



Canada, British Columbia

Prepared by Lex Mundi member firm,
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2012 **DOING BUSINESS IN**
British Columbia

FARRIS



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USE OF THIS GUIDE

This is a general guide to certain laws applicable to doing business in the Province of British Columbia, Canada, and no representations or warranties are made with respect to these materials. They have been prepared primarily for the Lex Mundi website and are for informational purposes only.

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ABOUT FARRIS

Farris has been ranked by Lexpert® as a leading corporate and litigation firm in Vancouver for many years. We are a high performance firm, with the proven capacity and experience to carry out complex and multi-dimensional legal projects and have in-depth knowledge of BC's business and legal landscape. Our clients include some of the most significant public institutions, listed companies and private corporations in British Columbia. We balance a strong regional and national presence with an expanding international practice that includes US, European and Asia-Pacific based clients.

In addition, eighteen of our practitioners are acknowledged as leaders in the Canadian Legal Lexpert® Directory and six are currently ranked among The Leading 500 Lawyers in Canada. In the most recent publications naming The Leading US/Canada Cross-Border Lawyers in Canada, six Farris partners were named (four corporate lawyers and two litigators), making us a leading Vancouver law firm in US/Canada cross-border legal matters.

ABOUT BRITISH COLUMBIA

British Columbia is the westernmost of Canada's provinces. The capital of British Columbia is Victoria and the largest city is Vancouver, the third-largest metropolitan area in Canada and the second largest in the Pacific Northwest.

British Columbia has an estimated population of 4.4 million with just under half living in the Metro Vancouver area. British Columbia's diverse economy is a mix of the

traditional (natural resources and mining) and cutting edge (life sciences, IT and gaming industry). Situated at the apex of major Pacific ports, transcontinental highways and railways, British Columbia is uniquely placed for international trade and specifically for trade with Asian-Pacific countries. Its natural beauty, culture and mild climate has created a significant real estate sector and attracts high net worth individuals from around the world.

LEGAL SYSTEM

British Columbia has a common law legal system and is regulated by provincial statutes that apply exclusively within the province and federal statutes that apply across Canada.

Canada has a significant body of common law relating to the rights of aboriginal peoples. This includes, for example, the government's duty to consult with and, if required, accommodate the interests of aboriginal

peoples when the government has knowledge, real or constructive, of the potential existence of an aboriginal or treaty right, and is contemplating actions that might adversely affect it. The duty to consult rests solely on the government but procedural aspects of this duty may be delegated to third parties. This allows for the government to rely on industry consultations with aboriginal peoples to assist in determining whether the duty to consult is triggered.



FOREIGN INVESTMENT

British Columbia does not impose any general stand-alone restrictions on foreign investment. General issues of foreign investment are governed by the federal *Investment Canada Act*. The *Investment Canada Act* requires foreign investors to notify the Canadian government when they begin a new business activity in Canada and when they acquire control of an existing Canadian business. The following acquisitions are subject to review in order to ensure they provide a net benefit to Canada:

- a direct acquisition of control of a Canadian business (by way of shares or assets) if the asset value of the business being acquired equals or exceeds C\$5 million
- an indirect acquisition of control of a Canadian business (the acquisition of a non-Canadian parent of a Canadian entity) if the asset value of the business being acquired either (i) equals or exceeds C\$50 million, where the asset value of the Canadian business being acquired is less than 50 per cent of the global transaction's asset value, or (ii) equals or exceeds C\$5 million, where the asset value of the Canadian business being acquired exceeds 50 per cent of the global transaction's asset value

A higher threshold is calculated annually for reviewable direct acquisitions by World Trade Organization (WTO) investors, which is C\$312 million for 2011. Indirect acquisitions are generally not reviewable, but are subject to notification requirements.

Proposed amendments to the *Investment Canada Act* will increase the threshold with respect to WTO investors to C\$1 billion over a five-year period, with

a starting threshold of C\$600 million, though the new threshold will be based on “enterprise value” rather than “book value”. The higher threshold for WTO investors does not apply to acquisitions of Canadian cultural businesses (publishing, film, video, music and broadcasting, for example), which are a significantly restricted area for foreign investment.

The *Investment Canada Act* also allows the Canadian government to review, prohibit or impose conditions upon a wide range of investments by non-Canadians on the basis of whether an investment is injurious to national security. Particular industry sectors, such as telecommunications, financial services and broadcasting are subject to additional laws that regulate foreign investment.



PROVINCIAL TAX INCENTIVES

British Columbia provides provincial tax credits, exemptions, refunds and deductions to encourage business investment and innovation, including for research and development, mining exploration, film and television production, new media, and international

financial activities. Sales and property tax exemptions are available for the purchase of certain machinery and equipment. Federal government incentives are also available.

BUSINESS ENTITIES

The most common form of business vehicle used by foreign companies is the corporation. Corporations can be incorporated under the provincial *Business Corporations Act*. However, corporations can also be incorporated federally under the *Canada Business Corporations Act*. The provincial *Business Corporations Act* was recently updated and provides considerable flexibility over the *Canada Business Corporations Act* and corporate statutes of other Canadian provinces. The following applies to corporations incorporated in British Columbia:

Registration Formalities. The corporate name must first be reserved with the Registrar of Companies. The incorporators then enter into an incorporation agreement and file an incorporation application with the Registrar of Companies. These filings, together with payment of the requisite fee, are carried out electronically.

Share Capital. There can be one or more classes of shares, which can be issued in different series. Shares may be issued with or without par value. While it is not necessary to prescribe a maximum number of shares, it is possible to do so.

Non-cash Consideration. Consideration can take the form of past services, property, and/or money. The value of the consideration received must equal or exceed the issue price set for the share.

Rights Attaching to Shares. A corporation can set out in its articles various rights attaching to its shares, including voting, dividends, share of assets on liquidation or dissolution, priority on liquidation or dissolution, conversion, redemption and retraction. Rights can vary among different classes of shares.

BUSINESS ENTITIES CONTINUED

Foreign Shareholders. There are no restrictions preventing foreigners from being shareholders.

Management Structure. A corporation must have at least one director and a public corporation must have at least three directors. Once a corporation has been created the shareholders elect a board of directors, which then appoint officers of the corporation. There are no residency requirements for directors or officers.

Directors' Liability. Directors of corporations operating in British Columbia are subject to a number of potential forms of liability arising from various federal and provincial legislation, as well as common law, which include:

- liability for breach of fiduciary duties owing to the corporation, its shareholders, and potentially other stakeholders
- liability for wages and related benefits, wrongful dismissal, termination pay, workplace safety and protection fines, human rights violations, and sexual harassment
- liability for unpaid taxes and certain government remittances

Parent Company Liability. Shareholders are not liable for a subsidiary's obligations.

Reporting Requirements. Corporations are required to file notices as to changes in directors, file an annual report, and make annual accounting records available for inspection.

For public corporations, regardless of where they are incorporated, the provincial *Securities Act* imposes additional reporting requirements that include annual information forms, press releases, information circular for shareholders' meetings, acquisition reporting requirements, and security distribution requirements.



EMPLOYMENT

Employment relationships in British Columbia are principally governed by the following (federal equivalents apply to employees of federal undertakings in British Columbia):

- *Labour Relations Code*. This governs the employment relationship for unionized work forces.
- *Employment Standards Act*. This sets out the minimum standards that apply in most work places in British Columbia. These minimum standards cannot be contracted out. The Act does not apply to students, volunteers or members of professional associations.
- *Human Rights Code*. This protects individuals and groups against discrimination on prescribed grounds, including race, sex and religion. Parties cannot contract out of the requirements of the Code.
- *Workers' Compensation Act*. This provides insurance coverage to workers who suffer workplace injuries or occupational diseases, and protects employers from lawsuits from workers affected by the economic hardship caused by work-related injuries or disease.
- *Freedom of Information and Protection of Privacy Act*. This governs the collection, use and disclosure of personal information including employee information by private employers.
- *Common law*.

EMPLOYMENT CONTRACTS

A written contract is not usually required, but it is often recommended. Certain terms are implied into employment relationships including that the:

- employer must provide the employee with a safe workplace
- employee is entitled to pay for work done
- employer must, absent just cause or a written contract to the contrary, provide reasonable notice of termination to an employee

TERMINATION

If an employee is dismissed for reasons other than just cause, the employer must provide a period of notice (or pay in lieu of notice), which complies with the *Employment Standards Act* and the common law, subject to the terms of an employment contract.

Unless an employment contract provides otherwise, under common law an employee is entitled to reasonable notice of termination, which is usually between one week and one month per year of service depending on an employee's age, length of service, position and marketability. A written employment contract may provide for a different notice period or pay in lieu of notice on termination, so long as the following minimum amounts are met (*Employment Standards Act*):

EMPLOYMENT CONTINUED

- one week's notice or pay in lieu, after three consecutive months of employment
- two weeks' notice or pay in lieu, after 12 consecutive months of employment
- three weeks' notice or pay in lieu, after three consecutive years of employment
- one additional week or pay in lieu for every additional year to a maximum of eight weeks notice

If an employee is dismissed for just cause, notice obligations do not apply. Examples of just cause include theft, dishonesty, assault, harassment, fraud, insubordination, and continued incompetence or neglect of duty (after specific warnings).

If an employer has acted in bad faith in terminating an employee, the employee may be entitled to additional damages. Unionized employees have stronger protection against unjust dismissal. An employer can also be exposed to liability for breaching the provincial *Human Rights Code* in terminating an employee.

MASS LAYOFFS

A redundancy is not just cause for termination. While an employer can temporarily lay off an employee for redundancy or for economic reasons without giving notice, a layoff exceeding 13 out of 20 weeks is deemed to be a termination, and the employer must provide the applicable notice period or pay in lieu of notice (see "Termination" above).

Mass layoffs are regulated under the *Employment Standards Act* and the *Labour Relations Code*:

- under the *Employment Standards Act*, if the employment of 50 or more employees at a single location is to be terminated within any two-month

period, the employer must give written notice to each employee who will be affected, a trade union certified to represent, or recognized by the employer as the bargaining agent of, any affected employees, and the Minister of Labour. The notice of group termination must specify the number of employees affected, the effective date(s) and reason(s) for termination. The notice period or pay in lieu of notice increases with the number of employees terminated. The group termination notice and termination pay requirements are in addition to any individual notice under the *Employment Standards Act* or any collective agreement.

- under the *Labour Relations Code*, for unionized workplaces, employers must provide 60 days' notice of changes that negatively affect the job security of a significant number of employees to whom a collective agreement applies. Often the notice periods between the *Labour Relations Code* and the *Employment Standards Act* will coincide.

WORK PERMITS

Foreign nationals require a work authorization, commonly known as a work permit, to work temporarily in Canada (C\$150). If the foreign national is from a country that is a party to the Canadian Visa Waiver Program, applications for work permits can be made in person at a Canadian port of entry (land, air or sea) and there is no need to apply for a temporary resident visa. However, if the foreign national is from a country that is not a party to this program, they must apply for both their work permit and a temporary resident visa (additional cost of C\$75 for single entry and C\$150 for a multiple entry visa) through a foreign visa office. Depending where the application is submitted, processing times range from two days to three months.



EMPLOYMENT TAXATION

TAX RESIDENCY FOR EMPLOYEES

For tax purposes, residence is determined by an individual's connection to Canada (including financial, residential, personal and social ties). An individual can also be deemed a Canadian resident for tax purposes in a particular year if he or she resides in Canada for 183 days or more that year.

An individual is considered a resident of the Canadian province where he or she resided on December 31 of that particular taxation year.

TAX RATES FOR EMPLOYEES

An individual who is resident in British Columbia (see "Tax Residency for Employees" above) during a taxation year is subject to the following taxes on his or her worldwide income from all sources:

Federal Income Tax. Federal income tax rates in 2011 are as follows:

- 15% on taxable income greater than C\$10,527 and less than or equal to C\$41,544
- 22% on taxable income greater than C\$41,544 and less than or equal to C\$83,088
- 26% on taxable income greater than C\$83,088 and less than or equal to C\$128,800
- 29% on taxable income greater than C\$128,800

Provincial Income Tax. Provincial income tax rates in 2011 are as follows:

- 5.06% on taxable income greater than C\$11,088 and less than or equal to C\$36,146
- 7.70% on taxable income greater than C\$36,146 and less than or equal to C\$72,293

- 10.5% on taxable income greater than C\$72,293 and less than or equal to C\$83,001
- 12.29% on taxable income greater than C\$83,001 and less than or equal to C\$100,787
- 14.7% on taxable income greater than C\$100,787

Canada Pension Plan. For 2011, the employee contribution rate is 4.95% of salary earned in the year greater than C\$3,500 and less than or equal to C\$48,300.

Employment Insurance. For 2011, the employee contribution rate is 1.78% of salary earned in the year less than or equal to C\$44,200.

NON-TAX RESIDENT EMPLOYEES

A non-resident individual employed in Canada is liable to pay Canadian federal and provincial income tax on their employment income. The rate and extent of taxation may be reduced by a tax treaty.

EMPLOYERS

An employer is generally required to deduct, withhold and remit in respect of its employees in Canada federal and provincial income tax on employment income, and employee and employer pension plan and EI premiums.

Employer contributions for 2011 are:

- **Canada Pension Plan.** Equal to applicable employee contributions
- **Employment Insurance.** Calculated as 2.49% of salary earned in the year less than or equal to C\$44,200



BUSINESS ENTITY TAXATION

TAX RESIDENCY FOR BUSINESS ENTITIES

A corporation will generally be considered resident in Canada for tax purposes if it was incorporated in or continued into Canada or its central management is situated in Canada. An applicable tax treaty will also be considered when determining residency.

TAX RATES FOR BUSINESS ENTITIES

Income Tax. A corporation resident in Canada must pay federal and provincial income tax on its worldwide income (income includes 50% of capital gains). The federal income tax rate for 2012 is expected to be 15%. The provincial income tax rate for 2012 is expected to be 10%, resulting in a combined federal-provincial tax rate of 25%.

Excise tax. Excise tax is currently levied in the form of a single federally administered Harmonized Sales Tax (HST) in British Columbia at a rate of 12%. HST registrants that are exclusively engaged in commercial activities are generally entitled to recover HST payable on input cost. It is anticipated that in 2013 excise tax in British Columbia will be in the form of a federally administered Good and Services Tax (GST) at a rate of 5% and a provincially administered Provincial Sales Tax (PST), which rate is expected to be 7%.

NON-TAX RESIDENT BUSINESS ENTITIES

A non-resident corporation is liable to pay tax on taxable income from carrying on business (including trading) in Canada and from the disposition of taxable Canadian property (subject to any applicable tax treaty).

TAXATION OF PAYMENTS TO FOREIGN SHAREHOLDERS

Dividends paid to foreign shareholders. These are generally subject to 25% non-resident withholding tax. Applicable tax treaties generally reduce this rate to 5% to 15%.

Dividends received from foreign companies. An individual or corporation resident in Canada must include in income dividends received from a foreign corporation. In certain circumstances, a corporation resident in Canada can deduct dividends received from and paid out of a foreign affiliate's active business income.

Interest paid to foreign corporate shareholders. Interest paid to arm's-length parties that is not "participating debt interest" is not subject to withholding tax. A 25% withholding tax applies to any payment to non-arm's-length parties or on any "participating debt interest". Applicable tax treaties generally reduce this rate to 0% to 15%.

IP royalties paid to foreign corporate shareholders. IP royalties are generally subject to non-resident withholding tax at the rate of 25% (subject to any reduction under an applicable Canadian tax treaty).

THIN CAPITALIZATION RULES

Thin capitalization rules restrict the deductibility of interest payable on debt to certain non-residents in excess of a 2:1 debt to qualifying equity ratio.

BUSINESS ENTITY TAXATION CONTINUED

FOREIGN SUBSIDIARIES

Foreign affiliate rules require a Canadian resident corporation to include in its income a participating percentage of certain passive foreign income (Foreign Accrual Property Income (FAPI)) of controlled foreign affiliates (CFA), regardless of whether the FAPI had been distributed. Corresponding deductions are generally available for foreign tax paid by the CFA on the FAPI.

Income may also be imputed to a Canadian resident from investment in a foreign investment entity or fund. Active business income of a foreign affiliate is generally exempt from Canada's foreign affiliate rules.

TRANSFER PRICING

Where a taxpayer and a non-arm's-length, non-resident person enter into one or more transactions, the transfer pricing rules generally provide that:

- if the consideration paid in the transaction is not an arm's-length amount, the consideration paid is deemed to be the arm's-length amount
- if the transaction is not one which would have been entered into had the parties been at arm's-length (and it may reasonably be considered that the transaction was not entered into other than to obtain a tax benefit), the nature of the transaction entered into is deemed to be that which would have been entered into had the parties been at arm's length

TAXATION OF IMPORTS AND EXPORTS

Importers are generally subject to Canadian excise tax and duty on goods imported into British Columbia (see "*Tax Rates for Business Entities*" above). Exporters are not generally subject to Canadian excise tax on duty on goods exported from Canada. The rate of duty depends on the type of goods imported.

Free trade agreements are currently in force between Canada and the US and Mexico (NAFTA), the European

Free Trade Association, Chile, Israel, Costa Rica, Peru, Colombia and Jordan.

The application of excise tax generally depends on the use of the imported goods. Goods imported for non-commercial use will generally be subject to HST at a rate of 12%. Goods imported for consumption, use, or supply in the course of commercial activities are generally entitled to recover GST or HST payable on input costs.

TAX TREATIES

Canada is a party to over 80 tax treaties, including treaties with the US, UK, Australia, China and France.



COMPETITION LAW

The federal *Competition Act* governs most business conduct in Canada. The Act is aimed at maintaining and encouraging competition in Canada by preventing corporations and individuals from engaging in anti-competitive conduct. The *Competition Act* focuses on two types of practices:

- *Civil matters*. These are subject to review by the Competition Tribunal (the governmental entity that hears and decides all applications filed under the *Competition Act* and any related matters) and include mergers, abuse of a dominant position, price maintenance, tied selling, refusal to deal, exclusive dealing, market restriction, delivered pricing, certain

misleading marketing practices, and agreements among competitors that substantially prevent or lessen competition.

- *Criminal matters*. These are subject to prosecution in Canadian courts and include bid rigging, conspiracies to fix pricing, allocate markets or control production of a product, multi-level marketing, and certain misleading advertising and telemarketing practices.

Civil matters are subject to remedial orders and administrative monetary penalties, whereas criminal matters are punishable by fines and/or imprisonment.

INTELLECTUAL PROPERTY

PATENTS

Nature of Right. Statutory rights created by the federal *Patent Act*. In order to patent an invention, it must be novel, possess utility, and not be obvious.

How Protected. A patent application must be filed with the Canadian Intellectual Property Office.

How Enforced. The patent holder can sue an infringer for damages.

Length of Protection. Patents last for 20 years from the filing date provided the prescribed maintenance fees are paid. In rare circumstances, the life of patent rights can be extended by an act of Parliament giving an extension of a particular patent to a particular patent holder.

TRADE-MARKS

Nature of Right. Rights arise in a trade-mark in Canada as soon as it is used in association with wares or services.

How Protected. A trade-mark holder can, under the common law action for passing off, prevent subsequent use of the same or a confusingly similar trade-mark for similar wares and/or services. However, without registration under the federal *Trade-marks Act* such protection is limited to the geographic area in which there can be said to be reputation in the trade-mark. Only registration under the federal *Trade-marks Act*, with the Canadian Intellectual Property Office, gives the full protection available by law. It also allows an action to be brought in any court of competent jurisdiction to prevent depreciation of goodwill in the trade-mark.

INTELLECTUAL PROPERTY CONTINUED

How Enforced. The right holder can sue under common law and/or the *Trade-marks Act*, the latter of which empowers a court to grant injunctive relief and the recovery of damages or profits where justified.

Length of Protection. A trade-mark is valid for 15 years, but can be renewed indefinitely.

INDUSTRIAL DESIGN

Nature of Right. To qualify for protection, a design must be original and not have been published in Canada or elsewhere more than one year before the filing date.

How Protected. Protection is through registration, under the federal *Industrial Design Act*, with the Canadian Intellectual Property Office which examines applications on a “first-to-file” basis.

How Enforced. The right holder can sue for infringement under the federal *Industrial Design Act*, which provides that the court may make orders for relief by way of injunction and/or the recovery of damages or profits.

Length of Protection. The owner of a registered industrial design has exclusive rights to it for ten years, provided the prescribed maintenance fees are paid.

COPYRIGHT

Nature of Right. There are four categories of works which are protected by copyright law: literary works; artistic works; dramatic works; and musical works. Copyright does not exist in ideas themselves, but only in the original, fixed expression of ideas.

How Protected. Copyright automatically subsists in a work in Canada on the creation of an original work (whether or not the work was published), if at the time the work was created, the author was a (i) Canadian citizen, (ii) a British subject or (iii) a citizen of a country that is a member of an international agreement for the protection of copyright to which Canada is a party. Although registration of copyright is not necessary, it is prudent. A registration application must be filed with the Canadian Intellectual Property Office.

How Enforced. Copyright can be enforced by the copyright holder through common law remedies and/or federal *Copyright Act* remedies such as injunctive, monetary, and/or other forms of relief.

Length of Protection. In most works, copyright subsists for the life of the author, plus 50 years. If a work was not published before the death of the author, copyright will subsist until publication and for a period of 50 years after publication.

CONFIDENTIAL INFORMATION

Nature of Right. Trade secrets and other confidential information is maintained in strict confidence by the owner of such information and such owners rely on contractual obligations placed on the recipients of the information to ensure information protection. The legal protection of trade secrets and confidential information from disclosure and unauthorized use is based on court rulings under common law.

How Protected. Generally, to be protected, the information in question must have been acquired in circumstances that produce an obligation of confidence. The most common example is the employer-employee relationship.

How Enforced. Owners of trade secrets may seek redress through the courts in certain circumstances if their secrets are disclosed or misused. The grounds for redress often include breach of confidence and fiduciary duty under common law. There is a duty on the owner of trade secrets to document their creation and use, as well as the measures taken to keep them confidential.

Length of Protection. The length of trade secret protection depends on the owner’s ability to maintain the information in confidence.



MARKETING AGREEMENTS

Agency. While there is no specific legislation governing agency in British Columbia, people who act as agents/brokers in certain industries are regulated by specific legislation, including the provincial *Real Estate Services Act*, provincial *Mortgage Brokers Act*, and provincial *Securities Act*.

Distribution. There is no specific legislation governing distribution in British Columbia, other than liquor distribution.

Franchising. There is no specific legislation governing franchising in British Columbia.

E-COMMERCE

E-commerce is principally regulated by the provincial *Electronic Transactions Act* which sets out rules for conducting business transactions electronically and governs the validity of electronic contracts and

electronic signatures. The federal *Personal Information Protection and Electronic Documents Act* applies to companies that operate under federal jurisdiction and provides guidelines relating to electronic signatures.

PRODUCT LIABILITY

Generally, under common law, product manufacturers have a post-sale duty to warn consumers and users of their products of defects and dangers that become known to the manufacturer after its products

were manufactured and sold into the marketplace. In addition, post-sale duties for certain types of products exist under common law.



DATA PROTECTION

Data protection is principally regulated by public sector and private sector legislation that exists on both the provincial and federal levels. In British Columbia, the following apply:

PROVINCIAL

Freedom of Information and Protection of Privacy Act. This Act governs the collection, use and disclosure of personal information by provincial departments, agencies and government corporations, and provides individuals a right of access to personal information being held by such public bodies. The Act also establishes rules that provincial public bodies must follow in responding to access to information requests.

Personal Information Protection Act. This Act governs the collection, use and disclosure of personal information by private sector organizations (both companies and non profits) in British Columbia, and provides individuals a right of access to personal information being held by such organisations.

FEDERAL

Personal Information Protection and Electronic Documents Act. This Act applies to federally-regulated private sector organizations (i.e., in the transportation, communications, broadcasting, federal banking and offshore sectors), as well as to the collection, use and disclosure of personal information by provincially-regulated private sector organisations across provincial and international borders in the course of commercial activities.

Privacy Act. This Act governs the collection, use and disclosure of personal information by federal departments, agencies and government corporations, including those operating in British Columbia. The Act also provides individuals a right of access to personal information being held by such public bodies.



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