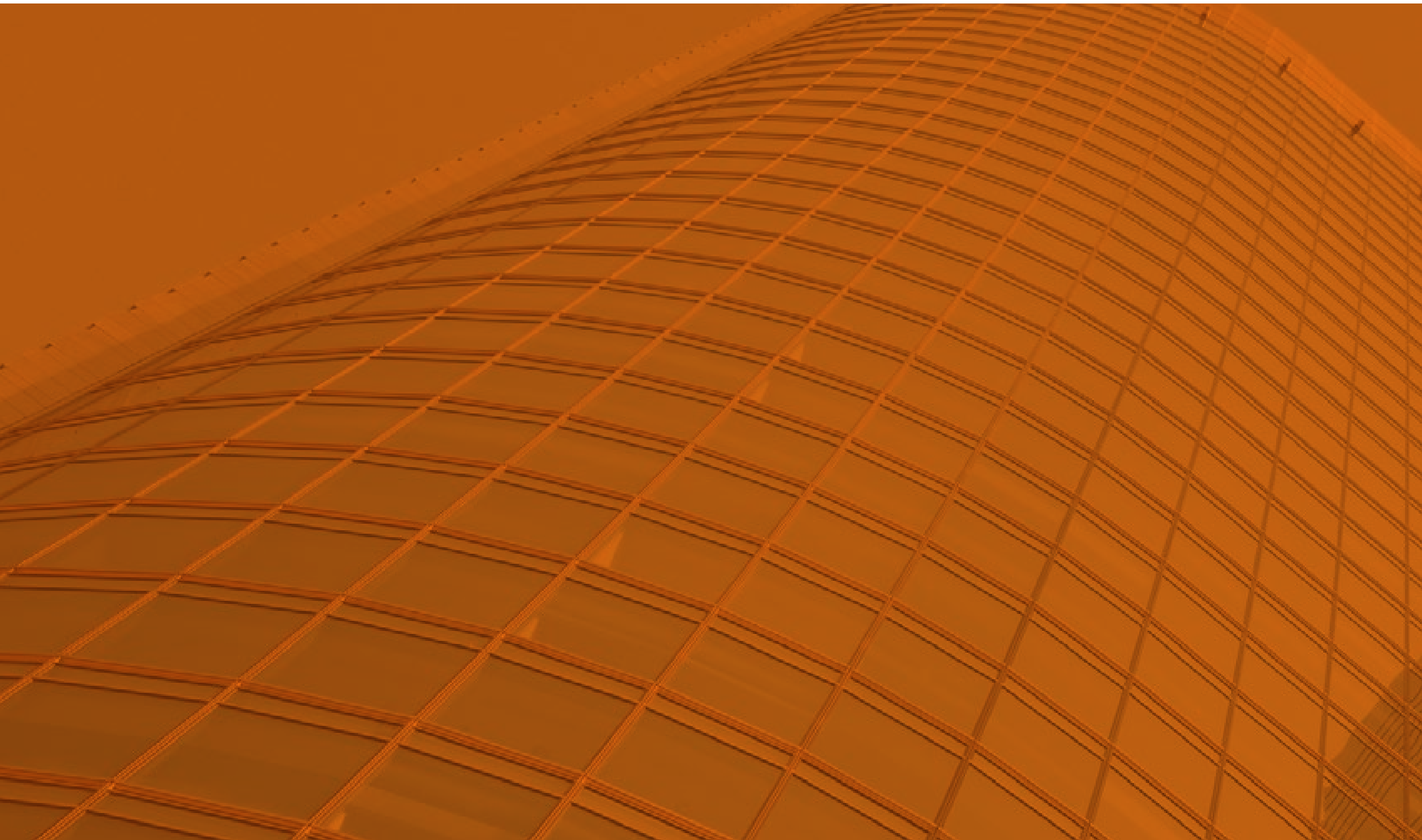
If an insolvent person prioritizes payment to one creditor over other creditors, any transfer of property or payment of money in favour of a creditor within three months of the bankruptcy may be deemed void as against the Trustee. Where the transfer or payment is in favor of a creditor who is related to the bankrupt, the review period is extended back a year prior to the date of bankruptcy.

The BIA also provides a Trustee with certain rights to attack transfers of property that were not made for adequate consideration, and seek redress against the recipient of the property or persons privy to the transaction.

In circumstances of preferences and fraudulent conveyances, provincial legislation may apply. For example, Ontario has the *Assignments and Preferences Act* and the *Fraudulent Conveyances Act*. In some instances, such legislation may provide alternatives to the provisions in the BIA. In other instances, such legislation may be the only available mechanism to effect any recovery. Generally, it is more difficult to set aside a transaction under provincial statutes than under the remedies provided for in the BIA.

The *Assignments and Preferences Act* applies to set-aside transactions made by an insolvent person or a person who "knows that he, she or it is on the eve of insolvency" with the intent to give an unjust preference to a creditor. As a result, the transaction may be declared void. The *Assignments and Preferences Act* may also catch transactions that are outside the time periods of the BIA.

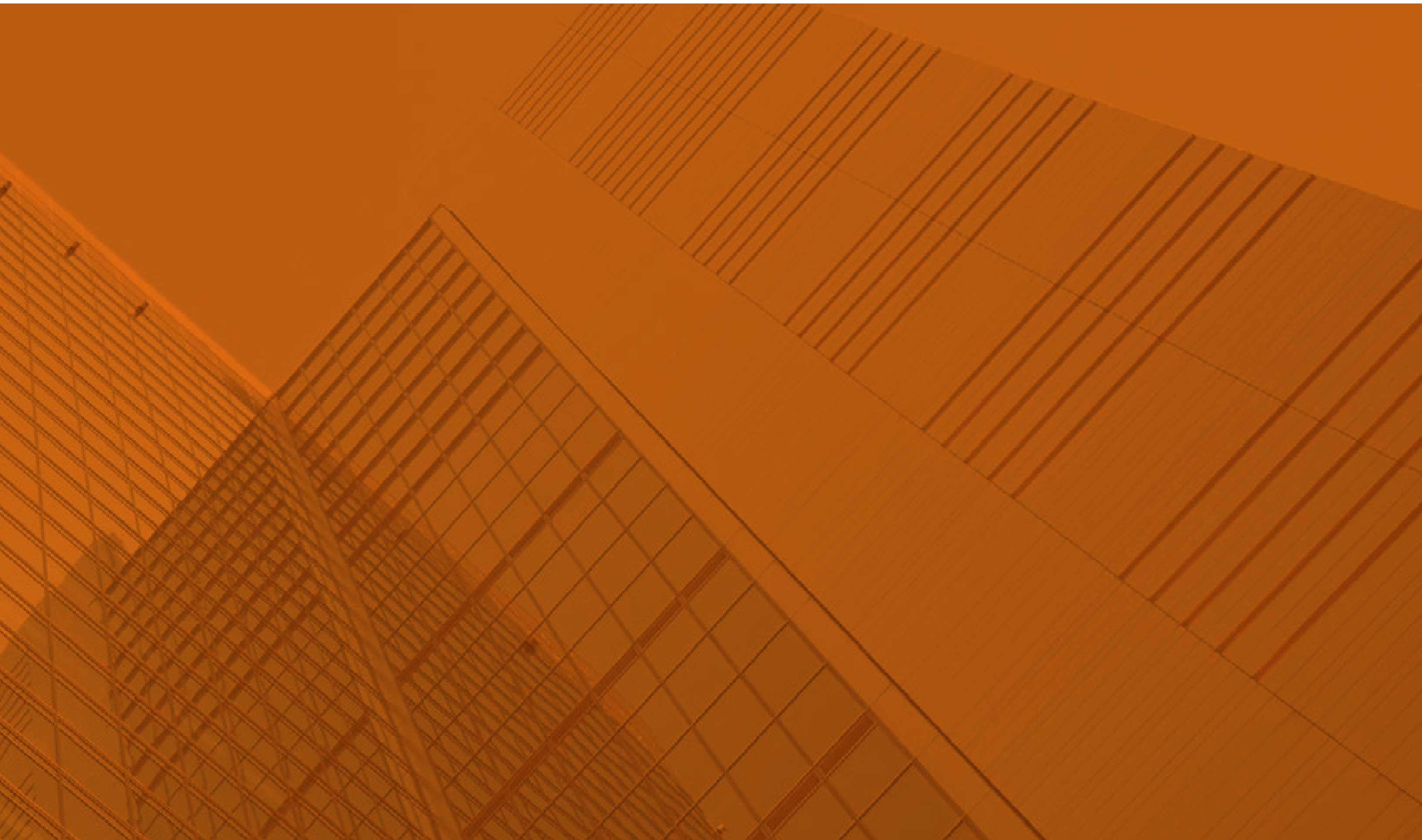
The *Fraudulent Conveyances Act* provides that every conveyance of real or personal property made with intent to defeat, hinder, delay, or defraud creditors or others, are void. Insolvency of the party transferring the assets is not a prerequisite to the application of this Act. The *Fraudulent Conveyances Act* may be available in circumstances where the provisions of the BIA would not apply.



DEEMED TRUSTS

In Canada, provincial and federal legislation may grant the government (the "Crown") priority in the distribution of a bankrupts assets during insolvency proceedings. The Crown is granted this priority by virtue of the creation of a deemed trust. Amounts collected and owed to the Crown are deemed to be held in trust until remittance. Deemed trusts do not need to be registered to grant priority, and other creditors may not know amounts held in trust prior to claims made by the Crown. Corporations must be diligent in collecting taxes, source deductions, Canada Pension Plan contributions and other amounts on behalf of the Crown and remitting them in order to avoid the effects of a deemed trust. The *Income Tax Act* and *Excise Tax Act* are important pieces of legislation to be aware of, as they grant particularly strong priorities to the Crown.

It is also important to be aware of the Crown's ability to trace assets that were at one time subject to a deemed trust into the hands of third parties, such as creditors.



Civil litigation in Canada

> **Leave to appeal to the SCC requires establishing that the appeal involves a matter of national importance or of a constitutional nature.**

The Canadian court structure

Each province and territory has a trial-level court, often called a superior court, and an appellate-level court. Most civil litigation in Canada begins in a superior court, although each province typically has a civil claims division of a provincial court with jurisdiction for lower-value claims (CA$50,000 or less). Appeals from superior courts are taken to the court of appeal of that province.

Canada also has specialized courts that are federal, rather than provincial, in scope. The Federal Court of Canada is a court of limited jurisdiction dealing primarily with intellectual property, immigration, maritime law and judicial review of the decisions and actions of federal boards, commissions and other tribunals. The Tax Court of Canada hears disputes concerning federal taxes. The Federal Court of Appeal hears appeals from both the Federal Court of Canada and the Tax Court of Canada, as well as appeals from certain specified federal tribunals, such as the National Energy Board.

The Supreme Court of Canada (SCC) is Canada's final court of appeal. It hears appeals from the appellate courts of all provinces and territories, and the Federal Court of Appeal. Ordinarily, a party wishing to appeal to the Supreme Court of Canada must apply for "leave" or permission to appeal, except in certain criminal cases. Leave to appeal to the SCC requires establishing that the appeal involves a matter of national importance or of a constitutional nature.

There are also several administrative tribunals across Canada, some federal and some provincial. Federal tribunals address, among other topics, matters related to energy, immigration and refugee, communications and transportation. Provincial tribunals address, among other topics, securities, financial services and pensions, alcohol and gaming, and provincial energy and environmental matters. Tribunals at both the provincial and federal levels deal with labour and human rights matters.

All Canadian provinces except Québec are common law jurisdictions. Québec has a civil legal system, founded on the *Civil Code of Québec*, which was originally inspired by the *Napoleonic Code* of 1804.

Jurisdiction of courts

The superior courts of provinces and territories have jurisdiction to hear claims that have a "real and substantial connection" to that province or territory. A real and substantial connection will be presumed where the defendant resides or carries on business in the province or territory, the tort at issue was committed in the province or territory, or a contract connected with the dispute was made in the province or territory. However, other factors may establish a real and substantial connection, which would permit a Canadian court to assume jurisdiction[1].

If a court has jurisdiction to hear a claim, it may nonetheless determine that a different forum is more appropriate and elect to stay proceedings in Canada on that basis.

Key considerations in civil litigation

PLEADINGS

A plaintiff formally begins litigation by serving an originating process, usually called a Statement of Claim. A Statement of Claim identifies the parties to the litigation, describes the relief being sought and the facts relied upon in support of the claim. An originating process must typically be served personally. However, personal service on a corporation may be as simple as handing the originating process to a receptionist at the business.

A defendant has a limited amount of time to respond to a Statement of Claim, but may arrange for an extension of time with the plaintiff's lawyer. A defendant will typically "tell their side of the story" in a responding pleading, usually called a Statement of Defence. A defendant has the opportunity to add other parties to the litigation in the event the defendant asserts the additional parties are responsible, in whole or in part, for the damages alleged in the plaintiff's claim. A defendant may also bring a motion to dismiss the proceeding, before filing a defence, if the claim is, on its face, legally deficient.

Usually, a defendant will accept the jurisdiction of the court, unless he or she files a motion to challenge jurisdiction.

LIMITATION PERIODS

All provinces and territories have statutes of limitation requiring a plaintiff to bring a claim within a certain time. The purpose of limitation periods is to define reasonable time limits within which a potential litigant must commence a civil proceeding. In general, if an action is not commenced within the prescribed period, the right to bring the claim will be extinguished.

Most, but not all, of the common law provinces and territories have implemented a two-year basic limitation period for claims in contract and tort, subject to discoverability of the claim. Ultimate limitation periods (not subject to discoverability of the claim) vary across jurisdictions and certain claims may not be subject to any limitation period whatsoever. Limitation periods may also apply to the enforcement of arbitral awards. Claimants—or plaintiffs—must take great care in this area.

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DISCOVERY

Discovery will typically include the document production and oral examination of a witness or witnesses for each party. Discovery may also include the inspection of property and the medical examination of a party. Each party

1 *Haaretz.com v. Goldhar 2018 SCC 28*

> Discovery will typically include the document production and oral examination of a witness or witnesses for each party.

is typically required to produce a list of documents relevant to the litigation, together with copies of the listed documents. In some provinces, parties must agree to a written discovery plan, which sets out, among other things, the intended scope of documentary and oral discovery, as well as dates for the delivery of documents. In preparing a discovery plan, parties typically must consult and have regard to The Sedona Canada Principles Addressing Electronic Discovery, developed by The Sedona Conference. The parties should also consider whether the scope of contemplated documentary production is proportional to the issues being litigated.

In addition to the disclosure of documents, parties may be entitled to question the other party under oath in an out-of-court examination. Many provinces have limits on the amount of oral discovery that can be conducted. These limits generally take the form of a maximum amount of time for oral discovery or a limit on the number of witnesses who can be questioned, absent leave of the court or party agreement. Subsequent objections during oral discovery are noted on the record and typically resolved through a motion to the court.

Discovery from non-parties is usually only available with permission of the court.

ALTERNATIVE (OR APPROPRIATE) DISPUTE RESOLUTION (ADR)

Most jurisdictions have embedded certain ADR procedures in the civil litigation process. The most common ADR procedures are negotiation, mediation and arbitration. Negotiation and mediation are often more informal and confidential processes in which information exchanged between the parties is not subsequently producible at trial. In some provinces, mediation is mandatory and must be conducted within certain time frames, or be completed before a matter can be set down for trial. Parties often agree to use arbitration as an alternative to litigation in the courts. An arbitration proceeding may either follow rules that are similar to those used in court, adopt the rules of a respected arbitration body, or proceed in an ad hoc manner. In the absence of an agreement between the parties, the arbitral tribunal determines the procedures the parties should follow. Except in limited circumstances, Canadian courts defer to the parties' contractual decisions with respect to arbitration.

> In some provinces, mediation is mandatory and must be conducted within certain time frames, or be completed before a matter can be set down for trial.

There are several Canadian arbitration bodies that handle commercial arbitrations. Parties also commonly use the processes of international institutional arbitration bodies, such as the International Chamber of Commerce.

SUMMARY JUDGMENT

With the exception of Québec, all provinces and territories feature a summary judgment mechanism in their respective rules of civil procedure that enables litigants to resolve a claim, or a portion of a claim, without a full trial. The SCC has established the following approach to summary judgment:

1. 1Without employing his or her fact-finding powers, or exercising his or her discretion to hear oral evidence, the judge must first determine if there is a genuine issue requiring a trial. No genuine issue exists if the summary judgment process provides the judge with the evidence necessary to fairly and justly determine the dispute, and if summary judgment is a timely, affordable and proportionate procedure.

2. If there appears to be a genuine issue requiring a trial, the judge must determine if the need for a trial can be avoided by hearing oral evidence or using his or her fact-finding powers. These powers are presumptively available to be exercised unless their use is contrary to the interests of justice. Summary judgment is mandatory where there is no genuine issue requiring a trial.

The SCC held there would be no genuine issue requiring a trial when "the judge is able to reach a fair and just determination on the merits on a motion for summary judgment."[2] A fair and just determination is only possible when the process:

a. Allows the judge to make findings of fact;

b. Allows the judge to apply the law to the factual scenario; and

c. Is a proportionate, expeditious and less expensive process to achieve a just determination of the matter.

Courts now consider summary judgment to be a "significant alternative model of adjudication" no longer limited to less complicated and document-driven cases.

Courts now consider summary judgment to be a "significant alternative model of adjudication" no longer limited to less complicated and document-driven cases.

Almost all civil cases are tried by a judge without a jury.

TRIAL

Almost all civil cases are tried by a judge without a jury. Jury notices may be served but are routinely struck.

Factual witnesses generally provide oral evidence at trial and are subject to direct examination, cross-examination and re-examination. In certain proceedings, the court will allow factual witnesses to give evidence in the form of a witness statement, subject to a right of cross-examination. Opinion evidence is typically permitted to be adduced only through experts, who are qualified by the court. The rules of court prescribe timelines and procedures for the advance disclosure of expert opinions that are proposed to be tendered at trial. As with fact witnesses, expert witnesses typically provide oral evidence at trial (along with their written opinion), and are subject to direct examination, cross-examination and re-examination. However, Canadian courts have differed on whether *partial* summary judgment on a claim is available: in some provinces and territories it is, and in others it is not. Unless these different approaches are resolved in the future by a decision of the SCC or by legislative changes, parties need to understand the approach taken in any particular jurisdiction.

COSTS

Canadian courts are "cost-sharing" jurisdictions. Generally speaking, a successful party is entitled to recover some or all of the costs incurred by that party from the unsuccessful party. The measure of costs payable is usually determined with reference to a tariff of costs set forth in the rules of court. Offers to settle often modify this general rule. For example, in most jurisdictions, if a plaintiff obtains a judgment that is at least as favourable as a qualifying offer to settle made prior to trial that was not accepted by the defendant, the defendant may be required to pay

2 *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 SCR 87.

an increased costs award to the plaintiff. Defendants can typically also make offer to settle with similar cost consequences.

As a general principle, costs are typically awarded on a partial indemnity basis. The amount relative to a lawyer's billable time, plus disbursements, varies based on the size and complexity of the matter, but a typical recovery would be in the order of 25-50 percent, while substantial indemnity and full indemnity costs can be awarded, they are reserved for unique circumstances involving reprehensible conduct or the failure to accept a reasonable settlement offer.

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Acquiring evidence from Canada

Canada is not a party to the Hague Evidence Convention of October 7, 1972. Therefore, a foreign request to take evidence from a witness in Canada should take the form of a written request from the foreign court, or letters rogatory. The federal and provincial evidence acts provide a procedure by which foreign requests for judicial assistance may be enforced.

Before the Canadian court grants an order to acquire evidence from a witness in Canada, the requesting (foreign) party must establish that:

1. The evidence sought is relevant;
2. The evidence sought is necessary either for the purposes of discovery or trial;
3. The evidence is not otherwise attainable;
4. The order sought is not contrary to public policy;
5. Documents sought are identified with reasonable specificity; and
6. The order sought is not unduly burdensome, bearing in mind what the relevant witnesses would be required to do and produce were the action to be tried in Canada.

Enforcement of foreign judgments

Generally, Canadian courts will enforce foreign judgments without the requirement of re-litigating the merits of the case, unless doing so would offend Canadian public policy. To be enforceable, the foreign court must have had jurisdiction based on a "real and substantial connection" to the jurisdiction in which it was rendered, the decision must be final, and the legal procedure followed must be just and fair.

Enforcement of a foreign judgment often involves starting a lawsuit in Canada to obtain an enforcement order, but certain provinces allow for a simpler registration process if the foreign judgment comes from a specified foreign jurisdiction. The SCC recently clarified that the existence of assets in the proposed jurisdiction of enforcement is not a prerequisite to bringing an action for the recognition and enforcement of a foreign judgment in Canada. Canadian courts may nonetheless elect not to assume jurisdiction in an enforcement action on the basis that there is a clearly more appropriate forum for recognizing and enforcing the judgment.

Canada is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted by the United Nations Commission on International Trade Law on June 21, 1958 .

Enforcement of foreign arbitral awards

Canada is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted by the United Nations Commission on International Trade Law on June 21, 1958 (the New York Convention). While obtaining the recognition and enforcement of foreign arbitral awards is a relatively straightforward process, due to the federal nature of Canada, consideration must be given to the province(s) or territory(ies) in which enforcement will be sought, as separate proceedings may be necessary. Typically, the commencement process requires filing an Originating Application supported by an affidavit, as well as the materials required under the New York Convention. While the grounds for refusal are very limited, care must be taken to ensure that applicable provincial or territorial limitation periods are adhered to.

Class proceedings

All Canadian provinces, with the exception of Prince Edward Island, have explicit class action legislation. Class actions require initial approval, or "certification", by the court.

In general, five criteria must be satisfied before a court will certify a proposed class action proceeding:

1. The pleadings disclose a cause of action;
2. There is an identifiable class of two or more persons;
3. The claims of the class members raise common issues;
4. A class action is the preferable procedure for resolution of the dispute; and
5. There is a valid representative plaintiff.

The SCC has confirmed that the evidentiary burden on plaintiffs at the certification stage remains relatively low.

Ontario and Québec have established funds to assist with the financing of class proceedings. In Ontario, the fund offers financial support for claimants' disbursements and indemnifies the claimants against an adverse costs award, but does not pay ongoing lawyers' fees. In Québec, the fund can assist with the payment of legal fees in addition to disbursements.

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The Communications industry in Canada

(...) various federal government entities play a role in the regulation of the communications sector in Canada (...)

Introduction

The communications industry is an important contributor to Canada's economy.

Historically, the various sectors of the communications industry were characterized by monopoly or near-monopoly supply, or were subject to highly restrictive market access conditions for policy reasons related to the preservation of Canadian identity and the protection of domestic cultural industries. Over the past 25 years, most of these have been opened up to competition. With the advent of competition, nearly all sectors have been deregulated, subject to targeted regulation to address specific policy objectives.

Meanwhile, the three main federal statutes governing the communications sector date back to at least the mid-1990s. They predate, and largely do not reflect, the shifts brought about by the Internet, over-the-top content and service delivery, new forms of interpersonal communications, or the coming age of connected machine-to-machine wireless communications systems.

As part of the Government of Canada's National Innovation Agenda (2017), on June 5, 2018, the Government of Canada appointed a panel of experts (BTLR Panel)[1]2 to study and report on 31 questions set out in the panel's Terms of Reference, related to ways in which the telecommunications, broadcasting and radiocommunication (wireless spectrum) statutes of Canada could be modernized. The final report of the BTLR Panel is due at the end of January 2020.

The particularities of the Canadian system, along with the ways in which government and regulatory actors have attempted to address the emergence of the Internet and increasing convergence under the current legislative framework, are discussed in more detail below. However, in 2020 and beyond, we can expect legislative reform and changes to the regulation of communications in Canada.

Oversight of communications sector

Under the Canadian Constitution, the regulation of wireline, and wireless telecommunications and broadcasting falls exclusively within the jurisdiction of the Parliament of Canada and the federal government. However, there is no single federal communications regulatory authority in Canada. Rather, various federal government entities play a role in the regulation of the communications sector in

1 Dentons Canada partner Monica Song is one of the experts appointed by the Minister of ISED and the Minister of Canadian Heritage to serve on the BTLR Panel. See online < https://www.ic.gc.ca/eic/site/110.nsf/eng/home >

Canada, including the Canadian Radio-television and Telecommunications Commission (Commission), the Department of Innovation, Science and Economic Development Canada (ISED), and the Department of Canadian Heritage.

The Commission is an ‘arms-length’ administrative tribunal that is responsible for regulating, supervising and administering Canada’s broadcasting and telecommunications systems pursuant to the *Broadcasting Act* and the *Telecommunications Act,* respectively. It performs legislative, administrative, quasi-judicial, investigative and consultative functions in pursuit of its mandate, and enjoys a great deal of autonomy in carrying out these functions, including the authority to establish its own procedures and enforce its own decisions.

The Commission also oversees the Commissioner for Complaints for Telecom-television Services, which mediates disputes and issues remedial orders against telecommunications service providers (and broadcast carriers) in relation to consumer complaints.

In competitive telecommunications markets, such as wireline broadband access and terrestrial mobile wireless services, the Competition Bureau is also taking on an increasingly important role in reviewing complaints, and undertaking market studies and investigations.

The Governor in Council (Cabinet of the federal government) also exercises important functions in the communications sector. ISED and Canadian Heritage are controlled by members of Cabinet, and under both the *Broadcasting Act* and the *Telecommunications Act*, Cabinet has the power to issue binding policy directions of general application on broad policy and regulatory matters to the Commission. It also has the power to set aside Commission decisions and refer them back to the Commission for further consideration.

Telecommunications

The provision of telecommunications services, such as local and long distance telecommunications services, mobile terrestrial wireless services, satellite services, voice-over-Internet-Protocol (VoIP), and Internet access services, are subject to the *Telecommunications Act*. The Act subjects telecommunications service providers that own and operate transmission facilities (telecommunications common carrier) to regulation by the Commission. This includes the requirement to file tariffs with the Commission of any rates they charge. The Commission will approve tariffs if it determines they are just and reasonable, and non-discriminatory.

The Act grants the Commission the power to regulate the rates, terms and conditions of telecommunications and interconnection services provided by carriers, and the interconnection of carrier systems. However, resellers that “resell” carrier services and facilities (non-facilities based carriers) are not directly subject to regulation by the Commission, and are not subject to foreign ownership and control requirements.

In addition, the Act requires that the Commission promote certain policy objectives in carrying out its mandate, including the maintenance of Canada’s identity and sovereignty, the provision of reliable, high

quality, accessible and affordable telecommunications services to Canadians, and Canadian ownership and control of carriers operating in Canada.

The Act provides the Commission with the power to forbear from regulating services or classes of services when such forbearance is found to be consistent with the Canadian telecommunications policy objectives, or where these services are found to be subject to sufficient competition to protect the interests of users. Although the Commission has broad powers to regulate telecommunications, the Commission is substantially forborne from regulating various telecommunications services, particularly at the retail level. It now generally regulates only to promote specific social objectives (e.g., accessibility, affordability), or to enable or facilitate competition in retail telecommunications markets.

In addition, the Commission retains jurisdiction to receive and adjudicate complaints of unjust discrimination and undue preference in the provision of telecommunications services. For example, the Commission's current "net neutrality" regime is largely, if not exclusively, based on its statutory powers to investigate and guard against unjust discrimination and undue preference.

Finally, the Commission has important consumer protection powers. It is the principal enforcement agency in relation to prohibited forms of telemarketing, spam and malware in Canada. It also mandates 9-1-1 service obligations in the public interest.

In addition to the foregoing, all telecommunications service providers in Canada are subject to Canada's privacy and anti-spam laws, and lawful access obligations involving the interception of communications, and the search and seizure of information, including subscriber data, tracking data and other computer data.

FOREIGN OWNERSHIP RULES

Foreign ownership rules in the telecommunications sector have been relaxed in recent years to promote 'green-field' foreign investment in the Canadian telecommunications sector. A telecommunications common carrier that accounts for less than 10 percent of the total revenues of the national telecommunications market does not have to meet Canadian ownership and control requirements. The exemption continues to apply even after the 10 percent threshold is reached, if the carrier exceeds the threshold through organic growth. In addition, Canadian ownership and control requirements do not apply to the ownership or operation of international submarine cables, satellites or earth stations that provide telecommunications services by means of satellites.

Otherwise, a common carrier is only eligible to operate in Canada if it is a Canadian-owned and controlled corporation incorporated or continued under the laws of Canada or a Canadian province. A corporation is Canadian-owned and controlled if at least 80 percent of the corporation's board members are individual Canadians; non-Canadians beneficially own, directly or indirectly, only up to 20 percent of the corporation's voting shares; and the corporation is not otherwise controlled by persons who are not Canadians (i.e., control in fact).

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(...) Canadian courts have generally viewed “control” to mean the ongoing power or ability to determine or decide the strategic decision-making activities of an enterprise.

With respect to control, Canadian courts have generally viewed “control” to mean the ongoing power or ability to determine or decide the strategic decision-making activities of an enterprise. Ultimately, this is a question of fact that is determined on a case-by-case basis. The courts have considered various factors to determine control, such as the right to appoint board members, veto rights over corporate decisions and the source of debt financing.

The Commission has the power to inquire into a carrier’s compliance with the foreign ownership restrictions in the Act. Over the years, there have been high-profile cases in which the Commission has examined transactions for compliance with these rules.

WIRELINE SERVICES

During the monopoly era when wireline services predominated, the provision of all telecommunications services, including wholesale services, by dominant carriers were subject to tariffs (i.e., rate regulation). The rates for services were first set based on the “rate-of-return” principle and then price caps.

With the enactment of the *Telecommunications Act* in 1993, the regulation of wireline services moved towards promoting competition and market forces. To that end, the Commission has established market entry rules for competitive local exchange carriers (equally applicable to wireless carriers). Internet Service Providers (ISPs) are subject to a registration requirement but are not otherwise required to obtain Commission approval for the rates, terms and conditions of their retail Internet services.

The Commission, however, has retained its powers to mandate the provision of a limited number of wholesale wireline telecommunications services required to serve the residential market. It is also retaining jurisdiction to mandate certain inputs required to facilitate competition in downstream markets, such as support structures (e.g., poles, conduits, strand, etc.), access to multi-dwelling units (e.g., condominiums), interconnection services, and rules pertaining to the allocation of numbering resources and customer transfers.

WIRELESS SERVICES

The provision of retail mobile wireless services is largely forborne from regulation by the Commission. Aside from complying with carrier obligations, such as interconnection, 9-1-1 service and numbering resource rules, wireless carriers are not required to obtain Commission approval for the rates, terms and conditions of their retail mobile wireless voice and data services. However, the Commission has retained the power to impose conditions on the offer and provision of the services, and to address discriminatory practices. For example, the Commission requires terrestrial mobile wireless carriers to abide by a mandatory code of conduct (the Wireless Code) to ensure consumer-friendly business practices, and has taken action to promote net neutrality on wireless networks.

Wholesale mobile wireless services are also largely forborne from regulation. However, the Commission recently commenced regulating the rates that the three large Canadian terrestrial wireless carriers charge other wireless carriers for GSM-based wholesale roaming.

Spectrum allocation

Spectrum, which is an essential input for over-the-air and direct-to-home satellite broadcasting and wireless telecommunications services, is managed and allocated by the Minister of Innovation, Science and Economic Development Canada (Minister). The Minister has the authority under the *Radiocommunication Act* to issue spectrum licenses, and to fix and amend the terms and conditions of licenses. It does this pursuant to the establishment of specialized policy and licensing frameworks for given radio frequency ranges, including spectrum in the fixed (e.g., microwave) and mobile bands (e.g., cellular, PCS, AWS, 700 MHz, WCS, 600 MHz, mmWave, 3500), unlicensed spectrum (e.g., WiFi), and in the fixed (FSS), mobile (MSS) and broadcast (BSS) satellite radio frequency ranges. In the terrestrial mobile wireless context, such terms and conditions include mandatory tower sharing and roaming requirements.

Spectrum is generally awarded on a first-come first-served basis. However, where the demand for spectrum is expected to exceed supply, spectrum will be auctioned through a competitive bidding process. In recent years, terrestrial mobile spectrum has been assigned through various auction processes because of high demand. In a number of these auctions, spectrum was set aside for 'new entrant' wireless carriers to foster greater competition in the marketplace. Spectrum auctions may also be subject to spectrum caps.

The Minister will review transfers of spectrum licenses. In particular, the transfer of commercial mobile spectrum licenses issued in certain bands is subject to a specific transfer review framework that is intended to ensure the transfer of licenses does not result in the undue concentration of spectrum among a small number of wireless carriers.

The *Radiocommunication Act* also regulates radio frequency (RF) devices, which include devices that utilize radio waves to communicate (like smartphones and devices that incorporate Wi-Fi and Bluetooth technology), and information technology equipment, such as computers and peripherals, which are unintentional radiators. All RF devices must meet specific ISED certification requirements, technical and human health and safety standards before the devices can be imported, sold or used in Canada. An RF device may require a radio licence issued by ISED, which establishes the terms and conditions under which the RF device may be operated. Whether a type of RF device is subject to licensing is stated in the applicable Radio Standards Specifications for the equipment. However, low-power RF devices that are intended primarily for consumer or commercial purposes are typically permitted to operate without a licence from ISED. These licence-exempt RF devices must operate on a no-interference, no protection basis.

Broadcasting

Programming undertakings and broadcast distribution undertakings (BDUs), such as cable, satellite DTH and IPTV television providers, are regulated under the *Broadcasting Act*. The Act establishes Canada's broadcasting policy objectives and the Commission's power to regulate broadcasting. The policy objectives primarily focus on the cultural enrichment of Canada, including the promotion of Canadian content, establishing a high standard for original programming and ensuring that programming is diverse and reflects Canadian attitudes, opinion, ideas and values. The Act grants the Commission wide discretion to issue licences and implement regulations with a view to furthering these policy objectives. This includes establishing Canadian content requirements, mandating regulatory disclosure, notice and approval requirements, including for transfers of control of licensed programming undertakings, and regulating the conditions under which non-Canadian programming services may be distributed in Canada.

FOREIGN OWNERSHIP RULES

The *Broadcasting Act* requires that the Canadian broadcasting system be effectively owned and controlled by Canadians. Only a person or entity that is Canadian may obtain a broadcasting licence, including amending or renewing a licence. A corporation is considered Canadian where:

- The corporation is incorporated or continued under the laws of Canada or a province;
- The CEO of the corporation and at least 80 percent of the directors are Canadian; and
- Canadians beneficially own and control, directly or indirectly, in the aggregate of at least 80 percent of all issued and outstanding voting shares of the corporation and at least 80 percent of the votes.

Additional rules apply to subsidiary corporations. Furthermore, if a corporation is determined to be otherwise controlled by a non-Canadian, whether on the basis of personal, financial, contractual or business relations, or any other considerations relevant to determining control (i.e., control in fact), the corporation will be deemed to be non-Canadian.

PROGRAMMING UNDERTAKINGS

In order for programming undertakings to have their programs transmitted in Canada they must, if Canadian-owned and controlled, obtain a broadcasting licence or qualify for an exemption from licensing, or if non-Canadian, obtain the necessary authorization from the Commission (see below). The Commission establishes the classes of licences, has the power to attach any conditions to each licence and the power to review the transfer of licences. Licensed and some exempt programming undertakings in Canada are generally required to comply with industry codes of conduct respecting children's advertising, violence, and gender portrayal, among other standards. Licensed and some exempt programming undertakings will also be subject to varying Canadian content requirements, depending upon the nature of the service. Most licensed undertakings are also subject to advertising restrictions and the requirement to make annual financial contributions to subsidize the production of Canadian programming.

NON-CANADIAN PROGRAMMING SERVICES

Non-Canadian programming services can be distributed in Canada with authorization from the Commission. In order for a non-Canadian service to obtain authorization from the Commission, a Canadian sponsor (e.g., a distributor, programming service or industry organization) must make a formal request to the Commission to distribute the channel. Authorized services are added to a list called the *Revised list of non-Canadian programming services and stations authorized for distribution*, and may be subject to any requirements that the Commission deems appropriate.

The Commission's general policy is to authorize the distribution of services that do not compete in whole or in part with Canadian pay or specialty services; however, in recent years, the strictness of this rule has been relaxed for certain types of non-Canadian services, such as news and third-language services.

BROADCAST DISTRIBUTION UNDERTAKINGS

At one time, broadcast distribution undertakings (BDU), like telecommunication common carriers, operated as regional monopolies that were heavily regulated by the Commission or its predecessor agencies. Over the years, the Commission introduced competition in the provision of broadcast distribution services and made it easier for new BDUs to enter the marketplace. At present, BDUs serving fewer than 20,000 subscribers are exempt from obtaining a licence. Once an exempt BDU has more than 21,000 subscribers in any two consecutive years, it must obtain a licence.

BDUs may distribute only licensed or exempt Canadian or authorized non-Canadian programming services to subscribers of their licensed BDU services. As part of the basic service provided to all subscribers, BDUs are required to include certain local, regional and national television channels.

At one time, when licensed BDUs enjoyed penetration levels as high as 90 percent, the Commission mandated tiering and linkage rules to actively promote Canadian programming services, as well as to ensure the carriage by large, integrated BDUs of programming services owned by independent programming undertakings. With the advent of programming content delivered over the Internet (i.e., over-the-top), the Commission overhauled distribution in Canada by modifying and relaxing the previous rules, and by mandating that BDUs offer their retail subscribers 'skinny-basic' television plans and 'pick-and-pay' packaging options to maximize consumer choice and flexibility.

The Commission also implemented the *Wholesale Code*, which governs certain aspects of the commercial arrangements between BDUs, programming undertakings and exempt digital media undertakings (see below). It is intended to ensure that subscribers have greater choice and flexibility in the programming services they receive, and that those negotiations between BDUs and programming undertakings are conducted in a fair and transparent manner, particularly by vertically integrated entities (e.g., companies that own both programming services, licensed BDU undertakings, and Internet access services). This includes ensuring the terms of 'affiliation agreements' are justified on a commercial basis and are not anti-competitive.

DIGITAL MEDIA

In Canada, over-the-top or online streaming services that deliver programming content over the public Internet are considered to be engaged in broadcasting. However, the Commission has exempted over-the-top services, known as digital media broadcasting undertakings, from regulation. Over-the-top services are exempt from certain requirements under the Act, including licensing by the Commission, minimum Canadian content rules, financial contribution requirements and Canadian ownership and control requirements. This means that foreign over-the-top services may operate in Canada without a licence.

However, digital media undertakings in Canada as a whole, including Internet portals, over-the-top content providers and other new media enterprises, are subject to rules pertaining to advertising and promotions, including behavioural advertising rules, and mobile marketing rules. In some cases, digital media content is subject to specialized rating rules. As with other telecommunications service providers, digital media providers may, in certain instances, also be subject to copyright licensing rules, rules relating to lawful access, including the interception and search and seizure of data, and other information, as well as Canada's privacy and anti-spam laws.

Environmental and climate change law in Canada

In Canada, environmental law is an area of jurisdiction shared between the federal government, the various provincial and territorial governments, and municipalities.

Jurisdiction

In Canada, environmental law is an area of jurisdiction shared between the federal government, the various provincial and territorial governments, and municipalities. This jurisdictional split arose because the Constitution of Canada, which dates back to 1867, did not specifically allocate power over the environment, leaving instead a gradual evolution of powers. Broadly speaking, the federal government has the power to legislate for the "peace, order and good government" of Canada, and notably has jurisdiction over federally-owned land and undertakings, sea coast and inland fisheries, navigation and shipping, aviation (including airports), railroads, import and export of toxic substances, interprovincial and international transportation and nuclear power. Provinces have the constitutional power to legislate on a wide range of environmental matters, including on all matters of a merely local or private nature in a province, and on the exploration, development, conservation and management of non-renewable natural resources and forestry resources, among other things. Municipalities in most provinces have the delegated power to pass by-laws, particularly with respect to storm and sanitary sewer discharges, control of noxious weeds, noise and certain other nuisances. The Supreme Court of Canada has held that where more than one level of government has the authority to regulate, duplication is permissible as long as there is a possibility of dual compliance, i.e., by abiding by the stricter of the applicable standards. In all other cases, and generally speaking, federal law trumps the others, and provincial law will be paramount over municipal law.

When doing business in Canada, it is important to keep in mind that environmental laws are not uniform among the provinces and territories. Attempts have been made to harmonize certain standards and criteria; however, there remain many differences with which companies operating in more than one Canadian province or territory need to be familiar.

Environmental permits

PERMIT REQUIREMENTS

Most Canadian provincial environmental statutes prohibit the release of any substance that can cause an adverse effect into the natural environment, unless authorized by regulation or permit. As "adverse effect" is defined broadly, and contaminants can even include such things as dust and noise, a wide range of industrial activities requires an environmental permit. These permits generally take the form of a Certificate of Approval or Authorization issued by the provincial regulator, which will set maximum discharge concentrations or quantities, impose conditions and monitoring and reporting obligations. In many instances, environmental permits for federally-regulated activities and matters could also be required.

Permits may also be required to remove certain resources, including for the removal and use of surface water and groundwater, which is typically owned by the provinces. Conducting activities in and around water bodies and wetlands may also require authorization and, in some cases, could involve the payment of a financial contribution to compensate for the loss of wetland.

“First Nations (Aboriginal) consultation is playing an increasingly important role in Canada, as there is a constitutional obligation on the governments to consult with First Nations prior to approving certain projects.

ENVIRONMENTAL ASSESSMENTS

Certain types of projects may trigger the need for an Environmental Impact Assessment (EIA) before federal or provincial regulators issue a permit. EIAs are comprehensive studies of potential environmental effects that involve scientific and engineering consultation, as well as public participation. First Nations (Aboriginal) consultation is playing an increasingly important role in Canada, as there is a constitutional obligation on the governments to consult with First Nations prior to approving certain projects. Due to their complexity, EIAs have the potential to delay planned projects significantly. Certain aspects of a project may trigger both federal and provincial environmental assessment legislation. In such cases, it is possible to have the assessments conducted concurrently by the relevant federal and provincial authorities and, where necessary, to have these assessments reviewed by a joint panel consisting of representatives appointed by both levels of government.

On August 28, 2019, the federal *Impact Assessment Act* came into force, which sets out a new EIA process at the federal level and replaces the process formerly conducted under the Canadian Environmental Assessment Act, 2012.

PERMIT TRANSFER AND CERTAIN RESTRICTIONS

In the case of a change of control of a corporation, certain restrictions regarding environmental permits could be applicable. Moreover, environmental permits are not always transferable, but under certain circumstances, such as an acquisition in which the key technical personnel and the environmental policies do not change, regulators have demonstrated a willingness to expedite the application process. In certain cases, notice to the regulator, with relevant documentation, is all that is required to transfer an authorization. Transfer of some permits may require the transferee to replace any financial security previously provided by the transferor (e.g., to cover decommissioning and reclamation costs).

Enforcement and compliance

OVERVIEW

Environmental enforcement in Canada generally proceeds through three stages:

1. Voluntary abatement/compliance;
2. Mandatory rectification; and, as a last resort,
3. Prosecution and penalties.

Both federal and provincial environmental regulators have designated compliance and enforcement personnel, and some of the regulators have publicly-available written policies setting out how compliance and enforcement are handled.

Canadian regulators encourage a proactive and cooperative approach to environmental protection. It is possible in the right circumstances to obtain a grace period and present a compliance plan, setting out designated plans of action and timeframes to achieve compliance. Where there is no such cooperation, environmental regulators are empowered to issue mandatory administrative/enforcement orders, directing that certain activities cease and that steps be taken to implement remedial or abatement measures, or to conduct further tests and studies. While, in some jurisdictions, these orders may be appealed, they are generally not stayed for the duration of the appeal, making immediate compliance mandatory. The time to file an appeal may be as short as seven days, so any order requires immediate attention and action.

INSPECTION AND INVESTIGATION POWERS OF REGULATORS

Both federal and provincial statutes invest regulators with broad inspection, and related search and seizure powers, to determine and investigate environmental compliance. Such rights allow regulators to:

- Enter property without a warrant or notice;
- Seize items;
- Take samples;
- Conduct sub-surface investigations;
- Require, inspect and seize documents;
- Interview employees; and
- Make related inquiries.

As these rights may not extend to buildings, in some jurisdictions, an inspector needs either a court-issued warrant, or the consent of the owner or occupier, to enter and conduct an inspection of, or within, a building. Failure to cooperate with an inspector/investigator is a separate offense, punishable by a fine and/or imprisonment. Canadian law draws a marked distinction between inspections and investigations. The purpose of inspections is to assess regulatory compliance. Accordingly, in certain cases inspectors also have the power to issue administrative orders requiring a party to take steps to attain or maintain compliance. Investigations, on the other hand, are for gathering evidence of a suspected offense in furtherance of a possible prosecution. A company or person being investigated has rights against self-incrimination and to legal counsel. It is unlawful for investigators to use the inspection powers to conduct what is effectively an investigation.

SPILL/RELEASE REPORTING

Spills and releases (generally defined as discharges out of the ordinary course of events, including exceedances of levels prescribed in permits), must be immediately reported to the regulator under most environmental statutes. Off-site migration of a contaminant may trigger a reporting obligation under certain circumstances. Some provinces do not impose a general obligation to report the discovery of historic contamination.

A number of provinces have reporting requirements for specific types of discharges, such as leaks from storage tanks. Contamination, regardless of characteristics, may also have to be reported, in certain circumstances, if it poses a risk to human health.

In addition to the requirement to report, a spill/release of a contaminant may trigger an immediate obligation to investigate and remediate. Regulators have the power to issue administrative orders requiring remedial or mitigative action. Such orders can compel a party to conduct tests or perform a site assessment to determine residual soil and groundwater contamination or risk of migration, and to fashion an appropriate cleanup program.

WHISTLEBLOWER PROTECTION

Federal and most provincial environmental statutes contain whistleblower protection clauses. Whistleblower protection is also extended under Canadian criminal law. The federal *Criminal Code* makes it an offense, punishable by imprisonment of up to five years, for an employer or person in a position of authority to take disciplinary measures against, demote, adversely affect the employment of or dismiss a whistleblower, or to threaten to do any of these actions. This is intended to protect employees who provide information to a person whose duties include the enforcement of federal or provincial law.

PENALTIES AND DUE DILIGENCE DEFENSE

Violations of federal and provincial environmental legislation can lead to significant penalties and, in the case of individual offenders, jail sentences. For example, in some cases, maximum penalties as high as CA$12 million may be levied against corporate offenders, and imprisonment of up to five years may be imposed. Some statutes provide that an offender may be liable to the maximum penalty for each day an offence occurs. To date, the highest penalty levied by a court in Canada for an environmental offence is CA$7.5 million.

Most environmental offences are considered “strict liability” offences, meaning the prosecution does not need to prove the accused’s actions were intentional in order to obtain a conviction.

Generally speaking, there is a “due diligence defense” available to accused corporations and individuals who can prove they took all reasonable steps in the circumstances to prevent the occurrence of the offense. Evidence of due diligence involves a proactive approach to the prevention and risk management at all levels of the corporation, and includes, for example:

- Regular training;
- Auditing and reporting within the corporation;
- Emergency response programs;
- Compliance with internal protocols; and
- Appropriate disciplinary action.

An exception to the availability of a due diligence defense are the administrative penalties that now exist for certain offenses, for example in Ontario, Québec and Alberta.

LIABILITY OF CORPORATE DIRECTORS AND OFFICERS

Most federal and provincial environmental statutes provide that, where a corporation commits an offence, the directors and officers (i.e., senior management) of a corporation who directed, authorized or acquiesced in the commission of the offence are guilty of the offence and liable to punishment, regardless of whether the corporation has been prosecuted for or convicted of the offence. The dissolution of a corporation does not provide a shield against this liability. Regulatory fines and criminal sanctions, including imprisonment, against such parties similarly survive corporate dissolution. In Québec, a presumption of environmental liability of directors or officers could be applicable, subject to the due diligence defense, pursuant to which directors and officers are presumed to have committed the environmental offence of a corporation.

Real estate transactions and contaminated land

OVERVIEW

While there are no restrictions on allocating contractual liability in a real estate transaction involving contaminated land, it is not possible to contract out of regulatory liability. The "polluter pays" principle is applied in provinces across Canada, under which the original landowner that caused the pollution retains potential statutory liability, even after a property is transferred. In addition to the polluter, other stakeholders could also hold statutory environmental liability regarding a contaminated land. For example, in the Province of Québec, the Québec *Ministry of the Environment and Fight Against Climate Change* can issue a characterization and rehabilitation order, under specific circumstances, to "any one who has or has had custody of the contaminated land as owner, lessee or in any other capacity". While indemnification clauses are frequently used in agreements of purchase and sale, the provisions of a contract between private parties do not affect such environmental regulatory liability regime and governmental authorities are not bound by same.

Certain provinces have a system in place under which a landowner can clean up a property to designated science-based regulatory standards, have the clean-up approved by the regulator and, in doing so, receive immunity from possible future clean-up orders. Brownfield developers in those provinces frequently avail themselves of this protection. It should be noted that this immunity does not extend to liability for off-site migration of pollutants.

Most provinces recognize that it may not be feasible to completely remediate contaminated property. In such cases, the person(s) responsible for dealing with contamination may be allowed to use approved forms of longer-term "risk management". This will typically not result in regulatory closure, but may still allow for redevelopment of the property.

LIABILITY OF LENDER

Lenders could assume environmental liability in specific circumstances, including where they become involved in the day-to-day operational management of a corporation or if they become owners by way of foreclosure. In some provinces, statutory exemptions from liability for secured lenders, receivers and owners by foreclosure, can be applicable, subject to certain conditions and restrictions.

DISCLOSURE OF KNOWN CONTAMINATION

Depending on the circumstances, the vendor in a real estate transaction may have to disclose any land contamination. Canadian law distinguishes between "latent" (hidden) and "patent" (readily observable through reasonable due diligence) defects in land. Where a vendor is aware of a latent defect, it must disclose it to a purchaser prior to closing. There is no similar duty for patent defects on the basis of *caveat emptor* ("buyer beware").

As part of most transactional due diligence, purchasers request disclosure of all environmental records in possession of the vendor as a matter of course. Some provinces have publicly-accessible registries containing records relating to reported environmental conditions affecting parcels of land.

ASBESTOS

The duties of owners and occupiers, with respect to materials containing asbestos on site, are set out in provincial occupational health and safety statutes. There is generally no requirement to remove undisturbed asbestos, including friable asbestos. However, some provinces, like Ontario, require record-keeping with respect to the location of materials above certain thresholds, and implementation of risk management plans. Loose friable asbestos has to be removed in all provinces. The precautions required for asbestos removal are extensive and are set out in specific provincial regulations and guidelines. Asbestos is considered a hazardous waste in certain provinces and is subject to special disposal requirements.

WETLANDS

The development of projects near or in a wetland could trigger the obligation to obtain specific environmental authorization and the requirement to pay a significant financial contribution, in certain cases and jurisdictions, as is the case in Québec.

Regulatory liability in the context of M&A

SHARE TRANSACTIONS VS. ASSET TRANSACTIONS

Since it is not possible to contract out of regulatory liability, special environmental considerations apply in the context of corporate acquisitions. In a share transaction, for example, both civil and regulatory liabilities of the corporation survive closing and remain with the corporation. This includes the risk of prosecutions for past environmental violations (e.g., a spill resulting in contamination), as well as any latent or known contamination.

In an asset transaction, on the other hand, liability of the corporation will not flow to the purchaser, unless tied to the specific asset(s) acquired.

SHAREHOLDER LIABILITY

Generally, shareholders in Canada are shielded from liability, unless they actively participated in management or had charge, management or control of a contaminant, in which case they can attract liability in the same way as directors and officers. Canadian courts will, however, "pierce the corporate veil" of a company, and hold shareholders, including parent companies, liable where the company is merely a sham or is being used for fraudulent purposes.

Environmental insurance

Many umbrella liability policies or contractors' general liability policies contain absolute pollution exclusion clauses. However, a number of policies dealing with specific environmental risks are now underwritten in Canada. For soil remediation projects below a threshold clean-up cost, it is possible to obtain cost-cap policies contingent upon the provision of a detailed cost estimate and environmental report prior to underwriting. Environmental impairment liability policies are available to insure against the risk of third-party claims due to off-site migration. Policies are also available to insure against future pollution events on a property, and for undiscovered contamination. Contractors' pollution liability insurance is available to insure against pollution caused by specific operations. This provides a useful supplement to umbrella liability policies containing pollution exclusion clauses.

As the cost of performing environmental clean-ups to regulatory standards has increased substantially, the role of environmental insurance in Canada has expanded. While the market for environmental insurance in Canada is still developing, new products are continually being added in response to a variety of situations.

Environmental and climate change disclosure

Securities law in Canada is an area of provincial jurisdiction (see the chapter on "Financing Canadian operations"). Provincial securities laws require timely disclosure of "material facts" as part of any offering of securities. A material fact is any fact that could have a significant impact on the value of the underlying securities. Environmental liabilities are increasingly being assessed as material facts in this context, and the Canadian Securities Administrators (CSA) in 2010 issued CSA Staff Notice 51-333 to provide guidance to reporting issuers (other than investment funds) on existing continuous disclosure requirements relating to environmental matters under securities legislation (2010 Notice). The Notice sets out "guiding principles" said to be a non-exhaustive list of factors to be considered in determining whether a particular environmental matter is material. **The five key disclosure requirements that relate to environmental matters are**:

1. Environmental risks, trends and uncertainties;
2. Environmental liabilities;
3. Asset retirement obligations; and
4. Financial and operational effects of environmental protection requirements.

In April 2018, the CSA released CSA Notice 51-354, Report on Climate change-related Disclosure Project (Report). The Report was the result of a project to review the disclosure by reporting issuers of risks and financial impacts associated with climate change. Among the key themes identified as emerging from the project were concerns about the mandatory disclosure requirements and dissatisfaction with the current state of climate change-related disclosure. The Report said the CSA would be undertaking further work to develop new guidance and education initiatives, and consider new disclosure requirements.

As a result, on August 1, 2019, the CSA published Staff Notice 51-358 Reporting of Climate Change related Risks to provide guidance for reporting issuers to develop more effective disclosure of material climate change-related risks (2019 Notice). The 2019 Notice does not create any new legal requirements, but it reinforces existing continuous requirements relating to a broad range of environmental matters, including climate change, and it expands upon the guidance provided under the 2010 Notice.

Waste management

GENERATION AND TRANSPORTATION

Waste management obligations are set out in various federal and provincial statutes. Transportation and disposal of hazardous wastes in Canada is strictly regulated. Transport Canada regulates interprovincial transport, as well as the import and export of hazardous waste. Provincial governments otherwise regulate the generation, handling, transport, storage and disposal of hazardous waste.

Waste may only be generated, handled, stored, processed and disposed of pursuant to a permit, and at an approved facility (which may be an onsite facility). Collection of residential waste is a matter of municipal responsibility, but is also regulated by the provinces.

Hazardous waste shipments require completion of a hazardous waste manifest or document, and may only be transported by licensed carriers. Certain categories of hazardous waste, such as asbestos waste and PCB waste, are subject to special requirements.

There is a general duty on waste generators to ensure that waste is only transported and disposed of by a licensed party, pursuant to a properly-issued waste manifest or document, and that a follow-up is conducted to ensure the waste has arrived at the designated disposal site. Failure to do so can result in fines.

WASTE DIVERSION AND STEWARDSHIP PROGRAMS

Provincial governments are responsible for the regulation of waste diversion, deposit return and other recycling programs under a variety of schemes, which increasingly shift the associated costs to the business that put the original item that generated the waste into the stream of commerce. Increasingly, Canadian provinces are implementing point-of-sale levies for electronics recycling and other consumer products (e.g., paint, used oil, appliances, tires). In certain jurisdictions, employers exceeding a certain size must implement mandatory waste separation programs.

In 2019, the Government of Canada announced plans to work with the provincial and territorial governments, businesses and others to develop an action plan to implement the "Canada-wide Strategy on Zero Plastic Waste". This will include introducing extended producer responsibility programs for the collection and recycling of plastic products.

Environmental and climate change litigation

To date, Canada has not seen the kind of large-scale environmental class actions found in the US, the Canadian class action regime being comparatively more restrictive. Environmental class actions are available for claims involving a reduction in property values because of pollution, but currently have not been successful for health claims.

Provincial employment law in Canada is based on a workers' compensation program under which workers can recover for their injuries from centrally administered funds, but are prevented from suing their employers for injuries or health problems sustained on the job. The funds can, in turn, commence subrogated claims in the names of the workers against the parties responsible for the injuries and health problems (as was done with asbestos claims).

While civil litigation to seek compensation for losses arising from land contamination, health effects from pollution, or other environmental causes is available, the imposition of punitive damages in Canada is more limited than in the US, and tort claims are often subject to court-imposed caps on damages.

Climate change class actions are emerging in Canada, including the following two recent cases:

- The *ENvironnement JEUness v Canada* case: Filed in the Superior Court of Québec in November 2018 on behalf of all Québec citizens aged 35 years and under. ENvironnement JEUness alleged that the Canadian government was infringing on a generation`s fundamental Charter rights because its GHG reduction targets are not ambitious enough to avoid harm to human life and health; and
- The *Belisle v Volkswagen* case: Class proceeding was brought, in Québec, against Volkswagen on behalf of all people who lived in Québec between January 1, 2009 and September, 2015. It was alleged that Volkswagen contributed to pollution in Canada due to the company's vehicles installed with a deficient system. The claim was authorized by the Superior Court of Québec, and the Supreme Court of Canada has granted leave to appeal that authorization.

Climate change and emissions trading

As is the case with other environmental legislation in Canada, both the federal government and the provincial governments claim jurisdiction over matters relating to GHG emissions. The history of GHG regulation in Canada is complex and constantly changing, as it has become a very political issue, resulting in existing carbon pricing and emissions trading legislation being repealed following changes in provincial governments.

As set out in its Nationally Determined Contribution submitted to the United Nations Framework Convention on Climate Change under the Paris Agreement, Canada committed to reduce GHG emissions by 30 percent below 2005 levels by 2030. To that end, Canada enacted the *Greenhouse Gas Pollution Pricing Act* in 2018. This legislation sets a price on GHG emissions applicable to any province or territory that did not implement its own federally-approved climate change scheme by January 1, 2019, or that asks to be regulated under this legislation. Provinces can either put a direct price on carbon (e.g., tax or levy), or adopt a cap-and-trade system. Provinces that chose a carbon tax had to use a price of CA$20 in 2019, and increase that price by CA$10 per tonne annually to CA$50 per tonne by 2022.

The federal regulatory scheme that came into effect on January 1, 2019 consists of two components:

1. The general charge on fossil fuels and; and
2. A separate pricing system for trade-exposed industries (referred to as the output-based pricing system or OBPS).

The OBPS applies to industrial facilities located in jurisdictions where the federal carbon pricing system applies and that emit 50 kilotonnes of carbon dioxide equivalent or more per year, with the possibility for smaller facilities (10 kilotonnes and above) to opt in voluntarily.

Currently, the federal "backstop" applies in Alberta, Saskatchewan, Ontario and New Brunswick, provinces, which the federal government says do not have carbon pricing systems that meet the federal criteria. The federal legislation has been challenged in the courts by several provinces on the basis it is constitutionally invalid. To date, provincial appellate courts have rejected these challenges, and the Supreme Court of Canada will likely ultimately determine the question. These provinces have implemented, or are planning to implement, their own regulatory schemes that they say will better address climate change and economic considerations in their respective jurisdictions.

The provinces and territories not subject to the federal carbon pricing regime have enacted a variety of regulatory schemes. Some have imposed a tax on carbon. For example, British Columbia has a carbon tax of CA$40 per tonne in 2019 that will rise by CA$5 per tonne annually to reach CA$50 tonne by 2021.

Others have implemented a cap-and-trade system. Québec introduced its system in 2013. Since then, corporations subject to the system have had to take into account the cost of emitting greenhouse gases in their decision-making process. In 2014, Québec linked its system with that of California. The Québec/California carbon market, also known as the Western Climate Initiative (WCI) regional carbon market became the largest cap-and-trade system in North America. The participants in the Québec or California systems can exchange allowances; the allowances from both systems can be used by an emitter covered by either one to comply with its regulatory obligations. In Québec, corporations that emit 25,000 metric tons or more of CO2 equivalent a year are subject to the cap-and-trade system. Designated industrial and electricity sectors, as well as fossil fuel distributors, are subject to the system. The system is also open to individuals and other entities that would like to participate in the carbon market on a voluntary basis.

Energy law

> **The emergence of new drilling technologies, including directional drilling and hydraulic fracturing, has expanded opportunities to exploit unconventional resources that were not technically feasible to produce until very recently.**

Oil and gas law in Canada

Oil price volatility and low natural gas prices continue to have a significant impact on oil and gas exploration and production activity. Compounding the various challenges faced by the Canadian oil and gas sector due to low commodity prices, restricted options for the transportation of oil (particularly to foreign markets), and the loss of some traditional gas markets, has proven challenging. Environmental and regulatory reviews of proposed projects have stalled and put in doubt the future of the construction of new transportation capacity, putting additional pressure on commodity prices. However, the emergence of new drilling technologies, including directional drilling and hydraulic fracturing, has expanded opportunities to exploit unconventional resources that were not technically feasible to produce until very recently.

In providing a brief overview of the applicable regulatory regimes, it is helpful to discuss matters in the context of the primary regions of oil and gas activity in Canada. These primary regions are:

1. Northern Canada;
2. Offshore the west and east coasts of Canada;
3. Conventional and unconventional onshore in the provinces of Alberta, British Columbia, Saskatchewan and Québec; and
4. The oil sands in northern Alberta.

Northern Canada

Northern Canada is estimated to contain approximately 467 billion m^3 of remaining marketable natural gas and 1,228 million barrels of crude oil[1]. There are currently three major areas of discoveries:

1. Mackenzie Valley and onshore Yukon;
2. The Arctic Islands; and
3. Mackenzie Delta/Beaufort.

Of the estimated remaining marketable gas in northern Canada, 66 percent is in the Mackenzie-Beaufort area, with the remainder residing in the Arctic Islands. The proposed 1,196-kilometre natural gas pipeline system along the Mackenzie Valley connecting northern onshore gas fields with North American markets was approved by the National Energy Board in March 2011. However, construction of the pipeline was cancelled on December 22, 2017 as a result of current natural gas supply conditions.

1 http://www.neb-one.gc.ca/nrth/pblctn/2014ptrlmrsrc/index-eng.html

Exploration activities in the Arctic have been frozen since December 20, 2016, when the Trudeau government imposed a moratorium on all oil and gas licensing in Arctic. This moratorium is set to be reviewed every five years, based on climate and marine science, with its first review scheduled for the end of 2021.

Under the *Canada Oil and Gas Operations Act*, the Canadian Energy Regulator has regulatory authority over oil and gas activities and operating licenses in the following areas:

- The Nunavut, Sable Island and submarine areas;
- The internal waters of Canada;
- The territorial sea of Canada; and
- The continental shelf of Canada that are not within a province.

In 2014, the National Energy Board devolved responsibility for the regulation of onshore oil and gas activities in the Northwest Territories to its territorial government, save for the Inuvialuit Settlement Region, the Norman Wells Proven Area and certain other federal lands. The Government of the Yukon oversees oil and gas rights, permitting and approval in the Yukon and adjoining areas. Approval from Fisheries and Oceans Canada, the Canadian Environmental Assessment Agency and other government departments may also be required.

Offshore British Columbia

The potential of the British Columbia offshore is largely unknown due to an informal moratorium on oil and gas activities that has been confirmed by certain federal and BC governments (and enforced by the non-issuance of federal exploration licences), since 1972. The moratorium reflected concerns regarding interference with fishery activities and adverse environmental impacts. With the enactment of Bill C-48, the *Oil Tanker Moratorium Act* on June 21, 2019, the Trudeau government has formalized this moratorium as it applies to oil transportation. However, interest in the area remains high. While there have been no significant discoveries, there are areas within the British Columbia offshore region that are considered to be highly prospective.

Offshore east coast

In contrast to the situation prevailing on Canada's west coast, the areas offshore of the provinces of Newfoundland and Nova Scotia have seen significant exploration and production activities. In 1992, Nova Scotia's first offshore project, Cohasset-Panuke, commenced oil production that would continue up until the depletion of the reservoir in 1999. The facilities have been de-commissioned, with environmental follow-up ongoing. Natural gas was found in deeper reservoirs offshore Nova Scotia. The Deep Panuke project started producing gas in 2013, but was abandoned in 2018 after running into production issues.[2] The nearby Sable Offshore Energy Project, which began production in 1999, is as of 2018 slated to be abandoned on account of naturally-declining production.[3] In 2014, BP began a 30-wide azimuth seismic survey in exploration blocks off the coast of Nova Scotia.[4] BP commenced drilling in 2017 after receiving regulatory approval in April of 2018.[5]

Newfoundland has also seen increased production activity in its offshore region. The Hibernia Project began operating in 1997, and currently reaches production volumes of 220,000 barrels per day of oil from its large gravity-based concrete production facility.[6] The Terra Nova Project, which began in 2002, and the White Rose Project, which began in 2005, each utilize large floating production storage and offloading facilities. The satellite expansions to the White Rose Project, including the North Amethyst, West White Rose and the South White Rose extension, have also contributed to growth in offshore oil production in the east coast.

It is estimated that the Hebron Field, discovered in 1981 and located north of the Terra Nova Field, contains more than 700 million barrels of recoverable resources.[7] Drilling began in 2018. Statoil (now Equinor)

2 https://www.neb-one.gc.ca/pplctnflng/mjrpp/ncndppnk/index-eng.html
3 http://www.neb-one.gc.ca/pplctnflng/mjrpp/xxnmblsblffshr/index-eng.html
4 http://www.cnsopb.ns.ca/offshore-activity/offshore-projects/bp-seismic-program
5 https://www.bp.com/en_ca/canada/who-we-are/offshore/bp-in-nova-scotia.html
6 http:// www.hibernia.ca/about.html
7 http://www.hebronproject.com

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After a number of jurisdictional disputes in the 1970s and 1980s, a series of Supreme Court of Canada and lower court decisions established that jurisdiction and ownership of the offshore resources rested with the federal government.

announced a significant discovery in 2013 with its Bay du Nord exploration well, which was initially expected to produce between 300 and 600 million barrels of oil.[8] The company will announce an investment decision on the project by 2020.[9]

The regulatory regime applicable to the offshore east coast differs from that applicable anywhere else in Canada. After a number of jurisdictional disputes in the 1970s and 1980s, a series of Supreme Court of Canada and lower court decisions established that jurisdiction and ownership of the offshore resources rested with the federal government. However, the provinces of Newfoundland and Nova Scotia were unwilling to accept this result and eventually agreed to a compromise solution with the federal government to share jurisdiction and powers. The federal government entered two separate accord agreements (one each with Newfoundland and Nova Scotia), which provide for the bulk of the regulatory authority for offshore petroleum matters to be delegated to joint management boards. For each province, this was enshrined in mirror legislation, which may not be amended without the concurrence of both governments. The resulting entities, the Canada-Newfoundland and Labrador Offshore Petroleum Board and the Canada-Nova Scotia Offshore Petroleum Board, continue to exercise their jurisdiction. The regulatory regime for each Board is modeled upon the federal legislation applicable in northern Canada.

In June 2014, the federal government enacted changes to various legislation governing the development of Canada’s east coast offshore oil and gas areas. Included in these changes was an increase in the amount for which an operator can be liable, on a no-fault basis, for causing environmental damage or pollution, to CA$1 billion. There is still no maximum amount of liability where an operator’s fault or negligence can be proven. The legislation also clarifies the provincial and federal governments’ status as plaintiffs in the event of environmental damage or pollution. Operators will also have to demonstrate increased financial capacity prior to the award of licenses. Further, the changes also stipulate that corporate directors and officers of operators can be found personally liable for offenses committed contrary to certain of the offshore acts. Sanctions can include fines of up to CA$1 million, imprisonment for a term of up to five years, or both.

8 http://www.statoil.com/en/NewsAndMedia/News/2016/Pages/10jun-newfoundland.aspx and http://www.statoil.com/en/NewsAndMedia/News/2013/Pages/26Sep_exploration.aspx

9 https://www.reuters.com/article/us-equinor-canada/equinor-eyes-investment-decision-on-bay-du-nord-project-in-2020-idUSKBN1KG29R

Conventional and unconventional onshore

Onshore exploration activities continue in every province in Canada, although the scale is relatively modest outside of the provinces of Alberta, British Columbia and Saskatchewan. These activities are governed by provincial legislation, except to the extent that a federal power might be invoked, as might be the case, for example, when navigable waterways are impacted. The majority of onshore oil and gas resources are located on government-owned lands, referred to as "Crown lands".

Alberta is the clear leader, ahead of British Columbia and Saskatchewan, in onshore oil and gas activities. However, activity in British Columbia and Saskatchewan has been increasing in relative terms over the last few years, in large part due to the exploitation of new unconventional resources (in the Montney and Bakken formations, respectively) in those provinces.

Conventional onshore oil and gas in Alberta dates back to the first major discovery at Turner Valley in the 1930s. More recently, unconventional production in Alberta, such as shale/tight gas and oil sands, has become more accessible due to technological advancements, and has become the dominant source of supply growth in Canada[10]. The *Mines and Minerals Act*, the *Oil and Gas Conservation Act* and the *Gas Resources Preservation Act* provide the foundational governmental regulatory regime in Alberta. The majority of oil and gas rights in Alberta are publicly owned by the Crown in right of Alberta. Rights to explore for and produce these minerals are granted under Crown mineral leases. However, some oil and gas rights are privately held by freehold owners, and rights to explore for and produce these minerals are granted under freehold petroleum and natural gas leases.

The Alberta Department of Energy is responsible for overseeing the regime by providing the necessary policy, administration and regulatory support. Two quasi-judicial agencies of the Government of Alberta are responsible for overseeing the regulatory regime in Alberta. The Alberta Energy Regulator (AER) regulates Alberta's oil, natural gas, oil sands and coal resources,

Alberta is the clear leader, ahead of British Columbia and Saskatchewan, in onshore oil and gas activities.

as well as pipelines located solely within the province. The Alberta Utilities Commission (AUC) regulates investor-owned electric, gas and water utilities, as well as some municipally owned electric utilities. The AUC also oversees the tolls, tariffs and service regulations of energy transmission through natural gas pipelines and electric transmission lines, and oversees the siting of electric transmission facilities, electric power plants and natural gas transmission pipelines.

The AER also oversees the Licensee Liability Rating (LLR) Program, which applies to all new and existing oil and gas wells, facilities and pipelines. The intent of the LLR Program is to ensure new and existing licensees for such wells, facilities and pipelines can meet their future abandonment, reclamation, and remediation obligations. Under the LLR Program, a licensee must demonstrate an LLR of 2.0, based on a ratio of deemed assets to deemed liabilities. If the licensee does not have an LLR of 2.0, or if a licensee's LLR subsequently falls below 2.0, the licensee must post a security deposit with the AER to cover their future abandonment, reclamation, and remediation obligations. The required LLR of 2.0 represents a recent increase from a previous requirement to maintain an LLR of 1.0, which the AER imposed in response to prevailing economic conditions. This requirement may serve as a barrier to entry for new industry entrants, or a barrier to continuance for current industry participants. Similar programs exist in both British Columbia and Saskatchewan.

Unconventional onshore oil and gas development in British Columbia has substantial potential, with natural gas being the focal point. Developments in multi-stage

10 https://www.neb-one.gc.ca/nrg/ntgrtd/ftr/2016/2016nrgftr-eng.pdf

hydraulic fracturing and horizontal drilling technologies have recently allowed previously untapped shale and tight natural gas resources to be economically developed.[11] As such, the northeast portion of British Columbia that borders Alberta has seen increased activity in the Montney region, the Cordova Embayment, the Liard Basin and the Horn River Basin. The *Oil and Gas Activities Act* and the *Petroleum and Natural Gas Act* provide the foundational regulatory regime in British Columbia. The Ministry of Energy and Mines provides oversight of the regulatory framework, and the BC Oil and Gas Commission regulates crude oil, natural gas and pipeline activities.

Saskatchewan, like British Columbia, has not developed its oil and gas resources at the same pace, nor to the same extent, as Alberta, although it is worth noting that the pace of development in parts of Saskatchewan had increased markedly prior to the decline in commodity prices. Oil production in Saskatchewan is second only to Alberta among Canadian provinces, and the Province is Canada's third largest producer of natural gas. Recent focus has been on the Bakken tight oil play, which is also thought to contain significant natural gas resources[12]. The *Department of Energy and Mines Act* and the *Oil and Gas Conservation Act* constitute the primary regulatory regime governing oil and gas resources in Saskatchewan.

The Petroleum and Natural Gas Division of the Ministry of the Economy is responsible for the exploration, development, management and conservation of non-renewable resources, and is tasked with ensuring the orderly exploration, development and optimized recovery of those resources.

Québec has also shown potential for large unconventional gas resources since the Utica shale gas play – estimated to be among the top 10 shale fields on the continent – extends into the Province. In March 2011, the Québec Environment Minister announced a temporary moratorium on the use of fracturing during shale gas drilling pending a full environment assessment audit. In December 2014, Québec's Premier confirmed that there would be no hydraulic fracturing in the province due to a lack of social acceptability. However, in June 2014, Québec's Minister of Energy and Natural Resources issued a Ministerial Order outlining a prescriptive framework for oil and gas exploration on Anticosti Island. The Ministerial Order appeared to indicate that Québec's provincial government might be considering wider exploration and development of the province's petroleum resources. More recently, however, Québec has swung the other way, proposing amendments to its *Petroleum Resources Act* that would ban all fracking for shale gas and drilling in 13 waterways across the Province.[13]

11 https://www.neb-one.gc.ca/nrg/ntgrtd/ftr/2016/2016nrgftr-eng.pdf
12 https://www.neb-one.gc.ca/nrg/ntgrtd/ftr/2016/2016nrgftr-eng.pdf
13 https://www.cbc.ca/news/canada/montreal/quebec-fracking-ban-1.4694327

Oil sands

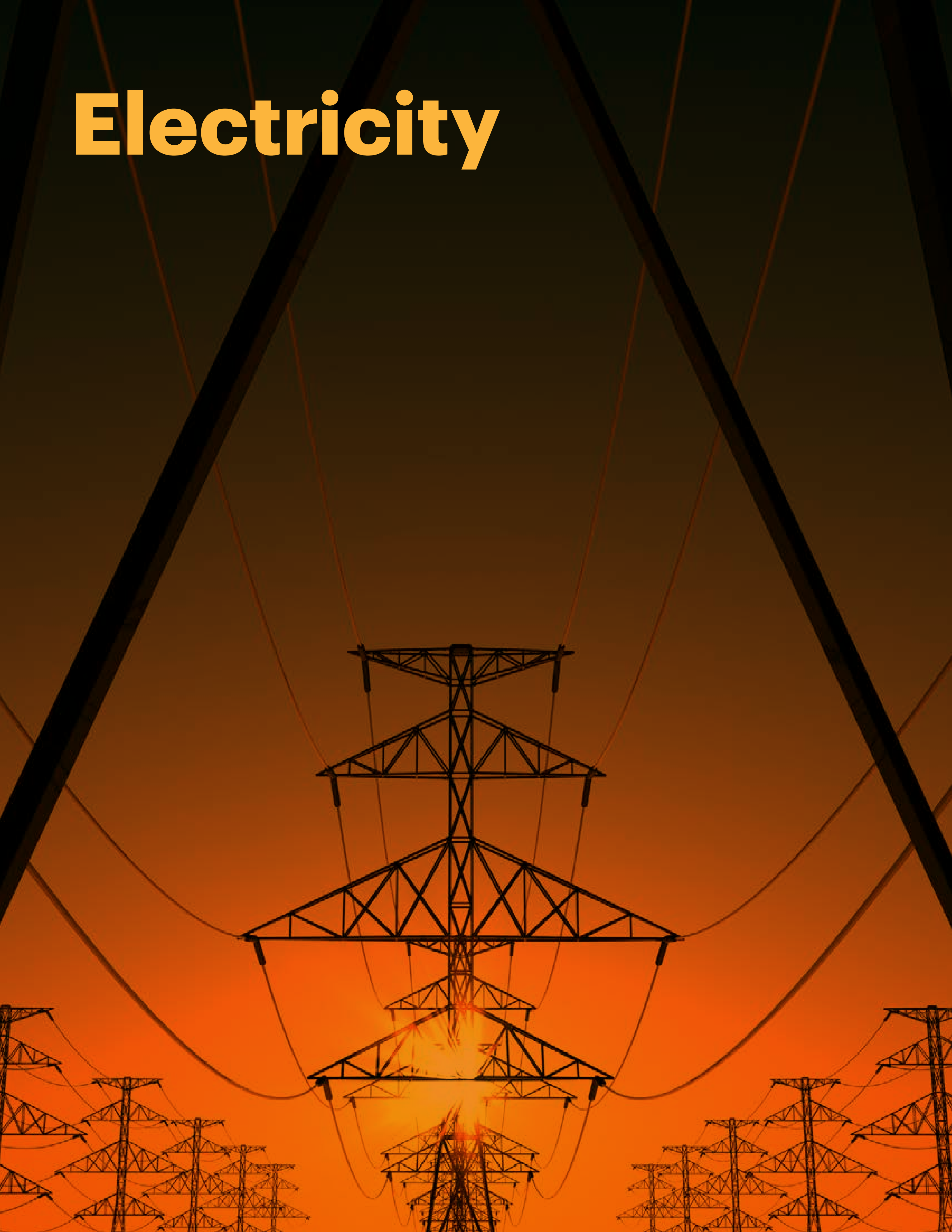
Oil sands production will be Canada's largest source of future oil production growth and a key driver of natural gas demand. Alberta's oil sands represent one of the largest known proven crude oil reserves in the world, containing a remaining established reserve of 166.3 billion barrels, and a remaining ultimate potential of 304 billion barrels. These total proven oil reserves rank Canada third globally, behind only Saudi Arabia and Venezuela[14]. Alberta's oil sands are contained in three major areas in northern Alberta: Peace River, Athabasca and Cold Lake, which in total comprise an area of approximately 140,800 square kilometres. The world's first oil sands production began north of Fort McMurray in 1967. It is only in the last few decades, as technology has improved, that production has rapidly expanded. Oil sands production is expected to more than double its current levels by 2040, increasing its share to 79 percent of Canada's total oil supply, up from 59 percent in 2014[15]. Oil sands extraction and production uses a wide scope of complex and innovative mining and production techniques and processes. Extraction is accomplished by either open pit mining, or in situ techniques such as steam assisted gravity drainage (SAGD). In situ techniques are employed to extract oil from the nearly 80 percent of the oil sands which are too deep below the surface for open pit mining. Construction and development of oil sands projects has been unprecedented since the early 2000s, as oil sands production progressively overshadowed conventional onshore production outputs. More recently, against a backdrop of low commodity prices, investment in new oil sands projects has slowed. However, the coming-online of projects that commenced construction prior to the 2014 oil price collapse has led to consistent increases in production.[16]

The primary legislation governing oil sands projects in Alberta is the *Mines and Minerals Act* and the *Oil Sands Conservation Act*; however, projects will often require approvals under other legislation as well, such as the *Environmental Protection and Enhancement Act* and the *Water Act*.

Oil sands production will be Canada's largest source of future oil production growth and a key driver of natural gas demand.

14 https://www.neb-one.gc.ca/nrg/ntgrtd/ftr/2016/2016nrgftr-eng.pdf
15 https://www.neb-one.gc.ca/nrg/ntgrtd/ftr/2016/2016nrgftr-eng.pdf
16 https://www.neb-one.gc.ca/nrg/ntgrtd/ftr/2017lsnds/index-eng.html

Electricity



In Canada, electricity markets are regulated at the provincial level. In the result, most provinces have their own electricity market structure and regulatory framework. These province-specific structures and frameworks are discussed below.

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Most provinces have their own electricity market structure and regulatory framework.

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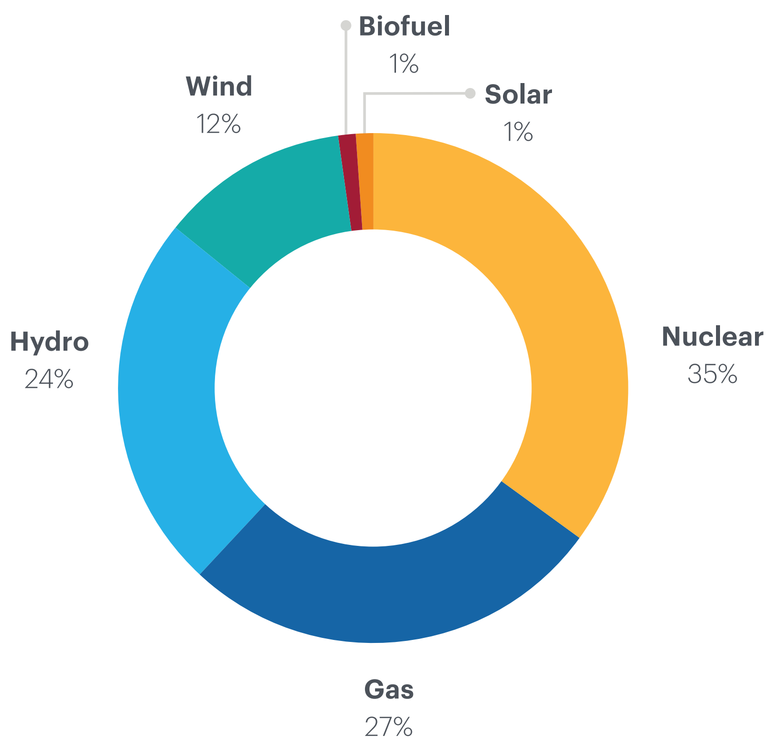
Ontario’s supply mix has changed significantly over the past decade, with wind, solar, bioenergy, hydro-power, gas-fired and nuclear generation replacing Ontario’s coal fleet.

Ontario

INSTALLED CAPACITY

Ontario’s supply mix has changed significantly over the past decade, with wind, solar, bioenergy, hydro-power, gas-fired and nuclear generation replacing Ontario’s coal fleet. As of June 2019, Ontario had 37,555 megawatts (MW) of installed, transmission-connected generation capacity, broken down by fuel type as follows: [1]



Nuclear	13,009 MW or 35%	**Wind**	4,486 MW or 12%
Gas/Oil	10,277 MW or 27%	**Biofuel**	295 MW or 1%
Hydro	9,065 MW or 24%	**Solar**	424 MW or 1%

1 See IESO, “Reliability Outlook, June 2019;” online: <http://www.ieso.ca/en/power-data/supply-overview/transmission-connected-generation>.

MARKET STRUCTURE AND OPERATION

Ontario's competitive electricity market framework was created in 1998 with the enactment of the *Energy Competition Act, 1998*. A further round of industry restructuring occurred in 2004 with the enactment of the *Electricity Restructuring Act, 2004*. The resultant market structure is generally referred to as a hybrid model, comprising a relatively small competitive wholesale component with real-time spot prices and a component characterized by long-term, government-backed supply contracts.

The Independent Electricity System Operator (IESO) administers the Ontario electricity market, continuously monitoring and directing its operations. The objective of the IESO-administered market is to promote an efficient, competitive and reliable market for the wholesale purchase and sale of electricity and ancillary services[2]. The IESO operates in accordance with the Market Rules established by the IESO pursuant to the *Electricity Act, 1998*. In order to participate in the Ontario electricity market, an entity must be authorized as a market participant and operate in compliance with the Market Rules. All electricity generation facilities must also be registered under the Market Rules.

In addition to providing longer-term electricity forecasts, the IESO issues daily forecasts of energy demand, which are continually updated as new information becomes available. Typically, these forecasts are highly accurate and assist generators in determining the amount of electricity that will be required. The IESO manages the purchase and sale of electricity through a competitive wholesale market in which it receives numerous offers to supply energy hourly and schedules the lowest-cost offers to meet demand, the average resulting in the Hourly Ontario Energy Price (HOEP). The HOEP is the price charged to large consumers that participate in the market, as well as to LDCs. The OEB sets time-of-use rates for residential consumers and small businesses, based on the HOEP. Consumers also pay a Global Adjustment charge that reflects the difference between the wholesale market price and rates paid to regulated and contracted generators (and for conservation and demand management programs).

In 2016, the IESO launched its Market Renewal Program (MRP) with the objective of enhancing the efficiency of Ontario's electricity markets by:

- Replacing the two-schedule market with a single schedule market that will address current misalignments between price and dispatch, eliminating the need for unnecessary out-of-market payments;
- Introducing a day-ahead market that will provide greater operational certainty to the IESO and greater financial certainty to market participants, lowering the cost of producing electricity and ensuring commitment only to the resources required to meet system needs;
- Reducing the cost of scheduling and dispatching resources to meet demand as it changes from the day-ahead to real-time through the enhanced real-time unit commitment initiative; and
- Transitioning from rate-regulated and contracted generation to capacity auctions to secure capacity to meet Ontario's future resource adequacy needs.

The various components of the MRP are expected to be launched in 2022.

CONTRACTED SUPPLY

In the period 2004 to 2018, the Ontario Power Authority (now the IESO) procured clean and renewable energy supply pursuant to a variety of competitive, standard offer and feed-in tariff programs. In this period, a total of 26,771 MW of capacity was procured under 33,772 long-term contracts, spread across eight different fuel types.[3] The counterparty to these government contracts are private sector businesses, partnerships, cooperatives, public sector organizations, municipal and governmental agencies, Indigenous communities, community groups, farmers and homeowners.

The election of a new Conservative government in June 2018, replacing two successive Liberal governments, signaled a change in how Ontario will procure power in the foreseeable future. Significantly, the new government has imposed a moratorium on new renewable energy contracts in Ontario and has

2 http://www.ieso.ca/Documents/marketRules/mr_marketRules.pdf

3 This does not include Ontario Power Generation regulated assets, heritage assets, NUGs operating under contracts with the Ontario Electricity Financial Corporation and merchant market participants.

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In 2016, the IESO launched its Market Renewal Program (MRP) with the objective of enhancing the efficiency of Ontario’s electricity markets.

terminated the supply contracts of projects that had not yet reached COD milestones.[4]

TRANSMISSION AND DISTRIBUTION

In Ontario, transmitters move electricity from the point of generation through the transmission system to smaller substations in or near populated areas. Local distribution companies (LDCs) deliver electricity directly to consumers’ homes and businesses. If a proposed generation facility is to be connected to the provincial grid (i.e., the transmission system), it requires the transmitter to conduct a Customer Impact Assessment to assess the impact of the project on other users of the IESO-controlled electricity grid. A System Impact Assessment, conducted by the IESO, is also required to determine the impact of the proposed project on the performance of the grid and the reliability of the integrated power system. If a proposed generation facility is to be connected directly to the local distribution system, a Connection Impact Assessment, conducted by the LDC, is required to assess the impact on the distribution system of connecting the project to the specified distribution connection point.

Approximately 97 percent of transmission assets in Ontario are owned by Hydro One, a formerly provincially-owned corporation that was privatized in the period 2015 to 2017. Other transmitters in the province include Great Lakes Power, Canadian Niagara Power and Five Nations Energy. While there has been a degree of consolidation within the LDC sector over the past decade[5], as of September 2019, there were still 69 individual local distribution companies in Ontario, including Hydro One, which is the principal distributor in most rural areas of the province.

REGULATION OF GENERATION, TRANSMISSION AND DISTRIBUTION

The Ontario Energy Board (OEB) is the administrative tribunal responsible for the regulation and supervision of the natural gas and electrical industries in Ontario. Exercising its powers under the *Ontario Energy Board Act, 1998* and *Electricity Act, 1998*, the OEB plays an integral role in the operation of Ontario’s energy markets. The OEB is responsible for determining the rates charged by transmitters and distributors, licensing all market participants (including generators, transmitters and LDCs), and approving the construction of new transmission and distribution facilities. The OEB also makes rules to govern the conduct of market participation, monitors electricity markets and reports to the Minister of Energy on the efficiency of such markets, and serves as an appeal tribunal from certain decisions of the IESO.

4 Government of Ontario, “Ontario’s Government for the People Shares Top Legislative Priorities for Upcoming Sitting” (10 July 2018), online: <https://news.ontario.ca/ghl/en/2018/07/ontarios-government-for-the-people-shares-top-legislative-priorities-for-upcoming-sitting.html>.

5 In 2017, a significant merger of three municipally-owned LDCs serving cities in the Greater Toronto and Hamilton Area took place, with the merged entity, Alectra Utilities, estimated to be the second-largest municipally-owned LDC in North America.

Alberta

Unlike most Canadian provinces, but similar to Ontario and US jurisdictions, Alberta's electricity system operates under a market structure. Following a Department of Energy review in mid-2019, the continuation of Alberta's structure—known as the "energy-only market"—was affirmed by a newly-elected provincial government, putting an end to its predecessor's pursuit of a program of subsidies for renewable energy and its plan to transition to a different market structure.

The province's *Hydro and Electric Energy Act* grants the Alberta Utilities Commission (AUC) the authority to approve the construction of any new electric generation facility in Alberta. The AUC is responsible for ensuring that facilities meet regulatory standards relating to safety, the environment, design standards and public consultation.

The AUC does not, however, set a rate of return to be earned by owners. Rather, owners submit price offers for the energy their facilities can produce to an independent, not-for-profit entity called the Alberta Electric System Operator (AESO). The AESO then grants rights to supply power to the Alberta grid through using a wholesale power market mechanism—known as the "power pool"—to accept and dispatch the lowest-cost offers. The market sets an hourly price, or "pool price," for electricity that is paid to owners. This market price, and not direct regulation, generally determines the revenue earned by generators and the costs paid by consumers. The AESO derives its authority from Alberta's *Electric Utilities Act*.

Legislation passed in 2018 would have implemented a new "capacity" market structure, allowing generators to submit offers not only in the power pool, but also in a separate market awarding fixed revenue streams in exchange for commitments to making generation capacity available on demand. The intent of the capacity market was to provide so-called "missing money" to generators subject to volatile power pool prices. The proposed market's mechanics were studied in an AUC hearing that took place in late 2018 and early- to mid-2019. Following the election of a new provincial government and a 90-day review of the market reforms, however, these reforms were terminated. As of late 2019, the Alberta government instead plans to examine incremental reforms to the energy-only structure.

All market participants must comply with the rules and standards the AESO creates and implements under the authority granted by its statute. These rules and standards include:

- The ISO Rules;
- The Alberta Reliability Standards;
- The ISO Tariff;
- The Technical Standards; and
- The Operating Policies and Procedure.

The AESO has a formal internal process by which it creates, reviews and approves these instruments.

Alberta's Market Surveillance Administrator (MSA) monitors Alberta's electricity markets to ensure they operate in a fair, efficient and openly-competitive manner. The MSA derives its authority from the *Alberta Utilities Commission Act*. To accomplish its mandate, the MSA has powers to investigate complaints lodged against market participants. The MSA also enforces compliance with the ISO Rules and the Alberta Reliability Standards.

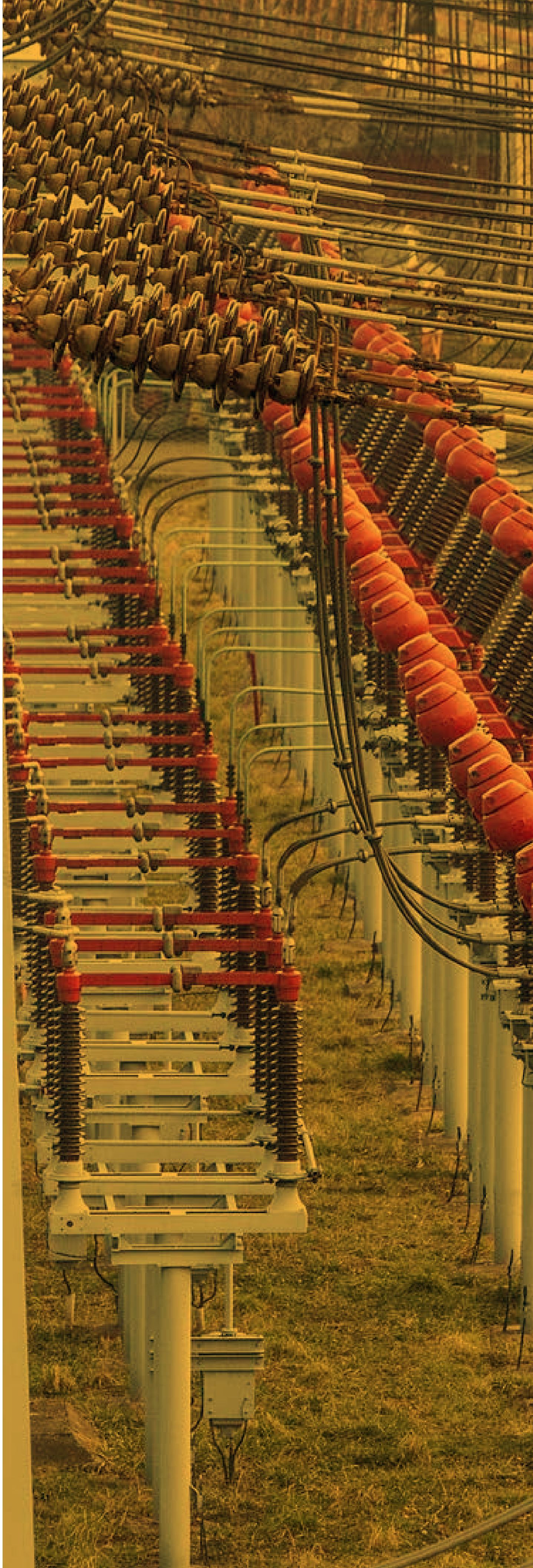
In Alberta, all existing electricity transmission is regulated under a non-market, cost-of-service model, whereby customers pay a cost for operating the system, plus a reasonable return, as determined in regulatory proceedings. The transmission grid is owned by private entities rather than (as in most other provinces) government-controlled "Crown" corporations. However, assessing the need for transmission additions to the grid falls to the AESO, which forecasts demand and seeks approval for new projects before the AUC. The AESO also directs the operation of existing transmission assets on a minute-by-minute basis, in conjunction with its market-based dispatch procedures. Certain industrial and commercial customers, especially oil and gas operations, are connected directly to the high-voltage transmission grid and often apply to the AUC to build their own industrial systems.

The lower-voltage distribution side of the grid, which serves residential and business end users, is largely owned and operated by municipalities or municipally-owned utility companies (such as ENMAX in Calgary and EPCOR in Edmonton). Alberta's retail electricity market contains both regulated and fully deregulated aspects. For large industrial and commercial consumers, retailers can offer a variety of contracts on a deregulated basis. Some very large industrial and commercial consumers purchase electricity directly from the wholesale market. Smaller consumers, comprising mostly residential customers, do have access to deregulated retail contracts. However, customers that do not sign deregulated contracts have access to a default supplier based on their physical location. These customers pay a default regulated rate, called the Regulated Rate Option (RRO). The AUC sets the RRO on a monthly basis based on market prices for power.

As of 2018, Alberta had 11,697 MW of generation capacity installed. The power generated in Alberta was predominantly sourced from natural gas (46 percent) and coal (38 percent), with a smaller share attributable to wind (9 percent) and hydro-electric (5 percent) generation.[6]

In the years prior to the election of a new provincial government in 2015, Alberta had committed to a market-based framework for generation additions, with reliance on the pool price as an economic signal for new investment. The 2015 *Climate Leadership Plan* (Plan), however, marked a shift in policy toward encouraging renewable energy, phasing out coal-fired generation and introducing carbon pricing. From 2016 to 2018, several renewable procurement processes took place under the government's "REP" programs. The current, 2019-elected provincial government has announced an end to these auctions, signaling a return to a model of generation development guided by private investment decisions rather than government policy.

6 AESO, "Electricity in Alberta," online: <https://www.aeso.ca/aeso/electricity-in-alberta/>.



British Columbia

INVESTMENT IN RENEWABLE ENERGY SOURCES

British Columbia has created policies to encourage the development of renewable energy, including direct subsidies, tax measures and renewable energy content targets. For example, pursuant to the British Columbia *Clean Energy Act*, the British Columbia Hydro and Power Authority (BC Hydro) has established a standing offer program, which encourages the development of energy technologies by offering stable prices under long-term contracts for energy generated from renewable resources. Furthermore, tax deductions are available for renewable energy equipment, and write-offs are available for intangible costs associated with certain investments.

Starting in the fall of 2018, the BC government will be commencing Phase 1 of a comprehensive review of BC Hydro. The purpose of this review will be to identify cost savings, efficiencies, new revenue streams and other changes that will help keep electricity rates low. An advisory group will be responsible for completing this review and is expected to issue its recommendations by February 2019.

INDEPENDENT POWER PRODUCERS

Electricity generation by private corporations or Independent Power Producers (IPP) has rapidly grown in British Columbia. IPPs are generally privately-owned companies that specialize in power production, municipalities, Aboriginal groups and BC Hydro customers. These companies can provide cost-effective sources of electricity through the development of power projects using clean or renewable resources such as wind, hydro, geothermal, biomass and waste heat. Despite a decline in demand for new IPP projects, some 124 such projects now connect to the grid, representing more than 5,000 MW of capacity.[7] An area of potential new growth for IPPs in the future will be power generation for the liquefied natural gas (LNG) export industry.

Currently, more than 95 percent of BC Hydro's current energy supply comes from renewable resources. BC Hydro operates 31 hydroelectric facilities and three thermal generating plants throughout the province, representing more than 12,000 MW of installed generating capacity. British Columbia has interconnections to the US Pacific Northwest and Alberta, and growth in electricity demand in Canada and the United States, as well as the retirement of environmentally-challenged facilities, will require increases in generation capacity in both countries. Despite opposition to the project's escalating costs, the NDP government has committed to follow-through with the completion of BC Hydro's Site C hydroelectric project on the Peace River in Northeast BC, which, when completed, will add 1,100 MW of capacity to BC's grid.

REGULATING ELECTRICITY IN BRITISH COLUMBIA

The federal government has jurisdiction over all of Canada's exports, including international and designated interprovincial transmission lines. British Columbia has jurisdiction over generation, transmission and distribution of electricity solely within its boundaries, while the Canada Energy Regulator (which succeeded the National Energy Board in August 2019) regulates electricity that falls within the federal jurisdiction.

The British Columbia Utilities Commission (BCUC) is the independent regulatory agency of the provincial government. The BCUC's primary responsibility is the regulation of energy utilities to ensure the rates charged for energy are reasonable, and that utility operations provide safe, adequate and secure service to customers. While electricity purchase agreements are subject to regulatory review by the BCUC under the *Utilities Commission Act*, IPPs are usually exempt from these requirements pursuant to the *Clean Energy Act*. In the past, BC Hydro provided generation, transmission and distribution services to the entire province. British Columbia now allows IPPs to generate power and distribute to large industrial users, subject to approval by the BCUC unless exempt under the *Utilities Commission Act* or the *Clean Energy Act*.

7 BC Hydro, "Independent Power Producers currently supplying power to BC Hydro" (1 April 2018), online: <https://www.bchydro.com/content/dam/BCHydro/customer-portal/documents/corporate/independent-power-producers-calls-for-power/independent-power-producers/ipp-supply-list-in-operation.pdf>.

THE MARKET IN BRITISH COLUMBIA

The current provincial energy plan describes the government's energy objectives and encourages IPPs to develop new electricity generation plants. Several elements and targets included in the plan were updated in the *Clean Energy Act*. In particular, the *Clean Energy Act* enumerates "British Columbia's energy objectives", a lengthy list of objectives that includes the goal of generating at least 93 percent of the electricity in British Columbia from clean or renewable resources, and building the infrastructure necessary to transmit that electricity. Note that power generation for the LNG export industry is exempt from this goal, meaning there may be opportunities to augment current generation projects with natural gas plants. Pursuant to the *Clean Energy Act* and its regulations, BC Hydro established a standing offer program for clean electricity projects with sizes up to 15 MW.

BC Hydro has issued several expressions of interest and requests for proposals for the supply of electricity from clean energy projects, resulting in several run-of-the-river hydro and other IPP projects. Additionally, large electricity consumers can choose their electricity supplier, and IPPs may use the transmission system to access these markets.

CONTRACTS NECESSARY

IPPs typically sell their electricity to an energy purchaser such as BC Hydro, following BC Hydro's periodic open tender bids for the supply of energy. Once BC Hydro and successful bidders have signed an electricity purchase agreement, the agreements must be filed with and approved by the British Columbia Utilities Commission, unless exempt pursuant to the *Clean Energy Act*. BC Hydro evaluates bids based on transparent criteria, which include:

- Financial strength;
- Technical aspects;
- Aboriginal engagement;
- Permits and approvals required;
- Energy source data; and
- Price.

Other factors will be specified in the call for tenders. Additionally, as BC Hydro owns all of the transmission facilities connected to the BC Hydro grid, each IPP must also enter into an interconnection agreement with BC Hydro.

As of 2018, while a procurement program for five new clean energy projects with First Nations involvement is underway, the government has announced that it does not intend to procure further electricity purchase agreements pending its review of BC Hydro's operations.

OTHER PERMITS OR CONTRACTS

Most projects require further provincial permits or authorizations for project design, construction, operation and land use. If the project is on Crown land, a contract must be negotiated for the use of that land, as well as its resources (such as water). Municipal permits may be required if the project is located within a municipality.

Québec

OVERVIEW

As of 2013, Québec had 42 956 MW of installed generation capacity, broken down as follows:

- 38 433 MW of hydroelectric energy (89 percent of total installed capacity);
- 2399 MW of wind energy (6 percent of total installed capacity);
- 1272 MW of gas (3 percent of total installed capacity);
- 444 MW of biomass energy (1 percent of total installed capacity); and
- 132 MW of diesel (0.3 percent of total installed capacity).

HYDRO-QUÉBEC

Hydro-Québec (HQ) is a provincial Crown electric utility corporation that is the sole legally-authorized reseller of electricity in Québec, a designation that was constituted under the *Hydro-Québec Act*. HQ plays a fundamental role in the bidding process and coordination between private developers, local and municipal authorities, and the Government of Québec. Through its distributing division Hydro-Québec Distribution (HQD), HQ is responsible for satisfying the electricity needs of Québec customers. In this regard, HQD purchases from HQ's producing division, Hydro-Québec Production, a maximum of 165 TWh of electricity at a regulated fixed price. All energy purchased over and above this quantity is obtained by way of call for tenders. Supply contracts are then awarded based on the lowest tendered price, as well as other factors, such as the applicable transmission costs. Winning bidders must then enter into a power purchase agreement (PPA), which is usually for a term of 20 or 25 years. Additionally, each supply contract must, in all cases, be approved by the Régie de l'énergie, an independent regulatory board established by the Government of Québec.

Since Hydro-Québec, through its Hydro-Québec TransÉnergie (HQTE) division, owns all transmission facilities of the HQ grid, a private supplier must enter into an interconnection agreement with HQTE. This supplier then sets out the obligations of the parties pertaining to the integration of the power plant onto the grid. While HQTE has the obligation to connect the supplier's power plant to the grid, the supplier facilities must be in compliance with Québec industry practices, as well as with the applicable technical standards and requirements generally included in the schedules attached to the interconnection agreement. Importantly, with its recent calls for tenders for supply of wind energy, HQTE has provided for the reimbursement of the supplier's incurred cost for the construction of the step-up station required to deliver the electricity produced by the wind farm onto the grid.

QUÉBEC LONG-TERM ENERGY PLAN

In May 2016, the Government of Québec unveiled its new Energy Policy *"Energy in Québec: A Source of Growth 2016-2030"*. This long-awaited policy was issued in the wake of the termination of the previous energy policy.

Unlike the previous energy policy, the new policy does not spell out specific supply targets per new energy supplies, but rather sets out general objectives to be achieved by 2030. These objectives are to be implemented in phases further to three distinct and consecutive action plans. The first one covers the 2016-2020 period, and specifies goals such as saving 1,000 MW in load during peak periods, bringing into service two large generating stations at its complex on the Romaine River (640 MW), and planning for a new hydropower project. This phase also calls for CA$4.3 billion in investment in generation and transmission facilities under the government's northern Québec development plan, Plan Nord.

Although more specific future actions will be defined in each action plan, the key goals outlined in the 2016-2020 energy policy, with respect to electricity, are as follows:

- Improving energy efficiency measures and energy consumption habits;
- Fostering the electrification of transport; and
- Increasing the portion of renewable energy in the Québec's aggregate production by 25 percent and promoting the export of wind energy.

The energy policy also makes the point that, since the overall generation of energy currently exceeds by 4 percent the overall consumption of energy within the province, no new tender of electricity supply will be allowed until the energy surplus falls below 2.5 percent.

Finally, it is noteworthy that although Québec enjoys a surplus of energy, it needs additional capacity during peak periods. The recent 2016-2020 strategic plan produced by Hydro-Québec provides that additional capacity requirements will be met through a call for tenders to reduce costly imports of electricity during peak periods.

Conclusion

The purpose of this publication has been to present a general overview of the legislative and regulatory framework faced by foreign businesses wishing to establish or acquire a business in Canada.

It is beyond the scope of such a summary to review such legislation in depth, or to provide particulars of the legal and other considerations which should be reviewed when dealing with a particular industry.

This publication does not constitute legal or tax advice to any person. Persons contemplating business activity in Canada should consult with their professional advisers to ensure that their endeavors are structured in compliance with local laws and to ensure maximum benefit.

Dentons Canada LLP
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Key Dentons Canada contacts

Beth Wilson
Canada Chief Executive Officer
D +1 416 863 4715
beth.wilson@dentons.com

David Pickwoad
Chief Client Officer, Toronto
D+1 416 862 3449
david.pickwoad@dentons.com

OFFICE MANAGING PARTNERS

Fausto Franceschi
Managing Partner, Edmonton
D+1 780 423 7348
fausto.franceschi@dentons.com

Tim B. Haney
Managing Partner, Calgary
D +1 403 268 3014
tim.haney@dentons.com

David Little
Managing Partner, Ottawa
D +1 613 783 9639
david.little@dentons.com

Blair McCreadie
Managing Partner, Toronto
D+1 416 863 4532
blair.mccreadie@dentons.com

Claude Morency
Managing Partner, Montréal
D +1 514 878 8870
claude.morency@dentons.com

John R. Sandrelli
Managing Partner, Vancouver
D+1 604 443 7132
john.sandrelli@dentons.com

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