

# Doing Business in Canada

Goodmans<sup>LLP</sup>

## About This Guide

*Goodmans Guide to Doing Business in Canada* (the “**Guide**”) was developed by Goodmans to provide executives, counsel and potential United States (“**US**”) and foreign investors with a practical overview of Canada’s legal framework and key business legislation.

The discussion in this Guide is confined to the laws of the province of Ontario, as well as the federal laws of Canada that apply in Ontario as of January 1, 2020. Because the laws and policies of governments and regulatory authorities change, some of the information may not be accurate after that date. This Guide provides general information only and should not be relied upon as legal advice.

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## Introduction

Canada is a federal state in which jurisdiction is constitutionally divided between two levels of government – federal and provincial. In some areas, either the federal government or the provincial government has exclusive jurisdiction. In others, both levels of government regulate different aspects of a particular activity. In addition, provincial governments delegate certain powers to municipal governments. A business may therefore be regulated at three levels – federal, provincial and municipal. It may also be affected by policies and decisions of administrative tribunals.

Canada is a constitutional monarchy. Although Queen Elizabeth II is Canada's official head of state, the governments of Canada are democratically elected by the population. At each level, the elections are independent, which sometimes results in a different political party governing at the federal and the provincial levels. In addition, Canada is governed by a Charter of Rights and Freedoms that guarantees certain rights of individuals as against the state.

All of the provinces of Canada, except Québec, are common law jurisdictions, with strong historical ties to the British common law. Québec is a mixed common law/civil law jurisdiction in which private law matters, such as contract and property, are governed by a Civil Code.

Canada provides an attractive climate for foreign businesses. It has stable political and economic systems, one of the world's soundest banking systems and it is rich in both natural and human resources.

Canada ranks among the top nations in global competitiveness, ease of doing business, transparency, political stability and human development. It's cities are among the world's best for quality of life, health and safety, infrastructure and education.

## I Types of Business Organization

### Sole Proprietorships

A business owned by one person is called a sole proprietorship. This is the simplest form of business organization. The individual is responsible for all of the business's obligations and his or her personal assets may be seized to meet these obligations.

There is no commercial legislation dealing specifically with sole proprietorships. However, a sole proprietor may need to comply with federal, provincial and/or municipal regulations affecting trade and commerce, licensing and registration. For example, in Ontario a sole proprietor who carries on business or identifies his or her business to the public under a name other than the owner's name, must register the name.

A sole proprietorship might be suitable for a small enterprise because it avoids many of the costs of setting up and running a corporation and the complex regulatory scheme that governs corporations. In addition, non-capital start-up losses of the business are generally deductible from the sole proprietor's income from other sources. One disadvantage of a sole proprietorship is the owner's unlimited liability. Another disadvantage is that the business can be transferred only by selling the assets.



### Corporations

#### General

The corporation is the most common form of business organization in Canada. A corporation has a legal personality distinct from its shareholders and management. A corporation's existence is potentially perpetual, since it is not affected by the departure or death of any or all of its shareholders or managers.

As a separate legal entity, a corporation has the rights, powers and privileges (and potentially the obligations) of a natural person. It can hold property and carry on a business, and it is subject to legal and contractual obligations.

The main advantages of the corporation are: (a) the limited liability of the shareholders; (b) the possibility of perpetual existence; and (c) the flexibility of the corporate form for financing and estate planning purposes. The disadvantages include the costs associated with incorporation, operation and dissolution. In addition, every corporation resident in Canada or carrying on business in Canada that deals with non-arm's length non-residents must file an annual information return with Canada Revenue Agency containing information about those transactions.

A corporation may be public or private. In a public corporation, shares may be bought and sold by members of the general public subject to applicable securities legislation. By contrast, the sale or transfer of shares in a private corporation is usually restricted and might require the consent of a majority of the directors or shareholders. Transfers of the shares of a private corporation must also be in accordance with applicable securities legislation.

## Federal or Provincial Incorporation?

Both federal and provincial legislation provide for the incorporation and regulation of corporations. Those establishing a corporation can choose which statute they prefer.

A company is incorporated federally under the *Canada Business Corporations Act* (Canada) ("**CBCA**"). In Ontario, the governing legislation is the *Business Corporations Act* (Ontario) ("**OBCA**"). The CBCA and OBCA prescribe essentially the same requirements (with some exceptions):

- **Corporate names and registration.** Under the CBCA, a federal corporation typically has the right to carry on business under its corporate name in any province of Canada, although it will be required to register or obtain a licence in a province in which it does business and may still be required to obtain consent pursuant to the rules of that province. An Ontario corporation applying for a licence or registering in another province cannot be licensed or registered under its name if that name is already being used there by another entity and may be required to obtain the consent of the existing entity in that province in that case. If this is a concern, incorporation under the CBCA might be advantageous, although as a practical matter a CBCA corporation may need to operate under a different name in any province where its corporate name would be confusing. Both federally and provincially incorporated companies must satisfy the registration requirements of every province in which they carry on business.
- **Residency requirements for directors.** The CBCA and OBCA require that at least 25% of directors be Canadian residents. If a corporation has fewer than four directors, at least one director must be a Canadian resident (in the case of the CBCA, there is an

exception for certain business sectors and corporations subject to federal ownership restrictions). Certain other provinces do not have residency requirements for directors.

- **Amendments to articles.** The CBCA and OBCA do not provide flexibility on shareholder approvals. A special resolution of shareholders must be passed by not less than 2/3 of the votes cast by shareholders to carry out amendments to articles and other fundamental changes.
- **Modification of directors' powers.** The OBCA and CBCA allow all of the shareholders to enter into a unanimous shareholders' agreement. Such an agreement can effectively transfer responsibility for the management of the corporation from the directors to the shareholders.

## Management of a Corporation

The directors of a corporation are responsible for its management. Directors may incur personal liability for acts that contravene the statute under which the corporation was incorporated or a myriad of other statutes. For example, they may be held personally liable for certain unpaid wages and wage-related deductions if the corporation becomes bankrupt.

Directors must act honestly and in good faith with a view to the best interests of the corporation. They must also exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. The corporation may purchase insurance to cover the personal liability of the directors. However, insurance will only cover liability for acts that were performed by the directors in good faith and within the scope of their duties.

The daily operations of a corporation are normally carried out by its officers. Officers can be non-residents of Canada.

Shareholders are the owners of a corporation, but they are not necessarily responsible for its management and normally cannot bind the corporation. Generally, the authority to bind the corporation rests with its directors and officers. However, as stated above, the CBCA and OBCA permit the directors' powers to be transferred to the shareholders which could include the authority to bind the corporation.

## Subsidiary or Branch?

A foreign organization may carry on business in Canada by setting up a new corporation as a subsidiary or through a branch of an existing foreign corporation. The choice will be based primarily on tax considerations.

**Directors must act honestly and in good faith with a view to the best interests of the corporation.**

If a branch is chosen, the foreign corporation must register in all provinces in which it wishes to carry on business. The corporation cannot register if its name is the same as, or similar to, one already in use in that province. Business names used by a branch should be properly registered and should not be the same as, or similar to, other names used in the province. A foreign corporation that establishes a branch in Ontario must apply to the Ministry of Government and Consumer Services for a licence.

## Partnerships

A partnership is the relationship among natural persons, corporations or other partnerships carrying on business in common with a view to profit. The rights and obligations of the partners among themselves are usually set out in a written partnership agreement. If there is no agreement to the contrary, the rights and obligations of partners will be those stipulated by provincial legislation.

In Ontario, legislation governing partnerships and limited partnerships sets out presumptive rules for the relationship among partners and governs the rights and obligations of the partnership to third parties.

Income and losses of a partnership, although determined at the partnership level, are taxed in the partners' hands. This tax treatment is the primary reason for using a partnership rather than a corporation, since each partner may offset its share of the partnership's business tax losses against income from other sources.



### General Partnerships

In a general partnership, each partner has unlimited liability for the partnership's liabilities. Contributions from each partner may be in money, property or services and, unless otherwise stated in the partnership agreement, all contributions are deemed to be equal. Each partner is jointly liable for all debts and obligations incurred by the partnership. However, a partner is generally not liable for obligations incurred before it became, or after it ceased to be, a partner. All partners may take an active role in operating a general partnership. Each partner may bind the others unless there are restrictions in the partnership agreement of which third parties have actual notice. The main disadvantages of a general partnership are the unlimited liability of the partners and the fact that each partner may bind the others.

In Ontario, all of the partners of a general partnership must register the partnership name unless the business is carried on under the partners' names.

## Limited Partnerships

A limited partnership provides both limited liability and the ability to flow tax losses through to passive investors. This form of business structure is often used to finance businesses that may have tax losses in the early years that are more valuable to investors than to the enterprise itself. A limited partnership is made up of one or more general partners, each of whom has the same rights and obligations as a partner in a general partnership, and one or more limited partners, whose powers and liabilities are limited.

The general partner or partners manage the partnership. A limited partner may not take part in the control or management of the partnership without jeopardizing its limited liability.

The primary advantage of a limited partnership over a general partnership is the limited liability of the limited partners. This enables passive investors to receive returns proportional to the amount of their contribution with minimal personal risk.

To establish a limited partnership in Ontario, a declaration must be signed by all of the general partners on behalf of all of the partners and filed under limited partnership legislation. The declaration must be renewed every five years. If the partnership wishes to cease operations, a declaration of dissolution must be filed.

## Real Estate Investment Trusts (“REITs”) and Income Trusts

In Canada, as in other common law legal systems, a trust is a relationship whereby property (real or personal, tangible or intangible) is held by one party for the benefit of another. The trust is governed by the terms under which it was created.

The trust form in Canada is a popular vehicle for publicly-traded issuers, in that (a) trusts holding certain assets (generally real estate and operating business assets where the business is conducted outside of Canada) are tax efficient and generally allowed pre-tax operating income to be distributed to unitholders, reducing corporate or asset-level tax; and (b) there is significant and enduring demand in Canada for investment vehicles that offer “yield” to investors. Publicly-traded trusts also provide limited liability to the beneficiaries of the trust (the public investors, who hold “units” and are referred to as “unitholders”). The business and affairs of publicly-traded trusts are typically governed by a contractual declaration of trust, which mirrors in significant part the requirements of corporate law concerning matters such as unitholder meetings, governance, unitholder rights and similar matters.

## Contractual Arrangements

Although the following contractual arrangements are not forms of business organization per se, they are alternatives to the forms described above.

### Joint Ventures

A joint venture is an arrangement between two or more parties (individuals, partnerships or corporations) to pool capital and skills for the purpose of carrying out a specific undertaking. Since a joint venture is not a recognized entity for tax purposes, income and losses for tax purposes are computed separately by each joint venturer. A joint venture is thus a means to carry out a single operation using common resources, with each party retaining a substantial degree of independence.

Joint venturers who do not want their joint venture to be a partnership should enter into a written agreement setting out their respective rights and obligations in detail. Otherwise, there is a risk that the joint venture may be characterized as a general partnership. If so, each partner would be fully liable for partnership obligations and subject to tax as a partner rather than as a joint venturer.

Since joint ventures are most commonly used in the real estate context, this form of business organization is discussed in more detail in the “[Real Estate](#)” section of this Guide.

### Franchising

A franchise is an agreement whereby one party, the franchisor, gives another, the franchisee, the right to use a trademark or trade name within a certain territory. Franchising involves an ongoing relationship between the parties. The franchisor generally retains some degree of control over the manner in which the franchisee carries on its business, but neither party is the agent of the other. In Ontario, franchise disclosure legislation imposes pre-sale disclosure obligations on franchisors and regulates the relationship between franchisors and franchisees. The legislation applies if the franchise is operated wholly or partly within Ontario and imposes serious penalties for violations.

### Licensing

Licensing is a contractual relationship between two parties whereby a licensor grants a licensee the right to use a copyright, industrial design, patent, trademark, trade name or know-how. The relationship is governed solely by contract.

**| A joint venture is an arrangement between two or more parties (individuals, partnerships or corporations) to pool capital and skills for the purpose of carrying out a specific undertaking.**

## Conclusion

In choosing the most appropriate form of business organization or contractual arrangement, the specific needs of the business must be assessed. Factors that require particular consideration include: (a) the extent of liability; (b) participation in management; (c) separate legal existence; (d) transferability of interest; (e) financing requirements; (f) complexity of organization; (g) the nature of the business; and (h) tax implications.



# Acquiring or Establishing a Business in Canada

## Investment Canada Act

Any non-Canadian proposing to establish a new business or acquire an existing business in Canada should be aware of the provisions of the *Investment Canada Act* (Canada) (“ICA”) governing investments in Canada by non-Canadians. Under the ICA, certain acquisitions of control of, or establishments of new non-cultural Canadian businesses by, non-Canadians are subject to review by, and notification to, the Investment Review Division of Innovation, Science and Economic Development Canada (“**Investment Canada**”) to determine if the investment is of “net benefit to Canada”. If the Canadian business being proposed or acquired carries on a cultural business, the review will be conducted by the Cultural Sector Investment Review Division of the Department of Canadian Heritage. If an investment is reviewable, the investor must file an application for review and obtain the relevant Minister’s approval or deemed approval. Other acquisitions of Canadian businesses or establishments of new businesses by non-Canadians in Canada, below applicable monetary thresholds, are not reviewable, but a non-Canadian investor must file a notification of the investment within 30 days after acquiring the business or establishing the new business.

In addition to a “net benefit” review, an investment by a non-Canadian may be reviewed to determine if it could be injurious to national security. “National security” is not defined in the legislation, but on December 19, 2016, the Government of Canada issued guidelines concerning the factors the Minister or Cabinet may consider when making determinations relating to national security under the ICA. The factors cited by the guidelines are relatively broad. In addition to such factors traditionally thought to implicate national security, such as the potential effects of the investment on Canada’s defence capabilities and interests, the guidelines clarify that national security may be implicated in the transfer of sensitive technology or know-how outside of Canada and the security of Canada’s critical infrastructure, including 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. Non-Canadian investors must consider whether there is a possible national security issue associated with a transaction involving the establishment, or an acquisition, of any interest (not necessarily a controlling interest) in a Canadian business, including businesses that are located in close proximity to sensitive infrastructure. A national security review can take up to 200 days to be completed from the time the government is first notified, or deemed to be notified, of the investment.

**If an investment is reviewable, the investor must file an application for review and obtain the relevant Minister’s approval or deemed approval.**

## Reviewable Transactions

The following acquisitions of control by non-Canadians are reviewable:

- A direct acquisition of a Canadian business with assets of \$5 million or more. For example, control of a Canadian corporation may be directly acquired by acquiring voting shares of the corporation or all or substantially all of the assets used in carrying on the Canadian business.
- An indirect acquisition of a Canadian business with assets of \$50 million or more. For example, indirect control of a Canadian corporation is acquired by purchasing voting shares in a non-Canadian corporation that controls the Canadian corporation.
- An indirect acquisition of a Canadian business with assets of \$5 million or more if the assets of the Canadian business represent more than 50% of all of the assets acquired in the transaction.

These thresholds for review are significantly increased or eliminated for World Trade Organization (“WTO”) investors (i.e., non-Canadian investors controlled by persons who are nationals of WTO countries or by governments of such countries) and for investors from countries with which Canada has entered into trade agreements (“**trade agreement investor**”). In 2019, a direct acquisition by a private sector WTO investor of a non-cultural Canadian business was reviewable only if the assets, based on an enterprise value calculation set out in the regulations, exceeded \$1.045 billion and \$1.568 billion for a private sector trade agreement investor.<sup>1</sup> Any non-Canadian investor acquiring a non-cultural Canadian business controlled by a WTO investor or trade agreement investor will also benefit from these higher thresholds. Indirect acquisitions of non-cultural Canadian businesses by WTO investors, or by entities controlled by WTO investors, are not reviewable. These higher thresholds and exceptions for WTO investors and trade agreement investors do not apply to investments in Canadian cultural businesses.

A direct acquisition by a state owned enterprise of a WTO member country was reviewable if the assets, based on their book value, exceeded \$416 million in 2019.

The ICA sets out comprehensive rules for determining whether an investor has acquired control of a Canadian business. The following are examples of some of the rules to determine whether an investor has acquired direct control of a corporation:

- Acquisition of a majority of voting shares<sup>2</sup> is deemed to be an acquisition of control.
- Acquisition of one-third or more but less than a majority of voting shares is presumed to be an acquisition of control, unless it can be shown that the acquired shares do not give control in fact to the investor.

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<sup>1</sup> The threshold level is adjusted annually based on growth in nominal GDP.

<sup>2</sup> Note that “voting share” is a defined term in the ICA.

- Acquisition of less than one-third of the voting shares is deemed not to be an acquisition of control.

Other rules may also apply in the case of corporations as well as other forms of business organization.

After an investor has filed an application for review, the Minister has an initial period of 45 days to determine whether the investment is likely to be of net benefit to Canada. The Minister may unilaterally extend that period by 30 days or longer, on consent. If the Minister does not send a notice of the decision to the applicant within the prescribed period, the Minister is deemed to be satisfied that the investment is likely to be of net benefit to Canada.

Under the ICA, the Minister will consider the following factors in determining whether the investment is likely to be of net benefit to Canada:

- The effect of the investment on the level and nature of economic activity in Canada;
- The degree of participation by Canadians in the Canadian business in particular and in the relevant industry in Canada in general;
- The effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;
- The effect of the investment on competition in the relevant industry or industries in Canada;
- The compatibility of the investment with Canadian industrial, economic and cultural policies, taking into account the policy objectives of affected provinces; and
- The effect of the investment on Canada's ability to compete in world markets.



If the Minister is not satisfied that the investment is likely to be of net benefit to Canada, the Minister must send a notice to the applicant advising of the applicant's right to make representations and to submit undertakings. The Minister's final determination will be made having regard to such representations and undertakings.

The government has issued specific guidelines respecting investment by state owned enterprises, which are defined broadly as including entities that are either controlled or influenced by foreign governments and agencies thereof. These guidelines include the type of undertakings which may be required specifically of state owned enterprises, such as those relating to corporate governance and commercial orientation.

## Cultural Industries

There are special provisions in the ICA for investments that affect Canada's cultural heritage or national identity ("**cultural industries**"). The establishment of a new business or the acquisition of control of a Canadian business that would not normally be reviewable under the ICA may be reviewable if it falls within this category. In the case of the establishment of a new business, after a notification of the investment has been filed, the federal Cabinet, composed of the Prime Minister and the other Ministers, has 21 days to decide whether the investment should be reviewed. The non-Canadian investor must be notified within that time period if a review is being ordered. Acquisitions of control are automatically reviewable if they exceed the monetary thresholds outlined above.

The Ministry of Canadian Heritage is responsible for investments related to cultural industries. The Cultural Sector Investment Review Division of the Department of Canadian Heritage is the counterpart to Investment Canada for these investments (jurisdiction is shared for investments that involve both cultural industries and non-cultural businesses). The ICA further provides that the Minister of Canadian Heritage has discretion to make determinations that could result in the review of investments in cultural industries that would not otherwise be reviewable. For example, an investor that thinks it is Canadian-controlled because it complies with the ICA rules might find that the Minister of Canadian Heritage has determined otherwise. The Minister can use this authority to review investments retroactively to June 18, 1992. Unless appropriate steps are taken, investors must accept a certain amount of risk in proceeding with investments involving cultural industries without review.

**There are special provisions in the ICA for investments that affect Canada's cultural heritage or national identity ("cultural industries").**

Cultural industries include:

- Publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine-readable form;
- Production, distribution, sale or exhibition of film or video products;
- Production, distribution, sale or exhibition of audio or video music recordings;
- Publication, distribution or sale of music in print or machine-readable form; and
- Radio communication in which the transmissions are intended for direct reception by the general public, any radio, television and cable television broadcasting undertakings and any satellite programming and broadcast network services.

## Competition Act

Federal competition legislation may also affect a person's ability to invest in Canada. The *Competition Act* (Canada) aims to maintain and encourage competition in Canada. The legislation creates criminal offences for serious anti-competitive activities such as price-fixing conspiracies, bid-rigging and deceptive marketing practices. The legislation also creates a system for civil review of business activities that could affect competition, including mergers and acquisitions of businesses.

The Competition Bureau ("**Bureau**")<sup>3</sup> is an independent law enforcement agency responsible for the *Competition Act* (Canada). The Bureau is headed by the Commissioner of Competition ("**Commissioner**"). The Bureau investigates both criminal and civil matters under the *Competition Act* (Canada). With court approval, it can use certain tools to gather evidence, including search warrants, subpoenas for production of documents and the taking of oral testimony under oath. In relation to the criminal provisions, the Commissioner may refer matters to the Attorney General of Canada for prosecution. For civil matters, including merger review, the Commissioner may apply to the Competition Tribunal<sup>4</sup> for remedial relief.

## Merger Notification

Subject to certain exceptions, if a proposed acquisition of assets or shares or an amalgamation or other combination exceeds certain size thresholds, the parties to the transaction must notify the Commissioner in advance and cannot complete the transaction before the expiry of a waiting period. The parties to the transaction, including their affiliates, must together have assets in Canada or gross revenues from sales in, from or into Canada that exceed \$400 million.

The subject matter of the proposed transaction itself must also be of a minimum value. For asset acquisitions, the book value of the assets in Canada that are being acquired must exceed \$96 million, or the annual gross revenues from sales in or from Canada generated from such assets in Canada must exceed \$96 million.

For share transactions, the book value of the assets in Canada of the corporation whose shares are being acquired (and all other corporations controlled by that corporation) must exceed \$96 million, or the annual gross revenues from sales in or from Canada generated from the assets in Canada must exceed \$96 million. For this purpose, the value of the shares of subsidiary companies held by the target parent corporation is excluded from the asset calculation. In addition, the merger notification rules will not apply to a share acquisition unless the acquiring party, as a result of the proposed transaction, would own more than 20% of the voting shares

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<sup>3</sup> The Competition Bureau's website is [www.competitionbureau.gc.ca](http://www.competitionbureau.gc.ca).

<sup>4</sup> The Competition Tribunal's website is [www.ct-tc.gc.ca](http://www.ct-tc.gc.ca).

of a company whose shares are publicly traded or more than 35% of the voting shares of a company whose shares are not publicly traded (unless the acquiring party already owns more than these limits, in which case it must be acquiring additional shares to own more than 50% of the voting shares).

The \$96 million transaction threshold applied in 2019 and is adjusted for inflation annually.

Where the notification thresholds are met and no exemption applies, each of the buying and selling parties must file a merger notification that includes information about the parties, their major customers and suppliers, and documents prepared for or received by an officer or director of the corporation (or individuals who serve in a similar capacity for unincorporated entities) that analyze or evaluate the proposed transaction with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into new products or geographic regions. There is a filing fee of \$73,584 to file the merger notification, which may be adjusted.

Once the merger notification is filed, the parties may not close their proposed transaction for 30 days. This waiting period can be terminated earlier by the Commissioner or extended if, during the initial waiting period, the Commissioner requires the parties to respond to a supplementary request for information, in which case the waiting period is extended to 30 days after compliance with this request.

The great majority of mergers subject to review do not raise competition concerns. In these cases, the Commissioner will respond with a no-action letter indicating that the Commissioner does not currently intend to challenge the transaction. The no-action letter provides considerable comfort as it would be very unusual for the Commissioner to subsequently challenge the merger. A no-action letter terminates the waiting period.

However, a no-action letter does not guarantee that the Commissioner will not re-open a merger examination at a later date. The Commissioner may file an application with the Competition Tribunal up to one year after a merger is substantially complete. A purchaser or seller who wants more certainty, and whose transaction does not raise substantive competition issues, may apply to the Commissioner for an advance ruling certificate. An advance ruling certificate precludes the Commissioner from filing an application with the Competition Tribunal with respect to a transaction solely on the basis of information that is the same or substantially the same as the information on the basis of which the advance ruling certificate was issued. In addition, if the advance ruling certificate is granted, merger notification is not required, although the fee for submitting the request is the same as for filing a merger notification. If the request is denied but a no-action letter is issued instead, it is common practice for the Commissioner to waive notification because substantially similar information was provided in support of the request for the advance ruling certificate.

## Substantive Merger Provisions

A merger is broadly defined in the *Competition Act* (Canada) to mean the acquisition or establishment, direct or indirect, of control over, or significant interest in, the whole or a part of a business of a competitor, supplier, customer or other person. Significant interest is not defined in the *Competition Act* (Canada), but relates to the ability to materially influence the economic behaviour of another party. The acquisition of only 10% of the voting shares of a target company may be enough to constitute a significant interest, depending on the facts. Representation on the board of directors is often an important factor in the determination of whether a proposed investment in a competitor may raise competitive concerns. The Bureau retains the jurisdiction to review a merger even if it falls below the thresholds for merger notification outlined above. As a result, a competition law risk assessment should be done even if the proposed transaction is not subject to merger notification.

The substantive legal test is whether the merger prevents or lessens, or is likely to prevent or lessen, competition substantially. The Bureau's analytical approach to merger examination is set out in detail in its merger enforcement guidelines, which can be found on its website. The key elements in the analysis include market definition, market concentration and market share, an assessment of entry conditions, competitive effects and effective competition remaining. Canada is one of the few jurisdictions in the world that allows anti-competitive mergers to proceed if the gains in efficiency resulting from the merger would likely be greater than, and offset, the anti-competitive effects and such efficiencies would likely not be attained if a remedial order were made.

Merger review is essentially a regulatory function in Canada as the great majority of mergers do not raise substantive competition concerns, and those that do are generally resolved by negotiating appropriate remedies with the Bureau. Most parties are unwilling to face the time, cost and uncertainty involved in litigating a merger application by the Commissioner before the Competition Tribunal. The *Competition Act* (Canada) streamlines the consent process by allowing for the registration with the Competition Tribunal of consent agreements between the Commissioner and the parties. Once registered, the consent agreement has the same force and effect as if it were an order of the Competition Tribunal.

If a merger raises significant competition issues that cannot be resolved through negotiation, the Commissioner can file an application for relief from the Competition Tribunal. If the Competition Tribunal, after considering the evidence of the Commissioner and the parties, finds that the merger prevents or lessens or is likely to prevent or lessen competition substantially, it may: (a) prohibit closing all or any part of a proposed transaction; (b) dissolve a completed transaction; (c) order divestiture of assets or shares; or (d) make other orders to which the Commissioner and the parties to the transaction consent.

**■ The key elements in the analysis include market definition, market concentration and market share, an assessment of entry conditions, competitive effects and effective competition remaining.**

### **Other *Competition Act* Provisions**

As noted above, in addition to merger review, the *Competition Act* (Canada) deals with certain anti-competitive conduct and practices and includes criminal provisions for more serious anti-competitive activities. These civil and criminal provisions are described in the “[Importing or Trading Goods](#)” section of this Guide.



## I Financing a Business Operation in Canada

Businesses commonly raise capital by equity and debt financings.

Equity financing involves the issuance of shares of capital stock of a corporation or units of a limited partnership or trust. Various classes of shares or units may be issued. The rights and privileges attaching to each class of shares or units will depend on the requirements of the issuer and the investors. In the event of dissolution or insolvency of a corporate issuer, capital can be returned to shareholders only after all creditors have been paid in full. The advantage of share or unit ownership is that the investor can share in the success of the issuer by receiving dividends or through an increase in the value of the shares or units.

Debt financing may be provided by shareholders, partners or third parties such as banks and other financial institutions or debt investment funds. Financing is available in Canada from Canadian chartered banks, Canadian subsidiaries of foreign banks, and other financial institutions including merchant banks, loan and trust companies and life insurance companies, as well as funds focusing on debt investments. Lenders to a corporation who do not have a personal interest in it usually require that a certain level of equity investment be maintained by the corporation's shareholders. Lenders may also require personal guarantees from the shareholders of small private corporations. The advantage of debt financing is that the equity interest of the corporation's shareholders is not diluted, as lenders will be paid a fixed return. In addition, certain types of interest charges incurred in connection with business activities may be tax deductible in Canada.

There are two principal forms of financing available from third-party lenders: operating financing and term financing. Operating financing usually finances the ongoing operations of the business. It is usually provided on a revolving basis and generally bears interest at a fluctuating rate linked to the market. Term financing is usually made available for capital investments. It normally requires scheduled repayment over a defined period of time and bears interest determined in any of a number of ways. Term lenders often allow the borrower to choose between fixed or floating rates of interest and may allow the borrower to convert from one interest option to another.

### Securities Law

The issuance of securities and trading in securities between investors is governed by legislation intended to create orderly markets and protect investors. Shares, bonds and options are

I There are two principal forms of financing available from third-party lenders: operating financing and term financing.

common forms of security. The term “security” is broadly defined and includes any document evidencing title to or an interest in the capital, assets, property, profits, earnings or royalties of a person or corporation and any document, instrument or writing commonly known as a “security”. In addition, a number of different types of agreements and instruments involving monetary consideration, including a broad category referred to as “investment contracts”, are specifically included in the definition of security. Depending on the circumstances, both equity and debt financing may come within the definition of security and may therefore be subject to securities legislation.

Each province and territory of Canada has securities regulation that is generally comparable to that in effect in the US. Unlike in the US, however, there is no overarching federal securities regulator. That said, many provinces and territories have harmonized elements of securities regulation by interpreting certain securities laws in the same manner through the adoption of national or multilateral instruments.

Any person or corporation engaged in the business of trading in securities or giving advice about securities must be registered under the relevant provincial securities legislation. In addition, distributions of securities must be qualified by a prospectus filed with and cleared by the relevant provincial securities commissions, unless the distribution is subject to an exemption. A prospectus is a document describing in detail the business and affairs of the issuer, the type of security involved and other relevant information.

There are a number of important exemptions from these registration and prospectus requirements. Three of the most commonly-used exemptions are:

- **Accredited investor exemption.** This exemption allows an issuer of securities to raise any amount of funds from any number of investors provided that each investor meets the definition of an “accredited investor” (i.e., is an institutional investor or other person or company that meets certain minimum income or asset tests) and, in certain circumstances where the investor is an individual, the issuer has obtained a signed risk acknowledgement in the required form from the investor.
- **Private issuer exemption.** This exemption permits “private issuers” to sell securities to certain categories of persons (e.g., a director, officer, employee, founder or control person of the issuer or an affiliate of the issuer, specified family members of the issuer, close personal friends or close business associates of a director, executive officer, a founder or control person of the issuer, accredited investors or security holders of the issuer or other persons that do not constitute the “public” vis à vis the issuer). An issuer is a “private issuer” if: (a) it is not a reporting issuer (i.e., it has not filed a prospectus or listed its securities on a Canadian stock exchange) or an investment fund; (b) its securities (other than non-convertible debt securities) are subject to

restrictions on transfer; (c) such securities are beneficially owned, directly or indirectly, by not more than 50 holders (excluding employees and former employees of the issuer or its affiliates); and (d) it has distributed securities only to persons who fit within the permitted categories (referred to above).

- **Minimum investment amount exemption.** This exemption is available where an issuer sells to a person who is not an individual securities that have an acquisition cost to the purchaser of not less than \$150,000 and such purchase price is paid in cash at the time of the trade.

Securities sold pursuant to an exemption like the ones mentioned above are usually subject to resale restrictions. In the case of certain exempt trades, it may be necessary to file a report with and pay a fee to the securities commissions of each of the provinces or territories in which the purchasers of the securities reside.

Securities legislation requires, among other things, continuous disclosure of any material changes in the affairs of public companies (known as reporting issuers) and also includes provisions relating to activities such as insider trading and take-over bids.

Some key steps have been taken to give US issuers easier access to the Canadian financial markets. A co-operative effort between Canadian provincial securities regulators and the U.S. Securities and Exchange Commission (“**SEC**”) resulted in the multijurisdictional disclosure system (“**MJDS**”), whereby securities could be offered by a US issuer in Canada primarily in accordance with SEC rules. Rights offerings, take-over and issuer bids, business combinations, offerings of debt and preferred shares that have received an approved rating, and offerings of equity and other securities by certain large issuers are included within the MJDS.

The major main stock exchanges in Canada are:

- The Toronto Stock Exchange (“**TSX**”), Canada’s sole principal exchange for the trading of senior equities. The TSX is the largest stock exchange in Canada and the third largest in North America.
- The TSX Venture Exchange (“**TSX-V**”), a public venture capital marketplace for emerging companies that do not yet meet the listing requirements of the TSX. The TSX-V is headquartered in Calgary, and also has offices in Toronto, Vancouver and Montreal.
- The NEO Exchange (“**NEO**”), a senior recognized exchange in Canada. Trading on the NEO commenced in March 2015.
- The Canadian Securities Exchange, a junior exchange targeted at micro cap and emerging companies.



**Each of Canada's stock exchanges has enacted rules, by-laws, procedures and policies applicable to listed companies and companies seeking to become listed.**

Each of Canada's stock exchanges has enacted rules, by-laws, procedures and policies applicable to listed companies and companies seeking to become listed. There are also a number of "alternative trading systems" that facilitate the trading of Canadian securities.

There have been numerous proposals for the establishment of a national securities regulator for Canada to replace the current "patchwork" of provincial and territorial securities commissions. In December 2011, after reviewing a draft proposed *Securities Act* (Canada) submitted by the federal government, the Supreme Court of Canada determined that the federal government could not constitutionally regulate securities without the participation of the provinces, through a "cooperative approach". As of December 2019, the federal government and the governments of British Columbia, New Brunswick, Nova Scotia, Ontario, Prince Edward Island, Saskatchewan and Yukon Territory have entered into a memorandum of agreement providing for the creation of the Cooperative Capital Markets Regulatory System (the "CCMR"), a national cooperative system for regulating capital markets in Canada. All other provinces and territories have been invited to participate. In November 2018, the Supreme Court of Canada found the CCMR was constitutional, overturning a Québec Court of Appeal decision that found the CCMR would infringe the legislative sovereignty of the participating jurisdictions and be an impermissible delegation of regulation-making authority. The Supreme Court's decision removes a significant impediment to implementation of the CCMR. However, its implementation and ultimate effectiveness as a fully harmonized national securities regulatory framework depends primarily on the political will of Canada's federal, provincial and territorial governments to undertake the work necessary to develop and adopt the comprehensive regulatory regime envisioned by the CCMR.

## Personal Property Security

Financial institutions that lend money to businesses normally require some form of security over property of the business to protect their investment. If the borrower defaults, the financial institution can sell or take ownership of the secured property. Operating financing is usually secured primarily by inventory and accounts receivable. Term financing is usually secured primarily by capital assets, such as machinery and equipment, real estate or by a security interest covering all the borrowers' assets. The exact nature of the security taken in each instance will depend on the borrowers' financial situation and the nature of its assets.

Canadian law distinguishes between real estate or immovables (land, buildings and movables that are permanently attached, joined to or incorporated into real property) and personal property or movables (anything not attached to land, including vehicles, equipment, inventory, accounts receivable and other intangibles). This section deals with security over personal property. Real property is dealt with in the "[Real Estate](#)" section of this Guide.

Ontario has personal property security legislation modelled on Article 9 of the pre-2002 US Uniform Commercial Code. This legislation applies to every transaction which in substance creates a security interest, including financing leases and conditional transfers of title. In general, to protect its rights against third parties, a secured party must either take possession of the property or register a financing statement at a computerized central registry. Computer-based searches allow for ease of searching but require the secured party to ensure that its financing statements are correctly completed: even a minor technical error, such as an incorrect letter in the debtor's name, may invalidate the registration. Further registrations are required in certain circumstances, such as a debtor name change, a transfer of collateral or to effect a renewal.

Securities transfer legislation and related amendments to personal property security legislation ("**STA**") came into force January 2007 in both Ontario and Alberta and have since been adopted by all Canadian provinces and territories other than Prince Edward Island. The STA implements rules governing property rights that exist whenever investment property (such as securities, futures and other financial assets) is bought, sold or used as collateral to secure obligations. It is intended to accommodate modern securities settlement systems where securities are held indirectly through intermediaries and where computerized book entries are relied on for settlement. It also provides additional certainty with respect to priority of perfection by allowing secured parties to perfect by control. The rules are based on Revised Article 8 of the US Uniform Commercial Code and, among other things, address perfection steps in connection with any security interest granted in: (a) securities that are directly held by a debtor; and (b) securities and other financial assets that are indirectly held through a securities intermediary.

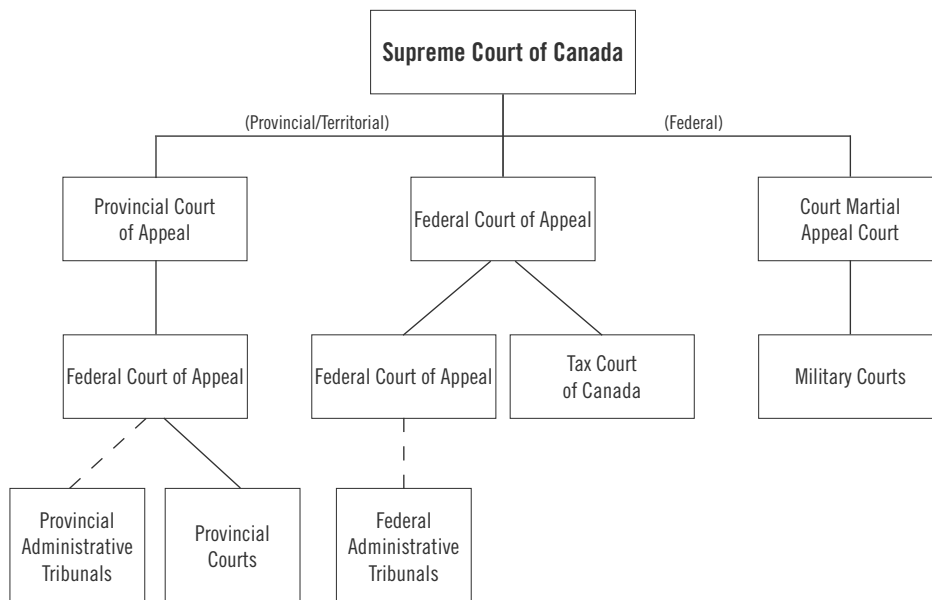
## Government Assistance Programs

There are many government programs at both the federal and provincial levels to assist businesses in Canada. Assistance may take a number of different forms, including cash grants, forgivable loans, guarantees to lenders, cost sharing and advisory services. These programs are too numerous to review in this Guide, but they usually have fairly rigid eligibility requirements and involve extensive documentation. Generally, the applicant must demonstrate it has the ability and resources to carry out its project and the project will benefit Canada. Close attention should be paid in each case to the detailed requirements of a particular program.

# Dispute Resolution

## Canada’s Court System

As with many other areas, Canada’s court system reflects its federal nature with some responsibilities falling to the federal government and others falling to the provinces. Federal courts only hear cases that relate to matters under exclusive federal control, such as federal taxation, federal administrative tribunals, intellectual property, competition law, admiralty law and certain matters pertaining to the military and national security. The provincial courts have jurisdiction over the general administration of justice, including all criminal and civil matters. Appeals from the provincial courts of appeal or from the Federal Court of Appeal are heard by the Supreme Court of Canada, which is the highest appellate court in Canada.



## Civil Litigation

All of the provinces and territories in Canada, with the exception of Québec, have common law systems of justice. Québec has a civil code system (though it has been heavily influenced by the common law). Provincial and territorial lower courts hear cases relating to relatively minor criminal offences, offences under provincial or territorial statutes ranging from the *Highway Traffic Act* (Ontario) to the *Securities Act* (Ontario) and some aspects of family law. The superior courts try more serious (indictable) criminal offences and have general jurisdiction over private commercial disputes, though disputes under a certain monetary threshold (\$25,000 in Ontario) are tried either in the lower court or the “small claims” branch of the superior court, depending on the province or territory. In the Greater Toronto Area, the Ontario Superior Court of Justice maintains a “Commercial List”,

a specialized court dealing with business matters such as shareholder disputes, securities litigation, corporate arrangements, restructurings and receiverships. Throughout Canada, jury trials are highly unusual for civil litigation matters except for personal injury proceedings.

Many disputes involving matters subject to regulation are adjudicated by provincial or federal tribunals; the availability and trajectory of appeals from their decisions to provincial or federal courts will depend on the tribunal's governing statute.

The provincial courts of appeal hear appeals from the decisions of the provincial and territorial lower courts and superior courts.

## Class Actions

Class actions are permitted in all provinces of Canada (with some variation). Once certified to proceed, a class action proceeding has certain features and procedural mechanisms that allow group claims against entities who have harmed them. Typical class action claims involve product liability, breaches of consumer or employment law, securities fraud, environmental contamination or price-fixing.

## Alternative Dispute Resolution

Alternative Dispute Resolution includes a number of different procedures that allow parties to resolve their disputes outside of the courtroom, with lower costs and shorter time periods than those associated with the traditional lawsuit. Arbitration might be binding or non-binding, and it can be pursued under rules agreed upon in advance by the parties or pursuant to rules and procedures mandated by locally or internationally recognized arbitration institutes. Unlike trials which are public and have transcripts of the proceedings, arbitration is usually private and the arbitrators chosen are often experts in the field that is the subject matter of the dispute. Typically, freely made agreements to arbitrate between commercial contracting parties are fully enforced by Canadian courts.

Mediation is usually required for civil matters before a case will be permitted to go to trial.

## I Insolvency and Restructuring

Canada's insolvency and restructuring regime consists primarily of the *Companies' Creditors Arrangement Act* (Canada) (the "CCAA") and the *Bankruptcy and Insolvency Act* (Canada) (the "BIA"). Corporate reorganizations can also be effected under the CBCA, or similar provincial corporate legislation.

### Bankruptcy

The liquidation of most insolvent businesses in Canada is conducted under the BIA. Upon bankruptcy, whether voluntarily or upon the application of a creditor, the BIA imposes a stay of proceedings in respect of the debtor, and a trustee in bankruptcy, in whom the debtor's property is vested, is appointed. In the liquidation context, the stay of proceedings does not generally apply to secured creditors, who are free to exercise their rights of self-help or to otherwise realize on their security. For this reason, receiverships are often run in parallel to a BIA liquidation. In exceptional cases, and on the application of the trustee in bankruptcy, the bankruptcy court may stay the rights of a secured creditor for up to six months.

### Receivership

Where provided for in the security agreement, a secured creditor may have the right to appoint a private receiver or receiver and manager to take possession of and realize upon the collateral on behalf of the secured creditor. This is often done where the secured creditor desires the assistance of a professional, usually an accounting firm, to act as its agent for the realization process.

A secured creditor also has the right to seek the appointment of a court-appointed receiver or receiver and manager to assist in the enforcement or realization process. This remedy is usually used where difficulty is expected in exercising self-help remedies or appointing a private receiver, or where the secured party wishes to obtain the protection of a court appointment. As a result of the court's involvement, this process is generally slower and more costly, but allows the secured creditor to have its enforcement and realization process approved by the court so as to minimize the risk of criticism or lender liability issues.

### CCAA Restructuring

The CCAA is a federal statute and has been the favourite refuge of mid-sized and large Canadian companies in financial difficulty. This relief is available only to corporate entities and to income trusts. Partnerships may be able to avail themselves of protection if their corporate partners or



general partners seek relief. The CCAA can be used to stay non-creditors, secured creditors and unsecured creditors from taking any action against the debtor or from exercising contractual rights (including the right to terminate contracts and leases), while the company's secured and unsecured debt is restructured.

The CCAA can be used in conjunction with corporate statutes to restructure equity. The ability of the court to adapt procedures and relief to unique or new circumstances has made the CCAA especially popular for cross-border reorganizations and other complex restructurings.

CCAA proceedings are commenced by the issuance of a court order on an application brought by the debtor or, in rare cases, a creditor. A debtor will be a company to which the CCAA applies if:

- it is a Canadian company, has assets in Canada or carries on business in Canada;
- it is insolvent or has committed “an act of bankruptcy” (a defined term in the BIA); and
- it has outstanding indebtedness in excess of \$5 million.

**The CCAA can be used in conjunction with corporate statutes to restructure equity. The ability of the court to adapt procedures and relief to unique or new circumstances has made the CCAA especially popular for cross-border reorganizations and other complex restructurings.**

It is common for debtors to seek on an initial application, court approval of new interim financing arrangements to ensure sufficient cash flow to fund operations. The CCAA also requires the court on an initial application to appoint a monitor whose principal role is to act as the court's eyes and ears in ensuring the restructuring is proceeding appropriately and whose role includes the dissemination of information to stakeholders. The monitor is typically a major accounting firm but cannot be the debtor's auditor or accountant.

The CCAA provides for the filing of a plan of arrangement intended to propose a compromise of the debtor's debts. Once the plan is finalized and accepted by the court for circulation, a meeting of all creditors affected by the plan is held for the purpose of voting on the plan. To become effective, a plan must be accepted by a statutory majority of the creditors of each class (into which the creditors have been separated based on similar economic interests) and then approved by the court. The court will only sanction the plan if it is fair and reasonable based on a number of statutory criteria. Once sanctioned, the plan is binding on all members of all classes of creditors affected by the plan, as if it were a contract between the debtor and those creditors.

## CBCA Restructuring

A number of Canadian companies have restructured their debt through the arrangement provisions of their governing corporate statutes, especially the CBCA. The CBCA arrangement provisions are very broad and give flexibility both to the company in proposing a plan and to the court in making orders. These provisions have been used by Canadian companies to

restructure debt as well as equity. The debt which is restructured under the CBCA has been bond debt and not the trade debt of a company.

The CBCA does not specifically mandate class votes or any particular level of approval. Rather, the court is authorized to make any interim or final order it thinks fit and to require the applicant to conduct meetings “in such manner as the court directs.” The court will take the views of affected classes into account but the votes are not determinative.

There are three statutory requirements for a CBCA plan of arrangement:

- The proposed plan must meet the definition of “arrangement” (as defined in s. 192 of the CBCA).
- The applicant must not be insolvent (as discussed below).
- It must not be practicable to effect the desired changes under any other provision of the CBCA (thus, for example, it must be something more than simply an amalgamation).

An arrangement under the CBCA does not involve a declaration of insolvency and in fact, as stated above, the CBCA arrangement provisions cannot be used by an insolvent company. There are two important caveats to this statement:

- In a number of cases, a new company was incorporated under the CBCA and acted as the solvent applicant. The courts have held that the arrangement provisions could be used since the applicant was solvent.
- More recently, the court has stated that it could consider the financial condition of the applicant after the implementation of the arrangement rather than before.

In other words, it is accepted in Canada that the CBCA arrangement provisions might be used in the case of a corporate group, even if strictly speaking the existing members of the corporate group would not meet a balance sheet solvency test before the arrangement is implemented.

## Proposals Under The BIA

The BIA has an effective legislative framework for reorganization in Canada in which judicial participation is encouraged to balance the rights of creditors in general and the debtor's opportunity to reorganize.

Commercial reorganizations under the BIA are conducted by way of “proposals” which may be made by an “insolvent person”, a receiver, a liquidator, a bankrupt or the trustee of the bankrupt's estate. By definition, an “insolvent person” includes all forms of business entity and, therefore, the BIA's proposal provisions are not restricted to corporate entities. In proposal

**In proposal proceedings under the BIA, the debtor must name a licensed trustee in bankruptcy to act as trustee under the proposal.**

proceedings under the BIA, the debtor must name a licensed trustee in bankruptcy to act as trustee under the proposal. The trustee has a number of legislatively mandated duties and responsibilities in respect of the debtor and the proposal itself, including assisting with the preparation of financial information regarding the debtor and reporting to both the court and creditors. A proposal is initiated when it is filed with the Official Receiver, the federal government appointee responsible for administering the BIA.

Proposals under the BIA may be made to creditors generally or to classes of creditors, both secured and unsecured. Proposals may only be initiated by the debtor or a person acting on behalf of the debtor. A creditor cannot commence a proposal. Applications brought by creditors against a debtor under the BIA may only seek its liquidation.

## Overview of Canada's Tax Regime

Canada's tax regime is governed by the federal *Income Tax Act* (Canada) (the "ITA") and its regulations, as well as the sales and other tax laws of Canada and its provinces and territories. Persons planning to do business in Canada should also note that the administrative policies of the Canada Revenue Agency ("CRA") and the provinces are relevant to taxation in Canada, but have not been described in depth in this Guide.

### Income Tax

The primary basis for income taxation in Canada is the residence of the taxpayer. Canadian residents generally are subject to Canadian tax on their worldwide income. Non-residents of Canada generally are subject to Canadian tax only on certain types of Canadian-source income.

#### Taxation of Canadian Residents

Individuals, trusts and corporations are, or are deemed to be, residents of Canada in the following circumstances:

- **Individuals.** Generally, an individual who, as part of his or her settled routine, regularly or normally lives in Canada will be considered to be a resident in Canada for Canadian tax purposes. In addition, an individual who sojourns in Canada for 183 days or more during a calendar year will be deemed to be resident in Canada for the year.
- **Trusts.** A trust generally is considered to be resident in Canada if its central management and control is located in Canada. This generally is the case if the trustees of the trust meet in Canada.
- **Corporations.** A corporation incorporated in Canada after April 26, 1965 (or earlier in certain situations) is deemed to be resident in Canada. A corporation may also be resident in Canada if its central management and control is located in Canada. This generally is the case if the corporation's board of directors meets in Canada.

A person is deemed not to be resident in Canada if the person is deemed to be a non-resident under an income tax treaty Canada has with another country.

## Basis of Taxation

### Individuals and Trusts

Canadian resident individuals are subject to Canadian tax at graduated rates on all sources of business, property and employment income, as well as on capital gains realized on the disposition of capital property. Most Canadian trusts (which are deemed to be individuals for the purposes of the ITA) are taxed at the top marginal tax rate on their undistributed income. In 2019, the combined federal-provincial individual marginal tax rates ranged from 20.05% to 53.53% in Ontario.

### Corporations

Canadian resident corporations are subject to Canadian tax on all of their business and property income, as well as on capital gains realized on the disposition of capital property. As of January 1, 2020, the combined effective federal-provincial tax rate for corporations (including non-resident corporations) carrying on business in Ontario was 26.5%.



### Taxation of Non-Residents

Under Part I of the ITA, individuals, trusts and corporations that are, or are deemed to be, not resident in Canada are liable for Canadian tax on certain types of Canadian-source income, including:

- income from employment exercised in Canada;
- income from business carried on in Canada; and
- capital gains realized on the disposition of “taxable Canadian property”, which includes (among other things):
  - real property situated in Canada;
  - property used or held in a business carried on in Canada;
  - shares of private corporations, or interests in partnerships or certain trusts, where more than 50% of the fair market value of the particular share or interest is, or was, at any time in the previous 60 months, derived from real or certain resource property situated in Canada;

- shares of public corporations where the non-resident, non-arm's length persons, partnerships in which the non-resident or such persons have an interest, or any combination of the above, owns, at any time in the previous 60 months, more than 25% of the shares of any class of the corporation, and the particular shares derive more than 50% of their fair market value from real or resource property situated in Canada; and
- an interest, option or right in any of the foregoing properties.

## Choice of Business Entities

Non-residents can use a variety of different legal forms to carry on business in Canada. A non-resident may carry on business in Canada through an incorporated Canadian subsidiary or through an unincorporated branch.

A Canadian incorporated subsidiary of a non-resident is a Canadian resident for Canadian income tax purposes and, therefore, is subject to tax in Canada on its worldwide income at the corporate tax rates for Canadian resident corporations, as discussed above. Certain types of payments (including dividends, interest, management fees and royalties) made by the Canadian subsidiary to its non-resident shareholder are subject to withholding tax, as discussed below.

When the business is carried on in Canada through an unincorporated branch, the non-resident generally is liable for tax on its Canadian source business income. In addition, the non-resident would be liable for branch tax of 25% of an amount approximately equal to the after-tax earnings of the branch not reinvested in Canada (in addition to any liability for income tax on its Canadian-source business income). Branch tax generally serves as a proxy for Canadian tax that would apply to dividends that are distributed to a non-resident shareholder if the non-resident carried on business in Canada through an incorporated Canadian subsidiary, rather than through a branch.

A non-resident also may carry on business in Canada through a partnership, which gives rise to unique Canadian tax issues. Although a partnership is not itself subject to tax in Canada, income of the partnership is allocated to its members based on their respective interests in the partnership and the non-resident partner will be subject to Canadian tax on its share of the partnership's income.

**A non-resident also may carry on business in Canada through a partnership, which gives rise to unique Canadian tax issues.**

## Withholding Tax

Amounts paid to a non-resident by a Canadian resident (or by other non-residents in certain circumstances) in respect of most forms of passive income (including dividends and royalties) generally are subject to Canadian withholding tax at a rate of 25%, subject to any applicable treaty relief. In addition, certain management fees paid by a resident of Canada to a non-arm's length non-resident are subject to withholding tax at a rate of 25%. The ITA generally does not impose withholding tax on most interest payments paid to non-residents dealing at arm's length with the payor.

## Treaties

A non-resident's liability to Canadian tax may be reduced or eliminated under an applicable income tax treaty that Canada has entered into with another country. Generally, Canada's income tax treaties exclude from Canadian tax *de minimis* employment income earned in Canada by non-residents, and limit Canadian tax on a non-resident's income from carrying on a business in Canada to only those profits that are attributable to a permanent establishment (e.g., a fixed place of business) situated in Canada. Employees or agents who regularly conclude contracts in Canada on behalf of a non-resident may be deemed to be permanent establishments of the non-resident. In addition, US residents who spend a significant amount of time providing services in Canada may be deemed to have a permanent establishment in Canada even if they do not have a fixed place of business in Canada.

Generally, treaties provide exemptions from Canadian tax on certain types of capital gains realized by non-residents and reduced rates of withholding tax on other types of Canadian-source income. Branch tax may also be reduced by an applicable treaty.

## Transfer Pricing

Transfer pricing is the pricing of goods or services transferred between a resident of Canada and a non-resident with whom the Canadian resident does not deal at arm's length. In a non-arm's length transaction, pricing may not be determined by market dynamics. Consequently, taxing authorities generally attempt to ensure there is an appropriate division of profits from the transaction between the Canadian resident and the non-resident. Amounts in respect to the transaction may therefore be subject to adjustment. It is important to pay particular attention to transfer pricing where non-resident corporations and their Canadian subsidiaries are transferring good and services between them.

## Goods and Services/Harmonized Sales Tax

### General Rules

Canada's Goods and Services Tax ("GST") is a comprehensive value-added tax on the consumption of nearly all property and services in Canada. The rate of GST is currently 5%.

GST is imposed on every person who receives a "taxable supply" of property or a service "in Canada". Property is broadly defined to include virtually every kind of real, personal, tangible and intangible property other than money. Service is also broadly defined to include anything other than property, money and employment duties. A taxable supply means the provision of property or a service by any means whatever in the course of the supplier's commercial activities, unless the supply is expressly exempted (principal categories of exempt supplies include financial services, residential rent, sales of "used" residential real estate, and most healthcare services). In addition, certain supplies are zero-rated – that is, they are taxable supplies but the rate of GST is zero. Zero-rated supplies include supplies of food, agricultural products and exports from Canada.

A supplier who is registered for GST purposes is entitled to claim an input tax credit ("ITC") equal to all GST paid in connection with property or services acquired by it for consumption, use or supply for the purpose of making taxable supplies (including zero-rated supplies) in its commercial activities. Therefore, GST does not become a cost or expense for a supplier engaged in commercial activities.

GST, although imposed on the recipient, must in most cases be collected and remitted to the federal government by the supplier. Registrants may offset their ITCs against GST collected and remit only the balance to the government.

### Harmonized Sales Tax and Provincial Sales Tax

Each province in Canada (other than Alberta) also levies a sales tax on most sales of property and services provided within the province. Several provinces (including Ontario) have harmonized their provincial sales taxes with the GST to form a single Harmonized Sales Tax ("HST"). The tax regime for the GST and the HST is generally the same. HST uses the same registration number as the GST and is reported on the registrant's GST return. The combined federal and provincial components of the HST result in a combined rate of 13% in Ontario. Québec's provincial sales tax mirrors, but is not harmonized with, the federal GST.

**The combined federal and provincial components of the HST result in a combined rate of 13% in Ontario.**



Each of Manitoba, Saskatchewan and British Columbia retain an independent retail sales tax. Generally, retail sales tax applies to transfers of tangible personal property and a smaller range of services than GST/HST. There is no input tax credit mechanism in the retail sales tax regimes. Rather, retail sales tax paid by a person engaged in a business is a cost of doing business.

## Other Commodity Taxes and Duties

Businesses involved in importing goods into Canada, exporting goods to Canada, or manufacturing or selling goods in Canada may be affected, directly or indirectly, by certain other taxes and duties imposed in Canada. Many products imported into or sold in Canada are subject to GST and provincial sales tax (or HST), as well as customs and excise duties and taxes.

### Customs Duties

The rate of customs duty payable on imported goods depends upon both the country of origin of the goods and the classification of the goods.

The amount of duty is based on the “value for duty” of the imported goods, which generally is determined by the “transaction value” of the goods. The transaction value generally is the price paid or payable by the importer of the goods, subject to adjustment for items such as commissions, brokerage fees, royalties, packaging and transportation costs.

There are special methods of valuation when the transaction value is not applicable or cannot be determined, for example, when a relationship between the vendor and the purchaser has affected the price of the particular goods or where the importer is a Canadian branch of a foreign exporter. Under certain circumstances, refunds, drawbacks and remission of duty are available.

The Canadian tariff classification system incorporates the principles of the Harmonized Commodity Description and Coding System, an internationally accepted system of classification.

Canada has entered into free trade agreements with several countries. Pursuant to these trade agreements, Canada has reduced or eliminated customs duties payable on goods imported into Canada from these countries.

## Excise Duties and Taxes

Certain goods (including jewellery and gasoline) manufactured in or imported into Canada are subject to an excise tax, which applies at varying rates depending on the type of product manufactured or imported, in addition to any applicable customs duties and GST/HST.

Excise duties are imposed on spirits, wine, beer, tobacco and cannabis products manufactured in Canada or imported into Canada, in addition to GST/HST and customs duties.

## Importing or Trading Goods

Businesses involved in importing or trading goods may be subject to domestic legislation dealing with product standards, consumer protection and competition. International trade agreements, import controls and special import measures such as antidumping duties also affect trade in goods and services.

### Product Standards

Product standards legislation in Canada is intended to prevent deceptive labelling and potential health and safety problems. This legislation requires goods being imported into Canada to meet prescribed standards. Both the federal and provincial governments have legislated extensively in this area. Non-governmental bodies are also involved in prescribing technical standards.

Federally, consumer packaging and labelling legislation regulates packaging and labelling of pre-packaged consumer products. The legislation requires display of information including product identity, quantity and the manufacturer or person for whom the product was manufactured or produced for resale. The size and placement of the required information is also prescribed by law. Certain information is also required to be displayed in both English and French. The legislation prohibits false or misleading representations.

Additional requirements are imposed for certain products including food and drugs. This legislation requires display of additional information relating to the durable life of food, storage, ingredients and nutritional facts.

In October 2016, the federal government announced the launch of a comprehensive, multi-year Healthy Eating Strategy, with commitments to: reduce sodium in processed foods, eliminate industrially produced trans-fat, provide consumers with more information about sugars and food colours, and introduce restrictions on the commercial marketing of unhealthy foods and beverages to children. Since the launch, the government has: (a) amended the Food and Drug Regulations to make the Nutrition Facts table and list of ingredients on packaged foods easier for consumers to use and understand; (b) made it illegal for manufacturers to add partially hydrogenated oils (i.e., trans-fats) to food sold in Canada; (c) held consultations on amendments to (i) front-of-package labelling requirements for foods that are high in sugars, sodium and saturated fat, (ii) repeal labelling requirements for high intensity sweetener products, and (iii) require additional Vitamin D be added to margarine and milk products; and (d) introduced a new version of Canada's Food Guide.

**The legislation requires display of information including product identity, quantity and the manufacturer or person for whom the product was manufactured or produced for resale.**

For drugs, additional information relating to medicinal ingredients, lot numbers, directions for use and expiration dates must be displayed. New drugs cannot be sold or advertised without a notice of compliance from Health Canada. Particularly stringent prohibitions, controls, manufacturing and labelling requirements are imposed on narcotics and certain other drugs.

The federal Food and Drug Regulations contain labelling and packaging requirements for non-prescription and prescription pharmaceutical and biologic drugs for human use. The Regulations require: (a) plain language labelling of drugs; (b) contact information be placed on labels; (c) non-prescription drug labels to include a standard format table of important information; (d) drug submissions to include mock-ups of labels and packages; and (e) drug submissions to include evidence that the drug would not be confused with another drug due to similar names.

Provincial legislation may also regulate specific products. For example, each province has its own legislative scheme regulating the practice of pharmacy, including specific provisions relating to the sale of drugs. Provincial legislation also controls such activities as inspecting, grading, labelling and marketing certain food products (e.g., margarine and edible oil products). This legislation may impose different and sometimes higher standards than those set federally.

Specialized federal legislation also regulates hazardous or potentially dangerous products, pesticides and other pest control products, textiles and precious metals.

Metric units of measurements (e.g. metres, grams, litres) must be used for all aspects of trade.

## Canadian Standards Association International

The Canadian Standards Association International (“**CSA International**”)<sup>5</sup> is a private, not-for-profit organization that develops standards and applies them through product certification, management systems registration and information products. CSA International tests and certifies products for sale in Canada, wherever produced. CSA International certification informs consumers that a product or system has been evaluated in a formal process that includes examination, testing and follow-up inspection, and that the product or system complies with all applicable standards.

Products and services that meet CSA International’s safety or performance standards are permitted to bear the internationally-recognized CSA International mark. The CSA International program is voluntary. The burden of application and compliance is on the manufacturer or person wishing to apply the CSA International mark.

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<sup>5</sup> The CSA’s website is [www.csa.ca](http://www.csa.ca).

CSA International can test and certify products for both US and Canadian markets. Thus, duplicate testing is unnecessary. CSA International also helps exporters conform to the requirements for marketing products in the European Union. As a member of the International Certification Bodies Scheme, CSA International can test and certify a wide range of products. Testing is performed locally and is recognized in over 50 countries.

Compliance with CSA International standards or standards of other testing and certification companies (such as Intertek Testing Services and Underwriters' Laboratories) or testing and approval authorities (such as Ontario's Electrical Safety Authority) is sometimes required by law.

## Consumer Protection

All of the provinces have some form of consumer protection legislation.

Ontario consumer protection legislation applies to all consumer transactions where the consumer or the person with whom the consumer is conducting the transaction is located in Ontario. The legislation provides broad protection to consumers through consumer rights and warranties (e.g., an implied warranty that services are of a reasonably acceptable quality), prohibition of unfair practices (e.g., false or misleading representation, and negative option marketing where businesses demand payment for unsolicited goods or services), and requirements for certain types of consumer agreements. The legislation also creates effective consumer remedies.

Ontario consumer protection legislation imposes information requirements for particular types of consumer agreements, including future performance agreements over \$50, internet agreements over \$50, direct (e.g., door-to-door sales) and remote agreements over \$50, gym memberships over \$50, credit agreements, motor vehicle repair and leasing agreements, time share agreements and agreements for personal services. The requirements are intended to inform consumers of exactly what they are contracting to receive, what they will be paying and with whom they are contracting. In some cases, a written copy of the agreement must be given to the consumer including specific information such as the name and contact information of the supplier, description of goods and services, full pricing and payment information. In the case of future performance agreements, internet agreements and remote agreements, the consumer must be given an express opportunity to accept or decline the agreement and to correct errors before entering into it. For direct agreements, time share agreements and gym memberships, the consumer has a 10-day cooling off period to cancel the agreement for any reason.

The information requirements in Ontario consumer protection legislation are enforced by



allowing the consumer to cancel an agreement within certain time periods if the requirements are not met. If a consumer has the right to cancel an agreement, he or she may do so by giving notice. The agreement and all related agreements are then cancelled as if they never existed. Consumers may also request that a credit card issuer cancel or reverse a charge where the card was used to pay for a consumer agreement that was cancelled, to make a payment that was received in contravention of the legislation or to make a payment that was collected for unsolicited goods or services. Similarly, the legislation allows a consumer to rescind an agreement if it was entered into as the result of an unfair practice.

## Competition Act

As noted earlier in this Guide, federal competition legislation governs trade practices affecting competition in Canada. The *Competition Act* (Canada) creates civil remedies for activities that could affect competition and criminal offences for more serious anti-competitive activities.

### Civil Provisions

The civil provisions of the *Competition Act* (Canada) provide for remedial relief from certain anti-competitive conduct and practices and are administered by the Competition Tribunal.

The abuse of dominance provision is targeted at the practice of anti-competitive acts by dominant firms that have had, are having or are likely to have the effect of lessening or preventing competition substantially in a market. Anti-competitive actions are exclusionary, predatory or disciplinary in nature. They may include practices such as long-term exclusive contracts or other contractual provisions that make it very difficult or uneconomic for customers to switch suppliers, thereby protecting or extending the market power held by the dominant firm or firms. In addition to remedial relief to stop the conduct or overcome the anti-competitive effects of the conduct, the Competition Tribunal may also impose penalties of up to \$10 million for a first occurrence and up to \$15 million for a subsequent occurrence. *The Competition Act* (Canada) also contains provisions relating to exclusive dealing or tied selling, although this conduct is normally examined as part of an abuse of dominance case.

The civil provision concerning refusal to deal may be relevant to the termination of a customer by a supplier, such as the termination of a retailer or distributor by a manufacturer. The provision may apply if a person is substantially affected in their business or precluded from carrying on business due to their inability to obtain adequate supplies of a product anywhere in a market on usual trade terms due to insufficient competition among suppliers in a market, where the product is in ample supply, the person is able to meet the usual trade terms and the refusal to deal is having or is likely to have an adverse effect on competition in a market. If these conditions are met, the Competition Tribunal may order the supplier to accept the customer on usual trade terms.

The civil provision regarding resale price maintenance may be applied to conduct that has, by agreement, threatened, promised, influenced upward, or discouraged the reduction of, the price at which a product is resold, offered for sale or advertised for sale by any other person within Canada. It may also apply to refusals to supply a product or other discrimination against a person because of that person's low pricing policy. For the Competition Tribunal to provide a remedy under this provision, it must also be shown that the conduct has had, is having, or is likely to have, an adverse effect on competition in a market.

Further, the *Competition Act* (Canada) contains a civil provision regarding agreements or arrangements among competitors that prevent or lessen, or are likely to prevent or lessen, competition substantially in a market. This provision is intended to cover anti-competitive agreements or arrangements between competitors that are not subject to the criminal conspiracy provision discussed below. It may apply, for example, to an agreement between a distributor and a supplier where the supplier supplies products to a distributor and also competes with that distributor, if the agreement can be shown to have the requisite anti-competitive effect.

Finally, the *Competition Act* (Canada) contains civil provisions targeted at deceptive marketing practices, such as misleading advertising. Some deceptive marketing practices, such as deceptive telemarketing or misleading representations that are knowingly or recklessly made, can be pursued as criminal conduct.

## Criminal Provisions

The *Competition Act* (Canada) makes it a criminal offence for competitors to conspire, agree or arrange with each other with respect to: (a) the prices at which a product is supplied; (b) the markets, territories or customers that are served; or (c) the level of production or supply of a product. Importantly, this provision applies to the prohibited conduct regardless of the actual or potential effect on competition.

A limited defence is available for conduct that is ancillary to a broader agreement or arrangement and that is directly related to, and reasonably necessary for giving effect to, the objective of the broader agreement or arrangement, provided that the broader agreement or arrangement does not itself contravene the conspiracy provision. For example, a non-competition provision that restricts the seller of a business from re-entering into competition with the buyer can be justified as necessary to protect the goodwill being purchased as part of the business. However, if the non-competition provision is unreasonably long in duration or includes products or businesses not being sold, this defence may not be available.

**| The *Competition Act* (Canada) contains a civil provision regarding agreements or arrangements among competitors that prevent or lessen, or are likely to prevent or lessen, competition substantially in a market.**

The criminal conspiracy provision is the highest enforcement priority of the Competition Bureau. Those persons found guilty can be subject to prison terms of up to 14 years or a fine of up to \$25 million or both. In addition, private parties may sue for damages as a result of conduct that is contrary to the criminal provisions.

The criminal provision concerning bid-rigging makes it a criminal offence to agree or arrange with another person with respect to making a bid, withdrawing a bid or deciding not to bid, unless a party to the agreement or arrangement makes it known to the person calling for the bids, at or before the time the bids are submitted or withdrawn. This provision also applies to tenders.

## International Trade

### Trade Agreements



Canada is a member of the WTO through the Agreement Establishing the World Trade Organization (“**WTO Agreement**”) and a party to the North American Free Trade Agreement (“**NAFTA**”) with the US and Mexico. However, if ratified by each country’s legislature, the recently negotiated and signed United States-Mexico-Canada Agreement (“**USMCA**”, known in Canada as “**CUMSA**”) will replace NAFTA. Canada has also entered into free trade agreements with Chile, Israel, Columbia, Peru, Panama, Costa Rica, Honduras, Jordan, Ukraine and South Korea, as well as with the four European Free Trade Association countries, namely Iceland, Norway, Switzerland and Liechtenstein.

The Canada-European Union Comprehensive Economic and Trade Agreement (“**CETA**”) with the European Union (“**EU**”) was signed on October 30, 2016 and entered into force provisionally on September 21, 2017. The CETA will take full effect once all EU member states have formally ratified it, but all of the economically significant parts of the agreement are now in force. CETA improves access to EU markets for goods and services, creates greater certainty and protection for investments, and creates new opportunities in EU procurement markets. The treaty has eliminated 98% of the tariffs between Canada and the EU. The EU is Canada’s second largest trading partner after the US.

CETA is further complicated by the January 31, 2020 departure of the UK from the EU. The UK will be aligned with the EU’s trading regulations until December 31, 2020 at which time the UK hopes to leave the EU with a free trade agreement of its own. There remains substantial uncertainty as to what such an agreement would look like or even if one can be concluded in



such a short time frame (CETA took over 7 years to negotiate). The significance for Canada of these developments is that the UK is by far Canada's biggest trading partner among the EU countries. Once the UK leaves the EU, the benefits of CETA for Canada will be substantially watered down unless Canada is able to enter into its own trade agreement with the UK.

Canada is also a party to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("**CPTPP**") with Australia, Brunei, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. CPTPP entered into force among the first six countries to ratify the agreement – Canada, Australia, Japan, Mexico, New Zealand and Singapore – on December 30, 2018. The CPTPP entered into force for Vietnam on January 14, 2019. Notably, the US is not a party to the agreement, as President Donald Trump withdrew the US from negotiations of the Trans-Pacific Partnership (the predecessor to the CPTPP) within a week of his inauguration. The CPTPP trading bloc represents 495 million people and a combined GDP of \$13.5 trillion.

Canada is negotiating free trade agreements with a number of other countries, notably India.

Canada is also party to a number of investment treaties. Some are incorporated into free trade agreements while others are set out in bilateral Foreign Investment Protection and Promotion Agreements ("**FIPAs**").

The Canadian government, together with the governments of the provinces and the territories, have entered into the Canadian Free Trade Agreement ("**CFTA**"), the objective of which is to reduce provincial government trade barriers and to free movement of people, goods, services and investments within Canada. The CFTA entered into force on July 1, 2017, and replaced the Agreement on International Trade.

### **Non-Discrimination in Trade in Goods**

The General Agreement on Tariffs and Trade 1994 ("**GATT 1994**") set out in Annex 1A of the WTO Agreement establishes two non-discrimination principles that have been the cornerstone of the modern trading system. The first is the most-favoured-nation ("**MFN**") principle, which requires that (subject to an exception for customs unions and free trade areas) an advantage given by a WTO member to products of another country be extended to like products of all WTO member countries. The second is the principle of national treatment, requiring that products imported from WTO member countries be treated no less favourably than like domestic products. There are certain exceptions to the application of these principles. The MFN principle and the principle of national treatment have been carried forward into all the free trade agreements to which Canada is a party.

### Tariff Bindings

Each WTO member, including Canada, has agreed to concessions respecting a wide range of goods. The schedules include tariff bindings that set maximum tariff rates that the member can charge on goods. The levels at which many tariffs have been bound have been substantially reduced over successive rounds of negotiations.

### Import and Export Restrictions

GATT 1994 prohibits all import and export restrictions, with certain exceptions, most notably measures necessary to protect human, animal and plant life or health, relating to the conservation of exhaustible natural resources and necessary for national security. NAFTA and other free trade agreements also prohibit export taxes and other export charges.

Notwithstanding NAFTA's prohibition on export charges, the Softwood Lumber Agreement 2006 that settled Canada's last softwood lumber dispute with the US allowed export charges to be imposed on softwood lumber exports when lumber prices fell below certain levels. The Softwood Lumber Agreement 2006 expired on October 12, 2015 and the one-year standstill to which the US had agreed has also expired. In April of 2017, the US imposed duties of approximately 20% on most Canadian softwood exports, alleging Canada was unfairly subsidizing its lumber industry and dumping lumber into the US at unfair prices. Canada is in the process of challenging the duties under NAFTA and the WTO. The US is seeking a reduction in the overall Canadian share of its lumber market.

**| The WTO Agreement on Agriculture required that all existing quotas on agricultural goods be converted into tariff rate quotas.**

Agricultural products have historically been subject to various trade restrictions, such as import quotas. Canada's dairy supply management regime complements domestic milk production quotas with import quotas. The WTO Agreement on Agriculture required that all existing quotas on agricultural goods be converted into tariff rate quotas. Under a tariff rate quota, imports up to a certain volume are subject to a low tariff rate (or a "within access" rate). Imports above that volume are subject to a higher tariff rate that is prohibitive for Canada's supply-managed products (such as dairy products and poultry). Quotas for imports entitled to the within-access rate for supply managed products like cheese are allocated to various importers and are transferable. Quotas have value and an importer seeking to import a product like cheese has to purchase quota from someone else. Economists refer to the value placed on quotas as "quota rents".

## Tariff Reduction and Elimination

Tariffs have been significantly reduced (and in many cases eliminated) through tariff bindings under successive rounds of GATT negotiations, as well as under the various free trade agreements to which Canada is a party.

To fit within the exception from MFN treatment that applies to free trade areas, parties to a free trade agreement must eliminate tariffs and other trade restrictions on substantially all trade in goods among themselves. Other than the over-quota tariff rates that apply to certain agricultural goods, NAFTA has eliminated tariffs on virtually all qualifying goods traded among Canada, the US and Mexico. The other free trade agreements eliminate tariffs on virtually all qualifying non-agricultural goods traded between the signatories. Tariff treatment of agricultural goods varies from agreement to agreement. In some agreements, tariff elimination only applies to certain agricultural goods; in others, tariff elimination on agricultural goods is more general.

Since the Canada-Korea Free Trade Agreement (“**CKFTA**”) came into force in January 2015, tariffs on many goods have been eliminated. As of January 2017, 93% of Canadian exports were eligible for duty-free access into South Korea. Tariffs on other goods such as automotive goods will be phased out over various periods of time. When CKFTA is fully implemented by January 2032, South Korean tariffs will be eliminated on 99.75% of Canada’s current exports.

Additionally, when CETA came into force provisionally in September of 2017, 98% of Canadian goods became eligible to enter the European Union tariff free. Additional tariffs will be subject to phase outs for seven years following CETA coming into force. Similar tariff reductions and eliminations will occur under the CPTPP. Once the CPTPP is fully implemented over a 12-year period, 99% of tariff lines among CPTPP parties will be duty free.

## Rules of Origin

Because the parties in a free trade area maintain their individual policies regarding products from other countries, there must be rules of origin to ensure the free trade agreement is not used to transship goods from non-party countries through the territories of free trade parties. To qualify, goods must either wholly originate in the territories of one or more of the free trade parties, or non-party inputs must be substantially transformed or have a prescribed minimum value added to them within the free trade area. Producers must weigh the benefit of the preferential tariff offered under the free trade agreement against the burden of having to comply with the applicable rules of origin. If the cost of complying approaches the value of the preferential tariff, the producer may choose to forego the benefit offered by the free trade agreement.

Rules of origin create inflexibilities in trading relationships. For example, an automobile produced in Canada that qualifies under NAFTA rules of origin will contain a large proportion of US and Mexican content. If the automobile is exported to the EU, the US and Mexican content will not qualify under CETA rules of origin. Unless the Canadian content (and EU content if there is any) is sufficient to meet the threshold in CETA rules of origin, the automobile will not qualify for duty-free treatment when entering the EU. CETA addresses this problem by allowing up to 100,000 Canadian-produced vehicles per year containing up to 70% of their value (or 80% of their cost) to be comprised of non-Canadian components and still benefit from CETA tariff preferences. CKFTA approaches this problem differently by allowing materials imported from the US to qualify as Canadian as if the US were a party to CKFTA and the material qualified under CKFTA rules of origin.

### Antidumping and Countervailing Duties

The WTO Agreement sets out comprehensive codes for both antidumping and countervailing duties with which WTO members, including Canada, must comply.

**Antidumping duties can only be imposed where dumping causes or threatens material injury to domestic producers of like goods.**

Dumping occurs when the export price of a product is lower than the price charged to buyers in the exporter's own domestic market or when the export price is consistently below cost. The "normal value" of a product is the price in the exporter's home market or the cost of the product plus a reasonable amount for profit. The "margin of dumping" equals the excess of the normal value over the export price and the antidumping duty imposed equals the margin of dumping. Antidumping duties can only be imposed where dumping causes or threatens material injury to domestic producers of like goods.

Countervailing duties may be imposed on imported goods that have been subsidized where the importation of the subsidized goods causes or threatens material injury to domestic producers of like goods in Canada. Under WTO rules, a subsidy occurs if the producer receives a financial contribution from the government that is found to be "specific." A financial contribution can take the form of a grant or a loan or loan guarantee on more favourable terms than those available in the market place. A financial contribution also occurs if the government grants a tax break or provides goods or services to a producer for less than market value or buys goods from a producer for more than the market price. A financial contribution is "specific" if it applies only to certain industries or enterprises rather than generally. The rate of the countervailing duty is based on the amount of the subsidy found to have been granted per unit of product. Countervailing duties can only be imposed where the subsidization causes or threatens material injury to domestic producers of like goods.

NAFTA does not have substantive requirements for antidumping or countervailing duties but establishes a system of binational panel review of certain major determinations in antidumping

and countervailing duty cases. A party to an antidumping or countervailing duty action affected by a determination (such as a determination of dumping or subsidization or injury) can request judicial review under domestic procedures or, alternatively, binational panel review. A binational panel comprised of nationals of the exporting and importing NAFTA countries applies the domestic law of the NAFTA country whose determination is being reviewed. This dispute resolution mechanism was highly debated during the negotiation of USMCA, as the US argued that it infringed on US sovereignty. Ultimately, the dispute resolution mechanism in NAFTA applicable to antidumping and countervailing duties has been nearly identically reproduced in USMCA's Chapter 10.

### **Safeguards**

WTO rules permit member countries to impose duties or quotas if imports of a particular product are seriously injuring domestic producers of that product. The advantage of safeguard actions from the perspective of domestic producers is that it is not necessary to establish an unfair practice, such as dumping or subsidization. However, unlike antidumping or countervailing duties, which are automatically imposed, the imposition of safeguards is discretionary on the government's part.

In October 2018, the Government of Canada imposed provisional safeguards on seven classes of steel products, and simultaneously called for the Canadian International Trade Tribunal ("CITT"), the quasi-judicial body responsible for making various determinations and decisions in Canadian trade matters, to conduct an inquiry into whether long-term safeguards on certain steel products were warranted. The provisional safeguards were in effect until May 2019. In April 2019, the CITT released its report which stated that long-term safeguards on two of the seven classes of steel products, heavy plate and stainless steel wire classes, were warranted. The Government of Canada refunded the provisional safeguard surtaxes paid on imports of five of the seven classes of steel products. However, for heavy plate and stainless steel wire, the Government of Canada imposed final safeguards that came into force in May 2019 and are to remain in place until October 2021.

### **Services**

The objective of the provisions of trade agreements covering services is to apply MFN and national treatment non-discrimination requirements to trade in services and to improve market access for service providers of other parties to the agreement. Services provisions identify a number of modes of providing services including the cross-border provision of services and the provision of services through the establishment of a commercial presence such as a subsidiary in the territory of another free trade party.

The WTO Agreement covers the provision of services. The WTO obligations are set out in a General Agreement on Trade in Services (“**GATS**”). GATS sets out MFN and national treatment requirements that are similar in concept to their counterparts in GATT 1994, as well as market access commitments. A number of other free trade agreements with Canada contain provisions respecting services.

### **Intellectual Property**

The WTO Agreement on Trade-Related Aspects of Intellectual Property (“**TRIPS Agreement**”) is a comprehensive intellectual property convention that sets out requirements respecting copyright, trademarks, patents, industrial designs and certain other forms of intellectual property. The TRIPS Agreement also requires WTO members to provide for effective civil remedies and criminal sanctions for infringement. NAFTA contains similar provisions, as does USMCA. Canada has made substantial alterations to its intellectual property statutes to comply with the requirements under these agreements.

CKFTA affirms the respective rights of Canada and South Korea under the TRIPS Agreement, but also sets out its own substantive obligations respecting copyright, trademarks, patents and geographic indications.

CETA also sets out provisions respecting intellectual property rights. Rather than affirming rights under the TRIPS Agreement, CETA states that the provisions of CETA complement those set out in the TRIPS Agreement. CETA sets out provisions respecting a number of categories of intellectual property, including performers’ rights, broadcasting, technological measures, electronic rights management information, camcording, trademarks, geographical indications and pharmaceuticals. Significantly, CETA provides for “sui generis” protection for pharmaceuticals that will allow patent holders to extend patent monopolies (currently 20 years in Canada) on eligible patents in respect of products that are subject to regulatory “delay” when achieving market entry. Canada has capped this additional period of protection at two years.

### **Government Procurement**

The objective of trade agreement provisions respecting government procurement is to apply non-discrimination principles in the selection by governments of suppliers to government of both goods and services and to set out requirements respecting various aspects of the procurement process, such as bidding, to ensure fair treatment of suppliers of other parties to the trade agreement. The concessions made in government procurement provisions are specific with many exclusions.

The WTO Agreement includes the Agreement on Government Procurement (“GPA”) to which only certain WTO members, including Canada, are party. The GPA sets out requirements for specified procurements by various departments and Crown enterprises of the Government of Canada. In addition to non-discrimination requirements, the GPA sets out requirements for various aspects of the government procurement process. NAFTA sets out similar requirements that apply among Canada, the US and Mexico. However, Canada is not a party to the government procurement chapter (Chapter 13) under USMCA. Therefore, if USMCA is ratified, there will not be a single trade agreement applicable to government procurement in North America. Once this happens, the GPA will govern procurement between Canada and the US, USMCA will govern procurement between the US and Mexico, and the CPTPP will govern procurement between Canada and Mexico.

Until 2010, there was no coverage of procurements by provincial and territorial governments. Under a new procurement agreement between Canada and the US, the US opened specified procurements by 37 states from which Canadian suppliers were previously excluded in return for all the provinces and two of the territorial governments opening up specified procurements to US suppliers.

Both CKFTA and CETA include provisions respecting government procurement. CKFTA only covers procurements at the federal level. However, CETA government procurement provisions cover procurements by provincial and municipal governments as well.

The CFTA sets out rules respecting government procurement that apply to procurements at the federal, provincial and municipal levels.

The federal government has established bid challenge procedures that benefit domestic as well as foreign suppliers. A supplier who considers that the federal government has not complied with the government procurement provisions of a trade agreement or the CFTA can challenge the procurement in a procedure administered by the CITT. A successful challenge can result in the reversal or modification of a procurement decision. The CITT bid challenge procedure does not cover provincial or municipal procurements. Under the CFTA, Canadian provinces and territories must establish an independent administrative or judicial authority to receive and review bid challenges.

### **Dispute Resolution**

The WTO Agreement sets out dispute settlement procedures that have been extensively used since the agreement became effective in 1995. Canada has been actively engaged in this process, both as a complainant and a defendant. NAFTA (as well as USMCA) and the other free trade agreements to which Canada is a party also contain dispute settlement procedures.

It must be emphasized that these procedures may only be invoked by governments against the governments of other member countries.

### **NAFTA Renegotiation**

President Trump made renegotiation of NAFTA a central plank in his 2016 election campaign. He characterized NAFTA, which came into effect in 1994, as the “worst trade agreement ever” and threatened that the US would withdraw unless able to negotiate a better deal. NAFTA renegotiations began on August 16, 2017, and lasted for over 13 months.

Issues central to the renegotiations included automotive rules of origin issues, dairy market access, intellectual property protection, softwood lumber, steel and aluminum tariffs, and dispute resolution mechanisms, among other issues. In August 2018, the US and Mexico reached a revised trade deal, without Canada. President Trump threatened to exclude Canada from the deal, and also threatened auto tariffs if Canada did not negotiate in a way the US thought was fair.

Ultimately, on November 30, 2018, all three countries signed USMCA. Proponents of USMCA tout the deal as a modernized free trade system between the three countries.

### **USMCA**

USMCA was signed by Justin Trudeau, Donald Trump, and previous Mexican President Enrique Peña Nieto at the G20 summit in Buenos Aires. The agreement has yet to be ratified by Canada or the US, but it was ratified by Mexico in June of 2019.

If ratified by each country, USMCA will have a significant impact on Canadians. For example, USMCA extends the minimum period of protection of patents to ten years for biological drugs (drugs made from natural sources). This essentially extends the period that a biological drug is protected from generic competition, and will impact Canadian firms and patients. USMCA also extends the terms of copyright from 50 to 70 years beyond the life of the author.

Additionally, USMCA creates new rules of origin in the automotive industry. To avoid tariffs, a vehicle would have to meet the following four origin requirements: (a) 75% of the auto production must occur within North America, up from 65%; (b) certain core vehicle parts must qualify as originating in North America; (c) 70% of the steel and aluminum used in the vehicle must be from North America; and (d) 40 % of the value of a vehicle must be produced by workers earning at least US\$16 per hour. USMCA also allows for the first 2.6 million automobiles exported from Canada to the US to be exempt from tariffs, up from the current export rate of 1.8 million.



The agreement limits Canada's ability to enter into a free trade agreement with a non-market economy, such as China. Parties to the agreement would be required to give the counterparties three months' notice before they enter into trade negotiations with China.

Canada's dairy market would also be significantly impacted by the ratification of USMCA. Under USMCA, Canada agrees to open 3.6% of its dairy market, which would allow for the entry of more products from the US. This aspect of the agreement was highly criticized by Canadian dairy farmers.

A significant hurdle to ratification of USMCA was the steel and aluminum tariffs imposed by the US in June of 2018. Both Canada and Mexico had stated they would not move forward with USMCA with the tariffs in place. For the Canadian products, the tariffs were 25% on imports of Canadian steel and 10% on imports of Canadian aluminum. In response, Canada imposed surtaxes and similar trade-restrictive countermeasures on up to \$16.6 billion of products from the US. In May of 2019, both countries announced their intention to eliminate all of these tariffs. This announcement increases the likelihood of the deal being ratified by Canada.

In December of 2018, Trump announced he would begin the six-month process of withdrawing from NAFTA, which increases the pressure on US legislatures to ratify USMCA. However, with the US House of Representatives controlled by the Democrats, outstanding concerns that the Democrats have with the deal must be addressed before House Speaker Nancy Pelosi agrees to put the deal to a vote. As the vote continues to be delayed, it is more likely to become a 2020 election issue in the US. If the vote is not conducted by the end of 2019, it is possible the issue will not be addressed until after the 2020 election.

In Canada, USMCA was introduced to Parliament in May 2019. Canada has maintained it will move in tandem with the US during the ratification process.

### **Investment Treaties and the FIPAs**

There are currently roughly 3,000 investment treaties in effect in the world. NAFTA contains a trilateral investment treaty and Canada is party to a number of bilateral investment treaties, either incorporated into free trade agreements or in free-standing FIPAs. USMCA contains many of the same core investment provisions as does NAFTA. CKFTA and CETA also contain investment provisions.

Investment treaties protect investors and their investments by imposing non-discrimination requirements (national treatment and MFN treatment) and requirements that treatment be fair and equitable. Investment treaties prohibit expropriation except for a public purpose, in accordance with due process on a non-discriminatory basis and with full compensation at



fair market value. Investment treaties also prohibit certain performance requirements (such as a requirement to use local goods and services) either as a condition for establishing, acquiring or conducting an investment or as a condition for receiving an advantage such as a subsidy. There are also rules for repatriation requirements, minimum equity requirements and nationality of boards of directors.

Canada's investment obligations are subject to numerous reservations. Some cover specific laws that existed when the treaty came into effect. For example, the ICA is covered by a reservation, whereby Canada preserves its ability to use the ICA to ensure investments by non-Canadians provide a net benefit to Canadians.

The investment treaties are unique in that most provide for investor/state arbitration procedures. If an investor of one party, or its investment, suffers damage caused by a breach of treaty obligations by the government of another party, the investor may, on its own behalf or on behalf of its investment, commence arbitration proceedings and, if successful, receive an enforceable award of damages. This mechanism allows the foreign investor to bypass the domestic courts. Sub-regional (provincial, state or even municipal) measures can give rise to an investor/state claim but the claim is brought against the federal or central government of the party in question. The NAFTA investment/state procedures have been actively used and the Government of Canada, as defendant, has paid damages on several occasions. Under USMCA, however, the NAFTA investment/state dispute resolution mechanism will be eliminated as between Canada and its US and Mexican counterparties.

Investor/state dispute settlement procedures are controversial. Investor/state proceedings frequently involve significant issues of public policy, yet the format of arbitral panels is based on a commercial arbitration model with tribunals being chosen on an ad hoc basis, with the disputing investor and the defendant government each choosing a tribunal member and with the third presiding member either being chosen by agreement between the disputing parties or by some objective means, such as by the Secretary of the International Centre for the Settlement of Investment Disputes. The one advantage to governments of investor/state proceedings is that the government of a complaining investor need not become involved in the dispute. From the investor's standpoint, investor/state proceedings can provide a remedy where no remedy would otherwise be available. However, the process is slow and expensive to pursue.

The CKFTA investor/state dispute settlement provisions are similar to those in NAFTA, with some differences as to details. Under CETA, Canada has agreed to the establishment of an Investment Court System, where investment disputes are submitted to a permanent and independent court.

## Canadian Import Duties

Duties in Canada are collected by the Canada Border Services Agency (“**CBSA**”). Policies concerning duties and duty rates are determined by the Department of Finance and by the commitments Canada has made in the trade agreements to which it is a party.

### Rates of Duty

Canada’s Customs Tariff imposes duties on imported goods. Federal customs legislation sets out the enforcement and administrative structure to levy these duties. The duties depend on the country of origin and the nature of the goods. The rate of duty that applies to goods depends on their classification for tariff purposes. The Customs Tariff classifies thousands of types of commodities in accordance with the Harmonized Commodity Description and Coding System which has been adopted by Canada and all WTO members, including all of Canada’s free trade partners.

The Customs Tariff sets out a number of tariff structures, depending on country of origin. Rules of origin apply to each tariff structure. The MFN Tariff applies to goods of all countries that are WTO members as well as to goods of certain other countries. The General Preferential Tariff (“**GPT**”), which is lower than the MFN Tariff, applies to specified goods from WTO members which are developing countries. Specified goods from Commonwealth and Caribbean countries receive duty-free treatment under the Commonwealth Caribbean Countries Tariff and all goods from least developed developing countries receive duty-free treatment under the Least Developed Country Tariff. There is also an Australia Tariff (“**AUT**”) that applies to certain goods of Australia and a New Zealand Tariff (“**NZT**”) for certain goods of New Zealand. The AUT and the NZT are vestiges of the old Commonwealth preferences system. Rules of origin must be satisfied for goods to qualify for each of these tariff treatments. If a country is entitled to more than one tariff treatment, the lowest applies.

The Customs Tariff sets out three separate tariff treatments for goods that qualify under NAFTA origin requirements. The US Tariff applies to US goods, the Mexico Tariff to Mexican goods and the Mexico-US Tariff to qualifying goods of mixed Mexican-US origin. The distinctions between these tariffs have little significance now that virtually all goods qualifying under NAFTA rules of origin enter Canada duty free, regardless of which NAFTA country they come from.

The Customs Tariff also establishes separate tariff treatments for qualifying goods of each free trade partner. These currently are: the Canada–Israel Agreement Tariff, the Colombia Tariff, the Costa Rica Tariff, the Chile Tariff, the Iceland Tariff, the Honduras Tariff, the Jordan Tariff, the Norway Tariff, the Panama Tariff, the Peru Tariff, the Switzerland–Liechtenstein Tariff and the South Korea Tariff. Qualifying goods are goods that satisfy the rules of origin set out in the free

trade agreement to which the country in question is a party. The tariff designations for goods of the EU will be established when CETA comes into effect.

Finally, goods from a country not falling under any of the foregoing are subject to a General Tariff of 35%.

### Duty Relief

Canadian customs law includes various duty relief programs, such as duty drawback (a refund of duties paid on imported goods) and duty deferral (for imported inputs that are incorporated into finished exported goods). However, there is no Canadian equivalent to the US foreign trade zone or the US outward processing rules.

With some exceptions, NAFTA restricts duty drawback and duty deferral (inward processing rules) for goods exported to the US and Mexico. Duty drawback and duty deferral are not affected by the other free trade agreements to which Canada is a party.

**I The Antidumping and Countervailing Directorate of the CBSA is responsible for making dumping and subsidy determinations and the CITT is responsible for making injury determinations.**

### Antidumping and Countervailing Duties

Canada's regime for imposing antidumping and countervailing duties is set out in the *Special Import Measures Act* ("SIMA") and is based on the principles set out in the relevant WTO agreements.

Antidumping and countervailing duty actions are initiated in Canada through a complaint filed by the domestic industry or representatives of the domestic industry. The Antidumping and Countervailing Directorate of the CBSA is responsible for making dumping and subsidy determinations and the CITT is responsible for making injury determinations.

The Antidumping and Countervailing Directorate will initiate an antidumping or countervailing duty proceeding if it receives a properly documented complaint. Once the proceeding is initiated, the CITT makes a preliminary determination of injury. If the determination is negative, the proceeding ceases. If the determination is affirmative, the proceeding continues and the Antidumping and Countervailing Directorate makes a preliminary determination of dumping or subsidization. If the determination is negative, the proceeding ceases. If the determination is affirmative, provisional antidumping or countervailing duties are imposed on imports of the goods preliminarily found to have been dumped or subsidized. The Antidumping and Countervailing Directorate proceeds to make a final determination of dumping or subsidization and the CITT will commence an investigation to arrive at a final injury or threat of injury determination. If either of these determinations is negative, all provisional duties are refunded and the proceeding ceases. If both of these determinations are affirmative, duties based on

the final determination of dumping or subsidization are collected on a going forward basis and provisional duties in excess of the dumping margins or subsidy rates found in the final determination are refunded. If threat of injury only is found, provisional duties are refunded but antidumping or countervailing duties are collected on a going forward basis. All the steps described above must proceed in accordance with strict time limits set out in SIMA.

The CBSA conducts re-investigations of dumping margins and subsidy rates from time to time. Antidumping and countervailing duties may only be imposed for five years unless the domestic industry requests an expiry review. If the CITT finds that injury is likely to continue by reason of importation of the dumped or subsidized products, the duties may continue to be imposed for successive five-year periods.

## Canadian Import Restrictions

Canada maintains import controls on a number of goods. These goods are listed on the Import Control List established under the Export and Import Permits Act (“EIPA”) and can only be imported under the authority of a general import permit or an import permit issued by the Export and Import Controls Bureau under Global Affairs Canada.

All of Canada’s supply-managed goods are listed on the Import Control List (dairy and poultry products), as well as food products that contain prescribed amounts of supply-managed products. A number of food products containing wheat or barley are included.

The Import Control List also includes carbon and specialty steel products. The objective of requiring that import permits be obtained is to more closely monitor volumes of imports of these products. The Import Control List also includes a wide range of weapons.

Certain goods, such as counterfeit coins and obscene literature, are prohibited from entering Canada.

Import prohibitions can also be found in legislation such as the Criminal Code. For example, the Import Control List makes no reference to gambling equipment but persons bringing such equipment into Canada can be subject to criminal sanctions.

## Canadian Export Restrictions

Canada also maintains controls over the export of a wide range of goods as listed in Canada’s Export Control List established under the EIPA. These goods include military and strategic goods and technology, goods relating to nuclear fusion reactors, anti-personnel mines, missile technology and goods and technology related to chemical and biological weapons. Export

restrictions are imposed on these goods because Canada is party to various international agreements relating to arms control and the proliferation of nuclear and other weapons. Persons in Canada who deal with these types of goods are subject to the Controlled Goods Program and must be registered with the Controlled Goods Directorate. There are various other legal requirements for persons who deal in controlled goods.

The Canadian Nuclear Safety Commission (“**CNSC**”) requires an export licence to ship controlled nuclear substances, equipment and information outside of Canada. The CNSC will usually only allow for export to a country with which Canada has a Nuclear Cooperation Agreement, a bilateral treaty that establishes the framework for cooperation between Canada and another country in the peaceful uses of nuclear energy. Nuclear Cooperation Agreements are required under Canada’s treaty obligations under the Treaty on the Non-Proliferation of Nuclear Weapons. CNSC requirements must be satisfied as well as EIPA requirements respecting products on the Export Control List.

Goods on the Export Control List also include logs, softwood lumber, firearms, sugar and sugar-containing products, peanut butter and US-origin goods and technology. The controls on softwood lumber previously maintained in connection with the administration of the Softwood Lumber Agreement 2006 referred to above no longer apply, but any new softwood lumber agreement negotiated with the US will be administered on the Canadian side through export controls. US-origin goods and technology are included because of a NAFTA provision that permits the US to restrict the export of US origin goods from Canada to certain countries.

As a general rule, a person intending to export a good set out on the Export Control List must apply for an export permit. The issuance of export permits is discretionary and may be refused. There are a number of General Export Permits that permit the export of goods on the Export Control List without having to apply for an export permit. For example, exports of US-origin goods to most countries are covered by General Export Permit No. 12 that allows exports without having to apply for an export permit. The exceptions are exports of US-origin goods to Cuba, North Korea, Iran and Syria, for which application for an export permit must be made.

Exports to countries listed on the Area Control List (as of November 2016, Belarus and North Korea) must be specifically authorized under an export permit.

## **Special Economic Measures Act**

Canada maintains trade and other restrictions in respect of certain countries to implement decisions or resolutions of international bodies such as the United Nations or in response to grave breaches of international security. Canada currently maintains regulations that impose restrictions respecting Burma (Myanmar), North Korea, Iran, Russia, South Sudan, Syria,

Ukraine, Zimbabwe and Libya. The form of the regulation varies from country to country. The regulation respecting Russia currently list designated persons (both individuals and entities) and prohibits various dealings (buying or selling goods, providing services, providing financial services) with those persons. Dealing with persons not on the list is not prohibited. Other regulations are more comprehensive in not only prohibiting dealings with designated persons but also prohibiting engaging in a range of commercial activities with the target country. The Special Economic Measures Act provides for significant penalties for failure to comply. However, the Act makes provision for the Minister of Foreign Affairs to issue a permit allowing an activity to be carried on that would otherwise be prohibited by the regulation. The issuance of such a permit is discretionary.

## United Nations Act

Canada also maintains sanctions against certain countries under the *United Nations Act* (Canada). This legislation authorizes the Governor in Council to make such orders and regulations as are necessary to give effect to decisions of the United Nations Security Council. As of November 2016, there are regulations respecting Lebanon, North Korea, Iran, Eritrea, Yemen, Côte d'Ivoire, Congo, Iraq, Liberia, Libya, South Sudan, Somalia, Central African Republic and Sudan.

## I Employment and Labour

The federal government and all provincial governments have enacted minimum employment standards legislation as well as legislation regarding human rights, occupational health and safety, workers' compensation, pay equity, labour relations and privacy.

Whether an employer operates in a provincially or federally regulated industry will determine whether federal or provincial employment laws apply. Most industries, such as manufacturing and retail, are provincially regulated, and the relationship between the employer and employees will be governed by the laws of the province in which the business is located. Industries that are inter-provincial in nature (e.g., railways and airlines) as well as certain specific industries (e.g., banking) are federally regulated and federal employment laws apply. Although provincial and federal legislation contain the same basic principles, specific rules can vary significantly.

### Employment Standards

Each province and the federal government have enacted their own employment standards legislation that provides specific workplace standards, such as maximum hours of work, minimum wage rates, overtime, compulsory public holidays, minimum vacation time and vacation pay, rights to pregnancy and/or parental leave, minimum notice of termination and severance pay requirements. These are minimum standards with which employers must comply and they cannot be contracted out of or waived.

Employment standards legislation provides protection for employees in the event of a sale or transfer of a business or a bankruptcy or restructuring. Such legislation generally provides that a purchaser who hires the employees of the seller's business must recognize the employees' past service with the seller for the purposes of calculating future entitlements to notice of termination and severance pay.

Most legislation establishes priority for employee claims for unpaid wages and accrued vacation pay in a bankruptcy or restructuring. Legislation also commonly imposes personal liability on the directors of a business for these types of employee claims.

It is relatively easy and inexpensive for employees to pursue their rights under employment standards legislation. Employment standards are not enforced by the courts, but by specialized labour tribunals which have relatively informal rules of procedure and independent adjudicators. Employees do not have to retain legal counsel to file a complaint and appear before such tribunals.



## Severance

In Canada, unlike most of the jurisdictions in the US, there is no concept of “employment at will” or “termination at will”, where employers are not required to give employees advance notice of termination.

Notwithstanding legislative minimum standards for notice of termination and severance pay, employees may be (and typically are) entitled to more generous treatment based on common law principles. In the absence of just cause for termination, all employees are entitled to reasonable notice of termination at common law. The notice may be by way of “working notice” or pay in lieu of such notice and all employee benefits (including group insurance, pension, stock options and other bonus or equity compensation and perks) must be continued during this reasonable notice period.

The risks of common law notice or payment in lieu of notice can be mitigated by a well-drafted employment agreement containing a contractual agreement to a pre-determined severance amount and period of benefits continuation upon a termination of an employee’s employment without cause. Employers and employees cannot contract out of or waive the minimum standards provided by legislation. Accordingly, if an employment contract provides less than the minimum notice of termination and continuation of benefits required by the applicable employment standards legislation, it will be unenforceable, and the more generous common law requirements will govern.



## Human Rights

The federal government and all provincial governments have adopted human rights legislation prohibiting discrimination and harassment in the workplace. This legislation generally provides that an employer must treat all people equally without discrimination on various bases including race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, political beliefs, age, record of offences, marital status, family status, or physical or mental disability. In exceptional cases, discriminatory treatment may be justified if a requirement is determined to be a valid occupational requirement.

Human rights legislation also prohibits indirect discrimination. This type of discrimination typically occurs when a company rule which appears neutral on its face negatively impacts a particular group or class of employees. For example, a requirement to work on Sundays may discriminate against employees whose religious beliefs and practices do not allow them to work on Sundays.

Human rights legislation sets a stringent standard for employers with disabled employees. Employers are required to accommodate disabled employees to the point of undue hardship, which is a high standard, typically requiring an employer to prove that accommodation would be financially unfeasible.

Alcohol and drug dependence has been found to be a disability, and employers are required to accommodate employees who suffer from such disabilities. Almost all provincial human rights commissions have established written policies on alcohol and drug testing. In most jurisdictions, random alcohol and drug testing is prohibited, but it might be allowed where an employee occupies a safety sensitive position.

Generally, human rights legislation is enforced through a complaint driven system. The federal government and all provincial and territorial governments (with the exception of Nunavut) have established human rights commissions (to investigate and mediate complaints) and most provinces have human rights tribunals (to adjudicate complaints that are not settled through mediation). These tribunals have the authority to issue orders requiring employers to comply with legislation and to impose financial penalties. Employees are not required to retain counsel to file a complaint and appear before a tribunal.

## Labour Relations

The federal government and all provincial governments have enacted labour relations legislation to allow employees to join unions and to facilitate collective bargaining between unions and employers. Employers are obliged to bargain in good faith with a trade union and to recognize a trade union's exclusive bargaining rights with respect to the "bargaining unit" that it represents.

Independent labour relations boards are established by the legislation to oversee the administration of labour relations laws and to provide investigative and adjudicative functions. Boards have significant enforcement powers to ensure employers comply with the legislation.

A union can apply for certification to become the exclusive bargaining agent of a group of employees of an employer. Certification is granted if the right level of employee support is established through a vote or other evidence. Following certification, the employer is required to bargain in good faith with the union to establish a collective agreement covering all the terms of employment between the employer and unionized employees.

Labour relations legislation includes mandatory conciliation, mediation and arbitration provisions designed to facilitate the settlement of workplace disputes or grievances without

**Labour relations legislation includes mandatory conciliation, mediation and arbitration provisions designed to facilitate the settlement of workplace disputes or grievances without work stoppages.**

work stoppages. It includes a number of conditions that must be met before employees can lawfully strike or before an employer can lawfully lock employees out.

Labour relations legislation also protects a union's bargaining rights when a business is sold, unless the appropriate labour board or similar entity declares otherwise. These provisions have been interpreted broadly so that the buyer of a business effectively "steps into the shoes" of the seller and is bound by the seller's collective bargaining agreement and becomes party to any union proceedings or grievances.

## Pay Equity

The federal government and certain provinces in Canada (including Ontario) have passed legislation and regulations providing for pay equity. While employment standards legislation typically requires employers to provide equal pay for equal work, pay equity legislation requires employers to provide equal pay for work of equal value to address gender discrimination with respect to the payment of female employees. It is aimed at addressing the historical wage gap between men and women, particularly in certain jobs which traditionally have paid lower wages. Women in female job classes who perform jobs of equal value to employees in male job classes have the right to salary adjustments. Such legislation requires employers to complete internal pay equity assessments to establish that they are in compliance with the legislation. Employers must make job comparisons using a gender-neutral comparison system taking into account skill, effort, responsibility and working conditions. Employees' pay must be fair and based on the results of these job comparisons. Like human rights legislation, pay equity legislation establishes a commission and tribunal to adjudicate disputes.

## Employment Equity

Employment equity legislation establishes an affirmative action/hiring quota system designed to encourage employers to hire and promote women, aboriginal people, people with disabilities and visible minorities. Currently, no province has such legislation in force and the federal legislation applies only to businesses that employ 100 or more employees in connection with a federal work, undertaking or business. This includes any corporation established to perform a function or duty on behalf of the Canadian government.

## Privacy

The federal and provincial governments have established privacy legislation which applies to certain employers. The legislation requires employers to obtain employees' consent to the collection and use of personal information. Privacy commissions oversee the administration and enforcement of privacy laws. Please see the "[Privacy](#)" section of this Guide for more information.

## Occupational Health and Safety and Workers' Compensation

All provinces and the federal government have legislation that sets out certain standards for occupational health and safety and provides for compensation to employees who are injured in the course of employment. The legislation imposes duties on employers, supervisors, workers and other persons (e.g., owners) concerning workplace safety (including workplace harassment and workplace violence). It also permits employees to refuse to work where they have reason to believe their safety or that of another employee is endangered. The legislation is enforced internally by mandatory workplace health and safety committees and externally by government-appointed health and safety inspectors. The penalties for offences under the legislation are very significant. For example, the maximum fine for a corporation under Ontario's legislation is \$1,500,000 for each offence. The maximum penalty for an individual for each offence is \$100,000 and/or one year in prison. A corporation's directors and officers may also be liable. The Criminal Code provides for criminal liability for corporations found to be in breach of occupational health and safety standards.

Workers' compensation legislation establishes a no-fault insurance system. It provides compensation to employees for workplace injuries, including rehabilitation and retraining, and benefits to dependents of workers who are killed at work. Benefits are provided on a no-fault basis and workers covered by the system are prohibited from suing their employer. Each provincial workers' compensation system is administered by a provincial board that has significant investigative and enforcement powers. Disputes regarding the interpretation of the legislation and the administration of the overall system are adjudicated by an independent tribunal.

## Accessibility for Individuals with Disabilities

In addition to human rights legislation, Ontario has adopted legislation that requires employers to ensure certain standards of accessibility are being met for disabled individuals. This relatively new legislation is being implemented in phases and the standards are not intended to be fully established and implemented until 2025. Currently, certain general standards regarding customer service are in effect.

## Payroll Deductions and Remittances

Employers are required to make certain deductions and remittances and, in some cases, payments to various governments and agencies based on the wages paid to their employees.

This includes employment insurance premiums, Canada Pension Plan (“**CPP**”) contributions, workers’ compensation assessments and, for example in Ontario, employer health tax remittances.

The employment insurance program is an income replacement program for employees who are temporarily unemployed. Employment insurance benefits are paid to employees who lose their jobs due to lay-off or termination. Employees who are on maternity leave, parental leave, compassionate care leave or are absent due to illness are also covered. No benefits are paid to those who quit a job without cause. Employees who are fired for misconduct may also be ineligible. Self-employed persons are ineligible. Both employees and employers are required to contribute to the funding of this program which is administered by the federal government. Although the exact amount of the contributions varies from year to year, employers’ contributions typically range from 1% to 2% of the employees’ insurable earnings, and employees’ contributions typically range from 2% to 3%. The employer’s contributions are deductible for tax purposes as a normal business expense.



With the exception of employers and employees in Québec, all employers and employees in Canada are also required to contribute to the CPP, Canada’s national pension plan. Québec has its own provincial pension scheme, the Québec Pension Plan (“**QPP**”), which provides benefits comparable to the CPP. The CPP provides retirement pensions to contributors who have reached 65 years of age, benefits to a surviving spouse and/or surviving dependent child of the contributor, and disability benefits to a contributor who is no longer able to secure substantially gainful employment. The employee’s contribution under the CPP or QPP is a percentage of earnings that is matched by the employer’s contribution. The employer can deduct contributions under CPP or QPP for tax purposes as a business expense. All provinces have pension benefits legislation governing the establishment and financial administration of private pension plans.

With the exception of a few industries, most employers are required to participate in provincially-based workers’ compensation systems. Employers who are required to participate in these systems must pay premiums calculated as a percentage of workers’ wages.

Employers operating in Ontario must also pay an employer health tax calculated as a percentage of their payroll. Eligible employers are exempt from employer health tax on the first \$490,000 of their Ontario payroll (the exemption is no longer available to employers and associated groups of employers with an annual payroll in Ontario that exceeds \$5 million). Self-employed individuals do not pay health tax on their self-employment incomes.

## Business Visits and Relocation<sup>6</sup>

Canada offers an expansive immigration framework that allows for the selection of foreign nationals as temporary and permanent residents. A non-Canadian who wants to work in Canada has three options: (a) temporary short term entry as a business visitor; (b) temporary entry through the Temporary Foreign Worker Program or the International Mobility Program; or (c) permanent residence. In all provinces except Québec, an applicant must meet only Canadian federal government requirements. In Québec, an applicant must also satisfy Québec immigration criteria. Across the country, the government has implemented greater measures surrounding immigration compliance, particularly in the area of temporary residence, to ensure the employment of foreign workers recruited by Canadian employers is consistent with Canada's goals regarding economic immigration and prosperity.

### Temporary Entry

#### Temporary Resident Visa

Regardless of the purpose for visiting Canada, nationals of certain countries must obtain an entry visa, also known as a Temporary Resident Visa (“**TRV**”), as designated by Immigration, Refugees and Citizenship Canada (“**IRCC**”). Where required, the TRV and any associated applications must be filed for processing at a local visa office. Processing times vary based on the nature of the visit, as well as the local visa office adjudicating the application.

With the exception of US citizens and other designated persons (such as members of the British Royal Family), visa-exempt nationals who are entering Canada by air must obtain an electronic Travel Authorization (“**eTA**”) before they may board their flight. eTAs may be obtained by filing an online application, with approval often granted within minutes.

#### Business Visitor

Some foreign nationals need not obtain a work permit. These include diplomats, employees who come to Canada for a short term to attend general business meetings, and business or governmental representatives who come on behalf of their foreign employer to purchase or sell goods for the business or government for a temporary period (provided they do not sell directly to the public).

People who qualify as business visitors are not required to apply for a work permit and may apply for entry as business visitors at the Canadian port-of-entry if no TRV is required, or at a visa post abroad if a TRV is required. A business visitor is a business person who is seeking

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<sup>6</sup> The “Business Visits and Relocation” section of this Guide was prepared by PwC Law LLP (Toronto). For further information, please contact Melodie Molina at 416.598.8849 or visit: <http://www.pwc.com/ca/en/law/immigration-law.html>.

to engage in international temporary business or trade activities in Canada without entering or competing with the Canadian labour market. Permissible business visitor activities include but are not limited to attending business meetings, conferences or negotiations, or visiting clients or customers for discussions on behalf of a foreign employer or entity.

People engaging in activities deemed to be competitive in the Canadian labour market must obtain a work permit regardless of the duration of their stay or the source of their pay.

## Work Permit Process

A work permit is almost always required where a foreign national will be entering or engaging in activities that compete with the local labour market or where he or she will be receiving remuneration from a Canadian source. Work permit holders in Canada will only be allowed to work for the employer stipulated, in the occupation noted, and at the location indicated on the work permit. Canada's work permit process is structured into two distinct programs: (a) the Temporary Foreign Worker Program; and (b) the International Mobility Program.

**Work permit holders in Canada will only be allowed to work for the employer stipulated, in the occupation noted, and at the location indicated on the work permit.**

## Temporary Foreign Worker Program

The Temporary Foreign Worker Program (“TFWP”) is intended to serve as a last resort for employers to fill jobs for which qualified Canadians are not available. Managed by Employment and Social Development Canada (“ESDC”), the program is based on employer demand to fill specific jobs. Before a foreign worker can apply for an employer-specific work permit, the proposed employer must obtain a Labour Market Impact Assessment (“LMIA”).

An LMIA is a labour market verification process utilized by ESDC to determine if the presence of a foreign worker will negatively impact the Canadian labour market. Before employers offer a position to a foreign worker, they must demonstrate they tested the labour market by advertising the position and trying to find a qualified Canadian to fill it. An LMIA will only be granted if an employer can prove that no suitable Canadians were found to fill the position.

There are several streams through which LMIAs will be considered, including:

- High wage (i.e., occupations at/above the provincial/territorial median wage);
- Low wage (i.e., occupations below the provincial/territorial median wage);
- Primary agricultural;
- Live-in caregivers;

- Highest demand, highest pay, shortest duration (i.e., for occupations in certain skilled trades and occupations, where the prevailing wage is within the top 10%, or for work periods of 120 days or less); and
- LMIA in support of a Permanent Residence application.

In the high-wage stream, employers are required to implement a transition plan that demonstrates how the employer will increase efforts to hire Canadians, and reduce their reliance on temporary foreign workers. Transition plans may include investing in skills training, hiring Canadian apprentices, engaging in more active recruitment efforts from within Canada, or transitioning temporary foreign workers to Canadian permanent residence.

If an employer intends to support a candidate for permanent residence, they now have the option of applying for either a dual-intent LMIA or an LMIA for permanent residence. A dual-intent LMIA will support a temporary work permit and may also be used for a permanent residence application under the Express Entry system. An LMIA for permanent residence will only support a permanent residence application under the Express Entry system.

## Global Talent Stream

Employers hiring foreign workers for certain technology-driven occupations, or those referred to the program by one of IRCC's designated partner organizations, are authorized to submit an LMIA application under the Global Talent Stream ("GTS"). The GTS facilitates the entry of highly skilled foreign workers by removing the recruitment requirement, reducing the documentation required, and significantly improving the processing times for a qualifying LMIA application. As the criteria required to qualify for an LMIA under the GTS stream reflect a recognized labour market shortage in the industries and occupations identified, an employer need not demonstrate it made an effort to recruit a qualified Canadian.

Employers applying under the GTS must include a Labour Market Benefits Plan in their application, outlining how the foreign national's employment will positively impact the Canadian labour market. In doing so, employers must commit to pursuing either job creation or upskilling for Canadian citizens or permanent residents and an additional two benefits of their choice.

## Province-specific Requirements

LIAs are province-specific and are adjudicated by the ESDC office responsible for the region in which the foreign worker is intended to work. In certain provinces, the processing of LMIA applications may be suspended for certain occupations where ESDC has issued ministerial



instructions based on public policy considerations (such as high unemployment rates). Since ministerial instructions were introduced, suspensions have typically applied to low wage occupations in certain industries as well as to select high and low wage occupations in the province of Alberta. Employers are advised to check ESDC's website for the most recent ministerial instructions before lodging an application for an LMIA.

Employers in Québec must also obtain approval from the Ministère de l'Immigration, de la Diversité et de l'Inclusion ("MIDI") when applying for an LMIA. If MIDI determines that the job offered to a foreign national will not have a negative impact on the local labour market, then it will issue a Certificat d'Acceptation du Québec (Certificate of Acceptance to Québec).

## International Mobility Program

Some work permit categories do not require a company to go through the LMIA process. These exceptions fall under the International Mobility Program ("IMP") and can result in both open and employer-specific work permits. Employers supporting an application for an employer-specific work permit under the IMP must electronically submit offers of employment using IRCC's Employer Portal. Information submitted will be referenced for future compliance purposes, including employer inspections and reviews.



### Intra-company Transfers

One of the most common IMP categories is the intra-company transfer, which targets senior managers, executives or specialized knowledge workers who are current employees of a foreign enterprise with a parent, subsidiary, affiliate or branch in Canada. To qualify for a work permit under the general provisions of the intra-company transfer category, the following minimum criteria must be met:

- There must be a qualifying corporate relationship between the applicant's current employer outside of Canada and the Canadian entity.
- The applicant must be working, and have been working, in a specialized knowledge, senior managerial, or executive position on a full-time basis for at least one continuous year<sup>7</sup> within the last three years.
- The applicant is entering Canada to work in a similar position on behalf and for the benefit of the Canadian employer.

IRCC officers apply a rigorous test for specialized knowledge, focusing not only on the applicant's degree of proprietary knowledge, but also on his or her advanced expertise and experience within both the company and industry. Specialized knowledge is unique and

<sup>7</sup> Under the general provisions of the intra-company transfer category, a minimum of one year of full-time, continuous employment must be demonstrated. Certain agreements to which Canada is a party provide for a shorter minimum employment period, starting at six months.

uncommon, held by only a small number or small percentage of employees within a company. The onus is on companies and applicants to demonstrate they are key personnel, not simply highly skilled. The salary of the specialized knowledge worker must also be commensurate with the intended specialist position in Canada, with a minimum wage requirement applying for most specialized knowledge workers.

### International Agreements

Canada is party to several international agreements that include mobility provisions to facilitate the issuance of work permits for member country nationals to work in Canada. Among the most commonly used international agreements for the issuance of work permits are the NAFTA (and its more recently negotiated CUSMA), the CETA, the CPTPP, the Canada-Colombia Free Trade Agreement, the Canada-Peru Free Trade Agreement, and the Canada-Chile Free Trade Agreement. Each of these agreements include provisions to allow for the entry of business visitors, investors/traders, intra-company transferees, as well as professionals.

To qualify for a work permit under an international treaty such as the NAFTA, eligibility criteria such as the employee's citizenship and educational requirements for the specific professional occupation must be adhered to. Although eligible citizens coming into Canada temporarily for work must still obtain work permits, they may not need to comply with the rigorous LMIA or other similar procedures generally required to obtain a work permit, provided that they are skilled professionals entering Canada to engage in pre-arranged employment, that they hold the requisite educational qualifications, and that their occupation is listed under the relevant treaty Appendix. The occupation criteria varies based on the treaty, with some (such as the NAFTA) having a positive list of qualifying occupations, and others (such as the Canada-Peru FTA) having a negative occupation list. Similarly, some may require the professional to meet the criteria of an independent professional or contract-based service supplier.

### Mobilité Francophone

In 2016, the Canadian government revamped the Mobilité Francophone work permit category, an LMIA-exempt category for French-speaking foreign nationals destined to work outside of the province of Québec. To qualify, the foreign national must:

- have received a job offer from an employer to work in a province or territory outside of Québec;
- intend and be qualified to work in an occupation classified at skill level O, A or B of the National Occupational Classification; and
- demonstrate that French is their language of daily, habitual use.

The offer of employment need not necessarily require the use of the French language, as IRCC wishes to foster the development and growth of Francophone communities outside of Québec.

### “Open” Permits

Some LMIA exemptions allow for foreign nationals to apply for open work permits, including under the International Experience Class (“IEC”), post-graduate and bridging open work permit categories. Dependent spouses may also be eligible for status in Canada on the basis of the work permit or permanent residence of their spouse or parent.

## Permanent Residence

Through permanent immigration, the government’s goal is to build a strong and skilled workforce that addresses long-term labour needs and growth. Permanent residents are selected based on various criteria, however the goal is that these individuals will make long-term contributions to Canada’s labour market, as well as contribute to Canada’s rich, diverse and progressive culture. Canadian immigration legislation recognizes the many contributions immigrants and refugees make to Canada, encourages workers with flexible skills to choose Canada and helps families reunite quickly. The legislation is stringent with those who pose a threat to Canadian security while continuing Canada’s tradition of providing a safe haven to people who need protection.

A person who wants to settle permanently in Canada can be admitted under one of a number of classes of immigrants, including the Family Class, Business Class, Economic Class via Express Entry and Provincial Nomination Programs. In addition, the permanent residence system has undergone comprehensive reforms in recent years and more are still expected.

Individuals intending to reside permanently in the province of Québec are not eligible to apply under a federal economic program, but rather must apply through one of the province’s permanent residence streams. Those intending to reside in any other province or territory may apply under either a federal or provincial program, provided they meet minimum eligibility criteria.

Proof of language ability for English or French is required for most Canadian permanent residence categories and is mandatory for Canadian citizenship. The applicant has the authority to decide which one of the two languages they are more comfortable using and may receive additional consideration for proficiency in both. The applicant must prove the level of language proficiency required for their intended application by completing one of the third-party language tests that IRCC will accept, namely the International English Language Testing System (“IELTS”), the Canadian English Language Proficiency Index Program (“CELPIP”) or

**Canadian immigration legislation recognizes the many contributions immigrants and refugees make to Canada, encourages workers with flexible skills to choose Canada and helps families reunite quickly.**

the Test d'Évaluation de Français pour le Canada ("**TEF Canada**"). An applicant must not be inadmissible based on security, criminal, health, financial or other grounds. Medical examinations are mandatory and dependants of the potential permanent resident are also required to undergo medical examinations, even if the dependents do not plan to enter Canada.

## Family Class Immigration

To be admitted under the Family Class, an applicant must be sponsored by a qualifying close family member who is 18 years of age or older and currently living in Canada as a Canadian citizen or a permanent resident. Sponsors must promise to support the relative or family member and his or her accompanying family members for a period of three to 10 years to help them settle in Canada. In Québec, necessary steps must also be taken to meet provincial requirements. Members of the Family Class include spouses, common-law or conjugal partners, parents, grandparents, dependent children, children to be adopted, and orphaned siblings, nephews, nieces or grandchildren (if under 18 and not married or in a common-law relationship). Further, Canadian citizens may begin sponsoring a foreign spouse while living outside of Canada.

## Business Class Immigration

The Business Immigration Program ("**BIP**") is designed to facilitate immigration for qualified business persons who intend to invest capital in Canadian business ventures. In general, the BIP prioritizes the applications of people who want to engage in business over other types of immigrants. Business immigrants may be conditionally or unconditionally admitted into Canada depending on the circumstances.

The Self-Employed Persons Program is available to those with relevant experience in cultural activities, athletics or farm management. The Start-Up Visa Program is another option for entrepreneurs with a business idea or venture that has obtained the support of designated venture capital funds, angel investor groups, or business incubators.

The Québec Investor Program and Québec Entrepreneur Program are options for business people destined for Québec, however both are undergoing provincial review (with the Investor program having been suspended as of the date of this Guide). Many of the Provincial Nominee Programs also have entrepreneur programs for individuals who wish to start and manage a Canadian business.

## Economic Class Immigration

### Express Entry

The Express Entry system is an online intake management and selection mechanism for permanent residence to Canada. Express Entry allows IRCC to select skilled immigrants under the following federal economic immigration programs: Federal Skilled Worker Program (“**FSWP**”), Federal Skilled Trades Program (“**FSTP**”), Canadian Experience Class (“**CEC**”) and a portion of the Provincial Nomination Programs (“**PNP**”).

Potential applicants must create an online profile, and those who meet the criteria of one of the economic class programs will be accepted into a pool of candidates. The candidates are ranked against others in the pool using the IRCC’s point-based system called the Comprehensive Ranking System. Candidates with the highest scores in the pool will be issued an Invitation to Apply for permanent residence under one of the economic immigration programs. The Express Entry system has allowed the government to select the best candidates who are most likely to succeed in Canada, rather than those who happen to be first in line.

### Federal Skilled Worker Program

Skilled workers are people who may become permanent residents because they are able to become economically established in Canada. Under the FSWP, the foreign national must possess at least:

- one year of continuous and paid work experience in a single occupation within the past 10 years at National Occupational Classification (“**NOC**”) skill level 0, A or B;
- sufficient English or French language skills; and
- a secondary or post-secondary certificate, diploma, or degree.

If the foreign national meets these eligibility conditions, they will then be assessed based on six selection factors that form part of a 100-point grid. The current pass mark to qualify is 67 points. The foreign national must also show they have sufficient funds to support their stay in Canada, and that they are not inadmissible based on security, criminal, health or other grounds. This is the only program open to those who do not qualify for the Family Class or CEC, and who wish to immigrate to Canada without a job offer from a Canadian employer. Skilled workers interested in immigrating to the province of Québec may also qualify under the Québec Skilled Worker program. Similar criteria are assessed, with a focus on the individual’s knowledge of French and adaptability to live in Québec.

## Federal Skilled Trades Program

Skilled tradespeople interested in immigrating to Canada have been able to apply under the FSTP. Under this program, more emphasis is placed on practical training and work experience, rather than an individual's education. This program benefits employers who cannot find Canadians to fill the demand for skilled trades in natural resources, agriculture and construction sectors. It also benefits foreign workers because the FSTP provides them with an avenue for permanent residence. An applicant to the FSTP must have either a qualifying job offer from a Canadian employer, or a provincial or territorial certificate of qualification in a qualifying skilled trade. The applicant must also have at least two years of work experience within the last five years, and satisfy the employment requirements set out in the NOC system. Language and admissibility requirements must also be met.

## Canadian Experience Class

A foreign national may qualify for permanent residence under the CEC if he or she has: (a) one year of full-time, highly-skilled (NOC skill levels 0, A or B) work experience in Canada within the previous three years; (b) plans to live outside of Québec; (c) has gained experience in Canada with proper work authorization; and (d) meets language requirements for the intended job as determined by IRCC. The foreign national also must not be inadmissible to Canada based on security, criminal, health, financial or other grounds.

## Provincial Nomination Programs

Most provinces and territories can nominate foreign nationals to immigrate to Canada if these individuals possess the requisite skills, education and work experience to contribute to the economy of that province or territory, and if the individuals intend to live in the province or territory nominating them. Generally, the employer must first become approved by the province for applications by its foreign worker employees. Approval is generally based on provincial objectives in regards to labour market needs and skill shortages, among other criteria. Once the PNP certificate is approved, in most cases the employee can use it to obtain a temporary work permit. This allows the employee to commence work immediately, while he or she awaits the processing of the permanent residence application.

Provinces and territories can also nominate a certain number of skilled workers through the Express Entry system to meet local immigration and labour market needs. The applicants must be eligible under one of the federal economic class programs and create an online Express Entry profile. Once the PNP certificate is issued, the candidate will receive additional points in their Express Entry profile.



## I Privacy and Data Protection

Canada has provincial, territorial and federal privacy legislation. Organizations that conduct business in Canada are expected to comply with such legislation when they collect, use or disclose personal information about Canadians in Canada. The *Personal Information Protection and Electronic Documents Act (Canada)* (“**PIPEDA**”), is overarching and applies to all sectors, which is similar to Europe, but different from the US. Depending on where they do business, businesses may be subject to the overlapping jurisdiction of one or more provinces and the federal government.

PIPEDA regulates the collection, use and disclosure of personal information. It affects almost all personal information being collected, used or disclosed by any private enterprise (corporation, person, partnership, association or trade union) in the course of commercial activities. The federal legislation does not apply in provinces that have adopted substantially similar legislation.

British Columbia, Alberta and Québec have enacted private-sector privacy legislation recognized as substantially similar to the federal legislation (although federal law continues to apply to federal works and undertakings). Although they have certain distinct features, the requirements under provincial legislation are not significantly different from the federal legislation (except in relation to employee personal information and breach notification, discussed below). Even where there is substantially similar provincial privacy legislation, inter-provincial and international transfers of personal information remain subject to the federal legislation.

Notably, certain sectors of the economy are subject to specialized privacy requirements. For example, Ontario, New Brunswick and Newfoundland and Labrador enacted privacy legislation that applies to the collection, use and disclosure of personal health information. This legislation has also been recognized as substantially similar to the federal legislation, and therefore federal privacy legislation will not apply to health information custodians in Ontario, New Brunswick or Newfoundland and Labrador. Other provinces and territories have health privacy legislation that is not substantially similar to PIPEDA.

PIPEDA does not apply to the collection, use or disclosure of personal information relating to employees, except employees of federal works and undertakings. Privacy legislation in British Columbia, Alberta and Québec covers employee information. It is a prudent practice for organizations to address employee personal information in their privacy policies and procedures.

An organization can collect, use and disclose personal information if its purpose is reasonable and the organization has obtained the informed consent of the individual to whom the information relates. Informed consent can be obtained expressly or implied from the circumstances surrounding the exchange of information.

Personal information is broadly defined in federal privacy legislation to mean any information about an identifiable individual. This includes data such as name, age, ethnic origin, personal email address, IP address, financial history, behaviour, identification numbers, health information, viewpoints and personal opinions (but not business card information such as an employee's name, title, business address, business email address or telephone number). Although considered personal information, specified publicly available information (e.g., information included in a telephone directory) is also excluded. One of the first steps for organizations developing procedures to deal with personal information is to identify what personal information they collect, how they use it and to whom they disclose it.

**Organizations must prepare privacy policies setting out how they deal with information they collect, how such information is used and to whom such information is disclosed.**

Notification of a privacy breach is required by law for matters governed by the federal and Alberta's privacy legislation. Notification under this legislation is required when there is a "real risk of significant harm". Notification is also required in certain provinces regarding breaches of personal health information. However, whether notification is required by privacy legislation or not, organizations need to consider whether they should provide any particular notification to avoid liability for failure to warn or to meet other relevant legal standards.

Also, irrespective of whether breach notification is required, where the federal legislation applies, an organization must keep a record of every breach of security safeguards.

## Obligations Imposed by Canadian Privacy Law

Canadian privacy legislation also imposes obligations on organizations that collect, use or disclose personal information.

### Policies and Procedures

Organizations must prepare privacy policies setting out how they deal with information they collect, how such information is used and to whom such information is disclosed.

Organizations are required to implement practices to, for example: (a) ensure personal information is properly safeguarded; (b) ensure information in their custody is kept accurate and current (if the organization is making decisions based on such information); (c) receive and respond to complaints and inquiries; and (d) train staff about the organization's obligations, policies and practices.



## Designating a Privacy Officer

Every organization must appoint an individual to be responsible for privacy matters. This person's responsibilities include dealing with requests for access to information and with complaints relating to non-compliance with the organization's privacy policies or privacy legislation.

## Safeguarding Personal Information

Organizations are required to protect personal information in their possession or control against loss, theft, unauthorized access, disclosure, copying, use and modification.

Required safeguards include physical measures such as locking filing cabinets and restricting access to offices, organizational measures such as security clearances, and technological measures such as the use of passwords and encryption. More sensitive information such as financial and health information must be safeguarded by a higher level of protection.

## Personal Information in a Third Party's Control

If an organization transfers personal information to a third party (e.g., through outsourcing certain functions), whether that third party is located inside or outside Canada, it must ensure that information is secure. One way for a transferring organization to protect itself is by including appropriate restrictions and obligations in the contracts under which the information is transferred, such as requiring the third party transferee to have in place similar privacy protection procedures and policies. If the personal information being transferred is sensitive, the information should be transferred in encrypted form.

In some instances, the transfer of personal information outside Canada requires notice of the transfer and the associated risks to the affected individuals, but not their consent.

## Data Retention

Organizations must develop guidelines and implement procedures with respect to the retention of personal information, including minimum and maximum retention periods. Personal information may only be kept for as long as required to satisfy the purpose for which it was collected.

## Access to Personal Information

If an individual writes to an organization and requests a copy of any personal information that the organization possesses in relation to the requesting individual, that organization is required to respond promptly (in most cases within thirty days of the request). For this reason, it is important that an organization's document retention policy provide that all information that is no longer required is either destroyed or anonymized.

## Challenging Compliance

Organizations are required to ensure that individuals who are assigned the task of responding to access requests, as well as any other staff members who may receive such requests, are properly trained. Organizations must develop policies and procedures to receive and respond to complaints or inquiries about their policies and practices relating to the handling of personal information which must be simple to use.

**I The Commissioner has the power to disclose to the public any information relating to the personal information practices of an organization if the Commissioner considers it is in the public interest to do so.**

## Enforcement

The Privacy Commissioner of Canada oversees federal privacy legislation. The Commissioner may initiate a complaint and commence an investigation where there are reasonable grounds to investigate a matter. An individual may also register a complaint directly with the Commissioner, which is the most common approach. The Commissioner can make recommendations, but has no power to issue orders or enforce recommendations. The Commissioner has the power to disclose to the public any information relating to the personal information practices of an organization if the Commissioner considers it is in the public interest to do so. Binding orders, including monetary awards, may be made under the federal privacy legislation by the Federal Court of Canada.

Provincial privacy commissioners oversee the privacy legislation in their provinces. Some of the provincial privacy commissioners have the power to make orders in addition to the power to disclose and publicize information about organizations. Provincial privacy commissioners are more likely to name organizations with deficient privacy practices than the federal Commissioner.

## Non-Canadian Businesses

Although the federal legislation covers collection, use and disclosure of personal information about Canadians regardless of where the data is collected, used and disclosed (e.g., outside Canada), as a practical matter the federal Commissioner's ability to enforce the legislation

outside Canada is limited. Nonetheless, the Commissioner can publicize the personal information management practices of an organization if the Commissioner considers that publicity is in the public interest.

## Anti-Spam Legislation

The anti-spam provisions of Canada's anti-spam legislation ("**CASL**") generally prohibit, subject to limited exceptions, the sending of commercial electronic messages (meaning email as well as text messages, instant messages and messages sent through social networking sites) unless: (a) the recipient has expressly consented to receiving the message; and (b) the message meets certain form and content requirements and enables the recipient to withdraw consent (such as with an unsubscribe mechanism). The installation of unauthorized computer programs is also addressed by the legislation. Organizations carrying on business in Canada will want to ensure they comply with CASL as the penalties for non-compliance are potentially severe.

# E-Commerce and Emerging Technology Businesses

## Jurisdiction

Responsibility for regulating the internet and e-commerce is shared by the federal and provincial governments. Regulation of broadcasting content on the internet falls within the jurisdiction of the Canadian Radio-television and Telecommunications Commission (“**CRTC**”). However, the CRTC has chosen to exempt internet broadcasting services from regulation, provided such services adhere to the terms and conditions of its digital media exemption order.<sup>8</sup> In transacting with Canadian consumers over the internet, non-Canadian businesses must abide by other Canadian laws of general or overriding application, including, but not limited to, laws with respect to intellectual property aspects of the internet (copyright and trademarks), consumer protection (including prohibitions against deceptive marketing practices found in the *Competition Act*), anti-spam, and privacy and personal data security. The federal government can also exert an indirect influence on the internet and e-commerce through its regulation of the banking sector, taxation and national criminal law.

Provincial and territorial legislation covers such issues as the validity of electronic documents, contracts and signatures, the formation and enforceability of electronic contracts and payments, consumer protection and advertising requirements, and privacy and personal data security. As described under the “[Consumer Protection](#)” heading of this Guide, consumer protection legislation extends to agreements entered over the internet and, among other things, requires that prescribed information be disclosed to the consumer before and after an e-commerce sale is transacted.

The law concerning jurisdiction in the context of the internet is still developing and not entirely settled. However, in recent years, certain Canadian courts have shown a willingness to assume jurisdiction over non-Canadian businesses that do not have a physical presence in Canada, by finding such businesses to be “carrying on business” in the Canadian jurisdiction in question.

## E-Commerce Legislation

Federal, provincial and territorial e-commerce legislation is modeled on the *Uniform Electronic Commercial Act* (US) which itself was based on the Model Law on Electronic Commerce developed by the United Nations Commission on International Trade Law. In Ontario, the *Electronic Commerce Act, 2000* (Ontario) provides legal validity to most electronic information

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<sup>8</sup> The CRTC has exempted from regulation the provision of broadcasting services that are delivered and accessed over the internet or delivered using point-to-point technology and received by way of mobile devices. Such services are required to adhere to the CRTC’s *Exemption order for digital media broadcasting undertakings* as set out in Broadcasting Order CRTC 2012-409, dated 26 July 2012.

and documents (some exceptions include wills and documents that purport to transfer real property), electronic signatures, formation of electronic contracts and electronic document retention. So long as there is a clear presentation of the contractual terms and an equally clear acceptance of those terms, an electronic contract will be enforceable in Canada.

## Emerging Technology Businesses

### The Technology Sector in Canada

The Canadian market for technology, innovation and entrepreneurship is one of rapid growth and development and is critical to the overall economic success of the country. The Canadian Venture Capital & Private Equity Association recently released the “VC & PE Canadian Market Overview H1 2019”, which reported that in the first half of 2019 (“H1”):

- the Canadian venture capital industry experienced its strongest H1 on record, with \$2.15 billion invested, surpassing the previous highest H1 (2018) which had \$1.67 billion invested; and
- the information and communication technology sector was directly responsible for 54% of total dollars invested in H1, with \$1.2 billion invested over 144 deals.



PwC Canada and CB Insights’ “Q4 and Full-Year 2018 MoneyTree Canada Report” published a number of eye-opening statistics regarding the technology sector’s importance to the Canadian economy. In 2018:

- Canadian venture capital backed companies raised \$3.5 billion over 471 deals, with funding and deal count up 35% and 30%, respectively;
- the internet sector maintained its position as the most active sector for venture capital activity in Canada, with almost US\$1.3 billion invested across 169 deals;
- the mobile and telecom sector experienced a year-over-year increase in funding of 11% to a total of US\$461 million invested. Notably, this sector experienced an almost 1300% increase in Q4 2018 over Q3 2018, driven by a large Series D round raised by mobile flight booking start-up Hopper; and
- the artificial intelligence sector saw a 51% increase in funds raised, as Canadian artificial intelligence companies raised US\$418 million in 2018. Annual deal count increased for the fifth straight year, rising to 43 transactions in 2018.

According to CompTIA’s “Cyberprovinces™ 2019” report, employment in the technology sector was strong in 2018. Net employment in the Canadian technology industry totaled approximately 1.66 million, a 3.8% increase over 2017. Employer demand for employees in emerging technology areas such as machine learning, robotics, augmented reality, virtual

reality, blockchain and the Internet of Things increased by 23% from 2017. The report also states that technology sector employees earned an average wage of \$78,070 in 2018, compared to the average private sector wage of \$51,794.

Canada is home to the TSX-V, known as Canada's "public venture market". The TSX-V offers a viable alternative for many small cap technology companies looking to raise venture-staged growth capital. 2018 was a strong year for emerging technology companies on the TSX-V. These companies are typically early-stage businesses, frequently with market values of \$20-30 million at the time of listing. Perhaps more significantly, the TSX-V continues to offer small-cap technology companies an important platform to raise growth capital. 2019 was also a strong year for technology companies on the TSX-V, with 20 new company listings and over \$233 million of equity capital raised as of October 31, 2019.

The Canadian technology sector continues trending towards growth. Innovative universities with world class technology programs, effective government support programs and a strong venture capital and private equity presence in the sector are driving forces behind this continued momentum. Many global technology powerhouses are opening offices in Toronto, Vancouver and Montreal, and homegrown companies are reaching unprecedented heights by Canadian standards. Examples of successful homegrown companies include Ottawa-based consumer technology firm, Shopify, Vancouver-based social media management developer, Hootsuite, and Toronto-based legal technologies Kira Systems, Diligen and Closing Folders.

Goodmans is proud to lead in the technology sector and has recently partnered with The DMZ at Ryerson University. The DMZ is a leading business incubator (selected by BMI as the top-ranked university incubator in North America, and third in the world), which connects its start-ups with resources, customers, advisors, investors and other entrepreneurs. Through this partnership, Goodmans provides mentorship and networking opportunities to assist start-ups in maximizing their potential.

**Goodmans is proud to lead in the technology sector and has recently partnered with The DMZ at Ryerson University.**

## Other Recent Developments

The Venture Capital Action Plan ("VCAP") was created by the Government of Canada to encourage investment in small and medium-sized Canadian businesses by private companies. Between 2013 and 2016, the VCAP program backed four private sector led funds, resulting in upwards of \$900 million in private investor capital being invested in early-stage Canadian companies.

To build on the success of the VCAP program, the Government of Canada made \$450 million available through the Venture Capital Catalyst Initiative ("VCCI"), which launched in December 2017. The government allocated \$350 million to large private sector-led funds and \$50 million

to venture capital funds focused on supporting underrepresented groups. In early 2019, the Government of Canada announced a further \$50 million for venture capital funds investing in Canadian CleanTech companies. It is estimated that the VCCI project could inject up to \$1.5 billion into Canada's innovation capital market.

The Canadian government has also made efforts to attract foreign entrepreneurs who can contribute to innovative sectors. The Federal Start-Up Visa program, which was launched in 2013 by Immigration, Refugees and Citizenship Canada, targets entrepreneurs who wish to build businesses in Canada that show the potential to create local jobs and compete on a global scale. Applicants to the program must have an investment commitment from a designated Canadian venture capital fund, angel investor group or business incubator to be successful. The Start-Up Visa program highlights Canada's commitment to fostering innovation and entrepreneurship.

In Ontario, the Ontario Securities Commission ("**OSC**") unveiled the OSC LaunchPad in 2016, the first innovation hub introduced by a Canadian securities regulator aimed at improving the integration of FinTech companies entering the securities regulatory framework. The LaunchPad program provides FinTech companies with guidance and flexibility in navigating securities requirements and keeps securities regulation in step with digital innovation, all while ensuring investor protections are addressed in a way that makes sense for Canada's evolving landscape. In addition, AngelList Syndicates, an American start-up funding platform, launched in Ontario pursuant to the OSC LaunchPad initiative. Canadian companies such as Drop and Inkbox have raised capital through this program. Finally, Lending Loop is available to investors and businesses in all Canadian provinces except Québec. Lending Loop provides access to affordable financing for small-sized companies by connecting them with Canadian investors. It also provides investors with access to alternative investments outside of the stock and real estate markets, allowing further diversification of investor portfolios with small business loans across various industries and geographies.

The successful OSC approval of Lending Loop and AngelList Syndicates illustrates how new FinTech companies are finding ways to fit into the current securities regulatory framework in Ontario. In addition, the Canadian Securities Administrators (the "**CSA**") launched the CSA Regulatory Sandbox in 2017. The CSA Regulatory Sandbox allows companies with innovative business models to register for a faster, more flexible regulatory compliance process to test their products, services and applications in the market.

# Industrial and Intellectual Property

## Copyright

The *Copyright Act* (Canada) grants an exclusive right to the copyright owner of any original literary (e.g., novels, magazines and computer programs), dramatic (e.g., films, videos, scripts and plays), musical (e.g., music, lyrics and instrumental compositions) or artistic work (e.g., paintings, photographs, sculptures and architectural works) to control copying and other commercial exploitation of that work. In addition, makers have copyright in their sound recordings, performers have copyright in their performances and broadcasters have copyright in their communication signals (rights which are often referred to as “neighbouring” as they are in the copyright neighbourhood). The copyright owner of a work has the exclusive right to publish, produce, reproduce, translate, broadcast, adapt and distribute the work, perform it in public, communicate it to the public by telecommunication, make it available online and authorize others to do these acts. Generally, copyright in Canada exists for the life of the author plus 50 years following the end of the year of his or her death, after which time the work falls into the public domain. On November 30, 2018, Canada signed the USMCA which, if implemented, would extend the basic term of copyright in Canada to “...not less than the life of the author and 70 years from the author’s death”. Other terms apply to particular works, such as photographs, sound recordings, home videos, posthumous works and jointly authored works.

Copyright arises automatically in Canada in any original literary, dramatic, musical or artistic work, including a compilation and sound recording, provided that the creator or author of the work is at the time of its creation a citizen, subject or person ordinarily resident in Canada or a treaty country and the work is first published (made available to the public) in Canada or a treaty country. A “treaty country” is a country that is a party to the Berne Copyright Convention or the Universal Copyright Convention, or is a member of the WTO. To be protected, the work must be fixed (expressed in a more or less permanent tangible form so as to make the work identifiable). In most cases, copyright belongs initially to the author of the work. The most prominent exception to this rule is that copyright in works made in the course of employment belongs initially to the employer unless there is an agreement to the contrary.

The *Copyright Act* (Canada) also creates certain royalties and levies. Performers and producers of published sound recordings share equally in royalties established under the statute and also have the right to royalties from any of the 50 countries which are party to the Rome Convention. The recent amendments to the *Copyright Act* (Canada) extend similar rights to performers where their performances are embodied in audio recordings. The *Copyright Act* (Canada) sets out a regime for the determination and collection of cable and satellite retransmission royalties



payable for the retransmission of copyrighted works on distant signals. As a quid pro quo for the legalization (since 1998) of the copying of musical sound recordings onto audio recording media for the private use of the copier, the *Copyright Act* (Canada) imposes a private copying levy on recordable blank audio recording media (e.g., audio cassettes, CD-R, CD-RW and Mini Discs) which is payable by manufacturers and importers of such media.

In general, anyone using a work without the copyright owner's consent in a manner that only the copyright owner has the right to do, infringes the copyright in that work. People who rent, sell, distribute or import infringing works are indirect infringers of copyright under Canadian law. As well, under the statute, a service that primarily enables acts of copyright infringement via the internet also infringes copyright and copyright owners can sue those who enable acts of copyright infringement. There are exceptions to infringement for non-profit organizations (e.g., schools, libraries and museums) in prescribed circumstances. There are also exceptions to copyright infringement for format shifting, time shifting, backup copying and non-commercial user-generated content. In addition, fair dealing for the purpose of research or private study, criticism or review, news reporting, education, satire or parody are defences to infringement (i.e., the Canadian version of "fair use" in the US).

**In general, anyone using a work without the copyright owner's consent in a manner that only the copyright owner has the right to do, infringes the copyright in that work.**

The *Copyright Act* (Canada) expressly limits the liability for copyright infringement of internet service providers ("ISPs") and information location tools used as "search engines" when they are acting solely as intermediaries in communication, hosting and caching activities. For an ISP or "search engine" to protect itself against being held liable for copyright infringement, it must meet the requirements of the "notice-and-notice" regime which is set out in the *Copyright Act* (Canada). In this regime, when an ISP or "search engine" receives a notice of claimed infringement from a copyright holder in prescribed form, it is obliged to promptly forward the notice to the recipient(s) allegedly infringing the copyright. The ISP must also retain identity records on its networks for a prescribed period of time. However, it is only obliged to reveal the alleged infringer's identity to the copyright holder who sent the notice pursuant to a court order.

The Canadian "notice-and-notice" regime differs significantly from the "notice and take down" regime in the *Digital Millennium Copyright Act* (US) which requires an internet intermediary that receives a notice of alleged infringing material to expeditiously remove or prevent access to the material or face potential liability for copyright infringement. Under the Canadian approach, ISPs and internet storage service providers are not required to remove or disable infringing content, although they may do so voluntarily, and a copyright owner must invoke its available legal remedies (e.g., a copyright infringement proceeding) directly against the alleged infringer.

Copyright infringers may be subject to criminal penalties or to civil remedies sought by copyright owners, including statutory damages in prescribed circumstances. Under the new

amendments, statutory damages for non-commercial infringement are significantly lower than those for commercial infringements. ISPs that fail to comply with the “notice-and-notice” regime and infringement “enablers” may also be subject to statutory damages. However, search engines found to be infringing copyright are only subject to injunctions prohibiting further use of the copyrighted material.

In an effort to prevent copyright infringement and maximize commercial exploitation, copyright owners often use technological protection measures (“TPMs”) to control access to and copying of their respective works and digital rights management information (“RMI”) to monitor the use of their respective works. The *Copyright Act* (Canada) protects such TPMs by prohibiting: (a) the circumvention of TPMs, (b) the offering of services primarily for the purpose of circumventing TPMs, and (c) the manufacture, sale or distribution of devices designed to circumvent TPMs. The *Copyright Act* (Canada) also prohibits removal of RMI, and persons who circumvent TPMs in the aforementioned ways and/or remove RMI are subject to civil remedies and criminal penalties. However, circumvention of TPMs is allowed for certain “public interest” purposes such as law enforcement and national security activities, security testing of systems and unlocking wireless devices, among others.

The *Copyright Act* (Canada) provides a system for registering copyright interests as well as registering assignments and licences of copyright interests. Registration is not necessary to create copyright in a particular work, but it provides public notice of copyright ownership, serves as evidence of copyright ownership in legal proceedings and strengthens the remedies available to a party whose copyright is infringed. An assignee or a licensee of a copyright interest who fails to register its assignment or licence may risk losing its interest in a priorities contest to a subsequent assignee or licensee who does register its interest in the work. Marking of copyright material is not legally required under the *Copyright Act* (Canada) but is often prudent and is required to obtain copyright protection under the Universal Copyright Convention. Marking uses the symbol ©, the name of the copyright owner, and the year of first publication.

In addition to the economic rights mentioned above, the *Copyright Act* (Canada) grants authors and performers (as opposed to owners) certain “moral rights”. These include, among others, the right of an author to claim authorship of the work and the right of integrity of the work (i.e., to prevent distortion or modification of the work or its use in association with a product, cause or institution in a way that prejudices the author’s integrity or reputation). Moral rights exist for the same term as copyright in the work. They belong to the author or performer and may not be assigned, although they may be waived in whole or in part. An assignment of copyright in a work does not, by that act alone, constitute a waiver of moral rights.



On May 29, 2019, the first reading of Bill C-100, *An Act to implement the Agreement between Canada, the United States of America and the United Mexican States*, took place in the House of Commons. The Bill includes a series of amendments to the *Copyright Act* (Canada) (and other federal statutes) to implement the new USMCA trade agreement.

The *Copyright Act* (Canada) must be also reviewed by Parliament every five years by a committee of the Senate, the House of Commons, or both. In 2017, the Government of Canada initiated the most recent parliamentary review of the *Copyright Act* (Canada), which was conducted by The Industry, Technology and Science Standing Committee (“INDU”), and the Canadian Heritage Standing Committee undertook a concurrent study on remuneration models for artists and creative industries. On May 15, 2019, Canadian Heritage released its report, *Shifting Paradigms*, which set out 22 policy recommendations, and on June 3, 2019, INDU released its report with 36 separate policy recommendations.

Among the key policy recommendations by each of Canadian Heritage and INDU to the federal government were the following:

#### Canadian Heritage Policy Recommendations:

- Expand the reversionary right to provide authors with a reversionary interest “25 years after assignment”.
- Provide economic and moral rights for audiovisual performers.
- Deem the screenwriter and director as co-authors and co-owners of copyright for cinematographic works.
- Limit the scope of fair dealing for the purpose of education to apply only for educational institutions when the work at issue is not commercially available.
- Increase the statutory damages for non-commercial infringement.

#### INDU Policy Recommendations:

- Implement an artist’s resale right.
- Provide that the list of allowable fair dealing purposes is illustrative only, as in the US copyright statute for “fair use”.
- Make copyright registration a requirement to enforce copyright in a work during the additional 20 years to be provided by the proposed extension of the basic term of copyright from the life of the author plus 50 years to life plus 70 years.

- Provide a right to terminate an assignment of copyright 25 years after the date of assignment, subject to: (a) prior registration of the copyright; (b) five years' notice of intent to exercise the right being given; and (c) the right being exercised within five years from when it is initially available.
- Update the rules governing first authorship and ownership of cinematographic works.
- Provide further clarity around ownership of computer-generated works (e.g., AI works).
- Provide regulations to standardize notices of claimed infringement under the notice-and-notice regime to be in a prescribed format.
- Introduce an exception to copyright to facilitate the use of lawfully acquired copyright protected works and other subject matter for informational analysis.
- Update the minimum and maximum statutory damages awards and periodically adjust these to inflation.

As of the date of this Guide, these remain recommendations and are not in force.

## Domain Names

A domain name is the unique electronic address of a website on the internet for an individual, business or other entity. No two sites can have the same domain name. The administrative organization which governs the Canadian (.ca) domain name regime is the Canadian Internet Registration Authority (“**CIRA**”).

Those seeking to register a .ca domain name through a CIRA-approved registrar must meet CIRA's Canadian Presence Requirements. Included in the acceptable categories are Canadian individuals and entities, and foreign individuals and entities who own a Canadian trademark registration or official mark. CIRA may request proof of compliance with a chosen category. Those who qualify may register as many domain names as they wish. CIRA uses a first-come-first-served system. CIRA has adopted a Canadian Domain Name Dispute Resolution Policy (“**CDRP**”) for complaints relating to the registration of .ca domain names. There are some significant differences between the CDRP and the Uniform Dispute Resolution Policy (“**UDRP**”).

## Industrial Design

The term “industrial design” generally refers to the three-dimensional features of shape and configuration, the two-dimensional features of pattern and ornamentation, or any combination of those features, applied to a finished article that serves a strictly aesthetic and not a functional purpose. Thus, an industrial design does not cover such things as an idea, a method of making an article, the materials used to make an article, or the manner in which an article works or



may be used. Other intellectual property rights may cover such aspects of a product. Original design features of finished articles represent valuable intellectual property and are important business assets that should be protected. Federal industrial design legislation recognizes this fact and provides a procedure to obtain and maintain an exclusive right to exploit those assets.

The *Industrial Design Act* (Canada) provides for the registration by Canadians and non-Canadians of original features of shape, configuration, pattern and ornamentation applied to a finished article produced or intended to be produced in numbers greater than fifty. Unlike copyright (which arises automatically upon creation) or trademark rights (which may accrue through use), industrial design rights may only be obtained by registering the design with the Canadian Intellectual Property Office (“**CIP**O”). However, a design can only be registered if it was not published in Canada or elsewhere more than one year before the filing date of the application for registration in Canada. Publication means making the design public or offering it for commercial use, and includes distributing samples of an article bearing the design, selling or exhibiting such articles for sale, publishing the design in advertising or other printed material, and publicly using articles bearing the design. Despite the one-year grace period between the publication and application filing date, it is wise to file as soon as possible due to Canada’s first-to-file system, that is, the first person who files the application is entitled to get a registration, regardless of who created the design first. The registration of an industrial design can usually be accomplished within 12 months of filing the application.

**| A design can only be registered if it was not published in Canada or elsewhere more than one year before the filing date of the application for registration in Canada.**

If an article is not useful, a design applied to it will not be registrable. Designs applied to articles that have no fixed appearance are not registrable nor are features of shape or appearance that are invisible at the time of purchase or during normal use.

If a design is an artistic work or was originally created as a work of art, it is automatically protected by copyright, and can be registered. In contrast, if a design is used or intended to be used as a model or pattern to produce 50 or more manufactured articles, it can be protected only by industrial design registration. However, there are many exceptions and the legal distinction between copyright and industrial design is very fine.

A design is registrable only if it is “new”. This essentially means the design was not published more than one year before the application was filed and the design differs substantially from previous designs. The design may be new or old provided that no one previously applied that design to the article in question, and provided the design was not published more than 12 months before filing an application. A slight change or an insubstantial variation from a previous design is not sufficient to obtain registration because there must be some “substantial” difference between the new and old designs.

An industrial design registration protects not only the specific design registered, but also any design not differing substantially from it. The owner of the design is the only one who can apply for registration. The original creator or author of the design is the owner unless the design was created for another person for payment, such as in an employment situation, in which case the other person is the owner and should apply. The right to make, use and sell a registered design can be licensed within and throughout Canada.

Registration gives the owner an exclusive right to make, import for the purpose of trade or business, or sell, rent or offer or expose for sale or rent any article to which the registered design, or a design not differing substantially therefrom, has been applied. This exclusive right begins on the date of registration and ends on the later of the end of 10 years after registration and 15 years from the Canadian filing date (registrations issued from applications filed before November 5, 2018, last 10 years from the date of registration), subject to the payment of a maintenance fee before the fifth anniversary of registration.

The owner of the registration or an exclusive licensee may bring an action for infringement against any person who infringes the exclusive rights granted by the registration in Canada. All actions for infringement must be brought within three years from the act of infringement. If successful, the owner and/or exclusive licensee may be awarded damages, punitive damages, an injunction, delivery up of all infringing articles and/or an accounting of the profits made by the infringer. However, the remedies available to a successful owner and/or exclusive licensee are limited if the infringer was not aware, and had no reasonable grounds to suspect, that the design was registered. To avoid this result, the owner and/or exclusive licensee should mark on all, or substantially all, of the articles, and/or on the labels or packaging associated with those articles, the capital letter “D” in a circle and the name, or the usual abbreviation of the name, of the proprietor of the design. This has the effect of providing constructive notice to infringers, thereby allowing the owner and/or exclusive licensee the opportunity to recover all types of remedies.

Most countries, including Canada, belong to the Paris Convention. This international treaty allows a design applicant to claim priority in respect of an earlier filed design application. Applications filed in a Paris Convention country within six months of the filing date of the original application are treated as though they were filed on the original filing date.

As of November 5, 2018, Canada joined the Hague System for the International Registration of Industrial Designs. The Hague System allows Canadians to apply for industrial design protection in multiple countries through one application and pay fees in one currency through a single transaction, thereby greatly facilitating the procedure for securing design rights in many countries. Like a Canadian registration, the rights granted by a registration obtained through

the Hague System begins on the date of its registration and ends on the later of the end of 10 years after registration or the end of 15 years after the date of International Registration.

## Patents

The terms and conditions for receiving a patent in Canada are set out in the Patent Act (Canada) and associated Patent Rules. Patents are granted for an “invention”, and to qualify as patentable, an invention must be novel and useful, and must constitute an unobvious step. The invention may be any new and useful art, process, machine, manufacture, composition of matter or improvement thereof.

The basic principle of the legislation is that a patent is only granted to an original inventor or to his or her legal representatives. In addition, the exclusivity of a patent is granted on the basis of a first-to-file system, regardless of who may have invented first. Because of the importance of the filing date of an application, an applicant should make every effort to file at least the minimum information permitted under the *Patent Act* (Canada) and Patent Rules as early as possible. If a person has previously filed an application for a patent in another country, that application may have the same force and effect in Canada as if it had been filed in Canada. The person must be entitled to protection under a treaty or convention to which Canada is a party, and the country in which the original application was filed must give similar protection to citizens of Canada. The Canadian application must be deemed to have been filed within 12 months from the date of filing in the other country.

Novelty has always been a condition of patentability in Canada. Therefore, any public disclosure of an invention in Canada or elsewhere before the filing date of a Canadian patent application or before its priority date is a bar to patentability. However, if the disclosure is by the applicant or a person who has been informed by him or her of the invention, the applicant has a 12-month period from the first public disclosure of the invention in which to file an application in Canada.

Patents are only available for inventions that have a practical application and whose function does not depend on the exercise of judgment or professional skill. For example, patents are not available for mere scientific principles, abstract theorems or methods of medical treatment. In some circumstances, the Canadian patent office may allow a patent on a method of doing business, but this will depend on the exact nature of the invention.

While computer programmes per se are not patentable, many computer-software related inventions can be claimed as an integral part of an overall system or method. Such software inventions may be patentable if a computer or other hardware is essential to the invention, or if the invention results in some change in the physical environment. For example, an invention that merely creates data or information is not patentable, but a method implemented using

software designed to operate machinery more efficiently may be patentable. In addition, recent jurisprudence indicates there may be copyright protection for the non-literal aspects of computer object or source code, for example, in the structure or algorithm of the program.

The term of the patent is 20 years from the date of the filing of the application in Canada. A patent is infringed by the unauthorized trespass on the patentee's exclusive right to make, construct or use the invention or sell it to others for their use. A patentee may seek an injunction to stop the infringement and damages, or an accounting of the infringer's profits from the infringement.

The patent owner or a person claiming rights from the owner may bring an action for infringement against any person who infringes a claim of the patent. All actions for infringement must be brought within six years from the act of infringement. If successful, the owner and/or person claiming rights from the owner may be awarded damages, punitive damages, an injunction, delivery up of all infringing articles and/or an accounting of the profits made by the infringer.

It is not necessary in Canada to mark an article, its packaging, etc. with an indication that there is a patent covering an aspect of the article, although it may be advantageous to do so in terms of the remedies that may be recovered from an infringer. However, it is an offence to falsely mark an article as patented if it is not patented in Canada.

For patented medicines, the legislation provides that a company (such as a generic drug company) seeking to market a drug containing a medicine previously marketed by a patentee who has listed patents that contain claims for the medicine or for the use of the medicine in the prescribed manner, must issue an allegation stating why its sale of the drug will not infringe any of the subject patents. The company will not obtain health and safety approval to market its drug until its allegations have been litigated. In addition, the patent legislation provides price control powers to the Patented Medicine Prices Review Board. If the Board determines that a patentee obtained excess revenue by selling a drug at an excessive price, the Board will choose from among a list of remedies which can be directed against the patented or other medicine sold by the patentee.

**All actions for infringement must be brought within six years from the act of infringement.**

## Trademarks

A trademark is a sign or combination of signs that distinguishes the goods or services of a particular business from those of others. Rights are obtained through either use or registration with CIPO ("CIPO"). Registered marks are easier to enforce and have a number of important advantages. Most importantly, registered marks are afforded protection throughout Canada, regardless of whether the trademark is used in the area where an infringer is located; in contrast, the owner of an unregistered mark or "common law" mark must establish the



distinctiveness of the trademark, that is, that the public exclusively associates the trademark with the goods or services of the owner. Even if the requisite degree of distinctiveness can be shown (and this is sometimes expensive and difficult to prove), the scope of protection is limited to the geographical area in which distinctiveness is proven. A registration provides evidence of the ownership of the trademark. In addition, a registration may have a greater persuasive impact on a potential infringer than an allegation of rights arising through use.

Significant changes to Canadian trademark law and practice came into effect with an overhaul to legislation effective June 17, 2019. Canada acceded to the Madrid Protocol, Nice Classification and Singapore Treaty, and there were significant amendments to the *Trademarks Act* (Canada) which affect filing, prosecution and maintenance as well as enforcement. The following describes the law as it stands as of June 2019.

With accession to the Madrid Protocol, foreign applicants from other countries that adhere to the Madrid Protocol can file in Canada through the harmonized filing system administered centrally by the World Intellectual Property Organization (“WIPO”) and Canadians can now use the system to seek trademark registrations abroad in Madrid member countries.

The scope of protectable marks has been expanded considerably, including a broadening of acceptable non-traditional trademarks such as sound, holograms, colour and three-dimensional marks. Filing grounds have been eliminated; it is no longer necessary to indicate if an application is being filed on proposed use, use in Canada or use and registration abroad. However, in the cases of certain types of marks, particular criteria need to be met for filing and marks may not be registrable without the filing of evidence of distinctiveness in Canada.

Notably, use as a requirement for registration has been eliminated. However, there is a requirement to demonstrate use or a justification for non-use in the first three years after registration to enforce the resulting registration in the event of infringement.

Another significant change is that Nice Classification is now required, accompanied by increased filing fees based on the number of classes for which coverage is sought.

Applications are examined by CIPO on both technical and substantive grounds. Registration may be refused on a number of bases, including if the applied-for mark is: (a) confusing with a registered trademark or earlier filed application; (b) not inherently distinctive; (c) clearly descriptive of the business or goods or services with which it is associated; (d) misdescriptive as to the character and quality of the goods or services; (e) geographically descriptive or misdescriptive; (f) the name in any language of the relevant goods or services; (g) a prohibited mark, which includes official marks and those of universities; (h) primarily merely a name or surname; (i) a protected geographical indication; (j) scandalous; or (k) utilitarian. A trademark

which is descriptive or primarily merely a name or surname may be registrable if it was distinctive at the date of filing the application. A claim of distinctiveness will require the filing of evidence to establish that the mark distinguishes the goods or services in association with which it is used from the goods or services of others.

A new informal procedure has been introduced whereby, during the course of the examination of a third party's mark, a trademark owner can submit a Letter of Protest providing information about its prior registered mark or prior application to the Registrar which could impact on registration of an application in the case of confusion, non-entitlement or where a registered mark appears in the specification of goods/services.

Once a trademark application has been examined and approved or, once all requirements or citations are overcome, the application will be advertised for potential opposition by third parties. With the coming into force of Canada's new laws, bad faith has been added as a new ground of opposition. If no opposition is filed, or an opposition is unsuccessful or withdrawn, the application will then proceed to registration. (For those applications filed before the coming into force of the new legislation, a registration fee will still be payable, but in the case of applications filed on the basis of proposed use, it will no longer be necessary to file a declaration that the mark is in use.) A certificate of registration will then be issued.

The registration term is now 10 years and may be renewed indefinitely. Proof of use is not required upon renewal. A registration can be renewed six months before up to six months after the expiry date of the registration. If a registration does not include classification of goods and services, classification under Nice Classification is required before renewal. The amount due on renewal is commensurate with the number of classes covered.

Following its third anniversary, a mark is vulnerable to cancellation in whole or in part for non-use unless the registrant can provide special circumstances for non-use since a certain date. Summary expungement proceedings for non-use may be commenced by third parties before CIPO.

While there are no marking requirements, marking is recommended, especially where a mark is used under licence. Many forms of notice are available, including using a symbol such as © (in the case of a registered trademark) or <sup>TM</sup> (for a trademark which is the subject of a pending application or is being used but is not the subject of an application) in close proximity to the trademark.

Trademarks may be assigned and it is prudent for assignments of trademark registrations or pending applications or other changes in titles such as mergers or changes of name to be filed with CIPO.

Trademarks may be licensed to third parties. The legislation only requires that use of a licensed trademark be subject to the direct or indirect control of the trademark owner. A written licence is recommended. It is not mandatory to register trademark licence agreements with CIPO. Where the existence of a licence is made public, there is a presumption that the use by the licensee of the subject trademark will not jeopardize the distinctiveness of the trademark. Use by a licensee without the control of the trademark owner or without disclosure of the licence may result in the loss of the trademark's distinctiveness and the possible expungement of the mark.

Rules concerning the protection of geographical indications for wines and spirits were enacted with the coming into force of the WTO Agreement. Subsequent trade deals have extended protection of geographical indications to many agricultural products and foods.

Any unauthorized use of a trademark may lead to civil liability and criminal penalties.

## **I Environmental Law**

Canada, like other industrialized countries, has experienced an increase in awareness of environmental issues and, as a result, an increase in government regulation dealing with environmental matters. Increased government regulation and attention to the environment has also led to significant overlap with other areas of the law, including natural resources and energy law, Aboriginal law, international trade law and insolvency law.

### **Jurisdiction**

Although the federal, provincial and local levels of government share authority to legislate with respect to the environment, most environmental regulation is carried out at the provincial level. Provincial governments may delegate authority to municipalities to enact and enforce local environmental by-laws, including sewer use and site alteration standards. Inevitably, there is some overlap among the levels of government.

### **Federal Environmental Law**

#### **Toxic Substances**

Federal environmental legislation regulates all aspects of toxic substances including development, handling and transportation. Federal and provincial legislation deal with the transportation of dangerous goods and hazardous products. Both levels of government affect the import and transport of goods and substances.

#### **Conservation**

The federal government enforces various conservation tools within its power, including regulating fish habitat, navigable water bodies, migratory birds, parks and protected areas, and certain endangered species. Provincial governments may enact supplementary laws or regulate conservation through land use planning instruments.

#### **Impact Assessment**

The federal government enacted a new environmental impact assessment regime. The federal government can require a proponent of an infrastructure project to assess the project's environmental effects, identify measures to mitigate adverse effects, and provide this information to the public. The federal government must then determine whether the project is within the public interest based on the proponent's assessment and appropriate public

participation, and may impose conditions on a project. Provincial governments may also require proponents to undertake an environmental assessment and/or may conduct an environmental assessment jointly with the federal government.

### **Greenhouse Gas (“GHG”) Emissions**

The federal government also regulates GHG emissions with the provinces.

## **Ontario Environmental Law**

### **Pollution, Controlled Substances and Contaminated Lands**

Ontario’s environmental legislation controls contamination and regulates the remediation of brownfield sites. Ontario’s occupational health and safety legislation imposes obligations on employers in respect of the use, storage, handling and manufacturing of controlled substances.

The range of regulated contaminants is very broad, including such things as odour, noise and vibration in addition to solids, liquids and gases. Contaminants and their adverse effects are not limited to a finite list or to prescribed levels or concentrations.

Ontario imposes the following duties on all persons:

- a person shall not pollute or discharge contaminants without obtaining relevant approvals or permits;
- a person shall immediately report spills and discharges of contaminants; and
- a person shall do everything practicable to ameliorate the spill’s adverse effects.

Ontario also allows persons impacted by a spill to seek compensation for losses or damage incurred as a direct result of a spill.

### **Liability**

A person who breaches Ontario’s environmental legislation may face quasi-criminal liability. Ontario’s environmental laws grant broad enforcement powers to the Ministry of the Environment, Conservation and Parks. The Minister can bring criminal or civil proceedings, issue orders, investigate, limit or prohibit releases or discharges, and order remediation.

**Ontario’s environmental laws grant broad enforcement powers to the Ministry of the Environment, Conservation and Parks.**

The Ministry can issue administrative orders against present and past owners and occupiers of land, even if the owner or occupier did not cause contamination at the property. The legislation provides standards, procedures and approval processes for the clean-up of contaminated lands which may be necessary to obtain an approval for development.

Compliance with environmental legislation is mandatory for all corporations. In Ontario, officers and directors are required to keep themselves aware of their corporation's compliance with environmental law. Civil and criminal sanctions may be directed to officers and directors of the corporation in some cases, and not solely at the corporation itself. Establishing and implementing a system for compliance can provide a defence if an issue is raised about the corporation's environmental practices.

### **Due Diligence**

Environmental due diligence has become an important part of acquiring businesses or real estate in Ontario. The system of compulsory disclosure, public registration and civil liability impacts past and present owners, operators and occupiers of land. Lenders will normally require evidence from third party professionals that the property is in compliance with all environmental laws. Specialized consultants are often retained to carry out site investigations and to assist with the development approval process.

### **Climate Change**

The Supreme Court of Canada is expected to rule in 2020 on whether the federal government has the jurisdiction to implement and regulate GHG emissions. Currently, the federal government can regulate GHG emissions as an emerging area of national concern. Provinces may also regulate GHG emissions through market-driven programs or through direct regulation and emissions standards.

### **Carbon Tax**

The federal government imposes a pan-Canadian price on carbon. The federal government requires all Canadian jurisdictions to have a system for carbon pricing in place. The objective of the plan is to ensure that carbon emissions are reduced to 30% below 2005 levels by 2030. A floor price for carbon emissions has been set for 2019 at \$20 per tonne of GHG emitted. That price will rise by \$10 each year until 2022, when the federally set minimum price will be \$50 per tonne.



Provinces can implement their own price on carbon in the form of a carbon tax or cap and trade system to avoid the application of the federal price on carbon. The federal government will return revenues generated from the federal carbon tax to the province where emissions occurred.

The federal carbon tax currently applies in Ontario, New Brunswick, Manitoba, Prince Edward Island, Saskatchewan, the Yukon, and Nunavut, B.C. and the Northwest Territories impose their own carbon tax regimes.

### **Cap and Trade**

Québec and Nova Scotia each adopt a cap and trade system. Québec's cap and trade system is currently connected to California's cap and trade program.

## Cleantech

With growing awareness of the climate emergency and other environmental impacts, interest in clean technologies has risen sharply and is expected to continue to grow in the coming years. Between 2008 and 2015, global cleantech exports increased at a compound annual rate of roughly 4%. By 2015, the value had reached an estimated \$1.2 trillion yearly and is now projected to rise to \$2.5 trillion by 2022.

The \$10.6 billion Canadian cleantech sector comprises renewable energy (bioenergy, geothermal, hydro, hydrogen and fuel cell, smart grid and energy storage, solar, waste-to-energy, wave and tidal, wind, and nuclear) and environmental sub-sectors (air pollution control, water and wastewater, and solid waste management). Canada benefits from a wealth of renewable energy riches. The country is endowed with vast and varied natural resources including massive supplies of water, solar, wind and biomass – the raw materials to produce green energy.

The growing strength of the Canadian cleantech sector is reflected in the fact that 12 Canadian companies were named to the prestigious 2019 Global Cleantech 100, an annual guide to the world's top 100 companies in sustainable technology innovation (up from a single Canadian company in 2009).

### Laws, Policies, Incentives and Programs to Support Cleantech in Canada

Canadian policy support for the cleantech industry shifted into a higher gear at the end of 2015 with the election of a federal government committed to fighting climate change, and the negotiation of the Paris Agreement. Early in 2016, the federal government, and most of the provincial governments, launched the pan-Canadian framework for clean growth and climate change with the goal of “building our clean growth economy”. Working Groups under the pan-Canadian framework focused on “Clean Technology, Innovation and Jobs” and on “Carbon Pricing Mechanisms” and collected suggestions from Canadians regarding laws and policies for pricing carbon pollution and supporting a vibrant and growing cleantech sector in Canada.

In January 2018, the federal government introduced its draft carbon pricing legislation as part of its pan-Canadian clean growth plan. Despite opposition from a number of provincial governments, the federal government implemented its carbon pricing backstop in the provinces across Canada that did not implement a compliant carbon pricing regime. In June 2019, Canada's federal House of Commons passed a motion to declare a national climate emergency and the governing Liberal Party, which was re-elected in November 2019, has adopted the goal of net zero emissions by 2050.

**Canada is endowed with vast and varied natural resources including massive supplies of water, solar, wind and biomass – the raw materials to produce green energy.**



## Federal Government Laws and Programs

In addition to its carbon pricing backstop, the Government of Canada has implemented a number of federal laws, policies and programs aimed to reduce GHG emissions and support the implementation of cleantech innovation and growth in Canada, some examples of which are outlined below. There are also innumerable provincial laws and initiatives, and industry groups such as the members of the Canada Cleantech Alliance, which are further supporting the development of the sector in Canada.

### Clean Fuel Standard (“CFS”)

The CFS will require all fossil fuel suppliers to reduce the emission intensity of fossil fuels and account for all GHG emissions associated with the extraction, production, distribution and use of fossil fuels. Fossil fuel suppliers will be able to meet the CFS: (a) by generating credits through (i) reducing emissions along the lifecycle of fossil fuels, (ii) supplying low-carbon intensity fuels such as ethanol, biodiesel and renewable diesel, and (iii) switching to cleaner sources of energy such as electric vehicles and zero emission vehicles; and (b) by purchasing credits from low-carbon intensity fuel producers and other credit generators. The demand for credits under the CFS will incentivize additional investment in low-carbon intensity fuels and technologies, which will result in growth in the cleantech sector in Canada. The Government of Canada aims to achieve 30 million tonnes of annual reductions in GHG emissions by 2030 through the CFS.

### Clean Water Initiatives

The Government of Canada has prioritized the monitoring and protection of major Canadian watersheds through regulations. There are a number of industry-specific regulations to prevent water pollution, which apply to industries like metal mines and pulp and paper. Environment and Climate Change Canada has also introduced regulations to limit the use of phosphates in cleaning products in order to reduce the frequency and intensity of blue-green algae blooms in waterbodies throughout Canada and the Chemicals Management Plan will establish regulations to limit toxic chemicals such as Bisphenol A (BPA) from entering freshwater reserves.

### Coal-Fired Electricity Phase-Out

The Government of Canada released regulations in 2019 to phase-out traditional coal-fired electricity by 2030, and aims to have 90% of electricity come from non-emitting sources by 2030. The Government of Canada expects these regulations to have benefits for Canadians totalling \$4.7 billion, including \$3.4 billion in avoided climate change damage, \$1.2 billion in health benefits for Canadians and \$40 million in environmental benefits.

### Reducing Methane Emissions

The Government of Canada released methane regulations in 2018, which establish operating and maintenance standards for the upstream oil and gas industry, and focus on preventing methane from being released or allowed to escape into the atmosphere when there is a higher potential to emit methane. The regulations are expected to achieve 20 million tonnes of reductions in methane emissions by 2030 and reduce methane emissions from oil and gas by 40-45% below the 2012 level, by 2025.

### Reducing Single Use Plastics

The Government of Canada announced that it will ban harmful single-use plastics as early as 2021, and focus on reducing pollution from plastic products and packaging. As well, the Government of Canada will implement standards to ensure that companies that manufacture plastic products or sell products with plastic packaging are accountable for the plastic waste that is generated through related transactions.

### Low-Carbon Economy Fund (“LCEF”)

Under the LCEF, the Government of Canada has allocated up to \$1.4 billion to provinces and territories that have adopted the Pan-Canadian Framework on Clean Growth and Climate Change. Allocations for the LCEF were determined using a base-level plus per capita funding formula. Projects are funded pursuant to bilateral agreements between the Government of Canada and the provincial and territorial governments. For example, the Government of Canada and the Province of Ontario developed the Energy Savings Rebate program, which provides rebates to Ontario retailers that sell energy-efficient appliances.

### Export Development Canada (“EDC”) Initiatives

EDC is one of Canada’s largest financiers of clean technology companies. In both 2017 and 2018, EDC provided more than \$1.5 billion in support for clean technology companies. EDC implemented a new climate change policy in 2018 that includes, among other things, an increased focus on climate-related considerations, such as carbon intensity, into EDC’s risk assessment processes.

### Incentives for Zero-Emissions Vehicles (“IZEV”) Program

The IZEV program is a three-year, \$300 million electric-vehicle purchases incentive program operated by Transport Canada. IZEV applies a point-of-sale incentive to the purchase or lease of vehicles that have the potential to produce zero direct tailpipe emissions.



**Sustainable Development Technology Canada (“SDTC”)**

SDTC is a foundation created by the Government of Canada to support Canadian companies in their efforts to develop and demonstrate new environmental technologies that address climate change, clean air, clean water and clean soil. SDTC funds the development of new sustainable technologies, fosters and encourages innovation amongst public and private-sector organizations and promotes the timely diffusion of new sustainable development technologies.

**Clean Growth Program (“CGP”)**

Under the CGP, the Government of Canada has committed to investing (at least) \$155 million in clean technology research and development and demonstration projects in the Canadian energy, mining and forestry industries.

## I Cannabis

### Federal Laws and Regulations

The *Cannabis Act* (Canada) received Royal Assent on June 21, 2018, and was brought into force on October 17, 2018. Together with the initial set of regulations promulgated under the act, a legal and regulatory framework was created for controlling the production, distribution, sale and possession of cannabis in Canada. Subject to provincial or territorial restrictions, adults who are at least 18 years of age or older (depending on the province or territory) are legally able to:

- purchase limited amounts of fresh cannabis, dried cannabis, cannabis oil, cannabis seeds or cannabis plants from retailers authorized by the provinces and territories;
- consume cannabis in locations authorized by local jurisdictions;
- grow up to four cannabis plants per household (not per person) for personal use, from licensed seeds or seedlings from licensed suppliers;
- share up to 30 grams of dried cannabis or equivalent with other adults; and
- make legal cannabis-containing products at home for personal use, such as food and drinks, provided that dangerous organic solvents are not used in making them.

Possession, production, distribution and sale outside the legal system will remain illegal and subject to criminal penalties proportionate to the seriousness of the offence, ranging from ticketing up to a maximum penalty of 14 years' imprisonment.

### The Cannabis Regulations

The Cannabis Regulations, which also came into force on October 17, 2018, established the rules and standards that apply to the authorized production, distribution, sale, importation and exportation of cannabis (with the exception of industrial hemp), as well as other related activities respecting the five classes of cannabis (i.e., dried cannabis, fresh cannabis, cannabis oil, cannabis plants and cannabis plant seeds) that can be sold by authorized persons.

The Cannabis Regulations set out a comprehensive public health approach to regulating the production, packaging and labelling of all classes of cannabis. Among other things, the Cannabis Regulations provide as follows:

- Licences are required to cultivate or process cannabis, to sell cannabis for medical purposes, to manufacture prescription drugs containing cannabis or to conduct analytical testing of or research with cannabis.

- Licence holders are subject to strict physical and personnel security requirements. These requirements are set out in Part 3 and 4 of the Cannabis Regulations.
- The production of cannabis products by licence holders is subject to strict rules and standards, including limits on tetrahydrocannabinol (“**THC**”) content, cannabidiol (“**CBD**”) specifications and the use of additives, as well as good production practices (“**GPP**”). Details concerning GPP and the composition of cannabis products, including dried leaves and oils, are set out in Parts 5 and 6 of the Cannabis Regulations, respectively.
- Plain packaging and labelling is required for cannabis products, including strict limits on the use of logos, colours and branding. Packaging and labelling requirements are set out in Part 7 of the Cannabis Regulations.
- Continued access to cannabis for medical purposes is provided for patients who qualify. Part 14 of the Cannabis Regulations sets out the provisions relating to access to cannabis for medical purposes.



Importantly, while Canada’s cannabis regulatory regime distinguishes industry hemp from other cannabis plants (generally, industrial hemp is a cannabis plant that contains 0.3% THC or less in the flowering heads and leaves) with a less restrictive regulatory regime governing industry hemp seed or grain, the extracting of CBD from industry hemp (along with the flowering heads, branches or leaves of industrial) remain subject to and is governed like all other cannabis by the more restrictive Cannabis Regulations. This is an important distinction from the US, for example, where the *Agriculture Improvement Act of 2018* (US) removed hemp and CBD (among others) extracted from hemp from the *Controlled Substances Act* (US), meaning that, in the US, hemp and CBD extracted from hemp are no longer federally illegal.

### Path to Cannabis Edibles

One area of particular interest to consumers, manufacturers and sellers is the availability of edible cannabis products. Indeed, the market is replete with stories of new cannabis infused foods and companies are embarking on ways to make water-soluble derivatives of cannabis to allow for a wider array of cannabis-infused beverages.

On December 22, 2018, the Government of Canada published a Regulatory Impact Analysis Statement (“**RIAS**”) that proposed regulations be passed to add three classes of cannabis to Schedule 4, namely:

- edible cannabis - products containing cannabis that are intended to be consumed in the same manner as food (i.e., eaten or drunk);

- cannabis extracts - products that are produced using extraction processing methods or by synthesizing phytocannabinoids; and
- cannabis topicals - products that include cannabis as an ingredient and which are intended to be used on external body surfaces (i.e., skin, hair, and nails).

The RIAS indicates that regulations directed at these classes of cannabis products should, among other things, address:

- the appeal that such products may have to youths;
- the risk of accidental consumption;
- the risk of overconsumption (in the case of edibles, because of the delay in experiencing the effects of cannabis when it is ingested rather than inhaled and, in the case of extracts, because the products contain a higher THC concentration);
- the risk of dependence and other negative health outcomes associated with cannabis products that contain ethyl alcohol or caffeine; and
- the potential health and, in some cases, safety risks associated with the use of certain solvents, carriers and diluents.

## Cannabis 2.0

On schedule, the Cannabis Regulations were amended effective October 17, 2019, to permit the legal production and sale of the three new classes of cannabis proposed by the RIAS, namely edible cannabis, cannabis extracts and cannabis topicals.

Consistent with the Government of Canada's stated objectives to protect youth and to address the risks of accidental overconsumption and other potential health and safety risks, the amended Cannabis Regulations strictly limit the amount of THC that may be present in the newly-permitted categories. In addition, drawing heavily from Canada's existing regulatory frameworks for food safety, vaping and cosmetics, the amended Cannabis Regulations also prescribe strict rules on:

- the proper handling and storage of ingredients, including a prohibition on cannabis production in a facility where conventional food is manufactured;
- restrictions on the use of certain ingredients (i.e., must be shelf-stable and not contain unsafe ingredients, no fortifications with vitamins or mineral nutrients, prohibitions on sugar, sweeteners, colorants, caffeine and additives subject to limited exceptions for those naturally-occurring or naturally-present such as caffeine in chocolates);
- packaging (i.e., child-resistant and plain packaging, with mandatory health warning messages and standardized symbol for products containing THC); and

- promotion and marketing (i.e., in addition to existing restrictions and regulations on promotion and marketing that are intended to protect public health and safety and restrict access to youth, the amended Cannabis Regulations also impose a complete prohibition on cross-branding and cross-marketing with alcohol or tobacco-related terms or products).

The Cannabis Regulations requires a 60-day written notice period before licensed holders may make a new cannabis product available for sale.

## Provincial Laws

The regulation of the retail cannabis industry is a shared responsibility across federal, provincial, territorial and municipal governments. Generally speaking, provinces and territories are responsible for determining how cannabis is distributed and sold within their jurisdictions. They set rules around how cannabis can be sold, where stores may be located and how stores must be operated. Provinces and territories also have the flexibility to set added restrictions, including lowering possession limits, increasing the minimum age, restricting where cannabis may be used in public, and setting added requirements on personal cultivation.

**I The regulation of the retail cannabis industry is a shared responsibility across federal, provincial, territorial and municipal governments.**

### Ontario

The approach taken in Ontario provides an instructive example as it has been evolving from a governmental-centric model towards a free-market, private model.

Initially, on account of the Ontario government's stated concerns over product availability from licensed producers (drawing on Ontario's observations of and concerns over the private retail experience in the western provinces such as Alberta and British Columbia, which allowed for private retailers immediately upon legalization in October 2018), the Ontario Cannabis Store ("**OCS**") website was the only legal way to purchase recreational cannabis, with no physical retail stores available for the purchase of cannabis in Ontario. This changed at the end of 2018 when, in the Ontario government's views, licensed producers' ability to produce and supply qualified product improved sufficiently to allow for a limited launch of privately-run retail stores.

The Alcohol and Gaming Commission of Ontario ("**AGCO**") is the provincial regulator authorized to grant store licences and make sure stores sell recreational cannabis safely, responsibly and lawfully. The OCS serves as the exclusive wholesaler to these stores.

To open a retail store and sell recreational cannabis, there are two licences and an authorization

that are required from the AGCO. These are: (a) Retail Operator Licence; (b) Cannabis Retail Manager Licence; and (c) Retail Store Authorization.

The eligibility criteria necessary to become a licensed retail operator are described in the *Cannabis Licence Act, 2018* (Ontario) and its regulations. Initially, the Government of Ontario only provided authority for the AGCO to license up to 25 stores in the first phase for April 1, 2019. A lottery system was implemented to determine who would be able to apply for a licence for one of the 25 initial stores. The OCS remains the sole online retailer in Ontario.

Since then, Ontario has continued its incremental moves to expand the private retail network by allowing a further 50 privately-run retail stores to be opened. In addition, in its Fall Economic Statement in early November 2019, the Ontario Government outlined additional proposed changes, including an open allocation of retail licences for privately-run retail stores, allowing private retailers to offer online and phone reservation and pick up services, as well as allowing federally-licensed producers to offer point-of-production sales on their premises. The Ontario Government has further suggested opening up the wholesale and distribution of cannabis within the province, which is currently the monopolistic domain of the OCS as well.

## Municipal Considerations

The sale of recreational cannabis in privately-owned stores will also require regulation by municipalities both from a zoning and licensing perspective. For example, in 2013, when the federal government enabled commercial production of medical cannabis, the City of Toronto amended its Zoning By-laws to define such facilities and prescribe where such uses would be permitted, including through the use of separation distances from sensitive uses. It is expected that consideration of where and when cannabis retail stores can operate will be the subject of ongoing debate.

Notably, Ontario municipalities had a one-time option to opt-out of having cannabis retail stores in their communities. Municipalities had until January 22, 2019 to inform the AGCO if they wished to opt out, and 77 out of 414 Ontario municipalities opted out, including some of Ontario's largest municipalities surrounding the City of Toronto (e.g., Markham, Mississauga, Pickering, Vaughan and Oakville). While municipalities that chose to opt out have the right to opt back in at any time, once they have opted back in, the right to opt out again is lost.



## Real Estate

### Capacity to Buy, Hold and Sell Real Property

Individuals and corporations can acquire real property (land, buildings and interests in land) in Canada. A non-resident can acquire, hold and dispose of real property in the same way as a Canadian citizen or resident unless a province has restricted the right of non-residents to acquire land.

In Ontario, a corporation incorporated in another country must obtain an extra-provincial licence to acquire, hold or convey real property, otherwise than by way of security, in the province. It can take from two to four weeks to obtain an extra-provincial licence for a non-Canadian corporation. A non-Canadian corporation must also have an agent for service located in Ontario.

### Forms of Land Ownership

Most land in Canada is held on a freehold/fee simple basis (full ownership of indefinite duration) rather than leasehold basis (an estate for a fixed period of time after which the estate reverts to the landlord).

Land can be owned by more than one person in one of two ways. In a joint tenancy, the owners have equal interests, cannot sell or convey their interest (without converting it to a tenancy in common) and have the right to each other's interest when one dies. In a tenancy in common, the owners can have equal or unequal interests, can sell or convey their interests independent of their co-owners, and on death ownership passes to the owner's heirs.

### Condominiums

Real estate in Ontario may be condominiumized. Following an approval process with the municipal government, the owner of land may register a condominium plan and a declaration to establish a condominium. The land is subdivided into residential, commercial, parking and/or storage units and common elements. A non-share capital condominium corporation is established, whose members are the unit owners from time to time. Each unit owner has an interest in the common elements of the condominium. In addition to standard freehold condominiums, there are a variety of other types of condominiums in Ontario, including: (a) common elements condominiums, where the property of the corporation consists solely of common elements without any units; (b) leasehold condominiums; and (c) vacant land condominiums, where vacant land is subdivided into units within the condominium plan with the ability to construct structures after the condominium has been registered.

## Joint Ventures

Commercial properties may also be held in a joint venture. A joint venture is a relationship between two or more entities that have invested or propose to invest cash, property and expertise, and in some cases, propose to carry on business in concert, with the desire to realize a gain or profit. The three most common vehicles for such arrangements are single joint venture corporations, partnerships (both general and limited) and co-tenancies or co-ownerships.

Joint venture corporations are generally created with a specific investment or project in mind. The usual arrangement is that each joint venture party holds shares of the corporation and the parties enter into a shareholders' agreement to govern their corporate relationship. The advantages of joint venture corporations are essentially the same as those enjoyed by corporations in general. They offer limited liability, ease of transfer of joint venture interests, ease of administration, and, as the arrangement is governed by a set of well-understood legal and accounting principles, certainty of rights and obligations. There are some advantageous tax considerations for joint venture corporations. Participants may roll real estate into the corporation on a tax-deferred basis to avoid a taxable event on the corporation's formation. There is also an advantage where participants propose to sell their interest; a transfer of shares does not attract the Ontario land transfer tax. The predominant drawback is that shareholders bear income tax at two levels, first on the corporation's income and then on the shareholder's income.

**One of the greatest advantages of a partnership is its flexibility. Subject to income tax legislation, the structure allows for a preferential, varying or other non-proportionate share of the profits.**

Joint venturers may also hold property in either a general or a limited partnership. A partnership is not a separate legal entity, but rather a relationship that subsists between persons carrying on business in common with a view to profit. A partnership agreement is typically used to allocate profits and losses between the partners. For land transfer tax purposes, each partner is treated as having an interest in the underlying real estate. Partnerships generally have greater advantages than joint venture corporations. It is possible to flow losses and profits to partners and to use some of those to off-set profits and losses from other projects. One of the greatest advantages of a partnership is its flexibility. Subject to income tax legislation, the structure allows for a preferential, varying or other non-proportionate share of the profits. Partnerships also share many of the disadvantages associated with joint venture corporations. All capital cost allowance deductions must be claimed at the partnership level; therefore, each partner is not free to choose what best suits its own needs. Other disadvantages of partnerships are that partners are constrained by their fiduciary obligations to each other, and general partners have unlimited liability. The option of limited partnership is available but limited partners cannot participate in the control and management of the business.

Real estate joint ventures are often structured as tenancies in common. A tenancy in common is a relationship between two or more parties who have direct or indirect ownership interest

in property. The ownership is undivided, entitling each co-tenant to an equal right of use and possession. Usually, co-tenants enter into a co-ownership agreement which dictates the extent to which each party is at liberty to deal with its interest by way of transfer, mortgage, lease or otherwise without interference by the other co-tenants. In the absence of a contrary provision in the agreement, every co-tenant has a right to receive a proportionate share but has no obligation to fund any portion of the costs. Unlike partnerships, there is no responsibility for the debts of other co-tenants, no right to act as agent for any other co-tenant, and no fiduciary obligations owed to any other co-tenants. Many disadvantages of the corporate vehicle are not present where the joint venture property is held by participants in a co-ownership. Each co-tenant is an entity unto itself. Therefore, the tax return of each co-tenant simply reports the co-tenant's percentage of gross revenues and profits, and each co-owner can claim its own capital cost deductions on its own percentage interest in the building. Each co-tenant is entitled to sell or finance its own interest in the joint venture property. Furthermore, where property held by one party before it is contributed to the joint venture appreciates in value, there is a taxable sale only to the extent of the undivided interest being sold to the other joint venture parties. Co-tenancies have the benefit of partially limited liability in that no co-owner is liable for the debts of co-venturers, and co-tenants have great latitude in their dealings as each is at liberty to compete with the project in operation. However, depending on the circumstances, co-tenants can be held to be partners.

## Agreements to Buy, Sell and Lease Land

Land is bought and sold pursuant to written agreements of purchase and sale between the buyer and seller. In Ontario, the Real Estate Board's standard form agreement of purchase and sale is typically used for most transactions for single-family residential property and some simple commercial transactions (supplemented by additional provisions in schedules). More complex transactions are effected by way of agreements prepared by the parties and their counsel and typically address, among other things, the due diligence process, title to the property, covenants, representations and warranties from the parties and various conditions to the transaction's completion. Similarly, land is typically leased pursuant to written agreements. Parties may begin with an offer to lease setting out the basic terms of the tenancy and contemplating the execution of a formal lease at some point in the future (usually before the tenant takes occupancy). Alternatively, the parties may go straight to a formal lease. Commercial leases are often fully net to the landlord (i.e., all costs related to the premises are passed on to the tenant in addition to the basic or minimum rent payable by the tenant) or they may be gross leases (i.e., where rent is inclusive of all costs and recoveries payable by the tenant) or they may be something in between. Typically, the lease documentation will set out the premises demised, the term of the tenancy, the rent, the recoveries that are to be passed on to the tenant, the various covenants, representations and warranties, events of default, and the landlord's remedies if the tenant defaults.

## Conveyancing

Title to land in Ontario is recorded in land registry offices. Most of the records kept in these offices are automated and available remotely. Ontario was among the first jurisdictions in the world to provide electronic registration of land-related documents. Specific legislation removes the requirement for traditional paper documents and signatures. Rather, electronic documents are used and signatures are electronically affixed by the parties' representatives who are licensed users of the electronic system. The representatives must be authorized to electronically sign, complete and register the documents. In some circumstances, statements of law are required; only lawyers in good standing with the province's law society who are licensed users of the system (and not, for example, paralegals) may make such statements. Documents prepared and submitted by authorized users within these electronic systems on behalf of other parties are deemed to be documents of those other parties and not of the authorized users.

## Title Opinions and Title Insurance



Traditionally in Canada, purchasers and lenders have received a solicitor's title opinion in respect of any property they are acquiring or over which they are taking security. To give such an opinion, the solicitor needed to examine title to the property and make a series of off-title searches. If a defect in title was not addressed in such an opinion, and to the extent the purchaser or lender suffered a loss as a result, it would be necessary for the purchaser or lender to sue the lawyer for negligence or breach of contract.

In recent years, Canadian lenders and, increasingly, purchasers are more apt to utilize title insurance policies in lieu of a solicitor's title opinion, especially in Ontario. In the US, title insurance is the accepted norm. Title insurance is issued by a title insurance company licensed under provincial insurance legislation to issue title insurance policies. The title insurance policy provides two distinct forms of protection. The primary one is the duty to indemnify; the insurer will reimburse the insured for actual loss only. The second is called the duty to defend, and it is also contained in many other types of insurance policies. This means the insurance company must pay legal defence costs and related costs and expenses if a claim threatens the insured's title or mortgage.

## Land Use Planning

In Canada, land use is subject to regulation and control by provinces, municipalities and other public agencies. Land use planning affects everything from the location where homes and businesses can be built to whether an owner can subdivide a property.

Land use planning is generally supervised at the provincial level, where policy goals and priorities are established. However, significant planning functions and implementation requirements are delegated to the various regional governments and municipalities. In Ontario, the government has created several provincial plans to guide land use planning decisions within certain defined geographic areas, as well as a Provincial Policy Statement which applies throughout the province. One such plan is the Growth Plan for the Greater Golden Horseshoe, which establishes important policies to manage growth and to encourage intensification within the municipalities that comprise the Greater Golden Horseshoe.

Regional governments (where they exist) and local municipalities control land use through such instruments as an official plan or community plan (a long-range general plan for a community) and zoning by-laws (rules that regulate use, height, density and other performance standards such as parking). For a purchaser of land, the provisions of both the official plan and the zoning by-law(s) that apply to the property are crucial as they determine the permitted uses and other development standards applicable to the property. However, these instruments are often outdated and may underrepresent the development potential of a property. Municipalities also issue urban design guidelines regarding numerous types of development, ranging from tall buildings to townhouses to commercial or industrial uses. It is also important to review the Provincial Policy Statement and any applicable provincial plans.

In Ontario, most municipalities require that site plans be approved before the construction of any new development. Site plans set out the details of a development (including the location of buildings and related facilities such as landscaping, services, driveways and parking spaces). Most municipalities also require the developer to enter into an agreement ensuring construction and ongoing maintenance in accordance with the approved site plans. In addition, municipalities may impose charges against land to pay for the increased capital costs of servicing new development as well as secure cash-in-lieu of the provision of parkland. When considering development in a particular municipality, it is advisable to determine whether a development charge by-law or parkland dedication by-law has been, or is in the process of being, enacted.

Any subdivision of land in Ontario requires the consent of the municipal or regional authority. The developer may be required to submit a draft plan of subdivision for approval. Normally, the municipality will require the developer to enter into development agreements agreeing to provide sewers, roads and other services for the subdivision, and to dedicate certain lands for public use or benefit, including the conveyance of land for public park purposes or the payment of cash-in-lieu of a conveyance.

Finally, other special legislation and regulations in Ontario may affect the use and/or development of certain lands, including, for example, the protection of employment lands,

**In Ontario, most municipalities require that site plans be approved before the construction of any new development.**

cultural heritage resources and natural features, as well as other environmental legislation addressing such matters as endangered species and site remediation, and regulations applicable to designated environmental regions of the province (e.g., in Ontario, the Niagara Escarpment, the Oak Ridges Moraine and the Greenbelt). Municipalities may also have power to enact special by-laws. For example, the City of Toronto is authorized to regulate the provision of green roofs, the erection of signs and the demolition of rental housing, and has enacted by-laws regarding these matters.

## Property Taxes and Fees

A variety of taxes apply to the sale and ownership of land in Canada.

### Land Transfer Tax

Ontario imposes tax on transfers of real property. Specifically, provincial land transfer tax applies to the registration of a transfer of land. For these purposes, land includes a lease where the unexpired term of the lease (including revisions and extensions) exceeds 50 years. The provincial tax is 0.5% of the value being paid for the land up to \$55,000, 1% of the next \$195,000 in value, 1.5% of the next \$150,000 in value, and 2% of the value over \$400,000. An additional municipal land transfer tax, which applies at the same rates as the provincial tax, applies to the registration of the transfer of land within the City of Toronto. If the land contains at least one and not more than two single-family residences, a 0.5% surtax on the amount of the value which exceeds \$2,000,000 is imposed by each of Ontario and the City of Toronto. In addition, any unregistered transfer of a beneficial interest in land gives rise to provincial and, in the City of Toronto, municipal land transfer tax. There are exceptions, such as for certain tax-driven intercorporate transfers.

Ontario imposes an additional 15% non-resident speculation tax on the acquisition of an interest in residential property (other than most multi-unit residential property) located in the Greater Golden Horseshoe Region by foreign nationals, foreign corporations and certain trusts with non-resident trustees or beneficiaries. There are rebates available within four years of the acquisition date, such as for foreign nationals who become permanent residents of Canada and foreign nationals who have legally worked full-time in Ontario for a 12-month period.

### Goods and Services Tax

Canada's GST applies to all supplies of Canadian real property, other than sales of used residential real estate and rent of residential real property. In a purchase and sale transaction involving commercial real property, where a purchaser is registered for GST purposes, special

rules generally apply so that the purchaser is not required to pay GST in connection with the acquisition of the property. In provinces where HST is applicable, including Ontario, HST applies in the same manner as GST.

## Municipal Taxes

Municipalities in Canada levy and collect taxes on real property to fund a wide variety of services. Property owners are required to pay municipal and education taxes every year based on the assessed market value of their property and tax rates established annually to meet the budgetary needs of municipalities and local school boards.

In Ontario, the current value of every parcel of land is re-assessed every four years by the Municipal Property Assessment Corporation, and confirmed annually through an assessment roll provided to each municipality in December. Property owners can challenge their assessment or tax classification by submitting a request for reconsideration to Municipal Property Assessment Corporation or by filing an appeal with the Assessment Review Board, an independent tribunal with expertise in adjudicating land valuation disputes.

## Residential Rent Controls

Provinces across Canada have created legislation to protect residential tenants. In some cases, this legislation limits the amount of rent or rent increases a landlord can impose. The City of Toronto also has the power to prevent the demolition or conversion of rental housing in certain circumstances.

In Ontario, no rent control is imposed on landlords when a unit is first rented to a tenant. A landlord and a tenant are free to negotiate a market rent and the services that are included in the rent. However, once the tenant has entered into a lease, tenant protection legislation limits annual rent increases. Once a tenant moves in, the rent will not increase for the next 12 months. The foregoing limit on annual rent increases does not apply to new buildings, additions to existing buildings and most new basement apartments that are occupied for the first time for residential purposes after November 15, 2018. In most cases, the landlord can then only increase rent once a year by the rent control guideline percentage. The guideline is determined based on the percentage change in the Consumer Price Index for Ontario for each calendar year and is available on the Landlord and Tenant Board website at [www.ltb.gov.on.ca](http://www.ltb.gov.on.ca). A landlord can charge a rental increase that is above the guideline if the landlord and tenant have agreed to a higher increase because of unit-specific capital expenditure work or new services provided by the landlord or if the landlord has successfully applied to the Board for an order for an above-guideline increase to cover certain additional costs. The Board deals with all disputes in the residential rental housing sector, including rent control matters.



## Regulation of Real Estate Brokers

Real estate agents must be licensed to trade in real estate in Canada.

In Ontario, real estate brokers are governed by legislation administered by the Real Estate Council of Ontario (“RECO”) on behalf of the Ministry of Consumer Services. Subject to specific exemptions, the legislation requires a person who wishes to trade in real estate (which is broadly defined) to be registered as a brokerage (a corporation, partnership or sole proprietorship that trades in real estate or holds itself, himself or herself out as such on behalf of others for compensation or the expectation thereof). An individual cannot act on behalf of a brokerage in connection with a trade unless the individual is registered as a broker or a salesperson (each being an individual employed by a brokerage to trade in real estate). Registration is a prerequisite to recovering a commission or remuneration in connection with a trade. Brokerages must have a designated broker of record managing the corporations’ affairs. Brokerages are required to disclose the identity of each person who beneficially owns 10% or more of the equity shares issued and outstanding at the time of registration or renewal, as well as persons that are associated with each other that together beneficially own 10% or more of the equity shares issued and outstanding. Registrations are also subject to an interested persons test. Registration could be refused if the Registrar is of the opinion that the conduct of an interested person affords reasonable grounds for believing the business will not be carried out in accordance with the law and with honesty and integrity. A registered broker or salesperson must be a Canadian resident and may not trade in Ontario real estate from an office outside Ontario. Registration may be refused on the basis of financial instability or past conduct and can be subject to conditions. Brokerages, brokers and salespersons must comply with not only the legislation, but also the terms and conditions of membership in RECO, including compliance with its Code of Ethics. RECO handles consumer complaints against its members.

## Regulation of Mortgage Brokers

Mortgage brokers in most provinces are governed by provincial legislation and regulations. In Ontario, subject to limited exceptions, dealing in, trading in and administering mortgages, as well as mortgage lending itself, are regulated activities that cannot be undertaken without the appropriate licence issued by the Financial Services Commission of Ontario. Excluded from most mortgage broker legislation are Canadian insurance and trust companies, banks and credit unions. For more information about mortgage brokers, visit the Canadian Association of Accredited Mortgage Professionals’ website at [www.caamp.org](http://www.caamp.org).



## Energy

### Jurisdiction

The approval of energy projects in Canada may be regulated by the federal or provincial governments depending on the scope of the undertaking, the nature of the resource and its location. In broad terms, undertakings within a province are provincially regulated while inter-provincial and international undertakings and transactions are subject to federal regulation. Federal and provincial environmental, wildlife, agricultural and fisheries legislation may also be relevant. Consultation with Aboriginal peoples may also play a significant role in any approval process.

### Federal Regulation

At the federal level, the Canadian Energy Regulator (“**CER**”) and the Impact Assessment Agency of Canada (“**IAAC**”) regulate interprovincial and international pipelines and powerlines and the import and export of electricity. The approval process normally requires a public hearing and the aim is to determine whether the project is in the “public interest”. The CER will look at energy safety and security, environmental protection, technical and financial factors and the general socioeconomic impact of the project. In some circumstances, the CER’s decision will require federal cabinet approval.

The Canadian Nuclear Safety Commission (“**CNSC**”) regulates atomic energy in Canada, including nuclear research, nuclear energy production and the import, export, sale and use of uranium, plutonium and other elements used by the industry. Canada has 19 commercial energy-producing nuclear reactors (18 in Ontario and 1 in New Brunswick) as well as 7 smaller reactors used for research and the creation of medical isotopes. In some circumstances, the CNSC’s decision will require federal cabinet approval.

A number of federal environmental statutes may apply to certain energy projects, including the following:

- *Fisheries Act* (Canada), if the project might impact commercial, recreational or Aboriginal fisheries;
- *Migratory Birds Convention Act* (Canada), the *Species at Risk Act* (Canada) and the *Canada Wildlife Act* (Canada), if certain protected wildlife habitats are affected by the project;
- *Arctic Waters Pollution Prevention Act* (Canada), to projects in Canada’s far north; and

- *Impact Assessment Act* (Canada), under which most energy and natural resource projects will trigger environmental assessments.

## Provincial Regulation

In Ontario, the Ontario Energy Board (“**OEB**”) regulates Ontario’s electricity and natural gas sectors. The OEB licences all electricity market participants in the province, including generators, distributors, transmitters, wholesalers and retailers. The OEB also sets electricity transmission and distribution rates and monitors the overall electricity market in Ontario. The electricity market is operated by the Independent Electricity System Operator, which is also responsible for electricity procurement and planning.

The OEB also regulates Ontario’s natural gas utilities and licenses all parties who sell natural gas in the province. Natural gas pipelines and storage facilities are also regulated by the OEB.

All provinces have similar utilities commissions which regulate the energy sectors within each province.

A number of provincial environmental and conservation statutes may apply to provincial undertakings.

## **| Mining and Natural Resources**

### **Mining**

Mining is a key sector of the Canadian economy as Canada's mining industry is one of the largest in the world. In 2017, the direct contribution of the mining sector to Canada's gross domestic product (GDP) was \$72.0 billion, 3.6% of Canada's total GDP. Indirectly, mining adds a further \$24.5 billion to GDP, for an overall impact of \$96.5 billion.

Toronto, in particular, is a global hub for mining finance, leveraging a sophisticated capital market, globally recognized legal and reporting regulations and a significant base of expertise with respect to projects from around the world. In 2018, nearly 50% of worldwide mining equity financings were done on the TSX and TSX-V. Over 1,000 issuers are currently listed on the TSX and TSX-V, raising over \$3-billion in equity capital.

As of January 2018, TSX and TSX-V companies were involved in an average of 6,000 mining projects globally, with more than half of these projects situated in Canada. This number will likely increase, as the federal government committed to a five-year renewal of the mineral exploration tax credit last year.

The mining industry is the largest private sector employer of Aboriginal peoples in Canada, with over 16,500 Aboriginal people employed in this sector.

### **Oil and Gas**

Canada is the world's fourth-largest oil producing country and natural gas producing country, and home to the third-largest oil reserves in the world. The oil and gas industry in Canada is active, with operations (both direct and industry-related) in 12 of Canada's 13 provinces and territories. From 1980 to present day, oil and gas production in Canada has nearly doubled.

Oil and gas projects are significant contributors to Canada's economy; over the last five years, the oil and gas industry averaged \$14.8 billion in government revenue. Alberta is the largest oil producing province, producing 28.4 million cubic meters of crude oil in 2018 from its large oil sands deposits of crude bitumen, and it is also the largest natural gas producing province in Canada, producing 129.9 billion cubic meters of natural gas in 2018.

As of August 2019, 127 energy issuers were listed on the TSX and 125 energy issuers were listed on the TSX-V. However, eight Canadian energy companies were removed from the S&P/TSX Composite Index in September 2019 because their market capitalization dropped below

minimum requirements, representative of the difficulties facing Canada's oil and gas sector. Direct employment in Canada's oil and gas sector is expected to fall by more than 12,000 jobs in 2019 because of the sector's economic instability. Given the longstanding and significant contributions of oil and gas to Canada's overall economic strength, slow activity within Canada's energy sector is currently constraining investment.

## Exploration and Development

### Mining Leases

Mineral rights in Canada are owned by either government entities (referred to as Crown) or private individuals/corporations (referred to as freehold). Over 90% of the mineral rights in Canada are owned by the Crown, with the remainder of mineral rights being subject to freehold ownership. Since the Crown no longer grants outright ownership of mineral rights to private parties, the only way to extract and sell minerals is to obtain a mining lease from the government controlling those minerals.

In most provinces, mining leases are given as a matter of right. If a person properly establishes a claim and performs the prescribed assessments, they will receive a mining lease. However, in Alberta, Nova Scotia and Prince Edward Island, the government retains the discretion to refuse mining leases. The "Crown discretion" system in these provinces permits the provincial government to withhold a mining lease if it would not be in the province's best interests to grant one.

**If owners of surface and mineral rights cannot negotiate a compromise, legislation provides access to courts or tribunals to craft a solution.**

### Surface Right

Private property owners in Canada will usually own only the surface rights to land. Surface rights are effectively all the rights to the land except for mineral rights. These two sets of rights tend to conflict so Canadian law has developed a framework for reconciling them. The basic framework is mutual compromise. The surface rights owner grants reasonable access to the mineral deposits as well as certain rights to deposit tailings or discharge effluent. Meanwhile, the mineral rights holder must pay the surface owner for damage to the surface. In some cases, the damage may be so great that the mineral rights owner will be required to purchase the surface rights. If owners of surface and mineral rights cannot negotiate a compromise, legislation provides access to courts or tribunals to craft a solution.

## Environmental Issues

Mining activities can be subject to environmental regulation at the federal, provincial and municipal level. On August 28, 2019, as part of the Canadian government's amendments to Bill C-69 (which received royal assent on June 21, 2019), three acts were enacted: the *Impact Assessment Act* (Canada) ("**IAA**") (repealing the *Canadian Environmental Assessment Act, 2012* (Canada)), the *Canadian Energy Regulator Act* (Canada) ("**CERA**") (replacing the *National Energy Board Act* (Canada) ("**NEBA**")), and the *Canadian Navigable Waters Act* (Canada) (amending and renaming the *Navigation Protection Act* (Canada)).

The IAA has created the new IAAC (formerly the Canadian Environmental Assessment Agency ("**CEAA**")), providing greater clarity and consistency regarding environmental regulations. Now, the IAAC, as a single federal body, is responsible for conducting all of the impact assessments of designated projects. Previously, there were three government agencies – the CEAA, the National Energy Board ("**NEB**") (which has been replaced with the Canadian Energy Regulator ("**CER**")) and the Canadian Nuclear Safety Commission. The IAAC currently leads all federal reviews of major projects, working with other bodies, such as the new CER, and in cooperation with provinces and territories and Aboriginal communities.

Since provincial and federal environmental regimes can overlap, most provinces have entered into agreements with the federal government to avoid redundant assessments. However, the situation is significantly more complicated in the northern territories. First, the division of powers between the federal and territorial governments in the Northwest Territories, Yukon and Nunavut is still evolving. In addition, there is a complex overlay of Aboriginal peoples' rights. The result is that Aboriginal communities and multiple levels of government can have jurisdiction to review a single mining project. Fortunately, this complexity has been ameliorated in some areas by agreements like the *Yukon Environmental and Socio-Economic Assessment Act* (Canada) that create a single jurisdiction.

Environmental groups, non-governmental organizations and Aboriginal communities can significantly influence Canada's mining industry. The aforementioned newly enacted IAA requires the CER to establish an Aboriginal Advisory Committee. Decision-making committees must include individuals whose membership on such committees is distinction-based, meaning they represent the interests of First Nations, Metis and Inuit peoples specifically.

## Aboriginal Rights and the Duty to Consult

Aboriginal rights have constitutional recognition through the *Constitution Act 1982* and the *Canadian Charter of Rights and Freedoms*. Aboriginal rights are derived from Aboriginal peoples' laws, governance structures, cultural practices, customs and traditions, and may

include: rights to land (Aboriginal title); rights to hunt and fish; rights to practise anything that was integral to the culture before European contact, such as governance rights, rights to harvest and manage trees, plants and medicines, etc.; special linguistic, cultural and religious rights; rights held under customary systems of Aboriginal law; and self-government rights. However, Aboriginal rights are not absolute in Canada. The Crown may infringe upon those rights to meet pressing and substantial objectives which may include development of mining projects provided the Crown makes reasonable efforts to consult with Aboriginal communities before any infringement.

A fundamental aspect of the recognition of Aboriginal rights is the Crown's duty to consult before infringing on Aboriginal rights. This duty is triggered by any Crown action that affects Aboriginal rights. The scope of consultation varies depending on the rights asserted and the degree of infringement. If, for example, the right was speculative and the infringement minimal, then notice might be sufficient. If the right is stronger and the infringement more severe, the government will have a higher duty to consult and may have to take steps to accommodate Aboriginal concerns. Under the newly enacted CERA, companies seeking to make use of a specific reserve land must now obtain consent from the relevant band council as opposed to seeking approval from cabinet. Nevertheless, the duty to consult does not create an Aboriginal veto to activity that the Crown considers pressing and substantial.

Direct consultation between the private entities and Aboriginal communities is an increasingly important aspect of the duty to consult when undertaking a mining project. While the duty rests solely on the government, it can often be valuable for mining companies to take an active role. One established practice is for natural resource companies for mining projects in Canada and affected Aboriginal communities to execute "impact benefit agreements". These agreements generally provide direct compensation from the mining company to the Aboriginal community in the form of employment opportunities, royalties or lump-sum payments, or even school donations and bursaries in return for the Aboriginal community's support for the proposed mining project. The recent amendments to Bill C-69 clarified that "impact benefit agreements" with Aboriginal communities can be executed before an impact assessment is completed.

The amendments to Bill C-69 require transparency as to use of Aboriginal knowledge in impact assessments, as well as regional and strategic assessments. Assessment reports must now describe how Aboriginal knowledge was considered in reaching decisions. Aboriginal knowledge across all legislation is increasingly protected, and Aboriginal consultation regarding mining projects is expected to continue to be a priority of the Canadian government for years to come.

## Capital Markets

### Mining

Canada is a global leader in developing and financing mining projects as the jurisdiction for more mining companies than any other market in the world. From 2000 to 2018, 298 mining companies have graduated from TSX-V to TSX, sophisticated exchanges with deep access to capital and investors for exploration, development and producing mining companies. Canada:

- is a global leader in mining equity finance – Approximately 1,200 mining companies were listed on the TSX and TSX-V in 2018, including more than half of the public mining companies in the world. Canada is also among the largest in the world in terms of equity capital raised in 2019.
- has access to capital – In 2018, the TSX and TSX-V raised \$6.5 billion in new equity capital for mining. In that year, 49% of mining equity financing globally was done on the TSX and TSX-V (although this reflects a decrease from 2017, when it was 59%).
- has a liquid mining market – Almost 45 billion mining company shares were traded on the TSX and TSX-V in 2018.
- has global visibility and a significant international presence – 40% of TSX and TSX-V daily trading originates from outside of Canada, and almost half of the mineral exploration projects held by companies on the TSX and TSX-V are outside of Canada.



### Energy: Oil and Gas

In 2018, Canada's energy sector attracted \$75 billion in capital expenditures. Specifically within the oil and gas industry, Canada:

- is a global leader in energy equity finance – Canada is #1 in the world for the number of oil and gas issuers listed. There are currently 278 energy companies listed on the TSX and TSX-V with a total market capitalization of \$488 billion.
- has access to capital – \$3.5 billion was raised in 2017 by energy companies listed on the TSX and TSX-V. In 2018, oil and gas extraction garnered \$36.7 billion in capital expenditure investments.
- has a liquid energy market – In 2018, 25 billion energy company shares were traded on the TSX and TSX-V.
- has global visibility and a significant international presence – 22% of all global public oil and gas companies are listed on the TSX and TSX-V. Further, among the companies listed, more than half have oil and gas properties outside of Canada.

The TSX and TSX-V also offer favourable listing conditions for mining companies compared to other international exchanges. Companies can list with a lower float than with the LSE, which means that companies listing in Toronto have greater flexibility in how they structure their equity. Canadian mining companies also pay significantly less in taxes in Canada than other companies do abroad.

In addition to equity financing, alternative forms of financing are available through royalty and streaming agreements. Royalties and streams do not deplete the equity of existing shareholders or dilute the miners' balance sheets with debt. Canada is a leading provider of alternative financings for mining projects and home to Wheaton Precious Metals Corp. and Franco-Nevada Corporation.

## Securities Regulation

After a series of mining company failures in the late 1990s, Canadian securities regulators adopted in 2001 a strict set of rules and guidelines for disclosure in respect of a mining project. National Instrument 43-101, Standards of Disclosure for Mineral Projects (“**NI 43-101**”) is a national instrument that applies to any scientific or technical disclosure made in Canada concerning a mineral project. Disclosures covered by NI 43-101 include press releases of mineral exploration reports, reporting of resources and reserves, presentations, oral comments and websites. NI 43-101 also has a broad scope of application applying to both public and private domestic and foreign issuers. Since its adoption, NI 43-101 has become a “gold” standard of mining disclosure around the world.

NI 43-101 is based on three key principles:

- the requirement for a “qualified person” to take accountability for the disclosure;
- the applicability of technical standards and best practices based on the Canadian Institute of Mining, Metallurgy and Petroleum standard; and
- a prescriptive and consistent form of disclosure and terminology (i.e., in a technical report, Form 43-101F1) for mineral projects.



## About Goodmans LLP

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