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Doing Business in Canada

Canada is internationally recognized for its innovation, open market, stable government, infrastructure and educated workforce. These factors make Canada one of the premiere locations in the world for business investment.

By uniting skills, experience, and influence through SCG Legal, the Canadian member firms leading and growing companies in every industry to navigate the complex and ever-changing international legal and business landscape. With local and regional professionals located across the country, firms capitalize on the strength and effectiveness of the Team Canada network to help their clients solve today's toughest legal and business challenges in a timely and cost-effective manner.

SCG Legal Team Canada has produced *Doing Business in Canada*, a comprehensive and practical review of Canada's legal and business landscape, to assist those that are interested in establishing operations in Canada and/or considering an investment in a Canadian business.

We hope this guide proves useful and look forward to discussing the Canadian market with you.

Province or Territory	**SCG Legal Team Canada Firm**
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British Columbia	**Clark Wilson LLP** Vancouver
Manitoba	**Taylor McCaffrey LLP** Winnipeg, Gimli and Riverton
New Brunswick	**Bingham Law** Moncton
Nova Scotia	**Burchell Wickwire Bryson LLP** Halifax
Ontario	**WeirFoulds LLP** Toronto + Oakville
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SCG Legal and SCG Legal Canada

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SCG Legal Canada assists clients that range in size and sophistication. With globalization affecting the regular running of day-to-day business in every sector, clients that engage SCG Legal firms in Canada gain access to solution-oriented advice regardless of boundaries and borders. We take care of the diverse legal and business needs of individuals, start-ups, multinational public companies, non-government and government entities and more. Our portfolio includes representing Canadian clients looking to protect and expand their interests in the domestic and international markets, and advising international clients seeking to protect and expand their interests in Canada. The SCG Legal law firms in Canada are here to help clients meet their goals and make a difference.

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Preface

Doing Business in Canada (DBIC) is a general overview of, and introduction to, Canadian federal and provincial legislative and business considerations involving starting and operating a business and investing in Canada.

DBIC was written by the lawyers from the SCG Legal Canada affiliated firms, with experience and knowledge in the area of law that is covered. This publication is intended to be a general overview and should not be regarded as legal advice or legal opinions.

Changes to the law can occur at any time. This publication reflects the law at a moment in time, but depending on when this document is read, may not reflect changes in the Canadian federal and provincial legal and business systems.

Qualified advice should be sought when considering starting a business and/or investing in Canada. Unless otherwise provided, all dollar amounts that appear within are in Canadian dollars.

SCG Legal Canada

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Introduction

Canada is the world's second largest country by area land mass. It is estimated that Canada has a population of over 376 million people (May July 20162021), most of whom reside within 200 miles of the Canada-United States border. As a federal state, Canada is comprised of ten provinces and three territories.

According to both Forbes and Bloomberg magazines, Canada is the among the best country top 10 countries for business in the G-20. Canada continues to be one of the most welcoming and profitable places in the world for international business and foreign direct investment.

Canada appreciates the importance of its business community and has created an environment to foster entrepreneurial success. Once the Canada and European Union (EU) Comprehensive Economic and Trade Agreement (CETA) comes into force, foreign investors in Canada will have grants Canada access to both The North American Free Trade Agreement (NAFTA) and the EU - a vibrant market with a combined gross domestic product (GDP) of US$15.16739 trillion., or one-half of the world's output of goods and services. This is coupled with Canada's participation in the United States-Mexico-Canada Agreement (USMCA), which is a trilateral trade bloc that has worked to amplify the economic growth brought about by its predecessor, being the North American Free Trade Agreement (NAFTA).

The SCG Canada law firms are monitoring BREXIT and the impact it will have on these agreements as well as recent negotiations over the future of NAFTA. Canada is one of the most multicultural countries in the world, with world-class universities, a universal health care system and clean and friendly cities. The Organization for Economic Cooperation and Development (OECD) Better Life Index shows ranks Canada as one of the best Countries in the G-7 in terms of overall living conditions and quality of life, satisfaction, economics, and health.

Canada's workforce is the most highly educated among members of the OECD, with half 62% of our working-age population adults aged 25 to 34 years old (age 25 to 64) having a post-secondary level education.

GOVERNMENT

Canada's government is a parliamentary democracy based on the British model of government. Legislative power is shared between the federal and provincial governments in accordance with Canada's Constitution. Legislation affecting business conduct may originate at either level of government, depending on the nature and scope of the business. Those areas over which the federal government has exclusive power to legislate include the regulation of trade and commerce, navigation and shipping, currency and coinage, banking, bankruptcy and insolvency, patents, copyrights, trademarks, immigration, citizenship and customs. The areas over which the provinces have legislative power include property and civil rights, education, municipal government, labour relations and other matters of local concern. As well, there are some areas in Québec where there is a dual legislative power, such as immigration, health and environmental matters.

LEGAL SYSTEM

Canada's legal system is very similar to those in other Commonwealth Nations, including the United Kingdom and the United States. All provinces and territories apply common law, except for the province of Québec, which applies both common and civil law. While the common law has developed rules through judge-made law, the civil law operates through written rules contained in a code, being the Civil code of Québec, which is interpreted by judges. However a lot of Québec's regulations emanate as well from the common law.

LANGUAGE

Although both English and French are official languages in Canada, businesses are not required to operate in French except in Québec. New Brunswick is officially bilingual, and many businesses provide services in both French and English, although only government service legislation must be offered in both official languages. In the rest of Canada, English is the language of business. Canada is a multicultural nation, and many languages are commonly spoken by various segments of the population.

For a non-resident who is considering investing in or conducting business in Canada, it is important to consider the areas of Canadian law that will influence each investment and business decision. Although an in depth look at each of these areas of law is beyond the scope of this publication, a variety of the most significant areas of Canadian law are surveyed in the following pages.

BANKING

The Canadian banking system, which follows the universal banking model, is a highly structured, stable, diversified and well-regulated regime consisting of a small number of large Canadian banks and a somewhat larger number of registered foreign subsidiary banks. In 2017, for the eighth consecutive year, the World Economic Forum declared Canada's banking system to be the soundest in the world..

Principal Forms of Business Entities

CORPORATIONS

Incorporating in Canada is a fairly simple process at both the provincial and federal levels. The main benefit of incorporating is that liability is limited to the corporation and except in certain limited circumstances, neither the directors nor shareholders are liable for the debts or obligations of the corporation.

Corporations in Canada have the power of a natural person and can generally carry-on business anywhere in the country (subject to certain filing requirements). There are no capitalization requirements at corporate law, but certain tax and accounting issues should be considered in this respect. Generally, meetings of directors and shareholders can be held outside of Canada although in certain cases this will need to be specifically contemplated in the constating documents. Certain provincial and federal corporations are subject to director residency requirements which is not the case of Québec corporations.

PARTNERSHIPS

In certain circumstances, setting up a partnership or other unincorporated association with one or more persons in Canada may be beneficial, especially from a tax perspective. The tax benefits of any flow-through entity needs to be carefully evaluated as they may not always be present, and without the benefit of incorporation, the liability of the partners may not be limited. In addition, the participation of a non-resident in a partnership or other unincorporated entity may be treated similarly to the establishment of a branch office. If a partnership is used, a detailed partnership agreement should be prepared to avoid certain default statutory rules.

In certain circumstances, a limited partnership may be an appropriate vehicle. Limited partnerships are typically used for more passive investments where tax planning is the prime basis for the structuring decision. In a limited partnership, a limited partner's liability is typically limited to the amount of their contribution. However, the general partner's liability is usually unlimited. It should be noted that where the limited partner becomes actively engaged in the business, this limitation on liability may cease to be effective and thus put his whole patrimony at risk.

BRANCHES OF FOREIGN COMPANIES

The decision to operate as a branch office or a subsidiary will depend on tax considerations. A branch office or division is an extension of the parent corporation's business, while a subsidiary is a separate corporation controlled by the parent corporation. In the case of a subsidiary, a parent company may be held liable, if there is a lifting of the corporate veil, for the actions of the subsidiary, even though it is a self-sufficient entity.

Branch registrations authorize foreign corporations to operate branch offices in Canada. Branches are registered provincially in each province where the foreign business intends to operate. The foreign company establishes a branch by applying for registration as an extra-provincial or foreign corporation. This requires a registered Canadian address and a Canadian resident lawyer/agent for service, so that the corporation has local representation in order to receive service of documents and to handle administrative and judicial matters locally.

Because a subsidiary allows for a division of liability between the Canadian operation and the foreign operation, it is the most common choice for non-resident investors. A subsidiary is simply a Canadian corporation whose controlling or sole shareholder is another corporation. A particular advantage is that an incorporated subsidiary of a foreign corporation is entitled to many of the same rights as a Canadian-owned corporation, such as limited liability. Foreign corporations can choose to incorporate a subsidiary in a federal or provincial jurisdiction. They can also apply for extra-provincial registrations. Whatever structure is contemplated, tax considerations should be a part of the decision.

TRUSTS

Real Estate Investment Trusts (REITs) and other forms of business trusts have grown in popularity over the past few years. A trust may be a resident of Canada or a non-resident of Canada. Residency of a trust is determined according to the circumstances of each case. For taxation purposes, the Canada Revenue Agency (CRA) (the Canadian federal taxation authority), following the Supreme Court of Canada's decision, considers a trust to reside where the trustee, executor, administrator, liquidator or other legal representative who manages the trust, or controls the trust's assets, performs the central management and control over the trust. In the Province of Québec, a trust constituted under the Civil code of Québec shall have an independent trustee in the case where a trustee of the trust is as well a beneficiary or the settlor or both of the said trust.

Foreign Investment Regulation

CANADIAN ATTITUDE TOWARD FOREIGN INVESTMENT

Foreign investment is generally viewed favourably in Canada but understanding the requirements of the *Investment Canada Act* (ICA) is essential. The ICA governs foreign investment in Canadian business and requires compliance by foreign investors with certain notification and review procedures.

Certain industries, including financial services, telecommunications, real estate, and broadcasting, have additional regulations regarding foreign investment, but a description of those regulations is beyond the scope of this publication. Legal advice regarding those regulations should be sought if an investment in one of those industries is being considered. Additionally, Canada's *Competition Act* should be consulted (discussed later in this guide) as some investments may be considered "mergers" under that statute.

INVESTMENT CANADA ACT: APPLICATION

The ICA applies when a non-Canadian acquires control of a Canadian business or establishes a new Canadian business. A “non-Canadian” is defined in the ICA as an individual, government or agency thereof or any entity that is not a Canadian citizen, permanent resident, or Canadian government or entity that is Canadian-controlled. “Control” is presumed acquired when 1/3 or more of an entity’s voting shares are acquired. This presumption can be rebutted if there is no control in fact. For non-corporate entities, holding a majority of voting interests constitutes “control”. A “Canadian business” is defined as a business carried on in Canada that has (a) a place of business in Canada, (b) an individual or individuals in Canada who are employed in connection with the business, and (c) assets in Canada used in carrying on the business.

INVESTMENT CANADA ACT: NOTIFICATION

A transaction is “notifiable” under the ICA if a non-Canadian acquires control of a Canadian business, and the transaction is not “reviewable” (discussed below). Notification can be submitted by the investor to Investment Canada any time before, or up to 30 days after, the close of the transaction. There is certain information that needs to be filed, but the process is not onerous relative to the review process.

INVESTMENT CANADA ACT: REVIEW

A transaction is “reviewable” under the ICA if certain investment thresholds are exceeded. If a transaction is reviewable, it can only be completed once the investor makes a pre-closing filing and receives government approval.

Direct acquisition of control of a Canadian business by a non-Canadian is subject to review if one of the following six thresholds is exceeded:

1. Direct acquisition of a publicly-traded entity: $1.043 billion or more in enterprise value;

2. Direct acquisition of a privately-held entity: $1.043 billion or more in enterprise value;

3. Acquisition of Assets: $1.043 billion or more in enterprise value;

4. Direct acquisition of a cultural business: $5 million or more in book value of assets;

5. Direct acquisition by a non-World Trade Organization (WTO) investor of a non-WTO controlled target: $5 million or more in book value of assets; or

6. Direct acquisition by a state-owned enterprise: $415 million or more in book value of assets.

Note that specific formulas are applied for calculating “enterprise value” and care must be taken to follow the ICA process in that regard.

A direct acquisition of a Canadian business by a trade agreement investor that is not a state-owned enterprise, or a direct acquisition of a Canadian business controlled by a trade agreement investor, has an enterprise value threshold of $1.565 billion.

Generally, indirect investments by non-WTO investors and indirect investments in the cultural sector are reviewable if the book value of assets is $50 million or more.

If a transaction is reviewable, the investor must establish that the investment is likely to be of “net benefit to Canada”. The term “net benefit” is not specifically defined, but the Minister is required to consider a number of factors in its analysis, including: (i) the effect of the investment on the level and nature of economic activity in Canada; (ii) the degree and significance of participation by Canadians in the Canadian business; (iii) the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada; (iv) the effect of the investment on competition within any industry or industries in Canada; and (v) the compatibility of the investment with national industrial, economic and cultural policies. If the government has concerns about whether the transaction will be of net benefit, investors usually engage in negotiations with the government and provide assurances and undertakings to resolve these concerns. Typically, this involves commitments to maintain a certain number of employees or local offices in Canada or to make additional investments in the economy.

INVESTMENT CANADA ACT: NATIONAL SECURITY REVIEW

Notwithstanding the foregoing, the Canadian government retains the right to review an investment if it has “reasonable grounds to believe that such investment could be injurious to national security,” regardless of whether the investment is notifiable or reviewable and regardless of the asset value or enterprise value of the targeted Canadian business. The government may notify the investor that the transaction is subject to a national security review up to 45 days, which can be extended by up to an additional 45 days, after it becomes aware of the transaction.

COMPETITION LAW

Canada’s *Competition Act* (CA) governs mergers and other business practices that can affect competition in Canadian markets. The CA seeks to prohibit anti-competitive conduct in pursuit of its objective to “encourage competition, promote efficiency and adaptability, expand participation in world markets and protect small and medium-sized businesses."

COMPETITION ACT: MERGER NOTIFICATION AND REVIEW

Under the CA, a "merger" is broadly defined as "the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, buyer or other person." Generally, transaction parties are required to notify the Competition Bureau of a merger when the following thresholds are met:

1. The parties to the transaction:

   a. Have combined assets in Canada that exceed $400 million; or

   b. Have combined gross revenues from sales in, from or into Canada that exceed $400 million; and

2. The Canadian assets acquired (in the case of an asset acquisition) or the Canadian assets owned by the target (in the case of a share acquisition) have an aggregate value or generate revenues in excess of $93 million. (The transaction-size threshold adjusts annually with reference to GDP growth. This amount is for transactions occurring in 2021.)

Where the thresholds are met, notification is required before a transaction is completed, and parties must wait 30 days after notification to close. During that 30-day period the Commissioner may request additional information from the parties to assist in the review of the transaction, which extends the waiting period until 30 days after all requested information is provided.

During its review, the Commissioner will determine whether the proposed transaction will, or is likely to, prevent or lessen competition substantially. If the Commissioner determines this will occur, the Commissioner may apply to the Competition Tribunal for an order preventing, dissolving, or altering the transaction or may enter into a consent agreement with the merging parties to resolve any concerns.

The Commissioner is also able to review transactions that fall below the threshold, but, in those circumstances, the parties need not provide any advance notification prior to closing.

COMPETITION ACT: OTHER MATTERS

The CA regulates other conduct that can have a negative impact on competition through both civil and criminal prohibitions. The criminal provisions prohibit the following types of conduct:

- Bid-rigging;
- Agreements among competitors to fix prices, allocate markets or restrict output; and
- Misleading advertising and telemarketing practices.

The civil provisions apply to conduct that is potentially, but not always, anti-competitive. These provisions govern the following forms of activity:

- Abuse of a dominant market position;
- Refusal to deal;
- Exclusive dealing;
- Tied selling;
- Market restriction;
- Price maintenance;
- Other agreements among competitors that are likely to substantially lessen or prevent competition;
- Delivered pricing; and
- Less egregious forms of misleading advertising practices.

The primary distinction between criminal and civil matters is the potential penalties (i.e. criminal fines/imprisonment as opposed to civil administrative monetary penalties and remedial orders), the burden of proof (i.e. the criminal standard versus the civil standard) and the forum for adjudication (i.e. courts as opposed to the Competition Tribunal).

Tax

TAX SYSTEM OVERVIEW

Income Taxes

The federal Government of Canada and each province and territory in Canada impose income taxes.

A resident of Canada (e.g., a Canadian subsidiary of a non-resident) is taxed on its worldwide income whereas a non-resident is only taxed on Canadian-source income (i.e., income from employment in Canada, or from a business carried on in, Canada gains on dispositions of “taxable Canadian property”, and certain passive income paid or deemed to have been paid by a Canadian resident such as dividends, rent and royalties).

A corporation will generally be resident in Canada if it is incorporated in Canada or if its central mind and management are located in Canada. If the corporation would also be resident in another country with respect to which Canada has a bilateral tax treaty, “tie-breaker” rules in that treaty might avoid double taxation that would likely otherwise result from such dual-residency. If such tie-breaker rules determine that the corporation is not resident in Canada, the corporation will generally be considered a non-resident of Canada for purposes of Canada’s domestic income tax legislation.

A partnership is not subject to Canadian income tax although it generally has to produce financial information to the tax authorities. Instead, the income or loss of the partnership is allocated to its partners and the partners thereof may be required to report the income in their Canadian income tax return (e.g., if the partner is a Canadian resident, or if the partner is a non-resident and the income is Canadian-source income).

Taxation of a Canadian Subsidiary v. Branch Operation

The two main methods of carrying on business in Canada are either by operating the business through a Canadian subsidiary corporation or by operating the Canadian business activities as a branch operation of the non-resident.

(a) *Branch Operation*

A non-resident “carrying on business” (or deemed to be carrying on business) in Canada in a year is generally liable for Canadian income tax in respect of the profits arising from such business activities and is required to file an annual federal income tax return (and possibly provincial returns) in respect of that year. However, a non-resident that is entitled to the benefits afforded by a bilateral tax treaty with Canada is not generally liable to Canadian corporate income tax in respect of its business profits provided it does not carry on the subject business through a “permanent establishment” (including a deemed permanent establishment) in Canada. If such an exemption under a treaty is available, the relevant returns would report a taxable income amount of “nil”.

In addition to income tax, a branch tax is imposed at a rate of 25% on a non-resident corporation’s after-tax Canadian income to the extent that such income was not reinvested in qualified investments in property in Canada. The branch profits tax rate will generally be reduced to rates between 5% and 15%

for non-resident corporations entitled to the benefits afforded under a bilateral tax treaty with Canada (under the Canada-U.S. income tax treaty, the first $500,000 of branch profits is exempt from this branch tax). This tax is intended to replicate the withholding tax that would be imposed if the after-tax profits of a Canadian resident corporation were repatriated to a non-resident shareholder by way of dividends.

If the Canadian business activities involve providing services to customers/clients, it is important to note that a person paying an amount to a non-resident in respect of services rendered in Canada is required to deduct and remit to the CRA 15% of such payment on account of the non-resident's potential Canadian income tax liability unless a waiver of the withholding requirement is obtained from the CRA. The non-resident may apply for and obtain a refund of such amounts by filing a Canadian income tax return in a timely manner if the non-resident is not, in fact, subject to tax in Canada (e.g., by reason of a treaty exemption) and has satisfied all of its other Canadian income tax obligations.

In certain circumstances, a non-resident will be deemed to be a Canadian resident and be required to withhold and remit tax to the CRA on certain payments to other non-residents.

(b) *Subsidiary Corporation*

A subsidiary incorporated in Canada is generally deemed to be a Canadian resident and therefore liable to federal and (as applicable) provincial income tax on its worldwide income.

Certain payments (and deemed payments) from a Canadian corporation to a non-resident are subject to Canadian withholding tax. These payments most commonly include dividends, rent, royalties and certain interest payments. The general withholding tax rate for such payments is 25% but is generally reduced in Canada's bilateral tax treaties to rates between 0% and 15% (a notable exception is that certain treaties, such as the Canada-U.S. tax treaty, do not provide for any reduced withholding tax rate on rent payments for Canadian real property). Canada's bilateral tax treaties will also generally reduce the scope of what would otherwise be considered a royalty under Canada's domestic income tax legislation (thereby potentially eliminating any withholding tax).

There is no withholding tax on conventional interest payments made by Canadian residents to arm's length non-residents. There is also no withholding tax on conventional interest payments between non-arm's length residents where the recipient is a U.S. resident for purposes of, and otherwise entitled to the benefits afforded under, the Canada-U.S. tax treaty.

Certain other payments can be made free from Canadian withholding tax. In particular, the repayment of the principal amount of indebtedness and the return of share capital are payments that are not generally subject to withholding tax.

Canadian transfer pricing rules will generally operate to deem cross-border payments for goods or services between non-arm's length parties to have been affected at arm's length prices for income tax purposes. Taxpayers are also required to contemporaneously document their transfer pricing methodology, as failure to do so potentially carries penalties.

U.S. residents regularly consider operating in Canada through a Canadian unlimited liability corporation (ULC), which may be advantageous for U.S. tax purposes since it can be treated as a pass-through or disregarded entity for U.S. federal income tax purposes. For Canadian income tax purposes, a ULC is treated the same as any other Canadian corporation. However, the use of ULCs creates additional complexity with respect to the availability of benefits under the Canada-U.S. tax treaty.

Select Issues of General Importance

(a) *Thin Capitalization Rules*

Interest payments may be deductible against income on a current basis provided certain conditions are satisfied. In general, in order to be deductible, interest payments must be paid or payable in the year pursuant to a legal obligation, and the borrowed money must be used for the purpose of earning income from a business or property.

Notwithstanding the general rules for the deductibility of interest payments, "thin capitalization rules" can restrict interest deductions in respect of interest on debts from certain closely connected non-resident lenders. In the case of a Canadian corporate subsidiary, these rules generally also apply to deem the subsidiary to have paid a dividend equal to the amount of interest that could not be deducted under the rules (which dividend would be subject to Canadian withholding tax).

(b) *Employee Source Deductions*

Resident and non-resident employers generally have the same withholding, remitting, and reporting obligations with respect to work performed in Canada by their employees (e.g., income tax, Canada Pension Plan (CPP) contributions, and Employment Insurance (EI) premiums in addition to applicable provincial payroll taxes). Exemptions from certain withholdings may be available under a bilateral agreement or under domestic legislation. Where CPP contributions and/or EI premiums must be deducted from an employee's pay, the employer is liable for CPP contributions and EI premiums on its own account.

Under a non-resident employer certificate regime, non-Canadian employers that are resident in a country with which Canada has a tax treaty, and are certified by the CRA, are not required to make withholdings on account of Canadian income tax on payments made to a non-resident employee in respect of employment services performed in Canada if the employee (i) is exempt from Canadian income tax in respect of the payment because of a tax treaty, and (ii) is either (A) not in Canada for 90 or more days in any 12-month period that includes the time of the applicable payment, or (B) not in Canada for 45 or more days in the calendar year that includes the time of the applicable payment.

To qualify for the exemption, the non-resident employer must make certain filings with the CRA to become certified and be so certified at the time of the applicable payment. Even if the employer is so certified, itwill generally continue to have reporting obligations with respect to amounts paid to its qualifying non-resident employees and subject to a due diligence defence, will be liable for withholdings to the extent that the non-resident employees were not in fact qualifying non-resident employees.

(c) *Clearance Certificates*

Non-residents who dispose of “taxable Canadian property” generally must obtain a clearance certificate from the federal government as part of the sale process, subject to certain exceptions. If they fail to obtain the certificate, the purchaser is required to withhold and remit 25% or 50% of the sale price, depending on the nature of the property. The definition of taxable Canadian property relates primarily to property in respect of a business carried on in Canada (e.g., assets of a branch), to real property or resource properties in Canada, and to shares of corporations, units in trusts, or interests in partnerships that derive their value principally from Canadian real property or resource properties.

Commodity Taxes

The federal government imposes excise taxes and customs duties and a value-added tax called the “good and services tax” or “GST” of 5% on most goods and services consumed. In addition to the GST, five provinces (Ontario, Newfoundland, Nova Scotia, New Brunswick and Prince Edward Island) have harmonized their provincial sales tax regimes with the GST in the form of a “harmonized sales tax” (HST). At present, the HST rates range from 13% to 15%. The Québec Sales Tax (QST), which is levied in Québec, is substantially similar to the GST regime, but is administered by Revenu Québec. British Columbia has a provincial sales tax which ranges from 7% to 12%.

For most types of businesses (financial institutions are a significant exception), GST/HST is intended not to be a business cost. In general, the business is required to collect GST/HST on its revenue and is entitled to recover any GST/HST that it has paid in carrying out its business.

A non-resident carrying on business in Canada will generally be required to register for, and charge and collect and remit, GST/HST on its "taxable supplies" assuming that the non-resident makes "taxable supplies" (whether inside or outside Canada) of over $30,000 annually.

A non-resident that does not carry on business in Canada is still generally required to register for GST/HST if making "taxable supplies" of services and intangibles to Canadian residents that are not registered for GST/HST if (i) the services or intangibles may be used or consumed in Canada (regardless of where the services are physically performed), and (ii) the non-resident will charge or will reasonably expect to charge more than Cdn$30,000 in fees for such supplies to such Canadian residents over any consecutive 12-month period. In these circumstances, the non-resident generally (a) is required to charge and collect and remit GST/HST on such supplies to such unregistered Canadian residents, but (b) is not entitled to recover any GST/HST that it has paid in making such supplies.

Special rules apply for non-resident vendor sales through online platforms and fulfillment warehouses.

In the absence of a permanent establishment for GST/HST purposes, a non-resident registrant is generally required to give, and maintain with, the CRA security generally equal to 50% of non-resident's net GST/HST liability for the previous 12-month period (or an estimate of its net tax for the first 12-month period beginning on the date of registration).

Where the non-resident carries on business in Canada through a Canadian subsidiary, the subsidiary will also be required to register for, and charge and collect and remit, GST/HST on its "taxable supplies", assuming that the subsidiary makes "taxable supplies" of over $30,000 annually. However, as a resident of Canada, it would not be required to post security in respect of its registration.

Canada's bilateral tax treaties do not provide any exemptions or relief for commodity taxes.

Employment & Immigration Law

LABOUR & EMPLOYMENT LAW

Unlike in many countries, regulation of employment in Canada is covered almost entirely by common law and provincial (rather than federal) statutes.

Employment standards laws establish minimum working conditions for almost all employees in each province. These laws governs such matters as minimum wage, hours of work, overtime compensation, wage payment, wage deductions, holidays, vacations, pregnancy and parental leave, other leaves of absence, and termination of employment. Regarding termination, these laws deal with the minimum obligations of an employer to give the employee notice of termination or pay in lieu thereof and other required payments and entitlements. An agreement between an employer and an employee cannot provide for employment terms that fall below these minimum requirements. Provisions in collective agreements prevail over some sections of these employment laws.

In addition to the pay required upon the termination of employment under relevant employment standards legislation, and unless the employee's contract of employment has an enforceable termination provision that specifies the notice required for termination or the basis to calculate that period of notice, employees are entitled to reasonable notice of a without-cause termination at common law. Damages for "wrongful dismissal", which is termination without proper cause and without adequate notice, are determined with reference to a number of factors such as the employee's length of service, age, position in the organization, and their prospects for comparable re-employment.

Provincial human rights legislation, such as the *Human Rights Code* in Ontario and *the Charter of Human Rights and Freedoms* in Quebec, prohibit an employer from refusing to employ, or refusing to continue to employ, a person or discriminating against a person with respect to employment or any term or condition of employment on the basis of a prohibited or protected ground. These prohibited or protected grounds are (with some variance by province): race, colour, ancestry, citizenship, ethnic origin, creed, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex (including pregnancy and breastfeeding), sexual orientation, age, gender, language, political convictions and record of offences. Provincial human rights statutes also prohibit discrimination in employment advertisements. The remedies that the provincial human rights tribunals can award to a successful complainant are broad, and include reinstatement, lost wages, and compensation for injury to dignity, feelings, and self-respect as well as non-monetary public interest remedies.

Workers' compensation statutes at the provincial level establish a mandatory statutory no-fault insurance plan that provides for payment of compensation to employees in the event of injury or illness arising from their employment. The system is funded through assessments (i.e. insurance premiums) levied on employers. The quantum of the assessment is dependent on a number of factors including the industry in which the employer operates, the size of the employer's payroll, and the past claims history of the employer.

In addition to premiums payable under workers' compensation legislation, an employer must also deduct or "withhold" income tax payments from wages and pay contributions for pension and employment insurance under the *Canada Pension Plan* and *Employment Insurance Act*. The *Employment Insurance Act* establishes a system to compensate employees during temporary periods of unemployment. It is paid for by employer and employee assessments.

Provincial occupational health and safety legislation impose a number of requirements on employers for the protection of workers, which can include (and which vary by province) the requirement to take all precautions reasonable in the circumstances for the protection of a worker, the selection of a health and safety representative by non-managerial workers or the formation of a joint health and safety committee, and specific requirements regarding workplace violence and workplace harassment.

Provincial labour laws in Canada establish and protect the rights of employees to organize into unions and the right of employers to organize into employer organizations for labour relations purposes. These statutes also prohibit unfair labour practices by employers, employees, and unions; create a general framework for collective bargaining, prescribes the requirements for legal strikes, lock-outs, and picketing; set general guidelines for the arbitration of labour relation disputes; and provides various mechanisms to assist employers and unions in reaching collective agreements.

For employers and employees (whether unionized or not) in federally regulated businesses such as banking, aeronautics, fishing, navigation and shipping, and inter-provincial transport, the *Canada Labour Code* is the principal governing statute. The *Canada Labour Code* sets minimum standards for federally regulated employment and provides remedies including reinstatement for unjust dismissal of certain types of employees. There is also a federal *Canadian Human Rights Act* that corresponds in general with each province's human rights legislation.

IMMIGRATION LAW

Immigration in Canada falls under federal jurisdiction and is governed by the Immigration and *Refugee Protection Act* of Canada (IRPA).

Foreign nationals can only work in Canada if they obtain a work permit in accordance with IRPA. Generally speaking, in order to obtain a work permit, an employer must first apply to Service Canada for a labour market opinion. In order to obtain the labour market opinion, employers must satisfy Service Canada that they have made concerted efforts to hire a Canadian to perform the job in question.

Not all U.S. workers will require a labour market opinion. The following is a list of categories of jobs and workers for whom an employer would not have to obtain a labour market opinion:

1. employees covered by international agreements such as NAFTA;
2. entrepreneurs and intra-company transferees;
3. spouses; and
4. academics and students.

In some cases, employers may wish to bring employees into Canada permanently. There are four general categories for doing so under IRPA:

1. family class;
2. skilled workers;
3. business class (entrepreneurs and investors); and
4. intra-company transfers.

Applications under each category are very different and employers must consider which category properly applies before submitting an application.

For those interested in additional information regarding the Canadian immigration system, please refer to the article State of the Nation: Canada's Immigration System by Vance P. Langford and Jenna Kirk of Field Law, featured on the Lexpert website.[1]

Foreign Investment in Canadian Real Estate

LAND AND TITLE SYSTEMS

Property legislation is a provincial responsibility in Canada and therefore each province has its own system for registering interests in real property. Historically, properties would be governed by the "Registry System" or a "Land Titles" or "Torrens" System. With the introduction of Electronic Searching and Registration in many Provinces, Land Titles is the predominant system in many Provinces.

[1] "State of the Nation: Canada's Immigration System", *2016 Canadian Lexpert Directory,* http://www.lexpert.ca/article/state-of-the-nation-canadas-immigration-system/?p=13|54&sitecode=lex

TITLE INSURANCE

The use of title insurance in commercial real estate transactions varies from province to province but has increased in use in most Provinces in the past 10-15 years.

PROPERTY DEVELOPMENT AND PLANNING LEGISLATION

Municipalities typically oversee land use regulation, including community development plans, zoning bylaws, subdivision requirements and development permits. Most municipalities have established comprehensive land-use regulation bylaws. The community development plans of municipalities can be of particular interest to real estate investors and developers as the documents serve as a guide for future development.

FOREIGN OWNERSHIP OF REAL PROPERTY

In Canada, Provinces have the right to restrict the purchase of real estate by non-residents or foreign citizens and each province has different legislation governing foreign ownership.

The disposition of real estate in Canada (or of shares of a company when the shares' value has been derived primarily from real property) by a non-resident triggers withholding rights for the purchaser under the *Income Tax Act* (Canada) (ITA). A purchaser acquiring real estate from a non-resident of Canada must withhold a portion of the purchase price of the real property until the vendor provides the purchaser with an adequate tax compliance certificate from the CRA. This withholding protects Canada's ability to collect taxes owing by a non-resident when a non-resident disposes of real estate in Canada.

CONDOMINIUM PROPERTY

The divided condominium ownership is a form of property ownership, seen most often in astrata title development, where a property owner individually owns a specified condominium unit, together with joint ownership and interest as a tenant-in-common over common areas of the condominium property. In the Province of Québec Across Canada, there is as well the are also undivided co-ownership structure where the right ownership is not accompanied by a physical division structures whereby purchasers buy shares in the corporation, which owns the lands and building. These purchasers do not own units (as condo owners do), rather, their ownership rights are as shareholders of the property corporation.

THE PROCEEDS OF CRIME (MONEY LAUNDERING) AND TERRORIST FINANCING ACT

The *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (Canada) imposes mandatory reporting and record-keeping requirements on real estate developers in Canada. This Act requires, among other things, that real estate developers report suspicious transactions and large cash transactions to the Financial Transactions and Reports Analysis Centre of Canada. In addition, real estate developers are required to establish and maintain a record-keeping system and compliance system.

LAND TRANSFER TAX/CHARGES

Land transfer taxes/land registry charges are payable in all Canadian Provinces when a purchaser acquires an interest in real estate through a registered transfer. Land transfer tax rates vary widely across the Provinces and vary within each Province, as in some provinces each municipality may set their own land transfer taxes. Across Canada, each real estate owner, except in particular situations, has to annually pay property taxes and school taxes. The amount of tax varies province by province.

OWNERSHIP STRUCTURE OF REAL PROPERTY

There are various methods available to structure ownership of real property, each with their own benefits, however, corporate entities will often structure their business affairs so that a separate single-purpose corporation holds registered title to real estate. In some instances, this single-purpose corporation holds registered title as a “bare trustee” or “nominee” for the beneficial owner.

FINANCING

Financing the purchase and development of real estate in Canada can be structured in a variety of ways, but the primary security documents involved are essentially the same as other common law and civil law jurisdictions. The primary security documents are the mortgage (a hypothec in the Province of Quebec) and assignment of rents, and additional security can be provided through general security agreements and other charges on personal property, personal guarantees and conditional assignment of material contracts.

The Regulation of the Energy Sector in Canada

The energy sector in Canada, consisting of the generation, transmission and distribution of oil, gas, and electricity, is subject to federal and provincial jurisdiction.

Energy projects in Canada may require a wide range of federal, provincial and municipal approvals, depending on the nature of the project and where it is located. Canada is rich in energy resources of all types, so the projects and specific approvals will vary greatly. This chapter provides an overview of the significant regulatory approvals that typically may be involved.

FEDERAL JURISDICTION

The federal government has formal jurisdiction over inter-provincial and international trade in energy, and regulates the projects that undertake those activities. We use the word "formal" because the federal government has left to the provinces the regulation of electricity projects, even those involving inter-provincial and international components. The federal government also owns and regulates the energy resources on federal lands – for example, the coastal offshore regions and northern territories. In 2019 the federal government undertook significant changes to the regulatory regimes for impact assessments and energy regulation. Those changes are described in more detail below.

Energy Regulation

The new Canadian Energy Regulator (CER) formerly known as the National Energy Board (NEB) has formal jurisdiction over federal aspects of the oil, gas and electricity industries under the new Canadian Energy Regulator Act (CERA) which came into force in 2019. It includes jurisdiction over inter-provincial and international power lines, pipelines, and energy imports and exports. While the CER has formal jurisdiction over the electricity component of the energy sector, the regulation of that sector has been left to the provinces. The CER also regulates oil and gas development in coastal offshore areas and within Canada's northern territories under the Canadian Oil and Gas Operations Act. The CER regulatory mandate includes the approval of new projects as well as the ongoing regulation and decommissioning of existing projects in Canada's public interest. The areas of regulation include: engineering and design, rates and service terms, safety and security, environmental protection, and efficient infrastructure and markets.

Environmental Regulation

Both the federal and provincial governments share jurisdiction over environmental matters. Federal legislation may apply to any project that touches on areas of federal jurisdiction. Those areas include: fisheries, the import and export of hazardous products, and the transportation, both between provinces and internationally, of dangerous goods, migratory birds, and species at risk.

Energy projects requiring federal approvals may also trigger a federal impact assessment (IA) under the new *Impact Assessment Act* (IAA) which came into force in 2019 replacing the previous *Canadian Environmental Assessment Act.* Projects are designated by type and thresholds prescribed by the *Physical*

Activities Regulations or by Ministerial order. A new Planning Phase has been introduced to assist the newly named Impact Assessment Agency of Canada (IAAC) with management of time limits and coordination with other authorities including Indigenous bodies, as well as with the scope of the assessment. An IA may range from a comprehensive study when a project may have significant environmental effects to less detailed screenings when a project may have less significant effects. If the public interest in a project is exceptionally high or the project is regulated under CERA then a review panel must be established and public hearings will be held. However, there are new time limits imposed (expected 300 days to a max of 600 days) by regulation

Some provinces have entered into "harmonization" agreements with the federal government to avoid duplication of the federal and provincial IA process. For example, British Columbia has entered into environmental assessment cooperation agreement with the federal government that provide for a single, cooperative IA process in situations where an IA of a proposed project is required under both the IAA and *British Columbia's Environmental Assessment Act*. Other Federal Legislation

The federal government has jurisdiction over other areas that may affect projects including - navigation on waterways, international relations and treaty matters, international and boundary waters, federal lands, and aboriginal rights.

PROVINCIAL JURISDICTION

Energy Regulation

The provinces regulate the transmission and distribution of electricity and natural gas within provincial boundaries. With some exceptions, the price of the commodity, whether gas or electricity, has been deregulated. Rates for transmission and distribution are approved by provincial regulatory agencies. Those agencies also approve new transmission and distribution facilities. In large measure, the provinces approve the construction of inter-provincial and international electricity transmission facilities and approve the rates for the international and inter-provincial transmission of electricity.

In some provinces, for example, Ontario and Quebec, the provincial government owns all or a major part of important electricity generation and transmission facilities. Some provinces, again for example, Ontario and Quebec, place restrictions on the extent of private sector investment in electricity transmission and distribution facilities. There are no comparable restrictions on natural gas facilities.

The provincial role in the regulation of the energy sector is increasing in importance as a result of two linked developments. One is the effort to reduce greenhouse gases, for example the establishment of a cap and trade regimes in Ontario and Québec and carbon taxes in British Columbia. The second is the deployment of distributed energy resources, which will have a material impact on provincially regulated electricity distribution utilities.

Environmental Legislation

The provinces share responsibility for environmental matters with the federal government. For example, both the provincial and federal government share responsibility over aspects of fisheries and wildlife protection and water resource protection. In most cases, a proposed project must be assessed from the perspective of both provincial and federal regulatory requirements, and in some cases even municipal.

Each province has an environmental assessment regime which reviews the environmental impact of projects.

CASE LAW UPDATE

References re Greenhouse Gas Pollution Pricing Act

On March 25, 2021, the Supreme Court of Canada (SCC) released its highly anticipated decision in *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11. In that case, the Court upheld the federal government's ability to establish a minimum national price on greenhouse gas (GHG) emissions.

Specifically at issue in *References re Greenhouse Gas Pollution Pricing Act* was the constitutionality of the federal *Greenhouse Gas Pollution Price Act* (GGPPA), which establishes a national price on greenhouse gas emissions. The GGPPA requires all Canadian provinces and territories to impose charges on the production, distribution, and importation of various carbon-based fuels. This obliges provinces and territories to implement a carbon pricing system that meet the minimum federal pricing of carbon-based fuels and emission reduction targets.

Nevertheless, the GGPPA merely operates as a "backstop," meaning that it only imposes a federal carbon price if provinces or territories' own measures to limit emissions do not meet the federal minimum price for carbon and other GHGs. In other words, the GGPA allows provinces to implement their own regulatory schemes to price carbon if those schemes satisfy federal minimum targets.

The SCC upheld the constitutionality of the GGPPA, finding that the Act fell within the federal government's jurisdiction to regulate matters of national concern. Now that the SCC's ruling has clarified the issue of carbon pricing in Canada, businesses should anticipate price increases of carbon-based fuels.

SOCIAL, GOVERNANCE PROVINCIAL JURISDICTION

What are Environmental, Social, and Governance criteria?

Another emerging consideration for Canadian businesses is environmental, social, and corporate governance (ESG) criteria. ESGs are factors that investors use to evaluate companies in which they may want to invest. The environmental criteria consider how the company manages its environmental impact, the social criteria consider how the company maintains relationships with its stakeholders, and the corporate governance criteria consider the company's corporate structure.

Some securities regulators, including the Ontario Securities Commission are currently attempting to implement enhanced disclosure requirements to help would-be investors navigate companies' ESG frameworks. Earlier in 2021, Ontario's Capital Market Taskforce advocated to the Canadian Securities Administrators for a mandatory and uniform ESG disclosure framework for all non-investment fund issuers across Canada. The Taskforce asserted that creating a uniform standard of disclosure across Canada would create an equal playing field for all issuers, improve access to global markets, and prevent excessive compliance costs. Canadian businesses should stay apprised of these evolving securities requirements.

Infrastructure Projects

Infrastructure projects, both public and private, are big business in Canada.

PRIVATE INFRASTRUCTURE PROJECTS

Canada's richness in natural resources make it a hotspot for private infrastructure development, including projects in energy, mining, forestry, manufacturing, transportation, communications and other industries. Private infrastructure projects face many of the same issues as do public projects, some of which are addressed below.

With Asia's increasing demand for new and reliable sources of energy, there is a rapidly growing need to expand western and eastern Canada's energy related infrastructure, including new oil and gas pipelines across Alberta, British Columbia and Quebec as well as storage facilities, liquefied natural gas (LNG) plants and marine terminals on the British Columbia coast. As these new markets have developed, so too have the federal and provincial regulatory frameworks, particularly as they relate to authorizations for new pipelines, oil and gas export licences, environmental assessments and permits, royalty and resource tax regimes and the engagement/consultation with First Nations. This is a dynamic and evolving area of Canadian business and law.

PUBLIC INFRASTRUCTURE PROJECTS

Public infrastructure in Canada is procured by all levels of government. The federal Government of Canada is responsible for infrastructure projects involving matters such as national defence, security and transportation projects that span multiple provinces. The provinces are responsible for infrastructure such as health care facilities, schools and transportation projects within the applicable province. Finally, local infrastructure such as local roads, sewers, recreational facilities, libraries and waste facilities are within the responsibility of the applicable municipality or local government.

DELIVERY OF PUBLIC INFRASTRUCTURE PROJECTS

Every infrastructure project must be designed, financed, constructed, operated and maintained, but there are many different ways for the government to procure and deliver an infrastructure project. Canadian governments procure these services using various delivery models along the spectrum from traditional design-bid-build to design-build-finance-operate-maintain models.

Over the past decade many Canadian governments have embraced public-private partnerships (P3s) as a method for delivering major infrastructure projects. In these projects, the government contracts with a single private sector partner (often a single purpose vehicle established by a consortium of companies) to design, build, fully or partially finance and maintain (and in some cases operate) the infrastructure under a long-term project agreement.

The governments of British Columbia, Quebec and Ontario have been particularly active in the P3 field, with each government having created its own government agency dedicated to bringing together government and the private sector to develop P3 projects. With an extensive and continuing deal flow, Ontario remains Canada's busiest P3 market.

Alberta has a dedicated P3 (Alternative Capital Financing) office through the Alberta Treasury Board. The province's focus was on education and transportation; however, water/wastewater and rapid transit projects recently have been announced. SaskBuilds is bringing together public and private sector parties for major infrastructure projects such as roads, schools and correctional facilities in the province of Saskatchewan. Manitoba does not have a dedicated public infrastructure agency.

Infrastructure Québec advises the provincial government on the implementation and structure of P3 projects in Québec. The provincial infrastructure organization has procured social infrastructure such as hospitals, highways, jails and courthouses in that province.

In the Maritimes, provincial organizations have procured social infrastructure including schools and highways. Bundling school buildings into a single P3 project, the Nova Scotia Ministry of Infrastructure and Transportation is responsible for the procurement of that province's major infrastructure projects.

The federal Government of Canada has also entered the P3 field, with the creation of a federal government P3 fund, as well as starting with its first P3 in spring 2010 (a Royal Canadian Mounted Police Headquarters Facility).

TRADE AGREEMENTS

Foreign investors should be aware that inter-governmental trade agreements may apply to government infrastructure procurements. International trade agreements relevant to government procurement include the North American Free Trade Agreement (NAFTA), the WTO Agreement on Government Procurement and the February 2010 Canada – U.S. agreement on government procurement. At the domestic level, the Government of Canada, the Canadian provincial governments and two of the three Canadian territorial governments are signatories to the Canadian Free Trade Agreement (CFTA), a trade agreement the purpose of which is to provide domestic suppliers with equal access to government procurements regardless of their province of origin. In addition to the CFTA there are interprovincial trade agreements between certain provinces such as the New West Partnership Trade Agreement between the Provinces of British Columbia, Alberta and Saskatchewan. These domestic trade agreements may be relevant to foreign companies with Canadian subsidiaries.

TENDERING LAW IN CANADA

Persons participating in Canadian bid processes (for infrastructure projects and otherwise) should be aware of the unique nature of Canadian tendering law. Canadian courts have held that a bid process contract (referred to as "Contract A") arises between the person who issues a call for bids or proposals and each bidder who submits a tender or proposal that complies with the terms of the call for bids or proposals, if the bid documents indicate an intention to create contractual relations. The contract awarded to the successful bidder or proponent is called "Contract B". Whether Contract A arises, and the content of its terms, can have important legal consequences for bid process participants.

OTHER ISSUES

In addition to the procurement and project delivery issues mentioned above, infrastructure projects in Canada face a range of issues including environmental review and approvals, First Nations consultation, property acquisition, finance, tax and construction issues. Navigating these areas for a given project requires specialized legal advice.

Securities Regulation

RAISING MONEY IN CANADA?

Regulatory Regime

Unlike in many countries where the securities industry is federally-regulated, in Canada, the securities industry is primarily regulated at the provincial or territorial level. Each province and territory in Canada has enacted securities legislation and established a securities regulator. These regulators work together through the Canadian Securities Administrators (CSA) with the aim of creating a harmonized and integrated securities regulatory regime, although there are differences in the laws and regulations applicable in each province and territory. Therefore, securities transactions may require compliance with several different regulatory regimes administered by different authorities.

Over the past few years, attempts have been made to establish a national securities regulator, none of which have been met with success, mostly due to the opposition by a number of provinces. Currently, all efforts to establish a single securities regulatory regime have been paused indefinitely.

Canadian securities laws regulate those who participate in the Canadian capital markets, including all issuers of securities in Canada, issuers listed on a Canadian stock exchange, those who trade in securities in Canada, those who provide investment advice in Canada, those who manage investment funds with investors in Canada or that have actively solicited investors, certain investors, directors and senior officers of Canadian public companies and those whose activities trigger the “take-over bid” or “issuer bid” rules under Canadian securities laws.

In addition, there are two national self-regulatory organizations: (1) the Investment Industry Regulatory Organization of Canada (IIROC), which oversees all investment dealers and trading activity on debt and equity marketplaces in Canada; and (2) the Mutual Fund Dealers Association of Canada (MFDA), which regulates the distribution side of the Canadian mutual fund industry.

Dealers, Advisers and Investment Fund Managers

Generally, Canadian securities laws require those who engage in, or hold themselves out to be in, the business of trading in securities, to be registered as a dealer and those who engage in or hold themselves out to be in the business of advising to be registered as an adviser. In addition, those who direct the business, operations or affairs of an investment fund are generally required to be registered as an investment fund manager. Registration is subject to a number of requirements, including working capital and insurance requirements, and various requirements applicable to the individuals acting for or performing certain functions for the dealer, adviser or investment fund manager. In addition, registered entities are subject to a number of ongoing requirements.

There are exemptions from the requirement to be registered. In particular, exemptions may be available to foreign dealers and advisers if they engage in certain specified limited activities and meet certain filing and other requirements.

Issuers

Generally, when securities are to be issued, Canadian securities laws require the filing of a prospectus containing full, true and plain disclosure of all material facts relating to the securities and the issuer with the securities regulator in each jurisdiction in Canada where the securities are being offered. The prospectus will be reviewed and any deficiencies must be resolved before a receipt for the prospectus will be issued.

Exemptions from the prospectus requirement are available and securities may be offered by way of “private placement” in certain circumstances, including where the investor is deemed to be sufficiently sophisticated, where the investor has an existing relationship with the issuer, or where there is some other disclosure document that will stand in the place of a prospectus, such as an “offering memorandum”. Recent amendments have expanded the prospectus exemptions available, such as the introduction of a “crowdfunding” prospectus exemption. Securities acquired in a private placement are generally subject to restrictions on resale. The issuance of securities under a prospectus exemption may trigger certain filing or disclosure requirements, depending on the exemption relied upon, including the filing of a report of exempt distribution (also known as a “45-106F1”).

An issuer that has filed and obtained a receipt for a prospectus from a securities regulator in a particular jurisdiction in Canada will be a “reporting issuer” under the securities laws of that jurisdiction (certain other actions may also trigger this status). Reporting issuers have additional obligations, including those relating to continuous and timely disclosure. These obligations seek to ensure that the investing public has current and accurate information to make informed decisions about whether to buy or sell the issuer’s securities. Canadian securities laws require a reporting issuer to, among other things, immediately announce material changes in its affairs, file interim and annual financial statements, provide management’s analysis of its financial results, provide disclosure about significant acquisitions, disclose details of executive compensation, comply with certain standards for soliciting proxies, comply with certain corporate governance practices, and publicly file its constating documents and material contracts.

Take-Over Bids and Issuer Bids

In Canada, the “take-over bid” rules govern the acquisition of issuers, which are similar to the U.S. tender offer regime. An offer made to a person in Canada to acquire voting or equity securities of an issuer, which, if acquired, would result in the offeror owning 20% or more of the outstanding securities of that class, is a “take-over bid”. Unless an exemption is available, the offeror must comply with the take-over bid rules, which are very complicated, including requirements that the bid be made to all holders in Canada of securities of the class subject to the offer pursuant to a circular containing prescribed information about the offer, that all holders must be offered the same consideration or choice of consideration and that the bid must remain open for a minimum period.

An issuer that offers to acquire its own securities (other than non-convertible debt securities) from holders in Canada may be considered to be making an “issuer bid”, which, unless an exemption is available, would be subject to similarly complicated rules and procedures.

Stock Exchanges

There are several securities exchanges in Canada. The Toronto Stock Exchange (TSX) is a senior stock exchange, the TSX Venture Exchange (TSX-V) is a stock exchange for junior companies, and the Montreal Exchange is the principal market for trading derivatives. Two relatively new stock exchanges include the Canadian Securities Exchange (CSE), which focuses on entrepreneurial companies, and the Aequitas NEO Exchange, a competitor to the TSX and TSX-V, which focuses on fairness and eliminating what it views as “predatory” high-frequency trading practices.

Investors, Directors and Senior Officers

Certain participants in the Canadian capital markets involved with reporting issuers may also have obligations under Canadian securities laws. For instance, certain “insiders” (such as directors, senior officers and ten percent shareholders) are required to report their trades. Significant shareholders meeting certain thresholds (generally, ten percent) are also required to file reports regarding the acquisition and disposition of shares. In addition, “insider trading” and “tipping” rules apply to those in a “special relationship” with a reporting issuer.

Intellectual Property

In addition to the items set forth below, intellectual property protection is also afforded in such areas as industrial designs, plant breeders’ rights, integrated circuit topographies, moral rights, passing off and personality rights, amongst others.

PATENTS

Patent protection in Canada is governed exclusively by the federal *Patent Act*. In order for a patent to be issued, the invention must be “new”, “useful”, and “not obvious to one skilled in the art” and must be registered. The definition is vital because computers or software do not appear in the *Patent Act*, therefore modifications to computers or software, in order to be considered for a patent in Canada, must meet the definition of invention. Canada operates on a “first to file” system in terms of which inventor will receive patent protection. The Canadian filing date must be within one year of the first public disclosure derived from the inventor. There is an immediate bar for non-inventor derived public disclosures. An inventor who previously filed a patent application in a member country of the Paris Convention can claim the previous foreign filing date for the Canadian application for the same invention that is filed in Canada within the following one-year period. However, an application must be actually filed in Canada within one year of first public disclosure anywhere in the world. The 12-month ‘grace period’ protects investors who have made public disclosure prior to filing the patent.

Canada also has a unique licensing regime for patented medicines where patentees must provide the price at which a medicine is sold as well as the costs of making and marketing the medicine, along with other information. Canadian authorities can intervene when a medicine is being sold at ‘excessive’ prices.

A valid patent allows its owner to preclude others from practicing the patent (whether intentionally or unintentionally) for 20 years from the date of the patent application.

TRADEMARKS

Trademark protection in Canada is regulated by both the federal *Trademarks Act*, and common law or the civil law in the Province of Quebec. A trademark is a word, symbol, shape, logo, sound or other identifying feature used in the marketplace to distinguish the owner’s wares or services from those of another.

Registration is not essential to acquire or protect trademark rights; however, registration provides several significant advantages. For example, a valid trademark registration gives the owner of the mark the exclusive right to use the mark in association with the prescribed wares and services throughout Canada. In the absence of a registration, a trademark can only be protected in the geographical area in which the owner can establish evidence of goodwill in association with the trade-mark and the goods or services with which it has been offered.

On June 17, 2019, Canada joined the Madrid Protocol. The Madrid Protocol provides trademark owners the possibility of filing a single application for international registration with the World Intellectual Property Organization (WIPO) and subsequently designate other members where protection is sought.

The Canadian trademark system gives priority to the first person who files an application for the registration of a trademark in Canada, subject to a few exceptions. Exceptions include priority rights of foreigners filing in Canada within 6 months of their home country application and "proposed use" applications which are filed prior to use of the trademark in Canada. Registration under the Act is granted for indefinitely renewable 10-year periods, provided the renewal fee is paid with in the prescribed period.

COPYRIGHT

Canadian copyright law protects the form of expression of all original works in the literary (including software code), artistic, dramatic and musical areas. Regulation of copyright in Canada is embodied in the federal *Copyright Act*.

The copyright owner is given the sole right to reproduce, publish, publicly perform, or broadcast a protected work. Under Canadian law, the author of a work is the work's first owner–subject to a few exceptions. Canada allows for the fair dealing of copyright for the purpose of research, private study, education, satire, parody, criticism, review, or news reporting if what is done with the work is 'fair'. Most notably, if an employee creates a work in the course of his or her employment then the copyright in that work will vest in the employer (subject to an agreement to the contrary).

Registration is not required for copyright protection, but does provide certain benefits, particularly in the event of litigation. Copyright may only be assigned in writing. In general copyright protection lasts for the life of the author, plus the balance of the calendar year in which the author dies, plus 50 years.

TRADE SECRETS AND CONFIDENTIAL INFORMATION

The protection of trade secrets and confidential information is governed by the common and civil law. Owners of trade secrets and confidential information must rely on contractual or other relationships (e.g., under corporate or employment law) for protection. In order to be legally protected, the information must have been disclosed in circumstances imposing a confidentiality obligation.

The length of protection depends on the owner's ability to keep the information confidential, for example through contractual obligations. The remedies available to owners of trade secrets or confidential information for the unauthorized use or disclosure of confidential information include injunctions and damages awarded under a court order.

E-COMMERCE

Generally speaking, the Internet is not regulated in Canada. However, specific uses of the Internet, such as online advertising, are governed by the same laws that apply to comparable offline practices.

E-commerce is considered part of contract law and as such is considered a provincial responsibility in Canada. In most provinces, electronic documents and records (with the exception of wills, powers of attorney, negotiable instruments and land transfers) are given equivalent legal effect to printed or handwritten documents. Similar legislation exists at the federal level and throughout other Canadian provinces and territories.

Certain provincial legislation also permits a contract to be formed online by touching or clicking on an appropriately designated icon or place on a computer screen. There is less certainty as to the enforceability of contract terms where a user is not required, for example, to click “I agree”, but the website terms say that using the website means that the user consents to the website terms. ‘Browsewrap’ agreements (those agreements that rely on the user’s navigation on a website) and ‘clickwrap’ agreements (those generally online contracts that rely on a user clicking an accept button) are valid, provided the agreement meets certain criteria so as not to be invalided by consumer protection legislation. For example, browsewrap agreements should always give users full opportunity to read it as even the most carefully crafted user agreement may be labelled unconscionable and unenforceable if the contract is not implemented correctly.

Electronic signatures are also legally valid in Canada so long as proper notice is given that e-signatures will be used, the method of collecting the e-signatures complies with privacy requirements, and records are accurately maintained on the consent to use, accept, and deliver e-signatures.

In court proceedings involving Internet businesses or other online matters, Canadian courts may exercise jurisdiction over the proceedings if the subject matter of that litigation has a “real and substantial” connection with Canada (or the province in question). Cases in which Canadian courts have claimed jurisdiction generally involve websites that target persons in Canada.

Sales taxes, including the federal GST or HST, are sometimes applicable to electronic commerce.

ANTI-SPAM LEGISLATION

Canada’s anti-spam law (CASL) came into force as of July 1, 2014, and the three-year transitional period ended July 1, 2017. CASL generally prohibits sending commercial electronic messages without the recipient’s consent. Such consent must be express and opt-in, except in relatively limited circumstances. Electronic messages include messages to email addresses, social networking accounts, and text messages sent to a cell phone, for the purpose of encouraging participation in a commercial activity. The law applies to commercial electronic messages sent or received in Canada. Electronic messages must also include contact information and unsubscribe mechanisms in compliance with the regulations.

The new anti-spam law also prohibits: installation of computer programs without the express consent of the owner of the computer system or its agent, such as an authorized employee; use of false or misleading representations online in the promotion of products or services; and electronic address harvesting.

The potential penalties for non-compliance under the anti-spam law are significant and include administrative monetary penalties of up to $1 million for individuals and $10 million for corporations.

Privacy & Data Protection

All businesses in Canada are subject to Canada's privacy laws governing the collection, use and disclosure of personal information. Personal information is generally defined broadly to mean any factual or subjective information, recorded or not, about an identifiable individual, except their business contact information. Privacy legislation generally requires an organization to comply with the following:

- Policies and procedures must be developed by the organization to ensure that it is in compliance with applicable privacy laws.
- One or more individuals must be designated to be responsible for ensuring that the organization complies with the applicable privacy laws and its internal policies and procedures.
- Individuals should have a right to access personal information held by the organization and to challenge its accuracy.
- Organizations should notify individuals of the purposes of, and obtain their consent for, the collection, use or disclosure of their personal information (there are some exceptions to this requirement).
- The purposes for which an organization collects, uses, discloses, or retains personal information should be limited, reasonable and justifiable.
- Reasonable security arrangements should be made by the organization to protect personal information held by the organization or transferred to a third party.

- Report to the Privacy Commissioner (either the federal or provincial Commissioners depending on the jurisdiction) and notify affected individuals and potentially other relevant third parties (in certain circumstances) about "breaches of security safeguards" that pose a "real risk of significant harm". "Breach of security safeguards" is defined in PIPEDA and generally includes what is commonly known as a data breach.

FEDERAL PRIVACY LAWS

Canada has two federal privacy laws, the *Privacy Act*, which covers the personal information-handling practices of federal government departments and agencies, and the *Personal Information Protection and Electronic Documents Act* (PIPEDA), the federal private-sector privacy law.

THE PRIVACY ACT

The *Privacy Act* relates to an individual's right to access and correct personal information the Government of Canada holds about them or the Government's collection, use and disclosure of their personal information in the course of providing services (e.g., old age pensions or employment insurance).

THE *PERSONAL INFORMATION PROTECTION AND ELECTRONIC DOCUMENTS ACT - PIPEDA*

The PIPEDA is intended to support and promote electronic commerce and applies to the collection, use, or disclosure of personal information in the course of commercial activity. A commercial activity is defined as any particular transaction, act, or conduct, or any regular course of conduct that is of a commercial character, including but not limited to the selling, bartering or leasing of donor, membership, or other fund-raising lists.

The Office of the Privacy Commissioner of Canada oversees compliance with the *Privacy Act* and PIPEDA.

PROVINCIAL PRIVACY LAWS

Some provinces have privacy legislation that is substantially similar to PIPEDA, and is applied instead of PIPEDA in some cases. Many Canadian jurisdictions also have privacy legislation that applies with respect to the collection, use and disclosure of personal health information about individuals by public and private sector health care providers.

Specifically, Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland & Labrador, Nova Scotia, Ontario, Saskatchewan, Prince Edward Island, the Northwest Territories and Yukon have legislation governing the collection, use and disclosure of personal health information. All Canadian provinces and territories have legislation which regulates the collection, use and disclosure of personal information in the public sector.

For the private sector, the provinces which have privacy legislation that is substantially similar to PIPEDA and is applied instead of PIPEDA in these jurisdictions are:

- Alberta – *Personal Information Protection Act*
- British Columbia – *Personal Information Protection Act*

Québec – *An Act Respecting the Protection of Personal Information in the Private Sector* Compliance with privacy laws should be considered in any business transaction involving the collection, use or disclosure of personal information, such as the purchase or sale of a business or an outsourcing transaction.

There are a number of federal and provincial laws in Canada that relate to privacy rights and there are various government organizations and agencies responsible for overseeing compliance with these laws. Failure to comply with privacy laws can result in complaints to the Privacy Commissioner, fines and court orders.

THE GENERAL DATA PROTECTION REGULATION – GDPR

While not explicitly a Canadian law, the European Union's GDPR has some extra-territorial applications for companies wishing to carry on business in Canada. As a general principle, where the processing of personal data falls within the territorial scope of the GDPR, all provisions of the GDPR apply to such processing. Non-EU organizations should assess their processing activities by first determining whether personal data is being processed, and then identifying potential links between the activity for which the data is being processed and the activities of any presence of the organization in the EU.