



Doing Business and Raising Capital in Canada

A Business Law Guide

Torys LLP

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This guide is a general discussion of certain legal matters and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the matters in this guide with you, in the context of your particular circumstances.

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The Purpose and Scope of This Guide

We have prepared this Business Law Guide as a general overview of certain legal and business matters that may be relevant to a decision to establish or invest in a business in Canada. In addition, parts 24 and 25 summarize some of the ways in which foreign issuers can raise money in Canadian capital markets and some of the activities that may be carried on in Canada by foreign securities dealers and advisers.

It is important to note that the information contained in this Guide is accurate as of the date shown below. Because the laws and policies of governments and regulatory authorities may change from time to time, some of the information may no longer be accurate when you read this.

Ontario is Canada's most populous province, and this Guide focuses primarily on the laws of the province of Ontario and on the federal laws of Canada applicable in Ontario. In this Guide, unless the context suggests otherwise, the term "a province" or "provinces" of Canada indicates also "a territory" or "territories" of Canada.

This Guide does not necessarily discuss all the legal, business and other issues that may have an impact on or be relevant to establishing or investing in a business in Canada. And since it is a general overview, this Guide should not be regarded as either exhaustive in subject matter or comprehensive in discussion. It is not, therefore, a substitute for qualified, professional advice, which should be sought before establishing or investing in a business in Canada or otherwise undertaking the activities in Canada described in more detail throughout this Guide.



Canada as a Place to Do Business, Invest and Live

1

Canada's Economy

Canada has a highly diversified, free-market economy that encourages significant foreign investment. In 2006 alone, foreign direct investment in Canada totalled approximately C\$449 billion. *The Economist* magazine ranked Canada fourth globally in its 2008 rankings of the best places to do business.

In 2007, Canada's total gross domestic product at basic prices was approximately C\$1,224 billion. Canada's economy began with the exportation of agricultural products, especially grains, and the production and export of minerals, oil and gas, and forest products, but these primary activities now account for only about 7% of Canada's total gross domestic product. Today, manufacturing, financial services and the service industry contribute about 84% of Canada's total gross domestic product.

Despite its relatively small population (33.1 million), Canada is one of the world's major industrial economies. It is a member of the G8 industrialized nations and has the seventh-largest economy among the industrialized countries. Canada is also a signatory to the General Agreement on Tariffs and Trade and to the North American Free Trade Agreement. Canada's largest trading partner is the United States. Significant trade is also conducted with the European Union, Pacific Rim countries and Mexico.

Canada has three primary stock exchanges:

- The Toronto Stock Exchange (TSX) is Canada's senior stock exchange.
- The Montreal Exchange is a specialized exchange for certain Quebec companies, and is an internationally recognized derivatives trading market.
- The TSX Venture Exchange (formerly the Canadian Venture Exchange) is Canada's junior stock exchange, with offices in Vancouver, British Columbia; Calgary, Alberta; Winnipeg, Manitoba; Toronto, Ontario; and Montreal, Quebec.

Geography and Population

Canada is the world's second-largest country, occupying some 10% of the world's land mass. A large majority of Canada's 33.1 million residents live relatively near the 6,000-kilometre border with the United States. About 80% of Canada's population lives in urban centres and their surrounding areas. Indeed, close to 45% of the population lives in Canada's six largest cities and surrounding areas: Toronto, in Ontario (approximately 5.1 million in the Metropolitan Area; 5.5 million in the Greater Toronto Area); Montreal, in Quebec (approximately 3.6 million in the Greater Montreal Area); Vancouver, in British Columbia (approximately 2.1 million in Metropolitan, or Greater, Vancouver); and Ottawa-Gatineau (or National Capital Region), in Ontario-Quebec (approximately 1.1 million); Calgary, in Alberta (approximately 1.079 million in the Metropolitan Area); Edmonton, in Alberta (approximately 1.035 million).

Quality of Life

Canadians enjoy one of the world's highest standards of living, and Canada's population is highly educated. More than one-half of the workers in Canada's labour force have graduated from high school, and one-quarter have a post-secondary degree.

Canada's cities enjoy the distinction of being desirable places to live. Consequently, many people from around the world move to Canada with the intention of making it their home. Toronto is heralded as among the most multicultural cities in the world: over 100 languages and dialects are spoken in Toronto.



Canada's System of Government

2

Canada is a federation of ten provinces and three territories. Canadian citizens elect representatives to the country's federal Parliament in Ottawa, Ontario, to enact laws and govern the country as a whole. In addition, eligible voters of each province elect representatives to their own provincial legislatures, to enact provincial laws and govern the province. The three northern territories have their own forms of local government, enact local ordinances and send representatives to the federal Parliament.

Division of Legislative Authority

Canada's Constitution divides legislative authority between the federal Parliament and the provincial legislatures. For example, Parliament has authority over banking, competition (antitrust) law and immigration; the provincial legislatures have authority over securities laws, property rights and employment standards. In some areas, Parliament and the provincial legislatures have overlapping legislative authority. Businesses may therefore have to deal with federal regulators and one or more provincial regulators. This overlap is most pronounced for certain financial institutions – namely, insurance companies and trust and loan companies.

The Canadian Charter of Rights and Freedoms

The *Canadian Charter of Rights and Freedoms*, which forms part of Canada's Constitution, imposes limits on the power of governments to interfere with an individual's rights and freedoms. The guarantees set out in the *Charter* include fundamental freedoms (such as the freedoms of conscience, religion and expression) and rights (such as democratic, mobility, legal and equality rights).

Common and Civil Law

With the exception of Quebec, Canada is a common law jurisdiction, like England, the United States and Australia. An extensive body of judge-made law interprets, and in many cases augments, statutes and regulations. Common law principles may impose additional rules on the manner in which business is conducted in Canada.

Quebec has a modern, European-style *Civil Code* that constitutes a codification of general principles of law applicable in that province.

Regulatory Bodies

Like many industrialized nations, Canada has various regulatory bodies that may affect the conduct of business. These bodies may be federal, such as the Competition Tribunal and Investment Canada, or provincial, such as the Ontario Securities Commission. They are responsible for monitoring, licensing and controlling certain types of business activities.



Business Corporations

3

Business is carried on in Canada by various entities, including corporations, unlimited liability companies, general partnerships, limited partnerships, joint ventures, business or investment trusts and sole proprietorships. The type of entity used to carry on business depends on a number of factors, such as the nature of the business, the significance of limited liability to the parties and tax considerations. The corporation is by far the most common entity used to carry on business in Canada.

Choice of Jurisdiction of Incorporation

Business corporations (as well as non-profit corporations and charitable foundations) may be incorporated federally or in any one of the provinces. Canada has one statute governing federal business corporations (the *Canada Business Corporations Act*), and each province has its own business corporations statute or ordinance (such as Ontario's *Business Corporations Act*). Canada's business corporations statutes are similar to those in the United States, England and other sophisticated common law jurisdictions.

Location of Business

The question of where to incorporate may well be answered, at least in the first instance, by considering the geographic area where the business will be conducted. Subject to what is said below, if you expect to conduct business in all or several Canadian provinces, then federal incorporation is probably the best choice. On the other hand, if you expect to conduct business in only one province, then incorporation in that province should suffice.

Use of Name

A potential advantage of federal incorporation is that a federally incorporated business is entitled to conduct business, under its corporate name, in every province. Thus, if using the corporate name throughout Canada is or could be important, you should probably seek federal incorporation. Otherwise, the corporation may have to obtain permission from a province to use the name when business commences there. If, on the other hand, you expect the corporate name to be used in only one province, provincial incorporation is likely to be appropriate.

Audit and Disclosure Requirements for Private Corporations

Private federal corporations are not required to have their financial statements audited if they have the approval of all shareholders not to do so, and they are not required to make those statements publicly available. Private Ontario corporations are not required to have those statements audited if they obtain the written consent of all shareholders not to do so; nor are they required to make those statements publicly available. A private corporation is essentially one whose outstanding securities are not distributed to the public.

Requirement for Canadian Residents on the Board and Board Committees

Under the *Canada Business Corporations Act*, a quarter of the board of directors of a corporation incorporated under that statute must reside in Canada. Committees of boards are not required to have any Canadian residents, but business may be transacted at board meetings only if a quarter of the directors participating in the meeting are Canadian residents.

Similarly, Ontario's *Business Corporations Act* requires that at least a quarter of the board of directors of a corporation incorporated under that statute reside in Canada. Board committees are not subject to Canadian director-residency requirements, nor is there a requirement that a Canadian-resident director attend all board or committee meetings.

Both these Acts may be less attractive to foreign businesses wishing to establish a Canadian subsidiary, compared with the business corporation laws of several provinces that impose no director-residency requirements.

Financial Assistance and Inter-company Holdings

The federal business corporations law and those of most provinces (including Ontario) do not prohibit corporations from giving financial assistance to various related parties, such as shareholders, directors, officers, employees, subsidiaries and other affiliates; nor is there a specific disclosure requirement regarding such financial assistance.

Neither a federal nor an Ontario corporation may hold its own shares, and the subsidiaries of that corporation may not hold shares of the parent corporation, except in limited circumstances.

The Incorporation Process

Incorporating a federal or an Ontario corporation is a simple process. Certain forms containing basic information about the proposed corporation and its incorporators must be filed with government officials. A nominal fee must be paid and an acceptable name selected. A corporation can usually be incorporated in one or two days. Once incorporated, the corporation is subject to annual filing requirements to update its place of business, directors and senior officers.

Duties and Liabilities of Directors

Canadian corporations are required to have a board of directors. As discussed above, the *Canada Business Corporations Act* and some provincial business corporations statutes (including Ontario's) require that a quarter of the directors of a corporation reside in Canada; however, some provinces have no such requirement.

Unless a unanimous shareholder agreement is in place (discussed below), the directors are required to supervise the management of the business and affairs of the corporation. The directors may delegate their powers to a managing director or committee, except for certain matters specified by the business corporations laws such as fundamental changes affecting the corporation, the issue of securities, the payment of dividends and the approval of financial statements and other disclosure documents.

A director or officer must disclose, at the earliest possible opportunity, any direct or indirect interest he or she has in an actual or a proposed material contract or transaction with the corporation. An interested director may not vote on the matter, subject to certain exceptions (e.g., when the material contract or transaction is between the corporation and an affiliate). Ontario's *Business Corporations Act* also prohibits an interested director from attending any part of the board meeting at which the material contract or transaction is discussed, and requires that the matter be referred to the corporation's shareholders for approval if all the directors declare a conflict.

Under several Canadian statutes and common law principles, directors of corporations may be subject to certain penalties and/or personal liability if they fail to meet an appropriate standard of conduct or, in certain cases, if the corporation commits prohibited acts or fails to fulfill certain obligations. For example, directors may be personally liable

- to the corporation and/or its shareholders if they fail to act in the best interests of the corporation or to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances;
- for the failure of the corporation to collect, remit or pay certain taxes, properly manage pension assets, pay employee wages (up to six months' worth) or vacation pay or make source deductions from employees' remuneration;
- in certain cases, if the corporation contaminates the environment; and
- to the corporation if they have approved or consented to an improper dividend, share issuance or share redemption.

A director cannot be completely shielded from the risk of personal liability. Directors can, however, take steps to reduce the risk. First, the directors should ensure that the corporation has appropriate programs and procedures in place so that they can exercise informed judgment, particularly if management is distinct from the board of directors. Second, if there is one shareholder or only a small number of shareholders, it is common for the shareholder(s) to assume certain or all of the directors' duties and responsibilities by executing a *unanimous shareholder agreement*. This agreement relieves the directors of their duties and responsibilities to the extent that they are assumed by the shareholder(s). Third, directors should consider obtaining contractual indemnities from both the corporation and the controlling shareholder(s). Finally, directors should obtain liability insurance if it is available. However, neither an indemnity nor insurance will assist a director who fails to act honestly and in good faith with a view to the best interests of the corporation.



Restrictions on Foreign Investment

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Notification and Review of Acquisitions Under the *Investment Canada Act*

The Canadian government encourages foreign investment that contributes to economic growth and employment opportunities in Canada. Though foreign investments that exceed certain monetary thresholds must be reviewed under the federal *Investment Canada Act*, they will be approved if they meet a “net benefit to Canada” test. Foreign investment reviews are handled by Industry Canada or, in the case of investments in the cultural sector, by the Department of Canadian Heritage.

The *Investment Canada Act* governs both the acquisition of control of a “Canadian business” by non-Canadians and the establishment of a new business in Canada by non-Canadians. A proposed foreign investment is subject to either a pre-closing application for review or a post-closing notification. If a proposed investment is reviewable, the non-Canadian investor must include in its application for review information about its business and its detailed plans for the Canadian business it is acquiring. Applications are typically filed after the public announcement of a transaction, but they could be filed earlier. If a proposed investment is not a reviewable transaction, the non-Canadian must file a two-page notification form within 30 days of the implementation of the investment. The establishment of a new business is subject only to a notification requirement unless it is in a culturally sensitive area such as the publication or distribution of books and/or magazines. Generally, the expansion of an existing business or the acquisition of assets that do not constitute a business does not require review or notification under the *Investment Canada Act*.

A direct foreign investment by a non Canadian that will result in the acquisition of control of a Canadian business is subject to review and government approval if the gross assets of the Canadian business exceed specified monetary thresholds. The current threshold is C\$312 million.¹ Amendments to the *Investment Canada Act* have been passed that, once implemented, will change the general review threshold to C\$600 million in enterprise value, with additional increases to C\$1 billion over the next four years, followed by annual GDP-indexed increases thereafter.²

¹ This threshold is for acquisitions made in 2009. The amount is adjusted annually.

² Lower thresholds apply in connection with investments in the cultural sector and where the investor and seller are not ultimately controlled by nationals of World Trade Organization–member states.

The “Net Benefit to Canada” Test

In determining whether it will approve an investment, Industry Canada considers whether the investment is likely to provide a “net benefit to Canada.” In its determination, Industry Canada generally takes the following factors into account:

- the effect of the proposed acquisition on the level and nature of economic activity in Canada (including employment; resource processing; utilization of parts, components and services produced in Canada; and exports from Canada);
- the degree and significance of participation by Canadians in the business to be acquired, as well as in the industry of which the business forms a part;
- the effect of the proposed investment on productivity, industrial efficiency, technological development, product innovation and product variety;
- the effect of the proposed acquisition on competition within Canada;
- the compatibility of the proposed acquisition with national industrial, economic and cultural policies (taking into consideration the economic and cultural policy objectives of any province likely to be significantly affected); and
- the effect of the investment on Canada’s ability to compete in world markets.

Investments in certain culturally sensitive areas, such as the publication or distribution of books and magazines, are subject to a greater level of scrutiny and may be prohibited as a matter of government policy.

Investments by foreign state-owned enterprises (SOEs) are subject to separate federal government guidelines designed to require the SOE to satisfy criteria relating to governance, transparency and commercial orientation.

Additionally, the government may review any transaction if there are reasonable grounds to believe the transaction “could be injurious to national security.” The *Investment Canada Act* does not define “national security” but the expectation is that it will be invoked sparingly. Factors likely to be considered in assessing whether there is a potential national security issue are the country of origin of the investor and the nature of the business activities undertaken or planned to be undertaken in Canada. It is likely that the concept of national security will be considered to be broader than traditional military or strategic considerations. A national security review may be commenced for virtually any investment, regardless of whether it would involve the acquisition of control of

a Canadian business or exceed the asset/enterprise value thresholds referred to above. For example, the acquisition of a non-controlling minority interest in a Canadian business could be subject to a national security review (but not a traditional “net benefit” review). It will therefore be important to identify potential national security issues early in transaction planning.

Applications for Approval under the *Investment Canada Act*

An investor must apply for approval of a reviewable acquisition in a prescribed form. Except with government consent, a direct acquisition of control cannot be completed until approval is received.

Within 45 days of the submission of a completed application, the Minister of Industry or the Minister of Canadian Heritage must indicate his or her decision or advise the applicant that an additional 30 days is required to review the transaction. In the latter case, the applicant has the opportunity to make further representations and submit undertakings designed to address the Minister’s concerns. The Minister may not further extend the review period without the applicant’s consent. The Minister’s failure to respond within the applicable period results in an automatic approval.

An investor that has breached the *Investment Canada Act* or an undertaking may be subject to penalties. These include divestitures, a court order directing compliance with the undertakings and fines of up to C\$10,000 for each day of non-compliance. Remedial orders cannot be made against the seller.

Other Restrictions

Some businesses (such as broadcasting or financial services) may be regulated by other legislation. This legislation may prescribe limits on foreign investment. Businesses regulated by this other legislation are not, however, completely closed to participation by foreign investors.

Financial Services

Foreign Bank Restrictions

The federal *Bank Act* generally prohibits a “foreign bank” from directly or indirectly (including through subsidiaries or branches) engaging in any business in Canada, except in accordance with the Act. If a foreign bank conglomerate derives 50% or more of its revenues or assets from the business of banking, then the businesses and investments of the conglomerate in Canada are subject to a framework that is similar to the regime applicable to domestic Canadian banks.

If a foreign bank conglomerate derives 35% or more, but less than 50%, of its revenues or assets from the business of banking, the conglomerate may seek an exemption from most of the provisions of the Act that are applicable to foreign banks operating in Canada; if, however, a regulated foreign bank in the foreign bank conglomerate establishes a bank subsidiary or branch in Canada, the businesses and investments of the conglomerate in Canada would be subject to a framework that is similar to the regime applicable to domestic Canadian banks.

If a foreign bank conglomerate derives less than 35% of its revenues or assets from the business of banking, then the businesses and investments of the conglomerate in Canada would not be subject to the Act; if, however, a regulated foreign bank in the foreign bank conglomerate establishes a bank subsidiary or branch in Canada, the businesses and investments of the conglomerate in Canada would be subject to a framework that is similar to the regime applicable to domestic Canadian banks. In addition, a foreign bank is prohibited from providing a guarantee of any securities issued or traded in Canada, except in certain circumstances. “Foreign bank” is defined broadly to include any entity that carries on the business of banking and refers to itself as a bank (including a captive offshore bank) as well as any other entity that controls a foreign bank. Foreign insurance companies, securities dealers and other providers of financial services that control a foreign bank anywhere in the world are considered to be foreign banks.

Foreign Ownership Restrictions

There are no other foreign ownership restrictions for financial institutions at the federal level. Some foreign ownership restrictions apply at the provincial level, however.

Other Ownership Restrictions

The *Bank Act* and the *Insurance Companies Act* prohibit any resident or non-resident from acquiring more than 10% of the shares of certain domestic banks and large demutualized insurance companies. Amendments to these statutes permit the acquisition of up to 20% of the voting shares and up to 30% of the non-voting shares of these institutions if prior ministerial approval is obtained. In addition, any investment in any other federal financial institution giving rise to a direct or indirect significant interest (10% or more of any class of voting or non-voting shares) is subject to ministerial approval. Similar approvals are required at the provincial level.

Real Estate

There are few restrictions on the ownership of land in Canada by non-Canadians. However, the provinces of Alberta, Saskatchewan, Manitoba, Quebec and Prince Edward Island limit the types or amount of land that can be owned by non-residents. Nova Scotia requires that a disclosure report be filed with the provincial government if a non-resident has acquired any land outside a city or town, although certain exemptions apply.

In most provinces, a tax or fee based on the purchase price of the property is imposed on purchasers (both Canadians as well as non-Canadians) at the time they acquire an interest in real property. In some provinces, a similar tax or fee is also imposed upon mortgages of land and long-term leases.

Most provinces require that corporations incorporated outside Canada or outside the particular province be licensed in that province if they carry on business there. “Carrying on business” is a broad concept that includes holding an interest in real property and, in Alberta, Saskatchewan and New Brunswick, holding a lender’s interest in a mortgage. In Ontario, even if a foreign corporation is licensed to carry on business, the corporation is empowered only to acquire or hold land that is necessary for use or occupation or for carrying on the corporation’s undertaking. If broader land-holding powers are required, it may be necessary to incorporate an Ontario corporation for this purpose.

The land registry systems in Canada are sophisticated and orderly, and property rights are well established and specific. Title insurance is available in Canada but its use is still less common than in the United States. Ordinarily, lawyers in the Canadian province in which the property is located are retained to conduct various searches and provide title opinions for purchasers and lenders.

Each province has a sophisticated property financing regime, and Canadian financial institutions are prepared to loan substantial proportions of the market value of real property upon the security of the property. A typical purchase of commercial real estate usually takes between two and four months from the date the agreement of purchase and sale is signed until the date that title to the property is transferred, whether or not third-party financing is obtained.

Property development is under the jurisdiction of the provinces and is controlled mainly at the municipal government level through municipal plans, zoning by-laws, building codes and construction permits. The time required to develop a parcel of land varies significantly – from several months to several years – and depends on factors such as location, proposed use, the size of the development and the potential impact on surrounding properties.

Communications Sector

Each of the broadcasting, telecommunications and wireless sectors in Canada is subject to Canadian ownership and control rules established under federal legislation, regulations and directions. The three regimes are similar in spirit and, as shown in the summary below, they share many of the same requirements. However, there are differences between the regimes that must be considered on a case-by-case basis. The ownership regimes set out in the federal *Broadcasting Act* and *Telecommunications Act* are administered by the Canadian Radio-television and Telecommunications Commission (CRTC), while the regime set out under the federal *Radiocommunication Act* is administered by Industry Canada.

Broadcasting

Under the *Broadcasting Act* and a direction issued by the federal cabinet to the CRTC, a licence to operate a broadcasting undertaking in Canada (including a radio or television station, a pay-television service or a cable or satellite television system) may be issued only to a “Canadian” (a resident Canadian citizen or a qualified Canadian corporation). A qualified Canadian corporation must be incorporated in Canada; its CEO and at least 80% of its directors must be resident Canadian citizens; and Canadians must own and control at least 80% of the voting shares and 80% of the votes attached to the voting shares. If a qualified corporation is controlled by another corporation, the latter corporation must also be incorporated in Canada; Canadians must own and control two-thirds of its voting shares and two-thirds of its votes; and, in some circumstances, the corporation or its directors must not control or influence any programming decisions of the qualified corporation. The CRTC has additional discretion to deem an applicant ineligible for licensing if it determines, on the basis of personal, financial, contractual or business relations or any other considerations relevant to determining control, that the applicant is controlled by a non-Canadian.

Telecommunications

Under the *Telecommunications Act*, only a Canadian-owned and -controlled corporation that has been incorporated in Canada may own or operate facilities used to provide telecommunications services to the public for compensation. For the corporation to be Canadian-owned and -controlled, at least 80% of the directors must be individual Canadians; Canadians must own and control 80% of the corporation’s voting shares; and the corporation must not otherwise be controlled by non-Canadians. Under the Canadian ownership and control regulations issued under the *Telecommunications Act*, a “Canadian” for these purposes includes a resident Canadian citizen and a corporation in which Canadian shareholders own and control at least $66\frac{2}{3}\%$ of the voting shares and which is not otherwise controlled in fact by non-Canadians.

Wireless

Under the federal *Radiocommunication Act* and related regulations, for a corporation to be eligible to be licensed as a radiocommunication carrier, such as a cellular telephone network, it must be Canadian-owned and -controlled and incorporated in Canada. For these purposes, Canadian-owned and -controlled and “Canadian” have the same meanings as they do under the Canadian ownership and control regulations issued under the *Telecommunications Act*.

Currency Exchange Controls

Canada has no currency exchange controls.



North American Free Trade

5

The North American Free Trade Agreement (NAFTA) is a regional trade agreement between Canada, the United States and Mexico. It liberalizes trade in goods, services and investment between the three countries and provides for the protection of intellectual property rights.

Advantages of the NAFTA

The principal advantage for residents of a NAFTA country is that the agreement permits freer trade in goods and services between the member countries through the reduction of tariffs and the elimination of non-tariff barriers. The NAFTA also makes it easier for residents of the United States and Mexico to make direct and indirect investments in Canadian businesses. The agreement provides protections to ensure that resident investors and their investments are treated fairly and without discrimination. The principal advantages of the NAFTA to investors who do not reside in a member country but who wish to establish a business in Canada are as follows:

- The products produced or the services provided in Canada will have access to markets in the other NAFTA countries on a tariff-free basis.
- The NAFTA's provisions ensure greater investment certainty and stability within the region by requiring fair, transparent and non-discriminatory treatment of investors and their investments throughout the free trade area.
- The NAFTA provides specific investor-state dispute resolution remedies that have already been successfully used on a number of occasions by investors from a NAFTA party to obtain compensation when they have been injured by the measures of another NAFTA party.

Reduction of Tariffs and Removal of Non-tariff Barriers

Most tariffs have been removed from NAFTA-eligible trade goods. For goods to qualify for preferential tariff treatment under the NAFTA, they must be wholly made in a NAFTA country or have undergone sufficient transformation through production to qualify as originating in a NAFTA country.

Subject to certain exceptions, the NAFTA provides for the elimination of non-tariff import and export restrictions, including import licences and quotas. The NAFTA also opens up cross-border trade in areas such as services, financial services, government procurement, land transportation, telecommunications, agriculture and energy.

Investor-State Arbitral Claims

The NAFTA allows an investor of a member country to bring a claim against the government of another member country if its investment in that country has been treated unfairly as a result of a measure adopted by that government – whether federal, provincial/state or municipal. A claim can be brought if a government measure discriminates against the investment of a foreign investor, treats it unfairly or expropriates it. Claims are heard by international arbitral panels that have the power to award compensation to the investor. These procedures provide assurance that the rights of investors will be safeguarded under the NAFTA in the event that they are not protected by NAFTA governments or courts.



Dispute Resolution

6

Civil Litigation

The procedures that govern the civil litigation process and the administration of courts in Canada are largely established and managed by individual provinces. The most significant variations exist between Quebec (which, although considerably influenced by the common law, has a civil law system) and the other provinces (which have common law systems).

In addition to provincially administered courts, there are four federal courts:

- the **Supreme Court of Canada**, which is the highest appellate court in Canada and hears, in most cases with leave, appeals of decisions made in the provincial and federal court systems;
- the **Federal Court** and **Federal Court of Appeal**, which have jurisdiction over actions against the federal government; judicial review of federal administrative tribunals; maritime litigation; certain kinds of intellectual property litigation; and proceedings relating to national security; and
- the **Tax Court of Canada**, which has exclusive jurisdiction over matters arising under federal taxation law and certain related matters.

Although litigation procedures vary from province to province, litigation in Canada generally falls somewhere between the English and U.S. approaches. For example,

- generally Canada does not have the same broad **pretrial discovery** rights as exist in the United States. In contrast to England, however, there is a right to oral examination for discovery in addition to documentary discovery;
- as in England, but in contrast to the United States, the loser in Canadian litigation is normally required to pay a portion of the winner's **litigation costs**;
- as in England, but in contrast to the United States, **civil jury trials** are rare in Canada except in personal injury and defamation litigation. Civil jury trials are essentially not a feature of complex business litigation;
- **punitive damages**, although not limited in Canada to quite the same degree as they are in England, are more restricted than in the United States. Punitive damages are generally confined to cases involving deliberate disregard of the plaintiff's rights, and they are lower in amount than those seen in the United States.

As in both the United States and England, **contingency fees** are permitted in Canada, subject to court supervision.

In keeping with global trends, **e-discovery** (with its attendant costs) is an increasingly prevalent component of business litigation in Canada. Parties are required to produce relevant electronic records unless doing so can be shown to be unduly burdensome.

Class Actions

Modern class action regimes are in place in most provinces and in the Federal Court. A court must, however, decide that the action ought to proceed as a class action. This stage is called “certification” or “authorization.”

The process for certification varies between jurisdictions, which can result in forum shopping by some plaintiffs. Forum shopping also arises because the legislation in some provinces allows class actions that permit non-residents to be part of a class, whereas other provinces generally restrict the class to residents of the province.

The availability of class actions has had the effect of encouraging litigation in many areas where such actions were previously too costly or unwieldy to be undertaken by individual plaintiffs. For example, the following have all tried to seek legal relief through the procedural mechanism of class actions: people with small product-liability claims; people who claim to have been affected by environmental contamination; customers bringing complaints arising from standard-form contracts; and pension plan members.

Alternative Dispute Resolution

Canada has seen a growing use of alternatives to the traditional lawsuit as the means of resolving disputes. In addition to binding and non-binding arbitration, Canadian disputes are frequently subject to mediation, mini-trials and combinations of these procedures. In Ontario, mediation is a mandatory step in most areas of civil litigation.

Arbitration

Most provinces have enacted modern arbitration statutes applicable to domestic disputes. In addition, each province has enacted a statute that adopts the UNCITRAL Model Law for international commercial arbitrations and implements the New York Convention's provisions, which facilitate enforcement of foreign arbitral awards.

Class-wide arbitration as a means of alternative dispute resolution is not prevalent in Canada. In fact, a court decisions regarding its permissibility are conflicting.



Financial Incentive Programs

7

General

A number of government financial incentive programs provide assistance to persons with technological or managerial skills who propose to engage in certain projects that are unlikely to be initiated without government assistance. The projects must benefit Canada and have a reasonable probability of success.

Some of the financial incentive programs offered by the federal, provincial and local governments apply to a broad range of industries and are available to foreign investors. These programs are intended to promote Canadian industry and technology, increase research and development, encourage new investment and address the particular needs of those regions in Canada that have lower levels of commercial development or employment.

The incentive programs differ from one another in the nature and amount of the incentive offered, the size and type of business eligible for assistance, and the nature and extent of the commitment required from the principals. The mandates of most of the programs are general; therefore, the criteria for determining a particular business's eligibility for assistance are somewhat flexible. The assistance provided under these programs may take the form of grants, subsidies, contributions, repayable contributions, forgivable loans, participation loans, loan guarantees, equity participation or tax incentives.

Incentives for Life Science Companies

Ontario

As a research community, Ontario is ranked number 4 worldwide, with 25 research hospitals and 10,000 research scientists.

- Significant federal and provincial tax credits are provided for basic science and clinical research (Scientific Research and Experimental Development [SRED] credits), and for certain operating expenses and capital expenditures. Moreover, banks will advance loans on the basis of estimated refundable SRED credits.
- Ontario Business Research Institute offers a refundable tax credit for preclinical work at certain approved academic institutions in Ontario. This tax credit is available to for-profit companies that have a permanent establishment in Ontario.
- Grants are given to approved companies creating at least 100 jobs or investing C\$25 million.
- Several other Ontario funds have grants available for early-stage companies.

Structures for U.S. Investors in Life Science Companies

- U.S. investors may invest through a traditional Delaware holding corporation into a Canadian entity.
- U.S. companies can access non-refundable SRED credits. Refundable credits can be accessed by establishing or contracting with Canadian-controlled research entities.
- Offshore affiliates holding intellectual property can also be attractive to Canadian research-based companies. Tax benefits of this structure are significantly greater than those available to U.S. research-based companies.



Lobbying the Governments of Canada and Ontario

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Both federal and Ontario legislation require the registration of, and disclosure of certain information by, designated categories of people who deal with the federal or Ontario government. Individuals required to register include the following:

- consultant lobbyists (individuals hired to lobby on behalf of clients), such as lawyers, accountants and other professional advisers;
- in-house lobbyists of corporations or organizations (employees whose jobs involve spending a significant amount of their time – 20% or more – lobbying for the employer).

Under federal law, lobbyists must register if they

- are paid for their services; and
- undertake to arrange a meeting with a public office holder (which includes almost anyone involved with the federal government) or to communicate with a public office holder on matters such as the development of, or a change in, government policy, legislation or regulation, or the procuring of a financial benefit or contract.

Under Ontario law, paid lobbyists are required to register only if they undertake to communicate with a public office holder in an “attempt to influence” the development of, or a change in, government policy, legislation or regulation, or the awarding of a financial benefit. Consultant lobbyists in Ontario also must register if they attempt to influence the awarding of a contract or arrange a meeting with a public office holder.

The criterion for the obligation to register as a lobbyist in Ontario is thus less stringent than it is under federal legislation, whereby *any* communication or meeting with a public office holder, regardless of intent, requires registration.

Requirements for Registration

Consultant and in-house lobbyists must register when they begin lobbying for a client and also must file an information return when there is any change in the lobbying activity or when the activity is terminated or completed.

Initial registration requirements include submitting to an electronic registry system the name of the lobbyist and his or her firm as well as the name of the client and its subsidiaries and parent corporation, if applicable. Corporations or organizations that have in-house lobbyists on staff must also submit a list of all these employees when the lobbying activity would constitute a significant part (20%) of their duties. Under federal law, corporations must submit a list of all senior officers who are engaged in any form of lobbying. The federal legislation also imposes a monthly filing requirement for information returns for both consultant and in-house lobbyists. The monthly return must set out the names of designated public office holders and the date and particulars of the communication.

Penalties for Failure to Register

Failure to comply with registration requirements or knowingly filing misleading or false information can lead to a substantial fine and imprisonment. Further, any contravention of any provision of the federal lobbying legislation or regulations can result in a fine being levied.



Standards of Business Conduct and Consumer Protection

9

Canada has sophisticated laws that regulate the conduct of business within its boundaries. These laws are intended to redress marketplace imbalances and remedy unfair business practices. They are designed to ensure and encourage fair competition, equality of treatment and accurate and timely disclosure in the marketplace.

Both the federal government and the provincial governments have enacted legislation aimed at protecting consumers from injurious marketplace practices. The legislation includes prohibitions on misleading advertising. It also regulates practices such as the labelling, packaging, importation, pricing, sale, distribution, promotion and advertising of certain items, including consumer goods, food, drugs, medical devices, cosmetics, motor vehicles, upholstered and stuffed articles, textiles, hazardous products and tobacco products. In some instances, minimum standards are imposed to safeguard consumers against the purchase of defective merchandise or merchandise that is not fit for the intended purposes.

In addition, individuals are protected by legislation from the consequences of insolvency of certain deposit-taking institutions. They also benefit from industry-run investor-protection regimes for investment dealers and insurance companies.

Corruption of Foreign Officials

Businesses in Canada are also required to comply with federal legislation that makes the bribery of foreign public officials a crime.

The *Corruption of Foreign Public Officials Act* makes it a criminal offence for any person (including corporations and individuals) to

- directly or indirectly give, offer or agree to give or offer an advantage or benefit of any kind to a foreign public official (which includes almost anyone involved with a foreign government or a public international organization composed of two or more states or governments) in order to obtain an advantage in the course of a business; or
- induce the official to do (or not to do) something or to use his or her position to influence any decisions of the foreign state or public international organization.

It is also an offence to knowingly possess any property or proceeds of property (including corporate income) derived from prohibited bribery or to launder this property or these proceeds. The legislation exempts payment of the good faith expenses of foreign officials, payments allowed under the laws of the foreign jurisdiction and payments made to expedite or secure the performance by a

foreign public official of any routine act that is part of the foreign public official's duties (such as mail service, issuance of visas or police protection).

Illegal bribery is punishable by up to five years of imprisonment; possession or laundering of the proceeds of bribery is punishable by up to ten years of imprisonment and/or a fine of as much as C\$50,000.

Money Laundering and Terrorist Financing

All businesses operating in Canada must comply with federal anti-terrorist financing legislation and many of these must also comply with federal anti-money laundering legislation. The *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* imposes various requirements on financial institutions; life insurance companies and life insurance brokers or agents; securities dealers, portfolio managers and investment counsellors; foreign exchange dealers; accountants; casinos; real estate professionals; and those in the business of cashing cheques, selling money orders or travellers' cheques, or transmitting money.

The requirements under this legislation include the following:

- **Client Identification and Record Keeping.** Reporting persons (those institutions and persons listed above) must identify their clients; ascertain whether individual clients are “politically exposed foreign persons”;³ implement a compliance regime; and keep identification records, account records and records of the particulars of “large cash transactions” – generally, transactions of C\$10,000 or more (although for some businesses, such as money order sales and cheque cashing, the transaction threshold is reduced to C\$3,000).
- **Reporting of “Suspicious” Transactions.** Whatever their size, transactions and attempted transactions must be reported to the Financial Transactions and Reports Analysis Centre of Canada (FinTRAC), a federal government agency, if there are reasonable grounds for suspecting that the transactions are related to money laundering or terrorist financing. FinTRAC publishes guidelines to help identify suspicious transactions.

³ Any member of government or a legislature, a representative of government (e.g., ambassador, attaché, head of government agency, head of a state-owned bank or company), a high-ranking military person or a judge, or a close family member of these persons.

- **Reporting of Prescribed Transactions.** Reporting persons must report large cash transactions and terrorist property (see below), and financial entities must report cross-border electronic funds transfers and receipts of C\$10,000 or more to FinTRAC. All persons who participate in the movement of cash or monetary instruments having a value of C\$10,000 or more over Canada's border will be required to report their activities to the Canada Customs and Revenue Agency.

The government maintains lists of individuals and entities believed to be involved in or associated with terrorist activity, and against whom Canada has implemented economic sanctions, and it is an offence for anyone in Canada or any Canadians (meaning Canadian citizens, permanent residents or corporations incorporated and continued under the laws of Canada or a province) outside Canada to deal in any way with property that they know is owned or controlled by anyone on the lists. Anyone in Canada and any Canadians outside Canada must disclose to FinTRAC, the Royal Canadian Mounted Police and the Canadian Security Intelligence Service the existence of any property in their possession or control that they believe is owned or controlled by or on behalf of anyone on the lists. In addition, each financial institution, life insurance company, securities dealer, portfolio manager and investment counsellor must determine on a continuing basis whether it is in possession or control of property owned or controlled by or on behalf of anyone on the lists, and report this status monthly to its principal supervisory or regulatory body.

It is an offence to fail (i) to keep the required records; (ii) to file the required reports with FinTRAC; or (iii) with the intent to prejudice an investigation, to disclose that a report to FinTRAC has been made. Failing to keep records carries a maximum fine of C\$500,000 and up to five years of imprisonment. Failing to report suspicious transactions carries a maximum fine of C\$2 million and up to five years of imprisonment. Liability extends to directors, officers and agents of any corporation guilty of an offence, though there is a statutory defence that prevents the conviction of any person or entity who exercised all due diligence to prevent the commission of the offence. Additional monetary penalties come into effect on December 30, 2008.

Legislation for the Protection of Privacy

Canada's federal legislation has (with some modifications) enacted into law the 10 general principles and commentaries contained in the Canadian Standards Association's *Model Code for the Protection of Personal Information*. Among these is the core principle that an individual's knowledge and consent are required for the collection, use or disclosure of personal information, except where this knowledge and consent are inappropriate (such as for law enforcement or emergencies, or for statistical, scholarly and research purposes).

The federal legislation exempts organizations from compliance if they comply with substantially similar provincial legislation. To date, British Columbia, Alberta and Quebec have enacted privacy laws that have been designated substantially similar to the federal legislation.

The legislation requires the applicable organizations to appoint compliance officers who are to be responsible for protecting personal information; developing internal guidelines that deal with the accuracy, retention and eventual destruction of personal information; creating appropriate safeguards to protect personal information; and educating employees about the importance of maintaining the confidentiality of personal information. The federal Privacy Commissioner can audit the practices of organizations to ensure that they comply with the legislation's requirements. Individuals can file complaints for investigation by the Privacy Commissioner and have the right to apply to court for a hearing and remedies, which may include an award of damages (including an award for humiliation) and punitive damages. Obstructing the Privacy Commissioner's audit or investigation is an offence punishable by a fine of up to C\$100,000.

The legislation applies to federal and provincial organizations in respect of "personal information" (defined as information about an identifiable individual, including health information) collected, used or disclosed in the course of commercial activities, unless the organization is exempt from the application of the law. The federal legislation does not apply to organizations in respect of their employee information unless they are federal works, undertakings or businesses (such as banks or telecommunications providers).

In addition to the federal legislation, organizations may be subject to provincial privacy legislation, depending on the location of their operations, the nature of their activities and whether personal information is being handled entirely within provincial borders. As outlined above, British Columbia, Alberta and Quebec have enacted privacy laws of general application. In addition, Alberta, Saskatchewan, Manitoba and Ontario have in place specific health information privacy laws that apply to the healthcare sector. Careful analysis is needed to determine whether more than one regime applies and to ensure compliance with the highest standard imposed among those regimes.

Facilitating Electronic Commerce

All jurisdictions in Canada except the Northwest Territories have enacted legislation to facilitate electronic commerce. With the exception of Quebec legislation, provincial legislation is substantially uniform, based on model legislation. Ontario's *Electronic Commerce Act, 2000* sets out standards of "functional equivalency" so that transactions are not denied legal effect solely because they are entered into electronically. These functional equivalency rules include, for example, that an electronic document satisfies the legal requirement for a written document if the electronic document will be accessible for subsequent reference and is capable of being retained by the other person. Another rule states that an "electronic signature" satisfies a legal requirement that a document be "signed." Electronic documents also satisfy the legal requirements for "original" documents as long as there is "reliable assurance as to the integrity of the information," which will be determined "in light of all the circumstances, including the purpose for which the document was created."

Essentially, the Ontario legislation

- permits a person to use a computer or other electronic means to enter into legally binding documents;
- recognizes the validity of a contract that is completed through automated electronic communication at one or both ends of the transaction;
- applies to existing and future technologies by providing a broad definition of "electronic";
- does not require a person to use electronic media without his or her consent, which may, except for dealings with the government, be inferred from a person's conduct (such as the nature of his or her use of electronic communications)

The Ontario legislation does not apply to wills and codicils, trusts created by wills and codicils, personal powers of attorney, negotiable instruments (such as cheques) or documents that create or transfer interests in land and require registration to be effective against third parties. Other exceptions can also be prescribed by regulation.

A number of Canadian jurisdictions have also enacted consumer protection legislation provisions that are applicable when a person enters into electronic agreements for personal, family and household purposes. In Ontario, the *Consumer Protection Act, 2002* stipulates that if a consumer's total payment obligation under an agreement is more than a prescribed amount (currently C\$50), a supplier of goods or services is required to disclose certain information to the consumer (this includes the supplier's contact information, description of the goods and services, terms, methods of payment and any additional charges).

Moreover, the supplier must provide an opportunity to the consumer to accept or decline the agreement and to correct errors as well as to access the information and be able to retain and print it. The supplier has a further obligation to deliver a copy of the agreement to the consumer within a specified period via email, fax, etc. The failure of the supplier to comply with any of these obligations gives the consumer the right to cancel the agreement within a certain time.



Competition Law

10

Canada's *Competition Act* contains criminal and civil provisions prohibiting a variety of anti-competitive conduct. The *Competition Act* also establishes a pre-merger notification and merger review regime.

Agreements Between Competitors

Under the *Competition Act*, agreements and other arrangements between competitors that restrain, prevent or lessen trade unduly (such as price fixing and customer or market allocation arrangements) are criminal offences that, upon conviction, are punishable by a fine of up to C\$10 million or a jail term of up to five years, or both.

In March 2010, the existing criminal offence will be replaced with a new, *per se* criminal offence for “hard-core” cartel-like agreements between competitors. The new offence will apply to agreements or arrangements between competitors to fix prices, allocate customers, products or markets, or fix the production or supply of a product; there will be no requirement to establish that the agreement or arrangement will have a negative impact on competition. The maximum penalty will increase to a fine of up to C\$25 million and a jail term of up to 14 years, or both.

Agreements between competitors that do not fall within the new criminal provision may nevertheless be reviewable under a new civil provision of the *Competition Act*. This provision will require the Commissioner of Competition (Commissioner) to establish that the agreement prevents or lessens competition substantially in a market, or is likely to do so in the future. If a prevention or substantial lessening of competition is established, the Competition Tribunal may make an order prohibiting any person from doing anything under the agreement or arrangement.

Misleading Advertising and Deceptive Marketing

Under the *Competition Act*, egregiously misleading advertising and deceptive marketing practices – such as deceptive telemarketing, deceptive notices of winning a prize, and pyramid selling – are criminal offences. The maximum penalty for the offence is a jail term of up to 14 years or a fine in the discretion of the court, or both.

Less serious misleading advertising and deceptive marketing practices, such as misrepresentations to the public about a product's performance of efficacy or bait and switch selling, are subject to review and sanction. If the Competition

Tribunal is satisfied that a person has engaged in one of these practices, it may order the person to cease the conduct, to publish a notice to make consumers who are likely to have been affected by the conduct aware of it and to pay an administrative monetary penalty of up to C\$10 million (for first-time corporate offenders).

Abuse of Dominant Position

The *Competition Act* prohibits a person with a dominant market position from engaging in certain anti-competitive business practices. If the Competition Tribunal finds that an anti-competitive practice has prevented or lessened competition substantially in a market, it may make an order prohibiting the person from engaging in the practice. It may also make any remedial order that is reasonable and necessary to restore competition, and may order the person to pay an administrative monetary penalty of up to C\$10 million (for first-time offenders).

Other Reviewable Business Practices

The *Competition Act* prohibits a variety of other business practices that have a significant, negative impact on competition. These practices include some marketing and distribution arrangements, such as refusals to deal, price maintenance, exclusive dealing, tied selling and market restrictions. If the Competition Tribunal finds that a person has engaged in one of these practices, it may order that the practice be discontinued and, in some circumstances, may make any other order that it deems necessary to restore competition in the market.

Merger Review

The *Competition Act* confers broad powers on the Commissioner to investigate whether a merger or proposed merger is likely to prevent or lessen competition substantially. If a transaction raises these concerns, the Commissioner may apply to the Competition Tribunal for a remedial order.

Pre-merger Notification

The *Competition Act* requires that the Commissioner be given prior notice of certain merger transactions that exceed specified size thresholds. Notification for share acquisitions is required if all of the following thresholds are exceeded:

- **Size of the parties.** The parties to the transaction, together with their affiliates, have assets in Canada, or annual gross revenues from sales in, from or into Canada, that exceed C\$400 million;
- **Size of the transaction.** The target corporation (or corporations controlled by it) has assets in Canada, or annual gross revenues from sales in or from Canada, that exceed C\$70 million;⁴ and
- **Voting threshold.** As a result of the transaction, the purchaser will hold more than 20% in the case of a public corporation or 35% in the case of a private corporation (or, in both cases, if the purchaser already holds 20% or 35%, more than 50%) of the votes attached to all outstanding voting shares of the corporation.

Similar thresholds apply to asset acquisitions, corporate amalgamations, non-corporate business combinations and acquisitions of interests in business combinations.

Unless an exemption is available, the parties to a notifiable transaction are required to provide the Commissioner with notice of the proposed transaction, which includes customer and supplier information, and to await the expiration of a statutory waiting period before the transaction may be completed. The waiting period is 30 days unless, prior to its expiry, the Commissioner issues a supplementary information request, which extends the waiting period to 30 days after the parties have provided the Commissioner with the required information.

Whether or not a merger is notifiable, it can be reviewed by the Commissioner under the substantive merger provisions of the *Competition Act* both before closing (assuming the transaction comes to the Commissioner's attention) and for a period of up to one year after its substantial completion.

Advance Ruling Certificates

As an alternative to a pre-merger notification filing, the parties to a notifiable merger transaction may apply to the Commissioner for an advance ruling certificate (ARC) that, if issued, both eliminates the pre-merger notification filing requirement and prevents the Commissioner from subsequently challenging the transaction. However, the issuance of an ARC is discretionary and ARCs will typically be issued only when a transaction does not raise any significant merger law issues.

⁴ Subject to an annual increase tied to the increase in Canadian GDP.



Intellectual Property

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Canada protects intellectual property through various statutes that govern patents, trademarks, copyright, industrial designs, integrated topographies and plant breeders' rights. The common law also protects unregistered trademarks and trade secrets, and may impose certain confidentiality and fiduciary obligations regarding trade secrets or other confidential information. Canada is a signatory to the principal international intellectual property conventions, including the *Patent Cooperation Treaty*, the *Berne Convention on Literary and Artistic Works*, the *Agreement on Trade-Related Aspects of Intellectual Property Rights* under the World Trade Organization and the *Paris Convention for the Protection of Industrial Property*.

Patents

Patents are granted for those aspects of an invention that are useful, new and inventive. In Canada, patents are granted on a first-to-file basis, and an application for a patent must be filed in Canada within one year of any public disclosure of the invention by the inventor or those claiming on behalf of the inventor. There are restrictions on what constitutes patentable subject matter in Canada. For example, animals, plants, seeds and subject matter that depends on artistic or personal skill are not patentable in Canada. To maintain patents and patent applications in good standing, the applicant or owner must pay annual maintenance fees. Patents have a term of 20 years from the date of patent application, and extensions to the patent term are not available in Canada.

Patent and Regulatory Protection in the Pharmaceutical Industry

The pharmaceutical industry relies on patents to protect new and innovative pharmaceutical products. Aside from the traditional protection afforded by a patent (recourse against infringement during the term of the patent), the existence of a pharmaceutical patent can have two further important implications in Canada. First, under certain circumstances, under the *Patented Medicines (Notice of Compliance) Regulations*, pharmaceutical companies can have relevant patents listed on the Patent Register to block generic competition for up to two years until the generic manufacturer can establish that it is justified in alleging that its product does not infringe the listed patents or that the listed patents are invalid. Second, in a regime that is unique in the world, the existence of a patent broadly pertaining to a marketed drug product is subject to price reporting obligations and the price control jurisdiction of the federal Patented Medicine Prices Review Board.

Finally, Canada has a further form of protection that is not related to patents: a pharmaceutical regulatory data protection regime that gives regulatory exclusivity for innovative drug products for eight years, extendable to eight and one-half years for pediatric data (“regulatory exclusivity” refers to the holding of a drug approval

issued by Health Canada for a specific drug or drug ingredient to the exclusion of competitors who wish to rely directly or indirectly on the innovator's approval). Canada has no orphan drug legislation – that is, no legislation or policy to provide assistance, tax credits or funding for clinical research for orphan drugs (which are used to treat rare diseases), or to grant market exclusivity, as in the United States.

Patent Protection in the Financial Services Industry

The financial services industry, which historically has not been meaningfully affected by the Canadian patent regime, has seen increasing patent activity in recent years. While the patentability of pure business methods remains unclear, applicants are still pursuing these and other patents relating to different aspects of the financial services industry, such as computing and communication systems used in a financial institution. Patent strategies – both offensive and defensive – for this emerging area require consideration.

Patent and Regulatory Protection in Other Industries

The food, consumer products, natural health products (NHPs), cosmetics and medical devices industries also rely on patents, trademarks and regulatory exclusivities to protect their products. From a regulatory perspective, the classification of a product (i.e., whether it is classified as a medical device or as a pharmaceutical, and whether it is classified as an NHP or a pharmaceutical) can significantly affect the life cycle management of the product – from flexibility in selecting the brand associated with the product to review and approval times for it, and then pricing, advertising and promotion.

Trademarks

A trademark can be a word, phrase, slogan, logo, design, symbol, letter combination, number combination, colour combination or any combination of these that is used to distinguish the holder's products or services from those of others. Unregistered trademarks can be protected on the basis of use. Registered trademarks, however, give the holder broader rights and facilitate enforcement. An application to register a trademark can be based on use or intended use of the trademark in Canada, or use and registration in the holder's home jurisdiction.

Copyright

The author of a literary (including computer software), dramatic, artistic or musical work – or the author’s employer if the author created the work as an employee within the scope of his or her employment duties – holds copyright in the work in Canada for the life of the author plus 50 years. Copyright owners of sound recordings (including soundtracks [the recorded performance of a musical work], audio tapes and compact disc recordings) hold copyright in the recordings for 50 years from the year in which the recording was made. Authors of works (whether or not the author is an employee) hold moral rights. Moral rights include the right to preserve the integrity of the work (i.e., to prevent modifications to the work that would prejudice the author’s reputation) and the right to have one’s authorship credited in the work. Moral rights subsist for the same period as copyright and cannot be assigned by the author (although they may be waived by the author). Copyright arises automatically and need not be registered, although registration facilitates enforcement of copyright.

Industrial Designs and Integrated Circuit Topographies

Canada also protects industrial designs and integrated circuit topographies (computer chips) through registration. Whereas a patent protects the functional features of an article, registration of an industrial design protects its visual features. An application to register an industrial design must be filed within one year of any publication of the design. Articles commonly protected by industrial design registration include consumer and industrial products, computer icons, ornamental containers and decorative furniture, windows and doors.

The registration of an integrated circuit topography protects the three-dimensional configuration of electronic circuits used in microchips and semiconductor chips. An application to register this type of topography must be filed within two years of the first commercial use of the configuration.

Plant Breeders’ Rights

Canada protects new varieties of plants, provided that they are distinct, uniform and stable and meet a number of other criteria set forth in Canada’s *Plant Breeders’ Rights Act* and regulations.



Language Laws

12

Canada has two official languages: English and French. The right to use either of these languages in the federal courts and in communicating with the federal government and its agencies is protected by law. As well, certain circumstances or instances in commerce require the use of French in addition to English (such as the packaging and labelling of consumer goods).

In addition to the federal language laws, some provinces (including Ontario) have enacted laws that entitle any person to communicate with the provincial government and in the provincial courts in French or English.

However, the most stringent laws concerning the use of the French language are in Quebec. The Quebec language laws

- give every person in Quebec the right to communicate in French with the Quebec provincial government, its agencies and courts;
- give every person in Quebec the right to conduct business in French and require that certain contracts be drafted in French (although in certain circumstances, the parties can contract out of this requirement);
- give employees in Quebec the right to carry on their activities in French;
- give consumers in Quebec the right to be informed and served in French;
- require that packaging be labelled in French at least as prominently as in any other language;
- require that both internal and external signs of a business be in French and in certain circumstances provide that French must be markedly predominant;
- require that businesses operating in Quebec adopt a French business name unless an exception exists (e.g., they use a recognized trademark);
- require that businesses with an establishment in Quebec must use French on their websites and the French must be as prominently displayed as any other language; and
- require the following documents to be filed in Quebec in French only or in French and English: every prospectus of any type (and continuous disclosure documents incorporated by reference into such prospectus, including annual information form, management information circular, financial statements, management's discussion and analysis and material change report); offering memorandum prescribed by regulation; and, subject to certain *de minimis* exemptions, takeover bid circular and directors' circular regarding a takeover bid or issuer bid.



Environmental Protection and Workplace Health and Safety Laws

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Environmental Protection

The protection, conservation and enhancement of the environment through government regulation and enforcement of laws (and voluntary private sector initiatives) continue to be pervasive in Canada. The most prominent issues relate to air, water, waste and contaminated property, as well as the enforcement of laws through charges and orders.

Industrial and commercial activities that may result in the discharge of contaminants (defined broadly to include almost anything that could cause pollution) into the natural environment are subject to comprehensive regulatory controls by all levels of government.

The federal *Canadian Environmental Protection Act, 1999* regulates the importation and exportation of many substances, including chemicals that are new to Canada, ozone-depleting substances and PCBs. In some cases, the legislation regulates the creation, use and disposal (within Canada) of these substances.

Each province has enacted its own environmental protection legislation, and many municipalities have passed by-laws relating to environmental matters. Ontario's *Environmental Protection Act*, for example, prohibits the discharge of contaminants into the natural environment unless the discharge is expressly permitted by statute, regulation or approval. In addition, the legislation contains requirements for the reporting, investigation and remediation of certain discharges or spills of contaminants.

Generally, government orders may be issued against a broad range of persons, including those who are, who are deemed to be or who have been in control of a source of contamination or contaminated property. In certain cases, the Ontario government will perform the remedial work and charge the costs of this work to the person responsible for remediation. Liability can potentially be joint and several, as well as retrospective. Legislation also creates offences for discharging contaminants into the natural environment, failing to comply with orders and engaging in certain activities (e.g., waste management) without first obtaining an approval.

Under certain legislation, offences committed by employees and agents are also deemed to have been committed by the employer or principal. Officers and directors may also have specific obligations imposed expressly on them. In Ontario, for example, officers and directors are obliged to take all reasonable care, among other things, to prevent the corporation from unlawfully discharging into the natural environment a contaminant that may cause an adverse effect. Conviction for committing environmental offences can result in the imposition of fines, imprisonment or both.

In addition to legislative prohibitions and government orders, the common law torts of nuisance, negligence, trespass and strict liability provide the foundation for civil causes of action. The courts can award damages but also have the ability to grant injunctive relief, which could potentially close down a source of pollution.

The increasing scope of liability for environmental contamination has put at risk of exposure a wide variety of parties, including both present and past owners and operators or “persons in control” of property or businesses. This potential liability is a concern for purchasers of real property, landlords and tenants, parent and successor corporations, purchasers of assets or shares of a business, lenders and underwriters.

A non-resident who invests in a business in Canada may be exposed to potential liability for both historical and current environmental problems associated with the property or business. A non-resident may wish to conduct appropriate due diligence investigations and obtain adequate contractual protections (and possibly insurance) in order to identify and address these potential liabilities.

Workplace Health and Safety

Industrial and commercial activities involving the workplace are subject to comprehensive provincial and federal regulatory controls concerning workplace health and safety issues.

Federal

The *Canada Labour Code* is the principal federal workplace health and safety legislation. It applies to federal government employees and to certain federally regulated industries such as interprovincial and international transportation, shipping, telephone and cable systems, radio and television broadcasting, banking, grain elevators and uranium mining and processing. Approximately 10% of the Canadian workforce is covered by the *Canada Labour Code*.

Contraventions of the *Canada Labour Code* may result in the imposition of fines, imprisonment or both. Under the *Criminal Code*, in certain circumstances, corporations and individuals, including officers or directors, may also be prosecuted for criminal negligence causing bodily harm or death, and certain persons are also responsible for taking reasonable steps to prevent bodily harm to persons who work under their authority. In addition, officers and directors of a corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence under the *Canada Labour Code* may be found guilty of that offence, regardless of whether the corporation was also prosecuted or convicted.

Provincial

All the provinces have workplace health and safety legislation. Although aspects of their legislation are similar, there are also some important differences. For example, under Ontario's *Occupational Health and Safety Act*, the following key requirements apply:

- Employers with 20 or more employees must establish a joint health and safety committee, at least half of whose members are employees who are not employed in a managerial function. At least one representative of the employer and one of the employees on the committee must be certified as having received specified training on workplace health and safety. At workplaces with between 5 and 20 employees, a health and safety representative must be identified. Both the health and safety committee and the health and safety representatives must conduct regular reviews of health and safety issues at the workplace, must be consulted about these issues and must have the power to obtain information on them.
- Employers, supervisors, owners, suppliers and officers and directors must carry out various duties related to workplace health and safety. In the case of employers, this includes preparing and reviewing at least annually a written workplace health and safety policy and developing and maintaining a program to implement the policy. Directors and officers are obligated to take all reasonable care to ensure that the corporation complies with the legislation and any regulations and orders made thereunder.
- Employees are entitled to refuse to work if they have reason to believe that they are likely to be endangered. Further, a certified member of a joint health and safety committee may order a work stoppage if dangerous circumstances are found to exist.
- Legislation establishes the Workplace Hazardous Materials Information System, which is intended to provide employees with information on hazardous materials in the workplace and with training in handling these materials and related preventive measures and emergency treatment.
- Provincial inspectors may issue orders to persons in charge of a workplace to remedy non-compliance with the legislation. Convictions for non-compliance may also result in fines, imprisonment or both.

Common Law

While historically the common law played an important role in the development of workplace health and safety law, it has now been replaced almost entirely by the federal and provincial statutory regimes.



Climate Change

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Businesses operating in Canada are subject to a growing body of law, at both federal and provincial levels, designed to mitigate the country's greenhouse gas (GHG) emissions. Securities laws in Canada that require issuers to disclose material information about their business and affairs are also being re-examined as the risks and opportunities associated with climate change become better known.

Cap-and-Trade Regimes and Emissions Trading

Businesses operating in industrial sectors are increasingly subject to cap-and-trade regimes, which generally require large industrial emitters to measure, monitor and report their emissions and, at the end of a set compliance period, to ensure they have enough allowances (essentially permits granted by the government that allow a specified amount of GHG emissions) to cover their actual emissions during that time. Currently, Canada's only cap-and-trade regime is in Alberta, which limits the emissions intensity (as opposed to absolute emissions) of certain industrial facilities. However, the Canadian federal government is also developing a national intensity-based cap-and-trade regime that is expected to take effect in 2010. Meanwhile, British Columbia, Manitoba, Quebec and Ontario, along with the seven U.S. members of the regional Western Climate Initiative, have undertaken to establish integrated absolute cap-and-trade regimes applicable to their own jurisdictions by 2012.

In cap-and-trade regimes, governments typically issue fewer allowances over time (requiring deeper cuts to emissions), thereby fuelling a market in which regulated entities can sell any surplus emissions allowances to other entities at a price that is less than the cost of reducing emissions. In addition, the existing and proposed regimes in Canada create markets for "offset credits" by allowing regulated entities to purchase credits earned by projects shown to have reduced GHG emissions when not required by law to do so. Outside the regulated sphere, the market for the voluntary purchase of emissions-reduction credits is also growing rapidly. In response, the Montreal Climate Exchange, a joint venture of Montreal Exchange Inc. and the Chicago Climate Exchange, has launched trading of physically settled futures contracts for Canadian units of carbon dioxide equivalent (CO₂e). The ability of projects to earn and sell such carbon-based attributes in Canada is becoming an increasingly important consideration in project financing.

Carbon Taxes and Incentives

A carbon tax is another market-based mechanism that is generally levied either on the production, import and distribution of fossil fuels (known as upstream carbon taxes) or, much more commonly, on the purchase and use of fossil fuels (known as downstream carbon taxes). The tax rates for each fossil fuel typically vary depending on the fuel's carbon content – in other words, how much CO₂e the fuel will emit upon combustion. Canada's first two carbon taxes were implemented in the provinces of Quebec and British Columbia. Quebec has an upstream carbon tax applied to approximately 50 companies that produce, import or distribute fossil fuel-based energy in the province. In contrast, British Columbia has a downstream carbon tax applied to the purchase or use of certain fossil fuels in the province, which affects a much broader spectrum of businesses and individuals. Various federal political parties have also proposed carbon taxes, and there are already various federal and provincial tax incentives to encourage the use and production of low-carbon energy.

Complementary Initiatives

The federal and provincial governments are implementing many other initiatives to mitigate GHG emissions – regulations and policies that, to varying degrees, may affect businesses operating in Canada. The provinces, which typically have jurisdiction over the production, transmission and distribution of electricity, are increasingly considering renewable energy standards (also known as “renewable portfolio standards”), which require that a minimum amount of electric power generation come from renewable energy sources by a specified date. Where these standards are in place, retail electric power distributors may be required to purchase power directly from renewable electricity generators, and may also be allowed to purchase renewable energy credits earned by eligible renewable power projects. Some provinces, such as Ontario and British Columbia, have also set regulatory targets for limiting the use of coal-fired electricity generators.

Various other federal and provincial initiatives are designed to encourage or require the use of renewable fuels, renewable energy and energy-efficient technologies. Both levels of government are also investing heavily in carbon capture and storage – a process that can be attached to industrial and other facilities to separate the GHG emissions produced by their operations, compress those emissions and inject them underground in geological formations. Such initiatives may affect operating costs, but may also provide an incentive for companies in the business of energy-efficient and renewable energy technologies.

Climate Change Disclosure

Issuers that are subject to ongoing continuous disclosure requirements in Canada are increasingly re-examining those requirements in the context of climate change. Chief among these legal requirements are those related to an issuer's disclosure in its annual information form (AIF) and its management's discussion and analysis (MD&A). These requirements hinge on the concept of materiality – whether a reasonable investor's decision to buy, sell or hold the issuer's securities would likely be influenced or changed if the information in question were to be omitted or misstated.

In the context of climate change, the information that an issuer chooses to disclose in its MD&A and AIF will depend on its exposure to the physical impacts of climate change, the applicable climate change regulation and the climate change-induced market shifts in the jurisdictions where it and its subsidiaries operate, have significant assets or sell their products. Although for many issuers the immediate consequences of climate change and its regulation may remain remote, other issuers may now determine that there is material information to disclose, given the scientific consensus on climate change and its specific physical effects, the introduction of cap-and-trade regimes, carbon taxes and other regulations across Canada and the proliferation of emissions trading markets.



Corporate Income Tax Rates

The federal government and the provincial governments impose tax on the taxable income of corporations. The general federal corporate tax rate for 2008 is 19.5%. In 2009 the general federal rate is expected to decrease to 19%. A lower preferential rate also applies to a maximum of C\$400,000, each year, of the business income of Canadian-controlled private corporations.

A federal large-corporations tax was levied on capital in excess of C\$50 million employed in Canada by corporations but was eliminated as of January 1, 2006. However, a federal capital tax is still imposed on certain financial institutions.

The provincial corporate tax rates vary, depending upon the particular province and industry, between 5% and 16%. Thus the combined federal-provincial corporate tax rate is, in general, between 24.5% and 35.5%. If a corporation carries on business in more than one province, its income is allocated among those provinces on the basis of revenue and salaries attributable to each province. The provinces other than Alberta, Ontario and Quebec have entered into tax collection agreements with the federal government under which the federal government administers the provincial corporate income tax systems, including tax collecting. Ontario has recently entered into a tax collection agreement with the federal government that will be fully implemented for taxation years ending after 2008.

Several provinces impose a capital tax on corporations that have or are considered to have a permanent establishment in the province. Ontario has announced proposals to gradually eliminate the Ontario capital tax by 2010.

The income of an unincorporated entity is generally taxable in the hands of the individual investors.

Personal Income Tax Rates

As in the case of corporations, both federal and provincial personal income taxes are imposed on the income of an individual. The current applicable federal tax rates are as follows:

Taxable Income (C\$)	Federal Marginal Tax Rate
\$37,885 or less	15%
\$37,886–\$75,769	22%
\$75,770–\$123,184	26%
\$123,185 or more	29%

Provincial tax rates are calculated by applying the applicable provincial tax rate to the taxable income amount. The rates range from 5.35% to 24%. Some provinces also charge a surtax. The federal government administers and collects provincial personal income tax on behalf of all provinces except Quebec.

Canadian Residents

Corporations and individuals who are resident in Canada are subject to Canadian tax on their worldwide income, subject to credits for some foreign taxes paid on income earned outside Canada. In general, a corporation is resident in Canada for tax purposes if its central management and control is exercised in Canada or if it was incorporated in Canada. In most instances, the central management and control of a corporation is exercised by the corporation's board of directors. An individual is considered resident in Canada for tax purposes if the individual's centre of interests, such as family, home, place of employment and property, is situated in Canada. An individual may also be deemed to be resident in Canada in certain other circumstances.

A non-resident is generally subject to Canadian tax only on Canadian-source business income, employment income and certain capital gains. Canadian withholding taxes are imposed on certain Canadian-source investment income that is paid to non-residents of Canada.

Calculation of Income

The income of a business for tax purposes is generally its profit determined in accordance with Canadian generally accepted accounting and commercial principles; however, this amount is subject to many express statutory exceptions. The accrual basis of accounting must be used in computing business income for tax purposes. Expenses of a current nature that are incurred in the ordinary course of business are normally deductible in computing income for tax purposes. Inventory must be valued consistently either at the lower of cost and market or at market. The last-in, first-out method of inventory costing cannot generally be used. In general, interest payable on borrowed money or on an unpaid purchase price for property is deductible if the money or property is used for an income-earning purpose. If the debt-to-equity ratio of debts owing to certain non-resident shareholders of a Canadian corporation exceeds 2:1, however, thin capitalization rules apply to prohibit the deduction for tax purposes of the interest owing on the excess debt. Some costs related to the construction of a building or to the acquisition and ownership of land may not be currently deductible, but may be added to the capital cost.

The deduction of capital expenditures is generally prohibited. A deduction is permitted, however, in respect of the depreciation of capital assets (other than land) used in carrying on a business. The tax deduction for depreciation operates on a pool basis, with assets categorized into separate classes. Maximum allowable rates (which are generally in excess of depreciation for accounting purposes) for each class are set out in the tax legislation. These rates are applied, on a declining balance basis, to the aggregate of assets in the particular class at the end of each year. A deduction is also permitted to allow for amortization of certain intangible capital properties, such as goodwill, patents and licences.

Management or administration fees are generally deductible in computing income; withholding tax may be imposed on certain management and administration fees paid to non-residents.

Treatment of Capital Gains, Interest and Dividends

A specified proportion of gains realized by an individual or a corporation on the sale of capital assets is included in income for tax purposes. This proportion is currently one-half of the gains. Capital losses realized on the sale of capital assets can be offset only against capital gains.

Interest income is generally taxable on an annual accrual basis. For this purpose, certain debt instruments, such as zero coupon or original issue discount obligations, are deemed to accrue interest at a rate determined in a prescribed manner.

Individuals are taxed on dividends from Canadian corporations at a rate lower than that applicable to other income. Canadian-resident corporations are not generally taxed on dividends from other Canadian corporations (although private corporations and certain other corporations can be subject to a refundable tax on some dividends received). However, a number of statutory rules impose tax on the payer and recipient of dividends on certain types of preferred shares. Dividends from, and certain passive income of, foreign affiliates of a Canadian taxpayer are subject to Canadian tax in accordance with specific rules.

Certain investment income of Canadian-controlled private corporations is subject to a refundable $6\frac{2}{3}\%$ tax.

Loss Carryforward

A business loss realized for tax purposes in a particular year may be applied to reduce taxable income in the previous three years and the following twenty years. Capital losses can be carried back three years and forward indefinitely to be deducted from capital gains. If control of a corporation is acquired, certain provisions limit the carrying forward of prior business losses and prohibit the carrying forward of prior capital losses.

Consolidation

There are no provisions in the tax legislation to permit the consolidation of income or loss among corporations in a commonly controlled group. Transactions between related persons, whether they are individuals or corporations, are considered to occur on a fair market value basis for tax purposes.

Withholding Tax

Dividends paid by a Canadian corporation to shareholders who are not resident in Canada are subject to withholding tax at a rate of 25% (or lower in some cases as a result of relevant tax treaties). Certain amounts paid to shareholders by a Canadian corporation on redemption of shares, reduction of capital and winding up are considered to be paid as dividends for tax purposes, and are thus subject to withholding tax when paid to a non-resident shareholder. Withholding tax also applies to other specified amounts paid by a Canadian corporation to a non-resident, such as interest, management fees, rent and royalties. Generally, effective January 1, 2008, non-participating interest paid to arm's-length non-resident lenders is exempt from withholding tax. Under amendments to the Canada-U.S. treaty that are not yet in force, withholding tax on interest paid to non-arm's-length U.S. residents who are entitled to the benefits of the treaty will also be gradually reduced.

Tax Treaties

Canada has an extensive network of international tax treaties, including treaties with the United States and most European countries. The tax treaties generally reduce the rate of Canadian withholding tax otherwise imposed and contain other important provisions relevant to the Canadian taxation of Canadian-source business income of a non-resident.

Subsidiary Compared with Branch

A Canadian subsidiary of a non-resident corporation is taxable in Canada on its worldwide income and computes its taxable income and its tax liability under the rules applicable to Canadian corporations. Dividends paid by the Canadian subsidiary to its non-resident shareholders are subject to the 25% withholding tax described above, subject to tax treaty relief.

By comparison, a non-resident corporation that carries on business in Canada through a branch is taxable under the usual Canadian rules on its Canadian-source business income. In effect, the Canadian branch business is treated as a separate taxable entity, with the appropriate allocation of income and deductions to the branch. In addition, the non-resident corporation is liable for a special 25% branch tax, subject to tax treaty relief. In essence, this tax is imposed on after-tax earnings of the branch to the extent that they are not reinvested in the Canadian business. The combined income and branch tax is intended to equate the Canadian tax burden of a branch to that of a subsidiary that distributes its retained earnings by way of dividend.

On the sale by the non-resident of the capital assets of the branch or the shares of the Canadian subsidiary, capital gains may be realized and subject to tax unless the gains are exempt under the provisions of a relevant tax treaty.

If a business was initially established in Canada as a branch, the assets of the business may subsequently be transferred to a Canadian subsidiary on a tax-deferred or rollover basis. It is generally not possible, however, to transfer assets from a Canadian subsidiary to a branch on a tax-deferred basis.

Succession Duties, Estate and Gift Taxes

Neither the federal government nor any provincial government currently imposes succession duties or estate or gift taxes. An individual is subject at death, however, to federal and provincial income taxes on accrued but unrealized capital gains and on certain other types of unrealized income. As well, if letters probate are required in a particular province to administer the estate of a deceased individual, probate fees are levied. These fees vary from province to province. In Ontario, the rate is 0.5% on the first C\$50,000 of value and 1.5% on the balance.

Ontario's Corporate Minimum Tax

Ontario imposes a corporate minimum tax (CMT) of 4% on large corporations that operate in Ontario and that are profitable for financial accounting purposes but that, because of deductions allowed under ordinary income tax rules, pay little or no Ontario income tax. Under the CMT legislation, a corporation will, in effect, pay the greater of its CMT amount and its Ontario income tax calculated under the existing income tax rules.

The CMT applies to corporations that are subject to the existing Ontario income tax legislation and that in any year, together with associated corporations (whether or not the associated corporations are operating or taxable in Ontario), have either (i) gross revenues in excess of C\$10 million or (ii) total assets in excess of C\$5 million. Both (i) and (ii) are determined in accordance with Canadian generally accepted accounting principles (without consolidation or equity accounting). Thus a corporation that does not have more than C\$10 million of gross revenues or C\$5 million of total assets may be subject to the CMT if it is a member of an associated group with combined revenues or assets in excess of those thresholds.



Sales Taxes

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Goods and Services Tax

A goods and services tax (GST) imposed by the federal government applies, subject to certain exceptions, to all goods and services purchased in or imported into Canada. The current rate of the GST is 5%.

The GST is designed to be paid by the ultimate consumer and must be collected by vendors throughout the production and distribution chain. Each vendor of a taxable good or service must, as an agent of the federal government, collect the GST on its sales, deduct the GST credit to which it is entitled in respect of GST it pays on its purchases (the input tax credit) and remit the balance to the government. Any excess of input tax credits over GST collected is refundable.

Certain goods and services are tax exempt. These include financial services, residential rents, used residential property, health and dental services, daycare and educational services. Certain goods and services are zero-rated, including basic groceries, prescription drugs, medical devices and exports of goods and services. A vendor of tax-exempt goods or services is not required to collect GST on such sales and is not entitled to any input tax credit on the purchases used to produce the tax-exempt goods or services. A vendor of zero-rated goods or services is not required to collect GST on such sales but may claim input tax credits on any GST paid on its purchases related to making the zero-rated goods or services. Under a small-traders exemption, persons making otherwise taxable sales that do not exceed C\$30,000 per annum are not required to collect GST on their sales, and are not entitled to claim any input tax credit for GST they pay on their purchases.

Provincial Retail Sales Taxes

With the exception of Alberta, all the provinces in Canada have a form of sales tax on sales of goods and services. The provinces of Nova Scotia, New Brunswick, and Newfoundland and Labrador have harmonized their sales tax system with the federal GST. The result is a 13% harmonized sales tax (HST), which applies in almost exactly the same way as the GST. In these provinces, the HST is administered and collected by the federal government in the same manner as the GST. The province of Quebec imposes and collects its own sales tax at the rate of 7.5% on the sale of goods and services in Quebec. This tax operates on a multilevel basis, in the same manner as the GST, and is generally subject to the same exceptions that apply under the GST. The Quebec government administers and collects the GST and the Quebec sales tax on sales of goods and services in Quebec. Alberta and the territories of Canada do not impose a sales tax; the GST is the only sales tax that applies to sales in Alberta and the territories. The remaining provinces (British Columbia, Saskatchewan, Manitoba, Ontario and Prince Edward Island) impose and collect their own retail sales tax at rates that vary from 5% to 10% on retail sales of certain goods and services in those provinces.



Exportation and Importation of Goods

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Canada's federal law imposes a limited system of import controls on specific goods (such as food and clothing) as well as export controls on goods such as military and dual-use goods, nuclear energy technology and certain cultural items. Federal law also imposes export controls on goods shipped to specific countries to implement United Nations Security Council resolutions or, in limited cases, to impose sanctions that are more onerous than those imposed by the United Nations. In addition, generally, Canadian officials will not grant permits for the export from Canada of goods of U.S. origin that are destined for a country that is subject to U.S. economic sanctions. These federal laws are contained in the *Export and Import Permits Act*, the *Special Import Measures Act*, the *United Nations Act* and regulations made under these statutes.

Manufacturers, distributors and importers must also consider legislation not related to customs and excise such as that governing packaging and labelling (including the use of French), consumer protection, hazardous products and the distribution and sale of food and drugs.

Customs Duties

Customs and excise duties are imposed on the importation of goods into Canada. Rates of duty vary according to the tariff classification of the goods and the country of origin. As noted above, the NAFTA has eliminated nearly all tariffs on trade in goods originating in the United States and Mexico. Many other tariffs have also been lowered as a result of World Trade Organization agreements.

The federal *Customs Act* contains detailed rules for determining value for duty purposes. These rules accept in principle the transaction value of goods (the price paid for the goods) as the basis for determining the amount of customs duties imposed, but only if the purchaser and vendor are not related and certain other conditions are met.

Anti-dumping Duties

Canada has an anti-dumping and countervailing duty regime, established under the federal *Special Import Measures Act*. An anti-dumping duty (equal to the margin of dumping) and a countervailing duty (equal to the amount of a subsidy) may be imposed on goods imported into Canada if the dumping or subsidy has caused or is likely to cause material injury to the production or establishment of production in Canada of like goods.



Employee Transfers, Foreign Workers and Business Immigrants

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An employer conducting or establishing a business in Canada may wish to transfer employees from a foreign jurisdiction to Canada, on either a temporary basis or a permanent basis.

Temporary Admission to Canada

Employees transferred to Canada on a temporary basis are generally required to obtain a work permit. There are some limited exceptions to this requirement. For example, the following people do not need employment authorization: trainees or trainers with a Canadian parent company or subsidiary organization; business representatives purchasing Canadian goods or services; and permanent employees of a company outside Canada coming to Canada to consult with employees in Canada or with employees of a Canadian parent company or subsidiary organization.

People may also visit Canada for temporary periods without a work permit to attend conferences, to search for suitable accommodation or schooling and for other non-work-related activities.

Senior managers or executives or employees working in a “specialized knowledge” capacity for multinational organizations transferred to a Canadian affiliate, parent or subsidiary organization may obtain work permits that are initially valid for a maximum of three years. Extensions are generally granted in two-year increments to a maximum aggregate duration of seven years in the case of senior managers and executives and five years in the case of specialized knowledge employees. Special provisions exist for certain types of employees in the information technology sector. They may qualify for an initial work permit valid for one year, as well as for extensions in one-year increments, depending on their qualifications, their experience and the nature of the work they will be performing.

Canadian companies that wish to hire foreign workers who are not employees of a foreign parent or subsidiary company or who do not qualify on any alternative basis must obtain a Labour Market Opinion from Service Canada (the Canadian government’s one-stop service delivery network that provides access to its programs and services, through telephone, Internet, mail, in-person, outreach and mobile services). They must demonstrate that the employment will not adversely affect employment opportunities for Canadians, that the foreign worker’s admission to Canada will result in a transfer of skills or knowledge to Canadians or that it will result in job retention or creation for Canadians.

Accompanying spouses may generally obtain open work permits, and children may attend school.

Temporary Entry Under the NAFTA

The NAFTA facilitates the transfer of employees between Canada, the United States and Mexico by allowing temporary entry to Canada to four categories of business persons: business visitors, traders and investors, professionals and intra-company transferees. For example, American and Mexican workers functioning in specified professional capacities (e.g., management consultants, accountants, engineers, scientific technicians/technologists and computer systems analysts) may obtain work permits that are renewable annually.

Permanent Residents

Canadian companies that wish to transfer or hire employees from a foreign jurisdiction on a permanent basis may assist in obtaining permanent status for these employees and their families. Permanent residents have rights equivalent to those of Canadian citizens, except that they cannot vote. Permanent residents may lose their status, however, if they are not physically present in Canada for at least 730 days in any five-year period. There are some limited exceptions to this requirement – for example, for those permanent residents who are employed abroad by a “Canadian business,” those in the Canadian foreign service or military and those who are accompanying Canadian-citizen spouses abroad.

Skilled Workers

Canada maintains a selection system for skilled workers who intend to work permanently in Canada. The immigration authorities consider various factors (such as intended occupation, education, experience, age, proficiency in English or French and “adaptability”). A period of many months – and for those from certain countries, several years – is usually required to complete the permanent resident application process. Applicants may be able to obtain a temporary authorization pending the acquisition of permanent resident status.

Certain provinces have entered into accords with the federal government to expedite the processing of permanent resident applications from those destined for these provinces under the Provincial Nominee Programs. Each province has different eligibility requirements and application procedures, and professional advice is strongly recommended.

Under criteria that apply to all Skilled Worker applications received on or after February 27, 2008, visa officers must follow ongoing directives from the Minister of Citizenship and Immigration concerning which pending applications are to be prioritized, retained or returned with a refund of the application processing

fee. These directives will arguably allow the Minister to “cherry-pick” the most desirable immigrants. These changes do not apply to applications filed under the Provincial Nominee, Quebec Skilled Worker and Family Classes.

It is also likely that provisions relating to the new Canadian Experience Class (CEC) will be promulgated in 2008 or 2009. The CEC is a proposed new avenue for immigration for certain temporary foreign workers and foreign student graduates who are already in Canada and who already possess Canadian work experience.

Business Immigrants

Canada also permits business immigrants to acquire permanent resident status. This category includes entrepreneurs who establish their own businesses in Canada that create employment for Canadians and in which they actively participate. These entrepreneurs must have business management experience and are expected to make a C\$400,000 investment or to own and manage businesses in Canada. Generally, these applications require a minimum net worth, which varies depending on whether the application is made under the Investor, Entrepreneur or Self-employed stream of the Business Immigration Program.



Employment Laws

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Canadian employment law derives from

- the terms of employment that are agreed to (orally or in writing), that are established by a continuing course of conduct or that are implied between an employer and an employee;
- legislation that imposes minimum employment standards, including minimum periods of notice (or payment in lieu of notice) that must be given to employees before terminating the employment relationship (although termination for just cause, such as theft, does not require notice to be given);
- legislation dealing with specific aspects of employment, such as collective bargaining, pay equity, human rights, and occupational health and safety;
- workplace safety and insurance legislation, pension and employment insurance legislation and related programs; and
- the common law, which, among other things, imposes a requirement to give reasonable notice of termination, or payment in lieu of notice, for periods that are usually longer (often significantly longer) than those prescribed under the minimum employment standards legislation referred to above. The common law also imposes duties of loyalty and confidentiality on employees.

In Canada, there is no equivalent to the U.S. concept of “employment at will,” and creating an employment contract in Canada that purports to be at will may void the contract.

Employment Contracts

In Ontario, employment contracts for non-unionized employees are often oral agreements for an indefinite term of employment. Senior managers, however, are more likely to be parties to written agreements. Employment contracts can stipulate periods for notice of termination of employment that are longer or shorter than those provided by the common law. The period cannot be shorter, however, than those prescribed by minimum employment standards legislation.

Minimum Employment Standards Legislation

Minimum employment standards legislation varies from province to province, and federal legislation varies from provincial legislation. Generally, minimum employment standards legislation covers matters such as maximum working hours, minimum wages, overtime pay, public holidays and vacation pay.

This legislation also sets out entitlements to pregnancy and parental leave. For example, Ontario female employees are entitled to pregnancy leave of 17 weeks, and either parent is entitled to parental leave of 35 weeks (or 37 weeks if no pregnancy leave is taken); both types of leave are without pay, but with entitlement to government-provided employment insurance.

As noted above, this legislation also provides for minimum periods of notice, or pay in lieu of notice, to employees before an employer may terminate the employment relationship. In Ontario, in addition to notice, employees with five or more years of service are entitled to severance payments in certain circumstances. The Ontario employment standards legislation also entitles employees to greater notice and severance in cases of mass termination (termination of 50 or more employees) when certain thresholds are met.

It is not possible to contract out of these minimum standards.

Common Law: Reasonable Notice of Termination

The common law requires both the employer and the employee to give reasonable notice of termination of an employment contract (if the employment contract does not itself specify the notice required on termination and there is no just cause for termination by the employer). The common law notice period to which employees are entitled is usually significantly longer than their entitlement under minimum standards legislation. The length of the period generally depends on the age, experience, position, compensation level and length of service of the employee, and on whether the employee was induced to leave prior secure employment; however, the length of the notice period is subject to the employee's duty to mitigate by seeking alternative employment.

Collective Bargaining Legislation (Unions)

A significant number of private sector and public sector employees in Canada are represented by a collective bargaining agent.

Under provincial collective bargaining legislation, employees are free to join a trade union of their choice and to participate in its activities. There is a prescribed process for the certification of a trade union as bargaining agent for a group of employees (which cannot include managerial and certain other employees). Generally, certification occurs when a majority of employees support unionization. A process for bargaining a collective agreement is also prescribed. Both the employer and the union are under a duty to bargain in good faith and make reasonable efforts to conclude a collective agreement. During the term of a collective agreement, no strikes or lockouts are permitted.

Collective bargaining legislation also regulates unfair employer interference with lawful trade union activities, as well as unfair behaviour of trade unions. In addition, it establishes a grievance arbitration process to resolve workplace disputes during the term of the collective agreement.

The legislation of certain provinces also restricts an employer's ability to utilize replacement workers if there is a strike or lockout.

Pay Equity Legislation

Many provinces (and the federal government) have enacted legislation that seeks to redress systemic gender discrimination in compensation for work typically performed by women.

Ontario's pay equity legislation applies to private sector employers with 10 or more employees. A "female job class" is one in which 60% or more of the members are female. A "male job class" is one in which 70% or more of the members are male. The legislation requires that systemic gender-based discrimination be identified by comparing each female job class with male job classes in respect of compensation and value of work performed. Pay equity is broadly achieved when the highest rate of compensation for a female job class matches the highest rate for a male job class whose members perform work of equal or comparable value. The legislation sets out other modes of analyzing female job classes when there are no comparable male job classes.

Human Rights Legislation

Certain human rights are protected by provincial and federal legislation (subject to a limited number of exceptions). In Ontario, these rights include the right of every person to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability. This right extends to job advertisements and applications that directly or indirectly classify or indicate qualifications by a prohibited ground of discrimination. Alcohol and drug addiction and pregnancy are protected as disabilities under Ontario's *Human Rights Code*. Sexual harassment in employment is also prohibited under the Code.



Employer Health Tax

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Each province participates in a health insurance plan (such as the Ontario Health Insurance Plan, or OHIP, in Ontario). As a funding mechanism, certain provinces, including Ontario, impose a payroll tax on employers carrying on business in that province. (In Ontario, the tax paid is a sliding percentage of the total remuneration paid by the employer in Ontario, ranging from 0.98% to 1.95%.)



Employee Benefits

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Pensions

Under the Canada Pension Plan, many retired employees receive a modest pension income from the federal government. Both employers and employees contribute to this plan by payroll deductions remitted to the federal government. Benefits payable to an employee on retirement are related to the employee's earnings and the amount of contributions over the employee's working life, and are in addition to old-age security benefits provided by the federal government to those over 65 years of age.

Employers frequently establish some form of retirement income arrangement as an employee benefit. Payments under these arrangements supplement, and often significantly exceed, benefits under the Canada Pension Plan. Ontario's *Pension Benefits Act* prescribes minimum standards for pension plans in Ontario. The Act also requires the employer to periodically calculate its present and future pension liabilities for defined benefit pension plans, and to fund them on both a going-concern basis and a windup basis.

Employment Insurance

The federal Employment Insurance Plan provides income support to employees undergoing a temporary interruption of earnings. Both employers and employees must contribute to this plan. The duration of employment insurance benefits is related to the employee's length of service. The amount of benefits, which is subject to a maximum, varies according to the earnings of the employee. Employment insurance benefits are also available for employees who are on maternity or parental leave. Maternity leave benefits are available for up to 15 weeks, and parental leave benefits are available for up to 35 weeks.

Workers' Compensation

Many employers in Canada are subject to workers' compensation legislation under which claims for compensation for personal injury or accidents arising out of or in the course of employment may be made against an accident fund. This compensation replaces the right of an employee to sue the employer for damages for personal injury or accidents. Compensation from the fund may be received for a variety of matters, including loss of earnings and medical costs.

In Ontario, each employer falls within a class of employers established under the *Workplace Safety and Insurance Act*, based on the hazards of their business. Only employers contribute to the accident fund. The amount of contribution depends on the accident experience of the entire class of employers, the size of an employer's payroll and, in some cases, the employer's individual accident experience.



Corporate Restructurings, Recapitalizations and Insolvencies

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Restructurings and Recapitalizations

Corporate restructurings and recapitalizations have become the more common alternative to bankruptcy and receivership liquidations in the case of mid-size to large Canadian companies in financial distress. Although the terms are often used interchangeably, in general, *restructurings* are focused on the refinancing or modification of a company's debt whereas *recapitalizations* involve new equity issuances or mergers and acquisitions. Beyond these broad generalities, however, corporate restructurings and recapitalizations can take on a myriad of forms.

Canadian transactions in this field can occur either with or without court proceedings. Those completed without judicial intervention are sometimes referred to as "informal" or "negotiated" workouts, restructurings or recapitalizations. They may involve bilateral or multilateral negotiations, new investors, business and asset dispositions, or fundamental operational changes. They must work within the constraints of a company's existing credit and other agreements, applicable laws and time demands. Companies usually prefer exhausting non-judicial solutions before resorting to the typically riskier and costlier court alternatives.

However, a company's time, contractual or other legal constraints can sometimes prevent it from adequately resolving its financial problems. In those cases, Canadian companies have typically sought the assistance of the courts by initiating proceedings under either the *Companies' Creditors Arrangement Act* (CCAA) or the *Bankruptcy and Insolvency Act* (BIA). Both are remedial federal statutes that, among other things, grant insolvent companies protection from creditor and counterparty remedies while they pursue a financial restructuring. They also facilitate interim emergency financing ("debtor-in-possession" financing), enable company actions that would otherwise be restrained by contractual covenants (e.g., asset sales) and provide for creditor class votes that bind dissenting minority creditors.

Restructuring proceedings under both the BIA and the CCAA involve an oversight official: a monitor in the case of the CCAA and a proposal trustee in the case of the BIA. In both cases, a company continues to be in control and carriage of its business and property, albeit within constraints imposed by the court and the statute and under the watchful eye of the oversight official and the court. Although the two statutes are similar, the CCAA is the preferred choice for most mid-size to large Canadian companies because restructuring proceedings under it have unlimited duration and courts have historically been inclined to exercise broad discretion under that statute in furtherance of its remedial purposes.

The CCAA and the BIA are available only to insolvent companies. For solvent companies requiring judicial assistance, the corporate plan of arrangement provisions of the *Canada Business Corporations Act* (CBCA) and its provincial counterparts can be utilized. These provisions allow, among other things, restructurings involving an exchange of securities (e.g., debt-for-new-debt or debt-for-equity) upon approval of the court, notwithstanding less than unanimous securityholder approval. In other words, like the CCAA and the BIA, the CBCA allows a court to make an order that crams down minority dissenting creditors in a class (this refers to the ability of a court to force a deal upon dissenting creditors when most [typically two-thirds] of the creditors of the same kind [i.e., class] have approved the deal). Although the company and presiding court have narrower powers than is the case in CCAA or BIA restructuring proceedings, CBCA proceedings are typically less costly, risky and disruptive than their insolvency counterparts and can be especially effective in dealing with problematic public debt.

Bankruptcy

Bankruptcy law in Canada is governed by the BIA. A debtor can become bankrupt in one of three ways: voluntarily; by an order granted by the court upon the petition of one or more creditors; or upon the failure of creditors or the court to ratify a restructuring proposal under the statute. Upon bankruptcy, a bankruptcy trustee is appointed and all the bankrupt's assets are vested in the trustee. In contrast to restructuring proceedings, a company's board of directors and management lose control and carriage of the bankrupt company's business and property.

Claims of all creditors other than secured creditors are stayed on bankruptcy. The trustee has a duty to review all security over the bankrupt's property and apply to the court to set aside security that is not valid. Subject to the trustee's right to challenge security, secured creditors are entitled to take possession and dispose of collateral over which they hold security. As a result, secured creditors are often said to be outside the bankruptcy process.

By electing a board of inspectors to represent them, unsecured creditors can influence bankruptcy proceedings. With the permission of the inspectors, the trustee may commence legal proceedings, sell assets subject to the approval of affected secured creditors and otherwise deal with the bankrupt's property. The essential objective of a bankruptcy process is the sale of the bankrupt's business and property, either as a whole or piecemeal. If the trustee sells assets of the bankrupt, the trustee is required to pay valid secured claims and distribute the balance of the proceeds to the bankrupt's creditors in accordance with priorities established by the BIA.

Receivership

Receivership proceedings are most often used by secured creditors to enforce their rights under security held on the assets of a defaulting debtor. Security can take many forms, including the traditional mortgage on real estate; a debenture on all the assets of a corporation; a general security interest on equipment, inventory, receivables and intangibles; or a general assignment of book debts.

A receiver's powers typically include the right to take control of the assets of the debtor and carry on its business with a view to selling those assets. As with bankruptcies, a receiver may sell the business and assets as a whole or piecemeal. A receiver may be appointed privately under a security agreement or by a court order. In the former case, the relevant security agreement(s) must clearly express the appointment privilege and the rights and powers of the receiver. A court order appointing a receiver typically stays proceedings against the debtor and the receiver, gives the receiver control over the assets of the debtor and authorizes the receiver to carry on the debtor's business and to borrow money on the security of the assets. Courts typically appoint receivers under either provincial laws or the BIA. In recent years, the BIA's "interim receiver" provisions have become popular with creditors seeking to initiate a receivership and liquidation of a debtor's property.



Securities Laws

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Canadian securities laws must be considered before any acquisition or disposition of outstanding shares of a company in Canada. The securities laws that usually apply to acquisitions and dispositions of shares are those that regulate takeover bids, insider reporting and insider trading.

In addition, procedural and substantive fairness requirements must be satisfied for many transactions, including those that commonly occur between a Canadian public company and its principal shareholders. These transactions include bids by insiders, issuer bids, going-private and business combination transactions and a broad range of related party transactions.

The Legislative Framework

Unlike the United States, Canada does not have generally applicable *federal* securities laws and a single federal securities regulator. In Canada, securities law is primarily a matter of provincial jurisdiction.⁵ Each province in Canada has enacted laws that govern securities transactions, and each has established a securities commission or similar securities regulatory authority. The securities legislation and regulations are augmented by rules and policies enacted by the respective securities regulatory authorities.

The securities regulatory authorities attempt to harmonize their rules nationally, through the Canadian Securities Administrators, an umbrella organization comprising representatives of each securities regulatory authority in Canada. Although rules governing the principal areas of securities regulation – such as prospectus offerings and takeover bids – have been substantially harmonized, many rules have not.

Canadian securities regulators cooperate with foreign securities regulators such as the U.S. Securities and Exchange Commission (SEC), primarily through information sharing.

Generally, the securities laws of a particular province will apply when a proposed transaction involves a “trade” in securities within that province or to a resident of that province, although there are exceptions to this principle. “Trade” is broadly defined to include a sale of a security for valuable consideration, as well as any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of the sale.

French language requirements must also be considered in connection with trading in securities and other market activities in Quebec.

⁵ The federal *Canada Business Corporations Act* contains provisions that regulate trading in securities of companies incorporated under that statute, such as prohibitions on insider trading and certain short sales.

A Note About Aggregation

Under Canadian securities law, rules related to takeover bids, early warning reporting, insider reporting and control block⁶ dispositions are triggered when certain thresholds are reached or exceeded.

These thresholds are stipulated percentages of outstanding securities (or voting rights) either beneficially owned by a securityholder or over which the securityholder exercises (or has the power to exercise) control or direction. In calculating these percentages, a person is required to include securities that are owned or controlled by certain associates and affiliates and others. This inclusion of securities is commonly referred to as “aggregation.”

Aggregation Relief for “Eligible Institutional Investors”

The aggregation requirement can create a compliance burden for corporate groups. To ease the burden, aggregation relief has been made available to eligible institutional investors in the context of Canadian takeover bid, early warning reporting, insider reporting and control block distribution requirements.

Generally, “eligible institutional investors” are financial institutions that are regulated in certain of the G8 countries; pension funds that are federally or provincially regulated; mutual funds that are offered by a prospectus (e.g., most pooled funds); investment managers (including investment managers of investment funds that are offered by prospectus) that are regulated in certain of the G8 countries and that have full discretionary authority; and certain U.S. investment companies and pension funds that are subject to ERISA (*Employee Retirement Income Security Act of 1974*).

Takeover Bids

Canadian securities laws that regulate takeover bids will be triggered when an offer is made to any person in Canada to acquire outstanding voting or equity securities of any issuer (domestic or foreign) if the securities subject to the bid, together with the securities held by the bidder and persons acting jointly or in concert with the bidder, constitute at least 20% of the securities of the class.

These laws specify the procedural requirements of a takeover bid and the type of information to be provided to shareholders of the target. The procedural requirements are designed to ensure that all target shareholders are treated fairly, are provided with sufficient information and are given an appropriate amount of time to consider the offer in an informed manner.

⁶ Generally, a control block is a holding of 20% or more of an issuer’s voting securities.

Exempt Takeover Bids

Certain kinds of takeover bids are exempted from the procedural requirements:

- bids for a limited number of securities conducted through the facilities of a stock exchange, as long as the rules of the stock exchange are complied with;
- bids effected by private agreement with up to five sellers, as long as the purchasers do not pay the sellers a premium of more than 15% over the market price of the securities; and
- bids made principally outside Canada if less than 10% of the outstanding target securities or their holders are in Canada and Canadian residents participate on the same terms as foreign holders.

In addition, under the multijurisdictional disclosure system discussed below, takeover bids for certain U.S. companies may be extended to Canadian securityholders on the same basis and with the same disclosure documents as they are to U.S. shareholders (see “Use of the Multijurisdictional Disclosure System by U.S. Issuers,” in part 24, “Accessing Canadian Capital Markets”).

Early Warning Reporting

Securities laws in Canada impose on buyers of securities an “early warning” reporting requirement to alert the market to creeping takeover bids. This requirement is triggered when a person, including a resident of another country, acquires beneficial ownership of (or control or direction over) 10% or more of the outstanding voting or equity securities of any class of a public company in Canada.⁷ The requirement also applies in respect of securities convertible into voting or equity securities.

If the early warning requirement is triggered, the acquiror must immediately issue a news release that contains prescribed information and, within two business days, must file a signed report with Canadian securities regulators.

After a person files an initial report, every increase of 2% or more in the person’s holdings and every material change in a report previously filed by the person must also be reported.

A person who is required to file either an initial or a subsequent early warning report is subject to a moratorium on further purchases. The moratorium prohibits acquisitions of additional securities of the same class (or securities convertible

⁷ If a takeover bid for the securities in question is underway, the threshold for reporting falls to 5%.

into the same class) from the time of the event giving rise to the report until the expiry of one business day from the date that the relevant report is filed. This moratorium does not apply to those who already hold a control block position.

Alternative Monthly Early Warning Reporting for Passive Eligible Institutional Investors

A passive eligible institutional investor can use an alternative monthly reporting system for early warning reports. To qualify as a passive investor, the eligible institutional investor (and its joint actors) must not intend to make a formal takeover bid for securities of the issuer. The passive investor must also not propose or intend to propose a merger or other transaction with the issuer that would result in the eligible institutional investor (either alone or with its joint actors) possessing effective control over the issuer (or over a successor to all or part of the issuer's business). Effective control will exist if the institutional investor (either alone or with its joint actors) has control-in-fact of an issuer through ownership or control or direction over voting securities, other than by way of security only. Effective control is presumed to exist if the institutional investor with any joint actor owns or controls more than 30% of the votes.

An eligible institutional investor is disqualified from using the alternative reporting system if the investor ceases to maintain passive investment intent. If this happens, a standard early warning news release must be issued and filed immediately, and there is a 10-day moratorium on further acquisitions.

Issuer Bids

Subject to certain exceptions, a company cannot purchase its outstanding voting or equity shares from shareholders in Canada in an issuer bid unless it makes an offer to all shareholders under a formal circular and subject to procedural requirements similar to those applicable to takeover bids.

Certain kinds of issuer bids are exempted from these requirements, including

- “normal course” issuer bids for a limited number of securities made in accordance with stock exchange requirements;
- limited purchases from employees, directors and officers at market price; and
- bids made principally outside Canada if less than 10% of the outstanding target securities or their holders are in Canada, and Canadian residents participate on the same terms as foreign holders.

The purchase of shares from one shareholder or group of shareholders is generally not permitted. As a result of these issuer bid rules, a hostile shareholder cannot employ a “greenmail” strategy to pressure an issuer to repurchase its stock at a premium.

Insider Reporting

Insiders must disclose ownership and changes in ownership of all securities of a public company in Canada: debt or equity, voting or non-voting, common or preferred. Insiders are obliged to report the grant and the exercise of options, as well as their ownership of puts, calls or other transferable options. Insiders must also report “equity monetizations,” including any arrangement whereby the insiders’ economic exposure to the public company or its economic interest in securities of that issuer changes, as through derivative transactions.

A person or company (including a resident of a country other than Canada) is an insider of a public company in Canada if

- the person is a director or officer of the public company;
- the person is a director or officer of a company that is itself an insider or subsidiary of the public company; or
- the person or company beneficially owns (directly or indirectly) and/or exercises control or direction over voting securities of the public company that carry more than 10% of the voting rights attached to all outstanding voting securities of the public company.

This definition is extended by provisions that (i) attribute ownership of securities to persons or companies that are not the direct owners of the securities, and (ii) deem certain persons who are not direct owners of securities to be insiders.

Generally, insider reports must be filed in prescribed form with the securities regulatory authorities of the provinces in which the Canadian public company is a reporting issuer or has similar status. The filing of the insider report must be made within 10 days of the date of the trade of the securities.

Canada has a mandatory, Internet-based system of insider reporting called SEDI (System for Electronic Disclosure by Insiders). Insiders (or their representatives) are required to file insider reports through the Internet by completing an online form at the SEDI website (www.sedi.ca), using commonly available Web browsers. The public can also obtain information about insider holdings from the SEDI website.

Insider Trading and Tipping

Canadian securities laws make it an offence for insiders of a public company and others who may have had special access to information about the company to trade in securities of the company while they have knowledge of undisclosed material information. Penalties and civil liability are imposed on people who do so. The nature of the offences, penalties and civil liability varies from province to province and depends on whether the public company in question is incorporated under federal legislation.

In addition, insiders and others may not inform or “tip” another person or company as to a material fact about, or a material change in, a public company before that fact or change has been generally disclosed. An exception applies for communication in the “necessary course of business,” such as correspondence with lenders or a regulatory authority.

Substantive and Procedural Fairness Requirements

As mentioned above, procedural and substantive fairness requirements must be satisfied for many transactions, including those that commonly occur between a Canadian public company and a foreign controlling shareholder. These transactions include bids by insiders, issuer bids, going-private and business combination transactions and a broad range of “related party transactions.” Subject to certain exceptions, these rules may

- require a valuation by an independent valuator;
- provide guidelines for the conduct of directors in these transactions, including the use of special committees of independent directors;
- prescribe tests for determining the independence of valuers and directors;
- require minority shareholder approval; and
- impose additional disclosure requirements.



Accessing Canadian Capital Markets

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The following discussion focuses on the securities laws of Ontario, which is the principal centre of capital markets activity in Canada and the home of the Toronto Stock Exchange and the TSX Venture Exchange, the country's primary stock exchanges.

Public Offerings

Foreign issuers can sell securities to the public in Canada by preparing and delivering to potential investors a prospectus that provides full, true and plain disclosure of all material facts about the securities that the issuer proposes to issue. A "material fact" is any fact that would reasonably be expected to have a significant effect on the market price or value of the offered securities.

If a prospectus contains a misrepresentation, securities legislation provides a purchaser of securities with a right of action for damages against the issuer and each of its directors, as well as each officer and each underwriter who signed the prospectus and all experts (such as lawyers and accountants) named in the prospectus. Securityholders who sell previously issued securities under a prospectus are also subject to liability. The legislation provides the purchaser with an alternative remedy: a right of rescission. "Misrepresentation" is

- an untrue statement of a material fact; or
- an omission to state a material fact that is required to be stated in the prospectus or that is necessary to make a statement in the prospectus not misleading in the light of the circumstances in which it was made.

Prospectuses must be filed for review with the securities regulatory authorities in the provinces in which the securities are being sold.

Generally, a foreign issuer that sells securities by prospectus in Canada must retain a Canadian underwriter or agent; reconcile its financial statements to Canadian generally accepted accounting principles (GAAP); and comply with ongoing continuous disclosure, certification and governance, proxy solicitation and related obligations. The issuer's insiders will be subject to insider trading and insider reporting requirements in Canada.

In certain cases, Canadian securities regulators will accept financial statements and other continuous disclosure documents that foreign issuers prepare in accordance with the disclosure requirements of either their home country or the United States. Both Canadian and non-Canadian issuers that have securities registered with the SEC in the United States are permitted to file with the Canadian securities regulators financial statements prepared in accordance

with U.S. GAAP and U.S. accounting standards, and are generally able to file their U.S. periodic reporting forms and comply with U.S. insider reporting and early warning requirements to satisfy the comparable Canadian requirements.

Foreign issuers may also file financial statements prepared in accordance with International Financial Reporting Standards and international standards on auditing or other standards permitted under the laws of certain jurisdictions designated by the Canadian securities regulators.⁸ Similarly, issuers domiciled in these designated foreign jurisdictions can file their home country periodic reporting forms and comply with home country insider reporting and early warning requirements to satisfy the comparable Canadian requirements. These exemptions for foreign issuers are not available if more than 50% of the issuer's voting securities are beneficially owned by Canadian residents *and* the issuer's business has a substantial connection to Canada through management or the location of its assets.

Private Placements

Foreign issuers can make private placements of securities in Canada without a prospectus if the transactions fall within specific exemptions. The principal private placement exemptions have been harmonized across the country, including an exemption for sales of securities to "accredited investors" (such as institutional investors and high net worth individuals) and an exemption for sales if the cash purchase price for the securities is at least C\$150,000. Certain provinces have more flexible exemptions to facilitate capital-raising activities for junior issuers.

The issuer must exercise reasonable diligence in confirming that a prospectus exemption is available, and will typically obtain a certificate or a representation from the purchaser confirming its exempt status.

⁸ The designated foreign jurisdictions are Australia, France, Germany, Hong Kong, Italy, Japan, Mexico, the Netherlands, New Zealand, Singapore, South Africa, Spain, Sweden, Switzerland and the United Kingdom.

Accredited Investors

Private placements of securities are permitted if the purchaser is an accredited investor acquiring securities as principal. Accredited investors include the following:

- financial institutions;
- regulated pension funds;
- registered charities;
- registered advisers and dealers (other than limited market dealers);
- individuals who, either alone or jointly with a spouse, beneficially own cash, securities, insurance contracts and deposits having an aggregate realizable value that, before taxes but net of any related liabilities, exceeds C\$1 million;
- individuals whose net income before taxes exceeded C\$200,000 in each of the last two years (or whose net income with that of a spouse exceeded C\$300,000 in each of those years) and who have a reasonable expectation of reaching the same net income level in the current year;
- corporations, trusts, estates and limited partnerships with net assets of at least C\$5 million;
- certain mutual funds and non-redeemable investment funds; and
- certain similar entities organized outside Canada.

Fully managed accounts of portfolio advisers are also treated as accredited investors, other than for purchases of mutual funds or non-redeemable investment funds.

Other Exemptions

The harmonized private placement exemptions include a number of other exemptions in addition to the accredited investor and “C\$150,000 purchase” capital-raising exemptions described above. For example, exemptions are also available for trades to

- affiliated entities, founders and control block holders;
- employees, directors and officers in connection with incentive plans and similar arrangements;
- in certain provinces, family, friends and close business associates of the issuer and its management team; and
- investors in a closely held private company.

Offering Memorandum

While a private placement memorandum to prospective investors is not a prerequisite to using most prospectus exemptions, a foreign issuer will often choose to prepare and deliver one. Whether information used in connection with an offering constitutes an “offering memorandum” for securities law purposes will depend on its content and whether it is accompanied by other documents that, together, have been prepared to describe the business and affairs of the issuer to prospective investors. A term sheet that merely outlines the features of an issue – but does not describe the business and affairs of the issuer – generally will not be regarded as an offering memorandum.

The securities laws of some provinces impose content requirements for an offering memorandum if the offering is made under certain capital-raising prospectus exemptions. There is no detailed content requirement for an offering memorandum under the accredited investor and “C\$150,000 purchase” exemptions.

Although Canadian securities regulators do not review an offering memorandum when it is delivered in connection with the most commonly used private placement exemptions, it must be delivered to the regulator in each jurisdiction where the trade is made, together with a report of the trades and a filing fee (which is either a nominal flat rate or a percentage of sales, depending on the province).

Rights of Action and Other Disclosure

In Ontario and certain other provinces, if an offering memorandum is delivered in connection with the accredited investor, C\$150,000 purchase and certain other exemptions, a statutory right of action will be available to investors, enabling them to sue the issuer for rescission or damages if the offering memorandum contains a misrepresentation.

The securities laws in certain provinces require that the right of action be described in the offering memorandum. In addition, certain provinces have adopted rules requiring that forward-looking information in an offering memorandum be accompanied by a description of key factors and assumptions underlying that information, cautionary language regarding the circumstances that could give rise to changes in that information and a statement of the issuer's policies for updating that information. This requirement may often be satisfied through the issuer's compliance with similar disclosure requirements in the United States or another jurisdiction.

The failure to include the statutory right of action or forward-looking information disclosure in the offering memorandum would be contrary to securities law, but would not invalidate the prospectus exemption.

Resale Restrictions

Securities of a foreign issuer sold on a private placement basis will generally not be freely tradable in Canada. However, if Canadian residents represent less than 10% of the number of holders of the class of securities and hold no more than 10% of the outstanding securities of the class, the securities can generally be resold through a foreign market.

Continuous Disclosure

Generally, a private placement will not subject the foreign issuer to ongoing continuous disclosure, certification and governance, proxy solicitation and related obligations in Canada; nor will its insiders be subject to insider trading and insider reporting requirements.

Concurrent Private Placement and Foreign Offering

When a foreign issuer carries out a private placement in Canada concurrently with an offering of securities in a foreign jurisdiction, the prospectus or offering document from the foreign offering – with the addition of a few wraparound pages – is commonly used as an offering memorandum.

The only language required to be included in the wraparound pages in Canada is the statutory right of action and the forward-looking financial information disclosure described above. Typically, the wraparound pages also include deemed representations as to the purchaser's eligibility under the private placement exemptions, a description of the plan of distribution in Canada, the Canadian tax consequences of an investment in the securities, the resale restrictions on the securities and a notice to investors about the filings that may be made with securities regulatory authorities.

If the securities are being privately placed in Quebec, the wraparound pages will include an acknowledgment that the offering memorandum and related documents will be provided in English only.

Most provinces require an approval from the relevant securities regulator if the offering memorandum includes a statement that the securities will be listed or quoted on a particular market, unless that statement has been approved by the applicable market regulator or securities of the issuer are already traded on that market.

Selling Restriction Language

The following is an example of a selling restriction for a foreign issuer's private placement of securities in Canada done concurrently with a foreign underwritten public offering:

The securities will not be qualified for sale under the securities laws of any province or territory of Canada. Each underwriter has represented and agreed that it has not offered, sold or distributed and will not offer, sell or distribute any securities, directly or indirectly, in Canada or to or for the benefit of any resident of Canada, other than in compliance with applicable securities laws. Each underwriter has also represented and agreed that it has not and will not distribute or deliver the offering circular, or any other offering material in connection with any offering of the securities, in Canada other than in compliance with applicable securities laws.

Use of the Multijurisdictional Disclosure System by U.S. Issuers

The Canadian securities regulatory authorities have adopted the multijurisdictional disclosure system (MJDS), which allows eligible U.S. issuers to make in Canada public offerings, rights offerings, takeover bids, issuer bids, business combinations and continuous disclosure filings on the basis of comparable disclosure and procedural requirements under the U.S. federal securities laws. The SEC has adopted reciprocal rules to permit eligible Canadian issuers to do the same in the United States.

The following sections give some of the highlights.

Eligibility

The MJDS is available to U.S.-incorporated private sector issuers (other than mutual funds) unless the following conditions apply:

- voting securities carrying more than 50% of the votes for the election of directors are held of record in Canada;

and one of

- the majority of the issuer's senior officers or directors are citizens or residents of Canada;
- more than 50% of its assets are located in Canada;
- the business is administered principally in Canada.

The MJDS may be used by eligible U.S. issuers for combined U.S.-Canada offerings or for Canada-only offerings. The documents used in connection with the offerings will in each case be the SEC-mandated disclosure documents, together with a Canadian cover page and certain prescribed legends. Documents for a combined offering must be filed with the applicable Canadian securities regulatory authorities and with the SEC; the customary SEC review procedures will apply. When a Canada-only offering is made, the disclosure documents are filed with the applicable Canadian securities regulatory authorities but not with the SEC. Except in unusual circumstances, the Canadian securities regulatory authorities will generally not review the disclosure documents filed in accordance with the MJDS.

Public Offerings

The MJDS is available for public offerings by an eligible U.S. issuer that, alone or with its predecessor companies, has a 12-month reporting history with the SEC and is in compliance with SEC requirements. The MJDS applies to the following categories of securities:

- i. non-convertible investment-grade debt and preferred shares (rated by a recognized rating agency);
- ii. investment-grade debt and preferred shares that may not be converted for at least one year after issuance if the issuer's equity shares into which the debt and preferred shares are convertible have a public float of at least US\$75 million (i.e., the market value of all outstanding equity shares owned by non-affiliates is at least US\$75 million); and
- iii. other types of securities if the issuer's outstanding equity shares have a public float of at least US\$75 million.

The MJDS is also available for public offerings of securities in categories (i) and (ii), and for debt and preferred shares in category (iii), by any majority-owned U.S. subsidiary of an eligible U.S. parent company that satisfies the requirements referred to above and that fully and unconditionally guarantees the securities being issued. Debt or preferred shares in category (iii) may be exchangeable, but only for securities of the U.S. parent company.

The Canadian securities regulators have also granted exemptive relief allowing eligible U.S. issuers to effectively rely on the MJDS offering procedures for offerings by special purpose Canadian subsidiaries such as "captive" finance companies.

U.S. GAAP financial statements may be used in an MJDS prospectus without a Canadian GAAP reconciliation. Translation of the U.S. prospectus into French is required if the securities are offered to Quebec residents.

Rights Offerings

Under the MJDS, an eligible U.S. issuer may extend a rights offering by prospectus to shareholders in Canada on the basis of documentation prepared in accordance with SEC requirements if the issuer

- has had a class of securities listed on the New York Stock Exchange or the American Stock Exchange, or has had a class of securities quoted on the Nasdaq National Market, for the 12 months immediately preceding the offering, and is in compliance with its listing or quotation requirements; and
- has a 36-month reporting history with the SEC.

The rights will not be transferable by Canadian residents (except between rights holders and for permitted transfers outside Canada, such as transfers on a U.S. stock exchange), but the securities issued on the exercise of the rights will be transferable in Canada. A standby underwriter or dealer-manager of an MJDS rights offering is not required to become registered as a dealer in Canada, as long as it does not engage in soliciting activity in Canada or resell in Canada any securities acquired under the standby underwriting agreement. Translation of the rights-offering prospectus into French is not required unless the issuer is a reporting issuer in Quebec, for reasons other than the rights offering, or 20% or more of the class of securities that are the subject of the rights offering are held by residents of Canada.

Tender Offers (Cash Takeover Bids and Issuer Bids)

Under the MJDS, an all-cash takeover or issuer bid for securities of an eligible U.S. target can be made in Canada by using U.S. disclosure documents and (among other criteria) by following applicable SEC bid conduct rules if less than 40% of the targeted securities are owned by Canadian residents (including Canadian affiliates of the target). These bids must be extended to all holders of the securities of the class in Canada and the United States on the same terms and conditions.

Exchange Offers (Securities Exchange Takeover Bids and Issuer Bids)

In a bid for an eligible U.S. target, in which all or some part of the purchase price consists of securities, an eligible U.S. offeror's compliance with SEC disclosure requirements with respect to the securities being offered is sufficient to satisfy comparable Canadian disclosure requirements if, in addition to the conditions specified under "Tender Offers" above, the offeror

- has been listed on the New York Stock Exchange or the American Stock Exchange, or has been quoted on the Nasdaq National Market, for the 12 months immediately preceding the offer, and is in compliance with its listing or quotation requirements; and
- has a 36-month reporting history with the SEC.

In addition, unless the bid is an issuer bid (with securities of the issuer being offered as consideration) or the securities being offered are investment-grade non-convertible debt or preferred shares, the public float of the offeror's equity securities must not be less than US\$75 million.

Special Accommodation for Cross-Border Tender and Exchange Offers

To accommodate cross-border tender and exchange offers, the Canadian securities regulatory authorities and the SEC have permitted the MJDS to be used by U.S. bidders who seek to acquire Canadian targets. In one case, for example, securities regulators in both Canada and the United States permitted a U.S. public company to make an exchange offer for all the outstanding securities of a Canadian public company. In that instance, less than 40% of the outstanding securities of the Canadian target were held by U.S. residents; the regulators permitted the bidder to use only Canadian takeover bid rules and procedures for the offer itself, with disclosure on the securities of the bidder presented in accordance with U.S. disclosure rules and filed in a U.S. registration statement with the SEC. It is expected that Canadian securities regulatory authorities and the SEC will accommodate future similar cross-border tender and exchange offers.

Business Combinations

The MJDS permits SEC disclosure documents, with certain additional disclosures, to be used in Canada for amalgamations, arrangements, mergers and other business combinations involving eligible U.S. issuers. To use the MJDS, each participant in the combination (other than a participant that would contribute on a *pro forma* basis less than 20% of the successor's total assets and gross revenues) must meet eligibility requirements similar to those specified under "Exchange Offers" above. In the business combination, less than 40% of the securities of the successor may be distributed to residents of Canada.

Use of the Foreign Issuer Prospectus System by Large Foreign Issuers

The Canadian securities regulatory authorities have previously granted exemptive relief to permit large U.S. or other foreign issuers to sell up to 10% of a public offering in Canada without any material prospectus review by the Canadian securities regulatory authorities and without reconciliation of financial statements to Canadian GAAP. The salient features of this exemptive relief – referred to as the Foreign Issuer Prospectus System (FIPS) – are as follows:

- Eligible U.S. or other foreign issuers that offer securities in the United States and register them with the SEC are able to contemporaneously offer in Canada up to 10% of the total number of securities being offered worldwide (including in Canada). The U.S. offering document, with the addition of a few wraparound pages containing prescribed legends and other information important to Canadian purchasers (such as Canadian tax considerations), will constitute the Canadian prospectus.
- An eligible foreign issuer is an issuer with equity securities that have a market value of at least C\$3 billion and a public float of at least C\$1 billion, after giving effect to the international offering. There are alternative eligibility requirements for offerings by non-eligible subsidiaries guaranteed by eligible parent companies.
- The prospectus review by the Canadian securities regulatory authorities is minimal.
- The offering may be of equity shares, debt or preferred shares. Offerings of derivatives are not permitted, except for warrants, options, rights or convertible securities, if the issuer of the underlying securities is eligible to use FIPS to distribute the underlying securities. FIPS is not available for mutual funds, commodity pools, investment companies or business combinations.
- The Autorité des marchés financiers in Quebec will likely continue to require that the Canadian prospectus be translated into French if any of the securities are offered to Quebec residents.
- A Canadian dealer is still required to act as full underwriter (i.e., to sign and to accept liability under the Canadian prospectus).



Activities That Foreign Securities Dealers and Advisers May Carry On in Canada

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Generally, Canadian securities laws require that anyone trading in securities or providing advice regarding the buying or selling of securities in Canada be registered with each securities regulatory authority in the province where that activity takes place. Typically, trading is defined very broadly to include not only the sale of securities but also any act in furtherance of a sale (such as a phone call, letter, email, fax or other contact with a Canadian resident from outside Canada).

As noted previously, Canadian securities regulation is a matter of provincial jurisdiction. Each Canadian province has its own securities laws, which are administered by the local securities commission or equivalent body. As described below under “Proposed Registration Reform,” the provinces are working to develop a harmonized national system with consistent registration categories and requirements, with dealer and adviser registrations recognized in all provinces. For now, there are significant differences among the provinces’ registration regimes. The following descriptions outline the current Ontario requirements, unless expressly indicated otherwise.

Foreign Securities Dealers

Registration as an International Dealer

In Ontario, a foreign securities dealer may apply for registration as an international dealer. The international dealer registration category is one of the least onerous registrations to obtain and is subject to a number of restrictions. The Ontario clients of an international dealer registrant are limited to “designated institutions,” such as banks, loan and trust companies, insurance companies, pension plans and other accredited investors that are not individuals. An international dealer’s trading activities are limited to debt securities and foreign securities, and it may also carry on activities, other than the sale of securities, that are necessary to facilitate the distribution of securities outside Canada. International dealers may not have an office or personnel in Canada and must carry on the business of a dealer and underwriter in a country other than Canada (although a discretionary exemption from the underwriter requirement can be obtained).

Registration as a Non-resident Limited Market Dealer

In Ontario, a foreign securities dealer may apply for registration as a non-resident limited market dealer, with an exemption from the requirement to be incorporated under Canadian federal or provincial law. A condition of this exemption is that the foreign securities dealer must not have an office or personnel in Canada and must be registered as a dealer or adviser in a country other than Canada. The clients of a non-resident limited market dealer are restricted to accredited investors (including individuals). A non-resident limited market dealer can trade in all types of securities (including Canadian securities).

Exemption from Registration for U.S. Broker-Dealers and Their Agents

In Ontario and the other provinces, a U.S. broker-dealer may trade in foreign securities with an individual (i) who is ordinarily resident in the United States but is temporarily resident in Canada or (ii) who was formerly a U.S. resident and whose tax-advantaged retirement plan (such as an Individual Retirement Account) is located in the United States. The U.S. broker-dealer must not have an office or personnel in Canada, and must belong to the Financial Industry Regulatory Authority (formerly the National Association of Securities Dealers). The U.S. broker-dealer must appoint an agent for service of process, submit to the jurisdiction of the courts of each applicable Canadian jurisdiction and make disclosures to the applicable Canadian securities regulatory authorities and to its clients in Canada. A similar exemption is also available to the individual agents of the U.S. broker-dealer.

Foreign Advisers

Registration as an International Adviser

Foreign advisers that do not have an office or personnel in Canada may provide certain securities advisory services in Ontario by registering as international advisers. If the recipient of the advice is in Ontario, registration as an adviser is generally required even if the adviser is located and conducts its activities outside Ontario or the advice is unsolicited. Certain exemptions from registration may be available, depending on the circumstances in which the advice is provided.

An international adviser registrant is exempt from many of the registration requirements that apply to “fully registered” non-Canadian or domestic advisers, but it is restricted in the advisory activities that it may undertake. An international adviser can provide advice only in respect of foreign securities, although incidental advice concerning Canadian securities is permitted. An international adviser’s Ontario clients are limited to “permitted clients,” including pension plans; individuals, corporations and charities that satisfy financial tests; banks and other financial institutions; governments; and certain registered advisers. An international adviser may also advise a mutual fund or non-redeemable investment fund in Ontario if

- the fund has a Canadian-resident manager that is registered as a dealer or adviser with a Canadian securities regulatory authority; or
- the Ontario investors in the fund are limited to clients that a registered international adviser can advise directly.

An international adviser must provide a written disclosure statement to Ontario clients indicating that it is not fully subject to Ontario securities law requirements and that there may be difficulty enforcing any legal rights that the client may have against the international adviser in a jurisdiction outside Canada. In addition, a prospectus or other offering document for investment funds whose securities are distributed to Ontario investors must describe these factors.

The securities, funds and other assets of an international adviser's Ontario clients must be held by the client or held by a custodian or sub-custodian that is a bank or trust company (whether domestic or foreign) that has a prescribed number of assets and is subject to the agreement announced by the Bank for International Settlements.

In order to provide advice to Ontario residents on commodity futures options and commodity futures contracts, foreign advisers must obtain either a separate registration under Ontario commodity futures legislation or an exemption from that registration requirement.

A foreign adviser that does not want to be registered in Ontario most commonly relies on one of two statutory exemptions from the adviser registration requirement:

- the “funds offered primarily abroad” exemption, which allows a foreign adviser to act as the portfolio manager of a fund whose securities are acquired by Ontario residents, if the fund is offered primarily abroad and purchases in Ontario are made through a registered Ontario dealer that sells securities of the fund in Ontario under a prospectus exemption; or
- the “sub-adviser for a registrant” exemption, which allows a foreign adviser to act as a sub-adviser to an Ontario registrant, provided that the registrant contractually agrees to be responsible to its clients for the foreign adviser's advice.

An exemption from the adviser registration requirement under Ontario commodity futures legislation is generally available to replicate the securities law exemptions described above.

Full Registration as a Non-Canadian Adviser

The Ontario Securities Commission (OSC) will register foreign advisers as full non-Canadian advisers on substantially the same basis as it registers domestic Ontario advisers. A non-Canadian adviser registrant may advise any Ontario clients in respect of both Canadian and foreign securities.

Registration as a non-Canadian adviser requires full compliance with Ontario's securities laws, including the satisfaction of requirements related to capital, insurance, financial reporting and conflicts of interest. All advising individuals must be registered and satisfy Ontario proficiency standards regarding industry exams and industry experience, or obtain a discretionary exemption. All directors, officers and advising individuals (not only those providing advisory services in Ontario) must be registered or approved and file a comprehensive regulatory form with the OSC.

Proposed Registration Reform

The CSA (Canadian Securities Administrators) has published proposed National Instrument 31-103 (NI 31-103), whose purpose is to harmonize, streamline and modernize the securities registration regime across Canada. If implemented in its current form (which is currently expected to take place in the first half of 2009 at the earliest), the instrument will result in significant changes to the Canadian securities registration regime. These changes include the following:

- The introduction of registration categories in all Canadian jurisdictions for an “investment fund manager” and an “exempt market dealer.” The exempt market dealer category will be similar in scope to the current limited market dealer category in Ontario, but will be subject to more onerous registration requirements (similar to those applicable to fully registered Canadian dealers).
- The introduction of a “business trigger” test, which will require firms that are “in the business of” trading in securities, advising in securities or managing an investment fund to be registered.
- The adoption of a consistent “permitted client” category, covering clients that are deemed to be sophisticated or have the resources to obtain expert advice. The permitted client list will be substantially similar to the current permitted clients of an international adviser registrant in Ontario, and will include financial institutions, other registrants, pension funds, investment funds having Canadian advisers, charities, high net worth individuals and large corporations.

- The introduction of general exemptions that will allow current international dealer and international adviser registrants to trade with or advise permitted clients without being registered in Canada, provided that the conditions of those exemptions are satisfied.

Regulation of exchange-traded futures is not addressed by the instrument; in Ontario, registration to trade in commodity futures continues to be governed under a separate regime.

The NI 31-103 proposals have been the subject of a lengthy development process, and it is expected that they will undergo additional fine-tuning after they have been implemented. Foreign dealers and advisers that plan to carry on business in Canada through the end of 2009 should consult with counsel concerning the status of NI 31-103 and the application of the new rules to their Canadian operations.

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