TORYS LLP

Doing Business and Raising Capital in Canada

Whether investing or starting a business, our all-in-one guide covers what you need to know to navigate the Canadian marketplace.

A Business Law Guide

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The Purpose and Scope of this Guide

This business law guide is a general overview of certain legal and business matters that may be relevant to a decision to establish or invest in a business in Canada. Parts 10 and 11 summarize some of the ways in which foreign issuers can raise money in Canadian capital markets and some of the activities that may be carried on in Canada by foreign securities dealers and advisers and investment fund managers.

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

In this guide, unless the context suggests otherwise, the term “a province” or “provinces” of Canada indicates also “a territory” or “territories” of Canada.

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

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Canada as a Place to Do Business, Invest and Live

Canada's Economy

Canada has a highly diversified, free-market economy that encourages significant foreign investment. In 2016 alone, foreign direct investment in Canada totalled approximately C$825.7 billion. Canada is also consistently ranked by *Forbes* magazine as one of the best countries in the world to do business in.

Canada's economy began with the exportation of agricultural products, especially grains, and the production and export of minerals, oil and gas, and forest products, but these primary activities now account for only about 7% of Canada's total gross domestic product. Today, manufacturing, financial services and the service industry contribute about 84% of Canada's total gross domestic product.

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

Geography and Population

Canada is the world's second-largest country, and consists of 10% of the world's land mass. A large majority of Canada's 36.2 million residents live relatively near the 6,000-kilometre border with the United States. About 80% of Canada's population lives in urban centres and their surrounding areas. Indeed, close to 45% of the population lives in Canada's six largest cities and surrounding areas: Toronto, in Ontario (approximately 5.8 million in the Metropolitan Area; 6.05 million in the Greater Toronto Area); Montreal, in Québec (approximately 3.9 million in the Greater Montreal Area); Vancouver, in British Columbia (approximately 2.4 million in Metropolitan, or Greater, Vancouver); and Ottawa-Gatineau (or National Capital Region), in Ontario-Québec (approximately 1.26 million); Calgary, in Alberta (approximately 1.27 million in the Metropolitan Area); Edmonton, in Alberta (approximately 1.2 million).

Quality of Life

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

Canada’s cities enjoy the distinction of being desirable places to live. Consequently, many people from around the world move to Canada with the intention of making it their home. Toronto is heralded as among the most multicultural cities in the world: over 140 languages and dialects are spoken in Toronto.

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Canada's System of Government

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

Division of Legislative Authority

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

Common and Civil Law

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

Québec has a modern, European-style Civil Code that works as a codification of general principles of law applicable in that province.

Regulatory Bodies

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

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Business Corporations

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

Choice of Jurisdiction of Incorporation

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

Location of Business

Incorporation of a business corporation can be effected under federal or provincial law. The question of where to incorporate depends on a number of factors, such as the geographic area where the business will be conducted, and whether the corporation will have resident Canadian directors.

Requirement for Canadian Residents on the Board and Board Committees

Several Canadian corporate statutes, such as the *Canada Business Corporations Act*, *Ontario Business Corporations Act* and *Alberta Business Corporations Act* require that at least one-quarter (25%) of the corporation's directors be Canadian citizens or permanent residents of Canada. Alternatively, in jurisdictions such as British Columbia and Québec, there are no residency requirements for directors. The lack of such a requirement in these jurisdictions provides flexibility that is attractive to many foreign investors in Canada.

In addition, corporations operating under the *Canada Business Corporations Act*, in sectors subject to ownership restrictions (such as airlines or telecommunications), or corporations in certain cultural sectors (such as book retailing, video, or film distribution) must also have a majority of resident Canadian directors.

Audit Requirements for Private Corporations

Private corporations are generally not required to have their financial statements audited if they have the approval of all shareholders not to do so.

The Incorporation Process

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

Duties and Liabilities of Directors

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

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

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

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

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Standards of Business Conduct and Consumer Protection

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

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

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

Corruption of Foreign Officials

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

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

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

It is also an offence to knowingly possess any property or proceeds of property (including corporate income) derived from prohibited bribery or to launder this property or these proceeds. The legislation exempts payment of the good faith expenses of foreign officials, payments allowed under the laws of the foreign jurisdiction and payments made to expedite or secure the performance by a foreign public official of any routine act that is part of the foreign public official's duties (such as mail service, issuance of visas or police protection).

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

Legislation for the Protection of Privacy

Canada's federal government has enacted into law the 10 general principles and commentaries contained in the Canadian Standards Association's *Model Code for the Protection of Personal Information.* Among these is the core principle that an individual's knowledge and consent are required for the collection, use or disclosure of personal information (defined as information about an identifiable individual), except where this knowledge and consent are inappropriate (such as in emergencies, or to comply with court orders).

The federal legislation applies to federal and provincial organizations in respect of personal information collected, used or disclosed in the course of commercial activities. The federal legislation may not apply to certain organizations subject to substantially similar provincial privacy laws enacted by British Columbia, Alberta and Québec.

The federal legislation requires organizations to appoint privacy officers responsible for, among other duties, protecting personal information and educating employees about the importance of privacy compliance. The federal Privacy Commissioner can audit organizations to ensure that they comply with the legislation's requirements. Individuals can file complaints for investigation by the Privacy Commissioner and have the right to apply to court for a hearing and remedies, which may include an award of damages and an order for the organization to change its practices. Ob-structing the Privacy Commissioner's audit or investigation is an offence punishable by a fine of up to C$100,000.

Federal and some provincial privacy laws require organizations to report to the regulator breaches of personal information that create a "real risk of significant harm" to an individual. The organization may also be required to notify individuals affected by serious breaches, and must keep internal records of all privacy breaches it suffers.

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

Anti-spam Law

Canada has a federal "anti-spam" law (commonly known as "CASL") that prohibits, among other things, the sending of commercial electronic messages to or from Canada without the consent of affected individuals, subject to certain exceptions. Significantly, consent may be implied under the law if the recipient of a message has an existing business relationship (as defined in CASL) with the sender. In addition, the law requires that commercial electronic messages (which include email, texts and direct social media messages) contain contact information for the sender and a mechanism for recipients to unsubscribe from receiving any further messages.

The federal regulator may investigate complaints under CASL and impose fines up to C$10 million for noncompliance by organizations and penalties up to C$1 million for violations by individuals such as directors and officers. Organizations are expected to keep detailed records to demonstrate their compliance with the law.

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Tax

Income Tax

Corporate Income Tax Rates

The federal government and the provincial/territorial governments impose tax on the taxable income of corporations. The general federal corporate tax rate for 2017 is 15%. A lower preferential rate also applies to a maximum of C$500,000, each year, of the business income of Canadian-controlled private corporations.

A federal capital tax is imposed on certain financial institutions.

The provincial corporate tax rates vary, depending upon the particular province or territory and industry, between 0% and 16%. Thus the combined federal-provincial/ territorial corporate tax rate is, in general, between 10.5% and 31%. If a corporation carries on business in more than one province, its income is generally allocated among those provinces on the basis of revenue and salaries attributable to each province. The provinces and territories, other than Alberta and Québec, have entered into tax collection agreements with the federal government under which the federal government administers the provincial/territorial corporate income tax systems, including tax collecting.

Some provinces also impose a provincial capital tax on certain financial institutions that have or are considered to have a permanent establishment in those provinces.

Personal Income Tax Rates

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

Taxable Income (C$)	Federal Marginal Tax Rate
$45,916 or less	15%
$45,917–$91,831	20.5%
$91,832–$142,353	26%
$142,354–$202,800	29%
$202,801 or more	33%

Provincial tax rates are calculated by applying the applicable provincial tax rate to the taxable income amount. The rates range from 5.05% to 25.75%. Some provinces also charge a surtax. The federal government administers and collects provincial personal income tax on behalf of all provinces except Québec.

Canadian Residents

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

Non-Residents

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

Calculation of Income

The income of a business for tax purposes is generally its profit determined in accordance with well-accepted business principles; however, this amount is subject to many express statutory exceptions. Expenses of a current nature that are incurred in the ordinary course of business are normally deductible in computing income for tax purposes. Inventory must be valued consistently either at the lower of cost and market or at market. The last-in, first-out method of inventory costing cannot generally be used. In general, interest payable on borrowed money or on an unpaid purchase price for property is deductible if the money or property is used for an income-earning purpose. However, thin capitalization rules prohibit the deduction for tax purposes of the interest owing to the extent that the debt-to-equity ratio with respect to debts owing to certain non-residents exceeds 1.5:1. Some costs related to the construction of a building or to the acquisition and ownership of land may not be currently deductible, but may be added to the capital cost.

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

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

Treatment of Capital Gains, Interest and Dividends

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

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

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

Certain investment income of Canadian-controlled private corporations is subject to a refundable tax.

Loss Carryover

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

Consolidation

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

Withholding Tax

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

Tax Treaties

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

Subsidiary Compared with Branch

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

By comparison, a non-resident corporation that carries on business in Canada through a branch is taxable under the usual Canadian rules on its Canadian-source business income. In effect, the Canadian branch business is treated as a separate taxable entity, with the appropriate allocation of income and deductions to the branch. The Income Tax Act (Canada) (the "Act") also imposes a special 25% branch tax on non-resident corporations. In essence, this branch tax is imposed on the after-tax earnings of the branch to the extent that they are not reinvested in the Canadian business. The combined income and branch tax is intended to equate the Canadian tax burden of a branch to that of a subsidiary that distributes its retained earnings by way of dividend. The branch tax rate may be reduced pursuant to certain provisions of the Act to the rate applicable to dividends under an applicable tax treaty.

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

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

Succession Duties, Estate and Gift Taxes

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

Ontario's Corporate Minimum Tax

Ontario imposes a corporate minimum tax (CMT) of 2.7% on large corporations that operate in Ontario and that are profitable for financial accounting purposes but that, because of deductions allowed under ordinary income tax rules, pay little or no Ontario income tax. Under the CMT legislation, a corporation will, in effect, pay the greater of its CMT amount and its Ontario income tax calculated under the existing income tax rules.

The CMT applies to corporations that are subject to the existing Ontario income tax legislation and that in any year, together with associated corporations (whether or not the associated corporations are operating or taxable in Ontario), have (i) gross revenues greater than or equal to C$100 million and (ii) total assets greater than or equal to C$50 million. Both (i) and (ii) are determined in accordance with Canadian generally accepted accounting principles (without consolidation or equity accounting). Thus a corporation that does not have at least C$100 million of gross revenues and at least C$50 million of total assets may be subject to the CMT if it is a member of an associated group with combined revenues and assets that equal or exceed those thresholds.

Sales Tax

Goods and Services Tax

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

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

GST is not collected on supplies of goods and services that are either tax exempt or zero-rated. Tax exempt supplies include certain financial services, residential rents, used residential property, health and dental services, daycare and educational services. Zero-rated supplies include basic groceries, prescription drugs, medical devices and exports of goods and services. The difference between exempt supplies and zero-rated supplies is that a supplier of tax-exempt goods or services is not entitled to any input tax credit on the purchases used to produce the tax-exempt goods or services, whereas a supplier of zero-rated goods or services may claim input tax credits on any GST paid on its purchases related to making supplies of zero-rated goods or services. Under a small suppliers exemption, suppliers making otherwise taxable sales that do not exceed C$30,000 per annum are generally not required to collect GST on their sales, and are not entitled to claim any input tax credit for GST they pay on their purchases.

Provincial Retail Sales Taxes

With the exception of Alberta, all the provinces in Canada have a form of sales tax on sales of goods and certain services. The provinces of New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario and Prince Edward Island have harmonized their sales tax system with the federal GST. The result is a harmonized sales tax (HST) at rates ranging from 13% to 15% (depending on the province), which applies in almost exactly the same way as the GST. In these provinces, the HST is administered and collected by the federal government in the same manner as the GST. The province of Québec imposes and collects its own sales tax at the rate of 9.975% on the sale of goods and services in Québec. This tax operates on a multilevel basis, in the same manner as the GST, and is generally subject to the same exceptions that apply under the GST. The Québec government administers and collects the GST and the Québec sales tax on sales of goods and services in Québec. Alberta and the territories of Canada do not impose a sales tax; the GST is the only sales tax that applies to sales in Alberta and the territories. The remaining provinces (British Columbia, Manitoba and Saskatchewan) impose and collect their own retail sales tax at rates that vary from 5% to 8% on retail sales of goods and certain services in those provinces.

Exportation and Importation of Goods

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

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

Customs Duties

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

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

Anti-dumping Duties

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

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Employment

Employment Laws

Canadian employment law derives from:

- the terms and conditions of the employment contract, as agreed to orally or in writing, that are established by a continuing course of conduct, or that are implied between an employer and an employee;
- legislation, including,
  - legislation that imposes minimum employment standards, including minimum periods of notice (or payment in lieu of notice) that must be given to employees before terminating the employment relationship,
  - legislation dealing with certain aspects of employment, such as labour relations, pay equity, human rights, and occupational health and safety, and
  - workplace safety and insurance legislation, and pension and employment insurance legislation; and
- in all of the provinces except Québec (which is a civil code jurisdiction), the common law, which, among other things, imposes a requirement on employers to give reasonable notice of termination, or payment in lieu of notice, for periods that are usually longer (often significantly longer) than those prescribed under the minimum employment standards legislation referred to above, but which may be limited or defined by contract in some cases and which also imposes duties of loyalty and confidentiality on employees.

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

Employment Contracts

Employment contracts for non-unionized employees are often oral agreements for an indefinite term of employment. However, employers are encouraged to use well-drafted written agreements for all employees. Employment contracts can, among other things, stipulate periods for notice of termination of employment that are longer or shorter than those provided by the common law. The period cannot be shorter, however, than those prescribed by minimum employment standards legislation, or the termination provision will be voidable.

Minimum Employment Standards Legislation

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

This legislation also sets out minimum entitlements to various leaves, including pregnancy and parental leave. These leaves can be quite lengthy (18 months or more in some pregnancy and parental leave cases), but are without pay, other than a potential entitlement to government-provided employment insurance in some cases.

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

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

Common Law: Reasonable Notice of Termination

The common law requires both the employer and the employee to give reasonable notice of termination of an employment contract, without cause (if the employment contract does not itself specify the notice required on termination and there is no just cause for termination by the employer). The common law notice period to which employees are entitled is usually significantly longer than their entitlement to minimum notice under minimum standards legislation. The length of the period generally depends on such factors as the age, experience, position, compensation level and length of service of the employee, as well as the availability of alternative employment and whether the employee was induced to leave previous secure employment; however, the length of the notice period is subject to the employee's duty to mitigate the loss of employment by seeking comparable alternative employment.

Collective Bargaining Legislation (Unions)

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

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

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

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

Pay Equity Legislation

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

In Ontario, an employer cannot pay one employee at a rate of pay less than another employee on the basis of sex when they perform substantially the same kind of work in the same establishment, their work requires substantially the same skill, effort and responsibility and their work is performed under similar working conditions. This standard is commonly referred to as "equal pay for equal work." Employers cannot lower employees' rates of pay to create equal pay for equal work.

Ontario also has pay equity legislation that requires private sector employers with ten or more employees to value and compare jobs usually done by women to those usually done by men in an objective and consistent way using factors of skill, effort, responsibility and working conditions. A female job class must receive compensation that is at least equal to the compensation that is paid to a male job class of equal or comparable value. The legislation sets out other modes of analyzing female job classes when there are no comparable male job classes.

Human Rights Legislation

Certain human rights are protected by provincial and federal legislation (subject to a limited number of exceptions). These rights include the right of every person to equal treatment with respect to employment without discrimination and harassment based on certain protected grounds, such as race, ancestry, place of origin, colour, ethnic origin, citizenship, creed (religion), sex (including pregnancy), gender identity, gender expression, sexual orientation, age (18 and over), record of offences, marital status (including same-sex partnerships), family status and disability. This right extends to job advertisements and applications that directly or indirectly classify or indicate qualifications according to a prohibited ground of discrimination. Sexual harassment in employment is also prohibited under provincial and federal human rights legislation.

Employer Health Tax

Occupational Health and Safety Legislation

Occupational health and safety legislation creates health and safety obligations for employers and employees to reduce the risk of workplace accidents. In all jurisdictions, employers must take all reasonable precautions to protect the health and safety of their employees. Employer responsibilities may be applicable to specific industries or relate to particular hazards, such as toxic substances or hazardous materials. Occupational health and safety legislation in all Canadian jurisdictions provides employees with certain rights designed to promote workplace safety, including the establishment of joint health and safety committees comprising both employee and management representatives. In Ontario, the occupational health and safety legislation was recently expanded to require employers to conduct a formal assessment of the risk of violence occurring in the workplace. Employers must prepare policies and programs on workplace violence and harassment, and provide information and instruction to employees regarding the contents of the policies and programs. Each province participates in a health insurance plan (such as the Ontario Health Insurance Plan, or OHIP, in Ontario; and the Alberta Health Care Insurance Plan, or AHCIP, in Alberta). As a funding mechanism, certain provinces, including Ontario, impose a payroll tax on employers carrying on business in that province. (In Ontario, the tax paid is a sliding percentage of the total remuneration paid by the employer in Ontario, ranging from 0.98% to 1.95%).

Employee Benefits

Pensions

Under the Canada Pension Plan, many retired employees receive a pension income from the federal government. Both employers and employees contribute to this plan by payroll deductions remitted to the federal government. Benefits payable to an employee on retirement are related to the employee's earnings and the amount of contributions over the employee's working life. In addition, the federal government provides an "old-age security" pension to seniors aged 65 and older who meet the eligibility requirements.

Employers frequently establish some form of retirement income arrangement as an employee benefit. Payments under these arrangements supplement, and often significantly exceed, benefits under the Canada Pension Plan. Pension standards legislation in each province (except Prince Edward Island) and the federal jurisdiction prescribes minimum standards for pension plans. Pension standards legislation requires the employer to periodically calculate its present and future pension liabilities for defined benefit pension plans, and to fund them on both a going-concern basis and a solvency basis. The objective of "going concern" and "solvency" funding is to ensure that contributions associated with pension benefits are paid regularly throughout the working life of the employee, and invested prudently, so that the necessary funds will exist upon retirement to pay the pension and other benefits that were promised in the plan text.

Employment Insurance

The federal Employment Insurance Plan provides income support to employees undergoing a temporary interruption of earnings. Both employers and employees must contribute to this plan. The duration of employment insurance benefits is related to the employee's length of service. The amount of benefits, which is subject to a maximum, varies according to the earnings of the employee. Employment insurance benefits are also available for employees who are on maternity or parental leave. Maternity leave benefits are available for up to 15 weeks and parental leave benefits are available for up to 35 weeks, although employees can opt to receive parental leave benefits at the lower benefit rate of 33% of weekly insurable earnings for an additional 26 weeks to a maximum of 61 weeks (instead of receiving such benefits at the current rate of 55% of weekly insurable earnings over a 35-week period).

Workers' Compensation

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

In each province, employers fall within a class of employers established under the applicable workers' compensation legislation, based on the hazards of their business. Only employers contribute to the accident fund. The amount of contribution generally depends on such factors as the accident experience of the entire class of employers, the size of an employer's payroll and, in some cases, the employer's individual accident experience.

Employee Transfers, Foreign Workers and Business Immigrants

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

Temporary Admission to Canada

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

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

Senior managers or executives or employees working in a "specialized knowledge" capacity for multinational organizations transferred to a Canadian affiliate, parent or subsidiary organization may obtain work permits that are initially valid for a maximum of three years. Extensions are generally granted in two-year increments to a maximum aggregate duration of seven years in the case of senior managers and executives and five years in the case of specialized knowledge employees.

Canadian companies that wish to hire foreign workers who are not employees of a foreign parent or subsidiary company or who do not qualify on any alternative basis must obtain a Labour Market Impact Assessment (LMIA) from Service Canada (the Canadian government's one-stop service delivery network that provides access to its programs and services, through telephone, internet, mail, in-person, outreach and mobile services). These companies must demonstrate that the employment will not negatively affect employment opportunities for Canadians, that the foreign worker's admission to Canada will result in a transfer of skills or knowledge to Canadians or that it will result in job retention or job creation for Canadians. In the province of Québec, a Québec Acceptance Certificate must also be obtained.

Accompanying spouses and common-law partners, and in some provinces working-age dependent children, may generally obtain open work permits, and children may attend school.

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Workplace Health and Safety Laws

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

Federal

The *Canada Labour Code* is the principal federal workplace health and safety statute. It applies to federal government employees and to certain federally regulated industries such as interprovincial and international transportation, shipping, telephone and cable systems, radio and television broadcasting, banking, grain elevators and certain uranium mining and processing operations.

Contraventions of the *Canada Labour Code* may result in the imposition of fines, imprisonment or both. Officers and directors of a corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence under the Canada Labour Code may be found guilty of that offence, regardless of whether the corporation was also prosecuted or convicted.

Under the *Criminal Code* (whether or not the *Canada Labour Code* applies to a corporation or individual), in certain circumstances, corporations and individuals (including officers or directors) may also be prosecuted for criminal negligence causing bodily harm or death. In addition, certain persons are responsible for taking reasonable steps to prevent bodily harm to persons who work under their authority.

Provincial

All the provinces have workplace health and safety laws. For example, *Ontario's Occupational Health and Safety Act* stipulates the following key requirements:

- Generally, employers with 20 or more workers must establish a joint health and safety committee, at least half of whose members are workers who do not exercise managerial functions. At least one representative of the employer and one of the workers on the committee must typically be certified as having received specified training on workplace health and safety. At workplaces with more than five workers and where a joint health and safety committee is not required, a health and safety representative must be identified. Both the health and safety committee and the health and safety representatives must conduct regular reviews of health and safety issues at the workplace, must be consulted about these issues and must have the power to obtain information on them.

- Employers, supervisors, workers, owners, suppliers and officers and directors must carry out various duties related to workplace health and safety. In the case of employers, this includes preparing and reviewing at least annually a written workplace health and safety policy and developing and maintaining a program to implement the policy. Employers must also take every precaution reasonable (in the circumstances) for the protection of workers. Directors and officers are obligated to take all reasonable care to ensure that the corporation complies with the statute and any regulations and orders made thereunder.

- Workers are entitled to refuse to work if they have reason to believe that they are likely to be endangered. Further, a certified member of a joint health and safety committee may direct a work stoppage if dangerous circumstances are found to exist.
- Employers must provide workers with information on hazardous materials in the workplace and with training in handling these materials and related preventive measures and emergency treatment.
- Provincial inspectors may issue orders to persons in charge of a workplace to remedy non-compliance with laws. Convictions for non-compliance may also result in fines, imprisonment or both.

Although aspects of each province's workplace health and safety laws are generally similar, there are also some unique features. For example, in British Columbia's legislation, employers are prohibited from retaliating against an employee for complaining about a workplace health or safety issue.

Common Law

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

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Language Laws

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

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

However, the most stringent laws concerning the use of the French language are in Québec. The French Charter states that French is the official language of Québec. This particular legislation, also known as Bill 101, protects the use of the French language in the province of Québec by establishing rules that must be respected by businesses, individuals, public institutions and others. Every new or established business in Québec must be aware of the obligations imposed by the French Charter. Given the broad scope of the French Charter, Québec business transactions may require a particular analysis based on language requirements.

The Québec language laws

- give every person in Québec the right to communicate in French with the Québec provincial government, its agencies and courts;
- give every person in Québec the right to conduct business in French and require that certain contracts be drafted in French (although in certain circumstances, the parties can contract out of this requirement);
- give employees in Québec the right to carry on their activities in French;
- give consumers in Québec the right to be informed and served in French;
- require that packaging be labelled in French at least as prominently as in any other language;
- require that both internal and external signs of a business be in French and in certain circumstances provide that French must be markedly predominant;
- require that businesses operating in Québec adopt a French business name unless an exception exists (e.g., they use a recognized trademark);
- require that businesses with an establishment in Québec must use French on their websites and the French must be as prominently displayed as any other language; and

- require the following documents to be filed in Québec in French only or in French and English: every prospectus of any type (and continuous disclosure documents incorporated by reference into such prospectus, including annual information form, management information circular, financial statements, management's discussion and analysis and material change report); offering memorandum prescribed by regulation; and, subject to certain de minimis exemptions, takeover bid circular and directors' circular regarding a takeover bid or issuer bid.

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Securities Laws

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

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

The Legislative Framework

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

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

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

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

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

A Note About Aggregation

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

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

Aggregation Relief for "Eligible Institutional Investors"

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

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

Takeover Bids

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

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

Exempt Takeover Bids

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

- bids for a limited number of securities conducted through the facilities of a stock exchange, as long as the rules of the stock exchange are complied with;
- bids effected by private agreement with up to five sellers, as long as the purchasers do not pay the sellers a premium of more than 15% over the market price of the securities; and

- bids made principally outside Canada if less than 10% of the outstanding target securities or their holders are in Canada and Canadian residents participate on the same terms as foreign holders.

In addition, under the multijurisdictional disclosure system discussed below, takeover bids for certain U.S. companies may be extended to Canadian securityholders on the same basis and with the same disclosure documents as they are to U.S. shareholders (see “Use of the Multijurisdictional Disclosure System by U.S. Issuers,” in part 21, “Accessing Canadian Capital Markets”).

Early Warning Reporting

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

If the early warning requirement is triggered, the acquiror must promptly, and in any event no later than the opening of trading on the business day following the acquisition, issue a news release that contains prescribed information and, within two business days, file a signed report with Canadian securities regulators.

After a person files an initial report, every increase or decrease of 2% or more in the person’s holdings and every change of a material fact in a report previously filed by the person must also be reported by issuing a news release and filing a signed report. A person is also required to report when it ceases to hold 10% or more of the outstanding voting or equity securities of the company by issuing a news release and filing a signed report.

A person who is required to file either an initial or a subsequent early warning report is subject to a moratorium on further purchases. The moratorium prohibits acquisitions of additional securities of the same class (or securities convertible into the same class) from the time of the event giving rise to the report until the expiry of one business day from the date that the relevant report is filed. This moratorium does not apply to those who already hold a control block position.

Alternative Monthly Early Warning Reporting for Passive Eligible Institutional Investors

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

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

Issuer Bids

Subject to certain exceptions, a company cannot purchase its outstanding voting or equity shares from shareholders in Canada in an issuer bid unless it makes an offer to all shareholders under a formal circular and subject to procedural requirements similar to those applicable to takeover bids. These rules apply equally to offers to Canadian residents to acquire shares of Canadian public companies and foreign companies.

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

- bids for securities of closely-held companies;
- "normal course" issuer bids for a limited number of securities (usually to a maximum of 5% of the securities of that class or 10% of the public float of that class, whichever is greater) made in accordance with stock exchange requirements;
- limited purchases from employees, directors and officers at market price; and
- bids made principally outside Canada if less than 10% of the outstanding target securities or their holders are in Canada, and Canadian residents participate on the same terms as foreign holders.

The purchase of shares by a company from one shareholder or group of shareholders is generally not permitted. As a result of these issuer bid rules, a hostile shareholder cannot employ a "greenmail" strategy to pressure a company to repurchase its stock at a premium; similarly, a company cannot pursue a "selective self-tender."

Insider Reporting

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

A person or company (including a resident of a country other than Canada) is an in-sider of a public company in Canada, and may be required to file insider reports[1], if:

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

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

Generally, insider reports must be filed with the securities regulatory authorities of the provinces or territories in which the Canadian public company is a reporting issuer. The filing of the insider report must be made within 10 days of the date of the trade of the securities, in the case of an initial report, and within five days of the date of the trade of the securities, in the case of a subsequent report.

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

Insider Trading and Tipping

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

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

[1] Only “reporting insiders”, as defined in National Instrument 55-104 – *Insider Reporting*, are required to file insider reports. The classes of reporting insiders are a subset of the persons identified in this list

Procedural and Substantive Fairness Requirements

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

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

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Accessing Canadian Capital Markets

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

Public Offerings

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

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

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

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

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

In certain cases, Canadian securities regulators will accept financial statements and other continuous disclosure documents that foreign issuers prepare in accordance with the disclosure requirements of either their home country or the United States. Both Canadian and non-Canadian issuers that have securities registered with the SEC are permitted to file with the Canadian securities regulators financial statements prepared in accordance with U.S. GAAP and U.S. accounting standards, and are generally able to file their U.S. periodic reporting forms and comply with U.S. insider reporting and early warning requirements to satisfy the comparable Canadian requirements.

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

Private Placements

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

The issuer must exercise reasonable diligence in confirming that a prospectus exemption is available and will typically obtain a certificate or a representation from the purchaser confirming its exempt status. In addition, the issuer may be required to file a report of the exempt distribution with the Canadian securities regulators and obtain risk acknowledgement forms in the case of sales to individuals.

Accredited Investors

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

- financial institutions;
- regulated pension funds;
- registered charities;
- registered advisers and dealers;

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

Fully managed accounts of portfolio advisers are also treated as accredited investors.

Other Exemptions

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

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

Offering Memorandum

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

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

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

Rights of Action and Other Disclosure

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

The securities laws in certain Canadian jurisdictions require that the right of action be described in the offering memorandum. An offering memorandum must also disclose certain relationships or conflicts of interest between an issuer and the underwriters of the offering, and their respective affiliates. Where forward-looking information is included in an offering memorandum, it should be accompanied by a description of key factors and assumptions underlying that information, cautionary language regarding the circumstances that could give rise to changes in that information and a statement of the issuer's policies for updating that information. This may often be satisfied through the issuer's compliance with similar disclosure requirements in the United States or another jurisdiction. Exemptions from certain of these disclosure requirements are available where the offering is restricted to a limited class of accredited investors, referred to as "permitted clients."

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

Resale Restrictions

Securities of a foreign issuer sold on a private placement basis will generally not be freely tradable in Canada. However, if Canadian residents represent less than 10% of the number of holders of the class of securities and hold no more than 10% of the outstanding securities of the class, the securities can generally be resold through a foreign market. Where the securityholder is resident in Ontario, additional exemptions for an offshore resale are available.

Continuous Disclosure

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

Concurrent Private Placement and Foreign Offering

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

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

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

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

As noted above, exemptions from certain of these disclosure requirements are available where the offering in Canada is limited to permitted clients.

Selling Restriction Language

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

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

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

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

The following sections give some of the highlights.

Eligibility

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

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

and one of

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

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

Public Offerings

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

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

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

The Canadian securities regulators have also granted exemptive relief allowing eligible U.S. issuers to effectively rely on the MJDS offering procedures for offerings by special purpose Canadian subsidiaries such as "captive" finance companies. U.S. GAAP financial statements may be used in an MJDS prospectus without a Canadian GAAP (International Financial Reporting Standards) reconciliation. Translation of the U.S. prospectus into French is required if the securities are offered to Québec residents.

Rights Offerings

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

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

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

Tender Offers (Cash Takeover Bids and Issuer Bids)

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

Exchange Offers (Securities Exchange Takeover Bids and Issuer Bids)

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

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

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

Special Accommodation for Cross-Border Tender and Exchange Offers

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

Business Combinations

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

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Activities that Foreign Securities Dealers and Advisers May Carry on in Canada

Generally, Canadian securities laws require that, unless there is an available registration exemption, anyone who is in the business of trading in securities or providing, securities advice, or acts as an investment fund manager in Canada be registered with each securities regulatory authority in the province/territory where that activity takes place or in which Canadian clients reside. Typically, trading is defined very broadly to include not only the sale of securities, but also any act in furtherance of a sale of securities (such as a phone call, letter, email, fax or other contact with a Canadian resident from outside Canada).

As noted previously, Canadian securities regulation is a matter of provincial/territorial jurisdiction. Each Canadian province/territory has its own securities laws, which are administered by the local securities commission or equivalent body. However, except for the registration requirements and related exemptions for non-resident investment fund managers, the provinces and territories have developed a national system with substantially harmonized registration categories, requirements and exemptions. The following descriptions generally outline the registration categories and exemptions that are available under National Instrument 31-103 (NI 31-103) and Multilateral Instrument 32-102 for a foreign firm that seeks to trade or advise in securities or act as an investment fund manager.

Foreign Securities Dealers

International Dealer Registration Exemption

A foreign securities dealer that has no head office or principal place of business in Canada and that is registered and carries on business as a securities dealer in a country other than Canada may conduct limited trading activity with “permitted clients” in Canada without registering as a dealer if it satisfies the conditions for the international dealer registration exemption under section 8.18 of NI 31-103. This exemption is not onerous to obtain but is subject to a number of restrictions. The exemption is necessary even if the foreign securities dealer is located and conducts its activities outside of Canada or its securities trading services are unsolicited. Permitted clients include pension funds and charities; individuals and corporations that satisfy financial tests; banks, loan and trust companies, insurance companies; investment funds managed or advised by a registered firm; and governments. An exempt international dealer’s trading activities are limited to “debt securities” and “foreign securities,” and it may also carry on activities, other than the sale of securities, that are necessary to facilitate the distribution of securities outside of Canada.

Permitted clients will generally also be “accredited investors” as defined in National Instrument 45-106 (NI 45-106), such that the accredited investor exemption from the prospectus requirement can be relied upon.

In addition to certain initial and annual regulatory filings and fees, an exempt international dealer must provide a written disclosure statement to Canadian clients indicating, among other things, that it is not fully subject to Canadian securities law requirements and that a client may have difficulty enforcing any legal rights that it may have against the exempt international dealer because it is not a resident of Canada.

Registration as a Non-resident Exempt Market Dealer

A foreign securities dealer that carries on business as a dealer or adviser in a country other than Canada may apply for registration as a non-resident exempt market dealer. The clients of a non-resident exempt market dealer are typically restricted to “accredited investors” as defined in NI 45-106 (including individuals). A non-resident exempt market dealer can trade in all types of securities (including Canadian securities); however, exempt market dealers cannot generally engage in secondary market brokerage activities. Registration as a non-resident exempt market dealer requires full compliance with securities laws, including requirements related to capital, insurance, financial reporting and conflicts of interest. The chief compliance officer and trading individuals must either be registered and satisfy Canadian proficiency standards regarding industry exams and industry experience or obtain a discretionary exemption. All non-trading directors, senior officers and 10% or greater shareholders must file a comprehensive regulatory form with the securities regulators and be approved. Registration under applicable corporate legislation may also be required.

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

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

Exemption from Registration for U.S. Broker-Dealers Trading Securities with U.S. Residents from a Canadian Location

Registration as a securities dealer, or an exemption from such registration, is required for a firm that acts as a dealer in a Canadian jurisdiction even if the firm’s clients are not resident in Canada. Ontario Securities Commission Rule 32-505 Conditional Exemption from Registration for United States Broker-Dealers and Advisers Servicing U.S. Clients from Ontario, and comparable blanket orders in the other Canadian jurisdictions, provide a conditional exemption from dealer registration for U.S. broker-dealers servicing U.S.

clients from a Canadian location, subject to certain conditions, including that prior notice of such reliance is provided to the applicable Canadian securities regulator. If the U.S. broker-dealer is exempt from dealer registration, the individuals acting on its behalf are also exempt from dealing representative registration.

Foreign Securities Advisers

International Adviser Registration Exemption

A foreign securities adviser that has no head office or principal place of business in Canada may provide certain securities advisory services to “permitted clients” in Canada without being required to register as an adviser if it satisfies the conditions of the international adviser registration exemption in section 8.26 of NI 31-103. This exemption is not onerous to obtain, but is subject to a number of restrictions. The exemption is necessary even if the foreign securities adviser is located and conducts its activities outside Canada or its securities advice is unsolicited.

An exempt international adviser is exempt from many of the registration requirements that apply to “fully registered” non-Canadian or domestic advisers, but it is restricted in the securities advisory activities that it may undertake. An exempt international adviser can provide advice only in respect of “foreign securities,” although incidental advice concerning Canadian securities is permitted, and not more than 10% of its gross revenue may be derived from its securities advisory activities in Canada. An exempt international adviser’s Canadian clients are limited to “permitted clients,” including pension funds and charities; individuals and corporations that satisfy financial tests; banks, loan and trust companies, insurance companies; and governments. An exempt international adviser may also advise a mutual fund or non-redeemable investment fund if:

- the fund has a manager that is registered as an investment fund manager with a Canadian securities regulatory authority or the fund has a registered, or otherwise authorized, portfolio manager; or
- the investors in the fund are limited to clients that an exempt international adviser can advise directly.

In addition to making certain initial and annual regulatory filings and paying fees, an exempt international adviser must provide a written disclosure statement to Canadian clients indicating that it is not fully subject to Canadian securities law requirements and that a client may have difficulty enforcing any legal rights that it may have against the exempt international adviser in a jurisdiction outside of Canada. In addition, a prospectus or other offering document for investment funds whose securities are distributed to Canadian investors must describe these factors.

International Sub-Adviser Registration Exemption

A foreign securities adviser that does not want to rely on the international adviser registration exemption, or to be registered as an adviser in Canada, may alternatively rely on the international sub-adviser registration exemption in section 8.26.1 of NI 31-103 which allows a foreign securities adviser to act as a sub-adviser to a Canadian registered firm, provided, among other things, that the Canadian registered firm contractually agrees to be responsible to its clients for the foreign securities adviser’s advice.

Exemption from Registration for U.S. Advisers Providing Securities Advice to U.S. Residents from a Canadian Location

Registration as a securities adviser, or an exemption from such registration, is required for a firm that acts as an adviser in a Canadian jurisdiction even if the firm's clients are not resident in Canada. Ontario Securities Commission Rule 32-505 *Conditional Exemption from Registration for United States Broker-Dealers and Advisers Servicing U.S. Clients from Ontario*, and comparable blanket orders in the other Canadian jurisdictions, provide a conditional exemption from adviser registration for U.S. broker-dealers servicing U.S. clients from a Canadian location, subject to certain conditions, including that prior notice of such reliance is provided to the applicable Canadian securities regulator. If the U.S. adviser is exempt from adviser registration, the individuals acting on its behalf are also exempt from advising representative registration.

An exemption from the adviser registration requirement under the commodity futures and derivatives legislation of certain provinces may be available by statute or upon application to replicate the exemptions under securities legislation that are described above.

Registration as an Adviser

A foreign securities adviser may be registered as an adviser on substantially the same basis as a domestic adviser. A registered foreign securities adviser may advise Canadian clients in respect of both Canadian and foreign securities.

Registration as an adviser requires full compliance with securities laws, including the requirements related to capital, insurance, financial reporting and conflicts of interest. The chief compliance officer and advising individuals must be registered and satisfy Canadian proficiency standards regarding industry exams and industry experience or obtain a discretionary exemption. All non-advising directors, senior officers and 10% or greater shareholders must file a comprehensive regulatory form with the applicable Canadian securities regulators and be approved. Registration under applicable corporate legislation may also be required.

Foreign Investment Fund Managers

Ontario, Québec and Newfoundland & Labrador

A foreign investment fund manager (foreign IFM) that is directing or managing the business, operations or affairs of an "investment fund" that distributes securities to residents in Ontario, Québec or Newfoundland and Labrador (each, a local jurisdiction) is considered to be acting as an IFM in that local jurisdiction and, unless an exemption is available, must register, even if the foreign IFM has no physical presence or representatives in that local jurisdiction.

Two exemptions from the IFM registration requirement in these provinces are available to a foreign IFM:

No securityholders or active solicitation in local jurisdiction. An exemption is available for a foreign IFM that has no place of business in the local jurisdiction if (i) none of the investment funds managed by the foreign IFM have securityholders resident in the local jurisdiction; or (ii) neither the foreign IFM, nor any of the investment funds managed by the foreign IFM, have "actively solicited" residents in the local jurisdiction to purchase securities of the investment fund at any time after September 27, 2012. The following does not constitute active solicitation: actions that are undertaken at the request of, or in response to, an existing or prospective investor in a local jurisdiction who initiates contact with the foreign IFM or an investment fund managed by the foreign IFM. This is a complete registration exemption and requires no further action by the foreign IFM.

Permitted clients. An alternative, somewhat more onerous, exemption is available for a foreign IFM that does not have its head office or its principal place of business in Canada if:

- all of the securities of the investment funds it manages are distributed in a local jurisdiction on a private placement basis under an exemption from the prospectus requirement only to "permitted clients," which include pension funds and charities; individuals and corporations that satisfy financial tests; banks, loan and trust companies, insurance companies; investment funds managed or advised by a registered firm; and governments; and
- so long as the foreign IFM satisfies the conditions of this exemption, including certain initial and ongoing filing and disclosure requirements to both clients and the securities regulatory authorities in the local jurisdictions. A foreign IFM relying on this exemption in Ontario will be required to pay annual fees to the Ontario Securities Commission.

Permitted clients must also be "accredited investors" as defined in NI 45-106 if the accredited investor exemption from the prospectus requirement will be relied upon to distribute investment fund securities.

Remaining Canadian Provinces/Territories

In the remaining Canadian provinces/territories, a foreign IFM is only required to be registered in a jurisdiction if it directs or manages the business, operations or affairs of an investment fund from a physical place of business in the jurisdiction or has its head office in the jurisdiction.

Functions or activities that a foreign IFM carries out because of the presence of securityholders, solicitation of investors, or the distribution of securities, in a jurisdiction will not trigger the IFM registration requirement unless the foreign IFM directs these functions or activities from within the jurisdiction.

Implications of IFM Registration

A foreign IFM that is required to become registered as an IFM in a province/territory, but is not already registered in this or any other capacity in Canada, will be subject to the following, among other things:

- the requirement to appoint a proficient chief compliance officer;
- capital ($100,000 minimum) and insurance requirements;
- regulatory financial reporting obligations, such as annual (audited) and interim (quarterly unaudited) financial statements;

- conflicts of interest management;
- record-keeping obligations;
- compliance system requirements, including having written policies and procedures;
- specified reporting to securityholders (trade confirmations and account statements);
- regulatory compliance audits;
- non-resident disclosure requirements; and
- possible registration under corporate legislation.

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North American Free Trade

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

Advantages of NAFTA

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

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

Reduction of Tariffs and Removal of Non-tariff Barriers

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

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

Investor-State Arbitral Claims

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

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Restrictions on Foreign Investment

Foreign Investment and the Canadian Government

Net Benefit Reviews Under the *Investment Canada Act*

Foreign investments that exceed certain monetary thresholds must be reviewed under the federal *Investment Canada Act* and will be approved if they meet a "net benefit to Canada" test. Foreign investment reviews are handled by Innovation, Science and Economic Development Canada ("Innovation Canada") or, in the case of investments in the cultural sector, by the Department of Canadian Heritage.

The *Investment Canada Act* governs both the acquisition of control of a "Canadian business" by non-Canadians and the establishment of a new business in Canada by non-Canadians. A proposed foreign investment is subject to either a pre-closing application for review or a post-closing notification.

- If a proposed investment is reviewable, the non-Canadian investor must include in its application for review information about its business and its detailed plans for the Canadian business it is acquiring. Applications are typically filed after the public announcement of a transaction, but they could be filed earlier.
- If a proposed investment is not reviewable, the non-Canadian must file a two-page notification form within 30 days of the implementation of the investment. The establishment of a new business is subject only to a notification requirement unless it is in a culturally sensitive area such as the publication or distribution of books and/or magazines.

A direct foreign investment by a non-Canadian that will result in the acquisition of control of a Canadian business is subject to review and government approval if the gross assets of the Canadian business exceed specified monetary thresholds. The current threshold for WTO investors is C$1.045 billion in enterprise value. For investors from the European Union, the US, Mexico and other countries with which Canada has a free trade agreement, the threshold is C$1.568 billion in enterprise value. Lower thresholds apply for investors that are state-owned enterprises (SOEs).

For investors who are not WTO investors or "Trade Agreement Investors," the threshold for investments which are subject to review are C$5 million in asset value for direct investments and C$50 million in asset value for indirect transactions. These thresholds also apply to all investments made by non-Canadian investors to acquire control of a Canadian business that is a cultural business.

The Review and Approval Process

In determining whether it will approve an investment, Innovation Canada considers whether the investment is likely to provide a “net benefit to Canada.” The review process starts when the investor files an Application for Review, which describes the investor’s plans for the Canadian business.

The Minister has up to 75 days to review the Application, but he can extend this period with the consent of the foreign investor. Although Applications may be submitted prior to the signing of a definitive transaction agreement, in practice most investors submit Applications after signing. Reviews are usually completed within 75-90 days from the date that an Application is submitted.

The “net benefit” assessment is made on the basis of broad economic and policy criteria, such as the effect of the acquisition on the Canadian management team, employment levels and capital expenditures. In the case of investments by SOEs, the assessment will also consider the degree of influence that the foreign government has over the SOE as well as its commercial orientation and corporate governance. Investments are generally approved as long as investors enter into binding undertakings relating to the maintenance and/or growth of the Canadian business. Typical undertakings relate to maintaining or growing Canadian production, employment, research and capital expenditures levels. Recent high-profile transactions have also involved the maintenance of Canadian head offices and stock exchange listings. Most undertakings are usually for three to five years, with no ongoing restrictions after that period. SOEs usually have to enter into undertakings that are longer in duration.

National Security Reviews Under the *Investment Canada Act*

The *Investment Canada Act* also has separate provisions that grant the government the discretion to review virtually any investment on the grounds that it could be “injurious to Canada’s national security,” regardless of whether it is “net benefit” reviewable. Risk assessment considerations include whether the investment would increase Canadian dependence on foreign suppliers and impact the availability of critical goods or services, result in the transfer of technology or expertise contrary to Canadian interests, or create a risk of espionage or sabotage. There is little public information about national security reviews, but numerous transactions have been rejected, withdrawn or conditionally approved following national security reviews. Most of these investments involved proposal to acquire Canadian businesses in the high technology or telecommunications sectors and at least one involved a proposal to establish a new business that was located close to a sensitive government facility.

Other Restrictions

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

Financial Services - Foreign Bank Restrictions

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

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

If a foreign bank conglomerate derives less than 35% of its revenues or assets from the business of banking, then the businesses and investments of the conglomerate in Canada would not be subject to the Act; if, however, a regulated foreign bank in the foreign bank conglomerate establishes a bank subsidiary or branch in Canada, the businesses and investments of the conglomerate in Canada would be subject to a framework that is similar to the regime applicable to domestic Canadian banks.

Real Estate

There are few restrictions on the ownership of land in Canada by non-Canadians. However, the provinces of Alberta, Saskatchewan, Manitoba, Québec and Prince Edward Island limit the types or amount of land that can be owned by non-residents. For example, in Alberta, non-Canadians are ineligible to control an interest in more than two parcels of controlled land containing, in the aggregate, more than 20 acres. Nova Scotia, meanwhile, requires that a disclosure report be filed with the provincial government if a non-resident has acquired any land outside a city or town, although certain exemptions apply.

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

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

Communications Sector

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

Broadcasting

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

Telecommunications

Under the *Telecommunications Act*, only a Canadian-owned and -controlled corporation that has been incorporated in Canada may own or operate facilities used to provide telecommunications services to the public for compensation. For the corporation to be Canadian-owned and -controlled, at least 80% of the directors must be individual Canadians; Canadians must own and control 80% of the corporation's voting shares; and the corporation must not otherwise be controlled by non-Canadians. Under the Canadian ownership and control regulations issued under the *Telecommunications Act*, a "Canadian" for these purposes includes a resident Canadian citizen and a corporation in which Canadian shareholders own and control at least 66 2/3% of the voting shares and which is not otherwise controlled in fact by non-Canadians. In 2012, foreign investment restrictions were removed for telecommunications carriers whose market share is less than 10% of the total Canadian telecommunications market.

Wireless

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

Currency Exchange Controls

Canada has no currency exchange controls.

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Competition Law

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

Agreements Between Competitors

Under the *Competition Act*, agreements and other arrangements between competitors to fix prices; allocate customers, products or markets; or fix the production or supply of a product or service are criminal offences. There is no requirement to establish that the agreement or arrangement has had a negative impact on competition. The maximum penalty is a fine of C$25 million or a jail term of up to 14 years, or both. Moreover, the *Competition Act* also provides for a private right of action for a breach of the criminal provisions of the Act.

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

Misleading Advertising and Deceptive Marketing

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

Less serious misleading advertising and deceptive marketing practices, such as misrepresentations to the public about a product's performance of efficacy or bait and switch selling, are subject to review and sanction. If the Competition Tribunal is satisfied that a person has engaged in one of these practices, it may order the person to cease the conduct, to publish a notice to make consumers who are likely to have been affected by the conduct aware of it and to pay an administrative monetary penalty of up to C$10 million (for first-time corporate offenders).

Abuse of Dominant Position

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

Other Reviewable Business Practices

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

Merger Review

The *Competition Act* confers broad powers on the Commissioner to investigate whether a merger or proposed merger is likely to prevent or lessen competition substantially. If a transaction raises these concerns, the Commissioner may apply to the Competition Tribunal for a remedial order. This could result in an order prohibiting the completion of a merger, or an order dissolving the merger in the case of a completed merger.

Pre-merger Notification

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

- **Size of the parties**. The parties to the transaction, together with their affiliates, have assets in Canada, or annual gross revenues from sales in, from or into Canada, that exceed C$400 million;
- **Size of the transaction.** The target corporation (or corporations controlled by it) has assets in Canada, or annual gross revenues from sales in or from Canada, that exceed C$88 million;[2] and
- **Voting threshold.** As a result of the transaction, the purchaser will hold more than 20% in the case of a public corporation or 35% in the case of a private corporation (or, in both cases, if the purchaser already holds 20% or 35%, more than 50%) of the votes attached to all outstanding voting shares of the corporation.

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[2] This threshold is adjusted annually.

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

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

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

Advance Ruling Certificates

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

An ARC application takes the form of a letter describing the transaction and the parties and explaining why there are no substantive competition law concerns. Most ARC applications are processed within two to three weeks.

There is a C$73,584 fee for an ARC application and a pre-merger notification (the fee is the same whether one or both are filed). Failure to file is a criminal offence, punishable by fines of up to C$50,000. Failure to observe the statutory waiting period after a filing has been made is subject to civil fines of up to C$10,000 per day.

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Government Procurement

The procurement of goods and services by governments and other public bodies in Canada is subject to an established system of regulation and a well-developed body of case law. In many cases it is also subject to international trade treaties to which Canada is a party.

Canadian courts have adopted a Contract A/Contract B analysis when examining the rights of the parties in a call for tenders. Pursuant to this analysis, a contract may arise between a purchaser and each bidder when the bidder submits its bid. This contract is referred to as Contract A and imposes obligations on both the purchaser and the bidder. Contract A is separate and distinct from the actual project contract or purchase agreement, referred to as Contract B, to be entered into between the purchaser and the winning bidder. Typically, a call for tenders gives rise to Contract A whereas a request for proposals does not.

If Contract A is found to exist on bid submission, liability may flow from the breach of any express or implied term of Contract A by the purchaser. The express terms of Contract A will be the provisions in the bid document that pertain to the conduct of the parties through the procurement process. In determining whether there are any implied terms in Contract A, a court will look to custom and practice in the particular trade or industry and the presumed intentions of the parties. One such implied term that often arises is an obligation on the part of the purchaser to treat all bids "fairly and equally." This obligation requires that bidders receive equal treatment, that the winning bidder be selected according to the criteria set out in the bid request and not undisclosed criteria and that the criteria not be inconsistently applied between bidders. Barring an express term permitting otherwise, it is also an implied term that the purchaser will only accept compliant bids.

Trade Agreements and Canadian International Trade Tribunal

International trade agreements to which Canada is a party—such as the Canada-European Union Comprehensive Economic Trade Agreement—apply to specified types of procurements and require that government entities provide no less favourable treatment to suppliers from the other jurisdiction as they provide to domestic entities. The trade agreements also specify certain procedures that must be followed to ensure procurements are conducted in a transparent and impartial manner. Complaints with respect to the Government of Canada's procurement processes under trade agreements are handled by the Canadian International Trade Tribunal (CITT). The CITT may recommend such remedy as it considers appropriate and the relevant government institution must implement the recommendation to the greatest extent possible. Possible remedies include re-evaluation of bids, the termination of an awarded contract, the award of a contract to the complainant or compensation for losses, including lost profit. The CITT only deals with federal procurements. Provinces and broader public sector organizations have their own procurement dispute resolution processes.

Integrity Rules

The Government of Canada has adopted an Ineligibility and Suspension Policy and also includes standard integrity clauses in federal procurement contracts. The policy can have the effect of barring a company from federal contracting for a period of up to 10 years if the company or, in certain cases, its affiliates, has been charged or convicted of certain offences such as fraud, bribery, falsification of documents, stock manipulation, insider trading, lobbying and foreign corrupt practices. The policy can also apply to offences committed in a jurisdiction outside Canada.

Defence Procurement

Defence procurement in Canada is subject to Canada’s Industrial and Technological Benefits (ITB) Policy. Under the ITB Policy, companies awarded defence procurement contracts must undertake business activity in Canada having a value equal to the value of the awarded contract. The ITB Policy also includes a value proposition component that requires bidders for defence procurements to compete on the basis of the economic benefits to Canada associated with each bid. Value Proposition is a criterion forming part of the evaluation, along with other customary criteria such as price and technical merit.

Healthcare Procurement

The supply of drugs, medical devices and other health care products used in Canadian hospitals and institutions is often subject to tendering. Many hospitals are part of group purchasing organizations (GPOs) that manage the competitive procurement process and contract terms. This is intended to streamline the supply process by having a vendor negotiate one contract that will apply to the acquisition of several products by multiple health care institutions.

Procurement in the healthcare sector has unique complexities. The price of drug products in Canada is regulated by a federal consumer protection body (the Patented Medicine Prices Review Board) and some provinces have enacted anti-rebate laws that apply to drugs and some consumables—these laws can impact the offer that a health product vendor is willing to provide to a GPO. Vendors and GPOs want to adapt to changes in the marketplace and therefore will negotiate terms into supply contracts that address entry of a generic drug or an improved device into the Canadian market. Tendering in the health care space must also address issues associated with inducements to physicians to ensure that health care professionals’ discretion to prescribe appropriate treatment for patients is not compromised.

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Intellectual Property

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

Patents

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

Patent and Regulatory Protection in the Pharmaceutical Industry

The pharmaceutical industry relies on patents to protect new and innovative pharmaceutical products. Aside from the traditional protection afforded by a patent (recourse against infringement during the term of the patent) and the availability of patent tern extension in limited instances as noted above, the existence of a pharmaceutical patent can have two further important implications in Canada. First, in certain circumstances, under the *Patented Medicines (Notice of Compliance) Regulations*, pharmaceutical companies can have relevant patents listed on the Patent Register to block generic competition for up to two years until the generic manufacturer can establish that it its product does not infringe the listed patents or that the listed patents are invalid. These regulations have recently been updated and should provide more certainty and procedural fairness to all parties. One of the key changes is that proceedings under the new Regulations will proceed as actions (including discoveries and evidence given by live witnesses at trial) rather than as applications. Second, in a regime that is unique in the world, the existence of a patent broadly pertaining to a marketed drug product is subject to price reporting obligations and the price control jurisdiction of the federal Patented Medicine Prices Review Board.

Finally, Canada has a further form of protection that is not related to patents: a pharmaceutical regulatory data protection regime that gives regulatory exclusivity for innovative drug products for eight years, extendable to eight and one-half years for pediatric data ("regulatory exclusivity" refers to the holding of a drug approval issued by Health Canada for a specific drug or drug ingredient to the exclusion of competitors who wish to rely directly or indirectly on the innovator's approval). Canada has no orphan drug legislation—that is, no legislation or policy to provide assistance, tax credits or funding for clinical research for orphan drugs (which are used to treat rare diseases), or to grant market exclusivity, as in the United States.

Patent Protection in the Financial Services Industry

The Canadian patent office tends to be inconsistent in its application of the law, which has held that there is no outright prohibition against business method patents in Canada. Nevertheless, applicants continue to pursue patent protection for "business methods" and other types of inventions relating to the financial services industry, such as computing and communication systems used in providing financial services and are having success in bringing these applications to grant. Patent strategies for this area— both offensive and defensive—require consideration.

Patent and Regulatory Protection in Other Industries

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

Trademarks

A trademark can be a word, phrase, slogan, logo, design, symbol, letter combination, number combination, colour or sound, or any combination of these that is used to distinguish the holder's products or services from those of others. Unregistered trademarks can be protected on the basis of use. Registered trademarks, however, give the holder broader rights and facilitate enforcement. There are restrictions on registering certain types of trademarks, including those that are confusing with existing trademarks, those that are descriptive of the goods and services offered, names and surnames, certain place names, as well as other restrictions. Currently, an application to register a trademark can be based on use or intended use of the trademark in Canada or use and registration in the holder's home jurisdiction. However, Canada is making significant changes to its trademark laws, including accession to a number of international treaties, adoption of the international classification system for goods and services, removal of the requirement to use a trademark before it can become registered, and removal of the requirement to select a filing basis at the time of application. The new law is expected to be implemented in early 2019.

Copyright

The author of a literary, dramatic, artistic or musical work (including computer software) – or the author's employer if the author created the work as an employee within the scope of employment duties – holds copyright in the work in Canada for the life of the author plus 50 years. Copyright owners of sound recordings (including soundtracks, audio tapes and compact disc recordings) hold copyright in the recordings for 50 years from the year in which the recording was made. Authors and performers also hold moral rights, the right to preserve the integrity of, and be credited for, a work or performance. Moral rights subsist for the same period as copyright and cannot be assigned although they may be waived by the author or performer. Copyright arises automatically and need not be registered, although registration facilitates enforcement of copyright.

Industrial Designs and Integrated Circuit Topographies

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

The registration of an integrated circuit topography protects the three-dimensional configuration of electronic circuits used in microchips and semiconductor chips.

An application to register this type of topography must be filed within two years of the first commercial use of the configuration.

Plant Breeders' Rights

In addition to patent protection that may be available for agricultural products, Canada protects new varieties of plants that are distinct, uniform, stable and meet other criteria under Canada's *Plant Breeders' Rights Act* and regulations.

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Corporate Bankruptcy and Insolvency

Both federal and provincial laws are applicable to the Canadian bankruptcy and insolvency process. Federal statutes such as the *Bankruptcy and Insolvency Act* (BIA), Winding-up and Restructuring Act (WURA), and *Companies' Creditors Arrangement Act* (CCAA) govern the insolvency process and deal with the allocation of a debtor's assets. Provincial jurisdiction over "Property and Civil Rights" gives provinces authority to govern contracts that create security interests and property rights. Since the BIA, WURA and CCAA are federal Acts, any order of a court in one province is binding in all other provinces.

Restructurings

Corporate restructurings are a more common alternative to bankruptcy and receivership liquidations in the case of mid-size to large Canadian companies in financial distress. The word "restructuring" is used as a generic term that includes all manner of sale, refinancing, reorganization, recapitalization and other restructuring transactions and processes, and these terms are typically used interchangeably. Corporate restructurings can take on a myriad of forms, and the use of restructuring proceedings to effect "going concern" asset sale transactions has become particularly commonplace. Whatever the form, restructurings are fundamentally transactional in nature—that is, there is typically one or more complex commercial transactions effected in response to the financial challenges faced by a distressed debtor.

Canadian transactions in this field can occur either with or without formal court proceedings. Those completed without judicial intervention are sometimes referred to as "informal" or "negotiated" workouts, restructurings or recapitalizations, and they are fundamentally contractual in nature (i.e., the resolution of corporate distress is facilitated and effected through one or more contractual arrangements with key stakeholders). They may involve bilateral or multilateral negotiations, forbearance arrangements, new investors, business and asset dispositions, or fundamental operational changes. They must work within the constraints of a company's existing credit and other agreements, applicable laws and time demands. Companies usually prefer exhausting non-judicial solutions before resorting to the typically riskier and costlier court alternatives.

However, frequently a company in distress will be unable to proceed without the commencement of court proceedings, including as a result of: (i) its limited time, resources and liquidity, (ii) a need for a broad stay of proceedings that binds all of its stakeholders and other relief only available in formal proceedings (e.g., the ability to disclaim agreements; a need for debtor-in-possession financing; a means to sell assets despite being insolvent, free and clear of existing encumbrances; an opportunity to bind dissenting minority creditors; etc.); and (iii) an inability to address the complexity of the company's distress through contractual negotiations alone. In those cases, Canadian companies have typically sought the assistance of the courts by initiating restructuring proceedings under either the CCAA or the BIA.

Restructuring proceedings under both the BIA and the CCAA involve a court-appointed officer to supervise and to asset the debtor: a monitor in the case of the CCAA and a proposal trustee in the case of the BIA. In both cases, a company (including its directors and officers) continues to manage its affairs and remains in possession and control of its business and property, subject to the ongoing supervision of the court and under the watchful eye of the court officer. Although the two statutes are similar, the CCAA is the preferred choice for most mid-size to large Canadian companies because of its flexibility and the creativity permitted thereunder, which are well-suited to complex corporate structures, businesses and affairs. Courts in CCAA proceedings have broad statutory and judicial discretion, with a view to facilitating practicable commercial outcomes. In contrast, the BIA's restructuring provisions are less flexible and such proceedings have a limited duration (i.e., no more than six months' in total). Accordingly, the BIA's restructuring provisions are more commonly resorted to by small to mid-size corporations having less complicated structures, businesses and affairs.

Where a restructuring consists of a CCAA plan or BIA proposal that is put to affected creditors for approval, creditors with similar interests and rights (i.e., a "commonality of interests" test) may be divided into one or more classes in order to vote. For a plan or proposal to be binding on a given class of creditors, it must be approved by a "double majority" of creditors—that is, by a majority in number representing two-thirds in value of the creditors in that class present and voting either in person or by proxy. A creditor related to the debtor may vote against, but not in favour of, a plan or proposal. Court approval of a plan is also required after creditor approval has been obtained, and the court need not approve the plan simply because the creditors have done so (though the court is mindful of the degree of support shown for the plan). Court approval of a plan is predicated upon a consideration of whether the plan is fair and reasonable, including whether: (i) the plan fairly balances the interests of all affected stakeholders; (ii) the plan results in a viable commercial enterprise; (iii) the plan provides stakeholders with a more favourable outcome than would be the case in bankruptcy; (iv) the debtor has complied with all statutory requirements; and (v) the plan is consistent with the requirements of the CCAA.

The CCAA and the BIA are available only to insolvent companies, although ancillary court protection may be extended to non-insolvent persons (i.e., often affiliated companies or related persons). For solvent companies (and for insolvent companies that do not wish to formally declare insolvency) that require judicial assistance to address unsustainable debt obligations, the corporate plan of arrangement provisions of the *Canada Business Corporations Act* (CBCA) and its provincial counterparts can be utilized as an alternative to formal insolvency proceedings under the BIA or CCAA. These provisions allow, among other things, court-supervised restructurings involving an exchange of securities (e.g., debt-for-new-debt or debt-for-equity) upon approval of the court, notwithstanding less than unanimous securityholder approval. In other words, like the CCAA and the BIA, the CBCA allows a court to make an order that binds minority dissenting creditors in a class (i.e. to force a deal upon dissenting stakeholders when most of the stakeholders with similar interests have approved the transaction). Although the company and presiding court have narrower powers than is the case in CCAA or BIA restructuring proceedings, CBCA proceedings are typically less costly, risky and disruptive than their insolvency counterparts and can be especially effective in dealing with public bond debt.

Bankruptcy

Bankruptcy law in Canada is governed by the BIA. A debtor can become bankrupt in one of four ways: (i) voluntarily; (ii) involuntarily, by an order granted by the court upon the application of one or more creditors; (iii) upon the debtor's failure to successfully make a proposal within the allotted six month timeframe in BIA proposal proceedings (including upon the rejection by the creditors or the court of the debtor's restructuring proposal); or (iv) upon the annulment of a proposal by the court. Upon bankruptcy, a bankruptcy trustee is appointed and all the bankrupt's assets are vested in the trustee. In contrast to restructuring proceedings, a company's board of directors and management lose control and carriage of the bankrupt company's business and property.

Claims of most creditors—other than secured creditors and certain other creditors given special status (e.g., those having "eligible financial contracts")—are automatically stayed on bankruptcy. The trustee has a duty to review all security over the bankrupt's property and apply to the court to set aside security that is not valid. Subject to the trustee's right to challenge security, secured creditors are entitled to enforce against collateral and exercise their statutory and contractual rights, including to appoint a receiver or to otherwise take possession and dispose of collateral over which they hold security. As a result, secured creditors are often said to be outside of the bankruptcy process, though in practice it is common for secured creditors to engage the trustee in bankruptcy to realize on secured collateral on their behalf.

Unsecured creditors can influence bankruptcy proceedings by electing inspectors at the first meeting of creditors following commencement of the bankruptcy. Inspectors provide guidance to, and in some instances instruct, the trustee in bankruptcy in administering the bankrupt estate. With the permission of the inspectors (and subject to the rights of secured creditors), the trustee may commence legal proceedings, sell assets, and otherwise deal with the bankrupt's property. The essential objectives of a bankruptcy process are: (i) the sale of the bankrupt's business and property, either as a whole or piecemeal; (ii) the distribution of the proceeds of sale to creditors in accordance with established priorities under applicable federal and provincial law; and (iii) the administration of the bankruptcy estate so as to wind-up on an orderly basis the bankrupt's existence and affairs.

Receivership

Receivership proceedings are most often used by secured creditors to enforce their rights under security held on the assets of a defaulting debtor. Security can take many forms, including a traditional mortgage on real estate; a debenture on all of the assets of a corporation; a general security interest in personal property (i.e., equipment, inventory, receivables, motor vehicles, and intangible personal property); or a general assignment of book debts. There are also numerous unique forms of security, such as security interests in intellectual property, aircraft, and marine vessels.

Receivers may be appointed privately pursuant to contract, but it is most common for receivers to be court-appointed in cases involving mid to large corporations. Where a receiver is privately appointed, the relevant security agreement(s) must clearly express the appointment privilege and the rights and powers of the receiver. The rights of a privately appointed receiver are dependent on the terms of the security agreement providing for the appointment, and such a receiver takes instructions from the appointing secured creditor.

Statutory provision for court-appointed receivers may be found in many federal and provincial statutes. In cases involving distressed companies, it is customary to proceed under the BIA (and in some instances this is done in conjunction with also seeking a receivership appointment under applicable provincial statutes, such as the *Courts of Justice Act* in Ontario). Court orders appointing receivers customarily contain: (i) a broad stay of proceedings; (ii) a grant of powers and duties of the receiver; and (iii) other relief to assist the receiver in fulfilling its mandate to liquidate the property of the debtor company and to distribute the proceeds of sale to creditors in accordance with established priorities under applicable federal and provincial legislation. A court-appointed receiver is an officer of the court and operates pursuant to the terms of the court order providing for its appointment and, therefore, takes its directions from the court and owes a duty to all creditors of the debtor.

Priorities

The relative priority of creditor claims in a bankruptcy or insolvency is not easily set out. Whereas the federal government has constitutional authority to legislate with respect to bankruptcy, provincial governments have constitutional authority with respect to “property and civil rights”, which includes the priority given to competing creditor claims outside of bankruptcy. Accordingly, where priorities are specified under federal insolvency legislation, those priorities govern. However, this is complicated because: (i) there may be competing federal statutes that provide for conflicting priorities (e.g., insolvency legislation versus tax legislation); and (ii) in many instances federal insolvency legislation does not set out priorities and resort must be had to applicable provincial legislation (e.g., provincial personal property security legislation). In addition, the priority given to certain claims may change depending on the type of insolvency proceeding (bankruptcy versus receivership versus BIA proposal versus CCAA proceedings versus WURA proceedings). Finally, the court—particularly in CCAA proceedings—may give “super-priority” status to certain claims by granting court-ordered charges that secure such things as administrative costs, directors’ and officers’ indemnities, debtor-in-possession financing, critical suppliers, key employee retention/incentive plans, etc.

Generally, the following simplified priorities would be typical in most bankruptcy and insolvency proceedings: (i) trust property; (ii) claims (whether secured or unsecured) given special priority status by statute or court order, whether in full or up to set caps; (iii) ordinary secured claims (with the relative priority of those secured claims as against each other determined by applicable non-insolvency federal and provincial legislation); (iv) in some instances (i.e., bankruptcy), certain “preferred” claims (being unsecured claims given a priority over other unsecured claims); (v) ordinary unsecured claim, which have a *pari passu* priority; and (vi) equity claims, with preferred shareholders having priority ahead of common shareholders.

Cross-Border Proceedings

It is commonplace that larger bankruptcy and insolvency proceedings involve more than one jurisdiction (i.e., affiliates, businesses, assets and/or liabilities outside of Canada).

In some instances, cross-border proceedings may be joint proceedings or there may be plenary proceedings in more than one country. For example, there may be CCAA proceedings in Canada and Chapter 11 proceedings in the United States in respect of the same company or group of companies. Cross-border plenary cases are typically coordinated, including through the use of court-approved protocols and guidelines for court-to-court communications, and may involve joint court hearings by the courts in each country.

In other instances, there may be plenary proceedings in one country and ancillary proceedings in one or more secondary jurisdictions. Canada's insolvency legislation provides for the recognition in Canada of plenary proceedings commenced in another country (i.e., Canadian ancillary proceedings). Part IV of the CCAA and Part III of the BIA incorporate a modified version of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency. These sections are similar to Chapter 15 of the US Bankruptcy Code and grant considerable authority and discretion to the courts to make orders or grant relief as it considers appropriate.

A foreign proceeding is a judicial or administrative proceeding, including an interim proceeding, in a jurisdiction outside of Canada dealing with a 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. A duly appointed foreign representative may apply to have a foreign proceeding recognized in Canada.

In recognizing a foreign proceeding, the Canadian courts must acknowledge whether it is a foreign main proceeding (FMP) or a foreign non-main proceeding (FNMP). An FMP is defined as a foreign proceeding in a jurisdiction where the debtor company has the center of its main interests (COMI). In the absence of proof to the contrary, a debtor's COMI is the location of its registered office. A foreign FNMP is simply defined as a proceeding that is not an FMP. Where an FMP, the court must issue an order granting a stay of proceedings and prohibiting the debtor from selling or disposing of its assets outside the ordinary course of its business. In an FNMP the stay is not automatic, however, the court may grant any order it considers appropriate for the protection of the debtor's property or the interests of its creditors.

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Environmental Protection and Climate Change

Environmental Protection

The protection, conservation and enhancement of the environment through government regulation and enforcement continues to be pervasive in Canada. The highest-profile issues relate to climate change, air, water, waste and contaminated property.

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

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

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

In each province, certain projects will also be required to undergo an environmental assessment before any environmental approvals are issued. Such an assessment typically involves environmental and cultural heritage studies as well as public, agency and Aboriginal consultations.

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

Under certain environmental laws, offences committed by employees and agents are also deemed to have been committed by the employer or principal. Officers and directors may also have specific obligations imposed expressly on them. In Ontario, for example, officers and directors are obliged to take all reasonable care, among other things, to prevent the corporation from unlawfully discharging into the natural environment a contaminant that may cause an adverse effect. Conviction for committing environmental offences can result in the imposition of fines, imprisonment or both. In some cases, regulators can also impose monetary penalties for environmental offences without first proving in a court proceeding that the offence was committed.

In addition to regulatory orders and penalties, environmental matters may result in civil causes of action, including the common law torts of nuisance, negligence, trespass and strict liability. The courts can award damages, but they also have the ability to grant injunctive relief, which could potentially stop a source of pollution (and the associated operations).

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

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

Climate Change

Businesses operating in Canada are subject to a growing body of law, at both federal and provincial levels, designed to mitigate the country's greenhouse gas (GHG) emissions. Securities laws in Canada that require issuers to disclose material information about their business and affairs can apply to material information involving, or prompted by the risks and opportunities associated with, climate change.

Carbon Pricing (Cap-and-Trade, Emissions Trading and Carbon Taxes)

Businesses operating in industrial sectors are increasingly subject to cap-and-trade regimes, which generally require large industrial emitters to measure, monitor and report their emissions and, at the end of a set compliance period, to ensure they have enough allowances (essentially permits granted by the government that allow a specified amount of GHG emissions) to cover their actual emissions during that time. Currently, the Canadian provinces of Ontario and Québec have cap-and-trade systems, which are linked with the system in effect in California, allowing participants in each system to purchase and trade allowances between the three jurisdictions. The current compliance period for these systems runs until the end of 2020. Alberta also has an emissions trading system that regulates the emissions intensity of large industrial operations in the province.

In cap-and-trade regimes, governments typically issue fewer allowances over time (requiring deeper cuts to emissions), thereby fuelling a market in which regulated entities can sell any surplus emissions allowances to other entities at a price that is less than the cost of reducing emissions. In addition, the regimes in Ontario, Québec, Alberta and California create markets for “offset credits” by allowing regulated entities to purchase credits earned by projects shown to have reduced GHG emissions when not required by law to do so. Outside the regulated sphere, the market for the voluntary purchase of emissions-reduction credits is also growing rapidly.

A carbon tax is another market-based mechanism that is generally levied either on the production, import and distribution of fossil fuels (known as upstream carbon taxes) or, much more commonly, on the purchase and use of fossil fuels (known as downstream carbon taxes). The tax rates for each fossil fuel typically vary depending on the fuel’s carbon content—in other words, how much CO2 the fuel will emit upon combustion. Currently, the provinces of British Columbia and Alberta impose downstream carbon taxes. These levies are applied to the purchase or use of certain fossil fuels in each province, which affects a broad spectrum of businesses and individuals.

In December 2016, the federal government outlined a nation plan with respect to carbon pricing called the Pan-Canadian Framework on Clean Growth and Climate Change (the Framework). Although the Framework still has not been implemented into law, it is designed to encourage each province to impose, at a minimum, a benchmark price on GHG emissions. To meet the benchmark, jurisdictions can implement either: (i) an explicit price-based system (e.g., British Columbia’s carbon tax); or (ii) a cap-and-trade system (e.g., Ontario and Québec’s programs). The benchmark will apply to substantively the same sources as British Columbia’s carbon tax and will become more stringent over time to support Canada’s 2030 target of 30% below 2005 levels.

For price-based systems, the benchmark carbon price would start at a minimum of $10 per tonne in 2018, rising by $10 per year to $50 per tonne in 2022. In contrast, jurisdictions that adopt cap-and-trade are expected to achieve: (i) emissions reductions of at least 30% below 2005 levels by 2030; and (ii) declining annual caps to at least 2022 that correspond, at a minimum, to the projected emissions reductions resulting from the carbon price that year in price-based systems. Revenues derived will remain in the jurisdiction of origin. As a backstop, the federal government plans to introduce a price-based system in jurisdictions that do not meet the benchmark.

Complementary Initiatives

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

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

Climate Change Disclosure

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

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

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