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DOING BUSINESS IN CANADA

This publication has been prepared to provide an overview to foreign investors and business people who have an interest in doing business in Canada. The material in this publication is intended to provide general information only and not legal advice. This information should not be acted upon without prior consultation with legal advisors.

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The global financial crisis of 2008 and 2009 revealed the strengths and weaknesses of the world's financial systems. It is universally recognized that Canada's well-regulated financial institutions proved to be a model of prudence to the world. While the Canadian and American economies are interrelated, Canada has forged its own path to become a leader in reducing barriers to global commerce. Canada offers a stable and potentially lucrative market for international businesses and investors.

Over 90% of Canadians live within 160 kilometers (100 miles) of the U.S.-Canada border. As a result, Canada and the United States share many economic imperatives and cultural influences. The economic and material aspirations and realizations of the Canadian and U.S. populations are strikingly similar.

From a historic perspective, however, Canada remains significantly different than the United States. Canada today is a highly multicultural society which generally respects and enshrines cultural heritage rather than encouraging the population to form a homogeneous melting pot. Colonized by the British and French, Canada remains a bilingual country; English and French are the two official languages. Approximately 59% of the population has English as their mother tongue while about 23% of the population is French-speaking (mostly in the province of Québec). The remaining 18% speak other languages.

Canada remains an attractive location for the establishment or expansion of business in North America. During the past decade, there has been a marked trend toward fiscal conservatism. Federal and provincial governments made serious efforts to reduce deficits and balance budgets. Budget surpluses have been achieved on the federal level and in many provinces. Inflation and interest rates have remained low.

Except in certain industry-specific situations where cultural values are at risk, Canada is receptive to foreign investment. Despite its relatively small population, Canada is one of the strongest trading nations in the world. Although historically Canada was an exporter of raw materials and an importer of manufactured goods, shipments from Canada are now balanced between raw materials and finished goods. In addition, Canada is recognized internationally as a world leader in such areas as fibre optics and telecommunications.

This book provides a general overview as of July 2013 of particular matters of interest to businesses considering entry into the Canadian market. Where appropriate, descriptions of both federal and provincial laws are provided. However, this book should not be considered an exhaustive review, and

particular businesses may be subject to industry-specific legislation and other legal requirements which are not dealt with in this book. Accordingly, before undertaking any business transaction involving entry into Canada, it is prudent to seek the advice of counsel.

1. WHAT LAWS INFLUENCE THE RELATIONSHIP BETWEEN LOCAL AGENTS AND DISTRIBUTORS AND FOREIGN COMPANIES?

Foreign companies doing business in Canada will be influenced by legislation, the common law and various international treaties. Canada's Constitution creates mutually exclusive jurisdictions for federal and provincial legislation. For example, Canada's intellectual property, competition, bankruptcy and criminal laws are solely within the purview of the federal government. Provincial legislative authority is granted for the regulation of trade and commerce, education and health within the province. However, the jurisdictional distinctions are often blurry, and the subject matter of federal and provincial legislation sometimes overlaps. In addition, Canada has entered into many international trade and tax treaties with other countries which will influence foreign companies doing business in Canada.

2. HOW DOES THE CANADIAN GOVERNMENT REGULATE COMMERCIAL JOINT VENTURES BETWEEN FOREIGN INVESTORS AND LOCAL FIRMS?

Legislation by the federal government and each of the provincial governments regulates ventures between foreign investors and local firms, including agents and distributors. From a contracting perspective, there is no material distinction between business parties who are foreign and those who are local.

The foreign investor will have to comply with the direct investment provisions noted below in question 3 and discussed in more detail in the Foreign Investment & Merger section of this Guide.

In addition, many obstacles to foreign investment have been removed as a result of the various free trade agreements that Canada has negotiated with other countries, such as the North American Free Trade Agreement discussed in detail in the International Trade section of this Guide.

3. WHAT ROLE DOES THE GOVERNMENT OF CANADA PLAY IN APPROVING AND REGULATING FOREIGN DIRECT INVESTMENT?

Non-Canadians who acquire control of an existing Canadian business or who wish to establish a new unrelated Canadian business are subject to the federal Investment Canada Act (ICA). In either case the non-Canadian investor must submit either a Notification or an Application for Review to the federal government. A Notification must be filed each and every time a non-Canadian commences a new business activity in Canada and each time a non-Canadian acquires control of an existing Canadian business where the establishment or acquisition of control is not a reviewable transaction. Only in certain circumstances does the ICA seek to review or restrict new investments by non-Canadians. In general terms, the transactions which are subject to review under the ICA are larger transactions, and transactions in certain politically and culturally significant sectors (as noted below in question 5). Securities transactions and venture capital deals, acquisitions of control in connection with realization on security, certain financing transactions and certain direct and indirect acquisitions of control by insurance companies are exempt from the ICA. For all other transactions a Notification needs to be filed.

More detailed information on the ICA and direct investment in Canada can be found in the Foreign Investment & Merger section of this Guide.

4. CAN FOREIGN INVESTORS CONDUCT BUSINESS IN CANADA WITHOUT A LOCAL PARTNER? IF SO, WHAT CORPORATE STRUCTURE IS MOST COMMONLY USED?

There is nothing preventing a foreign investor from conducting business in Canada without a local partner. All businesses, foreign or local, must register in the appropriate jurisdiction to conduct business; however, these are administrative filings.

Most foreign investors, however, would incorporate a new company in a Canadian jurisdiction in order to carry on their business. This Canadian subsidiary may be a standard limited liability corporation or it might be an unlimited liability corporation, depending on the tax characteristic of the parent's jurisdiction. More detailed information on the forms of business organization in Canada can be found in the Forms of Business Organization section of this Guide. In addition, the taxation of foreign investors and their Canadian subsidiaries is discussed in detail in the Taxes and Duties section of this Guide.

5. WHAT STEPS DOES THE CANADIAN GOVERNMENT TAKE TO CONTROL MERGERS AND ACQUISITIONS WITH FOREIGN INVESTORS OF ITS NATIONAL COMPANIES OR OVER ITS NATURAL RESOURCES AND KEY SECTORS (E.G., ENERGY AND TELECOMMUNICATIONS)?

As discussed in question 2, non-Canadians who acquire control of an existing Canadian business, or who want to establish a new unrelated Canadian business, are subject to the federal Investment Canada Act (ICA). The transactions subject to review include businesses within a prescribed type of business activity that is related to Canada's cultural heritage or national identity, and transactions where the Minister responsible has reasonable grounds to believe that an investment by a non-Canadian could be injurious to national security. Notice of the transaction is given to the Review Division of Industry Canada. When a transaction is reviewable under the ICA, the investor is required to file an extensive pre-closing filing called an Application for Review with supporting documents. When a review is conducted, the investor is prohibited from closing the transaction until the Minister's approval is obtained. Investment reviews under the ICA proceed in tandem with reviews under the Competition Act.

Merger or antitrust review and prenotification in Canada are governed by the Competition Act. Mergers that exceed a certain size threshold require the Commissioner of Competition to be notified prior to completion. Whether a notification filing is required is determined by the value of the assets in Canada and the annual gross revenues from sales in, from or into Canada of the parties to the transaction, and of the target corporation itself.

There are sectors in Canada, such as telecommunications and other broadcast-related sections, that have ownership restrictions imposed by the federal government. In addition, Canada has anti-dumping legislation which imposes duties to prevent unfair competition with domestic Canadian goods.

More detailed information on the direct investment and competition laws in Canada can be found in the Foreign Investment & Merger section of this Guide.

6. HOW DO LABOUR STATUTES REGULATE THE TREATMENT OF LOCAL EMPLOYEES AND EXPATRIATE WORKERS?

For employers in Canada, the employment relationship is governed by various federal and provincial acts that provide minimum standards for most employees. In most cases, individual or collective agreements will be governed by these minimum standards. Accordingly, Canada cannot be considered a jurisdiction in which there is employment at will. There are minimum standards which mandate that employees are entitled to receive either notice of the termination of their employment or pay in lieu of notice if their employment is terminated without cause. The legislative requirements are minimum standards only and do not restrict an employee's right to sue for breach of contract, wrongful dismissal or other damages arising from the termination of his or her employment. In the absence of a written contract to the contrary, termination of employment without cause generally requires significantly longer notice periods than those provided by the legislation. Appropriate reasonable notice periods have been established by common law through the litigation process on a case-by-case basis. The courts consider various factors, including the employee's age, length of service, position, remuneration, how the employee came to be employed, their chance of finding replacement employment and the manner of dismissal. The judge will consider all of these factors to determine the appropriate "reasonable notice" period.

Reasonable notice established by the common law in Canada often greatly exceeds the obligations of U.S. employers to their employees. The grounds for termination for cause in Canada are also very limited and reserved for the most serious misconduct (for example, where the termination results from acts of dishonesty of the employee, or where the employee has been warned in writing various times and provided with assistance, yet continues to perform below expectations).

More detailed information on employment law in Canada can be found in the Employment Law section of this Guide. In addition, more detailed information on business visitors (temporary residents), temporary workers, professional workers under the various international trade agreements and permanent residents can be found in the Immigration Restrictions section of this Guide.

7. HOW DO LOCAL BANKS AND GOVERNMENT REGULATORS DEAL WITH THE TREATMENT AND CONVERSION OF LOCAL CURRENCY, REPATRIATION OF FUNDS OVERSEAS, LETTERS OF CREDIT AND OTHER BASIC FINANCIAL TRANSACTIONS?

Banking, currency and negotiable instruments are regulated uniformly in Canada by the federal government. Specifically, all banks in Canada are regulated by the federal government. *The Bank Act*, S.C. 1991, c. 46 is the main federal statute which regulates Canadian banking. Canadian banks are divided into three distinct categories. Schedule I banks are domestic banks that are allowed to accept deposits which may be eligible for deposit insurance. Schedule II banks are foreign bank subsidiaries that are authorized to accept deposits which may be eligible for deposit insurance. Foreign bank subsidiaries are controlled by eligible foreign institutions. Schedule III banks are foreign bank branches of foreign institutions that are authorized to do banking business in Canada.

8. WHAT TYPES OF TAXES, DUTIES AND LEVIES SHOULD A FOREIGN INVESTMENT IN CANADA EXPECT TO ENCOUNTER?

When doing business in Canada, you can expect to encounter sales and transfer taxes, income and capital taxes, and custom and excise duties.

Canada has a 5% goods and services tax (GST) which applies to most goods and services on the purchase price. Those engaged in commercial activity in Canada having worldwide sale of goods and services subject to GST greater than CAD30,000 per year must register to collect GST. Registration entitles businesses to input tax credits (ITCs) equal to the full amount of GST paid by them on all business purchases. Some nonresidents carrying on business in Canada are also required to register to collect GST. Most Canadian provinces charge a sales tax ranging between 5% and 10% on tangible property and certain services. Harmonized Sales Tax (HST) has been implemented in Nova Scotia, New Brunswick, Newfoundland, British Columbia and Ontario. HST applies to all goods and services that are subject to GST and ranges between 12% and 15%. Registrants for HST are entitled to claim ITCs. The province of Québec administers its own sales taxes together with the GST. The rate of the Québec sales tax is 9.975%. In addition, a land transfer tax, ranging from .02% to 2%, is payable on the acquisition of real property in each province.

Canada imposes a federal income tax on nonresidents who conduct business or sell real property in Canada. Canada also imposes a federal nonresident withholding tax on certain Canadian source payments. This requirement can be waived if the non-resident is carrying on business through a permanent establishment. Canada has entered into bilateral treaties with many countries which contain tax relief provisions. A foreign tax credit may be available in the nonresident's own jurisdiction. A corporation incorporated in Canada will be considered a resident of Canada for income tax purposes. This means the corporation will be subject to Canadian income tax on its worldwide income. Foreign businesses can also be carried on through branch operations. Provinces and territories typically impose income tax on corporations carrying on business within the province and some impose a capital tax on corporations.

All goods entering Canada go through a customs inspection at the point of entry. Documentation accompanying goods ascertains the transaction value of the goods (the price paid for the goods by the importer, subject to adjustments for royalties, shipping fees and transportation). The amount of customs duty is determined by the customs tariff that sets out a specific list describing the class of goods and setting out the corresponding rate of duty. Member countries of North American Free Trade Agreement (NAFTA) receive a preferential duty rate. Imported goods, such as alcohol and tobacco, are subject to a special duty under the customs tariff that is equal to the excise duty paid by Canadian producers.

There are special anti-dumping duties for imported goods sold in Canada at prices that are below the prices in the home market. Dumping occurs when the "normal value" of the imported goods exceeds the "export price." These anti-dumping duties are imposed to provide Canadian producers with relief from unfair import competition.

More detailed discussion of this topic can be found in the Taxes and Duties section of this Guide.

9. HOW COMPREHENSIVE ARE THE INTELLECTUAL PROPERTY LAWS OF CANADA, AND DO THE LOCAL COURTS AND TRIBUNALS ENFORCE THEM OBJECTIVELY, REGARDLESS OF THE NATIONALITY OF THE PARTIES?

Canada offers a fully developed and modern intellectual property law regime. Through federally based legislation that governs the acquisition and enforcement of intellectual property rights throughout Canada, parties are able to register and protect all aspects of intellectual property, including trade-marks, copyright, patents of invention and industrial designs. Canada is also a party to all of the major world intellectual property law treaties and conventions, including the Patent Cooperation Treaty, the Berne Convention and the various World Intellectual Property Organization treaties. Parties, including those based in foreign jurisdictions, have the ability to enforce their intellectual property rights in either the superior courts of the Canadian provinces, or, more often, in the Federal Court of Canada, which courts are required to enforce Canada's laws fairly and objectively, regardless of a party's national origin.

A more detailed discussion of this topic can be found in the Intellectual Property section of this Guide.

10. IF A COMMERCIAL DISPUTE ARISES, WILL LOCAL COURTS OR ARBITRATION OFFER A MORE BENEFICIAL FORUM FOR DISPUTE RESOLUTION TO FOREIGN INVESTORS?

Whether or not foreign investors will benefit more from bringing a dispute to private arbitration or to the courts will depend on the nature of the dispute. For example, a foreign investor may benefit from having a complex commercial matter arbitrated privately, as the parties can attempt to select an arbitrator who has experience and knowledge related to the subject matter at issue. Private arbitration can also be beneficial because it is generally a much faster process than court proceedings. In either case, Canadian law, and in particular Canada's Charter of Rights and Freedoms, guarantees equality under the law, which extends to foreign participants in court or arbitration proceedings, such that neither party to a dispute should benefit (or suffer) from the fact of their national origin.

Canada has a vibrant Internet community. Because of the great expansion of the Internet in Canadian homes and businesses, Canada and its provinces have, in recent years, regulated Internet activity and electronic commerce.

REGULATION OF INTERNET ACTIVITIES AND ELECTRONIC COMMERCE

The provincial governments of Manitoba, Nova Scotia, British Columbia, Ontario, Yukon, Québec, Prince Edward Island, Saskatchewan, New Brunswick, Newfoundland and Nunavut have enacted legislation intended to govern electronic commerce. These provincial statutes are strongly inspired by the Uniform Electronic Commerce Act (the Uniform Act) which was adopted in 1999 by the Uniform Law Conference of Canada. The Uniform Act takes its source from the United Nations Model Law on Electronic Commerce and was adopted to serve as a guide for the provinces to enact their own electronic commerce legislation. Only Québec's Act to Establish a Legal Framework for Information Technology was not modeled on the Uniform Act.

Generally, the purpose of these statutes is to recognize the validity of an electronic document, the validity of electronic signatures as long as they correspond to the definition of "signature" under certain provincial legislation, the functional equivalence of electronic documents to written documents, and the validity of contracts in electronic form, and to set out the conditions under which an electronic contract will be valid. Under the Uniform Act, wills and their codicils, trusts created by wills or by codicils to wills, and powers of attorney documents that create or transfer interests in land are not recognized.

The Canadian Radio-Television and Telecommunications Commission (the CRTC) has also been given a mandate to regulate the Internet. The CRTC has confirmed that, for the time being, it will not impose its regulatory controls on the provision of content on the Internet. This is significant because television and radio stations in Canada are subject to strict content quotas. For example, no less than 35% of radio content must be "Canadian," as defined by the CRTC. Accordingly, a Canadian-based website that provides content is not as constrained as would be its television and radio counterparts.

APPLICABLE LAW AND JURISDICTION IN ELECTRONIC TRANSACTIONS

As Internet activity and electronic commerce are borderless, parties from different countries or from different provinces may be involved in electronic transactions. It is strongly recommended that the parties choose the applicable law and jurisdiction under which their transaction will be governed, construed and enforced in order to avoid a conflict over which law will apply in the event of a dispute.

CONSUMER PROTECTION IN ONLINE TRANSACTIONS

Despite the fact that several federal and provincial statutes regulate consumer protection, the Canadian Office of Consumer Affairs works on different initiatives to protect the consumer on the Internet. These initiatives have resulted in, among other things, the May 2001 Internet Sales Contract Harmonization Template (the Template) and the January 2004 Canadian Code of Practice for Consumer Protection in Electronic Commerce (the Code).

INTERNET SALES CONTRACT HARMONIZATION TEMPLATE

The Template was approved on 25 May 2001 by federal, provincial and territorial ministers to harmonize consumer protection in electronic commerce throughout Canada. This template covers contract formation, cancellation rights, credit card charge-backs, and information provision, and is destined to act as a guideline for provincial consumer protection legislation regarding online transactions. British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec and Nova Scotia have enacted legislation consistent with the template. Other provinces have consumer protection laws that may apply to online transactions.

THE CANADIAN CODE OF PRACTICE FOR CONSUMER PROTECTION IN ELECTRONIC COMMERCE

On 16 January 2004, the Code was endorsed by federal, provincial and territorial ministers responsible for consumer affairs. This code establishes a group of principles directed to any enterprise owning a transactional website. The code represents good practice benchmarks for merchants engaging in e-commerce, but does not have the force of law. The principal guidelines a vendor should follow include:

Information Provision

The Code suggests that transactional Web owners divulge sufficient information to the consumer. This way, the consumer can make an informed choice about

whether s/he will complete a transaction. A merchant owning a transactional website should identify the merchant to the consumer and provide him/her with information about the policies, the merchandise and services for sale, and the terms and conditions of sale. The type of information which should be provided to the consumer is specified in the Code.

Contract Formation and Fulfillment

The merchant should take reasonable measures to ensure that the consumer's agreement to a contract is fully informed and intentional. Information such as purchase price, conditions, details of order and payment conditions should be presented and approved separately. The cancellation of the transaction should be possible at any step during the process of approving the transaction. A vendor should not be able to require payment if the transaction is not approved by the consumer, if the product does not correspond to the description the merchant has given or if the delivery of the product is not made within the promised time.

Security Payment and Personal Information

Vendors should maintain effective controls to protect the integrity and confidentiality of payments provided by consumers. In this manner, vendors are encouraged to disclose to consumers the level of security used on their websites.

Redress

Any problems related to any transaction should be resolved through fair, timely and effective means, all of which should be provided by vendors. Complaint handling processes relating to a transactional problem should be free and be capable of resolution within 45 days of acknowledgment.

BORDER CONTROLS AND DUTIES

While the Internet may be borderless, border controls and customs duties are imposed on all goods shipped into Canada notwithstanding the fact they are purchased online.

DEFAMATION

Under Canadian common law and Québec Civil Law, defamation such as slander and libel is a tort. A website which displays any content in Canada must do so mindful of the fact that any information which is found to be slanderous or libelous could result in actions being brought against the website owner and publisher for its display in Canada. While Canada, under the Charter of Rights and Freedoms, recognizes the right to free expression, it is not as broad as that protected by the Bill of Rights in the United States and does not provide the

same protection in the context of a defamation action. The usual remedies for defamation include damages as well as injunctive remedies such as the immediate removal of the content from the offending website.

COMPETITION ON THE INTERNET

The expansion of online advertising and electronic commerce on the Internet has raised concerns as to whether an online consumer could be misled by representations or deceptive marketing practices on the Internet.

For this reason, the Competition Bureau published in 2003 (updated in August 2009) an information bulletin entitled “Application of the Competition Act to representation on the Internet.” This information bulletin confirms that the Competition Act applies equally to false or misleading representations regardless of the medium used. To evaluate if a representation is false or misleading in a material aspect under the Competition Act, the Competition Bureau will take into account the general impression left by the representation and its literal meaning.

Disclaimers are often used to alter the general impression left by a representation. The Competition Bureau will evaluate the following factors in order to determine if an online disclaimer is sufficient to alter the impression of the consumer:

- Location of the disclaimer on the website
- Hyperlinks to disclaimers
- Use of attention-grabbing tools
- Prominence of the disclaimer
- Accessibility of disclaimer by all potential users
- Repetition of the disclaimer

Individuals or companies making representations online from within Canada to Canadian consumers have an obligation to comply with the Competition Act. Concerns have been raised as to whether representations made from elsewhere to Canadian consumers would engage the liability of foreign companies or strangers.

COPYRIGHT

Canada is a signatory of the Berne Convention and accordingly, copyright laws in Canada have similar thresholds to those in most western countries. Under Canadian copyright laws, only the owner of a copyright work is entitled to reproduce, broadcast or telecommunicate to the public that work or to authorize others to do the same.

Any party who engages in any of these or similar acts without the express permission of the copyright owner will be held liable for copyright infringement. Canadian copyright law has been applied to the unlicensed use of copyright works on the Internet. The express permission of the copyright owner must be sought if one wishes to reproduce that work on the Internet.

CYBERSQUATTING AND MISAPPROPRIATION OF TRADE-MARKS

Canadian disputes over the right to domain names have been successfully tried before the ICANN domain name dispute tribunal under the UDRP rules for .com top-level domains (TLD), and under the CIRA CDRP rules for the .ca TLD. The decision in these Canadian cases, as elsewhere around the world, has not always been against the interest of the cybersquatter.

Canada has become a world leader in reducing global trade barriers. Free trade with the United States and Mexico and freer trade with other countries have lowered many of the barriers to entering into the Canadian market. Canada, with its rich resources and vibrant marketplace, presents many opportunities for foreign businesses and investors. The foreign investor is encouraged to explore the competitive advantages of Canada. Sensitivity to the cultural, administrative and legislative differences in Canada will assist an enterprise's entrance into the Canadian market.

Through the general information provided in this book, we have attempted to illustrate the highly multicultural society that is Canada and to provide an overview of some of the main issues faced by foreign businesses and investors in Canada. It is important for foreign businesses and investors wishing to invest in Canada or enter into trade with Canadian businesses to understand the laws and culture of this country and to seek the advice of counsel at the appropriate time.

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