



### Canada, Ontario

Prepared by Lex Mundi member firm,  
Blake, Cassels & Graydon LLP

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# Doing Business in **Canada**



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# Blakes Guide to Doing Business in Canada

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# Blakes Guide to Doing Business in Canada

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## I. Introduction

This Guide provides non-Canadians with an introduction to the laws and regulations that affect the conduct of business in Canada and, in particular, in the province of Ontario. In some cases, this Guide also identifies issues in the provinces of Alberta and British Columbia. Because of Canada's federal structure, the authority to make laws and regulations is divided between the federal and provincial governments by the Canadian Constitution although, in some areas of shared jurisdiction, both federal and provincial laws may apply.

For reasons rooted in history, Canada has two legal traditions, the civil law tradition of codified law in the province of Quebec, and the common law tradition of judge-made law in the other provinces of Canada. The province of Quebec, as Canada's only province whose majority population is French speaking, has also adopted a *Charter of the French Language* making French the official language of Quebec. Quebec also collects its own income taxes and has shared jurisdiction over immigration to Quebec with the federal government. A more detailed discussion of the laws of the province of Quebec is contained in the Blakes guide, *Doing Business in Quebec*.

The discussion under each heading in this Guide is intended to provide only general guidance and is not an exhaustive description of all provisions of federal, provincial and local law with which a business might be required to comply. Particular businesses or industries may also be subject to specific legal requirements not referred to in this Guide. For this reason, the reader should not rely solely upon this Guide in planning any specific transaction or undertaking, but should seek the advice of qualified counsel.

**The law is stated as of July 1, 2018.**

## II. Government and Legal System



With a population of approximately 36 million people and second only to Russia in area, Canada is a land rich in natural resources and among the world's leading industrialized nations. Home to some of the globe's most innovative and largest businesses, Canada has a highly skilled workforce and is a world leader in a variety of sectors, including manufacturing, technology, energy and natural resources.

While closely aligned in both commerce and culture to its southern neighbour, the United States, Canada has also enjoyed great success in forging strong trade ties with many countries in Asia, Europe, the Middle East, South America and other regions.

### 1. Brief Canadian History

Canada is a relatively young country that gained independence from Britain in stages over the course of a century. It started on its path as a self-governing nation in 1867, when the British Parliament passed the *British North America Act*. This legislation formed Canada's written constitution until 1982, when Britain formally relinquished its authority over the Canadian Constitution.

As its roots might suggest, Canada is a parliamentary democracy based closely on the British form of government. It has established two levels of government — a federal authority that governs matters of national interest, and the 10 provinces that govern matters of a more local interest. The Canadian Constitution also sets out the specific powers and jurisdictional limits for each level, with the intended result that each should have exclusive domain over certain aspects of government.

For example, the federal government has been allotted authority over the regulation of trade and commerce, banking, patents, copyright and taxation. The provinces have authority over property and civil rights and the administration of justice on a provincial level. As would be expected, there are areas of overlap. Indeed, the division of powers between the federal and provincial governments has been a long-standing source of contention among those who govern Canada.

The evolution of Canada's history has been greatly influenced by three world powers — Britain, France and the U.S. That said, while Canada's two official languages are English and French, the country is decidedly and increasingly multicultural, attracting talented new immigrants from all corners of the world.

## 2. Federal Government

Canada's federal government is based in Ottawa, Ontario. Similar to the U.S. federal government, the Parliament of Canada has two legislative bodies through which proposed bills must pass before becoming law: the House of Commons, which has elected representatives, and the Senate, which is comprised of appointees.

The members of Parliament (MPs) are elected representatives from over 300 "ridings" or electoral districts across Canada who sit in the House of Commons. The federal government itself is headed by a prime minister, who is usually the leader of the ruling political party in the House of Commons. The prime minister chooses members of the federal cabinet from the elected parliamentarians and these "ministers" are responsible for overseeing individual federal departments.

Canada has three principal political parties — Liberal Party of Canada, Conservative Party of Canada and New Democratic Party of Canada. The political party that controls the most seats in the House forms the ruling government of the day. The official opposition is the party that holds the second highest number of seats.

Canada's House of Commons is the only constitutionally authorized body to introduce legislation to raise or spend funds. Once a new law (a bill) or amendments to existing laws are voted on and approved by the House of Commons, the proposed legislation must then be debated and voted upon by the Senate.

This upper house of Parliament is made up of up to 105 senators appointed by the Governor General, on the advice of the prime minister. There are currently 97 senators and eight vacancies. Senators, theoretically, provide a check against potential excesses of the governing party. If the Senate approves a law or its amendments, the bill is ready for royal assent. The timing of the royal assent ceremony is chosen by the ruling government and, unless the bill fixes a date on which it is to come into force, it comes into force on the date of royal assent. This time period can be mere days or many months, depending on the political timetable.

## 3. Provincial and Territorial Governments

Similar to the U.S. system of states, each Canadian province has its own elected premier (similar to a U.S. governor), provincial cabinet of ministers, legislative assembly (i.e., lawmakers), political parties and court system.

Municipalities and their governments are considered "creatures" of the provinces and derive their authority from provincial laws. Canada also has territories, which can be created by the Parliament of Canada under its constitutional authority. While not full-fledged provinces, territorial governments are often delegated powers within the federal domain and have government structures similar to provinces.

Some of the laws that provinces are responsible for include family law, health law, labour standards, education, social services and housing. Similar to federal elections, voters in provinces elect members to sit in the provincial legislature based on ridings.



These elected officials are members of the legislative assembly (MLAs) or members of provincial parliament (MPPs). The ruling government is the party that controls the most seats in the legislature. Today, Canada has 10 provinces and three territories.

Canada's 10 Provinces	Capital
Alberta	Edmonton
British Columbia	Victoria
Manitoba	Winnipeg
New Brunswick	Fredericton
Newfoundland and Labrador	St. John's
Nova Scotia	Halifax
Ontario	Toronto
Prince Edward Island	Charlottetown
Quebec	Québec City
Saskatchewan	Regina
Canada's Territories	Capital
Northwest Territories	Yellowknife
Nunavut	Iqaluit
Yukon	Whitehorse

## 4. Canada's Legal System

Canadian courts are considered independent of the government. Elected politicians and bureaucrats cannot influence or dictate how the courts administer and enforce the law. In theory, federal and provincial governments make the laws, and courts interpret and enforce them. Increasingly, however, the line between who makes laws is blurring. In some cases, Canada's courts end up making new laws by virtue of the way legislation is interpreted.

A significant driving force for legislative and judicial change in recent years has been Canada's *Charter of Rights and Freedoms* (Charter) that took effect in 1982, and which imposes limits on government activity relating to Canadians' fundamental rights and liberties. These include the right to liberty, equality, freedom of religion, freedom of expression, freedom to associate with a group, and to be presumed innocent until proven guilty by an independent and impartial tribunal. The Charter, however, does not generally govern interactions between private citizens or businesses.

Canada's legal system is unique from many others in that the *Quebec Act* of 1774 created two systems of law — the “civil law” governing those in Quebec and a common law system in all other provinces. The common law system of justice, similar to that in the U.S., relies on the historical record of court interpretations of laws over the years. The civil law system in Quebec uses court decisions to interpret the intentions and allowable authority of law-makers, but also relies on a written Civil Code that sets out standards of acceptable behaviour or conduct in private legal relationships.

Canada's court system itself is shaped like a pyramid. At the top, the Supreme Court of Canada is the ultimate court of appeal and has the final word on the interpretation of the law of the country. The Supreme Court of Canada can declare all or part of a law invalid. All lower courts in the land are required to follow its interpretations when dealing with similar matters. Only an act of Parliament or a legislature, acting within their respective areas of authority, can change the effect of the top court's interpretation.

Next are the courts of appeal of each province. Decisions of a province's appellate court are binding on the lower courts in that province. In other provinces, some courts will seriously consider decisions of another province's court of appeal, but there is no requirement to follow them until their own provincial appeal court agrees.

Below each province's appeal courts are trial and specialty courts, where most civil and criminal matters are decided.

# III. Business Entities and Alternative Methods of Carrying on Business in Canada



A consideration of the different forms of business enterprises available under federal and provincial law will assist the investor in determining the most suitable arrangement for conducting business in Canada. Provincial law generally governs the forms of business organization although corporations may also be incorporated federally under the laws of Canada.

## 1. Corporations

A corporation with share capital is the most common form of business entity in Canada and enjoys advantages that make it the most practical form of business organization in most instances. Corporations may also be incorporated without share capital, generally for not-for-profit purposes. A corporation is a separate legal entity, distinct from its shareholders and management, that can hold property, carry on business and incur contractual and legal obligations.

### 1.1 What types of corporations are available in Canada?

#### 1.1.1 Will the Canadian subsidiary be a private or public corporation?

Canadian legislation governing corporations distinguishes between non-offering corporations (commonly referred to as private or closely held corporations) and public offering corporations. Private corporations generally are subject to restrictions on the transfer of their shares, a maximum permitted number of shareholders, excluding certain classes of individuals such as employees, and prohibitions against the issue of securities to the public. Public corporations do not have these restrictions and have taken steps under applicable provincial securities laws and stock exchange rules to permit their securities to be offered to, and traded by, the public.

Because shareholders of private corporations often participate actively in the management of the corporation, they do not require the same statutory protections that are essential for shareholders of public corporations. Many rules that apply to public corporations with respect to directors, insider trading, proxy solicitation, filing of financial statements, appointment of auditors, take-over bids and public disclosure do not apply to private corporations. However, all shareholders have substantial rights with respect to fundamental changes affecting the corporation, including, in some cases, dissent and appraisal rights and a very broad oppression remedy.

#### 1.1.2 Should the subsidiary be incorporated federally or provincially?

Corporations wishing to carry on business in more than one province or in foreign countries may prefer to incorporate under federal law. This permits the corporation to use its corporate name in every province in Canada (with the use of the French form of its name also being required in Quebec). Also, federally incorporated corporations may be more widely

recognized and accepted outside Canada, though there is no legal basis for this perception. Registration would be required to carry on business in any particular province in Canada.

When a corporation incorporates in a province, it must register and may be required to obtain an extra-provincial licence in any other province where it carries on business. Unlike a federal corporation, its corporate name may not be available for use in every other province or territory in Canada, in which case, it would be required to operate under an assumed name in that jurisdiction.

There may be additional factors affecting the decision of whether to incorporate federally or provincially. For example, differences in residency requirements for directors may be relevant in some cases. As well, U.S. investors may be interested in the possibility of incorporating an “unlimited liability company” (ULC) in British Columbia, Alberta or Nova Scotia to achieve certain U.S. tax objectives. A ULC is treated as a corporation for Canadian tax purposes but may be eligible for flow-through treatment for U.S. tax purposes. The Canada–U.S. tax treaty contains some adverse provisions that need to be dealt with in the case of unlimited liability companies (see Section VII, “Tax”).

### **1.1.3 What are the specific procedures for incorporation? How long does the process take?**

A corporation is formed in Canada by filing certain prescribed documents with the appropriate authorities under the *Canada Business Corporations Act* or the corporations act of one of the Canadian provinces (in Ontario, the *Business Corporations Act*).

The most important document under the *Canada Business Corporations Act* and similar provincial statutes is the “articles of incorporation,” which sets out the name of the corporation, its share capital, any restrictions on share transfer, the number of directors and any restrictions on the business to be undertaken. In British Columbia, the “notice of articles” sets out the company’s name, its authorized capital, whether a class of shares has any special rights or restrictions, the names and addresses of the company’s directors, and the “articles” govern the conduct of the company’s internal affairs. In most other jurisdictions, matters in the “articles” of a British Columbia corporation are dealt with in bylaws passed by the directors and shareholders following incorporation. Under most statutes, corporations are given the capacity and rights of a natural person and it is not necessary to specify the objects for which the corporation is incorporated. The name of the corporation is strictly regulated in all jurisdictions to avoid names that are too general or misleading. There is a government screening process in some jurisdictions and it is sometimes possible to pre-clear a name prior to application for incorporation. In addition, the Quebec *Charter of the French Language* requires that a corporation carrying on business in Quebec use a French version of its name. Once the required documents are filed and fees paid, incorporation is automatic. The corporation comes into existence on the date of issue of a certificate of incorporation by the regulators.

The government cost of establishing and maintaining a Canadian corporation is relatively modest in most jurisdictions. In Nova Scotia, however, the fee to incorporate an unlimited liability company is much higher than average, as is the annual fee. Modest registration fees may also be payable upon commencing business in various provinces.

## 1.2 Supervision and management of a corporation

### 1.2.1 Who is responsible for the corporation?

A Canadian corporation acts through its board of directors and officers. The directors are elected by the shareholders, and subject to any “unanimous shareholders agreement,” manage the business and affairs of the corporation. Unanimous shareholder agreements are discussed in Section III, 1.2.2, “Residency requirements for directors or unanimous shareholder agreements.” Corporate statutes may require that a certain number of Canadian directors be present. Under the federal statute, at least 25 per cent of the directors at a meeting must be resident Canadians or, if there are fewer than four directors, at least one must be a resident Canadian (other than for corporations engaged in certain prescribed business sectors, which require a majority of the directors present to be resident Canadians). There are a number of general rules governing the qualifications and number of directors, such as a requirement that each director be at least a specified age and not bankrupt, but (unlike many other countries) there is no requirement that the director hold any shares in the corporation unless the incorporating documents provide otherwise. These rules apply equally to non-resident and resident directors. There are also additional rules that relate only to directors of public corporations. Under the Ontario statute, a private corporation must have at least one director, and a public corporation at least three.

Directors and officers have a duty to act honestly and in good faith with a view to the best interests of the corporation. They must exercise their powers with due care, diligence and skill, and must comply with the governing statutes, regulations, incorporating documents, and any unanimous shareholder agreements. They are also subject to conflict of interest rules. Where directors and officers neglect their duties, they may be subject to personal liability. They may also be subject to other liabilities, such as with respect to certain unpaid taxes and employee wages. A corporation may purchase and maintain insurance for the benefit of directors and officers for certain liabilities incurred in such capacity.

Directors appoint officers and delegate some of their powers to officers who conduct the day-to-day management of the corporation. It is rare for a Canadian corporation to have a “managing director,” although such a role is specifically recognized in some Canadian corporate statutes. The senior operating officer would generally be described as the “president,” with the chief financial officer often being the “vice president, finance” or the “treasurer.” Normally, there is also a secretary. One person may hold two or more offices, and officers need not be resident Canadians. Canadian immigration rules must be satisfied in respect of the transfer of non-resident employees to Canada to work for a Canadian subsidiary.

### 1.2.2 Residency requirements for directors or unanimous shareholder agreements

As noted in Section III, 1.2.1, “Who is responsible for the corporation?”, the federal and the Ontario corporate statutes include a Canadian residency requirement for directors of 25 per cent, except where there are fewer than four directors, in which case at least one must be a resident Canadian. There are exceptions in the federal statute to this general rule for corporations in certain sectors. Some jurisdictions (being British Columbia, Quebec, New Brunswick, Nova Scotia, Prince Edward Island, Nunavut, the Northwest Territories and

Yukon) do not impose residency requirements for directors. There are no residency requirements for officers in any Canadian jurisdiction.

A foreign parent corporation will generally deal with the residency requirement of directors in the following way. It may find Canadian individuals to represent it on the board of the subsidiary, either Canadian resident employees or professional advisers (who will generally seek indemnification from the parent for agreeing to act). In some cases, the foreign parent will take the further step of entering into a “unanimous shareholders agreement” with respect to the corporation. Many Canadian corporate statutes (including the federal and Ontario statutes) provide for such agreements, under which the powers of the directors to manage the corporation’s business and affairs may be transferred in whole or in part to its shareholders. To the extent that the directors’ powers are restricted, their responsibilities and liabilities are correspondingly reduced and transferred to the shareholders.

## **1.3 How may a corporation be capitalized?**

### **1.3.1 Shares**

A share represents a portion of corporate capital and entitles the holder to a proportional right to corporate assets on dissolution. Shares must be fully paid before they can be issued (although calls on shares are permitted in Nova Scotia and Prince Edward Island, as well as under Quebec law for certain pre-existing companies). Under the federal statute and the corporate statutes of most provinces, a corporation is prohibited from issuing shares having a par value.

There is no minimum or maximum amount of share capital that a corporation is allowed to issue, unless otherwise specified in its incorporating documents. “One shareholder” companies are permissible under Canadian law.

Canadian corporate law provides great flexibility in developing the appropriate capital structure for a corporation. The articles of incorporation specify the permitted classes of shares and their key terms. Shares may be voting or non-voting, or they may have limited voting or disproportionate voting rights. The incorporating documents may attach various conditions to the payment of dividends and will stipulate rights on dissolution of the corporation. Absent specific provision in the articles, under the Ontario and federal statutes, shareholders do not have any pre-emptive rights in respect of future share offerings.

Redemption or purchase of shares by a corporation and payment of dividends are subject to statutory solvency tests. Financial assistance by the corporation in favour of shareholders and other insiders is also regulated in some provinces but is no longer regulated under the federal or Ontario statutes.

### **1.3.2 Debt financing**

Corporate capital may also be raised by borrowing. Directors may authorize borrowing unless the incorporating documents or a unanimous shareholders agreement restricts them. Restrictions upon corporate directors, however, will usually not protect the corporation against third parties in the case of unauthorized borrowing by directors. Corporations also have the power to grant security interests over their property and to give guarantees.

## 1.4 What are the basic procedures governing shareholder participation?

Shareholder meetings are usually held annually in a place determined by the directors or stipulated in the documents that govern the corporation. At the annual meeting, the financial statements for the year will be presented to the shareholders and any necessary resolutions passed (such as for the election of directors). Some corporate statutes require meetings to be held in their jurisdiction unless the documents that govern the corporation provide otherwise or the shareholders agree to hold meetings elsewhere. However, shareholders may act by way of written resolution rather than at a meeting. The practice with respect to non-resident wholly owned subsidiaries is for all shareholder matters to be carried out through written resolutions.

Where a corporation has only one class of shares, each share entitles the holder to one vote at all shareholder meetings. Where there is more than one class of shares, the voting rights are set out in the articles of incorporation. Shareholders may vote personally or by proxy.

## 2. Corporations and Partnerships in Canada

In Canada, a partnership is not a separate legal entity but a relationship between persons (which may be individuals, corporations, trusts or other partnerships) carrying on business in common with a view to profit.

A corporation is free to enter into partnerships in Canada. The resources each partner contributes to a partnership would commonly be money, but could also be skills, labour, intellectual property or other property. The relationship of the partners is established by contract and is also subject to applicable provincial laws. Some provinces require that partnerships be registered. A partnership may take one of three forms, a “general partnership”, a “limited partnership” or a “limited liability partnership”.

Subject to the terms of their agreement, all partners in a general partnership are entitled to participate in ownership and management, and each assumes unlimited liability for the partnership’s debts and liabilities. To the extent that each partner in a general partnership is itself a limited liability corporation, the liability risk for such partners would be reduced (but not eliminated).

In a limited partnership, there is a separation between the partners who manage the business (general partners) and those who contribute only capital (limited partners). A limited partnership must have at least one general partner, who will be subject to unlimited liability for the debts of the partnership. Limited partners are liable only to the extent of their capital contribution to the partnership provided they do not participate in the management of the business.

A third type of partnership is the limited liability partnership (LLP). In Canada, a limited liability partnership is only available in certain provinces, is governed by specific provincial legislation and is often only available to groups of professionals, such as lawyers, accountants and doctors. In British Columbia (unlike other provinces), any kind of business may be carried on through an LLP. A limited liability partnership is a general partnership in which the liability of its partners is limited. This type of partnership provides greater liability protection for partners

as only the assets of the partner who worked on, or with, a particular client would be at a risk if that client sued the partnership (and the assets of the other partners would be protected).

A partnership would generally be entered into by a foreign corporation, directly or through a subsidiary, only if it wished to establish a joint venture arrangement with another person or corporation. The income or loss of the business will be calculated at the partnership level as if the partnership were a separate person, but the resulting net income or loss will then flow-through to the partners and be taxable in their hands. Partnerships themselves are not taxable entities for Canadian income tax purposes. Because of its flow-through nature, a partnership might be appropriate if a joint venture business is expected to generate disproportionately large expenses in its early years, as the partnership structure would allow the individual co-venturers to take advantage of the tax write-offs arising from these expenses. In the case of a limited partner, the amount of losses which may be available is limited by the amount which the limited partner is considered to have “at risk” in the partnership.

### **3. Joint Venture Structuring**

Two or more parties may engage in a joint venture or syndicate where they collaborate in a business venture. There is no specific statutory definition or regulatory scheme for joint ventures, at either the provincial or federal level, although they are not uncommon in certain industries such as construction and natural resources. A joint venture generally denotes an association of two or more persons, usually governed by a contract, pursuant to which such persons agree to combine their money, property, knowledge, skills and other resources in furtherance of a desired venture, typically agreeing to share the profits and losses, with each having some degree of control over the venture.

To help avoid the presumption that a partnership has been formed, the joint venture agreement should declare that a partnership is not intended. The agreement should also set out the scope of the venture and the method of control and decision-making. It should stipulate the rights and obligations of the participants and provide mechanisms for the settlement of disputes. Unlike a corporation, a joint venture is not a distinct legal entity. It cannot sue or be sued. Such rights and liabilities are attached to the entities involved in the joint venture.

## **4. Alternative Methods of Carrying on Business**

### **4.1 Branch office**

Organizations with foreign ownership may conduct business in Canada through branch offices, so long as the *Investment Canada Act* and provincial registration and licensing requirements are complied with. The foreign corporation must register in all provinces in which it will carry on business.

A branch office operates as an arm of the foreign business, which may enjoy tax advantages from such an arrangement. See Section VII, “Tax.” However, the foreign business’s liability for the debts and obligations incurred in its Canadian operations is not limited as it would be if the Canadian operations were conducted by a separate corporation (other than a British Columbia, Alberta or Nova Scotia unlimited liability corporation or company) of which the foreign business was the shareholder.



## 4.2 Agents and distributors

As an initial step, a foreign enterprise may wish to offer its products or services in Canada by means of an independent agent or distributor. An agent usually would be given limited authority to solicit orders for acceptance at the foreign head office, and would not normally take title to the goods or provide services to the customer. A distributor, on the other hand, usually takes title to the goods and offers them for resale, either directly to the customer or through dealers or retailers. In both cases, the foreign enterprise will likely seek to avoid establishing a permanent establishment in Canada for tax purposes. See Section VII, "Tax."

The relationship with an agent or distributor should be established by contract. Although provincial law does not generally prohibit the termination of an agent or distributor, the courts will require reasonable notice to be given, or damages in place of notice, in the absence of an agreed contractual term for the relationship. The nature of the relationship should be reviewed to determine whether the arrangements are subject to franchise legislation. See Section III, 4.3, "Franchising."

## 4.3 Franchising

Franchising is not as heavily regulated in Canada as it is in a number of other jurisdictions, including the United States. In Canada, franchising is a purely provincial matter and, currently, six provinces have franchise legislation in effect: Alberta, British Columbia, Manitoba, Ontario, Prince Edward Island and New Brunswick. On February 1, 2017, British Columbia became the sixth Canadian province to have franchise legislation in effect. While there are slight differences in the legislation and regulatory requirements of each province, they are all ultimately derived from the U.S. model of mandated disclosure by a franchisor to prospective franchisees, coupled with a duty of good faith and fair dealing owed by each party to the other, and a right of franchisees to associate freely amongst themselves.

Unlike the United States, no Canadian province requires either the registration of franchisors or the public filing of their disclosure documents. There is no government agency in Canada which is charged with the task of regulating or overseeing compliance with franchise legislation, with the result that there is no body (save the court) from whom any permission must be sought or any comfort may be obtained (regarding compliance with or the non-application of franchise legislation, the availability of a disclosure exemption or otherwise).

Put simply, a franchise relationship is an ongoing relationship that is found to exist under provincial franchise legislation where the franchisor grants the franchisee the right to use the franchisor's trade-marks and other intellectual property and business methodology (typically at a specific location or within a specific territory only) in exchange for a fee. In a franchise relationship, the parties are independent contractors and neither party is an agent for the other, but the franchisor generally retains control over the use of its marks and a certain degree of control over the franchisee's manner of carrying on its business. This designation as a "franchise" is fact-based and occurs whether a company intends to operate as a "franchise" or not. Provincial franchise legislation in Canada defines "franchise" broadly and the term may apply to distribution arrangements not generally perceived to be franchises. As such, when utilizing distributorships or granting licenses in Canada, it is important to consider the implications of franchise legislation and the extent of a company's involvement in and/or control over the operation of the new distributor or retailer.

Among the most significant features of franchise legislation is the disclosure obligation which requires that franchisors deliver detailed pre-sale disclosure documents to prospective franchisees at least 14 days before an agreement is signed or any fees are paid. The disclosure document must contain all of the information prescribed by provincial regulations (which are substantially similar across provinces with franchise legislation) and any additional material facts about the franchise that could reasonably be expected to influence the prospective franchisee's assessment of the value of the franchise or decision to enter into a franchise arrangement. If the disclosure document does not comply with the legislative requirements, is delivered late or is not delivered at all, then the franchisee has the right for a specific period of time to rescind the franchise agreement and the franchisor is required to compensate the franchisee for all losses incurred in establishing and operating the franchised business (in addition, in certain provinces, to repurchase obligations). Franchisees can also bring a claim for damages for misrepresentation if the franchisor does not meet the applicable disclosure requirements.

Generally speaking, franchise legislation is remedial legislation enacted to protect franchisees and accordingly, it is not possible to contract out of its provisions. This means that properly identifying one's business as a franchise system that is subject to franchise legislation is an important step in determining the applicable legislative requirements.

## **4.4 Licensing**

Licensing is a contractual relationship between two parties in which a licensor grants a licensee the right to use trademarks, patents or other intellectual property. While franchising typically involves the licensing of trademarks, know-how and the use of a franchise system, it is distinguished from pure licensing arrangements by the franchisor's control over the franchisees' manner of carrying on its business. The licensing relationship does not dictate the licensee's method of operation but would often establish standards applicable to the licensee's use of the licensed marks. The relationship is governed predominantly by the general law of contracts but the federal legislation regulating the relevant form of intellectual property would also be relevant.

# IV. Trade and Investment Regulation



## 1. Competition Law

The *Competition Act* (Act) is Canada's antitrust legislation. It is legislation of general application and reflects classical economic theory regarding efficient markets and maximization of consumer welfare. It is administered and enforced by the Competition Bureau (Bureau), a federal investigative body headed by the Commissioner of Competition (Commissioner). The Act may be conveniently divided into two principal areas: criminal offences and civilly reviewable conduct, which includes merger regulation.

### 1.1 Criminal offences

#### 1.1.1 What business practices are subject to criminal liability?

The main criminal offences in the *Competition Act* relate to conspiracy and bid-rigging.

The conspiracy provisions prohibit competitors (or persons who would be likely to compete) from: conspiring or entering into an agreement or arrangement to fix prices; allocate sales, territories, customers and markets; or fix or control production or supply. Contravention of these provisions constitutes a per se offence (i.e., there is no need to show an effect on competition to secure a conviction). Prior to 2010, proof of an undue limiting, lessening or prevention of competition was required to establish the offence. The penalty upon conviction is imprisonment for up to 14 years and/or a fine not exceeding C\$25-million per offence.

The bid-rigging provisions prohibit two or more bidders (in response to a call or request for bids or tender) to agree that one party will refrain from bidding, withdraw a submitted bid, or agree among themselves on bids submitted. The provisions do not apply when the parties clearly inform the party who issued the tender about the joint bidding agreement at or before the time they submit the bid. The penalty upon conviction is imprisonment for up to 14 years and/or a fine at the discretion of the court.

#### 1.1.2 How are criminal offences prosecuted under the *Competition Act*?

The Commissioner, either on his own initiative or following a complaint from six resident Canadians, can initiate an investigation into a possible violation of the criminal provisions of the Act. At any time during his investigation, the Commissioner can refer the matter to the Director of Public Prosecutions (DPP). The DPP is the only person who may initiate criminal proceedings for contraventions of the Act. To obtain a conviction, the DPP must satisfy a court beyond a reasonable doubt that an offence has been committed.

It is important to note that, under the Act, a foreign competition authority that is a party to a mutual legal assistance treaty with Canada may request, subject to ministerial authorization, the assistance of the Commissioner to further its investigation — even where the conduct alleged as anti-competitive did not occur in Canada. Evidence obtained by the Commissioner in a Canadian investigation may be provided to a foreign competition authority without the authorization of the party being investigated.

The Act also allows for a private right of action (see Section IV, 1.3, “What business practices will attract civil liability? What is the exposure to civil damages?”).

### **1.1.3 Recent enforcement action**

Consistent with a global trend among competition authorities, the Commissioner has devoted substantial resources to enforcing the criminal conspiracy provisions of the Act, particularly so-called “hard core” cartels involving agreements between competitors to fix prices or allocate markets or customers between themselves. The single largest fine imposed thus far on a corporation is C\$48-million for conspiracy and C\$30-million for bid-rigging. Executives have also been fined and subjected to jail terms.

## **1.2 What business practices may constitute civilly reviewable conduct and be subject to possible review before the Competition Tribunal?**

Certain non-criminal conduct may be subject to investigation by the Bureau and review by the Competition Tribunal (Tribunal). The Tribunal is a specialized body that is comprised of both judicial and lay members. Reviewable practices are not criminal and are not prohibited until made subject to an order of the Tribunal specific to the particular conduct and party. Matters reviewable by the Tribunal include, among other things, non-criminal competitor collaborations, refusals to deal, exclusive dealing, tied selling, market restriction, price maintenance and abuse of dominant position.

If the Tribunal finds, on the civil standard of the balance of probabilities that a person has engaged in the reviewable activity, it may, depending on the activity, order a person to do or cease doing a particular act in the future, and to otherwise take any other action necessary to fix the anti-competitive harm. The Tribunal is also empowered to impose administrative monetary penalties of up to C\$10-million (and, in the case of repeat offenders, C\$15-million) under the abuse of dominance provisions. There are criminal penalties for failure to comply with an order once it has been made.

Private parties have the right to bring complaints directly to the Tribunal in relation to five matters: refusals to deal, exclusive dealing, tied selling, market restriction and price maintenance. At one time, the Commissioner was the only person who could bring reviewable trade practices before the Tribunal.

## **1.3 What business practices will attract civil liability? What is the exposure to civil damages?**

Section 36 of the Act establishes a private right of action for losses suffered as a result of another party’s breach of any of the criminal provisions (set out in Part VI) of the Act (see Section IV, 1.1, “Criminal offences” for a discussion of the main criminal offences under the Act), or failure to comply with an order made pursuant to the Act (such as, by the Tribunal in connection with civilly reviewable conduct). The constitutional validity of this provision has been upheld and increasing numbers of parties are seeking to enforce this right.

Unlike in the U.S., section 36 limits the recoverable damages to losses that can be proven to have resulted from a violation of the Act or the failure to comply with the order in question, plus costs.

Section 36 provides that the “record of proceedings” in proceedings that resulted in either (i) a conviction of a criminal offence under the Act or (ii) a finding of a failure to comply with an order made under the Act, is *prima facie* proof of the alleged conduct in a civil action. Furthermore, any evidence given in the prior proceedings as to the effects of the conduct on the person bringing the civil action “is evidence thereof” in the civil action.

## 1.4 Merger regulation

### 1.4.1 Under what circumstances will pre-merger notification be required?

Mergers fall under the civilly reviewable matters provisions of the Act. All mergers are subject to the Act, and thus to the substantive review provisions (described in Section IV, 1.4.3, “What is the substantive test applicable to the review of mergers?”) and to the enforcement procedures (set out in Section IV, 1.4.4, “What are the consequences if the Commissioner is concerned with a transaction?”) of the Act. Additionally, mergers that satisfy certain prescribed thresholds must be notified to the Bureau, and certain statutory waiting periods must have expired (subject to certain exceptions), before a merger can be completed.

The thresholds applicable to merger transactions are as follows:

- **Size of parties test:** the parties to the transaction, together with their affiliates, must have assets in Canada, or gross revenues from sales in, from or into Canada, that exceed C\$400-million.
- **Size of transaction test:** in respect of the target, the value of the assets in Canada, or gross revenues from sales in or from Canada from such assets, must exceed C\$92-million (this figure is adjusted annually).
- **Shareholding/interest test:** In addition to the above two threshold tests, the Act prescribes a shareholding/economic interest test that applies to the acquisition of an interest in a corporation or in an unincorporated entity. Regarding a corporation, there is an additional requirement that the acquirer and its affiliates must be acquiring more than 20 per cent of the voting shares of a public corporation or more than 35 per cent of the voting shares of a private corporation, or where the acquirer already owns such number of voting shares, it must acquire more than 50 per cent of the voting shares of the corporation. In the case of an unincorporated entity, the test is similar to the above, except that the interest is based on the right to more than 35 per cent of the profits or assets on dissolution, and if this level has already been exceeded, then more than 50 per cent. Additional thresholds apply in the case of amalgamations, which would cover, for example, Delaware mergers.

If all applicable thresholds are exceeded, the parties to the transaction are required to provide the Commissioner with prescribed information relating to the parties and their affiliates. The obligation to notify is on both parties to a transaction and the statutory waiting period (described below) does not commence until the parties have submitted their respective notifications. However, in the case of a hostile bid, a provision exists to allow the Commissioner to require the target to provide its portion of the notification within a prescribed period. Where this provision applies, the statutory waiting period begins when the bidding party submits its notification. A notification is subject to a filing fee of C\$72,000.

## 1.4.2 What are the notification procedures?

The waiting period is 30 days following the day on which complete notifications were submitted to the Bureau.

The parties may close the transaction after the 30-day statutory waiting period has expired unless the Commissioner makes a request for additional information, known as a Supplementary Information Request (SIR). The scope of additional information that may be required is potentially quite broad; any information relevant to the Commissioner's assessment of the transaction can be requested. Subject to the Commissioner seeking an injunction, the merging parties may complete their merger 30 days after the information required by the SIR has been received by the Commissioner. In many cases, however, the parties will choose to wait until the Commissioner has completed his substantive assessment of the transaction (see Section IV, 1.4.3, "What is the substantive test applicable to the review of mergers?").

In addition to, or in lieu of, filing a notification, the merging parties can request that the Commissioner issue an advance ruling certificate (ARC). An ARC can be issued, at the Commissioner's discretion, where he is satisfied that he does not have sufficient grounds upon which to challenge the merger before the Tribunal. In practice, an ARC is issued only in respect of mergers that do not raise any substantive concerns. The issuance of an ARC has two important benefits:

- It exempts the parties from having to file a notification (where the Commissioner does not issue an ARC, the parties can apply to have the requirement to file the notification waived as long as substantially the same information was supplied with the ARC request); and
- It bars the Commissioner from later challenging the merger on the same facts upon which the ARC was issued.

A filing fee of C\$72,000 applies to a request for an ARC. Only a single fee applies where both a request for an ARC and a notification have been submitted.

Where the Commissioner is not prepared to issue an ARC, but nevertheless determines that he does not have grounds upon which to initiate proceedings to challenge a proposed transaction, he will typically grant what is commonly referred to as a "no-action letter." A substantial number of transactions close on the basis of a no-action letter. However, where an ARC has not been granted, the Commissioner retains the jurisdiction to challenge a transaction for up to one year after it has been substantially completed.

## 1.4.3 What is the substantive test applicable to the review of mergers?

The substantive test applicable to a merger transaction is whether it will, or is likely to, prevent or lessen competition substantially in a relevant market. A market is defined on the basis of product and geographic dimensions. The Act provides that the factors relevant to assessing the competitive impact of a merger include the extent of foreign competition, whether the business being purchased has failed or is likely to fail, the extent to which acceptable substitutes are available, barriers to entry, whether effective competition would

remain, whether a vigorous and effective competitor would be removed, the nature of change and innovation in a relevant market, and any other factor relevant to competition.

The Act also provides for an “efficiencies defence” under which a merger that prevents or lessens, or is likely to prevent or lessen, competition substantially in any market in Canada may proceed as long as the efficiency gains resulting from the merger will be greater than, and will offset, the anticipated anti-competitive effects.

#### **1.4.4 What are the consequences if the Commissioner is concerned with a transaction?**

If, in the course of reviewing a proposed merger, the Commissioner identifies areas in which he believes the transaction will prevent or lessen competition substantially, he will normally try to negotiate alterations to the transaction which address his concerns. These negotiations can be protracted. Prior to challenging a transaction before the Tribunal, the Commissioner may apply to the Tribunal for an order enjoining the parties from completing the transaction for a period not exceeding 30 days to permit the Commissioner to complete his inquiry. The Commissioner can apply for an extension of the period for an additional 30 days. If the Commissioner makes an application to the Tribunal challenging a proposed transaction, he may also apply for an interim order on such terms as the Tribunal deems appropriate.

Following the end of this period, the Commissioner can challenge the merger. There is precedent for the Bureau permitting the parties to take up shares and enter into a “hold separate” agreement until the Tribunal process has run its course. Following its review, the Tribunal can either allow the merger to proceed or, in the case of a completed merger, it can order a purchaser to dispose of all or some assets or shares or take such other action as is acceptable to the merging parties and to the Commissioner.

In practice, there have been very few contested proceedings. In most cases where the Commissioner has expressed concerns, the parties have been able to agree upon a set of commitments that are mutually satisfactory to the merging parties and to the Commissioner.

## **2. General Rules on Foreign Investments**

### **2.1 Are there special rules governing foreign investment?**

The *Investment Canada Act* is a federal statute of broad application regulating investments in Canadian businesses by non-Canadians. Except with respect to cultural businesses, the Investment Review Division (Investment Canada) administers the *Investment Canada Act* under the direction of the Minister of Innovation, Science and Economic Development Canada. The Minister of Canadian Heritage is responsible for cultural businesses (i.e., business activities relating to Canada’s cultural heritage, such as publishing, film, video, music and broadcasting). In some cases investments are reviewed by both the Minister of Innovation, Science and Economic Development Canada and the Minister of Canadian Heritage where only part of the business activities of the Canadian business involve Canada’s cultural heritage.

Investments by non-Canadians to acquire control over existing Canadian businesses or to establish new ones are either reviewable or notifiable under the *Investment Canada Act*. The

rules relating to an acquisition of control and whether an investor is a “Canadian” are complex and comprehensive.

A “direct acquisition” for the purpose of the *Investment Canada Act* is the acquisition of a Canadian business by virtue of the acquisition of all or substantially all of its assets or a majority (or, in some cases, one-third or more) of the voting interests (shares) of the entity carrying on the business in Canada. Subject to certain exceptions discussed below, a direct acquisition is reviewable where the value of the acquired assets is C\$5-million or more.

An “indirect acquisition” for the purpose of *the Investment Canada Act* is the acquisition of control of a Canadian business by virtue of the acquisition of a non-Canadian parent entity. Subject to certain exceptions discussed below, an indirect acquisition is reviewable where (a) the value of the Canadian assets is less than or equal to 50 per cent of the value of all the assets acquired in the transaction and the value of the Canadian assets is C\$50-million or more, or (b) the value of the Canadian assets is greater than 50 per cent of the value of all the assets acquired in the transaction and the value of the Canadian assets is C\$5-million or more.

The acquisition of control of an existing Canadian business or the establishment of a new one may also be reviewable, regardless of asset values, if it falls within a prescribed business activity related to Canada’s cultural heritage or relates to national security.

Special rules apply with respect to investments made by state-owned enterprises (SOEs):

- The Minister of Innovation, Science and Economic Development Canada has the power to determine that an SOE has acquired “control in fact” of a Canadian business or that a Canadian business is “controlled in fact” by one or more SOEs (notwithstanding the control rules otherwise set out in the statute), with the potential result that certain investments may be subject to a ministerial review and approval requirement where they otherwise would not have been.
- SOEs’ investments in the Canadian oil sands are limited by a federal government policy introduced in December 2012. Specifically, reviewable acquisitions of control (including acquisitions of “control in fact”) of oil sands businesses by SOEs will not receive approval from the Minister of Innovation, Science and Economic Development Canada, except on an “exceptional basis.”

The *Investment Canada Act* defines an SOE broadly as including foreign governments and their agencies and entities that are controlled or influenced, directly or indirectly, by such governments or agencies. It also includes “an individual who is acting under the direction of” or “who is acting under the influence of” such a government or agency. An SOE investor, as with any other investor, will also have to consider the potential application of the national security review regime to the proposed investment.

## **2.2 How are WTO members treated differently?**

The *Investment Canada Act* reflects commitments made by Canada as a member of the World Trade Organization (WTO). In the case of a direct acquisition by or from a (non-Canadian) “WTO investor” (that is, an investor controlled by persons who are residents of WTO member countries) that is not an SOE, the C\$5-million threshold for direct investments increases to an “enterprise value” of C\$1-billion.



The regulations set out the precise manner in which the “enterprise value” is calculated. In general terms:

- For acquisitions of control of publicly traded entities, the enterprise value of the assets of the Canadian business is equal to the market capitalization of the entity plus liabilities, minus cash and cash equivalents
- For acquisitions of control of private companies and for asset acquisitions, the enterprise value is the purchase price, plus liabilities, minus cash and cash equivalents

The higher threshold applicable to WTO investors does not apply where the Canadian business is considered to be carrying on a “cultural business.”

Where the investor is an SOE WTO investor, the threshold is an asset value based test, which is C\$379-million, based on the book value of the assets of the Canadian business.

An indirect acquisition of a Canadian business by a non-SOE WTO investor is not reviewable but only subject to a notification obligation (provided that the Canadian business is not considered to be carrying on a cultural business).

## **2.3 How are trade agreement investors treated differently?**

A direct acquisition by a trade agreement investor is subject to a higher review threshold. Trade agreement investors refer to investors whose country of ultimate control is party to a trade agreement with Canada (such as the Canada-European Union Comprehensive Economic and Trade Agreement Implementation Act (CETA), the North American Free Trade Agreement (NAFTA), or bilateral trade agreements (e.g., Canada-Chile Free Trade Agreement Implementation Act; Canada-Korea Economic Growth and Prosperity Act).

Starting September 21, 2017, when a Canadian business is being acquired by a trade agreement investor, the threshold for review is an “enterprise value” of C\$1.5-billion (which is higher than the C\$1-billion threshold for WTO investors). The threshold will be adjusted annually to account for growth in nominal GDP, starting January 1, 2019.

The threshold does not apply to investments by SOEs or where the Canadian business is considered to be carrying on a “cultural business”.

## **2.4 If a review is required, what is the process?**

A reviewable transaction may not be completed unless the investment has been reviewed and the relevant minister is satisfied that the investment is likely to be of “net benefit to Canada.” The non-Canadian proposing the investment must make an application to Investment Canada setting out particulars of the proposed transaction. There is then an initial waiting period of up to 45 days; the minister may unilaterally extend the period for up to 30 days and then only with the consent of the investor (although in effect this can be an indefinite period since, with a few exceptions, the investor cannot acquire the Canadian business until it has received, or is deemed to have received, the minister’s “net benefit to Canada” decision). If the waiting period is not renewed and the transaction is not expressly rejected, the minister is deemed to be satisfied that the investment is likely to be of net benefit to Canada. Failure to comply with these rules opens the investor to enforcement proceedings that can result in fines of up to C\$10,000 per day.

The principal practical negative effects of a review are the reality of delay and negotiation. It is often difficult to get the minister's approval before the expiration of the initial 45-day period. In addition, the minister will usually seek undertakings (see Section IV, 2.4, "What is required for an investment to be of "net benefit to Canada"?") as a condition of approval.

Special review requirements and timing considerations apply to transactions, whether already implemented or proposed, which potentially raise national security considerations.

The term "national security" is not defined in the *Investment Canada Act*. However, in December 2016, the federal government released guidelines on national security reviews, as part of a new transparency initiative intended to encourage foreign investment by providing investors more information about (a) the types of transactions that may require a national security review; and (b) the factors considered by the government when assessing national security risk. Relevant factors identified in the guidelines include: the effect on Canada's defence capabilities, transfers of sensitive technology or know-how, critical infrastructure, the enablement of foreign surveillance or espionage, the hindering of law enforcement operations, the potential involvement of illicit actors (such as terrorists or organized crime syndicates), the impact on the supply of critical goods and services to Canadians, the supply of goods and services to the federal government, and the impact of an investment on Canada's international interests.

Where a national security review is required, the parties may be required to provide the minister with any information considered necessary for the review. The minister may then either:

- Inform the parties that no further action will be taken, if the minister is satisfied that the investment would not be injurious to national security (in which case the transaction may proceed); or
- Refer the transaction to the governor-in-council (the federal cabinet), if the minister is satisfied that the investment would be injurious to national security or the minister is not able to make such a determination.

Where the transaction is referred to the governor-in-council, the governor-in-council may take any measures considered advisable to protect national security including blocking the transaction, authorizing the transaction on the basis of written undertakings or other terms and conditions or ordering a divestiture of the Canadian business.

Where a "net benefit to Canada" review is concurrently underway, the minister will have up to an additional 30 days to complete that review once the governor-in-council has cleared the investment on national security grounds.

## **2.5 What is required for an investment to be of "net benefit to Canada"?**

The *Investment Canada Act* requires the relevant minister to take these factors into account, where relevant, when determining if an investment is likely to be of "net benefit to Canada":

- The effect of the investment on the level and nature of economic activity in Canada, including, without limiting the generality of the foregoing, the effect on employment, on resource processing, on the utilization of parts, components and services produced in Canada and on exports from Canada;

- The degree and significance of participation by Canadians in the Canadian business and in any industry or industries in Canada of which the Canadian business forms a part;
- The effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;
- The effect of the investment on competition within any industry or industries in Canada;
- The compatibility of the investment with national industrial, economic and cultural policies, taking into consideration industrial, economic and cultural policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the investment; and
- The contribution of the investment to Canada's ability to compete in world markets.

Typically, during the 45-day period, the investor will negotiate with Investment Canada and/or Canadian Heritage a suitable set of undertakings to be provided in connection with the minister's approval of the transaction. These undertakings comprise commitments by the investor concerning its operation of the Canadian business following the completion of the transaction. With respect to SOEs, the government has issued guidelines whereby such enterprises may be subject to certain additional obligations designed to ensure that their governance is in line with Canadian standards and that the Canadian businesses that they acquire maintain a commercial orientation.

Commitments provided to the minister by a foreign investor may, among other things, obligate the investor to keep the head office of the Canadian business in Canada, ensure that a majority of senior management of the Canadian business is comprised of Canadians, maintain certain employment levels, make specified capital expenditures and conduct research and development activities based on specified budgets, and make a certain level of charitable contributions, all over a period of usually three years. According to guidelines established by Investment Canada, these undertakings will be reviewed by Investment Canada or Canadian Heritage, as the case may be, on a 12- to 18-month basis for up to three to five years in the ordinary course to confirm the investor's performance.

## **2.6 Are there any requirements for investments that are not “reviewable”?**

If the acquisition of an existing business or the establishment of a new business is not reviewable, the investment will be “notifiable.” Notification requires the non-Canadian investor to provide certain specific information to Investment Canada, including information on the parties to the transaction, the number of employees of the business in question, and the value of its assets or market capitalization of the investment. Notification may be given before or within 30 days after the closing of the transaction.

## **2.7 Are there other statutes that regulate foreign investments in particular sectors?**

In addition to the *Investment Canada Act*, other federal statutes regulate and restrict foreign investment in specialized industries and sectors, such as telecommunications, broadcasting, rail and air transportation and financial institutions.

## **3. International Trade Agreements**

### **3.1 Trade agreements as a constitution for international business regulation**

The International Trade Agreements to which Canada is a party act like a constitution, placing limits on the laws, regulations, procedures, decisions, and actions that all levels of government and their agents may undertake. While these agreements do not automatically invalidate laws that breach their obligations, they all provide sanctions for non-compliance.

### **3.2 Key principles of trade agreements**

The guiding principle of all trade agreements is non-discrimination. This general principle is enforced through a number of specific rules that appear in most trade agreements with varying degrees of force. The underlying rationale is that discriminating between the goods, investments, persons, or services of different countries distorts trade and results in a less efficient utilization of resources and comparative advantages, ultimately to the detriment of all.

The two most prevalent rules are most favoured nation and national treatment. Most favoured nation treatment prohibits discrimination in the treatment of goods, persons, or companies, as the case may be, of other parties to the agreement. For instance, most favoured nation treatment requires that Canada must give as favourable a duty rate to imports from the European Union (EU) as from Brazil. National treatment prohibits giving more favourable treatment to domestic persons, investments, services or goods than is offered to persons, investments, services or goods from other countries. It does not require treating them the same as nationals, as long as the treatment is as favourable.

There are many other rules that address more subtle or specific forms of discriminatory and trade-distorting practices. Some of these are discussed below.

### **3.3 Using trade agreements as business tools**

Historically, trade agreements focussed on reducing tariffs, which are the most obvious form of trade discrimination in which a country imposes a “tax” on imported goods. As trade negotiations have succeeded in reducing tariffs, other, often more subtle, trade barriers have grown in importance. These non-tariff barriers can include all manner of domestic regulation such as labelling, environmental, and even food safety requirements that directly or indirectly affect the import, export and sale of goods, foreign investment, and the ability of companies to move people across borders to provide a service.

Today, these domestic regulations, policies and programs can interfere significantly with business operations. Canada’s trade obligations under the various agreements to which it is a party offer effective tools for the business community to respond to these obstacles. Some agreements, like the North American Free Trade Agreement (NAFTA), provide investors with a direct means of challenging barriers to establishing, acquiring or managing a Canadian company. Canada is a strong advocate of multilateral trade rules that seek to ensure that the development of new laws and the application of current regulations are consistent with international trade law obligations.

International trade agreements are a relatively new business tool. Identifying how these agreements can be leveraged into the achievement of strategic business objectives is a subtle and specialized skill that can help uncover potential market opportunities.

## 3.4 Canada's trade agreements

Canada is a party to many trade agreements. The list of countries with which Canada enjoys trade agreements continues to expand through ongoing negotiations. Canada's current and anticipated trade agreements are summarized below.

### 3.4.1 WTO agreements

Canada is a member of the World Trade Organization (WTO) and has committed to respect the rules of the agreements adopted by WTO members, effective January 1, 1995. The WTO administers the rules governing trade among the organization's 164 members.

The WTO Agreements encompass a structure with six principal parts: the Agreement Establishing the WTO; agreements on trade in goods; the General Agreement on Trade in Services (GATS); the Agreement on Trade-Related Aspects of Intellectual Property Rights; dispute settlement; and reviews of governments' trade policies. The WTO Agreements set out rules that governments must follow in regulating a wide range of business activities including procurement, investment, agriculture and industrial goods trade, and subsidies and anti-dumping decisions. The WTO's Agreement on Government Procurement is often reviewed when advising clients in procurement matters. A revamped Agreement on Government Procurement (sometimes referred to as the Revised Agreement on Government Procurement) has been in force since April 6, 2014 and is binding on those states, including Canada, that have completed the ratification process.

The current round of multilateral negotiations, commonly known as the Doha round, aimed at strengthening the rules of the WTO agreements, remains stalled largely as a result of differences between the Member States on measures relating to agricultural products. Nevertheless, the WTO Agreements continue to apply and impose rules governing the laws, regulations and practices of member countries that affect trade in goods or services.

The WTO Agreements place limits on actions that WTO member governments and their agents may undertake. If, for example, European, U.S. or Chinese laws, policies or practices adversely affect a business in Canada in contravention of the WTO rules, Canada may use the WTO dispute settlement process to ensure that a WTO member abides by its obligations under the WTO Agreements. While the WTO complaints mechanism is available only to sovereign states (or to a regional grouping of states, such as the EU), private companies confronting WTO unlawful barriers in their activities may request that their governments make use of the system.

In December 2017, Canada requested WTO dispute consultations with the United States on the basis that it considers certain U.S. measures relating to anti-dumping and countervailing duty proceedings to be inconsistent with its obligations under the WTO Agreements. In June 2018, Canada and the EU requested WTO dispute consultations with the United States, claiming that recently imposed U.S. duties on steel and aluminum products are inconsistent with the WTO Agreements. These disputes are currently ongoing under the WTO dispute settlement process.

## **3.4.2 NAFTA**

NAFTA is a regional free trade agreement between Canada, the U.S. and Mexico. NAFTA has essentially eliminated duties on trade between the three countries. The preferential treatment granted to the other NAFTA parties' goods and services would violate Canada's most favoured nation obligations to other WTO members under the WTO Agreements, but for an exception for this type of agreement. NAFTA also imposes similar, and in some cases, more comprehensive, rules to those found in the WTO Agreements. Aside from differences in tariffs, the biggest differences between the WTO and NAFTA agreements are in respect of investment and services rules.

### **3.4.2.1 NAFTA investment rules**

NAFTA Chapter 11 provides rules relating to the treatment of investments and investors of other NAFTA parties. These rules are more detailed than those provided for in the WTO's Trade-Related Investment Measures Agreement. Most importantly, the NAFTA investor-state arbitration mechanism enables aggrieved investors of a NAFTA country to submit a claim for damages against the country complained of without any approval or involvement of the investor's government.

Claims can only be brought against the government of another NAFTA party; an investor cannot complain of its own government's actions. Either party may seek judicial review of the arbitration panel's decision.

NAFTA Chapter 11 extends national and most favoured nation treatment to investors and investments of another NAFTA party so that laws, regulations and government actions cannot discriminate between investors of any of the three countries. Chapter 11 also enables investors to make claims that government measures have effectively expropriated their investment. These claims may recoup the value of the expropriated investment, including lost profits.

To pursue a claim under NAFTA Chapter 11, the company involved typically must be incorporated in one of the NAFTA countries. An investor cannot make a claim on behalf of a company unless they are a controlling shareholder. However, NAFTA investors may bring claims for damages to their investment (i.e., a drop in share price), and in certain cases, these claims may be made in respect of investments in companies that were incorporated elsewhere but operate in a NAFTA country.

### **3.4.2.2 NAFTA services rules**

Under NAFTA, businesses seeking to provide services must be extended national treatment in all service sectors, except those specifically excluded (under the WTO GATS, national treatment is extended only in those service sectors specifically included). National treatment means that each country must accord to service providers of another NAFTA country treatment no less favourable than it accords to its own service providers. No local presence is required to provide a service cross-border. NAFTA countries must also ensure that licensing and regulations relate principally to competence or ability and do not have the purpose or effect of discriminating against nationals of another NAFTA country. NAFTA countries can maintain existing restrictions on cross-border services where such restrictions have been listed in an annex to the Agreement.

NAFTA also eases restrictions on the entry of “business persons” for the purposes of providing marketing, training, and before and after sales and service for their products and services.

### **3.4.2.3 NAFTA renegotiation**

Following through on statements he made during his electoral campaign to withdraw from or renegotiate NAFTA, on May 18, 2017, U.S. President Donald Trump formally gave notice to the U.S. Congress through his Trade Representative, Robert Lighthizer, of the Trump administration’s plan to renegotiate NAFTA. This formal notification triggered a 90-day notice period, after which renegotiations could begin. As of July 2018, the NAFTA parties have completed eight rounds of negotiations but have as yet not reached final agreement on revisions to NAFTA.

While at this time it is difficult to predict the changes that may be made to NAFTA, President Trump has expressed his disapproval with the dispute resolution process that is available under Chapters 11 and 19 of the agreement, and has indicated that his administration is interested in seeing changes to the provisions of NAFTA dealing with rules of origin (especially with respect to the treatment of autos and auto parts), government procurement and intellectual property. The U.S. has also proposed a “sunset clause” under which NAFTA would automatically terminate after five years, unless the Parties agree on a continuation of the agreement.

More recently, President Trump has indicated that he is in favour of separate bilateral trade agreements with Canada and Mexico, rather than a renegotiated NAFTA. However, the Canadian government has indicated that it is committed to maintaining a trilateral agreement. Several challenging areas of NAFTA renegotiation are rules of origin for automotive parts, procurement, investor-state dispute settlement and dairy supply management. Recently imposed steel and aluminum tariffs by President Trump, and retaliatory countermeasures announced by Canada, Mexico and the EU, have impacted the progress of NAFTA renegotiations.

### **3.4.3 Canada-U.S. Agreement on Government Procurement**

Outside the context of NAFTA, in 2010, Canada and the U.S. entered into an Agreement on Government Procurement, which had the effect of liberalizing access to sub-central government procurements in both countries. In addition, the agreement provides for exemptions for Canada from “Buy American” provisions of the *American Recovery and Reinvestment Act of 2009* in relation to certain programs, in exchange for temporary Canadian procurement commitments for certain construction projects not included in the WTO Agreement on Government Procurement. Canada and the U.S. also committed to explore the scope of a long-term government procurement agreement to deepen, on a reciprocal basis, procurement commitments beyond those under the WTO Agreement and NAFTA.

### **3.4.4 Free Trade Agreements (FTAs)**

FTAs generally provide for preferential tariff rates on imported goods and services and enhanced market access to goods and services of the member parties. Such agreements may also provide for protection such as most favoured nation and national treatment. FTAs may go beyond the scope and extent of coverage of the WTO Agreements. Moreover, FTAs

may cover areas not addressed by WTO Agreements, such as protection of investments and investors. FTAs generally include dispute settlement mechanisms.

Canada has entered into FTAs with numerous countries besides the U.S. and Mexico, including Colombia, Costa Rica, Chile, Honduras, Israel, Jordan, Korea, Panama, Peru, and the European Free Trade Association (EFTA) countries (Iceland, Norway, Switzerland and Liechtenstein). After 14 rounds of negotiations spanning nearly 10 years, Canada concluded the Canada-Korea Free Trade Agreement (CKFTA), which came into force on January 1, 2015. The CKFTA is Canada's first free trade deal with an Asia-Pacific country and is considered to be an important gateway to other markets in the region. On July 11, 2016, Canada and Ukraine signed the Canada-Ukraine Free Trade Agreement (CUFTA), which was implemented on August 1, 2017.

Canada is in the process of negotiating FTAs with a number of other countries, including Singapore, Japan, the Dominican Republic, Morocco, Guatemala, Nicaragua, El Salvador and the Caribbean Community countries. In 2010, Canada and India began the negotiation of a possible Comprehensive Economic Partnership Agreement (CEPA). The two countries have since held 10 rounds of negotiations, the latest in August 2017, but have not yet reached an agreement.

#### **3.4.4.1 Comprehensive Economic and Trade Agreement (CETA)**

On October 30, 2016, Canada and the EU signed CETA. The European Parliament approved CETA on February 15, 2017. In Canada, legislation implementing CETA received royal assent on May 16, 2017, and CETA came into force provisionally on September 21, 2017. Most of the agreement now applies, including the elimination of most customs duties that the agreement covers. However, CETA will not take full effect until it is ratified by all EU Member States.

A recent decision of the European Court of Justice (ECJ) may call into question the validity of the investment court system under CETA. In Case C-284/16 *Slovakia v Achmea BV* EU:C:2018:158, the ECJ ruled that the existence of an independent arbitral tribunal established under a bilateral investment treaty between EU Member States was fundamentally incompatible with EU law, which gives exclusive jurisdiction to EU Member State courts and the ECJ to decide challenges that concern EU law. Belgium has requested an opinion from the ECJ on whether CETA's investment court system is compatible with EU law, which is pending determination.

#### **3.4.4.2 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)**

In October 2012, Canada joined the Trans-Pacific Partnership (TPP), an agreement designed to promote free trade between Asia and the Americas. The original signatories to the TPP included Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam. The agreement was signed on February 4, 2016, but was not ratified and did not take effect, as U.S. President Donald Trump issued a Presidential Memorandum on January 23, 2017, withdrawing the U.S. from the TPP.

In May 2017, the remaining signatories of the TPP agreed to proceed with the trade deal without the participation of the United States. The 11 remaining countries signed the CPTPP



on March 13, 2018. The agreement has not yet been ratified by six signatories, as required to take effect.

Canada's involvement in CPTPP, NAFTA, CETA and its free trade agreement with South Korea makes it the only G7 nation with free trade access to the Americas, Europe and the Asia-Pacific region. Since CETA's provisional application, Canada has free trade agreements with all of the G7 countries except Japan.

### **3.4.5 Foreign Investment Protection Agreements (FIPAs)**

A FIPA is a bilateral agreement aimed at protecting and promoting foreign investment through legally binding rights and obligations. FIPAs accomplish their objectives by setting out the respective rights and obligations of the countries that are signatories to the treaty with respect to the treatment of foreign investment.

Typically, there are agreed exceptions to the obligations. FIPAs seek to ensure that foreign investors will not be treated worse than similarly situated domestic investors or other foreign investors; they will not have their investments expropriated without prompt and adequate compensation; and they will not be subject to treatment lower than the minimum standard established in customary international law. As well, in most circumstances, investors should be free to invest capital and repatriate their investments and returns.

Canada began negotiating FIPAs in 1989 to secure investment liberalization and protection commitments on the basis of a model agreement developed by the Organization for Economic Co-operation and Development (OECD). In 2003, Canada updated its FIPA model to reflect and incorporate the results of its experience with the implementation and operation of the investment chapter of NAFTA. This model provides for a high standard of investment protection and incorporates several key principles: treatment that is non-discriminatory and that meets a minimum standard; protection against expropriation without compensation and restraints on the transfer of funds; transparency of measures affecting investment; and dispute settlement procedures. The new model serves as a template for Canada in negotiations with investment partners on bilateral investment rules.

Currently, Canada has FIPAs in force with 37 countries including Russia, Poland, Venezuela, Argentina, Barbados, Benin, China, Costa Rica, Jordan, Kuwait, and Tanzania, and has concluded negotiations with a number of countries, including Albania, Bahrain, Madagascar, Moldova, and Zambia. Negotiations of a FIPA with India are ongoing. Canada has updated its FIPAs with Latvia, the Czech Republic, Slovakia, and Romania and is in the process of updating its FIPAs with Hungary and Poland to bring them into conformity with EU law. FIPAs with Burkina Faso, Guinea and Mongolia have recently come into force, and agreements have been signed with Nigeria and Kosovo that are not yet in force. Canada has also recently concluded negotiations of a FIPA with the United Arab Emirates.

### **3.4.6 Trade within Canada**

In addition to Canada's international trade agreements, there are several significant agreements and recent developments relating to trade within Canada, summarized below.

### 3.4.6.1 Canadian Free Trade Agreement (CFTA)

The CFTA came into force on July 1, 2017, and replaced the Agreement on Internal Trade (AIT). The CFTA is an agreement among the federal, provincial and territorial governments designed to reduce barriers to the free movement of persons, goods, services and investment within Canada and to establish an open, efficient and stable domestic market. The CFTA seeks to reduce costs to Canadian businesses by making internal trade more efficient, increasing market access and facilitating labour mobility.

Unlike the AIT, which covered only those sectors that were specifically listed, the CFTA uses a “negative list approach,” meaning that the agreement applies to all sectors except those that are specifically excluded. Chapter 8 of the CFTA lists the types of measures that are subject to general exception, such as measures concerning Aboriginal Peoples, national security, taxation, water, social services, tobacco control, language, culture, gambling and betting, collective marketing arrangements for agricultural goods and passenger transportation services.

The CFTA contains formal dispute settlement mechanisms in Chapter 10. Only companies with a “substantial and direct” connection to a party to the agreement may bring forward a complaint under the CFTA. The CFTA does not trump Canada’s international agreements and does not create any obligations to foreign suppliers.

### 3.4.6.2 Inter-provincial trade barriers

Despite the CFTA, internal trade barriers continue to exist within Canada. One example is various provincial restrictions on alcohol imports and sales. In its 2018 decision in *R v. Comeau*, the Supreme Court of Canada confirmed that Canadian provinces are afforded considerable discretion to manage the passage of goods across their borders when legislating to address particular conditions and priorities in each province. While the *Constitution Act, 1867* prohibits explicit inter-provincial trade barriers such as the imposition of tariffs, regulating goods for different purposes that indirectly affect inter-provincial trade is permissible.

Regarding the particular example of alcohol imports and sales, the CFTA established an Alcoholic Beverages Working Group, tasked with identifying opportunities and making recommendations to enhance trade in alcoholic beverages within Canada. The working group is to submit its recommendations to the Committee on Internal Trade in July, 2018.

### 3.4.6.3 New West Partnership Trade Agreement (NWPTA)

The NWPTA, formerly known as the Trade, Investment and Labour Mobility Agreement, is an agreement between Alberta, British Columbia, Saskatchewan and Manitoba designed to remove barriers to trade, investment and labour mobility. Originally signed by Alberta and British Columbia and effective in 2007, Saskatchewan and Manitoba joined the agreement in 2010 and 2016, respectively.

The NWPTA applies to all government measures (e.g., legislation, regulations, standards, policies, procedures, guidelines, etc.) affecting trade, investment and labour mobility. Certain special provisions have been established for some sectors, such as investment, business subsidies, labour mobility, procurement, energy and transportation. There are also a limited number of sectors that have been excluded from the coverage of the NWPTA, such as water, taxation, social policy, and renewable and alternative energy.

The NWPTA requires the signatory provinces to provide open and non-discriminatory access to procurements in excess of minimum thresholds by various government entities, including departments, ministries, agencies, Crown corporations, municipal governments, school boards and publicly funded academic, health, and social service entities.

The NWPTA's dispute resolution provisions are available to companies registered under the laws of one of the parties to the agreement. Where a government measure is considered to be inconsistent with both the CFTA and NWPTA, the NWPTA provides that the dispute resolution process under either agreement may be selected, but once chosen, there is no recourse to the other process in respect of the same issue. The maximum penalty is C\$5-million and applies only to the provincial governments that are parties to the NWPTA.

#### **3.4.6.4 Trade and Cooperation Agreement between Ontario and Quebec**

In 2009, Ontario and Quebec entered into the Trade and Cooperation Agreement between Ontario and Quebec with the intention of eliminating and reducing barriers that restrict trade, investment and labour mobility. Under the agreement, the two provinces have pledged to cooperate on a number of matters falling under the general categories of economic, regulatory and energy cooperation. The agreement also contains commitments related to labour mobility, financial services, transportation, government procurement, agriculture and food goods, and environmental and sustainable development.

In May 2015, amendments to the agreement's chapter on government procurement were announced to bring its scope into alignment with the government procurement chapter contained in CETA. The thresholds applied under the revised chapter will be lower than those available under the CFTA or CETA. The revised government procurement chapter entered into force in two phases: on January 1, 2016 for ministries and agencies, and on September 1, 2016 for all other entities.

#### **3.4.6.5 Pipeline and related disputes between Alberta and British Columbia**

The Trans Mountain Pipeline currently carries approximately 300,000 barrels of oil per day from Alberta to British Columbia for the purposes of export. In November 2016, the federal government approved the Trans Mountain Pipeline Expansion Project, which would increase the capacity of the pipeline to approximately 890,000 barrels per day. Following the 2017 election, the new British Columbia NDP government expressed concerns regarding the environmental risks of the pipeline expansion project. In January 2018, British Columbia proposed a restriction on the increase of diluted bitumen transportation pending further consideration of these risks. British Columbia subsequently submitted a reference question to the British Columbia Court of Appeal to confirm whether the regulation of the impacts of heavy oil is within provincial jurisdiction.

In response to British Columbia's delays to the project, Alberta has implemented a number of retaliatory measures, including a temporary ban on the import of British Columbia wine, the suspension of negotiations for the purchase of electricity from British Columbia and the passage of the *Preserving Canada's Economic Prosperity Act* (PCEPA). The PCEPA allows Alberta to restrict the transport of energy products to British Columbia by requiring that energy exporters obtain a licence before they engage in export activities. In May 2018, British Columbia filed a lawsuit alleging that PCEPA is unconstitutional. The PCEPA lawsuit and the reference question before the British Columbia Court of Appeal are ongoing as of July 2018.

## 3.5 Importing goods into Canada

The importation of goods into Canada is regulated by the federal government. The *Customs Tariff* imposes tariffs on imported goods, while the *Customs Act* sets out the procedures that importers must follow when importing goods, and specifies how customs duties payable on imported goods are to be calculated and remitted.

Under NAFTA, barriers to trade in goods between Canada, the U.S. and Mexico have largely been removed. Tariffs between Canada and the U.S. have been generally eliminated since January 1, 1998, and tariffs on most goods flowing between Canada and Mexico were eliminated by January 1, 2003. However, despite a previous exemption, President Trump recently imposed tariffs on Canadian steel and aluminum products. In response, Prime Minister Justin Trudeau introduced tariffs on U.S. steel and aluminum products and certain other goods from the U.S. such as maple syrup, beer kegs and whiskey. The tariffs imposed by President Trump are linked to his dissatisfaction with the progress of NAFTA renegotiations.

In order for goods to be duty-free under NAFTA, they must satisfy “rules of origin,” which require a certain level of North American value-added. These rules are complex and are based on changes in tariff classification and regional value content, the latter calculated by either transaction value or the net cost method. Goods not meeting these requirements will remain subject to Canadian, U.S., or Mexican tariffs. These rules do not depend on the ownership of the business importing or exporting the goods, so they apply equally to foreign-owned Canadian companies. In the case of services, NAFTA’s provisions are generally applicable to enterprises of other NAFTA members, even if controlled by non-NAFTA nationals, as long as the enterprise carries on substantive business activities in a NAFTA country.

A more detailed discussion of the steps involved in importing goods and the applicable legislation is set out below.

### 3.5.1 Tariff classification

All goods imported into Canada are subject to the provisions of Canada’s customs laws, including the provisions of the *Customs Act* and the *Customs Tariff*. To determine the rate of duty, if any, applicable on the imported goods, the goods must be classified among the various tariff items set out in the List of Tariff Provisions of the *Customs Tariff*. Canada and the U.S. are signatories to the *Convention on the Harmonized Commodity Description and Coding System*; therefore, tariff classifications up to the sixth digit should be identical between Canada and the U.S.

### 3.5.2 Tariff treatment

Once the tariff classification of imported goods is determined, the List of Tariff Provisions under the *Customs Tariff* indicates the various tariff treatments available in respect of the goods, depending on their country of origin. For instance, where no preferential tariff treatment is claimed, the most favoured nation tariff treatment applies.

However, as a result of Canada’s participation in several bilateral, plurilateral and multilateral trade agreements in recent years, various preferential tariff treatments are available to goods

from certain countries. For example, all customs duties on goods originating in the U.S. have been eliminated pursuant to NAFTA.

In addition to the preferential tariff treatment that Canada affords to imports from countries with which Canada has established a free trade agreement, Canada also affords preferential tariff treatment to imports of goods originating in developing countries, as part of an effort to encourage foreign development in those countries. For instance, the General Preferential Tariff (GPT) treatment provides partial duty relief to goods originating in certain developing countries. In 2018, the GPT treatment is accorded to qualifying imports from 106 countries. Similarly, through the Least Developed Country Tariff (LDCT), Canada grants duty-free access to the Canadian market to goods that originate in certain specified Least Developed Countries. In 2018, the LDCT treatment is accorded to qualifying imports from 49 countries. To claim one of the preferential rates of duty, the importer must establish that the goods qualify for the claimed treatment pursuant to the relevant rules of origin and must obtain proper proof of origin, usually from the exporter.

### **3.5.3 How are tariffs calculated?**

The amount of customs duties payable on any importation is a function of the rate of duty (determined as set out above) and the valuation of the goods. This is because most of Canada's tariff rates are imposed on an *ad valorem* (or percentage) basis. In Canada, the primary method for customs valuation is the "transaction value" system, under which the value for duty is the price paid for the goods when sold for export to a purchaser in Canada, subject to specified adjustments. A non-resident may qualify as a "purchaser in Canada" where the non-resident imports goods for its own use and not for resale, or for resale if the non-resident has not entered into an agreement to sell the goods prior to its acquisition from the foreign seller. Otherwise, customs value will be based on the sale price charged by the non-resident seller to the customer who is resident, or who has a permanent establishment, in Canada.

The transaction value method may not be available in certain other circumstances, such as where the buyer and seller do not deal at arm's length, or where title to the goods passes to the buyer in Canada. In these circumstances, other valuation methods will be considered in the following order: (1) transaction value of identical goods; (2) transaction value of similar goods; (3) deductive value; (4) computed value; and (5) residual method.

If applicable, the transaction value method begins with the sale price charged to the purchaser in Canada. However, the customs value is determined by considering certain statutory additions and permitted deductions. For instance, selling commissions, assists, royalties, and subsequent proceeds must be added to arrive at the customs value of the goods. The value of post-importation services may be deducted from the customs value of the goods.

If the importer's goods originate primarily from suppliers with whom the importer is related and the importer wishes to use the transaction value method of valuation, the importer is frequently requested to demonstrate that the relationship did not influence the transfer price between the importer and the vendor. In such a situation, documentation may be required to establish that the transfer price reflects the transaction value.

### **3.5.4 How are tariffs assessed?**

Canada has a self-assessment customs system. Importers and their authorized agents are responsible for declaring and paying customs duties on imported goods. In addition, importers are required to report any errors made in their declarations of tariff classification, valuation, or origin when they have “reason to believe” that an error has been made. This obligation lasts for four years following the importation of any goods. The *Customs Act* imposes severe penalties for non-compliance with this and other provisions, up to C\$25,000 per occurrence.

### **3.5.5 What penalties are imposed for non-compliance with customs laws?**

Where a person has failed to comply with the provisions of the *Customs Act*, the Canada Border Services Agency (CBSA) is authorized to take several enforcement measures, including seizures, ascertained forfeitures, or the imposition of administrative monetary penalties under the Administrative Monetary Penalty System (AMPS). Seizures and ascertained forfeitures are applied to the more serious offences under the *Customs Act*, such as intentional non-compliance, evasion of customs duties, and smuggling.

Importers may be liable for penalties of up to C\$25,000 per contravention in accordance with the AMPS. The CBSA maintains a “compliance history” for each importer. The retention period for an individual contravention is either one or three years for penalty calculation purposes only. However, the contravention remains on the AMPS system for six years plus the current year. Repeat offenders may be subject to increased penalties.

### **3.5.6 Country of origin marking rules**

Certain goods listed in regulations made pursuant to the *Customs Tariff* must be marked with their country of origin in order to be imported into Canada. In the case of goods imported from a NAFTA country, the relevant regulations base the determination of origin on tariff shift rules, which are in turn dependent on the tariff classification of components and the finished product. In the case of goods imported from any country other than a NAFTA country, the country of origin is the country in which the goods were “substantially manufactured.”

### **3.5.7 Which products are subject to import controls?**

Almost all goods may be imported into Canada, subject to compliance with certain conditions imposed by the federal and provincial governments. Goods over which Canada imposes import controls and requires import permits are listed in the Import Control List. Other Canadian laws that must be complied with in relation to imports include labelling laws for goods intended for retail sale; emission control standards for vehicles; and health and sanitary conditions for food and agricultural imports. Certain goods, for example, electrical appliances, must be certified by a recognized certification body. Imports of liquor, wine and beer may require prior authorization from the appropriate provincial liquor commission.

## 3.6 Domestic trade remedy actions

### 3.6.1 Anti-dumping and anti-subsidy investigations

The *Special Import Measures Act* (SIMA) contains measures designed to protect businesses in Canada from material injury due to unfair import competition. SIMA's provisions are based on Canada's rights and obligations set out in the WTO agreements.

SIMA allows Canadian producers to file a complaint against unfairly traded imports and to request relief in the form of anti-dumping or countervailing duties where material injury results from: (1) imports that are "dumped" (i.e., sold at lower prices in Canada than in the exporter's home market); or (2) imports that are unfairly subsidized by the government of the exporter's country.

Canada's trade remedy regime establishes a bifurcated process under which the CBSA has jurisdiction over determinations of dumping and subsidization and the Canadian International Trade Tribunal (CITT) enquires into and considers the issue of whether any dumping or subsidization is causing or is likely to cause material injury to the affected Canadian industry.

If the CITT makes a preliminary determination of injury and the CBSA makes preliminary and final determinations of dumping or subsidization, the CITT goes on to consider whether there is "material injury." If the CITT makes a finding of material injury, an anti-dumping duty (equal to the margin of dumping found by the CBSA) or a countervailing duty (equal to the margin of subsidization found by the CBSA) will be imposed on all importations of the subject goods for a period of five years. During this time, the CBSA may initiate re-investigations to update the margin of dumping or subsidization, and the CITT may review its finding if the circumstances warrant. At the expiry of the five-year period, the CITT may review its finding and may rescind or continue the finding for an additional period of five years (with no limit on the number of continuation orders permissible).

The CBSA implemented a new normal value review process in June, 2018. Normal value reviews are conducted by the CBSA to ensure that export prices accurately reflect current market conditions, and normal values are used to make determinations regarding the margin of dumping or subsidization.

Importers may request a formal scope ruling from CBSA as to whether certain goods are subject to an anti-dumping or countervailing duty. A scope ruling may be appealed to the CITT. A final determination from the CBSA or CITT is subject to judicial review by the Federal Court of Appeal. Where a dumping or subsidy investigation involves U.S. or Mexican goods, an aggrieved party may choose to request a review of the CBSA or CITT finding by a NAFTA ad hoc panel of trade law experts. A review of final anti-dumping or countervailing duty determinations with respect to U.S. or Mexican goods must be undertaken by an ad hoc NAFTA panel, as NAFTA provides that there is no recourse to judicial review from final determinations.

### 3.6.2 Safeguard protection

SIMA applies only in the case of unfairly traded (i.e. dumped or subsidized) imports that are causing material injury to a Canadian industry. However, the *Canadian International Trade Tribunal Act* and the *Customs Tariff* provide for a trade remedy in the case of fairly traded goods that nevertheless are causing or threatening to cause "serious injury" to a Canadian

industry. These are called “safeguard” actions. In such cases, the CITT may hold an inquiry and may make recommendations to the finance minister. The finance minister is authorized, in appropriate cases, to take certain safeguard actions against such imports, including imposing surtaxes or quotas for a limited time.

### **3.7 Procurement (government contracts) review**

NAFTA, CETA, the CFTA and the WTO Revised Agreement on Government Procurement (AGP) require the signatories to the agreements to provide open access to government procurement for certain goods and services. These agreements also require signatory governments to maintain an independent bid challenge authority to receive complaints. The CITT is Canada’s complaint authority.

Parliament has enacted legislation designed to ensure that the procurements covered by NAFTA, CETA, the CFTA or the AGP are conducted in an open, fair and transparent manner and, wherever possible, in a way that maximizes competition. While there is considerable overlap in the scope and coverage of procurements covered by these international agreements, several areas have significant differences. The most notable differences are the goods and services included, and the minimum monetary thresholds for goods, services, and construction services contracts. These monetary thresholds are subject to periodic review.

The federal government has agreed to provide potential suppliers equal access to federal government procurement for contracts involving certain goods and services bought by approximately 100 government departments, agencies and Crown corporations. Still, on occasion, a potential domestic or foreign supplier may have reason to believe that a contract has been or is about to be awarded improperly or illegally, or that the potential supplier has been wrongfully denied a contract or an opportunity to compete for one. The CITT provides an opportunity for redress for Canadian and foreign suppliers concerned about the propriety of the procurement process relating to contracts covered by NAFTA, CETA, the CFTA or the AGP.

As discussed above, the NWPTA requires the governments of Alberta, British Columbia, Saskatchewan and Manitoba to provide open and non-discriminatory access to procurements by government entities in excess of minimum thresholds.

### **3.8 Export controls, economic sanctions and industry-specific trade laws**

#### **3.8.1 Which products are subject to export controls?**

Canada’s export controls are based on several international agreements and arrangements, such as the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technology, and the Treaty on the Non-Proliferation of Nuclear Weapons (NPT).

Canada’s *Export Control List* (ECL) identifies specific goods and technology that may only be exported from Canada to specified destinations if an export permit is obtained. The ECL is divided into seven groups of items: dual-use, munitions, nuclear non-proliferation, nuclear-related dual-use, miscellaneous goods and technology, missile technology control regime, and chemical and biological weapons non-proliferation.



Canadian businesses must determine whether their exports are subject to the ECL. Under the *Export and Import Permits Act* (EIPA), a corporation with its head office in Canada or operating a branch office in Canada may apply to the Minister of Foreign Affairs for a permit to export ECL goods.

Some goods and technology on the ECL may be exempted from the permit requirement if they are being shipped to certain countries. For example, goods or technology that are manufactured in the U.S., imported into Canada, and are proposed for export to a country other than Cuba, Iran, North Korea, Syria, or a country on the Area Control List are covered by General Export Permit No. 12 and do not require individual export permits. However, as a condition of authorizing exports of certain goods or technology to a Canadian company, the U.S. government may require that company to obtain an explicit re-export authorization before exporting the items from Canada.

In addition to the ECL, the *Area Control List* restricts the export of all products to specified countries, currently only North Korea. The export of any goods or technology to North Korea requires an export permit. Belarus was removed from the *Area Control List* in 2017.

The *Export Act* imposes export duties on certain logs and pulpwood, ores, petroleum in its crude or partly manufactured state, and intoxicating liquors.

### **3.8.2 Economic sanctions**

Certain activities and the export of certain goods are subject to United Nations (UN) trade sanctions or arms embargoes against particular countries and regions. Under the *United Nations Act* (UNA), Canada has implemented regulations that are necessary to facilitate compliance with measures taken by the United Nations Security Council. These regulations prohibit certain exports, principally arms and related material, to the following countries: the Central African Republic, the Democratic Republic of the Congo, Eritrea, Iran, Iraq, Lebanon, Libya, North Korea, Somalia, South Sudan, Sudan and Yemen. In some cases, UNA sanctions prohibit dealing with listed persons and entities. Listed persons and entities are normally associated with the subject country's government. Therefore, exports and other transactions should be carefully reviewed so that UNA sanctions are not violated.

The *Special Economic Measures Act* (SEMA) empowers Canada to take unilateral action, including embargoes, against a country in specified circumstances. SEMA gives the Canadian government authority to impose orders or regulations to restrict or prohibit persons in Canada, or Canadians outside Canada, from:

- Dealing in property of a foreign state (or its residents or nationals);
- Exporting, selling or shipping goods to a foreign state;
- Transferring technical data to a foreign state;
- Importing or acquiring goods from a foreign state; and
- Providing or acquiring any financial or other services to, or from, a foreign state.

Currently, Canada has imposed economic measures under SEMA against Burma, Iran, Libya, North Korea, Russia, South Sudan, Syria, Ukraine, Venezuela and Zimbabwe. Canadian companies are prohibited from making new investments in some, but not all, countries subject to measures under SEMA.

Where UNA or SEMA sanctions apply, it may be possible to obtain a permit allowing an otherwise prohibited transaction. While humanitarian assistance is often allowed, the

Canadian government may be willing to issue permits for certain types of non-humanitarian commercial transactions, depending on the government's specific priorities and policies in respect of the country subject to sanctions.

In 2016, Canada announced significant amendments to its economic sanctions imposed on Iran. Previously, Canada imposed a ban on all imports from and exports to Iran, subject to certain humanitarian exceptions. The amendments removed the blanket import and export prohibitions, although the export of specific goods deemed to be proliferation-sensitive is still prohibited.

### **3.8.3 Sector-specific trade laws**

Canada has certain trade laws that are specific to individual industries. For example, in the forestry industry, there are restrictions on the export of logs and softwood lumber from Canada. Similarly, permits are required for the export of steel and import controls are in place in respect of certain goods including steel, agricultural goods and textile products.

Moreover, numerous Canadian laws directly and indirectly impose trade controls. For example, consumer product safety laws and environmental regulations impact sales of specified types of goods by prohibiting or restricting importation into Canada unless the goods first comply with applicable Canadian standards. In some cases, the manufacture or sale of goods may be subject to Canadian standards even where those goods are intended solely for export.

Other government departments may also control the export of goods, requiring additional permits even where an export permit has already been granted pursuant to the EIPA. Departments that exercise controls over exports include Canadian Heritage, Natural Resources Canada, Fisheries and Oceans, Health Canada, the Canadian Wheat Board, Agriculture and Agri-Food Canada, Environment Canada, and the Canadian Food Inspection Agency. The circumstances that require additional departmental approvals are frequently not intuitive, and care must be taken to ensure compliance with all export controls.

### **3.8.4 International Traffic In Arms Regulations and the Canadian exemption**

The U.S. *International Traffic in Arms Regulations* (ITAR) generally regulates the export and licensing of certain defence articles and services from the U.S. For exports of defence articles and services to Canada for end-use in Canada, ITAR contains a very limited exemption for "Canadian-registered persons." For a Canadian business to qualify for exemption from the licensing requirements under ITAR, it must be registered under the Canadian *Defence Production Act*. A list of registered businesses is maintained by the Canadian Controlled Goods Directorate.

There is a process to extend this exemption to the employees of a registered business. However, this exemption may not be available to employees who are dual citizens of a listed country if the employee has "substantive contacts" with the listed country. Employers are required to screen dual-citizen employees for such "substantive contacts." When such employees are identified, a risk of technology diversion is presumed and the employer may not give such employee access to the defence articles or information unless the U.S. Directorate of Defence Trade Controls grants a discretionary individual exemption.

The *Controlled Goods Regulations* under the *Defence Production Act* set out the process for the registration of Canadian businesses in the Controlled Goods Program, described in greater detail in the following section.

### 3.9 Controlled Goods Program

The Controlled Goods Program is intended to safeguard potentially sensitive goods and technology and prevent them from falling into the wrong hands. The program requires companies dealing with specified civilian or military goods to register with the Controlled Goods Directorate, undergo security assessments, develop and implement a security plan, control access to the specified goods, report security breaches, and maintain extensive records on all such goods for the duration of registration and for five years after registration expires. In determining whether to register a business, the directorate must consider, on the basis of a security assessment, the risk that the applicant poses of transferring the controlled goods to someone not registered or exempt from registration.

Goods subject to the Controlled Goods Program include a number of goods that are listed on Canada's ECL, as well as U.S. goods that are "defense articles," or goods produced using "technical data" of U.S. origin, as those terms are defined in ITAR. The specific goods and technology that are subject to the Controlled Goods Program are contained in the Controlled Goods List, which is included in the schedule to the *Defence Production Act*. The inclusion of "technology" means that technical information such as documents or emails relating to these goods may also be captured.

While the procedures under the Controlled Goods Program can be very onerous, penalties for non-compliance are severe. Companies that fail to comply can have their registration revoked, and the company and individuals involved may receive fines from C\$25,000 to C\$2-million or a term of imprisonment not exceeding 10 years, or both.

The breadth of the goods involved, coupled with the severity of the potential penalties, make it imperative that companies doing business in Canada ensure that they are not dealing with controlled goods or technology if they have not registered with the Controlled Goods Program.

### 3.10 Foreign Extraterritorial Measures Act (FEMA) and doing business with Cuba

FEMA is largely an enabling statute to protect Canadian interests against foreign courts and governments wishing to apply their laws extraterritorially in Canada by authorizing the attorney general to make orders relating to measures of foreign states or foreign tribunals affecting international trade or commerce. The attorney general has issued such an order with respect to extraterritorial measures of the U.S. that adversely affect trade or commerce between Canada and Cuba. The order was originally issued in retaliation for certain amendments to the U.S. *Cuban Assets Control Regulations* and was further amended in retaliation for the enactment of the U.S. *Cuban Liberty and Democratic Solidarity (LIBERTAD) Act*, both of which aim to prohibit the activities of U.S.-controlled entities domiciled outside the U.S. (e.g., Canadian subsidiaries of U.S. companies) with Cuba.

The FEMA order imposes two main obligations on Canadian corporations. First, it requires Canadian corporations (and their directors and officers) to give notice to the Attorney General

of any directive or other communication relating to an extraterritorial measure of the U.S. in respect of any trade or commerce between Canada and Cuba that the Canadian corporation has received from a person who is in a position to direct or influence the policies of the Canadian corporation in Canada. Second, the FEMA order prohibits any Canadian corporation from complying with any such measure of the U.S. or with any directive or other communication relating to such a measure that the Canadian corporation has received from a person who is in a position to direct or influence the policies of the Canadian corporation in Canada.

This means that Canadian companies wishing to carry on business with or in Cuba and whose goods are regulated under the U.S. *Cuban Assets Control Regulations*, for example, could be in conflict with U.S. law. On the other hand, if the Canadian company decided not to do business in Cuba because a U.S. extraterritorial measure prohibited such conduct, the company could be in violation of FEMA. The conflict of U.S. and Canadian trade sanctions can result in legal liability for both individuals and corporations, not to mention public relations challenges.

For example, in January 2015, the federal government issued an order pursuant to FEMA in relation to a dispute with the State of Alaska over the construction of a ferry terminal in British Columbia that is leased by Alaska. Alaska had planned to complete the project using only American iron and steel. The FEMA order was intended to prohibit any person in Canada from complying with the Alaskan “Buy America” measures. However, two days after the FEMA order was issued, the State of Alaska cancelled its plans to construct the new terminal.

More recently, in 2017, the U.S. Office of Foreign Assets Control (OFAC) fined a U.S. company when its Canadian subsidiary approved and financed lease agreements between an unaffiliated dealership and the Cuban Embassy in Ottawa. OFAC determined that the lease agreements violated the U.S. Cuban Assets Control Regulations; however, the transactions were permitted under Canadian law and FEMA applied so as to prevent the company from refusing to enter the transaction on the basis of the U.S. law. .

### **3.11 Canadian anti-bribery legislation**

There are two statutes in Canada that address bribery and corruption, namely the *Corruption of Foreign Public Officials Act* (CFPOA), which criminalizes corruption of foreign public officials, and the Canadian *Criminal Code*, which criminalizes corruption of Canadian public officials and corrupt behaviour in certain transactions among private parties. In both the CFPOA and the *Criminal Code*, all relevant offences are criminal offences.

#### **3.11.1 Criminal Code**

The *Criminal Code* contains a number of provisions that regulate conduct in relation to Canadian government officials. In particular, it contains several sections prohibiting the provision of a loan, reward, advantage or benefit of any kind (collectively a “benefit”) to a government official by those who do business with the government. The *Criminal Code* is applicable to offences within Canada and offences that occur outside of Canada, provided there is a real and substantial connection between the offence and Canada. In essence, the *Criminal Code* can apply to any offence, provided some part of the formulation, initiation or commission of the offence has taken place within Canada.

Under the *Criminal Code*, “government official” is defined broadly to include provincial and federal employees and officials (including elected officials, ministers, judges, police, military, employees of regulatory bodies, etc.), as well state corporations if they are acting as an agent of the federal or a provincial government. Bribery of municipal officials and employees is also regulated by section 123 of the *Criminal Code*. The definition of “official” has also been applied to Aboriginal Band officials and employees under the *Criminal Code* breach of trust offence, designed to ensure that holders of public office use their offices only for the public good. The secret commissions offence is applicable to all employees and agents, regardless of whether they are in the public or private sector.

Subsection 121(1)(a) of the *Criminal Code* prohibits the offering or giving a benefit to any government official, or any member of his family, as consideration for cooperation, assistance, the exercise of influence or an act or omission in connection with the transaction of business with the government. This provision is targeted at prohibiting overt forms of corruption. Case law from the Supreme Court of Canada has confirmed that this subsection is designed to prevent the provision of benefits in exchange for influence or an advantage in doing business with the government. It is not illegal under this subsection to provide a benefit *per se*, unless the benefit is in exchange for cooperation or assistance.

Subsections 121(1)(b) and (c) of the *Criminal Code* are much broader than the other anti-corruption sections of the *Criminal Code*, which require an element of a *quid pro quo* arrangement. Subsection 121(1)(b) prohibits the provision of a benefit to government officials with whom the provider has business dealings, even if there are “no strings attached.” Subsection 121(1)(c) prohibits the receipt of such a benefit. Crucially, it is not an offence under these subsections to provide or receive a benefit that has been pre-approved, in writing, by the head of the branch of government dealing with the party that provided the benefit.

Penalties for violation of the anti-corruption offences in the *Criminal Code* include unlimited fines for corporations, up to five years imprisonment for individuals (including directors and officers that participate in or knowingly assist or encourage the commission of the offence), and forfeiture of any proceeds (not just profits) obtained by the illegal act. Under the Public Works and Government Services Canada Integrity Regime (Integrity Regime) and section 750 of the *Criminal Code*, conviction of a section 121 offence will result in debarment or incapacity to contract with the Canadian government indefinitely. Under the same regime, being charged with a section 121 offence may result in an 18-month suspension from contracting with the Canadian government.

### **3.11.2 CFPOA**

The CFPOA is Canada’s equivalent to the United States’ *Foreign Corrupt Practices Act*, (FCPA). While similar in many respects, there are some notable differences between the CFPOA and the FCPA, which include the prohibition of facilitation payments and lack of civil enforcement under the CFPOA.

The CFPOA forbids transferring or offering to transfer any type of benefit for the purpose of influencing a foreign official to misuse his or her power or influence with the purpose of obtaining or retaining a business advantage. There is also an accounting offence under the CFPOA such that it is an offence to keep secret accounts, falsely record, not record or inadequately identify transactions, enter liabilities with incorrect identification of their object,

use false documents, or destroy accounting books and records earlier than permitted by law for the purpose of concealing bribery of a foreign public official.

Under the CFPOA, the actions of Canadian citizens, permanent residents, corporations, societies, firms, or partnerships on a worldwide basis are deemed to be acts within Canada for the purpose of the Act. As a result, Canadian citizens and companies are subject to worldwide regulation by Canadian authorities under the CFPOA, regardless of whether the entirety of the alleged misconduct occurred abroad. For individuals and entities that are not Canadian, the CFPOA may still apply if there is a real and substantial connection between Canada and the alleged misconduct.

A foreign public official is defined in the CFPOA as a person who performs public duties or functions for a foreign state. This definition has broad application and includes a person employed by a board, commission, corporation or other body or authority that is performing a duty or function on behalf of the foreign state, or is established to perform such a duty or function. It also includes employees of wholly or partially state-owned or controlled corporations, and may extend to employees and members of political parties if they perform public duties or functions for a foreign state.

On October 31, 2017, the Federal Government of Canada repealed an exemption for facilitation payments under the CFPOA. Facilitation payments, often referred to as “grease payments,” are small payments made to government officials to secure or expedite “acts of a routine nature.” These payments are typically demanded by lower-level government officials, such as customs officials, for the provision of services that the provider of the payment would otherwise be entitled to. This is an important development for organizations that comply with the CFPOA and FCPA, as compliance with the FCPA alone will no longer prevent prosecution by Canadian authorities. These organizations must review their compliance programs to ensure they positively prohibit facilitation payments, even though they are still exempt under the FCPA.

A CFPOA violation can result in imprisonment for up to 14 years. An individual or corporation convicted of a CFPOA offence can also be subject to significant fines. There is no limit to the fines that can be imposed on corporations and the quantum is left to the discretion of the court. In addition, Canadian courts can and have ordered corporate probationary terms, including appointment of a third-party monitor. Under the Integrity Regime noted above, CFPOA convictions result in a maximum 10-year debarment period, and being charged with a CFPOA offence may result in an 18-month suspension from contracting with the Canadian government. Any proceeds (not just profits) or property obtained as a result of a CFPOA offence may be ordered to be forfeited to the Crown.

### **3.11.3 Canada’s New Resolution Regime**

On February 27, 2018, Public Services and Procurement Canada announced the federal government would introduce legislation to implement remediation agreements, known as deferred prosecution agreements in the United States and United Kingdom. Remediation agreements are agreements between an accused organization and the prosecutor, whereby the prosecutor agrees to suspend or defer prosecution of an offence in exchange for cooperation and compliance with certain conditions. Admissions made by an organization as a result of a remediation agreement, or during its negotiations, are not admissible as evidence in civil or criminal proceedings besides the remediation agreement itself. Once the terms of a remediation agreement are complete, charges against the organization are

withdrawn without a criminal conviction or debarment consequences. In the event that an accused organization violates the conditions of a remediation agreement, enforcement may resume through traditional means, including a full criminal conviction.

Amendments to the *Criminal Code* that allow for and govern the use of remediation agreements in Canada were included in Bill C-74 (Resolution Regime). These amendments come into force on September 19, 2018. The Resolution Regime will apply retroactively and will be available for offences committed prior to it coming into force. The Resolution Regime only applies to certain offences, including section 121 and 123 *Criminal Code* offences and CFPOA offences. At this time, the Resolution Regime does not apply to *Competition Act* offences.

Before these amendments, organizations charged with the *Criminal Code* and CFPOA offences set out above had three avenues for resolution:

- i. Convince the authorities not to proceed with criminal charges (such as by attempting to persuade the authorities to pursue individual rogue employees instead of the organization)
- ii. Plead guilty to a criminal offence
- iii. Fight the matter at trial

The Resolution Regime provides a welcome fourth option for organizations accused with an offence under the CFPOA or *Criminal Code*.

Under the Resolution Regime, prosecutors must initiate negotiations. Prosecutors can only enter into negotiations for a remediation agreement with an accused organization if they are of the opinion there is a reasonable prospect of conviction for the offence and that negotiating a remediation agreement is appropriate in the circumstances and in the public interest. Prosecutors must consider several factors to determine if negotiating a remediation agreement is appropriate in the circumstances and in the public interest, including:

- The circumstances in which the alleged offence was brought to the attention of authorities (i.e., whether an organization self-reported the offence)
- Whether the organization has made reparations or taken other measures to remedy harm caused by the alleged offence and to prevent the occurrence of similar issues in the future
- Whether the organization has identified, or expressed a willingness to identify, any individuals involved with the offence
- Whether the organization or its representatives have been convicted of, or entered into a remediation agreement with respect to, similar offences in the past

The Resolution Regime requires that remediation agreements receive court approval. Specifically, a court must be satisfied that a remediation agreement is fair, reasonable and proportionate, as well as in the public interest. Once approved, remediation agreements will be published by the courts and must include, among other items:

- A statement of facts
- An obligation to cooperate in identifying individuals or acts of wrongdoing involved in or related to the relevant conduct
- An obligation to cooperate in any investigation or prosecution resulting from the relevant conduct, including providing information or testimony
- An obligation to pay a penalty and make reparations (where appropriate)

Remediation agreements can also include additional terms, such as third-party compliance monitors or an obligation to reimburse the government for any costs related to the investigation and prosecution that led to the remediation agreement.

## **4. Product Standards, Labelling and Advertising**

### **4.1 How are product standards requirements created? Are Canadian product standards in line with international standards?**

Canadian legislators and industry bodies are highly influenced by international standards, and so Canadian standards frequently reflect both U.S. and European influences. These standards may take several different forms, from mandatory legal requirements to voluntary industry codes.

Mandatory legal requirements may be imposed under federal and/or provincial legislation, particularly where health or safety issues are involved. These requirements may be written into the legislation itself or may be incorporated into legislation by reference (e.g., legislation may require compliance with the latest issue or edition of a voluntary standard).

The Standards Council of Canada (Council) is the national co-ordinating body for the development of voluntary standards through the National Standards System. The standards-developing organizations accredited by the Council are the Canadian General Standards Board (CGSB), the Canadian Standards Association (CSA Group), Underwriters Laboratories Inc., the Underwriters Laboratories of Canada (ULC Standards), NSF International, le Bureau de normalisation du Québec, ASTM International, the International Association of Plumbing and Mechanical Officials (IAPMO), Health Standards Organization and the Air-Conditioning, Heating and Refrigeration Institute (AHRI). The Council also accredits other organizations, including certification bodies, inspection bodies, and testing/calibration laboratories.

The concern that standards constitute non-tariff trade barriers has been a major international and free trade issue. The Council participates in a variety of international harmonization initiatives, including the International Electrotechnical Commission and the World Trade Organization's Committee on Technical Barriers to Trade, established under the WTO Agreement on *Technical Barriers to Trade*.

### **4.2 Consumer product safety legislation**

Consumer products are regulated in Canada by the *Canada Consumer Product Safety Act* (CCPSA). The CCPSA applies to all consumer products except those specifically exempted from the Act. The term "consumer product" is defined broadly to include components, parts, accessories and packaging that may be obtained by an individual to be used for non-commercial purposes.

The CCPSA does not apply to certain products regulated under other existing legislation, such as food, drugs (including natural health products), medical devices, cosmetics and pest control products. Nevertheless, the legislation still impacts otherwise exempt organizations (e.g., food or non-prescription drug companies) that distribute non-exempted products (e.g., in their packaging or via mail-in offers). Further, there are many products that are regulated



by both the CCPSA and other product-specific legislation (such as electrical products and textile products).

#### **4.2.1 General prohibition**

There is a general prohibition in the CCPSA against the manufacture, importation, advertisement or sale of any consumer product that is a “danger to human health or safety” or is subject to a recall or certain other corrective measures. The term “danger to human health or safety” means any existing or potential unreasonable hazard posed by a consumer product during normal or foreseeable use that may reasonably be expected to cause death or an adverse effect on health.

In addition, the CCPSA prohibits any person from manufacturing, importing, advertising or selling a specific consumer product listed in Schedule 2. Regulations published under the CCPSA govern various aspects of certain prescribed products, including manufacturing standards, labelling requirements and prohibited components/substances.

#### **4.2.2 Mandatory record-keeping and reporting**

Under the CCPSA, manufacturers, importers, advertisers, sellers and testers of consumer products must maintain documentation that allows consumer products to be traced through the supply chain. Retailers must keep records of the name and address of the person from whom they obtained the product and all others must keep records of the name and address of the person from whom they obtained the product *and* to whom they sold it. These documents must be kept for six years at the Canadian place of business of the organization to which the provision applies.

Manufacturers, importers, advertisers and sellers of consumer products must notify the minister and the person from whom they received a consumer product within *two days* of an “incident” related to the product. An incident is defined to include:

- An occurrence that resulted or may reasonably have been expected to result in an individual’s death or serious adverse health effects
- A defect or characteristic that may reasonably be expected to result in an individual’s death or serious adverse health effects
- Incorrect or insufficient labelling or instruction that may reasonably be expected to result in an individual’s death or serious adverse health effects, or
- A recall or other measure initiated by a foreign entity, provincial government, public body or aboriginal government

The manufacturer or importer must provide a written report of the incident within 10 days of the incident.

#### **4.2.3 Minister’s powers**

The minister is granted broad powers under the CCPSA in several areas. The minister has the authority to order manufacturers and importers of consumer products to conduct tests or studies on a product and to compile information to verify compliance with the CCPSA and regulations and to provide the minister with that information within the time and in the manner the minister specifies.

If the minister believes on reasonable grounds that a consumer product is a danger to human health or safety, the minister may order a manufacturer, importer or seller to recall the product or to implement other specified corrective measures. If a recall or corrective measure order issued by the minister is not complied with, the minister may carry out the recall at the expense of the non-compliant manufacturer, importer or seller. A review of the recall, if requested in writing by a manufacturer, importer or seller, must be completed within 30 days (or as extended by the review officer). The order of the minister remains in effect while the review is ongoing.

The minister also has broad powers to disclose personal and business information without consent to a person or government that carries out functions relating to the protection of health and safety.

Further, under the CCPSA and its regulations, every person who contravenes an order to take specified measures with respect to a consumer product, such as an order to recall a product, commits a violation under the Act and is liable to pay an administrative monetary penalty.

### **4.3 What are the sources of labelling requirements? Must or should all labels be bilingual?**

Product labelling is regulated at both the federal and provincial levels through statutes of general application and statutes applicable to specific products. The *Consumer Packaging and Labelling Act* (CPLA) is the major federal statute affecting pre-packaged products sold to consumers. The CPLA and the associated *Consumer Packaging and Labelling Regulations* require pre-packaged consumer product labels to state the common or generic name of the product, the net quantity and the manufacturer's or distributor's name and address. Detailed rules are set out as to placement, type size, exemptions and special rules for some imported products.

The CPLA and associated regulations, like most federal legislation, require mandatory information on labels to be in both English and French. There are exceptions – most notably that the manufacturer's name and address can be in either English or French. While non-mandatory information is not *generally* required to be presented bilingually under federal law, most Canadian packaging is nevertheless fully bilingual for marketing and liability reasons. Moreover, labelling on products that are to be sold in Quebec is effectively required to be fully bilingual because the Quebec *Charter of the French Language* requires that most product labelling and accompanying materials, such as warranties, be in French. Labelling in Quebec can contain another language or languages, provided the French text has equal or greater prominence as compared to any other language.

Marking of the country of origin is required for certain products listed in regulations issued pursuant to the *Customs Tariff*. See Section IV, 3.5.6, "Country of origin issues."

Many other federal statutes, such as the federal *Food and Drugs Act* and the *Textile Labelling Act*, mandate labelling and language requirements for specific products and/or claims.

## 4.4 Food

All food products are regulated under the *Food and Drugs Act* and *Food and Drug Regulations*. In addition to labelling requirements common to other pre-packaged products, foods must also, with a very few exceptions, contain a list of ingredients in English and French. A “best before” date (in a particular Canadian format) is required for foods with a shelf life of less than 90 days. Nutrition labelling, with limited exceptions, is mandatory. Only a few very closely defined health claims are permitted. Specialized federal legislation such as the *Canada Agricultural Products Act*, the *Meat Inspection Act* and the *Fish Inspection Act* applies to certain categories of food. Canadian food legislation regulates claims, sets standards for specific food products and mandates standards of purity and quality.

In December 2016, amendments to the nutrition labelling, list of ingredients and food colour requirements under the *Food and Drug Regulations* came into force. Some of the notable changes include: revisions to the percentage daily values in the nutrition facts table based on updated science, updating the list of nutrients disclosed in the nutrition facts table, the grouping of sugars-based ingredients in the list of ingredients and changes to the declaration of serving sizes in the nutrition facts table. With the exception of amendments relating to food colours, which are effective immediately, industry has a five-year transition period to meet the new requirements. The Canadian government has also initiated regulatory proposals and consultations on other food labelling and advertising initiatives, such as front of package sugar, sodium and fat labelling for products that are high in these nutrients, as well as restricting food advertising to children.

Canada is currently undergoing a modernization of food inspection legislation. The *Safe Food for Canadians Act* (SFCA) received royal assent in 2012, but the majority of the legislation has not yet come into force. The Act, which is intended to align Canadian requirements more closely with trade requirements under the U.S. *Food Safety Modernization Act*, will replace the *Canada Agricultural Products Act*, the *Meat Inspection Act*, the *Fish Inspection Act* and the food-related provisions of the *Consumer Packaging and Labelling Act*. In January 2017, proposed regulations under the SFCA were published for comment and consultation. The government is in the process of reviewing and analyzing feedback and anticipates finalizing the regulations in 2018.

## 4.5 Drugs

Drugs are also regulated in Canada under the federal *Food and Drugs Act* and the *Food and Drug Regulations*. Prescription and non-prescription drugs require prior market authorization identified by a Drug Identification Number (DIN) which must appear on the product packaging. In the case of “new drugs,” a notice of compliance is also required which is issued following an assessment of the drug’s safety and efficacy. In addition, Canadian establishments that fabricate, package, label, distribute, import, wholesale or test a drug must have an establishment licence and further licensing may be required for activities related to certain substances, such as narcotics. The location of sale of drugs and the professions involved in the prescribing and sale of drugs, such as physicians and pharmacists, are regulated under provincial legislation and by self-regulatory professional organizations.

“Natural health products” such as vitamins and minerals, herbal remedies, homeopathic medicines and traditional medicines (such as traditional Chinese medicines) are regulated by the *Natural Health Products Regulations*. Natural health products require prior market

authorization (product licence) identified by a product registration number (NPN) or, in the case of a homeopathic medicine, by the letters DIN-HM, which must appear on the product packaging. Canadian sites that manufacture, package, label and import these products must have a site licence. These requirements are quite different than in the U.S., where similar types of products are considered “dietary supplements” and are not subject to the same level of regulatory oversight as natural health products.

In November 2014, the government passed amendments to the *Food and Drugs Act* under Bill C-17, the *Protecting Canadians from Unsafe Drugs Act*. Bill C-17 grants the minister substantial new powers, including the ability to: conduct recalls, order modifications to labels/packaging, and require the submission of health and safety data post-approval. In addition, Bill C-17 permits disclosure of confidential business information relating to drugs and medical devices under certain circumstances. Some of the provisions of Bill C-17 will only come into force after related regulations have been developed.

## 4.6 Weights and measures

The *Weights and Measures Act* mandates that the metric system of measurement is the primary system of measurement in Canada. While a metric declaration of measure is required, in most cases it is also possible to have a non-metric declaration in appropriate form.

## 4.7 Advertising regulations and enforcement

### 4.7.1 Federal law

Product advertising and marketing claims are primarily regulated by the *Competition Act* (Canada), which has a dual civil and criminal track for advertising matters. The *Competition Act* includes a general prohibition against making any misleading representation to the public for the purpose of promoting a product or business interest that is false or misleading in a material respect. It is not necessary to establish that any person was actually deceived or misled by the representation. Making a false or misleading representation is a criminal offence if done knowingly or recklessly. In the absence of knowledge or recklessness, the *Competition Act* provides for civil sanctions including cease and desist orders, mandatory publication of information notices and administrative monetary penalties.

Ordinary price or sale claims that do not meet time or volume tests set out in the *Competition Act* are also prohibited. These tests differ from U.S. law, and the Competition Bureau has been active in bringing enforcement actions against such claims. Performance, efficacy or length of life claims for products must be supported by adequate and proper testing conducted before the claims are made. The *Competition Act's* telemarketing provisions require disclosure of certain information during telemarketing calls and render failures to disclose and certain deceptive practices criminal offences.

The *Competition Act* also requires disclosure of key details of promotional contests, such as the number and approximate value of prizes and factors affecting the chances of winning. It is prohibited to send a deceptive notice that gives the recipient the general impression that a prize will be or has been won and that asks or gives the recipient the option to pay money or incur a cost. Because of anti-lottery provisions in the *Criminal Code*, most Canadian contests offer consumers a “no purchase” method of entry and require selected entrants to answer a skill-testing question before being confirmed as winners.

The *Competition Act* provides a civil right of action to those suffering damage as a result of conduct contrary to the criminal provisions of the Act, including the criminal false or misleading advertising provisions. While no similar right of action exists with respect to civilly reviewable conduct, recourse may be sought through common law tort and trade-mark routes.

Monetary penalties for civilly reviewable false or misleading representations can be significant. The maximum civil penalty under the *Competition Act* is C\$15-million for a second order against a corporation. Courts may also order advertisers who engage in misleading advertising to disgorge the proceeds to persons to whom the products were sold (excluding retailers, wholesalers and distributors to the extent that they have resold or distributed the products). Courts are given broad authority to specify terms for the administration of such funds, including how to deal with unclaimed or undistributed funds.

On July 1, 2014, the false or misleading advertising provisions of the *Competition Act* were amended by Canada's new Anti-Spam Legislation. The amendments, which were introduced to give the Competition Bureau greater oversight of online activity, prohibit any representation in an electronic message that is false or misleading in a material respect. In addition, the amendments prohibit any false or misleading representation, regardless of materiality, in the sender description or subject line of an electronic message, or in a "locator" (e.g., metadata or URL). Prohibited representations will constitute criminal offences if performed knowingly or recklessly; in the absence of knowledge or recklessness, the representations will be considered civilly reviewable under the *Competition Act*. See Section XI, "Information Technology."

In addition to the *Competition Act*, there are many other sources of advertising law and guidance in Canada. For example, Ad Standards, a national not-for-profit advertising self-regulatory body, has developed the Canadian Code of Advertising Standards. In addition, there are a variety of product-specific codes and laws that contain advertising requirements, such as the *Food and Drugs Act* and related regulations, as well as the *Pest Control Products Act*.

#### **4.7.2 Provincial law**

Provincial legislation, particularly consumer protection and business practices legislation, also impacts advertising. For example, *the Consumer Protection Act, 2002* (Ontario) renders it an "unfair practice" to make false, misleading or deceptive consumer representations, including with respect to sponsorship, approval, performance characteristics, accessories, uses, ingredients, benefits or quantities that the products do not have, and even goes so far as to create, as an unfair practice, certain "unconscionable" representations. Businesses that make unconscionable consumer representations face exemplary or punitive damages. Other remedies include rescission or having to refund that portion of the purchase price which exceeds the "fair value" of the goods or services in question. Non-residents should pay particular attention to the Ontario *Consumer Protection Act, 2002* as it applies if the consumer is located in Ontario, even if the supplier is not.

Promotional contests run in Quebec must comply with contest legislation in that province, including notice, duty, security and filing requirements. Moreover, Quebec's *Charter of the French Language* generally requires commercial advertising in Quebec to be displayed in French, although, depending on the location of the advertisement, it may be accompanied by a version in one or more other languages provided that the French version is at least as

prominent or, in some situations, markedly predominant. Depending on the circumstances, exceptions may apply. For instance, a “recognized” trade-mark within the meaning of the *Trade-marks Act* may appear exclusively in a language other than French on commercial advertising, posters or public signage unless a French version of that trade-mark is registered. Amendments to the regulations under the *Charter of the French Language* have been enacted to require the use of French words along with the trademark on outdoor signs in certain circumstances.

## **5. Product Liability — Common Law Provinces**

### **5.1 How broad is the potential for liability in a contractual claim?**

A party to a purchase or supply contract is entitled to sue for damages for breach of the contract if the product’s quality, fitness or performance does not comply with express or implied contractual terms. Implied terms may be found by reference to trade practice or common usage. In addition, provincial sales of goods legislation will generally imply, as part of any agreement for the sale of goods, terms and conditions regarding the fitness and quality of the products sold. Legislation commonly prohibits exclusion of these statutory warranties and conditions from contracts for the sale of products to consumers. In a few provinces, legislation implies statutory warranties in favour of consumers by manufacturers and others in the distribution chain in certain circumstances, even in the absence of contractual privity.

### **5.2 How broad is the potential for liability in a negligence claim?**

Where a purchaser or user of a defective product does not have a contractual relationship with the proposed defendant and statutory warranties are not implied, the purchaser or user will have to prove negligence; that is, failure to exercise reasonable care in the preparation or putting up of the product that results in injury to the foreseeable user or the user’s property. Product liability claims under common law can be made for negligently manufacturing a product, negligently designing it or failing to warn foreseeable users of the product of dangers inherent therein. Although negligence must be proven in each case, manufacturers will, as a practical matter, be held strictly liable if a product has a manufacturing defect (i.e., it was built in a way that was not intended by the manufacturer), because the court will assume there was negligence in the manufacturer’s production process or by its employees and will not require the consumer to establish which it was.

In addition to product liability claims, a product vendor, manufacturer or distributor who recklessly or carelessly makes false statements regarding its safety or utility may be held liable for any losses arising from reasonable reliance on such statements. To establish liability for such negligent misrepresentation, the court must find that there existed a “special relationship” between the person making the statement and the recipient of the statement, actual or constructive knowledge on the part of the maker that the recipient intended to rely on the accuracy of the statement, and proof that such reliance was reasonable and caused the loss. Provincial consumer protection legislation may provide consumers with additional remedies for “false,” “misleading” or “deceptive” representations, and is increasingly being relied upon in product liability class actions.

All parties in the distribution chain are potentially liable for product liability claims if negligence can be established. Examples would include failure to detect any product defect that they knew or ought to have known existed through reasonable inspection, or failing to provide warnings to potential users of dangers they knew or ought to have known were associated with use of the product.

Under provincial negligence legislation, joint tortfeasors are jointly and severally liable for a plaintiff's loss in most cases. The court may determine the degree of fault or negligence of various persons whose collective "fault" or neglect caused injury to a plaintiff and apportion it among those persons. However, the plaintiff can recover all damages from a defendant found even partly at fault, and it will then be up to that defendant to seek contribution from other tortfeasors.

### **5.3 What is the extent of a person's liability?**

A plaintiff's damage recovery may be reduced to reflect any fault or negligence on the plaintiff's part that contributed to the injury or loss. The recovery of damages for negligence, negligent misrepresentation, breach of the duty to warn and breach of contract are limited to losses reasonably foreseeable to the parties and not considered "remote." Damages for personal injury and property damage are intended to be compensatory. General damages for pain and suffering are presently capped at about C\$379,000. Canadian law is unsettled in some respects regarding the extent to which economic loss arising from a product defect may be recovered in a negligence action where the defect does not cause personal injury or property damage other than to the product itself, or the risk of such loss. However, several Canadian courts have expressed doubt that these types of economic losses are recoverable, and a recent appellate decision (that was denied leave to appeal to the Supreme Court of Canada) held that diminution in value caused by a non-dangerous defect is not recoverable in negligence. Economic losses are recoverable in claims respecting breach of contract, negligent misrepresentation and breach of the duty to warn.

### **5.4 Other litigation risks: class actions, juries and punitive damages**

Historically, Canadians have been less litigious than Americans and damage awards have been much lower. Jury trials are much less common than judge-alone trials; there is no constitutional right to a jury trial in a civil case. Punitive damages are available in Canada in certain circumstances, though such awards have historically been very rare in product liability cases and, in most cases, fairly modest when made. Outside the class action context, there has been some recent support for higher punitive damage awards, though still in very limited circumstances. See Section XVII, "Dispute Resolution."

In recent years, however, class action legislation in Canadian provinces has changed the Canadian litigation landscape, resulting in a number of multimillion-dollar settlements in the product liability area. The threshold for class certification is generally considered to be lower in Canada than the U.S. and product liability class actions for personal injury damages, medical monitoring costs, refunds and disgorgement of revenues from the sales of the product have been certified despite vigorous opposition from defendants. The latter claims for disgorgement are based on a novel theory of liability called "waiver of tort." The exact nature and scope of this doctrine remain a subject of debate. However, courts in some provinces have recently declined to certify issues relating to waiver of tort in class actions.

To date, relatively few class actions have proceeded to trial in Canada (outside of Quebec), though this number has increased in recent years. It remains to be seen whether the availability of class actions will result in more frequent jury trials, larger punitive damage awards or other changes in substantive laws.



# V. Procurement



Organizations that are either conducting competitive procurement processes in Canada or seeking business opportunities by participating in competitive procurement processes need to understand some basic principles about how procurement law in Canada differs from other jurisdictions.

The following is a summary of the law of procurement as it applies to all of the common law provinces and territories of Canada, that is, all of the provinces and territories other than Quebec. While some of the common law principles are applicable in Quebec, there are also specific statutory rules with respect to conducting competitive procurement processes and contracting with government. For more information, please consult our *Doing Business in Quebec* publication.

## 1. Procurement Law Framework

The law in Canada with respect to competitive procurement/tendering has been in development since 1981 and is based entirely on common law, in other words, there is no single piece of legislation that governs competitive bidding. What is somewhat unique to Canadian law is that competitive procurement processes create two contracts: (i) the bidding contract, which sets out the “rules” that apply up until the completion of the competitive procurement process, and (ii) the substantive contract entered into between the procuring authority and successful bidders. This contractual framework applies to both the public and private sector when issuing or responding to competitive procurement processes.

For the public sector, layered on top of this contractual legal framework is a collection of trade agreements and government guidelines that regulate procurement practices of government and quasi-government entities. These agreements and guidelines generally set out when a public-sector entity is required to conduct an open, competitive procurement process for the acquisition of goods and services, as well as establish certain principles that apply to the procurement processes. A more detailed discussion of these governance obligations is set out below.

### 1.1 Case law

There are a number of seminal Supreme Court of Canada (SCC) cases that presently inform the law of competitive procurement in Canada:

- The first, and seminal, case is *The Queen (Ont.) v. Ron Engineering & Eastern Construction (Eastern) Ltd.*, where the SCC first articulated the “Contract A/Contract B” analysis. Contract A is the contract that is made when a bidder submits a bid in response to an invitation to tender, or similar document. Contract B is the agreement that will be formed between the procuring authority and the winning bidder. This case established the legal framework for the development of procurement law in Canada.
- In *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Limited (MJB)*, the SCC clarified that Contract A can only be formed between a procuring authority and compliant bidders; that is, a procuring authority is contractually obliged through Contract A to accept only compliant bids, and only compliant bidders have legal remedies arising from the procurement process as against a procurement authority.

At the same time, the SCC recognized and accepted that procuring authorities are entitled to consider “nuanced” views of price and are therefore not bound as a matter of principle to accept only the lowest of compliant bids.

- The third case, *Martel Building Ltd. v. Canada (Martel)*, affirms that there is a duty owed to treat all compliant bidders fairly and equally, but always with regard to the terms of Contract A as set out in the competitive procurement documents, in this case, a tender call. At the same time, the SCC held that competitive procurement requirements where Contract A is created are not negotiable; that procuring authorities have the right to reserve privileges and impose stipulations; and that there is no duty of care owed in respect of the preparation of competitive procurement documents.
- The last and most recent seminal case is the 2010 decision in *Tercon Contractors Ltd. v. British Columbia (Tercon)* in which the SCC refused to enforce a waiver clause with respect to damages arising out of a breach of Contract A. This case required the SCC to face the competing tension between the implied obligation of “fairness” in procurement and the principle that courts should enforce valid contractual terms. It appears that in a conceptual battle between the right to contract and public policy to protect the integrity of fairness in competitive procurement processes, the fairness obligation has prevailed. There were two other important issues dealt with or alluded to in *Tercon*. First, the SCC left the door open for negotiation within a competitive procurement process, subject to disclosure and a prohibition against changing the fundamental nature of Contract B. Second, the SCC made a brief reference to other administrative law remedies available to a disgruntled bidder, thereby reinforcing the idea that judicial review was an available course of action to challenge public-sector procurement processes.

There are a few other key cases decided by the SCC that are worth mentioning. In *Design Services Ltd. v. Canada*, the SCC refused to recognize a new cause of action for “negligent procurement” and, in *Double N Earthmovers Ltd. v. Edmonton*, the SCC held that a procuring authority is permitted to renegotiate a contract on which a competitive procurement process was based after Contract B is signed. Most recently in *Bhasin v. Hrynew*, the SCC affirmed the *MJB*, *Martel* and *Tercon* cases, noting that a duty of good faith will be implied in fact in the tendering context and that there is a duty of fairness in considering bids submitted under a tendering process.

While not a SCC case, the recent Federal Court decision in *Rapiscan Systems Inc. v. Canada (Attorney General)*, which was upheld by the Federal Court of Appeal, established that when using flexible formats, public institutions must still follow due process rules or face legal challenges that can result in unfair contract award decisions being struck down by courts through judicial review.

The case law has clearly drawn a distinction between competitive procurement processes that are binding (where Contract A is created) and those that are not intended to be binding (where no Contract A is created). Courts have emphasized that a procuring authority must be clear in its competitive procurement documents as to its intention to create Contract A.

## 1.2 Procurement governance

### 1.2.1 Understanding an organization's procurement regulatory framework

A public-sector organization, or an entity that receives the majority of its funding from government, must be conscious of the “procurement regulatory framework” within which it is obliged to function. Each public-sector organization has a unique procurement governance framework and to understand the procurement governance framework of an organization, the following issues should be considered:

- Are there any procurement statutes that apply to the organization? For example, in Ontario, the *Broader Public Sector Accountability Act* prescribes a procurement governance framework for public-sector entities.
- What is the legal status of the organization and does it impact the applicable procurement regulatory framework? For example, in Ontario, is the organization an “agency,” a “ministry,” a “broader public-sector organization,” a “publicly funded organization,” a “designated broader public-sector organization” or a “local board”?
- Does the organization have a funding agreement or memorandum of understanding with the provincial or federal government? Does that funding agreement or memorandum of understanding specify procurement obligations?
- Does the organization have internal procurement policies that it is obliged to follow?
- Are there any trade agreements that apply to the organization? For example, is the organization “listed” as an organization subject to the Agreement on International Trade or the North American Free Trade Agreement?
- How do the various applicable “regulatory schemes” function as a whole to regulate the organization?
- Are there any requirements to obtain authorization to participation in the procurement process? For example, in Quebec there may be requirements to obtain an authorization delivered by the *Autorité des Marchés Financiers* as a condition to participation to certain procurement processes.

An organization's procurement governance framework dictates when an open, competitive procurement process is to be used; the circumstances under which an open, competitive procurement process is not required; the principles to be applied to a competitive process undertaken by the organization; and how disputes in relation to the competitive process are to be resolved.

A more detailed discussion of trade agreements, specifically the Agreement on Internal Trade and the New West Partnership Trade Agreement, is set out in Section IV, 3, “International Trade Agreements.”

### 1.2.2 Procurement obligations in trade agreements

An expanding and important factor in the Canadian procurement context is the requirements imposed by various domestic and international trade treaties. The connection between trade treaties and procurement is a relatively straightforward one: since regulating public-sector and quasi-public-sector purchasing is an important way to encourage the elimination or management of trade barriers, procurement rules to ensure fair and open access to government contracts are a natural consequence. Therefore, all government and public-

sector entities must be certain to understand which international and domestic trade treaties, and embedded procurement process requirements, apply to them. See Section IV, 3, “International Trade Agreements.”

### **1.2.3 Federal government procurement**

The specific requirements relating to federal government procurement are established and implemented by Public Works and Government Services Canada (PWGSC), which publishes standardized procurement and contract documents for use by various federal government departments and agencies. The *PWGSC Supply Manual* is the federal government’s procurement policy and contains provisions with respect to when the government will conduct an open, competitive procurement process and when it will not; how a procurement process will be conducted; the terms and conditions of a typical procurement process; and how disputes with the federal government are to be resolved.

A separate body of case law arising out of decisions of the Canadian International Trade Tribunal (CITT) is dominant in the regulation of federal government procurement processes. It is important to note that CITT and federal court cases arising out of appeals from CITT decisions form a second body or “stream” of case law that sets out the legal context within which federal government procurements are to proceed. A bidder’s rights in relation to disputes arising from federal procurement processes will be largely determined by this stream of case law and bidders have the ability to appeal federal government procurement decisions to the CITT, rather than as a civil proceeding.

### **1.2.4 Comprehensive Economic and Trade Agreement (CETA)**

CETA is an international trade agreement between Canada and the European Union (EU) that entered into force on a provisional basis on September 21, 2017. Under CETA, Canada and the EU have committed to reciprocal non-discrimination in the government procurement context. CETA opens up competition for Canadian and EU suppliers to a wide range of government procurement activities by central government agencies (federal), sub-central government agencies (provincial) and associated agencies (municipalities, school boards, universities and others), with the exception of the excluded entities named in an annex to CETA.

Subject to the financial thresholds and certain exceptions set out under CETA, the procurement of all goods is covered, while the procurement of only specifically identified services is covered.

### **1.2.5 Canadian Free Trade Agreement (CFTA)**

CFTA is a domestic trade agreement among the Canadian provinces, territories, and the federal government that entered into force on July 1, 2017. CFTA replaces the 1995 Agreement on Internal Trade Act (AIT), and while CFTA carries forward similar public procurement principles to those found in the AIT, it also contains some important changes, which are intended to align Canada’s domestic trade arrangements with its international treaties, such as CETA. The entities covered by CFTA are set out in annexes to CFTA, and each province and territory has a different list of covered entities.

Subject to the financial thresholds and certain exceptions set out under CFTA, the procurement of all goods and services is covered.

## 1.2.6 Defence Procurement Strategy

The Department of National Defence and Public Works and Government Services launched a new Defence Procurement Strategy (DPS) in early 2014. The DPS represents a fundamental change to the government's approach to defence procurement. In particular, a key component of the DPS is the rating and weighing of "Value Propositions" as part of the bid evaluation process, depending on the value of the procurement.

## 2. Issues for Organizations Participating in Canadian Procurement Processes

For organizations participating in Canadian procurement processes, there are three fundamental questions to consider when determining the extent and scope of their legal rights and risks in a competitive procurement.

### 2.1 What is the procurement governance regime that governs the procuring authority?

This issue is only applicable to public-sector and quasi-public-sector entities, that is, entities that receive the majority or a substantial portion of their funding from public sources.

The answer to this question will determine what procurement obligations the procuring authority is bound by, such as whether the procuring authority is required to conduct an open, fair and transparent process and under what circumstances an entity may obtain goods or services without a competitive process, such as through a single source or sole source.

This will also determine what options are available to a bidder to challenge the procuring authority's competitive procurement process, its decision about whether or not to conduct a competitive procurement process, or other issues related to the procurement process.

### 2.2 Is the competitive procurement process a binding or non-binding process?

Each procurement process, irrespective of the label given to it, is assessed from a Canadian procurement law perspective on whether or not Contract A, the procurement contract, has been validly created. Therefore, the label given to a competitive procurement process is not as important as whether the competitive procurement documents contain the "hallmarks" of the existence of Contract A. The creation of Contract A forms a binding legal agreement between the procuring authority and the bidder, and is referred to as a "binding" procurement process.

The following have been identified in the case law as hallmarks of Contract A:

- Submissions/bids are irrevocable for a defined period of time
- Bidders provide bid security
- Restriction on a bidder's ability to change its proposal after the submission deadline
- Fully formed contract for goods and/or services is attached to the procurement documents and the successful bidder is required to execute the contract in substantially the same form
- Pricing, once submitted, is fixed and non-negotiable

## **2.3 What are a bidder's rights in a binding procurement process?**

If the procurement process is a binding process, that is, if Contract A is validly formed, then there are certain rights and obligations on the part of both the procuring authority and the bidder that become effective.

### **2.3.1 Duty of full disclosure**

A procuring authority has the duty to disclose to all bidders the nature of the work, all preferences and biases, evaluation criteria, and the terms and conditions of the tendered contract.

This means that a procuring authority is obligated to disclose information about the tendered contract that could impact a bidder's decision to bid and pricing.

A procuring authority is required to disclose all evaluation criteria that will be used to evaluate bids, including the relative weighting of each criterion.

### **2.3.2 Duty of fairness and good faith**

Canadian courts have consistently imposed an implied duty of fairness based on the principle that the integrity of competitive procurement processes must be protected by the courts. This principle applies equally to the public and private sectors.

From a practical perspective, this means that:

- All bidders are entitled to equal access to information during a procurement process, which means that a procuring authority cannot selectively withhold information from some bidders
- A procuring authority must conduct a transparent evaluation process that follows the rules pre-established in the procurement documents
- A procuring authority must avoid conflicts of interest, unfair advantage or the operation of bias throughout the process
- A procuring authority must reject non-compliant submissions, that is, bids that do not materially comply with the requirements of the procurement documents
- A procuring authority must award the contract to the winning submission, that is, the highest-scored/lowest-priced, compliant proponent

## **2.4 Compliance with federal government integrity provisions**

Organizations interested in selling goods and services to the federal government or those with existing contracts with the federal government should be aware of recent developments related to "integrity" in procurement. The federal government's procurement policy includes provisions to ensure that the federal government does business only with businesses and individuals that act with integrity. Businesses or individuals that are bidding on federal government contracts must be aware of the disclosure requirements set out in the integrity provisions or risk having a bid declared unresponsive or having a contract terminated.

A bidder responding to a federal government procurement process must make certain certifications about itself and its “affiliates,” which are broadly defined to include a wide range of related entities and individuals, and its board members. Bidders must provide certifications relating to certain criminal convictions and lobbying activities of bidders, affiliates and the members of the bidder’s board of directors. In addition, bidders, including directors of corporate bidders, must consent to a criminal record check. Disclosure or evidence of certain convictions of a bidder or any board members, particularly relating to fraud or bribery, may preclude that bidder from winning a federal government contract for a period of 10 years.

The integrity provisions have been subject to review and modification over recent years. These revisions resulted in more stringent disclosure requirements reflecting the federal government’s uncompromising position against corruption in government business. Changes in July 2015 involved the implementation of an “Integrity Regime,” which replaces the “Integrity Framework” introduced in 2012. The new Integrity Regime eliminates automatic debarment for the actions of affiliated companies that existed under the Integrity Framework and also allows for a reduction in the 10-year debarment period to five years for companies that undertake appropriate remedial conduct. Further amendments in April 2016 introduced a requirement to provide certifications relating to certain foreign criminal charges and convictions, and created an automatic 10-year determination of ineligibility for a false or misleading certification.

### **3. Issues for Organizations Conducting Competitive Procurement Processes in Canada**

As an organization conducting a procurement process in Canada, there are three fundamental questions to be answered prior to launching a procurement process:

#### **3.1 What are the organization’s internal procurement obligations?**

For public-sector and quasi-public-sector entities, understanding the organization’s procurement obligations means understanding the applicable procurement governance framework. See Section V, 2, “Issues for Organizations Participating in Canadian Procurement Processes.” The procurement governance framework will determine what procurement obligations the procuring authority is bound by, including whether the procuring authority is required to conduct an open, fair and transparent process and under what circumstances an entity may obtain goods or services without a competitive process, such as through a single source or sole source.

For private-sector entities, understanding the organization’s procurement obligations means understanding any internal policies or guidelines with respect to when open, competitive procurement processes are required, or recommended, and with respect to any procedural requirements with respect to the process itself.

### **3.2 Does the organization wish to conduct a binding or non-binding competitive procurement process?**

As described in Section V, 2.2, “Is the competitive procurement process a binding or non-binding process?”, each procurement process is assessed from a Canadian procurement law perspective on whether or not Contract A, the procurement contract, has been validly created. Since the creation of Contract A forms a binding legal agreement between the procuring authority and the bidder, a procuring authority should determine in advance of issuing procurement documents whether it intends to create a binding process or not.

### **3.3 What are a procuring authority’s requirements in a binding procurement process?**

In a binding procurement process, Canadian courts will imply a set of terms and conditions into the procurement process, which procuring authorities, whether they are public-sector or private-sector entities, must be aware of and which must be followed:

- Procuring authorities must at all times adhere to the terms and conditions of Contract A and they cannot accept any non-compliant bids, no matter how attractive they may be.
- Procuring authorities must treat all compliant bidders fairly and in good faith, particularly during the evaluation of any bidder’s submission.
- Procuring authorities cannot make their ultimate decisions to award or reject submissions based on criteria that are not disclosed in the terms and conditions of the procurement documents.
- The law permits procuring authorities to create the terms and conditions of Contract A, or the bidding contract, as they see fit. Thus, privilege clauses that provide the procuring authority with discretionary rights are recognized as fully enforceable and, if properly drafted, allow procuring authorities to reserve to themselves the rights to award contracts to bids that may not be for the lowest price, or not to award contracts at all.



# VI. Acquiring a Canadian Business



## 1. General Considerations

The threshold question in any acquisition is whether to purchase shares or assets. This will be dictated by a variety of factors, including timing, ease of implementation and tax considerations. A share purchase is generally simpler and quicker to complete than an asset acquisition, as it avoids many of the practical problems associated with the transfer of particular assets and the common requirement to obtain consents of third parties. A share purchase may also have tax advantages from the vendor's perspective, as it generally permits the vendor to obtain capital gains treatment with respect to any gain on the sale of the shares, thereby reducing overall tax liability.

A sale of assets will generally be less favourable for the vendor, as a result of potential income inclusions in areas such as the recapture of depreciation on the assets being sold. On the other hand, from the purchaser's perspective, asset acquisitions may have some advantages, particularly where the purchaser wishes to exclude certain parts of the business or its liabilities from the transaction or to step up the tax cost of depreciable assets.

In either case, the purchaser will be concerned about the condition of the underlying business, the title of the vendor to its assets, the status of contracts with third parties and compliance with environmental and other laws. The purchaser will seek to protect itself by conducting a due diligence review of the vendor's business and obtaining appropriate representations, warranties and covenants in the purchase agreement, and potentially through obtaining representation and warranty insurance.

## 2. Share Acquisitions

### 2.1 What approvals are required for an acquisition of shares of a Canadian company by a non-resident?

The securities rules applicable to a purchase of shares depend on whether the purchase is of a private or a public company (see Section VI, 2.4, "Are there any special rules that apply to the acquisition of shares of public companies?"). In the case of large acquisitions, pre-clearance under the Canadian competition laws is required. See Section IV, 1.4, "Merger regulation." Apart from this, the principal authorization that might be required is approval under the *Investment Canada Act*. See Section IV, 2, "General Rules on Foreign Investments."

### 2.2 What are the tax consequences of a share purchase?

There are no stamp duties or similar taxes payable in Canada upon an acquisition of shares. The shares' vendor may be subject to payment of capital gains tax. To ensure that non-residents of Canada pay any taxes owing in respect of a sale of "taxable Canadian property," which can include some shares (e.g., if the shares derive their value principally from Canadian real property), the *Income Tax Act* requires the purchaser of taxable Canadian property to undertake a "reasonable inquiry" and satisfy itself as to the vendor's Canadian resident status (normally through representations in the purchase agreement). If the vendor is a non-resident, it might need to provide the purchaser with a certificate issued by the tax authorities, which will be granted when appropriate arrangements are made to ensure

payment of any tax liability. If the certificate is not provided, the purchaser might need to withhold and remit to the tax authorities 25 per cent of the purchase price, whether or not any tax would be payable by the vendor on the sale. Shares that are listed on a “recognized stock exchange” can be “taxable Canadian property” in certain circumstances; however, it is not necessary to obtain a certificate with respect to the sale of such shares.

## **2.3 Can one freely dismiss directors and officers of the acquired Canadian company?**

Directors may be removed by shareholders’ resolution, which would enable a non-resident purchaser to replace the acquired company’s board of directors as the purchaser sees fit, subject to the qualification and Canadian residency requirements for directors, discussed in Section III, 1.2.1, “Who is responsible for the corporation?”

Officers and other employees of the target may be dismissed, subject to the provisions of Canadian law and any employment contracts or collective agreements. Specifically, unless their employment contracts set out their entitlements upon termination of employment, at common law and under the *Civil Code of Québec*, employees whose employment is terminated without cause would be entitled to reasonable notice of termination or pay in lieu of notice. Depending on the employee’s length of service, position, compensation, age, and availability of similar employment, the required notice of termination (or pay in lieu of notice) could range between one month and 24 months or more.

A typical condition of closing may require the board and designated officers to resign their corporate offices and directorships and provide releases. See Section VIII, “Employment and Labour Law,” which discusses employees’ rights in general.

## **2.4 Are there any special rules that apply to the acquisition of shares of public companies?**

The acquisition of shares of a public company could trigger the application of the “take-over bid” requirements of Canadian corporate and securities legislation. In Canada, the rules governing take-over bids are now harmonized across all provincial jurisdictions. Negotiated public company acquisitions in Canada are typically commenced by a non-binding letter of intent from the offeror indicating an interest in purchasing the outstanding securities of the target, and a confidentiality and standstill agreement between the parties, followed by the negotiation of a comprehensive support agreement.

### **2.4.1 Regulation of take-over bids**

The threshold for a take-over bid is 20 per cent of the issued voting shares or “equity” shares (essentially non-voting common shares) of any class or series of the issuer. This threshold applies regardless of whether the offeror will obtain effective control of the company. Disclosure of the acquisition of 10 per cent or more of the voting or equity shares of a company (or securities convertible into voting or equity securities), and of subsequent acquisitions of two per cent or more within the 10 to 20 per cent range, is required under the “early warning” rules of Canadian securities legislation.

The offeror may determine the number of shares for which it wishes to bid. On a partial bid, shares must be taken up *pro rata*. Conditions may be attached to the bid (other than a

“financing” condition). It is common to make a purchase conditional upon attaining a minimum level of acceptance, frequently two-thirds (the threshold for approval of certain fundamental corporate transactions in most jurisdictions) or 90 per cent (the level that gives the offeror the right to acquire the balance of the shares outstanding). There is a minimum tender requirement of 50 per cent of the securities subject to the bid (excluding securities held by the bidder and its joint actors).

Unless an exemption applies, a take-over bid must be made to all shareholders pursuant to a disclosure document (comprising a take-over bid offer and a circular). The circular must set out prescribed information about the offer and the parties, including shareholdings and past dealings by the bidder and related parties in shares of the target. If the target company has Quebec shareholders, which will often be the case, then unless a *de minimis* exemption applies, the circular must also be prepared in the French language for the purposes of mailings to such Quebec holders. The circular must be delivered to the target company and filed with the securities commissions, but is not subject to any pre-clearance review. The offeror is generally free to determine the price at which it chooses to bid and the consideration may be either cash or securities (or a combination of cash and securities).

Where the purchase price consists of securities of the offeror, the circular must contain prospectus-level disclosure regarding the offeror’s business and financial results and *pro forma* financial statements assuming completion of the offer. For companies in the resource sector, technical reports on the offeror’s properties or oil and gas resources may be required. Issuing securities will make the offeror a “reporting issuer,” subjecting the offeror to certain ongoing disclosure requirements.

The target company’s directors must deliver their own circular to shareholders in response to the bid. There are a number of corporate rules and securities commission policies that affect the target company’s ability to undertake defensive measures in response to a bid, though recent amendments to the law are designed to provide more power to the target board. A bid subject to full regulation under provincial legislation must be made in accordance with certain timing and other procedural rules, including a compulsory minimum offer period. The minimum offer period is 105 days, except in certain circumstances where the target board agrees to waive that period in favour of a shorter period (not less than 35 days) or unless the target enters into certain alternative transactions in response to the bid (in which case the period moves to 35 days).

## **2.4.2 Exempt take-over bids**

Exemption from the statutory take-over bid rules is available in certain circumstances. As noted above, purchases of private companies are generally exempt from the take-over rules.

One of the most important exemptions relating to public companies is the “private agreement” exemption. Purchases may be made by way of private agreements with a small number of vendors without complying with the take-over bid rules, which would otherwise require the offer to be made to all shareholders. However, the rules exempt such purchases *only* if they are made with not more than five persons in the aggregate (including persons located outside Canada) and the purchase price (including brokerage fees and commissions) does not exceed 115 per cent of the average closing price of the shares during the 20 days preceding the date of the bid.

### 2.4.3 Arrangements

Friendly acquisitions of public companies are now generally effected in Canada by way of a plan of arrangement. An arrangement is a court-approved transaction governed by corporate legislation and requires shareholder approval (generally 66-2/3 per cent) by the companies involved. The parties enter into an arrangement agreement setting out the basis for the combination, following that an application is made to the court for approval of the process. The court order will require the calling of shareholders' meetings and specify the approval thresholds and — in most cases — dissent rights. A detailed circular will be sent to shareholders that provides broadly equivalent disclosure to that which would be provided by a take-over bid circular.

Arrangements have a number of advantages. In particular, they can: facilitate dealing with multiple securities (particularly convertible instruments); provide for acquisition of 100 per cent of the target company without the need for a follow-up offer or second-stage transaction; and, if securities are to be offered to the target company's shareholders, provide an exemption under U.S. securities laws from the requirement to file a registration statement. On the negative side, arrangements leave control of the process in the hands of the target company and can provide opportunities for interested parties to intervene in the court proceedings (though this rarely happens in Canada).

### 2.4.4 Amalgamations

Acquisitions are sometimes effected by "amalgamations." An amalgamation is akin to a merger under U.S. law, however, the amalgamated corporation is considered to be the successor of both amalgamating entities and the amalgamated entity succeeds to the assets and liabilities of the amalgamating entities. Similar to negotiated take-over bids, amalgamations are typically commenced by the execution of a non-binding letter of intent from the offeror indicating an interest in amalgamating with the target company, and a confidentiality and standstill agreement between the parties, followed by the negotiation of a comprehensive amalgamation agreement.

Generally, all securityholders whose legal rights are affected by a proposed amalgamation will be entitled to vote on the transaction. The approval thresholds are usually 66-2/3 per cent of the securities represented by class at the securityholders' meeting. The information to be provided to those entitled to vote on the amalgamation must be sufficient to allow them to form a reasoned judgment as to whether to support or vote against the proposal. Proxy circulars are not subject to regulatory review in Canada. Securityholders have the right to dissent from an amalgamation transaction and to be paid "fair value" for their securities. Subject to regulatory approvals, the amalgamation process typically takes 60 to 90 days. Subject to the availability of financial information and related preparation time, preparation of securityholder meeting documentation may take three to four weeks.

A statutory amalgamation provides certainty in an acquisition transaction that the acquirer will obtain 100 per cent of the shares of the target. However, completion time is often longer than if the transaction were undertaken by a take-over bid. Amalgamations are used less often than arrangements as the time and documentation required is virtually identical but amalgamations do not provide the structuring flexibility afforded by an arrangement or the benefit of a court decision as to the fairness of the transaction.

## **2.5 What rights of compulsory acquisition of the minority are available after a successful take-over bid?**

An offeror that acquires substantially all of a class of shares of a company (generally 90 per cent of the shares of the class not held by the offeror and its associates at the time of the bid) may generally buy out the remaining shareholders of the class at the offer price or, if the shareholder objects, at a court-determined “fair value.” If an offeror intends to exercise its right of compulsory acquisition, it must state its intent to do so in the circular and follow certain steps within a fixed period (generally 180 days) after the bid.

There are other ways by which a minority can be removed from a company, such as amalgamation, arrangement or consolidation, which results in the shareholder losing his participating interest in the business. Securities and corporate laws provide protection for minority shareholders in these circumstances, but if an offeror acquires 66-2/3 per cent of the shares under a bid, it will generally be able to eliminate the minority.

## **3. Asset Acquisitions**

### **3.1 What approvals are required in the case of a purchase of assets of a Canadian business by a non-resident or by its Canadian subsidiary?**

The review mechanisms of the *Investment Canada Act*, which are discussed under Section IV, 2, “General Rules on Foreign Investments,” also apply to the purchase of “all or substantially all of the assets used in carrying on a Canadian business.” Competition laws that might apply to an acquisition of assets are discussed in Section IV, 1.4, “Merger regulation.”

In addition to the statutory approvals, consents of landlords, equipment owners, creditors and shareholders may be necessary. Under most Canadian corporate statutes, if a sale involves the disposition of all or substantially all of a corporation’s assets, shareholders must approve the transaction by special resolution.

### **3.2 What are the tax consequences of an asset purchase?**

Two different sets of tax rules must be examined in this context: liability with respect to income tax, and the application of federal and provincial sales taxes. If real property is involved, land transfer taxes may also be payable.

#### **3.2.1 Canadian income tax issues**

Capital assets used by a vendor in a Canadian business will generally be “taxable Canadian property.” As discussed in Section VII, “Tax,” the purchaser should protect itself from possible tax liability by making “reasonable inquiries” to confirm that the vendor is a Canadian resident. For this purpose, an appropriate representation will generally be obtained in the purchase agreement. If the vendor is a non-resident, a certificate from the tax authorities might be required.

The allocation of the purchase price among the various assets being acquired will also have Canadian tax implications. The allocation is a matter of negotiation between the parties, and they should agree that they will file their income tax returns in a manner consistent with such allocation, to minimize the risk that the Canadian tax authorities will re-allocate the purchase price in a manner that may be disadvantageous to the parties.

Accumulated tax losses and credits in connection with a business are not available to the purchaser on an asset transaction.

### **3.2.2 Sales tax**

Both federal and provincial governments impose sales taxes; the province at the retail level and the federal government through the Goods and Services Tax (GST)/Harmonized Sales Tax (HST) discussed in Section VII, 6.1, “Federal sales and excise tax.”

In a sale of the assets of a business, an election may be available so that no GST/HST or Quebec Sales Tax (QST) will apply to the transaction. The election is available when the seller is selling a business or part of a business, and where the subject of the sale is all or substantially all of the assets that are reasonably considered to be necessary to operate a business. Where the election applies, the sale of the assets of a business may be made free of GST/HST and QST, the rationale being that the recipient would in any event be able to claim a full input tax credit or refund for the tax otherwise payable.

There are two principal conditions that must be met before the election is available. The assets being sold must constitute a “business or part of a business” that was established, carried on, or acquired by the seller. In addition, the recipient must be acquiring at least 90 per cent of the assets reasonably necessary to carry on the business. An indication of the sale of a qualifying business is the existence of an agreement that deals with issues normally found in acquisition arrangements, such as the sale of goodwill and intellectual property, dealings with employees, etc., in addition to the sale of equipment and inventory.

Provincial sales tax exposure, if any, will depend on the province in which the assets are located. For example, currently Manitoba, Saskatchewan and British Columbia impose tax at the rates of eight, five and seven per cent respectively, upon taxable transfers of tangible personal property. There is a wide range of exemptions, particularly for transfers of inventory, provided the goods are purchased for resale or further manufacture. If the purchaser is acquiring assets of a business, it may also be liable for the vendor’s accrued sales tax exposure unless clearance certificates are obtained from the retail sales tax authorities indicating that all taxes have been collected and paid to date.

## **3.3 What are the purchaser’s obligations regarding third parties?**

Canadian law provides protection for creditors of a business that might affect an acquisition of assets. To begin with, creditors who have a security interest over real or personal property will continue to have priority with respect to the relevant assets as against the purchaser. There are security registration statutes in Canada and searches can be conducted to determine the existence of such security interests. Unless the purchaser is to acquire the assets subject to existing security interests, which might be the case with respect to real property and major items of financed personal property, the vendor’s obligations should be paid and the security interests discharged at the time of the purchase. Because of time lags

in the registration systems, it may be necessary to withhold a portion of the purchase price until confirming searches have been conducted.

## 4. Employee Considerations

Employees' rights in the case of an acquisition depend on the nature of the acquisition, and the labour relations and employment laws of the jurisdiction that apply to the employees. The Ontario rules may be taken by way of illustration.

In the case of a share acquisition, unless otherwise provided in an employment contract, there are no changes to the employment relationship as the purchaser essentially becomes the employer for all employment purposes. Accordingly, there is no termination of employment as a result of the purchase of shares and existing employment contracts remain in place, unless otherwise provided in an employment contract.

In the case of an asset purchase, at common law the sale often results in a termination of employment with the vendor company. That is, if an employee is not offered employment by the purchaser or chooses not to accept such an offer, an asset sale often results in the constructive dismissal of the vendor's employees at the time of the sale. After all, as a practical matter, once the vendor's assets have been sold, there will no longer be any work for the employees to perform. In most instances, the vendor will *actually* terminate the employment of employees who are not offered or who do not accept the purchaser's employment offers. In order to minimize termination liabilities, a vendor may insist on provisions in the purchase agreement that require the purchaser to make employment offers to all of the in-scope employees on terms and conditions that are substantially similar to their current terms and conditions in order to induce the employees to accept those offers. In the event that an employee does not accept such an employment offer, this will also reduce vendor termination costs as a result of the failure of the employee to mitigate common law wrongful dismissal damages by accepting the purchaser's offer.

For provincially regulated businesses in Ontario, where some of the employees are unionized, the *Labour Relations Act, 1995* provides that the purchaser of the acquired "business" is placed in the role of employer for the purposes of the union's bargaining rights and any collective agreement. The effect of this provision is to require the purchaser to comply with the requirements of the collective agreement and to continue to recognize the bargaining rights of the collective bargaining agent. A "business" is defined to include "a part or parts thereof" and the transfer of any portion of a business as a going-concern would be caught.

In addition, the Ontario *Employment Standards Act, 2000* (ESA) establishes certain minimum obligations in respect of both union and non-union employees. More beneficial terms of employment, whether express (as, for example, in a collective agreement or a written contract of employment) or implied (as, for example, by the common law of wrongful dismissal), will take precedence over the minimum requirements of the employment standards legislation.

To avert a situation where companies buy and sell assets in order to avoid employment-related liabilities, the ESA stipulates that employees of a vendor who are hired by the purchaser following an asset sale carry forward their prior service for any subsequent calculation of the employees' service or length of employment, such as establishing entitlement to severance pay and notice of termination by the purchaser. However, this does

not apply to employees who are hired by the purchaser more than 13 weeks after the individual's last day of employment with the vendor or the date of the sale, whichever is earlier. The ESA also sets out minimum notice and severance pay requirements that apply in the event of the termination of employees, including specific requirements in the case of mass terminations of 50 employees or more within a period of four weeks or less. Mass terminations also oblige the employer to give notice to the Ministry of Labour. Employees who have five or more years of service at the time of their dismissal are entitled to severance pay if their employer has a payroll of \$C2.5-million or more, or if the dismissal is part of a discontinuance of all or part of a business involving the termination of 50 or more employees in a period of six months or less. If employees are terminated prior to the transfer of the business, the vendor, as terminating employer will be responsible for the termination costs. See Section VIII, 1.1.1, "Termination of employment."



# VII. Tax



## 1. Typical Organizational Structures

A number of forms of organization could theoretically be used by a U.S. entity in establishing a Canadian business enterprise.

Of these, however, the three most commonly considered are:

1. Sales representatives based in Canada
2. Canadian branch of the U.S. entity
3. Canadian subsidiary corporation

While there are some similarities in the basic rules for the computation of income subject to taxation under these possible forms of organization, it is most common for a substantial business undertaking to be organized using a Canadian-incorporated subsidiary.

In some cases, a British Columbia, Alberta or Nova Scotia “unlimited liability company” might be chosen to achieve U.S. tax objectives. The decision will, of course, depend on the circumstances of each case and consultation with both Canadian and U.S. tax counsel is essential, particularly if the U.S. entity has a special U.S. tax status. The Canada–U.S. Tax Convention (Convention), however, contains rules that adversely affect the tax treatment of some structures involving unlimited liability companies.

If the U.S. entity is a “limited liability company” or “LLC” not treated as a corporation for U.S. tax purposes, there have been special problems with entitlement to benefits under the Convention, so it is sometimes not desirable for such an LLC to hold an investment in Canada or carry on activities in Canada. The Convention now contains relieving provisions that should allow qualifying U.S. resident members of an LLC to obtain treaty benefits on a “look-through” basis in some cases, but there are still issues where an LLC is the shareholder of an unlimited liability company.

### 1.1 Limitation on benefits of treaty

The Convention includes “Limitation on Benefits” rules. To qualify for benefits under the Convention, a U.S. entity must be both a resident of the U.S. for purposes of the Convention, and also be a qualifying person or otherwise entitled to the particular benefits under the Limitation on Benefits rules.

### 1.2 Sales representatives based in Canada

#### 1.2.1 Are entities with representatives exempt from tax if activities are limited?

It is possible for a U.S. entity to extend the scope of its business to Canada without becoming subject to Canadian tax on its business profits if the types of activities carried on in Canada are sufficiently limited.

Under the Canadian *Income Tax Act* (ITA) every non-resident person, as defined by the ITA, who carries on a business in Canada is required to file a Canadian tax return and to pay an income tax computed in accordance with the ITA on the taxable income earned in Canada by such non-resident person for the year.

However, the provisions of the ITA relating to income tax on Canadian source business profits (but not the requirement to file a Canadian return) are overridden, in the case of a U.S. enterprise qualifying for benefits under the Convention, by Article VII of the Convention, which provides as follows:

“The business profits of a resident of a Contracting State shall be taxable only in that State unless the resident carries on business in the other Contracting State through a permanent establishment situated therein. If the resident carries on, or has carried on, business as aforesaid, the business profits of the resident may be taxed in the other State but only so much of them as is attributable to that permanent establishment.”

### **1.2.2 How is a “permanent establishment” defined? Does an office or a sales agent create this status? What about a storage facility?**

The term “permanent establishment” is defined in Article V of the Convention to mean a “fixed place of business through which the business of a resident of a Contracting State is wholly or partly carried on,” and there is also a concept of a deemed permanent establishment that can result from performing services in Canada.

The Convention goes on to specifically include the following in the definition of permanent establishment: any place of management, a branch, an office, a factory, a workshop and a mine, an oil or gas well, a quarry or any other place of extraction of natural resources or the presence in Canada of a non-independent agent who has and habitually exercises the authority to contractually bind the non-resident corporation. The Convention then goes on to specifically exclude the following from the definition of “permanent establishment”:

1. Facilities for the purpose of storage, display or delivery of goods or merchandise belonging to the resident (i.e., the U.S. entity)
2. The maintenance of a stock of goods or merchandise belonging to the resident for the purposes of storage, display or delivery
3. The maintenance of a stock of goods or merchandise belonging to the resident for the purpose of processing by another person
4. A purchase of goods or merchandise, or the collection of information, for the resident
5. Advertising, the supply of information, scientific research or similar activities which have a preparatory or auxiliary character, for the resident

Therefore, a U.S. entity will not have a permanent establishment in Canada by reason only of having sales representatives in Canada to offer products for sale, provided that these agents (i) do not have the authority to conclude contracts on behalf of the U.S. entity or (ii) are independent and acting in the ordinary course of their business.

If the U.S. entity contemplates establishing a fixed centre for its Canadian operations, care should be taken to ensure that the centre is not a permanent establishment. For example, it could be limited to functioning as a warehouse for the storage of goods awaiting delivery or processing, or as a display area. Any significant presence the U.S. entity will have at a

Canadian location needs to be reviewed to determine whether it amounts to a permanent establishment. A building site or construction or installation project is a permanent establishment if, but only if, it lasts more than 12 months. The provision of other types of services in Canada for 183 days or more in any 12-month period may result in a permanent establishment. If the U.S. entity has a permanent establishment in Canada, it will be subject to Canadian tax on business profits attributable to the permanent establishment.

## **1.3 Canadian branch**

If it is undesirable for the U.S. entity to restrict its Canadian business in the manner described above to avoid having a permanent establishment in Canada, an alternative would be to establish and operate a Canadian branch out of office premises situated in Canada.

### **1.3.1 Advantage of a branch operation**

One advantage to the use of a branch operation would normally arise when it is anticipated that the branch will incur substantial losses in the first several years of operation. In this case, organization through a branch might enable such losses to be included in the consolidated tax return of the U.S. entity or its parent corporation and deducted against income from other sources. In general, a branch may be useful where a “flow-through” structure is desirable from the U.S. tax perspective.

An alternative would be to consider incorporation of an entity that might be treated as a branch for U.S. tax purposes, such as a British Columbia, Alberta or Nova Scotia unlimited liability company. The use of such entities, however, may be adversely affected in some cases as a result of “anti-hybrid” rules in the Convention.

If a Canadian subsidiary (other than an unlimited liability company) is used, we understand that in the usual case such losses may not be consolidated with income from other sources for U.S. tax purposes. In Canada, the losses can be carried forward within the Canadian corporation for a maximum of 20 taxation years and used as a deduction in computing taxable income during that time.

### **1.3.2 What are the disadvantages? How would a branch be taxed as between the U.S. and Canada?**

It is clear that if a U.S. enterprise were to establish a divisional branch in Canada, it would have a “permanent establishment” within the meaning of the Convention, and would be required, pursuant to the ITA, the Convention and Canadian provincial tax legislation, to pay Canadian income tax on taxable income earned in Canada, which is attributable to the branch. Any employee resident in Canada and, subject to certain exemptions in the Convention, branch employees not resident in Canada, would be required to pay Canadian income tax, and the U.S. enterprise would be required to deduct and remit to the Receiver General amounts from the wages and salaries of such persons.

Despite potential tax savings, our experience has been that there are, in some cases, a number of practical difficulties with a branch operation. The most important has been the problem of preparing financial statements for the branch, which determine its income earned in Canada in a manner satisfactory to both the Canada Revenue Agency (CRA) and the U.S. Internal Revenue Service.

Particularly difficult is the allocation of head office charges, executive compensation and other common costs. In addition, in a branch situation, the CRA may conduct an audit of the U.S. corporation's books of account to satisfy itself as to Canadian-source income. The tax compliance obligations of a Canadian branch are sometimes more onerous than for a Canadian subsidiary in other respects. For example, if the branch disposes of capital assets used in the Canadian business, it must obtain a tax clearance certificate, and if it receives amounts of the type normally subject to non-resident tax withholding (such as service fees, rentals or royalties), the branch may need to apply for a waiver of withholding.

Finally, Canada imposes a branch tax on the after-tax income of the branch operation of a U.S. corporation, subject to a lifetime exemption, which the U.S. corporation may qualify for under the Convention for the first C\$500,000 of Canadian income. The branch tax rate under the ITA is 25 per cent, but this rate is reduced under the Convention to five per cent for qualifying U.S. residents. The branch tax is effectively the equivalent of the five per cent non-resident withholding tax which would be applicable under the Convention if the U.S. corporation carried on business in Canada through a subsidiary corporation and the subsidiary repatriated its retained earnings to the parent by means of a dividend.

### **1.3.3 If a branch turns profitable, how can it become a subsidiary corporation?**

It would be possible, if a branch were initially used, to transfer the Canadian business to a subsidiary corporation after it becomes profitable. There are, however, several difficulties in accomplishing this result and, in particular, there may be U.S. tax consequences. In addition, the complexity of a sale of assets, assignment of contracts and transfer of employees to a new corporation after a significant business has been established may be considerable.

A non-resident may transfer real property, interests in real property and most other assets used in the business of a Canadian branch to a Canadian corporation, as part of the incorporation of the branch, on a Canadian income tax deferred basis. However, the transfer by a U.S. entity to a Canadian corporation of real property or interests in real property not used in the business of a Canadian branch would have to take place at fair market value, giving rise to a potential recapture of capital cost allowance (i.e., depreciation) and/or capital gain.

In summary, therefore, unless there are important U.S. tax reasons to the contrary, it may be advisable to organize the Canadian business through a subsidiary corporation. We note again that the choice of organizational form depends on individual circumstances and that consultation with U.S. and Canadian tax counsel is advised.

## **1.4 Canadian subsidiary corporation**

If the Canadian business enterprise is carried on through a corporation incorporated in Canada (including a British Columbia, Alberta or Nova Scotia unlimited liability company), the corporation will be a "resident" within the meaning of the ITA and will be required to pay Canadian income tax on its worldwide income each taxation year. Canadian provincial income taxes will also apply. Where dividends are paid by the subsidiary corporation to a qualifying U.S. resident parent corporation that owns 10 per cent or more of the voting stock, the Canadian withholding tax rate applicable to the dividends under the Convention is five per cent (except in some cases where the subsidiary corporation is an unlimited liability company). The following comments address several of the most important provisions of the ITA, which would apply to the new corporation.

## 2. Income Computation

The computation of income from business for Canadian tax purposes starts with a computation of the profit from the business. A number of rules must then be applied to adjust the profit computation to arrive at taxable income. The main provisions in this regard are set out below.

### 2.1 How is depreciable property amortized?

#### 2.1.1 Capital cost allowance

ITA's system for amortizing the cost of depreciable property is known as capital cost allowance. All tangible and intangible depreciable assets must be included in one of the classes prescribed by Regulation. Each class is given a maximum rate, which may or may not be based on the useful life of the assets in the class. The rate for a class is applied to the total capital cost of the assets in that class to calculate the maximum deduction that may be claimed in each year. The actual deduction taken in a year may be any amount that is equal to or less than the maximum deduction available. The capital cost of a class is reduced by the amount of the actual deduction taken with respect to that class each year. Therefore, unused deductions are effectively carried forward as they do not reduce the capital cost of the class. There are also provisions as to the recapture of capital cost allowance from the disposition of capital assets that have been depreciated for tax purposes below their realizable value.

### 2.2 Licensing fees, royalties, dividends and interest

#### 2.2.1 Transfer pricing rules for related corporations

Particular scrutiny is normally given by the CRA to licensing fees, royalties, interest, management charges and other amounts of a like nature paid to non-residents with whom the Canadian taxpayer does not deal at arm's length. For this purpose, if a U.S. entity controls a Canadian company, either by owning a majority of the voting shares or by having sufficient direct or indirect influence to result in control, the two entities will be considered not to deal at arm's length. The tax authorities' first concern will be to determine whether the amount paid by the Canadian corporation should be allowed as a deduction in computing income.

Canadian transfer pricing rules require that, for tax purposes, non-arm's-length parties conduct their transactions under terms and conditions that would have prevailed if the parties had been dealing at arm's length. The rules also require contemporaneous documentation of such transactions to provide the CRA with the relevant information supporting the transfer prices. The rules provide that taxpayers may be liable to pay penalties where the transfer pricing adjustments under the rules exceed a certain threshold and the taxpayer did not make reasonable efforts (including contemporaneous documentation) to use appropriate transfer prices.

#### 2.2.2 What are the withholding tax rules?

Under the Convention, the Canadian entity must withhold 10 per cent of some "royalties" paid to U.S. residents. The Convention provides exemptions from withholding tax on "royalties" paid to qualifying U.S. residents which are payments for the use of or the right to use (i) computer software or (ii) any patent or any information concerning industrial, commercial or

scientific experience (but not including information provided in connection with a rental or franchise agreement).

Reasonable management fees for services rendered outside Canada are not subject to withholding tax as the CRA regards these as business profits of the U.S. entity and therefore not taxable under Article VII of the Convention. The CRA will allow a management fee to include a mark-up over the U.S. entity's costs only in limited circumstances.

Under the Convention, the rate of withholding tax on dividends is 15 per cent, although the lower rate of five per cent applies if the shareholder is a qualifying U.S. resident company that owns 10 per cent or more of the voting stock (except in some cases where the payer is an unlimited liability company).

There is no Canadian withholding tax on arm's-length (unrelated party) interest payments, other than certain types of participating interest. Withholding tax on interest paid by a Canadian resident to a related U.S. resident qualifying for the benefits of the Convention is eliminated by the Convention (except in some cases where the payer is an unlimited liability company).

## **2.3 What are the limits on thin capitalization?**

A statutory thin capitalization provision limits the amount of interest-bearing debts that may be owed by a Canadian corporation to certain non-resident creditors. The limit is set by requiring the Canadian company to have a debt-to-equity ratio of not more than 1.5:1 where debt and equity have particular definitions. In making the necessary calculation, equity includes the paid-up capital of shares of the Canadian corporation owned by non-resident shareholders described below as well as retained earnings and other surplus accounts.

Debt includes only interest-bearing debt held by non-resident shareholders who, alone or together with affiliates, own shares of the capital stock of the corporation representing 25 per cent or more by votes or fair market value of all shares of the corporation or their affiliates. There are special timing rules regarding when the different debt and equity elements are determined.

Not included as debt are amounts owed to residents of Canada or amounts owed to non-residents who are neither shareholders nor related to shareholders (unless they are part of a "back-to-back" arrangement whereby the non-resident shareholder or related party lends to a third party on the condition that it make an advance to the Canadian corporation). Also excluded from the definition of debt for this purpose are amounts loaned to the Canadian corporation by arm's-length entities where the loans are guaranteed by a shareholder.

The sanction for exceeding the maximum ratio is that interest on the amount of debt in excess of the permitted limit is not allowed as a deduction in computing the Canadian corporation's income. In addition, the excess interest is treated as a dividend for Canadian withholding tax purposes.

## **2.4 How can operating losses be used?**

Operating losses from a particular source can be used by the taxpayer to offset income from other sources. In addition, if an operating loss is realized for a particular year, it may be carried back three taxation years and carried forward 20 taxation years as a deduction in

computing taxable income of those other years. If the loss is not used within this statutory period, it expires and can no longer be used in computing taxable income. Special rules restrict the availability of these losses following an acquisition of control of the corporation.

## **2.5 Capital gains and losses**

One-half of any capital gain realized by a Canadian taxpayer (referred to as a “taxable capital gain”) is included in the taxpayer’s income and is subject to tax at normal rates. One-half of any capital loss may be deducted in computing income, but only against taxable capital gains. Capital losses, to the extent that they cannot be used as a deduction in the year in which they are incurred, may be carried back three years and carried forward indefinitely. Capital losses of a corporation are extinguished on an acquisition of control of that corporation.

## **2.6 Should a single subsidiary be used when there are several lines of business?**

Under the Canadian tax system, it is not possible under any circumstances for two or more corporations to file a consolidated tax return. As a result, the profits of one corporation in a related group cannot be offset by losses in another. It is generally desirable, therefore, unless there are compelling reasons to the contrary, to carry on as many businesses as possible within a single corporate entity. As well, non-residents establishing a corporate group in Canada should consider planning to minimize Canadian provincial income tax.

## **2.7 How is income taxed among the different provinces?**

The taxable income of a corporation with operations in more than one province is allocated for provincial income tax purposes among those provinces in which the corporation has a permanent establishment. The allocation is achieved by means of formulae that are generally based on the salaries and wages paid to employees associated with each permanent establishment and gross revenues attributable to each permanent establishment.

## **3. Rates of Taxation**

Corporate income tax is levied in Canada by both the federal and provincial governments. The effective rate of federal tax is currently 15 per cent, after taking into account a reduction in rate that partially offsets the impact of provincial taxation.

Provincial tax rates can vary substantially depending on the province and the type of income earned by the corporation. For example, the general rate imposed by the province of Ontario is currently 11.5 per cent. In some cases, Canadian provincial income tax liabilities may be substantially reduced by inter-provincial tax planning appropriate to the proposed Canadian operations.

Several reductions in federal and provincial rates are possible depending on the circumstances of the particular case. The most substantial of these reductions relates to active business income earned in Canada by a small “Canadian controlled private corporation” (CCPC).

However, a corporation will not be a CCPC if it is “controlled, directly or indirectly, in any manner whatever, by one or more non-resident persons.”

Another tax reduction occurs if a corporation carries on a manufacturing or processing business, as it may be entitled to provincial tax reductions.

## **4. Other Income Tax Considerations**

### **4.1 Are tax credits available for research and development?**

An “investment tax credit” against income tax otherwise payable is provided under the ITA in respect of certain expenditures on qualifying scientific research and experimental development carried out in Canada. An enhanced credit is available to CCPCs.

### **4.2 How are distributions treated?**

A corporation may generally return to a shareholder the shareholder’s investment in “paid-up capital” of the corporation (other than a public corporation) as a Canadian tax-free receipt. The ITA provides that all other distributions to shareholders of a corporation resident in Canada (including share redemptions and liquidating dividends) are treated as dividends to the extent that funds paid out of the company on a reorganization, share reduction or liquidation exceed the paid-up capital of the shares. Such distributions are treated as dividends regardless of the type of surplus or profits from which they are paid and regardless of whether the company has any undistributed income.

Dividends paid by a Canadian corporation to its non-resident shareholders are subject to withholding tax under the ITA. The withholding tax rate under the Convention is five per cent for dividends paid to a qualifying U.S. parent corporation (except in some cases where the payer is an unlimited liability company). Stock dividends are equivalent to cash dividends and are generally valued at the related increase in the corporation’s paid-up capital.

The ITA contains other rules for dividends paid to Canadian residents that are beyond the scope of this Guide. Dividends between affiliated Canadian companies are tax-free in some cases (although recent developments have called into question the scope of this treatment).

### **4.3 Loans to shareholders**

A loan made by a corporation to any of its shareholders or to persons connected with such shareholders (other than corporations resident in Canada) that is not repaid by the end of the taxation year following the year in which such loan was made is, with limited exceptions, (including a possible election out of this rule), considered to be income received in the hands of the shareholder.

More stringent rules apply to indebtedness of a non-resident to a Canadian affiliate arising under a “running account” between the two companies. Amounts deemed to be paid to non-resident shareholders as income are subject to non-resident withholding tax as though the amounts were dividends. There is, however, a refund of withholding tax to a non-resident if the debt is subsequently repaid, subject to certain limitations.



A loan that is not included in income as described above may give rise to imputed interest income for the Canadian corporation at prescribed rates and a taxable benefit in the hands of the shareholder or connected person (other than a corporation resident in Canada) if the rate of interest paid on the loan is less than the market rate applicable at the time of the loan. Some loans that rely on a special exception from the shareholder loan rules will result in imputed interest income for the Canadian corporation at higher prescribed rates.

## **5. Capital and Payroll Taxes**

### **5.1 Capital taxes**

Federal and provincial corporate capital taxes are now imposed only on financial institutions.

A non-resident corporation with no “permanent establishment,” as defined in the capital tax legislation, will not be subject to capital tax.

### **5.2 Payroll taxes**

Employers are generally required to make contributions on behalf of their Canadian employees to the Canada or Quebec Pension Plan and to the federal Employment Insurance plan. Certain provinces also impose employer health taxes or premiums. Contributions to provincial Workers' Compensation Boards are also obligatory for most businesses.

## **6. Commodity Tax and Customs Tariffs**

### **6.1 Federal sales and excise tax**

The federal Goods and Services Tax (GST) is a form of value-added tax that applies to most goods and services at the rate of five per cent. Unlike income tax, the GST is a tax on consumption rather than profits.

#### **6.1.1 How is the GST collected?**

Generally speaking, each registered supplier of taxable goods and services collects the applicable tax from its purchasers at the time of sale. The supplier must collect the GST as agent for the government, while the purchaser is legally responsible for the payment of the tax. Suppliers deduct from their collections any GST they have paid on their own purchases (called “input tax credits”) and remit the difference to the federal government. If the supplier paid more tax than was collected, the supplier is entitled to a refund of the difference. The result is that the tax is imposed on the value added to the product at each stage of production and distribution and the final consumer ultimately bears the full amount of the tax. In Ontario and British Columbia, certain types of registrants are subject to restricted input tax credits for specified types of purchases. These rules, which claw back the input tax credits otherwise available, are temporary measures that are scheduled to be eliminated gradually after eight years.

Currently, five provinces (Ontario, Prince Edward Island, New Brunswick, Nova Scotia, and Newfoundland and Labrador) have harmonized their individual provincial sales tax bases with that of the GST and the combined tax is called the Harmonized Sales Tax (HST), imposed at rates ranging from 13 to 15 per cent; therefore, most of the discussion that follows applies

equally to the HST. Quebec has also largely harmonized its provincial sales tax base with that of the GST; however, unlike the HST provinces, the Quebec Sales Tax or QST is imposed pursuant to a separate Quebec statute at the rate of 9.975 per cent.

### **6.1.2 Who is exempt from registration requirements?**

Generally speaking, most persons who carry on business in Canada must register to collect and remit GST. By way of exception, small suppliers with sales of less than C\$30,000 per year are generally not required to register for GST purposes and cannot claim input tax credits. In determining whether this threshold has been met, sales of associated corporations are included.

Non-residents who in Canada solicit orders or offer for sale prescribed goods (such as books, newspapers or magazines) to be sent to persons in Canada by mail or courier are deemed to carry on business in Canada. Accordingly, they must register to collect and remit GST on their sales.

Non-residents who do not carry on business in Canada, or small suppliers with sales of less than C\$30,000 per year, are permitted to voluntarily register to collect and remit tax if, among other activities, they regularly solicit orders for the supply of goods for delivery in Canada. Non-residents may wish to register in such cases to obtain input tax credits in respect of GST paid on purchases in Canada.

### **6.1.3 Zero-rated supplies**

Certain supplies, defined as “zero-rated supplies,” are effectively tax-free supplies and taxed at a zero rate. These supplies include basic groceries, prescription drugs, most medical devices and, generally speaking, goods which are sold for export. Services of an agent on behalf of a non-resident are also tax-free in some cases as are legal and consulting services supplied to assist a non-resident in taking up residence or setting up a business in Canada. Suppliers of tax-free goods and services do not charge tax on their sales, but are entitled to input tax credits for the GST paid on purchases used in supplying taxable and tax-free goods.

### **6.1.4 Exempt supplies**

The legislation also provides for a class of goods known as “exempt supplies.” No tax is charged on exempt supplies. However, unlike zero-rated supplies, suppliers of exempt goods and services do not receive input tax credits for the GST paid on their purchases to the extent they are used in making the exempt supplies. Examples of exempt supplies include resales of residential property, long-term residential leases, many health and dental services, educational services, domestic financial services and daycare services.

### **6.1.5 Special rules for non-residents**

To encourage non-residents to do business in Canada, the legislation provides relief from the GST in connection with certain transactions.

#### **6.1.5.1 What if goods are imported by the non-resident and delivered in Canada?**

A non-resident who sells goods to a Canadian customer on a “delivered” basis and also acts as importer of record will be required to pay GST on the importation of the goods. Where the non-

resident is not a GST registrant, the non-resident will not be able to obtain an input tax credit (i.e., refund) of the GST. In effect, the GST legislation would increase the non-resident supplier's costs and the price to the Canadian customer would include GST.

This is contrary to the intent of the GST legislation. As a result, the Canadian customer is permitted to claim an input tax credit in respect of the GST paid at the border by the non-resident supplier, where the customer obtains proof of payment of the GST from the non-resident. Therefore, its customer will reimburse the non-resident for the GST paid at the border, and the customer will claim the GST input tax credit as if the goods were purchased from a Canadian supplier. This levels the playing field between Canadian customers who deal with non-resident suppliers and those who deal with Canadian suppliers. This is referred to as the "flow-through" mechanism.

#### **6.1.5.2 Will the non-resident have to collect GST from its customer?**

A second relieving provision is referred to as the "non-resident override rule." This rule applies to a supply of personal property or a service in Canada made by a non-resident, and deems it to be made outside Canada and therefore beyond the scope of the GST. This provision applies where the non-resident supplier does not carry on business in Canada and is not registered for GST purposes. The "non-resident override rule" relieves the non-resident from any obligation to register and charge and collect GST on supplies that otherwise would be considered to be made in Canada. However, the Canadian customer may be required to self-assess GST on such supplies, in certain circumstances.

#### **6.1.5.3 What if goods are sold by a non-resident, but sourced from and delivered by a resident third party?**

A third relieving provision is referred to as the "drop shipment" rule. In general, this rule applies where a non-resident sells goods to a Canadian customer, sources those goods from a Canadian supplier, and arranges for delivery by the Canadian supplier directly to the Canadian customer. In these circumstances, the Canadian supplier to the non-resident seller must collect GST on the sale to the non-resident, and if the sale is to an individual consumer, the GST will be collected on the non-resident's re-sale price to the consumer. The drop shipment rule applies to deem the sale by the Canadian supplier to the non-resident re-seller to be made outside Canada and therefore not subject to GST, where the non-resident's customer provides a "drop shipment certificate" to the Canadian supplier. This places the Canadian customer in the same position as if the goods were purchased directly from a Canadian supplier.

#### **6.1.5.1 What if the goods are sold by a GST registered non-resident in a sale made outside Canada?**

Where the non-resident supplier of goods delivers the goods or makes them available outside Canada, the non-resident should avoid also acting as the importer of record of the goods, as the non-resident will not be permitted to claim an input tax credit in respect of the GST paid at the border. There is an exception to this rule where the supplier and customer in Canada enter into an election to permit the non-resident to claim the credits, however, the non-resident will also be required to charge and collect the GST/HST on the invoice price of the goods sold to the customer.

## 6.1.6 GST on imports

GST is generally exigible on imported goods based upon their duty paid value. GST is generally not exigible on imported services and intangible property (such as patents and trade-marks), provided they are used exclusively in taxable commercial activities of the purchaser.

Purchasers must self-assess tax on imported services and intangible property if such services and property are not used exclusively in taxable activities. It should be noted that, although customs duties on U.S.-origin and Mexico-origin goods have been eliminated under NAFTA, GST must still be paid on U.S. or Mexican goods imported into Canada.

## 6.1.7 Other federal excise taxes

In addition to GST, a limited range of goods is subject to excise duties or taxes at various rates based on the manufacturer's selling price. Examples of items subject to the *Excise Act, 2001* include certain types of alcohol and tobacco. Examples of items subject to the *Excise Tax Act* include certain insurance premiums, air conditioners for motor vehicles, certain gasoline and other petroleum products.

### 6.1.7.1 Cannabis taxation

As part of federal legislative initiatives to legalize the recreational use of cannabis, the federal government introduced legislation to establish a framework for the taxation of cannabis. The legislation, which received royal assent on June 21, 2018, imposes excise duties on cannabis pursuant to the *Excise Act, 2001*. The rules include a new tax licensing regime for cannabis producers, stamping and marking rules, ongoing reporting requirements, and applicable excise duties payable by licensed cannabis producers on both recreational and medical cannabis products.

## 6.2 Provincial sales and commodity taxes

### 6.2.1 When does provincial sales tax apply?

As set out above, five provinces (Ontario, Prince Edward Island, New Brunswick, Nova Scotia, and Newfoundland and Labrador) have harmonized their individual provincial sales tax bases with that of the GST, and the combined tax is called the Harmonized Sales Tax or HST, imposed at rates ranging from 13 to 15 per cent. Quebec has also largely harmonized its provincial sales tax base with that of the GST; however, unlike the HST provinces, the Quebec Sales Tax or QST is imposed pursuant to a separate Quebec statute at the rate of 9.975 per cent.

As a result, currently only Manitoba, Saskatchewan and British Columbia will continue to impose a sales tax at the provincial level. The following discussion provides general comments on provincial sales taxation in the referenced provinces. However, each province's legislation should be referred to for specific issues.

As a general rule, the provincial sales tax is levied on the purchaser of most tangible personal property purchased for consumption or use in the province or imported into the province, including most computer software. Certain services are also subject to this tax. Generally, the tax is based on the sale price of the taxable goods or services being sold at the retail level, calculated on the purchase price excluding the federal GST (and the GST is calculated on an amount excluding all provincial sales taxes).

The relevant provincial sales tax statutes generally provide that the vendor of the taxable goods or services is required to act as the agent for the provincial government in collecting the sales tax. In some cases, a non-resident vendor without a physical presence in the province is nevertheless required to register for purposes of the tax.

Various goods are exempt from the provincial sales tax, including certain foods, drugs and medicines, motor and heating fuels, certain production machinery and equipment, custom computer software, many items used in farming and fishing, and items to be shipped directly out of the province.

### **6.2.2 Which goods are subject to provincial commodity taxes?**

The various provinces impose sales or transfer taxes on specific goods such as gasoline, fuel, and tobacco. These taxes are usually imposed as a specific tax (cents per litre or cents per cigarette) rather than on an ad valorem (i.e., a percentage) basis. Certain provinces have enacted specific statutes to impose taxes on certain services such as accommodation, admissions, insurance premiums, gambling, etc. As well, land transfer taxes are imposed on transfers of land. See Section XII, "Real Estate." In addition, the provinces also impose property taxes on landowners.

## **6.3 Customs tariffs**

### **6.3.1 What are the treaties governing tariffs?**

Canada is a member of the World Trade Organization (WTO). In accordance with the WTO, it grants most favoured nation tariff status to other WTO members. Goods are classified in Canada's List of Tariff Provisions according to the *Harmonized Commodity Description and Coding System Convention*, which Canada adopted in the late 1980s. See Section IV, "Trade and Investment Regulation."

# VIII. Employment and Labour Law



Employment and labour law in Canada is designed to regulate both the conditions of employment and the relations between employers and employees. To understand Canadian labour and employment law, it is necessary to know about the constitutional division of power between the federal government of Canada and the governments of Canada's 10 provinces and three territories.

While labour and employment matters are principally within provincial and territorial jurisdiction, the federal government has jurisdiction over certain industries that are viewed as having a national, international or inter-provincial character, such as banks, air transport, pipelines, telephone systems, television and inter-provincial trucking. All other employers are provincially regulated for the purpose of labour and employment matters. As a result, the vast majority of employers in Canada are required to comply with the employment standards, labour relations and other employment-related legislation of each of the provinces in which it has operations.

Regardless of whether a business is provincially or federally regulated, or where in Canada it carries on business, Canadian employers should be familiar with the following types of employment-related legislation:

- Employment standards legislation
- Human rights legislation
- Federal and provincial privacy legislation
- Occupational health and safety legislation
- Workers' compensation legislation
- Labour relations legislation

The legislation referred to above is only the start. Regulations made pursuant to this legislation also establish numerous rights and obligations for employers and employees. For example, there are detailed regulations made under both employment standards and occupational health and safety legislation, which give substance to the obligations contained in the statutes. When considering any labour and employment problem, it is important to ensure there are no additional regulatory rights or obligations that may affect its solution. In addition to the statutory obligations discussed above, employers are often also required to satisfy common law obligations owed to their employees in Canada's common law provinces, and to abide by the *Civil Code of Québec* in Quebec. The most significant of these obligations is to provide employees with reasonable notice of the termination of the employment relationship without cause (see Section VIII, 2, "Common Law Obligations to Employees").

## 1. Statutory Obligations to Employees

In general, an employer's specific statutory and regulatory obligations will depend on the law of the province or territory in which it has operations. As such, any particular issue or question will have to be answered with reference to the law of that jurisdiction.

## 1.1 Employment standards legislation

Canadian employment standards legislation sets out the minimum terms and conditions of employment federally and in each provincial and territorial jurisdiction. Employers and employees may not contract out of these minimum obligations, except to provide for terms more favourable to the employee than those contained in the legislation. Accordingly, any document or practice that establishes a term of employment that is less favourable to an employee than an employment standard has no force or effect.

Generally, employment standards legislation sets out minimum standards relating to matters such as notice of the termination of employment, wages, hours of work, overtime pay, public holidays, vacations with pay, and various job-protected leaves of absence. Employment standards legislation and regulations include many exceptions to the statutory minimum standards for certain types of employees, such as managers and professionals.

### 1.1.1 Termination of employment

Critical to most employers, employment standards legislation in all Canadian jurisdictions sets out minimum notice obligations upon the termination of employment without cause which requires employers to provide written notice or pay in lieu of notice. Generally, an employee's entitlement to notice of dismissal increases with his or her length of service.

For example, in Ontario, employees are generally entitled under statute to one week's notice (or pay in lieu of notice) for each completed year of employment, to a maximum of eight weeks. Although employees' entitlement to notice of termination of employment varies slightly from province to province, Canadian employment standards legislation establishes a maximum statutory notice requirement of eight weeks or less for individual terminations. Employees in federally regulated businesses with a minimum of three consecutive months of service have a minimum statutory entitlement to two weeks of notice (or pay in lieu thereof).

Many employment standards statutes also include enhanced notice requirements for employers that effect a mass termination of employment, which is defined in most provinces and territories as the dismissal of 50 or more employees in a span of four weeks or less (although in several provinces the threshold is as low as 10 employees). Other obligations, including notice to government agencies, are also imposed.

For federally regulated businesses, under the *Canada Labour Code*, if an employer discontinues its business permanently or undertakes a mass termination (50 or more employees in a period of four weeks or less), it must give the federal government 16 weeks of prior notice. In most cases, the employer must also establish a "joint planning committee," which must include employee and trade union representatives if applicable. The object of the committee is to develop an adjustment program to: a) eliminate the necessity for termination of employment; or b) minimize the impact of the terminations on affected employees and assist them with obtaining other employment.

In Ontario and the federal jurisdiction, employment standards legislation also requires employers to provide employees with severance payments (in addition to notice or pay in lieu of notice) in certain circumstances. In Ontario, employees who have five or more years of service at the time of their dismissal are entitled to severance pay, if their employer has a payroll in Ontario of C\$2.5-million or more, or if the dismissal is part of a discontinuance of a business involving the termination of 50 or more employees in a period of six months or less. Severance

pay is equal to one week's pay for each completed year of employment and a proportionate amount of one week's pay for a partial year of employment, to a maximum of 26 weeks' pay.

In the federal jurisdiction, an employee is entitled to statutory severance pay if he or she has completed 12 consecutive months of employment with an employer prior to his or her dismissal. Severance pay is calculated as the greater of two days' wages for each year of employment completed by the employee and five days' wages.

Aside from the notice and severance pay requirements described above, employment standards legislation in three Canadian jurisdictions also includes "unjust dismissal" provisions. Generally, absent serious misconduct or certain other conditions beyond the employer's control, these provisions permit certain employees to seek redress from employment standards tribunals or adjudicators following their dismissal. If the administrative decision-maker determines following a hearing that an employee has been unjustly dismissed, the employee may be reinstated to employment and/or receive compensation relating to his or her dismissal. In the federal jurisdiction, non-unionized employees who have worked for an employer for at least 12 months in a non-management position may make unjust dismissal complaints. In Quebec, employees with two years of service can claim that they have been unjustly dismissed and, in Nova Scotia, employees with at least 10 years of service can do so.

In some Canadian jurisdictions, namely, Alberta, Manitoba, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, Saskatchewan and Yukon, an employee is required under statute to provide notice of resignation to his or her employer, which ranges from one week to six weeks, depending on the employee's length of service and jurisdiction of employment. In Quebec, employees are also required to provide reasonable notice of termination; however, no specific length of time is identified by the legislation.

### **1.1.2 Minimum wages**

The minimum wages that must be paid to employees vary by province and territory, generally ranging from a low of C\$10.85 per hour to a high of C\$14 per hour, although there are lower minimum wages for certain jobs and types of employees prescribed by regulations in some jurisdictions. In Alberta, Ontario and British Columbia, amendments to the provinces' employment standards legislation that are not yet in force will increase the minimum wage to C\$15 per hour for Ontario and Alberta and C\$15.20 for British Columbia. Employment standards legislation also includes various provisions regulating how employees are paid and the records that must be provided to employees and retained by employers regarding the employment relationship, including documentation with respect to the payment of wages.

### **1.1.3 Hours of work**

Generally, the employment standards legislation in each jurisdiction provides that an employee's regular hours of work may not exceed certain daily and/or weekly maximums.

In many jurisdictions employees can agree to work more than these maximum hours and may be required to do so to deal with emergency situations. Employment standards legislation also provides employees with entitlements to meal breaks, hours free between shifts, and days of rest during each week.

Each employment standards statute includes provisions with respect to the payment of overtime pay (or, in some instances, time off in lieu of overtime pay) after an employee works in



excess of a certain number of hours per day and/or week. For example, in Ontario, an employee is entitled to at least 1.5 times his or her regular rate for each hour worked in excess of 44 hours in a week, unless exempted from this entitlement by the regulations.

Generally, employees are entitled to overtime pay, although certain employees, including managers and some professionals, are often specifically exempted from this requirement. Further, in many provinces, a written agreement between the employer and employee may provide for the averaging of an employee's hours of work over a period of time for the purpose of calculating his or her entitlement to overtime pay. There are also specific provisions permitting employers to implement work schedules that include "compressed" or four-day workweeks.

#### **1.1.4 Vacations and holidays**

Employment standards legislation provides that employees are entitled to vacation time off work and vacation pay for each year worked. Except in Saskatchewan and Quebec, employees are generally entitled to two weeks of vacation time annually for the first five years of their employment, with vacation pay of at least four per cent of their annual wages. In most provinces, the minimum statutory entitlement to vacation time and pay increases with an employee's length of service to three weeks of vacation with vacation pay of six per cent of annual wages. In Saskatchewan, employees are entitled to three weeks of vacation per year, increasing to four weeks after they have completed 10 years of service. In the Yukon, employees are entitled to two weeks of vacation per year, with no mandatory increase based on service.

In addition, employment standards legislation recognizes a number of statutory holidays, including New Year's Day, Canada Day, Labour Day and Christmas Day. The number of holidays to which an employee is entitled under employment standards legislation will depend on the province or territory in which he or she works, and ranges from six to 10 holidays per year. Employment standards legislation generally provides that eligible employees must be paid for these statutory holidays. To be eligible, employees must often meet certain requirements, such as working for a certain number of days in a prescribed period prior to the holiday. If an employee works on a holiday, he or she will be entitled to premium pay for hours worked. In many provinces, the employee is entitled to 1.5 times his or her regular rate for hours worked on the holiday, in addition to the holiday pay for the day.

#### **1.1.5 Protected leaves**

Employment standards legislation also provides employees with a variety of protected leaves of absence. An employer may not dismiss or penalize an employee who chooses to exercise his or her right to take such leaves. Generally, employers are also required to continue to make contributions to certain benefit plans during the employee's leave, and the employee must be reinstated to his or her former position at the end of the leave. However, employers are not required to pay employees' wages during the vast majority of the statutory leaves as, in many cases, employees may collect benefits under Canada's federal employment insurance program while they are away from work.

In Canada, the types of leaves of absences available to employees vary significantly depending on the province or territory where the employee works. The discussion below provides a sample of some of the available types of leaves.

All Canadian employees are eligible for some type of pregnancy and parental leave, although most provinces require that an employee have worked for an employer for a certain qualifying period before a pregnancy or parental leave may be taken. In most provinces, pregnancy leave can last for 16 to 18 weeks. Parental leave can last for 34 to 63 weeks, depending on the province and whether the employee has also taken pregnancy leave. In Nova Scotia, an employee who has not taken pregnancy leave may take up to 52 weeks of parental leave. Quebec also provides employees with more extensive pregnancy and parental benefits, permitting employees to take 18 weeks of pregnancy leave and 52 weeks of parental leave. Quebec employees are also entitled to a leave of up to five days upon birth or adoption, two days of which must be paid by the employer in certain circumstances.

In most Canadian jurisdictions, employment standards legislation also provides for leaves which allow employees to take time off to meet child care responsibilities or due to the illness of the employee or certain of his or her family members. These protected leaves vary from a few days to many weeks. Employees generally have an obligation to provide their employers with medical or other information substantiating their absence.

In addition, Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, Quebec, Saskatchewan, the Northwest Territories, Yukon and the federal jurisdiction provide employees with bereavement leave on the death of specified family members. These bereavement leaves last from three to seven days and, in some instances, wages must be paid by the employer during a portion of that time. For instance, in Quebec, an employee is entitled to five days off, two of which are paid. In Ontario, employees are permitted to take personal emergency leave for up to 10 days in the case of a death of a family member or other individuals defined in the legislation, the first two days of which must be paid by the employer.

All jurisdictions in Canada provide employees with reservist leave. While reservist leave varies amongst jurisdictions, generally, it provides a protected leave for employees who are Canadian Forces military reservists and are deployed to an international operation overseas or for certain operations within Canada. To be eligible, most jurisdictions require that employees have at least six months of continuous service with an employer before being entitled to reservist leave. Employees are generally entitled to leave for the duration of the service required by the Canadian Forces.

Recently, Manitoba and Ontario have added a paid leave for survivors of domestic or sexual violence. Individuals who qualify for this leave receive five paid days of leave per year.

### **1.1.6 Enforcement**

Canadian employment standards legislation is enforced by way of a complaint made to the appropriate federal, provincial or territorial ministry responsible for the legislation. In most jurisdictions, employment or labour standards officers investigate complaints and make rulings if the matters cannot be settled. Appeals from those rulings are heard by labour relations boards or other administrative or quasi-judicial bodies established in each jurisdiction. In some provinces, an employee can file a civil claim in court against his or her employer regarding alleged violations of employment standards legislation. Limits exist on when complaints may be made and, in some cases, the maximum amount that may be recovered, which varies by jurisdiction and whether the complaint proceeds through the statutory enforcement process or a civil proceeding.

In the case of unionized workplaces, bargaining unit members and their representatives generally enforce employment standards legislation by way of grievance arbitration.

## 1.2 Human rights legislation

Every Canadian jurisdiction has enacted human rights legislation that establishes, among other things, a comprehensive system for the investigation and resolution of complaints relating to discrimination. Although these human rights statutes deal with matters beyond the scope of the employment relationship, they also contain a number of provisions that deal with workplace discrimination.

Specifically, human rights legislation provides for an individual's right to equal treatment with respect to employment, and prohibits discrimination in the workplace based on certain "prohibited grounds," which are set out in the legislation. As a general observation, discrimination has been defined to include any distinction, exclusion or preference based on a prohibited ground as defined by the legislation.

Ontario has enacted Regulations under the *Accessibility for Ontarians with Disabilities Act, 2005* (AODA) which apply in conjunction with human rights legislation in that province. The Regulations contain a number of significant employment-related obligations that require Ontario employers to revise their employment-related documentation and accommodations processes. Employers are also required to invest significant resources into training programs regarding accessibility matters in order to ensure compliance with the AODA.

### 1.2.1 Prohibited grounds of discrimination

The prohibited grounds of discrimination vary slightly from jurisdiction to jurisdiction, and include, among others, the following: age; race; colour; national or ethnic origin; place of origin; citizenship or nationality; source of income; language; sex; sexual orientation; gender identity expression; ancestry; disability, including substance dependencies; marital status; family status; pregnancy; creed or religion; political beliefs; and certain criminal convictions. As such, employers in Canada must be careful to ensure that they do not make employment decisions with reference to any of these characteristics. In this respect, employment decisions include a wide variety of matters relating to the employment relationship and the terms and conditions of employment, including hiring, compensation, promotion and dismissal.

Human rights legislation in many provinces and territories also prohibits the distribution of employment applications that express or imply a preference for an individual with certain characteristics related to prohibited grounds of discrimination. In addition, the human rights statutes of most Canadian provinces and territories contain a prohibition against sexual harassment and harassment based on other prohibited grounds. The legislation also seeks to protect employees who make complaints regarding discrimination or harassment by prohibiting reprisals of any kind against those individuals.

### 1.2.2 Exceptions

Generally, Canadian human rights statutes contain a variety of exceptions to their very broad prohibitions against workplace discrimination. The exception most commonly relied upon by employers permits an employer to discriminate on the basis of disability with respect to employment because the person is incapable of performing or fulfilling the essential duties of his or her position. This exception is narrowly interpreted and is subject to an employer's

obligation to reasonably accommodate the individual in performing those essential duties, to the point of undue hardship. Many human rights statutes also protect programs designed to relieve hardship or economic disadvantage, or to assist persons or groups to achieve equal opportunity (i.e., affirmative action programs) by providing that their implementation does not constitute a discriminatory practice.

### **1.2.3 Enforcement**

Enforcement of Canadian human rights legislation is essentially a complaint-driven process. Most jurisdictions have a human rights commission that will provide advice and assistance to individuals who believe they have been subject to unlawful discrimination. If a complaint is filed, the human rights commission will investigate the complaint. If the complaint cannot be settled, the human rights commission may refer the complaint to a human rights tribunal for adjudication. In some provinces, such as Ontario, individuals have a right to file complaints directly with the human rights tribunal without first filing a complaint with a commission or other investigative body.

Generally, human rights tribunals have broad remedial powers, including the power to award damages for loss of employment or wages, and damages relating to loss of enjoyment or hurt feelings. Human rights tribunals may also reinstate an employee to his or her employment or require an employer to take steps to ensure that discrimination does not continue. For example, in some jurisdictions an employer may be required to institute an anti-discrimination policy, report periodically to the human rights commission, and make specific changes to its employment systems or practices. Further, most human rights legislation provides that those persons who infringe the rights provided for by the legislation are guilty of an offence and liable to pay certain fines.

## **1.3 Occupational health and safety legislation**

Occupational health and safety legislation creates health and safety obligations for both employers and employees to minimize the risk of workplace accidents. In all jurisdictions, employers are required to take all reasonable precautions to protect the health and safety of their workers. In some provinces, this obligation extends to the protection of the health and safety of all individuals at or near the employer's workplace, whether or not those individuals are employees.

Aside from the general obligation to take reasonable precautions to protect employees, the regulations passed under occupational health and safety legislation contain many and very specific responsibilities that are imposed on employers to ensure that their workplaces are safe. Some of these responsibilities apply to specific industries. Other regulatory responsibilities relate to particular hazards that may exist in the workplace, including the use of toxic substances and hazardous materials, equipment, or sound levels.

Canadian occupational health and safety legislation also provides employees with certain rights designed to promote workplace safety. For example, employees have a right to be informed by their employer about hazards in the workplace and have the right to refuse work that they reasonably believe is dangerous. Although the right to refuse work is subject to very specific procedural requirements in each jurisdiction, employers cannot discipline employees for properly exercising their statutory right to refuse dangerous work.

Generally, occupational health and safety legislation requires employers to promptly report, within specific time-frames, any workplace accidents that result in a fatality or critical injury. Additional reporting obligations may apply in most of the provinces depending on whether medical attention was required and/or whether the worker was disabled from performing his or her normal duties.

Employees also have a right to participate in the creation of safe workplaces and in the resolution of health and safety problems. Occupational health and safety legislation in all Canadian jurisdictions provides for the creation of joint health and safety committees, which are advisory groups composed of worker and management representatives. The statutes contain specific provisions with respect to the composition and operation of joint health and safety committees, including their duties, size and the frequency of meetings. Generally, joint health and safety committees are required to meet either monthly or quarterly to discuss health and safety concerns in the workplace, and to make recommendations to the employer for the benefit of the health and safety of workers.

In Ontario, the occupational health and safety legislation requires employers to conduct a formal assessment of the risk of violence occurring in the workplace. In addition, employers must prepare policies and programs on both workplace violence and workplace harassment and must provide information and instruction to employees regarding the contents of the policies and programs. Similar obligations exist in many Canadian jurisdictions.

### **1.3.1 Enforcement**

In all Canadian jurisdictions, government health and safety officers or inspectors enforce occupational health and safety legislation. These officers or inspectors typically have broad powers to investigate potential violations of the legislation, and may be called to the workplace by a worker or employer, or may audit the workplace without notice.

An officer or inspector who finds that an employer has failed to comply with occupational health and safety legislation has broad powers to make orders to require the employer to rectify that failure. An officer or inspector will typically order that violations be remedied within a certain time-frame. They may also issue “stop work” orders and require the removal of hazardous equipment or material from the workplace. Subject to the specific procedural requirements in the governing legislation, the orders of an officer or inspector may be appealed by the employer to a labour relations board or other adjudicative body.

Canadian occupational health and safety legislation also provides for the quasi-criminal prosecution of individuals and corporations for violations of the legislation, resulting in the potential imposition of fines and/or imprisonment. Maximum fines vary greatly and can be significant, for example, C\$500,000 or more per count in some provinces. In addition to these quasi-criminal sanctions, the *Criminal Code* has been amended to expand both personal and corporate liability in the context of serious health and safety violations and workplace accidents. As such, employers and their representatives may also be subject to criminal sanctions with respect to a failure to ensure the health and safety of people in their workplaces which amounts to criminal negligence.

## **1.4 Workers’ compensation legislation**

All provinces and territories in Canada operate a no-fault insurance plan with respect to injuries and illnesses arising from employment. Participation is compulsory for most

employers. These plans provide workers who become sick or injured at work with compensation for both economic and non-economic losses, in certain circumstances.

An employee can collect benefits for workplace injuries causing temporary or permanent disabilities and make use of any rehabilitation services provided, but cannot sue his or her employer with respect to the injury. Workers' compensation boards in each Canadian province and territory manage the insurance plans, and most provinces and territories have workers' compensation tribunals to adjudicate disputes relating to benefit entitlements and other matters. Employees of federally regulated businesses are generally covered by the plan in the province or territory in which they work.

Most employers are required to register with the applicable workers' compensation board and to pay premiums into the insurance fund. In some jurisdictions, employers who carry on business in low-risk industries are not required to participate, although they may choose to do so. The contribution an employer is required to make to the insurance fund will depend on the types of activities carried on in the workplace. In general, the greater the risk of accident in the workplace, the higher the premium that employer will be required to pay. In some provinces, workers' compensation legislation provides that an employer's claims history may also affect its premium, such that a surcharge is applied to the account of an employer with a poor claims history and an employer with a good claims history receives a rebate.

Workers' compensation legislation establishes many additional employer obligations. Generally, the legislation requires employers to report any accidents that occur in the workplace within specific time-frames. Employers are also required to work with employees to prevent injuries and to help injured employees return to work. In some provinces, workers' compensation legislation requires employers to reinstate certain workers to their previous or a comparable position when they are able to return to work following a workplace accident, even if the worker has been absent for a significant period of time.

Employers must also comply with various administrative obligations relating to the investigation and adjudication of benefits claims and the payment of insurance premiums. These obligations may vary significantly in each of the provinces and territories.

Employers and their representatives must comply with all obligations contained in workers' compensation legislation. As with occupational health and safety legislation, workers' compensation legislation generally provides inspectors with the right to conduct workplace audits to ensure compliance with workers' compensation obligations, and for the quasi-criminal prosecution of individuals and corporations for violations, which may result in significant fines and/or imprisonment.

## **1.5 Labour relations legislation**

Labour relations legislation in each province and under the federal jurisdiction regulates trade union organization, certification, and collective bargaining. The legislation entrenches the right of employees to organize and to be represented by a bargaining agent, without interference from employers, through a certification process and by prohibiting conduct that interferes with the exercise of that right. The collective bargaining process is regulated to provide mechanisms for achieving collective agreements. Employers carrying on business in more than one province continue to be subject to provincial regulation, unless their business is subject to federal regulation as, for example, in the case of inter-provincial trucking.

If a provincially regulated employer carries on business in several provinces, a union must seek certification from the labour board of each province in which the employer is located to require the employer to deal with the union in each jurisdiction.

Generally, Canadian labour relations legislation governs the conduct of unions and employers, and addresses the various rights and obligations relating to collective bargaining and industrial disputes. It is important to remember that it is the right of every employee in Canada to join a trade union, and to participate in any lawful activity of a trade union. Consistent with that right, employers cannot discriminate against an employee because he or she has joined a trade union or is participating in an organizing drive.

### **1.5.1 Union certification**

Labour relations legislation sets out the process by which a trade union may be certified to represent employees in a specific bargaining unit. Certification is generally approved by provincial and territorial labour relations boards, although the process used varies in each jurisdiction. In some jurisdictions, a certification vote is required, whereas, in other jurisdictions, the trade union need only sign up a certain percentage of the employees to be certified.

Although an employer in almost all provinces has the right to communicate with employees during an organizing drive, labour relations legislation limits such communication to ensure that the employer does not coerce or unduly influence employees. Further, an employer must be careful not to interfere in other ways with a trade union's organizing effort. If a trade union believes that an employer has committed an unfair labour practice during the certification process, it may file a complaint with the applicable labour relations board.

In many jurisdictions, labour relations boards may proceed to certify the trade union if it is determined that the true wishes of the employees are not (or were not) capable of being determined by a vote as a consequence of the employer's inappropriate conduct (e.g., threatening to fire employees or shut down a plant if the workplace becomes unionized).

### **1.5.2 Collective bargaining**

Once a trade union is certified, the union becomes the exclusive bargaining agent for employees in its bargaining unit, and the employer has an obligation to bargain in good faith with the union to achieve a collective agreement. During the life of the collective agreement, strikes and lockouts are not permitted and all disputes are required to be resolved through grievance arbitration. Labour relations legislation in each Canadian jurisdiction sets out the procedures that trade unions and employers must follow before they are able to engage in a legal strike or lockout.

Generally, labour relations statutes also include provisions regarding the termination of a union's bargaining rights. As a general observation, an employer cannot encourage employees to initiate an application for termination in any way. In addition, labour relations legislation in each Canadian jurisdiction specifically provides that if all or part of a business is sold, bargaining rights are protected.

### **1.5.3 Strikes and lockouts**

Strikes or lockouts are illegal during the life of a collective agreement. They can be undertaken only after the expiration of the agreement and after mandatory conciliation has failed to bring about an agreement.

### **1.5.4 Picketing**

Traditionally, there are two forms of picketing. Primary picketing is lawful and involves picketing at the place of business of the struck employer. Where the employer has multiple places of business, picketing at other locations is considered to be primary picketing.

Secondary picketing, on the other hand, involves picketing third parties dealing with struck employers. Injunctive relief to restrain secondary picketing might be available from the courts or labour relations boards in appropriate circumstances.

Picketing is controlled by the criminal law and by the law of torts in addition to labour relations law, and is limited to communicating information. Forms of intimidation, including verbal threats, physical assaults or unreasonable blocking of premises, are unlawful.

### **1.5.5 Will the presence of a bargaining unit affect the sale of a business?**

Generally, the purchaser of all or part of a business is bound by existing collective agreements and must recognize the certified union. In some cases after a sale, where there has been an intermingling of employees, an application can be made to the Labour Board to determine if the bargaining units are still appropriate.

## **2. Common Law Obligations to Employees**

Over and above the statutory obligations summarized above, employers in Canada are also required to meet common law obligations owed to their employees working in Canada's common law provinces and territories, that is, all jurisdictions other than Quebec. Common law is essentially a "judge-made" body of law consisting of judicial decisions and precedents, instead of statutes or codes created by legislatures.

In the absence of a written contract of employment, certain terms and conditions of employment between an individual and his or her employer are implied by common law. One of the obligations imposed upon employers by the common law is the obligation to provide employees with reasonable notice of termination of employment, or pay in lieu of reasonable notice, in the absence of just cause for dismissal. Given that just cause for dismissal exists in only the most exceptional cases (typically involving serious wilful misconduct on the part of the employee such as theft or sexual harassment), terminations of employment in Canada are generally effected without cause by providing employees with reasonable notice or pay in lieu of notice.



There is no fixed formula for determining reasonable notice in any given case. There are, however, many factors that have been taken into account by courts of law when determining reasonable notice, including the:

- Age of the employee
- Employee's length of service
- Availability of similar employment
- Position held by the employee
- Employee's level of compensation

In essence, in each case, courts attempt to identify the length of notice that would be required to provide the employee with a reasonable opportunity to find alternate employment of a similar nature. Generally, notice periods determined by courts have not exceeded 24 months, but there are some exceptions, and the trend is currently toward longer notice periods. Further, any aggravating or "bad faith" behaviour on the part of the employer when dismissing an employee may serve to entitle the employee to additional damages in litigation.

Reference was made above to written contracts of employment. Written contracts of employment may contain provisions which speak to an employee's entitlement to notice or compensation upon the termination of his or her employment. In general terms, any obligations regarding dismissal described by a valid contract will govern the termination of employment, as long as minimum statutory obligations are met by the contracted provision.

Common law principles are not applicable in the province of Quebec. Rather, employers' obligations are established by the *Civil Code of Québec*. However, that legislation provides that an employee can claim reasonable notice (or compensation in lieu of notice) of the termination of his or her employment, such that an employee's entitlements upon dismissal in that province are substantially similar to those of employees in the common law provinces.

However, Canadian employers should be aware of the fact that there are unique legislative and other requirements relating to employment in Quebec that are not necessarily present in the common law provinces and territories.

## **3. Pensions, Benefits and Executive Compensation**

### **3.1 Government-administered benefits — federal**

Canada has many government-administered pension, benefit and welfare programs that provide a minimum degree of social security. Old Age Security provides pensions payable from general tax revenues from age 65, subject to residence requirements. The Canada Pension Plan is a compulsory, contributory, earnings-related plan that applies to employees and self-employed individuals in all provinces other than Quebec and provides basic retirement, survivor benefits, death, and long-term disability benefits. For individuals employed or resident in Quebec, the Quebec Pension Plan is applicable and is essentially identical to the Canada Pension Plan. The federal Employment Insurance Program (EI) provides for a number of different benefits, including a 15-week sickness benefit equal to 55 per cent of the average weekly insurable earnings in the employee's qualifying weeks to a fixed maximum. Most employers contract out of EI sickness benefits by providing equal or superior benefits, thereby reducing their EI premiums.

## 3.2 Government-administered benefits — provincial

All provinces maintain a hospital and medical insurance plan. In some cases, including in Ontario, it is financed by an employer health tax based upon annual payroll. Provinces also have workers' compensation legislation that provides non-taxable disability and death benefits for accidents that are work related, and which replaces the employee's right to take legal action against the employer in connection with work-related injuries. Workers' compensation is funded by employer contributions determined on an industry-wide basis, depending on accident experience.

## 3.3 Privately administered benefits

### 3.3.1 Registered pension plans

Many employers voluntarily offer private pension plans. They, like employment and labour matters, are governed by federal or provincial legislation depending on the jurisdiction of the undertaking and must be registered in the jurisdiction where the plurality of members is employed. To qualify for preferential tax treatment, pension plans must also comply with federal income tax laws and must be registered under the *Income Tax Act* (Canada) (ITA).

Pension legislation provides minimum standards applicable to registered pension plans and specifies rules relating to many aspects of the pension arrangement, including:

- Funding
- Eligibility
- Vesting
- Early, normal and postponed retirement
- Accrual of benefits
- Investing and withdrawing pension fund assets
- Transfers of pension fund assets
- Discontinuance of a pension plan

Employers with operations in more than one province or jurisdiction may operate one registered pension plan that contains terms required with respect to members employed in each province and jurisdiction.

### 3.3.2 Supplemental employee retirement plans and executive compensation

Employers in Canada may choose to establish a supplemental executive/employee retirement plan (SERP) for executives and more highly compensated employees, which will provide benefits in excess of the legislated limits applicable to registered pension plans under the ITA. SERPs often benefit from an exemption from the minimum standards legislation or registration requirements applicable to registered pension plans described in Section VIII, 3.3.1, "Registered pension plans." However, this should be confirmed when establishing an SERP. Assuming that an exemption applies and subject to any relevant employment agreements, benefits provided under an SERP need not be funded. Employers may choose to fund an SERP or secure the benefits provided pursuant to the SERP using a letter of credit. If this is the case, the SERP may be considered a Retirement Compensation

Arrangement (RCA) under the ITA and subject to a refundable tax regime. There are unique withholding and reporting requirements when the SERP is an RCA.

There are a number of other ways in which employers may compensate executives and other highly paid employees, such as stock options, restricted share units or other types of equity-based compensation plans. Proper plan design, in particular with respect to the ITA requirements and any cross-border tax considerations, will be important when implementing such plans. Generally, such plans benefit from broad exemptions from prospectus and registration requirements under Canadian securities laws.

### **3.3.3 Other retirement savings arrangements**

The ITA contains a number of provisions designed to encourage individual savings for retirement. In particular, individuals may establish registered retirement savings plans (RRSPs). Contributions made to an RRSP are deductible in computing income, and income earned in the plan is not subject to tax prior to withdrawal. When the accumulated contributions and income are eventually paid out (generally upon retirement), tax is payable on amounts received. Thus, the effect of an RRSP is to defer tax on current earnings. The ITA also contains provisions that permit an employer to share profits on a tax-sheltered basis with its employees (a deferred profit-sharing plan). Deferred profit-sharing plans, typically combined with a group RRSP (see below regarding such group plans), have become relatively popular employer-sponsored retirement income vehicles. There are many technical rules governing RRSPs and deferred profit-sharing plans, including the timing and method of withdrawal of contributions, annual contribution limits (which vary depending on whether the individual also participates in a registered pension plan) and qualified investment restrictions.

Individuals residing in Canada can also contribute up to a set amount per year to a tax-free savings account (TFSA), currently C\$5,500. Contributions are made with after-tax dollars but individuals are not taxable on any income or capital gains earned in their TFSA or withdrawals from the TFSA. Contributions made by an individual to their TFSA will not reduce the amount the individual is permitted to contribute annually to a registered pension plan, an RRSP and/or a deferred profit-sharing plan under the ITA, and contributions to these latter arrangements will also not reduce the amount an individual may contribute to their TFSA.

The Canada Revenue Agency permits the establishment and administration of RRSPs and TFSAs as group arrangements, as long as the group arrangement is sponsored by an employer, an association or other organization and is limited to employees or members of that employer, association or organization.

The federal government and several provincial governments have enacted legislation to permit pooled registered pension plans or PRPPs. PRPPs are intended to be large, capital-accumulation plans administered by third-party administrators, such as, for example, Canadian banks or insurance companies, allowing for broad-based participation from multiple employers, individuals (without requiring employer contributions), and the self-employed. In Quebec, PRPPs are known as “voluntary retirement savings plans” or “VRSPs.” Provincially regulated employers in Quebec with five or more eligible employees on December 31, 2017 and no other specified retirement savings plan in place will be required to offer such employees in a VRSP by no later than December 31, 2018. Employees are automatically enrolled in a VRSP. Employees may opt out from the VRSP or modify their contribution rate by notifying their employer within 60 days following the date on which the VRSP administrator sent the statement of participation. After enrolment, employees must have contributed for 12

months before being able to suspend or stop VRSP contributions, subject to certain exceptions provided by law. Employers will be required to deduct and remit employee contributions (unless the employee opts out), but employer contributions are not mandatory.

### **3.3.4 Employee benefit plans**

In addition to sponsoring pension plans or other retirement savings plans, employers often offer health and welfare benefits to their employees. Such benefits typically include life insurance, accidental death and dismemberment insurance, long-term disability, short-term disability, extended health care and dental care. Employer-sponsored health and welfare plans supplement the universal health care provided in Canada, which generally does not provide coverage for prescription drugs or dental care outside a hospital setting. Health and welfare plans may be insured or self-insured. There will be different tax implications for employers and employees depending on the types of benefits provided under the health and welfare plan and the structure of the health and welfare plan.

# IX. Privacy Law



Canada has comprehensive federal privacy legislation that applies to the private sector. In addition, certain provinces have enacted both comprehensive and sector-specific private-sector privacy legislation.

The federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) applies generally to all collection, use or disclosure of personal information by organizations in the course of a commercial activity. “Personal information” is broadly defined in PIPEDA, and includes any “information about an identifiable individual,” whether public or private, with limited exceptions.

All organizations subject to PIPEDA must comply with a range of obligations when collecting, using, disclosing and otherwise handling personal information, summarized in the following 10 principles:

1. **Accountability:** Organizations must appoint an individual (or individuals) to be responsible for the organization’s compliance and to develop and implement personal information policies and procedures. Organizations are accountable for personal information transferred to third-party service providers (including affiliated companies) for processing on their behalf, and must use contractual or other means to protect personal information while being handled by those third parties.
2. **Identifying Purposes:** Organizations must identify the purposes for collecting personal information before or at the time of collection.
3. **Consent:** Knowledge and consent of the individual are required for collection, use and disclosure of personal information, with limited statutory exceptions. Consent cannot be made a condition for supplying a product or service unless use of the personal information is required to fill an explicitly specified and “legitimate” purpose. Individuals may withdraw their consent at any time, subject to contractual or statutory limitations.
4. **Limiting Collection:** Organizations are required to limit collection to the amount and type of information necessary for the identified purposes. Information must be collected by “fair and lawful means,” and cannot be collected indiscriminately.
5. **Limiting Use, Disclosure and Retention:** Personal information may not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or pursuant to certain limited statutory exceptions. Personal information is to be retained only as long as necessary for the fulfilment of those purposes.
6. **Accuracy:** Personal information must be as accurate, complete and up-to-date as is necessary for the purposes for which it is to be used.
7. **Safeguards:** Organizations must use appropriate security safeguards to protect personal information against loss or theft, and unauthorized access, disclosure, copying, use or modification, and must train staff on security and information protection, among other matters.
8. **Openness:** Privacy policies and practices of the organization must be open, understandable and easily available.
9. **Individual Access:** Organizations must give individuals access to their personal information upon request, subject to certain statutory limits and, in appropriate circumstances, individuals must be given an opportunity to correct their information.
10. **Challenging Compliance:** Organizations must have a simple and easily accessible complaint procedure

In addition to the foregoing principles, compliance with PIPEDA is subject to an overriding reasonableness standard whereby organizations may only collect, use and disclose personal

information for the purposes that a “reasonable person would consider are appropriate in the circumstances.” This reasonableness requirement applies even if the individual has consented to the collection, use or disclosure of their personal information.

In the context of personal information about employees of organizations, given the constitutional limits placed on federal legislation, PIPEDA applies only to the employment information of employees of federally regulated organizations such as banks, airlines and telecommunications companies. However, in the provinces that have enacted provincial privacy legislation, this legislation applies to employee information outside those sectors.

Quebec’s *Act respecting the protection of personal information in the private sector* (Quebec Privacy Act) is similar in principle to PIPEDA, but there are important differences in detail. The Quebec Privacy Act applies to all private-sector organizations with respect to collection, use and disclosure of personal information (not just with respect to commercial activities) and to employee information. Alberta and British Columbia have also enacted comprehensive private-sector privacy legislation (in each case, the *Personal Information Protection Act* or PIPA) that applies generally, including to personal information of employees. Alberta, Saskatchewan, Manitoba, Quebec, Ontario, Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland and Labrador, Yukon Territory and the Northwest Territories have legislation in place specifically governing the collection, use and disclosure of personal health information.

PIPEDA permits the federal Cabinet, by order, to exempt an organization or class of organizations or an activity or class of activities from its application if the collection, use or disclosure of personal information occurs within a province that has enacted legislation that is substantially similar. The Quebec Privacy Act and the PIPA legislation in Alberta and British Columbia have each been designated as substantially similar to PIPEDA. In addition, in Ontario, New Brunswick, Nova Scotia, and Newfoundland and Labrador, the legislation governing the collection, use and disclosure of personal health information by certain designated entities (e.g., physicians, nurses, hospitals, etc.) has been designated as substantially similar to PIPEDA and therefore these entities are exempt from PIPEDA with respect to the activities covered by the provincial legislation. Given that many organizations operate in more than one province and inter-provincially, businesses are often required to deal with a “patchwork” of provincial and federal privacy legislation.

Effective November 1, 2018, PIPEDA will require organizations to notify the Office of the Privacy Commissioner of Canada (OPC) and affected individuals of a breach of security safeguards involving personal information if it is reasonable to believe that the breach creates a real risk of significant harm to an individual. Other organizations and government institutions must also be notified where appropriate to reduce or mitigate harm. Organizations will also be required to keep a record of all breaches, including those that do not meet the threshold for reporting, and to provide the records to the OPC upon request.

The Alberta PIPA also contains mandatory data breach notification requirements. Organizations must notify Alberta’s Information and Privacy Commissioner, without delay, of a loss of or unauthorized access to or disclosure of personal information if a reasonable person would consider that there exists a real risk of significant harm to an individual as a result of the loss, access or disclosure. The Commissioner can direct the organization to notify individuals of the loss, access or disclosure. Organizations are also able to notify individuals on their own initiative.

In addition, the personal health information protection legislation in Ontario, Newfoundland and Labrador, Nova Scotia, Yukon Territory, Northwest Territories, Prince Edward Island and New Brunswick also contain mandatory breach notification obligations.

Considerable attention has been given in Canada to cross-border transfers and outsourcing of Canadian personal information to the U.S. Much of this attention has centred on the concern that U.S. authorities could use the *USA PATRIOT Act* to obtain the information of Canadians where that information is located in or accessible from the U.S. PIPEDA and the related provincial legislation do not prohibit the transfer of personal information outside Canada. However, PIPEDA's "openness" principle has been held by privacy regulators to require that notice of such transfers be provided to affected individuals.

In addition, the Alberta PIPA requires an organization that uses a service provider outside Canada to collect, use or disclose personal information to notify individuals as to how they can obtain information about the organization's policies and practices with respect to the use of service providers outside Canada, including the name, position or title of a person who is able to answer questions on behalf of the organization.

The organization is also required to include in its privacy policy or in a separate document, the countries outside Canada in which the collection, use or disclosure of personal information may occur and the purposes for which the service provider outside Canada has been authorized to collect, use or disclose personal information on behalf of the organization.

Under the Quebec Privacy Act, an organization may not communicate personal information outside Quebec, nor entrust anyone outside Quebec with the task of holding, using or communicating such information, unless adequate measures are put in place to ensure that the information will not be used for purposes not relevant to the purposes for which it was collected or communicated to third persons without the consent of the individuals concerned. If the organization considers the personal information being transferred outside Quebec will not receive the protection required, it must refrain from such transfer.

Somewhat different rules apply to personal information that is collected by federal, provincial or municipal public-sector organizations. This information is covered by federal, provincial and municipal legislation that limits the use and disclosure of such information to purposes related to a valid public purpose. The provincial public sector privacy statutes in British Columbia and Nova Scotia prohibit storing and accessing personal information from locations outside Canada unless the individual consents or another exemption applies. These restrictions apply to the public-sector organizations as well as any service providers to public-sector organizations. As a result, private-sector organizations that provide services to government agencies or other public-sector organizations in British Columbia and Nova Scotia will be directly subject to restrictions on foreign storage of, and access to, personal information collected by public-sector organizations.

In addition, it is an offence under the public sector privacy legislation in British Columbia, Nova Scotia and Alberta to disclose personal information pursuant to foreign legal requirements (e.g., court orders, *USA PATRIOT Act* disclosure notices). Organizations that perform contracted services for federal public bodies should also be aware of federal government contracting guidelines that address privacy risks of contracting with foreign-based or foreign-affiliated service providers.

# X. Intellectual Property



Almost all business transactions and new product launches have intellectual property implications. Many products have various aspects that require protection.

For example, a “patent” protects new, useful and inventive functional features of a product or process. “Copyright” protects, among other things, original drawings by which a product is designed and software. An “industrial design” registration protects a novel and original aesthetic design of a functional article. “Trade-mark” protection is available for a distinctive word or design identifying the source of a product or service.

A secret formula, a product’s manufacturing process or business method that is known exclusively by the business would qualify as proprietary “confidential information.” “Personality rights” may be involved if the name or likeness of a person is used to promote a product. “Topography rights” and “plant breeders’ rights” protect products in specific industries.

With only a few exceptions, federal law governs intellectual property in Canada. Federal statutes regulate patents, trade-marks, copyright and moral rights, industrial designs, topography rights and plant breeders’ rights.

The only provincially regulated aspects of intellectual property are through the common law of passing off, personality rights and confidential information, and the statutes in some provinces governing personality rights. Provincial law also governs trade names and contracts related to intellectual property, such as assignments, licences and security interests.

## 1. Federal Law

### 1.1 Patents

#### 1.1.1 What inventions are eligible for a patent?

A patent is granted by the federal government for an invention that satisfies certain criteria pursuant to the *Patent Act*. The patentee may exclude others from making, using or selling an invention protected by a patent.

A patent may only be obtained for certain classes of inventions, namely processes (such as a method for refining oil), machines (devices with moving parts), manufactured articles and compositions of matter (such as chemical compounds like plastics).

To be patentable, the subject matter claimed in a patent application must be new, useful and inventive. Utility is determined by whether the claimed invention has a useful purpose and is capable of operation. Inventiveness means that the claimed invention is not obvious to a person having ordinary skill in the art to which the invention relates.

The novelty of an invention is assessed with reference to certain statutory criteria. In the event of competing applications, only the person whose application has the earliest effective filing date may be entitled to a patent. However, only an inventor or a person who derives rights from the inventor is entitled to a patent. An invention made by an employee within the scope of employment is, in the absence of an agreement to the contrary, the employer’s property.

An invention is not patentable if it is made available through disclosure by publication, sale or otherwise in any country prior to the filing date of the application, unless the disclosure is made



by the inventor or someone who derives knowledge from the inventor and an application is filed within one year of such a disclosure.

### **1.1.2 How does a person apply for a patent?**

Canada is a signatory to the *Paris Convention* and the *General Agreement on Tariffs and Trade* establishing the World Trade Organization (WTO). Thus, in determining priority of filing, an applicant may rely on the filing date of its first application for a patent for the same invention in another country that is also a member of either of these treaties (“priority date”) if the Canadian application is filed within one year of the priority date. Canada is also a signatory to the *North American Free Trade Agreement*, the *Budapest Treaty* and the *Patent Co-operation Treaty* (PCT). A PCT application may designate Canada, entitling the applicant to enter the national phase in Canada at a later date.

A patent application is subject to examination by the Canadian Intellectual Property Office (CIPO) prior to grant. Examination must be requested within five years of the filing of an application. Advanced examination is available under some circumstances. An applicant can also take advantage of Patent Prosecution Highway Programs between CIPO and certain other foreign patent offices in order to expedite the issuance of a Canadian patent with claims that substantially correspond with claims that have been found allowable by a foreign patent office.

### **1.1.3 May a patent be transferred?**

Any of an invention, a patent application and a patent may be voluntarily licensed and transferred. Transfers and exclusive licences must be recorded in the CIPO. A security interest may be recorded in the CIPO but the effect of such recordal is unclear. A security interest may also be recorded under provincial personal property security regimes.

### **1.1.4 What rights does a patent provide?**

A patent is in force from the date of grant to a date 20 years after the date the application is filed in Canada. In some circumstances, a Certificate of Supplementary Protection may provide up to two years of additional patent protection to compensate for delays in obtaining regulatory approval for a pharmaceutical product. Annual maintenance fees are required to keep patent applications pending and issued patents in force.

A valid patent protects against the unauthorized manufacture, use or sale in Canada of devices or methods embodying the claimed invention, whether copied or resulting from an independent act of invention. The sale in Canada of products made abroad by a process patented in Canada may also be prevented. There are a number of remedies for patent infringement. These include:

- Temporary and permanent injunctive relief
- Either the damages suffered by the patent owner or the profits earned by the infringer from infringing activities that occur after issuance of the patent
- “Reasonable compensation” for acts that occur after publication of a patent application and before issuance of the patent that would have constituted infringement if the patent had been issued at the time
- Punitive damages
- Delivery up or destruction of infringing articles

### 1.1.5 Patent Law Treaty Adoption in Canada

Canada has been a signatory to the Patent Law Treaty (*PLT*) since 2001, but certain amendments to the *Patent Act* will be required in order to ratify the *PLT*. The proposed amendments include:

- Changes to the filing date requirements
- Amendments to the abandonment/reinstatement regime, including the introduction of notifications prior to abandonment
- Amendments to certain requirements on representation
- Allowing for the restoration of priority
- Preventing the revocation of granted patents on the basis of an administrative defect during the application stage
- Introducing measures for the protection of third parties

The amendments to the *Patent Act* will come into force on a date that will be established after the relevant amendments to the *Patent Rules* have been prepared and CIPO's IT systems have been updated, both of which are in progress.

## 1.2 Trade-marks

### 1.2.1 Must a trade-mark be registered to be protected?

A trade-mark is a word, symbol, sound or shape used to distinguish a person's goods or services from those of others. Amendments to Canada's trade-mark legislation will, when they take effect (expected to be in early 2019), recognize additional categories of trade-marks such as scents, holograms, tastes and textures. Trade-mark rights may be acquired through use of the mark in Canada in association with goods, services or both, or by registration. Although a trade-mark need not be registered to be protected, registration will usually ensure protection throughout Canada and facilitate enforcement of trade-mark rights.

In the absence of registration, a trade-mark can be protected only in the geographical area in which the owner can establish a reputation or goodwill in association with the mark and the goods and services offered with it. See Section X, 2, "Provincial Law." The reservation of a business name or a corporate name, the incorporation of a company or the registration of a domain name will not itself create any trade-mark rights.

### 1.2.2 What trade-marks may be registered?

A trade-mark is registrable if it is not:

- Primarily merely the name or surname of an individual who is living or has died within the preceding 30 years
- Either clearly descriptive or deceptively descriptive in the English or French language of the character or quality of the goods or services in association with which it is used or of the conditions of, or the persons employed in, their production, or of their place of origin
- The name in any language of the goods or services in association with which it is used
- Confusing with a registered trade-mark

- A mark of which the adoption is prohibited by certain provisions of the *Trade-marks Act*

Although otherwise not registrable, some marks may be registrable if they have been so used in Canada as to have become distinctive or, if registered in a foreign country, are not without distinctive character.

### 1.2.3 How does a person apply to register a trade-mark?

As noted above, Canada is a signatory to *the Paris Convention* and the *General Agreement on Tariffs and Trade* establishing the WTO and is also a member of the *North American Free Trade Agreement*. Canada has announced its intention to adhere to the *Nice Agreement*, the *Singapore Treaty* and the *Madrid Protocol*. CIPO now also permits an applicant to voluntarily designate Nice classes for the goods and services listed in its application for a trade-mark.

For the purposes of the federal registration system governed by the *Trade-marks Act*, the first person to “adopt” a trade-mark in Canada is generally considered to be the person entitled to registration in Canada, even if someone else was the first to apply to register the same mark. A trade-mark may be adopted by “use” or “making known” of the trade-mark in Canada or by filing an application for registration of the trade-mark in Canada. A person who has filed a trade-mark application in its country of origin, which is a member of the *Paris Convention* or the WTO, may be entitled to treat the filing date of the first foreign application (“priority date”) as an adoption date in Canada if a Canadian application for the same mark is filed within six months of the priority date.

A trade-mark may be registered on one or more of the following bases:

- **Use in Canada by the applicant or a predecessor in title:** “Use” in Canada with goods occurs when a trade-mark is marked on the goods or their packaging or when the mark is otherwise associated with the goods so that a purchaser would have notice of the association when the goods are sold or their possession is transferred in Canada in the normal course of trade. While mere advertising of a mark does not constitute use of the mark in connection with goods, use with services occurs if the mark is used or displayed in Canada in performance of the services, or in advertising of the services if the applicant is capable of performing the services in Canada.
- **A stated intention to use a trade-mark in Canada:** Actual use must occur in Canada before registration is granted on this basis.
- **Making the trade-mark known in Canada by the applicant or a predecessor in title:** A mark is “made known” in Canada with goods or services if it is used in a foreign country that is a member of the *Paris Convention* or the WTO and is made well known in Canada to a substantial segment of the relevant population by reason of prescribed types of advertising.
- **Use abroad and registration of the mark in the applicant’s country of origin that is also a member of the *Paris Convention* or the WTO:** Although the Canadian application can originally be based on an application filed by the applicant in its country of origin, the Canadian application will not be approved for advertisement until registration is granted in the applicant’s country of origin.

The CIPO examines the application. If the mark is found to be registrable, the application is advertised in the *Trade-marks Journal*. Any person may file an opposition to registration within two months of advertisement.

Recent amendments to the *Trade-marks Act* will, when they are proclaimed in force, eliminate the requirement to specify a basis of registration in a trade-mark application. It is currently anticipated that these amendments will not be proclaimed in force until 2019 at the earliest.

#### **1.2.4 May a trade-mark be transferred?**

A trade-mark, an application for registration or a registration (even an application based on proposed use) may be assigned, although one must be careful that the distinctiveness of the trade-mark is not thereby impaired. “Distinctiveness” refers to the trade-mark’s ability to distinguish a person’s goods and services from those of others. The owner of a trade-mark may license others to use the mark if the owner controls the nature and quality of the licensee’s goods or services associated with the mark pursuant to a licence agreement. It is recommended that any such licence agreement be reduced to writing so as to make it easier, if required, to prove the existence of a licence between the relevant parties. A licence agreement is required even if the parties are related. If notice is given of the trade-mark owner’s name and that the use is a licensed use, control by the owner will be presumed.

A grant of a security interest may be filed against a trade-mark of record in the CIPO but the effect of such a filing is unclear. A security interest may also be recorded under provincial personal property security regimes.

#### **1.2.5 What rights does a trade-mark registration provide?**

Registration of a trade-mark is granted for indefinitely renewable periods of 15 years. Recent amendments to the *Trade-marks Act*, not yet proclaimed in force, will reduce this period to 10 years. A registration is subject to expungement if:

- After the third anniversary of registration the mark has not been used in Canada at any time during the preceding three-year period in association with the goods/services covered by the registration
- The mark was not validly registered
- The mark is no longer distinctive of the goods and services of its registered owner

A valid trade-mark registration gives the owner the exclusive right to use the mark throughout Canada in respect of the goods and services for which it is registered. A person who sells, distributes or advertises goods or services in association with a confusing trade-mark or trade name infringes this right. Confusion is caused if the use of two trade-marks, or a trade-mark and a trade name, in the same area would likely lead to the inference that the goods, services or business associated with such marks or names are manufactured, sold, leased, hired or performed by the same person.

The remedies for trade-mark infringement include:

- Temporary and permanent injunctive relief
- Either the damages suffered by the trade-mark owner or the profits earned by the infringer
- Punitive damages
- An order prohibiting importation
- Delivery up or destruction of offending materials

Recent amendments to the *Trade-marks Act* provide additional protection to trade-mark and copyright owners against infringing and counterfeit goods. These amendments give Canadian customs authorities the right — upon their own initiative or on the request of a rights holder — to detain suspected infringing or counterfeit goods. The owner of a Canadian trade-mark or copyright registration is now able to file a request for assistance with the Canada Border Services Agency (CBSA). The CBSA will then be entitled to take such steps as obtaining information regarding allegedly infringing goods and providing the rights owner with a sample of such goods and information regarding the importation of such goods.

## 1.3 Copyright

### 1.3.1 What types of works are capable of copyright protection?

Copyright is governed by the *Copyright Act*. Copyright is the sole right to reproduce, publish and perform literary, dramatic, artistic and musical works. Copyright also includes rights of performers in their performances and rights in relation to sound recordings and broadcast signals. Only the form of expression of a work is protected. Copyright does not protect an idea, concept or information. Computer programs are protected as literary works, regardless of the medium in which such programs are expressed.

Canada is a signatory to the *Berne Convention*, the *Universal Copyright Convention* and the *Rome Convention*. As noted above, Canada is also a signatory to the *General Agreement on Tariffs and Trade* establishing the WTO. Pursuant to those conventions, Canada recognizes copyright in works and other subject matter created by nationals of other signatories to the conventions. Canada is also a member of the World Intellectual Property Organization (WIPO) *Copyright Treaty*, the *WIPO Performances and Phonograms Treaty* and the *North American Free Trade Agreement*. Canada is also a member of other work or subject matter-specific treaties.

Copyright protection subsists in any work capable of being so protected from the moment it is created and fixed in a tangible form, provided that certain conditions relating to the publication and residence or domicile of the author in a convention country are satisfied. No registration of copyright is necessary, although registration in the CIPO is helpful as a means of proof of copyright and its ownership in the event of litigation. Marking of copyright on articles with a copyright notice is not necessary in Canada but is a usual practice.

### 1.3.2 Who owns copyright?

The work's author is generally the first owner of copyright in the work. If the author is in the employment of another and the work is made in the course of such employment, the employer is the first owner of copyright. If the author is an independent contractor and there is no written transfer of copyright, copyright is owned by the author. Special rules apply to contributions to periodicals and works prepared or published by or under the direction or control of the federal government. Other special rules apply for performers' performances, sound recordings and communication signals.

### 1.3.3 What does copyright protect?

Copyright generally lasts for the life of the author of the work plus the period to the end of the calendar year 50 years thereafter. Published sound recordings and performers' performances fixed in sound recordings are, in some circumstances, entitled to up to 70 years of protection

measured from the end of the calendar year of first publication. There have also been proposals, from time to time over the past few years, to extend the term of copyright to 70 years for other works, but such proposals have not yet matured into law.

Copyright includes the right to produce or reproduce a work or any substantial part thereof in any material form whatsoever and to perform a work or any substantial part thereof in public. Copyright protects original works against the unauthorized reproduction in different media, adaptation or conversion to a different form, translation, publication, making available, and telecommunication to the public, among other activities, and the authorization of such activities. Copyright also protects against certain commercial activities with infringing copies if there is knowledge that the copies infringe. Copyright law further protects against interference with technological protection measures.

### **1.3.4 May copyright be transferred?**

Copyright may be assigned and licensed. Any assignment or licence of exclusive rights must be in writing. Assignments and licences should be recorded in the CIPO. The effect of the recordal of a security interest in the CIPO is unclear. A security interest may also be recorded under provincial personal property security regimes.

### **1.3.5 How may copyright be infringed?**

Copyright is infringed by a person who performs any activity with a work protected by copyright without the author's permission.

A person need not be a copier or performer to infringe copyright. Copyright may also be infringed by certain commercial activities in relation to a work, which are done with knowledge that the work infringes copyright or would infringe copyright if it had been made within Canada. In some cases, importation of a work may constitute infringement.

For reasons of public policy, a number of activities in relation to copyright works that would otherwise constitute infringement are specifically exempted from infringement by users' rights. By way of example, any fair dealing with a work for the purposes of private study, research, criticism, review, newspaper summary, education, parody or satire may be exempted from infringement.

A user who is in lawful possession of a computer program may, in certain circumstances, alter and adapt that program to its particular needs, and make back-up copies of it, without infringing copyright. There are numerous other user rights, directed to specific institutions and activities. For example, non-commercial user-generated content reproduced for private purposes may, in some circumstances, be exempt from infringement.

The civil remedies for copyright infringement include:

- Temporary and permanent injunctive relief
- An order prohibiting importation
- Both the damages suffered by the copyright owner and the profits earned by the infringer through the sale of infringing copies (subject to a deduction for any overlap)
- Punitive damages

In some cases, statutory damages may be available as an alternative to damages and profits. Further, all infringing copies of a work in which copyright subsists, and all plates used or intended to be used for the production of such infringing copies, are deemed to be the property of the owner of the copyright.

In addition to civil liability for copyright infringement, an infringer may be exposed to criminal liability.

See Section X, 1.2.5, “What rights does a trade-mark registration provide?” regarding the recent introduction of border measures to protect against works entering the country that infringe upon the rights of the owner of copyright in Canada.

### **1.3.6 What are moral rights?**

Independently of any right of ownership of copyright in any literary, artistic, musical or dramatic work, the author of a work has moral rights in the work and a performer has moral rights in his or her performance. These include the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym, the “right of paternity”; and the right, where reasonable in the circumstances, to remain anonymous, the “right of anonymity.”

As well, the author has the “right to integrity” of the work. An author’s right to integrity of a work is infringed if the work is, to the prejudice of the honour or reputation of the author, distorted, mutilated or otherwise modified or used in association with a product, service, cause or institution. In the case of a painting, sculpture or engraving, prejudice is deemed to have occurred as a result of any distortion, mutilation or other modification of a work. Moral rights may not be assigned, but may be waived in whole or in part. A simple assignment of copyright in a work does not constitute a waiver of moral rights.

## **1.4 Industrial designs**

### **1.4.1 What industrial designs are registrable?**

An industrial design registration under the *Industrial Design Act* protects the aesthetic appearance of an article, that is, its features of shape, configuration, pattern or ornamentation or any combination of those features. The feature of colour may also form a part of the design. To be registrable, the design must be new and original. Features of a design that are solely functional in nature are not registrable.

Any article that is manufactured may qualify for industrial design protection. This includes three-dimensional objects, such as bottles and handheld devices, and two-dimensional objects, such as icons and graphical user interfaces (GUIs).

### **1.4.2 How does a person apply for registration?**

As noted above, Canada is a signatory to the *Paris Convention*, the *General Agreement on Tariffs and Trade* establishing the WTO and the *North American Free Trade Agreement*. Canada has announced its intention to adhere to the *Hague Agreement Concerning the International Registration of Industrial Designs* (Hague Agreement) and has introduced certain amendments to the *Industrial Design Act* (not yet in force) that will allow Canada to comply with the Hague Agreement upon adherence to this treaty.

To obtain registration of a design, an application must be filed, identifying the proprietor's name and including a drawing or photograph of the article to which the design is applied and a description of the design. The applicant of a design registration must also file a declaration that, to the knowledge of the first proprietor of the design, the design was not in use by any other person when it was adopted by the first proprietor.

A design will be refused registration if it is filed more than one year after it is published in Canada or elsewhere. A person who has filed an application for the design in another country that is a member of the *Paris Convention* or the WTO, may be entitled to treat the filing date of the foreign application, the "priority date", as the effective filing date in Canada if a Canadian application for the same design is filed within six months of the priority date.

Once a design application is filed, it is examined to ensure that it meets the requirements of the *Industrial Design Act* and the *Industrial Design Regulations*. If the examiner raises any objections, the applicant will be provided with a period of time to file a reply. Once the examiner is satisfied that the design meets the requirements of the Act and Regulations, the design is registered.

### **1.4.3 What does registration provide to a proprietor?**

An industrial design registration is granted for a term of 10 years from the date of registration. A single maintenance fee must, however, be paid by the fifth anniversary of the registration date to keep the registration in force for the last half of its term.

An industrial design registration entitles the registrant to restrain the manufacture, importation for trade, sale and rental of any article in respect of which the design is registered and to which the design or a design not differing substantially therefrom has been applied.

The remedies for industrial design infringement include:

- Temporary and permanent injunctive relief
- Either the damages suffered by the design owner or the profits earned by the infringer
- Punitive damages
- Delivery up or destruction of infringing articles

### **1.4.4 May an industrial design be transferred?**

A design, whether an industrial design registration or an application for an industrial design registration, may be assigned or licensed. Assignments and licences may be recorded in the CIPO. A security interest in the design may also be recorded in the CIPO as well as under provincial personal property security regimes.

## **1.5 Personality rights**

Although personality rights are generally governed by provincial law (see the discussion under "Provincial Law" below), the *Trade-marks Act* provides that no person may adopt in connection with a business, as a trade-mark or otherwise, any mark consisting of, or so nearly resembling as to be likely to be mistaken for any matter that may falsely suggest a connection with any living individual or the portrait or signature of an individual who is living or has died within the preceding 30 years.



## 1.6 Domain names

Canada has its own country code top-level domain name registry, **.ca**. To register a **.ca** domain name, an applicant must satisfy one of the 18 criteria in the Canadian Presence Requirements (CPR), which require some nexus with Canada. For example, the CPR may be satisfied if the applicant is a corporation incorporated in Canada or the domain name comprises a trade-mark registered in Canada by the applicant. The **.ca** registry has a domain name dispute resolution policy that is modelled on, but differs in some respects from, the Uniform Dispute Resolution Policy.

## 1.7 Criminal law

The federal *Criminal Code* provides sanctions against the forgery of trade-marks. Although the theft of tangible materials bearing confidential information is a criminal offence, the theft of information by itself is not a criminal offence.

## 2. Provincial Law

### 2.1 Trade-marks/passing off

Where someone makes a misrepresentation in the course of trade to prospective customers or ultimate consumers of goods or services that is calculated to injure the business or goodwill of another trader in the sense that it is a reasonably foreseeable consequence, and which causes, or is likely to cause, actual damage to a business or goodwill of the trader by whom the action is brought, such activity may be restrained by an action for passing off at common law. A similar cause of action is available pursuant to the *Civil Code of Québec*. To succeed in a passing off action, it is not necessary that the plaintiff conduct business in Canada, provided that the plaintiff has a reputation in its trade-mark in association with which the goods or services are offered.

### 2.2 Business names

Business names, being the names (other than a corporate name) by which a business is known, are regulated by provincial law. By way of example, Ontario's *Business Names Act* requires registration by every business operating in the province that uses a name other than its corporate name, or in the case of individuals, the owners' names. Business is defined very broadly to include "every trade, occupation, profession, service or venture carried on with a view to profit."

A person who has not registered a business name may not maintain a proceeding in an Ontario court in connection with that business except with leave of the court. The court may grant leave if the person in contravention of the *Business Names Act* satisfies the court that:

- The failure to register was inadvertent
- There is no evidence that the public has been deceived or misled
- At the time of the application, the person is no longer in contravention

## 2.3 Personality rights

The provinces of British Columbia, Manitoba, Newfoundland, Quebec and Saskatchewan have legislation dealing with personality rights. At common law, which applies in all Canadian jurisdictions other than Quebec, an individual generally has the right to restrain activities that suggest unauthorized endorsement, sanction or other involvement by him or her. Such involvement may be suggested through the misappropriation of a name, likeness or other recognizable indicia of the personality.

## 2.4 Confidential information and trade secrets

The possessor of confidential information, which is of commercial or other value, can generally require another party who obtains that information to maintain it in confidence. The existence of this legal right depends on whether there is a contractual or other relationship imposing an obligation of confidentiality.

The remedies for the unauthorized use or disclosure of confidential information include:

- Temporary and permanent injunctive relief
- An order prohibiting use or disclosure
- Either the damages suffered by the possessor or the profits earned by the violator
- Punitive damages

As well, other benefits gained from the unauthorized use of confidential information may in some circumstances be recoverable by the party from whom the information was obtained.

## 2.5 Licensing

All types of intellectual property may be licensed. The licensing of trade-mark rights must be handled carefully (see Section X, 1.2.4, “May a trade-mark be transferred?”). The law of licensing is governed by the law of the contract. No approvals are necessary, although recordal in the CIPO is advisable for some intellectual property rights. Licence agreements are subject to federal competition law and to other laws of general application.

# XI. Information Technology



Information technology law in Canada covers a wide range of legal rules and practices, many of which are discussed elsewhere in this Guide, related to activities and transactions involving software, hardware, databases, electronic communications, the Internet and other information technologies.

This section is a summary of some of the key legal issues under Canadian information technology law that one needs to consider when doing business in Canada.

## 1. Information Technology Contracting in Canada

### 1.1 What terms are generally negotiated?

In Canada, information technology contracts generally specify each party's obligations (such as delivery, performance, payment and confidentiality obligations) ownership and licence rights (including scope of use), acceptance tests and procedures, source code escrow (if applicable), representations, warranties, indemnities, limitations on liability and disclaimers. Disclaimers and limitation of liability clauses in information technology contracts can help minimize risks. However, it is important to note that there are some peculiarities in Canadian law that may render such clauses unenforceable and require careful drafting and review by Canadian counsel.

### 1.2 Assignments and licences

In Canada, assignments and licences of intellectual property rights should be in writing and should be registered with the Canadian Intellectual Property Office. Note that an author's moral rights, which exist under the *Copyright Act*, cannot be assigned but must be waived. See Section X, "Intellectual Property."

#### 1.2.1 Are software licences assignable and capable of being sublicensed?

A software licence may be viewed by Canadian courts as "personal" and thus not be assignable or capable of being sublicensed to third parties unless the licence contains the express permission by the licensor to do so. In addition, confidentiality restrictions and limitations on licence scope can also affect the transferability of a licence agreement. This is an important point to keep in mind when doing due diligence in any Canadian commercial acquisition.

#### 1.2.2 Are shrink-wrap, click-wrap and browse-wrap licences enforceable in Canada?

Off-the-shelf computer programs that are accompanied by "shrink-wrap" licences and online "click-wrap" and "browse-wrap" agreements have received mixed enforceability before Canadian courts due to the requirement in Canadian law that both parties must assent to a contract in order for it to be binding on them. Such agreements have been enforced where the purchaser was impressed with the knowledge of the terms at the time of sale. They have also been enforced with proof of established prior business conduct or by the subsequent conduct of the user.

## 1.3 Applicability of sale of goods legislation

### 1.3.1 Are information technology purchases sales of goods?

If a transaction for the acquisition of information technology falls within the scope of provincial sale of goods legislation, certain rights and obligations will follow. Canadian courts tend to treat computer system acquisitions as sales of goods while transactions involving pure service, maintenance, custom training or programming are generally characterized as incidental to the sale of goods and therefore not subject to sale of goods legislation. Pre-packaged software supplied pursuant to a licence agreement is not subject to sale of goods legislation as no property in the software is transferred to the licensee. An exception occurs where the software is provided in conjunction with a larger transaction involving the sale of goods (e.g., hardware).

## 1.4 Consumer protection

### 1.4.1 How do consumer protection laws affect Internet business and e-commerce?

Certain provinces have enacted consumer protection legislation that prescribes various requirements that must be met for Internet sales contracts, such as the disclosure of relevant information and the delivery of a copy of the contract to the consumer. The federal government has also released a code of conduct for businesses engaging in electronic commerce transactions with consumers. See Section IV, "Trade and Investment Regulation."

## 2. Intellectual Property Rights in Information Technology

### 2.1 Copyright

#### 2.1.1 What information technology is protected by copyright?

Copyright is currently a primary source of protection for software programs, user manuals, databases, websites and other information technology works in Canada, provided that they meet the requirements of the federal *Copyright Act*. To be the subject-matter of copyright, the work must be "original," meaning that it originated from the author and that skill and judgment were used in its creation. Further, for a work to garner copyright protection in Canada it must be fixed. The fixation requirement with respect to information technology is generally easily met.

Computer programs are protected under the *Copyright Act* as literary works. Canadian courts have recognized that the writing of a computer program uses sufficient skill and judgment and therefore computer programs will typically meet the minimal originality requirement to obtain protection under the *Copyright Act*. Updates or enhancements to software are subject to independent copyright protection. The fact that a computer program is created using well-known programming techniques or contains unoriginal elements may not be a bar to copyrightability if the program as a whole is original.

Computer hardware designs and plans have also received copyright protection in Canada. Further, any software code stored on the hardware may be subject to copyright. Computer

chips may be subject to integrated circuit topography protection. See Section XI, 2.2, “Integrated circuit topographies.”

In addition, courts in Canada have held that a web page’s look, layout and appearance are protected by copyright, as are underlying elements that would otherwise qualify for copyright protection, such as text or musical works.

### **2.1.2 Who owns the copyright in information technology?**

As discussed in Section X, “Intellectual Property,” the author of an information technology work is generally considered to be the first owner of the copyright in it. An exception to this rule is where the author is an employee and the work is created in the course of employment, (in the absence of an agreement to the contrary, the first owner of the copyright is the employer not the employee). A written assignment agreement is considered essential where works are created using non-employee third parties.

### **2.1.3 Can databases receive copyright protection? What criteria must be met?**

Under the *Copyright Act*, databases are given protection as “compilations.” The Supreme Court of Canada has ruled that, to receive copyright protection, databases must be independently created by the author, and the selection and arrangement of the components that make up the database must be the product of an author’s exercise of skill and judgment. The exercise of skill and judgment must not be so trivial so as to be characterized as a purely mechanical exercise. However, “creativity,” in the sense of novelty or uniqueness, is not required. In addition, the creator of the database only acquires copyright in the database and not in the individual components of the database.

### **2.1.4 What information technology is not protected by copyright?**

Canadian copyright law does not protect the underlying mathematical calculations, algorithms, formulae, ideas, processes, or methods contained in information technology, only the expression of the same.

## **2.2 Integrated circuit topographies**

Integrated circuit topographies (or computer chips) are protectable in Canada by the *Integrated Circuit Topography Act*. See Section X, “Intellectual Property.”

## **2.3 Trade secrets**

Information technology, including but not limited to a formula, pattern, compilation, program, method, technique, or process, may also be protected under trade secret law where duties of confidence exist either at law or by virtue of an agreement, which must be reasonable to be enforceable. See Section X, “Intellectual Property.”

## **2.4 Trade-marks**

Trade-marks can be used to protect the goodwill associated with the names, slogans, symbols, and other marks used by businesses in the information technology industry. Trade-

mark rights arise under the federal *Trade-marks Act* and at common law. Significant amendments have been introduced to the *Trade-marks Act* in 2014. A few minor amendments came into force in 2015; however, the most important amendments are expected to come into force in early 2019. These amendments include the elimination of the requirement that a mark be used in Canada or abroad before registration. See Section X, “Intellectual Property.”

#### **2.4.1 How are domain names protected?**

Domain names may garner trade-mark rights if they meet the statutory or common law requirements for trade-marks. Trade-mark owners may be able to obtain relief in Canada for cybersquatters under trade-mark law and the Canadian Internet Registration Authority’s alternative dispute resolution process (where the dispute is in respect of a .ca domain name). For generic domain names, the rules promulgated by the Internet Corporation for Assigned Names and Numbers will apply.

#### **2.4.2 What risks do metatags pose?**

Canadian courts have held that the use of metatags (i.e., tags or key words in a website’s coding that are used by search engines to sort web pages) that are confusingly similar to another person’s trade-marks may constitute trade-mark infringement.

As for the use of keyword advertisement, such as Google AdWords, the Québec Superior Court and the British Columbia Court of Appeal have found that bidding on a keyword is not in and of itself an infringement of the *Trade-marks Act*. Such practice is seen as generally legitimate and provides greater choice to consumers, as opposed to creating confusion. However, sponsored links on search pages resulting from keyword advertisements can infringe the *Trade-marks Act* if such links are confusingly similar to another person’s trademarks.

### **2.5 Patents**

In Canada, to obtain patents on information technology inventions one has to meet the statutory requirements of the federal *Patent Act*. See Section X, “Intellectual Property.”

#### **2.5.1 Is software and other information technology patentable in Canada?**

The Canadian Intellectual Property Office routinely issues patents for software-based inventions, particularly methods performed using computer-executable instructions that operate with some hardware elements or that focus on the systems, processes and methods used to achieve a solution to a specific technical problem, rather than on the algorithm per se. Furthermore, the Canadian Federal Court of Appeal ruled that an online method of doing business included patent-eligible subject matter. However, computer programs are not patentable in Canada if they only perform a series of mathematical calculations or if they relate to an abstract idea.

## 3. Criminal Law Issues Relating to Information Technology

### 3.1 Offences under the *Criminal Code*

In Canada, offences under the *Criminal Code* directly dealing with information technology include:

- Theft of computer data
- Defrauding the public of any property, money, or valuable security by deceit, falsehood or other fraudulent means using computers
- Use of a computer in an unauthorized manner or to possess an instrument for that purpose (i.e., hacking)
- Mischief in relation to computer data (i.e., distributing computer viruses)
- Trafficking in unauthorized passwords

There are several other criminal offences under the *Criminal Code* and the *Copyright Act*, which may indirectly involve information technology.

### 3.2 Lawful access

Lawful access generally refers to the interception of communications and the search and seizure of information carried out by law enforcement agencies pursuant to legal authority, including under the *Criminal Code*. Significant changes were introduced to lawful access legislation in 2015. Among other changes, certain *Criminal Code* provisions dealing with the interception of communications were amended by giving law enforcement new powers to collect electronic evidence in the context of an investigation.

In particular, these changes introduced a preservation demand and preservation order which enable law enforcement officials to demand or order third parties who possess or control computer data, including Internet service providers, to preserve computer data for 21 to 90 days. In addition, new production orders for historical transmission data and tracking data were introduced, as well as requirements for real-time transmission data and tracking data, which allow law enforcement officials to retrace an individual's web patterns and to remotely activate existing tracking devices (e.g., in vehicular GPS). It is important to note that in certain cases, the demands, orders or warrants created by these changes are subject to a threshold of "reasonable grounds to suspect" rather than the higher threshold of "reasonable grounds to believe."

## 4. Cryptography Controls

### 4.1 Are there restrictions on using encryption in Canada?

Other than export controls, and subject to any applicable intellectual property, confidentiality and criminal law issues, businesses and consumers in Canada are free to develop, import and use whatever encryption technology they wish.

## 5. Privacy and Data Protection

As discussed in Section IX, “Privacy Law,” the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) and the provincial private-sector privacy legislation in some provinces impose conditions on the collection, use and disclosure of personal information by organizations in the course of commercial activity.

These laws contain requirements for the protection of personal information within the control of an organization, including security measures to prevent unauthorized access, collection, use, disclosure, modification, destruction, and other similar acts. There may also be requirements in the event of a data breach. Businesses that collect, use or disclose personal information must comply with PIPEDA and/or the applicable provincial private-sector legislation.

The federal government also enacted the *Digital Privacy Act* in June 2015, which sets forth obligations on private-sector companies aimed at ensuring that consumers’ personal information remains protected online. All provisions of the *Digital Privacy Act* are now in force, except for the provisions that set forth data breach reporting requirements. The data breach provisions are expected to come into effect in 2018, once the federal government passes regulations detailing the reporting requirements. For more information about these requirements, see Section IX, “Privacy Law.”

## 6. Electronic Evidence

### 6.1 Is electronic evidence admissible in court?

In Canada, electronic evidence is admissible in the courts provided that it meets the rules found in the common law and applicable statutes such as the federal and provincial Evidence Acts and the *Rules of Civil Procedure*. These rules include: (i) authentication by the party tendering the evidence; (ii) integrity of the system used and the method of record keeping, information storage, and retrieval; (iii) originality; and (iv) reliability.

Canadian courts have admitted electronic evidence where it accurately and fairly represented the information it purported to convey. Finally, Canadian courts have permitted the use of the Internet in court and have admitted the contents of websites.

## 7. Electronic Contracting

### 7.1 Are electronic signatures and documents valid in Canada?

In Canada, at both the federal and provincial/territorial levels, a series of e-commerce legislation has given statutory recognition to the legal effect of most types of electronic signatures and documents (with some exceptions such as wills, negotiable instruments and land transfers) that meet the requirements set out in the applicable statutes and regulations.



## 8. French Language Issues

### 8.1 Must websites and information technology contracts be translated into French?

The province of Quebec has language laws that may impact electronic contracting and websites, by requiring French translations if the parties or transactions involved have a Quebec connection, such as an office or employees located in Quebec. If certain criteria are met, the parties to a contract may expressly agree to have it written in the English language.

### 8.2 Must software be translated into French?

Under Quebec's language laws, all computer software sold in Quebec must be available in both English and French, unless no French version exists. In addition, the software must meet the French language packaging and labelling requirements.

## 9. Jurisdiction and the Internet

### 9.1 Where are electronic contracts formed?

In Canada, the issue of where electronic contracts are considered to be formed has not yet conclusively been determined and the answer may be different from one province to another. Unlike faxes, which Canadian courts have held to be "instantaneous" in some circumstances and thus formed when and where the offeror receives notice of the acceptance, it is not clear whether electronic communication such as emails or contracts formed on a website are instantaneous. The Canadian e-commerce legislation (see Section XI, 7.1, "Are electronic signatures and documents valid in Canada?") provides some guidance as to when and where electronic documents are presumed to be received. However, the mere posting of information on a website may not be sufficient to deliver that information to another person. In addition, the exchange of emails discussing a contract or a contractual relationship may not be sufficient to form a contract.

### 9.2 Can foreign websites and Internet transmissions be subject to Canadian laws?

A court can exercise jurisdiction in Canada if there is a "real and substantial connection" between the subject matter of the litigation and the jurisdiction. Generally speaking, the courts have found that the more active a website or its owner's activity is in Canada, or if the website or business activity targets persons in Canada, it will be subject to Canada's laws. The fact that the physical location of a website or its server is outside Canada will not immunize the website owner from legal consequences in Canada.

Recently, the Supreme Court of Canada upheld an injunction granted on a worldwide basis against a leading search provider, demonstrating that Canadian courts can extend their reach and subject global websites to Canadian laws.

The Supreme Court of Canada has also applied the "real and substantial connection" test in determining jurisdiction in online copyright matters. The application of the *Copyright Act* depends on whether there is a real and substantial connection between the Internet

transmission and Canada. This test turns on the facts of each case and relevant connecting factors include the situs of the content provider, host server, intermediaries and end user.

### **9.3 Can parties to an online contract choose the governing law and forum?**

In Canada, the parties to an online contract have, subject to certain exceptions (for example consumer protection), the right to choose the governing law of the contract, the exclusive court in which disputes are to be heard, and to exclude the application of conflict of laws principles. However, the Canadian courts have found that such clauses cannot be used to oust the jurisdiction of a substantially connected province. The Supreme Court of Canada has also recently stated that, irrespective of the validity of a governing law clause, courts may find such a clause unenforceable for policy reasons; for example, if there is a strong public interest in having a decision heard in Canada or if there is extreme inequality in the bargaining position of parties to a contract.

## **10. Internet Regulation**

### **10.1 Are Internet activities regulated in Canada?**

The Canadian Radio-television and Telecommunications Commission, the body responsible for regulating broadcasting and telecommunications in Canada, has determined that, generally speaking, it will not regulate content transmitted over the Internet in Canada (with the exception of certain commercial electronic messages discussed below). However, if an Internet business qualifies as a “telecommunications common carrier,” i.e., by offering voice or data telecommunications services, under the *Telecommunications Act*, it may be subject to telecommunications regulation, which would impact its operations, ownership, facilities, rates and services.

With respect to Internet-based broadcasting, there exists an exemption from the application of the *Broadcasting Act*. However, the federal government has announced an upcoming review of the *Telecommunications Act* and the *Broadcasting Act* with a view to modernizing the regulatory framework applicable to communications companies and potentially imposing restrictions and regulations on Internet-based broadcasters. Consultations on these topics are expected to span several years.

Note that there are currently no compulsory copyright licences available for retransmission of over-the-air broadcasts over the Internet. As a result, re-transmitters have to negotiate copyright licences with all rights holders to broadcast works.

Further, there are certain obligations that must be met under consumer protection laws, when doing business with consumers on the Internet. See Section XI, 1.4, “Consumer protection” and Section XI, 9.3, “Can parties to an online contract choose the governing law and forum?”.

Also, many regulatory, licensing, registration and permit requirements are imposed in Canada by stock exchanges, securities commissions, the Office of the Superintendent of Financial Institutions, public health and safety boards, transportation safety commissions, competition boards, industry associations and a variety of other agencies and bodies that regulate different businesses and activities in Canada.

## 10.2 What rules apply to online advertising?

The same basic rules that govern traditional advertising and marketing practices, including the *Competition Act* and the *Criminal Code* apply to all forms of Internet advertising and marketing, such as deceptive prize notices, representations on websites and bulletin boards, or in emails, newsgroups and chat rooms. The Competition Bureau has prepared guidelines that address some of the ways in which these traditional rules are applied in the online context, including the use of disclaimers and hyperlinks, and the information that should be provided online when advertising products, services and businesses.

Canada's Anti-Spam Legislation (CASL) introduces new civil and criminal provisions in the *Competition Act*, which regulate false and misleading representations and deceptive marketing practices in the electronic marketplace. For more details on CASL, see Section XI, 10.3, "Is spam illegal in Canada?" and for more information on advertising regulations, see Section IV, "Trade and Investment Regulation."

## 10.3 Is spam illegal in Canada?

Designed as one of the most stringent anti-spam regimes in the world, CASL has a significant impact on the electronic communication practices of companies in Canada and foreign companies sending commercial electronic messages (CEMs) to recipients in Canada. Many of the provisions of CASL, including those dealing with CEMs, came into force on July 1, 2014, while the provisions dealing with the unsolicited installation of computer software came into force on January 15, 2015. CASL also restricts other activities, including the ability of businesses to alter transmission data in electronic messages.

Subject to certain exceptions set out in the law and its accompanying regulations, CASL prohibits the sending of CEMs to an electronic address unless: (1) the person to whom the message is sent has consented to receiving it; and (2) the message complies with prescribed form and content requirements. Among other requirements, express consent under CASL must be "opt-in," meaning that an explicit and positive consent from an intended recipient of a CEM must be obtained before sending a message. This differs from the common industry practices of using an opt-out or negative option method of obtaining consent for marketing, such as a pre-checked consent box that a consumer has to un-check to signify they do not wish to receive marketing messages.

With respect to the unsolicited installation of computer programs, subject to limited exceptions, CASL prohibits installing, or causing to be installed, a computer program (which may include software updates and upgrades) on another person's computer system including a laptop, smartphone, tablet, gaming console or other connected device in the course of commercial activity, without the express consent of the device owner or an authorized user. As with consent for sending CEMs, consent to the installation of computer programs must be "opt-in" and must be obtained in the prescribed manner. Disclosure requirements will also apply.

The potential penalties for non-compliance under CASL are significant and include administrative monetary penalties of up to C\$1-million for individuals and C\$10-million for corporations.

CASL also creates a private right of action for persons who have been affected by a contravention of any number of CASL's provisions, including the anti-spam provisions. The

provisions of the statute providing for a private right of action were originally scheduled to come into effect on July 1, 2017, but their enactment has now been suspended indefinitely. This suspension is welcome news for industry, which has been very concerned about lawsuits, including class actions, being instituted while industry struggles to understand and comply with the requirements of this legislation.

It should be noted that the *Competition Act* provisions dealing with the advertising of certain products, such as tobacco, or misleading advertising as well as the *Criminal Code* provisions dealing with fraud, authorized access and use of computers and mischief against data, could also apply against spammers. Various industry groups have established member codes and guidelines dealing with the distribution of promotional materials and enforcement.

*PIPEDA* and similar private-sector privacy legislation in some provinces (see Section IX, “Privacy Law”) may also affect spammers by imposing obligations on how personal information, which may include email addresses, is collected, used and disclosed in the course of commercial activity.

## **11. Liability of Internet Service Providers (ISPs)**

### **11.1 What risks of liability do ISPs face?**

ISPs, and possibly their directors and officers, may be liable under contract, tort or statute, for various claims arising from the provision of their services.

### **11.2 Does Canada have any laws that protect ISPs from liability?**

Canada has not passed legislation providing blanket immunity to ISPs from liability, however, courts have generally not held them liable for the infringing activities of their users. In the area of copyright, the Supreme Court of Canada has concluded that ISPs, and other intermediaries, will not face liability for copyright infringement if they restrict their activities to providing a conduit for information and do not engage in acts that relate to content. The Supreme Court has also found that caching (the temporary storage of material by the ISP) is also a protected activity.

Canada’s *Copyright Modernization Act* codified the Supreme Court’s approach in 2012 by limiting the liability incurred for “providing services related to the operation of the Internet or another digital network.” This limitation covers the activities of ISPs as well as those of persons who provide caching and hosting services. The *Copyright Modernization Act* also implements a “notice-and-notice” regime, under which ISPs are required to send notices of potential infringement received from copyright holders to their potentially infringing subscribers.

The province of Quebec’s *Act to Establish a Legal Framework for Information Technology* also establishes a regime for liability and some protection in certain circumstances for ISPs acting as intermediaries on communication networks.

# XII. Real Estate



## 1. Federal Law

The laws relating to the acquisition of real property in any particular province of Canada are, as a rule, those of the province itself. The federal government imposes relatively few regulations or restrictions in the field.

The notable exceptions to that general principle include the review and regulation of foreign investment in Canada, the regulation of bankruptcy and insolvency, the regulation of the activities of certain major lending institutions in Canada, the levying and collection of income taxes (in particular, taxes on capital gains realized by non-resident vendors) and sales taxes (in particular, the Goods and Services Tax or, in the province of Ontario, the Harmonized Sales Tax in connection with the sale and leasing of real property), the application of federal environmental standards, and the application of federal laws and regulations in the transportation sector such as with railway and airport lands.

## 2. Provincial Law

### 2.1 Laws of general application

Generally speaking, Ontario imposes no restrictions or prohibitions upon foreign investors in land, whether natural or corporate, although certain taxing, reporting and registration provisions may apply. For example, in Ontario, the *Extra-Provincial Corporations Act* requires corporations incorporated outside Canada to obtain licences to carry on business in Ontario, which, for the purposes of that Act, includes holding an interest, other than by way of security, in real property situate in Ontario. Quebec has a similar registration requirement, which exists under the *Act respecting the legal publicity of enterprises*. Also, non-residents shall not, directly or indirectly, make an acquisition of farm land except with the authorization of the Commission de protection du territoire agricole du Québec, under the *Act Respecting the Acquisition of Farm Land by Non-residents*.

The *Business Corporations Act* (British Columbia) requires that any company carrying on business in British Columbia be registered under the Act, either as a B.C. company or an extra-provincial company. Under the old *Company Act*, an extra-provincial company that was not registered was not capable of acquiring or holding an interest in land in British Columbia.

As that restriction is not contained in the current *Business Corporations Act*, the land title office requires a foreign entity to provide proof of incorporation and proof of current existence in the form of a certificate of status or affidavit from the appropriate government authority. A statutory declaration stating the entity is exempt from the extra-provincial registration requirements is no longer required. Accordingly, a company that wishes to buy or lease land, or hold a mortgage on land in British Columbia must satisfy these requirements. As well, British Columbia now requires certification of certain citizenship and residency information of individual purchasers and directors of corporate purchasers for statistical purposes.

In June 2018, British Columbia issued a discussion paper with respect to proposed new legislation, the *Land Owner Transparency Act*. This proposed legislation will require extensive disclosure as to the identity of all entities in the ownership chain of real property

including shareholders, partners, trustees, beneficial owners and other entities that have not historically been publicly disclosed.

Conversely, Alberta does restrict or prohibit certain foreign investments in Alberta land. Pursuant to the *Agricultural and Recreational Land Ownership Act* (Alberta), and the related *Foreign Ownership of Land Regulations*, no ineligible person or foreign controlled corporation may take or acquire an interest in certain controlled land, subject to various exceptions relating to certain commercial, industrial, transportation and other uses specifically enumerated in the applicable legislation. Generally, controlled land includes all privately owned land outside urban boundaries (usually farmland or rural recreational land). In addition, any corporation that acquires or attempts to register an interest in Alberta land must be registered in Alberta (either as an Alberta corporation or as an extra-provincially registered corporation).

## **2.2 How is real estate held and registered?**

Investors in Ontario real estate may acquire several types of interests in land, including full ownership (a “freehold” interest), an interest for a specified period (a “leasehold” interest) or a partial interest in a freehold or leasehold interest as co-owners under a joint venture. Special legislation permits condominium ownership, under which owners have title to their individual units and a right to use the “common elements” of the condominium project (e.g., a swimming pool, landscaping, etc.). Although condominiums are most usually residential units, their use for commercial or industrial purposes is becoming increasingly more common.

Two systems of land recording co-exist in Ontario: a registry system in which the individual is responsible for the determination of the quality of title based primarily on priority in time of registration, and a land titles system based upon the Torrens System of recording where the quality of the title is determined by the recording authority with indemnities supporting that determination. Most properties in the registry system have been converted to the land titles system to facilitate the introduction of electronic production and registration of documents. Generally speaking, Ontario has a fully automated electronic searching and registration system. Both Alberta and British Columbia have a Torrens-based land titles system exclusively.

Investors in Quebec real estate should refer to Blakes *Doing Business in Quebec* guide for a discussion of the civil law system surrounding ownership and registration of such property, known as “immovables” in Quebec.

## **2.3 The agreement of purchase and sale**

### **2.3.1 Is a written contract required? How much is paid up-front for the deposit and agent commissions?**

As oral agreements for the purchase and sale of land are generally unenforceable, most acquisitions of real property begin with an agreement of purchase and sale. Such an agreement is often initiated by the purchaser signing an offer to purchase which, when accepted by the vendor, becomes the agreement of purchase and sale. Although certain legal rights and obligations arise from that agreement, the actual transfer of title (ownership) usually takes place at a later time upon the completion or “closing” of the transaction.

It is usual for the purchaser to provide a deposit as “earnest money” which is held in trust by the agent for the vendor or by one of the law firms involved in the transaction pending closing. Generally speaking, the size of the deposit ranges from one to five per cent of the purchase price.

Most real estate transactions in Canada involve the services of an agent, generally licensed under provincial legislation. The agent should have expertise as to the market, the availability of properties for sale and prospective purchasers and the terms of sale that may be acceptable to the parties. Agents are usually paid a commission of five per cent or six per cent (but sometimes a lower percentage) of the purchase price on smaller properties and 10 per cent on recreational properties.

Those percentages are usually reduced on larger properties and commercial properties. The agent is usually hired, and paid, by the vendor (or the landlord in leasing transactions) with the duty to obtain for the vendor (or landlord) the highest price available. The purchaser who wishes the assistance of an agent should retain one by specific contract expressly defining the agent’s duties to the purchaser.

### **2.3.2 What services does a lawyer provide?**

Before signing an offer to purchase, a purchaser should obtain legal advice from a lawyer practising in the province in question, to ensure the offer contains appropriate representations, conditions and other provisions. The purchaser’s lawyer will conduct various searches and enquiries to verify that the vendor has good title to the property and that there is no prior lien or other claim by others affecting title. In the acquisition of commercial properties (such as office buildings), the purchaser’s counsel may conduct other due diligence investigations (for example, reviewing the terms of leases in the building). The offer should specify the purchaser’s right to search the title and conduct various inspections and investigations prior to completing the sale. In Canada, title insurance companies are not generally involved in the title due diligence process, and this is the responsibility of the purchaser’s lawyer.

### **2.3.3 What are the usual conditions for the purchaser’s benefit?**

It is usual in commercial transactions for the purchase agreement to contain a “due diligence” condition allowing the purchaser to inspect the property (with or without professional assistance) and permitting termination if the purchaser is not satisfied with the state of the property or the rental income. In exchange, however, the vendor will generally resist giving warranties and representations as to quality of construction, state of repair, or suitability to the purchaser’s needs, as such may be matters not within the vendor’s knowledge and are matters in respect of which the purchaser will be advised to satisfy itself through its due diligence.

From a real estate investor’s point of view, other conditions will likely be included in the agreement of purchase and sale relating to the state of the title and, in the case of income properties, the amount of any income (e.g., rental income or royalties) being derived from the property. Of central importance are representations and conditions relating to the environmental history and standing of the property.

Other typical conditions might relate to satisfaction with zoning, the terms of any existing leases, the terms of any mortgage to be assumed by the purchaser or the availability of suitable financing for the transaction. Unless otherwise dealt with in the agreement, the concept of “*caveat emptor*” — let the buyer beware — generally governs.

Many purchasers require the vendor to produce a current survey or real property report prepared by a land surveyor showing the footprint of any buildings situated on the property. Such a survey would confirm the identity of the land, whether the land is subject to or benefited by easements, that the buildings and other improvements do not encroach onto neighbouring land and that the buildings are “set back” the appropriate distances from the boundaries of the property in accordance with zoning requirements. It will also show whether the buildings, fences or other improvements belonging to neighbouring owners encroach on the property to be purchased. If the vendor does not have a recent survey to deliver to the purchaser, or is not required to have one prepared for the purchaser’s benefit, the purchaser will usually be well advised to arrange for an up-to-date survey as part of its due diligence investigations.

#### **2.3.4 The closing and beyond — what remedies are available upon a breach of the agreement?**

The closing of a transaction of purchase of real property located in Ontario or Alberta generally involves lawyers for the purchaser and vendor exchanging documents and closing funds which are released upon successful registration of title documentation, such as the transfer/deed and any security being granted. Notaries may also be used in Quebec and British Columbia. In Ontario and British Columbia, the purchaser normally pays the transfer tax (called the land transfer tax in Ontario, the municipal land transfer tax in the City of Toronto (which is payable in addition to the Ontario land transfer tax in respect of properties situate within the boundaries of the City of Toronto) and the property transfer tax in British Columbia) and any provincial or federal sales tax payable on the purchase. In Alberta, there is no land or property transfer tax or provincial tax payable pursuant to a real estate transaction.

Where the vendor breaches his or her obligations in the agreement of purchase and sale, the purchaser may proceed with the transaction and apply to the court for an order for “specific performance,” compelling the vendor to complete the transaction. Alternatively, the purchaser may terminate the contract, have the deposit returned to him or her and sue the vendor for any damages resulting from the vendor’s breach of contract.

If the purchaser does not perform his obligations under the contract, the vendor may either affirm the contract or seek specific performance and ancillary damages, or terminate the contract and retain the purchaser’s deposit. The vendor’s rights and remedies in the event of purchaser default may also be limited by the terms of the agreement of purchase and sale.

### **2.4 Restrictions on use or sale — what types of consent are needed?**

As with many areas of the world, all provinces regulate the development, use and disposition of real property. For example, the *Planning Act* (Ontario) prohibits, with certain exceptions, the disposition of less than the whole of a parcel of land held by any owner. Therefore, an owner is not entitled to sell or mortgage, or lease for a term of more than 21 years, parts of his or her holdings while retaining abutting property, without first obtaining consent from a local planning committee. A transfer or mortgage that violates this legislation, even inadvertently, will be void.

Although there is no equivalent legislation in British Columbia to the provisions of the *Planning Act* (Ontario) referred to above, the *Land Title Act* (British Columbia) does impose certain restrictions on the leasing of less than an entire legal lot (the lease of less than an



entire building is permitted), unless the subdivision requirements of the *Land Title Act* are complied with. As a result, in certain circumstances, a leasehold subdivision plan is required to be approved by the appropriate authority.

In Alberta, the *Municipal Government Act* prohibits the registration of an instrument that may have the effect of subdividing a parcel of land unless the subdivision has been approved by the appropriate authority. For example, certain long-term leases may constitute a subdivision and therefore may require approval by the subdivision authority prior to being able to be registered on title to the leased lands pursuant to this provision.

Ontario also has in place family law legislation that gives spouses an equal right to possession of the couple's matrimonial home, even though it may be owned by only one of them. Thus the spouse of the owner of the matrimonial home is a necessary party to the transaction, for the purpose of consenting to any sale or mortgage of the property, and must execute both the agreement and the transfer or mortgage in question.

Family law legislation in British Columbia also provides certain protections to a spouse who may have an unregistered interest in land. Accordingly, care must be taken if there is any indication of marital problems between a seller of real estate and his or her spouse.

In Alberta, the *Dower Act* prohibits a married person from disposing of a homestead without consent of the non-title spouse. A disposition includes, among others, a transfer, a mortgage and a lease over three years.

## **2.5 Provincial and municipal transfer taxes, provincial sales taxes and other taxes**

In Ontario, a land transfer tax is payable in most cases upon the transfer of ownership of real property interests. This land transfer tax is imposed at graduated rates but for most commercial transactions is slightly less than 1.5 per cent of the total consideration for the transfer. For real property situate within the boundaries of the City of Toronto, in addition to the Ontario land transfer tax, a municipal land transfer tax is also payable in most cases upon the transfer of ownership of real property interests. The municipal land transfer tax is also imposed at graduated rates but for most commercial transactions is slightly less than 1.5 per cent of the total consideration for the transfer. The purchase of real estate is often accompanied by the purchase of certain goods, such as furniture, appliances or equipment. In Ontario, harmonized sales tax is payable by a purchaser at the rate of 13 per cent of the value of all tangible personal property purchased. Quebec also levies a graduated land transfer tax and a sales tax. As previously mentioned, these taxes do not apply in Alberta, though there are land registration charges (the fees are C\$50 per transfer, plus C\$1 per C\$5,000 of value) and federal goods and services tax payable on certain real property interests at a rate of five per cent.

In addition, the Government of Ontario imposes a 15 per cent "non-resident speculation tax" (NRST) payable on the value of the consideration for a transfer (including a beneficial transfer) of residential property located in the Greater Golden Horseshoe, an area comprising the City of Toronto and certain regions and counties surrounding or geographically near to the City of Toronto. The NRST is imposed on foreign nationals, foreign corporations and certain taxable trustees, and applies to a transfer of land that contains at least one and not more than six family residences. The NRST does not apply to purchases of multi-residential

rental apartment buildings with more than six units or to agricultural land, commercial land or industrial land.

A property transfer tax is payable in British Columbia upon the registration of a transfer of land. The transfer tax is calculated at one per cent of the first C\$200,000 of fair market value, two per cent on the value between C\$200,000 and C\$2-million, three per cent on the value between C\$2-million and C\$3-million and, two per cent on the value over C\$3-million. As well, there is a federal goods and services tax payable on some real property interests at a rate of five per cent and, in addition, a provincial sales tax payable on most tangible personal property at a rate of seven per cent.

An additional 20 per cent property transfer tax is also payable in B.C. by “foreign buyers” of properties located in certain prescribed geographical areas of British Columbia, that are assessed as residential properties. As the residential assessment of a property is one of the triggers of the tax, this can result in some transactions being subject to the tax, that may typically be considered as a “commercial transaction”.

The City of Vancouver imposes an Empty Homes Tax (Vacancy Tax) of one per cent of the property’s assessed taxable value.

Whether the foreign buyers tax and the Vacancy Tax are payable, who may be liable to pay them, in what circumstances, and what exemptions may apply depends on the specific facts relating to the purchaser and the property.

## 2.6 How are leasehold interests regulated?

Long-term ground leasehold interests are more common in the United Kingdom and Europe than in North America. Nevertheless, increasingly, parcels of land in Ontario are held pursuant to long-term ground and building leases as an alternative to freehold ownership in arrangements often structured for tax purposes or to permit differing degrees of participation and liability.

In Ontario, with few exceptions, any lease in excess of 21 years is treated as a conveyance for the purposes of the *Planning Act* and any lease with a term (including renewals) in excess of 50 years will attract land transfer tax and municipal land transfer tax (for leases of land in the City of Toronto) calculated on the market value of the land. Quebec also has analogous provisions, under the *Act Respecting Duties on Transfers of Immovables*, where a lease and an emphyteusis with a term in excess of 40 years is deemed to be a transfer for the purpose of the Act. The registration of a lease in British Columbia with a term (including renewals) in excess of 30 years will attract property transfer tax calculated on a formula set out in the *Property Transfer Tax Act*.

## 2.7 How are landlords regulated?

If a purchaser is interested in acquiring a property that is occupied by residential tenants, a number of additional considerations become relevant. In Ontario, in addition to reviewing the terms of the leases, the purchaser should be aware that the *Residential Tenancies Act* and certain other legislation dealing specifically with residential tenancies, limit the rights of a landlord to evict existing tenants of residential premises, limit the landlord’s ability to increase rents beyond specified statutory limits, and permit rent reductions in certain cases where substandard levels of landlord maintenance persist. Quebec also has generous residential

tenant protection legislation (which includes rent control), as does Alberta. In British Columbia, the *Residential Tenancies Act* accords certain protections to residential tenants.

## **2.8 Joint ventures**

Real estate investors in Canada often enter into joint venture arrangements with other investors. There are many ways in which a joint venture may be organized, including joint venture corporations, partnerships, co-ownerships and sale and leaseback arrangements. Often the selection of the appropriate structure will depend on the tax or other legal ramifications of the proposed joint venture.

# XIII. Infrastructure



## 1. Overview

The infrastructure market continues to be robust in Canada. In Canada, there are three levels of government: federal; provincial/territorial; and municipal. Each level of government utilizes various affiliated entities for public service delivery in addition to the direct delivery of such services.

The federal government, most of the provinces and many urban municipalities have committed substantial resources to upgrading Canada's infrastructure through both traditional procurement and alternative finance or public-private partnerships (P3).

P3s in the broadest sense have been utilized by the three levels of government and some entities for a wide range of large and medium-sized projects. Large-scale capital projects involving long-term, privately financed concessions have been procured in a number of provinces. There is also a critical mass of P3 transactions in many municipalities, particularly where federal government support is available. Large-scale capital projects are the focus of this review.

Many provincial governments in Canada have established dedicated agencies to execute large-scale capital projects. The most active provincial agencies are Infrastructure Ontario, Partnerships British Columbia and the Société Québécoise des Infrastructures (SQI). SaskBuilds is the newest agency, launched in 2012 by the Government of Saskatchewan; it commenced its program for procurement of major projects in 2014–15. Partnerships New Brunswick was established in 2011 to provide advice, support and consulting services regarding the assessment, procurement and implementation of projects as P3s.

P3 procurement methodology has been adopted in Canada for roads, bridges, rail (including rapid transit), hospitals, courthouses, schools, hydroelectric power generation facilities and water/wastewater projects for long-term concessions. A wide range of accommodation and other public facilities have also been built, based upon design-build (DB), design-build-operation (DBO), design-build finance (DBF) and related transaction structures.

The federal government established the Canada Infrastructure Bank (CIB) in June 2017. The CIB will strategically invest at least C\$35-billion over the next decade and will operate under the mandate to “invest, and seek to attract investment from private sector investors and institutional investors, in infrastructure projects in Canada or partly in Canada that will generate revenue and that will be in the public interest.” The CIB will have broad powers, allowing it to pursue potentially innovative funding solutions for Canadian infrastructure projects. The CIB has stated that it expects private-sector investors will assume additional risks relating to infrastructure usage or revenue on projects supported by the CIB, in addition to their traditional role in P3 projects.

As well, in December 2017, the Ontario Legislature passed the *Construction Lien Amendment Act, 2017* with the goal of modernizing and updating the *Construction Lien Act* (Act). In addition to various other amendments, on July 1, 2018, the amended Act was renamed the *Construction Act*, and on October 1, 2019, provisions pertaining to the creation of a mandatory prompt payment regime and the implementation of a mandatory fast-track dispute resolution process will take effect.

At the federal level, Bill S-244, as passed by the Senate on May 4, 2017, is aiming to implement a prompt payment regime for federal construction projects. The government is currently considering the results of an industry consultation before adopting this legislative reform.

With several exceptions, P3 transactions have proceeded in Canada without specific enabling legislation, although both municipalities and provincial agencies have policy frameworks that direct the appropriation and governance of these projects.

Typical sources of private debt finance include international banks, Canadian pension funds, Canadian banks, Canadian insurance companies and bonds issued on the Canadian public markets. Typical sources of private equity finance include private equity/infrastructure funds, international contractors, Canadian pension funds, domestic non-bank finance companies, investment funds, subcontractors and other stakeholders in the particular P3 transaction.

The principal risks typically allocated to the private sector include design, construction, operation (where the operation is within the control of the concession company) and financing (where private financing is part of the contract). Milestone payments for project delivery followed by monthly payments for service delivery and deductions for failure to maintain specified service standards are key risk components of the contract.

The principal risks typically retained by the public sector depend in part upon the industry and the jurisdiction. The public sector typically retains risks related to discriminatory or industry-specific changes in law, costs of insurance, uninsurable events and risk related to pre-existing but undiscoverable environmental conditions. *Force majeure* event risk is typically shared between private-sector and public-sector parties.

The manner in which private participants manage P3 risk varies with how the contract is negotiated with the private sector, how the concessionaire entity organizes itself and allocates risks among its equity participants, its construction company and its service providers, and the availability of insurance. In general, the concessionaire entity will seek to manage its risk in three ways: (i) by insurance; (ii) by comprehensive due diligence investigations and inquiries; and (iii) by allocating risks to the subcontractors best able to manage such risks via subcontract agreements. Such agreements usually feature parent company guarantees and the provision of other performance security to the concessionaire entity which then forms part of the debt security package for the private financing.

## **2. Current State of Canadian P3 Market**

The P3 market in Canada is maturing as a number of the early P3 projects have now been successfully completed and are in operation, many projects having been sold to long-term investors in the secondary market. In addition, as projects mature, many are being refinanced for the first time and gainshare mechanics between public authorities and the private sector related to increased efficiencies in financing solutions are being tested.

With the renewed support of the lending community, the Canadian P3 market has continued to show increased levels of activity throughout Canada, particularly at the municipal level.

Initial Canadian P3 deals were financed through long-term bank borrowing, which became scarce to non-existent in late 2008. As the most recent financial crisis continued through 2009, the various Canadian P3 agencies introduced some form of milestone payments during

or at the end of the construction period to reduce the level of long-term debt financing required. Although the financial markets have been more stable in recent years, we continue to see milestone payments utilized in most Canadian P3 transactions. Lender exposure to market fluctuations has also been reduced by shortening the period between preferred proponent notification and financial close, and by the use of credit-spread reset mechanisms. In addition, recent transactions have seen the return of Asian and European lenders to the Canadian P3 market.

In terms of market development and growth, transit is the area of strategic focus for the federal government, as well as several provincial agencies and municipalities. One of the key 2016 announcements was the creation of the federal government's new Public Transit Infrastructure Fund, "to help provinces, territories and municipalities maintain safe, efficient, reliable and accessible transportation networks." Starting in 2016-17, the federal government promised to invest C\$3.4-billion over three years allocated to municipalities based on their share of ridership, which will be available to fund up to 50 per cent of eligible costs for projects across the country. Through Budget 2017, the government promised to invest C\$25.3-billion over 10 years through bilateral agreements with provinces and territories. As well, the CIB will invest at least C\$5-billion in public transit systems.

It is interesting to note, however, that the funds available through the Public Transit Infrastructure Fund are dwarfed by the publicly stated spending requirements of Canada's major population centres. Accordingly, other sources will be required to fund Canada's transit infrastructure needs, most notably from the provinces. The Ontario Progressive Conservative government, for example, has promised to dedicate C\$5-billion to new subway-related funding. In British Columbia, the Mayors' Council, which includes representatives from each of the municipalities across the Metro Vancouver transit and transportation system, has proposed a 30-year, C\$7.5-billion regional transportation vision for investment in roads, rail, bus, SeaBus, cycling and walking infrastructure.

In addition, there has been a diversification of asset classes to include data centres, power generation facilities, high-speed telecommunications lines and others, which provide more opportunities for new domestic and international entrants with depth of specialized experience.

## 3. Cross-Canada Review of Market Trends

### 3.1 Federal

- The 2016 and 2017 federal budgets laid out the government's intention to invest more than C\$180-billion in infrastructure over 12 years by way of the *Investing in Canada* plan. The 2018 federal budget reaffirms the government's commitment to this plan.
- A variety of procurement processes are currently underway, including the Canada Border Services Agency Land Border Crossing Project, the Energy Services Acquisition Program (ESAP) and the Library and Archives Canada Gatineau 2 Project.
- The Gordie Howe International Bridge Project has been awarded to a preferred proponent.

## 3.2 British Columbia

- Partnerships BC has been expanding its advisory services to other provinces and territories as well as to municipalities. It has also been instrumental in the creation of the West Coast Infrastructure Exchange, a body set up to share P3 knowledge between British Columbia and the states of Oregon, Washington and California.
- The 2018 B.C. provincial budget forecasts that capital spending on schools, hospitals, roads, bridges, hydro-electric projects and other infrastructure across the province will total C\$26.2-billion over the three-year fiscal period plan. Taxpayer-supported infrastructure spending is forecasted to be C\$15.8-billion over the fiscal plan period, the highest level ever.
- Following B.C.'s recent election, the NDP will form the next provincial government, having entered into a "confidence and supply" agreement with the BC Green Party. It is anticipated that the new government's approach to the development of provincial infrastructure projects, including those included within the 2017 budget, will become clearer in Q4.
- Key transport infrastructure projects discussed in the 2018 budget include the Pattullo Bridge Replacement project and the Highway 1 Kicking Horse Canyon project. The budget also introduced the Royal Inland Hospital Patient Care Tower project and the Vancouver General Hospital Operating Room Renewal.

## 3.3 Alberta

- The 2018 Alberta provincial budget includes C\$26.6-billion in capital spending on infrastructure over the next five years. Of this, C\$6.9-billion will be dedicated to municipal infrastructure support, C\$5.6-billion to roads and bridges, and C\$2.2-billion to the construction of schools.
- In the spring of 2015, the City of Calgary closed its first P3 project for the design, construction and operation of a composting facility. The indoor composting facility will be the largest of its kind in Canada.
- In 2016, the Province of Alberta closed the Southwest Ring Road Project, which was procured using a design-build-finance-operate (DBFO) process.
- The City of Calgary has approved Stage 1 of the Green Line Project, which is a 20 km light rail project, expected to commence construction in 2020.
- Recently, the federal government confirmed their commitment to providing C\$1.53-billion in funding to help Calgary build the Green Line LRT.

## 3.4 Saskatchewan

- The 2018 provincial budget in Saskatchewan allocates C\$1.2-billion to infrastructure, through the Saskatchewan Builds Capital Plan, which supports construction and maintenance on schools, health care facilities, municipal infrastructure, and highways.
- Both the cities of Saskatoon and Regina have also been active with their own P3 projects. Construction began in the summer of 2015 on the City of Regina's Bypass Project. It is the largest transportation infrastructure project in the province's history and received C\$200-million in P3 Canada funding. Construction on Saskatoon's Civic Operations Centre Project was completed in December 2016 and the North Commuter Parkway and Traffic Bridge Project is expected to be completed in

October of 2018. As well, Regina's Wastewater Treatment Plant Project was completed at the end of 2016.

### 3.5 Manitoba

- The 2018/19 Manitoba provincial budget allocated C\$1.56-billion to infrastructure. This includes C\$624-million to roads, highways, bridges and flood protection, and C\$577-million to health, education and housing.
- In 2016, the City of Winnipeg reached financial close for its Southwest Rapid Transitway (Stage 2) and Pembina Highway Underpass project, which was procured using the design-build-finance-operate-maintain (DBFOM) model.

### 3.6 Ontario

- The Ontario market remains a leader in P3 procurements, having an established agency and a commitment to publish their project pipeline in advance.
- The 2018 Ontario Budget was released on March 28, 2018 by the Liberal government, and showed that the province would invest about C\$182-billion over the next 10 years, representing C\$79-billion in public transit investment and C\$25-billion in highway projects. It should be noted, however, that on June 7, 2018, the Progressive Conservative party was elected as the new government in Ontario, and while the new government appears to remain committed to infrastructure spending, it would not be unusual for there to be some changes to priorities in future budgets.
- Transit projects already in progress across the Greater Toronto and Hamilton area, including Finch West Light Rail Transit (LRT), Hamilton Light Rail Transit, Hurontario Light Rail Transit, Mississauga Transitway, York vivaNext Bus Rapid Transit, and Ottawa Stage 2 Light Rail Transit projects, continue to receive funding in the budget.
- The Eglinton Crosstown Project is currently in construction and is the largest transit expansion in the history of Toronto, representing an investment of over C\$5.3-billion.
- This year, up to C\$400-million from the *Trillium Trust Act* will support investments in public transportation projects, including the GO Regional Express Rail project, which is the largest rail project in Canada.
- Infrastructure Ontario has expanded its advisory services to municipalities and other agencies developing P3 procurements.
- On March 14, 2018, Canada and Ontario signed a bilateral agreement that will provide more than C\$11.8-billion in federal funding over the next decade dedicated to infrastructure projects through the *Investing in Canada* plan.

### 3.7 Quebec

- Despite continued political opposition to P3s, a few major projects have been completed or are under construction.
- Total investments in the 2018-2028 Quebec Infrastructure Plan (QIP) rose to C100.4-billion, the biggest increase since the rollout of the first QIP in 2007.
- The QIP is providing for a total of C\$6.3-billion in additional investments in public transit and highway infrastructure, including C\$4-billion for major roadwork projects and C\$2.3-billion for transformative transit projects.
- A further C\$1.2-billion is provided for healthcare infrastructure improvements, such as the Vaudreuil-Soulanges hospital project in Montérégie



- The CHUM Hospital Project was successfully procured and featured the single largest bond offering in Canadian P3 projects.
- The Réseau électrique métropolitain project's construction is expected to cost approximately C\$6.04-billion. The Government of Quebec has confirmed an investment of C\$1.28-billion.

### 3.8 Atlantic Provinces

- The pipeline in the Atlantic provinces is not as robust as elsewhere in Canada. However, several projects are in planning and procurement, including the Gander and Grand Falls-Windsor Care Homes Project and construction is underway on the St. John Safe Clean Drinking Water Project, a C\$216-million water treatment plant and the city's first P3 project.
- As well, construction for the Corner Brook Long-Term Care Project in Newfoundland is currently underway.
- Recently, Canada and Nova Scotia announced the signing of a new bilateral agreement under the *Investing in Canada* plan that will provide more than C\$828-million in federal funding over the next decade for infrastructure projects in Nova Scotia. This commitment is expected to create economic growth and improve public transit and recreational and cultural infrastructure in the province.

### 3.9 The Territories

- Canada's territorial governments are also showing interest in P3 projects. For example, the Government of the Northwest Territories' C\$750-million New Stanton Territorial Hospital in Yellowknife is currently in the construction phase. As well, the Tlicheo All-Season Road project in the Northwest Territories has recently received a conditional environmental assessment approval that enables its construction.
- On March 7, 2018, Canada and the Northwest Territories signed the bilateral agreement for long-term infrastructure projects, providing for more than C\$570-million over the next decade in federal funding under the *Investing in Canada* plan.

## XIV. Environmental Law



All levels of government across Canada have enacted legislation to regulate the impact of business activities on the environment. Environmental legislation and regulation is not only complex, but all too often exceedingly vague, providing environmental regulators with considerable discretion in the enforcement of the law.

Consequently, courts have been active in developing new standards and principles for enforcing environmental legislation. In addition, civil environmental lawsuits are now commonplace in Canadian courtrooms involving claims over chemical spills, contaminated land, noxious air emissions, noise and major industrial projects. The result has been a proliferation of environmental rules and standards to such an extent that one needs a “road map” to work through the legal maze.

The environment is not named specifically in the *Canadian Constitution* and consequently neither federal nor provincial governments have exclusive jurisdiction over it. Rather, jurisdiction is based upon other named “heads of power,” such as criminal law, fisheries or natural resources. For many matters falling under the broad label known as the “environment,” both the federal and provincial governments can and do exercise regulatory responsibilities.

This is referred to as “concurrent jurisdiction,” which, in practical terms for business managers, means that businesses must comply with both provincial and federal regulations. Historically, the provinces have taken the lead with respect to environmental conservation and protection. However, the federal government continues to have a role in this area. In addition, some municipalities are also becoming more active, as is evidenced, for example, by their use of bylaws to regulate such matters as the development of contaminated land, the discharge of liquid effluent into municipal sewage systems, and reporting on the emission of chemical substances or application of herbicides/pesticides in the course of business operations.

Environmental statutes create offences for non-compliance that can result in substantial penalties, including million-dollar fines and/or imprisonment. Many provide that maximum fines are doubled for subsequent offences and can be levied for each day an offence continues. Most environmental statutes impose liability on directors, officers, employees or agents of a company where they authorize, permit or acquiesce in the commission of an offence, whether or not the company is prosecuted. In some instances directors, officers and agents may be held liable solely by virtue of their role as persons with charge, management or control of a company. Companies and individuals may escape environmental liability on the basis that they took all reasonable steps to prevent the offence from occurring.

Some statutes create administrative penalties, which are fines that can be levied by government regulators as opposed to the courts. There are also some jurisdictions that allow for tickets, similar to motor vehicle infractions, to be issued for non-compliance. Enforcement officers generally have rights to inspect premises, issue stop-work orders, investigate non-compliance and obtain warrants to enter and search property, and seize anything that is believed to be relevant to an alleged offence. A number of jurisdictions also have administrative tribunals to handle appeals of decisions made by such inspectors and other government officials.

# 1. Toxic and Dangerous Substances

The *Canadian Environmental Protection Act* (CEPA) provides the federal government with regulatory authority over substances considered toxic. The regime provides for the assessment of “new” substances not included on the Domestic Substances List, a national inventory of chemical and biotechnical substances. CEPA requires an importer or manufacturer to notify the federal government of a new substance before manufacture or importation can take place in Canada. Consequently, businesses must build in a sufficient lead-time for the introduction of new chemicals or biotechnology products into the Canadian marketplace. In certain circumstances, manufacturers and importers must also report new activities involving approved new substances so they can be re-evaluated.

If the government determines that a substance may present a danger to human health or the environment, it may add the substance to the Toxic Substances List, which currently lists upwards of 135 toxic substances or groups of substances. Within two years of a substance being added to the list, Environment and Climate Change Canada is required to take action with respect to its management. Such actions may include preventive or control measures, such as securing voluntary agreements, requiring pollution prevention plans or issuing restrictive regulations that may provide for the phase-out or outright banning of a substance. Substances that are persistent, bioaccumulative, and result primarily from human activity must be placed on the Virtual Elimination List, and companies will then be required to prepare virtual elimination plans to achieve a release limit set by the minister of environment or the minister of health. Listed toxic substances include PCBs, CFCs and chlorinated solvents, to name but a few.

The *Pest Control Products Act* (PCPA) prohibits the manufacture, possession, handling, transportation, importation, distribution or use of a pest control product that is not registered under the PCPA or in any way that endangers human health or the safety of the environment. Pest control products are registered only if their risks and value are determined to be acceptable by the minister of health. A risk assessment includes special consideration of the different sensitivities to pest control products of major identifiable groups such as children and seniors, and an assessment of aggregate exposure and cumulative effects. New information about risks and values must be reported, and a re-evaluation of currently registered products must take place. The public must be consulted before significant registration decisions are made. The public is given access to information provided in relation to registered pest control products. Maximum penalties under the PCPA are C\$1-million and/or three years’ imprisonment.

The *Hazardous Products Act* (HPA) prohibits suppliers, in certain circumstances, from importing and/or selling “hazardous products” that are intended for use in a workplace in Canada. The legislation identifies various hazard classes of hazardous products, namely compressed gas, flammable and combustible material, oxidizing material, poisonous and infectious material, corrosive material and dangerously reactive material. Maximum penalties under the HPA are C\$5-million and/or two years’ imprisonment. If a person knowingly or recklessly contravenes a provision of the HPA, maximum penalties are fines in an amount that is at the discretion of the court and/or five years’ imprisonment.

The *Transportation of Dangerous Goods Act* (TDGA) applies to all facets and modes of inter-provincial and international transportation of dangerous goods in Canada with the exception of commodities moved through pipelines that are governed by a regulator such as the

National Energy Board or a province. Each of the provinces has parallel intra-provincial requirements. The objective of the TDGA is to promote public safety and to protect the environment during the transportation of dangerous goods, including hazardous wastes. The TDGA applies to those who transport or import dangerous goods; handle, manufacture, ship, and package dangerous goods for shipment; or manufacture the containment materials for dangerous goods.

The TDGA and the *Transportation of Dangerous Goods Regulations* (TDG Regulations) establish a complex system of product classification, documentation and labelling; placarding and marking of vehicles; hazard management, notification and reporting; and employee training. The TDG Regulations also set standards for containers used in road, marine, air and rail transportation. The TDGA requires an Emergency Response Assistance Plan, security training and an implemented security plan before the offering for transport, handling or importation of prescribed goods. An Emergency Response Assistance Plan that is specific to a particular substance, geographic area and mode of transportation must be approved by the minister of transport or the designated person, and such approval is revocable. A security plan must include measures to prevent the dangerous goods from being stolen or unlawfully interfered with in the course of importing, offering for transport, handling, or transporting.

Dangerous goods are specified in the TDG Regulations and arranged into nine classes and over 3,000 shipping names. The classes include: explosives, compressed gases, flammable and combustible liquids and solids, oxidizing substances, toxic and infectious substances, radioactive materials, corrosives and numerous miscellaneous products prescribed by regulation. The TDGA also applies to any product, substance or organism that “by its nature” is included within one of the classes. The TDG Regulations have equivalency provisions with respect to international rules such as the International Maritime Dangerous Goods Code, the International Civil Aviation Organization Technical Instructions and Title 49 of the U.S. Code of Federal Regulations.

## 2. Air Pollution and Greenhouse Gases

Most air emission regulation is conducted at the provincial level of government, but a number of industry-specific air pollution regulations exist under CEPA. They limit the concentration of such emissions as: (1) asbestos emissions from asbestos mines and mills; (2) lead emissions from secondary lead smelters; (3) mercury from chlor-alkali mercury plants; and (4) vinyl chloride from vinyl chloride and polyvinyl chloride plants. The trend is for Environment and Climate Change Canada to focus on substance-specific regulations, some of which, like CFCs, are considered air pollutants.

New standards for air quality and industrial air emissions have been developed. In May 2008, the federal government agreed to work with provinces and territories to develop the Comprehensive Air Management System for air emissions. Subsequently, in October 2010, the Canadian Council of Ministers of the Environment finalized a new air quality management system known as the Air Quality Management System (AQMS). The AQMS includes new Canadian Ambient Air Quality Standards (AAQS), which set the bar for outdoor air quality. Standards have been developed for fine particulate matter (PM<sub>2.5</sub>), ozone and sulphur dioxide (SO<sub>2</sub>), and work has begun to develop standards for nitrogen dioxide (NO<sub>2</sub>). It is expected that new air quality standards will continue to be developed over the next decade.

CEPA requires Environment and Climate Change Canada to keep and publish a *National Pollutant Release Inventory* (NPRI). Owners and operators of facilities that manufacture,

process or otherwise use one or more of the numerous NPRI-listed substances under certain prescribed conditions are required to report releases or off-site transfers of the substances to Environment and Climate Change Canada. The information is made publicly available to Canadians each year.

The federal government has also been focusing attention on regulations aimed at reducing greenhouse gas (GHG) emissions such as carbon dioxide. The regulations are part of the federal government's strategy to reach its target of achieving a 30-per-cent GHG emission reduction from 2005 levels by 2030. These include the *Passenger Automobile and Light Truck Greenhouse Gas Emission Regulations* which apply to vehicles for 2011 to 2025 model years, and are aligned with mandatory national standards of the U.S. They are expected to reduce emissions per vehicle by 25 per cent from those sold in 2008.

The *Heavy-duty Vehicle and Engine Greenhouse Gas Emission Regulations* establish progressively more stringent emission standards for 2014 to 2018 model year heavy-duty vehicles, such as pick-ups, semi-trucks, garbage trucks, and buses. It is expected that, as a result of these regulations, emissions from 2018 model year heavy-duty vehicles will be reduced by up to 23 per cent.

The *Renewable Fuel Regulations*, require an average renewable fuel content of five per cent in gasoline and two per cent for diesel fuel and heating distillate oil. Five provinces (Ontario, Manitoba, Saskatchewan, Alberta and British Columbia) also have similar (or more stringent) renewal fuel mandates. The *Reduction of Carbon Dioxide Emissions from Coal-Fired Generation of Electricity Regulations* impose registration, monitoring, and reporting requirements on all coal-fired generation units, as well as establishing emission standards.

Energy efficiency standards for energy-consuming goods are an additional legislative instrument used in Canada to reduce GHG emissions. The *Energy Efficiency Regulations 2016* establish stringent energy efficiency standards for consumer and commercial products in Canada and represent a step towards harmonizing Canada's energy efficiency standards with those of the United States. Provincial governments can also implement energy efficiency standards on products transported intra-provincially and most provinces (with the exception of Saskatchewan, Alberta, Newfoundland and Labrador and Prince Edward Island) have enacted similar standards.

Alberta has developed a GHG emissions reduction program. Under the *Climate Change and Emissions Management Act* and the *Carbon Competitiveness Incentive Regulation*, Alberta's GHG emissions reduction system includes emissions trading systems, mandatory reporting and the creation of a fund for implementing new technologies, as well as programs and measures for reducing emissions. Regulated facilities, defined as facilities that emit more than 100,000 tonnes of CO<sub>2</sub> per year, are required to meet established emissions intensity benchmarks. If they are unable to do so through operational improvements, they have three other options available to them: (i) purchase emissions offsets, (ii) contribute to the Climate Change and Emissions Management Fund (Fund Credit), or (iii) purchase emissions performance credits. Since January 1, 2017, the price of a Fund Credit has been set at C\$30/tonne.

In addition to its large facility regime, Alberta has also implemented a carbon levy on the purchase of fossil fuel (including residential sale of gasoline and home-heating fuels). As of January 1, 2018 the levy is C\$30/tonne.

The *Oil Sands Emissions Limit Act* came into force in December 2016 and sets a cumulative GHG emissions limit of 100 megatonnes per year for all oil sand sites in Alberta. The regulatory scheme required to put into practice this emissions limit is expected to be implemented in 2018, and is anticipated to include some type of a cap-and-trade component.

In British Columbia, GHG emissions are regulated through a variety of statutes. The *Carbon Tax Act* imposes a tax on the purchase of fossil fuel with rates for different types of fuel set out in a schedule to the legislation. The *Greenhouse Gas Emission Reporting Regulation* under the *Greenhouse Gas Industrial Reporting and Control Act* requires B.C.-based operations emitting 10,000 tonnes or more of CO<sub>2</sub>e per year to report GHG emissions to the B.C. Ministry of Environment. Operations emitting 25,000 tonnes or more of CO<sub>2</sub>e are required to have their GHG report verified by an accredited third party. Certain sectors are exempt, including air and marine transportation.

The *Clean Energy Act* sets out B.C.'s energy objectives, including the generation of at least 93 per cent of the electricity in B.C. from clean or renewable resources. Electricity generated for purposes of serving liquefied natural gas (LNG) facilities is excluded from the 93 per cent clean energy objective.

The *Greenhouse Gas Reduction Targets Act* sets a provincial target in B.C. of a 33-per-cent reduction from the 2007 level of GHG emissions by 2020 and an 80-per-cent reduction by 2050.

The *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act* allows the B.C. government to set standards for the amount of renewable fuel that must be contained in transportation fuel blends, as well as reduce the carbon intensity of transportation fuels and meet its commitment to adopt a new low carbon fuel standard similar to California's. The renewable fuel content requirement for gasoline is a five-per-cent annual average and for diesel a four-per-cent annual average.

In Quebec, the *Clean Air Regulation* sets standards for contaminant emissions to the atmosphere. This regulation applies throughout Quebec, except for the Island of Montreal where the Montréal Metropolitan Community has adopted specific air quality regulations. Quebec has also adopted a cap-and-trade regime for the purpose of managing greenhouse gas emissions. Emitters of GHG above 10,000 MtEq must file a declaration in accordance with the *Regulation respecting mandatory reporting of certain emissions of contaminants into the atmosphere*. Emitters of GHG above 25,000 MtEq and distributors of fuel whose emissions meet that threshold are subject to the cap-and-trade regime that is regulated under the *Regulation respecting a cap-and-trade system for greenhouse gas emission allowances*. It is useful to note that Quebec forms part of the Western Climate Initiative (carbon market) with California and that Quebec and California's cap-and-trade regimes are linked.

An *Act to increase the number of zero-emission motor vehicles in Québec in order to reduce greenhouse gas and other pollutant emissions* was adopted in October 2016. Quebec is the first province in Canada to adopt legislation regarding zero-emission vehicles. The Act establishes a system of credits applicable to the sale or lease of motor vehicles in Quebec. Credits may be accumulated by leasing or selling vehicles propelled by a mean of propulsion that emits no pollutants, or by purchasing them from another motor vehicles manufacturer. The obligation to accumulate credits under the Act starts applying for 2018 model year vehicles, and only for vehicle manufacturers that meet a certain threshold established under the Act and its regulations.

Air emissions are regulated under Ontario's *Environmental Protection Act* (EPA) through a combination of the environmental approval process and specific air contaminant limits determined at "points of impingement." The principal air emission regulation is Regulation 419/05. Among other things, this regulation requires the use of new air emission models, detailed monitoring and reporting, and the phasing-in of stricter air emission standards for over 100 different chemical parameters.

The Ontario government has issued a number of regulations that have strengthened its air emission controls. In 2005, the province commenced implementation of a five-point action plan to reduce industrial emissions, particularly smog causing emissions of nitrogen oxide (NO<sub>x</sub>) and SO<sub>2</sub>. NO<sub>x</sub> and SO<sub>2</sub> limits and monitoring requirements now govern the electricity generation, base metal, iron and steel and petroleum sectors, among others.

In April 2015, Ontario signed an agreement with Quebec to create a joint cap-and-trade system to reduce GHG emissions and joined the Western Climate Initiative. In June 2018, the new Ontario Government announced the cancellation of Ontario's cap-and-trade program.

### 3. Land Contamination

Responsibility for past environmental damage can be imposed upon a past, current or purchasing operator or owner of land in a variety of ways.

First, liability — that is, responsibility for clean-up or remediation — for historic environmental damage can be imposed upon a current or past operator or owner by way of legislation. For example, under the Ontario EPA, a current or past owner, operator or person in charge, management or control of a source of contaminant is considered to be a "person responsible." This captures a property or a broad grouping of current entities, including past or current operators and landowners, even their officers or directors, who may be required to remediate the property. This liability is typically imposed through the issuance of an Order requiring study containment or remediation.

Second, liability for historic environmental damage can be imposed upon a current or purchasing operator or owner by operation of the common law. For example, a civil lawsuit for environmental damage may be brought by another landowner whose property has been contaminated by the migration of pollutants. Such an action may be based on common law liability principles of nuisance, negligence, trespass, riparian rights or strict liability. However, there are obviously restrictions placed on these actions by the common law. Ontario's EPA provides for a statutory cause of action to recover costs incurred as a direct result of a spill.

Each of the provinces has legislation dealing with releases to the environment and land contamination. In Alberta, the *Environmental Protection and Enhancement Act* (EPEA) is a comprehensive statute aimed at promoting "the protection, enhancement and wise use of the environment." The EPEA regulates the release of specific substances and imposes a reporting obligation on any person who "releases or causes or permits the release of [one of these substances] into the environment." The EPEA further regulates the issuance of remediation certificates and environmental protection orders (EPOs). The director may issue an EPO directing a person to take whatever measures the director deems necessary to deal with the release or potential release of a substance that may cause, is causing, or has caused an adverse effect. EPOs can be issued to a person in charge, management or control of a substance and includes principals and agents.

British Columbia's *Environmental Management Act* (EMA), together with the *Contaminated Sites Regulation*, establishes a detailed regime for the identification, determination and remediation of contaminated sites, and the assessment and allocation of liability for remediation. Liability under the regime is absolute, retroactive, joint and separate. Once a site is found to be contaminated, "responsible persons" will be responsible for remediation of the site and may be liable to anyone who has incurred costs to remediate the site unless an exemption from liability can be established. The term "responsible person" is broadly defined and includes current and past owners and operators of a site, plus transporters and producers of contaminants.

Ontario's EPA is the principal legislation dealing with pollution in that province. Where accidental spills or discharges of contaminants occur, the persons in control are obligated under the EPA to notify government agencies "forthwith" and to do everything practicable to clean up major spills and restore the natural environment. Persons suffering loss or damage from a spill are entitled to compensation and recent case law has confirmed that section 99 of the EPA does not require a plaintiff to establish a duty of care, foreseeability, intent or fault. If the government incurs clean-up costs, it is able to recover these costs from the past or current owners and persons in control of the substances spilled. The EPA gives the power to the government to issue orders against and recover costs of the remediation from owners of property, even in circumstances where the owner of the property is not responsible for the contamination. Directors and officers are specifically obligated to exercise "reasonable care" to prevent their corporations from causing or permitting the discharge of contaminants into the environment.

The "record of site condition" (RSC) part of the EPA, Regulation 153/04 and certain related "brownfield" legislation, encourage the revitalization of contaminated land in Ontario by establishing a voluntary remediation certification system involving the filing of an RSC when acceptable soil and groundwater standards are met, and allowing lenders, bankruptcy trustees and other fiduciaries to deal with contaminated land, without assuming liability for historical environmental conditions. Landowners who complete an environmental site assessment or remediation of a property in accordance with the requirements of the EPA and file an RSC with the Ministry of Environment, Conservation and Parks (MECP), obtain protection from EPA environmental orders with respect to historic contamination. The RSC soil and groundwater standards vary depending upon the nature of the land use and the potability of the groundwater, among other things.

The *Quebec Environment Quality Act* (EQA) contains a framework for managing contaminated sites. The EQA requires a person who permanently ceases an activity that is designated in a regulation, or a person who changes the use of property on which a designated activity once occurred, to carry out a site assessment in accordance with Ministry of Sustainable Development, Environment and the Fight against Climate Change (MSDEF) guidelines. If the site assessment indicates that soil or groundwater standards are exceeded, there is a requirement to provide the MSDEF with a remediation plan and an execution timetable for approval and remediation must be carried out according to the approval plan. Pursuant to recent amendments to the EQA certain land rehabilitation work can be carried out by filing a declaration of compliance and a rehabilitation plan and approval of the MSDEF is not required. The EQA recognizes the possibility of carrying out remediation by way of a risk assessment for certain types of contamination. In addition, if the site assessment establishes that standards are exceeded, a Notice of Contamination must be registered at the land registry. A Notice of Decontamination can be registered against title once a government-certified expert establishes that concentrations of contaminants onsite no longer exceed



regulatory criteria. Where an approved risk assessment rehabilitation is carried out, a Notice of Land Use Restriction setting out limits on the future use of the property must be registered on title.

The EQA also requires a person to notify their neighbours if they become aware that contaminants resulting from designated activities are present in soil at the property limits or if there is a serious risk that contaminants in groundwater are migrating offsite that might affect the use of water.

The EQA gives the MSDEF the power to order polluters or custodians of property to carry out site assessments and site remediation when the MSDEF is aware that contaminants either exceed regulatory limits or where there are no limits set for a contaminant that is likely to adversely affect the life, health, safety, welfare or comfort of human beings, other living species or the environment. Liability under these types of orders is joint and several. Defences available to innocent custodians of contaminated land facing an order from the MSDEF are:

- They honestly did not know about the contamination
- They knew about the contamination but they complied with the law and acted reasonably and diligently under the circumstances
- The site was contaminated by a neighbouring property caused by a third party

Across Canada, the obligation to report environmental incidents is contained directly in environmental legislation, and varies between jurisdictions.

In some provinces, such as Ontario, this requirement is quite broad. For instance, under the EPA, any discharge out of the normal course, which may have an adverse effect must be reported, and under the *Ontario Water Resources Act* there is an obligation to report a discharge (that is not in the normal course of events that may impair the quality of any waters) to the MECP. It is possible for an entity to be charged with failing to report, even if ultimately it is determined that the environmental incident itself does not result in charges or a conviction. Several other provinces have parallel provisions.

At the federal level, there are also various duty-to-report requirements. For instance, the *Fisheries Act* requires that notification be given when there has been a deposit of deleterious substances in water frequented by fish or activities that cause serious harm to fish. There are also numerous examples of the duty to report in CEPA.

## 4. Water

The federal *Fisheries Act* protects Canada's fisheries by safeguarding both fish and fish habitat. The Act applies to both coastal and inland waters, and is administered by the Department of Fisheries and Oceans (DFO) by Environment and Climate Change Canada. The Act has frequently been used by the government to charge those responsible for water-polluting activities.

There are two key prohibitions under the *Fisheries Act*. First, the Act prohibits the deposit of any type of deleterious substance into waters frequented by fish. A "deleterious substance" is defined to include any substance that would degrade or alter, or contribute to the degradation or alteration of, the quality of water frequented by fish so as to render the water deleterious to fish or fish habitat. Second, the Act prohibits carrying out a work, undertaking or activity that

results in serious harm to fish that are part of a commercial, recreational or aboriginal fishery, or to fish that support such a fishery. Serious harm to fish includes the death of fish or any permanent alteration to, or destruction of, fish habitat. DFO may issue authorizations to permit serious harm to fish (and fish habitat). Failing to comply with the Act or the conditions set out in an authorization is an offence. Penalties can be significant.

Each of the provinces has legislation dealing with water rights and water pollution. Alberta's *Water Act (WA)* supports and promotes the conservation and management of water, while recognizing the need for Alberta's economic growth and prosperity. Property in and the rights to the diversion and use of all water in Alberta are vested in the provincial Crown. The definition of "water" is broad, including all water on or under the surface of the ground, whether in liquid or solid state.

The WA enables the director to establish water management areas and water management area plans for specified areas within Alberta. However, the central function of the WA is to establish an approvals, priority and licensing regime. With the exception of deemed licence holders, exempt agricultural uses, households and riparian owners or occupants, a party must have an approval before it commences an activity (as defined under the WA) or a licence before it diverts water. The WA operates on a first in time, first in right principle. Older licence holders, therefore, have priority to the water supply over newer licence holders. Alberta currently has a moratorium on the issuance of new water licences for the South Saskatchewan River basin, which encompasses an area in and around Calgary.

The WA definition of "activity" is expansive. For example, an approval is needed for any activity that alters flow or water level, could cause siltation or erosion, affects aquatic life or alters the location of water. The WA defines a "diversion of water" as the impoundment, storage, consumption, taking or removal of water for any purpose. With some exceptions, anyone wishing to commence or continue a diversion of water or operate a works to divert water must apply to the director for a licence.

In British Columbia, the *Water Sustainability Act (WSA)* establishes the licensing regime for surface water and groundwater use whereby holders of licences are permitted to divert and use water for the "purpose" specified in the licence; and to construct, maintain and operate the "works" authorized under the licence and necessary for the proper diversion, storage, distribution and use of the water or the power produced from the water. Certain users are exempted from the requirement to have a licence to use groundwater, including domestic users and specified oil and gas operations using "deep water" wells. The WSA also prohibits the deposit of debris into water in a manner that causes harm.

The *Water Protection Act* prohibits the removal of water from B.C. and the construction or operation of large-scale projects capable of transferring water from one watershed to another without a licence. The *Drinking Water Protection Act* regulates drinking water supply systems, establishing mechanisms for source protection and provides for greater public accountability of water suppliers. The *Riparian Areas Protection Act* establishes regulations regarding the protection of riparian areas that may be subject to residential, commercial or industrial development.

The *Ontario Water Resources Act (OWRA)* is a companion statute to the EPA. Its purpose is to provide for the conservation, protection and management of Ontario's waters and for their efficient and sustainable use.

Where a waste generator wishes to discharge its waste to a local water body, the discharge must be subject to an environmental compliance approval granted by the Ontario MECP pursuant to the OWRA. Without such an approval, if the discharge “may impair the quality of the water,” the person causing or permitting the discharge is guilty of an offence under the Act. Upon conviction for such an offence, the generator/discharger may be fined or imprisoned in accordance with the same penalty structure provided for under the EPA.

Under OWRA, no person is permitted to establish or operate a facility or works for the collection, transmission, treatment and disposal of commercial and industrial sewage wastes, among other wastes (sewage works), without first obtaining an environmental compliance approval.

The construction of water wells and the use or taking of any surface or groundwater above 50,000 litres a day is also regulated by the Act, which requires such takings to be permitted by the Ministry of the Environment and Climate Change.

The Ontario *Clean Water Act* establishes areas to protect drinking-water sources. Such plans will guide and restrict development activities within the plan areas much like current provincial and municipal development plans.

Subject to certain specific exemptions, Quebec’s *Environment Quality Act* provides for the requirement to obtain approval for any withdrawal of water — defined as the taking of surface water or groundwater by any means — of 75,000 litres or more. Authorizations are generally valid for 10 years and government decisions regarding their issuance and renewal must give priority to public health needs and the environment. No water withdrawn in the St-Lawrence River Basin may be transferred out of the basin. Certain exceptions are provided, including for bottled water. Regulations require payment of fees for water takings in excess of 75 m<sup>3</sup> per day: C\$0.0025 per cubic metre, except oil and gas extraction and industries where water is incorporated into the final product (such as the bottled water industry), in which case the fee is C\$0.07 per cubic metre.

Where one discharges liquid wastes into a municipal sanitary sewer, it is necessary to become familiar with any applicable sewer use bylaw. Municipal sewer bylaws often restrict what may be discharged into local sanitary and storm sewers and, in some cases, require pollution prevention plans.

## 5. Waste Management

While most waste is regulated at the provincial level, a number of regulations exist federally under CEPA that control the movement of waste and recyclable material in, out and across the country. Waste movement is also regulated by the provincial levels of government within their individual boundaries. The *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* implement Canada’s obligations under the Basel Convention and certain other international treaties or agreements aimed at controlling the international movement of such materials. Section 185 of CEPA requires that the minister be notified of any intended international shipment of hazardous wastes or hazardous recyclable materials. An international movement may consist of an export from Canada, an import into Canada, a transit through Canada, or a transit through a country other than Canada.

The notification requirements are set out in the regulations and include the requirement to provide information such as: the nature and quantity of the hazardous waste or hazardous

recyclable material involved; the addresses and sites of the exporters, importers, and carriers; the proposed disposal or recycling operations of the hazardous waste or hazardous recyclable material; proof of written contracts between the exporters and importers; and proof of insurance coverage. With this information, Environment and Climate Change Canada is able to determine whether the proposed shipment of hazardous wastes or hazardous recyclable materials complies with regulations for the protection of human health and the environment.

If the notification requirements set out in the regulations are met, Environment and Climate Change Canada notifies the authorities in the destination country. If any authority (including those in any transit countries) objects to the proposed shipment, the shipment cannot proceed until the objection is lifted. A permit may be granted following a review of the notice and approval from the authorities in the destination country.

The *PCB Waste Export Regulations* allow Canadian owners of PCB waste to export such wastes to the U.S. for treatment and destruction (excluding landfilling) when these wastes are in concentrations equal to or greater than 50 mg per kilogram. The regulations require that advance notice of proposed export shipments be given to Environment and Climate Change Canada. If the PCB waste shipment complies with the regulations, and authorities in any countries or provinces through which the waste will transit do not object to the shipment, a permit is sent from Environment and Climate Change Canada to the applicant authorizing the shipment to proceed.

The *Interprovincial Movement of Hazardous Waste Regulations* maintain a tracking system, based on a prescribed waste manifest, for the movement of hazardous waste and hazardous recyclable material between provinces and territories within Canada.

Each of the provinces has a waste approvals regime. For example, in Ontario any business which collects, transports, treats or disposes of waste must obtain an environmental compliance approval from the Ministry of the Environment and, in certain circumstances involving energy generation, may require a renewable energy approval. In the case of “liquid industrial and hazardous wastes,” special rules apply. The generators of such waste must register each waste with the ministry and use prescribed waste manifests in respect of each shipment from the waste generation facility. Hazardous waste must be packaged and labelled in accordance with the federal *Transportation of Dangerous Goods Act* and the generator must confirm the delivery of a waste shipment at the intended receiving facility. If the liquid industrial or hazardous wastes are stored onsite for more than three months, the ministry must be notified and, in most cases, it will require assurances that the waste will ultimately be removed from the site.

Over the past few years, the MECP has taken steps to encourage the reduction and recycling of waste. Waste materials destined for recycling are exempt from some of the strictures of the legislation, including the requirement for environmental approval under the EPA. There are also regulations that require industrial and other waste generators to conduct waste audits and meet prescribed waste reduction targets.

The Ontario provincial government, under the authority of the *Waste Diversion Transition Act* and more recently the *Waste-Free Ontario Act*, now has several stewardship and extended producer responsibility programs aimed at the end use of consumer products. The “Blue Box” recycling program applies to packaging and printed materials with respect to a variety of consumer products and affects all “brand owners and first importers” of products that

generate plastic, paper, glass, metal or textile packaging waste. Similar recycling programs have been extended to household hazardous wastes and electronic products. New and expanded “extended producer responsibility” recycling and reduced packaging programs are expected over the coming years as Ontario moves towards a target of “zero” waste.

Regulations have been adopted in Quebec requiring manufacturers to take back used paint and paint containers, as well as used oil, used batteries, consumer electronics and fluorescent light bulbs. Companies that market printed materials or products containing containers and packaging are required to pay dues that are remitted to municipalities to finance the cost of curbside recycling programs.

Standards are in place at the provincial level for the use, treatment and storage of hazardous waste (known as residual hazardous materials in Quebec).

In British Columbia, the EMA establishes specific rules for the management of waste, including permitting and regulatory requirements for authorized waste activities, identification and handling of hazardous waste, spills and spill reporting, municipal waste management programs, product stewardship, and enforcement procedures and penalties. The product stewardship program covers a large range of consumer products including electronics, packaging and printed paper, paint, tires, beverage containers, used oil, pesticides, batteries, solvents and flammable liquids and other miscellaneous residual products. Responsibility for the programs rests with the producers of the materials, who administer them under product stewardship plans. Typically, producers appoint non-profit entities to act as their agents for carrying out the programs. Most products are collected through curbside pick-up by local governments, or recycling depots scattered across the province.

## 6. Project Approvals

The *Canadian Environmental Assessment Act*, 2012 is designed to ensure that federal government agencies take environmental concerns into consideration in their decision-making processes. This is accomplished by requiring environmental assessments to be conducted prior to a designated project proceeding. “Designated Projects” are defined broadly to mean one or more physical activities that are carried out in Canada or on federal lands; are designated by regulations; or are linked to the same federal authority as specified in those regulations, as well as the activities incidental to those physical activities.

The *Regulations Designating Physical Activities* under CEAA 2012 are aimed at ensuring that the regulations capture the major projects that the federal government believes have the greatest potential for significant adverse environmental effects. Of particular note, many large industrial facilities such as those which process heavy oil and oil sands or manufacture pulp and paper, steel and chemicals, as well as certain industrial mineral mines, are not automatically subject to the CEAA 2012, while railway yards, offshore exploratory wells, and expansions to oil sands mines remain as designated physical activities.

Each environmental assessment must consider whether designated projects are likely to cause significant adverse environmental effects on components of the environment that are within the legislative authority of the federal government. Assessments will be conducted by the Canadian Environmental Assessment Agency, the Canadian Nuclear Safety Commission (for projects that are regulated under the *Nuclear Safety and Control Act*), and the National Energy Board (for projects that are regulated under the *National Energy Board Act* or the *Canada Oil and Gas Operations Act*). Time limits are set in CEAA 2012 for assessments.

Unless otherwise modified, a decision on a standard environmental assessment will generally be required within 365 days from the issuance of the Notice of Commencement. In cases that involve a public review panel, unless otherwise modified, a decision statement from the minister must be issued not later than 24 months from the date the review panel was established.

The end product of a federal environmental assessment will include a “decision statement” to be issued under CEAA 2012, approving a project and stipulating conditions for the project to mitigate any environmental effects that are directly linked or necessarily incidental to the power exercised by the federal authority. These conditions are binding and enforceable.

The Canadian government has recently introduced legislation, not yet in force, proposing further changes to the project approval regime. In Alberta, individual projects may be subject to provincial environmental assessments under the EPEA. In addition, projects must comply with the provisions of the *Alberta Land Stewardship Act* (ALSA). ALSA provides a statutory framework that allows the provincial government to give direction with respect to the province’s economic, environmental and social objectives, and to create policy that enables sustainable development through cumulative effects management.

Under the ALSA and Alberta’s Land-Use Framework, a holistic approach is taken and development decisions are considered in light of the overall impacts to a region. The types of cumulative effects considered may include (among other things) water withdrawals, air emissions, land-based environmental impacts and overall habitat degradation.

The ALSA divides Alberta into seven regions. Each region will be subject to a separate regional plan based on its particular environmental, economic and social needs. Regional plans are ultimately approved by cabinet and thus form part of the government’s policy for the region. Accordingly, these regional plans may be viewed as top-down policy directives governing the interpretation and implementation of all legislation in Alberta including, where appropriate, statutes whose primary focus is not the environment. Currently two regional plans have been finalized, including:

- Lower Athabasca Regional Plan, which encompasses significant portions of the Alberta oil sands regions.
- South Saskatchewan Regional Plan, which encompasses the south-central part of the province including Calgary.

The oil, gas and energy industry is heavily regulated in Alberta, with the main regulator being Alberta Energy Regulator (AER). The mandate of the AER includes all regulatory and environmental functions pertaining to upstream oil and gas development as well as all energy-related, resource extraction and intra-provincial pipeline transportation issues.

In spite of considerable movement toward a more integrated regulatory system under the AER, Alberta is still not a true one-window regulatory jurisdiction as it relates to energy activities. For example:

- Land tenure is still under the purview of the Department of Alberta Energy for the time being, meaning Alberta Energy still grants the Crown mineral leases.
- The Surface Rights Board remains in place to deal with certain surface access issues on private and Crown lands.

- The AER has no jurisdiction with respect to assessing the adequacy of Crown consultation associated with the rights of Aboriginal Peoples. Given that the duty to consult can be a major factor in determining how a project can move forward, the AER still has significant gaps in the amount of finality it can provide to a project proponent with respect to any approvals it has granted.
- A mix of federal regulators and regulations continue to have jurisdiction over certain energy activities in the province. For example, the National Energy Board continues to have oversight over international and interprovincial pipelines and Indian Oil and Gas Canada continues to have regulatory functions pertaining to oil and gas resources located on First Nations reserves. Furthermore, the federal government continues to have certain authority over energy developments through various federal statutes such as the *Species at Risk Act*, the *Migratory Birds Convention Act*, 1994, and *the Fisheries Act*.

British Columbia has a range of legislation related to project approvals. The *Environmental Assessment Act* (BCEAA), which is administered by the B.C. Environmental Assessment Office (EAO), establishes a comprehensive process for the assessment of the environmental effects of major projects in British Columbia. Projects designated in the *Reviewable Projects Regulation* or designated as reviewable by ministerial order must undergo an environmental assessment and cannot proceed without an environmental assessment certificate, unless the EAO Executive Director exempts the project from the requirement for a certificate.

The British Columbia Utilities Commission (BCUC) is an independent regulatory agency that operates under and administers the *Utilities Commission Act* (UCA). The BCUC's responsibilities include the regulation of B.C.'s natural gas and electricity utilities as well as intra-provincial pipelines. A certificate of public convenience and necessity must be obtained from the BCUC before beginning the construction, operation or extension of a public utility plant or system. The BCUC can issue administrative penalties and impose fines of up to C\$1-million per day.

The *Forest and Range Practices Act* sets the framework for a "results-based" forestry system on public land. It sets environmental objectives for soils, timber, fish, biodiversity, cultural heritage, forage and associated plant communities, visual quality, water, wildlife, and resource and recreation features. The *Private Managed Forest Land Act* (PMFLA) creates a mechanism for the regulation of forest practices on private land.

The *Oil and Gas Activities Act* (OGAA) regulates conventional oil and gas producers, shale gas producers and other operators of oil and gas facilities in B.C. The OGAA establishes the B.C. Oil and Gas Commission (Commission) which has broad powers over permitting compliance and enforcement and the setting of technical safety and operational standards.

The *Environmental Protection and Management Regulation* under the OGAA establishes environmental objectives for water, riparian habitats, wildlife and wildlife habitat, old-growth forests, and cultural heritage resources. The *Petroleum and Natural Gas Act* regulates the tenures for sub-surface petroleum and natural gas rights in B.C. and requires proponents to obtain various other approvals before undertaking exploration or production work.

The *Mines Act* applies to all mines in B.C. during exploration, development, construction, production, closure, reclamation and abandonment activities. Before starting any work in or about a mine, the owner, agent, manager or any other person must hold a permit and have filed a plan outlining the details of the proposed work, as well as a program for the

conservation of cultural heritage resources, and for the protection and reclamation of land, watercourses and cultural heritage resources affected by the mine. A person who contravenes a provision of the *Mines Act* is liable for a maximum fine of C\$1-million and/or three years' imprisonment. The Act also authorizes the use of administrative monetary penalties.

In Ontario, pursuant to the *Ontario Environmental Assessment Act* (EAA), significant public projects proposed by the provincial and municipal governments and, in a few cases, environmentally sensitive private projects, are subject to an assessment of their environmental impacts or effects. The application of the process is subject to the minister of the environment's discretion, who must provide an approval before a project or undertaking may proceed. In some cases, a public project that is caught by the legislation may be exempted by order of the minister. In other cases, private projects that would normally not be subject to the EAA may be designated by the minister after having been asked to do so by members of the public. In anticipation of the further privatization of Ontario's electricity generation system, a regulation exists under the EAA requiring environmental assessments of prescribed electricity projects, which captures virtually all electricity projects of significance.

If a project in Ontario is required to undergo an environmental assessment, at the very least extensive environmental studies will be required to determine the project's environmental impacts and consider the need for, and alternatives to, the undertaking. Some public consultation will be required and, in many cases, full public hearings are carried out before an independent tribunal known as the Environmental Review Tribunal. Where other government approvals are required, a consolidated public hearing may be held and the hearing can easily go on for a number of months. In the past, the types of private projects required to undergo an environmental assessment have included major waste management undertakings and new mines.

The *Crown Forest Sustainability Act* is the principal statute governing forestry activities in Ontario. The Act provides for the administration and regulation of forest management planning, forest resource agreements and licences, information management, reforestation and revenue collection. The Ministry of Natural Resources and Forestry administers the Act and relies on several manuals to guide various aspects of forest management activities and ensure that provincial forests are managed in a sustainable manner consistent with the long-term objectives set out in forest management plans.

Mining activities in Ontario are governed by the *Mining Act*, which provides for the exploration, development and rehabilitation of mines. Before proceeding with advanced exploration or mine production, the proponent must first submit a closure plan that must be accepted by the Ministry of Northern Development and Mines. Such a plan will require a description of the proposed conditions and uses of the mine site and those that will exist after Site closure. The plan must provide for the rehabilitation of tailings areas and detail all other necessary rehabilitation work. The MECP will likely be required to issue permits or certificates of approval under its legislation as well. The Ministry of Northern Development and Mines will also require some form of financial assurance that the closure plan will be carried out at the end of the mine's life.

Similar rehabilitation requirements are provided for under the *Aggregate Resources Act*, which governs the extraction of sand, gravel and other aggregates in Ontario. Both the *Mining Act* and the *Aggregate Resources Act* were modernized in 2017, notably by the implementation of a new electronic mining lands administration system in Ontario.



Quebec has several laws regulating natural resources development and conservation.

Major projects that may have significant environmental impacts are subject to the environmental impact assessment (EIA) and review process before the Quebec government approves the project. The process can take about two years to complete and involves the submission of an EIA statement, and the possibility of public hearings before the *Bureau d'audiences publiques sur l'environnement* (BAPE), the office of public hearings on the environment. The recommendations of the BAPE must be taken into account by the Quebec government in making its decision to authorize the project and in setting permit conditions. The EQA contains a separate environmental and social impact assessment process for the James Bay and Northern Quebec Region which requires the involvement of Cree or Inuit representatives, and a decision by Cabinet. Projects that are subject to the EIA process are currently listed in a regulation and historically the environmental assessment regime in Quebec was based on a closed list. Provisions of the EQA now grant the government the power, in exceptional circumstances, to designate a project that is not specifically listed by regulation as being subject to the environmental impact assessment and review procedure. The government can make such a designation when it is of the view that the project presents major climate change issues, or raises major environmental risks and that public concerns with respect to such risks justify a review.

The *Quebec Mining Act* requires that a rehabilitation plan be filed before commencing mine operations or significant exploration work. The proponent must provide financial assurance to guarantee the execution of the anticipated rehabilitation work.

The *Petroleum Resources Act*, which lays down a regulatory regime for oil and gas exploration and production in Quebec, was adopted in December 2016. The Act will be in force upon publication of the regulations required to its implementation, which are expected later in 2018 or 2019.

The *Natural Heritage Conservation Act* allows the MSDEF to designate various types of protected areas in Quebec, sometimes on an emergency basis. The *Act respecting the conservation and development of wildlife* sets out rules for hunting, fishing and trapping on public land; allows the government to adopt wildlife conservation measures; and contains provisions for accommodating the rights of Aboriginal Peoples.

Under the provisions of the *Sustainable Forest Development Act*, the Ministère des Forêts, de la Faune et des Parcs (MFFP) is responsible for planning and managing the public forests, and also for carrying out, monitoring and controlling operations in the forests. Authorizations are required for a variety of works and activities in forests.

A timber supply guarantee under the *Sustainable Forest Development Act* entitles its holder to annually purchase a volume of timber from forests in the domain of the state, in one or more specific administrative regions, to supply the wood processing mill for which the guarantee was granted. Authorization to harvest the wood is given in a harvest agreement signed by the MFFP and by all the guarantee holders in the area it covers. The agreement defines the forest operations zones and the activities to be carried out, stipulates any conditions and lists the guarantee holders' other commitments.

The *Regulation respecting standards of forest management for forests in the domain of the State* establishes the standards that all local stakeholders must follow when conducting forest management activities in forests of the public domain. However, as part of the effort to

regionalize forest management, some of its provisions may be adjusted at the regional level to reflect local values. These standards ensure that forest lands are protected, forest cover is maintained and reconstituted, and forest management activities are in line with the activities of other users. The Regulation sets the rules for initiating ecosystem management, protecting rivers, streams, forest landscapes, and wildlife habitats, and ensures that the traditional activities of aboriginal communities are respected. On April 1, 2018, this Regulation will be repealed and replaced by the *Regulation respecting the sustainable development of forests in the domain of the State*.

The *Petroleum Products Act* is intended to ensure the continuity and security of the petroleum products supply in Quebec. Regulations under the *Petroleum Products Act* and related statutes set out standards governing the types of permitted petroleum products (oil and gasoline). Regulations adopted under the *Building Act* set standards for the use, monitoring and maintenance of petroleum storage tanks and other petroleum equipment, leaks and leak prevention, safety procedures, and government inspections and reporting, and permitting of high-risk petroleum products storage equipment.

## 7. Environmental Permitting

The licensing or permitting system in Canada differs in each province, with permits granted on a facility-wide basis in some cases and granted in association with particular activities (relating to air, water, soil and so on) in others. These approvals may be accompanied by conditions, which may concern certain infrastructure that is required at a facility, routine testing and reporting and basic contamination control measures. There are typically mechanisms for appeal, such a review by a government official, an administrative tribunal, or the relevant minister, and possibly to the courts.

In Ontario, whenever a contaminant is discharged from a factory stack or wastewater outfall, or when waste is deposited on land, approval must first be obtained from the MECP, which administers the Ontario EPA and a companion statute, the *Ontario Water Resources Act*, which regulates both the taking of water for human or industrial use and the discharge of wastes and storm water directly into a river or lake.

While this approval, prior to October 31, 2011, took the form of a Certificate of Approval, it now takes the form of an Environmental Compliance Approval (ECA).

The change to the ECA regime from the previous Certificate of Approval regime is mostly procedural and does not impose new, substantive environmental obligations on applicants. The ECA process is used to regulate high-risk activities. Unlike previous Certificates of Approval, an ECA can authorize multiple activities at a single site and a single activity at multiple sites. The MECP has also indicated that the ECA system would allow for more operational flexibility to businesses once they have obtained an approval.

Prior to issuing an ECA, the ministry generally requires detailed plans and modelling describing the discharge source, the expected off-site impact and the manner in which the level or concentration of contaminants discharged will be minimized. The ministry has increasingly required evidence that the owner or operator of the subject facility has identified the best available pollution control technology that is economically feasible. The ministry will also have regard to concentration limits that have been developed for specified contaminants and is aggressively pushing Ontario industries to continually reduce the levels of contaminants being discharged into the province's air and water. Major facilities are subject

to detailed wastewater discharge requirements, contained in both their approvals and industrial sector regulations.

In addition to the new ECA regime, the Ontario government has also created the Environmental Activity and Sector Registry (EASR). EASRs are intended for certain prescribed low-risk activities, such as the use and operation of heating systems and standby power systems, printing, solar facilities, waste management systems and automotive refinishing. No specific approval is required for activities that fall within the EASR. All that is required is that the activity be registered with the MECP.

Renewable energy projects such as solar and wind-powered generation facilities in Ontario are subject to a special approval or permit under the EPA as a result of amendments associated with the *Green Energy Act*.

In Alberta, most non-oil and gas industrial projects require permits issued by, and are regulated by, Alberta Environment and Parks. Renewable energy projects and other electrical production and transmission projects are regulated by a separate regulator known as the Alberta Utilities Commission.

Quebec's EQA is the main environmental statute in that province. The EQA makes it an offence to discharge or allow the discharge of a contaminant into the environment over and above limits set by regulation, that is prohibited by regulation or in a manner that negatively impacts human health, safety, welfare or comfort or that causes damage or impairment to soil, vegetation, wildlife or property. Accidental releases must be reported to the MSDEF immediately.

Anyone who intends to undertake an activity in Quebec that may result in the release of a contaminant into the environment must first obtain a certificate of authorization from the MSDEF. If a facility is located on the Island of Montreal, then as regards air emissions, the facility is subject to standards set forth in regulations of the Montréal Metropolitan Community (MMC). Moreover, if a facility is located within the territory of the MMC, then with respect to wastewater discharge standards, the facility is subject to standards set forth in the regulations of the MMC.

A new approval regime under the Quebec EQA is now in force.

Subject to a few exceptions, a single type of ministerial authorization is required for a given project (whereas several types of authorizations may currently be required for a project). In addition, projects will be classified into different categories based on the environmental risks they present: high-risk, moderate, low-risk and negligible-risk activities. Depending on the assigned risk level, some projects will require an EIA process be followed prior to authorization, whereas a declaration of compliance will be required for low-risk activities. Negligible-risk activities, established pursuant to regulation, will be exempt from an approval requirement. Environmental approvals will also become transferable upon simple notification to the minister, which will be a significant change from the previous regime which required the minister's consent.

Under the EQA, facilities in certain industrial sectors are subject to the requirement to obtain a "depollution attestation," a type of comprehensive environmental operating permit that must be renewed every five years. The three sectors currently subject to this requirement are pulp and paper mills, and the mining and primary metals industry. Emissions standards in

depollution attestations are tailored to the facility and its receiving environment. Holders of attestations pay fees that are based on their emissions and are subject to requirements to monitor the effects of their emissions on the local environment.

Environmental permitting of activities in British Columbia primarily falls under the EMA, which prohibits the introduction of waste into the environment except in accordance with a permit, regulation or code of practice. The *Waste Discharge Regulation* prescribes the activities that may operate under a code of practice or that require permits. Some industries may be exempt from the permitting requirements under the EMA if they are authorized to operate under other legislation. The EMA permitting regime is principally administered by the Ministry of Environment and Climate Change Planning. In some situations the permitting under the EMA is delegated to other agencies such as the Oil and Gas Commission. The authorization of air emissions in the Greater Vancouver area is delegated to the Greater Vancouver Regional District.

## 8. Species Protection

The federal *Species at Risk Act* (SARA) identifies wildlife species considered at risk, categorizing them as threatened, endangered, extirpated or of special concern, and prohibits a number of specific activities related to listed species, including killing or harming the species, as well as the destruction of critical habitat that has been identified in any of the plans required under SARA. These include recovery strategies and action plans for endangered or threatened species and management plans for species of concern. Plans are developed by Environment and Climate Change Canada in partnership with the provinces, territories, wildlife management boards, First Nations, landowners and others. SARA allows for compensation for losses suffered by any person as a result of any extraordinary impact of the prohibition against the destruction of critical habitat. SARA provides for considerable public involvement, including a public registry and a National Aboriginal Council on Species at Risk that provides input at several levels of the process.

The protections in SARA apply throughout Canada to all aquatic species and migratory birds (as listed in the *Migratory Birds Convention Act*, 1994) regardless of whether the species are resident on federal, provincial, public or private land. This means that if a species is listed in SARA and is either an aquatic species or a migratory bird, there is a prohibition against harming it, or its residence, and the penalties for such harm can be substantial. For all other listed species, SARA's protections only apply on federal lands, including National Parks and First Nations Reserves. However, SARA also contains provisions under which it can be extended to protect other species throughout Canada, if the federal government is of the view that the provinces or territories are not adequately protecting a listed species.

Some provinces have also enacted endangered species legislation, most notably Ontario with an extremely restrictive regime that can significantly affect development.

The *Migratory Birds Convention Act* (MBCA) enacts an international agreement between Canada and the U.S. for the protection of migratory birds. Although most of the statute focuses on the regulation of harvesting or hunting, it also contains some environmental protection provisions. The MBCA prohibits the deposit of substances harmful to migratory birds in any waters or areas frequented by migratory birds, except as authorized by regulation. It also prohibits the disturbance of the nests of migratory birds except as authorized by regulation.

## 9. Enforcement

Individuals and corporations may be held liable for any damage to the environment, pursuant to either federal or provincial legislation, or both.

First, such liability may be quasi-criminal “regulatory” and enforced under federal or provincial criminal statutes. Upon conviction, an offence such as the discharge of waste will be accompanied by fines or jail terms. Some of these fines can be significant and accumulate rapidly upon subsequent offences. Canada relies more heavily on the criminal process for environmental enforcement than many jurisdictions. Persons subject to quasi-criminal regulatory offences are able to mount due diligence defences.

Second, persons may be named in EPOs which may require them to undertake extensive repair, delineation, monitoring and remediation obligations. Once named in an EPO, it is extremely difficult for a person to succeed in removing themselves from the EPO. Compliance is often on a no-fault basis such that persons named in an EPO are generally precluded from asserting a due diligence defence.

Third, there are also administrative penalties which may be imposed without a full prosecution upon those who run contrary to the dictates of certain environmental legislation. At the federal level, the *Environmental Violations Administrative Monetary Penalties Act*, and the *Environmental Violations Administrative Monetary Penalties Regulations* establish administrative penalties for specific offences under a variety of federal statutes. At the provincial level, in addition to fines stemming from a conviction of an offence, various provinces have established administrative “environmental penalties” that can be imposed very shortly after an environmental incident. This does not preclude the laying of charges. Liability under administrative penalties legislation is often referred to as absolute liability and persons subject to administrative penalties are often not able to mount any due diligence defences.

Under both federal and provincial statutes, enforcement officers have broad powers of investigation. They typically may issue orders to stop illegal activity or require actions to correct a violation, carry out inspections and, in certain circumstances, search and seizure.

The ranges of fines payable under environmental statutes can be significant. For example, for a first offence under CEPA the penalties are as follows:

- For individuals, between C\$5,000 to C\$1-million, and/or a term of imprisonment of up to three years
- For small-revenue corporations, between C\$25,000 to C\$4-million
- For all other persons and corporations, between C\$100,000 to C\$6-million

In all cases, the range of fines payable doubles for repeat offenders.

Other federal environmental legislation, and all provincial environmental legislation, impose fines or jail terms for breaches, some quite significant. When imposing penalties, courts are required to consider specified aggravating factors to ensure that penalties reflect the gravity of the offence. CEPA imposes broad liability on officers and directors who “directed or influenced” the corporation’s policies or activities in respect of conduct that is the subject matter of the corporation’s offence. A public registry is used to maintain details of convictions of corporate offenders.

Fourth, there is also significant potential for civil liability under common law. This may arise in a variety of circumstances, such as under tort law or in relation to defects in disclosure of environmental problems prior to a transaction. More specifically, the common heads of action under which environmental claims are brought are nuisance (unreasonable interference with the use and enjoyment of land), negligence (stemming from a failure to meet a standard of care and damage caused to a plaintiff), trespass and strict liability.

The federal *Criminal Code* contains provisions that address corporate liability and provide a basis for criminal charges to be brought against corporations in the event that an activity causes harm to persons or property and negligence or fault can be proven. Three provisions expand criminal responsibility so that it can be attributable to organizations in addition to individuals. For negligence offences, criminal intent will be attributable to an organization where one of its representatives (directors, partners, employees, members, agents or contractors) is a party to the offence and departs markedly from the standard of care that could reasonably be expected to prevent the commission of the offence. For offences where fault must be proven, an organization is a party to an offence if one of its senior officers is a party to the offence, or, acting within the scope of his or her duty, directs other representatives of the organization to commit the offence, or fails to take all reasonable measures to stop the commission of the offence by a representative of the organization.

# XV.Power



## 1. Overview

The generation, distribution and transmission of electric power is primarily governed by the laws of the individual provinces, with each province selecting its method of regulation, such as rate-regulated government-owned utilities or open markets with private utility providers, and supply mix based on each province's policy considerations and available resources.

Privately held generators or a mix of private and government-owned corporations provide the power generation in Newfoundland and Labrador, Prince Edward Island, Nova Scotia, Ontario, Alberta and British Columbia. Generation is primarily provided by rate-regulated government corporations in Quebec, Saskatchewan, New Brunswick and Manitoba. Independent power producers that generate electricity for their own use and for sale to the power grid and utilities exist throughout the country.

There is a variety of regulatory regimes that control the wholesale and retail prices of electricity. Alberta is deregulated, and Ontario is partially deregulated (and is often referred to as having a hybrid market). Most other provinces generally have a regulated price structure where the price of electricity is set by a regulatory board based upon the cost of generating and delivering the power to customers. A summary of the main laws governing the power industry in Quebec, Ontario, Alberta and British Columbia is set out below.

### 1.1 Energy boards and commissions

There are several statutes at both the federal and provincial level that govern Canada's electricity sector. In many cases, these statutes provide for ongoing regulation by federal or provincial agencies and tribunals.

The National Energy Board is an independent federal regulatory tribunal that regulates the interprovincial and international aspects of the energy industry, including the construction and operation of international and designated interprovincial power lines and the export out of Canada and import into Canada of electricity.

Power lines that are completely within the borders of one province are usually regulated by a regulatory tribunal set up by that province, such as the Alberta Utilities Commission, the British Columbia Utilities Commission, the Ontario Energy Board (OEB) and Quebec's Régie de l'énergie. Energy tribunals, whether they are federal or provincial, typically review, among other things, the economic and technical feasibility, and the environmental and socio-economic impact of proposed projects subject to their jurisdiction.

In addition, utility companies that supply electricity within a province are usually regulated by that province's regulatory tribunal. The mandate of the various tribunals varies from province to province, depending upon how electricity is regulated in that province.

## 1.2 Supply mix

Canada is blessed with significant hydroelectric resources, and hydroelectric generation accounts for a meaningful portion of electricity production in Quebec, Manitoba, British Columbia, Newfoundland and Labrador, and, to some extent, Ontario, Alberta and the other provinces.

Quebec, Manitoba, British Columbia and Ontario have significant heritage hydroelectric assets that are regulated and supply electricity to local ratepayers at below-market rates. Quebec, Newfoundland and Labrador, British Columbia and Manitoba are undertaking significant new hydroelectric development and Ontario is redeveloping some of its hydroelectric projects in northern Ontario.

Nuclear generation supplies a portion of the baseload requirements in Ontario and New Brunswick. Alberta also considers nuclear generation proposals on a case-by-case basis. Some oil sands producers have expressed interest in miniature nuclear reactor technology in order to support the development of the oil sands resource in northern Alberta. It remains to be seen whether this initiative will proceed, as current projects are not scheduled to be completed until 2020. At the opposite end of the spectrum, Quebec closed its only nuclear power facility and British Columbia's policy expressly excludes nuclear energy development.

Canada also has significant natural gas and coal resources. As a result, natural gas-fired and coal-fired generation can be found in most Canadian provinces. The ability to quickly ramp up or ramp down these forms of energy supply often means that they are used to support other intermittent forms of generation, such as wind and solar. Alberta recently added, and is in the process of adding, additional gas-fired generation. However, Ontario deliberately eliminated coal-fired generation, Nova Scotia is moving away from coal-fired generation, and Alberta will eliminate all of its coal-fired generation by 2030.

Every province has set its own renewable energy targets and how it proposes to achieve those targets. In most cases, this has taken the form of government support by offering long-term power purchase agreements at favourable prices to encourage renewable energy development, including through standard offer programs, requests for proposals and competitive bidding programs.

## 2. Quebec — Power Industry and Laws

### 2.1 Electricity sector and Regulatory Framework main factors

Quebec has a regulated electricity market. Québec's Régie de l'Énergie is the regulatory agency that supervises and regulates the transmission and distribution of electric power in Quebec. Hydro-Québec, a Crown corporation, is responsible for furnishing a guaranteed annual supply of 165 terawatt hours (TWh) of "heritage pool electricity."

#### 2.1.1 Hydro-Québec

Hydro-Québec is one of the largest electric utilities in North America. Under its incorporating statute, Hydro-Québec is given broad powers to generate, supply and deliver electric power throughout the province. Hydro-Québec is authorized to purchase all of the electric power produced by independent power producers in Quebec. Other private electricity producers



may also be called upon to supply the required energy through long-term or short-term contracts.

Hydro-Québec is organized in separate divisions:

- Hydro-Québec Production is responsible for generating power for the Quebec market and sells power on wholesale markets. This division is responsible for furnishing the heritage pool electricity to Hydro-Québec Distribution in order to supply Quebec customers.
- Hydro-Québec TransÉnergie is the transmission system's operator and manages power flows throughout the province.
- Hydro-Québec Distribution is the distributor of electricity to Quebec customers with an almost exclusive right to distribute throughout the province. In order to meet needs beyond the annual heritage pool electricity, which Hydro-Québec production is obligated to supply, Hydro-Québec Distribution buys power on open markets.
- Hydro-Québec Équipement et services partagés and Société d'énergie de la Baie James is responsible for designing and carrying out projects for the construction and refurbishment of generation and transmission facilities.

### 2.1.2 Québec's Régie de l'Énergie (Régie)

The Régie is the agency responsible for regulatory supervision of the transmission and distribution of electric power, and electricity rates in Quebec are subject to its approval. The Régie was created by virtue of the *Act Respecting the Régie de l'énergie* (Act) with the powers needed to regulate the electricity and natural gas sectors in order to respond to the requirements of the liberalization of the North American electricity market, including the guarantee of non-discriminatory access to markets. In 2000, the Act was amended to introduce more competition into the electricity market, make the Régie's mode of operation more flexible, broaden its sources of funding and establish the procedure for setting the rates and conditions applicable to the transmission and distribution of electric power.

The Régie fixes and modifies the rates and conditions for the transmission of electricity power by the electricity carrier and the distribution of electricity power by the electricity distributors. In fixing and modifying rates, the Régie favours the use of incentives to improve the carrier's and distributor's efficiency to protect the interests of the consumers. Hence, Hydro-Québec's transmission and distribution activities are subject to the conventional form of regulation based on the cost of service for those activities.

More specifically, the Régie effectively regulates the generation, transmission and distribution segments of the electricity market as follows:

- **Generation:** The heritage pool of 165 TWh is established on the basis of an average cost for heritage electricity supply of C\$0.279 per kilowatt hour and since 2014 this cost of heritage pool electricity has been indexed to inflation, except for large-power industrial customers (Rate L). The cost of electric power over and above the heritage pool electricity is determined by way of call for tenders and supply contracts are awarded on the basis of the lowest tendered price and such other factors as the applicable transmission costs. Québec's Régie has procedures in place to govern calls for tenders and contract awards, and has adopted a code of ethics on conducting calls for tenders presented to Hydro-Québec. The Régie also approves the process for purchasing programs for electricity from renewable sources and the

Act provides that the provincial government shall determine the initial conditions for defining acquisition of blocks of energy by decree establishing supply rates, which represent the energy portion attributed to a class of consumers.

- **Transmission:** The Régie is responsible for setting the load and point to point rates with incentive mechanisms to improve the efficiency of Hydro-Québec TransÉnergie and to establish rates based on cost of service including a reasonable return. As required under the Act, the rates shall respect territorial uniformity. The Régie also adopts and monitors the application of reliability standards for Hydro-Québec TransÉnergie's network and ensure the non-discriminatory access to the network.
- **Distribution:** The Régie sets distribution rates on a cost of service basis including a reasonable rate of return. The Régie is responsible for setting rates respecting territorial uniformity and it also approves the conditions of Hydro-Québec Distribution supply contracts.

## 2.2 Quebec's energy supply mix and energy strategy

In 2013, Quebec's electricity generation capacity totalled 43,731 *megawatts* (MW), mainly generated through hydroelectricity (90.2 per cent), but also winds power (5.5 per cent) or biomass-based cogeneration (0.6 per cent). Quebec has an estimated 45,000 MW of untapped hydroelectric power potential with approximately 20,000 MW offering an economic potential. Quebec's exploitable wind power potential amounts to almost eight million MW.

On April 7, 2016, the Québec Energy Strategy 2016-2030 (Strategy) was released, pursuant to which the government's goals and actions in the energy sector for the period from 2016 to 2030 were defined. Pursuant to the Strategy, the government has set the following targets for 2030: (i) improve energy efficiency by 15 per cent, (ii) reduce the consumption of petroleum products by 40 per cent, (iii) eliminate thermal coal usage, (iv) increase renewable energy production by 25 per cent and (v) increase bioenergy production by 50 per cent.

On June 26, 2017, the Government of Québec unveiled the Action Plan 2017-2020 (Action Plan) in order to implement the first steps of the Strategy through public investments totalling C\$1.5-billion. Among other things, the Action Plan sets out the construction of a 100 MW solar power station by Hydro-Québec.

On the transmission side, Hydro-Québec's objective is to increase exports to the United States with the contemplated development of projects with New England including the 1,090 MW Northern Pass Transmission project between the Des Cantons substation in Quebec and the Franklin substation in southern New Hampshire.

Additionally, the Plan Nord launched by the Quebec government seeks to develop Quebec's vast territory north of the 49th parallel, which covers 72 per cent of the province or approximately 1.2 million km<sup>2</sup>. The initiative seeks an integrated development of transport, mining and energy infrastructure. The Strategy refers to the Plan Nord by promoting the development of liquefied natural gas (LNG), natural gas, hydrocarbons and wind farm projects in this portion of Quebec.

## 3. Ontario — Power Industry and Laws

### 3.1 Policy setting and regulation

Two entities set electricity policy and regulate Ontario's electricity market: the Government of Ontario and the Ontario Energy Board. There is also a provincially owned corporation, the Independent Electricity System Operator (IESO) that administers the electricity market.

#### 3.1.1 Government of Ontario

The Ontario cabinet retains authority to set policy for Ontario's energy sector, but day-to-day oversight of Ontario's electricity and natural gas industries is maintained by the minister of energy. Upon the approval of cabinet, the minister of energy can issue policy directives to the OEB and the IESO, and each is required to implement such policy directives. The minister of energy can also request that the OEB examine and advise upon any issue with respect to Ontario's energy sector.

#### 3.1.2 Ontario Energy Board

The OEB is the regulator of Ontario's electricity industry. Although the OEB reports to the minister of energy, it operates as an independent entity. OEB responsibilities include: determining the rates charged for regulated services in the electricity sector including transmission and distribution services; approving the construction of new transmission and distribution facilities; formulating rules to govern the conduct of participants in the electricity sector; engaging in advocacy on behalf of electricity consumers; hearing appeals from decisions made by the IESO; monitoring and approving the IESO's budget and fees; and monitoring electricity markets and reporting thereon to the minister of energy.

In Ontario, the cost for transmission and distribution of electricity to a customer is charged separately from the commodity price of electricity. The OEB typically regulates the cost of transmission and distribution service, while the commodity cost of electricity is determined in the IESO's real-time wholesale market. In addition, the provincial government has imposed on most electricity customers an additional charge known as the Global Adjustment. The Global Adjustment rate is typically inversely related to the IESO market price of electricity, and usually the lower the market price the higher the Global Adjustment rate.

### 3.2 Market creation and Ontario Hydro's successor corporations

Until 1998, the Ontario electricity sector was dominated by Ontario Hydro, a provincially owned company that integrated generation, transmission, system planning, electrical safety and rural and remote distribution functions. In 1998, Ontario Hydro was separated into five companies, each provincially owned, including: Ontario Power Generation Inc., which assumed Ontario Hydro's generation assets; Hydro One Inc., which assumed the transmission and rural distribution businesses of Ontario Hydro; and the IESO, which assumed responsibility for administering the electricity markets in Ontario and for directing the operation of Ontario's transmission grid.

A fully competitive wholesale and retail market opened on May 1, 2002, but electricity price and distribution rate freezes were enacted in December 2002 because of political pressure

due to volatile electricity prices. The rate freezes have since been lifted, but some elements of price smoothing and subsidy still remain.

As a result of intervention in the market, merchant generation effectively ceased. The Ontario Power Authority (OPA) was created to act as a creditworthy counterparty through which new generation could be procured, by means of long-term power purchase or contract-for-differences agreements, and the OPA was also responsible for long-term system planning, conservation and demand management, and certain aspects of market evolution.

The Ontario government merged the OPA and the IESO into one entity operating under the IESO name, effective January 1, 2015.

### **3.3 Independent Electricity System Operator**

The IESO is a not-for-profit government-owned corporation. Following its merger with the OPA in January 1, 2015, the IESO is responsible for two main functions:

- Administering Ontario's electricity markets
- Procurement and management of electricity contracts (the responsibilities of the former OPA)

#### **3.3.1 IESO physical and financial markets**

The IESO is responsible for administering the electricity markets in Ontario and for directing the operation of Ontario's transmission grid. The IESO has issued Market Rules that govern the market for electricity and ancillary services in Ontario. The IESO is required to administer the electricity market in accordance with the Market Rules, and Market Participants are required to comply with the Market Rules. Subsequent to its merger with the OPA on January 1, 2015, the IESO also assumed the responsibilities of the former OPA for procuring long-term power contracts and for long-term system planning, conservation and demand management,

The IESO administers both physical markets and financial markets for electricity. In terms of physical markets, the IESO operates the real-time wholesale market and the market for ancillary services. The IESO may also procure physical output through reliability must-run contracts with generators. Currently, the transmission rights market is the only financial market. Energy buyers and sellers have the option to enter into physical bilateral contracts which are not part of the IESO scheduling and dispatch process, but if the parties choose, they can submit specific data to the IESO and ask the IESO to provide a market settlement service.

#### **3.3.2 Real-time wholesale market and commodity price**

In the Real-Time Wholesale Market, the price of the electricity commodity is determined by the availability of supply and changes in demand. The IESO runs a real-time market, meaning purchases of electricity are made as they are needed.

Each day, the IESO forecasts the demand for electricity and makes this information available to participants in the market. Generators and other energy suppliers send in their offers to provide energy. The IESO then matches the offers to supply electricity against the forecasted demand. It first accepts the lowest-priced offers and then "stacks" up the higher-priced offers

until enough have been accepted to meet customer demands. Instructions are issued to power suppliers based on the winning bids, who then provide electricity into the power system for transmission and distribution to customers. All suppliers are paid the same Market Clearing Price based on the last offer accepted. A new price is set every five minutes depending on the supply and demand in the market. The five-minute prices are averaged to determine the Hourly Ontario Energy Price (commonly referred to as the HOEP).

While long-term projections still forecast growth in electricity demand, in the short term there is excess generating capacity in Ontario, which is driving down wholesale market prices. For example, in Ontario there has been surplus baseload generation causing “must-run” nuclear and large hydroelectric generators to bid in at prices resulting in negative pricing. This downward pressure on wholesale prices did not translate into downward pressure on the total price paid for the electricity commodity as most electricity consumers in Ontario also pay a charge known as the Global Adjustment, which is used to pay for a variety of government programs, such as the guaranteed prices paid to generators under various procurement contracts and for conservation and demand management programs.

The Global Adjustment rate varies monthly and is determined by a formula imposed by a government regulation. It is typically inversely related to the IESO market price of electricity and usually a lower HOEP will result in a higher Global Adjustment rate.

The amount of Global Adjustment paid by residential and small business customers is calculated based on the amount of electricity consumed by the customer each month. However, certain large consumers pay based on their average peak demand when the use of system-wide electricity is the highest and not based on their actual consumption.

The Global Adjustment rate for large consumers — those with an average hourly peak demand greater than five MW, or between 50 KW and five MW for certain industrial and commercial customers — varies individually depending on their energy use during coincident peak hours. For example, if a business on average uses one per cent of electricity demand during the five highest coincident peaks of the year, its Global Adjustment rate will represent one per cent of all Global Adjustment costs. Eligible large consumers can reduce their electricity costs by reducing their energy use during times of peak system-wide electricity demand.

In addition to the price of the electricity commodity, electricity customers in Ontario pay additional charges for the cost of transmission and distribution to the customers’ location at regulated rates determined by the OEB.

In June 2018, Ontario elected a new government, which came into office promising to reduce electricity prices by 12 per cent, but it is unclear as yet whether the new government will be able to fulfill this promise.

### **3.3.3 Operating Reserve market**

The IESO administers an Operating Reserve (OR) market, which ensures that additional supplies of energy are available should an unanticipated event take place in the real-time energy market, such as a surge in demand, an unexpected equipment failure at a generating facility or an unexpected drop in wind velocity. The IESO can call on this spare energy capacity, which is offered into the OR market by dispatchable generators or dispatchable

loads (e.g. to large-volume users who are able to cut consumption) who can respond quickly to dispatch instructions from the IESO.

### **3.3.4 Ancillary services**

Ancillary services are required to maintain the reliability of the IESO-controlled grid, including: frequency control, voltage control, reactive power and black-start capability. The IESO procures ancillary services through contracts with Market Participants who provide such services in accordance with the performance standards articulated in the Market Rules.

### **3.3.5 Reliability must-run contracts**

The IESO has authority to execute Reliability Must-Run (RMR) contracts that allow the IESO to call on the contracted facility to produce electricity if it is needed to maintain the reliability of the electricity system. Any costs that the IESO incurs for RMR contracts are recovered from all Market Participants as part of the IESO settlement process.

### **3.3.6 Transmission rights market**

The Transmission Rights Market allows a Market Participant to sell and to purchase transmission rights associated with transactions between the IESO-administered Market and an adjoining electricity jurisdiction. The Transmission Rights Market allows Market Participants who import and export power to buy financial protection ahead of time to hedge their prices for power across interties. The IESO conducts auctions for transmission rights, which are financial instruments that entitle a holder to a settlement amount based on the difference between energy prices in two different zones. The IESO determines which bids and offers are successful, given the clearing price for each transmission rights auction.

### **3.3.7 Day-ahead commitment process**

The IESO's Day-Ahead Commitment Process requires dispatchable generators and dispatchable loads to submit offers and bids one day in advance, and generators are able to signal in advance any limits on their production for a given dispatch day. The Day-Ahead Commitment Process is intended to improve information regarding the operation of the market so as to allow the IESO and Market Participants to better gauge the adequacy of market resources and help to improve forecasts of next-day market prices.

### **3.3.8 IESO's procurement of electricity contracts**

On January 1, 2015, the IESO took over the functions that were previously being carried out by the OPA, including responsibility for forecasting medium and long-term demand for and reliability of electricity resources; for planning adequate generation, demand management, conservation and transmission for Ontario; and for procuring new generation through various forms of procurement processes. As at March 31, 2018, the IESO was managing 32,217 procurement contracts, which had a combined capacity of 27,655 MW. This capacity was spread across several fuel types including nuclear, natural gas (both Combined Heat and Power and Simple/Combined cycle), and renewables like wind, solar, hydro and bio-energy.

Consistent with Ontario's emphasis on energy conservation, the IESO administers a number of programs designed to promote energy efficiency, including the Industrial Accelerator program to assist eligible transmission-connected companies to fast-track capital investment

in major energy-efficiency projects by providing financial incentives to encourage investment in innovative process changes and equipment retrofits.

### **3.3.9 IESO Market Renewal Project**

The IESO is currently engaged in a Market Renewal project to consider and implement market design changes over the coming years. Currently, Ontario's electricity market design uses a "two-schedule" energy market for determining and settling operational decisions and in the past, Ontario primarily obtained additional electricity supply by entering into long-term procurement contracts with independent power producers. It is expected that Market Renewal will fundamentally reform both of these practices by: (1) the introduction of a Day-Ahead Market based on a Single Schedule Market and (2) the implementation of an Incremental Capacity Auction for procuring longer-term electricity supply. IESO intends to use Market Renewal to provide greater certainty to market participants and lower the cost of electricity in Ontario.

## **3.4 Transmission and distribution**

Hydro One Networks Inc. (HONI), which is a wholly owned subsidiary of Hydro One Inc. (Hydro One), is the owner and operator of over 90 per cent of the transmission assets in Ontario. HONI also operates a significant distribution business. It is the largest local distribution company (LDC) in Ontario and serves approximately 1.3 million customers, primarily in the province's rural areas. The remaining LDCs are mainly owned by municipalities. Transmitters and distributors, including HONI, are licensed by the OEB and are subject to rate regulation by the OEB on a cost-of-service basis.

Prior to 2015, Hydro One, the parent of HONI, was a Crown corporation and wholly owned by the province. In April 2015, the Ontario government announced its intention to broaden ownership of Hydro One through an initial public offering. Hydro One has completed two share offerings and Ontario has sold approximately 2.4 per cent of the outstanding common shares to a limited partnership owned by 129 First Nations in Ontario. As a result, Ontario's ownership interest has been reduced to approximately 47.4 per cent of Hydro One's total issued and outstanding common shares.

The provincial government is encouraging municipally owned LDCs to consolidate to form larger LDCs. The province expects that consolidation of LDCs will result in greater economies of scale for the benefit of ratepayers.

The province has also taken steps to encourage private developers to participate in the development of new large-scale transmission projects.

## **4. Alberta — Power Industry and Laws**

Alberta is the only province in Canada, and one of a limited number of jurisdictions in the world, with a deregulated, competitive wholesale power generation market. This market is commonly referred to as the "Power Pool", which sets the price for electricity across Alberta for each and every hour of the year. It is operated by the Alberta Electric Systems Operator (AESO), which was established by the *Electric Utilities Act* (EUA). Currently, all electric energy bought and sold in Alberta must be exchanged through the Power Pool, and the hourly price determines the revenue for generators as well as the cost for consumers. A wide

variety of contractual arrangements also exist such that the hourly price may not be the same for all market participants, but these contracts are influenced by the hourly price signal. It is this set of price signals, as opposed to a regulated “cost-of-service” model, which makes Alberta’s power market deregulated and highly responsive to supply-demand dynamics. However, in November of 2016, the Alberta government announced its decision to transition from an electricity-only market structure to a structure that incorporates a capacity market operating alongside the pre-existing electricity-only market. This transition is expected to be completed by 2021. This is discussed in further detail below (see Section XV, 4.4.2.2, “Parallel Capacity Market Proposal”).

## **4.1 Policy setting and regulation**

The three entities that set electricity policy and regulate Alberta’s electricity market are the Alberta Utilities Commission (AUC); AESO; and the Market Surveillance Administrator (MSA).

### **4.1.1 Alberta Utilities Commission**

The AUC is an independent, quasi-judicial government agency mandated to ensure that Alberta’s utility services are provided in a manner that is fair, responsible and in the public interest. To this end, the AUC regulates electric utilities so that customers receive safe and reliable service at just and reasonable rates. Among other things, the AUC is responsible for: overseeing tolls and tariffs regarding energy transmission; siting and approval of new generation and transmission facilities; establishing requirements for retail electric markets; and adjudicating market participant conduct.

### **4.1.2 Alberta Electric System Operator**

AESO is the independent system operator of Alberta’s electricity system. AESO’s primary responsibility is operating and planning Alberta’s interconnected electric system (AIES) in a safe, reliable and economic manner and for ensuring fair and open access to the AIES. AESO maintains balance on the AIES by monitoring the demand for electricity and dispatching electrical supply to match such demand in real time. To this end, AESO manages power settlements under the Power Pool. To plan for future need, AESO forecasts load and generation growth to determine when, where and what type of transmission facilities are required to be built.

AESO also implements transmission tariffs for the purpose of recovering the costs of building, maintaining and operating the transmission system. These tariffs, which are subject to AUC approval, are structured to achieve a fair allocation of costs among stakeholders and to support a competitive market. Generators pay the costs of connecting their generating units to the grid, and consumers pay all other costs of transmission by way of a usage-based tariff.

In addition, AESO has been tasked with designing and implementing the new capacity market structure. This task forms part of AESO’s mandate to encourage growth in renewable electrical generation while maintaining the reliability of the system and ensuring that AESO’s technical requirements in respect of its oversight and system operation responsibilities are met. Similarly, AESO is responsible for administering the Renewable Electricity Program (REP), in order to support the Alberta government’s Climate Leadership Plan (Plan). For more information regarding the REP and the capacity market structure, see Section XV,



4.4.2.1, "Renewable Electricity Program" and Section XV, 4.4.2.2, "Parallel Capacity Market Proposal".

### **4.1.3 Market Surveillance Administrator**

Established by the EUA, the MSA acts as a monitor of Alberta's electricity market to ensure its fair, efficient and openly competitive operation. The MSA has a broad mandate to observe and investigate the Alberta market to assess market participants' conduct and investigate complaints received. If the MSA determines that a participant violated market rules or the principles of a fair, efficient and openly competitive market, such matter is referred to the AUC for adjudication.

## **4.2 Alberta's Power Pool**

Alberta's Power Pool is an independent, central, open-access pool that functions as a spot market, matching demand for power with the lowest-cost supply to establish an hourly pool price. The Power Pool is governed by competitive market forces of supply and demand where electricity is purchased and sold on a "real time" basis as it is produced and consumed. AESO manages power settlements under the Power Pool. AESO accepts offers to sell power from generators and bids from various sources of "load" (purchasers of power) through an online trading platform. In 2017, Alberta's wholesale electricity market was comprised of 201 participants and about C\$3-billion in energy transactions.

### **4.2.1 Setting the Power Pool price**

Suppliers offer a price for their power seven days ahead of the delivery hour. As long as they have an acceptable operational reason, suppliers may change their volumes at any time, and may change their offer price up to two hours prior to the delivery hour. Suppliers cannot change their offer price after this point.

Based on these offer prices from power suppliers, AESO generates a "merit order" that sorts the offers from the lowest price to the highest price for every hour of the day. AESO then dispatches the lowest price offers at the bottom of the merit order, moving incrementally up through the merit order until all demand for power has been supplied for that hour. The hourly pool price, which is paid on all MWs sold in that hour, is set by the last offer accepted in the merit order.

Imports and certain forms of non-dispatchable generation must offer their power generation to the Power Pool as a "zero-price" offer, meaning their power generation is offered on a "price-taker" basis. These zero-price offers will be first in the merit order, and these suppliers will receive the pool price otherwise established by fixed-price offers. "Price-takers" do not have any effect on determining the hourly pool price and must "take the price" set by the Power Pool.

Suppliers of dispatchable generation may also choose to be price-takers if they want to ensure that their generation is dispatched. For example, suppliers of coal-fired generation typically offer a portion of their generation capacity at the zero-price to guarantee that its generation is accepted into the Power Pool. It is quite costly and burdensome to shut-in coal generation, and the facility owner needs to avoid the situation where the coal generation capacity is not dispatched due to its offer price being higher than the settled pool price.

## 4.2.2 Offering and selling electricity into the Power Pool

Three categories of sellers are eligible to offer and sell electricity through the Power Pool: marketers, who trade electricity within Alberta; importers, who import electricity through interprovincial ties with Saskatchewan, British Columbia or the international tie with Montana and sell this electricity into the Power Pool; and generators, which include both independent power producers who own and operate generating capacity developed after 1996 and the buyers under Power Purchase Arrangements (PPAs) who are entitled to offer and dispatch the generation capacity of formerly regulated generation units. For more information regarding PPAs, see Section XV, 4.3.1., “Generation”.

## 4.2.3 Bidding and purchasing electricity from the Power Pool

There are also three categories of eligible purchasers who may acquire electricity from the Power Pool: retailers, who market and sell electricity to small commercial and residential consumers through the competitive retail market; direct access customers, generally large industrial customers who purchase their electricity on a wholesale basis through the Power Pool; and exporters, who purchase electricity from the Power Pool and export it to British Columbia, Saskatchewan or Montana. In order to become a Power Pool participant, one must obtain a licence from AESO.

## 4.2.4 Commercial arrangements in the Power Pool

The generation and sale of electricity in Alberta is governed by the EUA, which requires that all electricity entering or leaving the AIES must be exchanged through the Power Pool. There are generally three methods of selling electricity in Alberta: through the Power Pool at the hourly pool price; through a direct sales agreement; and through a forward financial contract.

### 1. Power Pool sales

As discussed, AESO creates an hourly index, or pool price, based on the highest price offer needed to balance supply and demand. The hourly pool price is charged to the purchaser and paid to the seller who participated in the wholesale market during that particular hour. The maximum pool price is capped, therefore all offer and bid prices for electricity must be between C\$0/MWh and C\$999.99/MWh.

### 2. Direct sales agreements

A direct sales agreement is a privately negotiated contract between two parties relating to the sale or purchase of electricity prior to the actual production and consumption of such electricity. A direct sales agreement allows a generator to bargain directly with a consumer to establish a set price for electricity, instead of using the pool price. Despite the fact that the price is determined through negotiation, is independent of the pool price, and payment occurs outside the Power Pool, the flow of electricity from seller to buyer still occurs through the Power Pool in real time and must be reported to AESO. AESO needs to know the amount of power purchased so that volumes sold into and taken out of the Power Pool may be adjusted to reflect the direct sales agreement.

The delivery of electricity in real time through the Power Pool under the direct sales agreement does not require generation and consumption in real time. This is because AESO balances the difference in volumes actually generated and consumed by the parties versus

the volumes contracted for in the direct sales agreement. If a generator produces less volume than the amount specified, the difference is considered a purchase from the spot market at the hourly pool price and is billed to the generator. Similarly, if a buyer consumed less volume than the amount specified, the difference is considered a sale to the spot market at the pool price and paid to the suppliers.

### **3. Forward financial contracts**

Forward financial contracts are agreements under which one party agrees to pay the other the difference between the price specified in the contract and the hourly pool price for the contract period. Forward financial contracts involve the flow of money and not the delivery of electricity. This arrangement allows a generator to hedge their risk by ensuring they will receive the contracted price for the duration of the contract. Without such a forward financial contract, the generating asset would either be idled or run at a loss any time the pool price is lower than the generator's operating costs. The downside for the generator is that it will lose out on additional profits any time the pool price exceeds the contract price. Since the forward financial contract occurs outside the Power Pool and is independent of the flow of electricity, it allows for the participation of parties aside from Power Pool licensed purchasers and sellers.

#### **4.2.5 Ancillary services**

AESO must also procure system support services, known as "ancillary services", from generators to assist in electricity transmission by maintaining system stability through voltage and frequency control. Ancillary services ensure the stability of the AIES so that electricity is efficiently and reliably transmitted throughout Alberta and system-wide blackouts and brownouts are avoided. These ancillary services are similar to those seen in other jurisdictions, such as Ontario, and include operating reserve, transmission must run, black start and load shed schemes.

## **4.3 Electricity market**

The electricity market in Alberta can be divided into three distinct areas: generation; transmission and distribution; and load (including the retail market). Generally speaking, generation is completely deregulated, with the exception of facilities permitting requirements; transmission and distribution are almost fully regulated, with the exception of government-mandated critical transmission infrastructure; and load is generally deregulated, with the notable exception of the retail market regulated rate option (RRO) (see Section XV, 4.3.3., "Load").

### **4.3.1 Generation**

#### **4.3.1.1 Generation developed prior to 1996**

Prior to 1996, the power generation market was regulated under a utility-based cost of service model, whereby generators built and operated plants in return for a regulated power rate. Following the generation market's deregulation, PPAs were introduced to govern the sale of power from the then-existing power plants. These PPAs are "arrangements," not private agreements, imposed by Alberta's Power Purchase Arrangements Determination Regulation. Under a PPA, the owner, primarily of baseload, coal-fired generation facilities,

has the right to own and operate generation facilities and receive government-guaranteed payments from a private PPA buyer who purchased the rights to such facility's PPA. The PPA buyer has the right to offer and sell the output from such generation facility through the Power Pool. The PPA buyer retains all profits and loss resulting from the difference of the payments required to be made to the generation facility owner and the price received from the seller output into the Power Pool.

PPAs for each generation facility were put up for auction in 2000 and went into effect on January 1, 2001. PPAs expire over various terms. After they expire, any useful economic life in the underlying facilities will be returned to the original owner for dispatch into the Power Pool or decommissioning.

In the past, PPAs governed approximately 30 per cent of the power generated and sold in Alberta. However, changes in Alberta's greenhouse gas (GHG) regulatory regime (see Section 4.4.2 "Alberta's Climate Leadership Plan"), announced in 2015, increased GHG compliance costs for large industrial emitters, including coal-fired generation facilities subject to PPAs. All of the PPA buyers exited the PPAs in reliance on provisions allowing termination (without payment of a fee) due to changes in law that made the PPAs "unprofitable or more unprofitable" for the remaining term. Upon termination, the Balancing Pool, a statutory corporation created in connection with the 1996 deregulation, became the deemed buyer under all of the terminated PPAs. Currently, the Balancing Pool holds all four remaining PPAs, which account for only 14 per cent of the power generated and sold in Alberta. These PPAs are scheduled to expire on December 31, 2020.

#### **4.3.1.2 Generation developed after 1996**

Generation plants added after market deregulation in 1996 are not subject to PPAs and have been built, and continue to be built, with private risk capital. They offer and sell their power directly to the market through the Power Pool and not through a third party marketer. With the exception of projects developed through the REP, generation developers and owners are not guaranteed a government mandated rate of pay, but instead take all financial risks that the Power Pool price will generate an acceptable rate of return.

Generators can hedge these financial risks by entering into direct sales agreements or financial forward contracts. Alternatively, generators pass the risks onto third parties through alternative contractual relationships. For example, in tolling arrangements, a third party agrees to pay the facility owner a fixed capacity payment, along with ongoing operating and maintenance costs, in return for the right to offer and sell the generation capacity into the Power Pool.

Deregulation also eliminated the requirement for developers to establish a market need for new generation capacity via a regulatory hearing prior to the construction and operation of such capacity. Instead, development of new capacity is determined on a competitive market basis, with the Power Pool price providing the "development signal" to prospective generation developers. If a prospective developer forecasts that the future supply and demand will produce a pool price capable of providing an acceptable rate of return for new generation capacity, the developer should proceed with the development, construction and operation of new capacity. Facilities continue, however, to be subject to AUC regulatory approval regarding siting, environmental, water usage and other facilities permitting requirements. Furthermore, given the recently announced transition to hybrid electricity-only and capacity

market, prospective developers currently face regulatory uncertainty with considering the decision to invest in generation capacity.

### **4.3.2 Transmission**

In Alberta, the power transmission and distribution system remains a natural monopoly and is regulated under a cost-of-service model, with AESO and the AUC setting the transmission tariff. The tariff is set at a rate where the transmission owner is meant to recover operating costs and receive a reasonable rate of return on its investment. Electricity transmission and distribution continue to be regulated by the AUC based on both “need” and “facilities” requirements.

Owners of transmission facilities retain ownership of their respective components of the system, but the transmission system as a whole is operated by AESO. There are three main transmission facility owners in the province: ATCO Electric Ltd., FortisAlberta and AltaLink, L.P., the latter of which owns more than half of Alberta’s transmission system and serves 85 per cent of its population. All entities eligible to trade power through the Power Pool have open access to the transmission grid.

### **4.3.3 Load**

Load is composed of two constituents: (i) direct access customers, primarily large volume industrial and commercial consumers of power who are registered Power Pool participants and directly purchase their electricity requirements from the Power Pool on a wholesale basis; and (ii) the retail market, representing lower volume commercial consumers of power and residential power consumers. The market is currently fully deregulated for industrial and commercial customers who either act as self-retailers interacting directly with the Power Pool or who have access to competitive retailers as their electricity provider.

The retail market, primarily made up of residential customers, has access to electricity either from competitive electricity retailers or through a government-mandated RRO. The RRO allows residential customers the option to purchase their power at a regulated rates established on a monthly basis by the AUC. On June 1, 2017 the Alberta government capped the RRO at 6.8 cents per kilowatt hour, effective until May 31, 2021. Retail customers may elect to sign a contract with a competitive retailer where the rates and terms of service are not regulated. Customers who choose not to contract with a competitive retail supplier automatically receive power from the default RRO provider for the region at the regulated rate.

## **4.4 Supply mix**

### **4.4.1 Current supply mix**

Some types of electricity generation facilities are considered “dispatchable” in the sense that they are able to come online to dispatch electricity fairly easily in order to quickly increase generation during “peak” hours. Generally speaking, in Alberta, dispatchable generation is represented by natural gas-fired generation facilities, which are the marginal producers or price-determining units through the Power Pool’s price-setting mechanism during “peak” hours.

Non-dispatchable generation facilities are not brought online as easily. For example, coal-fired generation, although capable of being offered into the Power Pool at any time, is not easily dispatchable in terms of being readily taken on and off-line in response to system supply requirements. Coal-fired generation facilities represent lower marginal cost sources of generation and therefore carry much of the baseload generation requirements during both “peak” and “off peak” periods. As a result of carrying this baseload generation, coal-fired facilities are the marginal producers or price-determining units through the Power Pool’s price setting-mechanism during “off peak” hours.

Currently, Alberta has 16,626 MW of installed electricity generation capacity and 26,000 km of transmission lines. Thermal sources account for the majority of Alberta’s installed generating capacity; natural gas accounts for approximately 45 per cent and coal almost 38 per cent. The remainder is hydro, wind and biomass (electricity produced from organic sources such as wood waste, garbage or animal matter).

The largest renewable source of installed generation capacity in Alberta is wind. Out of all Canadian provinces and territories, Alberta ranks third with 37 wind installations with the capacity to generate up to 1,445 MW of electricity. However, wind generation currently only constitutes about nine per cent of Alberta’s existing generation capacity. This is set to dramatically increase as AESO estimates that by 2037 Alberta’s wind energy capacity will more than quadruple to 6,445 MW and comprise 26 per cent of the province’s total generation capacity. Estimates of total future wind generation capacity have significantly increased from past predictions in large part due to the Alberta government’s Climate Leadership Plan (Plan) and the REP (see Section XV, 4.4.2.1, “Renewable Electricity Program”). AESO predicts that by 2037, renewables and co-generation (a process through which electricity and useful thermal energy are simultaneously produced through a steam or gas powered generator for the purposes of industrial or commercial heating and cooling) will account for approximately two-thirds of electricity generated in Alberta.

#### **4.4.2 Alberta’s Climate Leadership Plan**

Soon after taking office in 2015, Alberta’s newly-elected government announced a series of changes to the province’s approach to regulating GHG emissions. In November 2015, the province introduced the Plan, which seeks to enlarge the scope of GHG regulation in Alberta. While almost the entirety of the Plan will affect Alberta’s supply mix to some degree, the key planks of the Plan that will most directly influence the supply mix are: the implementation of a broad-based carbon levy, a phase-out of emissions from coal-generated electricity and the development of more renewable energy. Alberta will decommission all of its coal-fired power plants (unless they have zero emissions) by 2030, which equates to approximately 38 per cent of the province’s currently-installed generating capacity. C\$3.4-billion, of the estimated C\$9.6-billion, in future revenues from the carbon levy has been earmarked for the development of renewable energy projects to replace two thirds of the decommissioned capacity, with the remainder expected to be replaced with natural gas generation.

##### **4.4.2.1 Renewable Electricity Program**

On November 3, 2016, the Alberta government announced its endorsement of AESO’s recommendations for the REP and introduced the *Renewable Electricity Act* (Alberta). The aim of the REP is to use incentive structures, primarily through a series of competitive bidding processes for renewable energy credits, to add 5,000 MW of renewable generation to the Alberta electricity market by 2030. Broadly speaking, the REP functions through competitive

bids for government support of renewable projects through the issuance of Renewable Electricity Support Agreements (RESAs). Successful bidders will be entitled to subsequently sell their electricity production. The REP uses an indexed renewable energy credit method, whereby RESAs are bid on based on the generator's estimated cost to operate their new renewable generation project (the strike price). If the price the generator actually receives on the market is less than the strike price, AESO will pay the difference to the generator; however, if the pool price exceeds the strike price, the generator will pay the difference to AESO. AESO will award 20-year RESAs to eligible projects that can be developed at the lowest attribute price per MW hour. The process will also be subject to an affordability threshold above which bid prices may be deemed unaffordable.

Each competitive bid will follow a three-stage process, including a request for expressions of interest (REOI), a request for qualifications (RFQ) and a request for proposals (RFP). The entire competitive process will be monitored by a third-party observer that will advise and report on the process with the goal of enhancing fairness and accountability.

The successful bidders for REP Round 1 were announced on December 13, 2017. Four projects were awarded RESAs in REP Round 1, delivering 595.6 MW of wind generation to Alberta and exceeding the first round target of 400 MW. The weighted average bid price for the first round of bids was C\$37 per MWh, setting the record for the lowest renewable electricity pricing in Canada. The target date for commercial operations of these projects is December 1, 2019.

REP Round 2 and REP Round 3 are being run simultaneously. The REOIs for these rounds were issued on March 29, 2018 and the associated RFQs were issued on April 27, 2018. Rounds 2 and 3 have procurement targets of 300 MW and 400 MW respectively, and the projects must achieve commercial operation by June 30, 2021. Projects bidding in REP Round 2 must have 25 per cent Indigenous equity ownership and maintain that ownership for three years following commercial operation. The RFPs for the REP Round 2 and REP Round 3 are expected to open September 17, 2018 and the successful bidders are expected to be announced in December 2018.

#### **4.4.2.2 Parallel Capacity Market Proposal**

While initially the REP was not intended to fundamentally alter the electricity market structure in Alberta, it was quickly recognized that establishing an enhanced renewables sector and phasing out such a significant portion of Alberta's installed capacity would threaten the reliability of the market as it currently stands. In recognition of this, the Alberta government announced on November 23, 2016 that it would restructure the electricity market to include a capacity market that will operate alongside the present wholesale electricity market. This decision was in keeping with a formal recommendation put forth by AESO in October of 2016. Under the capacity market model, generators will be paid both for the capacity they could offer the market (even when they are not operational) and the price they actually receive for the electricity they generate when operational. Bill 13 - *An Act to Secure Alberta's Electricity Future* was passed by the Alberta government on June 11, 2018 to provide the legal framework required to transition to a capacity market.

Since 2016, AESO has engaged with stakeholders in order to assist in developing and implementing the new capacity market in Alberta. In June 2018, AESO published the Comprehensive Market Design (CMD), which is the result of the consultation process and outlines AESO's proposed technical design for the capacity market. Key features of the CMD

include the requirement that capacity assets prequalify to participate in the capacity market, the calculation of capacity ratings representing physical reliability, the development of forward capacity and rebalancing auctions, the development of supply obligations and performance assessments, and the use of financial security and settlements. The first capacity market procurement is expected in 2019, with the first contracts awarded in 2020-2021.

AESO is also developing ISO Capacity Market Rules regarding the establishment and operation of the capacity market, which are expected to be filed in January 2019. A demand curve will also be filed in January 2019 for the purposes of ensuring that AESO can procure enough capacity to meet an established resource adequacy standard. An ISO tariff to allocate the costs of procuring capacity is expected to be filed in late 2019.

## 5. British Columbia — Power Industry and Laws

British Columbia has a regulated electricity market. The British Columbia Utilities Commission (BCUC) is an independent regulatory agency that regulates electricity utilities pursuant to the *Utilities Commission Act* (UCA). British Columbia has a provincially owned utility company, known as BC Hydro, which is responsible for delivering power generation and transmission to users in the province. As BC Hydro has a virtual monopoly over these activities in the province, the BCUC has the responsibility under the UCA to provide oversight of its activities, including approving rates charged to customers and BC Hydro's spending and capital programs. Further, BC Hydro or any other person must generally obtain a "certificate of public convenience and necessity" from the BCUC before beginning the construction or operation of a public utility plant or system, or an extension of either.

There are no significant subsidies or incentives for power generation entrants in British Columbia. There are no specific barriers to investment in the British Columbia power sector by non-resident individuals or corporations. However, in certain circumstances, the change of control of any utility regulated by the BCUC may require approval from the BCUC, which is charged with the responsibility to determine that such a change of control is in the public interest.

As the significant majority of the land base in British Columbia is owned by the province, anyone wishing to establish a power generation facility is likely to be constructing on provincial land, which may require leases or other forms of tenure and permits from provincial regulators to construct and operate such facilities. Depending on the nature of the project, a variety of environmental permits, approvals and assessments may also be required. Such requirements may also extend to projects on private land.

British Columbia has a large number of First Nations (aboriginal) groups that claim virtually all of the provincial land base as their traditional territory. As a result, legal requirements exist that may require a power developer to enter into consultations with relevant First Nations to determine the potential impact, if any, of the project on the First Nations people. Accommodation measures may be required to be undertaken by proponents for such impacts. Therefore, project proponents often reach "impact benefit agreements" with affected First Nations. Similar consultations and accommodation measures are required in all of Canada's provinces if a project may affect a First Nations group.

Although BC Hydro has a near monopoly on power generation and transmission in British Columbia, it is possible to establish or acquire an independent power producer (IPP) in British Columbia that generates power, typically from renewable sources. Energy supply contracts



entered into by an IPP may be approved by the BCUC if it is in the public interest to do so. Given BC Hydro's near total control of the provincial transmission grid, virtually all IPPs enter into connection agreements and power sale/supply agreements with BC Hydro. Periodically, BC Hydro engages in a "call for power" process through which it identifies parties willing to become an IPP. The rates BC Hydro pays for such power are set by BC Hydro and are typically non-negotiable.

In 2008, BC Hydro launched the Standing Offer Program (SOP) to encourage the development of small and clean or renewable energy projects in the province. The SOP provides a streamlined process, simplified contract and decreased transaction costs to qualified energy project developers who sell electricity to BC Hydro.

There is no open power market in B.C. that is comparable to the markets in Ontario and Alberta. Thus, there are no market-entry requirements. In B.C., a power market entrant would enter as a generator or as a trader. Power traders are required to be regulated as a utility under the UCA for the trading of power within B.C., but not if they were to export power from B.C. As a regulated utility, they may or may not be required, depending on their level of activity, by the BCUC to meet certain requirements, such as capitalization level. They would be subject to regulation on rate of return, for example, which may make it less desirable to be a regulated utility in B.C.

The B.C. *Clean Energy Act*, introduced in 2010, sets out British Columbia's energy objectives and required BC Hydro to achieve electricity self-sufficiency by the year 2016. Currently, BC Hydro's system generates about 98.4 per cent of its power from clean or renewable sources. The *Clean Energy Act* also prohibits certain projects from proceeding, e.g., the development or proposal of energy projects in parks, protected areas or conservancies, ensures that the benefits of the heritage assets are preserved, and provides for the establishment of energy efficiency measures. The provincial government's interpretation and implementation of this Act remains the subject of ongoing internal and public discussion.

On June 11, 2018, the provincial government announced a comprehensive two-phased review of BC Hydro. The review will focus on ensuring electricity rates remain low and predictable, while also assessing BC Hydro's long-term direction. The first phase of the review, undertaken by an advisory group comprising staff from BC Hydro, the Ministry of Finance, and the Ministry of Energy, Mines and Petroleum Resources, is expected to conclude by the fall of 2018. The advisory group is tasked with identifying cost savings and new revenue streams to support a new 10-year rates plan. The second phase of review will consider shifts in the global and regional energy sectors due to changes in technology and climate. The resulting recommendations are likely to inform energy-related strategies undertaken by the provincial government going forward.

Numerous LNG projects have been proposed in the province, including the north coast, Howe Sound and Vancouver Island. It is likely that not all of these projects will proceed. However, the LNG industry could add load to the power system. While most LNG producers propose to use direct-drive natural gas turbines to run the cooling process to convert natural gas to liquid form, many would likely use electricity for ancillary requirements and others may choose electricity for all of their energy needs. BC Hydro intends to have sufficient supply to meet the initial LNG load and will meet further LNG load requirements through energy from clean power projects. In 2018, the provincial government announced a new fiscal framework to improve the cost competitiveness of the proposed LNG Canada facility in Kitimat, B.C.

Under the framework, BC Hydro would provide subsidized electricity rates, which are consistent with the rates assessed to other industrial users.

As a means to meet future electricity demands, the province has approved the building by BC Hydro of the Site C Clean Energy Project (Site C), a third dam and hydroelectric generating station on the Peace River in northeast British Columbia. Site C would add 5,100 gigawatt hours of electricity each year and would provide 1,100 MW of dependable capacity to the system. The earliest in-service date of Site C is currently projected to be 2024. The provincial government announced its intention to proceed with the project in December 2017, following an economic review conducted by the BCUC. Some uncertainty remains concerning Site C because of ongoing litigation. First Nations have initiated a number of legal proceedings seeking to prevent the construction of Site C. To date all have been unsuccessful. On January 15, 2018 the West Moberly and Prophet River First Nations filed notices of civil claim in the British Columbia Supreme Court. They allege that Site C unjustifiably infringes their constitutionally protected rights under Treaty 8. If successful, this legal action could impact the anticipated finish date of Site C and potentially the project itself.

# XVI. Restructuring and Insolvency



Commercial restructuring and insolvency law in Canada is not memorialized in any single statute. Canadian restructuring and insolvency law refers to the complex matrix of statutory and common law rules that govern the rights and responsibilities of creditors and debtors in situations where the debtors are in financial distress.

These insolvent debtors may become subject to a host of different formal or informal proceedings, with bankruptcy proceedings being only one such form of insolvency proceeding.

Bankruptcy and insolvency are oftentimes thought to be — by laypersons, the media and legal professionals not practising in the area — one and the same thing. An enterprise that ceases operations or cannot meet its obligations is commonly said to have “gone bankrupt.” A company that becomes subject to a court-supervised process as a result of some form of financial distress is often referred to as having become subject to “bankruptcy proceedings.” Despite their colloquial use as synonymous terms, the distinction between bankruptcy and insolvency in Canada is a critical one.

Bankruptcy is a legal status. Insolvency is a financial condition. An insolvent company is unable to meet its obligations generally as they become due or its liabilities exceed the value of its assets. When a commercial entity becomes bankrupt, on the other hand, it loses the legal capacity to deal with its assets and a trustee in bankruptcy is appointed over those assets with a mandate to, among other things, liquidate the assets and distribute the proceeds of sale to creditors.

In addition to bankruptcy, an insolvent business may be rehabilitated by a restructuring of the corporation and its debts under one or more statutes governing commercial insolvencies. Such “debtor-in-possession” (DIP) proceedings may also result in the sale of some or all of the assets of the insolvent business.

Alternatively, the assets of a business may be liquidated or sold on a going-concern basis in creditor-initiated proceedings. Such proceedings may include the appointment of a receiver of the business (appointed privately or by a court), the exercise of other private remedies of a secured creditor under its security or some combination of the above.

Set out below is a summary of Canadian restructuring and insolvency law.

## 1. Canada’s Insolvency Statutes

Canada has four key insolvency statutes:

- *Companies’ Creditors Arrangement Act* (CCAA). The CCAA is the principal statute for the reorganization of a large insolvent corporation that has more than C\$5-million of claims against it or which is part of an affiliated group of companies that has more than C\$5-million of claims in the aggregate. As a federal statute, the CCAA has application in every province and territory of Canada (and purports to have worldwide jurisdiction). The CCAA is generally analogous in effect to Chapter 11 of the U.S. *Bankruptcy Code* (U.S. Code), although there are a number of important technical differences. As discussed below, the sale of a debtor’s business and assets in a CCAA proceeding is permitted even in the absence of a formal plan of reorganization.
- The *Bankruptcy and Insolvency Act* (BIA). The BIA is also a federal statute that includes provisions to facilitate both the liquidation and reorganization of insolvent

debtors. The liquidation provisions, which provide for the appointment of a trustee in bankruptcy over the assets of the insolvent debtor, are known as “bankruptcy proceedings” and are generally analogous to Chapter 7 of the U.S. Code, although there are a number of important technical differences. The reorganization provisions under the BIA, known as “proposal” proceedings, are more commonly used for reorganizations that are smaller and less complicated than those that take place under the CCAA because the BIA proposal provisions have more stringent timelines and provide less flexibility than the CCAA. The BIA also provides for the appointment of an interim receiver with national power and authority to protect and preserve assets and a receiver with national power and authority to take possession of and sell assets of a debtor where it is “just or convenient” to do so. A receiver appointed over all or substantially all of the assets of an insolvent company must be a licensed trustee in bankruptcy — typically the licensed insolvency professionals in an accounting or financial advisory firm.

- Provincial *Personal Property Security Acts* (PPSAs). Each province of Canada except Quebec (which has its own unique *Civil Code of Québec*, modelled on the French Napoleonic Code) has enacted a version of the PPSA, which governs the priorities, rights and obligations of secured creditors, including a secured creditor’s right, following a default by the debtor, to enforce its security and dispose of assets subject to its security (including on a going-concern basis). The PPSAs are analogous to, and modelled on, *the Uniform Commercial Code* enacted in each U.S. state.
- Provincial *Rules of Court*. Each province, other than Quebec, has “Rules of Court” similar to Ontario’s *Courts of Justice Act*, which allow courts to appoint a receiver and/or receiver and manager over a debtor’s assets when it is “just or convenient” to do so. The receiver, by way of court order, can be granted the right to take possession of, and sell, the assets subject to the receivership. It is common to have dual receivership appointments under the BIA and Rules of Court. Receivership is available as a remedy in Quebec under the federal BIA.

Proceedings under the CCAA and BIA are subject to the oversight of the federal government office known as the Office of the Superintendent of Bankruptcy. The federal government also appoints Official Receivers to carry out statutory duties in each bankruptcy jurisdiction across Canada. The Official Receivers report to the Superintendent of Bankruptcy.

## 2. Reorganizations Under the CCAA

### 2.1 Who qualifies for relief under the CCAA?

To qualify for relief under the CCAA, a debtor must:

- (a) Be a Canadian incorporated company or foreign incorporated company with assets in Canada or conducting business in Canada (certain regulated bodies such as banks and insurance companies are not eligible to file under the CCAA or BIA but instead may seek relief from creditors under the *Winding-Up and Restructuring Act*). Income trusts (business trusts established for commercial investments) also qualify for relief. Partnerships cannot apply for protection from creditors under the CCAA but, as discussed below, relief has been extended to partnerships in certain circumstances where corporate partners have filed.
- (b) Be insolvent or have committed an “act of bankruptcy” within the meaning set out in the BIA. The CCAA does not contain a definition of insolvency; however, courts have

held that reference may be had to the definition of insolvency under the BIA. Accordingly, a company will qualify for relief under the CCAA if it is insolvent on a cash-flow basis (i.e., unable to meet its obligations generally as they become due) or on a balance-sheet test (i.e., has liabilities that exceed the value of its assets). Further, the Ontario Superior Court of Justice has held that in determining whether a debtor is insolvent for the purposes of the CCAA, courts may use a “contextual and purposive approach.” A debtor may be considered insolvent if the debtor faces a “looming liquidity crisis” or is in the “proximity” of insolvency even if it is currently meeting its obligations as they become due. It is sufficient if the debtor reasonably anticipates that it will become unable to meet its obligations as they come due before the debtor could reasonably be expected to complete a restructuring of its debt.

- (c) Have in excess of C\$5-million in debt or an aggregate in excess of C\$5-million in debt for a filing corporate family.

Partnerships and solvent entities do not qualify as “applicants” under the CCAA, and cannot file plans of arrangement or compromise under the CCAA. Nonetheless, Canadian courts have routinely extended the stay of proceedings and other relief granted to the qualifying insolvent applicants, to related partnerships (where corporate partners themselves have filed) and even solvent entities affiliated with the applicants, where there is a finding that it is appropriate to do so in the circumstances. For example, relief has been extended to partnerships where the business of the partnership is inextricably entwined with the business of the applicants and granting certain relief to the partnership is required for an effective reorganization of the qualifying applicants.

## **2.2 How does a company commence proceedings under the CCAA?**

Unlike Chapter 11, no separate bankruptcy estate is created upon a CCAA filing and the CCAA does not allow a debtor company to make an electronic filing to obtain a skeletal stay of proceedings and then subsequently obtain “first day” relief. Instead, a debtor company must seek the granting of a single omnibus initial order that provides the debtor with a comprehensive stay of proceedings and other relief. Proceedings under the CCAA are commenced by an initial application to the superior court of the relevant province and not a federal bankruptcy court as in the U.S. In some jurisdictions like Ontario, there are specialized commercial branches of the provincial superior courts before which these applications may be brought. In some provinces, there are recognized model orders, which establish the accepted framework for an initial order, subject to the appropriate modifications on a case-by-case basis as may be granted by the court. In most instances, the application is made by the debtor company itself (creditors may initiate the process, but this is uncommon). Where the creditor does initiate the proceeding it is usually with debtor consent.

## **2.3 Where must the application be brought?**

Applications for relief under the CCAA may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the debtor company in Canada is situated, or, if the debtor company has no place of business in Canada, in any province in which any assets of the company are located.

## 2.4 What must be included in the initial application?

All CCAA applications must include:

- Weekly cash-flow projections for the weeks to which the initial stay of proceedings will apply
- A report containing certain representations of the debtor regarding the preparation of cash-flow projections
- Copies of all financial statements of the debtor, audited or unaudited, prepared during the year before the application

## 2.5 What relief can the court provide?

The initial order granted by the court usually provides for the following key elements:

- (a) **Stay of Proceedings.** Initial orders typically grant a comprehensive stay of proceedings that will apply to both secured and unsecured creditors, and a stay against terminating contracts with the debtor. The purpose of the stay is to provide for an orderly process by preventing precipitous creditor action and prohibiting any single creditor or group of creditors from achieving an unfair advantage over other creditors. The stay is designed to maintain the status quo and allow the debtor company sufficient breathing room to seek a solution to its financial difficulties. Stays may also be extended to directors of the debtor in order to encourage those individuals to remain in office and advance the restructuring process.

The stay is subject to certain prescribed limits. For example:

- (i) The stay cannot restrict the exercise of remedies under eligible financial contracts such as futures contracts, derivatives and hedging contracts
- (ii) The stay cannot prevent public regulatory bodies from taking regulatory action against the debtor, although monetary fines and administrative orders framed in regulatory terms, but which are determined by a court to be monetary claims in substance can be stayed
- (iii) There are restrictions on the length of stays for “aircraft objects” — airframes, aircraft engines and helicopters
- (iv) No order granting a stay of proceedings can have the effect of prohibiting a person from requiring immediate payment for goods and services delivered after the filing date, or requiring payment for the use of leased property (pursuant to a true lease as opposed to financing lease) or licensed property
- (v) Nothing in the stay can have the effect of requiring the further advance of money or credit
- (vi) As noted above, partnerships do not qualify to apply under the CCAA, although there is case law that provides that the stay may be extended to partnerships, where the filing corporate partners themselves obtained CCAA protection and the protection is required to facilitate the restructuring

Unlike Chapter 11, the stay of proceedings is not automatic and is a function of the court’s discretion; however, the court will typically exercise its discretion to issue an

initial stay for up to a maximum of 30 days. An application to the court is required for any extensions. Before an extension can be granted, the court must conclude that circumstances exist that make the extension appropriate and that the debtor is acting with due diligence and in good faith. Unlike the initial 30-day stay, there is no statutory limit on the duration or number of extensions of the stay of proceedings.

With respect to aircraft objects, Canada has implemented the Convention on International Interests in Mobile Equipment (known as the Cape Town Convention) and the associated Protocol to the Convention on Matters Specific to Aircraft Equipment (the Protocol). Canada adopted “Alternative A” of the Protocol, which is an enhanced version of section 1110 of the U.S. Code. Alternative A contains a 60-day stay limitation for aircraft objects during which period the debtor must cure all defaults and agree to perform all current and future contractual obligations or the aircraft objects must be returned to the secured creditor. Alternative A also requires the aircraft operator to maintain the aircraft objects pursuant to its contract and preserve the value of the aircraft objects as a condition of the continuing stay.

- (b) **The Monitor.** As part of the initial order, the court appoints a monitor, a licensed insolvency professional typically from an accounting or financial advisory firm. The monitor’s basic duties are set out in the CCAA, but can be expanded by court order. Generally, the monitor plays both a supervisory and an advisory role in the proceeding. In its supervisory role, the monitor oversees the steps taken by the company while in CCAA proceedings, on behalf of all creditors, as an officer of the court. Further, the monitor will file periodic reports with the court and creditors, including reports setting out the views of the monitor as required by the CCAA in connection with any proposed disposition of assets or in connection with any proposed DIP financing (see Section XVI, 2.5(c), “DIP Financing and DIP Charge”).

Generally, the debtor’s management will remain in control of the company throughout the CCAA proceedings, however, in its advisory role, the monitor will assist management in dealing with the restructuring and other issues that arise. In certain cases, such as where the board of directors has resigned or creditors have otherwise lost confidence in management, the monitor’s powers can be expanded. By court order, the monitor can be authorized to sell assets, subject to court approval, and direct certain corporate functions. Monitors assuming this role are colloquially referred to as “super monitors.” In addition to the Monitor’s statutory authority to pursue fraudulent preferences and transfers at undervalue, courts have also authorized monitors to pursue litigation against certain parties alleged to have caused harm to the debtor or the debtor’s stakeholders, where the courts, among other things, are satisfied that the monitor (rather than the debtor or any creditor) is best placed to pursue such litigation. Initial orders may also approve the retention of a Chief Restructuring Officer with an extensive mandate to manage the debtor company, or a more limited mandate to assist management.

There are no statutorily mandated unsecured creditor committees in Canada although such committees have sometimes been formed on an ad hoc basis. There is no equivalent in Canada to the U.S. Trustee, which provides government oversight in Chapter 11 cases. However, the monitor fulfils certain of the functions that the U.S. Trustee and unsecured creditor committees would fulfil in Chapter 11 cases. The Superintendent of Bankruptcy has some general oversight powers as well.

- (c) **DIP Financing and DIP Charge.** DIP financing refers to the interim financing required by the debtor company to fund its working capital needs, while under CCAA protection. In many cases, the court will authorize the debtor to obtain DIP financing to the debtor and grant super-priority charges over the assets of the debtor in favour of the DIP lender, if the court is of the view that additional financing is critical to the continued operations of the business during the restructuring. This may be done in the initial order at the time of the first application or commonly, by way of a subsequent order or by amending and restating the initial order at a later date. Notice must be given to all pre-filing secured creditors that are likely to be affected by the priority of the DIP charge.

In determining whether to approve DIP financing, the CCAA requires courts to take into account, among other things:

- The expected duration of proceedings
- How the debtor's business and financial affairs are to be managed during the proceedings
- Whether the debtor's management has the confidence of major creditors
- Whether the DIP loan would enhance prospects of a viable plan of arrangement or compromise
- The nature and value of the debtor's property
- Whether any creditor would be "materially prejudiced" as a result of the DIP charge
- The monitor's report on the cash-flow forecast

The CCAA expressly prohibits the securing of pre-filing obligations with the DIP charge.

At the DIP approval hearing, the debtor company will submit a DIP term sheet or credit agreement for approval, together with projected cash flows and the monitor's report on those cash flows. The monitor will also typically advise the court of its view as to the appropriateness of the DIP (both with respect to quantum and terms).

Canada has not adopted the U.S. concept of "adequate protection," which is intended to protect existing lien holders who have become subject to super-priority charges, although Canadian courts may order protective relief to address prejudice to other creditors. Canadian courts also do not need to grant "replacement liens." A pre-filing secured creditor's security, if granted over after-acquired property (as is typically the case), continues to apply and automatically extends to post-filing assets acquired by the debtor, such as inventory and receivables, since, as noted above, a CCAA filing does not create a separate legal estate.

- (d) **Other Priority Charges Granted in the Initial Order.** Initial orders also routinely authorize priority charges, such as an administration charge to secure payment of the fees and disbursements of the monitor and the monitor's and debtor's legal counsel, and a directors' and officers' charge to secure the debtor's indemnity to the directors and officers against post-filing claims and provide such directors and officers with the protection and assurance necessary to secure their continued involvement throughout the CCAA proceedings. The charge in favour of directors and officers is only available to the extent that these individuals do not have (or if the debtor cannot obtain) adequate insurance at a reasonable cost to cover such liabilities. Accordingly, a practice has developed of providing in the initial order that the secured indemnity



can only be called upon to the extent the insurer does not respond to a claim. Along with the DIP charge, these priority charges will typically rank ahead of claims of pre-filing secured creditors, provided that notice is given to any such secured creditors likely to be affected by the priority charges.

- (e) **Treatment of Contracts (Disclaimers and Assignments).** The CCAA permits the disclaimer or resiliation (the equivalent of disclaimer under civil law in Quebec) of agreements. The debtor is not required to elect to accept or reject certain “executory contracts” (other than aircraft leases) or real property leases, as is the case under Chapter 11. Further, a standard initial order provides, among other things, that no counterparty to a contract may terminate the contract, alter, fail to renew or cease to perform its obligations under the contract.

Generally, the debtor will fulfil its post-filing payment obligations for the supply of goods or services and the use of property (i.e., rent) under all agreements unless the debtor disclaims the agreement in accordance with the process provided for in the CCAA. If the debtor fails to perform other covenants, which failure to perform would be a basis for the counterparty to terminate the agreement absent the stay, the counterparty may seek to lift the stay in order to exercise its termination rights. Any steps by counterparties to assert damage claims in respect of agreements that are disclaimed by the debtor are stayed by the initial order. As with rejected contracts under Chapter 11, counterparties to disclaimed agreements can assert a claim for damages on an unsecured basis and will be entitled to share in any distribution on a *pro rata* basis along with other unsecured creditors.

The monitor’s or the court’s approval is required to disclaim a contract. All disclaimers approved by the monitor are subject to review by the court if the counterparty objects. In deciding whether to approve a disclaimer, the court will take into account whether the disclaimer of the contract would enhance the prospects of a viable plan and whether it would likely cause the debtor’s counterparty significant financial hardship.

The CCAA also provides a process for the assignment of contracts, with court approval, despite contractual restrictions on assignment. However, a condition of any such forced assignment is that pre-filing monetary defaults are cured.

- (f) **Treatment of Intellectual Property Licences.** The CCAA provides protections for licensees of intellectual property including trade-marks, analogous to section 365(n) of the U.S. Code. Accordingly, a disclaimer does not affect a licensee’s right to use intellectual property — including any right of exclusivity — during the term of the licence, as long as the licensee continues to perform its obligations in relation to the licensed intellectual property.
- (g) **Post-filing Supply of Goods.** The initial order typically stays a party to any contract or agreement for the supply of goods or services from terminating the agreement. The initial order and the terms of the CCAA protect these suppliers by providing that no party is required to continue to supply goods or services on credit, or to otherwise advance money or credit to a debtor. Accordingly, although a supplier cannot terminate its agreement as a result of the CCAA stay of proceedings, the supplier is not required to honour its obligations to supply post-filing unless it is paid in advance or on delivery for those post-filing obligations or is designated a critical supplier (discussed below).

Unlike Chapter 11, which provides for an “administrative priority claim” for post-petition suppliers, if the supplier to a CCAA debtor elects to provide goods or services on credit and does not have the benefit of a critical supplier’s charge, that supplier is afforded no specific priority under the CCAA for its post-filing supply. Accordingly, it is important for post-filing suppliers to ensure that they receive cash on delivery (COD) payments or are otherwise fully protected by a court-ordered charge or some other form of financial assurance as security, such as a deposit for payments or a letter of credit issued by a third party.

- (h) **Plans of Arrangement or Compromise.** Initial orders in CCAA proceedings typically authorize the debtor to file a plan of arrangement or compromise with its creditors. See Section XVI, 2.7, “What is a plan of arrangement?.”

## 2.6 How are critical suppliers treated?

Where a vendor provides goods or services that are considered critical to the ongoing operation of the debtor, the court may declare the vendor a “critical supplier” and order the vendor to continue to provide goods or services on terms set by the court that are consistent with the existing supply relationship, or that are otherwise considered appropriate by the court. As part of such critical supplier order, the court is required to grant a charge over all or any part of the debtor’s property to secure the value of the goods or services supplied under the terms of the order, which charge can be given priority over any secured creditor of the debtor. Any creditors likely to be prejudiced by the court-ordered charge must be given notice of the application to declare a vendor a critical supplier.

Despite these provisions in the CCAA, decisions in Ontario have authorized pre-filing payments to critical suppliers when continued supply could not be guaranteed without such authorized payments.

## 2.7 What is a plan of arrangement?

Essentially, the plan of arrangement or compromise is a proposal made to the debtor’s creditors that is designed to provide creditors with greater value than they would receive in a liquidation under bankruptcy proceedings. The plan is designed to allow the debtor to compromise its obligations and continue to carry on business, although the nature and/or scope of the business might be altered dramatically. Plans can, among other things: provide for a conversion of debt into equity of the restructured debtor — which may require a concurrent plan of arrangement under the applicable federal or provincial business corporations statute (depending on the jurisdiction of the debtor’s incorporation) — or a newly created corporate entity designed to be a successor to the debtor’s business; the creation of a pool of funds to be distributed to the creditors of the debtor; a proposed payment scheme whereby some or all the outstanding debt will be paid over an extended period; or some combination of the foregoing.

Plans may offer different distributions to different classes of creditors (see Section XVI, 2.7.4, “How does the plan get approved by creditors?”). However, the plan must treat all members within a class equally.

### **2.7.1 Who may file a plan?**

Plans may be filed by the debtor, any creditor, a trustee in bankruptcy or liquidator of the debtor. As a matter of practice, plans are almost always filed by a debtor, or filed by a creditor with the debtor's consent. The CCAA does not provide for an "exclusivity" period in which only the debtor may file a plan, as is the case under the U.S. Code.

Normally, the filing of a plan is considered to be a procedural step that is routinely granted by courts. However, in one recent Ontario decision, a court refused to allow the debtor applicants to file a plan which contravened prior orders of the court in the same proceedings on the basis that even if it obtained requisite creditor approval, the plan was not capable of being sanctioned by the court.

### **2.7.2 Whose claims may be compromised?**

The claims of both secured and unsecured creditors may be compromised in a plan. The CCAA requires Crown — the federal or applicable provincial government — approval of any plan that does not provide for the payment, within six months, of all amounts owed to the Crown in respect of employee source deductions. Plans must also provide for the payment of certain pension and wage claims (see Section XVI, 4.3, "Priorities in liquidation").

The CCAA also provides that plans can compromise claims against directors, subject to certain limitations. For example, claims that relate to contractual rights of one or more creditors and claims based on allegations of misrepresentations made by directors to creditors or wrongful or oppressive conduct by directors are not subject to compromise.

Courts have also held that CCAA plans can provide for releases in favour of third parties being parties other than the CCAA debtor itself and its directors and officers. Third-party releases are available where, among other things, they are necessary and essential to the restructuring of the debtor, the claims to be released are rationally related to the purpose of the plan, the plan could not succeed without the releases and the parties that are the beneficiaries of the releases contribute in a tangible and realistic way to the plan. However, there has been judicial caution expressed that third-party releases are the exception, not the rule, and should not be granted as a matter of course. Releases often purport to bind the applicable creditor as well as its officers, directors, shareholders, affiliates and other parties that may not have received notice of the proceedings. Courts have also expressed some reservation as to the scope of these releases.

### **2.7.3 How do creditors prove their claims?**

There is no mandatory time-frame in the CCAA in which affected creditors must prove their claims. If it is anticipated that a distribution will be made to unsecured creditors in a plan or following a sale of assets, the debtor will typically seek a claims procedure order which establishes a process to determine creditor claims and a "claims bar date," after which claims will be barred and extinguished forever. There may be a separate bar date for "restructuring claims" arising from the disclaimer, breach or termination of contracts after the filing date. The claims procedure order also establishes a process to resolve disputed claims, often including the appointment of a claims officer, to address any disputes in an arbitration-style summary process. The monitor typically administers the claims process in consultation with the debtor.

While the U.S. Code provides that interest that is unmatured as of the filing does not form part of either a secured or unsecured claim, under the CCAA, post-filing interest accrues on secured claims but an Ontario decision held that post-filing interest does not form part of unsecured claims.

#### **2.7.4 How does the plan get approved by creditors?**

Creditors are separated into different classes based on the principle of “commonality of interest,” which is analogous to the requirement in the U.S. Code that claims in a particular class be “substantially similar.” Although unsecured creditors will typically be placed in a single class, certain unsecured creditors, such as landlords, may be classified in a separate class based on a different set of legal rights and entitlements than other unsecured creditors. The plan must be passed by a special resolution, supported by a double majority in each class of creditors: 50 per cent plus one of the total number of creditors voting in the class and 66-2/3 per cent of the total value of claims voting in each class. Note that, unlike under Chapter 11, there is no concept of “cram-down” in Canada. Cram-down allows for the passing of a plan of arrangement in certain circumstances, even though the plan has been rejected by a subordinate class of creditors. In Canada, each class of creditors to which the plan is proposed must approve the plan by the requisite majorities.

#### **2.7.5 What if the plan is not approved by creditors?**

If the plan is not approved by the creditors, the debtor does not automatically become bankrupt (i.e., have a trustee in bankruptcy appointed over its assets). It is possible for the debtor or any party in interest to submit a new or amended plan. In the event the plan is not accepted, however, it is likely that the debtor’s significant secured or unsecured creditors will move to lift the stay to exercise the remedies against the debtor that are otherwise available to them, which may include seeking to file a bankruptcy application against the debtor or appointing a receiver.

#### **2.7.6 How does the plan get approved by the court?**

Once the plan is approved by the creditors, it must then be submitted to the court for approval. This proceeding is known as the sanction or the fairness hearing, and is the equivalent of the confirmation hearing under Chapter 11. The court is not required to sanction a plan even if it has been approved by the creditors. However, creditor approval will be a significant factor in determining whether the plan is “fair and reasonable,” and thus deserving of the court’s approval.

#### **2.7.7 Who is bound by the plan and how is it implemented?**

Once the court sanctions the plan, it is binding on all creditors whose claims are compromised by the plan. Although all necessary court approvals might have been obtained, the plan may not become effective until a number of subsequent conditions are met, such as the negotiation of definitive documentation, the completion of exit financing, the obtaining of regulatory approvals or the expiry of appeal periods. Once all conditions are satisfied, the plan can be implemented. The day on which the plan is implemented is commonly referred to as the “implementation date” and is evidenced by a certificate filed with the court by the monitor, confirming that all conditions to the implementation of the plan have been satisfied.

## **2.8 Can certain pre-filing transactions with the debtor be voided?**

The CCAA contains provisions for the review of certain pre-filing transactions, including preferences and “transfers at undervalue” (see Section XVI, 4.1.6, “Can the trustee void certain pre-bankruptcy transactions?”), by incorporating by reference the avoidance concepts from the BIA that were previously only available in bankruptcies (i.e., in Chapter 7 — type proceedings) into the CCAA. The monitor in CCAA proceedings (but not the debtor) is empowered to challenge preferential payments or dispositions of property made by the debtor for consideration that was “conspicuously less than fair market value,” unless a plan of arrangement provides otherwise.

## **3. Reorganizations Under the BIA**

### **3.1 What is the difference between CCAA reorganizations and BIA reorganizations?**

Insolvent debtors may also seek to restructure their affairs under the BIA’s proposal provisions. There are a number of similarities between the BIA’s proposal provisions and the CCAA. The key elements of a proposal can be substantially the same as the key elements of a CCAA plan as both proposals and plans provide for the compromise and arrangement of claims against the debtor. The same basic restrictions and limitations that apply to CCAA plans, also apply to BIA proposals. Further, DIP financing, DIP charges, the assignment of contracts, the disclaimer of contracts, the granting of other priority charges and the ability to sell assets, free and clear of liens and encumbrances, are all available in BIA proposal proceedings.

The essential difference between a restructuring under the CCAA and one conducted under the BIA is that a BIA proposal process has more procedural steps set out with strict time-frames, rules and guidelines. A CCAA proceeding is, relative to BIA proposal proceedings, more discretionary and judicially driven. The CCAA remains the statute of choice for restructurings of any complexity for debtors that exceed the minimum C\$5-million debt threshold. Debtor companies and other key stakeholders that may support the restructuring process typically prefer the flexibility afforded by the CCAA over the more rigid regime of the BIA. In addition, a BIA proposal must be made to, and approved by, unsecured creditors whereas the CCAA can be used to compromise secured creditor claims, while leaving unsecured claims unaffected.

### **3.2 Who may make a proposal?**

An insolvent person, a bankrupt, a receiver (in relation to an insolvent person), a liquidator of an insolvent person’s property or a trustee of the estate of a bankrupt may make a proposal. An insolvent person is a person who is not bankrupt and who is insolvent on a cash-flow or balance-sheet basis. Persons include corporations, partnerships and other legal entities.

### **3.3 Where can a proposal be filed?**

The proposal is filed with a licensed trustee and, in the case of a bankrupt, with the trustee of the estate and copies of the relevant documents must be filed with the official receiver in the locality of the debtor. Locality of the debtor means the principal place (a) where the debtor has carried on business during the year immediately preceding the initial bankruptcy event; (b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event; or (c) in cases not coming within sections (a) or (b) above, where the greater portion of the property of the debtor is situated. The “initial bankruptcy event” is the earliest of the filing of the following: voluntary assignment in bankruptcy, a proposal, a notice of intention to file a proposal (NOI), a CCAA filing or the first application for a bankruptcy order made against the debtor.

### **3.4 How are proposal proceedings commenced?**

The proposal proceedings may be commenced by filing an NOI with the local office of the Official Receiver. Most debtors commence the proposal process with an NOI, which provides for an automatic stay of proceedings for an initial 30-day period (subject to extensions for additional periods of up to 45 days each, for an aggregate total of up to six months (within which time a proposal must be filed), upon a court determining that the debtor is acting in good faith and with due diligence). Once the proposal is filed, the stay continues until the meeting of creditors to vote on the proposal.

The stay applies to both unsecured and secured creditors (unless the secured creditor has delivered a notice of its intention to enforce security pursuant to section 244 of the BIA and the notice period provided for thereunder has expired or been waived by the debtor).

The purpose of the NOI is to allow the debtor a period of stability to negotiate a proposal with its creditors, with the assistance of a proposal trustee which is appointed at the time the NOI is filed. The NOI must also contain a list of creditors with claims of C\$250 or more. Once the NOI is filed, the trustee must send a copy of the NOI to every known creditor within five days. Within 10 days, the debtor must prepare a projected cash-flow statement.

### **3.5 What is the scope of the stay under an NOI?**

The stay of proceedings under an NOI stays creditor action against the debtor and provides that no person may terminate an agreement because of the insolvency of the debtor or the filing of the NOI. Landlords cannot terminate leases because of pre-filing rental arrears. Creditors can apply to lift the stay on demonstration of “material prejudice” or can oppose an extension of the stay if they can demonstrate, among other things, the debtor is not acting in good faith or with due diligence. The stay is also subject to substantially the same limitations as those discussed above in connection with a stay under the CCAA.

### **3.6 What if the stay extension is not granted?**

If a stay extension is not granted, the debtor is deemed to have made an automatic assignment in bankruptcy.

### **3.7 What is the role of the proposal trustee?**

The proposal trustee, selected by the debtor, has a number of statutory duties. These duties include giving notice of the filing of the NOI to all known creditors, filing a projected cash-flow statement accompanied by a report from the trustee on its reasonableness, and calling a meeting of creditors. At the creditors' meeting, the trustee is required to report on the financial situation of the debtor and the cause of its financial difficulties. The trustee must also make the final application to the bankruptcy court for approval of the proposal if it is accepted by creditors.

In addition to its statutory obligations, the trustee plays both a supervisory and advisory role and will assist the debtor in the development of the proposal and its negotiations with creditors and other key stakeholders.

### **3.8 How do creditors prove their claims?**

Pursuant to the terms of the BIA, all creditors must complete a statutory proof of claim form in order to prove their claim. Although there is no predetermined bar date, a creditor is not entitled to vote at a meeting of creditors to approve the proposal, or participate in distributions provided for under the proposal, if they have not submitted a proof of claim by the meeting time or prior to distributions.

### **3.9 How does the proposal get approved by creditors?**

Proposals are voted on at a meeting or meetings of the creditors called for that purpose. The meeting to consider the proposal must be called by the proposal trustee within 21 days of the filing of the proposal and at least 10 days' notice must be given to each of the creditors.

Like a CCAA plan, in order to be binding on creditors, a proposal must be approved by a double majority of creditors (50 per cent plus one in number of creditors, representing 66-2/3 per cent in value of voting claims), in each class of creditors voting on a proposal; however, if the proposal is made to a class of secured creditors and rejected by that class, the proposal may still become effective provided that it is passed by the class or classes of unsecured creditors voting on the proposal. The proposal will not be binding on the dissenting class of secured creditors. These secured creditors would be entitled to enforce their security, if otherwise entitled to do so.

### **3.10 What if the proposal is not approved by unsecured creditors?**

If the proposal is rejected by a class of unsecured creditors voting on the proposal, the debtor is deemed to have made an assignment in bankruptcy on the earliest of: (i) the date the debtor filed the NOI; (ii) the date of the earliest outstanding application for a bankruptcy order; and (iii) the date the debtor filed its proposal.

### **3.11 How does the proposal get approved by the court?**

In addition to creditor approval, the proposal must be approved by the court. Within five days of the acceptance of the proposal by the debtor's creditors, the proposal trustee must apply for a court hearing to have the proposal approved. The proposal trustee must give 15 days'

notice to the debtor, the Official Receiver and each creditor who has proven its claim against the debtor. The trustee must file a report regarding the terms of the proposal and the conduct of the debtor at least two days before the date of the hearing.

### **3.12 What if the proposal is not approved by the court?**

If the proposal is not approved by the court, the debtor will be deemed to have made an assignment in bankruptcy on the earliest of: (i) the date the NOI was filed; (ii) the date the earliest application for a bankruptcy order was issued; and (iii) the date the debtor filed its proposal.

### **3.13 Who is bound by the proposal and how is it implemented?**

If the proposal is approved, it is binding on all unsecured creditors and on the classes of secured creditors included in the proposal that voted in favour of the proposal by the requisite majorities. A proposal may be implemented in substantially the same manner in which a CCAA plan is implemented. In instances where unsecured creditors vote in favour of a proposal and certain secured creditors do not vote in favour, a proposal may have technically passed but become frustrated if its terms and implementation thereof required that secured creditors be bound by it.

### **3.14 What if a debtor defaults under the proposal?**

If a debtor defaults under the terms of its proposal, and such default is not waived by inspectors (creditor representatives that may be appointed by creditors in certain cases) or the creditors themselves (if there are no inspectors), the proposal trustee must inform the creditors and the Official Receiver. In these circumstances, a motion may be brought to the court to annul the proposal. If such order is granted, the debtor is automatically bankrupt.

## **4. Liquidations**

The two most common ways to liquidate an insolvent company in Canada are either through a bankruptcy proceeding under the BIA, or by way of an appointment of a receiver. The CCAA has also been used as a process for the self-liquidation of a debtor, without a plan being filed and, in most cases, with the support and co-operation of the debtor's main secured creditor(s).

### **4.1 Bankruptcy**

#### **4.1.1 How is a bankruptcy proceeding commenced?**

The legal process of bankruptcy (generally analogous in effect to Chapter 7 of the U.S. Code) can be commenced in one of three ways:

1. Involuntarily, by one (or more) of the debtor's unsecured creditors filing a bankruptcy application against the debtor in the court having jurisdiction in the judicial district of the locality of the debtor (see Section XVI, 3.3, "Where can a proposal be filed?"). To bring a bankruptcy application, a creditor must have in excess of C\$1,000 of unsecured debt and allege that the debtor committed an "act of bankruptcy" within six months of the date of the filing of the application. The acts of bankruptcy are



enumerated in the BIA, with the most commonly alleged act being that the debtor has ceased to meet its obligations generally as they become due — it is not sufficient that the creditor allege that the debtor has failed to pay the obligations owing to such creditor, only. The debtor has the right to object to the application, in which case, a determination will be made by the court as to whether the bankruptcy order should be issued.

2. Voluntarily, by the debtor making an assignment in bankruptcy for the general benefit of its creditors to the Official Receiver in the locality of the debtor. To make a voluntary assignment, the debtor must be an “insolvent person” (i.e., insolvent on a cash-flow or balance-sheet basis). Companies, partnerships and income trusts are “persons” that may make an assignment if insolvent. To make an assignment a person must reside, carry on business or have property in Canada and have at least C\$1,000 of debt.
3. On the failure of a BIA proposal process by the debtor to its creditors, including as a result of the rejection of the proposal by a class of unsecured creditors or by the court, or default under the proposal and subsequent annulment, in which case an assignment is deemed to have occurred. See Section XVI, 3.6, “What if the stay extension is not granted?”, Section XVI, 3.10, “What if the proposal is not approved by unsecured creditors?”, Section XVI, 3.12, “What if the proposal is not approved by the court?” and Section XVI, 3.14, “What if a debtor defaults under the proposal?”

#### **4.1.2 What is the effect of the commencement of the bankruptcy proceeding?**

When a corporate debtor becomes bankrupt, the debtor ceases to have legal capacity to dispose of its assets or otherwise deal with its property, which vests in a trustee in bankruptcy (other than property held in trust, which does not form part of the assets of the debtor). Such appointment is expressly subject to the rights of secured creditors. Trustees in bankruptcy are licensed insolvency professionals who, in almost all cases, are chartered accountants (unlike the U.S. where trustees are typically lawyers). They are not government officials but they are licensed and regulated by the Office of the Superintendent of Bankruptcy. In a voluntary proceeding, the debtor itself selects the trustee, however, the selection is subject to confirmation by unsecured creditors at the first meeting of creditors. In an involuntary proceeding, the applying creditor selects the trustee, also subject to confirmation at the first creditors’ meeting. Unsecured creditors are to be provided with notice of the first meeting of creditors promptly after the trustee’s appointment.

#### **4.1.3 What are the trustee’s duties?**

A trustee is an officer of the court and, accordingly, must represent the interests of unsecured creditors impartially. It is the trustee’s duty to collect the debtor’s property, realize upon it and distribute the proceeds of realization according to a priority scheme set out in the BIA (see Section XVI, 4.3, “Priorities in liquidation”). The trustee is required to give notice of the bankruptcy to all known creditors of the bankrupt. The trustee must also convene a first meeting of the creditors of the bankrupt within 21 days of its appointment, unless extended for a limited period by the Official Receiver or otherwise extended or waived by the court.

At the first meeting of creditors, creditors with proven claims must confirm the trustee’s appointment. Proven creditors may also elect “inspectors” from their ranks who will then act in a supervisory role and instruct the trustee. There are certain actions in which a trustee cannot engage without inspector approval, such as carrying on the business of the bankrupt

or the sale or other disposition of any property of the bankrupt. A trustee must obtain court approval if it wishes to undertake these actions prior to or in the absence of the appointment of inspectors. At the first meeting, the creditors can vote to dispense with inspectors. If there are no inspectors appointed at the first meeting of creditors, the trustee can exercise all of its power on its own accord, except dispose of assets to a party related to the bankrupt. This action can only be taken with court approval.

#### **4.1.4 How does a creditor prove its claim?**

Upon the commencement of bankruptcy proceedings, unsecured creditors are stayed from exercising any remedy against the bankrupt or the bankrupt's property and may not commence or continue any action or proceeding for the recovery of a claim (unless the creditor is granted special permission by the court). Generally, secured creditors are not subject to this stay of proceedings (see Section XVI, 4.1.5, "How does bankruptcy affect the rights of secured creditors?").

A creditor can assert its claim against the debtor by completing a statutorily prescribed proof of claim and submitting it to the trustee in bankruptcy. A proof of claim form is attached to the notice of bankruptcy sent by the trustee to all known creditors. The creditor must submit the completed form before the first meeting of creditors if it wishes to vote on the motion to affirm the appointment of the trustee or vote for and/or act as an inspector in the bankruptcy. Otherwise, the creditor need only submit its proof of claim before the distribution of proceeds by the trustee (known creditors will be provided notice before distribution) unless otherwise ordered by the court.

A trustee can disallow the quantum of the amount set out in a proof of claim or the entire claim itself. Disputed claims may be resolved through a judicial process if the parties are not able to reach a consensual resolution.

#### **4.1.5 How does bankruptcy affect the rights of secured creditors?**

The rights of a trustee in bankruptcy are expressly subject to the rights of secured creditors. Generally, a bankruptcy does not affect the rights of secured creditors except to the extent necessary to allow the trustee to realize on any value in the collateral subject to the security, above and beyond what is owed to the secured creditor. The BIA provides the trustee with a number of tools in this regard. The trustee can: require the secured creditor to prove its security; cause the secured creditor to value its security; inspect the collateral subject to the security — generally for the purpose of valuing it; and, redeem the collateral subject to the security by paying the secured creditor the amount of the assessed value of the security. On redemption, the collateral subject to the security becomes an asset of the bankruptcy estate. In addition, the court may make an order staying a secured creditor from realizing on its security, but the maximum period of such stay is six months. Such stay orders are not commonly granted. They may, however, be made in situations where the trustee requires some time to value the collateral and determine if it should exercise its right of redemption.

To the extent that the amount of a secured creditor's debt exceeds the value of the collateral subject to its security, a secured creditor may participate in the bankruptcy process and file a proof of claim in respect of the unsecured deficiency portion of its claim.

#### **4.1.6 Can the trustee void certain pre-bankruptcy transactions?**

The BIA establishes two types of pre-bankruptcy transactions that are subject to challenge: “transfers at undervalue” and preferences. A “transfer at undervalue” is a disposition of property or provision of services by the bankrupt for which no consideration was received by the bankrupt or for which the consideration received by the bankrupt was conspicuously less than the fair market value of the consideration given by the debtor. If the parties are dealing at arm’s length, the trustee must establish that the transfer at undervalue took place within one year of the initial bankruptcy event, when the bankrupt was insolvent and where the bankrupt intended to defraud, defeat or delay a creditor. When the transferee and the bankrupt are not at arm’s length, the relevant period of review is five years prior to the initial bankruptcy event (see Section XVI, 3.3, “Where can a proposal be filed?”).

If a court determines that a transaction was a transfer at undervalue, the transaction may be voided or the trustee may seek judgment for the difference between the value of consideration received by the bankrupt (if any) and the value of consideration given by the bankrupt.

A preference is a payment made to a pre-filing creditor that meets certain criteria. Where the creditor is dealing at arm’s length with the insolvent person, the trustee must establish that the applicable transaction took place within three months prior to the initial bankruptcy event and that the insolvent person had a view to giving that creditor a preference over another creditor. Where the creditor is not dealing at arm’s length with the insolvent person, the trustee must establish that the applicable transaction took place within one year prior to the initial bankruptcy event and that the insolvent person had a view to giving that creditor a preference over another creditor. If the transaction had the effect of giving a preference, there is a rebuttable presumption that it was made with a view to giving the creditor a preference. If a court determines that a transaction was a preference, such transaction may be voided.

In addition to the above, various analogous provincial statutes provide mechanisms for challenging transactions that favour one creditor over others and/or are made while a company is insolvent, provided that the necessary intention requirements are satisfied.

Generally, Canadian trustees are much less aggressive in attacking pre-bankruptcy transactions than their U.S. counterparts and the technical requirements to void such transactions are more onerous in Canada than they are in the U.S. Where the trustee in bankruptcy refuses or neglects to pursue a preference claim or a transfer at undervalue, a creditor may seek a court order authorizing it to bring such an action. If the relief is granted, the creditor proceeds in its own name at its own expense and risk, although notice must be provided to other creditors, who may join the contemplated proceeding. Any benefit derived from a creditor-initiated proceeding belongs exclusively to the creditor(s) who instituted the proceeding and the surplus, if any, must be returned to the bankrupt’s estate.

#### **4.1.7 What repossession rights do unpaid suppliers have?**

Suppliers have a limited right to recover inventory supplied to a bankrupt debtor or a debtor subject to a receivership. Unpaid suppliers have the right to repossess goods delivered 30 days before the date of bankruptcy or receivership. Written demand for repossession must be sent within 15 days of the purchaser becoming bankrupt or becoming subject to a receivership. The goods must be identifiable, in the same state as on delivery, still in the

possession of the purchaser, trustee or receiver, and not subject to a subsequent arm's-length sale. In practice, suppliers often find it difficult to satisfy these tracing requirements.

## 4.2 Receiverships

### 4.2.1 What is a receiver?

A receiver, or receiver and manager, may be granted the authority to deal with a debtor company's assets, including authority to operate and manage the debtor's business in place of the existing management. The receiver can also be granted authority to shut down the business if the receiver concludes the continued operations will likely erode the recoveries for creditors or there is insufficient funding to continue operations. The receiver does not become the owner of the debtor company's assets; however, the receiver may have been granted the right (but not the obligation) in the instrument appointing it to take possession and custody of the assets and to sell them.

### 4.2.2 How is a receiver appointed?

A receiver may be appointed (i) privately by a secured creditor pursuant to the terms of a security agreement or (ii) by court order.

- (a) **Privately Appointed Receiver:** A secured creditor may have the right to appoint a receiver under its security agreement. The receiver's duties are primarily to the secured creditor that appointed it. It also has a general duty to act honestly, in good faith and in a commercially reasonable manner and abide by statutory notice requirements in provincial PPSAs.

The secured creditor is mandated by section 244 of the BIA to provide a statutory 10-day notice of its intention to enforce its security and appoint a receiver, if such receiver is to be appointed over all or substantially all of the inventory, accounts receivable or other property of an insolvent debtor, to the extent acquired for, or used in the business carried on by the insolvent debtor. As a matter of practice, secured lenders typically issue a "section 244 notice" whenever enforcing security, out of an abundance of caution. A receiver appointed over all or substantially all of the assets in the categories set out in section 244 of the BIA must be a licensed trustee in bankruptcy who, as noted above, is typically an accountant. As discussed below, an interim receiver may be appointed prior to the expiry of the 10-day notice period. Privately appointed receivers are not available in Quebec.

- (b) **Court-Appointed Receiver:** In the case of a court-appointed receiver, the receiver is appointed pursuant to a court order, typically on application by a secured creditor under the *Rules of Court* of the province where the debtor's business is based. Certain regulatory authorities such as the Ontario Securities Commission or the Alberta Energy Regulator have also sought and obtained the court appointment of receivers of certain regulated entities, where the circumstances warrant. Generally, the courts in the common law provinces (i.e., all provinces other than Quebec) have the authority to appoint a receiver when the court is satisfied that it is "just or convenient" to do so. Courts also have the authority to appoint receivers under the BIA, with authority across Canada (the BIA being a federal statute) as opposed to in a particular province, as is the case with receivers appointed under provincial *Rules of Court*. Court appointments usually occur in more complex cases, especially where

there are disputes among creditors or between the creditor and the debtor or in cases where it appears likely from the outset that the assistance of the court will be required on an ongoing basis. The court appointment of a receiver is typically accompanied by a comprehensive stay of proceedings restraining creditor action against the debtor, the debtor's property and the receiver, and providing a more stable platform for the realization to occur (see Section XVI, 4.2.4, "How do creditors assert their claims in a receivership?").

A receiver appointed by the court derives its powers from the court order and any specific legislation governing its powers. The receiver is an officer of the court and has duties to all creditors of the debtor. It takes directions and instructions from the court, not the creditor that first sought its appointment. In most cases, the court order appointing the receiver gives the receiver broad powers similar to those normally granted to a privately appointed receiver under a security agreement, although certain actions, such as major asset sales, usually require specific court approval. The court-appointed receiver is also typically permitted to borrow on a super-priority basis, akin to DIP financing in a CCAA case.

- (c) **Interim Receiver:** An "interim receiver" may be appointed by the court during the 10-day window after a section 244 notice is issued, with a temporary and restricted mandate. The court may direct an interim receiver to take possession of all or part of the debtor's property, exercise such control over the property and the debtor's business as the court considers advisable, take conservatory measures, and summarily dispose of property. Interim receivers, however, are not authorized to borrow funds.

The appointment of the interim receiver expires on the earlier of: (a) the taking of possession by a receiver or a trustee in bankruptcy of the debtor's property, and (b) the expiry of 30 days following the day on which the interim receiver was appointed or any period specified by the court, or in the case where an interim receivership coincides with a proposal, upon court approval of the proposal.

### 4.2.3 What reporting requirements does a receiver have?

Both privately and court-appointed receivers have certain obligations mandated by their appointment. The receiver must provide notice of its appointment to all known creditors and, at various stages of administration of the receivership, prepare and distribute interim and final reports concerning the receivership. These reports are filed with the Office of the Superintendent of Bankruptcy and may be made available to all creditors. A court-appointed receiver must also report to the court, at such times and intervals as may be required, while carrying out its mandate.

### 4.2.4 How do creditors assert their claims in a receivership?

Where a receiver is court-appointed, the court will typically issue a stay of proceedings restricting creditors from exercising any rights or remedies without first obtaining permission from the court. This stay is generally analogous to the comprehensive stay of proceedings found in CCAA proceedings and it is much broader than the statutory stay of proceedings when a company becomes bankrupt.

Typically, once a receiver has realized on the assets of the debtor, it will seek to distribute proceeds to creditors in accordance with their entitlements and priority, following court approval. If the only recovery is to secured creditors, there may be no need for a claims process. If there are any surplus funds after satisfying all secured claims, the receiver may run a court-sanctioned claims process or seek the court's approval to assign the debtor into bankruptcy and have unsecured claims dealt with through bankruptcy proceedings (see Section XVI, 4.1, "Bankruptcy").

## 4.3 Priorities in liquidation

### 4.3.1 What are the super-priority claims?

Secured creditors rank in priority to unsecured creditors in a liquidation; however, there are certain statutorily prescribed super-priority claims that will rank ahead of secured creditors.

The BIA provides a priority for certain workers (the priority does not apply to officers or directors of the debtor company), up to a maximum of C\$2,000 per employee, for unpaid wages (including vacation pay but not including severance and termination pay) earned up to six months before the appointment of a receiver or initial bankruptcy event (see Section XVI, 3.3, "Where can a proposal be filed?"). The priority is secured by a charge over the debtor company's current assets, which are essentially inventory and receivables. To the extent that a receiver or trustee pays the worker's claim, the secured claim is reduced accordingly.

The *Wage Earner Protection Program Act* establishes a program run by the federal government through which employees entitled to claim a priority for unpaid wages are compensated directly by the government, to a maximum of the greater of C\$3,000 in actual unpaid wages or an amount equal to four times the maximum weekly insurable earnings under the *Employment Insurance Act* (which currently equals approximately C\$3,700). The government is subrogated to the rights of the unpaid employee for amounts paid under this program, and receives a priority claim against the current assets of the debtor company in the amount of the compensation actually paid out, to a maximum amount of C\$2,000 per employee. Any balance over such C\$2,000 priority claim does not have priority over secured creditors.

The BIA also provides a priority for amounts deducted and not remitted and for unpaid regularly scheduled contributions (i.e., not special contributions or the underfunded liability itself) to a pension plan by creating a priority charge, equal to the amount owing, over all of the debtor company's assets.

Unpaid wages and unpaid pension contributions effectively have the same priority against proceeds realized in a CCAA sale or sale pursuant to the proposal provisions of the BIA, as any proposal or plan of arrangement must provide that such priority claims are satisfied.

Before distributions are made to unsecured creditors in an insolvency proceeding, certain other statutorily mandated priority claims, such as employee deductions (i.e., income tax withholdings, unemployment insurance premiums and Canada Pension Plan premiums) must also be paid.

In addition to those listed above, there are also a number of other federal and provincial statutory liens and deemed trusts that have priority over secured creditors outside of bankruptcy, but which are treated as ordinary unsecured claims following bankruptcy (e.g.,

liens for unremitted federal and provincial sales tax). CCAA liquidations and receivership proceedings are often converted into bankruptcy proceedings, in part to achieve a reversal of these priorities.

### **4.3.2 What is the priority scheme after the super-priorities and secured creditors are satisfied?**

Once the statutory super-priority claims and secured creditor claims are satisfied, the BIA sets out the priority scheme for distribution to unsecured creditors, primarily as follows:

1. The costs of administration of the bankruptcy
2. A Superintendent of Bankruptcy's levy on all payments made by the trustee to creditors (which is currently five per cent on the first C\$1-million of distributions, and a sliding scale on amounts in excess of C\$1-million)
3. Preferred claims, which include wage claims in excess of the statutory C\$2,000 charge, secured creditors' claims in the amount equal to the difference between what they received and what they would have received but for the operation of the wage and pension super-priorities, and landlords' claims up to the maximum amounts prescribed by statute
4. Ordinary unsecured claims on a *pro rata* basis

## **5. Going-Concern Sales**

### **5.1 Can an insolvent business be sold as a going-concern?**

Although a going-concern sale can be affected by a trustee in bankruptcy or a privately appointed receiver, a sale of an insolvent business on a going-concern basis will typically be conducted by a court-appointed receiver or through the CCAA or BIA proposal process.

### **5.2 What is involved in a receivership sales process?**

To sell a business on a going-concern basis, a court-appointed receiver will typically request that the court approve a detailed marketing process for the assets of the company. The requirements for and timelines of the marketing process will vary depending on the nature of the business, the value of the assets, the rate at which the assets will depreciate in value through a sales process, the available operating financing and the realistic pool of potential purchasers. The court-appointed receiver will select the bidder with the best offer, taking into account value offered, conditions of closing, timing of closing, the purchaser's ability to close and any potential purchase price adjustments, among other factors.

While there is no statutory requirement for a stalking-horse process in Canada, Canadian courts routinely establish a stalking-horse process by court order and stalking-horse sales are commonplace in Canada. However, unless specifically authorized by the court, the agreement of purchase and sale with the winning bidder will not be subject to overbids as is the case in the Chapter 11 stalking-horse process.

The receiver, on notice to interested persons, will then request that the court approve the agreement of purchase and sale and vest the assets in the purchaser free and clear of all liens and encumbrances. Liens and encumbrances that exist in the purchased assets will be preserved in the proceeds of sale with the same rank and priority as they had in the

purchased assets. Net sale proceeds are typically held by the receiver pending the issuance of a “distribution order” of the court authorizing the receiver to disburse the funds to creditors in accordance with their entitlements. All interested parties are required to receive notice of the motion for the distribution order and disputes between creditors as to priority and allocation of funds are usually addressed at the distribution motion, rather than at the sale approval stage.

### **5.3 What is involved in a CCAA sales process?**

Like sales conducted pursuant to section 363 of the U.S. Code, sales by the debtor while under CCAA protection have become a preferred method of realization in many cases. Sale approval and vesting orders are available to give the purchaser the necessary comfort that it will acquire the purchased assets free and clear of any liens and encumbrances.

The CCAA sales process is similar to the receivership process, except that the debtor itself controls the process (under the supervision of the monitor), is the vendor, and is the party requesting the court’s approval of the process and eventually the sale itself. Generally, the sales process is supported by the key stakeholders including DIP lenders, who have significant influence over the debtor’s sales process. The debtor will also require the support of its monitor if the sales process and sale are to be approved by the court. Courts also frequently approve the retainer of a financial adviser or investment bank to conduct the sales process on behalf of the debtor.

The CCAA provides factors that a court is to consider in determining whether to approve a sale outside of the debtor’s ordinary course of business. These factors include:

- Whether the sales process was reasonable in the circumstances
- Whether the monitor approved the sales process and the sale, and determined that the sale would be more beneficial to creditors than a sale through a bankruptcy proceeding
- The extent to which creditors were consulted
- The effects of the proposed sale on creditors and other affected stakeholders
- Whether the consideration to be received for the assets is fair and reasonable, taking into account their market value
- If the sale is to a related party, whether good faith efforts were made to sell the assets to unrelated parties and whether the consideration to be received is superior to any other offer that would be received under the sales process

The proceeds of the sale may be held by the monitor. As is the case with sales by court-appointed receivers, a vesting order will provide that creditors will have the same priority against the proceeds that they had against the assets prior to the sale. Following court approval and closing, the court will authorize the distribution of the proceeds to creditors in accordance with their priorities. If there are surplus funds available for unsecured creditors following payment to secured creditors, it is common to seek leave of the court to bankrupt the debtor and have any surplus proceeds distributed by a trustee in bankruptcy in accordance with the priorities set out in the BIA, (see Section XVI, 4.3, “Priorities in liquidation”). Beneficiaries of deemed trusts (or their legal representatives), whose priority would be reversed on bankruptcy, should be given notice of any proceeding to bankrupt the debtor company. The debtor company may also elect to file a plan of arrangement or compromise that provides for the distribution of proceeds of sale to unsecured creditors.



## 5.4 Quick Flip or Pre-Pack Sales

It is also possible for a company to run a sale process prior to the commencement of a CCAA proceeding or receivership of the type that would be typically run in an insolvency proceeding and actually identify a successful bidder or stalking horse bidder, prior to the commencement of any such proceeding. In these circumstances, the primary purpose of the insolvency proceeding, whether a receivership or CCAA proceeding, would be to obtain court approval of the transaction, or commence an abbreviated sale process to determine if there are any overbids, in the case of a stalking horse. Prior to approval, the court will require assurance that the proposed receiver or proposed monitor had an oversight or supervisory role in the pre-appointment/pre-filing sale process or has otherwise reviewed the process and is satisfied with the reasonableness of it. The putative receiver or monitor would have to proffer evidence that the sale process was consistent with that typically approved by courts in receivership and CCAA cases. These “quick flip” proceedings often appeal to debtor companies, purchasers and lenders because they can save expense and time. As the purpose of the proceeding is to implement a going concern solution — rather than to identify one — the stigma associated with formal insolvency proceedings can also be reduced.

## 5.5 Can a secured creditor credit bid in Canada?

There is no CCAA equivalent to section 363(k) of the U.S. Code, which expressly authorizes a secured creditor to credit bid its debt. However, courts have routinely authorized credit bids in Canada. Unlike in the U.S., there is no case law in Canada addressing a collateral or administrative agent’s contractual right to credit bid on behalf of a syndicate of lenders and bind dissenting lenders. However, it is anticipated that a court would look to the provisions of the agency agreement and security documents to determine the scope of an agent’s security.

## 6. Cross-Border Insolvencies

Like Chapter 11, the CCAA provides for the co-ordination of cross-border insolvencies. The CCAA and BIA contain comprehensive provisions for the recognition of foreign insolvency proceedings. These provisions, incorporated into both the CCAA and BIA, are based on the UNCITRAL Model Law on Cross-Border Insolvency, similar to Chapter 15 of the U.S. Code. The majority of co-ordinated cross-border proceedings for large commercial insolvencies are conducted under the cross-border provisions of the CCAA rather than the BIA. Accordingly, the CCAA provisions are summarized below.

### 6.1 What is the purpose of the Model Law?

The purpose of the Model Law, as adopted in the CCAA, is to promote:

- Co-operation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies
- Greater legal certainty for trade and investment
- The fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies
- The protection and maximization of the value of a debtor company’s property
- The rescue of financially troubled businesses to protect investment and preserve employment

## 6.2 Who may commence a recognition proceeding?

A foreign representative may apply to a Canadian court for recognition of a foreign proceeding in respect of which he or she is a foreign representative. Prior to such appointment, a proposed foreign representative may seek an interim order which provides for a stay of proceedings to protect the assets of the debtor company for the period of time between the commencement of a foreign proceeding and the date on which a foreign representative is appointed by the foreign court, after which it may seek full recognition of the foreign proceedings.

## 6.3 What is a foreign representative?

A foreign representative is a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding in respect of a debtor company, to: (a) monitor the debtor company's business and financial affairs for the purpose of reorganization; or (b) act as a representative in respect of the foreign proceeding.

As a result of the second criteria, a debtor company itself can be a foreign representative, provided it has been duly authorized to act as such. Among other things, a foreign representative is required to inform the Canadian court of any substantial change in the status of the recognized foreign proceeding and any substantial change in the foreign representative's authority to act.

## 6.4 What is a foreign proceeding?

A foreign proceeding is a judicial or an administrative proceeding, in a jurisdiction outside Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation.

## 6.5 What evidence needs to be before the Canadian court in a recognition proceeding?

In connection with application for recognition, there are certain basic documentary requirements: (a) a certified copy of the instrument that commenced the foreign proceeding — typically a court order; (b) a certified copy of the instrument authorizing the foreign representative to act as foreign representative — typically a court order; and (c) a statement identifying all foreign proceedings in respect of the debtor company that are known to the foreign representative. In the absence of the evidence described above, the court has discretion to accept other evidence satisfactory to it.

## 6.6 What discretion does the Canadian court have in recognizing the foreign proceeding?

If the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and the applicant is a foreign representative in respect of that foreign proceeding, the court *shall* make an order recognizing the foreign proceeding. There is no discretion in this regard. However, the court does have discretion as to what relief is granted

in connection with the recognized proceedings (see Section XVI, 6.9, “What obligations does the Canadian court have once recognition has been granted?”). In addition, the order granting recognition will specify whether the proceeding is a “foreign main proceeding” or a “foreign non-main proceeding.”

## **6.7 What is a foreign main proceeding?**

A foreign proceeding will be a “main” proceeding if it is taking place in the jurisdiction that is the centre of the debtor’s main interests (the COMI). There is a presumption that the debtor company’s registered office is its COMI. Provided there are no insolvency proceedings already commenced in Canada with respect to the debtor company, in recognizing a foreign main proceeding, the court “shall” make an order, subject to any terms and conditions it considers appropriate, granting a stay of proceedings until otherwise ordered by the court, and restraining the debtor company from selling assets in Canada outside the ordinary course of business. Such recognition orders must be “consistent” with any order that may be made under the CCAA.

## **6.8 What is a foreign non-main proceeding?**

A foreign non-main proceeding is defined in the negative: a foreign non-main proceeding is a foreign proceeding that is not a foreign main proceeding. If the court recognizes the foreign proceeding as a “non-main” proceeding, the stay is not automatic, but the court may, at its discretion, order a stay if it is necessary for the protection of the debtor’s property or the interests of creditors.

## **6.9 What obligations does the Canadian court have once recognition has been granted?**

If an order recognizing a foreign proceeding is made, the court is required to co-operate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

Forms of co-operation include, among other things, the appointment of a person to act at the direction of the court — typically referred to as an “information officer” having similar reporting obligations as a monitor in a CCAA case — and the co-ordination of concurrent proceedings regarding the same debtor company.

## **6.10 What rules can the court apply?**

Nothing in the CCAA prevents the court, on application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and providing assistance to foreign representatives that are not inconsistent with the provisions of the CCAA.

Also, nothing in the CCAA prevents the Canadian court from refusing to do something that would be contrary to public policy. Under Chapter 15 of the U.S. Code, the analogous provision refers to anything that is “manifestly” contrary to public policy. This suggests that the U.S. courts are directed to be even more accommodating than their Canadian counterparts, when called upon to determine what is contrary to public policy.

# XVII. Dispute Resolution



The Canadian court system is quite similar to the systems of both the United States and Great Britain. There are two parallel court systems in Canada — federal and provincial. Accordingly, in Canada’s 10 provinces and three territories, there are both federal and provincial (or territorial) courts. The province of Quebec is unique from the rest of the country in that it administers civil law, while the courts of the remaining provinces and territories administer the common law.

Unless a matter has been assigned by statute to the Federal Court of Canada, the provincial Superior Courts have inherent jurisdiction to hear matters. The Federal Court of Canada has jurisdiction over specialized matters, including litigation relating to the *Income Tax Act* (Canada) and intellectual property rights. Both the provincial Superior Courts and the Federal Courts have two levels — a trial division and an appeal court. The Supreme Court of Canada is the final court of appeal for all decisions made by either federal or provincial courts. A more detailed discussion of dispute resolution is contained in the Blakes *Litigation and Dispute Resolution Guide*.

## 1. Independence of the Courts

While judges are appointed by elected officials, Canadian courts are completely independent from other branches of government. Accordingly, any government action is subject to review by the courts and, in particular, subject to scrutiny under the Constitution of Canada, including the *Canadian Charter of Rights and Freedoms*. The *Charter of Rights and Freedoms* contains protections for fundamental freedoms and equality rights, and guiding principles for judicial process including protections for accused persons. Canada’s courts are generally open to the public unless there are compelling reasons for a closed hearing.

## 2. Litigating Through the Courts

For civil disputes, each of the provinces and territories has rules of procedure for the conduct of matters that come before the courts. For example, prior to trial, all parties to civil litigation are required to produce documents that are relevant to the issues in litigation. Documents are broadly defined and now include such things as emails, computer files, tape recordings or videos. In most provinces, the primary onus is on each party to produce all relevant documents. However, in Quebec, parties need only produce the documents they rely on at first instance, or are asked to produce pursuant to a specific request. Following documentary disclosure, the parties are entitled to examine one representative of an opposing party. Unlike the American system, provincial rules often do not provide for automatic rights of discovery of more than one person or of non-parties.

For example, in Ontario, a party requires leave of the court to examine more than one representative of a corporation or witnesses in an action.

Some provinces have special case management rules to manage the litigation process. These rules provide for greater involvement by the judiciary in the conduct of an action and make things such as timetables mandatory.

### 3. Costs

The Canadian court system generally uses the loser pays principle of costs following litigation. (In some provinces, this principle is not applied to all aspects of class actions.) Many provinces have a system similar to Ontario's whereby two scales of costs can be awarded. The most common scale of costs is called partial indemnity in Ontario, which means the successful party will receive approximately 25 to 35 per cent of its legal costs from the unsuccessful party. Where one party's behaviour has been particularly egregious, or the plaintiff has effectively used an offer to settle, the court may award a higher scale of costs called substantial indemnity, which are 1.5 times partial indemnity costs. While most fixed costs like disbursements are generally fully reimbursed, experts' fees are subject to a similar review as lawyers' fees and the compensable amount may be reduced. The courts ultimately have discretion as to whether and how much to award for costs. While rare, it is possible for the losing party to be awarded costs against the winning party depending on the circumstances, offers to settle and the successful party's behaviour during the litigation. In some cases, such as where the subject of the litigation has a public interest component, the parties may be ordered to bear their own costs.

Contingency fees are permitted in all provinces subject to local rules and, sometimes, court approval. In some provinces, public funding is available for class actions.

### 4. Class Actions

Most Canadian provinces and the Federal Court now have legislation or rules expressly permitting class proceedings. In addition, the Supreme Court of Canada has opened the door to class proceedings throughout the country, even where there is no express legislation. In a class proceeding, a person or persons take on the role of representative plaintiff, representing the interests of the class. It is also possible in some provinces, though rare, for a representative defendant to defend an action on behalf of a class of defendants. Early in the litigation, the action must be certified by the court as a class proceeding. Generally, the certification order will identify common issues to be tried together in a common issues trial, and any individual issues will be resolved thereafter by way of separate proceedings to be established by the common issues trial judge. Otherwise, the action will proceed as a regular action. Class actions are case managed by one judge in most provinces. The case management judge, however, will typically not be the trial judge if the action proceeds through to trial, except in Quebec.

Plaintiffs' counsel in Canada are increasingly bringing class actions in a number of areas, particularly *Competition Act* (antitrust), product liability and *Securities Act* matters, mass torts, consumer disputes, and more recently, digital privacy cases. To date, very few class proceedings have proceeded through to trial and judgment. The vast majority of cases are either disposed of early through preliminary motions, or are settled early in the process of or following certification. Class actions have become a concern for commercial businesses in that they are time-consuming and expensive to defend and run the risk of substantial settlements or court awards.

## 5. Alternative Dispute Resolution

Because of the expensive and time-consuming nature of litigation, alternative dispute resolution is firmly established in Canada. Alternative processes to litigation, such as mediation and arbitration, are increasingly being used to resolve both commercial and non-commercial disputes. Most often, such alternative mechanisms are voluntary. However, Ontario has introduced mandatory mediation for certain types of cases, requiring parties to litigation to engage in a mediation session prior to trial, and British Columbia has a procedure whereby one party to litigation can require all parties to attend a mediation.

In the right case, alternative dispute resolution can be highly effective and much less expensive than traditional litigation. It may also help the parties to achieve a reasonable solution that will enable them to continue their business relationship.

Mediations are presided over by a neutral third party who facilitates a resolution to the dispute. Mediation is not binding and parties enter into it willingly on the understanding that if they do not reach an agreement, they can walk away and continue the litigation process. In contrast, arbitration is a more formal process and is often binding.

Many commercial agreements in Canada now provide for binding arbitration or other forms of alternative dispute resolution as an alternative to the courts for disputes arising out of the agreement. In arbitration, an arbitrator who has expertise in the area of disagreement will hear evidence and legal argument, much like a hearing in court. Arbitration can sometimes (though not always) be less formal and expensive than court proceedings, and can usually be completed more quickly and privately. Prior to entering into an arbitration or mediation, the parties will generally sign an arbitration or mediation agreement that sets out the parameters of the process.

# Office Locations

TORONTO



199 Bay Street  
Suite 4000, Commerce Court West  
Toronto, Ontario M5L 1A9  
**Telephone:** 416-863-2400  
**Facsimile:** 416-863-2653  
**Email:** [toronto@blakes.com](mailto:toronto@blakes.com)

CALGARY



855 - 2nd Street S.W.  
Suite 3500, Bankers Hall East Tower  
Calgary, Alberta T2P 4J8  
**Telephone:** 403-260-9600  
**Facsimile:** 403-260-9700  
**Email:** [calgary@blakes.com](mailto:calgary@blakes.com)

VANCOUVER



595 Burrard Street, P.O. Box 49314, Suite 2600,  
Three Bentall Centre  
Vancouver, British Columbia V7X 1L3  
**Telephone:** 604-631-3300  
**Facsimile:** 604-631-3309  
**Email:** [vancouver@blakes.com](mailto:vancouver@blakes.com)

MONTREAL



1 Place Ville Marie  
Suite 3000  
Montréal, Quebec H3B 4N8  
**Telephone:** 514-982-4000  
**Facsimile:** 514-982-4099  
**Email:** [montreal@blakes.com](mailto:montreal@blakes.com)

OTTAWA



340 Albert Street  
Suite 1750, Constitution Square, Tower 3  
Ottawa, Ontario K1R 7Y6  
**Telephone:** 613-788-2200  
**Facsimile:** 613-788-2247  
**Email:** [ottawa@blakes.com](mailto:ottawa@blakes.com)

**NEW YORK**



Blake, Cassels & Graydon (U.S). LLP  
126 East 56th Street, Suite 1700, Tower 56  
New York, New York U.S.A. 10022-3613  
**Telephone:** 212-893-8200  
**Facsimile:** 212-829-9500  
**Email:** newyork@blakes.com

**LONDON**



23 College Hill, 5th Floor  
London, England EC4R 2RP  
**Telephone:** +44-20-7429-3550  
**Facsimile:** +44-20-7429-3560  
**Email:** london@blakes.com

**BAHRAIN**



Blake, Cassels & Graydon LLP  
5th Floor, GB Corp Tower  
Bahrain Financial Harbour, P.O. Box 11005  
Manama, Kingdom of Bahrain  
**Telephone:** +973-17-15-15-00  
**Facsimile:** +973-17-10-49-48  
**Email:** bahrain@blakes.com

**BEIJING**



1 Guanghai Road, Unit 1050, South Tower  
Beijing Kerry Centre, Chaoyang District  
Beijing, People's Republic of China 100020  
**Telephone:** +86-10-6530-9010  
**Facsimile:** +86-10-6530-9008  
**Email:** beijing@blakes.com



