

# Doing Business in Canada

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# Doing Business in Canada

Osler, Hoskin & Harcourt LLP first produced *Doing Business in Canada* in 1997 and this guide continues to be one of our most popular and respected publications. Laws change and evolve and to ensure the information is current, we review the guide regularly.

*Doing Business in Canada* is designed to give business executives, counsel and potential investors from foreign countries a concise overview of Canada's legal and economic framework and key business legislation. For those looking to pursue business opportunities in Canada, this guide outlines several unique aspects of doing business in Canada, including French language requirements in the province of Québec as well as overlapping regulatory jurisdiction among various levels of government in certain areas of the law. With few exceptions, the same considerations apply to Canadians who live, work and conduct business in Canada.

Despite the ongoing harmonization of many areas of Canadian business law with those of our major trading partners through international agreements, addressing distinctly Canadian business law requirements is a crucial consideration when entering the Canadian marketplace.

Each chapter is designed to assist you with an overview of that particular subject and the laws most likely to affect your business decisions. Beginning with an introduction to Canada's legal system as it applies to businesses, the guide includes an introduction to Canada's tax system, the pensions and retirement savings landscape in Canada, foreign investment considerations, competition law, and details on doing business in Québec, to name a few topics.

*Doing Business in Canada* does not contain a full analysis of the law. This guide provides general information only and does not constitute legal or other professional advice or an opinion of Osler, Hoskin & Harcourt LLP or any member of the firm on the points of law discussed herein. We invite you to contact the contributing authors of this publication (listed at the end of each chapter) or any other firm member in our five offices to discuss the legal issues outlined in this publication.



# An Introduction to Canada's Government and Legal System

by LARRY LOWENSTEIN & LAURA FRIC

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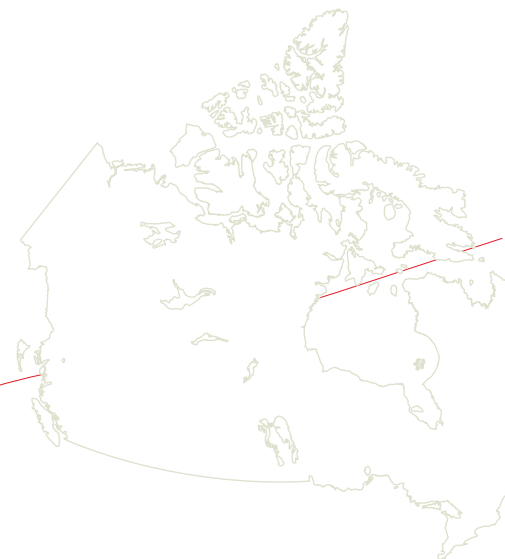
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While Canada's legal system is quite similar to that of many western democracies, there are nevertheless many unique aspects to it, including the existence of the English precedent-based common-law system throughout the country except in Québec where the French *Code Napoléon*-based system is used.

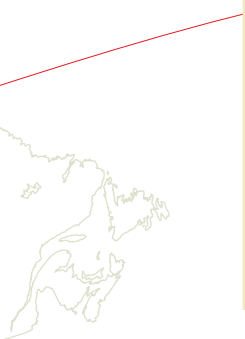


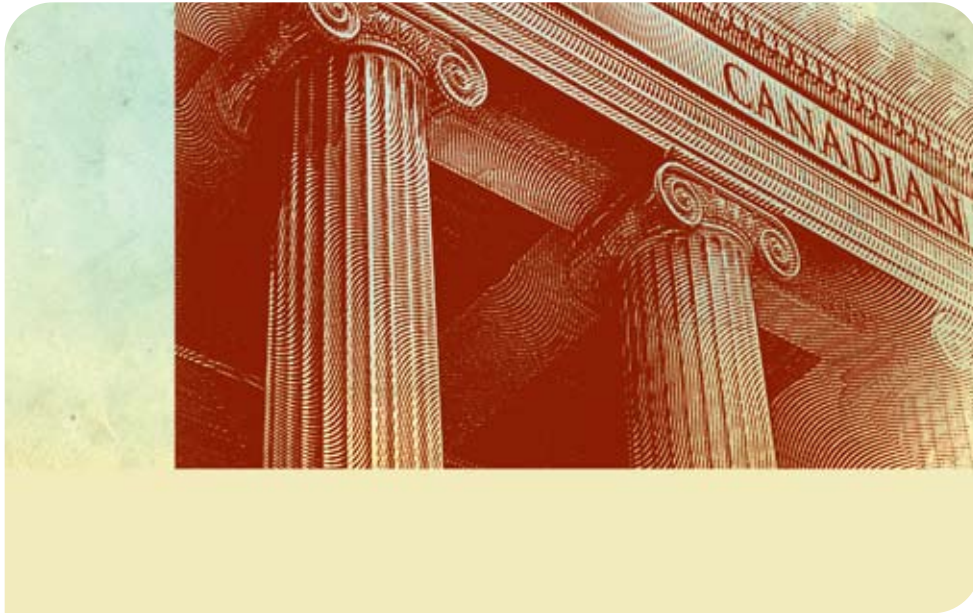
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## Levels of Government

Canada is a federal bilingual (English and French) country operating under a parliamentary system of government. Legislative authority and the ability to make laws are divided between various levels of government, including the Parliament of Canada and the legislatures of Canada's ten provinces and three territories.

While the federal government is responsible for the territories, it has provided for elected councils in the territories with law-making powers similar to those of the provinces. In addition, unique arrangements have been developed for aboriginal peoples in various regions of the country. For example, Indian bands exercise a range of governmental powers over reserve lands under the *Indian Act*.





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**Canada's Constitution**

The Constitution of Canada is the supreme law of the country. It sets out the basic principles of a democratic government and defines the three branches of government: executive, legislative and judicial. The Constitution also divides law-making power and responsibility between the federal and provincial levels of government.

The federal government is responsible for areas such as foreign affairs and international trade, defence, the monetary system, criminal law, patents, bankruptcy/insolvency and certain “national” sectors, such as financial services and telecommunications. The provinces are responsible for education, health care, municipal affairs and national resources along with other specified areas.

***Charter of Rights and Freedoms***

*Canada's Charter of Rights and Freedoms (Charter)*, under which several important legal decisions have been rendered since 1982, is also contained in the Constitution. Unlike the U.S. *Bill of Rights*, the *Charter* has only limited application to the regulation of economic rights.

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### **Two Civil Law Systems**

Another unique aspect of Canada’s legal system is the existence of two civil law systems. The criminal law system that governs the whole country and the civil law system that governs most jurisdictions in Canada is based on the English precedent-based system of common law. The civil law system in the province of Québec only is based on the French *Code-Napoléon*. Foreign companies and investors interested in doing business in Canada nationally should ensure that their Canadian legal advisors are well versed in both civil systems.

### **An Independent Judiciary**

Canada’s judiciary is completely independent from other branches of government. All government action is subject to judicial scrutiny.

### **Canadian Courts**

Commercial court proceedings are usually heard in the federal courts or in the superior courts of the provinces (which are presided over by federally appointed judges). In Toronto, a formal and well-respected “Commercial List” court hears most commercial matters; informally, certain judges in other provinces are often assigned to hear commercial matters. Canada generally has a “loser pays” civil litigation system, meaning that the losing side of any court battle can usually expect to pay some portion of the successful party’s legal costs.



## Alternative Dispute Resolution (ADR)

Alternative Dispute Resolution (ADR) comprises various techniques for resolving disputes outside of the court that are less formal, less costly and generally faster than court proceedings. ADR includes both mediation (an independent third-party facilitates the parties' resolution of their dispute) and arbitration (an independent third-party decides on how the dispute will be resolved). The province of Ontario has implemented a mandatory mediation program in place in Toronto and Ottawa for most civil non-family case-managed actions in those cities since July 2001. Canadian courts will generally recognize and enforce arbitration decisions made in other jurisdictions.

## Canadian Class Actions

Most provinces in Canada – including the most populous, Ontario and Québec – have statutes governing class proceedings. Even in the other Canadian jurisdictions, actions can usually be brought on behalf of large numbers of people as “representative” actions.

Canada's approach to class actions is relatively welcoming. The number of class proceedings being brought in Canada has grown substantially in the last 10 years, with the plaintiff's bar becoming larger and more experienced. It is now not uncommon to have similar actions commenced in many provinces at the same time and in a coordinated way, and for Canadian proceedings to be brought that mirror proceedings brought in other countries.



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*Osler's Litigation Department provides strategic litigation services and advice on class actions to many leading domestic and international enterprises. Larry Lowenstein and Laura Fric are partners in our Department.*

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# Forms of Business Organization in Canada

by DAVID HANICK

There are several different vehicles available for conducting a business in Canada, each with its own advantages and disadvantages. A foreign entity looking to carry on business in Canada should consider key factors, such as tax and liability issues, in selecting the most appropriate form of entity.

For foreign entities looking to carry on business in Canada, recent amendments to Canada's business statutes have (among other things) eased director residency requirements and further facilitated setting up a branch or subsidiary in Canada. Below, we provide an overview of the pros and cons of various forms of business organization in Canada.

## Federal versus Provincial Incorporation

If a foreign entity decides to incorporate a Canadian subsidiary, the subsidiary can be incorporated as a federal corporation under the laws of Canada, or as a provincial corporation under the laws of one of the provinces of Canada. Such incorporation is, generally speaking, a very simple process and does not require any substantive government approvals. A simple filing is necessary and the corporation must be registered with various tax (and other government) bodies. The capitalization of a corporation is a matter of private choice. No approvals are required, although there are tax rules that should be considered. Share capital and other financial information about the corporation does not have to be publicly disclosed unless the corporation is a publicly-listed company.

The *Canada Business Corporations Act* (CBCA) applies to federally incorporated businesses. Canada's 10 provinces have comparable legislation, although their laws differ in various respects. Generally, a federal corporation has the capacity and the power of a natural person and may carry on business anywhere in Canada and use its name in any province. Note that all provinces regulate the corporate activities of federal corporations operating in their jurisdiction through laws of general application requiring registration, the filing of returns and the payment of fees.

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A federally or provincially incorporated business must register or obtain an extra-provincial licence in each province in which it carries on business (other than, for a provincially incorporated business, the province in which it was incorporated). If the name of the corporation is not acceptable in the province where the licence is being sought (for example, because a corporation with a similar name is already registered in that province), registration may not be granted. In the province of Québec, a corporation must either have a bilingual name or a French version of its name, unless the name is a registered trade-mark. (For more information, see Chapter 17, “Doing Business in Québec,” starting on [page 86](#).)

Meetings of the directors of both federal and, for example, Ontario corporations may be held either in or outside of Canada; however, in certain cases, the articles or bylaws of the corporation must specifically provide for such meetings.

### **Directors’ Residency Requirements**

For most CBCA (federally incorporated) corporations, the Canadian residency requirement is 25% at the board level. (There is no residency requirement at the board *committee* level.) The minimum number of resident Canadian directors that must be present for business to be transacted at a board meeting is also 25% for CBCA corporations unless the absent Canadian director (whose presence would otherwise be required) approves the business transacted at the meeting in writing or by electronic means.

For boards with fewer than four directors, there must be at least one resident Canadian on the board. For business to be transacted at a board meeting, this member must be present or, if absent, he

or she must approve the business conducted at the meeting in writing or by electronic means. For CBCA corporations to which statutory or regulatory Canadian ownership requirements apply, a majority of the board (and board committee) members must be resident Canadians.

Note that some foreign investors choose to incorporate in British Columbia, New Brunswick, Québec, Yukon or Nova Scotia. The applicable business corporation statute in each of these provinces does not have a director residency requirement.

For information on directors' responsibilities in Canada, you can download a copy of our guide, "Corporate Governance in Canada," by visiting the "Publications & News" section of Osler.com.

### Branch versus Subsidiary Operation

A Canadian subsidiary may not generally be consolidated with other operations for foreign tax purposes. Consequently, in the initial period when losses may be expected, starting a business through a branch operation may permit losses in Canada to be offset against income in the home jurisdiction, depending on the laws of the home jurisdiction.

Use of a branch operation would require an application for an extra-provincial licence describing the structure of the applicant and designating an "agent for service" in the province. The business or corporate name under which the licence is to be granted must be approved by the applicable provincial authority.

Since the use of a branch subjects the foreign corporation to provincial and federal laws, consider first creating a wholly owned subsidiary in the home jurisdiction of the foreign corporation. That subsidiary would then carry on business in Canada through a branch. Depending on the laws in the home jurisdiction, the foreign parent might then avoid direct liability for actions of the Canadian operation, and might still be able to consolidate any losses of the Canadian branch into its own financial statements for tax purposes.

### Flow-through Entities

In some situations, for U.S. tax reasons, a U.S. investor will want to hold Canadian interests through a "flow-through entity." While this objective is not usually possible with a Canadian or provincial corporation, the provinces of Alberta, British Columbia and Nova Scotia permit the creation of an Unlimited Liability Company (ULC). A ULC may be treated in the U.S. as the equivalent of a partnership or "check the box" flow-through entity. However, the use of such flow-through entities has become significantly more complex as a result of recent amendments to the Canada-U.S. Income Tax Treaty which may deny the benefits of that treaty to such entities.

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## Partnerships and Joint Ventures

The use of a partnership or joint venture, in combination with one or more persons or corporations in Canada, may, in certain circumstances, be an attractive option from a tax perspective (but may be unattractive in other circumstances as the existence of a non-Canadian partner may cause payments to or from the partnership to be subject to Canadian withholding tax). If a non-resident holds its partnership or joint venture interest through a subsidiary incorporated in Canada, the same tax considerations as are noted above for subsidiaries are relevant. Participation of a non-resident in a partnership or joint venture directly (for foreign tax or other reasons) is equivalent to operating through a branch in Canada. The non-resident partner must obtain an extra-provincial licence in each province where the joint venture or partnership carries on business.

A detailed partnership agreement is customary in the case of a partnership, in part to avoid certain legislative provisions that would otherwise apply. Limited partnerships are commonly used for investment purposes to permit tax deductions for limited partners while retaining their limited liability. Structuring the partnership so that the general partner (with unlimited liability) is a corporation preserves all of the limited liability aspects of the corporate form. Ontario's *Limited Partnerships Act*, for example, is similar to comparable statutes in other provinces and in various states in the U.S.

True joint ventures or co-ownership arrangements, commonly involving one or more corporations, avoid the unlimited joint and several liability applicable to partners. They also permit the venturers or co-owners to regulate their tax deductions without being forced to do so on the same basis as other co-venturers. (This would not be possible in the case of a partnership.) A joint venture agreement must be carefully drafted to ensure that the venture is not considered a partnership.

## Franchising and Licensing

A licence or franchise may be granted directly by a non-resident carrying on business in a foreign country to a Canadian licensee or franchisee. The operation is run from outside Canada, with the licensee or franchisee in Canada being an arm's-length entity operating in Canada. There is no need for a separate Canadian business structure. Provided that the non-resident does not carry on business in Canada for Canadian income tax purposes, the non-resident will receive income from its Canadian resident licensee or franchisee, less any applicable Canadian withholding taxes.

Alternatively, a Canadian entity can be set up through which Canadian licences or franchises may be granted; this entity would parallel its foreign parent's activities. For a non-Canadian not

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already operating in Canada in this field, the creation of such an entity would require notification under the *Investment Canada Act* and may require review. (For more information, see Chapter 5, “Regulation of Foreign Investment in Canada,” starting on [page 22](#).) Regardless of the method chosen, the licensor’s or franchisor’s intellectual property (such as trade-marks, patents and copyright) must be properly protected in Canada.

The provinces of Alberta, Ontario, New Brunswick and Prince Edward Island require a franchisor to deliver a prescribed form of disclosure document to a prospective franchisee before it can grant a franchise. Current business practice for many national franchisors is to prepare a combined disclosure document for use in the four disclosure provinces and on a voluntary basis in other provinces in Canada.

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*Drawing on the expertise of our Tax and Litigation Departments as well as a variety of specialty groups, Osler’s Corporate Practice Group excels at helping domestic and international clients resolve unique business challenges. David Hanick is a partner in our Corporate Group.*

# Financing a Foreign Business Operating in Canada

by DALE SEYMOUR

There are a wide range of financing options available in Canada for new and expanding businesses. These options range from shareholder infusions of capital to sophisticated institutional financing.

A subsidiary corporation (or other business entity) operating as a new business in a Canadian province such as Ontario often is initially funded solely by its shareholders by way of equity, debt or a combination of the two.

When the company needs external financing, third-party lenders will typically require that any shareholder loans (and any security for such loans) be deeply subordinated to the third-party debt.

## External Debt Financing

### Types of Loans

Third-party financiers typically offer a business an operating or term loan, or a combination of the two, which can be provided on an unsecured or secured basis.

Operating or revolving loans are typically provided on a short- to medium-term basis and to finance the company's and its subsidiaries' working capital needs. This type of loan may be used to finance working capital requirements, acquisitions, recapitalizations and capital expenditure projects.

Term loans are usually medium- to long-term loans available for a fixed period of time and repayable on the occurrence of prescribed events of default or on demand. They often are amortized over the term of the loan, with required periodic payments of principal and a bullet payment at the end of the term. Regularly scheduled interest payments are usually required.

Loans will most commonly be made available in Canadian or U.S. dollars, with interest charged on the basis of a chartered bank prime rate/base rate, as well as LIBOR or bankers' acceptances.

### Security

Lenders often require a borrower to provide, at a minimum, security over the assets being financed and, in many cases, over all of the

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borrower's personal and real property, including after-acquired property. If a revolving facility is being provided to a company by a different lender than the term lender, the term lender may require a second lien on the primary collateral security of the revolving lender and vice versa. Lenders also may require parent holding companies, subsidiary companies and individual shareholders to provide guarantees and security as additional credit support.

Each of the common-law provinces in Canada has enacted personal property security legislation that is similar to the U.S. *Uniform Commercial Code* Art. 9 regime and that governs the creation, registration and enforcement of security on personal property. Ontario and most of the other provinces have also enacted securities transfer legislation, modeled on the U.S. *Uniform Securities Transfer Act*, creating a comprehensive set of rules for the transfer of securities and other investment property (including the creation of security interests in such property). The *Civil Code of Québec* governs such matters in Québec. The federal *Bank Act* also permits banks to receive security in raw materials, work in progress and finished goods inventory, as well as other specified assets and equipment. Sources of debt financing include Canadian chartered banks, foreign banks, "near" banks and other financial institutions.

### Domestic and Foreign Banks

A few very large, domestic chartered banks that are regulated by the federal government offer debt financing and provide cash management and investment services. Most Canadian chartered banks have a highly developed network of branch operations throughout the country. Since some of them also have a presence in the U.S. and internationally, these banks can be a useful liaison for a foreign investor establishing a business in Canada.

The federal *Bank Act* governs the activities of domestic and foreign banks operating in Canada. It authorizes Schedule I (domestic) banks and Schedule II (foreign subsidiary) banks that are controlled by eligible foreign institutions to accept deposits and Schedule III banks (foreign bank branches of foreign institutions) to do banking business in Canada.

Foreign banks concentrate mainly on commercial banking activities. Increasing competition in this field, particularly in light of the changes to the federal *Income Tax Act* with respect to withholding taxes payable to non-resident lenders, provides commercial business borrowers a broader range of institutional lenders to turn to. Foreign banks operating in Canada often provide the necessary financial liaison with a foreign investor and the opportunity to deal with the same bank in the investor's home country when a new Canadian business is established.

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### Non-Banks

While unable to take deposits, life insurance companies in Canada manage segregated investment funds, including pension funds, and provide medium- to long-term financing. Trust and loan companies in Canada are generally incorporated under the federal *Trust and Loan Companies Act* and take deposits and provide debt financing.

Credit unions, “caisses populaires” in Québec and the financing arms of major industrial companies and hedge funds also provide financing. In addition, financing can be secured from conventional real estate mortgage lenders for real property.

### Other Financing Sources

Acquiring capital assets from a manufacturer on a conditional sale basis or by way of a lease, either on an operating or capital basis, allows a company to pay for assets from its regular cash flow over time, reduce or eliminate the need for a substantial initial payment, and secure tax and/or accounting advantages. Many lease finance companies will buy assets specified by the company and then lease those assets to the company, allowing the company to convert its existing assets to capital while retaining use of those underlying assets in the business.

A company may sell its accounts receivables to a factor who will advance a percentage of the amount of the receivables. When its receivables are paid in full, the company will receive the balance of the amount, less any fees and interest charged by the factor.

In a securitization, certain assets of a corporation are pooled and transferred into a separate legal entity which finances the purchase of this portfolio by issuing debt or debt-like instruments into the capital markets, secured by the portfolio assets. Securitization can offer competitive pricing since pricing is based on the quality of the assets and credit enhancements, rather than on a company’s corporate covenants.

### External Equity Financing

Private equity (PE) funds provide equity capital to companies, typically those with high growth potential. In Canada PE funds have been particularly active in financing buyouts. The strategies adopted by PE funds can vary significantly, depending on the stage of a company’s life at which the investment is made. These funds may provide “seed” or start-up capital, as well as financing for expansion and development, to assist in a rescue/turnaround or to fund a buyout. Many private equity funds will focus in a particular industry or geographic niche.

Venture capitalists (VCs), really a subset of private equity, are private or publicly sponsored pools of capital that are interested in taking a minority equity position in a company (and may also make debt

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financing available, through subordinated, convertible or mezzanine debt, for example) in exchange for significant influence over the management and direction of the company.

VCs often invest in a company at the early stages of development, before sufficient predictable cash flows have been generated to attract institutional debt financing. VCs have a fairly strong presence in the IT, clean technology and life-science sectors.

### Government Assistance Programs

Many federal direct subsidy programs have shifted toward repayable loans. Others no longer offer government loans, but rather facilitate financing through commercial loans and bank financing. The federal Business Development Bank of Canada provides business loans, loan guarantees and export financing; offers management training programs; and has formed strategic alliances with many domestic banks. Export Development Canada provides financial assistance to exporters.

Also, both the federal and provincial governments offer investment programs which will provide equity capital to businesses, often partnering with private equity or venture capital firms. Examples of these include BDC Venture Capital and the Ontario Energy Technologies Fund.

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*Osler's Banking and Financial Services Group guides both domestic and global financial services providers in resolving complex legal issues that arise in the highly competitive, fast-paced financial services industry and in maximizing business opportunities as they emerge. Dale Seymour is a partner in our Group.*

# Insolvency and Restructuring in Canada

by TRACY C. SANDLER & SANDRA ABITAN

Canada's insolvency and restructuring regime consists primarily of two separate statutes that have been substantially amended in recent years to align their restructuring provisions. Despite some similarities with its U.S. counterpart, the amended Canadian regime remains distinct.

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## Corporate Restructurings

Corporate restructurings in Canada are governed by either the *Companies' Creditors Arrangement Act* (CCAA) or the proposal provisions of the *Bankruptcy & Insolvency Act* (BIA). The CCAA is only available to debtors with total debts of over \$5 million. The statute provides tremendous flexibility to the supervising court and the debtor in conducting restructuring proceedings. In contrast, the BIA provides a much more structured set of rules and regulations. Nonetheless, both statutes provide for a stay of creditors, the filing of a plan or proposal, and meeting(s) of affected classes of creditors for voting on the debtor's plan or proposal, followed by court sanction. Recent amendments (as discussed below) more closely align the CCAA and BIA restructuring provisions.

## Rights of Trustee in Bankruptcy and Secured Creditors

Liquidations are generally conducted under the bankruptcy provisions of the BIA (which is akin to Chapter 7 of the U.S. *Bankruptcy Code*). Upon bankruptcy, all of the assets of the bankrupt vest in a trustee in bankruptcy who is responsible for administering a claims process and for realizing upon the assets for distribution to creditors. The trustee's rights are generally subject to the interests of secured creditors who can realize against secured assets by seeking the appointment of a receiver (or receiver and manager), typically through application to court under the BIA or under provincial law in most provinces, or as typically through private appointment under the security agreement.




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### **Legislative Developments**

On September 18, 2009, significant amendments to the CCAA and the BIA came into effect, providing greater protection for wage claims; facilitating the restructuring of insolvent but viable businesses; making the insolvency system fairer; improving its administration; and curbing the potential for abuse.

These amendments include the establishment of the Wage Earner Protection Program, stronger protection for eligible financial contracts in insolvency provisions and provisions for the protection of collective agreements, wage and pension claim priorities, national receivers, executory contracts, interim financing, assets sales, duties of court-appointed officers, corporate governance and court-ordered charges. As a result of these amendments, the CCAA provisions are more harmonized with their Chapter 15 counterpart in the U.S.

### **International Harmonization**

In a “cross-border” insolvency, Canadian courts generally encourage coordination among the various proceedings in all jurisdictions so that the restructuring or liquidation can proceed in a fair and orderly manner. Embodying certain essential features of the UNCITRAL Model Law on International Commercial Arbitration, part IV of the CCAA (which was also proclaimed into force on September 18, 2009) facilitates coordination in cross-border insolvencies.

Where a primary insolvency proceeding is taking place outside of Canada, a foreign representative from those proceedings can appear in a Canadian court and obtain recognition of the relevant foreign court order(s), a stay of proceedings against the debtor or the

debtor's property in Canada and other appropriate relief. Canadian courts have also authorized numerous court-to-court protocols to facilitate cases with complicated cross-border aspects.

Despite aspects of harmonization, there are still many notable differences between insolvency and restructuring law in Canada and the U.S. For instance, unlike the U.S., neither the CCAA nor the BIA authorizes a court to consolidate the assets or liabilities of different entities; however, Canadian courts have exercised their equitable authority under both statutes to consolidate the estates of *related* debtors. In addition, while the doctrine of equitable subordination is an accepted and codified feature of the U.S. legal landscape, it may not be applicable in Canada.

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*Osler's Insolvency & Restructuring Group offers our corporate, institutional and public sector clients a team-based, multi-disciplinary approach to devising and implementing innovative, integrated solutions to complex insolvency and restructuring matters. Tracy C. Sandler and Sandra Abitan are partners in our Group.*

# Regulation of Foreign Investment in Canada

by PETER FRANKLYN & PETER GLOSSOP

An acquisition of control of a Canadian business by a non-Canadian may be reviewable by the Canadian government under the *Investment Canada Act*. If it is reviewable, the investment must be of “net benefit to Canada” and not “injurious to national security” to secure approval. Although Canada’s foreign investment rules do not affect many transactions, the closing of a transaction which is affected may be delayed while the foreign buyer negotiates undertakings with the Canadian government as a condition of securing approval.

Under the *Investment Canada Act* (ICA), the Canadian government reviews a foreign acquisition of a business in Canada where its value exceeds specified thresholds. The ICA applies whether or not the business being acquired is Canadian-controlled.

## Review and Approval

Under the ICA, the requirement for government review and approval is generally limited to direct acquisitions of control of large Canadian businesses by non-Canadians. In general, a “non-Canadian” means an individual who is neither a Canadian citizen nor a permanent resident of Canada, or an entity that is controlled by one or more non-Canadians.

A review may be required in the case of a smaller acquisition or the establishment of a new business by a non-Canadian in prescribed “cultural” industries. Special policies in some cases prohibit or limit foreign investment in certain cultural businesses. On a case-by-case basis, the federal Cabinet may order a review in the public interest of an acquisition of a cultural business where even the requisite value threshold is not met.

A national security review may be ordered for any investment by a non-Canadian that is potentially injurious to national security. The broad range of investments by non-Canadians potentially subject to

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a national security review include the acquisition of control or establishment of a Canadian business, as well as the acquisition, “in whole or in part,” or the establishment of an entity carrying on any part of its business in Canada, even if it has a minimal presence in Canada.

### Authority

The Minister of Industry has authority for the review and approval of investments in all industries, except cultural. The Minister of Canadian Heritage has authority for the review and approval of investments in cultural industries. For all reviews other than national security reviews, the initial review period is up to 45 calendar days. This period may be extended by the responsible Minister for an additional 30 days (and beyond the 30-day period for an additional period with the consent of the investor). The review period for national security reviews is up to 130 days.

### Net Benefit to Canada

For an acquisition to secure approval under the ICA it must be of “net benefit to Canada.” To demonstrate net benefit, it is usually necessary for the non-Canadian investor to give an undertaking to the Canadian government that, for a period of at least three years, it will commit to maintain certain levels of employment, Canadian management and a Canadian head office, make capital expenditures, increase production, etc.

The negotiation process to demonstrate net benefit by way of undertakings may be difficult and protracted. This may be the case, for example, where (1) the business being acquired is a Canadian multinational or Canadian public company and there are numerous Canadian employees; (2) the acquired business has significant operations in Québec; (3) a significant employment reduction is proposed; or (4) there are no obvious synergies between the acquiror and the acquired business (as in the case of a private equity firm acquiror).

### Review Process

The ICA review thresholds (referred to below) apply where either the acquiror or the vendor of the Canadian business being acquired is (or is controlled by) a World Trade Organization (WTO) investor (as defined in the ICA). For example, investors controlled by the governments or nationals of China, India, Korea, Kuwait, Saudi Arabia and the United Arab Emirates are all WTO investors for purposes of the ICA; investors controlled by the governments or nationals of Russia and a number of former Soviet republics are not.

A *direct* acquisition of control of a Canadian business by a WTO investor (or a Canadian business owned by a WTO investor) generally is only reviewable in 2011 where the Canadian business has

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assets with a book value of more than \$312 million. As a result of recent amendments which are not yet in force, this threshold will increase to \$600 million, and eventually to \$1 billion, based on “enterprise value.” The calculation of enterprise value has yet to be prescribed.

An *indirect* acquisition of control by a WTO investor, involving an acquisition of a non-Canadian corporation which has a Canadian subsidiary generally is not reviewable. Similarly, an indirect acquisition of control by a non-WTO investor of a non-Canadian corporation with a Canadian subsidiary where the non-Canadian corporation is controlled by a WTO investor immediately prior to the implementation of the investment is not reviewable.

For transactions involving neither a WTO buyer nor a WTO-controlled seller/target, the relevant threshold is \$5 million book value of worldwide assets for the Canadian business in a direct acquisition, and \$50 million of such assets in an indirect acquisition (where the Canadian business represents less than half of the worldwide assets acquired). Such an indirect acquisition is reviewable on a post-closing basis. These thresholds also apply to an acquisition of a cultural business, even if the buyer or seller is a WTO investor.

### Investments Requiring Notification

A non-Canadian must notify Industry Canada in the prescribed form and not later than 30 days following an acquisition of control of a Canadian business with an asset value falling below the monetary thresholds for review, and of the establishment of a new business that is unrelated to any business then being carried on in Canada by such non-Canadian.

It is generally not necessary to notify Industry Canada of a new business investment that represents an expansion of a non-Canadian’s existing business in Canada, or of an investment related to an existing business.

### Special Rules for National Security Transactions

The test that must be satisfied in a national security review is that the investment not be “injurious to national security.” The ICA does not contain a definition of what is considered injurious to national security, nor does it provide a list of factors to be considered as part of a review.

The ICA does not prescribe a pre-closing filing process for national security reviews. The ICA does, however, provide a three-step review procedure:

1. **Notice.** If the Minister believes, on reasonable grounds, that an investment by a non-Canadian could be injurious to national security, a notice will be provided to the non-Canadian. Upon receipt of

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a notice, the proposed investment cannot be completed until the issue is resolved.

2. **Review by the Minister and referral to the Cabinet.** The Minister may order a formal review if it is deemed necessary, during which the non-Canadian can argue its case. The Minister can then refer the matter to the Cabinet if national security concerns are unresolved after the Minister's review, or inform the non-Canadian that no further action will be taken (following which the transaction may be completed, subject to any requirements imposed under the "net benefit to Canada" test).
3. **Cabinet decision.** If an investment is referred to it, on national security grounds, the Cabinet may prohibit the investment or authorize the investment subject to certain undertakings and/or conditions. Where the investment has already been implemented, the Cabinet may order divestiture to alleviate any national security concerns.

### Investments by State-Owned Enterprises (SOEs)

Investors that are owned or controlled, either directly or indirectly, by a foreign government are subject to additional scrutiny in determining whether their investments meet the "net benefit to Canada" test. The following additional criteria will be considered:

1. **Governance and Transparency:** Whether the enterprise adheres to Canadian standards of corporate governance; and
2. **Commercial Operation:** Whether a Canadian business to be acquired by an SOE will continue to have the ability to operate on a commercial basis.

SOE investments also may undergo scrutiny under the national security review process referred to above.

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*Osler's Competition/Antitrust Group provides strategic competition law counseling and litigation advice to many leading domestic and international enterprises. Peter Franklyn and Peter Glossop are partners in our Group.*

# Competition Law in Canada

by PETER FRANKLYN & PETER GLOSSOP

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Collusion with competitors can trigger significant criminal and civil consequences in Canada. Acquisitions of significant Canadian businesses may require approval from the Canadian Competition Bureau before completion.

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Competition Law in  
Canada

The *Competition Act* is a federal law which deals with two types of practices:

1. **Activities subject to prosecution under the criminal law of Canada.** Criminal offences include collusion with competitors (as well as the implementation in Canada of collusive arrangements entered into outside of Canada), bid-rigging and certain misleading advertising and telemarketing practices.
2. **Activities subject to civil review by the Competition Tribunal.** These practices include mergers, certain anti-competitive agreements, abuse of dominant position, price maintenance, tied selling, refusal to deal, exclusive dealing, market restriction and certain misleading advertising practices.

The *Competition Act* (Act) was substantially amended in March 2009. Key amendments include:

- collusion between competitors (a conspiracy that fixes prices, allocates markets or restricts supply) is now illegal *per se* without any need to prove an undue lessening of competition as required under the prior law;
- administrative monetary penalties (AMPs) for the abuse of a dominant position;
- decriminalization of price maintenance and repeal of the criminal pricing provisions (price discrimination and predatory pricing); and
- adoption of a two-stage U.S. style merger review process.

## Criminal Enforcement

The Commissioner of Competition and the Competition Bureau staff are primarily responsible for the enforcement of the Act. The Director of Public Prosecutions (DPP) prosecutes violations of the criminal provisions of the Act referred by the Commissioner. Similar to other jurisdictions, the Commissioner and the DPP have leniency guidelines

as well as an Immunity Program. A co-operating party who provides information to the authorities and meets the requirements for leniency or immunity may be eligible for a reduced or zero penalty.

### Civil Actions

The Act permits civil actions for the recovery of damages resulting from the failure to abide by an order made by the Competition Tribunal (in the case of a reviewable practice), or resulting from conduct contrary to a criminal offence provision of the Act. Private parties may also obtain leave from the Competition Tribunal to challenge certain types of reviewable conduct (price maintenance, tied selling, exclusive dealing, market restriction and refusals to deal); however, relief is injunctive only and the Competition Tribunal has no power to award damages.

### Pre-Merger Approval

The need to obtain pre-closing approval applies to transactions where both of the following two monetary thresholds are met:

1. The parties to the transaction, together with all of their affiliates, (a) have assets in Canada the aggregate book value of which exceed \$400 million; or (b) have aggregate gross revenues from sales in, from or into Canada that exceed \$400 million; and
2. (a) for an acquisition of assets in Canada of an operating business, the aggregate book value of those assets, or the gross revenues from sales in or from Canada generated from those assets, exceeds \$73 million; or  
(b) for an acquisition of voting shares of a corporation that carries on an operating business or controls a corporation that carries on an operating business, the aggregate book value of the assets in Canada of the corporation and all corporations controlled by it (other than assets that are shares of any of those corporations), or the gross revenues from sales in or from Canada generated from those assets, exceeds \$73 million.

If the transaction is an acquisition of shares, pre-merger notification is required if the transaction exceeds the monetary thresholds above and, as a result of the acquisition, the buyer would own more than 20% of the outstanding voting rights in respect of a publicly traded target or, if it already owns more than 20%, as a result of the acquisition it would own more than 50% of the voting rights. If the target is a private corporation, the relevant initial threshold is more than 35% of the voting shares.

There are special rules for transactions involving joint ventures or partnerships.

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## Merger Review Process

Where the above thresholds are met, the parties must submit a pre-merger notification filing to the Commissioner, which triggers a 30-day waiting/no-close period. If, prior to expiry of the waiting period, the Commissioner issues a supplementary information request (SIR), the waiting period is extended for an additional period ending 30 days following full compliance with the SIR. The Commissioner issues SIRs only in cases that raise potentially serious competition concerns. In other cases, expiry of the initial waiting period constitutes competition law clearance, although the Commissioner retains a residual power to challenge a completed merger for up to one year following closing.

In addition to observing the waiting period, transaction parties also often wait for a “no action letter” to be issued by the Commissioner before closing their transaction. In most cases, a no action letter is issued within approximately 45 days after the Bureau receives the pre-merger notification filing and other information sufficient to commence its review.

## Advance Ruling Certificate

Where there is no or very minimal competitive overlap, the buyer can request that the Commissioner issue an advance ruling certificate (ARC) which usually can be obtained within 14 days. The ARC exempts the acquisition from the formal pre-merger notification and clearance provisions of the Act mentioned above, and removes the Commissioner’s power to challenge a transaction following closing.

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# International Trade and Investment Law

by RONALD CHENG & RIYAZ DATTU

Companies contemplating the acquisition, establishment or expansion of a business in Canada whose operations include imports and exports may be afforded certain preferences under international trade agreements. Nonetheless, a company needs to be mindful of duties, safeguards, import and export controls, and marking and labelling requirements under federal laws in Canada. Companies that anticipate selling their Canadian businesses should monitor compliance with such laws to avoid accruing liabilities under these legal requirements.

Canada's regulation of international trade is governed by a broad array of federal legislation that is applied and enforced by an administrative structure based in Ottawa, the nation's capital. Businesses contemplating the acquisition, establishment or expansion of a business in Canada whose operations include imports and exports, or whose competitors deal in cross-border trade, should include Canada's trade legislation in their due diligence reviews.

## International Trade Agreements

Canada is party to many international trade agreements, including the World Trade Organization agreements, the *North American Free Trade Agreement* (NAFTA), the *Canada-Chile Free Trade Agreement*, the *Canada-Costa Rica Free Trade Agreement*, and the *Canada-Israel Free Trade Agreement*, as well as foreign investment protection and promotion agreements. Agreements with the European Union and India are under negotiation. Businesses should review the preferences afforded by these agreements, such as reduced duty rates and market access, and non-discrimination and investment protection rights.

## Customs Duties

All goods entering Canada must be reported to the Canada Border Services Agency (CBSA), which verifies compliance with Canadian law, collects statistical information and levies applicable duties as

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well as goods and services, excise and, in some cases, provincial taxes. The customs duty rate is determined by tariff classification under the *Customs Tariff Act*, country of origin according to the appropriate rule of origin, and value for duty under the *Customs Act*. Goods that meet the rules of origin under NAFTA and that can be so certified are entitled to enter Canada duty-free.

### Anti-dumping and Countervailing Duties

Anti-dumping and countervailing duties assist Canadian producers experiencing unfair competition from imports. Under the *Special Import Measures Act* (SIMA), the CBSA has jurisdiction to determine whether there is dumping or subsidization, and the Canadian International Trade Tribunal has jurisdiction to determine whether there is injury to the domestic industry. Recently, China and India have been frequent targets of anti-dumping and/or countervailing duty actions in Canada.

During the five-year term of an injury finding (which may be renewed), the CBSA will review (usually annually) normal values assigned to exporters. Injury findings not reviewed within five years automatically expire.

### Safeguards

Import safeguards address large surges of imports. A safeguard is a trade remedy under the *Canadian International Trade Tribunal Act* that can be initiated by a federal Cabinet referral or a complaint from a domestic producer that a product is imported in such increased quantities and at such lower prices as to cause or threaten serious injury to the domestic industry.

A market disruption safeguard may be imposed where a rapid increase in imports from China causes a “market disruption” (i.e., a significant cause of material injury) to Canadian production. Also, a trade diversion safeguard may be imposed where the trade measures of other WTO Members against Chinese goods cause a significant diversion of those goods to Canada.

### Import and Export Controls

Canada limits or prescribes conditions on the export and import of certain goods which are enforced by CBSA and the Department of Foreign Affairs and International Trade (DFAIT) in conjunction with federal government agencies with regulatory authority over particular products.

Restrictions on imports reflect Canadian security, agricultural and industrial policies, and are authorized by the *Export and Import Permits Act* and the *Import Control List*. They are administered by DFAIT, which allocates import quotas and issues import permits.

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Canada controls the export of certain goods to all countries and of all goods to certain countries. Exporting such goods requires an individual permit or a General Export Permit for continuing exports. Permits are required if the goods are destined for countries on Canada's *Area Control List* or on Canada's *Export Control List*, which includes all goods of U.S. origin. Exports to countries with which the U.S. has political or economic concerns, such as China, may receive closer scrutiny by Canadian authorities.

Moreover, economic sanctions which have been imposed under the *Special Economic Measures Act* or the *UN Act* restrict a broad range of dealings with certain countries. Recent examples include restrictions and prohibitions of financial transactions with named institutions and individuals from Libya and Iran.

In addition to obtaining permits, the *Defence Production Act* requires any person or company dealing in "controlled goods" (including permitting foreign nationals access to such goods) to be registered under the Controlled Goods Program. "Controlled goods" include military, nuclear weapon-related and missile technology-related goods. Non-registration can result in civil or criminal penalties, including fines or imprisonment.

### Marking and Labelling of Imported Goods

The *Marking of Imported Goods Regulations* requires prescribed goods to be indelibly marked with their country of origin. Since Canada has two official languages, English and French, all imports must meet bilingual labelling requirements. Foreign exporters planning sales into Canada need to review these requirements and determine where exceptions may apply. (For more information, see Chapter 17, "Doing Business in Québec," starting on [page 86](#).)

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*Osler's International Trade and Investment practitioners offer astute guidance on critical compliance issues and strategic advice on how best to exploit bilateral trade, investment, regional and multilateral agreements. Ronald Cheng and Riyaz Dattu are partners in our Corporate Group.*

# An Introduction to Canada's Tax System

by SEAN AYLWARD & JACK SILVERSON

Several federal and provincial tax considerations are relevant to non-residents seeking to do business in Canada. One of the most important considerations is whether to establish a branch operation or to incorporate a Canadian subsidiary.

Canada's tax regime for businesses (and individuals) is largely governed by the federal *Income Tax Act* (ITA) and its regulations, as well as by the sales tax, corporate tax and other laws of the provinces and territories. When establishing a business in Canada, a non-resident will have to decide whether to conduct its business in Canada through a branch operation or a Canadian subsidiary. More general considerations include capital taxes, the taxation of individuals, tax matters for partnerships and joint ventures and sales and commodity taxes.

In addition to filing annual income tax returns, corporations are subject to various reporting requirements under the ITA. Severe penalties can be levied for failing to file an information return, or for providing incorrect or incomplete information on a return.

## General Tax Considerations

### Ordinary Income Tax

The ITA levies income tax for each taxation year on the taxable worldwide income of every "person" (which includes a corporation) resident in Canada in that taxation year. Likewise, a non-resident who, in a particular taxation year, was employed in Canada or carried on a business in Canada is liable to pay income tax on the non-resident's taxable income earned in Canada. Also, the disposition of "taxable Canadian property" (defined in the ITA) may result in a non-resident being subject to tax in Canada. Provincial taxes are also payable by a non-resident on taxable income earned in a province where the non-resident carries on business through a permanent establishment located in that province.

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**Residence**

At common law, a corporation will generally be resident in Canada if its “central management and control” is located in Canada (e.g., if the corporation’s board of directors meets in Canada). In addition, generally a corporation that is incorporated in Canada after April 26, 1965 is deemed by the ITA to be resident in Canada for the purposes of the ITA.

An individual will generally be resident in Canada if the centre of his or her vital interests (i.e., family, home, personal property, etc.) is in Canada. Further, an individual who is present in Canada for one or more periods that, in total, amount to 183 days or more in a taxation year will be deemed to have been resident in Canada throughout that year.

**Canadian Withholding Tax**

Income earned by a non-resident that is not subject to ordinary income tax may still be subject to a withholding tax at a rate of 25% (unless reduced or eliminated by an applicable tax treaty) on certain Canadian source income. This includes management fees, interest, dividends, rent royalties and some distributions from trusts. A recent amendment to the ITA eliminates withholding tax on most interest payments paid to persons dealing at arm’s length with the payer.

**Tax Treaties**

Canada has entered into over 85 income tax treaties with other jurisdictions. These tax treaties generally provide that the business profits of a non-resident of Canada that is a resident of the other jurisdiction are not subject to tax under the ITA, except to the extent that such profits are attributable to a permanent establishment (i.e., a fixed place of business) of the non-resident in Canada. These tax treaties also usually reduce both the withholding tax rate imposed under the ITA and the branch-profits tax rate.

Amendments to the Canada-U.S. Tax Convention (Convention) eliminate withholding tax on almost all interest, including interest paid between related persons. In addition, these amendments address “treaty shopping” by ensuring that treaty benefits are only available to residents of Canada or the U.S. that satisfy certain tests. The provinces generally adhere to (although they are not bound by) the provisions of the treaties.

### **Transfer Pricing in Non-Arm’s Length Transactions**

The ITA deems related persons to not deal with each other at arm’s length; whether unrelated persons deal with each other at arm’s length is a question of fact. Under the transfer pricing rules, a Canadian taxpayer and a non-arm’s length non-resident must conduct their transactions in a manner similar to that which would have applied had the parties been dealing at arm’s length. If the terms and conditions of the non-arm’s length transaction differ from those that would have prevailed between arm’s length persons, the rules provide that the terms and conditions may be adjusted to reflect those that would have existed had the parties been dealing at arm’s length.

### **General Anti-Avoidance Rule**

The ITA’s general anti-avoidance rule allows the re-characterization of transactions and amounts in certain circumstances where taxpayers have entered into tax-motivated transactions that result in a misuse or abuse of the provisions of the ITA.

## **Income Tax – Corporations**

### **How Profit Is Determined**

The ITA provides that a taxpayer’s income from a business for a year is the taxpayer’s business profits for the taxation year, which are generally computed on an accrual basis in accordance with ordinary commercial principles. Deductions from income are generally only permitted for expenses or outlays that are made or incurred for the purpose of earning income from the business, are not on account of capital (except as expressly permitted), and are in an amount that is reasonable in the circumstances.

Subject to the thin-capitalization rules (as discussed below), interest expense is generally deductible from a taxpayer’s income if it is reasonable in amount, incurred pursuant to a legal obligation to pay interest on borrowed money or on an amount payable for property, and used for the purpose of earning income from a business or property. In lieu of book depreciation, the ITA sets out a capital cost allowance (CCA) system that provides taxpayers with discretionary deductions for depreciable property. Depreciable assets are segregated into “classes” and a maximum annual allowance applies for each class.

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## Capital Gains and Losses

Generally speaking, one half of capital gains (i.e., taxable capital gains) in excess of one half of capital losses (i.e., allowable capital losses) are included in income and are subject to ordinary income tax at regular rates under the ITA.

## Determining Taxable Income

Taxable income is generally calculated on the basis of income for the taxation year. That income is then modified by the specific provisions of the ITA by subtracting certain permitted deductions, including losses carried forward or back from other taxation years. Generally losses can be carried back for three taxation years or forward for 20 taxation years to reduce taxable income in those years. Net allowable capital losses for a taxation year may generally be carried back three taxation years and forward indefinitely, but may not be claimed against any income other than taxable capital gains.

## No Consolidation

Related corporations may not file consolidated returns and the losses incurred by one corporation may not be used to offset, on a current basis, the income of another corporation. However, certain permissible corporate reorganizations may achieve loss consolidation between related corporations.

## Use of a Corporate Branch

### Branch Profits Tax

In addition to federal and provincial income taxes, a non-resident corporation (NRC) carrying on business in Canada will be subject to the so-called “branch profits tax” which is intended to approximate the withholding tax that would have been paid on taxable dividends from a Canadian resident subsidiary if the NRC had incorporated a Canadian subsidiary to carry on business in Canada, rather than using a branch. Under the ITA, the branch profits tax is generally levied at a rate of 25%, which may be reduced under certain tax treaties, on the profits of the branch, after Canadian taxes and an allowance for investment in Canada.

### Branch Accounting

The ITA requires a non-resident taxpayer that carries on business in Canada to calculate income or loss from its Canadian business. Expenses incurred exclusively and directly for the Canadian branch should be deductible in computing the income of the branch.

### Financing the Branch

As the “thin-capitalization” rules (as discussed below) do not apply to NRCs carrying on business in Canada, these rules do not limit the deduction of interest payable by an NRC on money borrowed for the purpose of financing the branch in Canada.

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### **Withholding Tax**

Canadian non-resident withholding tax generally only applies to payments made by residents of Canada to non-residents of Canada. However, a non-resident of Canada who carries on a business through a branch in Canada may be deemed, for purposes of the withholding tax rules, to be resident in Canada; so, certain payments made by the non-resident to another non-resident may be subject to Canadian withholding tax, unless such tax is reduced by an applicable tax treaty.

### **Converting a Branch to a Subsidiary**

Under the ITA, a branch generally may be incorporated without incurring immediate significant income tax or branch tax liability.

### **Use of a Canadian Subsidiary**

#### **Repatriation of Funds**

Since a Canadian subsidiary is a Canadian corporation, it is not subject to branch profits tax; however, upon the repatriation of funds by the Canadian subsidiary to the NRC by way of dividend, a 25% withholding tax is payable, subject to reduction by an applicable tax treaty.

#### **Thin-capitalization Rules**

The thin-capitalization rules can disallow a deduction for interest payable by a Canadian subsidiary on debts owing to “specified non-resident persons” when such debts exceed the subsidiary’s equity by a ratio of 2:1.

#### **Withholding Tax**

Subject to treaty relief, a Canadian subsidiary must withhold tax on several types of payments to non-residents, including dividends, interest paid to non-arm’s length parties, participating interest, certain management or administration fees and rentals, royalties and similar payments.

### **Capital Tax – Corporations**

#### **Provincial Capital Taxes**

Most provinces, including Ontario and Québec, have announced that they will reduce and ultimately eliminate their capital taxes. Federal capital tax, known as “Large Corporations Tax,” was eliminated as of January 1, 2006.

#### **Corporate Minimum Tax**

Ontario levies a Corporate Minimum Tax (CMT) on all corporations subject to Ontario tax (other than those that are eligible for the CMT small business exemption) on adjusted book income allocated to Ontario. A corporation generally is required to pay CMT only to the extent that it exceeds corporate income tax payable.

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## Income Tax – Individuals

The federal tax brackets for individual taxpayers for ordinary income tax are adjusted each year against the Consumer Price Index. Provincial income tax for individuals is calculated as a percentage of federal tax in all provinces (except Québec, which levies its own income tax).

## Income Tax – Partnerships and Joint Ventures

A partnership is generally considered to be the relationship that exists between two or more persons carrying on business in common with a view to profit; therefore, a partnership is not considered to be a separate legal entity. Although the income of a partnership (including a claim for CCA) is generally calculated as if the partnership were a separate taxpayer, it is allocated among the partners according to the terms of the partnership agreement and is taxed in the hands of the partners. Special rules apply in determining the adjusted cost base of a partnership interest. A non-resident partner in a partnership that carries on business in Canada will generally be considered to carry on business in Canada for the purposes of the ITA. If the partnership has a permanent establishment in Canada for purposes of a tax treaty, each partner is deemed to carry on business through the permanent establishment.

The ITA limits certain deductions that may be claimed against a limited partner's "at-risk" amount for the partnership. In certain cases, a partner that is a general partner for non-tax purposes may be deemed to be a limited partner for tax purposes.

In a joint venture, the profit of each joint venturer is determined and taxed separately in the hands of each joint venturer (i.e., each joint venturer makes a separate CCA claim).

## Sales, Excise and Other Commodity Taxes

The federal government imposes a sales tax, in some cases at a combined federal-provincial rate, in all provinces. Some provinces also impose a separate provincial sales tax.

## Federal Goods and Services Tax (GST) and Harmonized Sales Tax (HST)

Subject to certain exemptions, the federal Goods and Services Tax (GST) is imposed at each stage of distribution. A vendor (registrant) must maintain books and records sufficient to determine its GST liabilities and collect GST from the purchaser at the rate of 5% of the amount payable for taxable supplies made in Canada. An importer is required to account directly for tax at the rate of 5% on taxable imported goods or services. A business may deduct the GST payable on its purchases as an "input tax credit" against the GST collectible on its sales and may claim a refund of input tax credits in excess of tax collectible on sales during the relevant reporting period.

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The federal sales tax is referred to as the “Harmonized Sales Tax” (HST) in those provinces that have repealed their former separate provincial retail sales taxes in favour of receiving a share of the federal sales tax. The HST is essentially the GST levied at a higher rate that includes a federal (5%) component and a provincial component that varies by each HST-participating province. The HST generally has the same basic rules of operation as the GST described above. The current HST-participating provinces are British Columbia, Ontario, New Brunswick, Nova Scotia and Newfoundland and Labrador.

### **GST/HST – Non-residents**

Non-residents must register under the GST legislation and charge and collect GST if they are carrying on a business that involves making taxable supplies. A foreign firm with a permanent establishment in Canada is deemed to be a resident of Canada, for GST purposes, with respect to activities carried on through that establishment in Canada. A business with a Canadian branch may be required to register for GST and collect tax on supplies made through the permanent establishment. Non-resident registrants without a permanent establishment in Canada are required to post security with the Canada Revenue Agency for collection and remittance obligations.

### **GST/HST – Partnerships and Joint Ventures**

For GST/HST purposes, a partnership is considered to be a separate legal entity. Accordingly, a commercial activity carried on in a partnership is deemed to be an activity of the partnership, and not of the partners. As such, partnerships must be registered for GST/HST purposes if the business of the partnership involves making taxable supplies. The GST/HST collectible, and any input tax credits, must be reported/claimed in GST/HST returns filed at the partnership level.

Joint ventures that do not constitute partnerships are not treated as separate persons. Therefore, each joint venturer generally is responsible for GST/HST registration, reporting and remittance obligations in respect of its own share of the joint venture sales. Some special rules apply, however, in the cases of oil and gas, real estate and other specified types of joint ventures.

### **Excise Taxes**

Federal excise taxes, which may be a fixed monetary amount or based on a percentage of value, are levied on certain specified goods such as tobacco and gasoline. The excise tax rate varies with the class of goods taxed and is in addition to any other taxes or duties payable.

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## Provincial Sales Taxes

Single-stage provincial retail sales taxes are imposed by Saskatchewan, Manitoba and Prince Edward Island at rates that vary with each of those provinces. These retail sales taxes are generally applicable to all goods and, to a limited extent, services purchased by consumers and other end users. Québec imposes a multi-staged sales tax, the Québec Sales Tax (QST), which is substantially consistent with the GST/HST. The Québec Revenue Ministry administers both the GST and the QST for businesses operating in Québec.

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# Employment and Labour Law in Canada

by JIM HASSELL & SVEN POYSA

The constant change associated with employment and labour law in Canada poses a significant challenge for employers doing business here. That challenge is compounded by the fact that employers with operations across Canada may be subject to differing employment laws in each province.

Both the federal and provincial levels of government have jurisdiction over employment and labour matters for certain types of employers. The level of government that has jurisdiction is determined by the industry in which an employer operates. For example, industries that are inter-provincial by nature – such as airlines, telecommunications and railways – are regulated by the federal government. Most other industries – which account for the majority of employers in Canada – fall under provincial jurisdiction.

## Employment Standards

The employment standards legislation in each jurisdiction sets out mandatory minimum conditions of employment governing areas such as hours of work, overtime pay, minimum wages, holidays, vacations, employee benefit plans, pregnancy, parental leave and other leaves of absence, notice of termination of employment, and severance and termination pay. Certain categories of employees may be exempt from certain standards. As a result of these varying legislative requirements, U.S. employee policies on the above issues need to be adapted for use in Canada.

## Human Rights/Non-Discrimination (Equal Treatment)

All jurisdictions in Canada have administrative agencies that handle human rights complaints and legislation designed to address discriminatory practices in the workplace on the basis of, for example, race, creed, colour, ethnic origin, age, sex, sexual orientation, marital status, citizenship, ancestry, place of origin, family status, record of offences and disability. Ontario employees may either add such a complaint to a wrongful dismissal lawsuit or file a complaint with

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a human rights tribunal. The tribunal may award monetary compensation; order reinstatement of a terminated employee; and require an employer to take steps to prevent discrimination and harassment.

#### ***a) Age Discrimination & Mandatory Retirement***

Most provinces in Canada have expanded the definition of “age” to protect those 65 years of age or over from discrimination, thereby eliminating mandatory retirement. That said, exceptions continue to exist allowing differentiation among employees on the basis of age for pension and group insurance plans. In addition, potentially discriminatory differences based on age (or other enumerated grounds of discrimination) may be permitted if the employer can establish that such differences constitute a “*bona fide* occupational requirement.”

#### ***b) Employees With Disabilities: the Duty to Accommodate***

Courts, tribunals and human rights commissions have become increasingly activist in promoting the protection of disabled employees under human rights legislation. Employers have a duty to accommodate disabled employees to the point of “undue hardship” – a high standard under Canadian human rights law. Employers usually are expected to go to considerable lengths to provide time off, modified duties and other assistance to accommodate disabled employees.

#### ***c) Drug and Alcohol Testing***

Employees who are addicted to drugs and alcohol are considered to be disabled and thus drug and alcohol testing can raise human rights concerns. Appellate courts in different provinces have issued seemingly contradictory decisions about an employer’s ability to conduct pre-employment drug testing. Random drug and alcohol testing has largely been found to violate human rights legislation, but may be permitted in certain circumstances, such as where the employer can demonstrate that testing is required for safety reasons.

### **Workers’ Compensation**

Canada’s provinces and territories have no-fault insurance systems to compensate employees for workplace injuries and most (but not all) employers must participate in these systems. Generally, an employee may not sue an employer for personal injury or an accident arising out of and in the course of employment, but rather can claim compensation from the no-fault insurance accident fund. The workers’ compensation board in each province is responsible for the applicable legislation and has broad powers of enforcement.

There is no federal workers’ compensation legislation and thus federally-regulated employers in Ontario and elsewhere often have the choice of “opting-in” to the provincial regime.

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## Employment Equity (Affirmative Action)

Some provinces, like Ontario, have abandoned employment equity legislation. However, mandatory federal employment equity laws apply to provincially-regulated employers who bid on federal government contracts. Under the Canadian *Employment Equity Act*, a federally-regulated employer must prepare and submit annual reports about its workplace, such as occupational groups, salary ranges, hiring and terminations. Failure to submit complete and accurate reports is a violation of the Act. These same requirements are applied by the federal government to any employer who has a contract with the federal government valued at \$200,000 or more.

## Pay Equity (Equal Pay)

In Canada, “pay equity” refers to wage parity between male and female job classes who perform work of equal value to redress systemic discrimination.

Ontario’s *Pay Equity Act* is one of the most far-reaching pieces of legislation of its kind in any Canadian jurisdiction. For employers in the province who have not maintained their pay equity arrangements which have been required since the mid-1990s, an employee complaint may result in a significant potential liability in retroactive wage adjustments to current and former employees. The Act provides for a proactive enforcement mechanism under which employers can be found liable for non-compliance even if no employee lodges a complaint. The Pay Equity Office ensures legislative compliance through periodic audits and by investigating complaints. Legislation in most other provinces provides for a complaint-driven process under which an employer may be held accountable only if an employee or union files a complaint.

## Executive Compensation

Designing, implementing and administering compensation and benefits arrangements for foreign businesses operating in Canada must take into account Canadian tax and employment laws, securities disclosure and compliance requirements, and heightened scrutiny by shareholders and other stakeholders, regulators and the courts.

## Director and Officer Liability

If a company fails to pay its employees due to insolvency or other reasons, business corporations statutes and/or employment legislation in certain Canadian jurisdictions impose personal liability on directors and officers of the company for unpaid wages and certain other amounts that may be owing to employees.

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## Occupational Health and Safety

Occupational health and safety legislation across Canada requires employers to provide workers with a safe workplace. Most provinces also impose a number of specific duties (i.e., preparation of a written occupational health and safety plan and establishment of a joint health and safety committee certified members of which may order a work stoppage where dangerous circumstances exist). In most jurisdictions, a worker has the right to refuse unsafe work. Fines for violations of health and safety legislation can be significant and are rising. Recent changes to Canada's *Criminal Code* provide for the prospect of criminal charges for senior managers, officers and directors of corporations for health and safety violations. A criminal conviction may result in a jail sentence. In recent years, a number of jurisdictions in Canada have added requirements to protect workers from workplace violence and harassment.

## Health Tax

Some jurisdictions pay for health care out of general tax revenues. The "Ontario Health Insurance Plan" (OHIP) is available to all Ontario residents and is funded in part by a graduated payroll tax paid by employers. The Ontario "health premium" is paid by employees according to their income level.

## Termination of Employment

"At-will" employment does not exist in Canada and, as such, an employer cannot terminate an employee's employment without notice (or pay in lieu), unless the employer has "just cause," which is a very high standard. Employees who are terminated without cause are guaranteed certain minimum entitlements under applicable employment standards legislation as well as potential common-law and/or contractual termination entitlements.

### ***a) Minimum Notice of Termination***

Employment standards legislation in each jurisdiction sets out varying minimum notice of termination requirements – and, in some cases, statutory severance pay – or pay in lieu of notice for employees terminated without cause. Statutory notice typically ranges from one to eight weeks' written notice, based on an employee's length of service. Most jurisdictions require enhanced notice when an employer terminates or indefinitely lays off a certain number of employees within a specified period.

### ***b) Common Law or Civil Law Requirements***

Although employment standards legislation sets out minimum standards, non-union employees are also entitled to "reasonable" notice of termination under the common law (or under the *Civil Code of*

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Québec for employees in Québec). Such notice is often substantially longer than the statutory minimums and depends on such factors as the employee's position, length of service, re-employment prospects and age.

An employee who has been terminated with notice in accordance with the applicable employment standards legislation may still sue the employer for more pay in lieu of notice. Court awards of a year or more are not unusual for senior management employees, with awards of up to 24 months for long-service, senior employees.

In the absence of a contractual provision limiting termination entitlements, short-service employees have also been found to be entitled to common-law reasonable notice that may be equal to or even longer than their service with the company.

### **c) Contractual Termination Provisions**

Employers and employees may enter into a written contract that specifies entitlement on termination of employment. This contractual severance will replace the common-law default of reasonable notice, as long as the contract meets or exceeds the minimum statutory entitlements. Such provisions can limit employers' exposure while also providing certainty to both parties.

## **Union Certification and Labour Relations**

Approximately one third of the Canadian labour force is unionized. By law, employees are free to join a union of their own choice and to participate in its lawful activities.

The rules for certifying unions vary between jurisdictions. For example, Ontario currently requires the union to win a vote which is only held after at least 40% of the employees have signed union cards. Other jurisdictions provide for unionization without a vote when a certain percentage of employees (usually a majority) have signed union membership cards.

An employer faced with a union organizing campaign may not make threats or promises intended to influence the employees' decision; otherwise, the labour relations tribunal charged with adjudicating the dispute may, in certain jurisdiction, automatically certify the union.

Following certification, the parties must bargain in good faith in an attempt to reach a collective agreement. Strikes and lockouts are not permitted during the term of a collective agreement.

## **Sale of a Business – Successor Employers**

As a successor employer, the purchaser of a business can inherit a wide variety of employment-related liabilities and obligations from the vendor. These can include termination costs, employment

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standards violations, workers' compensation costs, pay equity adjustments, collective agreements and union bargaining rights. Accordingly, only careful due diligence can bring to light the liabilities being acquired along with a business. To reduce such liabilities, transactions can be structured in various ways and vendors may provide appropriate indemnities.

### Employee Privacy

A number of jurisdictions, including the federal government, British Columbia, Alberta and Québec, have introduced privacy legislation covering the employment relationship. Previously, few rules governed how employers gathered and managed personal information respecting employees. Employers operating in jurisdictions with privacy legislation are now expected to establish policies for the collection, storage and disclosure of employee information.

This new legislation also further limits the circumstances in which employers may conduct surveillance for the purpose of discovering employee wrongdoing or poor performance. Employers must also be aware that, under privacy legislation, they are accountable for any personal information transferred to suppliers; therefore, precautions should be taken to ensure the confidentiality and security of such information.

### Unique Québec Considerations

The province of Québec has language and employment law considerations which are unique to that province. Please see Chapter 17, "Doing Business in Québec," starting on [page 86](#).

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*Osler's Employment & Labour Department offers practical and results-oriented advice that recognizes the value and importance of human resources to an organization's success. Jim Hassell and Sven Poysa are members of our Department.*

# Executive Transfers, Business Visits and Immigration

by DAMIAN RIGOLO

Canada's participation in several free trade agreements, coupled with its national *Immigration and Refugee Protection Act*, determine whether a foreign business person may live and work in Canada on either a temporary or indefinite basis.

The Government of Canada's *Immigration and Refugee Protection Act* (IRPA) provides that only Canadian citizens or permanent residents of Canada may work in Canada without a valid work permit. As a general rule, a person who is neither a citizen nor a permanent resident (often referred to as a "landed immigrant") may be employed in Canada only if no qualified Canadian is available to fill the position in question. Business people wishing to relocate temporarily or permanently to Canada, however, do have a number of other options open to them (as outlined below).

## Temporary Business Visits

Canada maintains a list of countries whose nationals must obtain a visa prior to entering the country. Many foreign nationals may enter Canada without a work permit to work temporarily (generally for a period of 90 days or less) if they are permanent employees of corporations based outside Canada that carry on business in Canada, either directly or through a parent or subsidiary company.

Such employees may only be in Canada to meet and consult with other employees, sell goods to parties other than the general public, or purchase Canadian goods or services. They may not directly enter the Canadian labour market and their primary source of remuneration for the business activity must be outside Canada.

## Business Visits Under Trade Agreements

The *North American Free Trade Agreement* (NAFTA) and the *General Agreement on Trade in Services* (GATS) set out additional categories of business visitors who may temporarily enter Canada for a period not exceeding six months to market their goods or services here or to take the steps necessary to establish a commercial presence in Canada to sell those goods or services here.

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### ***North American Free Trade Agreement (NAFTA)***

Under NAFTA, business visitors from the U.S. and Mexico may enter Canada to sell goods or negotiate contracts for goods or services for a company of a signatory country provided they are not delivering goods or providing services. Direct sales to the general public are permissible provided the goods or services are not delivered or made available to the buyer at the time of the sale (i.e., on the same business trip).

A business visitor who practises a “Designated Professional Occupation” under NAFTA may participate in business meetings, negotiate the purchase or sale of goods or services, or market, distribute or provide after sales services. Similar rules apply to Chilean business people coming to Canada under the Canada-Chile Free Trade Agreement (CCFTA).

### ***General Agreement on Trade in Services (GATS)***

To be eligible under GATS, a business visitor may not receive remuneration from within Canada and may not engage in making direct sales or supplying services to the general public. He or she may only participate in business meetings, including negotiations for the sale of services or other similar activities, including setting up a business in Canada.

Short-term business visitors should carry an employment letter confirming their continuing employment with the foreign company and indicating the duration, purpose and temporary nature of their visit to Canada. They may request a visitor record if they will be coming to Canada regularly over an extended period of time and the reason for the visit remains the same. A visitor record is issued by an immigration officer at his or her discretion and allows entry to Canada on subsequent visits.

### ***Intra-company Transfers***

Securing status as an “intra-company transferee” (which is the rough equivalent of an L-1 Visa in the U.S.) offers the quickest and most convenient method by which a foreign business visitor may temporarily relocate to Canada. To qualify, a proposed intra-company transferee must carry a letter from a company carrying on business in Canada which identifies the holder as an employee of a branch, subsidiary or parent of the company located outside of Canada. The individual also must seek entry to Canada to work in an executive or managerial position for a temporary period. A written job offer from a senior officer of the Canadian company, addressed to Citizenship and Immigration Canada, is required to satisfy this criterion. The offer must describe the job in sufficient detail to demonstrate that it is at the senior executive or managerial level, the nature of the

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corporate affiliation between the offering company and the company from which the employee is being transferred, and the period of time for which the transfer is required.

Under NAFTA, CCFTA and GATS, companies within signatory countries may also arrange intra-company transfers for employees with specialized knowledge. The applicant must possess knowledge at an advanced level of expertise or have proprietary knowledge about the Canadian entity's product, service, research, equipment, techniques, management or processes and procedures.

Under NAFTA, intra-company transferee and specialist employees must demonstrate continuous employment with the foreign company over a period of not less than one year within the three-year period immediately preceding the application. Under GATS, they must be employed by the foreign company for a period of not less than one year immediately prior to the application. Note that length of employment is one indicator of specialized knowledge. For American and Mexican citizens, NAFTA is generally a more advantageous route to obtain entry to Canada as an intra-company transferee than is GATS.

### Spouses of Intra-company Transferees

Neither GATS nor NAFTA accommodates spouses of intra-company transferees who wish to work in Canada. However, Citizenship and Immigration Canada will grant work permits to eligible spouses of senior executives, managers and highly skilled individuals without the need of a specific Human Resources and Skills Development Canada (HRSDC) temporary foreign worker approval in the form of a labour market opinion. This policy applies to spouses of intra-company transferees whose occupation is eligible for the spousal work permit program under a list maintained by Citizenship and Immigration Canada.

### Professionals

Many classes of professionals may gain temporary admission to Canada under either GATS or NAFTA. GATS covers six occupations: engineers, agronomists, architects, forestry professionals, geomatics professionals and land surveyors. NAFTA covers more than 60 occupations, including accountants, computer systems analysts, economists, management consultants, and lawyers as well as biochemists, biologists, chemists and other types of scientists.

Under GATS, a professional may be admitted for a maximum of three months. An extension may be granted with an HRSDC labour market opinion. A professional admitted under NAFTA will be granted a work permit for one year, with one-year renewals possible thereafter, provided the individual continues to occupy a *temporary* professional position in Canada (usually less than seven years).

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## Employment Categories Requiring HRSDC Approval

HRSDC must approve applications from those who do not come from a country that is a signatory to NAFTA, GATS or CCFTA or who do not qualify for temporary admission to Canada as a business visitor or intra-company transferee or as an applicant in another foreign worker approval-exempt category. This process is similar to obtaining an employment certification in the U.S.

While HRSDC approval is challenging, may be expensive and usually takes 8 to 10 weeks, an application will be approved where there is proof that no qualified Canadians are available to assume the position, or where granting the approval will create or maintain significant employment benefits or opportunities for Canadian citizens or permanent residents of Canada (i.e., generally through training, the creation of new jobs, or the preservation of jobs that might otherwise disappear).

## Permanent Resident Status

Those wishing to reside and work indefinitely in Canada must obtain permanent resident (or “landed immigrant”) status. Many business people qualify to apply for this status as a skilled foreign worker. A permanent resident may work for any employer in Canada and his or her spouse and dependent children may also accept employment or attend school in Canada without authorization. However, while a temporary work permit can be obtained in a matter of weeks, an application for permanent residence can take 18 to 24 months (or longer) to process and complete. New immigration targets and restrictions are set each year. Those applying for permanent residence in Canada are assessed on standard point-scoring selection criteria including education, experience, knowledge of English or French, ties to Canada and whether the applicant has “validated” employment in Canada. Note that independent immigrants (i.e., investors and entrepreneurs) are assessed on different points and criteria.

## Business Categories

After abuses and cases of money-laundering were revealed in the late 1990s, Citizenship and Immigration Canada tightened its rules for “business class” permanent residents or landed immigrants. Today, there are business class programs for self-employed individuals, entrepreneur and investors.

## Self-employed Program

A “self-employed person” is someone who has the relevant experience and ability in cultural, athletics or farm management to be

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self-employed in Canada (i.e., he or she will, at a minimum, establish a business that creates employment for at least his- or herself). The capital investment in the business of a self-employed applicant need not be as high as that required for entrepreneurs (see below), nor does the business proposal need to be as detailed.

### Entrepreneur Program

An “entrepreneur” is someone who:

- has managed and controlled a percentage of equity of a qualifying business;
- has a certain required minimum amount to invest in that business;
- has the intention and ability to control a percentage of a qualifying business in Canada;
- will provide ongoing and active management of the business; and
- will create at least one full-time new job for a Canadian citizen or permanent resident.

The last three requirements must be fulfilled within three years of the entrepreneur’s acceptance as an immigrant under this program.

### Investor Program

An “investor” is an immigrant who has adequate business experience; a legally obtained net worth of at least \$800,000; and indicates in writing that he or she intends to make (or has made) an investment in Canada. The investor places a prescribed investment of \$400,000 with the Receiver General of Canada. That investment, which is used by participating provinces to build their economies and create jobs, is returned, without interest, approximately five years after the applicant has obtained landed immigrant status.

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*Osler’s Employment & Labour Department offers practical and results-oriented advice, recognizing the value and importance of human resources to an organization’s success. Damian Rigolo is a partner in our Department.*

# The Pensions and Retirement Savings Landscape in Canada

by ANTHONY DEVIR

Canada's pensions and benefits regime is varied and complex. The federal government and each of the provinces has its own minimum standards legislation in addition to the federally imposed requirements of the *Income Tax Act*. The lack of uniform legislation across the country has a significant impact on how pensions are managed in Canada.

Pensions and retirement savings arrangements in Canada can be divided into three broad categories: state-sponsored social-security benefit plans; employer-sponsored arrangements; and employees' own savings.

## State-sponsored Social Security Benefit Plans

The state-sponsored social security benefit plans consist of the Canada Pension Plan (or, if the employee resides in Québec, the almost identical Québec Pension Plan) (CPP/QPP), Old Age Security (OAS) and the Guaranteed Income Supplement (GIS). Both employees and employers are required to contribute to either the CPP or QPP (as applicable). Upon retirement, CPP/QPP provides benefits based on an employee's average earnings and years of participation, up to certain maximums.

As both OAS and GIS are tax-funded, no employee or employer contributions are required for either of these benefits. Although OAS is not means-tested up-front, it is subject to a "clawback" based on an income threshold. The GIS benefit is means-tested.

## Employer-sponsored Pensions or Retirement Savings Arrangements

Other than mandatory participation under the CPP/QPP, employers are not required to establish or participate in any type of pension or savings arrangement for the benefit of their employees. Where employers do establish pensions or savings arrangements for their employees, varying degrees of obligations and liabilities arise, depending on the type of arrangement.

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### **Registered Pension Plans**

Pension plans that qualify as “registered pension plans” are subject to minimum standards legislation and income tax legislation. In addition, the interpretation of registered pension plan documents and legislation is governed by the common law (except in the province of Québec as detailed below). Accordingly, the roles, obligations, liabilities and entitlements of plan sponsors, plan administrators, plan members and trustees of pension funds are shaped and affected by the applicable legislation, the plan documents and the common law.

In Québec, the *Civil Code of Québec* (CCQ) sets out the substantive law applicable in the province, subject to specific statute law. Accordingly, where Québec is the applicable jurisdiction, the administration of employer-sponsored registered pension plans will generally be governed by the minimum standards legislation applicable in that province. However, specific issues, such as fiduciary obligations, will also require the application of the CCQ.

### **Legislative Regime**

Unlike in the U.S., in Canada, there is no single code equivalent to the *Employee Retirement Income Security Act* (ERISA) which regulates pension plans. Instead, the pension plan must comply with the legislated minimum standards of the applicable jurisdiction with respect to each employee – usually the jurisdiction where the employee works.

### ***Minimum Standards Pension Legislation***

There are nine provincial regimes and one federal regime in Canada, each of which imposes minimum standards applicable to registered

pension plans. (Note that in 2010, Prince Edward Island introduced into Parliament minimum standards pension legislation but this is not yet law.) Where members are employed in more than one Canadian jurisdiction, multiple jurisdictions may apply with respect to a single registered pension plan. Although employers are permitted to offer pension plans that are *more* advantageous to employees, each registered pension plan must meet the minimum standards of the applicable jurisdiction(s) to obtain and maintain its registered status. Generally, the province of employment of a pension plan member will determine which minimum standards apply; however, federal minimum standards legislation will apply to members of a plan employed in a federally-regulated industry (i.e., banking, railways, broadcasting, etc.) regardless of the plan member's province of employment.

While such legislation is not identical and important differences do exist, such minimum standards legislation imposes similar requirements in respect of such things as eligibility for membership; locking in; the need for regulator consent for pension plan asset transfers; duties of plan sponsors and administrators; funding and solvency requirements; and pension plan investments.

### ***Income Tax Act***

To qualify for preferential tax treatment, a pension plan must be registered under the federal *Income Tax Act* (ITA). Essentially, the ITA limits the amount that may be contributed to a registered pension plan on a tax-sheltered basis as well as the benefits that may be paid from a registered pension plan on a tax-sheltered basis.

### **Common Law**

The underlying documents which create a pension plan (i.e., the pension plan rules and trust agreements) are also subject to the common law (the only exception being plans with Québec members who are not employed in federally regulated industries). Accordingly, the terms of the plan documents, as interpreted through the common law, may prevail to provide greater rights to members than those provided for under pension legislation or otherwise restrict the employer's abilities with respect to the plan. Various issues may arise in the context of registered pension plans which require interpretation of the applicable minimum standards legislation, the terms of the plan documents and the common law, including:

- plan sponsor's entitlement to surplus;
- plan sponsor's entitlement to use surplus to take contribution holidays;
- plan sponsor's power to amend the terms of the plan; and
- permissible plan expenses that may be charged to the plan.

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## Collective Bargaining Regime

In a unionized environment, the terms of a pension plan may be collectively negotiated, which may restrict an employer's ability to alter or amend the plan terms without union consent. This issue may need to be considered in a transaction where the existence of a collective agreement may affect the range of choices available to a vendor or purchaser concerning the treatment of benefit plans applicable to unionized employees.

A collective agreement may require an employer to make contributions for unionized employees to a pension plan that is not maintained or administered by the employer. Whether the employer has additional contribution obligations under such a plan, other than to make the contributions required under the collective agreement, may be an issue.

## Employer-sponsored Savings Plans

An employer may sponsor other types of retirement savings arrangements, such as group registered retirement savings plans (Group RRSPs) and deferred profit sharing plans (DPSPs). These plans are defined contribution in nature, and employee and/or employer contributions are typically invested at the direction of the employees and the benefits payable are typically equal to the balance of the member's account.

While Group RRSPs and DPSPs are not subject to minimum standards regulation, they are regulated by the ITA. Among other things, the ITA prescribes the maximum contribution limits applicable to such plans. However, guidelines published by regulators overseeing the financial services sectors may nonetheless set the standard to which such plans should be administered.

## Supplemental Plans

An employer may establish a supplemental plan for certain employees to "top-up" their pension plan benefits. Such plans provide benefits above the ITA limits applicable to registered pension plans and they are not subject to minimum standards legislation. However, where such a plan is funded or secured in some fashion, it may be subject to classification under the ITA as a Retirement Compensation Arrangement and will be subject to particular tax requirements.

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## Health and Welfare Benefits

In addition to sponsoring pension and retirement savings arrangements, employers may offer health and welfare benefit plans to their employees, on an insured, self-insured or partially insured basis. Typical health and welfare benefits include life insurance, accidental death and dismemberment insurance, long-term disability, short-term disability, health care and dental care. Because Canada currently has a system of universal health care, private health care benefits offered by employers are typically top-up benefits covering such expenses as semi-private or private hospital care, drugs and vision care.

While these employer plans generally are not (as such) subject to minimum standards legislation, particular issues may arise, for example, in the context of a sale of a business or communications with employees.

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*Osler's Pensions & Benefits Department offers a dedicated team of lawyers with experience in every aspect of this complex, multi-jurisdictional area of the law. Anthony Devir is a partner in our Department.*

# Privacy Law in Canada

by PATRICIA WILSON & MICHAEL FEKETE

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Protection of personal information remains at the forefront of public policy debate in Canada. Federal and provincial privacy legislation has a profound impact on the way virtually all organizations carry on business across the country. In addition, Canada has now enacted comprehensive anti-spam and anti-spyware legislation that will apply to commercial electronic messages and computer program distribution by legitimate businesses in Canada, not just those engaged in deploying spam and spyware.

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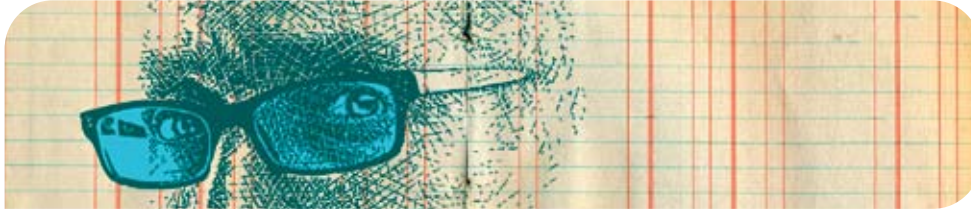
## **Tough New Spam and Spyware Law**

Canada has enacted what may be the most comprehensive spam law in the world. The legislation, which is known as Canada's Anti-spam Law (or CASL), goes much further than regulating bulk, unsolicited email communications. Rather, it creates an "express" or "opt-in" consent-based regime that applies to almost all electronic messages, including e-mail, text and instant messages and other electronic messages sent for a commercial purpose. As well, it sets out prescriptive rules governing, among other things, unsubscribe mechanisms, sender identity and contact information.

CASL also includes an express consent and related disclosure requirements for the installation of computer programs. Although the principal policy objective of the new rules is to deter the distribution of "spyware," they will apply to many computer programs and regardless of whether the program is installed for a malicious purpose.

Once the new anti-spam and spyware rules come into force (which is expected in late 2011), organizations that fail to comply will be exposed to stiff penalties, including administrative monetary penalties of up to \$10,000,000 for corporations (\$1,000,000 for individuals). As well, a private right of action would allow consumers and businesses to commence enforcement proceedings and recover damages, including statutory damages of up to \$1 million a day.





## Public Sector Privacy Laws

Public sector privacy laws apply in the federal and most provincial and municipal jurisdictions. Similar to the U.S. federal *Privacy Act*, the federal *Privacy Act* and provincial counterparts require government departments, agencies, most Crown corporations and municipal government bodies to define, and notify individuals of, the lawful, authorized purposes for their collection of an individual's personal information and to provide access to personal information they hold that is requested by individuals. Some provincial public sector privacy laws restrict public sector bodies and/or their service providers from permitting access to or disclosure of personal information from or to a place outside Canada. (See *International Personal Data Transfers* below.)

## Private Sector Privacy Laws

Canadian businesses are subject to federal or provincial privacy protection legislation governing both customer and (with some exceptions) employee information. The federal *Personal Information Protection and Electronic Documents Act* (PIPEDA)<sup>1</sup> applies to all private sector organizations in Canada, except in provinces that have enacted “substantially similar” legislation. PIPEDA also applies when personal information is disclosed across a provincial border in the course of commercial activity and in most situations where an organization in Canada receives or transmits personal information from or to a destination outside Canada.

Québec, B.C. and Alberta<sup>2</sup> each have their own private sector privacy law<sup>3</sup> which has been recognized as “substantially similar” to PIPEDA. Ontario's health information law has also been declared substantially similar to PIPEDA.

There is uneven privacy law coverage of employee personal information in Canada. PIPEDA only applies to information about employees if an organization is a federal work, undertaking or business.<sup>4</sup> However, privacy legislation in Québec, B.C. and Alberta does apply to employee information. Businesses operating in the other provinces,

<sup>1</sup> S.C. 2005, c. 5, as amended.

<sup>2</sup> Québec *Act Respecting the Protection of Personal Information in the Private Sector*, RSQ, c. P-39.1 (Que. PPIPS); B.C. *Personal Information Protection Act*, SBC 2003, c. 63 (B.C. PIPA); Alberta *Personal Information Protection Act*, SA 2003, c. P-6.5 (Alta. PIPA).

<sup>3</sup> Ontario *Personal Health Information Protection Act*, SO 2004, c. 3, Schedule A (Ont. PHIPA).

<sup>4</sup> Federal works, undertakings or businesses are those in the inter-provincial transportation, shipping and communication sectors, banks and offshore operators, as well as in Canada's three territories (Yukon, Northwest territories and Nunavut).

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where PIPEDA applies, will not be subject to privacy laws in relation to their employees unless the business is federally regulated for purposes of employment and labour relations.

PIPEDA and provincial privacy statutes also do not apply to the journalistic, artistic or personal collection, use or disclosure of personal information.

### Requirements of Private Sector Privacy Legislation

PIPEDA requires compliance with the 10 “fair information management principles” of the *Model Code for the Protection of Personal Information* (Model Code) developed by the Canadian Standards Association.

The Model Code requires organizations to notify individuals of the purposes of, and obtain their consent for, the collection, use or disclosure of their personal information (PIPEDA sets out limited exceptions to this notice and consent requirement) and to have reasonable and appropriate purposes for their collection, use or disclosure of personal information. Organizations also are required to limit the amount of personal information that the organization collects, uses, discloses or retains to that necessary for the purpose for which it was collected; are prohibited from tying the provision of goods or services to consent by individuals to a collateral collection, use or disclosure of personal information; and must meet standards for accuracy and the security of the personal information they hold. In addition, organizations must implement a privacy policy and appoint a privacy officer who will be responsible for representing the organization in privacy matters, provide individuals with access to their personal information (with limited exceptions) and correct inaccurate information at the request of individuals.

Provincial privacy statutes in Québec, B.C. and Alberta contain similar requirements and exceptions, although differences between provincial statutes and PIPEDA necessitate close examination of each law in most situations involving personal data collection, use and disclosure.

Federal and provincial Privacy Commissioners have made numerous findings with significant impact on business practices, ranging from decisions on the standards for notice and consent for marketing communications, affiliate sharing, purchase histories, international data transfers and social media applications, to decisions on large international personal data breaches, the use of voice recognition and GPS technologies for data collection, restrictions on collection of drivers’ licences for fraud prevention purposes, use of publicly available and aggregate personal information, standards for video surveillance, inappropriate collection and use of personal information by psychological profiling services and data retention by online dating services.

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Privacy law requirements relating to service providers and outsourcing, data breach notification and international personal data transfers are set out below.

## Health Sector Privacy Law Requirements

Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Newfoundland and Labrador and Nova Scotia<sup>5</sup> have each passed health information protection laws to deal specifically with the collection, use and disclosure of personal health information by public and private sector health care providers, called custodians or trustees. Health information protection laws also apply, directly or indirectly, to agents who act for health care custodians, as well as to service providers that manage information, such as data storage and system management providers.

Health information statutes require custodians to notify and obtain express consent from patients for all collection, use or disclosure of personal health information, with limited exceptions for disclosures to other health information custodians within a patient's circle of care. Subject to detailed, limited exceptions, each statute contains provisions entitling patients to access their personal health information, limits access to and use of health information within a custodian's organization, and prohibits disclosure for purposes other than those to which a patient has consented.

## Enforcement of Privacy Laws

### Domestic

The Privacy Commissioner of Canada (PCC) oversees both the federal *Privacy Act* and PIPEDA. The PCC may audit the privacy practices of organizations suspected of a breach of PIPEDA, and may receive and investigate complaints of non-compliance. The PCC can make recommendations regarding PIPEDA compliance and report to Canada's Parliament organizations that are found not to comply. Both the PCC and complainants may seek remedies for non-compliance in the Federal Court of Canada, which has wide remedial authority to award damages and issue mandatory compliance orders.

Provincial privacy laws are enforced by provincial Information and Privacy Commissioners (IPCs) or Ombudsmen, who can investigate complaints and issue binding orders requiring compliance. In addition, individuals have a private right of action for privacy breaches in Québec, B.C., Alberta and Ontario (under the Ontario PHIPA) where a Commissioner has made an order finding a breach.

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## Privacy Law in Canada

<sup>5</sup> Alberta *Health Information Act*, RSA 2000, c. H-5; Saskatchewan *Health Information Protection Act*, SS, 1999 c. H-0.021; Manitoba *Personal Health Information Act*, CCSM c. P33-5; Ontario PHIPA (footnote 3); New Brunswick *Personal Health Information Privacy and Access Act*, SNB 2009, c. P-7.05; Newfoundland *Personal Health Information Act*, SNL 2008, c. P-7.01; Nova Scotia *Personal Health Information Act*, SNS 2010, c. 41 (not in force as of June 14, 2011). The Ontario PHIPA has been declared substantially similar to PIPEDA.

**International**

PIPEDA applies to the personal information of non-residents, so that non-residents of Canada can complain to the PCC about PIPEDA breaches by an organization in Canada.

The PCC can co-operate and share investigation information with foreign authorities, such as the U.S. Federal Trade Commission, when investigating an international privacy breach involving Canada. Both the PCC and IPCs investigate and make findings regarding alleged breaches of PIPEDA or provincial privacy laws that may originate or be caused outside Canada but involve the personal information of Canadians.<sup>6</sup>

**Data Breach Notification**

2010 amendments to the Alberta PIPA now require notification to the Alberta IPC by businesses that have experienced a data breach and empower the IPC to order organizations to notify individuals of data breaches, in both cases where the data breach represents a “real risk of significant harm” to individuals. In the year since passage, the Alberta IPC has issued over 20 notification orders in cases of data breaches involving organizations in Alberta as well as organizations outside Alberta and/or Canada where individuals in Alberta may be affected.

Proposed 2010 amendments to PIPEDA<sup>7</sup> would require businesses to notify the PCC and individuals (and other organizations capable of mitigating the harm) of a data breach where the breach presents a real risk of significant harm to individuals, as soon as feasible after the detection and assessment of the risk of harm caused by the breach. Direct, clear and conspicuous notification including sufficient information for a person to understand the significance of the breach and, if possible, mitigate any resulting harm would be required. The PCC has also issued guidance in advance of the PIPEDA amendments that the PCC expects to be notified of data breaches presenting a real risk of significant harm.

**Outsourcing and Service Providers**

Organizations that outsource or contract for services retain responsibility for privacy compliance in respect of the personal information transferred to the service provider. While this puts service providers – including those providing services from outside the country – in the position of ensuring information is handled or processed in compliance with PIPEDA, the contracting organization is generally responsible for obtaining consent from individuals and for ensuring,

<sup>6</sup> Examples are PCC investigations and findings regarding the Abika search service, Facebook’s third-party applications and Google’s street video mapping WIFI data collection and Alberta IPC data breach notification orders involving data breaches occurring in the U.S.

<sup>7</sup> Bill C-29 died with the 2011 federal election, but is expected to be re-introduced in the fall of 2011.

through contractual means, that service providers provide comparable protection for the personal information that they process or store for organizations subject to Canadian privacy laws.

## International Personal Data Transfers

### Private Sector Privacy Laws

The European Union's (E.U.) "safe harbour" rule requires organizations to ensure that any jurisdiction to which they are sending personal data has enacted legislation providing "adequate" privacy protection. The E.U.'s designation of PIPEDA as providing "adequate protection" enables the exchange of personal data between E.U. member states and Canada (where PIPEDA applies) without the necessity of a safe harbour agreement.

PIPEDA and provincial privacy laws require organizations to notify individuals of out-of-country personal data processing or storage by the organization or its service providers.<sup>8</sup> Alberta's PIPA also requires organizations to disclose to individuals who request its policies and practices and to provide a contact person to answer questions regarding service providers handling personal information outside Canada. In addition, the Alberta and B.C. PIPAs and most health information protection laws require consent for disclosure of personal information to law enforcement and investigatory bodies outside Canada.

The Québec PPIPS (*An Act Respecting the Protection of Personal Information in the Private Sector*) makes organizations responsible for compliance when they use, transfer or disclose personal information outside Québec, and prohibits the transfer or disclosure if it cannot be assured that the personal information will not be used or disclosed for other purposes than those for which it was transferred or disclosed to third parties without consent.

### Public Sector Privacy Laws

In response to public concerns about threats to privacy arising under the *USA PATRIOT Act*, B.C. and Nova Scotia,<sup>9</sup> have enacted data-blocking measures that prohibit public sector bodies (which include utilities, hospitals and Crown corporations in those provinces) from permitting out-of-country access or disclosure.

The data-blocking restrictions place tough restrictions on the storing, accessing and disclosing of B.C. and Nova Scotia public sector data by service providers from or to locations outside Canada. A number of other provinces, such as Alberta, have amended their public sector privacy laws to require notice to and consent from individuals for disclosure of personal information to law enforcement bodies outside Canada.

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<sup>8</sup> The Québec PPIPS does not require such notice, but notice of out of country data transfers is recommended as a best practice.

<sup>9</sup> B.C. *Freedom of Information and Protection of Privacy Act* (FOIPPA), RSBC 1996, c. 165; Nova Scotia *Personal Information International Disclosure Protection Act*, SNS 2006, C.3.

In addition, the Canadian federal and most provincial governments have adopted a risk assessment approach to mitigate the risk of information breaches, address privacy and security risks in service contracts and determine the level of trans-border personal data processing or storage permissible by service providers to public bodies. These legislative restrictions and policies will significantly impact how service providers to public sector bodies in Canada store or access personal information.

Finally, as part of a broad discussion on border security and harmonization, the Canadian federal government is in ongoing discussions addressing trans-border data flows through the Security and Prosperity Partnership with the U.S. and Mexico. These discussions involve potential agreements to collect and share personal information about travelers, transporters, importers and exporters between Canada, the U.S. and Mexico.

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*Osler's Privacy team has helped shape the privacy landscape in Canada and can help clients identify practical solutions to privacy issues. Patricia Wilson and Michael Fekete are partners in our Firm.*

# Protecting Intellectual Property in Canada

by KELLY L. MOFFATT

The Canadian intellectual property regime comprises six federal statutes that have evolved in response to issues such as global technological developments, international treaties and public access needs. Foreign companies carrying on business in Canada must familiarize themselves with both the requirements of and protections afforded by this legislation.

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Protecting Intellectual  
Property in Canada

Intellectual property (IP) in Canada is governed under six pieces of federal legislation:

1. The *Patent Act*;
2. The *Trade-marks Act*;
3. The *Copyright Act*;
4. The *Industrial Design Act*;
5. The *Integrated Circuit Topography Act*; and
6. The *Plant Breeders' Rights Act*.

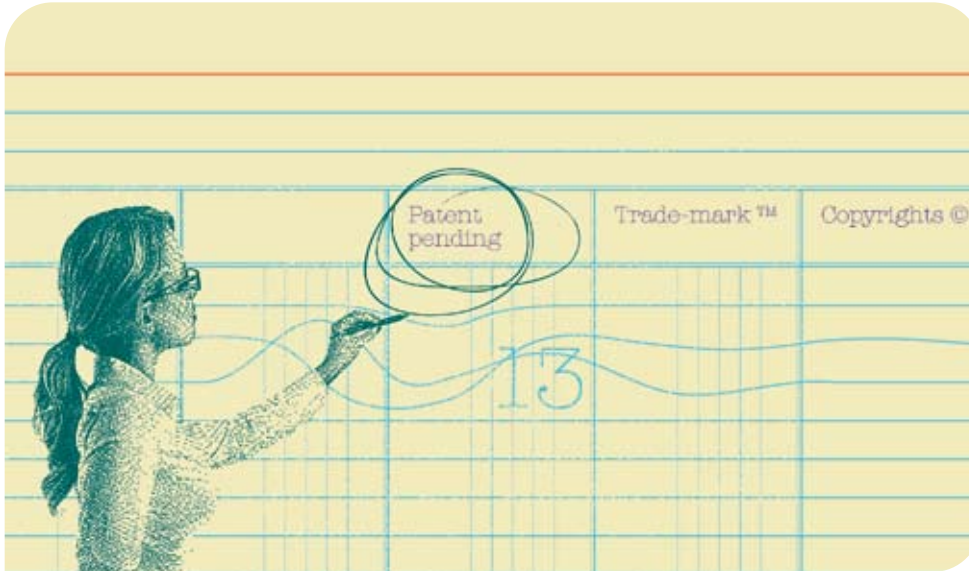
The Canadian Intellectual Property Office (CIPO), an agency of Industry Canada, administers the first five acts, sharing responsibility with the Department of Canadian Heritage for the *Copyright Act*. CIPO also maintains databases of registered patents, copyrights, trade-marks, industrial designs and integrated circuit topographies. The Canadian Food Inspection Agency administers the *Plant Breeders' Rights Act*, which applies to certain new plant varieties.

## Patents

For an invention to be patentable in Canada, it must be

- novel (i.e., not already publicly disclosed elsewhere);
- useful (functional and operative); and
- non-obvious to someone skilled in the art (i.e., demonstrate “inventive ingenuity”).

A Canadian patent gives the inventor the right to exclude others from “making, using or selling” the invention for 20 years from the



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filing date; no patent term extensions of any kind are available in Canada. As of October 1, 1989, Canadian patents are granted to inventors who are the first to *file a patent application*, not the first to invent. This means that it is essential to prepare and file a patent application at the earliest opportunity.

An applicant who previously filed a patent application in a member country of the *Paris Convention* may claim the benefit of that early filing date for an application for the same invention that is filed in Canada within the following 12-month period. Effective January 1, 1996 this benefit was extended to applicants who first filed in any World Trade Organization member country.

#### Protest and Re-examination

Before a patent is granted, the *Patent Act* provides for formal opposition proceedings on the basis of prior patents, published applications and printed publication. There is also a procedure for re-examination of an issued patent.

#### Maintenance Fees

The Patent Office charges maintenance fees both during prosecution of the patent application and after a grant. These fees are payable annually from the second anniversary of filing in amounts that increase over the term of the patent.

#### Infringement

Although an infringement action can be commenced in the Superior Court of any province, generally it is brought in the Federal Court. The action is heard by a judge alone (there are no jury trials) and the resulting court order is effective across the country. If infringement is found, the successful party is entitled to injunctive relief, damages or an accounting of profits, delivery up and costs.



While there are exceptions, the current trend favours the patentee; claims are construed liberally and held valid unless clearly without merit. Accordingly, a foreign enterprise seeking to establish a business in Canada that might involve a patented process, method or product should conduct a careful search of Canadian patents in force and have the search results interpreted by someone familiar with Canadian patent law.

### Trade-marks

A trade-mark is a word, symbol or design (or a combination of these) that is used to distinguish the wares or services of a person or organization from those of others in the marketplace. A Canadian trade-mark registration can often be obtained within 20 to 24 months of filing and gives the registrant the exclusive right to use the mark across Canada for a period of 15 years, with renewal for successive 15-year periods on payment of renewal fees.

Foreign businesses that are considering setting up a business in Canada should take steps to protect their trade-marks in Canada before actually starting to sell products or perform services here. This move will minimize the possibility that someone else, observing the use abroad, will file in Canada first and preclude registration by the true owner of the mark. Obtaining a Canadian trade-mark registration will also assist foreign entities in obtaining a .ca domain name registration (as there are certain Canadian presence requirements associated with obtaining .ca domain names). A trade-mark application may be based on use of the trade-mark in Canada as well as *proposed* use.

Before registration of a proposed use trade-mark will be granted, the applicant must confirm that use in Canada has started. A Canadian application may also be based on registration and use of the mark in the applicant's country of origin, without use in Canada.

### Summary Cancellation

A trade-mark that has stood on the register for three years may be subject to summary cancellation. At the request of any person and on receipt of the prescribed fee, the Registrar sends a notice requiring the registrant to either establish that the mark was in use for each of the defined wares or services at some time during the three-year period immediately before the date of the notice, or offer satisfactory reasons to excuse the absence of use. If the registrant's evidence or explanation is not accepted, the registration will be cancelled or restricted. This procedure provides a relatively inexpensive method of pruning the "deadwood" from the register.

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## Protecting Intellectual Property in Canada

## Licensing

In Canada, there is no requirement to record licensees. To maintain the distinctiveness of a licensed mark, however, the trade-mark owner must have control over the character or quality of the wares and services to which the licensed mark is applied. Corporate control over the licensee will not, in and of itself, be sufficient to establish the requisite level of control. Under the *Trade-marks Act*, if notice is given of the fact that the mark is used under licence and the identity of the trade-mark owner, it will be presumed that the use is a licensed use and that the character or quality of the licensed wares or services is controlled by the owner (although such presumption may be rebutted and, as such, it is important for licensors to exercise true control with respect to the use of the licensed marks).

## Copyright

Copyright subsists in all original literary, artistic, dramatic and musical works, including computer programs, provided that the author is a citizen or resident of a treaty country or the work, if published, was first published in a treaty country (see “International Treaties” below). Copyright gives the owner the sole right to produce or reproduce a work, or a substantial part of it, in any form.

While copyright protection generally lasts for the life of the author, plus 50 years, the Canadian government is considering extending this term to 70 years, as is the case in the U.S. and the European Union. Under the *Copyright Act*, the Copyright Board certifies tariffs which set out royalties payable for certain uses of copyright material.

Registration, while not necessary, provides certain presumptions that are useful if the copyright is litigated and prevents any person from relying on the defence of “innocent infringement” (i.e., where the infringer did not know and had no reason to suspect that copyright existed in the work). If there is no registration, an infringer who successfully proves the defence of innocent infringement could be prohibited from further copying but would not be liable for damages.

## International Treaties

Canada is a member of the *International Copyright Convention* (the “*Berne Convention*”) and of the *Universal Copyright Convention*. Under the latter agreement, each of the contracting nations agrees to protect works first published in other contracting nations, provided that the published copies of the work are marked with the symbol © followed by the date of first publication and the name of the copyright owner.

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#### Protecting Intellectual Property in Canada

## Industrial Design

Ornamental shapes or the configuration of industrial objects may be registered under the *Industrial Design Act* for patent-like protection for a period of five years, renewable for one further five-year period. To be valid, a design application must be filed in Canada within one year of its first publication in Canada or elsewhere. Only the “proprietor,” who is the author, may validly apply for registration, unless the author has executed the design for another party for consideration or payment; in this case, the other party is the first proprietor. If the design is then assigned (i.e., sold), the assignee will be considered a subsequent proprietor and either the first or subsequent proprietor may apply to register. Care must be taken to correctly assess the facts, to name the correct “proprietor” and to file the application in a timely manner.

## Integrated Circuits

Canada’s *Integrated Circuits Topography Act* provides exclusive rights in the design or “topography” of integrated circuits (the semiconductor chips used in modern electronic technology). The law provides the creator of a topography or a successor in title a 10-year exclusive right to reproduce the topography, manufacture the integrated circuit incorporating the topography and import or commercially exploit the topography or integrated circuit incorporating it.

To be valid, an application must be filed in Canada within two years of the first commercial exploitation of the topography anywhere in the world. Reverse engineering of a registered topography is lawful if used for analysis, evaluation, research or teaching, but not for commercial purposes.

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*Osler’s Intellectual Property Department assists companies representing virtually every business sector in the acquisition, commercial exploitation and protection of intellectual property. Kelly Moffatt is a partner in our Department.*

# Environmental Law in Canada

by DAN KIRBY & SHAWN DENSTEDT

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Companies carrying on business in Canada are subject to environmental regulation undertaken by all levels of government – federal, provincial/territorial and municipal. Moreover, directors and officers of Canadian corporations can be personally liable to orders, charges, fines and (in extreme cases) imprisonment for causing or permitting damage to the environment, regardless of whether the corporation has been prosecuted or convicted.

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The federal and provincial governments in Canada both have jurisdiction over environmental matters and their environmental statutes often overlap. In addition, municipal governments, traditionally responsible for water and sewage systems and noise issues, in some cases now restrict or prohibit the use of pesticides and herbicides (even after their use has been approved by the federal or applicable provincial government), require public disclosure regarding the use of toxic substances and often try to control the impact of development on the environment through their role as the primary authority for land-use planning. To make matters more complicated, there are sometimes two separate levels of municipal government. Despite attempts to harmonize environmental standards throughout the country, companies carrying on business in Canada must consider the potential impact of environmental regulation undertaken by all levels of government in multiple jurisdictions.

## Federal Regulation

### *Canadian Environmental Protection Act*

The *Canadian Environmental Protection Act, 1999* (CEPA) regulates toxic substances from research and development through to production, marketing, use and disposal. CEPA provides broad enforcement powers (with substantial maximum fines and other penalties) and mandatory mechanisms to enforce compliance with CEPA and its regulations (i.e., environmental protection orders).



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**New Substances, Toxic Substances and Hazardous Wastes**

Regulations under CEPA govern (among other things) the import and manufacture of substances new to Canada; the import, export, manufacture or use of toxic substances; and the import, export and movement of hazardous wastes between provinces within Canada.

***Fisheries Act***

The *Fisheries Act* prohibits the deposit of “deleterious substances” in water where fish may be present at any time, or in any place or under any conditions where such substances may enter into water where fish may be present. It also prohibits the destruction of fish habitat unless permission is received from the government and actions are taken to compensate for the loss of habitat. Regulations under the Act establish standards for effluent discharged by companies in various industrial sectors including mining, petroleum refining and pulp and paper.

***Transportation of Dangerous Goods Act***

The transportation of substances that qualify as “dangerous goods” by air, road, rail or ship within Canada, regardless of the destination or point of origin of the goods and whether or not the activity is for profit, is governed by both provincial and federal regulatory schemes. Provincial laws generally incorporate (by reference) the requirements of the federal scheme which is set out in the *Transportation of Dangerous Goods Act, 1992* and the *Transportation of Dangerous Goods Regulations*. This scheme incorporates accepted international requirements and is generally complementary to U.S. provisions governing the movement of such materials.

**Canadian Environmental Assessment Act**

The *Canadian Environmental Assessment Act* applies to federal government and private projects that, among other things, involve federal government funds or lands, or that require specified federal government approvals. It may also apply to certain other projects that, for example, may result in adverse international or interprovincial environmental effects or impacts on Indian reserves. Environmental assessments range from comprehensive studies for prescribed projects that have the potential for significant environmental effects to less detailed screenings of smaller scale projects. In certain cases, a review panel may be appointed and public hearings held.

The objectives of an assessment are to ensure that potential adverse environmental effects are considered before proceeding with a project; projects that cause unjustifiable, significant adverse environmental effects are not permitted by the federal government; and appropriate mitigation measures are implemented, where necessary. An assessment likely will be required for any project that involves construction in surface water (i.e., dams, bridge abutments, water intake structures) or over surface water (i.e., bridges); most major resource-based projects; and many linear projects, such as pipelines.

**Canadian Criminal Code**

Under the *Canadian Criminal Code*, the government may criminally prosecute “organizations” for egregious environmental violations (i.e., those causing bodily injury or death). Persons who direct, or who have the authority to direct, how another person does work or performs a task must take reasonable steps to prevent bodily harm to that person or any other person. This duty could arise, for example, where environmental discharges cause injury.

**Environmental Enforcement Act**

The federal government has recently adopted a Bill that increases the powers of the federal government to enforce the provisions of various environmental statutes. The Bill has increased maximum fines, provided more order making powers and authorized the issuance of administrative monetary penalties for violations under nine different existing federal statutes dealing with environmental matters. The Bill also requires a corporation convicted of an offence under the specified environmental statutes to notify its shareholders of the conviction.

**Provincial Regulation**

Canada’s ten provincial and three territorial governments are very active in the area of environmental regulation. Generally speaking, these regulatory regimes employ both a standards-based system (i.e., specified emission criteria) and an objects-based system (i.e.,

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prevention of adverse effects). Below is an outline of some aspects of the scheme for the province of Ontario. The other provinces and territories all have similar robust environmental and regulatory approval regimes in place.

### **Control of Emissions, Discharges and Environmentally Sensitive Undertakings**

The *Environmental Protection Act* (EPA) and the *Ontario Water Resources Act* impose prohibitions and penalties for the “discharge” of contaminants in amounts or concentrations in excess of that prescribed by regulation, that would otherwise cause or likely cause an “adverse effect,” or that may impair water quality. An adverse effect includes virtually any damage or harm that could occur to the natural environment, people, plants or animal life. The EPA also deals specifically with spills.

Both statutes require approvals for certain environmental undertakings that have the potential to discharge or emit contaminants or pollutants, and for most waste handling and disposal activities, water works, sewage works and water takings in excess of 50,000 litres per day. The statutes also authorize the Ontario Ministry of the Environment to issue orders requiring that an ongoing discharge (or a process resulting in a discharge) be controlled or stopped, or that a contamination be cleaned up. Most private-sector projects (i.e., proposed waste disposal sites) are required to be approved under the EPA. The *Technical Standards and Safety Authority Act, 2000* and subsidiary regulations govern the installation, use and removal of tanks and related equipment used to store petroleum products. The *Fire Code of Ontario* similarly governs larger petroleum storage tanks and tanks for the storage of other substances that may pose fire hazards.

### **Brownfields Legislation**

Former industrial sites that may be contaminated with pollutants from earlier uses must, in some cases, be cleaned up before they can be redeveloped. There is relatively little coordination amongst the Canadian provinces and the three territories in their respective approaches to environmental regulation in this area. All provinces permit either a risk-based or a standards-based approach to remediating contaminated lands. Changes to Ontario’s brownfield legislation that became effective in July 2011 will make compliance with the regime considerably more onerous and expensive. For example, the generic standards that can be used to determine site clean-up will, in some cases, become several orders of magnitude more stringent.

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## Environmental Liabilities

### General Types of Liabilities

There are four general types of environmental liabilities of which a corporation doing business in Canada should be aware:

1. **Quasi-criminal Enforcement:** Individuals and companies that do not comply with environmental legislation may be subject to quasi-criminal charges. Both the number of prosecutions and the size of the penalties for these offences have increased significantly in recent years. Although rare, individuals involved in environmental offences can also be imprisoned. Convictions are being publicized to stigmatize and embarrass offenders and to deter potential offenders.

In most jurisdictions in Canada, a due diligence defence is available for most environmental charges. To establish the defence, the accused must show that they took “all reasonable care” to prevent the offence from occurring (i.e., that an effective environmental management system had been implemented).

2. **Environmental Penalties:** The stated purpose of environmental penalties (EPs) is to encourage compliance with the appropriate regulatory regime, rather than to penalize those who do not comply, but their practical effect is very similar to that of a fine. In Ontario, EPs can be imposed for violations of environmental statutes by regulatory order and appeals of such orders are to an administrative board rather than the courts. In addition to having to pay an EP, an offender can be charged and fined with respect to the same violation.
3. **Administrative Orders:** Government authorities can order individuals and businesses to take remedial action to investigate, clean up or otherwise address an environmental concern or issue. Those who fail to comply with an order can be prosecuted. Certain environmental statutes may permit the government authority to undertake necessary action to address a violation and seek recovery of its costs from the party responsible for the violation.
4. **Civil Actions:** A person may bring a civil action for breach of contract or based in tort (i.e., for negligence, nuisance, strict liability or trespass) to recover damages suffered from the party that caused the damage. Some environmental statutes also give injured parties the right to recover damages suffered as a result of, for example, spills. Any individual or corporation that causes environmental damage to another’s property, or harm to a person, may be held responsible for the damage. The use of civil actions to recover environmental damages is growing. The Supreme Court of Canada has determined that, in the right circumstances, civil claims can be advanced by the government for damages akin to the statutory right to claim damages to natural resources in the U.S.

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## Directors' and Officers' Environmental Duties and Potential Liability

Directors and officers of corporations can be personally liable to fines and, in extreme cases, imprisonment for causing or permitting damage to the environment or for failing to take all reasonable care to prevent the corporation from committing an offence, regardless of whether the corporation has been prosecuted or convicted. Also, if the directors and officers are sufficiently involved in the activity leading to a discharge or, in at least one province, the corporation fails to comply with an order issued to it, they may be personally named in regulatory orders for the protection or clean-up of the environment.

Under CEPA, directors, officers and agents may be subject to charges if they directed, authorized, assented to, acquiesced in or participated in the commission of an offence by the corporation. They also have a duty to take all reasonable care to ensure that the corporation complies with CEPA, its regulations and orders or directions issued under it or its regulations. Failure to do so is an offence.

In Ontario, directors and officers of corporations have a statutory duty to take all reasonable care to prevent the corporation from illegally discharging contaminants; obstructing environmental officials; failing to notify the regulator where the corporation is legally required to do so; failing to install and maintain emission or discharge control equipment required under environmental permits or licences; contravening an order issued under environmental legislation; and contravening certain provisions related to hauled liquid industrial or hazardous waste. A breach of any of those duties can result in charges, fines and, in egregious situations, imprisonment. Where so charged, the director or officer has the (reverse) onus of proving that he or she did discharge the duty.

## Climate Change and Greenhouse Gas Control

The province of Alberta was the first North American jurisdiction to legislate the regulation of greenhouse gas emissions from large industrial emitters. The Alberta regime regulates the intensity of emissions (i.e., the GHG emissions per unit of product produced). The Provinces of British Columbia, Manitoba, Ontario and Québec originally committed to participating in the Western Climate Initiative along with seven American States and the Province of Saskatchewan has registered as an observer, but only Québec has indicated that it will proceed with the original implementation schedule. Each of the proposed and existing regimes place a cap on permitted emissions (in Alberta, based on emissions intensity) and permit emissions reduction credit trading to achieve compliance.

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The most recent federal government proposal also involved a proposed cap and trade system. Like Alberta, it would be based on emissions intensity. However, more recent statements from the federal government have suggested an intention to adopt an approach similar to that generally outlined by the Democrats in the U.S. Until more details are disclosed on the American approach, it is unclear what approach will be taken by the Canadian government.

Climate change regulation is an emerging issue that companies carrying on business in Canada will have to monitor closely.

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*Osler's Environmental Group understands that businesses today are faced with escalating and arduous environmental requirements. We help leading organizations adopt forward-looking approaches to manage these issues and challenges. Dan Kirby (Toronto) and Shawn Denstedt (Calgary) are the Co-Chairs of our Group.*

# Regulatory Approvals for Energy Projects

by SHAWN DENSTEDT

Proposed resource projects in Canada require a range of regulatory and environmental approvals from the federal and/or provincial/territorial governments, depending on the scope of the proposed project and where it is located. Consultation with Canada's aboriginal peoples oftentimes plays a significant role in the approvals process.

Since the federal and provincial governments share jurisdiction over the environment, federal legislation may apply to energy projects that have inter-provincial or international characteristics, or that are wholly situated within a province or territory.

## National Energy Board

The National Energy Board (NEB) is the primary federal energy regulatory agency. The NEB regulates inter-provincial and international pipelines, international power lines and designated inter-provincial power lines, and the importation and exportation of energy to and from Canada. It also regulates onshore and offshore development in the Northwest Territories, Yukon and Nunavut, as well as offshore areas not within provincial jurisdiction, under the *Canada Oil and Gas Operations Act*.

The purpose of the NEB is to promote safety and security, environmental protection, and efficient energy infrastructure and markets in the Canadian "public interest" (a balance of economic, environmental and social interests that change as society's values and preferences evolve over time). In deciding whether to approve an energy application, the NEB must consider the overall public good that a project may create as well as its potential negative impacts.

## Federal Environmental Legislation

Federal environmental legislation may also apply to energy projects. For example, the *Fisheries Act* applies where a proposed project would negatively affect fish and fish habitat managed by the federal

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Department of Fisheries and Oceans. Energy project proposals must also comply with provisions of the federal *Migratory Birds Convention Act* and the *Species at Risk Act*. Additionally, where equipment is to be erected or placed in navigable waters, approval under the *Navigable Waters Protection Act* may be required.

In May 2011, the Environment Minister indicated that in the near future the federal government will release regulations for coal-fired electricity plants aimed at reducing greenhouse gas emissions. He indicated that the regulations will not, however, involve a market-based approach such as a carbon tax or a cap-and-trade plan. The Minister also indicated that similar regulations for the oilsands will follow later in 2011.

### **Canadian Environmental Assessment Act**

Projects that require certain federal government approvals may also trigger a federal environmental assessment under the *Canadian Environmental Assessment Act* (CEAA). This assessment may range from a comprehensive study for prescribed projects that have the potential for significant environmental effects to less detailed screenings of less significant projects. In certain cases, a review panel may be appointed and public hearings held.

### **Major Projects Management Office**

The Major Projects Management Office (MPMO) is an organization which serves as a single point of entry into the federal regulatory system for proposed major resource projects. The MPMO provides overarching coordination and management for major resource projects as they progress through the federal regulatory review process. A “major resource project” is a large resource project which is subject to a comprehensive study, a panel review, or a large or complex multi-jurisdictional screening, as defined under the CEAA. Major resource projects may include federally-regulated pipelines, electrical transmission lines, oil sands mines or in-situ projects, and water management facilities handling large quantities of water.

### **Provincial**

Each province and territory maintains its own regulatory regime for approving energy-related projects. Energy projects situated wholly within one province are subject to the legislation and authority of that province. The majority of oil and gas-related activities under provincial jurisdiction are located in the provinces of Alberta and British Columbia, although there are also significant oil and gas activities in Saskatchewan, Newfoundland and Labrador, Nova Scotia, and in Canada’s northern territories.

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### Regulatory Approvals for Energy Projects

## Alberta

The Energy Resources Conservation Board (ERCB) and Alberta Utilities Commission (AUC) are Alberta's primary energy regulators. These tribunals regulate upstream energy projects, intra-Alberta electricity transmission and pipeline projects, and local distribution utility matters. The ERCB and AUC's mandates are to ensure the safe, responsible and efficient development of Alberta's energy resources, and to regulate the pipelines and transmission lines required to move these resources to market.

All significant steps in proposed energy projects require ERCB and/or AUC approval. Where a project is approved, a licence, order or permit is issued. Energy development applications are processed as either routine (which applications may be processed in as little as one to two days) or non-routine (which applications may take months to process and may involve public hearings). In a routine application, there are no landowner obligations and all technical, safety, public consultation and environmental requirements have been met. Landowner objections, community or environmental concerns, or objections from competing companies give rise to a non-routine process.

Larger energy projects require an environmental assessment process and review under the Alberta *Environmental Protection and Enhancement Act* (the EPEA). The ERCB and AUC consider the results of the assessment process in assessing the public interest.

### Regulatory Enhancement Task Force

In January 2011, the Alberta Government accepted the recommendations of the Regulatory Enhancement Task Force, including a proposal to consolidate a variety of upstream oil and gas regulatory functions under the authority of a new single regulator. The proposed regulator would assume all of the regulatory functions currently executed by Alberta Environment, Alberta Sustainable Resource Development, and the ERCB in respect of oil, natural gas, oil sands and coal. The Regulatory Enhancement Task Force recommendations are designed to enhance the effectiveness, efficiency, predictability, and transparency of Alberta's regulatory system to maintain Alberta's competitiveness in the global market. In May 2011, the Alberta government issued a Discussion Document which outlines a proposed path to create a new single regulator. Future implementation of a single regulator will result in significant changes to the regulatory regime in Alberta.

### *Alberta Land Stewardship Act*

The *Alberta Land Stewardship Act* (ALSA) provides the Lieutenant Governor in Council (Cabinet) with the authority to make and implement land-use plans for seven regions within Alberta. The seven regions are identified in Alberta's Land Use Framework and are based

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on major watersheds with boundaries aligned to best fit municipal boundaries and natural regions. The Draft Lower Athabasca Integrated Regional Plan (LARP) is the first draft regional plan released by Cabinet pursuant to the ALSA. The LARP identifies several specific outcomes for the Lower Athabasca region, including improved integration of industrial activities on the landscape, designation of new conservation, recreation and tourism areas, and inclusion of aboriginal peoples in land-use planning. The LARP includes both regulatory and non-regulatory strategies to implement the identified outcomes for the Lower Athabasca region. If implemented as presently drafted, the LARP would introduce an additional layer of environmental scrutiny and compliance into the Athabasca area of Alberta.

### British Columbia

The Oil and Gas Commission (OGC), a Crown corporation, is primarily responsible for the regulation of oil and gas activities and pipelines in British Columbia. The OGC also provides for the effective and efficient review of applications; ensures that approved applications are in the public interest, having regard to environmental, economic and social effects; encourages the participation of First Nations; participates in planning; and educates and communicates with the public. British Columbia's *Oil and Gas Activities Act* (OGAA) regulates the majority of oil and gas activities in British Columbia. The OGAA repeals the *Pipeline Act*, the *Oil and Gas Commission Act* and certain regulatory provisions of the *Petroleum and Natural Gas Act*.

The British Columbia *Environmental Assessment Act* (EAA) requires an environmental assessment review process for project proposals that exceed thresholds established by the *Reviewable Projects Regulation* (RPR). All such proposals must receive a certificate before they may proceed. The *Environmental Assessment Office* may review the process and coordinates with all other governmental agencies, including the OGC.

If a project proposal does not exceed the thresholds set out in the RPR, the OGC has jurisdiction over any environmental review, subject to a variety of statutes. The *Environmental Management Act*, for example, guides the OGC in discharging its responsibilities. Other applicable legislation includes the *Forest Act*; the *Forest and Range Practices Act*; the *Forest Practices Code*; the *Water Act*; and the *Heritage Conservation Act*.

### Federal-Provincial Cooperation Agreements

Both Alberta and British Columbia have entered into environmental cooperation agreements with the federal government that provide for a single, cooperative environmental assessment process where an environmental assessment of a proposed project is required

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under both the CEAA and Alberta's EPEA or British Columbia's EAA. These agreements minimize the duplication of efforts and ensure that an environmental assessment is conducted as efficiently and effectively as possible.

### Aboriginal Communities

Given that aboriginal and treaty rights are protected by the *Constitution Act, 1982*, aboriginal issues can play a significant role in pursuing energy projects in Canada. Both the federal and provincial governments have a duty to consult with and, if appropriate, accommodate aboriginal communities (First Nation, Inuit, and Métis) when they have knowledge of the potential existence of aboriginal or treaty rights and are contemplating conduct that may adversely affect those rights. The scope of the duty depends on the circumstances under consideration; however, at all times, consultation must be conducted in good faith and with the intention of substantially addressing the concerns of the aboriginal community whose lands are at issue.

The duty to consult and accommodate arises when a government is asked to approve a regulatory or environmental application for a proposed resource project that would be developed on or near the traditional lands of aboriginal communities or that may adversely affect aboriginal or treaty rights. Governments are expected to inquire into and determine whether there is a potential infringement of those rights prior to making its decision and, if so, to accommodate those rights appropriately. Any infringement must be justifiable, failing which the resource developer risks a court order quashing the regulatory permit or licence issued by the government for violating the *Constitution Act, 1982*.

In practice, governments frequently delegate some (or all) consultative responsibilities to resource developers. They may also require resource developers to consult as part of the regulatory process, and the regulatory process itself can work to satisfy the Crown's duty. Consultation requirements usually include providing information to the aboriginal community; identifying their interests and concerns; and taking action to avoid or mitigate negative impacts from the project (i.e., accommodation). Often, information is exchanged in the context of the environmental impact assessment through discussion with elders and the preparation of Traditional Land Use and Traditional Ecological Knowledge studies. In many cases, the project proponent will need to provide funds to enable the aboriginal community to review the project and environmental assessment documents, and to participate in the regulatory process.

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In the context of a large resource project, developers may need (or choose) to negotiate agreements with the aboriginal community. Such agreements may be used to build positive, long-term relationships with affected aboriginal communities. The agreement can provide for environmental mitigation measures, training and education opportunities, business opportunities, and cultural and traditional land use commitments. Sometimes, the aboriginal community may seek equity participation in the project.

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CONTACT

*Osler's Environmental Group helps energy project proponents navigate the increasingly complex and rigorous environmental and regulatory approvals process in Canada. Shawn Denstedt is Co-Chair of our Group.*



# Foreign Investment in Canadian Real Estate

by GEORGE M. VALENTINI & ADRIAN HARTOG

There are several legal structures available for investment in Canadian real estate. Understanding the principal issues involved in acquiring, leasing, financing or developing a property in Canada will assist a foreign investor in properly assessing the risks and rewards associated with any proposed investment.

The provinces have primary responsibility for property law in Canada. In all provinces except Québec, property law has developed through the English common-law process. In Québec, property law is governed by the *Civil Code of Québec* (which is derived from the *Napoleonic Code*.) There is no constitutional protection for property rights in Canada. Consequently, property can be expropriated by government and quasi-governmental authorities, but, appropriate compensation must be paid.

Interests in land are generally held directly in fee simple or by leases as leasehold interests. Condominium or strata title ownership is also common throughout Canada. All provinces maintain a system of public land titles registration whereby ownership can be verified and through which interests in land are registered.

## Investment Vehicles

There are several legal structures available for investment in Canadian real estate, including a general partnership, a limited partnership, co-ownership (commonly known as a “joint venture”), a corporation, a trust, personal ownership or any combination of the foregoing. The choice of an appropriate investment structure will be governed by factors such as tax planning requirements, liability issues and business considerations and each foreign investor’s rules and regulations. (For more information, see Chapter 02, “Forms of Business Organization in Canada,” starting on [page 10](#).)

## Acquisitions

The first document in any real estate acquisition is normally the Agreement of Purchase and Sale between the purchaser and the

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vendor, although this is often preceded by a non-binding letter of intent which sets out the major business terms which have been agreed upon. This agreement should contain all necessary business terms for the transaction, including the description of the land, purchase price, deposit (if any), closing date and any other special terms. This agreement also typically contains conditions for the benefit of the purchaser and/or vendor, as well as representations and warranties by the vendor and, to a lesser extent, the purchaser.

### **Due Diligence**

Once the Agreement of Purchase and Sale is signed, it is generally the responsibility of the purchaser (usually through counsel) to conduct due diligence concerning the property being acquired. This includes title and zoning searches and a review of any leases and surveys of the property. An independent engineering review of the property with respect to environmental and physical matters (particularly property with older buildings) is commonly conducted.

### **Title Insurance**

The purchaser's counsel may provide a title opinion to the purchaser, although title insurance similar to that available in the U.S. is available throughout Canada and is quite commonly obtained in real estate transactions. With title insurance, the purchaser relies on the policy for its confirmation of title, not on a lawyer's title opinion.

## **Leasing**

### **Ground Leases**

Property may be leased as well as purchased. One form of leasing arrangement is a long-term ground lease, in which a tenant leases vacant land and develops it. Once the development is complete, the ground tenant sublets space to retail, office or industrial tenants, depending on the type of development. Ground leasehold interests may be bought and sold in a manner similar to fee simple property interests.

### **Commercial Leasing**

Most commercial office and retail space, and much of the standard industrial space in Canada, is available only through a commercial lease. Most commercial lease transactions start with an agreement to lease, although this is often preceded by a non-binding letter of intent. An agreement to lease is typically a binding agreement that contains the business terms agreed upon by the parties, including the space, term, rent and any tenant inducements. Commercial leases in Canada are typically on a net/net rental basis, which requires a tenant to pay basic rent plus a proportionate share of the realty taxes, insurance, utility and other maintenance charges for the commercial building. In a retail lease, a tenant may also be required to pay rent based on a percentage of its annual sales.

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## Residential Leasing

Residential leases are regulated by provincial legislation. In some cases, the applicable legislation will override the terms of the lease agreement, regardless of the intention of the parties. In some provinces, the ability of the landlord to increase residential rents is limited by provincial regulation.

## Financing

Most real estate financing is arranged through institutional lenders such as banks, trust companies, pension funds, credit unions and insurance companies. Credit terms will vary from institution to institution and will depend on the nature of the transaction and the risks involved.

## Interest Rate

Interest rates on real estate financings can be either fixed for a specified period of time or variable, based on a “prime rate” set by the lending institution on a periodic basis. The prime rate is based on a rate announced by the Bank of Canada from time to time. A borrower may consider borrowing in other currencies and has a choice of interest rate pricing, including applicable Government of Canada Bond Rates, the London Interbank Offered Rate (LIBOR) and bankers’ acceptances. Certain fees, such as commitment and processing fees, are normally charged by lenders. Typically, it will be the borrower’s responsibility to pay for all of the lender’s legal and other costs in arranging property financing.

## Primary and Collateral Security

Lending institutions typically take both primary and collateral security in real property and related assets to secure the loan. Typical primary security includes a mortgage or charge, a debenture containing a fixed charge on real property or, in some cases where more than one lender is involved, a trust deed securing mortgage bonds or debentures and including a specific charge over real property. Collateral security often includes assignments of leases and rents, general security agreements and personal guarantees.

## Foreign Lenders

Because many foreign lenders in Canada are subsidiaries of the world’s major banks, they typically participate by way of syndicated loans which are often arranged by major Canadian lending institutions. Whether through a syndicate or directly, foreign lenders may be subject to certain withholding and other forms of taxes on the interest paid to them.

## Environmental Concerns

Canada has many detailed laws concerning the protection of the environment. These laws attribute liability for environmental damage to the owner of land and to polluters.

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A property owner has certain duties in connection with the discharge of contaminants and hazardous materials into the environment from its property. Note that liabilities associated with improper waste management practices can be inherited by subsequent owners of a property. See also the discussion in Chapter 14, “Environmental Law in Canada,” starting on page 68.

### Environmental Risk Assessment

A purchaser should assess the environmental risks associated with a property being purchased. In Canada, government officials do not “certify” that a property is free from such risks. A property’s environmental status can be ascertained by inspecting applicable company and public records. In virtually all cases, a purchaser will want to do an “environmental audit” of the property which may include conducting scientific testing and a technical analysis of the property. Lending institutions often require such an audit before advancing any funds.

### Development Controls

Property development is provincially regulated, primarily at the municipal level. Municipalities typically control land use and the density of development through official plans and zoning by-laws. Many of them impose development charges on new developments within their jurisdiction. Several provinces restrict and regulate the ability of an owner to subdivide property.

Construction of new projects is also subject to provincial and municipal legislation. In addition to regulating the maintenance of existing structures, building codes set specific standards for the construction of buildings. Before construction commences, most municipalities require that building permits and all regulatory approvals be obtained.

### Real Estate Brokers Legislation

Generally, a person who wishes to dispose of or acquire real estate will seek the assistance of a real estate broker. Real estate brokers are subject to special regulation in Canada. Each province has legislation that regulates the trade in real estate. Such regulation is designed to better protect consumers and instill confidence in the buying and selling of real estate.

In Ontario, the Real Estate Council of Ontario (RECO) is responsible for regulating trade in real estate and administering the *Real Estate and Business Brokers Act, 2002* (REBBA), which came into force on March 31, 2006. Under REBBA, all brokerages, brokers, salespersons and any person involved in the trade in or of real estate must be registered with RECO. Members of RECO accept a Code of Ethics that forms part of the legislation and defines how members are

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to conduct themselves in doing business in Ontario. RECO can lay charges under the statute, and its Registrar has the authority to propose, revoke or put conditions on a broker's registration. RECO provides for a complaints, compliance and discipline process to ensure that effective action is taken in instances where a RECO member has acted in an unethical manner.

### **Mortgage Brokers Legislation**

As with real estate brokers, mortgage brokers, lenders and administrators are subject to specific regulations in Canada. These regulations are governed by various pieces of provincial legislation. In Ontario, the *Mortgage Brokerages, Lenders and Administrators Act, 2006* went into full effect in 2008. The Act requires all mortgage brokerages, administrators, brokers and agents to obtain a licence to do business in Ontario. Similar legislation either exists or is under consideration in most of the other provinces.

### **Land Transfer Taxes**

Land transfer taxes are imposed on the transfer of real estate in some provinces. The amount of tax payable will vary based upon the value of the consideration paid for the real estate. Certain leasehold and other interests in land may be exempt.

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#### CONTACT

*Osler's Real Estate Group understands the many forces that come into play in today's increasingly complex and sophisticated commercial real estate market. George Valentini and Adrian Hartog are partners in our Group.*

# Doing Business in Québec

by ANNE-MARIE L. LIZOTTE

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Québec's distinct language, culture and legal system present unique challenges for foreign entities considering doing business in Canada's second largest province. In particular, foreign businesses interested in the Québec marketplace must adhere to the province's French language requirements.

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The *Charter of the French language* (Charter) establishes French as the official language of Québec and governs the use of the French language in a broad range of activities. The Charter sets forth the fundamental right of every person to have all firms doing business in Québec communicate with him or her in French. The Office of the French Language (OFL) is the provincial authority that oversees the use of French in commerce and business. The OFL has stated that a firm that maintains an address in Québec or conducts business in Québec by soliciting Québec residents is carrying on business in Québec and, therefore, is subject to the Charter.

## Business Name in French

An *Act respecting the legal publicity of sole proprietorships, partnerships and legal persons* and the Charter require companies carrying on business in Québec to have a firm name in French. According to the OFL, the French firm name does not have to be adopted as a French version of the firm's corporate name. However, generally, this is preferable to avoid situations where, on the one hand, Québec law requires the use of the French firm name alone (i.e., without the English name) and, on the other hand, corporate law requires the use of the corporate name for the same purpose.

Generally speaking, a French firm name may be accompanied by its English version, provided that the French version appears at least as prominently as the English version; however, in some cases, use of the English version of a firm name is only permitted if the French version is "markedly predominant" – meaning that the French text must have a much greater visual impact than the text in another language.




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## Common Business Applications in French

Similarly, all documents used in common business applications must be translated into French, and the French must be displayed at least as predominantly as the English translation. There are specific instructions in the Charter dealing with:

**Product labelling:** Every inscription on a product, its container or wrapping, or on a leaflet, brochure or card supplied with it, including the directions for use and warranty certificate, must be drafted in French. This requirement extends to labels containing, for example, washing instructions and sizes.

**Employment forms, order forms, invoices, etc.:** Employment application forms, order forms, invoices, receipts, catalogues, brochures and almost every other document designed for use by employees or customers must be produced in French or in a bilingual version.

**Public signs, posters and commercial advertising:** Public signs, posters and commercial advertising may also be bilingual, provided that the French translation is “markedly predominant.” However, large billboards or signs that are visible from any part of a public highway must be exclusively in French, unless they are displayed on the firm’s premises. Likewise, signs on public transportation vehicles, such as buses and subways, must be exclusively in French, unless they are used regularly to transport passengers or merchandise both inside and outside of Québec, in which case the signs may be bilingual.

**Websites:** Commercial advertising posted on a website must also be drawn up in French. Alternatively, it may be bilingual, provided that the French version is displayed at least as prominently as the English version.

**Trade-marks:** As stated above, any “recognized” trade-mark within the meaning of the Canadian *Trade-marks Act* (which recognizes both registered and unregistered marks) may appear in English only in a business firm’s catalogues, brochures, public signs, posters and commercial advertising, provided that a French version of such trade-mark has not been registered.

## Language as a Condition of Employment

Employers are prohibited from dismissing, laying off, demoting or transferring a staff member for the sole reason that he or she is exclusively French-speaking or has insufficient knowledge of the English language. An employer is prohibited from making knowledge of the English language a condition of obtaining employment, unless the nature of the duties requires such knowledge. Normally, in Québec, people who work in retail stores and who are dealing with customers need at least a basic knowledge of English to enable them to serve customers in either language.

## Francization Programs

An enterprise in Québec which employs more than 50 employees must register with the Office de la langue française. If the Office considers that the use of French is not generalized at all levels of the enterprise, the enterprise will have to adopt a francization program.

An enterprise employing 100 or more persons must form a francization committee. Where necessary, the committee will have to devise a francization program and supervise its implementation. Certificates of francization will be issued in each case where the Office is satisfied with the enterprise's linguistic situation.

## Penalties for Non-compliance

Any corporation that contravenes the Charter is liable for each offence to a fine of \$1,500 to \$20,000. The fines are doubled for a subsequent offence. Recent amendments have extended liability to those distributing, selling by retail trade, renting, offering for sale or rental or otherwise marketing a product, computer software or a publication not in compliance with the Charter.

## Employment and Labour Law

Québec's employment laws share many similarities with those of other Canadian provinces in areas such as occupational health and safety, workers' compensation and pay equity; however, there are some unique aspects to consider. Three major statutes govern employment in Québec.

## *Civil Code of Québec (CCQ)*

Generally, the CCQ governs the employment contract. It provides that the employer has to take measures consistent with the nature of the work to protect the health, safety and dignity of the employee. It also confirms the right of the parties to include a non-competition clause in a contract, provided it is limited as to time, place and type

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of employment. The CCQ provides that an employment contract will not be terminated by a sale of the business or any change in its legal structure by way of amalgamation or otherwise, and will be binding on any successor employer.

Either party to an employment contract with an indeterminate term may terminate the contract, subject to reasonable prior notice. One of the parties may always terminate the contract, without prior notice, for a serious reason. The CCQ also provides that a “choice of law” clause in an employment contract may be unenforceable if it results in depriving the worker of the protection to which he or she is entitled under the mandatory provisions of the law of the country where the worker habitually carries on his or her work. The “choice of law” cannot be forced upon a worker. Article 3149 of the CCQ provides as follow:

A Québec authority also has jurisdiction to hear an action involving a consumer contract or a contract of employment if the consumer or worker has his domicile or residence in Québec; the waiver of such jurisdiction by the consumer or worker may not be set up against him.

### **Québec Labour Code**

Unionized employees are governed by the Québec *Labour Code*. The *Canada Labour Code* and the Québec *Labour Code* are essentially similar, except that the *Canada Labour Code* is broader. The latter Code includes issues that are dealt with in Québec under other legislation, such as *An Act respecting labour standards* or *An Act respecting occupational health and safety*. One distinction between the two Codes that may be important is that the *Canada Labour Code* does not include anti-scab measures.

### **Labour Standards Act**

*An Act respecting labour standards* applies to employees regardless of where they work. It includes employees who perform work both within and outside of Québec for an employer whose undertaking is in Québec. The Commission des normes du travail supervises the implementation and application of labour standards. Any employer who pays remuneration to an employee must also pay a contribution to the Minister of Revenue and file an annual statement. An employer’s contribution is equal to the product obtained by multiplying the rate fixed by regulation (not exceeding 1%) by the remuneration, subject to the contribution paid by the employer during the year.



***Significant Provisions***

Other employment standards provisions include the following:

- Equal rates or wages have to be paid for the same tasks;
- There is also a minimum wage, determined by regulation, which is currently \$9.65 per hour;
- Employees must be paid at intervals not greater than 16 days;
- The regular work week is 40 hours. Overtime work entails a premium of 50% of the prevailing hourly wage paid to the employee;
- Minimum annual leave with pay is two weeks after one year of uninterrupted service and three weeks after five years;
- Prior written notice of termination or layoff of one week is required if the employee has worked for more than three months but less than one year. The notice period is two weeks for an employee who has worked between one to five years; four weeks for an employee who has worked between five to ten years; and eight weeks for an employee who has worked ten years or more;
- Sale or concession of the whole or part of a business does not invalidate a claim arising from the application of the Act; the former employer and new employer are bound jointly and severally;
- Work performed by children under the age of 14 is prohibited;
- Labour standards contained in the *Labour Standards Act* and the regulations are mandatory; and
- Fines between \$600 and \$6,000 may be levied, depending on the offence.

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*Osler's Montréal office offers fully integrated services and seamless service in both French and English, providing exceptional service to companies doing business in Québec. Anne-Marie Lizotte is a partner in our Montréal office.*



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