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Overview of Canadian legal system

Canada is a federal state with ten provinces and three territories, each with its own government. The *Constitution Act*, 1867 divides legislative authority between the federal and provincial governments. The federal government has exclusive jurisdiction over national matters such as the regulation of interprovincial and international trade and commerce, bankruptcy and insolvency, foreign affairs and criminal law. The federal government also has jurisdiction over the territories; however, the territorial governments do have authority over a number of local government programs. The provincial governments have legislative power in areas such as property and civil rights in the province, education, and all matters of a local or private nature. All provinces and territories in Canada are common law jurisdictions with the exception of Quebec, which is a civil law jurisdiction. Courts in the common law jurisdictions apply a combination of statute and common law, whereas courts in Quebec apply the *Civil Code* as well as federal and provincial statutes.

Establishing a Canadian business

Most foreign investors choose to carry on business in Canada through a Canadian subsidiary or use a Canadian subsidiary to acquire an existing Canadian business. However, a foreign investor may also conduct business in Canada by establishing a branch office or through agency, distribution, franchising or licensing arrangements.

A. Corporations

The following is a brief overview of the key issues involved in establishing a Canadian company with share capital. Companies may also be incorporated without share capital, typically for non-profit or charitable purposes.

1. Incorporation and organization

A corporation may be incorporated under the laws of Canada or under the laws of one of the provinces or territories of Canada. Federal and provincial corporations legislation prescribe substantially similar requirements, but there are differences which may make certain jurisdictions more attractive than others. For example, differences in directors' residency requirements may be a relevant consideration.

Incorporation can be accomplished quickly and relatively inexpensively. It involves the filing of articles of incorporation which set out the principal attributes of the corporation (i.e., name, location of registered office, number of directors, composition of share capital and any restrictions on the issue, transfer and ownership of shares).

Rules which regulate how the business and affairs of the corporation will be conducted are generally set out in the corporation's by-laws (i.e., borrowing powers, banking arrangements, execution of documents, financial year end and meeting procedures).

There is flexibility to create different share structures by establishing classes of shares with different rights regarding voting, receipt of dividends and other distributions, and profit participation. This flexibility is useful in providing equity participation to local management. Unlike many European countries, there are no statutory pre-emptive rights of subscription attaching to shares of Canadian corporations, although such rights may be provided for in the articles of a corporation or by contract.

2. Shareholders, directors and officers

Unlike certain European countries such as Germany or England, one cannot distinguish between Canadian private and public corporations by the corporate name. Generally, the distinction between private and public corporations is based on whether or not the corporation has distributed its securities to the public and / or whether such securities are listed on a Canadian stock exchange. Private corporations normally include restrictions in their incorporation documents and security holder agreements imposing restrictions on the transfer of their securities. Public corporations have no such limits on the transfer of securities.

In most jurisdictions a private corporation is not required to have more than one director. There is no requirement that a director hold any shares in the corporation unless the articles of incorporation provide otherwise.

There may be residency requirements applicable to directors of Canadian corporations:

- at least 25 percent of the directors must be Canadian residents for corporations incorporated under the federal *Canada Business Corporations Act* (CBCA), the *Ontario Business Corporations Act*, the *Alberta Business Corporations Act* (it is anticipated that Alberta will relax this requirement in 2020) and corporate legislation in each of the provinces of Manitoba, Newfoundland and Labrador and Saskatchewan.
- there are no director residency requirements under the corporate laws of the provinces of British Columbia, New Brunswick, Nova Scotia, Prince Edward Island, Quebec or the three territories: the Northwest Territories, Nunavut and the Yukon.

Certain regulated industries have Canadian ownership requirements which may require that at least a majority of the directors be Canadian residents.

A foreign parent company may execute a "unanimous shareholder agreement" with respect to its Canadian subsidiary, which can effectively transfer to the shareholder all the powers and duties of the directors. This is particularly useful where a foreign company has appointed Canadian directors for the purposes of complying with the Canadian residency requirements. The daily operations of a corporation are managed by its officers. Officers can be nonresidents of Canada but will, of course, need valid immigration authorizations to work in Canada (see "Foreign nationals working in Canada").

3. Corporation name and provincial registration

The name of a corporation is strictly regulated in all jurisdictions so as to avoid names that are too general, misleading or duplicative. There is a screening process and it is possible to pre-clear a name prior to applying for incorporation.

In Quebec the *Charter of the French Language* requires that a corporation carrying on business in Quebec use a French version of its name.

A corporation incorporated or continued under the CBCA has legal status throughout Canada although it must be registered with the provincial authorities in the province(s) where it intends to carry on business. In the absence of extra-provincial registration, the legal status of a corporation created under provincial jurisdiction is usually limited to its province of incorporation.

Obtaining an extra-provincial licence will allow a corporation formed outside of a jurisdiction to carry on business in that jurisdiction. The process of obtaining such a license is not difficult.

B. Alternative methods of carrying on business

A foreign investor may also conduct business in Canada through branch offices or through agency, distribution, franchising or licensing arrangements which are discussed below. General partnerships, limited partnerships, limited liability partnerships and other joint ventures are also common arrangements for collaborative business ventures, but are not addressed in this publication.

1. Branch office

A foreign investor may carry on business in Canada through one or more branch offices. To do this, the foreign investor will need to obtain an extra-provincial licence in each province or territory in which it proposes to carry on business. It may also need to comply with the notification requirements of the *Investment Canada Act.* (See "*Competition and Foreign Investment Laws – Investment Canada Act*".)

The use of a branch office may have certain tax advantages (e.g., losses of the branch may be used to offset income in the foreign investor's home jurisdiction). However, the foreign investor will be directly subject to Canadian federal and provincial laws and will be liable for all debts and obligations incurred in its Canadian operations.

2. Agents and distributors

A foreign investor may wish to offer its products or services in Canada through an independent agent or distributor. There is no legislation in Canada relating specifically to agency or distribution arrangements. Agency or distribution arrangements within certain regulated industries, such as natural resources, real estate, securities or professions, may be subject to particular legislation that relates to such industry's activities. Also, the *Competition Act* provides for reviewable trade practices which apply to agency, distribution and franchise agreements. (See *"Competition and Foreign Investment Laws – Competition Act"*.)

3. Franchising

While most of the provinces and territories of Canada do not have specific legislation governing franchise relationships, legislation does exist in a few provinces (e.g., Alberta, Ontario, Prince Edward Island and New Brunswick) in respect of franchise businesses partly or wholly conducted in such provinces. While there are some differences among the relevant statutes, they all set out disclosure regimes, fair dealing provisions for parties to a franchise agreement and the right of franchisees to associate.

4. Licensing

Licensing of intellectual property rights is governed by general contract law. License agreements are subject to the federal *Competition Act* and other federal and provincial laws of general application.

Competition and foreign investment laws

A. *Competition Act*

The federal *Competition Act* (Canadian antitrust legislation) sets out a framework to promote and maintain fair competition and applies to Canadians and non-Canadians alike. The *Competition Act* prohibits certain anti-competitive business practices and also provides the Commissioner of Competition (the Commissioner), who heads the Competition Bureau (the Bureau), with the ability to review merger activity in Canada. Where the Commissioner believes a transaction is likely to prevent or lessen competition substantially, he may challenge the transaction before the Competition Tribunal (the Tribunal), an independent quasi-judicial body.

There are two parts of the *Competition Act* that apply to the acquisition of an existing Canadian business which any investor must consider:

- the pre-merger notification provisions in Part IX of the *Competition Act*; and
- the substantive merger provisions in Part VIII.

These provisions apply independently. For example, even if a transaction is not subject to mandatory pre-merger notification under Part IX, it may still be subject to the substantive merger provisions in Part VIII of the *Competition Act*.

1. Pre-merger notification – part IX of the *Competition Act*
Pre-merger notification is only required for five specific types of transactions (notifiable transactions):

- the acquisition of the assets of an operating business;
- the acquisition of voting shares of a corporation that will result in the buyer and its affiliates holding greater than (i) 20 percent of the shares of a publicly traded corporation, (ii) 35 percent of the shares where none of the shares are publicly traded, or (iii) 50 percent of the shares if the buyer(s) already owned more than the percentages in (i) or (ii), as the case may be, before the proposed acquisition;
- the acquisition of a greater than 35 percent interest in non-corporate combinations;
- the amalgamation of two or more corporations; or
- the formation of a combination (e.g., joint venture) of two or more entities which will carry on business otherwise than through a corporation.

If a transaction requires pre-merger notification, it may not be completed until the parties have (i) filed a pre-merger notification and waited until the applicable waiting period has expired, been waived or terminated; or (ii) obtained an advance ruling certificate (ARC) from the Commissioner. The transaction may then be completed, unless the Tribunal has issued an order to prevent completion of the transaction or the parties have otherwise agreed with the Commissioner to defer closing. Failure to file a pre-merger notification is a criminal offence in Canada.

Pre-merger notification is required when two financial thresholds are both met:

Size of Parties Threshold: the parties,[1] together with their respective affiliates, must have aggregate assets in Canada or annual gross revenues from sales in, from, or into Canada in excess of $400 million; and

Size of Transaction Threshold: the value of the assets in Canada, or the annual gross revenue from sales (generated from those assets) in or from Canada, of the target operating business and if applicable, its subsidiaries, must be greater than $96 million. In the case of an amalgamation, each of at least two of the amalgamating corporations (together with its affiliates) must exceed the $96 million threshold.

A notifiable transaction involving a federal transportation undertaking may also be subject to pre-closing review under the *Canada Transportation Act*.

If a pre-merger notification is required, the parties can submit either a pre-merger notification or a request for an ARC, and a filing fee of $75,055.68 applies:

(i) Pre-merger notification

The pre-merger notification requires the disclosure by each party of certain prescribed information, including customer and supplier information and all reports and similar documents that evaluate the proposed transaction with respect to its potential impact on competition. The requirement to supply reports and similar documents that evaluate the impact of the transaction is similar to the requirement in U.S. antitrust filings. Therefore in cross-border transactions, counsel should coordinate the collection of such documents. A 30-day waiting period begins with the submission of a complete pre-merger notification.

1 The parties to a share transaction are the person or persons who propose to acquire the shares and the corporation the shares of which are to be acquired. Affiliate rules are complex and vary depending on the nature of the entities involved (partnerships, corporations, etc.), but generally include corporations under common control.

The Commissioner can extend the initial review period by making a "supplementary information request" (SIR) within the first 30 days, after which time closing can only occur 30 days following the submission of the supplementary information (barring a challenge to the transaction by the Commissioner).

(ii) Advance ruling certificate

Alternatively, for transactions which are unlikely to raise any significant competition issues, the parties may request an ARC. The ARC request typically consists of a letter submitted on behalf of the purchaser describing the parties and the transaction, and explaining why the transaction will not result in a substantial lessening or prevention of competition. The Commissioner may grant the request and issue the ARC, or where there are insufficient grounds to challenge the transaction but the Commissioner does not want to issue an ARC because there may be some competitive overlap between the parties, he may provide the parties with a letter indicating that he will not refer the matter to the Tribunal (a so-called "no action" letter). The Commissioner will also provide the parties with a waiver from the obligation to file a pre-merger notification. A benefit of receiving an ARC is that once issued, the Commissioner cannot challenge the transaction as long as it is substantially completed within one year and the factual basis upon which the ARC was based remains unchanged. In all other cases the Commissioner has the ability to challenge any transaction for up to one year after it has been substantially completed. The risk associated with only requesting an ARC is that doing so does not trigger the statutory waiting period. If timing certainty is important, consideration should be given to submitting both an ARC request and a pre-merger notification.

Once an ARC or a no-action letter has been received, the parties are free to complete their transaction. Parties may also elect to close upon the expiry of the waiting period, although the Commissioner may seek an interim order from the Tribunal to prevent completion of a transaction if the Commissioner has not yet finished the substantive review of the competitive effects of the transaction.

2. Substantive merger provisions – part VIII of the *Competition Act*

The substantive merger provisions of the *Competition Act* apply to all mergers irrespective of whether pre-merger notification is required. If the transaction involves the acquisition of control over, or a significant interest in, the whole or part of a business, it is considered to be a merger and will be judged on the basis of whether it is likely to prevent or lessen competition substantially. This analysis involves consideration of a number of factors including whether the merger removes a vigorous and effective competitor, whether there will be effective competition remaining post-merger, the barriers to entry facing potential competitors, the availability of substitute products, the importance of change and innovation in affected markets, and whether the firm being purchased is failing. There is an express efficiency exception which may save an otherwise anti-competitive merger where the efficiencies from the merger are likely to be greater than and offset any effects of the prevention or lessening of competition. Mergers may only be challenged by the Commissioner, who can apply to the Tribunal to delay or block closing in the case of a proposed merger, to dissolve the merger or seek divestitures in whole or in part, or, with the consent of the parties, for any other remedies.

It is not uncommon for the Commissioner's review of a merger, particularly mergers that raise some competition law issues, to extend beyond the expiry of the waiting period. For this reason, parties often delay closing until they receive some form of comfort that their transaction will not be challenged. The Bureau has adopted service standards to indicate the expected time for the completion of its substantive review. The service standard depends upon the complexity of the transaction, as determined by the Bureau. The two potential designations are "non-complex" and "complex," with respective service standards of 14 days and 45 days. In cases where a SIR is issued, the service standard will not be 45 days but will rather end 30 days from the date all responses to the SIR have been received by the Bureau. As such, that service standard will exactly correspond to the statutory waiting period provided for in the *Competition Act*. It should be noted that parties are legally entitled to complete their transactions upon the expiry of the statutory waiting period regardless of the status of the service standard period.

The Bureau has provided guidance on how it will classify mergers: generally speaking, transactions that result in a combined market share of ten percent or less will be classified as "non-complex," and transactions with combined shares of more than 35 percent will be "complex." Transactions with combined shares between ten percent and 35 percent will be classified depending on a number of factors, including the barriers to entry, the number and effectiveness of remaining competitors, the existence of credible complaints or competitive concerns, the incremental increase in post-merger market share, and the challenges in defining the relevant product and geographic markets.

3. Practical considerations

If the parties have reason to believe that their transaction will require a pre-merger notification, and/or potentially raise

substantive competition concerns under the *Competition Act*, they should meet early in the negotiation process with their respective competition counsel to establish a protocol for dealing with the Bureau. If a determination is made by one or more of the parties that the filing thresholds will not be met, it may be prudent for the purchaser to seek representations and warranties with respect to the "numbers". For example, a purchaser may want a seller to confirm that the target business has less than the threshold amount in assets and that it generates annual gross revenues from sales in or from Canada of less than the threshold amount.

Provisions in the transaction documents should address who bears the risk and costs of any enforcement action by the Bureau and the coordination of filing requirements between counsel for all parties.

Transaction timetables should consider not only the initial waiting period during which the transaction cannot close, but also the likelihood of a SIR that could delay closing for at least several months. Timetables should also accommodate the need to prepare the pre-merger notification or ARC request. In the event there are expected to be competition law issues, the practice in Canada is to submit a briefing paper analyzing the potential competitive effects of the transaction.

4. Confidentiality

Information provided to the Bureau in a pre-merger notification, ARC request or in a competitive effects submission on a voluntary basis is generally protected from disclosure under the *Competition Act*. However, the Commissioner is permitted to disclose information in the course of the administration and enforcement of the *Competition Act*. For example, in the course of its substantive analysis of a transaction, officials may contact market participants and disclose the existence of a non-public transaction if believed necessary to reach conclusions on substantive competition concerns. In all events, the Commissioner's practice is to keep all information as confidential as possible while also ensuring that the Bureau staff can perform their legislative duties. Parties may request that the Bureau refrain from making market contacts, but that will affect the timing of the review as the "service standard" will not commence until the Bureau can begin its market contacts. In international transactions, the Commissioner's practice is that the Bureau can share information with antitrust officials in other jurisdictions without seeking a waiver from the merging parties (although other jurisdictions may require a waiver to share information with the Bureau).

5. Regulation of anti-competitive practices

The *Competition Act* prescribes criminal penalties, including imprisonment, for conduct such as conspiracy,[2] bid-rigging, and misleading advertising. The Bureau investigates this conduct and where it concludes that enforcement action is justified, it will refer the matter to the Attorney General for prosecution. Combatting domestic cartels and bid-rigging are enforcement priorities for the Bureau, and immunity and leniency programs exist to encourage self-reporting of criminal conduct.

In addition, the *Competition Act* provides a statutory private right of action for damages to those who have suffered a loss as a result of alleged violations of the criminal provisions of the *Competition Act* or a person's failure to comply with an order of the Tribunal. Damages and other relief may also be possible under tort law. Private actions for damages under the *Competition Act* are increasingly proceeding by way of class actions.

The *Competition Act* also applies to civil matters that are commonly referred to as "reviewable trade practices", which include such practices as deceptive marketing, refusal to deal, exclusive dealing, consignment or tied selling, abuse of dominant position and other anti-competitive behaviour. Price maintenance, price discrimination, predatory pricing and offering discriminatory promotional allowances are no longer subject to criminal sanction in Canada. Since 2009, only price maintenance that results in an adverse effect on competition is actionable, and price discrimination, predatory pricing and discriminatory promotional allowances may be treated as types of abuse of dominance.

The Tribunal hears all civil matters and, if the Tribunal finds that a person has engaged in an anti-competitive practice, they may order a person to do, or cease doing, a particular act in the future. Failure to comply with a Tribunal order may result in criminal penalties. In addition, where the Tribunal finds that a party has engaged in abuse of dominance or certain deceptive marketing violations, it may impose an administrative monetary penalty of up to $10 million for a first violation and up to $15 million for subsequent violations.

Private parties may seek leave to bring an action before the Tribunal in respect of the aforementioned reviewable practices with the exception of deceptive marketing and abuse of dominance. Only the Commissioner can commence such actions.

B. *Investment Canada Act*

In general, any acquisition by a 'non-Canadian' of control of a 'Canadian business'[3] is either notifiable or reviewable under the *Investment Canada Act* (ICA). Whether an acquisition is notifiable or reviewable depends on a number of factors, including the structure of the transaction (whether the transaction is a direct or indirect acquisition of control of a Canadian business), the value and nature of the Canadian business being acquired, and the country from which the acquiring entity is controlled. With limited exceptions, the federal government must be satisfied that a reviewable transaction 'is likely to be of net benefit to Canada' before closing can proceed; notifiable transactions only require that the investor submit a report after closing.

1. Non-Canadian acquisitions of Canadian business

(i) Reviewable transactions

A reviewable transaction generally requires filing an application for review before closing and awaiting the determination of the Minister of Innovation, Science and Economic Development (ISED Minister) and/or Minister of Canadian Heritage (Heritage Minister), as the case may be, that the transaction is 'likely to be of net benefit to Canada.' Particular scrutiny may be applied to investments by foreign SOEs and sovereign wealth funds as described further below.

Only direct acquisitions of control of a Canadian business are subject to review. A direct acquisition of control involves the purchase of voting interests or all or substantially all of the assets of a Canadian business. By contrast, acquiring the shares of the foreign parent company of a Canadian business is an indirect acquisition because control of the Canadian business is acquired indirectly through the acquisition of the foreign parent.

The direct acquisition of voting interests will be reviewable where the value of the Canadian entity, and of all other entities in Canada the control of which is acquired, is equal to or greater than the threshold set by legislation. For the purposes of the ICA, an acquisition of control is deemed to occur when a non-Canadian directly acquires greater than 50 percent of the voting shares in a Canadian corporation and is presumed to occur where there is an acquisition of between 33 percent and 50 percent of the voting shares.

The acquisition of voting shares will be reviewable where there is a direct acquisition of control of a Canadian corporation, and the value of that entity, and of all other entities in Canada the control of which is acquired, is equal to or greater than the threshold set by legislation. For the purposes of the ICA, an acquisition of control is deemed to occur when a non-Canadian directly acquires greater than a 50 percent voting interest in a Canadian corporation and is presumed to occur where there is an acquisition of between 33 percent and 50 percent of the voting shares.

The acquisition of control of other Canadian entities such as a partnership, trust or joint venture, with assets greater than the prescribed threshold, will be reviewable if a non-Canadian acquires more than a 50 percent interest.

An acquisition of all or substantially all of the assets used in carrying on a Canadian business will be reviewable if the value of those assets is equal to or greater than the threshold amount.

There are now a number of different thresholds depending on the identity of the country from which the acquiring entity is ultimately controlled. The general threshold applicable to investments made by investors from countries which are members of the World Trade Organization (WTO) is whether the Canadian business being acquired has an enterprise value of more than $1.075 billion.

As a result of the provisional implementation of the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) in September 2017, the threshold for review for investors from members of the European Union[4], for investments in most industry sectors, is now $1.613 billion based on the enterprise value of the Canadian business. Given most favoured nation clauses in other free trade agreements Canada has signed, investors from several of Canada's other trading partners benefit from this provision as well.[5] This group – the European Union, US, Chile, Colombia, Honduras, Korea, Mexico, Panama and Peru – is known under the ICA as "Trade Agreement Investors."

The adoption of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) has expanded the list of Trade Agreement Investors to include Australia, Japan, New Zealand, Singapore and Vietnam.

3 Section 3 of the ICA defines Canadian business as 'a business carried on in Canada that has (a) a place of business in Canada, (b) an individual or individuals in Canada who are employed or self-employed in connection with the business, and (c) assets in Canada used in carrying on the business.'

4 Notwithstanding Brexit, private sector investors whose country of ultimate control is the United Kingdom will continue to receive the benefit of the higher Trade Agreement threshold under the terms of the transition period established by the Withdrawal Agreement between the United Kingdom and the Europen Union.

5 Government of Canada, 'Technical Summary of Final Negotiated Outcomes, Canada-European Union Comprehensive Economic and Trade Agreement' <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ceta-aecg/ceta-technicalsummary.pdf> accessed 27 September 2015.

How enterprise value is calculated also depends on the nature of the transaction:[6]

Publicly traded entity: acquisition of shares	Market capitalization plus total liabilities (excluding operating liabilities), minus cash and cash equivalents
Not publicly traded entity: acquisition of shares	Total acquisition value, plus total liabilities (excluding operating liabilities), minus cash and cash equivalents
Acquisition of assets	Total acquisition value, plus assumed liabilities, minus cash and cash equivalents transferred to buyer

The enterprise value test does not apply to all transactions. A lower review threshold applies to: (i) acquisitions of cultural industries; (ii) investors from non-WTO members; and (iii) SOEs. These investments will continue to be reviewable based on a book value of assets test using applicable monetary thresholds, which are adjusted annually for changes in GOP. The threshold for 2020 is $428 million.

When control of a Canadian business is acquired due to the acquisition of control of its foreign parent company, and where the buyer is from a WTO member nation, the transaction will not be subject to review unless the acquired business carries on a cultural business. In such a case, if the threshold is exceeded, the review could occur post-closing.[7]

(ii) Notifiable transactions

Any acquisition of control of a Canadian business by a non-Canadian that is not reviewable is a notifiable transaction.[8]

A notifiable transaction generally requires that a notification be sent to the responsible Minister within 30 days of the completion of the investment.[9] Prior to April 24, 2015 the notification consisted of a two-page form setting out basic information regarding the parties. However, the amount of information that must be supplied in both an application for review and in a post-closing notification has increased following amendments to the Investment Canada Regulations. This has had a significant impact on notifications, as they had traditionally been straightforward to complete and required little more than basic information about the parties and the transaction. Among the data that must now be provided are:

- The legal names of the directors of the investor as well as of the five highest paid officers of the investor, together with a business and personal mailing address, telephone and fax number, email address, and date of birth for each person;
- An indication of whether a foreign state has a direct or indirect ownership interest in the investor, as well as information about any special rights or influence the foreign state may have over the business or the appointment of its officers;
- The sources of funding for the investment; and
- Descriptions of the products of the Canadian business, including the associated North American Industry Classification System (NAICS) codes.

While certain of this information will be easily obtainable for publicly-traded companies, it may be burdensome for privately held entities. The federal government contends that certain of the newly required information is designed to provide them with the information they consider necessary to properly undertake a national security review.

(iii) Global acquisitions with Canadian elements

An indirect acquisition of control of a Canadian business occurs when there is an acquisition of a company incorporated outside Canada that controls an entity in Canada carrying on a Canadian business (e.g., the acquisition of a foreign company that has a Canadian subsidiary). Pursuant to Canada's international commitments, indirect acquisitions by or from WTO investors are not reviewable, unless the Canadian business carries on a cultural business. In such a case, and the review threshold is exceeded, there will be a post-closing review of the investment.

For non-WTO investors, the threshold is $5 million for a direct acquisition and $50 million for an indirect acquisition. However, the $5 million threshold will apply to an indirect acquisition if the asset value of the Canadian business being acquired exceeds 50 percent of the total asset value of the global transaction.

(iv) Special considerations for SOEs

In 2007, the Minister of Industry (as the ISED Minister was then called) published guidelines that apply to investments

6 Investment Canada Regulations ('Regulations'), SOR 85-611.

7 The powers of the Minister to impose remedies exists regardless of the timing of the review. To date, the Minister has not ordered any transaction be unwound post-closing due to concerns over the lack of net benefit to Canada. The Minister has ordered a post-closing divestiture on national security grounds in at least one transaction. National security reviews are conducted on a confidential basis, but this matter came to light because of a legal challenge commenced by the investor. *O-Net Communications Holding Limited v. Canada (Attorney General)* (Court File 1319-15).

8 ICA, s. 11.

9 ICA, s. 12.

by SOEs (the 2007 SOE Guidelines).[10] An SOE was defined as 'an enterprise that is owned or controlled directly or indirectly by a foreign government.' This approach is consistent with the definition used in CETA. However, amendments adopted in 2013 expanded the definition of SOE to mean:

> (a) the government of a foreign state, whether federal, state or local, or an agency of such a government; (b) an entity that is controlled or influenced, directly or indirectly, by a government or agency referred to in paragraph (a); or (c) an individual who is acting under the direction of a government or agency referred to in paragraph (a) or who is acting under the influence, directly or indirectly, of such a government or agency.[11]

The increased breadth of the 2013 SOE definition is troubling due to the lack of guidance provided to explain the concept of 'influence.' Businesses contemplating a transaction with an entity associated with a foreign government need to know whether that entity will be considered an SOE in order to properly assess the regulatory risk associated with the transaction. Not only will it determine whether a transaction is subject to the lower book value of assets review threshold, but the ISED Minister has been given the discretion to determine whether that entity is controlled in fact by an SOE or whether there has been an acquisition of control in fact by an SOE even if less than a majority of the target company was acquired.[12] With respect to the latter point, the ICA already contains a rebuttable presumption that control is acquired where more than one-third of the voting shares are acquired. As a result, acquisitions of less than one-third of the voting shares are not considered acquisitions of control. The amendments therefore permit the ISED Minister to deem an otherwise non-reviewable minority acquisition to be an acquisition of control, resulting in a net benefit review being necessary if the book value of assets threshold is exceeded. The Heritage Minister has a similar power with respect to acquisitions of cultural businesses.

The 2007 SOE Guidelines established additional criteria to be considered when making the net benefit determination, including:

- The governance and commercial orientation of the SOE:
  - the SOE's corporate governance (such as 'whether the non-Canadian adheres to Canadian standards of corporate governance');
  - reporting structure; and
  - compliance with 'Canadian laws and practices';
- The extent to which the non-Canadian is owned or controlled by a state; and
- Whether the Canadian business to be acquired by a non-Canadian SOE will continue to have the ability to operate on a commercial basis.

The main concern with respect to governance was whether the Canadian business would, following the transaction, abide by Canadian standards of corporate governance, which may include commitments to transparency, disclosure and independent directors and audit committee functions. Commitments to that effect would only be sought at the level of the Canadian business, not the parent SOE level. With respect to commercial orientation, the 2007 SOE Guidelines indicated that the ISED Minister would assess whether the Canadian business would continue to have the ability to operate on a commercial basis.[13]

The 2007 SOE Guidelines did not prove to be a bar to significant SOE investments in Canada, as there were no rejections of any SOE-led investments until 2012. Among the major investments approved after 2007 were the acquisition of Nova Chemicals by International Petroleum Investment Company (owned by the Abu Dhabi government); Korea National Oil Corp.'s acquisition of Harvest Energy; PetroChina's acquisition of interests in two oil sands projects owned by Alberta Oil Sands Corp.; Sinopec's acquisition of a company holding a 9 percent interest in oil sands producer, Syncrude Canada Ltd., and CNOOC Limited's acquisition of OPTI Canada Inc.

However, several transactions in 2012 changed the environment for SOEs. On July 23, 2012, CNOOC, China's largest producer of offshore crude oil and natural gas, announced it had agreed to acquire Nexen Inc. for approximately USD 15.1 billion. Nexen had interests in the Canadian oil sands, but also had projects in Europe, the US and Africa. This announcement followed the June 28, 2012 announcement by PETRONAS, the Malaysian national oil and gas company (and one of the largest LNG producers in the world), that its Canadian subsidiary PETRONAS Canada would acquire Progress Energy Resources Corp. for approximately $5.5 billion.

10 Industry Canada Press Release, 'Government of Canada Clarifies Rules on Foreign Investment for State-Owned Enterprises' (December 7, 2007) <http://news.gc.ca/web/article-en.do?crtr.sj1D=&mthd=advSrch&crtr.mnthndVl=&nid=366639&crtr.dpt1D=&crtr.tp1D=&crtr.lc1D=&crtr.yrStrtVl=2008&crtr.kw=&crtr.dyStrtVl=26&crtr.aud1D=&crtr.mnthStrtVl=2&crtr.yrndVl=&crtr.dyndVl=> accessed 5 October 2015, and Minister of Industry, 'Guidelines — Investment by state-owned enterprises — Net benefit assessment' <https://web.archive.org/web/20080112151754/http://www.ic.gc.ca/epic/site/ica-lic.nsf/en/lk00064e.html> accessed 5 October 2015.

11 ICA, s. 3, as amended by An Act To Implement Certain Provisions Of The Budget Tabled In Parliament On March 21, 2013 And Other Measures, 2013 c. 33, s. 136.

12 This would not be an issue where an entity is an SOE as defined by CETA; any such entity would also meet the definition in the ICA. However, where the Minister considered an EU investor to be an SOE under the ICA due to the broader "influence" criteria, it remains an open question what remedies would be available to that EU investor to argue that because it is not an SOE under CETA, it should not be considered an SOE under the ICA.

13 Areas of inquiry included where the business could export; where it could process; the extent of Canadian participation in its operations in Canada and elsewhere; levels and degree of support of on-going innovation, research and development; and the appropriate level of capital expenditures to maintain the Canadian business in a globally competitive position.

During the course of the reviews of these two transactions, members of the Canadian government, including the former Prime Minister, indicated that further guidance would be forthcoming about the manner in which the government would review investments by SOEs. In announcing the approval of the two transactions, the former Prime Minister announced that 'these decisions are not the beginning of a trend, but rather the end of a trend.'[14] Concurrent with these approvals, the government adopted a new policy statement and revised guidelines for SOE investments.[15]

Under the new rules, the acquisition of control of a Canadian oil sands business by an SOE will be found to be of net benefit 'on an exceptional basis only.'[16] The government noted they will carefully monitor investments by SOEs in other sectors as well where an industrial sector becomes subject to an inordinate amount of foreign state influence.

Highlights of the government's policy statement and updated guidelines on the issue of SOE investments (and the manner in which the ICA will be applied to such investments) include:

- **Broader definition of an SOE**: The definition used in the original 2007 SOE Guidelines was broadened to include not just an enterprise that is 'owned or controlled' directly or indirectly by a foreign government, but one that is influenced directly or indirectly by a foreign government. No definition of 'influence' was provided, but the term is amenable to broad application. The revised SOE guidelines specifically state that 'SOE investors are expected to address in their plans and undertakings, the inherent characteristics of SOEs, specifically that they are susceptible to state influence. Investors would also need to demonstrate their strong commitment to transparent and commercial operations.'
- **Expanded inquiry into corporate governance**: The new guidelines build on the governance issues raised in the 2007 SOE Guidelines and provide that the Minister will examine whether 'the non-Canadian adheres to Canadian standards of corporate governance… and to Canadian laws and practices, including adherence to free market principles.'
- **Limits on SOE investments in the oil sands**: Although not specifically addressed in the guidelines, the government indicated in a separate policy statement that investments by SOEs to acquire control of a Canadian oil sands business will, going forward, be found to be of net benefit on an exceptional basis only. In addition, any investment by an SOE that is subject to review and does not involve the oil sands will continue to be closely examined.
- **Key additional scrutiny for SOE investments**: In addition to the factors identified in the 2007 SOE Guidelines, the updated guidelines note the Minister will closely examine:
  - the degree of control or influence an SOE would likely exert on the Canadian business that is being acquired;
  - the degree of control or influence an SOE would likely exert on the industry in which the Canadian business operates; and
  - the extent to which a foreign state is likely to exercise control or influence over the SOE acquiring the Canadian business.
- **Lower review threshold for SOEs**: Despite the move to an enterprise value test for most transactions, acquisitions by SOEs will continue to be reviewable based on the original book value of assets threshold.

2. National security reviews

The 2009 amendments to the ICA authorized the Minister to review almost any investment by a non-Canadian, regardless of the size of the interest acquired or the value of the assets, where the Minister has reasonable grounds to believe that such an investment could be injurious to national security. There are, therefore, no monetary or other quantitative thresholds to provide guidance to investors on the issue of whether their investment will be reviewed. In December 2016, guidelines were issued to provide some detail on the review process, and to identify certain of the factors that the government will consider when determining the impact of a transaction on Canada's national security. These factors include:

- The potential effects of the investment on Canada's defence capabilities and interests;
- The potential effects of the investment on the transfer of sensitive technology or know-how outside of Canada;
- Involvement in the research, manufacture or sale of goods/technology identified in Section 35 of the *Defence Production Act*;
- The potential impact of the investment on the security of Canada's critical infrastructure. Critical infrastructure refers to processes, systems, facilities, technologies, networks, assets and services essential to the health, safety, security or economic well-being of Canadians and the effective functioning of government;

14 Prime Minister of Canada, Stephen Harper Press Release, 'Statement by the Prime Minister of Canada on foreign investment' (7 December 2012) <www.pm.gc.ca/eng/news/2012/12/07/statement-prime-minister-canada-foreign-investment#sthash.8a0Zcm4q.dpuf> accessed 5 October 2015.

15 Industry Canada Press Release, 'Government of Canada Releases Policy Statement for Revised Guidelines for Investments by State-Owned Enterprises' (December 7, 2007) <http://news.gc.ca/web/article-en.do?nid=711489> accessed 30 October 2015; see also Industry Canada, 'Guidelines - State-Owned Enterprises' <http://www.ic.gc.ca/eic/site/064.nsf/eng/07248.html> accessed 5 October 2015.

16 The government has since permitted one SOE acquisition of a Canadian oil sands business: PTTEP's acquisition of control of the Thornbury, Hangingstone and South Leismer oil sands projects from Statoil Canada in May 2014. PTTEP is an SOE from Thailand. The transaction involved the parties dividing their respective interests in project in which they had been partners.

- The potential impact of the investment on the supply of critical goods and services to Canadians, or the supply of goods and services to the Government of Canada;
- The potential of the investment to enable foreign surveillance or espionage;
- The potential of the investment to hinder current or future intelligence or law enforcement operations;
- The potential impact of the investment on Canada's international interests, including foreign relationships; and,
- The potential of the investment to involve or facilitate the activities of illicit actors, such as terrorists, terrorist organizations or organized crime.

From March 2009 to March 2017, the government has reported that thirteen national security reviews have been ordered. The government has reported that those reviews have led to 3 transactions being blocked, five being approved with divestitures, four being approved with conditions, and one instance of a party withdrawing its application after being advised of the security review.

(i) National security review process

The ISED Minister has primary responsibility for communicating with the non-Canadian investor on national security questions, but it is unclear to what extent he is to be involved in the national security assessment. If the ISED Minister has reasonable grounds to believe that a transaction may be injurious to national security, he must notify the investor. The parties will be barred from completing their transaction until the issue is resolved. The ISED Minister will then consult with the Minister of Public Safety and Emergency Preparedness and may refer the matter to Cabinet, which could order a review of the investment. Following that review, Cabinet may block the transaction, or allow it to proceed subject to certain terms and conditions.

The ICA imposes restrictions on the ISED Minister's ability to share privileged information that it receives in the course of its reviews. However, the ISED Minister is permitted to share privileged information with certain prescribed investigative bodies or classes of investigative bodies.

(ii) Timing

The National Security Regulations prescribe timeframes associated with the review process outlined above. The timelines for sending the initial notice depend on whether the transaction is notifiable or subject to net benefit review:

- for Reviewable Transactions, the ISED Minister has up to 45 days after a complete application for review is submitted;
- for Notifiable Transactions, the ISED Minister has up to 45 days after a complete notification is submitted; and
- in all other cases, the ISED Minister has up to 45 days after the implementation of the investment.

Where the ISED Minister gives notice that a transaction may be injurious to national security, Cabinet, on the recommendation of the ISED Minister, has a further 45 days to determine whether to order a review of the transaction.

If Cabinet orders a review, the ISED Minister will consult with other government officials and departments. Following these consultations, if the ISED Minister is satisfied that, or is unable to determine whether, the investment would be injurious to national security, the ISED Minister must submit a report, with recommendations, to Cabinet. Alternatively, if the ISED Minister is satisfied that the investment will not be injurious to national security, notice to that effect must be sent to the investor. Under the National Security Regulations, the deadline for the ISED Minister to submit a report and recommendations to Cabinet, or give notice stating that no action will be taken, is 45 days from the date on which Cabinet ordered a review of the investment. However, if the ISED Minister cannot conclude the review within that initial 45 days, the period may be extended by up to a further 45 days and for a subsequent period beyond that with the agreement of the investor.

If the ISED Minister submits a report and recommendations, Cabinet may then order any measure it considers advisable to protect national security, including prohibiting the investment, attaching conditions, or requiring the foreign investor to divest itself of its investment. The National Security Regulations require that such an order be made within 20 days from the date on which the ISED Minister reported on the investment to Cabinet. The ISED Minister is then required to notify the investor of the Cabinet order without delay.

Based on the foregoing, assuming the ISED Minister and Cabinet take the maximum allowable time (not including an extension on consent), the national security review process could take 200 days from the date of filing a notification or application. In practice, however, an investor who is told that an order for review will be made would likely reconsider its options at that stage (the 90-day mark) rather than proceed through a complete review.

The national security guidelines strongly suggest that parties submit their notification at least 45 days before closing where any of the factors listed in the guidelines are present. This will allow the parties to know whether the government has any national security concerns before closing.

General tax considerations

The following is a general outline of some of the more important Canadian tax issues that should be considered in connection with the establishment of a business in Canada by a corporation that is not resident in Canada for purposes of the *Income Tax Act* (Canada) (the ITA) (a Foreign Corporation). Note that Canadian tax laws are subject to change.

In general, a Foreign Corporation may choose to carry on business in Canada directly through a branch or indirectly through a Canadian subsidiary resident in Canada. As noted in the discussion below, the ITA contains rules that attempt to equate the tax position of these two alternatives.

A. Canadian taxation of a branch

1. General

A Foreign Corporation that chooses to carry on business directly in Canada through a branch will be taxable in Canada on its "taxable income earned in Canada" for the year under both Part I and Part XIV of the ITA. For this purpose, a Foreign Corporation's "taxable income earned in Canada" will generally include its income from all businesses carried on by it in Canada, taxable capital gains from dispositions of "taxable Canadian property" (as defined in the ITA) and recaptured depreciation. A Foreign Corporation's income from sources outside Canada will not generally be subject to tax in Canada.

Under many of Canada's income tax conventions with other countries (Conventions), the business profits of a Foreign Corporation from carrying on business in Canada will be subject to tax in Canada only if the Foreign Corporation carries on business through a permanent establishment (PE) situated in Canada and only to the extent that the business profits are attributable to that PE. A PE in this context generally means a fixed place of business in Canada and would generally include a place of management, a branch, an office or a factory. A PE may also include an extended physical presence in Canada by employees of the Foreign Corporation in certain situations, depending on the particular Convention.

Generally, a relevant Convention will provide that any business profits attributable to a PE will be computed as though the PE were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a PE.

Benefits under a Convention will generally be available to a Foreign Corporation carrying on business directly in Canada provided the Foreign Corporation is a resident of the foreign contracting state for purposes of the Convention (subject to application of a "limitation on benefits" provision, if any, in the Convention). Certain foreign entities that are treated as fiscally transparent in their country of residence may not qualify for benefits under a Convention. A careful review of the applicable Convention(s) should be undertaken with respect to any business carried on in Canada by the Foreign Corporation.

The longstanding administrative view of the Canada Revenue Agency (CRA) has been that a limited liability company, or LLC, is not considered a resident of the United States for purposes of the Canada – United States Income Tax Convention (1980) (the U.S. Convention). While the U.S. Convention provides benefits to members of an LLC who are residents of the U.S. for purposes of the U.S. Convention, the LLC itself was commonly viewed as not being a resident of the United States. However the Tax Court of Canada concluded that a U.S. LLC that was a disregarded entity for U.S. income tax purposes was a resident in the U.S. in applying the relevant provisions of the U.S. Convention in *TD Securities (USA) LLC v. The Queen* (April 8, 2010). The breadth of this decision is unclear and the CRA has not changed its administrative practices to follow this case. As a result, additional considerations may arise if an LLC carries on business in Canada.

2. Part I tax

As noted above, a Foreign Corporation may be taxed under Part I of the ITA on income derived from its businesses carried on in Canada and on gains from the disposition of taxable Canadian property. At the time of publication, the basic federal corporate income tax rate under Part I of the ITA for income earned in a province is 15 percent.

A Foreign Corporation carrying on business in Canada directly through a branch will also be subject to applicable provincial and territorial income taxes. The provincial or territorial general tax rates currently range from 11.5 percent to 16 percent (reduced tax rates may be available for certain manufacturing and processing income). See "Provincial income and capital taxes" for further discussion.

A Foreign Corporation must file federal and, where required, provincial income tax returns within certain prescribed time limits and will generally be required to pay its income tax in monthly installments throughout its fiscal year.

3. Branch tax

In addition to the tax levied under Part I of the ITA, a separate "branch tax" is imposed under Part XIV of the ITA on a Foreign Corporation carrying on business in Canada through a branch. The general purpose of the branch tax is to provide a rough proxy for the withholding tax on dividends that applies where the Foreign Corporation carries on business in Canada through a Canadian subsidiary. This is necessary in order to equate the Canadian tax position of non-residents who carry on business in Canada through a branch operation with the tax position of non-residents who carry on business in Canada through a Canadian subsidiary. The Part XIV tax is in effect an additional tax on the Foreign Corporation's taxable income earned in Canada (with certain adjustments) that represents an amount of withholding tax that would be imposed in Canada on dividends paid by a Canadian subsidiary to the Foreign Corporation.

As explained below, a withholding tax of 25 percent is generally payable under Part XIII of the ITA (subject to reduction under a Convention) in respect of dividends paid by a Canadian subsidiary to a Foreign Corporation. As dividends paid by a Canadian subsidiary are paid from after-tax income of that subsidiary, the withholding tax on dividends represents a second level of Canadian income tax. Absent the branch tax, profits earned by the Canadian branch of a Foreign Corporation could be repatriated to that Foreign Corporation without any further Canadian income tax, providing an incentive for Foreign Corporations to carry on business in Canada through a branch. To eliminate any such incentive, Part XIV of the ITA will impose a tax of 25 percent on branch profits earned by a Foreign Corporation that are not re-invested in Canada.

Similar to withholding tax on dividends under Part XIII of the ITA, the rate of branch tax under Part XIV of the ITA may be reduced by an applicable Convention.

Carrying on business through a branch may, depending on the tax laws of the Foreign Corporation's home jurisdiction, permit the consolidation of income (or loss) of the Canadian operations with the income (or loss) of the operations in the home jurisdiction for purposes of calculating the Foreign Corporation's income taxes in its home jurisdiction. The Foreign Corporation should consider whether the Part I tax or Part XIV tax will be creditable against taxes of the Foreign Corporation in its home jurisdiction.

4. Thin capitalization rules in respect of branches

Canada's thin capitalization regime (discussed more fully under "Canadian taxation of a subsidiary") applies to a branch of a Foreign Corporation, where that Foreign Corporation owes amounts to non-resident persons who do not deal at arm's length with the Foreign Corporation and such owed amounts can be considered to relate to the operations of the branch. The extension of the thin capitalization rules to Canadian branches is intended to further equate the tax position of a Foreign Corporation that carries on business in Canada through a branch with the tax position of a Foreign Corporation that carries on business in Canada through a subsidiary.

B. Canadian taxation of a subsidiary

1. Part I tax

A subsidiary incorporated in Canada will generally be taxable as a resident of Canada under Part I of the ITA on its worldwide income from all sources, subject to any available foreign tax credits and any relief under applicable Conventions. A Canadian subsidiary will be required to file both federal and, where applicable, provincial corporate income tax returns and to pay installments of tax throughout the year.

2. Withholding tax

Part XIII of the ITA imposes a withholding tax at a rate of 25 percent on certain payments made by a Canadian resident to a non-resident person, including payments of dividends, royalties, non-arm's length interest and interest that is "participating" for purposes of the ITA and certain management and administration fees. Non-participating interest paid by a resident of Canada to an arm's-length non-resident person will not be subject to Canadian withholding tax under the ITA.

A Convention may reduce the rate of withholding tax in certain circumstances. For instance, withholding tax on dividends is generally reduced by a Convention to 15 percent and may be further reduced to as low as 5 percent for certain non-resident corporate shareholders that hold a significant interest in the Canadian payer. Similarly, withholding tax on interest and royalties may be reduced significantly by a Convention. Of particular note, the U.S. Convention eliminates withholding tax on payments of non-participating interest paid by a Canadian person to a non-arm's length person resident in the U.S. and a reduced rate of 15 percent applies to payments of participating interest.

3. Thin capitalization rules and interest deductibility

When computing its income under the ITA, a corporation resident in Canada may generally deduct amounts in respect of interest that are paid or payable by it in respect of borrowed money, provided that the borrowed money is used to gain or produce income from a business or property and the amount of interest is reasonable in the circumstances. However, the "thin capitalization" rules may restrict a corporation's ability to deduct

interest. Generally, when the ratio of a corporation's "outstanding debts to specified non-residents" to equity exceeds 1.5:1, a prorated portion of the interest paid or payable in the year to such non-residents is disallowed as a deduction in computing the income of the Canadian corporation.

In addition, interest that is disallowed as a deduction will be deemed to have been paid by the Canadian resident corporation to the non-resident creditor as a dividend, subject to the normal withholding taxes applicable to dividends paid to non-resident persons.

Certain rules deem certain debt owed by a Canadian resident corporation to an arm's length lender to be owed instead to specified non-residents, where the borrowing is part of a "back-to-back loan" arrangement.

4. No group consolidation

There is no provision under the ITA permitting the filing of consolidated returns by related corporations. Each corporation must report its own income for tax purposes and losses incurred by one corporation will not be available to offset the income of any other corporation. However, certain loss consolidation arrangements among affiliated corporations are generally permitted.

5. Foreign affiliate dumping rules

The Foreign Affiliate Dumping Rules apply where a Foreign Corporation controls a Canadian corporation that owns or acquires an interest in a non-resident corporation that is a "foreign affiliate" of the Canadian corporation. If the rules apply, the consequences can include the triggering of deemed dividends subject to Canadian withholding tax. While intended to be an anti-avoidance measure, the Foreign Affiliate Dumping Rules are broadly drafted and can apply in conventional cross-border structures. If the Foreign Corporation contemplates that its Canadian subsidiary will hold shares in foreign companies, these rules must be considered.

C. Transfer pricing

Whether a Foreign Corporation chooses to carry on business in Canada through a branch or a subsidiary, consideration must be given to the issue of transfer pricing. Transfer pricing, sometimes referred to as inter-entity pricing, is the pricing for goods or services transferred between non-arm's length parties. Particular areas of concern include management and administration fees, development charges, royalties and interest.

The ITA contains provisions requiring prices charged in non-arm's length transactions to conform to prices charged in comparable arm's length transactions. The purpose of these provisions is to ensure that a reasonable profit is being earned by the entity transferring goods or services and that only reasonable deductions are claimed for tax purposes by the entity paying for the goods or services.

Canadian transfer pricing rules may adjust the profits or losses of a Canadian resident person in respect of transactions between that Canadian resident person and a non-resident person with whom the Canadian resident does not deal at arm's length (i.e., a Foreign Corporation and its Canadian subsidiary) where: (i) the terms and conditions in respect of the transactions differ from those that would have been agreed to by persons dealing at arm's length, in which case the terms and conditions may be adjusted to those that arm's length persons would have agreed to; or (ii) the transaction would not have been entered into by persons dealing at arm's length and it may reasonably be considered not to have been entered into primarily for bona fide purposes other than to obtain a tax benefit, in which case the transaction may be recharacterized as a transaction that would have been entered into by persons dealing at arm's length. It should be noted that transactions involving partnerships may also be subject to a transfer pricing adjustment.

Where a taxpayer or a partnership is subject to a transfer pricing adjustment, a penalty generally applies unless the adjustment relates to a "qualifying cost contribution arrangement" or the taxpayer has made reasonable efforts to determine an arm's length transfer price. To avoid penalties, a taxpayer is generally required to prepare contemporaneous documentation to support the transfer pricing methodology relied upon. The documentation must be prepared, at the latest, by the "documentation due date" of the taxpayer or partnership for the year in which the relevant transactions occurred. The "documentation due date" generally means the day on or before which the taxpayer would be required to file a return of income under Part I (i.e., within six months after the end of the year in the case of a corporation).

While the transfer pricing rules under the ITA do not explicitly contemplate a Foreign Corporation carrying on business in Canada through a branch, transfer pricing principles are generally applicable when allocating profits and losses to a Canadian branch, particularly where income and losses are required to be allocated to a PE in Canada in accordance with the terms of a Convention. As noted above, Conventions often provide that any business profits attributable to a PE will be computed as though the PE were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a PE.

D. Provincial income and capital taxes

As mentioned above, a Foreign Corporation carrying on business in Canada through a branch or a Canadian subsidiary of a Foreign Corporation will generally be required to pay provincial income tax in addition to the tax imposed under the ITA.

1. Income tax

Each of the provinces of Canada imposes income tax on domestic and Foreign Corporations that have a PE in that particular province. The calculation of taxable income for provincial purposes generally parallels the provisions contained in the ITA. While tax rates and methods may vary as between provinces, the rate of corporate tax imposed in the provinces ranges from 11.5 to 16 percent (reduced tax rates may be available for certain manufacturing and processing income). The following information is provided with respect to Alberta, Ontario and Quebec, and the rates are accurate as of the time of writing.

Alberta

The general corporate tax rate in Alberta is 12 percent. Corporations subject to Alberta corporate income tax are required to file income tax returns with the Tax and Revenue Administration (Alberta), separate from the tax returns filed with the CRA.

Ontario

The general corporate tax rate in Ontario is 11.5 percent. Ontario also imposes a 2.7 percent corporate minimum tax on corporations subject to Ontario tax that alone or with their associated corporations have gross revenues in excess of C$100 million and total assets in excess of C$50 million. The minimum tax is payable only to the extent that it exceeds the corporation's regular Ontario income tax liability.

The CRA administers Ontario corporate tax collection as part of the federal tax collection program. Accordingly, there is no requirement to file a separate Ontario corporate tax return.

Quebec

The general corporate tax rate in Quebec is 11.5 percent. Corporations subject to Quebec corporate income tax are required to file income tax returns with Revenu Quebec, separate from the tax returns filed with the CRA.

2. Capital tax

As of 2012, neither Canadian provinces nor the federal government levies a capital tax, except in the case of large financial institutions, under Part VI of the ITA.

E. Federal goods and services tax

The Goods and Services Tax (GST) imposed under the *Excise Tax Act* (Canada) (ETA) is a federal value-added tax similar to the sales tax imposed by many European countries. It is administered by the CRA and is a multi-stage tax that applies to almost all "supplies" of goods and services made in Canada throughout the chain of production and distribution. Even the transfer of commercial and newly built residential real property situated in Canada may be subject to GST. All purchasers of taxable supplies are required to pay GST at the rate of 5 percent on the value of the consideration paid or payable in respect of the supply. However, if the payer of the GST is engaged in a commercial activity and is registered as a supplier for GST purposes, that payer may be entitled to recover some or all of the GST it has paid through the input tax credit (ITC) mechanism provided under the ETA. It is intended that only consumers and certain providers or exempt supplies bear the final incidence of the GST.

Every person (whether a resident of Canada or not) who makes a taxable supply in Canada in the course of a commercial activity of that person is generally required to register as a supplier for GST purposes within 30 days of the person's first taxable supply in Canada unless:

- the person's worldwide taxable sales in the previous 4 quarters were less than C$30,000;
- the only commercial activity of the person is the making of supplies of real property otherwise than in the course of a business; or
- the person is a non-resident of Canada who does not carry on any business in Canada.

Moreover, non-residents must generally register if they are importing goods to Canada by direct mail or if they are selling tickets for admission directly to those attending a place of amusement, a seminar, an activity or an event in Canada.

GST will generally be payable on all taxable supplies made in Canada. A supply of goods is deemed to be made in Canada if the goods are delivered or made available in Canada. For supplies of services, the services are deemed to be made in Canada if the services are to be performed in whole or in part in Canada or the service is in relation to real property situated in Canada. There are special "place of supply" rules, which apply to real property, intangible personal property and telecommunications services.

Except for certain sales of real property, the vendor of the taxable supply that is subject to GST is required to collect the applicable GST and remit that amount, net of any available ITCs, to the

Receiver General for Canada on its periodic return. Registrants must file a periodic return monthly, quarterly or annually depending on their level of sales. If the ITCs for a particular period exceed the GST collected for that period, a refund can be claimed from the federal government.

Goods imported into Canada, except for certain non-taxable importations defined in the ETA, will generally be subject to GST at the rate of 5 percent on the duty paid value of the goods. The importer of record is generally liable to pay the GST upon the release of the goods from customs. In addition, the ETA contains rules that may impose GST on the value of certain other imported goods and services supplied to residents of Canada outside of Canada and also on the value of goods and services that are considered for purposes of the ETA to be enjoyed by a PE of a Foreign Corporation in Canada that are provided by the Foreign Parent.

Exports of goods and services from Canada are not generally subject to GST. This means that non-residents will not generally have to pay GST on goods or services acquired from a supplier for GST purposes when those goods or services are not considered to be consumed in Canada. In addition, where goods are supplied in Canada but for immediate export, the supply of these goods will generally be considered "zero rated" for purposes of the ETA (i.e., taxed at the rate of zero percent) and will not attract GST.

A non-resident that has paid an amount of GST (or HST, as defined below) will not be entitled to claim ITCs unless it is registered for purposes of the ETA. An unregistered non-resident is entitled to a rebate of GST it has paid only in limited circumstances.

F. Provincial retail sales tax

All provinces except Alberta impose a provincial level of sales tax. At the time of publication, five Canadian provinces have harmonized their respective provincial sales taxes with the federal GST such that a harmonized sales tax (HST) reflects both a 5 percent federal component in respect of GST and a provincial component determined by the applicable province. The HST is administered by the federal government and the rules concerning HST are found in the ETA. The applicable provincial component of the HST is determined on the basis of where a supply is considered to have been made under the HST "place of supply" rules. As at the time of writing, the rates for the provincial components are: in Nova Scotia, New Brunswick, Newfoundland and Labrador and Prince Edward Island, 10 percent; and in Ontario, 8 percent. HST is generally based on the same rules as the GST and ITCs are generally available for amounts of HST, though there are certain province-specific rules that may impact its application, such as point-of-sale rebates for a limited range of consumer products in Ontario.

The sales tax of the province of Quebec has been modified so that it is very similar to the GST. That is, almost all supplies of goods and services in the province are taxed but refunds are available when the Quebec sales tax is paid on business imports. Quebec sales tax applies at a rate of 9.975 as at the time of writing.

British Columbia, Saskatchewan and Manitoba impose and administer a consumption tax independent of the GST on tangible personal property and taxable services (other than certain exempt property and services) at a rate of 7 percent, 6 percent and 7 percent (as at the time of writing), respectively. Suppliers are generally required to obtain a permit and collect retail sales tax from the purchase of such property and services and remit such tax to the appropriate province. Provincial sales taxes do not generally incorporate a rebate system.

G. Income tax administration matters

The ITA is administered by the Minister of National Revenue through the CRA. Other than Alberta and Quebec, all provinces of Canada have entered into an agreement with the federal government that has transferred the administration of their respective provincial corporate income tax regimes to the federal government.

Corporate federal income taxes are payable in monthly installments and are generally calculated by reference to the previous taxation year. Any balance owing by a corporate taxpayer in respect of income taxes is due within two months after the relevant taxation year-end. Installments are not due in the first year of operation, though a corporation is required to remit the balance of any taxes owing to the CRA within two months after the end of the first taxation year.

Annual federal income tax returns are required to be filed by corporate taxpayers who are resident in Canada, carry on business in Canada, dispose of taxable Canadian property (as defined in the ITA) or owe an amount of tax under Part I of the ITA (or would owe an amount of tax absent the benefits of a Convention). As such, where a Foreign Corporation carries on business in Canada through a branch, that Foreign Corporation must generally file annual income tax returns in respect of the business; where a Foreign Corporation carries on business through a Canadian subsidiary, that subsidiary is responsible for filing annual federal income tax returns, though the Foreign Corporation may be responsible for certain filings to the extent it has directly carried on business in Canada or has disposed of "taxable Canada property."

After an annual income tax return has been received by the CRA, an assessment is sent to the taxpayer indicating the tax payable

in respect of the year and the balance of any amount owing by the taxpayer or refunds owing to the taxpayer. Generally, where a corporation fails to file an income tax return as required by the ITA, that corporation will be subject to a penalty based on the amount of tax payable in the taxation year for which the return is owed. However, a non-resident corporation that was required to file an income tax return for a year and fails to file such return will be liable for a penalty regardless of whether any tax is payable in that year.

A special annual information return is also required to be filed by any corporation resident in or carrying on business in Canada that makes payments to or enters into certain transactions with a non-resident person with which the corporation does not deal at arm's length (e.g., a foreign parent).

The ITA and its provincial equivalents provide for objection, reassessment and appeal procedures.

Additional provincial filing requirements not discussed in this publication may also apply.

H. Payroll taxes

Where an employer pays remuneration to an employee that is performing services in Canada, that employer is required to withhold from such remuneration amounts in respect of income taxes, contributions under the Canada Pension Plan, and premiums under the *Employment Insurance Act*. The withheld amounts are remitted to the Receiver General for Canada. The required withholdings must be made regardless of whether or not the employee is a resident of Canada (and regardless of whether the employer is resident in Canada), and may be in addition to any withholdings in respect of such remuneration required by another country other than Canada. Certain possible exceptions may apply to the amounts required to be withheld under the Canada Pension Plan and *Employment Insurance Act* in respect of non-residents employed in Canada. Additionally, it may be possible for employees to obtain waivers from such withholding where they are exempt from taxation in Canada on their employment income by virtue of a Convention.

Remuneration generally includes all amounts of salary and bonuses paid to employees and will also include the amount of taxable benefits paid to an employee. Whether a certain amount paid to an employee is a taxable benefit or a non-taxable benefit must determined on a case-by-case basis.

In addition to being required to withhold from the remuneration paid to employees, the employer will also be responsible for employer contributions in respect of the Canada Pension Plan and the *Employment Insurance Act*.

International trade and customs regulation

International trade and customs regulation falls primarily within the jurisdiction of the Canadian federal government. Many of Canada's customs and trade laws and regulations implement international trade agreements to which Canada is a signatory, including the *World Trade Organization Agreement* (WTO), the *North American Free Trade Agreement* (NAFTA) (which is likely to be replaced by the *Canada - United States - Mexico Agreement* (CUSMA) in 2020), the *Comprehensive Economic and Trade Agreement* (CETA) with the European Union, and free trade agreements between Canada and Chile, Colombia, Costa Rica, the EFTA countries (Iceland, Liechtenstein, Norway, and Switzerland), Honduras, Israel, Jordan, Panama, Peru, South Korea, and Ukraine. Global Affairs Canada is in exploratory discussions with a number of other countries.

Although Canada's provinces are not directly bound by these treaties, many of them affect matters of provincial competence and the Canadian government assumes liability for the failure of any province to comply with the provisions of international treaties.

A. Customs duties

Customs duties are levied, for the most part, as a fixed percentage of the declared value of the imported goods. In addition to these duties, importers may be subject to other charges at the time of importation, such as the federal goods and services tax (currently 5 percent of the duty paid value), product specific excise taxes and provincial sales taxes. All duties and taxes must generally be paid, or security posted, before the goods are permitted to enter the Canadian market.

The Canada Border Services Agency (CBSA) is the federal agency responsible for the administration of Canada's customs laws and regulations, as well as many other statutes and regulations that can affect imported goods, such as food and drug legislation, product labelling and import controls.

The determination of the actual customs duties applicable to an imported product requires the examination of three factors in relation to the imported good: its classification in the *Customs Tariff*, its value for duty, and its country of origin.

1. Classification of imports

Imports must first be characterized, and then classified under a specific tariff item in the *Customs Tariff*. The Canadian *Customs Tariff* uses the classification system set out in the *International Convention on the Harmonized Commodity Description and Coding System*, an international treaty that establishes a tariff coding system used by most WTO member countries.

2. Value for duty

Once classified in a tariff item, the value for duty of the imported product must be established. The *Customs Act* adopts the valuation methods prescribed by the WTO *Valuation Code*. Where importation is made pursuant to a sale, the good is valued at its transaction value, in essence the price paid or payable by the importer to the exporter for the imported goods, adjusted by payments for royalties, assists and certain other transaction related costs. There are four additional valuation methods enumerated in the *Customs Act*, applicable when the transaction value cannot be used, such as in the case of consignments and transfers without a sale.

3. Country of origin

After having classified the goods under a tariff item and determined the value for duty, the origin of the goods is established, since duty rates vary depending on Canada's trade arrangements with the product's country of origin. For example, the most favoured nation (MFN) rate applies to imports that originate in WTO member countries. The NAFTA rate, which today is mostly zero, pertains to imports that originate in the United States or Mexico. There are similar rate reductions in the various free trade agreements to which Canada is a party. Generally, the country of origin of an imported article is the country where the good was substantially produced. When an imported article is comprised of parts produced in multiple countries, Canada has established a set of hierarchical rules to determine the country of origin.

4. Canada's NAFTA advantage

Although NAFTA does not create a customs union, it creates a form of duty free zone among Canada, the United States and Mexico. Goods that originate in one of the three NAFTA member countries can be freely traded among the countries, given that virtually all NAFTA duty rates are now zero. The advantage to locating production in Canada is that if the products meet the NAFTA rules of origin, imports can be sourced duty free from, and products can be sold duty free to, the U.S. and Mexican markets.

NAFTA has been renegotiated and a new agreement, the CUSMA will replace and modernize NAFTA likely in early 2020.

B. Relief from customs duties

Importers may reduce or eliminate the duty payable on goods being imported into Canada by using various duty drawback and inward processing mechanisms applicable to imported goods that are re-exported from Canada. As well, the Canadian government may on petition remove, reduce or remit duties through

mechanisms found in the *Customs Tariff Act* and the *Financial Administration Act* in special circumstances, such as when the goods are not available from Canadian producers.

C. Administrative monetary penalty system

The CBSA administers a penalty system called the *Administrative Monetary Penalty System* (AMPS), which addresses non-compliance with customs legislative, regulatory and program requirements. AMPS largely replaces the use of seizure and forfeiture provisions with monetary penalties for technical infractions. The monetary penalties are graduated as to type, frequency and severity of infractions. In addition to monetary penalties, noncompliance and failure to meet undertakings entered into with CBSA may have a negative effect on performance records, possibly resulting in the withdrawal of special service option privileges and leading to increased targeting for examinations. Seizure and forfeiture are used for the most serious infractions.

D. Import/Export controls and sanctions

Canada maintains a variety of import and export controls on various products, ranging from agricultural products to military goods and technology to products from endangered species. Most of these restrictions are found in the *Export and Import Permits Act*, as well as in the *Import Control List*, *Export Control List*, and *Area Control List* which the act establishes. United Nations sanctions against specific destinations or individuals are controlled by orders made under Canada's *United Nations Act*. Sanctions are also effected pursuant to the *Special Economic Measures Act*, the *Freezing Assets of Corrupt Foreign Officials Act*, and the *Justice for Victims of Corrupt Foreign Officials Act* (also known as the *Magnitsky Act*). Lists of designated persons, including individuals and corporate entities, can be frequently updated depending on current events. There have been amendments to regulations under the *Special Economic Measures Act* against various countries in 2019, as well as the implementation of a new sanctions regime against Nicaragua.

There has been one high profile guilty plea under the *Special Economic Measures Act*. In 2014, a Calgary-based company was fined $90,000 for trying to send $115 worth of prohibited goods to Iran.

In addition, the importation and exportation of specific products may be restricted by other federal legislation, such as the *Cultural Property Export and Import Act* or the *Food and Drugs Act*.

E. Anti-dumping and countervailing duties regime

The *Special Import Measures Act* (SIMA) provides for the imposition of anti-dumping and countervailing duties, which is guided by the principles established by the WTO. SIMA is administered by the CBSA, which is responsible for determining if dumping or subsidization has occurred. The Canadian International Trade Tribunal is responsible for determining whether dumping or subsidization has caused or is likely to cause, "material injury to production in Canada of like goods".

Generally, anti-dumping duties may be imposed on imported goods sold in Canada at prices below the manufacturer's fully absorbed home market prices, or at prices lower than the manufacturer's fully absorbed cost of production plus profit. Anti-dumping or countervailing duties will be imposed if the following conditions are met: (i) the imported good has been dumped onto the Canadian market or subsidized by the government of its origin; and (ii) the dumping or subsidization must have caused, or be likely to cause, material injury to Canadian production of like goods.

Employment and labour law

A. The Canadian employment relationship

Canadian employment law is predicated on the notion that the relationship between an employee and an employer is a contractual one. The contract is governed by legislative minimums that underpin common law principles (except in Quebec, where only the *Civil Code* is applicable). The employment contract usually takes one of three forms (written, implied or collective) and, in some cases, there may be overlap.

Many employees, particularly executives and senior management, will have a written employment contract which sets out the terms and conditions of almost every aspect of their employment relationship. Other employees may have only a short employment contract, which may outline key aspects of the employment, such as salary, hours of work, position and vacation terms. In both cases, where the contract is silent, legislative minimums will dictate the appropriate terms. Employment contracts may also be unwritten (in whole or in part) and may often include certain implied terms and arrangements that may have been agreed to by the parties, either directly or indirectly through employer policy or past practice.

Employees represented by a union will be governed by the terms of the applicable collective agreement. Employees governed by a collective agreement do not have individual contracts with the employer, and any enforcement of employment terms must be pursued in accordance with the grievance process set out in the collective agreement.

Regardless of its type, every contract of employment (collective or individual) will expressly and/or impliedly impose obligations on both parties, such as the obligation to provide work, compensation and a safe work environment (in the case of the employer) and the obligation of loyalty and competence in performance of work (in the case of the employee). In the Canadian private sector, employment and labour relations matters are generally governed by provincial rather than federal legislation. However, certain types of businesses will be subject to federal legislation (such as railways, banks, broadcasting and telecommunications). Where a business has operations in more than one province, coordination of policies and practices is critical to ensure compliance with all applicable laws.

B. Termination of employment

The application of legislative requirements and common law principles (or civil law principles in Quebec) to an employment relationship means, among other things, that the concept of "employment-at-will" which would allow an employer to unilaterally terminate the employment relationship without notice and cause, does not exist in Canada.

In each Canadian jurisdiction, employees whose employment is terminated without cause are statutorily entitled to working notice of termination or pay in lieu thereof. The length of working notice (and therefore the amount of any payment in lieu of notice) will depend on the employee's length of employment and will vary between jurisdictions. In certain Canadian provinces, as well as those businesses governed by the federal *Canada Labour Code*, employees will also be entitled to severance payments based on their length of service. Similarly, federally and in certain Canadian provinces, non-union employees who have been terminated without just cause may be entitled to reinstatement or, in some circumstances, pay in lieu of reinstatement.

Special notice requirements may apply where there is a group termination of employees. Depending on the jurisdiction, employers may have to notify governmental agencies and provide job search assistance for employees where there is a group termination.

The statutory termination and severance requirements are quite modest. However, non unionized employees in Canada are not limited to these minimum statutory entitlements. Provided the contract of employment has not specifically limited reasonable notice to that provided by statute (or a specified greater amount) and the employee has not been terminated "for cause", the employer is required to provide "reasonable notice" of termination, which is often greater than the minimum required by statute. "Cause" is very narrowly defined and would not include, for example, downsizing due to economic factors. In the event reasonable notice is not provided, the employee may seek further compensation (in addition to required statutory minimums) through a wrongful dismissal action.

When setting the appropriate amount of notice that should be provided, an employer should consider, in addition to years of service, other factors such as the employee's salary, position held with the company, his or her age and the likelihood of finding similar employment. Common law notice or notice required in accordance with civil law principles in Quebec is quite generous and a review of these factors and the case law that has developed should be considered in each case. For union employees, any restriction on lay-off, entitlement upon termination of employment or the right of recall will be set out in the collective agreement.

An employee who has been terminated does have a duty to mitigate his or her damages by making efforts to obtain reasonable alternative employment. Failure to mitigate can reduce the amount of damages to which the employee may be entitled should the employee pursue damages through a wrongful dismissal action. However, minimum statutory notice and severance, if applicable, is not subject to mitigation.

C. Special considerations in acquisition transactions

In a share acquisition, the identity of the employer does not change. The acquired company, despite the change in share ownership, continues to be the employer for all employment-related purposes. This means there is no break in service or seniority (both of which are factors in determining, among other things, severance costs) because a purchaser inherits all obligations and liabilities of the acquired company with respect to employees, extensive due diligence is required in order to assess the scope of these liabilities, whether they relate to historic wrongful dismissal claims, complaints under human rights legislation or even occupational health and safety charges. On-going and past financial obligations relating to vacation pay and statutory withholdings will also have to be considered.

Unlike the Quebec *Civil Code*, where the employee's employment is deemed continuous even in the face of the sale of the assets of a business, at common law a sale of assets will trigger the termination of employment of the assets of the employees affected by the sale. These employees will have to be given and will need to accept offers of employment with the purchaser, in order for their employment to continue unbroken. In the event that an employee is terminated, does not accept a non-mitigating offer of employment or is not offered employment with the purchaser, the seller is generally obligated to provide reasonable notice or pay in lieu thereof. Therefore normally, a seller will require the purchaser to offer employment to all its employees on the same or substantially the same terms and conditions to avoid these notice and severance requirements. Employees who do not accept offers of substantially similar employment from the purchaser are still under a duty to mitigate and their refusal of a reasonable offer could be prejudicial to their ability to obtain an award of damages through a wrongful dismissal claim. However, in some provinces, an employee who refuses such an offer likely remains entitled to statutory notice and severance, if applicable. Employees who accept employment with the purchaser will generally take with them their accumulated service and seniority.

A purchaser and seller may agree (subject to any collective agreement) to a reduction in workforce prior to closing. It is, of course, a matter of negotiation as to who will pay the costs associated with any such terminations. However, because the purchaser often assumes all the employees of the seller, due diligence and the nature of any representations and warranties in an asset purchase transaction will not be that different from those in a share purchase transaction.

In every jurisdiction in Canada, labour relations legislation will almost always require the purchaser to assume the terms and conditions of a collective agreement following a sale, irrespective of whether the transaction involves a sale of assets or shares and whether or not it involves all or part of the business. In most cases, the purchaser will be bound by the existing collective agreement as well as any pending applications for certification. It will, therefore, be important for the purchaser to review a copy of all collective agreements in order to assess such things as restrictions on plant closures, layoffs, contracting out and transferring or redeploying employees. The collective agreement will also set out any scheduled pay or benefit increases. Any plan to reduce the workforce that is prohibited by the collective agreement will require the consent of the union.

In situations where the purchaser intends to intermingle the seller's employees with its own, the different labour relations boards across Canada will decide how bargaining rights are affected.

Employee benefits and pensions

In Canada, employee benefits and retirement income programs are provided through a combination of public plans, private employer-sponsored plans and self-directed plans. Some public plans apply to all Canadians irrespective of their employment status, while others apply only to those who are or have been employed. Public plans vary from province to province. Most are established and managed by the federal or relevant provincial governments and are funded through general tax revenues or employer and/ or employee contributions. Private plans are established and funded by employers for the benefit of their employees although, in some cases, the costs of providing the benefits are paid, in part, by the employees. Whatever the nature of the plan, they are often expensive to maintain and will have significant cost implications for any acquisition.

A. Public plans

The most significant government pension program in provinces other than Quebec is the Canada Pension Plan. It is administered by the federal government using employee contributions withheld and remitted by the employers together with contributions funded directly by employers. The Canada Pension Plan provides a pension to all Canadian workers outside Quebec upon their retirement. Quebec operates its own plan, the Quebec Pension Plan, which is very similar to the federal plan. Each province of Canada has a scheme of public health insurance for all residents which is funded by both the federal and provincial governments through general tax revenues and employer and employee contributions.

All employers are required to deduct and remit employment insurance premiums on behalf of employees pursuant to the federal *Employment Insurance Act*. Employers are also required to pay a premium on behalf of their employees. The Employment Insurance Fund then makes payments for a limited period of time to persons who have become unemployed with the amount of the payment calculated on the basis of their prior wages.

Except to the extent it is required to make its own contributions and withhold and submit employee contributions to the relevant governmental authority, a business will not be liable for the costs of maintaining public plans or providing promised services. However, it is important to understand what a company's funding obligations are and ensure that appropriate systems are in place to collect and remit the prescribed amounts.

B. Private plans

There is no statutory requirement in Canada for employers to provide employee benefits. However, except for some small businesses, employers will generally provide some employee benefits as a means to attract and retain employees and, if offered, employers must administer these plans according to legislative restrictions and requirements. These will often contain retirement income and group benefits components. Group benefits may include life insurance, drug, supplemental hospital and medical care, short term disability and long-term disability. They are typically administered through a group insurance contract with a third party insurer. Other benefit plans may include share purchase plans, stock option plans, home and automobile insurance plans, tuition fees programs and employee loan plans.

Retirement savings are typically provided through one or more of the following types of retirement income plans:

- Registered Pension Plans (defined benefit or defined contribution);
- Deferred Profit Sharing Plans (defined contribution); and
- Group Registered Retirement Savings Plan (defined contribution).

In a defined benefit plan, the pension payable to any individual is determined according to a pre-existing formula. The formulas vary but often include elements relating to average earnings and total years of service. Contributions and pensions payable are subject to limits under the *Income Tax Act* (Canada). Given the nature of funding a defined benefit plan, either surplus assets or deficits can more typically be generated by this type of plan, depending on the funding policy, benefit costs and the return on investment of plan assets.

In a defined contribution plan, the contribution amount is fixed as a percentage of salary or earnings and is subject to contribution limits under the *Income Tax Act* (Canada). The value of a person's individual entitlement under this type of plan is dependent on the total contributions and level of investment income generated by the fixed contributions. There is no issue of unfunded liabilities for an employer under a defined contribution plan.

A new type of registered pension plan called "Pooled Registered Pension Plan" is being gradually introduced in the various Canadian jurisdictions. It is a defined contribution plan to which the employer is not required to contribute. It is meant to be an alternative to existing pension or retirement savings plans. In the Province of Québec, this plan is called "Voluntary Retirement Savings Plan". It must be offered by employers to employees who do not have a registered pension plan or do not have access to a

registered retirement savings plan or tax free savings account for which source deductions can be made

C. Applicable laws

All retirement income plans are subject to the provisions of the federal *Income Tax Act* while registered pension plans are also subject to applicable minimum standards pension legislation (provincial or federal).

The need for dual registration under, and compliance with, both tax and pension legislation gives rise to a certain degree of complexity in pension plan administration. In addition, if the acquired business has employees in more than one province, the pension legislation in each relevant province must be considered. However, Canadian law does not have a concept equivalent to that of "ERISA affiliate" in the United States and the likelihood of a company having liabilities for plans operated by related entities and to which it does not contribute is very low.

Health and welfare benefits are generally not subject to statutory regulation as covered in the U.S. by "COBRA" and some aspects of ERISA. Canadian group benefits plans can be subject to the *Income Tax Act* (Canada) and also could be subject to applicable provincial insurance legislation.

D. Due diligence on acquisition of existing business

A review of all retirement income plans applicable to transferred or inherited employees is critical when acquiring a Canadian business. In particular, a purchaser should obtain, at a minimum, copies of the basic plan documentation (including plan texts, trust agreements, insurance contracts, employee brochures, actuarial valuation and financial statements). The purchaser should ensure that it has identified any compliance issues, evaluated the impact of unfunded liabilities on the business and otherwise considered the costs of maintaining the plans.

The funded status of defined benefit pension plans and prior events affecting pension plans (for example, the use of surplus, merger or acquisition of pension plans and partial windups) are of particular concern.

Attention should also be paid to other group benefit plans particularly retiree health and medical benefit plans whose costs can be significant and continue to escalate. If the seller participates in, and contributes to, multi-employer pension or benefit plans, the purchaser should obtain relevant information on the funded status of those plans.

E. Purchaser's approach to pension and employee benefit plans

In the context of both an asset purchase transaction and a share purchase transaction where there are unionized employees, the purchaser must provide those employees with the employee benefit plans negotiated in the most recent collective agreement. The purchaser has more flexibility with respect to non-unionized employees in an asset purchase context but will often provide either the same benefits or substantially similar benefits. Significantly different benefits, if less generous, may raise concerns about potential constructive dismissal which could lead to high severance costs. (See "*Employment and Labour Law*".)

Unless the purchased company participates in the plans of a selling parent company, a share purchase does not normally involve any changes to the existing employee benefit plans although the regulators must be notified of a change in the name of the plan sponsor or plan administrator. The key issue in the context of a share purchase is usually to determine the funded status of all liabilities and obligations particularly pension liabilities and assets to determine responsibility for funding or adjusting the purchase price prior to closing.

If the purchaser intends to provide a pension or retirement income plan to transferred employees in an asset purchase context, the following options are available:

- assume the seller's plan if that plan covers the transferred employees exclusively;
- establish a plan for future service only (past service remaining the responsibility of the seller's plan); or
- establish a plan for both future and past service and, with respect to past service, transfer related assets and liabilities from the seller's plan, which requires regulatory approval which can only be obtained after closing of the purchase transactions.

If the purchaser assumes the seller's defined benefit pension plan or assumes liability for past service pension benefits, the funded status of the assumed benefits is a critical issue. The preferred objective is usually to obtain assets from the seller's plan which are equal to the greater of the going concern and the solvency liabilities being assumed by the purchaser. However, this objective may not be attainable because of applicable laws. If the amount transferred is less, the purchaser will normally require the seller to pay the difference or reduce the purchase price accordingly. If the amount transferred is more, the seller would typically want to be at least partially compensated for the surplus that would be so transferred.

In the case of defined contribution plans the process is less complicated as the employees' accounts in the seller's plan would simply be transferred to the purchaser's plan subject to regulatory consent. Underfunded multi-employer pension or benefit plans can also be an issue, therefore, employers must satisfy themselves that those unfunded liabilities are adequately dealt with.

Any modification that affects an existing pension plan, including the transfer of assets and liabilities, or the establishment of a new pension plan, involves the drafting of appropriate documentation and the approval of the relevant government authorities. All this takes time and is normally done after the closing date with retroactive effect to the closing date.

It should be noted that most Canadian jurisdictions are considering permitting the establishment of Target Benefits Plans. Such plans would provide pension defined benefits to employees but employers financial obligations would be limited to their agreed upon contributions.

Unlike pension plans, group benefit plans and arrangements must be in place on the closing date. This can be accomplished using a new insurance company, the insurance company of the seller or the purchaser's insurance company. The insurance industry in Canada has adopted internal rules which facilitate the transition from one insurance company to another. In general, the purchase agreement should clarify that events which occurred or claims incurred prior to the closing date are the responsibility of the seller's insurer while those occurring or incurred after the closing date are the responsibility of the purchaser's insurer.

Foreign nationals working in Canada

A. Temporary resident visa

Regardless of the purpose for a foreign national's entry into Canada, unless the foreign national is a citizen of a visa-exempt country (including the United States, Australia, Japan, Singapore and Western Europe), the foreign national will be required to apply for and obtain a Temporary Resident Visa (TRV) prior to the foreign national's arrival in Canada. A TRV is an official document that is issued by a Canadian visa office abroad that shows that that the foreign national has met the requirements for temporary admission to Canada. If the foreign national's entry into Canada is related to the provision of employment related services, the foreign national will also require a work permit unless the foreign national qualifies as a business visitor. The challenge is differentiating between business and employment activities, and identifying those activities that will trigger the requirement for a work permit.

It should be noted that while a TRV is not required for a foreign national coming to Canada from a visa exempt country, such a national must apply online for an Electronic Travel Autorisation (eTA) prior to flying to or transiting through Canada. The eTA is not required if the foreign national is entering Canada by car, bus, train or boat (including cruise ship).

B. Business visitors

Pursuant to the *Immigration and Refugee Protection Act* (IRPR), a foreign national may enter Canada without a work permit as a "business visitor" if: (1) the foreign national does not intend to enter the Canadian labour market; (2) the activity in which the foreign national will be engaging in Canada is international in scope; (3) the foreign national's primary source of remuneration will remain outside of Canada; (4) the foreign national's employer is located outside of Canada; and (5) the accrual of profits of the foreign national's employer is located outside of Canada. The most important criteria in determining whether a work permit is required or if the foreign national is truly a business visitor will be the actual duties being performed in Canada. Activities which fall within the business visitor category may include:

- attending conferences or trade shows;
- attending business meetings to obtain project updates and discuss project requirements;
- general marketing activities, including those targeting a prospective client on behalf of a foreign company;
- negotiating foreign contracts;
- reviewing documents for the purpose of an international audit;
- providing after-sales service pursuant to an international warranty for a product manufactured entirely outside Canada;
- receiving or providing intra-company training at a related company, so long as any production of goods or services that results from the training is incidental; and
- leading a seminar or workshop for five business days or less.

Entry as a business visitor is at the discretion of the Canada Border Services Agency (CBSA) officer at the port of entry (airport or border crossing). In some circumstances, the CBSA may determine that the activities to be performed by the foreign national in Canada qualify as work and that the foreign national is required to obtain a work permit to enter Canada.

It should be noted that if the foreign national is not from a visa exempt country, said national must apply for and be approved for a visitor visa, and an official visa document placed in the foreign national's passport prior to their business trip to Canada.

C. Work permits

Every foreign national whose activities constitute work requires a work permit. The IRPR defines "work" as an activity for which wages are paid or commission is earned, or that competes directly with the activities of Canadian citizens or permanent residents in the Canadian labour market. If a foreign national undertakes an activity in Canada which could be seen to "take away" from opportunities for Canadian citizens or permanent residents to gain employment or experience in the workplace, then a work permit will be required. Examples of activities considered to be work include: occupying a position within a Canadian office, having direct reports in Canada, or providing direction to a Canadian office. This captures senior managers who have cross-border managerial responsibility for employees or functions and foreign-based consultants.

In general, a foreign national must apply for a work permit at a Canadian Visa Office in advance of arrival in Canada. However, where the foreign national does not require a TRV, the foreign national may apply for a work permit at a port of entry (airport or land border crossing) in Canada. Foreign nationals working in Canada are known as "temporary foreign workers".

D. Labour market impact assessment and the temporary foreign worker program

Over twenty different work permit categories exist with differing procedures, processing times and documentation requirements. The most common, and default, category is obtaining a Labour Market Impact Assessment (LMIA) from Employment and Social Development Canada (ESDC).

In order to apply for a LMIA, the Canadian employer must first advertise the position for a minimum of four (4) weeks nationally, including on a government designated website. As part of the LMIA application, the Canadian employer must persuasively explain to ESDC why the Canadian employer was unable to hire a Canadian citizen or permanent resident for the position. In response to a LMIA application, ESDC will issue a positive or negative assessment. A Canadian employer's LMIA application may be denied on various grounds, including if ESDC is of the opinion that a Canadian citizen or permanent resident could have filled the vacant position, or, in the case of a low-wage position, the Canadian business' workforce already consists of 10 percent or more low-wage temporary foreign workers.

All foreign nationals who apply to Immigration, Refugees and Citizenship Canada (IRCC) for work permits on the basis of a positive LMIA are part of the Temporary Foreign Worker Program (TFWP). The TFWP is designed as a last and limited resort to allow employers to bring foreign nationals into Canada as workers on a temporary basis to fill jobs for which qualified Canadians are not available.

E. Labour market impact assessment exemptions and international mobility programs

Through the International Mobility Programs (IMP), a foreign national from a country with which Canada has entered into a labour mobility agreement, or who wishes to work in Canada in a specific occupation, with a certain company, or who offers a significant benefit to Canada, may apply to IRCC for a work permit without a LMIA. One such category is under the North American Free Trade Agreement (NAFTA) category, which permits eligible citizens of the USA or Mexico who have pre-arranged employment with a Canadian employer to apply for a work permit work in one of the over 50 professions identified in Appendix 1603.D.1 of the NAFTA, such as computer analyst, scientist, land surveyors, management consultants, engineers, and accountants. Another popular and facilitative IMP category is the intra-company transfers category, which permits international companies to temporarily transfer qualified foreign nationals from any country to Canada for the purpose of improving management effectiveness, or providing specialized services. A foreign national may qualify for a LMIA-exempt work permit as an intra-company transfer if the foreign national is currently and has been, for at least one year in the three year period immediately preceding the work permit application, employed in a full-time capacity by a multi-national company and is seeking entry into Canada to work for a parent, subsidiary, branch or affiliate of that enterprise in an executive, senior managerial, or specialized knowledge capacity.

Other LMIA- exempt work permits include those for French speaking skilled workers with a valid job offer in a province other than Quebec, charitable workers and religious workers. As well, researchers and academics, professional coaches and athletes, industrial repair or maintenance workers, and those working in arts and entertainment, may also be eligible for LMIA exempt work permits.

Environmental law

All levels of government in Canada have laws that regulate the impact of business activities or projects on the environment. It is an area of law that is shared among the federal government, the various provincial and territorial governments and municipalities. The environment is not specifically named in *Canada's Constitution Act, 1867*, accordingly jurisdiction is based on certain named "heads of power" such as fisheries, natural resources and criminal law. Some environmental matters are regulated by both the federal and provincial or territorial governments. In other cases one or the other levels of government has exclusive jurisdiction to regulate. Municipalities for their part have become more active in regulating environmental matters. They have delegated power under their municipal statutes to pass by-laws, for example, with respect to the discharge of effluent to municipal sewerage or storm sewer systems, pesticide use, noxious weeds, noise and other nuisances. Where more than one level of government has authority to regulate a matter, both can regulate, so long as there is the possibility of dual compliance. In other circumstances federal law trumps the other levels and provincial law trumps municipal law.

A. Environmental regulatory regime

The Canadian regulatory regime in the area of environmental law has a number of different elements. However, the main focus is on the following:

- prohibition on discharges into the environment
- licence, authorization and permit requirements
- wetlands and bodies of water, including compensation as a condition for issuing an authorization
- reporting requirements for spills, releases or emissions
- contaminated site clean-up
- waste management and waste diversion including recycling programs and extended producer responsibility
- ministerial or other regulatory compliance orders, monetary administrative penalties and fines
- environmental assessment and review procedures for significant projects
- climate change and emissions trading
- classification of hazardous substances and importation of substances into Canada
- pesticides and herbicides
- controlled substances as asbestos and PCB
- transportation of dangerous goods; export and import of hazardous waste and hazardous recyclable materials
- fisheries protection
- species-at-risk

The principal federal environmental statutes are the following: The *Canadian Environmental Protection Act, 1999* regulates among other things: the classification, use, import and disposal of toxic substances, reporting of National Pollutant Release Inventory substances; procedures for notification of substances that are newly introduced to Canada (the importation or manufacture of substances that are not listed on the Domestic Substances List is prohibited when certain threshold volumes are exceeded, until the substance and its potential risks have been assessed by Environment and Climate Change Canada and Health Canada), and environmental emergencies and pollution prevention plans. The *Impact Assessment Act*, came into force on August 28, 2019, creates the new Impact Assessment Agency of Canada and repeals the *Canadian Environmental Assessment Act*, 2012. A project is subject to the new impact assessment if it described on the *Physical Activities Regulation* or has been designated by the Minister of Environment and Climate Change (designated project). The purpose of the Act is not only to protect the components of the environment but also the health, social and economic conditions that are within the legislative authority of Parliament from adverse effects caused by a designated project. Engagements towards Indigenous peoples are increased and the Indigenous knowledge must be took into account. After the publication in the Canadian Impact Assessment Registry of the initial description of the project, a public consultation in relation with this initial description and a notice of the proponent to the Agency that set out how it intends to address the issues raised by the public or any jurisdiction or Indigenous group, the Impact Assessment Agency decides whether an impact assessment is required. If an impact assessment is required and no substitution is authorized for a process of another jurisdiction, tailored impact statement guidelines are prepared and the Minister may refer the impact assessment to a review panel. Impact assessment must be referred to a review panel if the project includes physical activities that are regulated under *Nuclear Safety and Control Act* or *Canadian Energy Regulator Act*. A decision is taken at the end of the process and conditions may be added in relation to the adverse direct or incidental effects.

The *Fisheries Act* is the principal federal statute that manages Canadian fisheries resources. Modifications came into force

in 2019 to improve the protection of the fisheries and their ecosystems. Lost protections in 2012 have been reinstated to protect all fish and fish habitat, to restores the previous prohibition against the harmful alteration, disruption or destruction of fish habitat and to provide a stronger role to Indigenous peoples in project reviews, monitoring and policy development. The Minister shall implement measures to maintain major fish stocks at or above the level necessary to promote the sustainability of the stock. There are new prohibitions regarding the fishing of a cetacean with the intent to take it into captivity (except under authorization of the Minister if the circumstances require it, including when the cetacean is injured or in distress or is in need of care) and the importation into Canada or exportation from Canada, or attempt to so import or export, any shark fins or parts of shark fins that are not attached to a shark carcass except in accordance with a permit. There is also a prohibition to carry on any work, undertaking or activity that results in the harmful alteration, disruption or destruction of fish habitat except if it is in a category designated by regulation or authorized by the Minister in accordance with the conditions established by the Minister. The Minister may amend, suspend or cancel the authorization.

At the provincial or territorial level there are environmental statutes and regulations that need to be consulted. These are typically the more relevant ones from an operational perspective.

One marked difference between Canadian environmental law and American environmental law is that Canadian law does not embrace the "Superfund" theory of liability found in the United States although the British Columbia legislation bears some similarity but without a Superfund. That said, government order powers in provincial environmental statutes are generally very broad and can be issued to a number of "potentially responsible" persons.

Other environment - based legislation at the federal/provincial and territorial level include liquid fuels and petroleum products tanks, hazardous waste and hazardous products, natural resources and water, fish and wildlife and green energy resource laws.

For the most part, in Ontario, a corporation operating under a permit or approval which allows it to transfer its hazardous waste to a licensed third party waste disposal corporation / site will not have continuing liability for any damage to the environment caused by that waste. The legislative regime in the particular province must be consulted.

Municipalities have become more active in regulating contaminated properties through development applications and in cases of land use changes to more sensitive uses. Their by-laws generally deal with discharge of liquid effluent to their sewerage and storm water systems, pesticide use, noise, air emissions and community right-to-know programs concerning reporting of certain toxic substances being used or released at facilities in their jurisdictions. The governing provincial statutes define the scope of local government authority.

B. Risks to the purchaser of an existing business

One of the risks that is of most concern to potential purchasers in any transaction is soil or groundwater contamination that may be migrating off-site. This can result in "clean-up" orders issued by governmental bodies and / or civil suits commenced by neighbouring land owners. In Quebec, can be required to perform a characterization study and rehabilitate a land a person who permanently ceases an industrial or commercial activity designated by regulation or who change the use of land where such activity has been carried. By law, the current owner of a property can be held liable for a clean-up even though the contamination was caused by a previous owner. In addition, prior owners, and persons who currently or previously had the charge, management or control of an undertaking or property may also be targeted by government environmental authorities. The net of "potentially responsible parties" will depend on the specific environmental statutes of the jurisdiction in question.

Situations of bankruptcy or insolvency of a responsible party polluter may increase the risk of liability for other persons in that net. Although the Supreme Court of Canada has confirmed the operation of the statutory "polluter pay" principle and the fact that a bankrupt company's estate remained liable for some environmental obligations in priority to the company's creditors in some circumstances, real property purchasers must be mindful that they can be held responsible for contamination they did not cause. Tenants need to ensure that lease agreements protect from such liability. Investors should also be concerned about future regulatory changes that reduce emission or discharge limits, thereby requiring operational or technical facility changes in order for the business to be compliant.

At a minimum, a potential investor will want to understand: (i) whether the seller has all the requisite permits and approvals to enable the business to be carried on at the same level after closing, (ii) in the case of a share purchase transaction, whether the business operations have been carried on in compliance with existing environmental laws, and (iii) where real property is being purchased or leased, the likelihood and extent of any soil or groundwater contamination. Ownership of historically owned properties is also a focus of lingering liability. Environmental issues in acquisition transactions are resolved through purchaser due diligence, including environmental studies and site assessments if

appropriate, and the negotiation of environmental representations, warranties and indemnities which will allocate the liability for environmental risks between the parties.

C. Director and officer liability

Directors and officers of a Canadian corporation may be found personally liable for the contravention of environmental legislation by the company. In particular and most commonly, statutory provisions create liability for directors and officers who authorize, permit, acquiesce in, or participate in, an environmental offence whether or not the company is prosecuted. In Ontario, a higher standard applies: directors and officers have a position duty to prevent the corporation from violating the laws and breach of the personal duty is an offence. However, a due diligence defence is typically available, so it is important for directors and officers to be actively aware of the business' environmental issues and support compliance plans and policies established by the business. In Québec when a corporation is convicted of an environmental offence, its directors and officers are presumed to be guilty of that offence, unless they can show they exercised due diligence and took all necessary steps to prevent the offence. Directors and officers may also incur operational liability if they are found to have personally permitted a discharge or deposit. If a director or officer is found personally liable, he or she can be fined, required to make restitution, or, in rare cases, face imprisonment. In addition, the federal *Criminal Code* imposes criminal liability on persons (including managers) who direct or who have the authority to direct others where such persons fail to take reasonable steps to prevent bodily harm to those over whom they have authority.

Some statutes create administrative monetary penalties that can be imposed by government regulators instead of court proceedings. Some jurisdictions allow for tickets for minor offences to be issued for non-compliance. Directors and officers may also be subject to remedial or preventive orders or clean-up issued by environmental authorities. Recently, environmental cases, especially in Ontario, have seen directors and officers personally liable to orders or as a result of a negociated settlement agreement for millions of dollars related to contaminated properties. The risk is particularly high in cases of bankruptcy, insolvency and corporate work-outs.

D. Climate change

On October 3, 2016, the Government of Canada announced its approach to pricing carbon pollution, which provides that all provinces and territories should have carbon pricing in place by 2018 otherwise, the federal government will establish the pricing system in those jurisdictions that request it or do not have a carbon pollution pricing system that meets federal benchmark. The *Greenhouse Gas Pollution Pricing Act* came in force on June 21, 2018. On October 23, 2018, the federal government confirmed that the federal regulatory trading system for large industry will apply in Ontario, Manitoba, New Brunswick, Prince Edward Island and partially in Saskatchewan starting in January 2019, the federal fuel charge will apply in Saskatchewan, Ontario, Manitoba and New Brunswick starting in April 2019 (will also apply in Alberta beginning in 2020) and both components in Yukon and Nunavut in July 2019. However, the federal pricing system was challenged in court by Ontario and Saskatchewan. In each case, a majority of the Court of Appeal upheld the constitutionality of the *Greenhouse Gas Pollution Pricing Act* in the face of a strong dissenting opinion. The Supreme Court of Canada is expected to hear appeals from these two decisions at the beginning of 2020. Carbon pricing is aimed at helping Canada achieve its GHG reduction target, namely 30% below 2005 levels by 2030. That target reflects Canada's commitment at the twenty-first Conference of the Parties (COP21) to the 2015 United Nations Framework Convention on Climate Change. COP21 resulted in the Paris Agreement under which the international community undertook to limit global warming to less than 2°C and to pursue efforts to limit it to 1.5°C. The Parliament of Canada voted on October 5, 2016 to ratify the Paris Agreement. Ultimately, the ratification thresholds for adopting the Paris Agreement were reached, and it came into force in November 4, 2016.

The federal government's action plan to date for reducing GHG emissions has been to adopt sector-specific regulations. Since 2010, it has implemented regulations under the *Canadian Environmental Protection Act, 1999* (CEPA), each of which are aimed at limiting GHG emissions from major emitting sectors, including transportation and coal-fired electricity generation. These regulations are the *Heavy-duty Vehicle and Engine Greenhouse Gas Emission Regulations, the Passenger Automobile and Light Truck Greenhouse Gas Emission Regulations, the Renewable Fuels Regulations and the Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations*. The federal government has also introduced regulations for the oil and gas sector, which currently accounts for approximately 25 percent of the country's total GHG emissions. The proposed regulations are part of the Pan-Canadian framework on Clean Growth and Climate change to reduce methane emissions by 40% to 45% by 2025.

In addition to the regulations summarized above, CEPA also imposes reporting requirements on operators of facilities that meet the criteria specified in an annual notice published in the Canada Gazette. Currently, all facilities that emit the equivalent of 10,000

tonnes of carbon dioxide or more are required to report their facility GHG emissions to Environment Canada by June 1st of each year.

The climate change regulatory landscape also varies significantly by province. Each province has, to varying extents, implemented their own legislation aimed at reducing and reporting GHG emissions. For example, British Columbia was the first province to authorize the establishment of a market-based cap and trade framework under its *Greenhouse Gas Reduction (Cap and Trade) Act*. Its *Carbon Tax Act* puts a price on greenhouse gas emissions, providing an incentive for sustainable choices that produce fewer emissions. Its *Greenhouse Gas Reduction Targets Act* sets legislated targets for reducing greenhouse gases. Additionally, its *Greenhouse Gas Industrial Reporting and Control Act* which received Royal Assent in November 2014 aims to enable performance standards to be set for industrial facilities or sectors by listing them in a schedule to the *Act*. Quebec imposes a carbon levy on various energy sector participants, mandates reporting by all sources of more than 10,000 tonnes of carbon dioxide and, since January 1, 2013, has been implementing a cap and trade system of carbon emission rights pursuant to the *Regulation respecting a cap-and-trade system for greenhouse gas emission allowances*. The Quebec system has been linked to the California market since January 1, 2014. A similar system has been implemented in Ontario on January 1, 2017 and was linked to Quebec and California systems as of January 1, 2018. But on July 3, 2018, the Government of Ontario revoked its cap-and-trade regulation and prohibited all trading in allowances. Ontario's *Cessation of Coal Use* regulations require all coal units in the province to be retired by the end of 2014, and will result in Ontario being the first jurisdiction in North America to eliminate coal as a form of electricity production.

Finally, at both the federal and provincial level, numerous governmental programs, including tax incentives, have been implemented in order to encourage energy efficiency, promote the use of renewable energy, and incentivize development of green energy technologies, such as carbon capture and storage.

E. Hazardous products & GHS

In 2015 the federal *Hazardous Products Regulation and Hazardous Products Act* (HPA) came into force. Together they implement the Globally Harmonized System of Classification and Labelling of Chemicals (GHS) in Canada. To allow suppliers, employers and workers time to comply with the new system, transition to the updated Workers Hazardous Materials Information System (WHMIS) will follow a three-phase approach however, by 2018 all manufacturers, importers, distributors and employers across Canada must comply with the new HPA requirements.

Intellectual property protection

Protection is available for a broad array of intellectual property rights (IPRs) including: patents, trademarks, copyright, industrial designs, plant breeders' rights, integrated circuit topography, trade secrets and confidential information.

A. Protection available

With the exception of unregistered trademarks, trade secrets and confidential information, the essential conditions for the creation, registration and enforcement of IPRs arise from the following statutes enacted by the federal parliament which are effective and enforceable throughout Canada: *Patent Act*, *Trade marks Act*, *Copyright Act*, *Industrial Design Act*, *Plant Breeders' Rights Act*, and *Integrated Circuit Topography Act.* Jurisdiction over enforcement is shared concurrently between the Federal Court of Canada and the provincial superior courts. The Federal Court has exclusive jurisdiction to impeach, annul, expunge, vary or rectify any registered IPR. As a national court, its orders are recognized and are enforceable throughout Canada without additional formality.

The statutory intellectual property regimes are administered by officials at the Canadian Intellectual Property Office (CIPO). Its website (http://cipo.gc.ca) contains useful information about Canadian IPRs, including searchable databases containing Canadian patents, trademarks (including applications of the foregoing when published), copyrights and industrial designs.

B. Patents

Canada is a signatory to both the *Paris Convention for the Protection of Industrial Property and the Patent Cooperation Treaty* (PCT). Since October 1, 1989, Canada has adopted a first-to-file system and a patent will be issued to the first applicant regardless of the date of invention, provided however, that the essential requirements of novelty, inventiveness and utility are present and the application relates to patentable subject matter. In Canada, unlike many other first-to-file jurisdictions, there exists an exception to absolute novelty in the form of a one-year grace period to file a patent application in Canada after a direct or indirect public disclosure by the applicant. As a general rule, it is wise not to disclose the invention in a non-confidential manner prior to the filing of a patent application.

An applicant can claim priority from one or more earlier patent filings in another member country of the Paris Union as long as the Canadian application is filed within 12 months of the filing date of the priority application.

National entry based on a PCT international patent application may be made into Canada, after which the application proceeds through regular Canadian application procedures.

Canadian applications and patents are subject to annual maintenance fees. Applications are published at 18 months from the priority date, after which reasonable compensation for infringement can accrue, although the patent is enforceable only after issue. Examination must be requested within four or five years from, and depending on, the application filing date in Canada.

The term of a Canadian patent filed after October 1, 1989 is 20 years from the date of filing. Patents filed before this date expire 17 years from the date of grant unless the patent was unexpired on July 12, 2001, in which case the patent will benefit from the later expiry as between the 17 and 20 year terms.

Patents may be freely assigned or licensed. Any assignment, however, must be in writing and registered with the Commissioner of Patents to be effective as against third parties.

C. Trademarks

Trademark rights are created through use or the filing of a trademark application and are maintained through use. A common law trademark is a trademark which is distinctive of a particular source but has not been registered. Once a trademark is registered, its owner benefits from certain presumptions which make registered trademarks more readily enforceable than a common law trademark. Registration of a trademark is granted for indefinitely renewable 10 year periods.

The valid registration of a trademark gives to the owner the exclusive right to use the trademark throughout Canada in association with the goods and / or services for which the trademark is registered, even if the trademark is used only in certain provinces. Furthermore, the right of the owner of a registered mark will be deemed to be infringed by a person, not entitled to its use, who sells, distributes or advertises goods or services in association with a confusing trademark or trade-name.

There are other advantages in registering a trademark in Canada. CIPO will refuse to register any trademark which is considered to be confusing with a trademark which is already registered or the subject of a pending application. A registered trademark serves to notify third parties of the owner's rights.

Trademark owners can now record their trademark registrations with the custom authorities to prevent counterfeit goods from entering the Canadian market.

Under the *Trademarks Act* (Canada), a person may apply for a trademark registration if they are using or propose to use, and are entitled to use the trademark in Canada in association with specific goods and/or services that are also required to be grouped in accordance with the Nice Classification. An application may also be based upon a trademark which is the subject of a foreign application or registration in a Country of the Union, as defined in the *Trademarks Act* (Canada), (in which the applicant has a real and effective industrial or commercial establishment) provided that at the date of filing of the application, the trademark was in use abroad in association with the goods and / or services to be covered by the application. The advantage of filing a trademark application based on intended use is that the protection conferred by the eventual registration will be retroactive as of the date of filing of the application, even though use of the trademark had not yet commenced. This benefit stands in stark contrast to common law rights in an unregistered trademark which can only be created through use. It is therefore advisable to apply to register trademarks at the earliest possible moment.

A 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. Signs include words, personal names, designs, letters, numerals, colours, figurative elements, three-dimensional shapes, holograms, moving images, modes of packaging goods, sounds, scents, tastes, textures and the positioning of signs.

A trademark may be registrable provided that it is not:

- primarily merely the name or the surname of an individual living or deceased within the preceding 30-year period.
- clearly descriptive or deceptively misdescriptive, in either the English or French languages, of
  - the character or quality of the goods or services in association with which the trademark will be used;
  - the conditions of their production;
  - the persons employed in their production;
  - their place of origin.
- the name of the goods or services in any language.
- confusing with a registered trademark.
- without distinctive character.

The *Trademarks Act* also prevents the use and registration of marks consisting of, or so nearly resembling as to be likely to be mistaken for any badge, crest, emblem or mark reserved to the royalty, governments, universities and public authorities that are the subject of significant ongoing governmental control. The *Trademarks Act* also prevents the use and registration of marks of some protected geographical indications for designated wines and spirits, agricultural products or food.

Trademark applications are initially reviewed by an examiner at CIPO and, if acceptable, the trademark will be advertised for opposition in the Trademarks Journal. Any person may, within two months of the advertisement, oppose an application before the Opposition Board. In the absence of opposition, the application will then be registered upon payment of the registration fee. The decision of the Registrar refusing to register a trademark may be appealed to the Federal Court of Canada.

Caution should be exercised whenever a trademark owner is contemplating licensing its trademark, even to its own subsidiary. The owner must exercise direct or indirect control of the character or quality of the licensee's goods or services in association with which its trademark is used. Where this essential requirement is complied with, any use by a licensee of the trademark is deemed to have the same effect as use by the owner.

Following the coming into force of the amendments to the *Trademarks Act* on June 17, 2019, Canada has implemented the Madrid Protocol and Nice Classification. The Madrid Protocol offers trademark owners the possibility of obtaining trademark protection in more than 100 countries by filing one single international application with the World Intellectual Property Organization (WIPO). It is also possible to designate Canada when filing an application for international registration filed form outside Canada.

D. Copyright

Canada is a member of the Berne Convention and a signatory of the Universal Copyright Convention. Copyright in Canada subsists in all original works from the moment of their creation and vests in the copyright owner for the duration of the author's life plus an additional period of 50 years.

In Canada, copyright protection exists without the formality of registration. A registration certificate, however, provides the owner with certain presumptions and advantages in enforcement proceedings.

The owner of a copyright has the sole right to, *inter alia*, produce or reproduce the work in any material form, as well as 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, to communicate the work by telecommunications, as well as to authorize such acts.

Copyright, except for the author's moral rights, may be assigned or licensed, which assignment or licence may also be registered with the Canadian Intellectual Property Office (CIPO). Assignees often seek a contractual waiver of moral rights from the author.

Canadian copyright law underwent significant legislative reform in 1997, resulting in a number of innovations, the most significant of which are a right of private copying for musical works, performances and sound recordings in exchange for a remuneration regime established by the statute. Moreover, these amendments also created copyright protection in performer's performances, sound recordings and communication signals. Since 1997 there were four attempts at revising the legislation. Amendments to the legislation came into force in November 2012. The 2012 amendments introduced additional protection such as the "making available" and the "distribution" rights, new moral rights for performers, new protection against the providing of electronic services for the purpose of enabling acts of infringement and against the circumvention of technological protection measures. Controversial new exceptions and limitations were also introduced, including the broadening of the fair dealing exception to include education, parody and satire in allowable purposes, new exceptions for non non-commercial user-generated content, reproduction for private purposes, "time-shifting" and the creation of backup copies. The new legislation also created "safe harbours" for network service providers, such as when "hosting" and providing data memory.

A new mandatory "notice-and-notice" procedure and corresponding duties for Internet Service Providers were also introduced. They came into force in January of 2015. In June of 2015, the duration of copyright in certain sound recordings was extended. In June 2016, amendments were made to make works more accessible to people with disabilities.

E. Industrial designs

Protection exists under federal law for industrial designs as defined by the features of shape, configuration, pattern or ornament of an article which appeal to and are judged solely by the eye. Protection may not extend to any features dictated solely by the utilitarian function of the article or any method or principle of manufacture or construction. The design must be original.

At the time of filing, the proprietor, whether the first proprietor or a subsequent proprietor, must file a declaration that the design was not, to its knowledge, in use by any person other than the first proprietor at the time the design was adopted by the first proprietor. In order to be registrable, a design shall not have been published in Canada or elsewhere more than one year before the filing date of the application for registration in Canada.

Current CIPO practice no longer requires a lengthy and detailed description of the industrial design thereby simplifying the application procedure.

Under the *Paris Convention*, an industrial design application may claim the priority date of a previously filed application in a member country as long as the application in Canada is filed within six months of the priority date.

The term of an industrial design is 10 years from the date of registration with a renewal fee required at five years. Like patents, industrial designs may be assigned or licensed.

Since Canada's electronic commerce strategy was first announced in September 1998, the federal government has released policies on cryptography and authentication, enacted personal information privacy legislation, anti-spam legislation and made changes to copyright legislation. Primary considerations include the protection of personal information and ensuring the security of on-line transactions.

Product standards, labelling and advertising

A. Product standards

Product standards in Canada may take the form of mandatory legislated standards or voluntary industry standards. Both federal and provincial legislation may impose mandatory standards, usually for health and safety reasons. The Standards Council of Canada co-ordinates the development of voluntary industry standards through Canada's National Standards System.

B. Product labelling

Product labelling is regulated both federally and provincially in Canada. The federal *Consumer Packaging and Labelling Act* (CPLA) regulates prepackaged consumer product labelling. The CPLA requires labelling regulated by the statute to be in both French and English. The Quebec *Charter of the French Language* requires that most product labelling and materials accompanying products sold in Quebec (e.g., warranties) be in the French language.

Other federal statutes, such as the Marking of Imported Goods Order, the *Safe Food for Canadian Act*, the *Food and Drugs Act*, the *Textile Labelling Act*, the *Tobacco and Vaping Products Act*, and the *Cannabis Act* and associated regulations impose core labelling requirements for specific products and for certain products content and country of origin disclosure.

C. Advertising

As described earlier in this publication, the federal *Competition Act* contains criminal and civil provisions to address false and misleading representations and deceptive marketing practices made or used in the course of promoting the supply or use of a product or any business interest.

Under the criminal provisions of the *Competition Act* (which support a private right of action for damages), a general provision prohibits all materially false or misleading representations made knowingly or recklessly. Other provisions specifically prohibit deceptive telemarketing, deceptive notices of winning a prize, double ticketing and pyramid selling schemes. The multi-level marketing provisions of the *Competition Act* define the responsibilities of operators and participants in multilevel marketing plans.

Under the civil provisions of the *Competition Act*, a general provision prohibits all materially false or misleading representations. Other provisions specifically prohibit performance representations not based on adequate and proper tests, misleading warranties and guarantees, false or misleading ordinary selling price representations, untrue, misleading or unauthorized use of tests and testimonials, bait and switch selling, and the sale of a product above its advertised price. Promotional contest provisions set out the requirements for conducting a contest, lottery or game of chance or skill. Recent Canadian case law sets a low threshold for assessing whether an advertising representation is false or misleading. Ensuring that product claims are substantiated before the claim is made is a particularly important issue in Canada.

Provincial legislation, notably business practices and consumer protection legislation, also impacts product advertising and marketing claims. In the province of Quebec, promotion contests are subject to additional regulation.

In addition to federal and provincial laws and regulations, Advertising Standards Canada, a nonprofit national industry association, administers industry advertising codes and guidelines.

Other federal statues, such as the *Food and Drugs Act* and the *Cannabis Act* and associated regulations impose additional requirements or restrictions.

D. Consumer product - mandatory incident reporting

The *Canada Consumer Product Safety Act* has a significant impact on consumer products sold in Canada.

This legislation:

- prohibits the manufacture, importation, advertisement or sale of any consumer products that pose an unreasonable danger to human health or safety;
- requires industry to report serious incidents, or death, related to a consumer product and to provide government with information about product safety issues;
- requires manufacturers or importers to provide test/study results on products when asked;
- allows Canada's Minister of Health to order recalls of consumer products; and
- imposes significant fines and penalties for non-compliance with the legislation.

Other federal statues, such as the *Food and Drugs Act* and the *Cannabis Act* and associated regulations impose additional requirements or restrictions.

E-commerce

A. Jurisdiction

E-commerce transactions often involve multiple jurisdictions. Canadian administrative bodies and courts have used the "real and substantial connection" test to determine whether there is jurisdiction over persons located outside of Canada who conduct business with Canadian residents over the Internet. Canadian jurisprudence has found a "real and substantial connection" can arise from a number of factors, including where the relevant activity took place and where the damage was suffered. Canadian courts have also upheld choice of venue clauses contained in Internet "click-wrap" contracts. It is less clear that such terms in "browse wrap" agreements are enforceable, absent clear confirmation that the contract terms have been brought to the attention of, and accepted by, the party contesting the terms (an important consideration when setting contract terms).

B. Legislation

In Canada, *Uniform Electronic Commerce Act* (the "UECA") serves as a model for provincial electronic commerce laws, consisting of various technology-neutral rules based on the principle that electronic records should have the same legal effect as paper-based records. All Canadian provinces and territories (except Quebec) have enacted electronic commerce legislation based on the UECA with minor or no modifications. In Quebec, *An Act to Establish a Legal Framework for Information Technology* was enacted, which is much broader and more comprehensive than the UECA. Canada's *Personal Information Protection and Electronic Documents Act* governs the use of electronic documents in circumstances where federal laws contemplate the use of paper-based communications or records.

C. Electronic contracting

Electronic contracts may be formed under Canadian law (supported by both electronic commerce legislation and the common law) in many ways as long as there is a clear presentation of the contractual terms and an unequivocal indication of the recipient party's acceptance of those terms. The manner of acceptance of the contractual terms, however, must be carefully considered and structured in order to ensure the terms are clear and enforceable. This is particularly the case as technologies evolve and as greater use is made of the Internet in commercial communications. There may also be mandatory personal rights of cancellation in the event that regulatory disclosure requirements are not met or a consumer was not provided with an opportunity to accept or decline the contract.

Generally speaking, in electronic contracts, it is critical to ensure that there has been sufficient notice of terms (particularly onerous terms), sufficient opportunity for the buyer to consider the terms and to decline, evidence of acceptance of terms that is sufficiently clear and positive as to demonstrate actual consent to be bound by terms and the absence of terms that are unconscionable or greatly unfair.

D. Consumer protection

Provincial consumer protection legislation is aimed at protecting consumers in the context of various transactions, including transactions conducted electronically. Generally, consumers are individuals who conduct transactions for personal, family or household purposes. In addition to the various consumer protection requirements that apply regardless of whether a transaction is conducted electronically or otherwise, certain provinces have requirements that specifically apply to agreements entered into over the Internet or more generally, to agreements entered into when the supplier and the consumer are not together in person at the time of the transaction. These include certain required disclosures and the requirement to give the consumer an express opportunity to accept or decline the agreement and correct any errors before entering into it.

E. Domain names regime

The Canadian Internet Registration Agency (CIRA) controls the registration of ".ca" domain names. CIRA's *Canadian Presence Requirements* only allow certain persons to register for a ".ca" domain: persons with a "real and substantial connection" to Canada, organizations with a Canadian territorial registration, or owners of registered Canadian trademarks. Domain names are registered on a first-come-first-served basis and disputes are settled under CIRA's Canadian Domain Name Dispute Resolution Policy (CDRP).

Privacy and anti-spam laws

The federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) sets forth principles for the protection of personal information. PIPEDA recognizes the right to privacy of individuals and is directed at protecting personal information in the course of commercial activity, including commercial transactions. PIPEDA balances the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate.

In general, PIPEDA applies to every "organization", which is defined as including an association, partnership, person (including a corporation) and a trade union, concerning all "personal information" collected, used or disclosed in the course of "commercial activity", which is interpreted at the very least to include transactions, acts or conduct "of a commercial character." Such collection, use or disclosure is prohibited without the knowledge and consent of the individual, except in certain limited and specified circumstances.

The definition of "personal information" is critical to the application of PIPEDA as it only regulates information that constitutes "personal information". The definition provides that personal information is "information about an identifiable individual". It does not include, however, the "name, title or work address of an employee of an organization".

An individual's consent to the collection, use or disclosure of that individual's personal information is the lynchpin of PIPEDA. Consent may be either express or implied, although express consent where possible and obtainable is preferred. The more sensitive the information is, for example, financial information or personal health information, the more likely express consent will be required for the collection, use or disclosure of such personal information. Implied consent may be adequate for less sensitive information. PIPEDA does not purport to create an overall privacy protection scheme. As such, it does not apply to, for example, any government institution to which the *Privacy Act* applies or to non-commercial information gathering activities.

Quebec has had privacy legislation since 1994 similar in principle to PIPEDA. Alberta and British Columbia also enacted comprehensive private sector privacy legislation and similar legislation has been enacted, but not yet brought into force, in the province of Manitoba. These provincial laws apply to personal information of employees. Certain other provinces have legislation in force governing the collection, use and disclosure of personal health information. Some of the privacy legislation provide for mandatory breach reporting obligations. PIPEDA's mandatory breach reporting regime came into force on November 1, 2018. Organizations subject to PIPEDA are required to report to the Privacy Commissioner of Canada any breaches of security safeguards involving personal information that pose a real risk of significant harm to individuals. They also need to notify affected individuals about those breaches, and keep records of all data breaches within the organization. Previously, data breach reporting to the Commissioner was done on a voluntarily basis.

In the context of a commercial transaction, privacy issues should be considered at the outset of commercial discussions. Appropriate safeguards must be put in place to ensure that the disclosure or sharing of personal information during a due diligence phase of a transaction or transferred as part of the transaction is undertaken in compliance with privacy laws. Non-disclosure agreements and transaction documents, for example, should be drafted having regard to the disclosure of personal information that may be exchanged at any stage of the transaction. To the extent provincial privacy legislation requires notification of the transfer of personal information, parties must ensure that responsibility for, and the costs associated with, such notification are considered as part of the commercial deal.

Canada's anti-spam legislation (CASL) is comprehensive legislation which regulates a variety of electronic communications, such as e-mails, and the installation of computer programs. The key provisions of CASL came into effect on July 1, 2014. Provisions relating to the installation of computer programs came into force on January 15, 2015. CASL provides for very substantial administrative monetary penalties for violations. The private right of action against "spammers" created by CASL, which was supposed to come into force on July 1, 2017, has been suspended for an undetermined period of time.

Subject to limited exceptions, CASL prohibits sending commercial electronic messages (CEMs) without the recipient's consent (permission), including email and text messages as well as messages sent to social networking accounts. CASL implies consent to send a CEM in certain situations, including where the sender has an existing business relationship with the recipient. Examples of an existing business relationship include:

- a written contract between the sender of the message and the recipient. The consent is implied only for 2 years from the end of the contract;

- a purchase or lease of a product, goods, a service, land or an interest or right in land between the sender of the message and the recipient. This must have occurred within 2 years of sending the message;
- the person to whom the message is sent accepted a business, investment or gaming opportunity within 2 years before the message was sent; and
- the person to whom the sender wishes to send the message made an inquiry or application regarding the purchase, lease of a product, goods, a service, land or an interest or right in land. The inquiry or application must have been made within the last 6 months.

Consent to send a message is not required for certain internal company or business to business communications, to enforce legal rights or where the communication is required by law.

CEMs, and requests for consent to send CEMs, must include certain mandatory contact information as well as an unsubscribe mechanism. Requests for consent sent electronically must also contain a statement indicating that the consent may be withdrawn.

Aboriginal considerations

Canada's Aboriginal peoples consist of three groups: First Nations (or Indians), the Inuit (who occupy Canada's far north), and the Métis (people of mixed First Nation-European heritage). Section 35 of the *Canadian Constitution Act, 1982* recognizes and affirms existing Aboriginal and treaty rights, giving them special protection. A series of cases from Canadian courts have elaborated on the nature and scope of these rights, but this remains an evolving area of law. Governments have a constitutional duty to engage in meaningful consultation, and often accommodation, where their actions (including the issuance of regulatory permits) may adversely affect established or credibly asserted Aboriginal and/or treaty rights.

In many provinces in Canada, historic treaties were signed between First Nations and the Crown, often involving the surrender of land by an Aboriginal group in exchange for certain benefits (e.g., Reserve lands) and the continued right to utilize their traditional Territories (e.g., for hunting, fishing, etc.). Since the 1970s, modern treaties have been entered into in Quebec, Newfoundland and Labrador, British Columbia and the Federal Territories. Those agreements reserve large areas of land to the Aboriginal signatories and contain sophisticated regulatory processes with respect to matters such as land use planning and water management. In parts of Canada where treaties are not yet negotiated, including most of British Columbia, comprehensive land claim negotiations are currently underway.

The *Constitution Act, 1982* also recognizes the existence of Aboriginal rights. The precise nature of these rights remains a complex and evolving legal question. Such rights may involve hunting, fishing or trapping activities that are exercised on the traditional lands of an Aboriginal community or Aboriginal title. Aboriginal title confers ownership rights similar to those associated with fee simple including the right to decide how the land will be used and the right to the economic benefits of the land.

Duty to consult

Resource development activities that take place in one or more Aboriginal communities' traditional Territories are likely to impact Aboriginal and/or treaty rights, triggering the duty to consult.

The federal and provincial governments have a duty to consult with Aboriginal communities when they have knowledge (real or constructive) of such rights and contemplate conduct (e.g., issuing a permit to allow for exploration) that may impact these rights. This duty has been elaborated in court cases, and exists separate from other statutory consultation processes, such as that involved in the environmental assessment process. Because of the historical relationship between the Crown and Aboriginal people and the unique nature of, and protection for, their rights, Aboriginal consultation requires a different approach than general public engagement.

The scope of the duty to consult can vary widely depending on the strength of the claimed right and the nature and extent of the impact of the project/activity. Canadian courts have held that circumstances where the right is either established or credibly asserted, and the potential impact is high, attract a higher level of consultation, and in some cases, require accommodation. Accommodation may involve deeper participation by the community in the decision making process, as well as changes to the development to mitigate negative impacts on that community. The duty to consult does not include a veto over development for Aboriginal communities, although in practice, new resource developments will endeavor to accommodate Aboriginal concerns (via mitigation measures) and/or attempt to provide project benefits to the local Aboriginal communities through Impacts and Benefits Agreements (IBAs).

Although the federal or provincial governments retain the ultimate duty to ensure that adequate consultation has taken place, there are many instances where government will delegate some consultation obligations to private proponents (via environmental assessment or resource legislation or policies). Furthermore, it is a good business practice for companies to develop positive relationships with Aboriginal communities regardless of the Crown's approach. A strong, mutually respectful relationship with local communities can increase support for a project, facilitate the permitting process, and improve certainty of access to lands and ressources.

Far north

Canada's three territories, Nunavut, the Northwest Territories and Yukon, comprise almost 40 percent of Canada's land mass, and have a coastline twice the length of the combined Atlantic and Pacific coasts. As global demand for mineral resources and energy continues to rise, the North is becoming a prime destination for domestic and foreign investment.

The government of Canada has developed Canada's Northern Strategy which provides a high-level vision for the North. The Strategic Framework 2013-2018 focuses on three priority areas: an engaged and skilled workforce; enabling infrastructure and community capacity.

The Canadian Northern Economic Development Agency (CanNor) exists to establish and strengthen a diversified and sustainable economy for the Territories that would support both northern social and economic development, including for Aboriginal peoples, as well as contribute to Canada's overall prosperity.

CanNor's Northern Projects Management Office (NPMO) plays a key role in advancing resource development and infrastructure projects in particular by providing advice to industry and communities to improve the timeliness, predictability and transparency of regulatory processes around major projects, a "one-stop shop" for industry and Aboriginal communities. NPMO was established to foster a more stable and attractive investment climate in the territories.

While the Canadian Far North is being increasingly positioned as a destination for resource development investments, presently there exists limited and dispersed infrastructure in the North which is a significant challenge for further economic development. This is aggravated by significant distances between localities, northern weather conditions and difficult topography.

Devolution of powers to the territories from the federal government

Devolution, generally speaking, is the transfer of power, authority and resources from the national government level to sub-national governments. In the Canadian North, devolution plays out as the transfer of province-like responsibilities from the federal government to the territories. The process of devolution in the territories has been ongoing since the early 1970s and, since then, northern governments have become increasingly responsible for many aspects of life in the Territories, including education, health care and social services.

In 2003, Yukon became the first territory to finalize a devolution agreement on lands and resource management, giving them decision-making authority in these areas. The Northwest Territories signed a similar agreement in 2013. In Nunavut, the Governments of Canada and Nunavut and the Nunavut Tunngavik Inc. signed in 2019 an agreement-in-principle which will serve as a guide for the negotiation of a final devolution agreement.

However, devolution is just one part of a larger process whose goal is regional empowerment and local control. The other parts of the process include the expansion of Aboriginal self-government and the signing of modern treaties.

In the Yukon, 11 of 14 First Nations have signed self-government agreements and settled claims. Most of the Northwest Territories is covered by Comprehensive Land Claims Agreements that give Aboriginal people authority to manage their lands and resources. In Nunavut, the Land Claims Agreement led to the creation of the territory in 1999.

The signing of these treaties has brought about significant transformation in the North through the infusion of hundreds of millions of dollars in capital, the ability to collect royalties from future resource developments, and increased financial opportunities and responsibilities.

Language legislation

A. Language legislation applicable in Quebec

Generally speaking, since 1977 the *Charter of the French Language* (the Charter) recognizes that French is the official language in the province of Quebec and states that every person has the right to be communicated to in French by all civil administration, health services, public utility firms, professional corporations, associations of employees and businesses operating in Quebec. It also creates the *Office québécois de la langue française* (the Office) which is responsible for ensuring compliance with the *Charter*

1. The Language of commerce and business

The *Charter* states that consumers of goods and services have a right to be informed and served in French.

Contracts

The *Charter* requires certain contracts and other documents to be in French only; others may be in French and in another language; some may be in another language only.

Any contract entered into with the civil administration and health and social services, must be in French unless such contract is entered into with a party outside Quebec.

Contracts of adhesion (i.e. contracts pre-determined by one party and contracts containing printed standard clauses) must be drawn up in French except with the express consent of the parties.

Application forms for employment, order forms, invoices, receipts, and acquittances must be in French. They may be in French and in another language as well, provided that the French version is displayed at least as prominently as every other language.

Commercial advertising

Public signs and posters and commercial advertising must be in French. They may also be in French and in another language provided that French is markedly predominant.

This is defined in a regulation. In essence, in public signs and posters and in posted commercial advertisings that are both in French and in another language, French is markedly predominant where the text in French has a much greater visual impact than the text in the other language. There are specific rules to deal with certain specific situations.

Inscriptions on products

The *Charter* provides that every inscription on a product, on its container, on its wrapping, or on any document or object supplied with the product, including directions for use and warranty certificates, must be in French. Translation of the inscription in one or more languages is permitted provided that the translation is not given greater prominence than that in French.

There are however exceptions stipulated in the legislation and its regulation.

In addition, the firm name of a firm established exclusively outside Quebec and a recognized trademark within the meaning of the *Trademarks Act* (unless a French version has been registered) may be inscribed on a product exclusively in a language other than French.

Commercial publications

The Charter provides that catalogues, brochures, folders, commercial directories, and other publications of the same nature must be in French, but they may also be bilingual, provided that the French version is displayed at least as prominently as the other language. There are however certain exceptions stipulated in a regulation.

Firm names

As earlier mentioned, the *Charter* provides that the name of an enterprise must be in French and that to obtain juridical personality, it is necessary to have a name in French.

However, the *Charter* also permits that the name of an enterprise be accompanied with a version in a language other than French provided that, when it is used, the French version of the name appears at least as prominently.

2. The language of labour relations

General principles

The *Charter* states that workers have a right to carry on their activities in French. This is a fundamental language right. The *Charter* imposes obligations and prohibitions on all employers, regardless of the size of their business.

Written communications and offers of employment

An employer must comply with the *Charter* when sending written communications to its staff and offers of employment and promotion. Communications pertaining to working conditions with personnel in general must be in French or bilingual as opposed to communications with individuals which need not be in French, if such is the will of the employee. Bilingualism is permitted, provided that the French version is displayed at least as prominently as the English version.

3. Francization of business firms

The *Charter* contains a series of provisions dealing with francization of businesses which vary depending on the number of employees in the firm within the province of Quebec.

Francization programme

An enterprise that employs 50 persons or more must register with the Office, and inform the Office of the number of persons it employs and provide it with general information on its legal status and its functional structure and on the nature of its activities. The Office shall then issue a certificate of registration to the enterprise. The enterprise shall thereafter transmit an analysis of its linguistic situation to the Office. If the Office considers that the use of French is generalized at all levels of the enterprise, it shall issue a francization certificate.

If, however, the Office considers that the use of French is not generalized at all levels of the enterprise, it shall notify the enterprise that it must adopt a francization programme. It can also order the establishment of a francization committee.

Every business employing 100 or more persons in Quebec is also required to analyze its language situation. In addition, such businesses must form a francization committee.

The francization committee has the mandate to analyze the language situation in the firm and report on it to management. Said linguistic analysis is then transmitted to the Office.

Upon review of such linguistic, if the Office is of the opinion that the use of French language is generalized at all levels of the firm, it will issue a francization certificate.

If however, the Office considers that the use of French is not generalized at all levels of the firm, it will notify the firm that it must adopt a francization programme. This programme has to be submitted to the Office and must be approved by the Office.

After having approved the francization programme of an enterprise, the Office shall issue an attestation of implementation in respect of the programme. The enterprise must comply with the elements and stages of its programme.

Exceptions allowing the use of another language

The Charter provides that a francization programme must take into account, among other things, the relations of the firm with the exterior, the particular case of head offices and research centres established in Quebec by enterprises whose activities extend outside Quebec, and the line of business of the enterprise.

Special agreements can be entered into between head offices and research centres and the Office to allow the use of English as the language of operation.

Finally, it is important to note that once a firm has been granted a francization certificate, it is required to ensure that the use of French remains generalized at all levels.

Information and communication technologies

A francization programme must, among other things, ensure that the use of French is generalized in "information technologies" as well as in a firm's working documents. This is particularly important for the Office and it will pay a lot of attention to a firm's hardware, software, number of users of english versions, intranet and website.

4. Consequences in cases of non-compliance with the Charter

Every person who contravenes a provision of the Charter or the regulations made thereunder commits an offence and is liable, for each offence, to a fine of $600 to $6,000 in the case of a natural person, and of $1,500 to $20,000 in the case of a legal person. The fines are doubled for a subsequent offence.

Other penalties of a commercial nature may also be imposed in cases of non-compliance such as loss of contracts with the civil administration.

B. Language legislation applicable outside of Quebec

1. Services provided on behalf of a government institution

Federal legislation, as well as legislation in Ontario and New Brunswick, extends into the private sphere obligations of federal institutions with respect to language rights in the provision of services. In short, a private company providing services "on behalf of" the federal, Ontario, or New Brunswick government may be subject to certain language obligations if the institution on behalf of whom the private company provides services is itself subject to the obligations. Private companies doing business in Canada and providing services to the public "on behalf of" the federal, Ontario, or New Brunswick government should therefore be aware of their obligations with respect to language rights under the federal *Official Languages Act*, *Ontario's French Language Services Act*, and New Brunswick's *Official Languages Act*.

2. Payroll records

In certain provinces, there are language requirements imposed on employers with respect to payroll records. For instance, pursuant to employment legislation in British Columbia[1] and

1 *Employment Standards Act*, RSBC 1996, c 113, sec 28(2)(a).

Saskatchewan,[2] employers in these provinces must keep payroll records in the English language. In Manitoba, on the other hand, these records may be kept either in English or in French.[3]

3. Company names

Likewise, Letters patent of a federal corporation[4] or a corporation established pursuant to the laws of New Brunswick,[5] British Columbia,[6] Prince Edward Island,[7] or Saskatchewan[8] may bear a company name in French, in English, in both languages or in a combination of the two, in which case either of the two versions may be used in official documents. In Ontario, either English or French may be used in the issuance of share certificates,[9] for the list of shareholders,[10] and for affidavits.[11]

4. Product labelling

In terms of inscriptions on products, various federal regulations create language obligations. These include legislation and regulation such as the:

- The *Consumer Packaging and Labelling Regulations* made under the *Consumer Packaging and Labelling Act* provides that, subject to certain exceptions, all information required by the Act and the Regulations to be shown on the label of a prepackaged product must be in both official languages.[12]
- The *Food and Drug Regulations* made under the *Food and Drugs Act* provide that any information that is required by regulation to appear on the label of any drug may be either in French or English in addition to any other language,[13] and that adequate directions for use required to be shown on inner and outer labels of a drug available for sale without a prescription in an open shelf-selection area must be both in French and English.[14] Further, subject to certain exceptions, the *Food and Drugs Regulations* provide that all information required by the regulations to be shown on the label of a food must be in both official languages.[15]
- Pursuant to the federal *Meat Inspection Regulations* under the *Meat Inspection Act*, subject to certain exceptions, markings required by regulation to be shown on a label used in connection with a meat product must be shown in both official languages.[16]
- The *Textile Labelling and Advertising Regulations* under the *Textile Labelling Act* require the textile fibre content of an article to be represented on the article's label both in English and in French.[17]

5. Other federal language legislation

Various federal laws and regulations in various industries create language rights and language obligations that impact companies operating in the private sector in Canada, such as:

- Canada's *Copyright Act* requires a proposed tariff to be filed in both official languages.[18]
- Canada's *Excise Tax Act* provides that every person who is required to pay or collect taxes under that Act to keep records and books of account in English or French.[19]
- Canada's *Marine Transportation Security Act* requires the operator of a vessel or facility to post certain notices in both official languages.[20]

6 Other provincial language legislation

In Ontario and New Brunswick, the insurance and real estate industries in particular are subject to language requirements. For instance, certain clauses and statutory conditions in Ontario insurance contracts must be drafted either in English or in French.[21] In the real estate industry, instruments and documents may be registered in French in regions prescribed by regulation.[22]

2 *Wage Recovery Act*, RSS 1978, c W-1, sec 18(1).

3 *The Employment Standards Code*, CCSM c E110, sec 135(1).

4 *Interpretation Act*, RSC 1985, c I-21, sec 21(1)(b) & 21(2).

5 *Interpretation Act*, RSNB 1973, c I-13, sec 13-14; *Companies Act*, RSNB 1973, c C-13, sec 6(3) & 34.1(1).

6 *Interpretation Act*, RSBC 1996, c 238, sec 17(1)(f).

7 *Interpretation Act*, RSPEI 1988, c I-8, sec 16(e).

8 *The Interpretation Act*, SS 1995, c I-11.2, sec 16(4).

9 *Corporations Act*, RSO 1990, c C.38, sec 46(1)(a).

10 *Corporations Act*, RSO 1990, c C.38, sec 306(1).

11 *Corporations Act*, RSO 1990, c C.38, sec 307(2).

12 *Consumer Packaging and Labelling Regulations*, CRC, c 417, sec 6(2).

13 *Food and Drug Regulations*, CRC, c 870, sec A.01.015(1).

14 *Food and Drug Regulations*, CRC, c 870, sec A.01.015(2).

15 *Food and Drug Regulations*, CRC, c 870, sec B.01.012(2).

16 *Meat Inspection Regulations*, 1990, SOR/90-288, sec 97.

17 *Textile Labelling and Advertising Regulations*, CRC, c 1551, sec 11(1)(3).

18 *Copyright Act*, RSC 1985, c C-42, sec 83(3).

19 *Excise Tax Act*, RSC 1985, c E-15, sec 98(1).

20 *Marine Transportation Security Act*, SC 1994, c 40, sec 21(2).

21 *Insurance Act*, RSO 1990, c I.8, sec 148(1), 149, 234(1), and 300.

22 *Registry Act*, RSO 1990, c R.20, sec 44.

In New Brunswick, insurers must draft insurance contracts both in English and in French.[23] In addition, in this province, where an insurer engages a solicitor to act on behalf of an insured, the insurer must ask the insured to indicate the official language he wishes to be used by the solicitor acting on his behalf and must engage a solicitor who uses that official language.[24]

Further, in the real estate industry in New Brunswick, the standard forms of conveyances of land are prescribed in both official languages.[25]

23 *Insurance Act*, RSNB 1973, c I-12, sec 20.1.

24 *Insurance Act*, RSNB 1973, c I-12, sec 20.2.

25 *Standards Forms of Conveyances Act*, SNB 1980, c S-12.2, sec 0.1.

Anti-corruption and bribery law

The *Corruption of Foreign Public Officials Act* (CFPOA) makes it a criminal offence in Canada to bribe a foreign public official, while provisions in the *Criminal Code of Canada* make it a criminal offence to bribe Canadian officials.

An individual or a corporation can be charged and convicted of a criminal offence in Canada for directly or indirectly bribing a foreign public official.

A. Definitions

The definition of bribe under the CFPOA includes virtually all forms of economic benefit that might be given or paid to a foreign public official. A foreign public official includes officials of foreign governments, officials of various government entities including boards or commissions or state owned corporations, as well as officials of public international organizations such as the United Nations and the World Bank. Bribery of such officials is prohibited where used to obtain an advantage in the course of business, whether for profit or not, to make the official do or refrain from doing something, or to use his or her position to influence the acts or decisions of a foreign state or public international organization. There is also a broad scope of what can be considered a bribe, which can include basically any form of economic benefit to an official. The scope of application of the CFPOA includes charitable organizations and other non-governmental organizations. There is no exception for "facilitation payments" under the CFPOA.

B. Offences and exceptions

There is a "books and records offence" which requires maintaining accounts in accordance with Generally Accepted Accounting Principles. Criminal liability can arise for failure to record or inadequately record in respect of the transactions; recording expenditures that did not occur; incorrectly identifying the purpose of a liability; knowingly using false documents; and intentionally destroying books and records earlier than permitted by law.

The CFPOA deems any act or omission that, if committed in Canada, would constitute an offence under the CFPOA to have been committed in Canada for the purpose of prosecution. This makes prosecutions easier because it eliminates the need to establish a territorial link to Canada and allows the prosecution of CFPOA offences against Canadian citizens, Canadian permanent residents, and organizations that are incorporated or otherwise organized under the laws of Canada or of a province, located or operating anywhere in the world solely on the basis of their nationality.

In a 2014 decision of the Ontario Superior Court of Justice, the court held that it has jurisdiction over offences that have a connection to Canada or over persons in Canada, but that Canadian courts do not have jurisdiction over persons who are outside Canada and are not Canadians.

The CFPOA includes some limited exceptions. A bribery offence will not be committed where the bribe is permitted or required under the laws of the foreign state or public international organization in question. Payment of reasonable expenses for a foreign public official incurred in good faith in the course of a marketing program or in the performance of a contract are other exceptions. Facilitation payments are prohibited by the CFPOA.

C. Case law

There is limited case law in Canada relating to the CFPOA, especially in respect of its application to foreign corporations doing business in Canada. What little case law there is suggests that simply having a Canadian subsidiary will not attract liability if a bribery activity took place outside Canada by a non-Canadian parent corporation. To date, there have only been three corporate convictions under the CFPOA, all of which were entered as guilty pleas, and three convicted individuals.

There are several ongoing investigations, and it is expected that the Royal Canadian Mounted Police (RCMP) will continue their increased levels of CFPOA enforcement with the creation of the RCMP's National Division that focuses on sensitive and high-risk investigations including bribery and corruption.

D. Penalties

Conviction under the CFPOA is a criminal offence and the penalty includes fines and potential imprisonment of up to 14 years, or both. Combined with other legislation, courts can no longer order a sentence of less than two years to be served in the community for convictions under the CFPOA, and individuals will have to wait 10 years to apply for a record suspension (pardon) after their sentences have expired.

Three individuals have been convicted to-date under the CFPOA, all with respect to one potential contract and where there was found to be an agreement to pay a bribe to a foreign public official, another person to offer bribes to Air India officials. The first convicted individual was sentenced to three years imprisonment (before the maximum imprisonment was increased to 14 years).

The wide scope of the CFPOA means that there can be many grey areas that must be navigated by those seeking to be in compliance with its terms. In many cases it is advisable for a corporation to adopt a corporate compliance program in relation to the CFPOA. Such a measure may allow corporations to reduce the risk of non-compliance and the resulting adverse legal and public relations consequences that could result.

Dispute resolution

A. Court-based litigation

Formal court proceedings represent the most common forum for the resolution of commercial disputes in Canada.

Each province has a Superior Court of Justice and an appellate court that have broad jurisdiction over civil and criminal matters. Some provinces have appointed masters who hear procedural motions in the course of an action.

There is also a Federal Court system that has jurisdiction over matters governed by certain federal laws such as taxation, patents and trademarks.

The Supreme Court of Canada hears appeals from all provincial appellate courts and from the Federal Courts.

Some jurisdictions, including Ontario, have implemented various forms of case management whereby courts actively supervise the litigation process. In Toronto, Ontario, the Superior Court of Justice has created the Commercial List court, presided over by judges with significant experience in corporate and commercial matters.

Class actions are a recognized feature of the legal landscape in Canada. Each province in Canada has legislation expressly permitting class proceedings. Class actions have been brought with respect to many different types of issues, including product liability matters, mass torts, securities issues, employment matters, price fixing and consumer issues.

B. Arbitration

Arbitration continues to gain popularity as a means of resolving commercial disputes in Canada. Commercial agreements increasingly include a provision that all disputes must be determined exclusively by arbitration. Arbitration allows the parties more control over the dispute resolution process and, unlike the court system, disputes can remain confidential. Most provinces have adopted legislation governing arbitration.

C. ADR

Other forms of alternate dispute resolution are often used to resolve commercial and non-commercial disputes in Canada, especially mediation. Mediation may be at the instance of the parties or may be required by the court.

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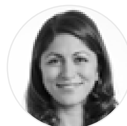

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