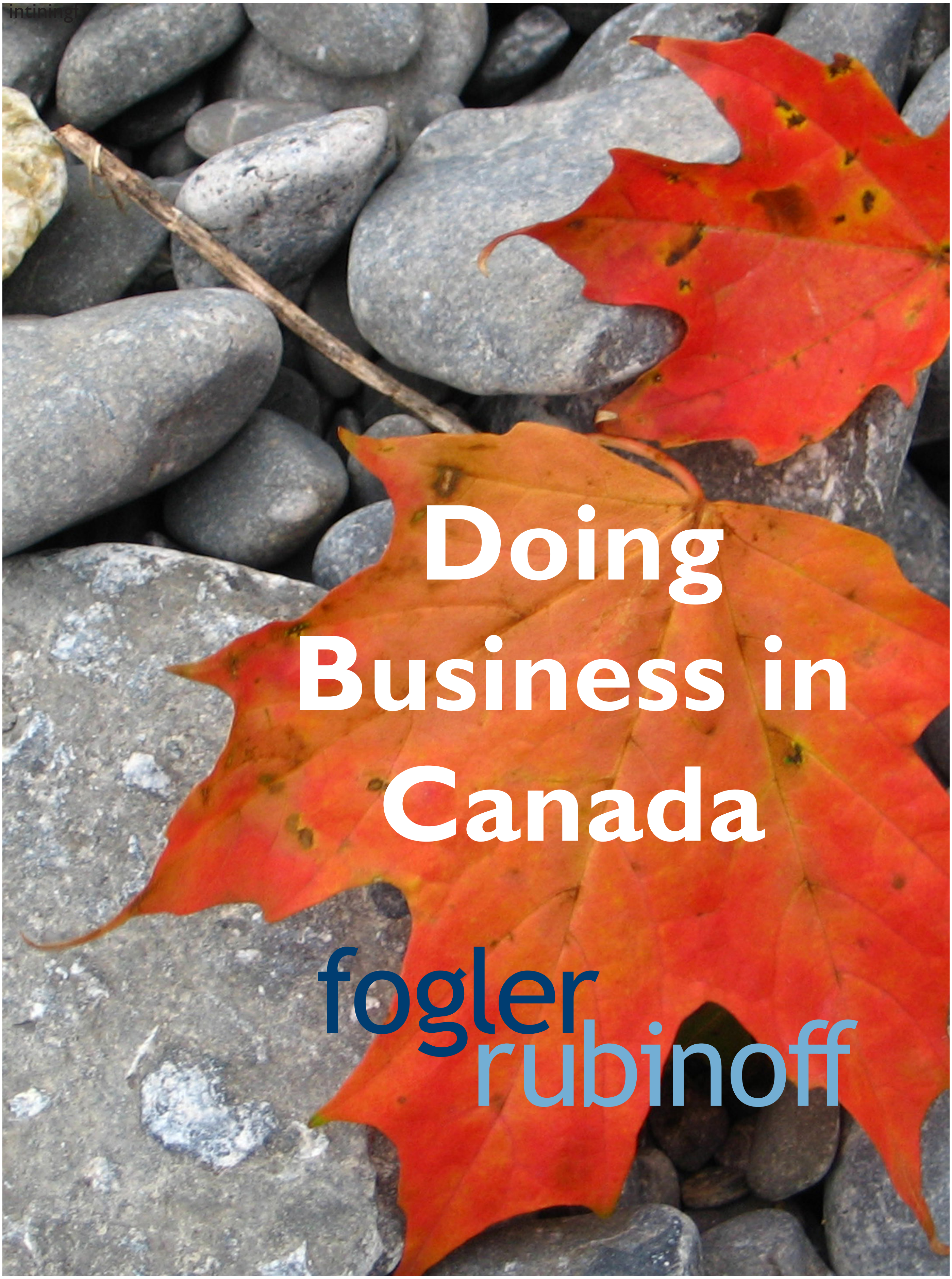

Doing Business in Canada

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INTRODUCTION

"Canada remains an attractive location for the establishment or expansion of business in North America."

Canada is geographically the world's second largest country, with an area of approximately 10 million square kilometres and a population exceeding 38 million. The United States is smaller in area, but the Canadian population is only slightly more than 1/10 of the population of the United States.

Roughly 70% of the Canadian population resides within 100 kilometres of its southern boundary with the United States — in the highly industrialized corridor between Windsor, Ontario and Québec City, Québec. As a result, Canada and the United States share many economic imperatives and cultural influences. The economic and material aspirations and realizations of the Canadian and the United States populations are strikingly similar.

From a historical perspective, however, Canada remains significantly different than the United States. Canada today is a highly multicultural society that generally respects and enshrines cultural heritage rather than encouraging the population to form a homogeneous melting pot. Colonized by the British and French, Canada remains a bilingual country; English and French are the two official languages. Approximately 20% of the population speak French as their, first language, with the greatest concentration of French speakers residing in the province of Québec.

Canada remains an attractive location for the establishment or expansion of business in North America. Canadian workers are highly skilled and well educated with the lowest turnover and absenteeism rates in North America. Canada ranked #18 on the United Nations Human Development Index. Toronto is North America's fastest growing tech market, and North America's third ranked market for tech talent, coming in just behind San Francisco and Seattle.

The Canadian economy is also heavily influenced by the state of the United States economy. Canada is the world's largest exporter to and importer from the United States. Goods exported to the United States rose to $438 billion in 2022, representing 75% of all Canadian goods exports. Imports from the United States were $297 billion, representing 49% of all Canadian goods imports.

In November 2018, Canada, the US and Mexico signed the new Canada-United States-Mexico Agreement ("**CUSMA**") to replace the North American Free Trade Agreement ("**NAFTA**"). The CUSMA has now been ratified by all three countries and replaced NAFTA on July 1, 2020.

Except in certain limited situations where cultural values are at risk, Canada is receptive to foreign investment. With its stable political and economic systems, and its rich natural and human resources, Canada continues to provide an attractive climate for foreign businesses.

LEGISLATIVE JURISDICTION

Canada is a federal state, governed as a parliamentary democracy and a constitutional monarchy. Its governmental jurisdiction is constitutionally divided between two levels of government, federal and provincial. In some areas, either the federal government or the provincial government may have exclusive jurisdiction. In others, both levels of government regulate different aspects of a particular activity. The federal government has legislative jurisdiction over, among other matters, the regulation of trade and commerce, education and health within the province 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. In addition, provincial governments delegate certain powers to municipal governments. A business may therefore be regulated at three levels, federal, provincial and municipal. However, the jurisdictional distinctions are often blurry, and the subject matter of federal and provincial legislation sometimes overlaps.

Bankruptcy is governed by the *Bankruptcy and Insolvency Act* (Canada). However, receiverships often are governed by private contractual relationships which are interpreted in accordance with provincial law. Corporations may be incorporated either federally or provincially. Similarly, both levels of government assess personal income and value added taxes. The regulation of broadcast, pharmaceutical and most transportation industries are within the federal purview; however, virtually all professions are governed by provincial statutes. In the case of property and civil rights matters, they are within the purview of the provincial governments. Accordingly, businesses may find themselves regulated by securities laws and environmental legislation from several jurisdictions.

When establishing or acquiring a business in Canada, it is necessary to review the federal laws as well as the laws of the provinces in which the business will be conducted. All jurisdictions in Canada other than Québec operate under common law principles. Accordingly, unless ousted by legislation, the law governing business relationships is derived from the decisions of the judiciary. Québec is a civil law jurisdiction with a civil code based on the Napoleonic code. The Québec judiciary's function is generally confined to the interpretation and application of the civil code to determine the rights of parties. In this publication, we have chosen to refer primarily to Ontario legislation, but in most cases, the legislation and programs of the other common law provinces are similar to those of the Ontario legislation and programs.

"When establishing or acquiring a business in Canada, it is necessary to review the federal laws as well as the laws of the provinces in which the business will be conducted."

Form of Business Organizations in Canada

The first issue facing foreigners setting up business in Canada is deciding which type of entity to use in operating the business. There are several different entities available for conducting a business in Canada, each with its own advantages and disadvantages. Most commonly, a business being carried on in Canada by a foreign corporation would be conducted using a corporate vehicle.

> ***"As a separate legal entity, a corporation has the same rights, powers, privileges and obligations as those enjoyed by an individual. It can also hold property and carry on a business and can incur legal and contractual obligations. "***

Among the most commonly used are:

- corporations
- unlimited liability corporations (ULCs)
- branch of foreign corporation
- sole proprietorships
- general partnerships
- limited liability partnerships (LLPs)
- limited partnerships
- co tenancies and joint ventures
- agency, distribution and franchise arrangements

Each form of business organization is described below. Deciding on a form of business organization is dependent upon a number of factors, such as the nature of the business, or the taxation issues that revolve around the desirability to consolidate income for tax purposes. Availability of incentive or assistance programs may also impact the decision. Foreign investors should obtain professional legal and accounting advice to determine the most advantageous method of carrying on business.

Corporation

A corporation with share capital is the most frequently used form of business organization in Canada.

A corporation is a distinct, legal entity from its shareholders and management. A corporation's existence is not affected by the departure or death of any or all of its shareholders or managers, making it potentially perpetual. As a separate legal entity, a corporation has the same rights, powers, privileges and obligations as those enjoyed by an individual. It can also hold property and carry on a business and can incur legal and contractual obligations.

The shareholders, elect directors who are given the authority to manage the corporation on their behalf. Shareholders who are individuals may be elected as directors. All directors have a duty to act honestly, in good faith and in the best interests of the corporation.

There are several advantages to utilizing a corporate form of organization, including:

- **Limited Liability** - Shareholders are protected by statute from liability for obligations or liabilities of the corporation. The exposure of the shareholders of a corporation is limited to the amount of their equity investment. The liabilities of the corporation are distinct from the shareholders.

- **Flexibility and Investment** - A corporation offers investors access to a wider variety of capital and financing opportunities than most other forms of organization. Since a corporation is a flexible form of organization for business, various classes of shares and debt instruments may be utilized to provide different levels of shareholder and lender participation which reflect the degree of risk inherent in the investment.

- **Transfer of Control** - Control of a corporation can be easily transferred through the transfer of issued and outstanding shares.

Private vs. Public Corporations

A corporation may be either public or private. In both private and public corporations, shareholders are the owners of the corporation. In a public corporation, shares may be bought and sold by members of the general public, and the shares of such corporations are often listed on a stock exchange. In a private corporation, which generally has fewer than 50 shareholders, the sale or transfer of shares is restricted, often requiring the consent of a majority of the directors or shareholders. Private corporations also expressly prohibit any invitation to the public to subscribe for securities.

Articles of incorporation often contain restrictions to ensure that the corporation is a private corporation. Such restrictions exempt the corporation from additional regulatory and securities law rules that apply to public corporations in areas such as proxy solicitation, takeover bids, insider trading, filing of financial statements and public disclosure.

Federal vs. Provincial Incorporation

Corporations may be incorporated and organized as a federal corporation under the laws of Canada, or as a provincial corporation under the laws of one of the provinces of Canada. The *Canada Business Corporations Act* ("**CBCA**") applies to federally incorporated businesses. Canada's 10 provinces have comparable legislation,

"As a separate legal entity, a corporation has the same rights, powers, privileges and obligations as those enjoyed by an individual. It can also hold property and carry on a business and can incur legal and contractual obligations."

although their laws differ in various respects.

A federal corporation has the capacity and the power of a natural person and may carry on business anywhere in Canada and use its name in any province. However, all provinces regulate the corporate activities of federal corporations operating in their province, meaning that a federal corporation must register in each province in which it carries on business. Similarly, a provincial corporation may carry on business in another province, provided an extra-provincial licence is obtained. If the name of the corporation is not acceptable in the province where the licence is being sought, registration may not be granted. In the province of Québec, a corporation must either have a bilingual name or a French version of its name, unless the name is a registered trademark.

When consulted by a foreign company wishing to carry on business in Canada through a Canadian subsidiary, a lawyer will compare the features of the CBCA and the provincial statute of the province in which the head office of the subsidiary will be located. This is done in order to determine the preferred corporate statute under which to incorporate and organize. Although the statutes are substantially similar, there are slight differences in the areas of public disclosure of financial statements and residency requirements for directors, which may affect the choice of incorporating jurisdictions. For certain highly regulated business undertakings such as insurance companies, banks and trust companies, specific statutes set incorporation, organization and operational standards.

The CBCA requires at least 25% of the directors of a corporation to be Canadian residents, unless the corporation has less than four directors, in which case it needs to have at least one Canadian resident. This residency requirement formed part of the *Business Corporations Act* (Ontario) ("**OBCA**") up until the enactment of Bill 213, the *Better for People, Smarter for Business Act, 2020* ("**Bill 213**"), which removed the requirement that at least 25% of a corporation's directors be Canadian residents. As a result, Ontario corporations no longer require resident Canadian directors. The removal of this requirement brought Ontario in line with other jurisdictions, such as Alberta, British Columbia, Québec, and Nova Scotia, where there are no residency requirements for directors.

The CBCA, OBCA and *Québec Business Corporations Act* ("**QBCA**") all require a public corporation to have at least three directors, and that a certain number of such directors be independent. The CBCA, OBCA and QBCA also have strict rules with respect to financial disclosure and grant rights and remedies to minority and dissident shareholders. Additional corporate governance requirements are imposed by securities regulators on public corporations.

There are other factors which help to decide whether or not the federal jurisdiction or the provincial jurisdiction should be utilized for incorporation. For example, certain financing incentives provided by one level of government may dictate incorporation within that jurisdiction. There is also a perception that certain businesses that supply goods or services to a particular province should strongly identify with that province, making it advisable to incorporate within that jurisdiction. OBCA corporations are required to maintain a register of real property owned by the corporation, whereas CBCA corporations are not. As of January 1, 2023, both OBCA and CBCA corporations will be required to maintain a register of "persons with significant control" in the corporation. This is essentially a ledger of all major stakeholders, whether they directly or indirectly hold shares in the corporation. The OBCA contains limited disclosure obligations to police and investigative bodies in respect of this ledger. The CBCA also contains disclosure obligations to police and investigative bodies in respect of the register. However, unlike the OBCA, under the CBCA, shareholders and creditors of the Corporation can apply to require the Corporation to provide them access to the register as well. Bill C-42, *An Act to amend the Canada Business Corporations Act and to make consequential and related amendments to other Acts* ("**Bill C-42**") requires businesses incorporated under the CBCA to file information respecting individuals with significant control over the corporation with Corporations Canada. The following information about individuals with significant control on a corporation's register must be made available to the public:

- name;
- address for service (or residential address, if no such address for service is provided);
- the day on which the individual became an individual with significant control;
- a description of how each individual on the register is an individual with significant control over the corporation;
- any other prescribed information.

Incorporation Procedures

A corporation is formed by filing certain prescribed documents with the appropriate authorities under the CBCA or the equivalent provincial legislation. These documents are called articles of incorporation and must be filed in the appropriate office along with the required filing fee. Incorporation is automatic once the documents are filed and fees are paid.

The articles of incorporation must provide certain information, including the name of the proposed corporation, the location of its registered office, a description of the classes of shares, any restrictions on share transfers, the number of directors and the restrictions on the business that the corporation may carry on.

The cost of establishing a Canadian corporation is relatively inexpensive. Fees payable to the Government upon registration vary between $200-$300 under the CBCA and $300 under the OBCA if the registration is done online. Registration fees and legal fees will also be payable and vary depending upon the

> ***"Canadian corporate law provides great flexibility in developing the appropriate capital structure for a corporation in order to meet its specific requirements."***

complexity of the corporation's structure. The incorporation of a routine Canadian corporation can occur electronically immediately after receipt of appropriate authorization from the incorporator. The corporation comes into existence on the date of issue of a certificate of incorporation by the applicable regulator.

The name of the corporation is strictly regulated in all jurisdictions in order to avoid names that are too general or misleading. There is a screening process, and it is possible to pre-clear a name prior to the application for incorporation. Corporate names may also have separate English and French versions. In such cases, the versions may be used interchangeably.

Shares and Shareholders

A share is a fractional part of the capital of a corporation. Shares entitle the holder to a proportionate part of the assets of the corporation, whether by way of dividend or upon a distribution on the dissolution of the corporation, and governs the right to vote at shareholder meetings. The corporation may issue more than one class of shares and may designate the shares in any way. There is no minimum or maximum amount of shares of each class that a corporation is allowed to issue, unless specified in the incorporating documents. The articles of incorporation specify the permitted classes of shares and their key terms. Shares may be voting, non-voting or they may have disproportionate voting rights. The incorporating documents may also attach various conditions to the payment of dividends and will stipulate rights on dissolution of the corporation. Simple share provisions will usually suffice in the cases of a small or closely-held corporation. Ultimately, Canadian corporate law provides great flexibility in developing the appropriate capital structure for a corporation in order to meet its specific requirements.

Federal and provincial corporate statutes also provide shareholders with dissent and appraisal rights which may require a corporation to acquire a shareholder's interest for its fair value if a corporation implements a fundamental change. Corporate legislation also contains statutory oppression remedies and derivative actions which grant courts broad rights to grant equitable remedies where shareholders or creditors have been subject to corporate activity which is unfairly prejudicial or unfairly disregards their respective interests. These remedies are in addition to any remedies flowing from fiduciary duties which have been compromised.

Decision Making

Ordinary Resolutions

Resolutions refer to a method by which a corporate entity conducts its business or the board of directors seek shareholder approval of its actions. An ordinary resolution may be passed by a simple majority or, under the CBCA, it may also be passed by way of a written resolution signed by all the shareholders entitled to vote on that resolution at a meeting of the shareholders. Therefore, a resolution passed by written resolution under the CBCA must be unanimous (although it may exclude shareholders whose rights do not entitle them to vote on the resolution).

Currently, under the OBCA, non-offering corporations are permitted to pass a written resolution of the shareholders signed by the shareholders holding at least a majority of the shares entitled to vote on that resolution. Subject to the requirements for notice described below, the written resolution will be as valid as if it had been passed by ordinary resolution at a meeting of the shareholders. In circumstances where the articles or a unanimous shareholder agreement require a greater number of votes of shareholders than what is required by the OBCA to pass a resolution, the greater requirement applies to the written resolution. Within 10 business days after a resolution is signed by the shareholders holding at least a majority of the shares, Ontario corporations will be required to give written notice of the resolution to all the shareholders entitled to vote on the resolution who did not sign it. The notice will need to include a copy of the text of the resolution and a statement containing a description of and the reasons for the business dealt with by the resolution.

Special Resolutions

A special resolution requires the approval of not less than two-thirds of the votes cast at a special meeting of shareholders (which excludes from both the numerator and denominator all shares whose votes are not cast for whatever reason including abstention). A special resolution may also be passed if a written resolution is signed by all the shareholders entitled to vote on that resolution at a meeting of shareholders. Therefore, a special resolution passed by written resolution must be unanimous (although it may exclude shareholders whose rights do not entitle them to vote on the resolution).

In some circumstances, both the CBCA and OBCA call for a special resolution of the class or series of shares voting separately as a class or series.

Unanimous Shareholders' Agreements

The shareholders of a corporation may enter into an agreement called a shareholders' agreement, which provides for the conduct of the business and affairs of the corporation. It also regulates the rights and obligations of the shareholders to one another, and may provide for rights of first refusal or other provisions dealing with the transfer of shares.

The term unanimous shareholders' agreement ("**USA**") is used to refer to a shareholders' agreement between all of the shareholders of a corporation that restricts, in whole or in part, the powers of the directors to manage or supervise the management of the business and affairs of the corporation. A USA is often used for corporations that are 100% subsidiaries owned by one shareholder.

USAs can regulate a specific topic or every detail of a corporation's operation. The following are subjects which are commonly covered in USAs:

- **Voting**: Shareholders may want to exercise their power to vote on a basis different than the votes determined according to share ownership;

- **Share Transfer:** Shareholders may want to set up mechanisms to restrict share transfers (which are typically subject to a right of first refusal) and the issuance of additional securities;

- **Buy-Sell Arrangements:** "Shotgun"

buy-sell arrangements, rights of first refusal, auction procedures, and the method by which shares are valued; and

- **Dispute Resolution**: Shareholders may want to resolve their disputes by such means as arbitration, instead of by means of the relative voting power of different shareholders.

A USA gives the shareholders the rights, powers and duties that are removed from the directors. The directors are thereby relieved of such duties and liabilities.

Where a corporation has few shareholders they will often want to customize their relationship to provide for an arrangement which is different from that contemplated in the OBCA, CBCA or at common law.

Unlimited Liability Companies (“ULC”)

A ULC is a hybrid entity that has a separate legal identity, analogous to a corporation. A ULC is similar to a partnership in that shareholders of a ULC are jointly and severally liable for losses which exceed corporate assets. In certain circumstances, a ULC can allow for losses incurred by the corporation in Canada to be deductible by the foreign corporation, while still providing certain advantages of corporate status in Canada. At present, Nova Scotia, Alberta and British Columbia are the only provinces which allow for the incorporation of ULCs.

For many years United States businesses coming to Canada often used ULCs as a vehicle for their business activity in Canada because of the favourable treatment afforded to ULCs as “flow-through” entities under the tax laws of the U.S. This tax advantage was removed by amendments to the U.S.-Canada Income Tax Convention described below. Though a ULC is treated as a corporation from a Canadian tax standpoint, it may be treated as a partnership or a branch (if there is a sole shareholder) from its parent’s perspective. In turn, the ULC structure allows flow-through of income, deductions, gains and losses to its parent company.

The disadvantage of ULCs is the potential liability of shareholders. However, shareholder exposure to liability can be limited by contract or by the interposition of a “buffer” entity. An example of a “buffer entity” would be a limited partnership or a U.S. limited liability company,

> ***“Under Canadian tax law, partnerships do not pay income taxes. ”***

generally with assets limited to the shares of the ULC, between the ULC and the U.S. parent company. Nevertheless, ULCs have proven attractive for many U.S. companies engaged in cross-border transactions.

There are a number of differences between Alberta, Nova Scotia, and British Columbia ULCs. For instance, the extent of the liability of shareholders of a ULC is dependent on the jurisdiction of incorporation. In Alberta, the shareholders of a ULC are jointly and severally liable to creditors for any liability, act or default of the ULC. In contrast, in Nova Scotia and British Columbia, the shareholders of a ULC have no direct liability to creditors, other than on the dissolution or liquidation of the ULC. Additionally, the costs associated with establishing and maintaining a ULC are more significant in Nova Scotia than in Alberta and British Columbia.

When discussing the advantages and disadvantages of ULCs, it is important to consider the changes to the Canada-United States Income Tax Convention (1980) that resulted from the Fifth Protocol. These changes have, in some circumstances, made ULCs less attractive to U.S. investors by eliminating the tax benefits associated with such entities and giving rise to adverse tax consequences. Particularly, under the Fifth Protocol, hybrid entities that are treated as flow-through entities in the United States, such as ULCs, have been denied treaty benefits. Additionally, the Fifth Protocol eliminated the withholding tax on interest effective as of January 1, 2010, allowing for a more tax-efficient capitalization of a subsidiary by a U.S. person. It should also be noted that the Fifth Protocol includes a "Limitation on Benefits" provision whereby residents of the U.S. will be denied Canadian treaty benefits unless they satisfy the "qualifying persons" test. Canadian treaty benefits may be extended to "non-qualifying persons" resident in the U.S. who satisfy an "active trade or business" test.

Branch of Foreign Corporation

While most foreign investors elect to conduct business in Canada through a Canadian corporation, a foreign entity can carry on a business in Canada directly as a branch of a foreign corporation or U.S. subsidiary, as opposed to creating a separate Canadian entity. Foreign corporations are generally entitled to carry on business in this manner in most areas of commercial activity, provided that extra-provincial licences are obtained in the jurisdictions in which they carry on business. A foreign corporation which sets up a branch in Ontario must obtain a licence under the *Extra-Provincial Corporations Act* (Ontario).

The decision to use a Canadian branch operation is dependent upon a number of considerations. Incorporation often makes it easier for small and medium-sized businesses to deal with Canadian suppliers and customers. It is often assumed that choosing a Canadian corporation demonstrates a commitment to Canadian operations. Such assumption has no foundation in law. If independent financing for the Canadian operation is required, local financing may be easier to obtain through the use of a Canadian-owned subsidiary. The failure to create a separate corporate entity will expose the foreign corporation to all liabilities incurred in the Canadian operations.

The tax treatment of branch operations is discussed elsewhere in this paper. Income tax must be paid in Canada on Canadian branch profits. The ability to claim a full foreign tax credit by the parent corporation must be considered to ensure that double taxation is avoided. Accordingly, the taxation of the foreign corporation and the projected income or losses which will be incurred by Canadian operations are important (and usually determinative) factors to be considered.

Sole Proprietorship

A sole proprietorship may be established by any single individual and exists where the individual is the sole owner of the business and there are no other forms of business organization used as a vehicle to carry on the business. The sole proprietor accrues all benefits gained and all obligations incurred from the sole proprietorship. Consequently, the sole proprietor is personally liable for all the debts and liabilities of the enterprise. The liability extends beyond the investment in the business to the personal resources and assets of the investor. On the other hand, there are tax advantages in operating as a sole proprietorship. Losses from a sole proprietorship accrue to the individual and are taxed at the tax rate applicable to the individual, which allows the losses to be set off against the sole proprietor's income from other resources.

"The primary advantage of a limited partnership over a general partnership is the limited liability of the limited partners. This enables passive investors to receive returns proportional to the amount of their contribution with minimal personal risk, which has made limited partnerships the vehicle of choice for raising money for certain kinds of business ventures. "

The sole proprietorship is a simple arrangement for carrying on business. There are few legal formalities required to create or operate a sole proprietorship. One such formality is the legislative requirement for this form of enterprise to obtain a business licence or registration of the name of the business under the appropriate provincial statute. In addition, a sole proprietor who engages in business in certain provinces using a name or designation other than the individual's own name, must register a declaration in prescribed form with the relevant government authority.

General Partnerships

A partnership is a relationship that exists between two or more people (individuals, corporations, partnerships or other entities) who carry on a business in common with a view to earning a profit. The relation between the persons may be established by written or verbal agreement, or be implied by the circumstances. A general partnership carries on business under a firm name and can sue or be sued under the firm name. Much like a sole proprietorship, the business is carried on directly by the partners and a partnership does not form a separate legal entity.

In a general partnership, it can generally be said that:

- each partner is jointly liable with the other partners to the full extent of the partner's personal assets for all of the debts and other liabilities of the partnership

- net income will be determined at a partnership level and such net income will be allocated to the partners

- a partner may not be entitled to be a creditor of the partnership (although a party related to the partner is entitled to be a creditor)

- unless a partnership agreement specifies otherwise, all partners must contribute equally to the capital of the partnership and are entitled to share equally in the profits of the partnership; likewise, all losses would be shared equally

- the estate of a deceased partner remains liable for partnership debts incurred when the partner was alive.

Partnerships are governed by the provisions of provincial statutes. However, written partnership agreements can override many of the provisions of various statutes, and it is advisable to enter into a partnership agreement in order to avoid certain arbitrary provisions of these statutes. As stated above, in the absence of a written agreement to the contrary, partners may be equally liable for partnership obligations, notwithstanding their unequal capital contributions or profit sharing arrangements.

Under Canadian tax law, partnerships do not pay income taxes. Although net income is calculated at the partnership level, the net income is allocated to the partners, who are obligated to pay taxes. A foreign partner allocated income from a Canadian partnership would, therefore, be obligated to pay Canadian income tax on the foreign partner's share of income.

Limited Liability Partnerships ("LLP")

An LLP allows certain groups of professionals, such as lawyers and accountants, to practice through a special type of general partnership known as a limited liability partnership. The LLP provides individual partners with a degree of protection against unlimited liability for the negligent acts of other partners. LLPs can be established in a number of jurisdictions in Canada, including Ontario, Québec, Alberta and British Columbia. The benefit of this structure is that it reduces, but does not eliminate, the liability that general partners face. In a general partnership, partners are liable for the debts and liabilities arising from the negligent acts of all partners. The partnership itself can be sued, and the assets of any particular partner who did something wrong will be at risk. However, the assets of the other partners will be protected. That being said, LLPs are still the same as general partnerships in the way in which they are formed, governed and taxed.

Limited Partnerships

A limited partnership restricts the exposure of passive individual partners for the liabilities of the partnership. In a limited partnership, there are one or more general partners and one or more limited partners. The general partners have the same rights and obligations as a partner in a general partnership, whereas the limited partners have limited power and liability to the extent of their investment in the partnership for liabilities of the partnership. The general partner has unlimited liability for partnership liabilities, and is responsible for managing the partnership. A limited partner who engages in managing the limited partnership will lose that partner's limited liability. The primary advantage of a limited partnership over a general partnership is the limited liability of the limited partners. This enables passive investors to receive returns proportional to the amount of their contribution with minimal personal risk, which has made limited partnerships the vehicle of choice for raising money for certain kinds of business ventures. In addition to public financing, limited partnerships are also often used for real estate syndication.

Limited partnerships are creatures of provincial statutes. These statutes contain subtle differences with respect to the exposure of individuals to liability in excess of the capital invested in the partnership by such individuals. These differences are dependent on the province in which a limited partnership is organized.

A limited partnership does not come into existence until it is registered under the laws of the province in which it is established. Typically, registration requires filing forms which provide specific information about the identity of the general partner. These forms may or may not require the identities of the limited partners. Furthermore, the limited partnership agreement itself may have to be filed in an office where it may be scrutinized by the public.

In Ontario, a limited partnership is established by having the general partners sign a declaration and then filing it under the Limited Partnerships Act. The declaration must be renewed every five years, and when the partnership wishes to cease operations, a declaration of dissolution must be filed.

Under the Ontario legislation, a limited partner is liable as a general partner in the event such limited partner takes part in the control of the business. Therefore, in some circumstances, the limited partner will have unlimited liability. In some provinces, the extent to which a limited partner is exposed to liability is limited to the result of the acts such limited partner performs in the management and operation of the business of the limited partnership.

As mentioned above, limited partnerships are useful vehicles where there is a desire to flow through income and expenses and yet limit the liability of the individual participants in a particular venture. However, its suitability requires that the investment of the limited partner/investor be passive in nature.

Co-Tenancies and Joint Ventures

Real estate investments are often held in the names of co-tenancies or joint ventures.

A co-tenancy is a relationship between two or more parties with a direct or indirect ownership interest in property. Co-tenants will typically enter into a co-ownership agreement which governs this relationship and the ability of each party to deal with its interest. A co-tenancy is not a tax paying entity, nor is it a relationship like a partnership which is treated like an entity for the purposes of calculating net income. Accordingly, there is some flexibility available in the preparation of financial statements for co-tenancies. Each co-tenant is considered its own entity and is entitled to sell or finance its interest in the joint venture property. Each co-tenant, much like a joint-venturer, may also determine the amount of depreciation expense, which will be utilized by it in the calculation of income for tax purposes.

A joint venture is an association of two or more business entities for the purpose of carrying on a single enterprise or specific venture. A joint venture may take the form of a partnership, a limited partnership, a co-ownership of property or a corporation. It is not recognized as a distinct and separate entity, and as a result, it cannot sue or be sued. Generally, the parties to a joint venture will enter into a written agreement which establishes the rights and obligations of the parties in respect of the venture, including their right to bind other parties. Through the joint venture agreement, the parties will often agree to contribute property and/or skills towards a stated common purpose. Because a joint venture is essentially a contractual relationship and not specifically regulated by statute, the venturers are free to agree on whatever terms they choose. Since a joint venture is not a recognized entity for tax purposes, income and losses for tax purposes are computed separately by each joint venturer rather than at the joint venture level.

The most important goal in drafting an agreement, whether it be for a joint venture or co-tenancy, is to avoid having the structure characterized at law as a partnership because of the duties imposed on partners. Joint-venturers or co-tenants who do not want their venture to be treated as a partnership should set out in the agreement their respective rights and obligations in detail and exercise care in dealing with third parties.

The existence of a partnership is a question of fact. Every effort must be expended to ensure the joint venture or co-tenancy structure will survive the scrutiny of a third party who may seek to impose full liability on each party as if it was a partner in a general partnership.

Joint ventures and co-tenancies between Canadian and foreign companies are an excellent vehicle for combining the strengths of the participating firms, while reducing the risk of taking on new markets.

Agency, Distribution and Franchise Arrangements

In some cases, the decision to expand into Canada may be realized without actually having the foreign business entity carry on business in Canada. The granting of a franchise or the entering into of a distribution contract or agency agreement in Canada does not, in and of itself, constitute carrying on business in Canada. Accordingly, it is often appropriate for a foreign entity to consider the use of a Canadian agent, distributor or master franchise, or to expand its business operations into Canada.

In each case, the relationship should be governed by contract to avoid ambiguity. Generally speaking, if an agency relationship exists, the agent will have the right to bind its principal to contractual commitments. A distributor does not have such rights, and, like a franchise, is generally considered to be an independent contractor.

The ownership and protection of intellectual property rights and exclusivity rights are often given insufficient emphasis when establishing an initial relationship with a Canadian entity.

Such differences can create significant problems when the relationship between the parties change. In addition, termination rights must be considered. In the absence of a written contract, a Canadian agent or distributor will be entitled to reasonable notice before the termination of the agent or distributor. If insufficient notice of termination is given, a court may award damages in lieu of notice.

> ***"The main reason trusts are used over a corporate structure is to realize greater tax efficiencies for investors than would be possible by distributing corporate earnings to shareholders by way of dividends. "***

Ontario, British Columbia, Alberta, Prince Edward Island, Manitoba and New Brunswick have franchise disclosure legislation. Ontario's *Arthur Wishart Act* (Franchise Disclosure), 2000 imposes a "fair dealing" obligation on each party to a franchise agreement and requires the franchisor to provide the prospective franchisee with a disclosure document setting out all material facts of the business, including financial statements. Franchisees are permitted to form dealer associations, a practice generally prohibited by standard Canadian franchise agreements. In addition, a franchisor is not able to contract out of the legislation. The franchise disclosure legislation in other provinces is similar to that in Ontario.

Trusts

An income trust is an investment trust that buys and holds income-producing assets. A trust is not a separate legal entity and is not itself the operating business entity. In law, its assets are held by the trustees, who are also liable for obligations incurred in carrying on its activities. The main reason trusts are used over a corporate structure is to realize greater tax efficiencies for investors than would be possible by distributing corporate earnings to shareholders by way of dividends. However, changes in the early 2000's reduced the tax advantages of a trust structure. In 2007, the federal government passed legislation pursuant to which income trusts—now termed "specified investment flow-through entities" (SIFTS)—would be taxed in a similar fashion to corporations and their shareholders.

Directors' Liabilities

Under the CBCA and the OBCA and under common law, directors and officers of a corporation are required to act honestly and in good faith with a view to the best interests of the corporation. They must also exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances. They must also comply with governing statutes, regulations, incorporating documents and any unanimous shareholders' agreements.

Apart from statutory liability, in most circumstances directors are shielded from personal liability by the "corporate veil". However, in certain circumstances, the courts will look beyond the corporate veil in order to hold directors personally liable for their wrongdoings, particularly where the corporation is used as a vehicle for fraud. Courts have also held directors personally liable for tortious conduct, equitable breaches, and the violation of statutory duties. Generally speaking, a director will only be held personally liable in tort where the degree of personal involvement in the wrongdoing makes the act his or her own. The Ontario courts have identified the following four grounds on which personal liability will almost always be extended to the principals of a corporation: (1) fraud; (2) deceit; (3) dishonesty; and (4) want of authority.

As a general rule, statutes imposing liability on directors operate in one or both of the following ways:

- A statute may make directors personally liable to make payments the corporation has failed to pay;

- A statute may create offences for which directors can be found liable and therefore subject to penalty or imprisonment, or for which the corporation can be found liable, with the directors who participated in the corporate decisions also made liable by virtue of their participation. In many of the cases, directors will be held jointly and severally liable with the corporation such that the directors can be left responsible for payment of the entire sum.

Liability may attach to directors personally where negligence, negligent or fraudulent misrepresentation, inducing breach of contract, or breach of trust are involved, where the director benefited personally or was personally involved. Directors have two key duties: a fiduciary duty and a duty of care.

Fiduciary Duty

Under statute and at common law a director is said to have a fiduciary duty to the corporation which requires that he or she deal honestly with the corporation and maintain the confidence of the corporation's business information. A director may only exercise his or her powers in the capacity and for the purposes for which they were intended. He or she must avoid conflicts of interest and so may not profit or benefit to the detriment of the corporation by taking advantage of opportunities or benefits which belong to the corporation. This principle applies whether the director has learned about such opportunities by virtue of his position as director or otherwise. A director must also disclose any interests which may be adverse to or in conflict with his or her obligations and responsibilities as a director to the corporation.

Note that directors may not escape liability for breach of fiduciary duty or other obligations by claiming that they did not agree with a decision or were not present at the meeting where the decisions were made. Under the CBCA, a director is generally deemed to have consented to any resolution passed or action taken at a meeting unless the director takes the specific steps to record dissent, as outlined in the statute.

Duty of Care

Under the CBCA, directors owe a duty of care to the corporation to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. This is an objective test of the director's judgment in the situation. However, as the director must apply his or her knowledge, experience and skill when exercising powers, those with greater attributes may be judged at a higher standard. For example, if the director is also in an officer's position of the company, she would have a greater knowledge of the day-to-day activities of the company in comparison to an outside director to make informed decisions.

Business Judgment Rule

The courts in Canada have applied the "business judgment rule" to business decisions of directors that have been made honestly, prudently, in good faith and on reasonable grounds. Courts are deferent towards the business judgment of directors, so long as the decision is found to be within a range of reasonable alternatives. The business judgment rule is intended to guard against hindsight bias. The business judgment rule was upheld in the case of *BCE Inc. and Bell Canada v. Certain Debenture Holders* where a board's decision in a change-of-control transaction was challenged by bondholders who lost significant value as a result of the transaction. The Supreme Court held that deference should be given to the directors provided it's within a range of reasonable choices, considering conflicting interests. The BCE case further reaffirmed that the directors consider not only the best interests of the company, but also the interests of the stakeholders. There is no principle in Canadian law that one stakeholder groups' interests should prevail over another. In 2019, the CBCA was amended to reflect these aspects of the BCE decision. For example, the CBCA now expressly permits directors to consider the interests of employees, creditors, consumers, the environment, etc. in addition to the interests of shareholders, when acting with a view to the best interests of the corporation.

Securities Law

The undertaking of a distribution under a prospectus gives rise to significant legal responsibilities for the issuer and its directors and officers. In certain circumstances, it can result in direct and personal liability of the directors and officers. Securities legislation in all Canadian provinces contain important provisions relating to the responsibilities of directors and officers in connection with a distribution of securities.

The standard required by the *Securities Act* (Ontario) (in the following paragraphs, referred to as the "**Act**") with respect to the reporting requirement of companies traded publicly in the province of Ontario is that a prospectus offering securities must contain "full, true and plain disclosure of all material facts relating to the securities" offered by the prospectus and that a prospectus must not contain an untrue statement of a material fact or omit a material fact. The term "material fact" is defined in the Act to mean a fact that significantly affects, or would reasonably be expected to have a significant effect on, the market price or value of the securities being offered.

The Act also provides rigorous standards of responsibility and liability for purchasers of securities. Where a prospectus contains a "misrepresentation", each purchaser is deemed to have relied on the misrepresentation. Therefore, regardless of whether the purchaser relied on the misrepresentation, the purchaser has a remedy against the corporation either in damages or for rescission, and a remedy against the directors and any officers who signed the certificate. There are also similar provisions imposing liability for a misrepresentation in a takeover bid circular.

Under securities legislation, a "material change" is an event that triggers a public disclosure obligation on officers and directors. Material change is defined to include a change in the business, operations, or capital of an issuer that would reasonably be expected to have a significant effect on the market price or value of its securities. This definition requires officers and directors to make a business judgment, either alone or based on information or advice from capital markets professionals. In *Kerr v. Danier Leather,* the Supreme Court held that a change in intra quarterly results does not necessarily signal a material change for the purposes of amending a prospectus after a receipt has been obtained. The court further held that disclosure is a matter of legal obligation rather than a matter of business judgment, and directors must comply with the statutory disclosure requirements. Given the higher stakes involved under the new regime, the decision about when to disclose major corporate events has been made more difficult. Consequently, issuers may decide to disclose negotiations of significant transactions at an earlier stage in an attempt to err on the side of caution.

- Issuers may decide to file a confidential material change report in order to protect themselves from liability. However, in such a case, potential defendants in a lawsuit must be prepared to defend the reasonableness of their decision to make a confidential filing.

- Furthermore, directors are considered to be insiders of a public company. In order to protect the integrity of the marketplace and ensure that the secondary markets are based on the principle of equal access to material information, various rules are imposed on insiders. A director who purchases or sells a security of the corporation with knowledge of confidential information that, if generally known, might reasonably be expected to alter the value of the security in a material way, he or she is liable under the Act and under the CBCA to the person to whom he or she sells the security or from whom he or she has purchased the security for any damages suffered by him or her. The director will not be liable if:

- the director reasonably believed that the information had been generally disclosed;

- the information was or ought to be reasonably known by the seller or purchaser; or

- the purchase or sale took place in the prescribed circumstances.

Also, under the Act and under the CBCA, a director of a corporation who discloses information about the corporation that is not generally known and that, if generally known, might reasonably be expected to alter the value of the security in a material way, is liable for damages incurred by the person who sells the security or purchases the security from the individual in receipt of such information, unless the director can establish:

- the director reasonably believed that the information had been generally disclosed;
- the information was or ought to be reasonably known by he or she who has suffered damages;
- that the disclosure of the information was necessary in the course of the director's business (subject to certain limitations).

In such cases, the director is also liable to the corporation as described in the case of insider trading. As above, a reasonable belief in the general disclosure of the information as well as the necessity of the disclosure in the ordinary course of business constitute exceptions to this general principle.

Under the Act, a director could be found guilty of either insider trading or tipping and may be fined up to the greater of $5,000,000 and three times any profit made and/or imprisoned for up to five years less a day.

Environmental protection statutes also impose liability upon directors. Case law appears to require positive steps to be undertaken by directors to seek out, monitor, and resolve environmental issues in order to avoid statutory liability. These issues are discussed elsewhere in this paper.

Other Duties

Under the *Employment Standards Act* (Ontario), directors are jointly and severally liable for employee wages, not exceeding six months, which have become payable while they were directors. Under the OBCA, directors are also responsible for not more than 12 months of vacation pay which accrued while they were directors. Under several statutes, including the *Income Tax Act* (Canada), the *Corporations Tax Act* (Ontario), *Excise Tax Act* (Federal) – *Goods and Services Tax, Retail Sales Tax Act* (Ontario), etc., directors may be held personally liable for any amount which the corporation has failed to deduct, withhold or remit for or its employees pursuant to the tax statues or for having directed, authorized, assented to, acquiesced in, or participated in, the commission of an offence under the various acts.

Mitigation of Director's Liabilities

The most effective way for directors to reduce the risk of liability is to act honestly, faithfully, and exercise knowledgeable skill and care in their role. There are further options to mitigate personal liability:

- The CBCA and the OBCA allow a corporation to indemnify directors against liabilities incurred in the course of their duties.
- Liability insurance may be purchased to protect against losses derived from director's liability.

- Private corporations in some cases can agree to a unanimous shareholders agreement that transfers directors' powers and liabilities onto the shareholders.

- Resigning from the board may also limit the liability of a director, although not from liabilities incurred while in office.

CHAPTER 3

Foreign Investment and Anti-Competition Legislation

The Investment Canada Act

While foreign businesses have historically faced barriers when attempting to enter Canada, it is now generally accepted that foreign investment in Canada is welcomed and encouraged. The *Investment Canada Act* ("**ICA**") is a federal statute that regulates foreign investment. The objective of the ICA is to monitor the level of foreign investment in Canada in order to ensure a "net benefit to Canada."

What is a Reviewable Transaction?

The notification or review provisions of the ICA are triggered by the establishment of a new business in Canada or the acquisition of control of an established Canadian business. Most investments are not automatically reviewed by the Canadian government and simply require notification. The notification process is completed by filing forms that disclose information relating to the parties, the transaction and the business itself.

Reviewable transactions are limited to those which exceed certain threshold values or are related to specified industries. Most new businesses, except for those which are "cultural" in nature (such as book publishing, broadcasting and film production), require notification only.

On March 22, 2024, Bill C-34 the *National Security Review of Investments Modernization Act* received royal assent. While Bill C-34 has not yet come into force, when it does, it will broaden the scope of transactions which may be subject to notification under the ICA, by introducing pre-closing filing obligations for certain investments (including certain acquisitions of minority interests) where the target entity carries on a prescribed business activity, or where such an investment would give the investor access to "material, non-public information" or "material assets". It should be noted the regulations which will ultimately identify the targeted business activities, and define the terms "material, non-public information" and "material assets", have not yet been enacted. Bill C-34 will also increase penalties for failing to comply with a demand by the Minister made under the Act, where a court finds the Minister was justified in making such a demand.

Review Thresholds

Under the ICA, the direct acquisition of control of a Canadian business can occur through the purchase of one-third or more of the voting shares of a corporation carrying on business in Canada. In such cases, the direct purchase of control of an active Canadian business by

> ***"The objective of the ICA is to monitor the level of foreign investment in Canada in order to ensure a "net benefit to Canada."***

foreign interests is subject to review under the ICA if the Canadian business has assets whose book value is equal to or exceeds $5,000,000.

Countries that are members of the World Trade Organization ("**WTO**") face significantly higher thresholds for review under the ICA. The 2024 threshold for WTO investors is now $1.326 billion in "enterprise value", up from $1.287 billion in 2023.

The threshold is increased to $50 million (asset value) for non-WTO entities making indirect acquisitions, provided that the Canadian business assets do not represent more than 50% of the assets involved in the international transaction. An indirect acquisition can occur through the acquisition of a foreign company that has a subsidiary carrying on business in Canada. Indirect acquisitions made by WTO investors are not automatically reviewable unless the business is cultural in nature.

The review thresholds change again for state-owned enterprises ("**SOE**"). For a WTO-based SOE that is acquiring a Canadian business, or a non-WTO SOE that is purchasing a business from a WTO-based vendor, the threshold is indexed to the change in Canada's GDP (in 2023, the threshold is $512 million). Indirect acquisitions of control by WTO SOE investors remain exempt from review.

The "Net Benefit" Criteria

- the effect on the level of economic activity in Canada, on employment, on resource processing, on the utilization of parts and services produced in Canada and on exports from Canada;

- the degree and significance of participation by Canadians in the Canadian business or new Canadian business and in any industry or industries in Canada;

- the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;

- the effect of the investment on competition within any industry in Canada;

- the compatibility of the investment with national industrial, economic and cultural policies; and

"Where a review is required, the government is required to determine whether or not the proposed investment is likely to result in a "net benefit" to Canada."

- the contribution of the investment to Canada's ability to compete in world markets.

The Review Process

Pursuant to the ICA, once a threshold is exceeded the government will conduct a review to determine whether the proposed investment is of net benefit to Canada. A reviewable transaction may not be completed until the Minister is so satisfied or the time period for review is deemed to have expired under the ICA. Under the ICA, the initial review period can be as long as 45 days, with the Minister having the option to extend this period for another 30 days or longer through an agreement with the investor. Where an investor is advised within the appropriate time periods that the Minister is not satisfied that the investment is likely to be of net benefit to Canada, the applicant has the right to make representations and submit undertakings to the Minister. The scope of these undertakings can be very broad and may include guaranteeing levels of investment or employment in Canada.

National Security Review

The ICA also allows for the review of investments that "could be injurious to national security". This type of review can be conducted regardless of whether any of the preceding thresholds have been met, so long as the Minister has reasonable grounds to believe the investment could be injurious to national security. In these situations, the Minister will notify the investor of the impending review, which temporarily halts the proposed investment. The Minister might additionally require the investors to provide information that is considered necessary for the review. In 2018, the Minister of Industry made a decision to block a proposed $1.5 billion takeover of Aecon Group Inc. by China Communications Construction Company International Holding Limited due to national security concerns.

It should be noted that, in August 2022, the ICA (and certain regulations thereunder), were amended to permit a foreign investor to voluntarily file for review of an investment prior to the transaction having taken place. These amendments thereby provide a mechanism by which investors can obtain pre-closing certainty as to whether the investment in question will be subject to review.

Further, proposed amendments, tabled in December 2022 through the introduction of *Bill C-34: An Act to amend the Investment Canada Act*, should be noted. The draft legislation, currently before the House of Commons, would require investors to file a notification, prior to implementation of any transaction, where an investment is being made into a Canadian business which is engaged in a "prescribed business activity". "Prescribed business activities" are not defined in the bill, and will be defined through future regulations.

"The ICA also allows for the review of investments that "could be injurious to national security". This type of review can be conducted regardless of whether any of the preceding thresholds have been met, so long as the Minister has reasonable grounds to believe the investment could be injurious to national security. "

The Competition Act

The *Competition Act* ("**CA**") is the federal legislation that regulates market competition in Canada. The purpose of the CA is to maintain and encourage competition in Canada by promoting the efficiency and adaptability of the Canadian economy in order to provide consumers with competitive prices and product choices. Mergers, agreements between competitors, trade and marketing practices and monopolies are all subject to the provisions of the CA. The CA is divided into three principal areas: criminal offences, civil offences and merger regulation.

Criminal Offences

The CA creates offences for a number of activities, regardless of whether it can be demonstrated that such activities would have an adverse effect on competition. Agreements between competitors to fix prices, allocate markets or customers, or fix output or supply can result in criminal liability unless one of the statutory defences, such as an "ancillary restraints defence", can be successfully established.

If a party is convicted of any of these offences, the court can order a fine, imprisonment or both. For example, if a person is convicted of a conspiracy offence, the offender is liable to imprisonment for a period of up to 14 years and/or a fine at the discretion of the court. Notably, the fines for these offences were capped at $25M until June 23, 2023, after which this cap was removed. This occurred with the passing of Bill C-19 in 2022, which amongst other things, sought to increase fines and penalties for violations of the CA to ensure continued compliance with the act. Additionally, any person who has suffered loss or damage as a result of any such offence may recover damages in a private civil action.

Civil Offences

The CA also regulates non-criminal conduct in an attempt to avoid misleading advertising and deceptive marketing practices. The non-criminal conduct is divided into two categories, reviewable offences and reviewable trade practices. These offences are more fully discussed under the Marketing and Labelling Legislation section.

Merger Regulation

A merger is defined broadly under the CA and includes the acquisition of control over, or of a significant interest in, the whole or part of a business. The CA allows for the substantive review of all mergers to determine whether a proposed transaction will, or is likely to substantially decrease competition in a particular industry. Transactions that meet certain size thresholds trigger advance notification requirements, which prompts a 30-day waiting period during which the Competition Bureau (the "**Bureau**") reviews the transaction. If the Bureau has concerns with respect to a proposed merger it can, among other powers, make a demand for documents from the merging parties. The period during which the Bureau can review the merger—which must be completed prior to the closing of the transaction—is extended until the parties fulfill the production requirement. To avoid or shorten the waiting caused by pre-merger notification requirements, parties can apply for an advance ruling certificate which are administered at the discretion of the Bureau.

For many transactions, the Bureau will issue a “no action letter” stating that there are no grounds to challenge the proposed transaction. Notwithstanding the delivery of a no action letter, the Bureau may challenge the merger for up to three years following closing in the event that new facts come to their attention.

Subject to minimum voting share holding requirements, pre-notification under the CA is generally required where:

- the parties to the transaction, together with their affiliates, have assets in Canada or annual gross revenues from sales in, from or into Canada which exceed $400 million; and

- where the proposed transaction involves an acquisition of assets of an operating business in Canada, the aggregate value of assets to be acquired or the annual gross revenues from sales in or from Canada exceed $93 million (this figure is adjusted annually).

CHAPTER 4

Bankruptcy and Insolvency

Bankruptcy and insolvency are governed by federal legislation, namely the *Bankruptcy and Insolvency Act* ("***BIA***") and the *Companies' Creditors Arrangement Act* ("**CCAA**")

There are four principal types of insolvency proceedings in Canada:

- Bankruptcy under the BIA;
- Receivership by court appointment or private appointment;
- Restructuring under the BIA; and
- Restructuring under the CCAA.

Reorganizations and liquidations can occur under both the BIA and the CCAA. Generally, the BIA is used for smaller cases and the CCAA is used for larger cases because it is more flexible for reorganizing debtors. Non-Canadian creditors have the same rights as Canadian creditors for debts inside Canada.

Bankruptcy under the BIA

The BIA can be applied to almost all types of entities including individuals, partnerships, associations and corporations. The BIA defines a corporation as a company incorporated federally, provincially or elsewhere, and that has authorization to carry on business in Canada or has office property in Canada. The definition excludes certain financial services companies including banks, authorized foreign banks, insurance companies, trust companies and loan companies. The *Winding-up and Restructuring Act* ("**WURA**") and not the BIA, governs the liquidation and restructuring of these financial institutions.

Under the BIA, bankruptcies may be either voluntary, involuntary, or the result of a failed restructuring proposal. An involuntary bankruptcy may be commenced by any creditor who is owed at least $1,000. The creditor must file an application with the court on behalf of all the creditors for a bankruptcy order. The court will grant such an order if it is persuaded that an "act of bankruptcy", such as failure to satisfy financial obligations generally when they come due, has occurred within six months of the proceeding.

A debtor may commence a voluntary bankruptcy by filing an assignment in bankruptcy when they are unable to pay their debts. In order to start the process, the bankrupt must file their assignment in bankruptcy with the Office of the Superintendent in Bankruptcy Canada, an agency of Industry Canada whose mandate is to ensure that bankruptcies and insolvencies in Canada are conducted in a fair and orderly manner. When a corporation declares bankruptcy, The Board of Directors and management of the company lose their control over the company. A trustee is appointed upon bankruptcy and all assets are vested in the bankruptcy trustee for distribution to the unsecured creditors. Secured creditors typically are not part of the bankruptcy proceedings, as they obtain repayment against secured assets through the appointment of a receiver.

The BIA also provides for an insolvent debtor seeking to avoid bankruptcy to make a proposal in bankruptcy for obtaining a temporary stay against all of its secured and unsecured creditors and a mechanism to obtain approvals for the compromise of debt and reorganization. The BIA also provides for increased level of protection for the wages of employees of bankrupt companies, a re-ordering of priorities among creditors and confers upon an unpaid supplier the right to take those goods back from a bankrupt company where the supplier has not been paid for 30 days following bankruptcy.

The *Wage Earner Protection Program Act* ("**WEPP**") compensates individuals for wages earned but not paid in the six months prior to bankruptcy or receivership. Subject to certain amounts prescribed by regulations, an individual may be paid the amount of eligible wages owing to that individual, up to a maximum of an amount equal to seven times the maximum weekly insurable earnings under the *Employment Insurance Act* ($8,507.66 for 2024).

Receivership

Secured creditors can have a receiver appointed under the BIA either by court or by a private instrument, if the terms of the security agreement permit it. A receivership can also be commenced by a specific provincial statute, for example the *Courts of Justice Act* in Ontario.

A receiver is an officer of the court and must act in good faith and in a commercially reasonable manner; they are not agents of the creditor or the debtor. The outcome is that the debtor loses control of the specific asset in question and the receiver sells the asset with proceeds going to the receiver's administrative fees, then to the secured creditor and the balance (if any) to unsecured creditors.

Restructuring under the BIA

Restructuring is a procedure in which an insolvent debtor circumvents liquation by negotiating a debt restructuring agreement between its creditors. Restructuring is commenced via a proposal under the BIA. A restructuring proposal under the BIA applies to the same companies as bankruptcy under the BIA, so larger companies must restructure under the CCAA.

A restructuring generally starts with filing of a Notice of Intention to Make a Proposal at which time an automatic stay of proceedings is granted. A proposal trustee must monitor the proceedings, but the insolvent debtor retains possession of its assets and remains in control of the business. A successful proposal requires the

"Restructurings under the CCAA are restricted to insolvent companies whose liabilities exceed $5,000,000."

approval by a 'double majority' of the unsecured creditors of each class of creditors, meaning a majority in number and two-thirds majority in value. A court approval is also required.

Restructuring under the CCAA

Restructuring of an insolvent business may also be facilitated under the CCAA, which is entirely devoted to restructuring a debtor company through a plan of compromise or arrangement. The CCAA provides greater flexibility than the BIA and is often the preferred regime where the insolvent debtor is large and the reorganization is complex. In fact, restructurings under the CCAA are restricted to insolvent companies whose liabilities exceed $5,000,000.

Under the CCAA a debtor commences its restructuring by bringing an application to the court seeking a stay of proceedings order protecting it from its creditors, as this is not automatic under the CCAA. The court appoints licensed trustee that must monitor and audit the proceedings, but the insolvent debtor retains possession of its assets and remains in control of the business subject to any restrictions the court may impose. The debtor must bring a plan of arrangement or compromise to its creditors. The plan of compromise or arrangement must obtain approval by a 'double majority' of the unsecured creditors of each class of creditors, meaning a majority in number and two-thirds majority in value.

Both the BIA and the CCAA restructurings apply to insolvent companies. Solvent companies requiring judicial assistance in a restructuring can use the plan of arrangement sections of the CBCA.

It is worth noting that in 2019, both the BIA and CCAA were amended to impose a duty to act in good faith on all interested persons involved in an insolvency proceeding under either of those acts.

International Bankruptcy

Canadian insolvency legislation allows Canadian courts to recognize foreign insolvency proceedings. If a Canadian court does recognize a foreign proceeding, the foreign court must proceed with the creditor's claim in a consistent manner to that of Canadian insolvency law.

In insolvency proceedings that take place in two or more jurisdictions, or "cross-border" insolvency, Canadian courts generally work with proceedings in the other jurisdiction(s) to encourage a favourable result for all parties.

In terms of procedural harmonization, Canada adopted the UNCITRAL Modal Law on Cross-Border Insolvency into Part XIII of the BIA and Part IV of the CCAA in 2009 which is a guide (not a treaty) that facilitates coordination between foreign courts and authorities in cross-border insolvencies. However, there are still significant and important differences between Canadian Bankruptcy and Insolvency law and that of other jurisdictions, for example the United States.

CHAPTER 5

Securities Regulation

The Canadian securities industry is provincially regulated. Each province has its own set of laws, regulations and policies governing the industry. At present, Canada does not have a national regulator analogous to the Securities

"The primary advantage of a limited partnership over a general partnership is the limited liability of the limited partners. This enables passive investors to receive returns proportional to the amount of their contribution with minimal personal risk, which has made limited partnerships the vehicle of choice for raising money for certain kinds of business ventures."

and Exchange Commission in the United States, and is currently the only G20 country that does not have a national securities regulator. In response to this, in November 2018, the Supreme Court of Canada ruled that a proposed national securities regulator is constitutional, and therefore a national regime may be adopted in the near future. Until then, each province independently regulates securities trade, and the various provincial authorities cooperate to ensure a consistent regulatory framework across the country. Securities law across the provinces is comparatively similar if not the same due to harmonization efforts. The Canadian Securities Administrators, a voluntary umbrella organization established by the provincial regulators, acts as a forum to work towards securities law harmonization.

There are three objectives of securities regulation in Canada; (1) to protect investors from fraudulent, manipulative, or misleading practices; (2) to ensure investors have fair access to market facilities and market or price information through regulations that can detect, deter, and penalize market manipulation and unfair practices; and (3) to reduce the risk of failure of market intermediaries and, when it cannot be avoided, seek to reduce the impact on investors and other market participants. These objectives are accomplished by requiring the registration of those who trade, sell, underwrite, or advise investors with respect to securities and by having mandatory disclosure rules which ensure the general public is able to make informed investment decisions with respect to publicly traded companies (reporting issuers). Public disclosure is achieved, in part, by requiring reporting issuers to distribute a prospectus whenever a reporting issuer offers shares to the public.

The term "security" is broadly defined in the Ontario Securities Act to include any document constituting evidence of title to or interest in the capital, assets, property, profits, earnings or royalties of a person or company. Different types of agreements and instruments involving monetary consideration are encompassed by the definition, including bonds, debentures, notes, stocks, certificates of interests, transferable shares and any option, subscription or other interest in or to a security including derivatives.

Prospectus Requirement

Except for minor exceptions, before a reporting issuer is entitled to make a trade in a security that amounts to a distribution, they must first file both a preliminary and a final prospectus (unless the reporting issuer is subject to an exemption). These prospectuses are detailed documents that disclose all material facts relating to the securities of the reporting issuer and must be approved by provincial security regulators in each province and territory where the securities are to be sold.

There are a number of exemptions which permit securities to be issued without a prospectus. In general, these exemptions exist to allow companies to avoid prospectus requirements in situations where all of the investors are sufficiently sophisticated or proximate to the corporation such that the level of disclosure contained in a prospectus is not required to make an informed decision. Typically, once securities have been issued pursuant to an exemption, they can only be resold to the general public after a four-month holding period has expired. It is assumed that during this period, the reporting issuer has provided prospectus-level disclosure by adhering to continuous disclosure requirements.

As of November 21, 2022, the Canadian Securities Administrators (the "**CSA**") introduced the Listed Issuer Financing Exemption (or "**LIFE**"), which is an exemption that allows reporting issuers who are listed on a Canadian stock exchange, and who have filed all timely and periodic disclosure requirements, to issue freely tradeable listed equity securities to the public. In other words, securities issued under the LIFE exemption are not subject to the four-month holding period that securities issued under other prospectus exemptions are subject to. Most notable amongst the list of requirements that a reporting issuer must meet in order to utilize the LIFE exemption, is that the reporting issuer must have been a reporting issuer for a minimum of 12 months in at least one Canadian jurisdiction. Further, while less onerous than filing a prospectus, a reporting issuer must also file an "offering document" which discloses certain information including details of: (a) the offering, (b) new developments in the issuer's business, (c) any material facts pertaining to the securities that have not been disclosed by the issuer within the previous 12 months, etc. Under the LIFE exemption, issuers are limited to raising the greater of $5,000,000 or 10% of the issuer's market capitalization, to a maximum total dollar amount of $10,000,000.

Continuous Disclosure

A reporting issuer is obligated to publicly disclose detailed information about the company on an ongoing basis. This information includes audited and unaudited financial statements, proxy, and management information circulars related to shareholders meetings and management's discussion and analysis of operating results. When material changes occur to the business, operations or capital of a reporting issuer, they are required to issue a press release and file a material change report that is accessible by the public as soon as practicable, or in any event within 10 days. These documents are filed with the appropriate regulatory authorities and disclose the nature and substance of the change.

Specified reporting issuers are also required to file an annual information form which provides a "point in time analysis" of the performance of the business in the context of its historical and possible future development. There are also obligations for insiders, such as directors, officers, and major shareholders of a reporting issuer to disclose their shareholdings. The use of undisclosed material information by insiders to trade in public companies is forbidden. This requirement applies to issuers whose securities are listed on the TSX and Cboe Canada but does not apply to junior issuers whose securities are listed on the TSX Venture Exchange or the Canadian Securities Exchange..

Reporting issuers (and to an extent, underwriters, in the case of a distribution) are liable for misrepresentations contained within their disclosure documents.

Crowdfunding and Securities Regulation

Equity crowdfunding has become an increasingly popular method for raising capital in Canada. In 2016, Multilateral Instrument 45-108 Crowdfunding came into force in Ontario, Québec, Manitoba, New Brunswick, and Nova Scotia, with the intention of facilitating online capital raising activities by non-reporting issuers such as start-ups and other small to medium sized enterprises by exempting prospectus requirements within certain limits.

Canadian Stock Exchanges

There are four principal stock exchanges in Canada – the Toronto Stock Exchange ("**TSX**"), the TSX Venture Exchange ("**TSX-V**"), the Canadian Securities Exchange ("**CSE**"), and Cboe Canada ("**Cboe**"). Each of these exchanges have their own requirements and regulations for companies who wish to list their securities for trading. In addition to the various stock exchanges, there is an active over the counter market among brokers in securities not listed on any stock exchange.

Toronto Stock Exchange (TSX)

The TSX is Canada's largest stock exchange. Many companies listed on the TSX are inter-listed on U.S. and European markets. Companies can list on the TSX in three ways:

- An Initial Public Offering ("**IPO**"), which is a first-time listing on the TSX;
- A Reverse Take-Over ("**RTO**"), where a generally larger private company takes over a smaller public company to utilize its exchange listing; and
- A Special Purpose Acquisition Corporation ("**SPAC**"), which is a shell company that goes public and raises at least $30 million from an IPO with the intention of using those funds to acquire a private company or other assets in a "qualifying transaction", which it has 36 months to complete.

TSX Venture Exchange (TSX-V)

The TSX-V provides emerging companies with access to capital while offering investors a regulated environment for higher risk investments. TSX-V listed companies are primarily listed in metals & mining, oil & gas, manufacturing, technology, and financial services. Companies can list on the TSX-V in the same ways as the TSX, including through an IPO, a RTO and the Capital Pool Company program ("**CPC**") which is similar to the SPAC. A CPC listing involves creating a shell company to raise funds up to $4,750,000 through an IPO with the intention of using those funds to acquire a private company or other assets in a "qualifying transaction" which it has 24 months to complete.

Canadian Securities Exchange (CSE)

A direct competitor with the TSX-V, the CSE (formally the Canadian National Stock Exchange) is an alternative stock exchange in Canada. The CSE has gained popularity amongst issuers and investors as it offers the benefit of simplified reporting requirements and reduced barriers to listing.

Cboe Canada (Cboe)

Cbeo is a recognized Canadian exchange for senior public companies and investment products, with a stated purpose of providing Canadians with a stock exchange that puts the interest of capital-raising companies, investors and their dealers first.

Multi-Jurisdictional Disclosure System

The Multi-Jurisdictional Disclosure System ("**MJDS**") is an agreement between Canadian securities regulators and the U.S. SEC. The purpose of the MJDS is intended to remove unnecessary barriers to certain offerings of securities of U.S. issuers in Canada, to facilitate take-over and issuer bids and business combinations involving securities of certain U.S. issuers and to facilitate compliance by U.S. issuers with proxy and continuous disclosure requirements, all while ensuring that Canadian investors are properly protected. Under this system, eligible issuers are only required to make a single disclosure filing as opposed to two filings in any cross-border securities issue. As a result, Canadian and U.S. markets are becoming highly integrated, providing U.S. companies with greater access the Canadian market.

CHAPTER 6

Sales and Transfer Taxes

Goods and Services Tax

The Goods and Services Tax ("**GST**") is a value-added tax imposed under the *Excise Tax Act* ("**ETA**") on the supply of goods and services that are purchased in Canada. As of 2023, the current rate of tax for GST is five percent. Most goods and services are subject to GST, but there are certain goods and services that are exempt or zero-rated (meaning that they are taxed at a rate of zero percent). Examples of such exemptions include groceries, residential rent, medical services, and financial services (for example, insurance premiums and bank interest). Many of Canada's provinces have chosen to combine their provincial retail sales taxes with the federal GST. This is known as Harmonized Sales Tax ("**HST**"). In provinces where HST is charged, the rate varies from thirteen or fifteen percent: Ontario charges HST at a rate of thirteen percent (13%); and Nova Scotia, New Brunswick, Newfoundland/ Labrador and Prince Edward Island charge HST at a rate of fifteen percent (15%).

GST is applied to each transaction in the production and distribution chain. Virtually all persons, including corporations, who carry on business in Canada having revenues greater than $30,000 per year must register to collect GST. A business first registers to collect GST, and then collects tax on their sales from consumers. They then claim an "input tax credit" ("**ITC**") for any tax paid on their purchases. This has the effect of placing the burden of tax on the ultimate consumer, rather than the business that is selling the goods and services, and thereby reducing the tax on each business entity to the value added by such entity.

With respect to imported goods, GST is based on the value of duty paid, meaning the value for customs purposes, plus applicable customs duty, additional duty, countervailing duty or anti-dumping duty and excise tax. GST is not paid on exported goods. Non-residents who solicit orders in Canada or offer for sale certain goods such as books or periodicals for delivery in Canada are required to register for and collect GST. Certain non-residents who are not carrying on business in Canada may register to collect and remit GST if they regularly solicit orders for the supply of goods in Canada. Registration would be desirable if a supplier wishes to obtain ITCs for GST paid to Canadian suppliers. A non-resident without a permanent establishment may be required to post security in connection with its obligation to collect and remit GST. To ensure that direct exporters to Canada do not receive advantageous treatment, imported goods are subject to GST based upon their duty paid value. Imported services and payments to non-residents in respect of intellectual property

> ***"Virtually all persons, including corporations, who carry on business in Canada having revenues greater than $30,000 per year must register to collect GST. "***

are not subject to GST if wholly used in taxable commercial activities of the purchaser.

Provincial Sales Tax

With the exception of the province of Alberta, each province charges a sales tax on tangible personal property and certain services. These sales taxes are levied on the consumer. Sales taxes in the Canadian provinces generally range from six percent to ten percent. There is a separate sales tax in Québec called the Québec Sales Tax ("**QST**"), which is taxed at a rate of 9.975% as of 2022. The QST is generally applicable to the same goods and services as the federal GST. Business owners should be wary of the variation in provincial sales taxes if they do business in multiple provinces, because businesses which provide taxable goods or services in a province that levies a separate sales tax, other than HST or QST, must obtain a provincial vendor's license. These provinces are Saskatchewan, Manitoba and British Columbia. Once a business obtains such a license, they act as an agent of the province in collecting tax from their purchasers or consumers, and remit this tax to the provincial government. It is common in various provinces for licensed vendors to be able to sell goods to one another in exemption from provincial sales tax, so long as the goods are acquired for resale to consumers and not for the licensee's own personal use.

Most provinces provide exemptions to the consumer from retail sales taxes for certain goods, such as basic groceries. There are also exemptions for certain purchases of production machinery which are contained in most provinces' legislation. It is important to note that there is a variation from province to province in the services which are subject to taxation.

A Harmonized Sales Tax ("**HST**") system has been implemented in Ontario, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland/Labrador. The HST harmonizes those provinces' respective retail sales tax systems with the federal Goods and Services Tax. The HST rate in Ontario is thirteen percent as of 2023.

The HST applies to all goods and services that are currently subject to GST and is administered by the Canada Revenue Agency under the *Excise Tax Act* ("**ETA**"). It operates as a single value-added tax on taxable supplies for goods and services made in the participating provinces. Supplies made in the non-participating provinces remain subject to GST and provincial retail sales tax under the current rules. Registrants will be entitled to claim ITCs for tax payable. Entitlement is determined under the current GST rules, as well as any HST specific rules. GST registrants will continue to use their GST registration number to collect and remit HST and to claim ITCs. The HST is designed to streamline collection and reporting required by merchants.

Other Provincial Taxes

There are other items that are taxed differently across provincial borders. Such items include tobacco products, alcohol, and fuel. Provinces also tax forestry and mineral operations, as well as petroleum and natural gas production.

Land Transfer Tax

Under the *City of Toronto Act, 2006* the City of Toronto was granted the power to implement new taxation measures. On October 22, 2007, Toronto City Council approved a new municipal land transfer tax, which took effect on February 1, 2008. The municipal land transfer tax is applied to purchases on all properties in the City of Toronto in addition to the provincial land transfer tax which will be discussed below. For property containing at least one, and not more than two, single family residences, the rate is 0.5% on the first $55,000 of value, 1% of the value which exceeds $55,000 up to an including $250,000, 1.5% of the value between $250,000 and $400,0000, 2% of the value between $400,000 and $2,000,000 and 2.5% for amounts exceeding $2,000,000.

For all other property in Ontario outside the limits of the City of Toronto, the rate of taxation is 0.5% on the first $55,000 of value, 1% of the value of the consideration exceeding $55,000 up to $250,000, 1.5% of the value of the consideration exceeding $250,000 up to and including $400,000, 2% of the value between $400,000 and $2,000,000 and 2.5% for amounts exceeding $2,000,000 where the land contains one or two single family residences.

As of April 21, 2017, there is a Non-Resident Speculation Tax ("**NRST**") imposed on Ontario lands conveyed to foreign nationals and corporations. Prior to October 25, 2022, the rate of the NRST was twenty per cent of the value of the consideration for the conveyance. As of October 25, 2022, the NRST was increased to twenty-five per cent of the value of the consideration for the conveyance.

Land transfers are taxed differently across provincial borders, and they are often imposed municipally. It is advisable to consult local municipal by-laws and provincial statutes specific to the province in which a transaction is being conducted in order to be sure what the land transfer taxes will amount to.

CHAPTER 7

Income Taxes

"Taxation is restricted to income derived from Canadian business activities and investments that are situated in Canada."

Federal Income Tax

Canada imposes a federal corporate income tax on non-residents who carry on business in Canada or sell real property located in Canada, subject to the exceptions outlined below. In general terms, taxation is restricted to income derived from Canadian business activities and investments that are situated in Canada. Additionally, Canada imposes a federal non-resident withholding tax on non-residents who do not carry on business in Canada through a permanent establishment, but they receive Canadian source dividends, interest and certain other amounts from Canadian individuals or entities. Under these circumstances, the Canadian entity is required to withhold tax from the gross amount of the dividend, interest, etc. and remit this to the Receiver General for Canada as tax on behalf of the non-resident recipient. Subject to rules in the Internal Revenue Code, a U.S. foreign tax credit should be available in respect of Canadian non-resident withholding tax or branch tax.

An American non-resident corporation desiring to do business in Canada must select a business structure to utilize. The available options are to incorporate a subsidiary, to open a branch, or to minimize the business' footprint in order to avoid having 'permanent establishment' status, thereby securing favourable tax treatment. Companies doing business in Canada must evaluate the taxation implications of using one business entity form over another.

Avoidance of Permanent Establishment Status

The Canada-U.S. Income Tax Convention 1980 (the "**Convention**"), specifies that in the absence of a permanent establishment in Canada (as defined in the Convention), a U.S. non-resident carrying on business in Canada will not be subject to Canadian federal income tax. A permanent establishment is defined as a fixed place of business through which the business of the non-resident is carried on and includes, for example, an office or factory. The Convention also provides for a reduction in withholding tax rates on certain types of Canadian source income distributed to non-residents as described below.

It should be noted that the definition of "permanent establishment" in the Convention may differ from the definition of the same term as applicable for provincial income tax purposes.

Canadian Subsidiary Corporation

A corporation incorporated in Canada (whether federally or provincially) will be considered to be a resident of Canada for income tax purposes and therefore will be subject to Canadian income tax on all of its worldwide income under Part I of the *Income Tax Act* (Canada).

The 2024 combined federal-Ontario corporate rates of income tax are as follows:

Type of Income	Federal	Ontario	Combined
General	15%	11.5%	26.5%
Manufacturing and processing	15%	10.0%	25%
Small business	9%	3.2%	12.2%

If a foreign entity establishes a Canadian subsidiary with a Canadian resident and owns no more than 50% of the Canadian subsidiary, tax on the first $500,000 of annual net income may be significantly reduced. Assuming that the Canadian subsidiary shall repatriate profits to its foreign parent, non-resident withholding tax under Part XIII of the *Income Tax Act* may apply. Part XIII of the *Income Tax Act* imposes a withholding tax rate of 25% which is generally reduced by the various tax treaties. Pursuant to the Convention, the reduction depends on the means of repatriation as follows:

Dividends paid to U.S. parent corporation	5/15%*
Interest (other than participating interest) paid to U.S. parent corporation	0%
Royalties paid to U.S. parent corporation	0/10%**

* For the 5% withholding tax rate to apply, the recipient of the dividends must be a company beneficially owning 10% or more of the voting stock of the company paying the dividends.

** For the 0% withholding rate to apply, the payments to the US resident must relate to the use of computer software or patent information pertaining to commercial, industrial or scientific usages.

If a non-resident carries on business in Canada through a permanent establishment and does not incorporate a Canadian subsidiary, tax under Part I of the *Income Tax Act* will also be applicable at the rates described above in respect of income from Canadian business operations.

Canadian Branch

Branch tax is imposed on the after-tax profits of the Canadian branch operations which are not, in general terms, reinvested in Canada. The branch tax is intended to be roughly equivalent to the withholding tax which would be payable on dividends which would have been paid by a Canadian subsidiary to its foreign parent. The rate of Canadian branch tax is 25%. Where the withholding on dividend rate is reduced by treaty, the Canadian branch tax rate is normally reduced as well. In any event, as a result of the Convention, this rate has been reduced to 5% for branches of U.S. corporations. Certain businesses carried on through a Canadian branch are exempt from the branch tax, including banking, communications, and mining. In addition, branch profits that are reinvested in Canadian business assets are generally not subject to the branch tax. The Convention also provides for a one-time exemption for the first $500,000 of Canadian net profits. A U.S. foreign tax credit should be available in respect of Canadian income taxes paid for the Canadian branch operation, subject to the rules in the *Internal Revenue Code*.

The tax treaties usually reduce both the withholding tax rate imposed under the *Income Tax Act* and the branch profits tax rate.

Choosing Between a Canadian Subsidiary and Canadian Branch Operation

Foreign companies doing business in Canada frequently find that using a Canadian-Incorporated subsidiary is best suited to their needs.

There are a number of relevant issues to consider when deciding which entity to use. Non-income tax considerations such as regulatory compliance or the desirability of segregating Canadian assets and liabilities from U.S. assets and liabilities are relevant. Tax considerations to consider include the following:

- the desirability of utilizing any Canadian start-up losses against U.S. income in order to include the losses in the U.S. tax return filings;

"If a Canadian subsidiary is utilized, it is taxable on its worldwide income and taxes are calculated under the rules applicable to Canadian."

- if a Canadian branch structure is utilized, the Canadian branch business is treated as a separate taxable entity. Accordingly, a Canadian income tax return must be filed and a certain amount of disclosure about the U.S. parent will accordingly be necessary;

- if a Canadian branch structure is utilized, the ability to subsequently incorporate the branch on a tax free basis must be considered both from a Canadian and U.S. tax perspective; and

- if a Canadian branch structure is utilized, one will typically pay the higher of the two tax rates of the two jurisdictions.

If a Canadian subsidiary is utilized, it is taxable on its worldwide income and taxes are calculated under the rules applicable to Canadian corporations.

Small Business Tax Rate

The federal small business limit is $500,000. The federal small-business rate was reduced from 10.50% to 10.00% effective 1 January 2018 and has been further reduced to 9.00% effective 1 January 2019.

The benefit of federal small business limit is reduced if taxable capital employed in Canada exceeds $10 million in the preceding taxation year and is eliminated when it exceeds $50 million. This federal small business deduction (SBD) reduction for large CCPCs applies in all provinces and territories. For taxation years beginning after 2018, the federal SBD was further reduced if a CCPC earns passive investment income exceeding $50,000 in the preceding taxation year, and is eliminated when this type of income exceeds $150,000. As of June 2019, Ontario and New Brunswick were the only provinces that had tabled legislation confirming that they would not parallel the federal SBD reduction with respect to passive investment income. The SBD generally applies to Manufacturing and Processing income within the small-business income limit, except in the Yukon, and in certain circumstances in Québec.

Employer Health Tax

All employers in Ontario are subject to the Employer Health Tax ("**EHT**"). It is a payroll tax on remuneration paid to employees and former employees. The purpose of the EHT is to assist in funding the Ontario health care system. An employer must pay EHT if they: (1) have employees who physically report for work at a permanent establishment in Ontario; (2) have employees who are attached to their permanent establishment in Ontario; (3) have employees who do not report to work at any of their permanent establishments however they are paid from or through an Ontario permanent establishment; and (4) have Ontario payroll in excess of the allowable exception amount outlined in this section.

As a result of the COVID-19 pandemic, the Ontario government increased the EHT exemption. Therefore, effective January 2020, the EHT exemption was increased from $490,000 to $1,000,000 of Ontario payroll. The tax rates payable range from 0.98% on total remuneration less than $200,000, to 1.95% for remuneration in excess of $400,000. The rates apply for employees who either report for work at a permanent establishment in Ontario or are paid from a permanent establishment in Ontario. Private sector employers with annual Ontario payrolls over $5 million, including groups of associated employers, are not eligible for the exemption. Registered charities, including those with payrolls over $5 million, are eligible for the exemption.

CHAPTER 8

Custom & Excise Duties

Customs Duties

All goods entering Canada must go through customs inspection at the port of entry, at which time they are valued and duty, if any, is levied. In Canada, customs duties are levied on imported goods under a classification system based on the World Customs Organization's *Harmonized Commodity Description and Coding System*. This system provides for the classification of goods by their essential or intrinsic character, not according to use.

Canada has a self-assessment customs system where importers are responsible for declaring and paying customs duties on imported goods according to the *Customs Act* (Canada). Importers are required to report any errors made in their declarations of tariff classification, valuation or origin when they have reason to believe that an error has been made. This obligation lasts for three years following the importation of any goods. The *Customs Act* (Canada) imposes severe penalties for non-compliance. Documentation accompanying goods must show origin, nature of the goods, their intended use and their value and/or price.

In Canada, customs valuation is based upon the World Trade Organization's Customs Valuation Code which has been incorporated into the *Customs Act* (Canada). There are six (6) methods of valuing goods for duty under the *Customs Act* (Canada). The transaction value is the primary valuation method in respect of imported goods and is the price actually paid or payable for the goods when sold for export to a purchaser in Canada. If the transaction value is not reliable, the following valuation methods are considered:

- transaction value of identical goods;
- transaction value of similar goods;
- deductive value; and
- computed value.

If the valuations are still not satisfactory in the circumstances, the residual basis of appraisal provides for the application of one of the above methods in a flexible manner. The method to be used will be the method that can be most closely applied and the information necessary to apply such method is available in Canada.

The amount of customs duty is determined by reference to the customs tariff which sets out a specific list describing the class of goods and setting out the corresponding rate of duty. The customs tariff is updated yearly, and can be found on the Canada Border Services Agency website. The customs duty rate is determined according to the country of origin of the goods and whether the country falls under a most favoured nation type status.

Free Trade Agreements

CUSMA

In November 2018, Canada, the United States, and Mexico signed the new Canada- U.S.-Mexico Agreement (CUSMA) to replace the North America Free Trade Agreement (NAFTA). Mexico and the United States ratified CUSMA in 2019, and Canada ratified in Q1, 2020.

CUSMA mirrors NAFTA in many respects, and will maintain the tariff-free market access established by NAFTA. NAFTA eliminated tariffs or trade barriers between Canada, the US and Mexico on goods which meet certain "rules of origin" requirements. The NAFTA rules of origin took into account where goods are produced, and what materials are used to produce them. Only originating goods as defined by NAFTA were entitled to receive duty free or tariff reduced treatment. Typically, goods manufactured outside of the United States or Canada or goods manufactured in those countries which did not meet the rules of origin tests relating to the materials and other components used during the manufacturing process did not benefit from NAFTA duty reductions. The nature of the transformation of the goods during the manufacturing process and the direct importation from the United States thereafter without any subsequent processing or assembly outside the United States generally permitted goods to qualify as goods originating in the United States. However, the rules of origin required transformation into a new tariff classification to qualify for the preferential tariff rates under NAFTA. In certain circumstances, some specific goods must meet a minimum regional value content in order to be classified as originating.

Some notable changes which CUSMA has introduced include:

- changes to the rules of origin for automobiles made in Canada, the United States and Mexico;
- an increase in the percentage of Canadian dairy products allowed to be exported by the United States; and
- the introduction of a "sunset clause", which forces the parties to revisit the terms of the agreement after the first six years.

CETA

In 2017, the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) came into force. CETA is a progressive free trade agreement which covers virtually all sectors and aspects of Canada-EU trade in order to eliminate or reduce barriers. With CETA, 90% of EU tariff lines are now duty-free for Canadian goods.

CPTPP

In January 2019, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) entered into force among Canada, Australia, Japan, Mexico, New Zealand, Singapore, Peru and Vietnam. The agreement has not yet entered into force in Brunei, Chile, or Malaysia. The CPTPP, once fully implemented, will form a trading block amongst the 11 participating countries, providing Canada with preferential access to key markets in Asia and Latin America.

As a free trade agreement, CPTPP aims to reduce and, where possible, eliminate tariffs between member countries. Most tariff lines became duty-free when the Agreement entered into force for each CPTPP country. Tariffs on other goods will be eliminated gradually over "phase-out" periods, which differ for each country.

Excise Duties

The *Excise Act, 2001* imposes duties on spirits, wine, beer, tobacco and related products which are manufactured in Canada and includes extensive control provisions relating to the production and distribution of these products. All persons who manufacture these goods in Canada must have a license to do so. Most licensees must provide security of at least $5,000. Excise duties are not applicable to imported goods which are not further manufactured or processed in Canada. However, imported goods of such categories are subject to a special duty under the customs tariff which is equal to the excise duty.

The *Excise Tax Act* imposes excise taxes on both imported and domestic goods at a unit rate for wine and tobacco products and at a proportionate rate to the value for cigars.

The Customs Tariff imposes customs duties equivalent to the excise duties that are applicable to domestically produced goods on alcohol, beer, and tobacco products that are imported.

Anti-Dumping Duties

Pursuant to the *Special Import Measures Act* ("**SIMA**") there are special anti-dumping duties for imported goods sold in Canada at prices which are below the prices in the home market. In addition, where goods sold in Canada are subsidized by the exporting country, a countervailing duty may be imposed. These anti-dumping and countervailing duties may be imposed as additional charges, over and above the normal customs tariffs. SIMA is designed to provide Canadian producers with relief from unfair import competition. The following is a summary of the SIMA.

In order for an anti-dumping duty to be levied, two conditions must be met:

- the Canadian Border Services Agency ("**CBSA**") must have found the imported goods to have been dumped; and
- the dumping of the imported goods must have been found by the Canadian International Trade Tribunal ("**CITT**") to have caused, be causing or be likely to cause material injury to production in Canada of like goods.

Accordingly, if there are no "like goods" produced in Canada, anti-dumping duties cannot be levied.

Dumping occurs when the "normal value" of the imported goods exceeds the "export price". The "normal value" is generally the price at which the exporter sells the goods in its domestic market under competitive conditions to arm's length purchasers comparable to the importer. Where there are no comparable purchasers (i.e. purchasers who are at the same or substantially the same trade level, and who purchase the same or substantially the same quantities, as the importer), the normal value may be derived by adding the goods cost of production, an amount for administrative, selling and other costs and an amount for profit. It may also be derived by reference to the prices at which the exporter sells the goods to importers in third countries.

Generally, "export price" means the lesser of the exporter's sale price of the goods and the price for which the importer has purchased or agreed to purchase the goods after deducting (i) all costs, charges and expenses arising from the exportation of the goods; and (ii) import duties and taxes imposed by Canadian law.

If the normal value exceeds the export price, determined as above, the imported goods will be found to have been dumped.

In 2018, the CBSA implemented the "normal value review" process. Normal value reviews are conducted by the CBSA to ensure that normal values and export prices in place accurately reflect current market conditions. This process gives the CBSA greater flexibility in responding to situations where prices charged in the exporter's domestic market are distorted. The CBSA can also instigate a "re-investigation" of normal values, which is distinct from the normal value review process. Where a "normal value review" is conducted in respect of a single exporter, a "re-investigation" is an administrative procedure which reviews an entire country or market as a whole to update existing normal values, establish values for new exporters and ensure the values in place accurately reflect current market conditions.

Recently, the SIMA was amended to require that the impacts on workers employed in the domestic industry, and any impacts on jobs, be taken into account in determining whether or not there has been material injury to production in Canada of like goods. The following factors may also be considered in the analysis:

- price suppression or erosion of sales by Canadian producers of like goods;
- loss of market share by Canadian producers of like goods;
- reduced utilization of Canadian production capacity; and
- inventory build-ups.

Generally, an anti-dumping inquiry can be commenced by written complaints filed by competitors with the CBSA. If the CBSA is of the view that there is evidence that imported goods are being dumped and material injury to production in Canada of like goods will occur, an investigation may be initiated. Notice of the investigation will be given to the sellers, the purchasers, the government of the country of export, and any Canadian producers who have complained. If a preliminary determination of dumping occurs, the CBSA has the right to impose a provisional dumping duty equal to the "margin of dumping".

The "margin of dumping" is the amount by which the normal value of imported goods into Canada exceeds the export price for such goods. The importer is responsible for payment of dumping duties.

A final determination is thereafter made by the CBSA. At the same time, the CITT is required to commence its inquiry and to hold a public hearing to determine whether or not the dumping is causing, or will likely cause in the future, material injury to production in Canada of like goods.

Counter-vailing Duties

In order for a counter-vailing duty to be imposed, SIMA requires that two conditions must exist: (i) the CBSA must find that the imported goods have been subsidized by a prohibited subsidy; and (ii) the CITT must find that the imported goods have caused, are causing or are likely to cause material injury to production in Canada of like goods. The definition of subsidy includes any financial or other commercial benefit to people engaged in the production, manufacture, growth, distribution, export or import of the goods in issue as a result of a scheme or program provided or implemented by the country of export. If subsidization and material injury have been found, the imported goods will be subject to countervailing duties in the amount of the subsidy.

Pricing Offences

Under the *Competition Act* (Canada) (the "**CA**") price maintenance, price discrimination and predatory pricing are prohibited practices in Canada. The Commissioner of Competition (the "**Commissioner**") and private parties with leave of the Competition Tribunal (the "**Tribunal**") may request that the Competition Tribunal review conduct in question. Under the new civil regime the person must actually engage in the conduct, whereas under the previous criminal provision, attempts to influence were actionable. Additionally, the practice must be determined to have or is likely to have an "adverse effect on competition" in the market. Upon such findings, the Tribunal has the power to order the party to stop engaging in the practice or accept the other person as a customer on usual trade terms.

Even though price discrimination and predatory pricing are no longer subject to civil damage claims under the CA, the Commissioner of the Competition Tribunal is able to seek penalties of the greater of $10 million (or $15 million for subsequent violations) and three times the amount of value derived from the prohibited conduct under the CA's abuse of dominance civil reviewable practice provisions.

The CA mandates, under criminal and civil provisions, that anyone engaged in "telemarketing" must provide full, reasonable and timely disclosure of, among other requirements, the nature of the product or business being promoted, the purpose of the communication, the price of the product, any restrictions that may be imposed with respect to the delivery of the product. These provisions aim to improve the quality and accuracy of marketplace information. There is also now a criminal provision which prohibits the making, or the permitting of the making, of materially false or misleading representations in promoting the supply of a product or a business interest during person-to-person telephone calls. Telemarketers are also prohibited from engaging in certain practices, such as requiring payment in advance as a condition of receiving a prize that has been, or has supposedly been won in a contest or game, or offering a "gift" as an inducement to buy another product, without fairly disclosing the value of the gift. Directors and officers of a corporation may be held personally liable for offences committed by the corporation under these prohibitive provisions. Any person guilty of an offence under these provisions is liable to a fine of up to $200,000 and/or imprisonment. These prohibitive provisions aim to discourage deceptive marketing practices.

"The Competition Act makes it a criminal offence to make a representation to the public that is false or misleading in any material respect."

Misleading Advertising

The CA makes it a criminal offence to make a representation to the public that is false or misleading in any material respect. In addition, representations in the form of statements, warranties or guarantees regarding a product that are not based on adequate or proper testing will also be considered a criminal offence. Finally, making a false or misleading representation regarding the price at which goods will ordinarily be sold is unlawful.

Wage-Fixing and No-Poaching Agreements

Effective June 23, 2023, the Competition Act was amended to add provisions which criminalize wage-fixing and no-poaching agreements.

Packaging and Labelling Laws

There are a number of laws directed at deceptive marketing practices and improving fairness towards consumers in the marketplace. The following review concentrates on consumer products. However, in the event industrial products are exported into Canada, there may be specific rules regarding a particular product.

The *Consumer Packaging and Labelling Act* (Canada) ("**CPLA**") is designed to protect consumers from misrepresentation in pre-packaged products. Retailers, manufacturers, processors and producers of a "pre-packaged product" are required to comply with the CPLA. The CPLA defines "prepackaged products" as any product that is 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. Further, the CPLA defines "product" as any product that is or may be the subject of trade and commerce. This includes both food and non-food items. The CPLA requires that prepackaged consumer products bear accurate and meaningful labelling information to help consumers make informed purchasing decisions.

The CPLA prohibits the making of false or misleading representations, and mandates that certain information appear on the product label, specifically:

a. the identity and address of the person by or for whom the product was manufactured or produced for resale; and

b. the identity of the prepackaged product in terms of its common or generic name or in terms of its function, and

c. such information respecting the nature, quality, age, size, material content, composition, geographic origin, performance, use or method of manufacture or production of the prepackaged product as may be prescribed.

The CPLA requires all prepackaged products to have affixed a label declaring the net quantity of the product in the prescribed form. Generally, information is required to be in both English and French, and must expressly disclose the quantity of the product in metric units as well as the common name of the product and the principal place of business of the person by or for whom the prepackaged product was manufactured.

Certain products are required by the CPLA to be packaged in standardized containers. Toiletries, perfume, peanut butter, wine, cosmetics, and powdered laundry detergent fit within this class of products. This requirement is intended to prevent consumers from being misled or confused by an undue proliferation of container shapes and sizes.

Hazardous Products Act

The *Hazardous Products Act* (Canada) ("**HPA**") regulates the advertising, sale and importation into Canada of hazardous products. The HPA requires suppliers of hazardous products to communicate the hazards associated with their products via product labels and Safety Data Sheets ("**SDSs**") as a condition of sale and importation for workplace use. The Hazardous Products Regulations ("**HPR**") specify the criteria for classifying hazards posed by chemical products and requirements for product labels. The HPR, in addition to the amendments made to the HPA under the Economic Action Plan 2014 Act, No. 1, modified the Workplace Hazardous Materials Information System ("**WHMIS**") to incorporate the Globally Harmonized System of Classification and Labelling of Chemicals for workplace chemicals. The HPR repealed and replaced the Controlled Products Regulations (CPR), and repealed the Ingredient Disclosure List.

The Workplace Hazardous Materials Information System ("**WHMIS**") is Canada's national hazard communication standard for hazardous chemicals used in the workplace. The objective of this national program is to help ensure the protection of Canadian workers from the adverse effects of hazardous products through the provision of relevant health and safety information. WHMIS is implemented through interlocking federal legislation administered by the Department of Health and federal, provincial and territorial occupational health and safety laws.

Textile Labelling Act

The TLA prohibits the making of false or misleading representations, and requires a disclosure statement contained in each label indicating:

- the name of the textile fibre (as such name is prescribed in the Textile Labelling Regulations);
- the percentage of that textile fibre contained in the product by weight;
- the name and address of the person/buyer for whom the article was imported and labelled; and,
- the country of origin of imported articles.

It should be noted that the textile fibre article must bear the label at the point

"Together, the Cannabis Act and the FDA establish strict parameters for the production, possession, distribution, and sale of health products containing cannabis. "

of sale and the permanency of such labels depends on the type of article.

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In certain cases, consumer textile articles may be imported to Canada without a disclosure label, provided that a sample of the article and certain specified information regarding the article is delivered to a federal government inspector at the port of entry on or before the importation. However, before the imported article may be sold in Canada, the dealer must apply a disclosure label, notify the federal inspector that this has been done, and provide the inspector with a reasonable opportunity to inspect the article.

Regulations pursuant to the TLA exempt a number of articles from labelling requirements. As well, certain other sales are exempt where articles are made in compliance with specifications supplied by the buyer and the articles are not intended for resale.

Food and Drugs Act

The *Food and Drugs Act* (Canada) ("**FDA**") regulates the advertising, importation and sale of certain foods, cosmetics, drugs, therapeutic products and medical devices. Advertising with respect to certain products listed in a schedule to the FDA is prohibited. These prohibitions relate to advertising of certain foods, drugs, cosmetics and medical devices for illnesses such as alcoholism, cancer and heart disease. The definition of food contained in the FDA is broad enough to include chewing gum and ingredients that may be mixed with food for any purpose.

In certain cases, a food may become a drug for the purposes of the FDA if medicinal claims are being made in connection therewith. Such claims must be substantiated through scientific study and a pre-approval process through the Health Protection Branch of the Department of Health and Welfare.

Further, the FDA contains stringent standards for the preparation of food and drugs, and has regulations regarding the labelling, advertising and packaging of foods, drugs, cosmetics and medical devices. The federal Food and Drug Regulations were amended in 2014 to add five labelling and packaging requirements for non-prescription and prescription pharmaceutical and biologic drugs for human use, including:

- understandable plain language be used on labels;
- contact information be placed on labels;
- labels for non-prescription drugs include a standard format table of important information;
- drug submissions include mock-ups of labels and packages; and
- drug submissions include evidence that the

drug would not be confused with another drug due to similar names.

FDA and the Cannabis Act

In October 2018, Canada's Cannabis Act came into force to regulate and control the production, distribution, sale and possession of cannabis across Canada. The Cannabis Act maintains a partnership with the FDA for regulating health products, achieving the distinct objectives of two pieces of legislation in a coordinated way. Together, the Cannabis Act and the FDA establish strict parameters for the production, possession, distribution, and sale of health products containing cannabis.

For greater clarity, products containing cannabis can be considered to fall into one of three different categories:

- Cannabis for non-medical purposes - obtained from provincially and territorially licenced sellers, with no health claims or pre-market review for safety and efficacy
- Cannabis for medical purposes - obtained via a health care practitioner's authorization for human use, with no health claims or premarket review for safety and efficacy
- Health products containing cannabis or for use with cannabis - products, such as prescription drugs and medical devices, that are marketed with health claims and subject to a premarket authorization by Health Canada

Health products containing cannabis or for use with cannabis remain subject to a number of requirements under the FDA to ensure appropriate controls for safety, efficacy, and quality, while separate requirements under the Cannabis Act protect against risks to public health and safety, including diversion to the illegal market.

The Cannabis Regulations establish a framework that allows existing health products containing cannabis or for use with cannabis to remain on the market. These regulations complement existing pathways under the FDA for the review and approval of new health products. A dual-licencing regime has been established between the FDA and the Cannabis Act to meet the objectives of the Cannabis Act. From a patient perspective, Canadians will continue to be able to access prescription drugs containing cannabis in the same way as they do now: through a prescription filled by their pharmacist.

New regulations for edible cannabis, cannabis extracts and cannabis topicals came into effect in October 2019, which made these products available for purchase by Canadians in December of 2019.

Consumer Protection Legislation

Most of the jurisdictions in Canada have enacted Consumer Protection Legislation. The increased use of technology and the evolution of the internet in the business world has increased the need for added consumer protection. As such, some jurisdictions in Canada have enacted new Consumer Protection Legislation to provide customers with certain rights.

For example, Ontario's *Consumer Protection Act* gives consumers the right, among other things, to:

- refuse to pay for goods or services that they did not request (negative-option billing);
- obtain the same protection when buying or leasing services, as when buying or leasing goods;
- receive goods or services within 30 days after they are promised in agreements, or get a refund
- cancel agreements due to unfair business practices within one year;
- receive written contracts for goods or services worth more than $50 to be delivered or paid for in the future;
- cancel "direct agreements", which are consumer agreements that are negotiated or concluded in person, at a place other than a place of business, without any reason within a cooling period of 10 days after the date the consumer received the written copy of the agreement;
- full disclosure about the cost of long-term leases and interest on purchases in agreements;
- obtain the same protection for online agreements as all other types of agreements;
- obtain final cost estimates of no more than 10 per cent of the original agreed estimate for home renovations or moving services; and
- cancel timeshare and vacation club agreements, for any reason, within 10 days after receiving a written copy of the agreement.

In 2017, the Province of Ontario legislated the *Putting Consumers First Act*, which includes amendments to the Consumer Protection Act that will prohibit most "direct agreements" for prescribed products. For some prescribed goods and services, such as HVAC services, direct agreements are no longer considered valid under the CPA.

Ontario also legislated the *Protecting Awards Points Act*, regulations to which were recently put into place to ban the expiry of awards points programs. This ban is retroactive to any points earned at any time which expired between October 1, 2016 and January 1, 2018.

Failure to comply with the consumer protection legislation can be quite costly as there are maximum fines of up to $50,000 for individuals and $250,000 for corporations. Violating individuals can be sentenced to jail for up to two years less a day.

Natural and Non-Prescription Health Product Directorate

The Natural and Non-prescription Health Product Directorate ("**NNHPD**") under Health Canada, regulates products containing vitamins, minerals, herbals and other natural products, ensuring consumers are not misled in any way. Natural health products (NHPs) are defined in the Regulations as vitamins and minerals, herbal remedies, homeopathic medicines, traditional medicines such as Traditional Chinese Medicines, probiotics, and other products like amino acids and essential fatty acids. Formerly the Natural Health Product Directorate (NHPD), it has been renamed the NNHPD subsequent to its expanded mandate to include the oversight of non-prescription and disinfectant drugs in addition to NHPs.

Under the Regulations the product must be safe for consideration as an over-the-counter product. Natural health products are available for self-care and self-selection, and do not require a prescription to be sold. Products requiring a prescription will continue to be regulated under the Food and Drug Regulations.

To be legally sold in Canada, all NHPs must have a product licence, and the Canadian sites that manufacture, package, label and import these products must have site licences. To get product and site licences, specific labelling and packaging requirements must be met, good manufacturing practices must be followed, and proper safety and efficacy evidence must be provided.

Cannabis has been excluded as a Natural Health Product Substance under the Natural Health Product regulations, unless the cannabis is a derivative product made from a derivative that is exempt from the application of the Cannabis Act that does not contain psychoactive compounds, i.e. hemp products.

CHAPTER 9

Intellectual Property Legislation

This chapter is an overview of Canada's laws in the areas of trademarks, copyright, patents and industrial designs.

Trademarks

Trademarks in Canada are governed by the *Federal Trademarks Act* (the "**FTA**"). The Trademarks Office of the Canadian Intellectual Property Office (the "**Trademarks Office**") is responsible for the Federal registration of trademarks.

Under the Act, the definition of "trademark" is:

- a sign or combination of signs that is used or proposed to be used by a person for the purpose of distinguishing or so as to distinguish their goods or services from those of others, or
- a certification mark which means a sign or combination of signs that is used or proposed to be used for the purpose of distinguishing or so as to distinguish goods or services that are of a defined standard from those that are not of that defined standard, with respect to:
- the character or quality of the goods or services,
- the working conditions under which the goods are produced or the services performed,
- the class of persons by whom the goods are produced or the services performed; or
- the area within which the goods are produced or the services performed.

Further, under the FTA, "sign" is defined to include a word, a personal name, a design, a letter, a numeral, a color, a figurative element, a three-dimensional shape, a hologram, a moving image, a mode of packaging goods, a sound, a scent, a taste, a texture and the positioning of a sign.

These expanded definitions have resulted in expanded protection of trademarks in Canada.

All trademarks, whether registered or unregistered, when used in Canada for goods and/or services and which possess goodwill in Canada can be protected through passing off and/or unfair competition causes of action. That protection for unregistered trademarks is usually limited to the geographical area in Canada in which such goodwill is established. If the trademark is federally registered with the Trademarks Office, there is an infringement cause of action available to protect the mark throughout Canada. Such litigation is usually commenced in the Federal Court of Canada.

The FTA defines trade name to mean the

"If a foreign corporation/ owner grants rights to use or sell a product or perform a service in association with a trademark to a licensee, it should register the trademark in Canada."

name under which any business is carried on, whether or not it is the name of a corporation, a partnership or an individual. A trade name may be protected in the same manner as an unregistered trade mark. It may also be protected as a trade mark if it used as a trademark in Canada.

Registration of a trademark is initiated through an application to the Trademarks Office. The foreign corporation/owner may apply for the registration of a trademark in Canada either directly through the Trademarks Office or through the Madrid Protocol which allows the applicant to file a single "international" application for a mark. The applicant in an international application filed through the Madrid protocol can designate Canada.

Registration gives the Registrant the exclusive right to use the mark across Canada in connection with the goods and services for which it is registered, for a period of 10 years. To maintain trademark rights, renewal fees must be paid every 10 years. Under the Act, cancellation proceedings may be initiated (three years after the registration date) before the Trademarks Office to cancel the registration for failure of the registrant to use the mark. It is also possible to commence expungement proceedings in the Federal Court to cancel the registration of the mark.

One trademark registration can be obtained for a trademark for multiple classes of goods and services, without the need to show any use of the mark in Canada. A foreign corporation/owner may register a trademark in Canada, even if it is not carrying on business in Canada, since there is no requirement to allege or show use of the trademark in order to obtain registration.

The Registrant should ensure that the trademark is used and displayed in the form that the trademark is registered. The owner of the trademark, whether the mark is or is not registered, should control how the mark is used whether by itself or any licensee. For example, using a trademark as a generic name for a product or service could be fatal to the validity and enforceability of the trademark and any registration for it.

If a foreign corporation/owner grants rights to use or sell a product or perform a service in association with a trademark to a licensee, it should register the trademark in Canada. Whether such trademark is registered or not, the foreign/owner should enter into a written trademark license agreement (a bare assertion of a license or control may not be sufficient to maintain the validity of the mark). The terms of this agreement should deal with the requirements of the Act (Section 50) and control the use of the mark during the term of the agreement and upon termination. The agreement should clarify the right of each of the parties to enforce the trademark in Canada. Even if the user is a related entity, it is best to have a written agreement to show that use of the mark is being controlled.

A trademark is not registerable if it violates certain sections of the Act, such as Section 12. For instance, a trademark is not registrable if it is clearly descriptive or deceptively misdescriptive of the character or quality of the goods or services or of the place of origin of the related goods or services or the conditions of or the persons employed in the production of such goods or services. Trademarks are also not registerable if their use would be likely to cause confusion with a registered trademark. As well, any member of the public may oppose the application for any trademark advertised in the Trademarks Journal by the Trademarks Office. The grounds of opposition often include the Opponent's prior use and/or registration of its marks and names since the Opponent may take the position that the use and registration of the applied for mark is likely to cause confusion with such marks and names.

There is no requirement in the Act to give public notice of the trademark. However, giving such public notice may be beneficial in respect of the ownership, validity and enforceability of the mark. Such public notice may be as follows:

- For the marks for which the foreign corporation/owner has a registration in Canada for the goods and services (as set out in each registration) – display the ® to the right of the trademark (either upper or lower); and
- For the marks for which the foreign corporation/owner has no registration or pending application or for which it has filed a trademark application (which is not yet registered) - display the ™ to the right of the Trademark (either upper or lower).

In addition, when a licensee uses a trademark, it should give public notice of the identity of the owner of the mark and that the use of the mark is a licensed use (in compliance with Section 50 of the Act).

Before adopting, using or registering a trademark in Canada, the foreign corporation/owner should conduct trademark clearance searching to ensure that the mark is available for adoption, use and registration for the goods and services at issue.

Furthermore, the Act includes provisions that focus on counterfeiting and the international trade in counterfeit goods and introduces new remedies and criminal offences for those possessing and/or dealing in counterfeit goods.

There are French language laws in the province of Québec in Canada which affect the adoption and use of trademarks other than in the French language. Registration of the mark federally with the Trademarks Office may be beneficial since there are certain exceptions in that province to the display and use of such registered marks.

For certain products for sale in Canada, such as tobacco, cannabis, etc. there are packaging requirements and stringent marketing and advertising restrictions on the use and display of trademarks in Canada.

Copyright

The *Copyright Act* provides a legal right that extends to any original literary, dramatic, musical and artistic work which protects the expression of original ideas. It can also subsist in other works such as sound recordings, broadcast signals and performers' performances. Copyright includes the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof. Copyright arises upon the creation (expression) of a particular work and generally subsists for the life of the author/creator, the remainder of the calendar year in which the author/creator dies and, pursuant to recent amendments by way of Bill C-19, the Budget Implementation Act, 2022, No. 1, a period of 70 years following the end of that calendar year (an increase from the previous 50 year term of protection). The Copyright Office of the Canadian Intellectual Property Office (the "**Copyright Office**") is responsible for the Federal registration of copyright.

Copyright exists in an original work, namely a work that has not been copied from another work or source.

Copyright is automatic in Canada in that it exists from the time of creation of the work by the author/creator. Registration of the copyright is not required but there is a Federal copyright registry system in Canada. Registration is evidence that a work is protected by copyright and that the registrant is in fact the owner of the copyright. Registration is no guarantee that a claim of ownership will eventually be recognized as legitimate. A copy of the work cannot be filed with the Copyright Office so the actual work covered by the registration may be an issue.

A copyright owner can bring an action for infringement against any person who, without the consent of the owner, copies the whole or a substantial part of a copyrighted work, or sells, leases, distributes, exhibits by way of trade or imports for sale or hire into Canada any work that to his/her knowledge infringes copyright or would infringe copyright if it had been made in Canada.

If an infringer was not aware of or did not have reasonable grounds for suspecting the subsistence of the copyright, the infringer may only be subject to an injunction in respect of infringement. However, if an infringer had knowledge of, or reasonable grounds for suspecting the subsistence of the copyright, a copyright owner is also entitled to damages, disgorgement of profits, an order for the detention of imported infringing copies, recovery of infringing copies and/or legal costs.

A copyright owner may elect, at any time before final judgment, to recover, instead of damages and profits referred to above, an award of statutory damages for all infringements involved in the proceedings, with respect to any one work or other subject-matter, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $500 or more than $20,000 as the court considers just. When a copyright owner makes such an election and, if the defendant satisfies the court that he/she was not aware and had no reasonable grounds to believe that he/she had infringed copyright, the court may reduce the amount of the award to less than $500. An election for statutory

"For certain products for sale in Canada, such as tobacco, cannabis, etc. there are packaging requirements and stringent marketing and advertising restrictions on the use and display of trademarks in Canada."

damages does not affect any right to be awarded exemplary or punitive damages.

Canadian copyright law includes various defences to infringement including certain fair dealing with the work for certain purposes.

Canada is a signatory to the Berne, Universal Copyright and Rome Conventions and a member of the WTO and has acceded to the principal multilateral treaties seeking to harmonize copyright protection around the world. Pursuant to these conventions, Canada recognizes copyright in works created by nationals of other signatories to the conventions. Therefore, foreign owners of copyright may enforce such copyright in Canada.

Authors of copyrighted works own moral rights associated with the works. Moral rights arising under the Copyright Act include the right to the integrity of the works, the right to attribution of authorship in the works, the right to restrain any distortion, mutilation or other modification of such works and the right to prohibit any use of any such works in association with a product, service, cause or institution that may be prejudicial to the author's honour or reputation.

The concept of "work made for hire" does not exist in Canada. Generally, the author is the first owner of copyright. The Copyright Act does have a section dealing with the creation of works by employees – in certain circumstances the employer may be the first owner of copyright in the work if there is not an agreement to the contrary.

Copyright can be assigned in whole or in part. However, the assignment must be in writing and signed by the copyright owner. Also, the same is the case to have a valid exclusive license. While a written agreement is best, a non-exclusive license need not be in writing. Moral rights may not be assigned. The author may waive the moral rights – again it is preferable for the waiver to be in writing.

The Copyright Act includes a statutory regime for copyright collectives which operate in Canada and which deal with many of the copyright rights under the act.

The Copyright Act deals with technological protection measures - a TPM is essentially a "digital lock". It is defined as any technology, device or component that controls access to a work or prevents certain uses of a work. A TPM is placed on a device, file or disc to allow the content creator to control how the content will be used and to help prevent piracy. This includes encryption software that is found on certain DVDs.

The Notice and Notice regime under the Copyright Act requires that an Internet intermediary (such as an Internet Service Provider) forward on notice from a copyright owner to an Internet subscriber, alerting the subscriber that the Internet account has been linked to alleged infringing activity, such as the illegal downloading of a movie. A notice of such infringement that contains an offer to settle, or a request or demand for payment or for personal information, or a reference to any such offer, request or demand, in relation to such infringement, does not comply with this regime.

Patents

Under the *Patent Act* (the "**PA**"), the first applicant to file an application in respect of an invention will be entitled, subject to certain qualifications, to the grant of a patent. The patent once issued provides the owner with an exclusionary right to the invention covered in the claims of the patent. The Patent Office of the Canadian Intellectual Property Office (the "**Patent Office**") is responsible for the Federal issuance of patents.

Without a patent, inventions can only be protected as trade secrets, and if the invention is published or otherwise available (and knowable) through being placed in the market, such protection will no longer be available. Further, public disclosure of an invention prior to the filing of the application may bar the grant of a patent. There is a one-year grace period whereby a patent application can be filed within 12 months of a public disclosure of the invention provided that the disclosure is made by the inventor or someone who learned of the invention from the inventor. A patent application is normally made public 18 months after filing by the Patent Office.

To be patentable, an invention must be novel (new), useful (workable) and inventive (showing ingenuity and not obvious to a person skilled in the art or science to which the invention relates). "Invention" is defined as any new and useful art, process, machine, method of manufacture or composition of matter or any new and useful improvement thereof. There must be at least one new and inventive element to the invention or improvement.

Patent protection in Canada may not be available, even if it may be in other jurisdictions. Protection is not available for scientific principles or abstract theorems. There are obstacles to protecting business methods and computer implemented inventions. Methods of medical treatment are not patentable in Canada but claims to medical uses may be patentable. Higher life forms are not patentable but claims directed to unicellular life forms having a distinctive characteristic may be patentable. It is recommended to seek advice from a Canadian patent agent to ensure that a Canadian patent application meets the requirements of the Act and the office practices of the Patent Office.

Patent applications must be filed with the Patent Office in a particular form, identifying the inventor(s). Also, there are prosecution differences in Canada which may limit the claims or the process to issuance. The applicant must request examination of the application by the Patent Office. The application may include independent and dependent claims. Also, Canada has a "small entity" designation for universities and applicants employing 50 or fewer employees which provides for reduced filing, examination, and maintenance fees. For

"Patent protection applies in the country that issues the patent and gives the patent holder the exclusive right to make, construct, use and sell the invention. A patent issued in another jurisdiction is not enforceable in Canada."

applications for which examination is requested on or after October 2, 2022, (i) excess claim fees are payable for claims in excess of 20 included in the application and (ii).pProsecution is closed if the application is not allowed after two office actions. Prosecution can be continued by requesting continued examination and paying the applicable fee.

The inventor owns the patent rights unless there has been a transfer or assignment. Usually, inventions created in the course of employment when the inventor is employed to invent are owned by the employer. The employer, however, should ensure that a written assignment is executed by the inventor. An invention and patent applications and issued patents therefor can be assigned or licensed in whole or in part. Such assignments should be recorded with the Patent Office.

Patent protection applies in the country that issues the patent and gives the patent holder the exclusive right to make, construct, use and sell the invention. A patent issued in another jurisdiction is not enforceable in Canada. For applications filed on or after October 1, 1989, the period of protection is 20 years from the date of filing. Further, to maintain an application or patent having a filing date after October 1, 1989, annual maintenance fees must be paid, as prescribed by the Patent Rules.

The patent provides an infringement cause of action against third parties infringing the invention claimed in the patent. Such litigation usually is commenced in the Federal Court of Canada, although the patent is also enforceable in the courts in the provinces.

The PA aims to harmonize national patent formalities throughout the world. Canada is a signatory to the Paris Convention on the Protection of Intellectual Property and to the principal multilateral treaties. These enable patents filed in one member state to be filed in another member state within one year and obtain the same application priority filing date.

Although not a legislative matter, the Patent Prosecution Highway program between the Patent Office and other patent offices of partner countries enables applicants whose claims have been found to be patentable by such offices to request accelerated processing of their corresponding applications that are pending before the other offices. This can be used to streamline examination of the patent application in Canada. There can also be accelerated examination pursuant to a "Special Oder", based on the prejudice to the applicant's rights if there is a failure to advance the examination.

As to protesting the grant of a patent, there is no interference or opposition procedure in Canada. There is a "protest" procedure permitting a third party to provide information to the Patent Office with a view to preventing the patent being issued. It is however a limited procedure.

Industrial Design

The *Industrial Designs Act* (the "**IDA**") defines "industrial designs" as "features of shape, configuration, pattern or ornament and any combination of those features that, in a finished article, appeal to and are judged solely by the eye". In contrast to copyright and trademark protection but like patent protection, industrial designs must be registered with the Industrial Design Office of the Canadian

Intellectual Property Office ("**the Industrial Design Office**") for the owner to be able to make a legal claim of ownership and to secure legal protection for the design. The visual aspects of the design in the finished article serve to attract a consumer's eye. Functional features, ideas, materials, methods of use and methods of construction are not covered by the industrial design registration.

The Act permits the owner of the industrial design registration to prevent others from making, importing, selling and renting of articles which incorporate the design or a substantially similar design.

Only the proprietor of a design may apply for and obtain registration for an industrial design with the Industrial Design Office. The proprietor may be the author of the design, the person who contracts the making of the design under a contract or an employer when the employee makes the design in the course of employment. It is best to enter into a written agreement to assure that the ownership is clear, as between such parties.

The design must be novel as of the filing date of the application. The design cannot be publicly available anywhere in the world, but there is a one-year grace period in respect of certain disclosures. A priority claim can be made if a prior application was filed in a qualifying jurisdiction within the previous 6 months.

Registration of an industrial design grants the proprietor the exclusive right to make, import for the purpose of trade or business, or sell, rent or offer or expose for sale or rent, any article in respect of which the design is registered and to which the design or a design not differing substantially therefrom has been applied (which includes the right to do, in relation to a kit, anything that would constitute an infringement if done in relation to an article assembled from the kit). Remedies other than an injunction are not available if the defendant was not aware, and had no reasonable grounds to suspect, that the design was registered. Notice can be given by marking of articles with a design registration notice.

The term of the registration for the design is from the date of registration to the later of 10 years from the registration date and 15 years after the filing date. Once the term has expired, any member of the public is free to make, import, rent or sell etc., the industrial design in Canada.

New industrial design applications are made available to the public on the earlier of the registration date and the date that is 30 months after the filing date (or the priority date). The applicant must request a deferral of registration to defer publication, since the application will proceed to registration without notice to the applicant.

The applicant in an international industrial application filed through the Hague System can designate Canada.

There is a connection between copyright and industrial design protection. As set out herein, copyright protects artistic designs but copyright may cease upon the production of 50 or more articles incorporating the design. Industrial design protection would be necessary to protect the design. Otherwise, protection of the design may not be possible or be difficult to enforce under such causes of actions as passing off or unfair competition.

CHAPTER 10

Investment Incentives

There are several types of investment incentive programs that are designed to assist investment in new Canadian business initiatives. Various levels of government have direct and indirect assistance programs. Assistance programs can involve capital grants, loans or even job training supplements. Further, a tax credit system has been established which may effectively permit acceleration of deductibility for capital expenses which might otherwise only be amortized over an extended period.

Program Requirements

Eligibility for most direct incentive programs is often limited to companies incorporated under federal or provincial laws. Capital grants are generally available only for manufacturing or processing projects. Various provinces have targeted industry segments such as tourism projects for eligibility for an indirect capital grant which gives a rebate to shareholders taking minority positions. Labour sponsored venture funds provide a new source of venture capital in Ontario by providing individual investors with tax credits to encourage investment. A large pool of capital has been raised by this method for investment in Ontario. Some municipalities provide incentives for locating a new enterprise within their boundaries. These are negotiated on an individual basis.

Often government assistance is available only where it is demonstrated that traditional private sector financing cannot be obtained. Accordingly, unless a project is industry specific or designed to be implemented in a geographical area designated as eligible for assistance, an applicant for assistance often walks the fine line of asserting a project's viability while demonstrating that no financial institution will provide the necessary funds.

Export Financing and Marketing

Export Development Canada ("**EDC**") is a federal crown corporation which has programs to encourage domestic producers of goods and services to expand beyond Canadian borders. EDC's mandate is to grow and develop Canada's trade, and the capacity of Canadian companies to participate in and respond to international business opportunities. Most of EDC's program relate to guarantees of foreign receivables and risk insurance for Canadian exporters. EDC also offers loans to foreign purchasers of Canadian goods. EDC operations are not intended to be grant programs. Accordingly, EDC charges interest and fees similar to other financial institutions. However, many local banks do not like to margin or provide credit for foreign receivables so EDC's programs are a worthwhile alternative.

Other Programs

CanExport

The CanExport funding program is a funding program through the Trade Commissioner Service of the federal government of Canada which provides grants as follows:

- **CanExport SMEs** provides grants as well as personalized advice to Canadian small and medium sized enterprises (SMEs) to help SMEs enter international markets;
- **CanExport Associations** provides grants to Canadian national industry organizations to allow them to pursue

international business development;

- **CanExport Innovation** provides funding and advice to help Canadian organizations develop R&D collaborations and commercialize new technologies through partnerships in foreign markets; and

- **CanExport Community Investments** provides funding and support to help Canadian communities and non-profit, locally based organizations attract, retain and expand foreign direct investment.

The Canadian International Innovation Program (CIIP) promotes international collaborative research and development between Canada and Israel, India, China and Brazil and South Korea. The program is intended to support bilateral research projects with commercialization potential through a seed fund.

National Research Council of Canada manages the Industrial Research Assistance Program, where financial support for a portion of salary and contractor costs associated with a project. To be eligible a company must be a small or medium sized enterprise in Canada, have less than 500 full time employees and have the objective of commercializing a new or innovative technology driven product.

Venture Capital Action Plan

In 2013, the Government of Canada created the Venture Capital Action Plan (VCAP) to encourage investment in start-ups by private companies, and in doing so, to create a more sustainable and effective venture capital financing system in Canada. To implement this objective, VCAP partners with institutional and corporate strategic investors to close the investment gap in Canadian innovation. Through the VCAP initiative, the Government of Canada has deployed $390 million to establish and recapitalize large scale, private sector-led funds in partnership with some provinces, institutional investors and strategic corporate investors. VCAP has also made $50 million available to some existing high performing venture capital funds in Canada.

Tax Incentives

Investment incentives also come in the form of tax credits available to companies to offset income generated in Canada. The Scientific Research and Experimental Development (SR&ED) Tax Incentive Program allows Canadian-controlled private corporations (CCPCs) a refundable income tax credit at the enhanced rate of 35% for the first $3 million of current qualifying SR&ED expenditures. Non-CCPCs can earn a non-refundable income tax credit at the basic rate of 15% on qualified SR&ED expenditures. Individuals and trusts can earn a refundable income tax credit at the basic rate of 15% on qualified SR&ED expenditures. To qualify for SR&ED the respective activities must include systematic investigations carried out in a field of science or technology that is basic or applied research or experimental development, including work with respect to engineering, design, operations research, mathematical analysis and testing.

The Ontario Innovation Tax Credit is a refundable tax credit of 8% on qualified expenditures on Ontario scientific research and experimental development. The Ontario Business-Research Institute Tax Credit offers a 20% refundable tax credit for scientific research and development in Ontario under an "eligible contract with an eligible research institute."

Film or Production Services Tax Credit Program

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

CHAPTER 11

Immigration Restrictions for Non-Canadians

“To be entitled to work in Canada, a non-resident must either become a permanent resident, or obtain a valid employment authorization, which is commonly referred to as a work permit.”

Labour Market Impact Assessments

Where work permits are required, a Labour Market Impact Assessment (“**LMIA**”) may be required, where an exemption to LMIA does not exist. In such situations, the Canadian employer will have to demonstrate that recruitment efforts have been made to find a Canadian or permanent resident for the job and hiring a foreign worker is the only option. The Employment and Social Development Canada (“**ESDC**”) office processes the LMIAs and considers factors such as prevailing wages for the occupation, labour shortages, company layoffs, and transition plans. Initial work permit applications should be made to a Canadian consulate or embassy outside of Canada, or at a port of entry into Canada if the applicant is visa exempt.

The position in Canada may also be exempt from an LMIA. For example, an exemption exists for employees of a related business outside of Canada who are transferred on a temporary basis to a Canadian branch to work at a senior executive level or specialized knowledge position.

If a work permit is obtained for Canada, the applicant will receive remuneration from a Canadian source. The holder of the work permit will thereby be required to file Canadian tax returns. In addition, all workers having work permits are entitled to receive temporary Canadian social insurance numbers. These social insurance numbers begin with the number 9, indicating that the individual does not have landed immigrant status in Canada.

Temporary Entry

To be entitled to work in Canada, a non-resident must either become a permanent resident, or obtain a valid employment authorization, which is commonly referred to as a work permit. To obtain landed immigrant status, all requirements for immigrating into Canada must be satisfied. NAFTA significantly relaxed the immigration rules for many American and Mexican citizens coming to Canada to work on a temporary basis.

CUSMA

With respect to foreign nationals working in Canada, CUSMA does not differ from NAFTA. CUSMA provides for a grant of temporary entry to a business person who falls into any of the following categories:

- Business Visitors;
- Intra-Company Transferees;
- Professionals; and
- Trade and Investors.

There are a number of other free trade agreements that allow for applicants to apply for temporary entry to Canada, including the CPTPP and agreements with the EU, Peru, Chile and Columbia.

Business Visitors

There are a few types of business activities for which certain classes of persons ("**Business Visitors**") do not require a work permit for entry into Canada. These persons typically stay in Canada for a period of time ranging from a few days to several weeks. They must demonstrate that they intend to stay for less than six months and have no intention of entering the labor market. They must also demonstrate that their business profits will occur outside of Canada, and that their main source of income is located externally. These persons include:

- individuals coming into Canada to purchase goods for their own country or corporation which carries on business outside of Canada;
- individuals entering Canada for the purposes of acquiring training or familiarization with goods or services purchased in Canada;
- sales representatives of a foreign business who enter Canada to sell goods for that business, but who will not be making such sales to members of the public;
- permanent employees of a corporation carrying on business outside of Canada who are entering Canada for the purpose of consulting with other employees or members or inspecting a Canadian branch office or headquarters; and
- individuals entering Canada as trainees to Canadian parent or subsidiary corporations where the trainees will not be actively engaged in the production of goods or services.

Business Visitors are not permitted to engage in hands-on work or directly interact with the general public for business purposes. In addition, they are not allowed to receive their primary source of remuneration from a Canadian source. They are however allowed to receive expense allowances or other expense reimbursements related to temporary stay. No management or supervisory functions may be performed.

Documentation should be provided which will satisfy the inquiries of officials at ports of entry and assure them that both the individual seeking entry, his U.S. employer and, if applicable, the Canadian corporation involved are aware of the limitations on the services which the individual is permitted to perform.

Highly Skilled Workers and Researchers

Non-residents can also work short term in Canada under the Global Skills Strategy. Under this strategy, highly skilled workers and researchers do not need work permits for short term work. To qualify as a highly skilled worker or researcher under the strategy, the work must meet certain requirements under the National Occupation Classification ("**NOC**"), and must engage the worker for specific time allotments. Specifically, highly skilled workers must have a job under the Training, Education, Experience and Responsibilities (TEER) categories 0 (management occupations) or 1 (occupations that usually require a university degree) of the NOC, and can only work for up to 15 consecutive days once every 6 months or up to 30 consecutive days once every 12 months. Researchers must perform research at a Canadian, publicly funded, degree-granting institution or its affiliated research institution, and work for 1 period of 120 days in Canada once every twelve months.

Intra-Company Transfers

NAFTA broadened the opportunity for people to enter into Canada pursuant to an intra-company transfer. Intra-company transfers occur where foreign corporations second individuals to a Canadian parent, subsidiary branch or affiliate. To obtain a work permit, the individual must be a citizen of the United States or Mexico and have worked for the foreign corporation continuously for one year out of the proceeding three years prior to seeking entry into Canada. In addition, the individual must be either a manager or executive, or have specialized knowledge particular to the corporation. Such a work permit will be issued for a one to three year period and can be extended from within Canada for up to five years. This remains pathway remains available under CUSMA.

In order to obtain an intra-company transfer work permit, there are a number of documents which should be prepared for review prior to entry or upon entry into Canada. They include the following:

- Correspondence from the individual's employer setting out the applicant's present position and length of service with the corporation;
- Correspondence from the foreign employer's lawyers setting out the legal relationship between the current employer and the potential Canadian employer;
- Correspondence from the Canadian employer setting out the position and expectations of the transferee;
- Correspondence from a Canadian lawyer setting out the legal basis for entry under the Immigration Act and any Free Trade Agreement provisions supporting the application;
- A resume or curriculum vitae of the

applicant setting out his or her professional experience for those seeking entry under the "specialized knowledge" category;

- Proof of U.S. or Mexican citizenship; and
- All appropriate fees.

It should be noted that an intra-company transfer will not permit permanent entry into Canada. Similarly, the work permit issued to an applicant in an intra-company transfer will not permit his or her spouse or any other members of the immediate family to obtain employment in Canada.

Professionals

Certain professionals may be eligible to enter Canada for employment after obtaining an offer of employment from a Canadian employer, provided that employment is on a list of professions targeted for special treatment by CUSMA. These professions are listed in Appendix I of Chapter 16 of CUSMA and include engineers, accountants and computer systems analysts for example. Initial work permits can be granted for durations up to three years. So long as an individual continues to comply with the requirements under this category, extensions of up to three years can continue to be granted, with no limit on the number of extensions. Such a work permit does not exempt the applicant from having all relevant Canadian qualifications, certifications and licences which are required for practice in any particular Canadian jurisdiction.

Trade and Investors

As a general rule, this category receives scrutiny from the immigration authorities and involves applying at a visa office (rather than simply at the port of entry) to obtain approval. Entry under this category should only be sought after obtaining legal assistance in the completion of the application process, which often involves provision to the immigration authorities of substantial financial statements and other information.

Permanent Residents

Permanent residents are not yet Canadian citizens, but have the opportunity to apply for citizenship. To enjoy permanent resident status, a person must have been in Canada for at least 730 days in the last five years, which days do not have to be continuous. They remain citizens of their native countries, yet concurrently possess rights and privileges in Canada. They must pay Canadian taxes. In 2021, the federal government planned to welcome 401,000 new Permanent Residents to Canada. For 2022 and 2023 these numbers are 411,000 and 421,000 respectively.

Anyone can apply to Canada. However, in the case of married applicants, both spouses are required to complete the application for permanent residence. All dependents 19 years of age and over must complete and file a separate application. There are three relevant generally admissible classes:

- Family class;
- Economic Immigrant class; and
- Refugee class.

Family Class

Family class involves a sponsorship by a close relative who is at least 19 years old and is currently living in Canada as a landed immigrant or citizen. Individuals in the family class must meet basic standards of good health and character. The sponsoring relative must sign an undertaking of support for a period of between three and ten years. The sponsor must also establish that he or she has the financial wherewithal to provide shelter and maintenance for the applicant and his or her accompanying dependents.

Applicants who may qualify to be sponsored under the family class include spouses, common-law or conjugal partner, or dependent children, brothers, sisters, nephews, nieces and orphaned grandchildren can be sponsored if they are under the age of 18 and not married or in a common-law relationship. The Government of Canada has a low target of accepting 100,000 applicants and a high target of 118,000 applicants through family sponsorship in 2023.

In an effort to reduce the number of spousal sponsorships that occur through "marriages of convenience" (relationships that are strictly entered into so that a spouse can become a Canadian permanent resident and that end shortly after the sponsored person arrives in Canada), Citizenship and Immigration Canada has in place legislation which applies to spouses, common-law or conjugal partners in a relationship of two years or less with their sponsor and who have no children in common at the time they submit their sponsorship application. From the day on which they receive their permanent resident status in Canada, the sponsored spouse must cohabit in a legitimate relationship with their sponsor for two years. The sponsored spouse's status could be revoked if they do not remain in the relationship.

Economic Classes

The Economic Class is comprised of the following federal and provincial categories:

- federal skilled;
- caregivers;
- federal business;
- provincial nominee;
- Atlantic Immigration Pilot;
- Quebéc skilled workers; and
- Quebéc business immigrants.

Federal Skilled

The federal skilled category is divided into three separate programs: Federal Skilled Worker Program, the Federal Skilled Trades Program and the Canadian Experience Class Program. Federal skilled permanent residents are chosen based on their education, work experience, knowledge of English and/or French as well as other factors such as age, whether the individual has a valid job offer and the individual's level adaptability to a Canadian work environment. These factors are part of a point system used to assess eligibility of the candidate. Skilled workers who want to live in Québec must apply under the separate category of Québec skilled workers.

Caregivers

Full time, live-in caregivers may also apply for permanent resident status in Canada if the applicant has been working in Canada under a Live-in Caregiver Program work permit, or if the applicant was approved for their first Live-in Caregiver Program work permit based on an LMIA submitted to Employment and Social Development Canada on or before November 30, 2014. The Live-in Caregiver Program is otherwise closed to new applicants.

Federal Business

The Federal Business immigration programs consist of the Self-Employed Persons program and the Start-Up Visa Program. To qualify as a self-employed person, the individual must have two years of relevant experience and must show they intend to become self-employed in Canada. The individual must also score at least 35 points on a selection grid designed to determine whether they will be able to make an economic contribution to Canada.

To qualify for the Start-Up Visa Program, the applicant must meet all of the eligibility requirements, as well as the admissibility requirements to enter Canada. The eligibility requirements include that the candidate has a qualifying business, has a letter of support from a designated organization, is able to meet the stated language requirements, has enough money to settle and live in Canada before making money from the start-up. The admissibility requirements depend on your nationality, age, language ability, family members, education, work experience, income and/or net worth and details on any job offers.

Provincial Nominees

The Provincial Nominees program is based on stated specific economic development needs by the provinces and territories. The program addresses these stated needs and distributes the benefits of economic immigration across all provinces and territories accordingly. As part of this nomination process, provincial and territorial governments must assess the skills, work experience and business experience of prospective candidates to ensure candidates can satisfy economic development needs as stated, on an immediate basis.

The Atlantic Immigration Program

The Atlantic Immigration Program is a program designed to assist the four Atlantic Provinces with hiring candidates for jobs that could not be filled locally. In 2023, Government of Canada is targeting to accept between 4,000 and 10,000 applicants under the program.

Québec Skilled Workers and Business Immigrants

Similar in structure to the Federal Skilled Workers programs and Federal Economic business Immigrants programs, Québec has separate skilled workers and business immigrants programs. Skilled workers and business immigrants who wish to reside in Québec must apply through these Québec-specific programs through the provincial Government of Québec. To immigrate as a Québec Skilled Worker, the individual must apply to the Government of Québec for a Québec Selection Certificate (Certificat de sélection du Québec), after which the Province of Québec will assess the individual using its own rules. The Province of Québec will then either accept or reject the candidate. To apply as a business immigrant to Québec, the candidate must select one of the Québec immigration programs to apply to, complete an official application as well as obtain a Québec Selection Certificate from the Province of Québec.

Refugee Class

In order resettle in Canada as a refugee, individuals must be referred by a designated referral organization, such as the United Nations Refugee Agency (UNHCR) or be sponsored by a private sponsorship group. To be referred, individuals must fall into one of two refugee classes:

- **Convention refugee abroad class** – where the individual is outside his or her home country and cannot return due to a well-founded fear of persecution based on race, religion, political opinion, nationality or membership in a particular social group (gender, sexual orientation, etc.); or
- **Country of asylum class** – where the individual is outside his or her home country where he or she normally lives and has been seriously affected by civil war or armed conflict, or have been denied basic human rights on an ongoing basis.

Individuals will not be eligible for referral as refugees if:

- the individual has another stable option for protection, such as an offer to be resettled in another country;
- the individual has become a citizen of another country, which will then protect him or her;
- the individual chooses to return to the country he or she left; or
- the reasons the individual left his or her country no longer exist.

Refugees who are resettled in Canada may become permanent residents through the Government-Assisted Refugee Program or the Private Sponsorship of Refugees Program. Individuals who make refugee claims do not become permanent residents at the time of their claim. To become a permanent resident as a refugee, the individual must first have their claim approved by the Immigration and Refugee Board, and then must apply for an obtain permanent resident status.

In March 2023, the Ministry of Immigration, Refugees and Citizenship announced its intention to launch a new Federal Pathway Under Economic Mobility Pathways Pilot (EMPP). The EMPP is focussed on connecting skilled refugees with potential Canadian employers. In order to apply, in addition to meeting admissibility requirements and being eligible for one of Canada's designated economic immigration programs, candidates must have one of the following:

- a positive Refugee Status Determination from the UN Refugee Agency or a refugee-hosting state;
- evidence the person is registered or recorded as a person of concern by the UN Refugee Agency;
- a refugee certificate from the United Nations Relief and Works Agency for Palestine in the Near East (UNRWA);
- evidence of being registered or recorded as a person of concern with UNRWA;
- evidence of temporary protected status and a copy of the completed durable solution information form.

CHAPTER 12

Employment Law

Minimum Standards

Provincial employment legislation contains minimum standards for all labour and employment relations for industries that fall under provincial jurisdiction. Federal employment legislation contains minimum standards for all labour and employment relations for industries that fall under federal jurisdiction. Contracts with all employees are deemed to contain the minimum standards and contractual terms provided for by each province's respective employment standards legislation. Standards or requirements that are less than those provided for in the respective provincial or federal legislation are deemed null and void. Accordingly, Canada is not a jurisdiction in which there is employment at will, as the minimum standards mandate either notice of the termination of employment or pay in lieu of notice, severance pay (where applicable), health benefit continuation (if applicable) and vacation pay. While health benefits are not a mandatory term of employment, they must be continued during the applicable notice period on termination of employment.

The employment standards legislation varies from province to province and federally. However, the following is a list of some issues regulated by the various employment standards acts and their regulations, with examples of the standards set out in the *Ontario Employment Standards Act* ("**OESA**"):

- minimum wage (subject to certain exceptions, the minimum wage is currently CDN$16.55 per hour for workers 18 years of age or older and $15.60 per hour for students under the age of 18 (these rates will increase to $17.20 and $16.20, respectively, on October 1, 2024);
- method of payment of wages and record keeping;
- hours of work (subject to certain restrictions and exemptions, the maximum hours of work per week is 48 hours, at 8 hours per day / however, an employer may extend the workday under certain circumstances);
- overtime (minimum of 1.5 times the employee's regular wage rate each hour of work in excess of 44 hours in each week), except for specific industries;
- public holidays (subject to certain restrictions and exemptions, most employees who qualify are entitled to take these days off and be paid public holiday pay);
- vacation time and vacation pay (these are separate entitlements under the OESA):
    - at least two weeks vacation time per year, if the employee has been with the employer for less than five years (at 4 per cent of the wages, excluding vacation pay, that the employee earned during the period for which the vacation is given); or
    - at least three weeks vacation time per year, if the employee has been with the employer for more than five years (at 6 per cent of the wages, excluding vacation pay, that the employee earned during the period for which the vacation is given);

- pay equity (equal pay for men and women performing work of equal value to work typically performed by the opposite gender);

- pregnancy leave of 17 unpaid weeks, plus 61 unpaid weeks of parental leave (totalling 18 unpaid months), with assurance of reinstatement of same job or its equivalent. If no pregnancy leave is taken, parental leave can be taken for up to 63 unpaid weeks, with the same assurance as stated above;

- family medical leave (entitled to up to 28 unpaid weeks of leave in a 52 week period to care for a family member with a serious medical condition where there is a significant risk of death);

- family responsibility leave (where an employee is employed for at least 2 consecutive weeks, he or she is entitled to up to 3 unpaid days of absence from work for illness, injury or medical emergency of a relative, or an urgent matter concerning a relative);

- bereavement leave (where an employee is employed for at least 2 consecutive weeks, he or she is entitled to up to 2 days for death of a family member); and

- organ donor leave (where an employee is employed for at least 13 weeks and undergoes surgery for the purpose of organ donation, he or she is entitled to up to 13 weeks of unpaid leave, which may be further extended for medical reasons).

Notice on Termination of Employment

Under the OESA, the minimum notice period to be given to an employee prior to termination from their employment is based upon a number of factors. An employee who has worked for at least three months with their employer is entitled to one week's notice. After one year of employment, but less than three (3) years, the employee will be entitled to two weeks' notice. After three years of employment, the employee will be entitled to one week's notice for each year of service up to a maximum of eight weeks. Where more than 50 but less than 200 employees are terminated in any four-week period, at least eight weeks' notice is required, regardless of the length of service. This notice requirement is extended to 12 weeks if more than 200 are so terminated and 16 weeks where 500 or more are so terminated. This includes remote workers. Where an employee has been terminated with notice, the employer may not reduce the employee's wage rate or alter the terms and conditions of employment and must maintain any contributions to employee benefit plans during the notice period. Employers may terminate an employee without notice, provided that the employer paid the terminated employee the amount she or he would have received had notice been given, and provided that the employer maintains all benefits the employee would have been entitled to during the notice period. Of note, there are exceptions to the mass termination rules in limited circumstances.

Where 50 or more employees are terminated in a six (6) month period because of a permanent discontinuance of all or part of the employer's business at an establishment or where an employer or its related companies have global combined annual payroll of $2.5 million or more, severance pay must be paid, in addition to the provision of notice or a payment in lieu of notice, to terminated employees with five years' service. The statutory severance pay obligation is equal to approximately one week's salary for each year of service (up to a maximum of 26 weeks' severance pay). Severance pay cannot be provided as working notice.

Of course, an employee may be terminated without notice where the employee has been guilty of wilful misconduct, disobedience, or wilful neglect of duty, that is not trivial and has not been condoned by the employer. When termination is without notice (often referred to as, 'with cause'), the employer is not obligated to pay these standards. However, unless the contract limits the employee to the OESA only, then common law notice may apply. There are also various other exceptions, i.e. fixed term contracts, frustrated contracts, and temporary lay-offs.

The above notice obligations are basic minimums. Termination of employment without cause generally requires significantly longer notice periods than those provided by the legislation unless a contract of employment has an enforceable clause limiting an employee to only receiving the minimum entitlements under the OESA. These standards have been established by common law through the litigation process on a case-by-case basis. The courts look at various factors, including the employee's age, length of service, position, total annual compensation and their chance of finding comparable employment. The judge will consider all of these to determine the appropriate "reasonable notice" period. Further, reasonable notice established by the common law in Canada often greatly exceeds the obligations of U.S. employers to their employees.

The grounds for termination for cause in Canada are also limited in most circumstances. Employers must consider the proportionality between the employee's misconduct and the sanction imposed, and where the misconduct has resulted in a breakdown in the employer-employee relationship.

Employment Contracts

In order to avoid the uncertainties that arise in the litigation process, it is highly desirable to have employment contracts with all personnel. Contracts should specifically address issues which arise upon the termination of employment, including termination pay, severance pay, benefit continuation, vacation pay, and restrictive covenants. Without a specified term contained in a contract, an employer will be deemed to have hired the employee for an indefinite term. Similarly, if a written contract for a specified term is not formally renewed and the employee continues to work for the employer, the employment will likely be considered to be a relationship of indefinite duration. Consideration should be made to where the employee will be working (remotely, hybrid, or in office).

Of note, non-competition covenants are prohibited in most circumstances in Ontario, as set out below.

Employers cannot contract out of basic employee protections under the OESA. Employers should be mindful that any contractual provisions meet the statutory minimums provided in the OESA or they may be subject to common law standards for employment relationships, which are usually more generous towards employees.

> ***"Canadian workplaces are regulated by provincial and federal human rights codes which prohibit discrimination on the basis of, among other things, race, colour, citizenship, creed, sex, sexual orientation, age, record of offence, handicap and marital or family status or gender identity or expression."***

Updates to Ontario's Employment Standards Act:

In December of 2021, the OESA was amended to prohibit employers from entering into employment contracts with employees that include non-competition agreements, unless the employee in question is:

a. an executive, meaning that they hold a designated executive position; or

b. a seller of part or all of a business, who becomes an employee of the buyer immediately following the sale.

This change came into effect on October 25, 2021. Therefore, any employment agreements executed prior to October 25, 2021, which included a non-competition agreement, remain unaffected. However, where an employment agreement is entered into after October 25, 2021, those agreements cannot contain a non-competition agreement unless the employee is one of those described in (a) or (b) above, who are exempt from the application of the rule.

The December 2021 amendment to the OESA also required employers with more than 25 employees to have a written "disconnecting from work" policy in place. Disconnecting from work means "not engaging in work-related communications, including emails, telephone calls, video calls or the sending or reviewing of other messages, so as to be free from the performance of work."

The OESA was further amended in April of 2022. This amendment requires Ontario employers with more than 25 employees on January 1 of any year, to have a written policy on electronic monitoring in place prior to March 1 of that same year. The policy must provide employees with information pertaining to whether the employer electronically monitors its employees, and if so, must describe how and in what circumstances employees are monitored and the purposes for which information obtained through monitoring will be used by the employer.

Successor Employers

According to some provincial statutes, where a

Canadian business is acquired and continued as substantially the same business, the purchaser may have various obligations towards the vendor's employees (if they remain employed after the acquisition). For example, the purchaser may inherit the vendor's obligations under an existing collective agreement with a certified bargaining agent (see below for further detail). Additionally, tenure with the predecessor corporation will be considered for the purposes of determining termination pay required by the employment standards legislation and for determining the amount of reasonable notice which must be given on termination of employment. Thus, a detailed understanding of the nature and relationship of the employees to a business being sold must be considered so that the ongoing obligations can be quantified and factored into the negotiations on the purchase.

Occupational Health and Safety

The *Occupational Health and Safety Act* ("**OHSA**") provides for a comprehensive set of rules which impose duties on employers in matters relating to the health and safety of workers. Employers must prepare a written occupational health and safety policy and post a copy of the policy in the workplace where workers are likely to see it. Additionally, the OHSA requires employers to prepare written policies on workplace violence and harassment and set out programs to implement these policies. Employers must also ensure investigations appropriate in the circumstances are carried out in response to complaints of harassment and violence in the workplace.

Employers must provide, and employees must use, proper and effective protective equipment and machinery. Further, employees have the right to refuse to do unsafe work. Employees must report all defects, deficiencies, injuries and illnesses arising in the employee's course of employment to their employers and employers must report all injuries and illnesses arising in the employee's course of employment to the Workplace Safety and Insurance Board. Employers make financial contributions to an insurance fund (out of which the Board may pay administrative expenses and make disability and injury awards to employees) based on the claims history of the employer's industry and the individual employer. Subject to very few exceptions, workers are only entitled to the benefits fixed by the OHSA and cannot sue their employers for damages arising out of a work-related injury or disease. Benefits are often available and administered through the Workplace Safety and Insurance Board (WSIB) which is governed by the *Workplace Safety and Insurance Act, 1997*.

The *Canada Labour Code* and its regulations sets out obligations for employers to provide a safe workplace and its respective harassment and violence prevention mandates.

Human Rights

In addition to the above, Canadian workplaces are regulated by provincial and federal human rights codes (for example, Ontario's Human Rights Code (provincial) and the *Canadian Human Rights Act* (federal)) which prohibit discrimination on the basis of, among other things, race, colour, citizenship, creed, sex, sexual orientation, age, record of offence, disability and marital or family status or gender identity or expression. Employers are required to accommodate individuals in situations of disability or long-term illness to the extent that the accommodation does not cause undue hardship to the business. Undue hardship has been interpreted in various ways by the Courts, but in general, an employer should consider whether they have exhausted all options to accommodate the employee, whether there is a risk to health and safety of customers or patients and the financial burden required to accommodate the employee.

Government and government-controlled workplaces are also governed by the Canadian Charter of Rights and Freedoms.

Labour Relations

Employees have the right to be members of a trade union under both the *Labour Relations Act* ("**LRA**") (Ontario) and the *Federal Canada Labour Code*. A certified union has the exclusive right to bargain collectively for all its members and the employer is required by law to bargain with the union in good faith. Unless permitted otherwise by court order or by the consent of the Ontario Labour Relations Board, the purchaser of a business in which there are unionized workers must recognize any collective agreement in effect at the time of the purchase. The legislation also provides certain remedies to employees if an employer intimidates, coerces or threatens an employee during an organizing drive, including an order from the Labour Relations Board that a representation vote be taken with the assurance that the representation vote reflects the true wishes of the employees in the bargaining unit, or the certification of a trade union regardless of employee support, if the Board feels no other remedy would be sufficient to counter the effects of the employer's contravention of the LRA. The law surrounding the right to strike and lock-out is complex, however, the general starting point is that if the employer and the union are parties to a collective agreement, the agreement must expire before either can be in a legal position to strike or lock-out. As well, it will be considered a violation of the LRA if either threatens to strike or lockout.

Collective bargaining agreements (the agreements reached between unions and employers) dictate the relationship between the employer and all members of the bargaining unit and include such issues as work hours, compensation rates, employee benefits and dispute resolution mechanisms. Disputes between employers and unionized employees arising from the interpretation, application or alleged violation of a collective agreement are dealt with outside the court system through grievance arbitration.

CHAPTER 13

Environmental Law

The Canadian public is concerned with the protection of the environment. In response, the federal and provincial governments have

> *“Companies are also required to notify the federal government before any “new” substances can be manufactured or imported into Canada for the purpose of assessing whether the substance is toxic or is capable of becoming toxic and required control in some manner. ”*

enacted environmental legislation which has had a dramatic impact on business and trade. To undertake a business venture in Canada requires information about mandatory requirements, limitations, prohibitions and penalties imposed by relevant environmental laws. Canada’s federal, provincial and municipal governments have enacted laws and regulations aimed at preventing pollution, supporting sustainable development and addressing climate change.

Federal Regulation

The *Canadian Environmental Protection Act, 1999* (“**CEPA**”) provides the federal government with very broad powers in respect of environmental protection. CEPA provides for pollution prevention, the regulation and control of toxic substances and animate products of biotechnology, control and management of nutrients, pollution and waste including disposal at sea and the protection of the marine environment from land-based sources of pollution. CEPA also prescribes national requirements for fuels, vehicle and engine and equipment emissions, addresses international air and water pollution and provides for the control of movement of hazardous waste and hazardous recyclable material. Companies are also required to notify the federal government before any “new” substances can be manufactured or imported into Canada for the purpose of assessing whether the substance is toxic or is capable of becoming toxic and required control in some manner.

The *Fisheries Act* was most recently amended in 2019 and provides a framework for the proper management and control of fisheries and the conservation and protection of fish and fish habitat, including by preventing pollution. The Fisheries Act is primarily aimed at regulating the harvesting of the commercial fisheries in Canada’s territorial and inland seas. The *Fisheries Act* contains a number of anti-pollution provisions and regulations which have been made to limit waste water or effluent discharges from such important industrial facilities as pulp and paper mills, petroleum refineries and meat and poultry processing plants. If an activity will cause harmful alteration to a fish habitat, or involves the discharge of a “deleterious substance” into waters frequented by fish, approval must be obtained from the Department of Fisheries and Oceans.

The *Transportation of Dangerous Goods Act, 1992* provides for the classification, packaging, labelling, safe handling and transportation by road, rail, marine and air, of dangerous goods. Dangerous goods include explosives, compressed gases, radioactive or corrosive materials and many other substances prescribed in the regulations. The transportation of substances which are "dangerous goods" are governed by both federal and provincial regulatory schemes.

In 2018, the *Greenhouse Gas Pollution Pricing Act* came into force and created a national carbon pricing scheme. The national scheme applies in all provinces that have not implemented a provincial scheme.

In 2019, the Impact Assessment Act, the *Canadian Energy Regulator Act*, and the *Canadian Navigable Waters Act* came into force replacing the former *Canadian Environmental Assessment Act, 2012* and establishing a new federal review process for certain types of projects such as those described in the Physical Activities Regulations made under the Impact Assessment Act as well as any physical activity incidental to those listed physical activities.

Provincial Regulation

The principal enforcement provisions of most provincial environmental regimes are similar to those of Ontario's *Environmental Protection Act* ("**EPA**"), which prohibits the discharge of a contaminant into the natural environment that causes or is likely to cause an adverse effect. An adverse effect includes harm or potential harm to the natural environment, human health and safety and the use and enjoyment of property. Whenever a contaminant is to be discharged into the environment as waste, either in the air, water or land, an environmental compliance approval ("**ECA**") must first be obtained pursuant to the EPA. Corporate activities are encompassed by a provision which deems any act or omission of an officer, official, employee or agent of a corporation in the course of employment or in the exercise of power to be an act or omission of the corporation.

Directors, employers, employees and even shareholders, may also be personally liable if they have either "caused" or "permitted" the circumstances resulting in the discharge. Directors and officers, however, may avoid personal liability if they are able to show that they took all reasonable care to avoid the discharge. These measures include implementing, operating and reviewing a corporate environmental management system designed to deal with environmental situations.

"Environmental law in Canada is in a continuous state of growth and evolution. Businesses are advised to seek counsel to keep up-to-date on environmental issues and legislation in order to ensure compliance and plan for change."

Both the EPA and the ECA process impose

requirements for investigating and reporting discharges or spills of contaminants to the relevant authorities, as well as remediation following any illegal discharge. To achieve compliance with environmental legislation, governmental authorities have been given authority to issue a wide variety of orders, including stop orders, control orders and remediation orders. Penalties, including fines and/or imprisonment, may also be imposed where the legislation has been violated.

Regulatory orders can be issued against those who cause or permit the pollution or those responsible for the source of the contaminant. They can also be issued against persons having charge or control of the substance at the time of its discharge and the person who owns or occupies the land on which a discharged substance is located or was located prior to the discharge.

Under the EPA, orders can be issued against former owners, former occupiers and people who were in management and control of the polluting facility. There is no requirement that the person or entity caused or contributed to the pollution of the property or the pollution created by the facility.

The EPA provides guidelines with respect to decommissioning and clean-up of sites and provides for the issuance of permits relating to waste disposal and transport. Businesses may prepare risk assessments for negotiation with regulatory authorities regarding the application of the guidelines to contaminated sites for the purpose of obtaining approval for decommissioning or clean-up plans.

Environmental law in Canada is in a continuous state of growth and evolution. Businesses are advised to seek counsel to keep up-to-date on environmental issues and legislation in order to ensure compliance and plan for change.

For example, in October of 2023, Canada's Supreme Court ruled that the "designated projects" portion of the federal *Impact Assessment Act* was unconstitutional. The Court held that while environmental protection remains one of today's most pressing challenges, and the federal government has the power to enact a scheme of environmental assessment to meet this challenge, it must do so within the division of powers framework laid out in Canada's Constitution. Previously, in 2019, Canada's Supreme Court ruled that after going bankrupt, an oil and gas company was required to fulfill provincial environmental obligations before paying anyone that it owed money to.

CHAPTER 14

Electronic Commerce

"CASL has a broad application, and harsh penalties for non-compliance."

Electronic Commerce continues to grow at an explosive rate. Canada's vision is to be number one in the world in the provision and utilization of the information highway, creating substantial economic, social and cultural advantage for all Canadians. Canada has currently adopted a comprehensive electronic commerce policy framework which includes:

- a cryptography policy;
- the principle of tax neutrality;
- *Personal Information Protection and Electronic Documents Act;*
- *Electronic Commerce Act* (Ontario's e-commerce legislation);
- the adoption of voluntary guidelines for consumer protection; and
- a comprehensive policy on a Public Key Infrastructure.

Regulation of Electronic Commerce

The development of a legal framework that harmonizes international state laws and promotes consumer confidence in the digital marketplace is necessary to facilitate global electronic commerce. Canada continues to collaborate with international organizations, such as the Organization for Economic Co-operation and Development ("**OECD**"), the World Trade Organization, Asia Pacific Economic Co-operation, United Nations and the G-7, on matters which encourage and support the broad international growth of, and access to, global electronic commerce and e-government, such as the development of UNICTRAL Rules on Electronic Signatures.

The United Nations has a Model Law on Electronic Commerce ("**Model Law**") which sets out an international standard for the resolution of legal issues arising out of electronic commerce. This Model Law was adopted in Canada through *Uniform Electronic Commerce Act* ("**UECA**").

Canada, on a federal level, and all of Canada's provinces and territories have enacted UECA based Electronic Commerce Acts, which provide for the legal recognition of electronic information and documents. In Ontario, this legislation is called the *Electronic Commerce Act*.

The Federal Government implemented the UECA by implementing the *Personal Information Protection and Electronic Documents Act* ("**PIPEDA**"). Specifically, Part 3 of PIPEDA implements UECA by amending the *Canada Evidence Act* to facilitate the admissibility of electronic documents in Court.

PIPEDA also has other functions. PIPEDA adapts existing federal statutes and regulations so that they are compatible with an electronic environment. The PIPEDA addresses the recognition of digital signatures, the validity of electronic contracts and other ancillary electronic commerce issues. The PIPEDA also establishes rules to govern the collection, use and disclosure of personal information by businesses in the commercial setting.

Protection of Personal Information

Federally, the collection, use and disclosure of personal information of individuals by Canadian businesses is governed by *PIPEDA*. Similar legislation exists also on a provincial level for some provinces, such as Ontario's *Personal Health Information Protection Act* ("**PHIPA**"), which applies to personal health information.

Under *PIPEDA*, organizations must obtain an individual's consent when they collect, use and disclose that individual's "Personal Information" as such term is defined under *PIPEDA*.

Personal Information includes any factual or subjective information, recorded or not, about an identifiable individual. This includes an individual's name, birth date and address, as well as more sensitive information, such as the individual's race, blood type, medical history, credit card information, employee files, loan records or credit scores. Personal Information does not include any information collected, used or disclosed by the federal government, as such handling of personal information is governed by the *Privacy Act*.

While *PIPEDA* does not define the term "consent", the Office of the Privacy Commissioner of Canada published an information bulletin in May, 2019 to clarify how organizations can obtain "meaningful consent" from individuals. The publication states that "to make consent meaningful, people must understand what they are consenting to. It is only considered valid if it is reasonable to expect that your customers will understand the nature, purpose and consequences of the collection, use or disclosure of their personal information". The publication also states that meaningful consent depends on the degree of sensitivity of the information. The more sensitive the personal information being collected, used or disclosed, the more conscientious the organization must be that the individual understands the nature, purpose and consequences of the collection, use or disclosure of their personal information while obtaining meaningful consent.

It is important to note that there are potentially major reforms coming with respect to privacy legislation in Canada. If enacted, Bill C-27, a bill currently before the House of Commons, would repeal Part 1 of *PIPEDA* (the part which sets out the legislation dealing with the protection of information in the private sector, as discussed above) and would enact in its place, the *Consumer Privacy Protection Act* ("**CPPA**"), which strives to align Canada with the European Union's General Data Protection Regulation (GDPR), the California *Privacy Rights Act* and Quebec's recent Bill 64 (or Law 25). Like *PIPEDA,* the CPPA would provide principle-based rules which apply across sectors and are grounded in a primacy-of-consent framework.

Unlike *PIPEDA*, the CPPA would include more stringent consent requirements, as well as new exceptions to those requirements (including, but not limited to, "business activity", "legitimate interest" and "public interest" exceptions). The CPPA would also significantly increase penalties for non-compliance through administrative monetary penalties of up to $10,000,000 or 3% of organizations' gross global revenues and fines for offences of up to $25,000,000 or 5% of organizations' gross global revenues. The CPPA will also include right of disposal language which will require organizations to dispose of personal information upon an individual's request (subject to certain exceptions), as well as the requirement that every organization implements and maintains a privacy management program.

It should also be noted that in June 2021, the Ontario government released a white paper in which it raised concerns with several "points of weakness" it identified with the *Digital Charter Implementation Act*, 2020 (former Bill C-11). These "points of weakness" included: a consent framework which could allow organizations to collect and use citizens' data for commercial purposes without their knowledge, lack of protections for children and youth, and digital rights protections which "did not go far enough" in protecting individuals from new risks, such as surveillance.

CASL

Canada's Anti-Spam Legislation ("**CASL**") protects consumers and businesses from the misuse of digital technology, including spam. CASL prescribes a strict regime, which regulates the dissemination of commercial electronic messages ("**CEMs**"). CEMS include emails, texts, sms messages, BBM messages and direct social media communications such as messages sent via Facebook messenger or WhatsApp. CASL requires business and organizations to obtain consent before sending or disseminating CEM's to electronic addresses of Canadians.

CASL is enforced by 3 government agencies:

- The Canadian Radio-Television and Telecommunications Commission ("**CRTC**") issues monetary penalties for violations of CASL.
- The Competition Bureau can seek monetary penalties or criminal sanctions under the *Competition Act*.
- The Office of the Privacy Commissioner can enforce the legislation through the PIPEDA.

"The penalties for non-compliance are up to $1 million per violation by an individual, and $10 million per violation by a business."

CASL has a broad application, and harsh penalties for non-compliance. The Competition Bureau and the Office of the Privacy Commissioner jointly enforce CASL. The penalties for non-compliance are up to $1 million per violation by an individual, and $10 million per violation by a business.

In April, 2019 the CRTC issued its first decision in which an individual was held liable for CASL violations committed by a corporation. The CRTC found Brian Conley, the President and CEO of nCrowd group of companies, liable for a fine of $100,000 for violations committed by nCrowd under the act.

CASL generally prevents activity such as the sending of commercial electronic messages without the recipient's consent (includes messages sent to email, cell-phones, or social networking accounts), installing computer programs without the express consent of the owner of the computer system, using misleading representations online to promote products or services, collecting personal information via the access of a computer system, and the harvesting/use of electronic addresses.

Telecommunications

The *Telecommunications Act* may apply to internet businesses if the business qualifies as a "telecommunications common carrier". The Telecommunications Act imposes duties relating to the operation, rates and services of telecommunication common carriers.

Cryptocurrency and Blockchain Technology

Digital currency, or "cryptocurrency" refers to electronic money. Canada does not prohibit the exchange, purchase or sale of cryptocurrency in electronic exchanges or forums, however Canada does not recognize cryptocurrencies as "legal tender" in Canada. The *Currency Act* defines "legal tender" as bank notes issued by the Bank of Canada under the Bank of Canada Act or coins issued under the Royal Canadian Mint. Only the Canadian dollar is considered official currency in Canada.

Despite the lack of recognition of cryptocurrency as legal tender in Canada, the Canada Revenue Agency does recognize cryptocurrency as income, and as such the *Income Tax Act* applies to transactions where cryptocurrency is used. The CRA also recognizes cryptocurrency as a commodity.

Canada's anti-money laundering legislation also recognizes and regulates the use of cryptocurrencies by treating cryptocurrencies as "money service businesses" for the purpose of money laundering. Companies using cryptocurrencies are required to register with the Financial Transactions and Reports Analysis Centre of Canada ("**FINTRAC**"), maintain record and bookkeeping standards, implement compliance programs, report suspicious activity to the appropriate authorities and or evaluate whether any of their customers are "politically exposed persons".

Securities Regulation also applies to the exchange of cryptocurrencies on the open market. In 2017, the CSA published CSA Staff Notice 46-307 Cryptocurrency Offerings, which outlines how securities law requirements may apply to the offerings of cryptocurrencies, cryptocurrency investment funds, and exchanges of cryptocurrency products. In 2018, the Ontario Securities Commission (the "**OSC**") approved Canada's first blockchain fund – Blockchain Technologies ETF.

The CSA has continued to enhance the regulatory space with respect to crypto currency. In 2020, the CSA published CSA Staff Notice 21-327 which outlines how securities legislation applies to entities facilitating the trading of crypto assets, or Crypto-Asset Trading Platforms. Since the publishing of Staff Notice 21-327, the CSA has also published Staff Notices 21-329, 51-363 and 21-330 which respectively provide: (a) guidance to Crypto-Asset Trading Platforms on complying with Canadian regulatory requirements; (b) observations on disclosure by crypto reporting issuers; and (c) guidance for Crypto-Asset Trading Platforms with respect to advertising, marketing, and the use of social media. In February 2023, the CSA published Staff Notice 21-332 which provided that unregistered Crypto Asset Trading Platforms would be required to submit pre-registration undertakings by March 24, 2023. The notice was intended to enhance investor protection and alleviate concerns in light of recent insolvencies in the crypto currency space.

On January 18, 2024, the CSA published a set of proposed amendments introducing regulatory requirements for reporting issuer investment funds that seek to invest in crypto. The proposed amendments are in respect of National Instrument 81-102 Investment Funds ("**NI 81-102**") and Companion Policy 81-102CP. The proposed amendments will introduce a definition of a "crypto asset", a term that is not presently defined by NI 81-102 or its companion policy. We can expect this term to be defined to mean "any digital representation of value that uses cryptography and distributed ledger technology, or a combination of similar technology, to create, verify, and secure transactions". Although the proposed amendments are anticipated to exclusively impact investment funds that are reporting issuers (and related industry participants), this definition may have broader ramifications as the CSA extends its regulatory reach to include active market participants in the "crypto asset" industry, impacting securities regulation applicable to other crypto industry participants.

Canada is also exploring the potential uses of block-chain technology. Blockchains are public ledgers that record transactions shared among many users. Blockchains produce secure, unalterable information which offer transparency and trust, allowing public records to be searched, verified and audited at an unprecedented level. The National Research Council of Canada, through its Industrial Research Assistance program, is exploring the use of block-chain technology in the context of publishing grants and contribution data in real time. Payments Canada is working on "Project Jasper", a research project which uses blockchain technology to ledger inter-bank payments.

Artificial Intelligence

If passed, Bill C-27, which is currently before the House of Commons, would enact the Artificial Intelligence and Data Act (the "**AIDA**"). AIDA would establish regulations, applicable across Canada, for the design, development and use of artificial intelligence systems and prohibit certain conduct in relation to artificial intelligence systems which could result in serious harm to individuals or their interests. The legislation proposed to date is framed such that it will rely heavily on future regulations, which can be expected once Bill C-27 has officially been passed.

On October 10, 2023, the OSC published a report underscoring the present utilization of artificial intelligence across and within Canadian capital markets, along with its advantages, drawbacks, and potential opportunities and risks. At a high level, the report delineates how the OSC will enforce oversight, regulation, or guidance to advance its statutory mandate to; (1) provide protection to investors from unfair, improper, or fraudulent practices; (2) foster fair, efficient, and competitive capital markets and confidence in capital markets; (3) foster capital formation; and (4) contribute to the stability of the financial system and the reduction of systemic risk.

CHAPTER 15

The French Language Requirements in the Province of Québec

“A French corporate name is required for a company’s incorporation in Quebéc. Under the Charter, a firm’s name must be in French, but a version in another language may accompany it, so long as the French version appears at least as prominently.”

French is the official language of Québec. The Charter of the French language (the “**Charter**”) (more commonly known as Bill 101), as amended by Bill 96 (*An Act respecting French, the official and common language of Quebéc*) (“**Bill 96**”) adopted on June 1, 2022, guarantees the predominance of the French language in virtually every field of human, government and business activity within that province.

Contracts and Forms

Prior to June 1, 2023, contracts pre-determined by one party, contracts containing printed standard clauses, and any related documents, must be drawn up in French. However, they may be drawn up in another language as well at the express wish of the parties. Application forms for employment, order forms, invoices and receipts must also be drawn up in French.

Following June 1, 2023, because of the amendments resulting from Bill 96, contracts pre-determined by one party may be drawn up and entered into in another language other than French, but only after the non-drafting party has first had an opportunity to examine a French version of the contract. Contracts containing standard clauses will be permitted to be drawn up in French if both parties wish to do so. It should be noted that the following list of contracts will be exempt from the requirement to be drafted in French:

- Loan contracts, financial instruments and contracts whose object is the management offinancial risk;
- Clearing house contracts;
- Contracts for derivatives and securities; and
- Insurance policies, if the policy has no French equivalent in Québec, and it comes from outside Québec, or its use is not widespread in Québec.

Application forms for employment, order forms, invoices and receipts will also be required to be drawn up in French. Further, if there are versions of these documents available in a language other than French, the French version must be available on terms that are at least as favourable.

Employment and Labour Relations

Written communications between an employer and employee must be in French and job offers or promotions must be offered in French.

Workers have the right to carry on their activities in French. Collective agreements and the schedules attached to them must be drafted in French.

An employee cannot be dismissed, laid off, demoted, or transferred for the sole reason that the employee is exclusively French-speaking or that he or she has insufficient knowledge of a particular language other than French. Obtaining employment cannot be contingent upon possessing the knowledge or a specific level of knowledge of a language other than French, unless the nature of the duties requires such knowledge.

Product Labelling

Product labels and all leaflets, brochures or cards supplied with the product, including such things as directions for use and warranties, must be drafted in French.

Other languages may also be used, provided that no inscription in another language is given greater prominence than that in French, or be available on more favourable terms.

These rules do not apply to products destined exclusively for export.

Catalogues, Brochures, Etc.

In general, catalogues, brochures, folders, commercial directories and any similar publications must be drawn up in French. However, if such documents are made available or distributed to the public by way of mass mail or door-to-door delivery, they may be in two separate versions (one exclusively in French and the other exclusively in the other language), provided that the French version is available under no less favourable conditions of accessibility and quality than the version in the other language. Software must be available in French unless no French version exists.

Signs and Posters

In general, most public signs and posters and commercial advertising may be in both French and another language, provided that the French is "markedly predominant", as defined by the Regulations. However, there are two situations where commercial advertising must be exclusively in French. Commercial advertising displayed on billboards, signs or posters of 16 square meters or more and visible from any highway (unless it is displayed on the firm's premises) and commercial advertising on or in any public means of transportation or access thereto must be solely in French.

Websites

A firm doing business in Québec must comply with the language requirements pertaining to its website's content. The website of a business conducted in Québec must operate in French, regardless of the location of the business' head office (or where the site is hosted). The website may also operate in other languages, if so desired.

Firm Names

A French corporate name is required for a company's incorporation in Québec; an English name may be used in addition to the French name. Under the Charter, a firm's name must be in French, but a version in another language may accompany it, so long as the French version appears at least as prominently.

When another language is permitted to be used in public signs and posters and commercial advertising, the use of a firm name in a language other than French is also permitted. When texts and documents are drawn up in a language other than French, the firm name may appear in the other language, without the French version.

Francization of Business

Firms employing 50 or more people in Québec for a period of six months must register with the *Office de le Langue Francaise*, the government agency that enforces the Charter. The Office will issue a francization certificate if it concludes that the use of French is generalized at all levels of the firm. In contrast, if the Office considers that the use of French is not generalized, the firm must adopt a francization program. Businesses that employ 100 or more people must form a francization committee regardless. It should be noted that as of June 1, 2024, the number of employees a firm must employ before being subject to this requirement will drop to 25.

Fines and Penalties

The Charter imposes fines ranging from $700 to $7,000 for individuals and from $3,000 to $30,000 for corporations which breach the terms of the Charter. Fines are doubled for a second offence and tripled for a subsequent offence. The Charter also imbibes judges with the power to impose further fines, depending on the circumstances of the offence.

Conclusion

Globalization of the economy in the era of free trade has lowered many of the barriers to entering into the Canadian market. However, proximity to the United States and similarities in lifestyle and economic aspirations should not fool the unwary investor. The Canadian social safety net can be significantly more supportive in health, education, welfare and other areas. Canadian legislation and common law provides significant protection for individuals and attempts to preserve cultural heritage groups. For example, individuals' protection under employment standards legislation is generally more exhaustive than most jurisdictions. The entrenchment of bicultural and multicultural ideals is manifested in laws running the gamut from packaging and labeling to education and the judicial system. Sensitivity to the cultural, administrative and legislative differences will assist an enterprise's entrance into the Canadian market. The foreign investor must explore the differences and the competitive advantages of Canada. There are signposts and guides readily available for assistance. Do not hesitate to use them to your advantage.

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Michael Slan, Managing Partner

The information in this publication should not be relied upon as legal advice. We encourage you to contact us directly with any specific questions.