



McCarthy
Tetraul

Doing Business in Canada 2013

Navigating Opportunities
for Investment and Growth

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Introduction

INTRODUCTION

What are the key considerations when planning to establish or acquire a business in Canada? What are the potential opportunities, and where are the possible pitfalls?

Doing Business in Canada was developed by McCarthy Tétrault as a basic guide to the legal aspects of establishing or acquiring a business in Canada. It is written for the non-resident businessperson, but with few exceptions the same considerations apply when all parties are based in Canada.

We've organized this guide into what we hope you'll find to be a useful and user-friendly resource. Beginning with an overview of the Canadian political and legal systems, the guide proceeds through the areas of law most likely to affect your business decisions: foreign investment, international trade, corporate finance, mergers & acquisitions, competition, taxation, intellectual property, real property and others.

The discussion in each section is intended to provide general guidance, and is not an exhaustive analysis of all provisions of Canadian law with which your business may be required to comply. For this reason, we recommend you seek the advice of one of our lawyers on the specific legal aspects of your proposed investment or activity. With offices in Canada's major commercial centres, McCarthy Tétrault has substantial presence and capabilities to help you successfully complete any business transaction in Canada.

The information in this publication is current as of December 2012 unless otherwise indicated. If you would like an electronic copy of this publication, you can find it under the Publications section of our website at www.mccarthy.ca.

DOING BUSINESS
IN CANADA WAS
DEVELOPED BY
MCCARTHY TÉTRALERT
AS A BASIC GUIDE TO
THE LEGAL ASPECTS
OF ESTABLISHING
OR ACQUIRING A
BUSINESS IN CANADA.

CANADA

Canada is the second-largest country in the world, with an area of approximately 10 million square kilometres and a population just under 34 million. Its developed portion constitutes less than one-third of its total territory, and roughly 50% of its population resides within about 150 kilometres of its southern boundary with the United States — in the highly industrialized corridor between Windsor, Ontario and Québec City, Québec. Canada's two official languages are English and French.

As one of the eight largest economies of the industrialized countries, Canada is a member of the world's Group of Eight (G8) industrialized nations. Currently, approximately 72%

of Canada's exports go to the United States, 5% to the European Community, 4% to the United Kingdom and 2% to Japan. Canada is by far the largest trading partner of the United States, with almost 20% more imports and exports than the U.S. has with China, and three, four and five times larger than with Japan, Germany and the U.K., respectively.

The Toronto Stock Exchange (TSX) and the TSX Venture Exchange rank third among North American exchanges and eighth among world stock exchanges in terms of market capitalization. More resource company stocks are listed on the TSX than anywhere else in the world.

In the last several years, the business environment in Canada has been quite resilient compared to the economies of many industrialized nations. Commodity prices have remained high and interest rates have continued to be low, creating a favourable investment environment for the resource companies that are so important to the Canadian economy. A combination of rigorous regulation, strong capitalization and the conservative practices of Canadian banks has distinguished and insulated the Canadian banking system from the more dramatic losses experienced by banks in other industrialized countries.

In 2012, European and U.S. sovereign debt worries, together with the consequent lessening of demand for commodities, resulted in weaker

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than expected stock markets and reduced confidence levels throughout much of the world, including Canada. For 2013, GDP growth for Canada is expected to be moderate, at around 2%.

The Canadian dollar spent much of 2012 trading slightly above par to the US dollar. Inflation continues to remain very low.

Canada is a federal state, with governmental jurisdictions divided among a national government, 10 provincial governments and three territorial governments.

The *Constitution Act, 1867* provides the federal and provincial governments with exclusive legislative control over enumerated lists of subjects, and also provides exclusive legislative control to the federal government over residual subjects not clearly assigned to the provincial governments. Each of Canada's two levels of government is supreme within its particular area of legislative jurisdiction, subject to the limits provided by the *Canadian Charter of Rights and Freedoms*, which forms part of the *Constitution Act, 1982*.

The federal government has legislative jurisdiction over, among other matters, the regulation of trade and commerce, banking and currency, bankruptcy and insolvency, intellectual property, criminal law and national defence. The provincial governments have legislative jurisdiction over, among other matters, real and personal property, civil rights, education, health care and intra-provincial trade and commerce. Certain aspects of these provincial powers are delegated to municipal governments, which enact their own bylaws.

Both levels of government are based on the British parliamentary system. At the federal level, the Prime Minister is the head of government; at the provincial level, the Premiers. These individuals are the leaders of the political parties that have either the greatest number of seats in the House of Commons or the provincial legislatures, respectively — or that have, at a minimum, the support of a majority of the members of the House of Commons or provincial legislatures, respectively.

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10 PROVINCIAL
GOVERNMENTS AND
THREE TERRITORIAL
GOVERNMENTS.

Canada

When establishing or acquiring a business in Canada, one must be concerned with the federal laws as well as the laws of the provinces or territories within which the business will be conducted. In nine of the 10 provinces and in the three territories, the legal systems are based on common law. In Québec, the legal system is based on civil law. In this publication, we have chosen to refer primarily to Ontario legislation, but the legislation and programs of the other common law provinces are similar to those of Ontario. We have included references to Québec legislation — in particular, under the heading **Language**. Lawyers in the various offices of McCarthy Tétrault would be pleased to conduct a review of the federal and provincial laws and regulations and municipal bylaws relevant to your particular business operation.

WHEN ESTABLISHING OR ACQUIRING A BUSINESS IN CANADA, ONE MUST BE CONCERNED WITH THE FEDERAL LAWS AS WELL AS THE LAWS OF THE PROVINCES OR TERRITORIES WITHIN WHICH THE BUSINESS WILL BE CONDUCTED.

BUSINESS ORGANIZATIONS

A wide variety of legal arrangements may be used to carry on business activity in Canada. Some of the more commonly used arrangements are corporations, limited partnerships, partnerships, trusts, co-ownerships, joint ventures and unlimited liability companies.

The selection of the appropriate form of business organization will depend in each case upon the circumstances of the investor, the nature of the activity to be conducted, the method of financing, income tax ramifications and the potential liabilities related to the activity.

Generally, one of the first issues faced by a foreign entity contemplating carrying on business in Canada is whether to conduct the business directly in Canada as a Canadian branch of its principal business, or to create a separate Canadian entity to carry on the business. The following issues should be taken into consideration before making this decision:

- ¬ the treatment of Canadian business income for tax purposes in the proponent's home country;
- ¬ the advisability of isolating the assets of the principal business from claims arising out of the Canadian business;
- ¬ whether one or more parties will own the Canadian enterprise;
- ¬ criteria for the availability of federal, provincial and municipal government incentive programs; and
- ¬ Canadian tax considerations.

A foreign entity carrying on a branch operation in Canada must be registered in each of the provinces in which it carries on business. In addition, foreign entities must complete many of the same disclosures and filings with the federal and provincial governments as are required of Canadian corporations.

Of the forms of business organization referred to above, the corporation with share capital is the entity most often used to carry on commercial activities in Canada. Unlike the limited partnership, partnership, trust,

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co-ownership or joint venture, the corporation is a legal entity separate from its owners. The shareholders do not own the property of the corporation, and the rights and liabilities of the corporation are not those of the shareholders. The liability of the shareholders is generally limited to the value of the assets they have invested in the corporation to acquire their shareholdings. In addition to the advantages of limited liability, the securities of a corporation are generally more readily marketable. As a result, corporate shares (and debt instruments) are often seen as more attractive investments than units in partnerships or joint ventures. In some situations, there may also be tax advantages to using a corporation.

CORPORATE SHARES
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PARTNERSHIPS OR
JOINT VENTURES.

Unlike a corporation, a partnership is not a separate legal entity, but a relationship that exists between the parties who carry on business in common with a view to profit. Partners share in the profits, losses and net proceeds on dissolution. The most significant advantage of a partnership is that it is permitted to “flow through” losses to its partners that may, subject to certain rules in the *Income Tax Act* (Canada), be used as deductions against the partners’ other income. The most significant disadvantage of a general partnership is that each of the partners is personally liable for the liabilities of the partnership, and their personal assets are exposed in the event the partnership assets are insufficient to cover such liabilities. The exposure of a partner to liability can be minimized by using a limited partnership rather than a general partnership. In a limited partnership, the liability of a limited partner is limited to the extent of its investment in the partnership so long as it takes a passive role in the business and governance of the limited partnership.

In each case, the selection of the form of business organization best suited to carry on business in Canada will depend entirely on individual circumstances.

Where a corporation is the preferred vehicle for carrying on business within Canada, consideration must be given to the appropriate jurisdiction for incorporation. The nature of a corporation’s particular undertaking

Business Organizations

(e.g., banking) may be such that it falls within the exclusive legislative purview of either the federal or provincial governments, with an attendant requirement to incorporate under a specific statute. However, corporations not specifically subject to such legislation may be incorporated under the federal laws of Canada or under the laws of any one of the provinces or territories.

The principal federal corporate statute is the *Canada Business Corporations Act* (CBCA), which is modeled on modern business statutes in the United States. Most provinces and territories in Canada also have their own corporate legislation, based largely on the CBCA. There are minor differences between the various federal and provincial corporate statutes that can affect the choice of jurisdiction of incorporation, depending upon the particular circumstances.

A foreign investor will find the following features of Canadian corporate legislation of interest:

- ¬ Under the CBCA, 25% of a Canadian corporation's directors must be "resident Canadians" (i.e., individuals resident in Canada who are either Canadian citizens or Canadian permanent residents). Directors' residency requirements for corporations established under the laws of the provinces or territories differ from one jurisdiction to another. Several provinces and territories have no residency requirements at all.
- ¬ The board of directors of a Canadian corporation must consist of at least one individual, but can have an unlimited number of directors.
- ¬ Each director must be an individual person, and a director may not appoint an alternate to serve in his or her place.
- ¬ Directors are generally subject to a number of liabilities and obligations under corporate law, as well as under a range of other federal and provincial laws including those relating to the environment, tax, securities, pensions and employment.

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- ¬ The shareholders of a Canadian corporation can, in most cases, enter into a “unanimous shareholders’ agreement” to restrict the powers of the board of directors. To the extent the powers of the directors are so restricted, the liabilities and obligations of the directors will generally be transferred to the shareholders.
- ¬ Single shareholder corporations are permitted and directors need not hold shares in the corporation.
- ¬ Minority shareholders of a Canadian corporation have significant statutory rights and remedies, and eliminating minority shareholders can often be difficult and costly.
- ¬ The board of a Canadian corporation must approve the corporation’s financial statements annually, and present them to the corporation’s shareholders.
- ¬ Generally, there is no requirement to file a Canadian corporation’s financial statements with a government body, except in the case of a public company.
- ¬ The requirement that the corporation’s financial statements must be audited varies by jurisdiction; in most cases it is possible for the corporation’s shareholders to consent to exempt it from the audit requirement, except in the case of a public company.
- ¬ The identities of a Canadian corporation’s shareholders are not a matter of public record and a corporation is not obliged to disclose the names of its shareholders, unless it is a public company.
- ¬ Meetings of the board of directors and, in certain limited circumstances, the shareholders of a Canadian corporation need not take place in Canada.
- ¬ Resolutions of directors or shareholders may be passed by a written instrument signed by all of the directors or shareholders, as the case may be, in lieu of a meeting.
- ¬ The statutory books and records of a Canadian corporation, including those maintained in electronic form, must be kept in Canada.

GENERALLY, THERE IS NO REQUIREMENT TO FILE A CANADIAN CORPORATION’S FINANCIAL STATEMENTS WITH A GOVERNMENT BODY, EXCEPT IN THE CASE OF A PUBLIC COMPANY.

Business Organizations

United States businesses coming to Canada may, in certain circumstances, use unlimited liability companies (ULCs) as a vehicle for their business activity in Canada because of the favourable treatment afforded to ULCs as “flow-through” entities under U.S. tax law. U.S. advice should be obtained. In addition, the recent changes that result from the Fifth Protocol to the U.S. Convention should be considered, as in certain circumstances they may eliminate the tax benefits associated with such entities or give rise to adverse tax consequences without proper tax planning. See **Taxation**.

FOREIGN INVESTMENT LAWS

The *Investment Canada Act* (ICA) is the only federal foreign-investment law of general application. Certain statutory provisions restrict foreign investment and ownership in specific areas, including the financial services, air transportation, and broadcasting and telecommunications sectors. There are also foreign-investment disincentives for media and publishing. The ICA was amended in a number of significant respects, with effect from March 2009. These amendments are discussed below. Transactions involving “national security,” including minority investments, are now also reviewable.

One of the ICA’s stated purposes is to encourage investment in Canada by non-Canadians, as this contributes to economic growth and employment opportunities. Two federal ministers are responsible for administering the ICA: the Minister of Industry and the Minister of Canadian Heritage and Official Languages. The Minister of Industry has appointed a Director of Investments to advise and assist the Minister in administering the ICA for non-cultural matters.

If an investment by a non-Canadian relates to a cultural business, the Minister of Canadian Heritage and Official Languages is responsible. Consequently, any required review process for cultural businesses as defined under the ICA will be done through Canadian Heritage instead of Industry Canada. The Minister of Canadian Heritage and Official Languages has appointed a Director of Investments to advise and assist the Minister in administering the ICA for cultural matters.

Whether a foreign investor establishes a Canadian operation through an acquisition or by starting up a new Canadian business, the investment may be subject to the foreign investment review requirements of the ICA. Investments to establish a new Canadian business, and acquisitions of control of existing businesses that do not exceed applicable thresholds, are subject to “notification,” which requires only the filing of a short

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information form either before or shortly after completion of the transaction. However, investments to acquire control of Canadian businesses that exceed applicable thresholds are subject to “review,” which requires the filing of more detailed information concerning the target business and the investor’s plans for it. The review process generally takes at least 45 days and focuses on whether the proposed transaction “is likely to be of net benefit to Canada.”

Review Thresholds

Generally, when a non-Canadian is acquiring control of a Canadian business, review by the Minister-appointed Director and approval by the Minister are required in the following cases:

- Where there is a direct acquisition of control of a Canadian business through the acquisition of voting shares of a corporation incorporated in Canada or through the acquisition of voting interests of a non-share capital corporation, partnership, trust or joint venture carrying on that business, or by the acquisition of substantially all of the assets used to carry on that business, the book value of the assets of the Canadian business is \$5 million or more.
- Where there is an indirect acquisition of control of a Canadian business through, for example, the acquisition of the foreign parent of a corporation incorporated in Canada if either a) the Canadian business has assets of \$50 million or more in value, or b) the Canadian business represents more than 50% of the assets of the acquired group of entities and the Canadian business has assets of \$5 million or more in value. The value of the assets is usually calculated by using book values based on the most recent audited financial statements for the relevant entity.

INVESTMENTS TO
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As a result of the *North American Free Trade Agreement* (NAFTA), the *Agreement Establishing the World Trade Organization* (WTO), amendments made pursuant to the renegotiation of the *General Agreement on Tariffs and Trade* (GATT) and the policy of the Director,

Foreign Investment Laws

the thresholds for review referred to above are modified in some instances with respect to the acquisition of control of a Canadian business, by what the ICA defines as a “WTO Investor” (a person or entity from countries that are members of the WTO), or by another non-Canadian where the Canadian business is controlled by a WTO Investor. These modifications are made in the following cases:

- For the direct acquisitions referred to above, the threshold value of assets of the Canadian business that will trigger the review requirement for an acquisition by or from a WTO Investor is increased from \$5 million to \$330 million (for 2012; this threshold is adjusted at the beginning of each calendar year in accordance with an inflation index), subject to annual adjustment for inflation and economic growth. However, the March 2009 amendments affect the review thresholds as described below.
- For indirect acquisitions by or from a WTO Investor, there will be no review, regardless of the value of Canadian assets.

WITH CERTAIN EXCEPTIONS, A NON-CANADIAN MAY NOT IMPLEMENT A REVIEWABLE INVESTMENT UNTIL THE INVESTMENT HAS BEEN REVIEWED AND THE MINISTER IS SATISFIED, OR DEEMED TO BE SATISFIED, THAT THE INVESTMENT “IS LIKELY TO BE OF NET BENEFIT TO CANADA.”

Review may be required if the investment involves either the acquisition of control of a Canadian business (regardless of the value of the assets) or the establishment of a new Canadian business in an area concerning Canada’s “cultural heritage or national identity.” Areas of “cultural heritage and national identity” include book publishing, magazine publishing, film production and distribution, television and radio, and music production and distribution.

With certain exceptions, a non-Canadian may not implement a reviewable investment until the investment has been reviewed and the Minister is satisfied, or deemed to be satisfied, that the investment “is likely to be of net benefit to Canada.” If the Minister initially decides that the investment will not be of such benefit, the non-Canadian will be given an opportunity to make representations and submit undertakings with respect to the investment with a view to satisfying these requirements.

In determining “net benefit to Canada,” the Minister is required to give consideration to:

- the effect of the investment on the level and nature of economic activity in Canada;
- the degree and significance of participation by Canadians in the Canadian business and the industry of which it forms a part;
- the effect of the investment on productivity, industrial efficiency, technological development and product innovation and variety in Canada;
- the effect of the investment on competition within an industry in Canada;
- the compatibility of the investment with national industrial, economic and cultural policies; and
- the contribution of the investment to Canada’s ability to compete in world markets.

IN DECEMBER 2007, THE MINISTER OF INDUSTRY ISSUED GUIDELINES THAT APPLY TO REVIEWABLE TRANSACTIONS FOR THE ACQUISITION OF CONTROL OF A CANADIAN BUSINESS, WHERE THE PROPOSED ACQUIROR IS AN ENTERPRISE CONTROLLED DIRECTLY OR INDIRECTLY BY A FOREIGN GOVERNMENT.

In December 2007, the Minister of Industry issued guidelines that apply to reviewable transactions for the acquisition of control of a Canadian business, where the proposed acquiror is an enterprise controlled directly or indirectly by a foreign government (“state owned enterprise”). The guidelines reflect the potential concerns the Minister may have regarding the “governance and commercial orientation” of some state-owned enterprises. The guidelines specify that the Minister will examine the corporate governance and reporting structure of the state owned enterprise, and that part of this examination will include whether the state owned enterprise adheres to Canadian standards of corporate governance — including, for example, commitments to transparency and disclosure, independent members of the boards of directors, independent audit committees, equitable treatment of shareholders and adherence to Canadian laws and practices.

Foreign Investment Laws

In making the net benefit determination, the guidelines state that the Minister will assess whether the Canadian business to be acquired by the state owned enterprise will continue to have the ability to operate on a commercial basis and specify a number of important indications. These include where exports go, where processing takes place, the participation of Canadians in the operations and the level of capital expenditures to maintain the Canadian business. A state owned enterprise can therefore anticipate that it may be required to provide undertakings beyond those normally expected of a privately owned company, in order to secure approval by the Minister.

In December 2012, the Prime Minister of Canada announced that two state owned enterprises would be permitted to acquire control of Canadian businesses. One was CNOOC's acquisition of Nexen Inc., the other was Petronas' acquisition of Progress Energy Resources Corp. At the same time, the Prime Minister announced important changes to Canada's policy for reviewing investments in Canada by state owned enterprises. These new guidelines indicate that the rules will be changing. The Prime Minister stated that in the future, while each case will be examined on its own merits, the Minister of Industry will find the acquisition of control of a Canadian oil sands business by a foreign state owned enterprise to be of net benefit (and therefore allowed) only in exceptional circumstances. It remains to be seen what the rules will be in other economic sectors besides energy.

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General

Presently, not all investments in Canadian businesses by non-Canadians are subject to review or notification under the ICA. For example, the ICA contains a number of exempt transactions, such as the acquisition of shares by a person whose business is dealing in securities. An investment to acquire an interest in an existing Canadian business that does not result in an acquisition of control under the ICA will also generally not be subject to notification or review.

Information submitted under the ICA is treated as confidential and, subject to certain exceptions, will not be disclosed to the public. It is also subject to the Minister's new powers, described below.

Compliance with provisions of the ICA does not bar review or action by the Competition Bureau under the merger provisions of the *Competition Act*. See **Competition Law**.

As indicated, care must be taken to ensure that the ICA's requirements are met and that compliance is achieved with any legislation relating to foreign investment restrictions applicable to specific industries or activities.

Some of the significant changes included in the March 2009 amendments to the ICA (the first, third and fifth of which noted below are not yet in force) were:

¬ **Increase of WTO thresholds.**

The thresholds for review of WTO investments in a Canadian business will be increased to \$600 million, \$800 million and \$1 billion, respectively, over the next several years. After that, the applicable threshold will be determined on an annual basis using a prescribed formula. This may decrease the number of investments that are subject to pre-closing review. Investments by non-Canadians will still be subject to an obligation to submit a post-closing notification.

¬ **Removal of most sector-specific thresholds.** The \$5-million threshold for investments in transportation businesses, financial services businesses and uranium businesses has been removed, but will be maintained for investments in cultural businesses and certain direct investments by non-WTO investors. Pre-closing review for transportation and uranium investments may still be subject to pre-closing government scrutiny. The Minister of Transport conducts pre-closing reviews of proposed transactions involving a transportation undertaking that raise public interest issues and that exceed the pre-notification thresholds under the *Competition Act*. Further, although the lower threshold for certain businesses has been

CARE MUST BE TAKEN TO ENSURE THAT THE ICA'S REQUIREMENTS ARE MET AND THAT COMPLIANCE IS ACHIEVED WITH ANY LEGISLATION RELATING TO FOREIGN INVESTMENT RESTRICTIONS APPLICABLE TO SPECIFIC INDUSTRIES OR ACTIVITIES.

Foreign Investment Laws

repealed in the ICA, the new national security review criteria described above could still provide a mechanism for the Minister to review investments in a uranium business at the Minister's option.

- **Thresholds based on “enterprise value.”** Currently, the threshold for review is based on the aggregate value of all assets being acquired as shown in the financial statements for the Canadian business for the prior year. The calculation will be changed from one based on the value of assets to one based on “enterprise value,” to be defined in regulations that are still pending and a Regulatory Impact Analysis Statement, a draft of which have been Gazetted.
- **Vague criteria and potentially broad review.** The government has the authority to review proposed investments (including minority investments) where the responsible Minister has “reasonable grounds to believe that an investment by a non-Canadian could be injurious to national security.” No financial threshold will apply to a national security review and there is no definition of “national security.” The government may deny the investment, ask for undertakings, provide terms or conditions for the investment, or, where the investment has already been made, require divestment. Review can occur before or after closing and may apply to corporate reorganizations where there is no change in ultimate control. Regulations are still pending on this topic.
- **Information produced can be shared with other investigating agencies.** The Minister will be able to compel a party to provide information within the context of a review application that the Minister “considers necessary.” In addition, for information produced with respect to a national security review, the Minister may communicate this information to prescribed investigative bodies, which may also disclose the information to others for the purposes of that agency’s investigation.

THE GOVERNMENT HAS THE AUTHORITY TO REVIEW PROPOSED INVESTMENTS (INCLUDING MINORITY INVESTMENTS) WHERE THE RESPONSIBLE MINISTER HAS “REASONABLE GROUNDS TO BELIEVE THAT AN INVESTMENT BY A NON-CANADIAN COULD BE INJURIOUS TO NATIONAL SECURITY.”

Foreign Investment Laws

Generally, information provided to the Minister in the context of investment review is protected from disclosure to other government agencies unless necessary for the purposes of the administration and enforcement of the ICA.

COMPETITION LAW

The federal *Competition Act* (Act) provides for criminal sanctions against persons involved in agreements with competitors that fix prices, restrict supply or allocate customers or markets, or that are involved in bid-rigging, deceptive telemarketing, or wilful or reckless misleading advertising offences. A civil regime regulates the less egregious forms of misleading advertising. The Act also contains non-criminal or administrative provisions that allow the Competition Tribunal, on application by the Commissioner of Competition, to review certain business practices, and, in certain circumstances, to issue orders prohibiting or correcting conduct to eliminate or reduce its anti-competitive impact. Reviewable practices include mergers, agreements among competitors, abuse of dominant position, or monopoly and a number of vertical practices between suppliers and customers such as price maintenance, tied selling, refusal to supply and exclusivity arrangements. Private parties are also able to apply to the Competition Tribunal to challenge certain types of reviewable conduct, such as price maintenance, exclusive dealing, tied selling and refusal to deal. The Competition Tribunal also has the power to impose monetary penalties for abuse of dominant position.

MERGERS, MEANING THE ACQUISITION OF CONTROL OVER A SIGNIFICANT INTEREST IN THE WHOLE OR A PART OF A BUSINESS, DO NOT REQUIRE ADVANCE APPROVAL UNDER THE ACT, ALTHOUGH THEY MAY BE SUBJECT TO PRE-MERGER NOTIFICATION REQUIREMENTS.

Merger Regulation

Mergers, meaning the acquisition of control over a significant interest in the whole or a part of a business, do not require advance approval under the Act, although they may be subject to pre-merger notification requirements (described below). If the Commissioner of Competition believes that a merger is likely to prevent or lessen competition substantially, and the Commissioner of Competition challenges the merger before the Competition Tribunal, the merger is then subject to review by the Competition Tribunal. If an adverse finding is made, the Competition Tribunal may issue an order preventing or dissolving the merger in whole or in part.

The Act includes a list of criteria to be considered by the Competition Tribunal when determining whether a merger substantially lessens competition. Such criteria are generally similar to those found in U.S. case law, although their application may be different. Because of the small size of the Canadian domestic economy, greater concentration may be acceptable in industries where even a relatively high percentage of the Canadian market would still not allow for optimal efficiency and international competitiveness. This is why the thresholds that could trigger government review, such as those relating to market share, will in many industries be higher in Canada than in the U.S.

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Larger mergers require pre-merger notification and the filing of information with the Commissioner of Competition. Generally, for a merger to be notifiable (i.e., subject to pre-merger notification), two threshold tests must be met: the “size of parties test” and the “size of transaction test.” Under the “size of parties test,” the parties to the transaction, together with their respective affiliates (defined to include all corporations joined by a 50%-plus voting link), must have assets in Canada or gross revenues from sales in, from and into Canada in excess of \$400 million in the aggregate. The size of transaction threshold is met where the assets in Canada or gross revenues from sales in and from Canada generated by such assets exceeds a stipulated amount (an annually adjusted amount). The 2012 Act “size of transaction” threshold is \$77 million, which is expected to increase in 2013.

In general and with certain exceptions, these asset and revenue values are calculated using book values based on the most recent audited financial statements for the relevant entity. Pre-merger notification involves the filing of a notification form with the Commissioner of Competition. A transaction that is subject to pre-merger notification may not be completed until the applicable waiting period has expired.

The initial waiting period is 30 days. If, within this initial period, the Commissioner of Competition issues a supplementary information request (SIR), then the waiting period is extended to 30 days after

a complete response to the SIR has been provided to the Commissioner of Competition. Unlike the *Investment Canada Act*, where the relevant Minister approves the proposed transaction, the passing of the applicable waiting period under the Act does not preclude the Bureau from subsequently opposing the merger at any time within the next year. Accordingly, while a transaction may be completed after the expiry of the relevant waiting period, the parties will generally wait until they receive an indication from the Commissioner of Competition that the transaction will not be challenged before they complete the transaction. The Commissioner of Competition's review of complex mergers may take longer than the applicable statutory waiting period. It is possible in some circumstances to obtain an Advance Ruling Certificate (ARC) from the Commissioner of Competition and thereby avoid the pre-merger notification process. If an ARC is issued in respect of a proposed transaction, the Commissioner of Competition will thereafter be precluded from challenging the transaction, assuming there are no material changes in circumstances prior to closing. It should be noted, however, that the granting of an ARC is discretionary, and that ARCs are typically issued only when it is clear the merger raises no competition issues. The Commissioner of Competition can also, in lieu of issuing an ARC, exempt the transaction from notification and issue a "no action letter" indicating that the Commissioner of Competition does not have grounds to challenge the transaction, which is usually sufficient comfort for the merging parties to proceed. A \$50,000 filing fee is payable in respect of any transaction that is subject to pre-merger notification.

IT IS POSSIBLE IN SOME CIRCUMSTANCES TO OBTAIN AN ADVANCE RULING CERTIFICATE FROM THE COMMISSIONER AND THEREBY AVOID THE PRE-MERGER NOTIFICATION PROCESS.

Abuse of Dominant Position

Abusing a dominant position in a market constitutes a reviewable practice that could give rise to an order (including monetary penalties up to \$15 million) by the Competition Tribunal if it results in a substantial lessening of competition. To start with, there must be a dominant position or control of a market. A monopoly is not a prerequisite, but there

must be a relatively high market share such that the dominant firm or firms can, to a substantial degree, dictate market conditions and exclude competitors. There must also be an abuse of such dominant position by the practice of anti-competitive acts. There is nothing wrong with market dominance as such; what causes a problem is adoption by a dominant player of predatory or exclusionary business tactics. When a dominant firm attempts to exclude potential competitors or to eliminate existing competition, the Competition Tribunal can be called upon to intervene. It is not always easy to distinguish competitive from anti-competitive practices. There is nothing wrong with tough competition, even from a dominant firm. However, when a firm's intention is to eliminate competition or prevent entry into or expansion in a market, there could be an abuse of dominant position. The Act includes a non-exhaustive list of anti-competitive acts. These include selling at prices lower than acquisition costs in order to discipline or eliminate a competitor, inducing a supplier to refrain from selling to competitors, or a vertically integrated supplier charging more advantageous prices to its own retailing divisions. Predatory pricing is also a practice that could constitute an anti-competitive act.

IT IS NOT ALWAYS
EASY TO DISTINGUISH
COMPETITIVE FROM
ANTI-COMPETITIVE
PRACTICES.

Criminal Violations

It is a crime under the Act (subject to available defences) to enter into an agreement or arrangement with a competitor to fix prices for the supply of a product, allocate customers or markets for the production or supply of a product, or restrict the production or supply of a product. It is also a crime to engage in bid-rigging. These practices are prohibited regardless of their effect on competition. Deceptive telemarketing and wilful or reckless misleading advertising are also offences under the Act. Penalties for persons found guilty of such activities include imprisonment for up to 14 years and/or multi-million dollar fines. A violation of the criminal provisions of the Act can also result in a civil suit for damages by the person or persons who have suffered a loss as a result of such violation.

CORPORATE FINANCE AND MERGERS & ACQUISITIONS

Canada has well-developed and sophisticated capital markets. The main sources of capital are Canadian chartered banks, other financial institutions (including pension funds, mutual funds and insurance companies), public markets and government agencies. Securities of Canadian and foreign public companies can be listed and traded on one or more of Canada's stock exchanges. The Toronto Stock Exchange (TSX) is the country's largest stock exchange. Canada also has active over-the-counter markets for a variety of other securities, including, in particular, debt securities. Canadian chartered banks are the principal source of revolving lines of credit and term loans.

Public Offerings and Private Placements

In Canada, securities law is currently regulated under provincial jurisdiction and consequently, each Canadian province and territory currently has its own separate securities regulator as well as its own securities legislation. Nonetheless, securities legislation in Canada is largely harmonized through the use of national and multilateral instruments adopted by an umbrella organization comprising all of the provincial securities regulators (the Canadian Securities Administrators or CSA) and implemented as law by the provinces. Further, the "principal regulator" or "passport" system adopted by each province of Canada (other than Ontario, which has Canada's largest capital market) allows many aspects of securities law to be effectively regulated by only one participating jurisdiction (i.e., the "principal regulator" in the circumstances), in addition to Ontario. These aspects include the review and receipt of prospectuses, compliance with continuous disclosure obligations and obtaining exemptions from various provisions of securities law.

CANADA HAS WELL-DEVELOPED AND SOPHISTICATED CAPITAL MARKETS.

When debt or equity securities are offered to the public in Canada, whether as part of an initial public offering or not, a prospectus must be filed with the securities regulatory authorities in those provinces and territories where the securities are being offered. This prospectus will be reviewed by the principal regulator under the above passport system.

A copy of the prospectus must also be provided to potential investors. The prospectus must contain full, true and plain disclosure of the nature of the securities being offered and the business of the issuer. Where securities are being offered in Québec, the prospectus must be translated into French.

The requirement to prepare a prospectus can be avoided where the securities are offered on an exempt basis exclusively to institutional or other “accredited investors” by way of a private placement, although in such cases market practice may nonetheless dictate the delivery to investors of an “offering memorandum” containing disclosure that is often substantially equivalent to a prospectus. There are a number of other prospectus exemptions, including those for the issue of securities by “private issuers” or to employees, or the issue of short-term commercial paper with an approved rating and bank debt, in which case generally either no disclosure document or an abbreviated one is used. Securities sold on an exempt basis may be subject to resale restrictions.

Shareholders of Canadian public companies are not generally afforded statutory or contractual pre-emption rights. Accordingly, new equity issues are typically effected by way of public offering or private placement, rather than by way of rights offerings to existing shareholders.

Issuers with equity securities listed on certain Canadian exchanges can take advantage of Canada’s short-form prospectus distribution system, which enables capital to be raised in the public markets quickly by preparing and filing a shorter prospectus that incorporates by reference the issuer’s most recent financial statements and other continuous disclosure documents. Generally, issuers eligible for this system can clear a prospectus with the provincial securities authorities within four business days of filing a preliminary prospectus. In the case of more senior issuers, it is common for Canadian underwriting syndicates to enter into a “bought deal” arrangement. This constitutes an enforceable

THE REQUIREMENT
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PLACEMENT.

agreement by the underwriters to purchase the securities being offered for sale, even before the filing of a preliminary prospectus, with the result that the syndicate incurs the risk of price fluctuations in the market from the time of signing the “bought deal” letter with the issuer until the closing of the offering.

In such cases, a preliminary prospectus must be filed within four business days of the signing of the bought deal letter, and the syndicate may begin to solicit purchasers immediately upon signing the letter. For issuers that do not qualify under the short-form system, prospectus clearance can often take from three to six weeks, and sometimes longer.

Canadian securities laws also provide issuers with the ability to file a base shelf prospectus for an aggregate dollar amount of securities (which may be unallocated between debt, equity and other securities) for subsequent issuance over a period of up to 25 months. At the time of an actual distribution of securities qualified by the base shelf prospectus — and not later than two business days after the determination of the offering price of the securities — the issuer simply files a relatively brief supplement to the prospectus containing the specific terms of the securities then being offered, as well as any additional information that was not available to the issuer at the time the prospectus was filed. Although there are exceptions (e.g., where innovative, structured or derivative products are being distributed), supplements to the base shelf prospectus are not reviewed, allowing issuers to act quickly and take advantage of narrow windows of opportunity for financing in the markets.

An issuer filing a prospectus, listing its securities on a Canadian stock exchange or acquiring a Canadian reporting issuer through a share exchange transaction, will become a “reporting issuer,” and thereby become subject to various continuous and timely disclosure obligations. These include the requirement to prepare and file quarterly and annual

CANADIAN
SECURITIES LAWS
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ISSUERS WITH
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FILE A BASE SHELF
PROSPECTUS FOR
AN AGGREGATE
DOLLAR AMOUNT
OF SECURITIES
(WHICH MAY BE
UNALLOCATED
BETWEEN DEBT,
EQUITY AND OTHER
SECURITIES) FOR
SUBSEQUENT
ISSUANCE OVER A
PERIOD OF UP TO
25 MONTHS.

financial statements and the related management's discussion and analysis, as well as an annual information form and reports with respect to material changes in the affairs of the issuer. Directors, officers and other "insiders" of the issuer will be required to file reports with respect to any trading they conduct in securities of the issuer, and will be precluded from trading in the issuer's securities if they possess any material non-public information about the issuer. Management information circulars must be prepared for annual and special shareholder meetings and must contain prescribed disclosure, including comprehensive disclosure on executive compensation in the case of annual general meetings or other meetings where directors will be elected or executive compensation will be voted on.

CERTAIN FOREIGN ISSUERS THAT HAVE BECOME REPORTING ISSUERS IN CANADA MAY GENERALLY SATISFY THEIR ONGOING CONTINUOUS DISCLOSURE OBLIGATIONS IN CANADA BY FILING THEIR HOME JURISDICTION DOCUMENTS.

Foreign issuers that meet certain conditions, and that have become reporting issuers in Canada, whether by listing on a Canadian exchange or by acquiring a Canadian reporting issuer through a share exchange transaction, may generally satisfy their ongoing continuous disclosure obligations in Canada by filing their home jurisdiction documents.

The CSA has adopted various instruments modeled on U.S. Sarbanes-Oxley legislation. These include a national instrument on auditor oversight, a national instrument requiring CEO and CFO certifications and a national instrument on audit committees. In addition, a national instrument and a national policy have been adopted on corporate governance. The latter sets out guidelines for corporate governance; the former requires issuers to disclose, on an annual basis, their corporate governance practices.

Canadian and U.S. securities regulatory authorities have implemented a multi-jurisdictional disclosure system (MJDS) that enables securities of large U.S. issuers to be offered to the public in Canada using a U.S. registration statement that has been reviewed only by the U.S. Securities and Exchange Commission (SEC). Corporations with securities listed on a Canadian stock exchange are subject to the rules and regulations of that exchange.

Mergers & Acquisitions

Take-Over Bids (Tender Offers)

Harmonized provincial and territorial securities laws regulate the conduct of any public take-over bid. A public take-over bid is defined generally as an offer made to a person in a Canadian province or territory to acquire voting or equity securities of a class of securities, which, if accepted, would result in the acquiror (and persons acting in concert with the acquiror) owning 20% or more of the outstanding securities of such a class of a target company. A take-over bid must offer identical consideration to all shareholders, with no “collateral benefit” to any shareholder permitted, and must be open for acceptance for 35 days. The bidder must provide shareholders of the target with a circular containing prescribed information about the offer, as well as prospectus-level disclosure about the acquiror (including pro forma financial statements) if its shares form part of the consideration being offered. If the bidder is a TSX-listed company and is issuing shares under the offer (whether structured as a take-over bid or as a “business combination” discussed below), that would cause dilution to its shareholders of more than 25%, it will be required by the TSX to seek approval from its own shareholders prior to completing such an offer. The directors of the target company must also send a circular to shareholders that includes the board’s recommendation as to whether the shareholders should accept the offer, or, if the board declines to make a recommendation, an explanation of why no recommendation has been made. Both the bid circular and the directors’ circular must be translated into French if the take-over bid is being made in Québec (unless a *de minimis* or other exemption from the translation requirement is obtained in Québec).

HARMONIZED
PROVINCIAL AND
TERRITORIAL
SECURITIES LAWS
REGULATE THE
CONDUCT OF ANY
PUBLIC TAKE-OVER BID.

When the bid is made by an “insider” of the target, special rules apply. In particular, a formal valuation of the target shares prepared by an independent valuator under the supervision of an independent committee of the target’s board, will generally be required.

Certain take-over bids are exempt from compliance with the foregoing requirements. These include: transactions involving the acquisition of

securities from not more than five shareholders of the target, provided that the price paid does not exceed 115% of the prevailing market price; normal course purchases on an exchange not exceeding 5% of the issuer's outstanding securities in a 12-month period; the acquisition of securities for which there is no published market of a company that is not a reporting issuer and has fewer than 50 shareholders exclusive of current or former employees; and foreign take-over offers where, *inter alia*, the number of shares held beneficially by Canadian shareholders is reasonably believed to be less than 10% of the total outstanding shares, and Canadian shareholders are entitled to participate on terms at least as favourable as other shareholders.

Generally, under corporate statutes, where a bidder successfully acquires 90% of the voting shares of a target (other than shares held by it or its affiliates prior to making the offer) pursuant to a public take-over bid made to all shareholders, the shares of those who did not tender their shares to the offer can be acquired at the public offering price pursuant to a statutory compulsory acquisition procedure. Where this procedure is not available because the 90% threshold has not been reached, but at least 66 $\frac{2}{3}$ % of the outstanding shares have been acquired under the bid, the shares of the remaining shareholders who did not tender their shares to the offer may also generally be acquired by way of a business combination (see below) at the offering price.

CERTAIN TAKE-OVER
BIDS ARE EXEMPT
FROM COMPLIANCE
WITH THE FOREGOING
REQUIREMENTS.

Notice is required to be given to the market in the event of an acquisition of equity or voting securities representing 10% (5% where a take-over bid has already been made) of a class of securities of a target (including shares beneficially owned by the purchaser and its joint actors).

The purchaser must give this notice to the market by issuing a press release forthwith and filing, within two business days, an "early warning" report in the prescribed form (which must include disclosure of any intention on the part of the purchaser to acquire additional securities of the class). A press release is required to be issued and an additional report filed if there is a change in a material fact contained in a prior report, or upon the acquisition of a further 2% of the class of securities.

Business Combinations

Acquisitions of Canadian public companies are frequently effected not by way of a take-over bid but through a “business combination,” i.e., a statutory procedure, such as an amalgamation, consolidation or plan of arrangement, under the target’s corporate statute. This business combination requires approval by the target’s shareholders at a meeting held for such a purpose.

In such a case, a management information circular containing prescribed information will be prepared by the target and mailed to its shareholders. The plan of arrangement is the most common form of business combination, as it provides maximum flexibility for various aspects of a transaction that might not be possible to effect under another statutory procedure, and will generally permit securities of the offeror to be issued to U.S. holders of the target without requiring such securities to be registered in the U.S. Plans of arrangement require both court approval (based on a finding that the arrangement is “fair and reasonable” to affected stakeholders) and shareholder approval (generally by a majority vote of 66 $\frac{2}{3}$ %).

IF THE ACQUIROR
IN THE BUSINESS
COMBINATION
IS RELATED TO
THE TARGET, A
FORMAL VALUATION
AND APPROVAL
BY A MAJORITY
OF MINORITY
SHAREHOLDERS MAY
BE REQUIRED.

If the acquiror in the business combination is related to the target or if a related party is receiving a “collateral benefit,” certain special rules will generally apply. In particular, approval by a majority of minority shareholders (i.e., shareholders unrelated to the acquiror or any related party who receives a collateral benefit) will generally be required, in addition to the shareholder approval required under applicable corporate law. Where the related party is acquiring the target or is a party to a concurrent “connected transaction” of a certain threshold size, then a formal valuation of the target shares, prepared by an independent valuator under the supervision of the target’s board or an independent committee of directors, may be required.

Related-Party Transactions

The securities laws of certain Canadian provinces contain complex rules governing transactions between a public company and parties that are

related to it (i.e., major shareholders, directors and officers) and that are of a certain threshold size. These rules are designed to prevent related parties from receiving a benefit from a public company to the detriment of its minority shareholders without their approval.

BANK LOANS AND OTHER LOAN CAPITAL

Bank loans in Canada are readily available from sophisticated domestic banks as well as from non-Canadian foreign bank subsidiaries and Canadian branches of non-Canadian banks. The Canadian banking system is well-regulated and Canadian banks are well-capitalized. The Canadian banking system has won international praise for its resiliency in the current global banking crisis and bank credit continues to be available in Canada. Canada also has competitive non-bank lenders that are particularly active in the asset-based loan, mezzanine debt and project finance markets. As well, there are two federal government financial institutions that provide financing — the Business Development Bank of Canada, which offers financing to small- and medium-sized businesses; and Export Development Canada, which is specifically targeted to assist Canadian exporters with financing.

Floating-rate loans are often indexed to a “prime rate” set by a Canadian bank on a periodic basis and based on the rate announced weekly by Canada’s central bank, the Bank of Canada. Fixed-rate loans are typically priced off long-term Government of Canada bond rates. Other forms of borrowing and interest rate pricing (such as LIBOR loans and bankers’ acceptances) are also offered. Borrowers generally incur some fees associated with such transactions. These typically include legal costs, commitment and processing fees, and other charges.

BANK LOANS IN
CANADA ARE READILY
AVAILABLE FROM
SOPHISTICATED
DOMESTIC BANKS AS
WELL AS FROM NON-
CANADIAN FOREIGN
BANK SUBSIDIARIES
AND CANADIAN
BRANCHES OF NON-
CANADIAN BANKS.

Short- and long-term loans in Canada can be unsecured or secured against the real or personal property of the borrower. Lenders may insist that unsecured loans be supported by a parent company guarantee, or by a “negative pledge,” where the borrower agrees (with some exceptions) not to grant security over its assets. All provinces provide an electronic registry for the recording of security interests over personal property. All provinces also have established land registry systems to record interests in real property. See **Real Property**.

Canada has no currency restrictions. Loans are available in multiple currencies, but are most commonly in Canadian and US dollars.

Due to the competitive nature of Canada's loan markets, interest rates are often lower for comparable credits compared to other jurisdictions, particularly the U.S. Where Canadian tax rates are higher than those of a foreign jurisdiction, the benefits of deducting interest expenses for loans in Canada are correspondingly higher. There are other tax advantages when borrowing in Canada. For example, thin-capitalization rules do not apply to arm's-length third-party debt to limit the deductibility of interest. In addition, Canadian withholding tax will generally not apply to interest (other than certain types of interest) paid on arm's-length third-party debt. Finally, Nova Scotia, Alberta and British Columbia have unlimited liability companies. These are hybrid entities that create tax-planning opportunities for U.S. cross-border transactions. See **Taxation**.

A NUMBER OF FEDERAL AND PROVINCIAL PROGRAMS AND AGENCIES PROVIDE GRANTS AND/OR LOANS TO CANADIAN BUSINESSES.

A number of federal and provincial programs and agencies provide grants and/or loans to Canadian businesses. The availability of government assistance will depend upon a number of factors. These include the location of the proposed investment, the number of jobs that will be created, the export potential for the product or service, whether the investment would be made without the government assistance and the amount of equity the owners of the business are investing. Foreign ownership of a corporation does not generally preclude the availability of government assistance programs.

All provinces and territories in Canada (other than the Province of Prince Edward Island) have recently enacted *Securities Transfer Act* (STA) legislation. These acts govern, among other matters, the transfer of securities and other investment property and work with personal property security legislation to regulate the perfection of security interests in securities and other investment property, including securities in uncertificated form. The STA legislation was modelled after Revised Article 8 of the *Uniform Commercial Code* of the United States. This approach was taken so that there could be a more consistent regime governing the transfer of securities and other investment property cross-border between Canada and the U.S., as well as a uniformity of approach across Canada.

TAXATION

Income Tax

Income taxes are imposed at the federal level, as well as by the various provinces and territories. Federal income tax is levied on the worldwide income of every Canadian resident, and, subject to the provisions of any applicable income tax convention, levied on the Canadian source income of every non-resident who is employed in Canada, who carries on business in Canada or who realizes a gain on the disposition of certain types of Canadian property. Generally, a province or territory will also impose an income tax on persons resident, or carrying on business, in the provincial or territorial jurisdiction. Certain provinces also tax non-residents on gains realized on the disposition of certain types of Canadian property situated in the province.

The combined federal and provincial rate of income tax imposed on corporations varies widely depending on the nature and size of the business activity carried on, the location of the activity and other factors. The federal government has enacted legislation that provides for a gradual reduction of the federal general corporate income tax rate through 2012. In 2012, the highest combined rate of income tax applicable to non-Canadian-controlled private corporations was about 31%, while the lowest such rate, applicable to the ordinary business profits of such a corporation, was about 25%. Tax credits and other incentives are also available in certain circumstances to reduce the effective tax rates.

INCOME TAXES ARE IMPOSED AT THE FEDERAL LEVEL, AS WELL AS BY THE VARIOUS PROVINCES AND TERRITORIES.

Individuals are subject to graduated rates. These rates depend on the type of income, the province of residence and other factors. In 2012, the highest combined federal and provincial rate of tax on taxable income of an individual was about 50%, while the lowest top marginal combined federal and provincial rate was about 39%.

Canada also levies a 25% withholding tax on the gross amount of certain types of Canadian source income of non-residents.

Payments subject to withholding tax include dividends, certain types of interest, rents, royalties and certain management or administration fees. Withholding tax can also apply to payments made between non-residents if the payments relate to a Canadian business or to certain types of Canadian property. Recently enacted legislation generally eliminated Canadian withholding tax on interest (other than interest that is contingent on the use of or production from property in Canada, or interest that is computed by reference to revenue, profit or cash flow) paid by a Canadian resident to arm's-length non-residents of Canada. An applicable income tax convention may reduce or eliminate the relevant rate of withholding tax. While withholding taxes are imposed on the non-resident recipient, the payer is responsible for withholding the tax from amounts paid to the non-resident and for remitting the withheld amount to the government.

The following sections highlight some of the principal tax matters that should be considered in deciding whether to carry on business in Canada through a Canadian subsidiary or as a branch operation.

Carrying on Business Through a Canadian Subsidiary

A corporation incorporated in Canada will be resident in Canada and subject to Canadian federal income tax on its worldwide income. As noted above, income of the subsidiary may also be subject to provincial and/or territorial income tax.

The combined federal and provincial/territorial income tax rate to which the subsidiary is subject will depend on the provinces and territories in which it conducts business, the nature of the business activity carried on, and other factors.

The calculation of the subsidiary's income will be subject to specific rules of the *Income Tax Act* (Canada) and any applicable provincial or territorial tax legislation. Income includes 50% of capital gains.

Expenses of carrying on business are deductible only to the extent they are reasonable. Neither federal nor provincial/territorial income tax

A CORPORATION
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CANADIAN FEDERAL
INCOME TAX ON ITS
WORLDWIDE INCOME.

is deductible in computing income subject to the other level of tax. Generally, dividends may be paid between related Canadian corporations on a tax-free basis. Groups of corporations may not, however, file consolidated income tax returns. Accordingly, business losses of the subsidiary will not be available, for Canadian tax purposes, to offset income of an affiliated company.

Transactions between the subsidiary and any person with whom it does not deal at arm's length, including its parent corporation, will generally have to be effected for tax purposes on a "fair market value" basis. Certain contemporaneous documentation may also be required under Canada's transfer pricing rules.

The debt/equity structure of the subsidiary will be subject to thin-capitalization rules, which operate to deny the deduction of interest payable to specified non-residents by the subsidiary if the subsidiary is "thinly capitalized." The subsidiary is deemed to be thinly capitalized where the amount of debt owed to the non-resident shareholder is more than twice (or 1.5 times, for taxation years commencing after 2012) the aggregate of the retained earnings of the corporation, the corporation's contributed surplus that was contributed by the non-resident shareholder and the paid-up capital of the shares owned by the non-resident shareholder.

The withholding tax regime, briefly described above, will apply to the subsidiary's payments to non-residents, including interest and dividends. In the case of payments by a subsidiary to a US-resident parent, the Fifth Protocol to the *Canada-United States Income Tax Convention (1980)* (U.S. Convention) eliminated the withholding tax on interest (other than certain types of interest, such as interest determined with reference to profits or cash flow or to a change in the value of property) beginning in 2010. This change allows for a more tax-efficient capitalization of a subsidiary by a U.S. person. It should be noted that the benefits of the U.S. Convention (such as reduced rates or elimination of withholding tax)

THE FIFTH PROTOCOL TO THE CANADA- UNITED STATES INCOME TAX CONVENTION (1980) ELIMINATED THE WITHHOLDING TAX ON INTEREST (OTHER THAN CERTAIN TYPES OF INTEREST) BEGINNING IN 2010.

are, subject to some exceptions, available only to certain “qualifying persons,” as defined in the Limitation on Benefits provisions of the U.S. Convention.

We understand that, in appropriate circumstances, an unlimited liability company (ULC) established under the laws of Alberta, British Columbia or Nova Scotia may be used to access the advantages of both a branch and a subsidiary operation for a U.S. parent corporation. The reason is that a ULC, while treated as a corporation for Canadian tax purposes, may be treated as a branch for U.S. tax purposes. U.S. tax advice should be obtained. In addition, the changes to the U.S. Convention that result from the Fifth Protocol should be considered, as in certain cases they may eliminate the tax benefits associated with such hybrid entities or give rise to adverse tax consequences without proper tax planning.

BRANCH TAX
MAY, IN SOME
CIRCUMSTANCES,
FAVOUR THE
ESTABLISHMENT OF
A SUBSIDIARY BY THE
FOREIGN BUSINESS
RATHER THAN
A BRANCH.

Carrying on Business in Canada Through a Branch Operation

Subject to the provisions of any applicable income tax convention, a non-resident corporation will be subject to Canadian income tax on business profits from carrying on business in Canada through a branch operation. A non-resident carrying on business in Canada must also pay a branch tax. The branch tax essentially takes the place of the withholding tax that would have been payable on dividends paid by a Canadian subsidiary carrying on the business. This factor may, in some circumstances, favour the establishment of a subsidiary by the foreign business rather than a branch.

If the non-resident of Canada is: (i) a resident of a jurisdiction that has entered into an income tax convention with Canada; and (ii) entitled to the benefits of that convention, generally the non-resident will be taxable on its business profits earned in Canada only to the extent that such profits are attributable to a permanent establishment situated in Canada. Under certain of Canada’s income tax conventions, a non-resident may have a significant business presence in Canada without being deemed to have a permanent establishment in Canada. As noted above, in the

case of the U.S. Convention treaty benefits are generally available only to U.S. residents who are qualifying persons. A thorough review of the applicable convention is crucial in determining the relative merits of establishing a branch or a subsidiary business in Canada.

Generally, the income of the branch will be computed under the same rules that are applicable to the computation of the subsidiary's income.

If the Canadian operation will incur start-up losses, it may be possible for the non-resident to deduct these losses in computing its income for its domestic tax purposes if the Canadian business is carried on through a branch operation. When the Canadian business becomes profitable at some future time, it may be possible to transfer the branch operation to a newly incorporated Canadian subsidiary with no significant adverse Canadian income tax consequences.

WHEN THE CANADIAN BUSINESS BECOMES PROFITABLE AT SOME FUTURE TIME, IT MAY BE POSSIBLE TO TRANSFER THE BRANCH OPERATION TO A NEWLY INCORPORATED CANADIAN SUBSIDIARY WITH NO SIGNIFICANT ADVERSE CANADIAN INCOME TAX CONSEQUENCES.

Foreign Currency Controls and Repatriation of Income

There are no foreign exchange or currency controls in Canada, nor are there exchange restrictions on borrowing from abroad, on the repatriation of capital or on the ability to remit dividends, profits, interest, royalties and similar payments from Canada.

As noted above, there may be a withholding tax payable on the repatriation of certain types of income, including interest, dividends and royalties.

SALES AND OTHER TAXES

The federal government and most of the provinces have sales tax regimes. In 2013 three provinces – British Columbia, Québec and Prince Edward Island will undergo significant sales tax related changes.

Federal Goods and Services Tax

The federal government imposes a 5% multi-stage value-added tax called the goods and services tax (GST) that applies to taxable supplies (i.e., supplies of most types of property, including intangibles, and services) made in Canada. Certain types of property and services, including most financial services, are exempt for GST purposes and certain supplies, defined as zero-rated supplies, which include exports, are taxed at a rate of 0%.

GST is also levied on taxable goods imported into Canada, and there are self-assessment obligations on certain purchasers of imported services and intangibles.

As the GST is a value-added tax, it applies at each stage of the production and distribution chain. Generally, businesses making taxable supplies of property and services must register for, collect and remit, the applicable GST on their supplies made in Canada. While GST applies to every transaction throughout the distribution chain, it is imposed on the ultimate consumer; accordingly, businesses involved in commercial activities are entitled to recover the GST they pay by means of the input tax credit mechanism.

THE FEDERAL GOVERNMENT AND MOST OF THE PROVINCES HAVE SALES TAX REGIMES.

It is not always easy to determine whether supplies made to or by non-residents of Canada attract GST; accordingly, consideration of specific rules is required. For example, whether GST applies to recent e-commerce developments requires close examination.

Harmonized Sales Tax

Five provinces currently have harmonized their provincial sales taxes with the GST, namely: Nova Scotia, New Brunswick, Newfoundland and Labrador, Ontario and British Columbia. In those provinces, the harmonized sales tax (HST) made up of the federal 5% GST component and the

provincial component, which varies from 7 to 10%, applies on the same basis as the GST. Accordingly, the discussion above regarding the GST also generally applies to the HST. It should be noted, however, that the Provinces of British Columbia and Ontario have implemented temporary restrictions on the ability of certain large businesses to claim input tax credits with respect to the provincial component of the HST on certain specified supplies.

Once it is determined that a supply is made in Canada, it must then be determined whether the supply is made in a harmonized province and therefore subject to HST. Detailed rules apply to determine whether a supply is made in a harmonized province, which vary depending on the type of supply at issue.

While the 12% HST (made up of the 5% federal component and the 7% provincial component), which was effective as of July 1, 2010, applies in British Columbia, as of April 1, 2013, the Province will repeal the HST and re-implement the GST and the British Columbia provincial sales tax.

As of April 1, 2013, the Province of Prince Edward Island will harmonize its provincial sales tax to impose the HST at a rate of 14%.

Effective January 1, 2013, the Province of Québec will harmonize the Québec sales tax (QST) with the federal GST; however, unlike other harmonized provinces, the QST will remain a separate tax imposed under provincial legislation. As of January 1, 2013, the QST rate will be 9.75%.

Transitional rules will apply to determine the application of the applicable taxes in the Provinces of Québec, British Columbia and Prince Edward Island for transactions straddling the January 1, 2013 and April 1, 2013 implementation dates.

Provincial Sales Tax

The Provinces of Saskatchewan, Manitoba and Prince Edward Island (up until March 31, 2013) impose a single incidence provincial sales tax

DETAILED RULES
APPLY TO DETERMINE
WHETHER A
SUPPLY IS MADE
IN A HARMONIZED
PROVINCE, WHICH
VARY DEPENDING ON
THE TYPE OF SUPPLY
AT ISSUE.

Sales and Other Taxes

(PST) on the end-users of most tangible personal property and certain services in the provinces. General rates of PST vary from 5 to 10%.

As indicated above, as of April 1, 2013, the Province of British Columbia will also impose a PST and the Province of Prince Edward Island will impose the HST. The Province of Alberta does not impose a PST.

Provincial Payroll Taxes

The Provinces of Manitoba, Ontario and Newfoundland and Labrador levy an employer payroll tax that is calculated based on a percentage of remuneration paid in the province (subject to a certain threshold). The Province of Québec also levies a similar employer tax in the form of contributions to a provincial health services fund.

Other Taxes

The federal government imposes other taxes, including customs duties and excise duties. Various provinces also impose other taxes, including provincial capital taxes (often limited to financial institutions) insurance taxes and real estate transfer taxes. Most municipalities impose annual taxes on the ownership of real estate. In 2008, the City of Toronto enacted a municipal land transfer tax.

MANUFACTURE AND SALE OF GOODS

Regulations and Product Standards

The Canada Consumer Product Safety Act came into force in 2011. This legislation prohibits the manufacture, importation or sale of consumer products that pose a “danger to human health or safety.” It also expands the federal government’s powers to regulate, inspect, test and recall consumer products, and creates a wide array of related offences and penalties. Manufacturers, importers and retailers need to comply with stringent requirements to maintain required records concerning their products.

In addition, federal statutes such as the *Food and Drugs Act*, the *Hazardous Products Act*, the *Consumer Packaging and Labelling Act* and the *Textile Labelling Act* (and regulations made under them), as well as a range of provincial regulations, can directly affect business operations in Canada, since goods that fail to comply with the statutory and regulatory requirements may not lawfully be sold.

For example, regulations made under the *Hazardous Products Act* cover items as diverse as cellulose insulation, mattresses, booster cushions, tents, pacifiers and children’s sleepwear, and also describe product standards that must be met before such products can lawfully be sold in Canada. Regulations under the *Food and Drugs Act*, the *Consumer Packaging and Labelling Act*, and the *Textile Labelling Act* contain detailed provisions concerning a wide range of goods and products.

FAILURE TO COMPLY
WITH STATUTORY
OR REGULATORY
REQUIREMENTS CAN
RESULT IN CRIMINAL
PROSECUTION, CIVIL
LIABILITY — OR BOTH.

Failure to comply with statutory or regulatory requirements can result in criminal prosecution, civil liability — or both.

The Standards Council of Canada (SCC) is a federal Crown Corporation with a mandate to promote efficient and effective development and application of standards. It carries out a variety of functions designed to ensure the effective and coordinated operation of standardization in Canada. The SCC oversees Canada’s National Standards System, a network of over 400 organizations and 15,000 volunteers involved in the development, promotion and implementation of standards.

The National Standards System does not itself develop standards or verify the conformity of products or services to standards, but accredits those organizations that do develop standards or verify the conformity of products or services to standards, such as the Canadian General Standards Board (CGSB), a federal government organization, and the Canadian Standards Association (CSA), an independent non-profit organization.

The CSA develops standards and tests products to certify that the products meet the CSA's published standards. CSA certification is mandatory under government regulation for some products (e.g., toys that are operated electrically) and voluntary for others. The CSA certification mark ensures that a product meets a basic level of conformity to the product features deemed essential by the published standard. Once a standard is published by the CSA, product manufacturers may elect to have their products tested by either the CSA or another approved certification laboratory, in order to obtain CSA certification. After certification, CSA representatives conduct regular, unannounced, on-site visits to manufacturing locations to ensure that the products continue to meet CSA standards. Where CSA certification is mandatory, manufacturers may be required by inspectors appointed under the *Hazardous Products Act* to pull or recall non-conforming products.

WHERE CSA CERTIFICATION IS MANDATORY, MANUFACTURERS MAY BE REQUIRED BY INSPECTORS APPOINTED UNDER THE HAZARDOUS PRODUCTS ACT TO PULL OR RECALL NON-CONFORMING PRODUCTS.

Consumer Protection

The *Canada Consumer Product Safety Act* gives the federal government authority to deal with products that may pose a danger to human health and safety. Any safety incidents involving the product must be reported. Manufacturers, employers and retailers are also required to report recalls or similar measures involving the product anywhere in the world. The government also receives reports directly from consumers. Such reports can lead to inspections, requirements for product testing or product recalls.

Federal and provincial governments have also enacted specific legislation that prohibits deceptive or unfair business practices (including misleading

Manufacture and Sale of Goods

advertising), imposes sanctions on businesses engaging in such conduct and provides additional protection for Canadian consumers. Class actions, which are becoming increasingly popular as a consumer protection tool in Canada, are often based on alleged breaches of the *Competition Act* or provincial consumer protection statutes.

To ensure that consumers are not misled, the *Competition Act* contains important provisions concerning advertising of products and promotion of business interests. Making a representation to members of the public that is false or misleading in a material respect, and making this representation knowingly or recklessly, is punishable by substantial fines and even jail terms. False or misleading statements can also lead to liability to consumers for monetary damages. See **Competition Law**.

Provincial statutes such as Ontario's *Consumer Protection Act, 2002* are also aimed at providing protection for consumers in their dealings with corporations and businesses. These statutes provide consumers who have been harmed by deceptive or unconscionable business practices with a variety of statutory remedies, including damages, punitive damages and rescission of agreements. Specific, consumer-friendly contract terms may be mandated. Other contract terms, such as waivers of implied statutory warranties or terms requiring any disputes to be submitted to binding arbitration or purporting to ban a consumer from initiating or participating in a class action, may be unenforceable against consumers.

For a discussion of the application of consumer protection laws to online commerce, see **Information Technology — Consumer Protection — Internet Agreements**.

Product Liability

Any business involved in the design, manufacture, distribution or sale of products is a potential defendant in a product liability claim. Claims may be based on breach of a contract or on negligence; sometimes they

CLASS ACTIONS, [...],
ARE OFTEN BASED
ON ALLEGED
BREACHES OF THE
COMPETITION ACT
OR PROVINCIAL
CONSUMER
PROTECTION
STATUTES.

are based on both. Product liability claims are also popular subjects for class action litigation in Canada. See **Dispute Resolution — Class Actions**.

Provincial statutes such as the Ontario *Sale of Goods Act* provide that warranties of fitness for purpose and of merchantable quality are implied in contracts between buyers and sellers for the sale of goods. Parties can contract out of the implied terms, except in the case of consumer or retail sales. A buyer of a product purchased from someone other than the product's manufacturer may not rely on the implied warranties under the *Sale of Goods Act* in a claim against the manufacturer. However, the buyer may be able to assert a contract claim against the manufacturer for breach of warranty if a collateral warranty was provided by the manufacturer and that warranty is found to be a representation inducing the sale.

CONTRACT CLAIMS
ARE STRICT LIABILITY
CLAIMS. ABSENCE OF
NEGLIGENCE IS NOT
A DEFENCE.

Contract claims are strict liability claims. Absence of negligence is not a defence.

Often, no contractual relationship will exist between a product manufacturer and the ultimate purchaser or user, and as a result, many product liability claims are tort-based claims alleging negligence. Claimants must prove that:

- ¬ a duty of care was owed to them;
- ¬ the product was defective;
- ¬ there was a failure to meet the applicable standard of care; and
- ¬ the claimants suffered damage caused by the defendant's negligence.

The mere presence of a defect in a product can justify an inference of negligence in the manufacturing process. Where a product is not necessarily defective, but is or could be dangerous, a product liability claim may be based on a failure to provide adequate warnings concerning the use of the product and/or a failure to warn of risks associated with use of the product. The duty to warn is a continuing duty, and can be triggered by information that becomes known after the product is in use.

Manufacture and Sale of Goods

In defining the standard of care, Canadian courts will assess the reasonableness of the defendant's conduct with regard to industry standards. However, if the industry standard is inadequate, a defendant may be found negligent despite conforming to it. Although conformity with regulatory standards can be highly relevant to the assessment of reasonable conduct in a particular case, meeting those standards alone will not necessarily absolve a manufacturer of liability.

Generally, a manufacturer's duty is to take reasonable care to avoid causing either personal injury or damage to property.

However, where a product has not in fact caused any physical injury or damage to property, a person may still recover damages for economic losses (e.g., the cost of repairing a defective product) where the failure to take reasonable care resulted in defects that pose a real and substantial danger of actual physical injury or property damage.

IN DEFINING THE
STANDARD OF CARE,
CANADIAN COURTS
WILL ASSESS THE
REASONABLENESS
OF THE DEFENDANT'S
CONDUCT WITH
REGARD TO INDUSTRY
STANDARDS.

REAL PROPERTY

Land Registration Systems

Each Canadian province has its own systems for registering interests in real property, as property legislation is constitutionally a provincial responsibility in Canada. In Ontario, for example, there are two land registration systems: registry and land titles. The older of the two is the registry system, which merely provides for the public recording of instruments affecting land and does not guarantee the status of title. Most Ontario properties, however, are in the land titles system, which is operated by the Province pursuant to the *Land Titles Act*. Title to land within this system is guaranteed by the Province. Where the land titles system applies, each document submitted for registration is certified by the Province, and, until this certification is complete, the registration is subject to amendment at the request of the registry officials.

In other provinces, registration systems vary. In the western provinces, for example, land falls exclusively within the provincial land titles systems. These systems are similar to the one in Ontario, creating an “indefeasible title” that is good against the world, subject only to certain limited exceptions. In Atlantic Canada, on the other hand, registry systems dominate land registration, except in New Brunswick, where its land titles system encompasses most of the land in the province. Québec has its own unique system for registering interests in land, which in its effect is more similar to a registry system than to a land titles system.

Canadian provinces have been working to modernize their land registration systems by automating the paper-based records and converting to electronic systems. In most of Canada, real property instruments can be registered and obtained electronically. In addition, in many provinces, including Ontario, registration occurs in real time. In other words, upon registering an instrument against specific land, the instrument will immediately thereafter appear on the title relating to such land.

CANADIAN PROVINCES HAVE BEEN WORKING TO MODERNIZE THEIR LAND REGISTRATION SYSTEMS BY AUTOMATING THE PAPER-BASED RECORDS AND CONVERTING TO ELECTRONIC SYSTEMS.

Planning Legislation

All Canadian provinces regulate property development to some degree, and often this regulation occurs at the municipal level. Official plans, zoning bylaws, development permits, subdivision bylaws and servicing bylaws are the primary means by which municipalities control land use and development.

At the provincial level, the subdivision of land is restricted by statute in a number of Canadian provinces. In Ontario, the *Planning Act* is the main statute that controls subdivision. In

British Columbia and many other provinces, the *Land Title Act* is the main statute that controls subdivision. In addition, most provinces have legislation granting power to municipalities to regulate the subdivision and servicing of lands. In most cases, instruments such as transfers, subdivision plans or separation of title, which result in the issuance of separate titles, and instruments such as leases, mortgages or discharges, which deal with part of a parcel, require subdivision approval.

MOST PROVINCES
HAVE LEGISLATION
GRANTING POWER
TO MUNICIPALITIES
TO REGULATE THE
SUBDIVISION AND
SERVICING OF LANDS.

Subject to certain exceptions, the *Planning Act* in Ontario prohibits any transfer or mortgage of land or any other agreement granting rights in land for a period of 21 years or more (this includes leases and easements) unless the land is already described in accordance with a plan of subdivision or the transaction has previously received the consent of the appropriate governmental body. If the proposed transaction does not fall within one of the exceptions outlined in the *Planning Act*, then it may be necessary to obtain a severance consent for the transaction to proceed. The process to obtain a consent typically takes at least 90 to 120 days to complete.

A number of the changes recently introduced by the Province of Ontario will directly impact how development approval applications are prepared, submitted, processed and appealed. The goal of the Province seems to have been to put greater control of the development approval process in the hands of municipalities, although the real

effect of these changes may be to require applicants to look farther down the road, past the municipal process, to eventual appeals to the Ontario Municipal Board (OMB), and to take careful steps to put their applications on OMB-ready footing from the outset.

Many provincial statutes (including Ontario's) provide that no interest in land is created or conveyed by an improper transaction carried out contrary to the governing legislation. Investors in real property in Canada need to consider the possible application of subdivision control regulations both at the provincial and municipal level when they are contemplating subdivision and development of land.

Title Opinions and Title Insurance

Rights in land are not required to be registered. That said, registration in the appropriate land registry office is essential to protect an owner's priority over subsequent registered interests and to protect an owner against loss from a *bona fide* third party. On an acquisition, in addition to registering a deed in the appropriate land registry office, a lawyer's opinion on title is typically issued to the purchaser of real property following closing.

However, the use of commercial title insurance as an alternative to the traditional lawyer's opinion on title continues to gain popularity, particularly for lenders (since the available protections are broader for lenders). Unlike a traditional lawyer's opinion on title, title insurance provides protection against hidden risks such as fraud, forgery and errors in information provided by third parties (e.g., a government ministry). Fraud, in particular, represents a significant loss when it does occur, and this is a risk generally better assumed by a title insurer (note, however, that for commercial properties coverage is typically only provided for fraud that occurred prior to the date of placement of the policy). Also, unlike a traditional lawyer's opinion on title, title insurance is a strict liability contract — the policy holder is not required to prove that the title insurer has been negligent in order to receive compensation for a covered loss (up to the amount insured, which is typically the purchase price for an owner's policy and the mortgage amount for a lender's policy).

THE USE OF
COMMERCIAL TITLE
INSURANCE AS AN
ALTERNATIVE TO
THE TRADITIONAL
LAWYER'S OPINION
ON TITLE CONTINUES
TO GAIN POPULARITY,
PARTICULARLY FOR
LENDERS.

There are two types of commercial title insurance policies that may be issued: (i) an owner's policy that protects the purchaser against loss or damage arising from disputes regarding property ownership; and (ii) a loan policy that protects the lender against loss or damage arising from the invalidity or unenforceability of the lien of the insured mortgage. While the benefits of an owner's policy remain in effect only as long as the insured owner possesses title to the property, the benefits of a lender's policy automatically run to the insured lender's successors and/or assigns, thereby facilitating the sale of mortgages in the secondary market.

There is a wide variety of different title insurance packages and varying premiums for such coverage, and there is no regulation of title insurance rates in Canada. Policy premiums are negotiated, and when a premium is paid to the title insurer such premium constitutes consideration for both the policy and any endorsements (the total price of which is typically lower than the combined price for premiums and endorsements in the U.S.).

THE LIABILITY FOR IMPROPER ENVIRONMENTAL PRACTICES RUNS WITH THE LAND AND CAN BE INHERITED BY FUTURE OWNERS OF THE PROPERTY.

Environmental Assessments

In Canada, there is a legislative framework at both the provincial and federal level that governs the duties of land owners with respect to the storage, discharge and disposal of contaminants and other hazardous materials connected with the property. The liability for improper environmental practices runs with the land and can be inherited by future owners of the property. In certain circumstances, any "guardian" of a property, such as a tenant, may face liability for contamination. Additionally, it is incumbent upon a potential purchaser to inspect a property and assess environmental risks as government officials in Canada cannot certify that properties are free of environmental risk. Commercial lenders in Canada will customarily require the completion of an environmental assessment of a property before the advance of funds.

Non-Resident Ownership

Non-residents can purchase, hold and dispose of real property in Canada as though they are residents of Canada, pursuant to the

Real Property

Citizenship Act (Canada). However, each province has the right to restrict the acquisition of land by individuals who are not citizens or permanent residents, in addition to corporations and associations controlled by such individuals.

Each province has different legislation as regards the particularities of foreign ownership of Canadian real property. In Ontario, for example, non-citizens have the same rights as Canadians to acquire, hold and dispose of real property, though corporations incorporated in jurisdictions other than Ontario must obtain a licence to acquire, hold or convey real property in Ontario. Non-residents who dispose of real property situated in Canada are subject to withholding tax requirements under the *Income Tax Act (Canada)*, as described below.

NON-RESIDENTS
WHO DISPOSE OF
REAL PROPERTY
SITUATED IN CANADA
ARE SUBJECT TO
WITHHOLDING TAX
REQUIREMENTS
UNDER THE *INCOME
TAX ACT (CANADA)*.

Proceeds of Crime Legislation and Real Estate Developers

In January 2008, new amendments and regulations with respect to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act (Canada)* were made. These came into force on February 20, 2009, and address transactions involving, among other groups, real estate developers (generally defined as those who sell new developments to the public, other than in the capacity of a real estate broker or sales representative). The amendments impose mandatory reporting and record-keeping requirements on real estate developers, who are obligated to report suspicious transactions, large cash transactions and any property in their possession that is owned or controlled by terrorists. They are also required to keep records of funds received, large cash transactions and client information, copies of official corporate records and suspicious transaction reports, and to ascertain the identity of any individual:

- a) who conducts a large cash transaction (taking reasonable measures to determine whether that individual is acting on behalf of a third party);
- b) for whom they must keep a client information record or receipt of funds record; and
- c) for whom they must send a suspicious transaction report.

They must also develop a compliance regime that includes,

among other things, the appointment of a compliance officer, written compliance policies and ongoing compliance training programs. If real estate developers fail to comply with these requirements, criminal or administrative penalties may be imposed.

Some Taxes on the Transfer of Real Property in Canada

Withholding Obligations

The *Income Tax Act (Canada)* contains provisions that protect Canada's ability to collect taxes when a non-resident disposes of "taxable Canadian property" (which includes, among other types of property, real property situated in Canada). Unless (i) the purchaser has no reason to believe, after making reasonable inquiries, that the vendor is not a non-resident of Canada; (ii) the purchaser concludes after reasonable inquiry that the non-resident person is resident in a country with which Canada has a tax treaty, the property disposed of would be "treaty-protected property" if the non-resident were resident in such country, and the purchaser provides the Canada Revenue Agency with a required notice; or (iii) the purchaser is provided with an appropriate certificate

in respect of the disposition issued by the Canada Revenue Agency, the purchaser will be liable to pay as tax on behalf of the non-resident up to 25% of the purchase price of land situate in Canada that is capital property and up to 50% of the purchase price of land inventory situate in Canada, buildings and other depreciable fixed-capital assets. If the non-resident vendor does not provide the purchaser with an appropriate certificate (and the conditions of either (i) or (ii) above are not met), the purchaser is entitled to deduct from the purchase price the amount for which the purchaser would otherwise be liable. Québec tax legislation imposes similar requirements in respect of the disposition of immovable property situate in the Province of Québec. It should be noted that gains realized by a non-resident on the disposition of Canadian real estate are generally not, subject to certain exceptions, exempt from tax under Canada's treaties, and therefore real estate in most cases will not qualify as "treaty-protected property" for purposes

THE *INCOME TAX ACT (CANADA)* CONTAINS PROVISIONS THAT PROTECT CANADA'S ABILITY TO COLLECT TAXES WHEN A NON-RESIDENT DISPOSES OF "TAXABLE CANADIAN PROPERTY."

Real Property

of the *Income Tax Act (Canada)*. Accordingly, absent an appropriate certificate, most purchasers acquiring real estate from non-residents will withhold from the purchase price and remit to the Canada Revenue Agency the applicable amounts.

Land Transfer Tax

In all Canadian provinces, land transfer taxes (or in Alberta, “registration fees”) are generally imposed on purchasers when they acquire an interest in land (typically including a lease in excess of 40 or 50 years, though the threshold is 30 years in British Columbia) by registered conveyance and, in some cases, by unregistered disposition.

Provincial rates vary widely. In Ontario, for example, land transfer tax is calculated on the “value of the consideration” paid for the interest transferred, whereas in Alberta the fees assessed against a purchaser are based on the value of the land being acquired by the purchaser, and in British Columbia the tax is calculated on the “fair market value” of the interest transferred. In Québec, the calculation is made on the basis of imposition that equals the greatest of a) the consideration furnished for the transfer; b) the consideration stipulated for the transfer; and c) the market value of the immovable at the time of its transfer. Of note, the City of Toronto has recently mandated an additional land transfer tax for conveyances within the City that is roughly equivalent to the Ontario land transfer tax (resulting in what is essentially a doubling of the total land transfer tax payable when real property is conveyed in Toronto). In addition, the City of Montréal may, via bylaw, set a higher rate than what is provided for under the provincial legislation for the calculation of duties for any part of the basis of imposition that exceeds \$500,000.

IN ALL CANADIAN PROVINCES, LAND TRANSFER TAXES ARE GENERALLY IMPOSED ON PURCHASERS WHEN THEY ACQUIRE AN INTEREST IN LAND BY REGISTERED CONVEYANCE AND, IN SOME CASES, BY UNREGISTERED DISPOSITION.

Federal Goods and Services Tax, Provincial Sales Tax, and Harmonized Sales Tax

In Canada, goods and services tax (GST), currently at a rate of 5%, is generally payable upon a supply of real property (this includes a sale). See **Sales and Other Taxes — Federal Goods and Services Tax**. The vendor is responsible for collecting GST from the purchaser of the real property unless the purchaser is entitled to self-assess under the GST legislation, which requires that the purchaser register with the federal government. The conveyance of previously owned residential property is not subject to GST (except where such residential property has been “substantially renovated”).

REAL ESTATE
FINANCING CAN BE
STRUCTURED IN A
VARIETY OF WAYS.

If the purchase of real property is accompanied by the purchase of certain goods, such as furniture or appliances, then provincial sales tax is payable by the purchaser at a rate determined by each province. See **Sales and Other Taxes — Provincial Sales Tax**. In Alberta, there is no provincial sales tax.

In provinces that have “harmonized” their provincial sales tax with the GST, such as Ontario and British Columbia, the rate of the harmonized tax (HST), currently 13% in Ontario and 12% in British Columbia, is generally payable on the sale of any non-residential real property and any new or substantially renovated residential property. The same self-assessment rules that apply to GST apply to HST. In Ontario and British Columbia, HST also generally applies to lease payments in respect of non-residential real property made by a GST/HST registrant, though certain leases of real property that are exempt under the GST rules are also exempt under HST rules. See **Sales and Other Taxes — Federal Goods and Services Tax — Harmonized Sales Tax**.

Financing

Real estate financing for commercial, industrial, retail, multi-family residential, mixed-use, condominiums, hotels, casinos and other types of real estate can be structured in a variety of ways, including:

- ¬ conventional mortgage lending;
- ¬ public and private capital market financing;

Real Property

- ¬ portfolio loans;
- ¬ acquisition financing;
- ¬ permanent financing;
- ¬ public and private bond financings;
- ¬ syndications;
- ¬ restructurings; and
- ¬ securitization.

Banks, pension funds, credit unions, trust companies and other entities all arrange such financing on credit terms that vary on the basis of the transaction itself and the risks involved. Various rate and term combinations are offered. **See Bank Loans and Other Loan Capital.**

There are various instruments used to take primary security over real property in Canada, such as a mortgage or charge, a debenture containing a fixed charge on real property and trust deeds securing mortgage bonds (where more than one lender is involved). Additional security usually includes assignments of rents, leases, and other contracts, guarantees and general security agreements.

**ADDITIONAL SECURITY
USUALLY INCLUDES
ASSIGNMENTS OF
RENTS, LEASES, AND
OTHER CONTRACTS,
GUARANTEES AND
GENERAL SECURITY
AGREEMENTS.**

Common Forms of Ownership/Interest

Generally, both asset acquisitions and share acquisitions are common in Canada. Canadian real estate transactions typically involve the following common forms of ownership/interest in real property: freehold, condominium, mortgage/charge, easements and leasing. In Québec, where the real property regime is based on civil law concepts, these forms of ownership/interest in real property all have their equivalents, but other types of interests, based mainly on surface or building rights, also exist.

Developments on Aboriginal lands are subject to a unique set of legal regimes governing ownership interests and security arrangements. See **Aboriginal Law.**

Common Investment Vehicles for Real Property in Canada

There are various avenues for investment in real property in Canada, including corporations, partnerships, limited partnerships, trusts, co-ownerships and condominiums. See **Business Organizations**. Each of these vehicles has its own nuances, and with careful planning and legal advice, investors in the Canadian real property market can structure their investments so as to take maximal advantage, for tax purposes or otherwise, of the available alternatives.

A real estate investment trust (REIT) is a special type of trust whereby a trustee agrees to hold real property assets for the benefit of unitholders as the beneficiaries of the trust.

The trustee (or more commonly, a corporate nominee) will hold legal title to the trust property. One disadvantage of this vehicle is that under common law, beneficiaries of a trust are potentially subject to unlimited liability. Commercial documentation, however, is generally crafted so as to limit such liability that may arise in relation to the assets or business dealings of the trust. Like shares of corporations, units of REITs can be publicly or privately held. The units of public REITs may be listed on public stock exchanges, like shares of common stock, and REITs can be classified as equity, mortgage or hybrid.

THERE ARE VARIOUS AVENUES FOR INVESTMENT IN REAL PROPERTY IN CANADA, INCLUDING CORPORATIONS, PARTNERSHIPS, LIMITED PARTNERSHIPS, TRUSTS, CO-OWNERSHIPS AND CONDOMINIUMS.

The REIT structure was designed to provide a structure for investment in real estate that is similar to the one mutual funds provide for investment in stocks. Currently a significant advantage to a REIT is that if its income is distributed to the unitholders, it will be taxed in their hands at their marginal rates rather than at the REIT level. REITs have been generally excluded from the income trust tax legislation changes the federal government enacted in 2007; these require income trusts to be taxed in the same manner as corporations beginning in the 2011 tax year. Legal advice is often necessary to determine whether a particular REIT falls within the exclusion provisions and to ensure the REIT continues to qualify for exclusion.

Co-Ownership Arrangement

A co-ownership arrangement is typically used where joint and several liability is not desirable. The advantages to using a co-ownership arrangement include the following: (i) each co-owner receives its own share of the revenues and pays its own share of expenses; (ii) each co-owner decides its own capital cost allowances, subject to the rules in the *Income Tax Act* (Canada); and (iii) each co-owner can sell, mortgage or otherwise separately deal with its interest.

Condominiums

Condominium ownership is a form of real estate ownership where the owner receives title to a particular unit and has a proportionate interest in certain common areas. Legal advice is needed to ensure that condominium projects satisfy all local policies and legislative requirements:

- ¬ structuring the project, i.e., common and shared facilities, exclusive use areas, commercial v. residential facilities, phasing and community associations;
- ¬ pre-selling units — preparing real estate disclosure statements or prospectuses, complying with securities and pre-marketing regulations;
- ¬ registering condominium/strata plans, declarations, descriptions and bylaws and developing policies; and
- ¬ closing and conveying the individual units.

A CO-OWNERSHIP ARRANGEMENT IS TYPICALLY USED WHERE JOINT AND SEVERAL LIABILITY IS NOT DESIRABLE.

Issues can include, for example, obtaining exemptions from the Ontario Securities Commission to permit the sale of rental pool units without a securities prospectus.

Nominees

Limited partnerships, REITs, trusts and even some corporations will often structure their business affairs so that a separate entity, usually a single-purpose corporation, holds registered title to real property as "bare trustee," "agent" or "nominee" for the beneficial owner. For both tax and accounting purposes, the property belongs to the beneficial

owner and appears on its balance sheet; it is not the property of the nominee. Although nominee arrangements may be used for several reasons, they are frequently established to facilitate dealing with property in the land registration system where there is a complex, underlying ownership structure — either to permit the beneficial ownership of the property to be kept confidential or to facilitate corporate reorganizations or third-party transfers on a land transfer tax-deferred basis.

Pension Funds

Canadian pension funds have been steadily increasing their presence in the Canadian real property market over the last few years through acquisitions of various portfolios, including Class A office buildings and shopping centres. Pension fund capital has, in fact, recently overtaken public real estate capital as the primary impetus of large real estate transactions in Canada. Pension funds that invest in real estate need to comply with strict national and provincial rules to retain their tax-exempt status.

PUBLIC-PRIVATE PARTNERSHIPS

Governments worldwide have chosen to meet the infrastructure gap by investing in public-private partnerships (PPP). Canada has joined world leaders such as the U.K., France, Spain, Italy, Portugal and Australia in supporting PPP. Large infrastructure projects are a key component of Canada's and every province's economic stimulus packages, and there is active encouragement of participation by foreign constructors, operators and equity providers. PPP projects in Canada are drawn from various industry sectors including hospitals

and healthcare, justice and corrections, transportation, schools, recreation and culture, transit, water and wastewater, mining, airports and civil navigation, ports, energy, universities, government services, property management, data centres, defence and communications.

In addition, there is a growing secondary market for infrastructure projects. Financing was originally sourced from foreign banks, but this source of capital has declined and been replaced by a combination of Canadian and foreign banks providing shorter-term financing together with an active private placement and broadly marketed bond market in Canada, at least for projects where the return to the private sector is based on "availability."

GOVERNMENTS
WORLDWIDE HAVE
CHOSEN TO MEET THE
INFRASTRUCTURE
GAP BY INVESTING
IN PUBLIC-PRIVATE
PARTNERSHIPS (PPP).
CANADA HAS JOINED
WORLD LEADERS IN
SUPPORTING PPP.

Government and public support for PPP projects in Canada is high because these projects address the infrastructure backlog, come in on-time and on-budget versus traditional delivery and efficiently transfer significant risks to the private sector. As well, lifecycle maintenance is built into the cost of PPP projects, allowing for a focus on long-term performance of the asset, and there are opportunities to encourage and reward innovation.

Federal, provincial and municipal governments in Canada are establishing frameworks or dedicated agencies for the use of PPP to achieve the completion of infrastructure projects. These agencies include Infrastructure Ontario, Partnerships BC, PPP Canada and Infrastructure Québec, as well as a dedicated PPP (Alternative Capital Financing) office within the Alberta Treasury Board.

There are several different models of PPP in Canada including operation and maintenance, build-finance, design-build-finance-maintain, design-build-finance-maintain-operate and concession. In a typical design-build-finance-maintain PPP:

- ¬ a single entity (Project Co) contracts with the government or a sponsor, which in turn contracts with consortium partners;
- ¬ the private sector accepts responsibility for design, construction, financing, maintenance and, in some cases, operations;
- ¬ the facilities maintenance component covers a long-term concession period (25-35 years) with pre-defined hand-back conditions;
- ¬ contracting arrangements are performance-based and the partner is reimbursed;
- ¬ payment from government or the sponsor only begins upon completion of construction; and
- ¬ ongoing payments remain subject to deduction for failures in service delivery.

EVERY PROVINCE
IN CANADA HAS
ITS OWN UNIQUE
AND COMPLEX
REGULATORY
AND LEGISLATIVE
REQUIREMENTS.

Every province in Canada has its own unique and complex regulatory and legislative requirements. As well, consortia and their contractors are faced with the project-approval requirements of municipalities and local authorities. Unique issues will often present themselves — including tax, environmental, lending, structuring, real estate and Aboriginal law issues.

ABORIGINAL LAW

In Canada, Aboriginal law often affects the development of land and natural resources. This is of particular interest to businesses involved in the energy, forestry, mining and transportation sectors, with respect to developments and activities on lands covered by treaties, reserve lands and areas subject to Aboriginal land claims.

In 1982, Canada voluntarily amended its Constitution and “recognized and affirmed” the existing Aboriginal and treaty rights of Aboriginal peoples in Section 35 of the *Constitution Act, 1982*. The term “Aboriginal peoples” includes the First Nations (for historical reasons originally, and incorrectly, referred to in Canada as “Indians”), Inuit and Métis peoples of Canada.

Aboriginal rights are those rights that have been traditionally exercised by Aboriginal peoples, and can include customs, traditions and activities integral to the distinctive culture of the Aboriginal group at issue. These rights can include rights to hunt, trap, fish and gather, and, in cases where Aboriginal title has been proven, a right to land itself.

ABORIGINAL AND
TREATY RIGHTS OF
ABORIGINAL PEOPLES
ARE RECOGNIZED IN
SECTION 35 OF THE
CONSTITUTION ACT,
1982.

Treaty rights are those rights set out in historic and modern treaties. With some exceptions, treaties usually involve the giving up of certain interests or rights by Aboriginal peoples in return for expressly set out “treaty rights,” such as the right to hunt or fish over a defined treaty territory. Much of northern Canada is covered by modern treaties and a large portion of southern Canada is covered by some form of historic treaty. The notable exception is British Columbia, which remains largely uncovered by treaties. There are also a number of unsettled comprehensive claims elsewhere in Canada, including those in Ontario, Québec, Newfoundland and Labrador, New Brunswick, Nova Scotia, the Northwest Territories and Yukon.

Effecting transactions on or relating to lands subject to some Aboriginal interest, including First Nations’ reserve lands, requires specific knowledge about and experience in dealing with such lands. Parliament has exclusive

legislative jurisdiction over Indians and lands reserved for Indians, and has enacted an array of legislation including the *Indian Act*, the *Indian Oil and Gas Act* and the *First Nations Land Management Act*. First Nations and Inuit are under such federal jurisdiction, whereas the relationship between the Métis and Parliament is unclear at law.

Furthermore, developments on lands subject to Aboriginal claims or interests may be subject to a legally required consultation process. The constitutional recognition and affirmation of Aboriginal and treaty rights requires the Crown (which includes the federal and provincial governments) always to act honourably when dealing with Aboriginal peoples. In circumstances where the Crown may make a decision that might adversely affect an Aboriginal interest, the Crown has a duty to consult, and, where appropriate, accommodate Aboriginal peoples. This Crown duty arises when the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal interest and contemplates conduct that might adversely affect this interest.

DEVELOPMENTS ON
LANDS SUBJECT TO
ABORIGINAL CLAIMS
OR INTERESTS MAY
BE SUBJECT TO A
LEGALLY REQUIRED
CONSULTATION
PROCESS.

What amounts to appropriate Crown consultation is a matter for legal analysis on a case-by-case basis. The content of the Crown's duty varies with each project or approval, and the duty does not require the same degree of consultation in all instances where it is engaged. The scope of the Crown's duty to consult exists on a spectrum, and is proportionate to the strength of the case supporting the existence of an Aboriginal interest, and the degree of the potential adverse effect of the Crown decision on such interest.

Although the duty to consult is ultimately the responsibility of the Crown, the courts have stated that procedural aspects of consultation may be delegated to private entities. It is not uncommon for the Crown to pass along certain requirements associated with the duty to consult to applicants or project proponents. Inadequate Crown consultation can lead to approvals or permits being delayed or called into question, protests, community and investor relations challenges or litigation for injunctions or damages, all of which can have serious impacts on project scheduling, costs and certainty.

Aboriginal Law

It is common for governments to promote, and for the private sector to consider, entering into agreements with the relevant Aboriginal groups (sometimes referred to as access, participation or impact and benefits agreements). Such agreements can assist in addressing the concerns of Aboriginal groups, establish stable frameworks for development projects to move forward and provide an effective means of managing Aboriginal-related risks on projects. These agreements can include an array of benefits for the Aboriginal group, including employment opportunities, support for education and training initiatives, contracting and business opportunities, and capacity building, generally with corresponding assurances to the proponent that facilitate the development of the project.

INTELLECTUAL PROPERTY

The federal laws on patents, copyright and trade-marks provide the principal protection for intellectual property in Canada. Canada is a member of the WTO agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and has agreed to the minimum standards of protection and reciprocal treatment provided in this treaty.

Patents

Canada is a member of the *Paris Convention for the Protection of Industrial Property* (Stockholm Act) and the *Patent Cooperation Treaty* (PCT).

The Patent Act provides that any new, useful and unobvious invention that falls within the statutorily defined categories, namely, art, process, machine, manufacture or composition of matter (or any improvement of any of these) is patentable. Higher life forms *per se* are not patentable, but engineered genetic material and cell lines containing such genetic material typically are patentable. Algorithms *per se* are not patentable, but computer program products or methods that implement a tangible and useful solution generally are patentable.

CANADA IS A MEMBER
OF THE PARIS
CONVENTION FOR
THE PROTECTION OF
INDUSTRIAL PROPERTY
(STOCKHOLM ACT)
AND THE PATENT
COOPERATION TREATY.

In a landmark decision rendered in October 2010, the Federal Court overturned a rejection by the Commissioner of Patents and the Canadian Patent Appeal Board of a patent application of Amazon.com for its “one-click” online product-ordering technology. The Commissioner of Patents had held that Amazon’s application did not qualify as having patent-eligible subject matter under the Patent Act. In overturning this finding, the court articulated a new test that does not preclude computer-implemented innovations and business methods from being patented in Canada as long as they meet the general test of what constitutes an “invention” under Section 2 of the Patent Act. In late 2011, the Federal Court of Appeal allowed the appeal of the Federal Court decision. One point of difference with the reasoning in the decision at first instance was that the Court of Appeal dismissed the view that a business method may become patentable subject matter merely because it has a practical

embodiment or a practical application. On the other hand, the Court of Appeal agreed with the judge at first instance in his determination that patentable subject matter must either be something with a physical existence or something that manifests a discernible effect or change. The Court of Appeal remanded the construction of the patent claims back to the Commissioner of Patents, and the application was issued by the Patent Office shortly thereafter. The *Amazon.com* decision is thought by many to herald a new era of increasing acceptance for patents directed to computer-implemented inventions and business methods in Canada.

Other patent decisions of note in Canada in the past year have included a unanimous decision of the Supreme Court of Canada which held that Pfizer Canada's patent describing and claiming sildenafil, the active ingredient for the prescription drug VIAGRA®, failed to satisfy the disclosure requirements of the Patent Act. The Court came to this holding on the basis that the specification did not categorically indicate that sildenafil was the effective compound of interest, and that the notional skilled person, on reading the patent, would be left to the prospect of further testing to determine which of two stated compounds in the specification would actually work. Another noteworthy decision included a judgment of the Federal Court that invalidated certain of the claims of a patent of Eurocopter for a helicopter landing gear structure, on account that the utility of the claimed structure was not demonstrated nor soundly predicted at the date of filing of the subject application. The result is a surprising one for a patent outside of the chemical, pharmaceutical or biotechnology fields. The decision is currently under appeal and a decision is expected sometime in 2013.

THE APPLICATION
IN CANADA MUST
GENERALLY BE
FILED BEFORE THE
INVENTION IS MADE
AVAILABLE TO THE
PUBLIC ANYWHERE IN
THE WORLD.

A patent grants its owner the exclusive right in Canada to make, sell or use the invention for a fixed term. In general, the first inventor to file for patent protection will be entitled to a patent. There is no requirement that the invention be made in Canada. The application in Canada must generally be filed before the invention is made available to the public anywhere in the world. A grace period of one year is permitted for

disclosures originating directly or indirectly from the inventor, but an application by another inventor with an earlier filing date will effectively prevent the grant of a patent. It is therefore important to file as early as possible in Canada or in a Paris Convention country, and not rely on the grace period. The making of an invention available to the public includes publication (e.g., by publication of an earlier patent application or by distribution of a product embodying the invention). Pending patent applications will be published by the Canadian Intellectual Property Office 18 months after the earliest filing date claimed by the applicant. The patent will last for a maximum of 20 years from the date of filing in Canada, provided all annual maintenance fees are paid in a timely manner.

Copyright

Canada has and is in the process of implementing the *WIPO Copyright Treaty* (WCT) and the *WIPO Performances and Phonograms Treaty* (WPPT). Many of the substantive provisions in the WCT and WPPT, such as the establishment of a "making available" right and the implementation of technical protection measures, were implemented in a major revision to the *Copyright Act* that came into force in November 2012. The new legislation, in addition to addressing these international treaty obligations, provides a new secondary liability remedy against those who "enable" digital infringements, as well as a series of broad new exceptions to copyright protection, including exceptions in respect of "reproduction for private purposes", "time-shifting", "technological processes", "fair dealing for the purposes of education, parody or satire" and "user-generated content". The new legislation also contains new safe harbours for Internet intermediaries, including for hosts and Internet location tool providers; however, providers considering reliance on the new safe harbour provisions should be aware they are subject to the new "enablement" remedy.

In mid-2012, the Supreme Court of Canada released five new copyright decisions. The most important themes emerging from these decisions include the Supreme Court's acknowledgement of the concept

CANADA HAS AND IS IN THE PROCESS OF IMPLEMENTING THE WIPO COPYRIGHT TREATY AND THE WIPO PERFORMANCES AND PHONOGRAMS TREATY.

of technological neutrality (the idea that digital and non-digital uses should receive comparable treatment under copyright law) and the continued treatment of copyright exceptions as “user rights”.

However, it should be noted that the decisions were made under the historical Copyright Act, and may not apply predictably to the new provisions passed in late 2012. In November 2012, the Supreme Court issued another important copyright decision in which it prohibited the creation of copyright-like rights by any body other than Parliament, in this instance the Canadian Radio-television and Telecommunications Commission, which has regulatory oversight over broadcasting and telecommunications policy in Canada.

Canada is a party to the *Berne Convention* and the *Universal Copyright Convention*. Depending on the nature of the work, the owner of copyright in a work has the sole right to reproduce, perform, publish or communicate the work. The *Copyright Act* provides that copyright arises automatically in all original literary, artistic, dramatic or musical works. The *Copyright Act* provides that registration is permissive rather than mandatory. However, registration does raise certain presumptions in favour of the registered owner that are useful in the context of litigation. In general, copyright lasts for the life of the author plus 50 years. Since 1993, computer programs are expressly protected, under statute, as literary works.

Trade-marks

Canada is not a member of the *Madrid Agreement* or the *Madrid Protocol*.

The *Trade-marks Act* provides for the protection of interests in words, symbols, designs, slogans or a combination of these to identify the source of wares or services. Rights in a trade-mark are created through use in Canada (or in the case of foreign owners, by use abroad and eventual registration in their home country). It is possible to reserve rights by filing based on an intent to use a trade-mark in Canada. Registration is permissive and not mandatory.

Registration does, however, give the registrant the exclusive right to use the mark throughout Canada and facilitates enforcement. Without a registration, an owner's rights are limited to the geographic area where the mark has been used. If the trade-mark owner

CANADA IS NOT A
MEMBER OF THE
MADRID AGREEMENT
OR THE *MADRID*
PROTOCOL.

intends to license the mark for use by others, even by a subsidiary company, proper control over its use by the licensee is essential for proper protection. While a trade-mark endures for as long as the owner uses it to identify his or her wares or services, registrations can be attacked on the basis of non-use or invalid registration. The first term of a registration is for 15 years and is renewable for successive 15-year terms on payment of a renewal fee.

Domain Names

The Internet's domain name system and the Internet-based practice of meta-tagging present the intellectual property system and especially trade-mark law with some interesting challenges. The conflict between the registered trade-mark system and a domain names registry is the result of domain name registrations following a "first come, first served" policy, without an initial, independent review of whether the name being registered is another person's registered trade-mark. At the same time, a domain name in some respects is more powerful than a trade-mark, as there can only be one company name registered for each top-level domain.

To obtain a Canadian ".ca" registration, a would-be registrant must meet certain Canadian-presence requirements. These present certain challenges for foreign entities that do not wish to incorporate in Canada. While the ownership of a registered Canadian trade-mark suffices to meet the requirement, the owner may reserve only those domain names that consist of or include the exact word component of that registered trade-mark.

In Canada, some trade-mark owners have successfully used the doctrine of "passing off" in combating so-called "cybersquatters." In other cases, they have argued trade-mark infringement under the *Trade-marks Act*. To gain control of a domain name, it might also be possible to argue "depreciation of goodwill" under Section 22 of the *Trade-marks Act* as well as misappropriation of personality rights.

THE INTERNET'S
DOMAIN NAME
SYSTEM AND THE
INTERNET-BASED
PRACTICE OF META-
TAGGING PRESENT
THE INTELLECTUAL
PROPERTY SYSTEM
AND ESPECIALLY
TRADE-MARK
LAW WITH SOME
INTERESTING
CHALLENGES.

The Canadian Internet Registration Authority (CIRA) Domain Name Dispute Resolution Policy (CDRP) is an online domain name dispute resolution process for the ".ca" domain name community. One- or three-member arbitration panels consider written arguments and render decisions on an expedited basis. Among other features, the CDRP permits a panel to award costs of up to \$5,000 against a complainant found guilty of reverse domain name hijacking.

Other Intellectual Property

Patents, copyrights, trade-marks and domain names represent some of the most common types of intellectual property. However, in today's economy, intellectual property protection takes many additional forms. The common law protects against the misappropriation of trade secrets, personality rights and passing off, among other things. It also protects privacy and personality rights to some degree. A broad range of particular rights and obligations also arise under more specific statutes such as the *Industrial Design Act*, the *Integrated Circuit Topography Act*, the *Personal Information Protection and Electronic Documents Act*, the *Plant Breeders' Rights Act*, the *Competition Act*, the *Public Servants Inventions Act* and the *Status of the Artist Act*.

INFORMATION TECHNOLOGY

Export Control of Technology

In Canada, the control of exports in technology falls within the mandate of the federal government. These controls apply not just to physical shipments, but also to transfers by intangible means including through the provision of services or training, downloads or other electronic file transfers, e-mails, faxes, telephone conversations and face-to-face meetings. Export of certain computers, technology and other products may be controlled by means of the *Export and Import Permits Act* (EIPA), the *United Nations Act* (UNA), or the *Special Economic Measures Act* (SEMA). Under the UNA and the SEMA, Canada can restrict the export of goods, as well as the movement of people and money and the provisions of services, to any country against which the United Nations or Canada has imposed economic sanctions. The *Export Control List* (ECL) kept under the EIPA restricts certain high-tech goods, but is not product-specific; instead, it provides a set of technical specifications that are technology-neutral for the most part and that are functional in their description. The ECL also regulates the export of certain software (software generally available to the public is not usually restricted). Software and other items having cryptographic security features are generally covered by export controls, subject to certain limited mass market and public domain exceptions or unless the cryptography employs very low-key lengths. In addition, all U.S.-origin technology that is to be transferred to a destination other than the U.S. is subject to export controls.

OVER THE PAST
DECADE, VARIOUS
LEGISLATIVE
INITIATIVES HAVE
PROVIDED MORE
LEGAL CERTAINTY
TO DOING BUSINESS
ONLINE.

Consumer Protection — Internet Agreements

Over the past decade, various legislative initiatives have provided more legal certainty to doing business online. In Ontario, for example, the *Consumer Protection Act, 2002* (CPA) overhauled various existing consumer protection legal regimes and brought them under one roof for consistency and ease of administration. Some important extensions of the law favour consumers. These extensions are particularly germane to online

commerce, where a growing number of Canadian consumers buy and sell goods and services, though they apply generally outside e-commerce as well. See **Manufacture and Sale of Goods — Consumer Protection**.

The creation of a new implied warranty, for example, requires that services supplied under a consumer agreement be of “a reasonably acceptable quality.” It also extends the implied warranties in the *Sale of Goods Act* to goods that are leased or traded. Another important change is a provision that prohibits contracting out of the class action proceedings regime. This is designed to counteract the practice of some suppliers to provide arbitration as the contractually stipulated dispute resolution mechanism, precisely to avoid a class action scenario. Further, the CPA requires the supplier to provide the consumer with a fairly extensive list of information before concluding an Internet agreement. The CPA also requires that this information be disclosed to the prospective consumer in a manner that is “clear, comprehensible and prominent”, as well as “accessible.” In addition, a confirmation screen that summarizes the consumer’s purchase details just before the conclusion of the online purchase is mandatory, along with the requirement that the supplier provide a copy of the Internet agreement to the consumer within 15 days after the consumer enters into that agreement. Finally, recent amendments to the CPA set out rules for pre-paid cards such as gift cards, which comprise a growing segment of the consumer economy, especially online. These rules cover a number of requirements and limitations on issuers, such as whether a gift card can have an expiration date, or whether the issuer can charge the consumer any fees, among other things.

RECENT AMENDMENTS
TO THE CPA SET OUT
RULES FOR PRE-PAID
CARDS SUCH AS
GIFT CARDS, WHICH
COMPRIZE A GROWING
SEGMENT OF THE
CONSUMER ECONOMY,
ESPECIALLY ONLINE.

Evidence Laws

Most jurisdictions in Canada have provided clarity to evidentiary issues arising because of computer-generated documents by amending their evidence law statutes to resolve the issue of what constitutes the “original” record in the context of the creation, storage and communication of electronic information. The statutes now also provide for the best evidence

rule to be satisfied in respect of electronic records, by proof of the integrity of the electronic records system by which the data was recorded or preserved. These provisions allow the integrity of the record-keeping system to be implied from the operation of the underlying computer-related devices. In short, the amendments support the admissibility of electronic evidence, while still permitting a party to challenge the reliability of the computer system or network that produced the evidence.

In the current era of electronic word processing coupled with e-mail, strict and literal compliance with litigation discovery rules, such as Rule 30 of the *Rules of Civil Procedure* (Ontario), would prove very expensive and largely of limited value to participating litigants. Therefore, judges in Canada are increasingly receptive to having parties to a litigation follow e-discovery guidelines. These require, for example, that parties contemplating or threatened with litigation must consider e-evidence issues and, among other things, circumscribe the scope of e-discovery in order to comply with Rule 30. See **Dispute Resolution — Electronic Discovery**.

E-Commerce Statutes

The Canadian provinces have adopted electronic commerce statutes that address a variety of issues that arise in doing business electronically, such as the validity of using electronic messages to meet the writing requirements for legal documents. Ontario's *Electronic Commerce Act*, for example, provides that the legal requirement for a document to be in writing is satisfied by a document that is in electronic form — such as e-mail — if it is accessible so as to be usable for subsequent reference. In Québec, the legal value of a document, particularly its capacity to produce legal effects and its admissibility as evidence, is neither increased nor decreased because of the medium or technology chosen. Under the Québec regime, it is critical to be able to establish that the "integrity" of a technological document has been maintained throughout its life cycle. In this regard, certain legal presumptions apply.

THE AMENDMENTS
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THAT PRODUCED THE
EVIDENCE.

The provincial electronic commerce statutes also stipulate that one can satisfy any legal requirement that a document be signed by an electronic signature. The definition of “electronic signature” is very broad, and encompasses any electronic information that a person creates or adopts in order to sign a document and that is in, attached to or associated with the document.

The federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) is somewhat narrower, and focuses only on “secure electronic signatures,” which is currently taken by the government to mean, essentially, an authentication process based on public key type encryption.

In addition to writing and signature rules, most provincial electronic commerce statutes provide that an offer, an acceptance or any other matter material to the formation or operation of a contract may be expressed by electronic information or by an act intended to result in electronic communication, such as touching or clicking an appropriate icon or other place on a computer screen, or even by speaking. These rules are useful because they confirm that contracts made over the Internet will not be unenforceable simply because they were concluded electronically. There is jurisprudence in Canada supporting the enforceability of “express click consent” agreements. Where a user is not required to click “I agree” expressly, but rather where the terms say, for example, that using the website denotes consent to the terms, there is less certainty as to enforceability.

THERE IS
JURISPRUDENCE IN
CANADA SUPPORTING
THE ENFORCEABILITY
OF “EXPRESS
CLICK CONSENT”
AGREEMENTS.

Anti-spam, Anti-spyware

After considerable discussion, a law commonly referred to as Canada’s *Anti-Spam Act* (CASL) was enacted by Parliament in December 2010. As of the date of publication of this guide, CASL is not currently in force, although it is expected to come into force in 2013. Once proclaimed into force, the legislation will implement a broad range of requirements intended to reduce spam, identity theft, phishing and spyware. It will also allow businesses and consumers to take civil action against violators, and will allow the Canadian Radio-television and Telecommunications

Commission (CRTC) and the Competition Bureau to seek administrative monetary penalties of up to \$1 million for individuals and \$10 million for other offenders. Canadian regulators will be given the power to share information and evidence with their counterparts in other countries. Many industry groups consider parts of the legislation to be overreaching because: a) the law governs all forms of “commercial electronic messages” (not merely e-mails used for direct marketing); and b) the law imposes an “opt-in” consent requirement and detailed disclosure requirements to both the delivery of “commercial electronic messages” and to the installation of computer programs on another person’s computer system (whether or not the computer program might be considered “spyware” or “malware”).

Cyber-Libel

Cyber-libel is posting a publication onto the Internet that is calculated to injure the reputation of another without lawful excuse. Recent Canadian court decisions have awarded significant damages to plaintiffs who were libelled by defendants sending defamatory e-mails and making other similar online postings about plaintiffs. The case law is developing to minimize potential liability of responsible hosts of online discussion forums.

Jurisdiction

In the criminal, quasi-criminal and regulatory arenas, Canadian courts and regulators seem to have little hesitation assuming jurisdiction over foreign-originated Internet-related conduct they view as harmful to the public good, so long as there is a real and substantial connection to the court’s or regulator’s own jurisdiction.

Criminal Law

In general, the Canadian government has made useful strides in combating computer crime by continuously amending the *Criminal Code* over the past 20 years to keep pace with perpetrators of computer-related crime. However, the Internet and other computer-based technologies and business practices raise a number of novel questions under these amendments as well as the older provisions of the *Criminal Code*,

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highlighting (among other challenges) the difficulty in enforcing a national criminal law in an increasingly global technology environment. As technology evolves, the applicability of the *Criminal Code* to certain harmful behaviour remains in question.

LANGUAGE

Language rules in most of Canada govern public life and institutions, not business. Canada's Constitution grants English and French equal status in Canada's Parliament and federal courts. Every law must be published in both English and French in some provinces, including Québec. The federal *Official Languages Act*, given additional profile by the *Canadian Charter of Rights and Freedoms*, requires that all federal institutions provide services in either language wherever there is demand for it, or wherever the travelling public is served. Public education is available in either official language, where numbers warrant.

Outside Québec

Outside Québec, the main exception to this focus on the public sector is consumer packaging. Regulations under the federal *Consumer Packaging & Labelling Act* identify specific information with which pre-packaged consumer products sold in Canada must be labelled. That information must be set out in both English and French. Exceptions include religious, specialty-market and test products, and language-sensitive products such as books and greeting cards.

CANADA'S
CONSTITUTION
GRANTS ENGLISH
AND FRENCH EQUAL
STATUS IN CANADA'S
PARLIAMENT AND
FEDERAL COURTS.

Although Canada is bilingual at the federal level, other governments in Canada may apply their own language policies to matters within their jurisdiction. New Brunswick and the three northern territories are officially bilingual. Several provinces have adopted legislation to ensure that public services are available in French where warranted; but only Québec's language legislation regulates how businesses operate.

Inside Québec

Québec's *Charter of the French language* (Charter) affirms French as that province's official language. The Charter grants French-language rights to everyone in Québec, both as workers and as consumers. Anyone who does business in Québec — anyone with an address in Québec, and anyone who distributes, retails or otherwise makes a product available in Québec —

is therefore subject to rules about how they interact with the public and how they operate internally inside the province.

In the Workplace

In Québec, written communications with staff must be in French, including offers of employment and promotion and collective agreements. No one may be dismissed, laid off, demoted or transferred for not knowing a language other than French — but knowledge of English or another language may be made a condition of hiring if the nature of the position requires it.

Businesses that employ at least 50 people within Québec for at least six months must register with a provincial regulator (the OQLF) to obtain a francization certificate by demonstrating the generalized use of French at all levels of the business (including in relation to the use of information technology, and in communications with clients, employees and investors). Businesses where the use of French is not generalized at all levels may be subject to a francization program in order to achieve this goal. In addition, businesses with at least 100 employees must establish an internal francization committee to report on progress.

RULES ABOUT
HOW BUSINESSES
COMMUNICATE
IN QUÉBEC'S
MARKETPLACE
DIFFER ACCORDING
TO WHETHER THE
COMMUNICATION IS IN
A PUBLIC OR PRIVATE
PLACE.

In the Marketplace

Rules about how businesses communicate in Québec's marketplace differ according to whether the communication is in a public or private place. Billboards and signs visible from a public highway, on a public transport vehicle or in a bus shelter must be exclusively in French. Public signs, posters and commercial advertising located elsewhere may include other languages, but the French text must predominate. Non-French business names must be accompanied by a French version appearing no less prominently, unless the non-French name has been trade-marked and a French version has not. Even in this latter case, the OQLF has recently adopted the view that when a business uses an English language trade-mark as a firm name on a public sign, the trade-mark must be accompanied by a French language generic descriptor.

Language

Anyone carrying on business at a Québec location, however, must register a language business name.

Communications such as leaflets, catalogues, brochures, order forms, invoices, receipts, user manuals, warranties and product packaging must include French text that is no less prominent than any non-French text displayed. Because such communications are not displayed in a public place, however, the French text need not predominate.

The latter rule applies not only to communications and product labelling, but also directly to certain products that use words. Subject to certain cultural exceptions, for example, the words on toys and games must be available in French alongside any other language version. Software products, on the other hand, must be made available to Québec consumers in French only where a French-language version of that software exists and has been made commercially available somewhere in the world. If no such version has been marketed elsewhere, however, there is no obligation to create a new French-language version for the Québec market; the non-French version may be provided on its own.

If a French-language version of the software exists and has been made commercially available somewhere in the world, then non-French versions may be sold in Québec only if a functionally equivalent French-language version is simultaneously made available in Québec on terms and conditions that are equally attractive to those applicable to the non-French version.

QUÉBEC COURTS
HAVE HELD THAT
CERTAIN PROVISIONS
OF THE CHARTER
*OF THE FRENCH
LANGUAGE APPLY
TO WEBSITES.*

Québec courts have held that certain provisions of the Charter apply to websites. For example, product and service descriptions on websites may be subject to French-language requirements since they are akin to a commercial catalogue. Similarly, standard form contracts (such as website terms of use and privacy policies) as well as order forms must be drafted in French according to the Charter. In general, if a company has a physical address in Québec and its website advertises products or services sold in Québec, then the above-mentioned aspects of the website may be subject to French language requirements.

IMMIGRATION

The federal government is responsible for immigration, although some provinces have entered into agreements with the federal government enabling them to assume certain policy and procedural objectives. These agreements are called Provincial Nominee Programs. The federal statute governing Canadian immigration law is the *Immigration and Refugee Protection Act* (IRPA).

Permanent Residence

Any non-Canadian entering the country and planning to remain as a permanent resident must first apply for, and then be granted, a permanent resident visa.

There are a number of different categories under which a person may apply for permanent residence, including skilled workers, investors, entrepreneurs and family class sponsorship.

An entrepreneur applicant must demonstrate the intention and ability to establish or acquire a substantial interest in a viable business that will create or maintain job opportunities for Canadians, and must participate actively in the management of the business. An applicant in the investor category must have a minimum net worth and be willing to invest a set amount either with the federal government or with any of a number of provincial investor programs.

Due to recent rule changes the Federal Investor and Federal Skilled Worker programs are now not viable for most foreign nationals who intend to seek permanent residence. This series of changes has made the various Provincial Nominee programs for permanent residence a more critical component of the permanent resident application system. Provincial Nominee programs are agreements between the federal government and some of the provinces whereby there is a delegation of authority to the provincial government to allow the provincial government a limited right to select immigrants destined to its province. Each Provincial Nominee Program has its own selection criteria.

ANY NON-CANADIAN ENTERING THE COUNTRY AND PLANNING TO REMAIN AS A PERMANENT RESIDENT MUST FIRST APPLY FOR, AND THEN BE GRANTED, A PERMANENT RESIDENT VISA.

In 2008, the Department of Citizenship and Immigration Canada introduced a new category for permanent residence called the Canadian Experience Class (CEC). This category allows temporary foreign workers who have garnered a requisite amount of Canadian work experience on a work permit to apply from within Canada for permanent residence, thus bypassing the more complex and restrictive skilled worker category. The CEC is also available for foreign students in Canada who have met the appropriate criteria for both post-secondary study and a minimum level of Canadian work experience after completion of their studies in Canada. This progressive change in immigration policy signals the beginning of a new approach the Canadian government is adopting to encourage more skilled workers to migrate to Canada.

Québec has an agreement with the federal government on immigration matters. The Québec agreement provides for a separate selection process for permanent residents, and some additional procedures for temporary entry that are administered by the government of Québec.

Generally, any business-related activity carried on in Canada on a temporary basis by a person who is neither a Canadian citizen nor a Canadian permanent resident, for which remuneration is received or would reasonably be expected to be received, requires a work permit. There are, however, a number of work permit exempt categories that allow a foreign national, if eligible, to carry on prescribed business activities in Canada without need for a work permit. Work permit exempt categories include the NAFTA Business Visitor and the intra-company trainer.

WORK PERMIT
EXEMPT CATEGORIES
INCLUDE THE NAFTA
BUSINESS VISITOR
AND THE INTRA-
COMPANY TRAINER.

Work Permits

Under certain circumstances, multinational or other foreign companies carrying on business in Canada may transfer executive or senior managerial employees or workers with specialized knowledge to work in Canada on a temporary basis, subject to the person who is to be transferred obtaining a work permit. A person might be eligible for a work permit as an intra-company transfer pursuant to three separate and distinct international agreements — NAFTA, the Canada Chile

Free Trade Agreement (CCFTA) and the General Agreement on Trade in Services (GATS). These three international agreements liberalized the rules respecting the temporary entry of business visitors, certain professionals and intra-company transferees who are citizens or permanent residents of the numerous countries that are GATS signatories or citizens of the United States or Mexico (in the case of NAFTA) or citizens of Chile (in the case of CCFTA).

Recently, the rules concerning the maximum work permit duration limits for the NAFTA Professional category have been increased from 12 months to three years for any single work permit issued.

In addition to certain prescribed work permit categories under these agreements, there are also a number of other exempt categories available under the Regulations of the IRPA, including one for intra-company transfers.

In 2008, Citizenship and Immigration Canada also relaxed duration limits for young workers under the post-graduation work permit category, raising duration limits in some cases to three years from the typical 12 months. The post-graduation work permit was also shifted to an open work permit, which makes it non-employer-specific and allows more flexibility to young graduates to pursue employment options in the Canadian labour market.

If an employee is not eligible for any of the exempt categories, he or she can still obtain a work permit if his or her Canadian employer can first obtain a Labour Market Opinion from Service Canada, a federal government agency. To do so, the Canadian employer must demonstrate that granting a work permit to the employee will result in the transfer of skills or technology to Canadians or will result in other types of positive benefits, such as job creation. Usually the employer must also show that there are no Canadians available to do the job.

IN ADDITION TO CERTAIN PRESCRIBED WORK PERMIT CATEGORIES UNDER NAFTA, CCFTA AND GATS, THERE ARE ALSO A NUMBER OF OTHER EXEMPT CATEGORIES AVAILABLE UNDER THE REGULATIONS OF THE IRPA, INCLUDING ONE FOR INTRA-COMPANY TRANSFERS.

Stricter rules for the maximum total duration of some work permits based on Labour Market Opinions went into effect in April 2011, which cap the total duration at four years. At that time, the foreign national will no longer be able to hold a lawful work permit until a subsequent four years has passed. Tougher new rules concerning penalties for employers who do not comply with immigration laws also came into effect on April 1, 2011, which can now bar a company from bringing anyone into Canada to work for a mandatory two year period should it be deemed to have breached its obligations.

Temporary Entry

With respect to temporary entry, nationals of certain countries may also be required to obtain a temporary resident visa (formerly, a visitor visa) to enter Canada, and may be required to undergo a medical examination before arriving for entry to Canada.

The rules and regulations governing both permanent and temporary entry to Canada are complex and ever-changing. It is therefore prudent for any company to become familiar with Canadian immigration laws before establishing a commercial presence in Canada.

INTERNATIONAL TRADE AND INVESTMENT

Canada is a member of the World Trade Organization (WTO) and a party to the *North American Free Trade Agreement* (NAFTA) as well as numerous other regional trade and investment protection agreements. As such, Canada has rights and obligations in a wide range of areas addressed under these treaties.

Because of the broad scope of these trade and investment agreements and their binding dispute settlement mechanisms, foreign investors establishing a business in Canada should be cognizant of Canada's obligations and the remedies available to them, particularly where they are facing discriminatory or otherwise harmful government measures.

The regulatory regimes discussed below apply to those doing business in Canada and engaged in the international transfer of goods, services and technology.

CANADA IS A MEMBER OF THE WORLD TRADE ORGANIZATION (WTO) AND A PARTY TO THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) AS WELL AS NUMEROUS OTHER REGIONAL TRADE AND INVESTMENT PROTECTION AGREEMENTS.

The World Trade Organization

As a member of the WTO, Canada is subject to a broad range of obligations that impact all sectors of the Canadian economy. These obligations govern Canadian measures concerning market access for foreign goods and services, foreign investment, the procurement of goods and services by government, the protection of intellectual property rights, the implementation of sanitary and phytosanitary measures and technical standards (including environmental measures), customs procedures, the use of trade remedies such as anti-dumping and countervail, and the subsidization of industry.

These WTO obligations apply to Canadian government policies, administrative and legislative measures, and even judicial action. They apply to the federal government and also in many cases to provincial and other sub-federal governments.

Canada is an active participant in the WTO's dispute settlement system, both as complainant and respondent. As a result of WTO cases brought against Canada by other countries, Canada has had to terminate or amend offending measures in numerous sectors, including automotive products, magazine publishing, pharmaceuticals, dairy products and aircraft. On the other hand, Canadian successes under the WTO dispute settlement system have increased access for Canadian companies to markets around the world.

The North American Free Trade Agreement

NAFTA came into effect on January 1, 1994, and provided for the elimination of trade barriers among Canada, the United States and Mexico. Between Canada and the United States, the process of tariff elimination initiated pursuant to the *Canada-United States Free Trade Agreement* that came into effect on January 1, 1989 was continued under NAFTA. On January 1, 1998, customs duties were completely eliminated with respect to U.S.-origin products imported into Canada, with the exception of certain supply managed goods, including dairy and poultry products. Effective January 1, 2003, virtually all customs tariffs were eliminated on trade in originating goods between Canada and Mexico.

GOODS WHOLLY PRODUCED OR OBTAINED IN CANADA, MEXICO OR THE UNITED STATES, OR ALL THREE, WILL QUALIFY FOR PREFERENTIAL TARIFF TREATMENT.

While NAFTA eliminates tariff barriers among Canada, Mexico and the United States, each country continues to maintain its own tariff system for non-NAFTA countries. In this respect, NAFTA differs from a customs union arrangement of the kind that exists in the European Union, whereby the participating countries maintain a common external tariff with the world. A system of rules of origin has been implemented to define those goods entitled to preferential duty treatment under NAFTA. Goods wholly produced or obtained in Canada, Mexico or the United States, or all three, will qualify for preferential tariff treatment, as will goods incorporating non-NAFTA components that undergo a prescribed change in tariff classification, and that in some cases satisfy prescribed value-added tests. Provided the NAFTA rules of origin are satisfied, investors from non-

International Trade and Investment

NAFTA countries may establish manufacturing plants in Canada through which non-NAFTA products and components may be further processed and exported duty-free to the United States or Mexico.

NAFTA Chapter 11 imposes obligations on Canada concerning its treatment of investors of other NAFTA countries. It also contains an investor-state dispute settlement mechanism, which permits a private investor of one NAFTA country to sue the government of another NAFTA country for loss or damage arising out of that government's breach of its investment obligations. Under NAFTA Chapter 11, the federal government can be sued for damages arising out of provincial government measures that are inconsistent with NAFTA's investment obligations.

While NAFTA contains many obligations similar to those found in WTO agreements, it is sometimes referred to as "WTO-plus" because of enhanced commitments in certain areas, including foreign investment, intellectual property protection, energy goods (such as oil and gas), financial services, telecommunications and rules of origin. NAFTA also establishes special arrangements for automotive trade, trade in textile and apparel goods, and agriculture.

CANADA HAS ALSO NEGOTIATED FREE TRADE AGREEMENTS WITH COLOMBIA, CHILE, COSTA RICA, HONDURAS, JORDAN, ISRAEL, PANAMA, PERU AND THE EUROPEAN FREE TRADE ASSOCIATION.

Other Free Trade Agreements

In addition to being a signatory to NAFTA and the agreements of the WTO, Canada has also negotiated free trade agreements with Colombia, Chile, Costa Rica, Honduras, Jordan, Israel, Panama, Peru and the European Free Trade Association (Iceland, Liechtenstein, Norway and Switzerland).

Canada is currently negotiating, or considering initiating negotiations of free trade deals with India, Japan, South Korea, Turkey, Ukraine, Morocco, the Caribbean Community (CARICOM), the Dominican Republic, Singapore, the Andean Community, El Salvador, Guatemala and Nicaragua. Canada is also participating in the negotiation of the Trans-Pacific Partnership.

In addition, Canada is currently engaged in the negotiation of a Comprehensive Economic and Trade Agreement (CETA) with the European Union. If negotiations are successful, the resulting treaty could be Canada's broadest and most significant trade agreement to date — with substantial commitments across a number of areas, including trade in goods and services, investment protection, sanitary and phytosanitary measures, technical barriers to trade, trade facilitation, government procurement, customs procedures, regulatory cooperation, labour mobility, competition policy, provincial measures and the protection of intellectual property, including geographic indications.

CANADA IS CURRENTLY ENGAGED IN THE NEGOTIATION OF A COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT (CETA) WITH THE EUROPEAN UNION.

Bilateral Investment Treaties

Bilateral investment treaties (BITs) between Canada and 25 developing countries and former communist-bloc nations are currently in force. Like NAFTA Chapter 11, these BITs govern a range of foreign investment issues, including the treatment of foreign investors and their investments, performance requirements, expropriation and compensation, and government-to-government dispute settlement mechanisms.

To investors, perhaps the most important feature of these BITs is that they also contain private investor-state dispute settlement mechanisms that enable foreign investors to sue host governments, including Canada, for damages arising out of breaches of their investment treaty obligations. Foreign investors intending to establish a business in Canada are advised to determine whether their home state has a bilateral investment treaty with Canada; if so, their rights as an investor may be enhanced. Canadian-based businesses will also benefit from the BIT protections available for their foreign direct investment in developing countries.

Canada recently concluded negotiations of BITs with Bahrain, China, Kuwait, Madagascar, Mali, Senegal and Tanzania. Canada is currently in the process of negotiating BITs with India, Vietnam, Pakistan and a number of other countries.

Agreement on Internal Trade

The federal government of Canada has negotiated the Agreement on Internal Trade (AIT) with each of the governments of Canada's provinces and territories. The AIT contains

obligations pertaining to: measures restricting or preventing the movement of goods, services and investment across provincial boundaries; measures relating to investors of a province; the government procurement of goods and services; consumer-related measures and standards; labour mobility; agricultural and food goods; alcoholic beverages; natural resources processing; communications; transportation; and environmental protection measures.

The AIT also provides for government-to-government and person-to-government dispute resolution.

THE FEDERAL GOVERNMENT OF CANADA HAS NEGOTIATED THE AGREEMENT ON INTERNAL TRADE (AIT) WITH EACH OF THE GOVERNMENTS OF CANADA'S PROVINCES AND TERRITORIES.

Duties and Taxes on the Importation of Goods

Importers are required to declare imported goods upon entry into Canada and to pay customs duties and excise taxes, if applicable, to Canada's customs authority, the Canada Border Services Agency (CBSA). Goods are subject to varying rates of duties depending upon the type of commodity and its country of origin. As a member of NAFTA, Canada accords preferential tariff treatment to goods of U.S. and Mexican origin; in most cases, these goods may be imported duty-free.

The amount of customs duties payable is a function of the rate of duty (determined by the tariff classification and the origin of the goods, and as set out in the Schedule to Canada's *Customs Tariff*) and the value for duty. Canada has adopted the World Customs Organization's Harmonized System of tariff classification, as have all of Canada's major trading partners.

In accordance with Canada's obligations under the WTO's agreement regarding customs valuation, the value for duty of goods imported into Canada is, if possible, to be based on the price paid or payable for the

imported goods, subject to certain statutory adjustments. This primary basis of valuation is called the “transaction value method.” An example of an adjustment that would increase the value for duty of the goods is a royalty payment, if the royalty is required to be paid by the purchaser of the imported goods as a condition of the sale of the goods for export to Canada. An example of an adjustment that would allow for a deduction from the price paid or payable is the transportation cost incurred in shipping the goods to Canada from the place of direct shipment, if such costs are included in the price paid or payable by the importer.

If for one reason or another (e.g., where there has been no sale of the goods) the transaction value of the goods may not be used as a basis for the declared customs value, Canadian legislation provides for alternative methods for valuation. These methods must be applied sequentially.

In addition to customs duties, GST in the amount of 5% is also payable upon the importation of goods. This GST rate is applied to the duty-paid value of the goods. Provided that they have acquired the goods for use in commercial activity, importers registered under the *Excise Tax Act* will be able to recover GST paid upon importation by claiming an input tax credit. See **Sales and Other Taxes — Federal Goods and Services Tax**.

CERTAIN IMPORTED
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MARKED WITH THEIR
COUNTRY OF ORIGIN.

Other Requirements for Imported Goods

Certain imported goods are required to be marked with their country of origin. These generally fall within the following product categories: goods for personal or household use; hardware, novelties and sporting goods; paper products; wearing apparel; and horticultural products. Certain types of goods, or goods imported under specific conditions, are exempt from the country of origin marking requirement.

Pre-packaged products (i.e., products packaged in a container in such a manner that it is ordinarily sold to or used or purchased by a consumer without being re-packaged) imported into Canada are also subject to requirements under the federal *Consumers Packaging and Labelling Act*. Consumer textile articles are subject to the requirements of the federal *Textile Labelling Act*.

International Trade and Investment

There are also significant legislative requirements relating to the importation of foods, agricultural commodities, aquatic commodities and agricultural inputs. They are all subject to the inspection procedures of the Canadian Food Inspection Agency.

Counterfeit trade-mark or pirated copyright goods may be detained upon importation into Canada. In accordance with the *Copyright Act* and the *Trade-marks Act*, the owner of a registered trade-mark, the owner or exclusive licensee of a copyright, or the owner of a performer's performance may apply to the court for an order directing the CBSA to take reasonable measures to detect and detain alleged infringing goods that are being imported into Canada. When the CBSA detects such imported goods, the goods will be detained and the importer will be notified.

Certain goods are prohibited from being imported into Canada. These include: materials deemed to be obscene under Canada's *Criminal Code*; base or counterfeit coins; certain used or second-hand aircrafts; goods produced wholly or in part by prison labour; used mattresses; any goods in association with which there is used any description that is false in a material respect as to their geographical origin; certain used motor vehicles; certain parts of wild birds; certain hazardous products; white phosphorous matches; certain animals and birds; materials that constitute hate propaganda; and certain prohibited weapons and firearms.

Trade Remedies

Canada maintains a trade remedy regime that provides for the application of additional duties and/or quotas to imported products, where such products have injured or threaten to injure the production of like goods in Canada.

The federal *Special Import Measures Act* provides for the levying of additional duties on "dumped" products (i.e., products imported into Canada at prices lower than the comparable selling price in the exporting country) if they have caused or threaten to cause injury to Canadian industry.

CERTAIN GOODS ARE PROHIBITED FROM BEING IMPORTED INTO CANADA, INCLUDING OBSCENE MATERIALS, CERTAIN HAZARDOUS PRODUCTS AND CERTAIN PROHIBITED WEAPONS AND FIREARMS.

Duties may also be levied in instances of countervailable subsidies being provided by the government in the country of export, and if such subsidized products injure or threaten to injure Canadian industry.

Further, Canada may apply safeguard surtaxes or quantitative restrictions on imports, where it is determined that Canadian producers are being seriously injured or threatened by increased imports of goods into Canada. These measures may be applied whether the goods have been dumped or subsidized.

Canada also maintains a special safeguard mechanism for imports from China. This mechanism, in force until December 11, 2013, allows Canadian manufacturers to seek the application of surtaxes and/or quantitative restrictions where goods originating in China are being imported into Canada in such increased quantities or under such conditions as to cause or threaten to cause "market disruption." The Canadian government can also grant such protection where measures applied to imports of Chinese goods into the markets of other WTO members cause or threaten to cause a significant diversion of trade into the Canadian market.

Import and Export Controls

Canada, for reasons of both domestic policy and international treaty commitments, maintains controls on imports, exports and transfers of certain goods and technology and, in the case of exports, their destination country. The federal *Export and Import Permits Act* (EIPA) controls these goods through the establishment of three lists: the *Import Control List* (ICL), the *Export Control List* (ECL) and the *Area Control List* (ACL).

Goods identified on the ICL require an import permit, subject to exemptions (including for goods from certain countries of origin).

These include steel products, weapons and munitions, and agricultural and food products such as turkey, beef and veal products, wheat and barley products, dairy products and eggs.

CANADA, FOR
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TECHNOLOGY.

International Trade and Investment

The ECL identifies those goods and technology that may not be exported or transferred from Canada without obtaining an export permit, subject to exemptions for certain destination countries. Controlled goods and technology are categorized into the following groups: dual-use items, munitions, nuclear non-proliferation items, nuclear-related dual-use goods, miscellaneous goods (including all U.S.-origin goods and technology, and certain medical products, forest items, agricultural and food products, prohibited weapons, nuclear-related and strategic items), missile equipment and technology, and chemical and biological weapons and related technology.

Export permits must also be obtained for the export or transfer of any goods or technology, regardless of their nature, to countries listed on the ACL. At present, those countries are Burma (Myanmar), Belarus and North Korea.

In addition to the EIPA, other Canadian legislation regulates import and export activity, including in respect of rough diamonds, cultural property, wildlife, food and drugs, hazardous products and environmentally sensitive items.

Controlled Goods Program

The Canadian government has established the Controlled Goods Program under the authority of the *Defence Production Act*. This Program is a domestic industrial security regime for certain goods and technology that have a military application. It provides for defence trade controls to regulate and control the examination, possession and transfer in Canada of controlled goods and technology.

Anyone who deals with controlled goods and technology in Canada must register with the Controlled Goods Directorate and comply with numerous security and other requirements.

THE CANADIAN GOVERNMENT HAS ESTABLISHED THE CONTROLLED GOODS PROGRAM UNDER THE AUTHORITY OF THE DEFENCE PRODUCTION ACT.

Trade Embargoes

A number of nations are subject to Canadian trade embargoes under the *United Nations Act* and the *Special Economic Measures Act*.

Canadian trade controls of varying scope apply to activities involving the following countries: Burma (Myanmar), Belarus, Iran, Lebanon, Côte d'Ivoire, Democratic Republic of the Congo, Egypt, Eritrea, Guinea-Bissau, Iraq, Liberia, North Korea, Pakistan, Sierra Leone, Somalia, Sudan, Syria, Tunisia and Zimbabwe. Canada also maintains very significant prohibitions on dealings with listed "designated persons," terrorist organizations and individuals associated with such groups.

CANADA ALSO MAINTAINS VERY SIGNIFICANT PROHIBITIONS ON DEALINGS WITH TERRORIST ORGANIZATIONS AND INDIVIDUALS ASSOCIATED WITH SUCH GROUPS.

Unlike the United States, Canada does not maintain a general trade embargo against Cuba. Indeed, an order issued under the *Foreign Extraterritorial Measures Act* makes it a criminal offence to comply with the U.S. trade embargo of Cuba, and requires that the Attorney General of Canada be notified of communications received in respect of the embargo.

Government Procurement of Goods and Services

Given recent increases in government spending and the passage of stimulus legislation in Canada, the United States and other countries around the world, the disciplines imposed by trade agreements on government procurement have become particularly relevant. Among other things, these agreements restrict the extent to which governments may favour domestic goods and services in their procurement processes.

NAFTA (Chapter 10), the WTO Agreement on Government Procurement and the AIT (Chapter Five) all set out numerous requirements for procurement of goods and services that must be satisfied by the parties to those agreements, including Canada. These requirements include provisions that address technical specifications; the qualification of suppliers; the design and issuance of requests for proposals; selective tendering procedures; tender documentation; negotiations that may occur during the tender; the process of submitting, receiving and opening

International Trade and Investment

tenders and awarding contracts; limited tendering procedures; and bid challenges. They apply to federal government departments and entities, as well as to various government enterprises and Crown corporations. In certain circumstances, they also apply to provincial government entities, including municipalities, municipal organizations, school boards and publicly funded academic, health and social service entities.

Pursuant to its NAFTA, WTO and AIT obligations, Canada's bid challenge authority for federal procurement is the Canadian International Trade Tribunal. Where the

Tribunal finds that a procurement complaint is valid, it may recommend that a new solicitation be issued, the bids re-evaluated, the existing contract terminated and the contract awarded to the complainant or the complainant compensated for its loss of the contract. The Tribunal may also award costs incurred by the complainant in preparing a response to the solicitation.

Anti-Corruption Legislation

The federal *Corruption of Foreign Public Officials Act* (CFPOA) makes it a criminal offence for any person to bribe a foreign public official. This Act prohibits Canadians from directly or indirectly giving, offering or agreeing to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official in order to obtain or retain an advantage in the course of business. It is therefore necessary that Canadian companies carefully scrutinize their activities abroad, including the actions of their agents and other business partners in other countries.

Over the last year and a half, Canadian corporate culture has been undergoing significant change in response to new and vigorous enforcement of the CFPOA by the Royal Canadian Mounted Police (RCMP) and Crown prosecutors. The widely publicized guilty plea of Niko Resources Ltd. in June 2011 and ongoing RCMP investigations into the activities of a number of other Canadian companies serve as stark warnings of the costs of non-compliance. With an additional 30 or so RCMP investigations underway, Canadian companies are

PURSUANT TO ITS
NAFTA, WTO AND
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INTERNATIONAL
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moving quickly to implement and enforce specially designed anti-corruption policies and procedures as well as transactional risk mitigation strategies.

EMPLOYMENT

Employment in Canada is a heavily regulated area, governed by either federal or provincial legislation. The majority of employers are covered by provincial legislation, with the exception of “federal works or undertakings,” which include businesses involved in banking, shipping, railways, pipelines, airlines and airports, inter-provincial transportation, broadcasting and telecommunications.

The types of employment-related legislation with which employers operating in Canada should be familiar include:

- employment standards legislation;
- labour relations legislation;
- human rights legislation;
- occupational health and safety legislation;
- federal and provincial privacy legislation; and
- employment benefits, including pension, employment insurance and workers’ compensation.

EMPLOYMENT IN
CANADA IS A HEAVILY
REGULATED AREA,
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EITHER FEDERAL
OR PROVINCIAL
LEGISLATION.

As the following section clearly indicates, the employment relationship in Canada is governed by a broad array of regulations, legislation and common law principles. Employers need to be aware of the various legal considerations in order to avoid unnecessary liability in the workplace.

Employment Standards

All jurisdictions in Canada have enacted legislation that governs minimum employment standards. Generally, employment standards acts (ESAs) are broad and apply to employment contracts, whether oral or written. The standards defined in the ESAs are minimum standards only, and employers are prohibited from contracting out of or otherwise circumventing the established minimum standards. These laws spell out which classes of employees are covered by each minimum standard and which classes of employees are excluded. Although standards vary across jurisdictions, many topics covered are common to all ESAs, including

minimum wages, maximum hours of work, overtime hours and wages, rest and meal periods, statutory holidays, vacation periods and vacation pay, termination and severance pay and leaves of absence. The leaves of absence protected by ESAs vary across provinces, but may include sick leave, bereavement leave, maternity/parental/adoption leave, reservist leave, compassionate care/family medical leave, organ donor leave, personal emergency leave and family responsibility leave.

Unlike employers in the United States, Canadian employers may not terminate employees “at will.” Employers must provide required notice of termination, unless they have sufficient cause to terminate an employee without notice. The length of the required notice period varies among jurisdictions, but generally increases with an employee’s length of service. In Alberta, for example, employees are statutorily entitled to at least one week’s notice of termination, with a maximum eight-week notice period for employees with 10 or more years of service. Employers are required either to give “working notice” of an employee’s job termination, or provide pay in lieu of notice.

UNLIKE EMPLOYERS
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EMPLOYERS MAY
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An employer is not required to give notice or pay in lieu of notice if the termination is for sufficient cause (Cause). Cause is a high standard, and includes willful misconduct or serious disobedience.

Certain classes of employees, including construction workers, employees on a temporary lay-off and employees terminated during or as a result of a strike or lockout may be exempted from the termination notice provisions of the legislation depending on the jurisdiction.

In most jurisdictions, special provisions apply where a significant number of employees are terminated within a specified period of time. These provisions include, at the very least, written notice to the Director of Employment Standards or an equivalent governmental authority.

Some jurisdictions provide severance pay as an additional benefit to employees. For example, under the federal scheme, all employees who have been employed for 12 consecutive months are entitled to severance pay equal to the greater of: five days of regular pay or two days of regular pay for each completed year of service.

Employment

In Ontario, an employee with five or more years of service may be entitled to severance pay if the employer, as a result of the discontinuation of all or part of its business, terminates 50 or more employees in a six-month period, or if the employer has a payroll of \$2.5 million or more. Severance pay is calculated on the basis of an employee's length of service, and may reach a maximum of 26 weeks of regular pay. As with pay in lieu of notice of termination, employees may be disqualified from receiving severance pay if they have engaged in willful misconduct or disobedience, or if they fall within other exceptions specified in the legislation.

In addition to minimum statutory termination and severance pay entitlements, a terminated non-union employee, may be entitled by common law (or Civil law, in Québec) to further reasonable notice of the termination or pay in lieu of notice.

This right may be enforced in the courts.

The amount of notice will depend on the employee's individual circumstances, including length of service, age, the type of position held and the prospect for future employment. The manner in which an employer treats an employee at the time of dismissal is also important, because an employer may be liable to compensate an employee for any actual compensable damages caused by tortious conduct.

In most jurisdictions, an employer can limit its liability to the statutory minimum in an employment contract. Employers who wish to avoid or limit liability for common law pay in lieu of notice should therefore have clear terms in written contracts.

In Québec, the ESA specifically provides all employees — unionized or not — with a right to a psychological harassment-free workplace and creates a special recourse for employees who believe they have been victims of such harassment. Employers are required to take reasonable steps to prevent psychological harassment and, should such harassment occur, take reasonable steps to put an end to it.

EMPLOYERS WHO
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Labour Relations

The federal government and each province have enacted legislation governing the formation and selection of unions and their collective bargaining procedures. In general, where a majority of workers in an appropriate bargaining unit is in favour of a union, that union will be certified as the representative of that unit of employees. An employer must negotiate in good faith with a certified union to reach a collective agreement. Failure to do so may result in penalties being imposed. Most workers are entitled to strike if collective bargaining negotiations between the union and the employer do not result in an agreement; however, workers may not strike during the term of a collective agreement.

Human Rights

The *Canadian Charter of Rights and Freedoms* (Charter) is a constitutional charter that governs the content of legislation and other government actions. It contains anti-discrimination provisions that may be enforced by the courts. In addition, all Canadian jurisdictions have enacted human rights codes or acts that specifically prohibit various kinds of discrimination in employment, including harassment. Whereas the Charter applies only to the actions of government, human rights legislation applies more broadly to the actions of private individuals and corporate entities, including employers of virtually every description. Commencing January 2012, Ontario will enforce a rolling set of compliance deadlines relating to the implementation of the *Accessibility for Ontarians with Disabilities Act, 2005* (AODA). The AODA creates significant obligations for public and private sector organizations in Ontario with respect to accessibility for persons with disabilities.

HUMAN RIGHTS
LEGISLATION STATES
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THE BASIS OF ANY
OF THE PROHIBITED
GROUNDS.

Human rights legislation states that persons have a right to equal treatment and a workplace free of discrimination on the basis of any of the prohibited grounds. These vary somewhat from one jurisdiction to another, but generally include race, ancestry, place of origin, colour, ethnic origin, religion, gender (including pregnancy), sexual orientation,

Employment

age, marital status, family status and physical or mental disability (which may include a diagnosed dependency), among others. The law prohibits direct discrimination on such grounds and also constructive or systemic discrimination, whereby a policy that is neutral on its face has the effect of discriminating against a protected group. However, employers may maintain qualifications and requirements for jobs that are *bona fide* and reasonable in the circumstances.

The first step in the analysis of discrimination is for an employee to demonstrate that discrimination has occurred, or that he or she has been treated differently in a term or condition of employment on the basis of one of the enumerated grounds. Once an employee or former employee can demonstrate that discrimination has likely occurred on the basis of one of the enumerated grounds, the employer has the burden of proof to establish that the offending term or condition of employment is a *bona fide* occupational requirement (BFOR).

The duty to accommodate arises when considering whether a workplace requirement or rule is a BFOR. An employer must demonstrate that the workplace rule was adopted for a rational purpose and in a good faith belief that it was necessary, and that it is impossible to accommodate individuals without undue hardship. "Undue hardship" is a high standard: it requires direct, objective evidence of quantifiable higher costs, the relative interchangeability of the workforce and facilities, interference with the rights of other employees or health and safety risks. The employer must assess each employee individually to determine whether it would be an undue hardship to accommodate his or her particular needs.

THE FEDERAL GOVERNMENT AND ALL PROVINCIAL JURISDICTIONS HAVE ENACTED LAWS DESIGNED TO ENSURE WORKER HEALTH AND SAFETY, AS WELL AS COMPENSATION IN CASES OF INDUSTRIAL ACCIDENT OR DISEASE.

Occupational Health & Safety

The federal government and all provincial jurisdictions have enacted laws designed to ensure worker health and safety, as well as compensation in cases of industrial accident or disease. Employers must set up and monitor appropriate health and safety programs. In provinces such as

Alberta, Saskatchewan, Manitoba and Ontario, occupational health and safety legislation requires a workplace violence and harassment policy. The purpose of occupational health and safety legislation is to protect the safety, health and welfare of employees as well as the safety, health and welfare of non-employees entering worksites.

Occupational health and safety officers have the power to inspect workplaces. Should they find that work is being carried out in an unsafe manner or that a workplace is unsafe, they have the power to order the situation to be rectified and to make “stop work” orders if necessary. Contraventions of the acts, codes or regulations are treated very seriously, and may result in fines or imprisonment. Recent changes to the *Criminal Code* have also increased potential employer liability for failing to ensure safe workplaces.

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Privacy

Employers in Canada must be aware that Canada has privacy obligations regarding the collection, use, disclosure, storage and retention of personal employee information, as well as an employee’s rights of access to such information. This is especially important in Québec, Alberta and British Columbia, which have already enacted privacy legislation separate from the federal legislation. See **Privacy Laws**.

Employment Benefits

The Canada Pension Plan is a federally created plan that provides pensions for employees, as well as survivors’ benefits for widows and widowers and for any dependent children of a deceased employee.

All employees and employers, other than those in the Province of Québec, must contribute to the Canada Pension Plan.

The employer’s contribution is deductible by the employer for income tax purposes. Québec has a similar pension plan that requires contributions by employers and employees within Québec.

In addition to the Canada Pension Plan, both employees and employers must contribute to the federal Employment Insurance Plan, which provides

Employment

benefits to insured employees when they cease to be employed, when they take a maternity or parental leave and in certain other circumstances. The employer's contribution is deductible for income tax purposes.

Québec also has its own Parental Insurance Plan, which provides benefits to insured employees when they take a maternity or parental leave and to which both employers and employees in Québec contribute.

ALL PROVINCES
PROVIDE
COMPREHENSIVE
SCHEMES FOR
HEALTH INSURANCE.

All provinces provide comprehensive schemes for health insurance. These plans provide for medically necessary treatment, including the cost of physicians and hospital stays. They do not replace private disability or life insurance coverage.

Funding of public health insurance varies from one provincial plan to another. In some provinces, employers are required to pay premiums or health insurance taxes.

In others, individuals pay premiums. In still others, the entire cost of health insurance is paid out of general tax revenues.

Employers commonly also provide supplemental health insurance benefits through private insurance plans to cover health benefits not covered by the public health insurance plan.

Employers may be required to provide sick or injured worker benefits, in the form of workers' compensation, a liability and disability insurance system that protects employers and employees in Canada from the impact of work-related injuries. This benefit compensates injured workers for lost income, health care and other costs related to their injury. Workers' compensation also protects employers from being sued by their workers if they are injured on the job.

Other laws in Canada address additional benefits such as private pensions and private benefit plans. For example, most Canadian jurisdictions have pension standards legislation that establishes minimum requirements for private pension plans.

PRIVACY LAWS

All businesses in Canada are subject to legislation that regulates the collection, use and disclosure of personal information in the course of commercial activity. “Personal information” generally means information about an identifiable individual. The collection, use and disclosure of personal information by private sector organizations and entities within the provinces of British Columbia, Alberta and Québec is regulated by legislation enacted by each of those provinces. The federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) governs the collection, use and disclosure of personal information in other provinces and in the territories, as well as in the course of inter-provincial and international commercial activities.

These statutory regimes are all generally built upon the following 10 principles that govern the collection, use and disclosure of personal information:

- ¬ accountability;
- ¬ identifying purposes;
- ¬ consent;
- ¬ limiting collection;
- ¬ limiting use, disclosure and retention;
- ¬ accuracy;
- ¬ security safeguards;
- ¬ openness;
- ¬ individual access; and
- ¬ challenging compliance.

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Unless certain “without consent” exceptions apply, an individual’s knowledge and consent are required to collect, use or disclose his or her personal information. Explicit consent may be required for more sensitive personal information (e.g., medical or financial information), while implicit consent may be sufficient for non-sensitive personal information.

Currently, Alberta’s *Personal Information Protection Act* (PIPA) is the only general private sector privacy legislation that imposes a statutory

obligation on private sector organizations to report (to the Information and Privacy Commissioner of Alberta) privacy breaches that could pose a real risk of significant harm to an individual. The Information and Privacy Commissioner of Alberta in turn determines whether an organization needs to notify the individuals affected.

With respect to transfers of personal information to service providers located outside Canada, the “openness” principle under PIPEDA has been held by federal privacy regulators to require that notice of such transfers should be provided to affected individuals. Alberta’s PIPA requires that organizations notify individuals if they transfer personal information to a service provider located outside Canada. Québec’s privacy legislation requires organizations to take all reasonable steps to ensure that personal information that is transferred cross-border for processing will not be used for new purposes nor communicated to third parties without the consent of the individuals concerned.

In addition to general private sector privacy laws, the Provinces of Alberta, Manitoba, New Brunswick, Newfoundland and Labrador, Ontario and Saskatchewan also have specific health privacy legislation to protect personal health information. For example, Ontario’s *Personal Health Information Protection Act, 2004* establishes rules for the collection, use and disclosure of personal health information by health information custodians in Ontario.

Whether PIPEDA or similar provincial legislation is the applicable privacy regime, immediate priorities for most organizations that establish a business in Canada should include:

- ¬ the adoption of a privacy compliance strategy that identifies the organization’s compliance with the applicable regulatory regimes;
- ¬ the adoption of a privacy policy, and personal information management practices, to ensure compliance with applicable privacy laws;

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INFORMATION.

Privacy Laws

- ¬ the appointment of an individual who will be responsible for the administration and oversight of the organization’s personal information management practices and who will be prepared to implement any changes required by applicable legislation;
- ¬ a review of the current personal information practices of the organization outside Canada and proposed information practices within Canada, including determining what personal information is collected, and from where; what consents are obtained and what purposes are identified when collecting personal information; where personal information is stored; how personal information is used; when and to whom personal information is disclosed; and how current personal information practices of the organization may need to be changed for the collection, use and disclosure of personal information in Canada;
- ¬ a review of the organization’s data management infrastructure to ensure that the infrastructure is adequately flexible and robust to facilitate implementation of the organization’s privacy policies and data management practices;
- ¬ the implementation of consent language in contracts, forms (including Web forms) and other documents utilized when collecting personal information from individuals (including customers and employees); and
- ¬ the requirement, where there are contracts with third parties to whom personal information will be disclosed (or where the third party is granted access to the personal information), that the third party agree to appropriate contractual terms such as: specifying the ownership of the data and ensuring that the third party will provide adequate security safeguards for the information; ensuring that the personal information will be used only for the purposes for which it was disclosed to the third party; ensuring that the third party

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MANAGEMENT
PRACTICES.

will cease using (and return or destroy) the personal information if requested; and providing for indemnification by the third party for any breach of such terms.

Implementation of such initial steps may require several months, depending on the size and maturity of the organization.

Compliance with privacy laws needs to be considered in any business transaction involving the disclosure or transfer of personal information such as purchases or sales of businesses, outsourcing transactions and securitization transactions. For

example, when contemplating the purchase of a business in Canada, it is essential that a review of the privacy policies and practices of the target form part of the due diligence process. If personal information of employees or customers has to be disclosed to the purchaser during the due diligence process, it is also essential that an appropriate confidentiality regime be established for the process.

It is recommended that only personal information that is necessary or likely to affect the decision to proceed with a transaction or its terms (including price) be disclosed.

Failure to comply with privacy laws can result in complaints to the relevant Privacy Commissioner, orders and fines. An organization with deficient privacy practices may risk adverse publicity for failure to comply with privacy laws.

In light of the complexity of privacy laws and the differences between the various laws that may apply to an organization or to a particular business unit, ensuring privacy compliance across an organization's departments may be challenging, particularly for organizations that operate globally.

IT IS RECOMMENDED THAT ONLY PERSONAL INFORMATION THAT IS NECESSARY OR LIKELY TO AFFECT THE DECISION TO PROCEED WITH A TRANSACTION OR ITS TERMS BE DISCLOSED.

ENVIRONMENTAL REGULATION

Environmental regulation in Canada is an area of shared responsibility between the federal government and the provincial governments, which, in turn, have delegated certain matters to municipal governments.

Both the federal and provincial governments have enacted legislation, regulations, policies and guidelines that affect industry on environmental matters such as pollution or contamination of the air, land and water, toxic substances, hazardous wastes, and transportation of dangerous goods and spills. In addition, there are requirements for approvals and environmental impact assessments in many areas affecting both the public and private sectors.

Environmental regulators have broad monitoring and inspection powers, and use a wide range of enforcement mechanisms. These powers and mechanisms extend not only to the businesses involved but also to corporate directors, officers, employees and agents. For example, the *Canadian Environmental Protection Act* includes provisions for warnings, significant fines, imprisonment, injunctions and compliance orders. Canadian courts are also now holding companies, as well as their officers and directors and employees, liable for environmental offences.

Liability for contaminated sites is also an important issue in Canada. The law in this area places liability on those persons who cause the pollution and, depending on the particular situation, on those persons who own, occupy, manage or control contaminated sites, or who owned or occupied such sites in the past. Such liability now extends to past owners and occupiers. Consequently, a "buyer beware" philosophy prevails, making it critical in business and real estate transactions that the buyer or lender know about all past and potential environmental problems associated with a particular business or property.

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Environmental Regulation

As a result of stringent environmental legislation and the regulatory bodies' vigorous approach to investigating and prosecuting environmental concerns, prudent businesses seek proper advice concerning environmental due diligence.

DISPUTE RESOLUTION

Canada's Court System

Under the Canadian Constitution, the judiciary is separate from and independent of the executive and legislative branches of government. Judicial independence is a cornerstone of the Canadian judicial system. Judges make decisions free of influence and based solely on fact and law.

Canada has provincial trial courts, provincial superior courts, provincial appellate courts, federal courts and a Supreme Court. Judges are appointed by the federal or provincial and territorial governments, depending on the level of the court.

Each province and territory (with the exception of Nunavut) has a provincial court. These courts deal primarily with criminal offences, family law matters (except divorce), traffic violations and provincial or territorial regulatory offences. Private disputes involving limited sums of money are resolved in the small claims divisions of the provincial courts. The monetary ceiling for the small claims division in British Columbia, Alberta and Ontario, for instance, is currently \$25,000.

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The superior courts of each province and territory try the most serious criminal cases, as well as private disputes exceeding the monetary ceiling of the small claims divisions of the provincial courts. Although superior courts are administered by the provinces and territories, the federal government appoints and pays the judges of these courts.

In the Toronto Region of the Province of Ontario, the Superior Court of Justice maintains a Commercial List. Established in 1991, the Commercial List hears certain applications and motions in the Toronto Region involving a wide range of business disputes. It operates as a specialized commercial court that hears matters involving shareholder disputes, securities litigation, corporate restructuring, receiverships and other commercial disputes. Matters on the Commercial List are subject to special case management and other procedures designed to expedite

the hearing and determination of complex commercial proceedings. In addition, judges on the Commercial List are experienced in commercial and insolvency matters.

Each province and territory has an appellate court that hears appeals from decisions of the superior courts and the provincial and territorial courts. Ontario also has a Divisional Court that serves as a court of first instance for the review of administrative action. It also hears appeals from provincial administrative tribunals, interlocutory decisions of judges of the Superior Court and appeals from the Superior Court involving limited sums of money (currently \$50,000).

ALMOST ALL
CANADIAN
PROVINCES HAVE
CLASS PROCEEDINGS
LEGISLATION.

The Federal Court of Canada has limited jurisdiction. Its jurisdiction includes inter-provincial and federal provincial disputes, intellectual property proceedings, citizenship appeals, *Competition Act* cases, and cases involving Crown corporations or departments or the government of Canada. The Federal Court, Trial Division hears decisions at first instance. Appeals are heard by the Federal Court of Appeal.

The Supreme Court of Canada is the final court of appeal from all other Canadian courts. It hears appeals from the appellate courts in each province and from the Federal Court of Appeal. The Supreme Court of Canada has jurisdiction over disputes in all areas of the law, including constitutional law, administrative law, criminal law and civil law. There is a right of appeal in certain criminal proceedings, but in most cases leave must first be obtained. Leave to the Supreme Court of Canada may be granted in cases involving an issue of public importance or an important issue of law.

Class Actions

Class proceedings are procedural mechanisms designed to facilitate and regulate the assertion of group claims. Almost all Canadian provinces have class proceedings legislation. In provinces without such legislation, representative actions may be brought at common law.

Dispute Resolution

Canadian class action statutes are modeled closely on Rule 23 of the United States Federal Court Rules of Civil Procedure, which, together with its state counterparts, governs class action litigation in the United States. Unlike ordinary actions, a proceeding commenced on behalf of a class may be litigated as a class action only if it is judicially approved or “certified.” Generally, the bar for certification in Canada is lower than in the United States.

In Canada, common targets of class actions include product manufacturers, insurers, employers, companies in the investment and financial industries, and governments.

Class actions may involve allegations of product liability, misrepresentation, breaches of consumer and employment laws, competition law (i.e., antitrust) breaches, securities fraud and breaches of public law.

Class actions are becoming an increasingly prominent aspect of business litigation in Canada. Businesses may benefit from the fact that individual damage awards tend to be lower in Canada than in the United States. In addition, the availability of punitive damages is limited in Canada.

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Alternative Dispute Resolution

Alternative Dispute Resolution (ADR) refers to the various methods by which disputes are resolved outside the courtroom. Such methods include mediation (an independent third party is brought in to mediate a dispute) and arbitration (the dispute is referred to a third party for a binding decision).

In Ontario, the *Rules of Civil Procedure* mandate and regulate mediation in civil cases commenced in Toronto, Windsor and Ottawa. Mediation remains common in other parts of Ontario, and parties to a dispute will often agree to non-binding mediation by mutually selecting a mediator.

Arbitration may be pursued on an ad hoc basis under a structure provided for in the local jurisdiction or under local statutory provisions.

Alternatively, arbitration may be conducted under the administrative and supervisory powers of one of the recognized international arbitration institutes such as the International Court of Arbitration of the International Chamber of Commerce in Paris, the London Court of International Arbitration or the American Arbitration Association. These bodies do not themselves render arbitration awards, but they do provide a measure of neutrality and an internationally recognized system of procedural rules.

One advantage of arbitration compared to domestic court procedure is the confidentiality of arbitration proceedings. The arbitration process is normally private; hearings are not public and written transcripts of proceedings are not generally available to the public. In addition, the arbitration process may be faster than the court system, and there is generally no right of appeal from an arbitration award. This may lead to disputes being resolved more quickly.

Electronic Discovery

The discovery and production of electronically stored information, commonly called e-discovery, has become an increasingly significant issue in litigation across Canada.

A national committee has produced the *Sedona Canada Principles* to establish national guidelines for electronic discovery. These guidelines are thought to be compatible with the rules of procedure in each of the Canadian territories and provinces.

In Ontario, parties are now required to formulate and adhere to a discovery plan to address all aspects of the discovery process, including the exchange of electronic documents. The parties are required to consult and have regard to the *Sedona Canada Principles* when preparing their discovery plan.

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Dispute Resolution

The following principles are among the most significant recommendations of Sedona Canada:

- ¬ Once litigation is reasonably anticipated, the parties must take good-faith steps to preserve potentially relevant electronic information.
- ¬ As early as possible in the litigation, the parties should meet and confer regarding e-discovery issues, and should agree upon the format in which electronically stored information will be produced.
- ¬ In any proceedings, the parties should ensure that the steps taken in the e-discovery process are proportionate to the nature of the case and the significance of the electronic evidence in the case.

BANKRUPTCY AND RESTRUCTURING

Under Canadian constitutional law, the federal government has exclusive legislative control over bankruptcy and insolvency matters. Insolvency proceedings in Canada may take a variety of different forms. When a corporation becomes insolvent, two options are generally available: (i) liquidate the corporation's assets for the benefit of its creditors, or (ii) restructure the affairs of the corporation. Although several different legislative regimes are available to effect either a liquidation or a restructuring of a corporation, the *Bankruptcy and Insolvency Act* (BIA) and the *Companies' Creditors Arrangement Act* (CCAA) are the two most common federal statutes employed for these purposes. The BIA provides for both restructurings (via BIA proposals) and liquidations (via bankruptcies) of insolvent businesses, while the CCAA is used primarily for the restructuring of more complex corporate businesses, although it can also be used to conduct a sale or liquidation.

WHEN A CORPORATION BECOMES INSOLVENT, TWO OPTIONS ARE GENERALLY AVAILABLE:
 (I) LIQUIDATE THE CORPORATION'S ASSETS FOR THE BENEFIT OF ITS CREDITORS, OR
 (II) RESTRUCTURE THE AFFAIRS OF THE CORPORATION.

Bankruptcy and Insolvency Act (BIA)

Bankruptcy

The term "bankruptcy" refers to a formal procedure under the BIA to effect the liquidation of a debtor's assets by a trustee in bankruptcy. A bankruptcy can either be voluntary or involuntary and can be brought in respect of any insolvent person that has an office, assets or carries on business in Canada, with the exception of banks, insurance companies, trust or loan companies, and railway companies (for which other insolvency legislation exists).

A voluntary bankruptcy under the BIA commences when a debtor files an assignment in bankruptcy with the Office of the Superintendent of Bankruptcy.

An involuntary bankruptcy under the BIA commences when a creditor with a debt claim of at least \$1,000 files an application for a bankruptcy

order with the court. This proceeding is brought on behalf of all creditors, although it is not necessary for more than one creditor to join in the application. In order to obtain the bankruptcy order, the creditor must establish that the debtor has committed an act of bankruptcy within six months preceding the commencement of the bankruptcy proceedings. The most common act of bankruptcy is failing to meet liabilities generally as they become due. In addition to being placed into bankruptcy pursuant to a court order made upon application by a creditor, a debtor can also be placed into bankruptcy under the BIA if its proposal (discussed below) is rejected by its unsecured creditors or is not approved by the court.

The practical effect of a bankruptcy is the same whether it is commenced voluntarily or involuntarily: the debtor's assets vest in its trustee in bankruptcy, subject to the rights of the debtor's secured creditors. The trustee in bankruptcy is a licensed insolvency professional or firm that is appointed by the bankrupt or the bankrupt's creditors.

There is an automatic stay of proceedings by unsecured creditors of the debtor upon the commencement of the debtor's bankruptcy proceedings. However, the stay does not affect secured creditors, who are generally free to enforce their security outside the bankruptcy process unless the court otherwise orders (which is exceedingly rare).

The bankruptcy trustee has many duties. The most important is to liquidate the assets of the debtor for the benefit of its creditors. In addition, the trustee in bankruptcy is responsible for the administration of claims made against the bankrupt estate in accordance with the relevant provisions of the BIA. If appropriate, the bankruptcy trustee may also investigate the affairs of the debtor, to determine whether any fraudulent conveyances, preferences or transfers at undervalue were effected by the debtor, prior to the bankruptcy.

THERE IS AN AUTOMATIC STAY OF PROCEEDINGS BY UNSECURED CREDITORS OF THE DEBTOR UPON THE COMMENCEMENT OF THE DEBTOR'S BANKRUPTCY PROCEEDINGS. HOWEVER, THE STAY DOES NOT AFFECT SECURED CREDITORS.

Bankruptcy and Restructuring

The creditors will generally meet shortly after the debtor becomes bankrupt, and appoint a group of up to five individuals known as “inspectors” to work with and supervise the trustee in bankruptcy. With the approval of the inspectors, the trustee in bankruptcy may sell the assets of the bankrupt estate.

A corporation may not be discharged from bankruptcy unless all of the provable claims against it have been satisfied, which may occur by payment in full or pursuant to a successful BIA proposal.

BIA Proposals

Generally speaking, the restructuring provisions under the BIA are most commonly used for smaller, less complicated restructurings. This means small and medium-sized corporations tend to use the BIA process, as opposed to the CCAA process. A restructuring under the BIA is commenced by a debtor either filing a proposal (i.e., its restructuring plan) or filing a notice of intention to file a proposal (NOI).

Upon the filing of an NOI or the filing of the proposal itself, the BIA imposes a stay of proceedings against the exercise of remedies by creditors against the debtor's property or the continuation of legal proceedings to recover claims provable in bankruptcy. Provisions in security agreements providing that the debtor ceases to have rights to use or deal with the collateral upon either insolvency or the filing of a notice of intention to make a proposal under the BIA have no force or effect. The BIA also provides that, upon the filing of an NOI or the filing of a proposal, no person may terminate or amend any agreement with the insolvent person or claim an accelerated payment under any agreement with the insolvent person simply because the person is insolvent or has filed an NOI or a proposal. The court can lift a stay in a BIA restructuring if the creditor is able to demonstrate that it will be “materially prejudiced” by the stay or if it is equitable on other grounds that the stay be lifted.

It is more common for a debtor to start the process by filing an NOI, rather than by filing a proposal immediately. If the debtor files an NOI,

THE RESTRUCTURING PROVISIONS UNDER THE BIA ARE MOST COMMONLY USED FOR SMALLER, LESS COMPLICATED RESTRUCTURINGS.

a copy of the written consent of a licensed trustee in bankruptcy, consenting to act as the proposal trustee in the proposal proceedings, must be attached to the NOI. Where an NOI is filed, the debtor must file cash flow statements for its business within 10 days and must file its proposal within 30 days. The court can extend the time for filing a proposal for up to a maximum of five additional months, although the court can only grant extensions for up to 45 days at a time.

During the process, the debtor normally carries on its business as usual, subject to monitoring by its proposal trustee and the supervision of the court. Ultimately, the debtor may table a proposal to its creditors. The BIA requires a proposal to contain certain terms, including: (i) the payment of preferred claims (such as certain types of employee claims) in priority to claims of ordinary creditors; (ii) the payment of all proper fees and expenses of the proposal trustee and incidental to the proceedings; (iii) the payment of tax remittances, such as employee source deductions, within six months of the approval of the proposal; and (iv) the payment to the proposal trustee of all consideration to be paid out under the proposal, for distribution to creditors.

A proposal must be made to the unsecured creditors generally, either providing for all unsecured creditors to be placed into one class or providing for separate classes of unsecured creditors. A proposal may also be made to secured creditors in respect of any class or classes of secured claims.

A proposal is deemed to be accepted by the creditors if all classes of unsecured creditors vote for the acceptance of the proposal by a majority in number and two-thirds in value of the unsecured creditors of each class. In practice, there is usually only one class of creditors to which a proposal is directed — the unsecured creditors. Secured creditors are usually dealt with by individual negotiation under the BIA, since a commonality of interest within each secured creditor class is required and there are seldom multiple secured creditors that can be

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Bankruptcy and Restructuring

grouped together as a class on this basis. If the proposal is approved by the creditors, it must then be approved by the court. When deciding whether to approve the proposal, the court must be satisfied that, among other things, it is reasonable, calculated for the benefit of creditors and meets the technical requirements of the BIA.

If a BIA proposal is not approved by the requisite “double majority” of unsecured creditors, the debtor is automatically placed into bankruptcy. A BIA proposal will also fail if the court refuses to approve it. Finally, if after receiving court approval of the proposal the debtor defaults in its performance of the proposal, the court may annul the proposal, which then leads to an automatic assignment of the debtor into bankruptcy.

Companies’ Creditors Arrangement Act (CCAA)

Generally speaking, the restructuring provisions under the CCAA are most commonly used for larger, more complicated restructurings. This means larger sized corporations tend to use CCAA proceedings to restructure.

To qualify to use the CCAA, a “company” (as defined in the CCAA) must be insolvent and must have outstanding liabilities of \$5 million or more. To initiate the proceedings, the company brings an initial application to court for an order (referred to as the Initial Order), imposing a stay of proceedings on creditors (i.e., a freeze on the payment of indebtedness) and authorizing the company to prepare a plan of arrangement to compromise its indebtedness with some or all of its creditors.

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The materials presented to the court include a proposed form of Initial Order and an affidavit prepared by the company describing its background, its financial difficulties and the reasons why it is seeking the protection of a court order made under the CCAA. After reviewing the materials and hearing submissions from counsel, the judge exercises his or her discretion as to whether to make an Initial Order and on what terms. Usually, the Initial Order is made in the form of the order requested by the company, with little or no input from creditors and other stakeholders. However, certain relief

can only be granted on notice to secured creditors likely to be affected thereby (for example, interim financing) and in any event affected parties have the right to apply to court to vary the Initial Order after it is made.

Typically, an Initial Order does the following things:

- a) authorizes the company to prepare a plan of arrangement to put to its creditors;
- b) authorizes the company to stay in possession of its assets and to carry on business in a manner consistent with the preservation of its assets and business;
- c) prohibits the company from making payments in respect of past debts (other than any specific exceptions allowed by the court, such as amounts owing to employees) and imposes a stay of proceedings: (i) preventing creditors and suppliers from taking action in respect of debts and payables owing as at the filing date; and (ii) prohibiting the termination of most types of contracts by counterparties;
- d) appoints a monitor (a licensed bankruptcy trustee) as an officer of the court, to monitor the business and financial affairs of the company during the proceedings;
- e) authorizes the company, if necessary, to obtain interim financing to ensure that it can fund its operations during the proceedings, including setting limits on the aggregate funding and the priority of the security (commonly known as "DIP financing"); and
- f) authorizes the company to disclaim unfavourable contracts, leases and other agreements, subject to some limited exceptions.

The CCAA provides that an Initial Order may only impose a stay of proceedings for a period not exceeding 30 days. Once an Initial Order has been made, the company may apply for a further order or orders extending the stay of proceedings. The intention is to have the stay of proceedings continue until the company's plan of arrangement has been presented to the creditors and approved by the court. As a general matter, the duration of proceedings

THE CCAA PROVIDES THAT AN INITIAL ORDER MAY ONLY IMPOSE A STAY OF PROCEEDINGS FOR A PERIOD NOT EXCEEDING 30 DAYS.

Bankruptcy and Restructuring

under the CCAA usually ranges between 6 to 18 months from the commencement of proceedings to the sanctioning of a plan of arrangement. However, the proceedings can be much quicker if the terms of the plan of arrangement have already been worked out in advance of the filing. The court may terminate the proceedings under the CCAA, upon application of an interested party, if the court believes that it is unlikely that a consensual arrangement will be achieved or that the continuation of the proceedings is otherwise not appropriate. However, such orders are rare, at least at the initial stages of the restructuring.

In recent years, the CCAA has also been used as a means by which a sale of particular assets of the company, or the entire company, is conducted. The sale process runs on a parallel, alternate track to the restructuring process with a view to maximizing value for the stakeholders. In such circumstances, approval of the sale must be sought from the court on notice to the affected secured creditors, among others, in a process similar to a court receivership sale.

During CCAA proceedings, the debtor company typically continues to carry on business as usual. Significant transactions out of the ordinary course of the debtor's business are usually submitted to the court for approval. The role of the CCAA Monitor is generally limited to monitoring and reporting to creditors and to the court regarding the debtor's business and operations. When a CCAA plan of arrangement is developed, it ordinarily will divide the creditors into classes and will provide for the treatment of each class (which can be substantially different between classes). The classification of creditors must be approved by the court prior to any creditor meeting on the plan. In this regard, the guiding legal principle set out in the CCAA and applied by the courts in considering classification issues is whether there is a commonality of interest among the creditors in the class.

For a plan of arrangement to be approved by the affected creditors, a majority in number of the creditors representing two-thirds in value of the claims of each class (other than equity claims), present and voting

WHEN A CCAA PLAN OF ARRANGEMENT IS DEVELOPED, IT ORDINARILY WILL DIVIDE THE CREDITORS INTO CLASSES AND WILL PROVIDE FOR THE TREATMENT OF EACH CLASS.

(either in person or by proxy) at the meeting or meetings of creditors, must vote in favour of the plan of arrangement. Parties related to the company cannot vote in favour of the plan.

If the plan of arrangement is approved by the creditors, it must then be approved by the court. In doing so, the court must determine that the plan of arrangement is "fair and reasonable". Upon approval by the creditors and court, the plan of arrangement is binding on all of the creditors of each class affected by the plan. If a class of creditors (other than a class consisting of equity claims) does not approve the plan, the plan is not binding on the creditors within that class.

The court cannot sanction a plan if it does not provide for the payment in full of certain Crown claims and certain employee and pension liabilities, or if it does not in effect subordinate "equity claims" to the claims of creditors. A plan may include releases in favour of non-debtor third parties in certain cases.

Additionally, if a debt restructuring involves a reorganization of the share capital of a company, it is possible to reorganize the share capital of the company by way of the CCAA court sanction order without a shareholder vote. In recent years, this device has been used, in effect, to extinguish the existing share capital and issue new shares to creditors in satisfaction of their claims or to a new equity investor (whose investment may fund distributions to the creditors).

If a CCAA plan is not approved by the requisite "double majority" of creditors, there is no automatic assignment of the debtor company into bankruptcy. Typically, what may lead to the bankruptcy of the debtor is the court's refusal to extend or decision to otherwise terminate, the stay of proceedings by creditors against the debtor company, thereby allowing those creditors to exercise their lawful remedies against the debtor. If a sale of the assets occurs before the filing of a plan and meeting of creditors, consideration would be given to the benefits of proceeding toward a plan (presumably, to distribute the proceeds of the sale) as opposed to terminating the CCAA proceedings, for example, by commencing bankruptcy liquidation proceedings.

UPON APPROVAL BY
THE CREDITORS AND
THE COURT, THE PLAN
OF ARRANGEMENT
IS BINDING ON ALL
OF THE CREDITORS
OF EACH CLASS
AFFECTED BY THE
PLAN.

GOVERNMENT RELATIONS

In Canada, there is a division of legislative power between Parliament (the federal legislature) and Provincial Legislative Assemblies. They are all based on the British Parliamentary model, where the political party with the most members elected to Parliament or to the Provincial Legislative Assembly forms the government. See [Canada](#).

For the most part, the governing party that forms the federal or provincial government holds a majority of the seats in the federal or provincial legislature. This usually reduces the relative influence of individual elected members of the legislature, as it is rare that members of the governing party vote against a government-supported initiative. However, at the federal level there was a series of “minority governments,” from 2004 – 2011, where the governing party holds more seats than any other party in Parliament, but does not hold a majority of the seats. As a result, the relative influence of Members of Parliament increased during that time.

Given the significant role of the federal and provincial governments in the Canadian economy, every enterprise operating in Canada should consider a government relations strategy. Companies may also engage with government through industry associations. This may be a necessity for companies active in industries that are heavily regulated (such as telecommunications, pharmaceuticals, transportation and energy); that can be greatly affected by government policy (such as manufacturing and agriculture); or that sell to the government (such as defence and IT companies).

Government relations work, which includes lobbying, is generally focused on outreach to senior government employees (who are non-partisan), the Ministers who form the executive council (i.e., Cabinet) in each province and federally, and members of the legislature who are part of the governing party. Depending on the concern, clients may also choose to lobby members of opposition parties in order to have matters raised

GIVEN THE
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in the legislature or at a committee of the legislature. This can be particularly important when a minority government is in power.

Government relations work is needed when an enterprise seeks to initiate, support or oppose legislation initiatives, or seeks a change in regulations or policy. A number of government ministries and regional/political interests may be involved with any given initiative or change, and the enterprise will seek out meetings with all the responsible senior government employees and Ministers. For example, enterprises involved in inter-provincial trucking work within a regulatory environment that includes provincial and federal ministries of transportation, industry and commerce, and labour. Likewise, private development of hydro-electric power usually requires contact with provincial ministries of energy, lands and environment, as well as the federal ministries of fisheries and oceans, and environment. It may also be necessary to engage the senior elected member in the political party who is “politically responsible” for a given region, as any given initiative or change can affect regions differently.

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Two areas of notable interest for government relations are relationships with Aboriginal peoples and the Canadian system of environmental assessment (EA) which is required for major project approval.

In the case of the group of Aboriginal peoples known as First Nations (the other two groups are the Métis and the Inuit), the First Nations themselves will likely need to be consulted, as they may retain some claim to Aboriginal title or traditional Aboriginal rights to the land. These rights vary across Canada, depending on historical and legal developments. Where First Nations interests are involved, both the federal and provincial governments will also have to be advised and consulted. See **Aboriginal Law**.

In the area of EA, Canada requires comprehensive environmental assessments when projects involving land use reach a certain threshold

Government Relations

of invested capital or when certain types of projects are involved. If the project is under federal jurisdiction (such as inter-provincial pipelines), the federal EA system will be invoked. If the project is strictly within a single province and federal jurisdiction is not involved, generally only the provincial EA process will be invoked. In some cases, both federal and provincial EA processes are invoked. There are dramatic differences in the efficiency and timeline of EA processes in various provinces and that of the federal government. As such, most enterprises considering investments above the EA threshold should develop an early and positive relationship with the appropriate levels of government, so their eventual EA application does not come as a surprise or become controversial.

See **Environmental Regulation**.

Another factor to take into consideration is that, compared to the United States, Canada's federal and provincial governments are much more active in the delivery of certain services such as health care, utilities, infrastructure and broadcasting. Investors should seek advice on the attitudes of government toward investments in these and other fields before proceeding, as coordination and cooperative relationships with government will lead to much more effective and efficient decision-making.

Interaction between the private sector and government officials has come under increased scrutiny in recent years.

As a result, the regulation of interaction with government officials has increased, as has the attention that all concerned pay to such regulations. This includes regulation of the public officials themselves through codes of conduct and regulation of those who interact with public officials.

Codes of conduct for public officials generally regulate the public officials and not those interacting with them. Such codes of conduct govern what activities a public official may engage in, as well as the hospitality he or she may accept, if any.

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An enterprise should, for example, avoid inadvertently placing public officials in a conflict-of-interest position that could impede that official from being involved with a given issue, and also bring negative attention to the enterprise's government relations effort.

The regulation of those in the private sector who interact with public officials is generally governed by lobbyist legislation. Such legislation provides that businesses and their employees may need to register their government relations activities with a central registry. In some jurisdictions, directors of businesses may also have to individually register the government relations activities that they engage in on behalf of the business. This central registry is available to the public (usually through the Internet).

The registration of lobbyists has come under increasing scrutiny in almost every jurisdiction in Canada. The Parliament of Canada and most provincial legislatures, including British Columbia, Alberta, Ontario, Québec, Manitoba, Nova Scotia and Newfoundland and Labrador have enacted lobbyist legislation. The provincial legislature of New Brunswick has introduced lobbying legislation, but its laws are not yet in force. In May 2012 a standing committee in the Saskatchewan legislature released a report recommending lobbying legislation in Saskatchewan. Some cities, such as Toronto, also have bylaws requiring lobbyists to register. Lobbying activities in other cities, such as St. John's, in the Province of Newfoundland and Labrador, and Montréal and Québec City, in the Province of Québec, are regulated by provincial lobbying legislation. Other cities, such as the City of Ottawa, are also moving to create a lobbyist registry.

The types of communication that may require registration vary from jurisdiction to jurisdiction. Broadly speaking, they include: communications with public officials (which includes not only politicians, but also many government employees) with respect to the development of legislative proposals; the introduction, passage, defeat or amendment of legislation; the making or amending of any regulation; the development or amendment of any policy or program; the awarding of any grant, contribution or other

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Government Relations

financial benefit; and, in some cases, the awarding of contracts and the arrangement of meetings with public officials.

A well-planned government relations strategy can lead to a productive and professional relationship with responsible decision-makers in government. Both industry and public officials benefit from such relationships, because they ensure that all the facts relevant to a decision are expressed, understood and taken into account. Governments in Canada will generally do their best to be responsive, transparent and effective in addressing the needs of enterprises. However, when engaging public officials, it is essential for an enterprise to know and follow the rules.

McCARTHY TÉTRALKT: A PROFILE

McCarthy Tétrault actively listens to its clients to understand their needs, their business and their industry, then develops the best solutions and strategies to achieve successful outcomes. With this approach, the firm has established a position as one of Canada's leading full-service law firms.

McCarthy Tétrault's unified, client-focused teams regularly advise on the largest and most complex transactions and cases involving Canadian and foreign interests. The firm provides unequalled depth of legal talent, industry knowledge and practice experience, capitalizing on our size and scale to deliver customized legal services that assist clients in meeting their business goals and protecting their rights and financial interests.

With offices in Canada's major commercial centres and in London, U.K., McCarthy Tétrault delivers integrated business law, litigation, tax law, real property law, and labour and employment law services nationally and globally. McCarthy Tétrault lawyers work seamlessly across practice groups, representing diverse Canadian and international clients such as businesses and public institutions from a wide range of sectors, including — among many others — the financial services, power, oil & gas, private equity (including Canadian pension plans), insurance, pharmaceutical, mining, high-tech, telecommunications, life sciences, infrastructure and construction industries.

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IF WE CAN ASSIST
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McCarthy Tétrault: A Profile

Please contact any of the lawyers in our firm to assist you in providing a detailed analysis of the issues relevant to your specific proposed investment.

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