



Doing Business in Canada



2023

AIRD BERLIS

airdberlis.com

AIRD BERLIS

Global Experience, Canadian Expertise™



For more information, please contact:
Steven Zakem, Managing Partner

T 1.416.865.3440 E szakem@airdberlis.com

airdberlis.com

TABLE OF CONTENTS

Introduction.....	1
Constitution, Government and Legal System	3
Vehicles for Doing Business.....	6
Securities Regulation.....	9
Income and Other Taxes.....	14
Canadian Income Tax Considerations for Non-Residents Making Investments in Canada	18
Regulation of Foreign Investment and Merger Regulation.....	29
Financial Services	35
Real Estate, Municipal and Land Use Planning.....	44
Commercial Leasing.....	50
Environmental	53
ESG	60
Cannabis	69
Technology/E-Commerce.....	73
Intellectual Property	78
Privacy and Data Protection Laws in Canada and Canada’s Anti-Spam Legislation	89
Labour and Employment Regulation and Benefits.....	95
Infrastructure Opportunities in Canada: Alternative Financing and Procurement and Public-Private Partnerships	103
Energy	108
Dispute Resolution	112
Commercial Arbitrations.....	116

MESSAGE FROM THE MANAGING PARTNER OF AIRD & BERLIS LLP - DBIC 2023

On behalf of Aird & Berlis, I am pleased to present this year's *Doing Business in Canada*, our annual publication providing an update on legal and business developments in Canada. This publication is written by legal professionals who are deeply versed in global trends and structures, as well as Canadian federal and Ontario provincial law.

The business opportunities in Canada are immense and provide great benefits to those planning to expand to or invest in the country. These benefits include global market access through existing trade agreements and transport infrastructure, a highly skilled and educated workforce, lower costs and lower risk due to political stability, a safe banking system and low corruption.

As one of Canada's premier business law firms, we act for a broad range of international business entities and individuals doing business in Canada, as well as Canadian entities doing business abroad. We are the Canadian gateway for our international clients and are dedicated to delivering high-quality Canadian legal services to advance their interests and add value to their businesses.

We are well-equipped to advise our clients with respect to their international business activities, with a particular focus on taxation, corporate finance (including mergers and acquisitions), securities, financing and real estate investments. We stay abreast of material changes announced and proposed in Ontario and across Canada, and keep clients and contacts apprised of these developments through publications, communications and presentations.

Environmental, social and governance and sustainability matters are becoming increasingly important to governments, investors, public and private companies and their stakeholders. Our multi-disciplinary group of lawyers advise clients on a broad range of ESG matters, including regulatory compliance, disclosure and reporting requirements, and risk mitigation.

Throughout this publication, we provide a broad overview of Canadian federal and Ontario provincial law as it relates to various sectors, industries and practice areas, as well as cover significant regulatory updates from the past year. Our goal is to equip you with the knowledge required to take advantage of the opportunities available in the Canadian market and ensure you have the proper support to do so. If you have any questions, please reach out to me or my colleagues listed in the relevant area and we would be happy to assist.

Steven Zakem
Managing Partner
Aird & Berlis LLP
szakem@airdberlis.com



Introduction

2023

Doing Business in Canada

AIRD BERLIS

airdberlis.com

Canada welcomes international participants in its economy and business community. Our firm has a thriving practice assisting international clients with the Canadian aspects of their business and financial matters. As one of Canada's premier business law firms, we have extensive national and international expertise. Our lawyers advise clients on all types of cross-border and multijurisdictional matters.

We provide Canadian legal services in three principal transactional activities: (1) transactions which originate outside of Canada; (2) Canadian transactions which involve jurisdictions outside of Canada; and (3) all Canada-wide transactions. We bring a focused approach to addressing the Canadian legal needs for each of these types of transactions. International clients often seek us out specifically for our market-leading tax expertise. We are also known for our cross-border M&A, corporate finance, real estate, intellectual property and insolvency practices.

To better serve our clients, Aird & Berlis has developed a network of partners around the world to ensure that our clients receive the same dedication, innovative ideas and personal attention they have come to expect from our firm. We are proud to be the Toronto law firm representative of [Interlaw](#), an international network of full-service law firms in more than 140 cities worldwide, and recipient of *Chambers Global's* 2023 top-ranked "Elite" Leading Law Firm Networks award.

We are very proud of the national and international recognition given to various members of our firm by authoritative guides, including: *Chambers Global*; *Chambers Canada*; *Who's Who Legal*; *Legal 500*; *The Best Lawyers in Canada*; the *Martindale-Hubbell Law Directory*; the *Martindale-Hubbell Bar Register of Preeminent Lawyers*; the *Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada*; the *Canadian Legal Lexpert Directory*; *IP Stars*; the *World Trademark Review*; *World Tax Guide*; *Benchmark Litigation*; and *IAM Patent 1000: The World's Leading Patent Professionals*.

Our dedication to the international business arena is exemplified by active involvement and leadership roles in the International Bar Association; the American Bar Association; the Canadian Bar Association; the Canadian Tax Foundation; the International Fiscal Association (international branch); and the International Fiscal Association (Canadian branch).

Our lawyers' commitment is also evidenced by our active participation in various international associations where we learn from our colleagues around the world, including the following, among others: AIJA (International Association of Young Lawyers); the American Bankruptcy Institute; the American Bar Association; the American Intellectual Property Law Association; the American Real Estate Society; the Association of Commercial Finance Attorneys; the Inter-American Bar Association; the International Association of Restructuring, Insolvency and Bankruptcy Practitioners; the International Bar Association; the International Council of Shopping Centers; the International Fiscal Association; the International Municipal Lawyers Association; the International Project Finance Association; the International Swaps and Derivatives Association; the International Trademark Association; and the International Women's Forum.

Our [Diversity & Inclusion](#) efforts also continue to receive recognition for the work we do to empower communities and create awareness. Through our educational programs, resources and activities, we recognize and celebrate diversity and promote a sense of belonging.

DISCLAIMER

This publication is a general overview of Canadian national and provincial law that has been prepared by Aird & Berlis LLP. It is intended for those planning to start, acquire or invest in a business in Canada, and who require more knowledge about the laws and regulations that affect the conduct of business in Canada - particularly in the province of Ontario. This publication is current as of May 2023, or other listed dates as indicated in the separate chapters.

Please note that the contents of this publication are a summary and should not be considered as legal advice to the reader. We therefore recommend that you seek the advice of our lawyers on any specific legal issue.

If you have any questions or comments on the materials, feel free to contact any member of our firm. For a list of our lawyers and areas of expertise, please visit us at www.airdberlis.com.



Constitution, Government and Legal System

2023

Doing Business in Canada

AIRD BERLIS

airdberlis.com

Canada was created in 1867 and currently consists of 10 provinces and three territories. Canada is a parliamentary democracy and constitutional monarchy with King Charles III as its head of state. The Governor General, to whom the King has delegated all of his powers over Canada (except the power to appoint or dismiss the Governor General), is obliged to follow the wishes of Canada's elected representatives. As the King's representative in Canada, the Governor General's role is largely ceremonial. Canada's two official languages are English and French and both have equal status in federal courts, Parliament and in all federal institutions.



[Image: Map of Canada, Source: Encarta]

GOVERNMENT AND POLITICS

Canada is a federal state in which legislative power is constitutionally divided between the federal government and the provincial governments. A third level of government, municipal or local government, has only the powers granted to it by the applicable provincial government. The federal and the provincial governments have exclusive jurisdiction and legislative powers over specified matters. The federal government also has “residual” jurisdiction over matters not specifically assigned to the provinces. In addition, while Canada's three territories (Yukon, Northwest Territories and Nunavut) have legislatures and govern themselves on local matters, their constitutional responsibilities are fewer than those of the provinces.

The federal government has control over matters of national interest, such as trade and commerce, transportation and communication, banking, currency, customs and excise, external

relations, defence and criminal law. The provincial governments have power over matters of a local nature, such as property and civil rights within the province, municipal institutions, education, health and welfare, and the administration of justice. Since coming into force more than three decades ago, the *Canadian Charter of Rights and Freedoms*, has imposed limitations on government powers in order to protect civil liberties.

Canada has a parliamentary government. The legislative power of the federal government is vested in the Parliament of Canada, which consists of the Crown, an upper house, known as the Senate, and a lower house, known as the House of Commons. The members of the House of Commons (known as Members of Parliament, or MPs) are chosen in a general election held on the third Monday of October in the fourth calendar year following the last general election, though there is no prohibition on a general election being called on another date, when, on the advice of the Prime Minister, the Governor General dissolves Parliament. The federal government is headed by the Prime Minister, who is normally the leader of the political party that has the most members in the House of Commons. The members of the Senate are currently appointed by the Governor General on the recommendation of the Prime Minister, and appointments are distributed on a regional basis.

Canada's provinces have systems of government which parallel that of the federal government in several ways. A premier leads each provincial government by virtue of being the leader of the political party with the most support in the provincial legislature, and forms a cabinet from the elected members of the governing party. As the federal and the provincial governments are elected separately, there may be different political parties in power at each level. There are no provincial bodies that are equivalent to the Senate.

Those seeking to do business and/or develop a project in Canada need to be mindful of the fact that various Indigenous groups in Canada have their own governments and jurisdictions of authority that may overlap with provincial or federal regimes. Canada's Constitution also enshrines the Indigenous and treaty rights of the Indigenous Peoples of Canada. At present, the scope and nature of these Indigenous and treaty rights are not clearly defined in Canadian law and, in turn, they have not been addressed and accommodated within all the various aspects of Canada's governance and legal frameworks. However, with the passing of the *United Nations Declaration on the Rights of Indigenous*

Peoples Act in 2021, the federal government took a significant step forward in Canada's implementation of the United Nations Declaration on the Rights of Indigenous Peoples ("**UNDRIP**") which requires the federal government to take all measures necessary to ensure that federal laws are consistent with UNDRIP, and to do so in consultation and co-operation with Indigenous Peoples. As a result, those doing business or developing a project in a particular region of Canada will want to identify and understand the dynamic and issues between the local Indigenous groups and the various local and provincial governments and regulators, as well as the federal government, to fully understand all of the implications of doing business in that particular region.

LEGAL SYSTEM

There are two legal systems in Canada: British-based common law and European-style civil law. Civil law predominately applies in the province of Quebec, while common law applies in all other provinces and territories. Both legal systems are subject to the Constitution of Canada.

The Supreme Court of Canada is Canada's highest court. It is the final court of appeal having jurisdiction to hear appeals from the courts of appeal of each province, as well as from the Federal Court of Appeal, which has jurisdiction over a relatively small range of specialized areas under the jurisdiction of the federal government, such as intellectual property. The Supreme Court of Canada consists of nine judges, three of whom must be from the province of Quebec. The judges of the Supreme Court, the Federal Court and certain provincial courts (so-called "**Superior Courts**") are appointed by the Governor General on the advice of the Prime Minister and cabinet.

May 2023

A person in a dark business suit and white shirt is pointing with their right index finger at a document. The document features a bar chart with blue and red bars. The background is a blurred office setting. A yellow L-shaped graphic is in the top right corner.

Vehicles for Doing Business

2023

Doing Business in Canada

AIRD BERLIS

airdberlis.com

In selecting the most appropriate vehicle for carrying on business in Canada, foreign entities will often be driven by tax preferences. Other factors that should be considered in determining the form of the business organization include potential liabilities, the method of financing and the nature of a particular business. The most common form of business organization in Canada is a corporation. Foreign entities may also consider conducting business in Canada through a branch office, partnership, limited partnership, franchise and licensing arrangement, joint venture, or by entering into contracts with Canadian distributors and independent agents.

CORPORATIONS

Overview

A foreign entity may choose to carry on business in Canada through a Canadian subsidiary corporation. A corporation with share capital is the form of business enterprise used most frequently to carry on commercial activities. A corporation is a legal entity with a separate legal existence from its shareholders, has perpetual existence and, unless its constating documents provide otherwise, has all the rights, powers and privileges of a natural person. A corporation offers the greatest flexibility in both the structuring of decision-making authority and of investment in the business. Its separate legal existence, however, also means that a corporation is subject to separate reporting, regulatory and filing requirements imposed by various levels of government.

Incorporation as a Federal or Provincial Corporation

In Canada, a corporation may be incorporated under federal law pursuant to the *Canada Business Corporations Act* (the “**CBCA**”) or under the corporate statute of any province or territory. The key distinction between the two types of corporations is that a federal corporation may carry on business in any province or territory provided that it complies with the applicable registration and reporting requirements of each province. In contrast, a provincial corporation is required to obtain an extra-provincial licence and register in any other province where it carries on business. Many incorporation statutes, including the CBCA, have minimum Canadian residency requirements for directors. In December 2020, Ontario enacted the *Better for People, Smarter for Business Act, 2020*, which, among various significant amendments to the *Business Corporations Act* (Ontario), removed the Canadian residency requirement for directors.

In June 2019, new regulations pertaining to federal corporations and certain provincial corporations came into force, which now require corporations to actively collect and maintain certain information regarding beneficial shareholders with “significant control” over the corporation, in addition to the pre-existing obligation to maintain a database of registered shareholders.

Unlimited Liability Companies

The laws of Nova Scotia, Alberta and British Columbia provide for the creation of unlimited liability companies. In the United States, we understand that certain rules permit certain entities, including unlimited liability companies, to be treated as partnerships or disregarded entities for U.S. tax purposes rather than as corporations. The use of a flow-through vehicle may be attractive for U.S. investors.

OTHER BUSINESS VEHICLES

Branch Office

A non-resident foreign corporation may choose to carry on business in Canada through an unincorporated branch office. A branch operation is not a separate legal entity and, accordingly, exposure to debts, liabilities and obligations of the Canadian operation are important considerations. In addition, the foreign corporation will be subject to federal and provincial laws and must obtain a licence or otherwise register in all provinces in which it carries on business.

Partnerships

A general partnership is a relationship where two or more persons, either individuals or corporations, carry on a business in common with a view to profit. The partnership is not a legal entity separate from the partners. Subject to the provision of any agreement between the partners, each partner is allocated a specified share of the profits and losses of the partnership business and is entitled to take part in the management of the partnership business. A separate income tax return is not required from a partnership, although in many cases an information return is required for tax purposes. The tax consequences of a partnership’s business activities flow through to the individual partners in their respective proportions and are reported upon individually in each partner’s tax return. All partners assume unlimited liability for the debts and obligations of the partnership.

Limited Partnerships

A limited partnership is a partnership with unique characteristics. It is comprised of: (a) one or more general partners who manage the business and assume all liabilities of the limited partnership; and (b) limited partners whose liability is limited to their contribution to the partnership. In Ontario, in order to maintain limited liability status, limited partners are not permitted to take part in the management of the business.

Except in certain circumstances, the flow-through features and tax consequences of a general partnership are the same for a limited partnership. In essence, a limited partnership combines the tax benefits of a partnership with the advantages of limited liability.

Franchising

A foreign entity may expand its business into Canada by means of a franchising arrangement. In a typical franchise arrangement, a franchisor develops a business system, in association with a trademark, and licenses the use of that system and trademark to a franchisee. The franchise relationship is governed by a franchise agreement which sets out the details of the relationship, including the fundamental rights and obligations of the parties and the operating principles of the business system. Foreign entities can choose to set up a separate Canadian entity through which Canadian licences may be granted, or, in certain circumstances, can grant licences directly from the foreign country to Canadian franchisees.

Certain provinces have specific legislation governing the sale of franchises and impose specific disclosure requirements.

Joint Ventures

The term “joint venture” is commonly used to describe a contractual business arrangement between two or more parties that have agreed to combine complementary resources for a particular undertaking or specific business venture without the formality of a new legal entity such as a corporation or limited partnership. A joint venture is not recognized as a separate legal entity and therefore, for tax purposes, income and losses are calculated separately according to the business structure of each party.

May 2023

The background features a complex digital financial theme. A large, stylized number '50' is formed by a grid of blue and cyan circles, positioned diagonally across the center. The background is filled with various financial data points, including red and green arrows, and numerical values such as '50.9086', '90.6718', and '88.9625'. A yellow L-shaped graphic is located in the top right corner.

Securities Regulation

2023

Doing Business in Canada

AIRD BERLIS

airdberlis.com

Regulatory requirements imposed by Canadian securities authorities and stock exchanges are generally comparable to U.S. requirements. In Canada, securities regulation is within provincial jurisdiction. Currently, each of the provinces and territories has securities regulatory legislation. Although the securities regulatory regimes are generally similar within Canada, there is currently no national securities law or national securities regulator.

The Canadian uniform securities regulation system has developed “organically” over time on the basis of increased co-operation between provincial and territorial regulators. Currently, such “organic” development is evidenced by co-ordination among all provincial securities commissions (principally through an umbrella organization known as the Canadian Securities Administrators or “**CSA**”) in formulating “national instruments” and “national policies” which have been adopted by each of the provincial and territorial securities regulators. Further, with the adoption of the “principal regulator” or “passport” system by each province and territory of Canada (other than Ontario), many aspects of securities law are effectively regulated by one participating jurisdiction in addition to Ontario. In addition, the national electronic filing system (known as “**SEDAR**”) (the Canadian equivalent to EDGAR) and the passport system encourages regulators to delegate responsibilities to one another. It is anticipated that, in July 2023, a new and enhanced national electronic filing system known as SEDAR+ will replace SEDAR,

Canada has a national registration database (“**NRD**”) system, which is a web-based system that permits dealers and advisers to file registration forms electronically and to deal with one principal regulator in connection with initial registration, amendments to registration and approval or review of certain sponsored individuals. Non-resident firms are not permitted to use the NRD system due to differing requirements across Canada for non-residents.

PROSPECTUS REQUIREMENT

A “security” is broadly defined, similar to the U.S. definition, to be any document evidencing title to or an interest in, among other things, the capital, assets, profits or property of a person or corporation. In addition, a number of different types of agreements and instruments involving monetary consideration are specifically included in the definition of “security,” including, among other

things, notes, stocks, treasuries, bonds, debentures, options or privileges on a security.

Provincial and territorial securities laws generally require the filing of a prospectus to qualify any “distribution” of securities, subject to the availability of a prospectus exemption. A distribution of securities includes, among other things, a trade by an issuer in previously unissued securities and a trade in securities from a person that is a “control person” in respect of the issuer. A person (or combination of people acting jointly or in concert) is generally presumed to be a “control person” in respect of an issuer if that person (or combination of people acting jointly or in concert) holds more than 20% of the voting rights attached to the securities of the issuer. In addition, securities legislation of the various Canadian jurisdictions deems certain trades in securities that were previously acquired under an exemption from the prospectus requirements, called “first trades,” to be distributions. Securities of an issuer that is a “reporting issuer” under Canadian securities law that were acquired under an exemption from the prospectus requirements are generally freely tradable, depending on the exemption relied upon, after a four-month hold period.

Any person or corporation engaged in trading or giving advice regarding securities must be registered under the relevant provincial and territorial securities legislation unless an exemption from this requirement is available.

PROSPECTUS DISCLOSURE

A prospectus must be prepared in accordance with applicable provincial and territorial regulations and must contain “full, true and plain” disclosure of all material facts relating to the securities being offered. In the event that a prospectus contains a misrepresentation, the issuer and each underwriter that signs it may be found liable. An issuer would not be liable if it could prove that the purchaser purchased the securities with knowledge of the misrepresentation. In addition, directors of an issuer and underwriters can also rely on a due diligence defence in order to avoid liability for a misrepresentation.

Upon filing a final prospectus and being receipted therefor, the issuer (assuming it had not already filed a prospectus) will become a “reporting issuer” in each jurisdiction in which a receipt for the prospectus was issued. As a reporting issuer, the issuer is subject to continuous disclosure rules and periodic reporting.

The regulation of trading in the “secondary market” is generally referred to as the “closed system.” In the closed system, every trade that is a “distribution” requires the filing of a prospectus or obtaining a ruling from a securities regulatory authority allowing the trade, unless a prospectus exemption is available. The resale of securities sold pursuant to a prospectus exemption requires reliance on a further exemption or, if this is not available, on a prospectus – unless a set of resale restrictions is met. Those restrictions are that the issuer of securities is a “reporting issuer” for the four months prior to the trade, that the securities carry a prescribed legend, that the person proposing to sell the securities must have held them for a minimum hold period of four months and that no unusual effort is made to prepare the market for the securities being sold. The system is called “closed” because the security never becomes freely tradable unless a prospectus is filed or, if distributed under a prospectus exemption, until enough time passes to allow information about the issuer and the security to be disseminated in the marketplace.

EXEMPTIONS FROM THE PROSPECTUS REQUIREMENT

The existing exempt offering regimes in Canada’s various jurisdictions have been consolidated in National Instrument 45-106 – Prospectus Exemptions (commonly known as “**NI 45-106**”), which is designed to generally harmonize the prospectus and registration exemptions contained in provincial statutes and instruments.

The most useful existing exemptions for an entity financing a business in Canada are the following exemptions:

(a) the “accredited investor” exemption permits certain qualified investors, including institutional investors and persons or companies that meet income or asset tests (and who, if they are an individual, have completed a prescribed Risk Acknowledgement Form) to purchase securities without a prospectus. No minimum amount must be invested and accredited investors are able to re-sell securities in any dollar amount to other accredited investors; (b) the “substantial purchase” exemption permits a person (though not an individual) to acquire securities on a prospectus and registration exempt basis where each purchaser invests no less than C\$150,000 paid in cash; and (c) the “private issuer” exemption.

In the case of certain exempt trades, it may be necessary to file a report and pay a fee to the relevant securities regulator. To rely on certain

prospectus and registration exemptions (although not the accredited investor or substantial purchase exemption), the issuer is required to deliver a disclosure document to prospective investors. Where a disclosure document is provided to an investor (whether required by the exemption or voluntarily) in certain Canadian jurisdictions, including Ontario, securities legislation grants the investor a right of action for damages or recession if the disclosure document contains a misrepresentation. In addition, a copy of the offering memorandum generally must be filed with the relevant securities regulator.

CONTINUOUS DISCLOSURE REQUIREMENTS AND OBLIGATIONS

There are generally two kinds of reporting requirements required under Canada’s continuous disclosure regime – “periodic” and “timely.” Periodic reporting requires a reporting issuer to disclose material information by filing disclosure documents such as financial statements, annual reports, annual information forms and proxy circulars. Conversely, timely reporting requires a reporting issuer to disclose material changes as they occur, through press releases and material change reports. “Insiders” of a reporting issuer (i.e., officers, directors and over 10% shareholders) must also report any trade they might make in a reporting issuer’s securities within five days of the trade in question (the initial insider reports continue to be required to be filed within 10 days of the trade). Failure to report may result in daily monetary penalties, depending on provincial jurisdiction.

National Instrument 51-102 – Continuous Disclosure Obligations (commonly known as “**NI 51-102**”) was introduced to provide a harmonized set of continuous disclosure requirements for reporting issuers across Canada (other than investment funds) and, generally speaking, sets out the obligations of reporting issuers relating to business acquisitions, annual information forms (“**AIFs**”), material change reporting, management discussion and analysis (“**MD&A**”), information circulars, proxies and other disclosure matters. The board of a reporting issuer is required to approve both interim, unless this function is delegated to the audit committee of the board, and annual financial statements prior to their release, and MD&As must include discussions of, and provide a comparative analysis of, all financial transactions, including all off-balance sheet transactions, as well as providing information about critical accounting estimates and facts that are required for a better understanding of the issuer’s affairs.

CORPORATE GOVERNANCE PRACTICES

The CSA has adopted a uniform set of corporate governance rules and policies. These rules and policies generally require reporting issuers to disclose their corporate governance practices by way of disclosure in their information circulars or AIFs and to be filed on SEDAR (and soon, SEDAR+).

Other CSA policies are designed to provide “guidance” on corporate governance practices. This guidance, or best practices, constitutes recommendations relating to board independence, the role of a board in its management of board members, etcetera.

LIABILITY FOR SECONDARY MARKET DISCLOSURE

Ontario legislation grants certain rights of action to investors who purchase or sell securities from third parties in the market (commonly known as the “secondary market”) as opposed to investors who purchase securities from an issuer (commonly referred to as the “primary market”). This legislation creates an offence for fraud, market manipulation and misleading or untrue statements. The legislation also introduces a regime for statutory civil liability by providing a cause of action in respect of a misrepresentation by or on behalf of a responsible issuer in its disclosure documents, whether oral or written, and a responsible issuer’s failure to make timely disclosure of a material change. This legislation creates a statutory right of action without regard to whether the purchaser or seller relied on any alleged misrepresentation, which is different from the common law cause of action for negligent misrepresentation which requires detrimental reliance.

STOCK EXCHANGES IN CANADA

Canada has four main securities exchanges on which debt or equity securities can be listed for trading: Toronto Stock Exchange (“**TSX**”), the TSX Venture Exchange (the “**TSXV**”), Canadian Securities Exchange (“**CSE**”) and Cboe Canada (formerly NEO Exchange) (“**Cboe**”). The TSX is Canada’s largest stock exchange and also oversees and administers the Montréal Exchange (primarily a derivatives exchange) and the TSXV, which is a listed exchange for more junior companies. The CSE is focused also on listing microcap and emerging companies, as it offers simplified listing processes and is generally considered to impose less onerous reporting and continued listing requirements on its issuers. Cboe is a senior stock exchange that is majority-owned by large institutional investors and in addition to

listing its own securities, trades all TSX, TSXV and CSE securities.

TAKEOVER BIDS

The regulation of takeover bids in Canada is governed by the applicable provincial and territorial securities statutes in Canada’s various provinces and territories. A takeover bid in Canada is generally defined as an offer to acquire outstanding voting securities or equity securities of an issuer that would bring the “offeror’s securities” to 20% or more of the class in question. In this context, “offeror’s securities” include securities beneficially owned or over which control or direction is exercised by the offeror or persons acting jointly and/or in concert with the offeror. A purchase resulting in a holding of less than 20% of the relevant class of securities will not constitute a takeover bid even if the bidder obtains effective control of the company.

An “early warning” notification system is imposed once 10%, but less than 20%, of the voting or equity securities of a reporting issuer is acquired. In this case, every person (or persons acting jointly or in concert) acquiring 10% or more of the voting or equity securities of a reporting issuer is required to issue a press release containing certain prescribed information and to file an “early warning report” in prescribed form within two business days of the acquisition in question. A further press release and early warning report is required whenever an additional 2% of the outstanding securities is acquired by a person holding 10% or more.

A takeover bid must be made in compliance with the substantive and procedural requirements of the regulating statute of the applicable province or territory in the absence of an exemption from the takeover bid requirements. Generally speaking, a takeover bid offer is to be made to all security holders of a given class on identical terms. A formal offer requires preparation of a takeover bid circular satisfying certain statutory disclosure requirements, which circular must be sent to all shareholders of the target. However, it is not necessary to make an offer for all shares and the offeror may determine the number of shares for which it wishes to bid, subject to a mandatory minimum tender requirement of more than 50% of the outstanding securities of the class that are subject to the bid, excluding those beneficially owned, or over which control or direction is exercised, by the bidder and its joint actors. On a partial bid, shares must be taken up pro-rata to those tendered to the offer. Conditions, other than financing, may be attached to the bid. For instance, it is common to make a purchase

conditional upon obtaining a minimum level of acceptance, frequently two-thirds (the threshold for approval of certain fundamental corporate transactions in most jurisdictions) or 90% (the level which gives the offeror the right to acquire the balance of the shares outstanding). Subject to certain exemptions which may shorten the period, a takeover bid must remain open for a minimum deposit period of 105 days. Furthermore, after the minimum tender requirement has been achieved and all other terms and conditions of the bid have been complied with or waived, bids are required to be extended by the offeror for an additional 10 days.

There are various statutory exemptions from the takeover bid requirements and the provincial and territorial securities statutes provide securities regulatory authorities with discretion to exempt takeover bids from full bid compliance. The most commonly relied upon takeover bid exemptions under the provincial and territorial securities statutes are: (a) purchases and private agreements from not more than five persons where the consideration paid does not exceed 115% of the market price (as defined for the securities at the date of purchase); and (b) acquiring, at market prices, within any period of 12 months not more than 5% of the outstanding securities of a class measured at the commencement of the 12-month period.

In addition to the takeover bid regime, there are two other structures that can be used to acquire 100% of a public company, namely: (a) a plan of arrangement (which is effected under court supervision and requires the approval of two-thirds of those shareholders voting on whether to amalgamate); and (b) an amalgamation squeeze-out (which requires the approval of two-thirds of the votes of the shareholders voting on the question). In both the plan of arrangement and in an amalgamation squeeze-out, the shareholders may, under certain circumstances and within the prescribed time, effect “dissent” rights and demand that you pay fair value if they have a concern that the amount to be paid is not fair value.

In addition, the CSA has promulgated rules regarding related party transactions, insider bids and going private transactions. The essence of these rules is that if there is such a transaction (which is based on the economic result and not on the form) then the process must be overseen by an independent committee of the board of directors, there must be a valuation done by an independent valuator and there must be a vote of the approval of the “majority of the minority shareholders.”

CAPITAL POOL COMPANIES

The Capital Pool Company program is a unique two-stage listing process offered by the TSXV which brings together experienced participants in public capital markets with entrepreneurs seeking funding and a public listing. In stage one of the process, a new shell company (known as a “**Capital Pool Company**”) is listed on the TSXV by way of an initial public offering (the “**CPC IPO**”).

A financing, through an agent who is registered under applicable securities laws, must be completed in conjunction with the CPC IPO. The gross proceeds of the CPC IPO plus all subsequent private placements prior to the Qualifying Transaction (as hereafter defined), must not exceed C\$10 million.

In stage two (the “**Qualifying Transaction**”), the Capital Pool Company identifies a suitable asset or business. In order to be accepted by the TSXV, the proposed company resulting from the Qualifying Transaction (also known as the Resulting Issuer) must be able to meet the initial listing requirements set out in the TSXV’s policies. If the acquired business can meet the minimum listing requirements of the TSX, it can be directly listed on the TSX at the closing of the Qualifying Transaction.

In many cases, taking a business or asset public in Canada through the Capital Pool Company program can be a more cost and time efficient alternative than a listing through a traditional initial public offering. Recent changes to the Capital Pool Company program effective from January 1, 2021, have provided greater flexibility and simplicity to the program by reducing the regulatory burden and relaxing certain requirements.

May 2023



Income and Other Taxes

2023

Doing Business in Canada

AIRD BERLIS

airdberlis.com

In Canada, taxes are levied at the federal, provincial and municipal levels of government. At the federal level, the government generates most of its revenue by way of income taxes and excise taxes imposed on the distribution and consumption of goods and services in Canada. The provinces and territories also impose income taxes and sales taxes, whereas municipalities generally levy taxes on real property. There are no stamp duties levied by any government in Canada.

The rates of income taxation to which a taxpayer will be subject will vary according to a number of factors, including: (a) the character of the income; (b) the nature of the business activity; (c) the jurisdiction in which that activity is carried on; and (d) the identity of the taxpayer in question.

TYPES OF INCOME

Under the *Income Tax Act* (Canada) (“**ITA**”), the residence of a person and the source of income are the key factors in determining liability for income tax. Non-resident persons are liable for Canadian income tax only in respect of income earned in Canada. The ITA imposes income tax on a non-resident who is employed in Canada, carries on business in Canada or disposes of certain types of Canadian property. Income resulting from the disposition of capital property gives rise to a capital gain, currently only one-half of which is included in income and taxed at the taxpayer’s rate of taxation as otherwise determined.

INDIVIDUALS

Individuals are liable for tax under the ITA on their worldwide income if they are resident in Canada. The tests for determining residency are not easily applied. Generally speaking, an individual’s residency status arises from his or her “connection” with Canada, generally whether such individual is ordinarily resident in Canada. An individual may also be deemed to be resident in Canada for a particular year where the person sojourns (which generally means to visit or temporarily stay) in Canada for 183 days or more in a calendar year.

In Canada, individuals pay tax at graduated rates based on their income levels. In Ontario, individuals are liable to a 20% surtax on provincial tax payable in excess of C\$5,315, and an additional 36% surtax on provincial tax payable in excess of C\$6,802. The top marginal rate of tax for an individual resident in Ontario for 2023 is 53.53%.

Because of tax credits, the top marginal rate of tax on dividends received by an individual resident in

Ontario from a taxable Canadian corporation is 47.74% for non-eligible dividends, while the top marginal rate of tax for eligible dividends is 39.34%. The effective top marginal tax rate on capital gains realized by an individual resident in Ontario is 26.76%. The top marginal rates vary between provinces and territories.

CORPORATIONS

Under the ITA, the taxation of a corporation varies depending on the jurisdiction of incorporation, the type of corporation, the type of income and the activities carried on by the corporation. As discussed in the context of individuals above, a corporation resident in Canada is liable for tax in Canada on its worldwide income. Credit for Canadian taxes is generally available in respect of foreign taxes paid in respect of foreign source income. A corporation is deemed to be resident in Canada if it is incorporated in Canada. A corporation will also be resident in Canada if its “central management and control” is exercised from within Canada.

In general, a corporation’s income for purposes of the ITA is its income computed in accordance with generally accepted accounting principles, as modified by specific rules in the ITA. For instance, corporate income for tax purposes is not computed on a consolidated basis. Also, the ITA provides rules in respect of depreciation (referred to as capital cost allowance), which may differ from depreciation for accounting purposes. In addition, the ITA provides deductions and credits in respect of scientific research carried on in Canada and a special regime for Canadian resource exploration and development. Various rules restrict the deductibility of certain expenses, particularly in non-arm’s-length situations.

The combined federal and provincial corporate income tax rates vary from a high of 31% in Prince Edward Island to a low of 23% in Alberta. The combined federal and provincial corporate income tax rate in Ontario is 26.5%. These tax rates are reduced under the ITA for small businesses that are Canadian-controlled private corporations (“**CCPCs**”) and for corporations that carry on manufacturing or processing activities. A CCPC is a private corporation that is a Canadian corporation, other than a corporation controlled directly or indirectly by a non-resident, by one or more public corporations or by a combination of non-residents and public corporations. Depending on the facts, a corporation which is 50% owned by Canadians and 50% owned by non-residents may qualify as a CCPC and therefore be subject to a reduced rate of tax.

A CCPC is generally subject to a reduced rate of tax on the first C\$500,000 of business income it earns each year. In Ontario, the combined federal and provincial corporate income tax rate for a CCPC on such income is 12.2% for 2023. If certain income and capital tests are exceeded, the benefits of this low rate of tax may be lost. Where a non-CCPC earns income eligible for the manufacturing and processing deduction, the combined federal and provincial tax rate on such income in Ontario is 25%.

Ontario also has a corporate minimum tax (“**CMT**”), which will apply to all large corporations in Ontario with gross revenues of at least C\$100 million and total assets of at least C\$50 million. Subject to certain adjustments, the CMT rate is 2.7%.

PARTNERSHIPS

For Canadian income tax purposes, a partnership acts as a flow-through vehicle unless it is a “SIFT partnership” for purposes of the ITA. Unlike a trust, a partnership is not a taxable entity. While not a separate legal entity per se, the ITA requires that a partnership calculate its income or loss from each source as if it were a separate person resident in Canada before flowing through the income (or loss) from each source through to the partners in their respective proportions. Such income (or loss) retains its character in the hands of each partner and is then reported in each partner’s tax return with such income being taxed at each partner’s respective tax rate.

TRUSTS

Generally speaking, the scheme of the ITA allows a trust having only Canadian resident beneficiaries to determine whether the income of the trust will be taxed in the hands of the trust or flowed through to its beneficiaries to be taxed in their hands.

Income that is received by a trust and paid or payable to beneficiaries in the year is included in the income of the beneficiary and deductible by the trust. Losses of a trust may not be flowed through to the beneficiaries. On the other hand, income that is received by the trust and not paid or payable to the beneficiaries is taxed in the trust as if the trust were an individual. However, most *inter vivos* trusts are taxed at the top marginal rate and are not entitled to individual tax credits.

Real Estate Investment Trusts (“**REITs**”) and other forms of business trusts had become quite common in the early 2000s. However, beginning in 2007, certain publicly-traded business trusts which meet the definition of “SIFT trust,” other than trusts

which meet the definition of “real estate investment trust,” as defined in the ITA, became subject to tax on certain income. Where this tax applies, the SIFT trust essentially loses its ability to flow-through income to beneficiaries in respect of such income. As a result of the tax on SIFT trusts, most business trusts other than REITs converted to corporations before the end of 2010.

OTHER TAXES

The Canadian tax system also includes federal and provincial sales taxes, payroll taxes, and land transfer taxes (addressed in the discussion under Real Estate). Individuals owning personal real property may also be subject to property taxes on the ownership or transfer of such property.

GST/HST AND PROVINCIAL SALES TAXES

Canada imposes a 5% federal goods and services tax (“**GST**”) on taxable supplies made in Canada. The tax generally applies to supplies of most goods and services made in Canada. Suppliers are liable to collect the tax from recipients of the supplies and remit such tax to the government. In some instances (notably certain imports), the recipient of supplies may have an obligation to self-assess and remit the tax.

Taxpayers may be entitled to an input tax credit if the tax is paid in respect of supplies acquired for use, consumption or supply in the course of commercial activities.

Most provinces (other than Alberta) also have a provincial sales tax. Some provinces, such as Manitoba and Saskatchewan, directly impose the tax on certain sales of goods and services. Others, like Ontario and Nova Scotia, have harmonized their provincial sales taxes with the federal GST to create a harmonized sales tax (“**HST**”). Ontario imposes the HST at 13% on all goods and services that would be subject to the GST (other than a few enumerated exceptions). Quebec has a sales tax which is similar to, but not identical to, the GST.

Persons paying the HST in Ontario are entitled to an input tax credit in respect of tax paid on supplies acquired for use, consumption or supply exclusively in the course of commercial activities.

Non-residents of Canada that register for GST/HST purposes but do not have a permanent establishment in Canada are required to provide a security deposit equal to 50% of the net tax remittable or refundable to the non-resident for the immediately preceding 12-month period. For the first year after registration, the non-resident is required to estimate its net tax for

security purposes. Thereafter, the security will be 50% of the net tax remittable or refundable in the previous fiscal year. The maximum amount of security required is C\$1 million while the minimum amount is C\$5,000. A non-resident may post security in the form of cash, certified cheque or money order and certain types of bonds. However, no security need be provided if the annual taxable supply of a non-resident does not exceed C\$100,000 and the annual net tax (whether remittable or refundable) is less than C\$3,000.

PAYROLL TAXES

Payroll taxes include employer and employee contributions towards the Canada Pension Plan and Employment Insurance and, in Ontario, the Employer Health Tax.

Canada Pension Plan contributions are required when an employee is at least 18 years of age but younger than 70, is in pensionable employment during the year, and does not receive a Canada Pension Plan or Quebec Pension Plan retirement or disability pension.

Canada Pension Plan contributions are deducted from most types of remuneration payable, including salaries, wages, bonuses and commissions. An employer is required to deduct contributions from the amounts and benefits paid and provided to employees. The same amount must also be contributed by the employer as its share of the Canada Pension Plan contributions. The maximum employee contribution for 2023 is C\$3,754.45.

An employer must deduct employment insurance premiums from an employee's insurable earnings if the employee is in insurable employment during the year. Insurable employment includes most employment in Canada under a contract of service. There is no age limit for deducting employment insurance premiums. An employer is required to pay 1.4 times the amount of an employee's premium as its contribution towards employment insurance. The maximum annual employee premium for 2023 is C\$1,002.45. The maximum annual employer premium per employee for 2023 is C\$1,403.43.

Ontario levies Employer Health Tax on employers who have annual total remuneration exceeding an enumerated amount and the remuneration is paid to employees or former employees who report for work at a permanent establishment of the employer in Ontario or do not report for work at a permanent establishment of the employer but are paid from or through a permanent establishment of the employer in Ontario.

The first C\$1 million of annual remuneration is exempt from tax for this purpose if the employer is a private sector employer. The exemption is eliminated for private sector employers with annual Ontario payrolls (including the payroll of any associated employers) over C\$5 million. Remuneration includes all payments, benefits and allowances required to be included under sections 5-7 of the ITA in the income of the employee from an office or employment, or would be required to be included if the employee were a resident of Canada. Payments of salaries and wages would be considered remuneration for this purpose.

The rate of tax varies from 0.98% on Ontario payroll less than C\$200,000 to up to 1.95% for payroll in excess of C\$400,000.

CAPITAL TAXES & SPECIAL FINANCIAL INSTITUTION TAXES

There is no capital tax under the ITA nor does any province impose a tax on the capital of a taxpayer other than a financial institution.

A flat capital tax of 1.25% is levied on a financial institution's taxable capital employed in Canada in excess of its capital deduction for the year. The amount of the capital deduction is C\$1 billion. A financial institution can also offset its capital tax payable by its federal income tax payable for that fiscal year.

STAMP DUTIES

Canada does not impose stamp duties.

August 2023



Government
of Canada

Canadian Income Tax Considerations

for Non-Residents Making Investments in Canada

2023

Doing Business in Canada

AIRD BERLIS

airdberlis.com

In acquiring a business in Canada, a determination must be made as to whether it is preferable to purchase the assets of the business or the shares of a Canadian corporation which owns the assets. From a purchaser's point of view, it is often advantageous to purchase the assets of the business so that the cost base of the assets, for tax purposes, will be equal to the purchase price of the assets. In a situation where shares of an existing Canadian corporation are acquired, the cost base of the assets for Canadian federal income tax purposes generally remains at the historical tax cost of such assets to the corporation whose shares are acquired.

Due to differing tax concerns for Canadian sellers and foreign buyers, a purchase and sale may be structured to accommodate potentially conflicting interests. Canadian individual sellers may wish to take advantage of their capital gains exemption by selling shares of Canadian private corporations that meet certain criteria. As of 2023, the amount of the capital gains exemption is C\$971,190 and is adjusted annually as it is indexed to the rate of inflation. A Canadian seller may also prefer to sell shares if there would be significant recaptured capital cost allowance on an asset sale. A non-resident seller of shares of a Canadian corporation may insist on a share sale since unless the value of the shares is derived principally from certain Canadian nexus properties (such as Canadian real estate, Canadian resource property and Canadian timber limits) any gain on the sale of such shares is not likely to be taxable in Canada. Alternatively, a non-resident seller may wish to sell shares of a Canadian corporation in order to take advantage of a treaty exemption for capital gains if such gains might otherwise be taxable in Canada. Conversely, a purchaser may wish to acquire assets directly in order to achieve a "step-up" in their basis of the assets held by a business and retain the opportunity to apply Canadian losses or profits against their profits or losses from other operations.

A foreign purchaser's tax goals normally include the following: minimize Canadian taxation of operating profits; minimize Canadian withholding taxes when funds are repatriated; deferral of foreign taxation on Canadian profits; maximize the utilization of foreign tax credits when Canadian income is taken into account for the foreign purposes; and in the case of a U.S. purchaser, amortize the goodwill for U.S. tax purposes over 15 years on a straight-line basis or reduce Canadian earnings and profits for U.S. tax purposes by goodwill amortization.

CANADIAN BRANCH OR CANADIAN SUBSIDIARY

Where a non-resident purchaser has made a decision to purchase the assets of a Canadian business through a corporation, the purchaser will have to determine whether to acquire the assets using a branch to carry on the business or, alternatively, a corporation formed in Canada. The same determination will have to be made by any non-resident who seeks to open or establish a new business in Canada. Any apparent advantage of conducting business through a branch as opposed to a subsidiary is largely lost once the business is profitable.

Most treaties to which Canada is a signatory include a provision which states that the income earned in Canada by a branch of a foreign corporation is only taxable in Canada if that business is carried on through a "permanent establishment" in Canada. Permanent establishment is broadly defined in most treaties to which Canada is a signatory to include a fixed place of business through which the business of a resident of a contracting state is wholly or partly carried on, including a place of management, a branch, an office, a factory, a workshop, a mine, an oil or gas well, and a quarry or other place of extraction of natural resources. However, the carrying on of business by a non-resident through an independent contractor does not necessarily mean a permanent establishment exists.

A Canadian subsidiary is subject to income tax under Part I of the ITA on its worldwide income. To the extent that the Canadian subsidiary repatriates its profits by paying dividends to its parent, Part XIII of the ITA provides that those dividends will be subject to withholding tax at the rate of 25%. However, this rate may be reduced by treaty.

A branch of a non-resident corporation is subject to Canadian tax as if the branch were a corporation incorporated in Canada. However, in contrast to a subsidiary, a branch is only taxable on its income from business carried on in Canada rather than on its worldwide income.

One advantage of utilizing a branch operation in Canada is that, while the losses of a Canadian subsidiary are generally not available for deduction in the jurisdiction of the parent corporation, the losses of a Canadian branch operation may, subject to the tax laws of the jurisdiction of the parent corporation, be applied against the income of the parent corporation. The advantage provided by a branch operation in this context can only be realized where the parent has sufficient income against which it can offset the losses of the Canadian branch.

In addition to Part I tax, a branch of a non-resident corporation will generally be subject to branch tax under Part XIV of the ITA. Generally speaking, branch tax is levied on the amount of accumulated taxable income in excess of taxes paid or payable as well as an investment allowance. An investment allowance provides the opportunity to defer branch tax to the extent that profits of the branch are reinvested in Canadian business assets and other qualifying assets. The purpose of the branch tax is to equate the Canadian tax position of non-residents who carry on business in Canada through a branch operation with that of non-residents who do so through a Canadian subsidiary. In this way, the branch tax effectively acts as a proxy for dividend withholding tax. As such, the usual rate of branch tax is 25%. However, similar to withholding tax on dividends, many tax treaties to which Canada is a signatory provide that the applicable rate will be reduced to the same rate as the withholding tax rate applicable to dividends under the particular treaty with, in some cases, an exemption from the branch tax up to a cumulative limit. Moreover, the ITA provides that if a non-resident corporation is resident in a country with which Canada has a treaty and on the last day of the year the treaty applies to that corporation, and if the treaty does not address the rate of branch tax, the rate of branch tax will be reduced to the rate which would be applicable to a dividend paid to a corporation resident in that country which owned all the shares of a Canadian subsidiary corporation.

One significant disadvantage of a branch arises where a branch provides services in Canada. Regulation 105 provides that where a non-resident provides services in Canada (whether provided wholly or even partly in Canada), the payer must withhold 15% of the gross amount of the services fee and remit such amount to the Canada Revenue Agency (“**CRA**”) on behalf of the non-resident’s tax liability. This requirement to withhold applies even if the non-resident would not be taxable in Canada because of the application of a treaty (most of Canada’s tax treaties provide that a non-resident person who is resident in a jurisdiction with which Canada has a treaty is not liable to pay income in Canada unless it has a permanent establishment in Canada), unless it obtains a waiver from withholding tax.

UNLIMITED LIABILITY COMPANIES

The laws of Nova Scotia, Alberta, British Columbia and Prince Edward Island provide for the creation of unlimited liability companies. In the United States,

we understand that certain rules permit certain entities, including unlimited liability companies, to be treated as partnerships or disregarded entities for U.S. tax purposes rather than as corporations. The use of a flow-through vehicle may be attractive for U.S. investors.

The shareholders of an unlimited liability company can attempt to restrict their liability by having the corporation contract with third parties to limit their recourse to corporate assets. The shareholders agreement and the articles of an unlimited liability company could be structured to avoid centralized management. We understand that it may be possible to have the unlimited liability company not be characterized as an association for U.S. purposes. It therefore may offer the benefits of the U.S. limited liability corporation for a cross-border transaction.

It is our understanding that unlimited liability companies may be regarded as a partnership (if there is more than one shareholder) or disregarded entity (where there is one shareholder) for U.S. tax purposes. For Canadian purposes, an unlimited liability company is regarded as a Canadian corporation and taxed in Canada as such. Distributions in excess of originally invested capital are treated as dividends (unless effected as a return of capital) and are subject to Canadian withholding tax. However, from a U.S. perspective, we understand that an unlimited liability company has the advantage of being treated as a branch operation. Accordingly, we understand that losses of the unlimited liability company may be applied against U.S. profits. We understand that any dividends paid by an unlimited liability company will be disregarded for U.S. purposes and any interest paid by the unlimited liability company to the U.S. parent would be ignored for U.S. purposes.

In addition, the subsequent sale of an unlimited liability company (as is the case with a regular business corporation) is generally not subject to tax in Canada unless the assets of the company have a significant Canadian real or resource property nexus, but may nonetheless be exempt from tax under Article XIII of the *Canada-U.S. Income Tax Convention* (“**Canada-U.S. Treaty**”) provided that the assets of the unlimited liability company are not primarily Canadian real estate at the time of sale. Use of an unlimited liability company, as opposed to a branch, would obviate the necessity of the U.S. corporation filing a Canadian tax return in respect of all of its operations. Instead, for Canadian purposes, the unlimited liability company would be regarded as a Canadian corporation and would file a Canadian tax return in respect of its operations.

The Fifth Protocol to the Canada-U.S. Treaty has had an impact on the use of unlimited liability companies. Under the anti-hybrid rule in Article IV(7)(b) of the Canada-U.S. Treaty, amounts paid by an unlimited liability company to a U.S. resident are not eligible for the reduced rates of withholding tax available under the Canada-U.S. Treaty. For example, dividends paid by an unlimited liability company to a U.S. resident company that would otherwise be entitled to a 5% rate of withholding are subject to a 25% rate. However, there may be tax planning strategies to ameliorate the effect of the anti-hybrid rules depending on the circumstances. Despite the anti-hybrid rule, most dividend distributions by an unlimited liability company to a regarded U.S. parent corporation can be effected in a manner so as to access the lower 5% rate of withholding.

CAPITALIZING THE NON-RESIDENT OWNED CANADIAN BUSINESS

In determining the appropriate structure for a non-resident purchaser of a Canadian business, it is important to consider how the acquisition is to be financed. Issues such as the deductibility of interest, the possible application of withholding tax on interest payments and the ability to repatriate capital should be considered. Subject to the thin capitalization rules of the ITA, the ITA generally permits the deduction of reasonable interest paid in the year, or payable in respect of that year, under a legal obligation to pay interest on borrowed money used for the purpose of earning income or an amount payable for property acquired for the purpose of earning income, including shares or the assets of a business. Starting in taxation years that begin on or after January 1, 2024, taxpayers will also need to plan around a new excessive interest and financing expense limitation in addition to thin capitalization rules. These rules will limit net interest expense to 30% of adjusted taxable income.

THIN CAPITALIZATION

If a Canadian corporation is formed to acquire shares or assets from an existing Canadian corporation, the Canadian thin capitalization rules should be considered in determining the appropriate mix of debt and equity in the Canadian corporation (and partnerships of which the Canadian corporation is a partner). The ITA denies a deduction for interest paid by a corporation resident in Canada to the extent that the aggregate amount of interest-bearing debt owed to specified non-resident shareholders exceeds the equity contributed by specified non-resident shareholders by a ratio of greater than 1.5:1. For the purpose of determining a corporation's debt-

to-equity ratio, debt obligations of a partnership of which a corporation is a partner may be allocated to the corporation based on the corporation's proportionate share of the partnership's total income or loss for the partnership's fiscal period.

Interest on debt that exceeds the permitted ratio will be non-deductible in computing income, recharacterized as a dividend for non-resident withholding tax purposes and subject to withholding at appropriate rates.

A specified non-resident shareholder is defined in the ITA as a non-resident shareholder who, either alone or together with non-arm's-length persons, owns shares carrying 25% or more of the voting power or representing 25% or more of the fair market value of the issued and outstanding shares. This test is measured on a fully diluted basis with respect to the non-resident shareholder.

The deduction will be denied for that proportion of otherwise deductible interest equal to the amount determined by the following formula:

$$\frac{(A - B)}{A}$$

Where:

A: is the average of all amounts each of which is, for a calendar month that ends in the year, the greatest total amount at any time in the month of the corporation's outstanding debts to specified non-residents, and

B: is 1.5 times the equity amount of the corporation or trust for the year.

The equity amount for a corporation resident in Canada is the aggregate of: (i) the retained earnings of the corporation at the beginning of the year (except to the extent those earnings include the retained earnings of any other corporation); (ii) the average of all amounts, each of which is the corporation's contributed surplus at the beginning of a calendar month that ends in the year, to the extent that it was contributed by a specified non-resident shareholder of the corporation; and (iii) the average of all amounts, each of which is the corporation's paid-up capital at the beginning of a calendar month that ends in the year (excluding the paid-up capital with regard to shares of any class of the capital stock of the corporation owned by a person other than a specified non-resident shareholder of the corporation).

The reference to paid-up capital at the beginning of a month can be problematic when a new acquisition occurs mid-month and is financed, in part, with an interest-bearing loan by a significant shareholder. As there would be no credit for the paid-up capital until the following month, the interest expense may be denied for the initial month.

It also should be noted that the Canadian thin capitalization rules do not apply to an interest-free loan made by a non-resident to a Canadian corporation, as the effect of the rule is to deny the interest deduction on the excess amount owing to a specified non-resident. If the Canadian corporation is required to capitalize interest under the ITA (for example, interest incurred during a construction period), the thin capitalization rules will not apply to the capitalized interest.

Supporting back-to-back loan provisions greatly extend the application of the thin capitalization rules. In very general terms, these back-to-back loan rules provide that where a non-resident who deals not at arm's length with a Canadian borrower provides property in support of a loan made by a third party to a Canadian borrower that is a corporation or trust, the loan may be, in some circumstances, considered to be made by the non-resident to the Canadian borrower for purposes of the thin capitalization rules. In addition, interest paid by the Canadian borrower to the lender may instead be deemed to be paid to such non-resident for purposes of the withholding tax rules in Part XIII of the ITA. The rules may apply to cross-collateralized loans and cash pooling arrangements.

The thin capitalization rules also apply to trusts resident in Canada, non-resident trusts and corporations that carry on business in Canada as a branch, and partnerships in which the aforementioned entities are members.

CANADIAN ACQUISITION CORPORATION

In most cases, non-resident purchasers should interpose a Canadian corporation to acquire the shares of an existing Canadian corporation. This structure may have several advantages, including the ability to benefit from an increase or “bump” in the Canadian tax cost of the non-depreciable capital property (such as shares of subsidiary corporations or land) of the Canadian target corporation(s) if it is subsequently wound-up into or combined by amalgamation with the Canadian holding corporation, and the ability to create an increase in paid-up capital that may subsequently be repatriated on a tax-free basis.

Generally, paid-up capital represents the amount that is paid to a corporation for the issuance of treasury shares. If a shareholder of a Canadian corporation sells those shares to a non-resident purchaser, the non-resident purchaser will not be able to increase the paid-up capital of the shares of the corporation, although the non-resident's adjusted cost base (tax cost) will be equal to the purchase price. The “step-up” in tax cost of the shares for Canadian purposes is of no value to a non-resident shareholder if the disposition of the shares would not be taxable under Canadian domestic law or under a treaty. However, if the non-resident subscribes for shares of a Canadian holding corporation that in turn purchases the shares of a Canadian operating corporation from a Canadian shareholder, the paid-up capital of the non-resident's shares in the Canadian holding corporation will be equal to the amount invested for shares. Dividends could be paid by the Canadian operating corporation to the Canadian holding corporation free of tax under Parts I and IV of the ITA, and the surplus can then be distributed by the Canadian holding corporation as a return of capital to the non-resident up to the amount of the paid-up capital without the imposition of Canadian withholding tax. This is the case whether or not the Canadian group has undistributed earnings and profits.

Similarly, if the Canadian operating corporation is subsequently amalgamated with or wound-up into the Canadian holding corporation, the operating corporation's after-tax profits can be distributed to the non-resident shareholder as a reduction of the paid-up capital until the paid-up capital is exhausted. Also, if the Canadian holding corporation and operating corporation are amalgamated, the interest on funds borrowed by the holding corporation to purchase the shares would be deductible against the operating profits of the business. This potential to increase the paid-up capital and to take advantage of either the “bump” available on the amalgamation or wind-up of a wholly-owned subsidiary or the ability to pay dividends free of tax between related Canadian corporations generally makes the use of a Canadian holding corporation attractive.

STRUCTURING FOR THE EVENTUAL DISPOSITION OF A CANADIAN BUSINESS ENTITY

Canada taxes the disposition of “taxable Canadian property” (“TCP”) by non-residents. The definition of TCP includes real or immovable property situated in Canada and property used in carrying on business in Canada. It also includes a share of a private corporation, and an interest in a partnership or trust

where at any time in the 60-month period prior to the date of disposition, more than 50% of the fair market value of the share, partnership interest or trust interest, is derived directly or indirectly from one or any combination of: (a) real or immovable property situated in Canada; (b) Canadian resource properties; (c) timber resource properties, and (d) options in respect of, or interests in, or civil law rights in, property described in subparagraphs (a)-(c), whether or not the property exists. If the shares of a corporation are listed on a designated stock exchange or a trust is a mutual fund trust, the shares or units are TCP only if the above test is met at any time in the 60-month period prior to the date of disposition and, at the particular time in which that test is met, the non-resident person, alone or together with non-arm's length persons, owned 25% or more of the issued shares of any class, or 25% or more of the issued units of the mutual fund trust.

A section 116 clearance certificate must be obtained from the Minister of National Revenue in connection with the disposition of TCP (other than excluded property). Publicly listed shares are excluded property. Unfortunately, the process to obtain a section 116 certificate is slow and it can be expensive and time consuming. The requirement to obtain a section 116 certificate is particularly problematic for foreign funds which are formed as partnerships investing in TCP, particularly where the fund has other funds (as partnerships) as an investor. If a person acquires TCP (other than excluded property) from a non-resident without obtaining a section 116 certificate from the vendor, the purchaser is generally required to remit 25% of the gross purchase price (or 50% in the case of certain TCP). Accordingly, where a non-resident owns TCP, it may be desirable to hold such investments through a blocker corporation resident in a jurisdiction which has a treaty with Canada which contains an appropriate capital gains exemption.

ENTITIES OWNING REAL ESTATE

If a Canadian corporation to be acquired by a non-resident Canadian owns real estate as well as an operating business, consideration should be given as to whether a non-resident purchaser should acquire the Canadian real estate in a separate corporation. This may attract land transfer tax depending on the province in which the property is located. However, if the real estate is in the operating company and has significant value, then on the disposition of shares of the Canadian subsidiary, the value of the real estate may result in the shares being TCP and the disposition being subject to Canadian tax, unless there is relief from Canadian tax under

a capital gains exemption under an applicable tax treaty. Some treaties exclude from the definition of real property, property from which the business of the corporation is carried on. Depending on the provisions of the relevant treaty, separating the Canadian corporation's assets into separate Canadian corporations for the business and the real estate may preserve the ability of the non-resident to benefit from the capital gains exemption under the relevant treaty should the shares of the Canadian corporation operating the business subsequently be sold.

ACQUISITION OF CONTROL

An acquisition of control of a corporation creates certain tax consequences to the Canadian target, and all underlying corporations controlled by it, including a deemed year end. Under this provision, the corporation's year end is deemed to end immediately before the acquisition of control. A deemed year end gives rise to the requirement to file the corporation's federal and provincial or territorial tax returns (within six months from the date of the deemed year end) and may accelerate the payment of taxes due.

Where a Canadian corporation is a Canadian-controlled private corporation ("CCPC"), it will be deemed to have a year end immediately prior to ceasing to be a CCPC. A non-resident is deemed to own any shares that it has a right (including a contingent right, such as one under a purchase agreement) to acquire. As a result, a corporation will often lose its status as a CCPC as soon as an agreement of purchase and sale to acquire all the shares of the corporation is signed. This may trigger a year end, followed by another year end on the actual closing of the share purchase.

There are a number of other tax consequences arising from an acquisition of control. For example, a deemed year end shortens the period for non-capital loss carry-forwards and carry-backs. The general rule is that non-capital losses may be carried back three years and forward 20 years. Following the acquisition of control, non-capital losses (business losses) are generally only deductible if the corporation continues to carry on the same business in which the losses arose, or a similar business, throughout the taxation year with a reasonable expectation of profit. Net capital losses incurred prior to the acquisition of control expire and are not deductible in any period subsequent to the acquisition of control. However, an election may be made under the ITA in the taxation year ending immediately prior to the acquisition of control to

deem the corporation to have disposed of capital properties for an amount up to the fair market value thereof (thereby creating capital gains in the pre-acquisition of control year, using up the capital losses and increasing the adjusted cost base of such non-depreciable capital properties).

INCREASING THE TAX COST OF CANADIAN ASSETS

When a controlling interest is acquired in a Canadian corporation, any net capital losses carried forward will be lost. An election may be made under paragraph 111(4)(e) of the ITA in the taxation year which is deemed to end immediately prior to the acquisition of control for the Canadian corporation to increase the tax basis of any capital properties owned by the subsidiary Canadian corporation up to the lesser of their fair market value and the greater of the adjusted cost base of the property and the amount designated by the corporation in respect of the property to the extent of any net capital-loss carry-forwards.

When a wholly-owned Canadian subsidiary is amalgamated or wound up into its parent, and both the subsidiary and its parent are taxable Canadian corporations, it is possible to increase the tax basis of non-depreciable capital property owned by the subsidiary, in general terms, to the extent that the adjusted cost basis of the shares of the Canadian subsidiary exceeds the net tax value of its underlying assets. The step-up in the basis of any asset is limited to the fair market value of such asset.

Subsection 88(1) of the ITA provides rules for the winding-up of a taxable Canadian corporation into its parent if not less than 90% of the issued shares of each class of capital stock of the subsidiary are held by a parent which is also a taxable Canadian corporation. In general, a tax-free rollover is available with respect to the assets distributed on the winding-up. If a parent receives capital property other than depreciable property, it may increase its basis in the capital property over the basis that the subsidiary had in the property. This “bump” in basis will occur if the adjusted cost base (tax cost) of the shares of the subsidiary immediately before it is wound-up exceeds the aggregate of the net tax value of the subsidiary property and the amount of any dividends paid by the subsidiary to the parent. Subsection 87(11) of the ITA provides for an identical “bump” on a vertical amalgamation between a parent and a subsidiary. Both the parent and subsidiary must be governed by the same corporate statute for an amalgamation. The “bump” in basis on an amalgamation is only available if the parent

owns all of the shares of the subsidiary (compared to the 90% requirement on a winding-up).

If the Canadian target corporation owns non-depreciable capital property, such as land or shares of other Canadian or non-resident corporations, it may be possible to wind-up the Canadian target corporation and to increase the tax basis of its non-depreciable capital property to the extent of the positive difference between the purchase price of the shares and the tax basis of the assets, provided that the tax basis of the assets may not exceed fair market value. This increase in basis is only available with respect to non-depreciable capital property that was owned by the subsidiary at the time the parent last acquired control of the subsidiary. Moreover, the availability of the “bump” is restricted if, as part of the series of transactions, any property, or property substituted for such property, that is distributed to the parent on the winding-up, is acquired by certain persons (which, in general terms, includes persons who own more than 10% of the issued shares of any class but who are not related to the corporation). There is a myriad of technical rules that may deny the “bump” in various circumstances which need to be looked at and considered very carefully.

If a U.S. purchaser formed a new Canadian corporation to purchase the shares of an existing Canadian corporation with a U.S. subsidiary (“USCo”) from Canadian sellers, it would be possible to subsequently wind-up the existing Canadian corporation and to increase the Canadian tax basis of the shares of the USCo. The USCo could then be transferred directly to the U.S. purchaser without any tax in Canada. One method of accomplishing the distribution without attracting Canadian withholding tax would be to reduce the paid-up capital of the shares of the new Canadian holding corporation by an amount equal to the fair market value of the shares of the USCo. Alternatively, if the new Canadian holding corporation was funded by a combination of shares and debt, the shares of the USCo could be transferred to new U.S. purchasers and the principal amount of the debt would be reduced by an amount equal to the fair market value of the shares of the USCo. The removal of the USCo from below the Canadian holding company would have the added advantage of enabling the U.S. purchaser to report the operations of the USCo on a consolidated basis.

We understand that while the pre-acquisition amalgamation or winding-up of the Canadian target into its parent is one way to get a step-up for U.S. purposes, the more common way is to structure the acquisition as a “qualified stock purchase,”

entitling the purchaser to make a section 338(g) election under the U.S. Internal Revenue Code. We understand that the section 338(g) election results in a stepped-up basis in the Canadian target's assets, but only for U.S. purposes. We understand that an election is usually available under section 338(g) if the buyer (e.g., a Canadian holding corporation) acquires at least 80% of the shares of the target corporation by way of purchase.

USE OF EXCHANGEABLE SHARES

In some sales of businesses, Canadian sellers are required to take back shares in a foreign corporation as all or part of the sale price. The problem that this creates is that there is no tax deferral available in Canada for an exchange of shares of a Canadian corporation for shares of a foreign corporation. Under the current law, a Canadian seller in such a situation is taxable in Canada on the full capital gain based on the fair market value of the shares of the foreign corporation received as consideration. This may create a cash flow problem as there are no cash proceeds available to discharge the resulting tax liability. In many situations, exchangeable shares have been used to avoid this problem.

In addition, the Canadian shareholder may be faced with double withholding tax if he, she or it owns shares of a foreign corporation that in turn owns shares of a Canadian corporation. The Canadian corporation would be subject to Canadian withholding tax on the distribution of dividends to the foreign corporation and the foreign corporation may be subject to foreign withholding tax on the distribution of dividends to the Canadian shareholders.

If the shares of the foreign corporation subsequently decline in value, the Canadian shareholder may be faced with a capital loss. If that loss is incurred more than three years after the date of the share sale, the loss may not be carried back to offset any capital gain that arose on the original share exchange.

Generally speaking, in an exchangeable share transaction, the foreign purchaser forms a subsidiary ("**Newco**") in Canada which acquires the shares of the Canadian target in exchange for exchangeable shares of Newco, which are economically equivalent to the shares of the foreign purchaser. The Canadian shareholders can benefit from a rollover under subsection 85(1) of the ITA, in the case of a transfer of shares of the target to Newco, or section 86 of the ITA, in the case of a reorganization of the capital of the target corporation, permitting the Canadian holders to defer tax until the disposition of the exchangeable shares. The transaction may be

structured to enable the Canadian vendors to claim their Canadian capital gains exemptions, if available.

The Newco exchangeable shares would have a dividend entitlement that would match the dividends that would be paid on the common shares of the foreign corporation. The Newco exchangeable shares also would be redeemable and retractable for a predetermined number (usually 1 for 1) of shares of the foreign corporation or a related corporation. The Canadian shareholders may wish to ensure that they have voting rights in the foreign corporation. The Canadian shareholders may wish, at a minimum, to have a "put" of the exchangeable shares to the foreign corporation if Newco subsequently becomes insolvent.

Newco, or more usually a related Canadian corporation, will ultimately purchase the exchangeable shares in exchange for shares of the foreign corporation. The transaction would be structured to increase the paid-up capital of Newco to reflect the purchase price, thus facilitating the future repatriation of the purchase price free of Canadian withholding tax. The Canadian shareholder would typically trigger the exchange of the exchangeable shares only when the shareholder wishes to dispose of the shares of the foreign corporation. Although the exchange of the exchangeable shares for shares of the foreign corporation will be taxable in Canada, there is a matching of the Canadian gain with the receipt of the sale proceeds.

These transactions must be carefully structured to ensure that the Canadian shareholders benefit from a rollover, whether automatically or by way of a required joint election, and are not deemed to receive any taxable benefit. In addition, from the perspective of the Canadian corporation, it may be important that the transaction be structured to avoid Part VI.1 and IV.1 tax. If the exchangeable shares are taxable preferred shares or short-term preferred shares, Part VI.1 of the ITA imposes a tax on the payer in respect of certain dividends paid on the shares and Part IV.1 imposes a tax on the corporate recipient of dividends in certain circumstances. If the exchangeable shares are taxable preferred shares or short-term preferred shares (which they would likely be if they are retractable by the holder at any time pursuant to the share provisions), this tax is avoided by enabling a corporation other than the corporation which issued the exchangeable shares to purchase the exchangeable shares once the Canadian seller has requested a redemption, but before the redemption is completed (the redemption, if completed, may trigger the Part IV.1 tax and the Part VI.1 tax).

INTEREST PAYMENTS

There is no Canadian withholding tax on interest paid by a resident of Canada to an arm's-length lender provided that the interest is not participating debt interest. Canadian withholding tax of 25% (unless reduced by a treaty) will apply to interest paid by a Canadian borrower: (i) to a non-resident lender with which the Canadian borrower does not deal at arm's-length, or (ii) on "participating debt interest." Participating debt interest is generally interest all or any portion of which is contingent or dependent on the use of or production from property in Canada or is computed by reference to revenue, profit, cash flow, commodity price or any other similar criteria or by reference to dividends paid or payable to shareholders of any class of shares of the capital stock of the corporation. The interest on certain convertible debt may be considered to be participating debt interest.

Under the Canada-U.S. Treaty, withholding tax on interest paid to a related person who is a "qualifying person" for purposes of the Canada-U.S. Treaty is 0%. Canada does not currently have any other treaties with a 0% rate of withholding tax on interest. Most of Canada's other treaties reduce the rate of withholding tax on interest to 10%.

No Canadian withholding tax arises on the repayment of capital, even if the Canadian corporation has earnings and profits.

DISTRIBUTION BY WAY OF DIVIDENDS

If a non-resident investor has invested directly in a Canadian corporation and this corporation pays dividends to the non-resident investor, those dividends would be subject to Canadian withholding tax at 25% unless the rate is a reduced rate under an applicable tax treaty^{1,2}.

DISTRIBUTION BY WAY OF ROYALTIES

Where a resident of Canada pays or credits, or is deemed to pay or credit an amount, to a non-

resident person, on account, or in lieu of payment of, or in satisfaction of a rent, royalty or similar payment, the non-resident is subject to withholding tax of 25% on the gross amount of the payment, unless reduced by treaty. Many of Canada's treaties reduce the rate of withholding tax on royalties. For example, pursuant to Article XII of the Canada-U.S. Treaty, the rate of withholding tax on royalties is limited to 10% of the gross amount of the royalty. For purposes of the Canada-U.S. Treaty, the term "royalty" means payments of any kind received as consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work, any patent, trademark, design or model, plan, secret formula or process, or for the use of tangible personal property or for information concerning industrial, commercial or scientific experience.

Many of Canada's treaties provide an exemption from Canadian withholding tax on certain types of royalties. Paragraph 3 of Article XII of the Canada-U.S. Treaty also provides for the exemption of withholding tax in respect of the following types of royalty payments: (a) copyright royalties and other like payments in respect of the production or reproduction of any literary, dramatic, musical or artistic work (other than payments in respect of motion pictures and works on film, videotape or other means of reproduction for use in connection with television); (b) payments for the use of, or the right to use, computer software; (c) payments for the use of, or the right to use, any patent or any information concerning industrial, commercial or scientific experience (but not including any such information provided in connection with a rental or franchise agreement); and (d) payments with respect to broadcasting as may be agreed for the purposes of this paragraph in an exchange of notes between Canada and the United States.

MANAGEMENT FEES

The payment of reasonable management fees by the Canadian corporation gives rise to a deduction in Canada but is subject to withholding tax at a rate of 25% (unless modified by treaty or unless the management fees constitute a reimbursement for specific expenses). However, to the extent that the non-resident resides in a jurisdiction with which Canada has a tax treaty, management fees generally escape Canadian withholding tax on the basis that they constitute business income if the entity providing the management services does not maintain a permanent establishment in Canada.

If the services are rendered by a non-resident in Canada, GST may have to be charged. In addition,

¹ Under most treaties, the rate of withholding tax is reduced to 15%, but may be reduced further to 5% if the beneficial owner of the dividends is a corporation that meets a certain level of ownership in or control over the dividend paying company (some treaties contemplate the requirement to directly own at least 10% of the voting shares, some treaties contemplate the need of the corporate beneficial owner of the dividend to control, directly or indirectly, at least 10% of the voting power of the Canadian corporation, etc.). The terms of each particular treaty need to be considered. Further, the terms of some treaties may require a minimum holding period in order to access these benefits).

² If the Canadian payer is an unlimited liability company and the recipient is a U.S. person, the anti-hybrid rules in the Fifth Protocol to the Canada-U.S. Treaty may apply so that there is no reduction in the rate and withholding tax is levied at 25%. There are techniques to avoid the application of the anti-hybrid rules. However, the withholding tax rate on dividends paid by an unlimited liability company to a U.S. LLC will be 25%.

Regulation 105 of the ITA imposes a separate withholding tax of 15% in respect of all fees paid to a non-resident for services rendered in Canada. The non-resident may apply for a waiver from this 15% tax (which may be difficult to obtain) or claim a refund of the tax by filing a Canadian tax return and taking the position that the non-resident is entitled to the protection of a treaty and does not have a permanent establishment in Canada.

SCIENTIFIC RESEARCH AND EXPERIMENTAL DEVELOPMENT (“SR&ED”) TAX INCENTIVE PROGRAM

The ITA contains a series of generous tax incentives in support of SR&ED in Canada. These tax incentives are provided through a system of tax deductions and credits to taxpayers that incur qualifying SR&ED expenditures, and engage in SR&ED activities in Canada. Taxpayers that are CCPCs are afforded additional benefits under the SR&ED regime. Tax credits range from 15% to 35% of an entity’s qualifying SR&ED expenditures, and may be refundable if the taxpayer is a CCPC. Other than capital expenditures, taxpayers may generally deduct the full amount of any qualifying expenditures, including overhead expenditures, in the year in which they were incurred. Conversely, the deduction of these qualifying expenditures may also be deferred. Almost all of the provinces in Canada provide similar tax incentives for SR&ED activities.

There are no restrictions on the ownership of intellectual property that are funded by the SR&ED tax incentives. Hence, it would be possible for a non-resident corporation to set up a Canadian subsidiary to carry out its SR&ED activities in Canada on its behalf so as to take advantage of the SR&ED tax incentives. With proper agreements between the non-resident and its Canadian subsidiary, ownership of any resulting intellectual property from the activities of the Canadian subsidiary may vest in the non-resident corporation. Such an arrangement is particularly useful if the non-resident parent resides in a lower tax jurisdiction.

TRANSFER PRICING AND NON-ARM’S LENGTH TRANSACTIONS

Canada’s transfer pricing regime closely follows the transfer pricing guidelines set out by the Organization for Economic Cooperation and Development. Under the ITA, transactions between a Canadian taxpayer and a related non-resident must be carried out on terms and prices that would have prevailed had the Canadian taxpayer and non-resident been acting at

arm’s length. This “arm’s-length principle” is meant to prevent taxpayers from engaging in improper tax planning by manipulating prices for transactions between related members of a corporate group with the goal of shifting profits from high tax rate jurisdictions to low tax rate jurisdictions. The “arm’s length principle” applies to all non-arm’s-length inter-company transactions involving tangible and intangible property, and services. Generally, under Canada’s transfer pricing regime, profits from transactions between non-arm’s length entities are allocated based on the respective entity’s functions, assets and risks. The entity that has the greater functions, assets and risks is expected to earn a larger share of the profit.

The ITA allows CRA to adjust the terms, conditions and prices of transactions between a Canadian taxpayer and a non-arm’s length non-resident that it concludes are inconsistent with the “arm’s length principle.” CRA may further levy a 10% penalty on any resulting net transfer pricing adjustment. In addition to increasing the Canadian taxpayer’s taxable income, the transfer pricing adjustment may also result in a “secondary adjustment” particularly in situations where the non-arm’s length non-resident is a shareholder of the Canadian taxpayer. This “secondary adjustment” pertains to the benefit accruing to the non-arm’s length non-resident from the inappropriate transfer prices. If CRA determines that the non-arm’s length transfer prices resulted in a benefit to the non-resident shareholder of the Canadian taxpayer, the ITA would treat this benefit as a deemed dividend, subject to applicable withholding taxes, from the Canadian taxpayer to the non-resident shareholder.

Any Canadian taxpayer that engages in transactions with a non-arm’s length entity is obligated to create and retain certain documentation that generally sets out the rationale for the prices used in the non-arm’s length transactions. The failure to provide this documentation when requested by CRA may result in significant penalties should there be a subsequent transfer pricing adjustment.

INCOME TAX FILING AND RECORD KEEPING OBLIGATIONS

Every non-resident corporation that carries on a business in Canada, either directly or through a partnership, is required to file a Canadian income tax return within six months of the corporation’s fiscal year end. The filing obligation remains even if the non-resident corporation does not have any profits or is exempt from Canadian tax pursuant to a tax treaty. Corporations are not allowed to file consolidated

returns. Therefore, each corporate entity in a corporate group is required to file separate returns.

Any non-resident that disposes of taxable Canadian property or has a capital gain is required to file an income tax return. However, if a capital gain is sheltered by an applicable tax treaty or the non-resident obtained a section 116 clearance certificate for each disposition of taxable Canadian property, the non-resident is not required to file an income tax return.

Non-residents carrying on a business in Canada must also maintain books and records in Canada or otherwise make these books and records available to CRA for audit purposes.

MULTILATERAL CONVENTION TO IMPLEMENT TAX TREATY RELATED MEASURES TO PREVENT BASE EROSION AND PROFIT SHIFTING (“MLI”)

The MLI is a multilateral convention sponsored by the OECD. It is designed to reduce opportunities for multinational enterprises to use tax treaties to avoid tax.

The MLI applies to tax treaties where each of the parties to the treaty have (i) brought the MLI into force, (ii) listed the treaty as being covered by the MLI, and (iii) to the extent that both countries have chosen that a particular provision of MLI should apply. Canada has listed over 80 of its tax treaties as being covered by the MLI. The MLI is in force in Canada.

One of the most significant treaty modifications for Canada under the MLI is the addition of a broad anti-abuse rule, commonly referred to as the “principal purpose test” (“**PPT**”). Under the PPT, a treaty benefit is denied where it is reasonable to conclude that one of the principal purposes of an arrangement or transaction was to obtain that treaty benefit. However, an exception is available where it can be established that granting that treaty benefit would be in accordance with the object and purpose of the relevant provisions of the treaty. At this time, the impact of the PPT on Canadian tax planning is uncertain.

August 2023



Regulation of Foreign Investment and Merger Regulation

2023

Doing Business in Canada



airdberlis.com

REGULATION OF FOREIGN INVESTMENT

The *Investment Canada Act* (the “**ICA**”) applies when a “non-Canadian” (a non-Canadian-controlled entity): establishes a new business in Canada or acquires, either directly or indirectly, control of a Canadian business. Direct acquisitions of control that exceed specified statutory monetary thresholds are subject to a “net benefit” review which precludes the investor from completing the acquisition until the investment has been reviewed and the Minister is satisfied that the investment “is likely to be of net benefit to Canada.”

Notification Procedure

In view of the high monetary thresholds which trigger a net benefit review, most investments by non-Canadians require only that the Director of Investments (an officer appointed under the ICA) be notified of the investment (unless the investment relates to a “culturally sensitive” business, which is reviewed by the Canadian Heritage Minister). The notification, which may be filed up to 30 days after closing, requires information concerning the non-Canadian investor; the nature of the investment; a description of the Canadian business being established or acquired; details relating to the investor’s officers, directors and shareholders; its sources of financing for the proposed investment; the transaction documents (or the principal terms and conditions, including the estimated total purchase price of the investment); whether the investor is owned, controlled or influenced, directly or indirectly, by a foreign government; and information to permit enterprise value information to be collected.

The notice is filed with the Director of Investments who issues a receipt certifying the date on which the notice is deemed complete. The receipt indicates that the establishment, or acquisition, of the business is not reviewable under Part IV of the ICA. The certified date of a complete notice is also relevant to commence the 45-day period in which any investment can be reviewed under the national security provisions of the ICA (see below).

Review Thresholds: WTO Transactions

By reason of the Agreement Establishing the World Trade Organization (“**WTO**”) between Canada and certain other countries (there are currently 164 WTO members), direct acquisitions by non-Canadians who are WTO investors and direct acquisitions of Canadian businesses controlled by WTO investors have been subject to historically higher thresholds for review under the ICA. The review threshold for WTO investments (by investors other than state-

owned enterprises (“**SOE**”), which is addressed below) for 2022 is C\$1.141 billion in “enterprise value.”

For certain trade agreement investors, the review threshold for 2022 is C\$1.711 billion in enterprise value. This higher review threshold applies to European Union investors falling under the Comprehensive Economic and Trade Agreement (“**CETA**”) between Canada and the European Union as well as and to other Free Trade Agreement (“**FTA**”) investment partners benefiting from Canada’s Most-Favoured-Nation (“**MFN**”) trade commitments. MFN treatment will be accorded to many FTA jurisdictions including the United States, Mexico, Chile, Colombia, Panama, Peru, Honduras, South Korea, Japan, Singapore, New Zealand, Australia and Vietnam.

Enterprise Value: Methodology

Regulations made under the ICA provide for a detailed methodology for calculating the enterprise value when an acquisition of control of a Canadian business has occurred. The calculation of enterprise value depends on the type of transaction contemplated (i.e., where the acquired entity is a publicly traded entity, a non-publicly traded entity, or if the transaction involves the acquisition of assets). There are also specific rules to calculate enterprise value in contingent payment scenarios, such as transactions with potential earn-outs.

Indirect acquisitions of control of non-cultural Canadian businesses by non-Canadians (i.e., by acquiring control of a non-Canadian parent of a Canadian subsidiary) are not subject to review for WTO investors (or for non-Canadian WTO sellers).

These established review thresholds (as well as the statutory exempt review for indirect acquisitions of control) are not applicable in certain enumerated circumstances set out in the ICA (see below).

Review Thresholds: Non-WTO Transactions

Acquisitions of control by non-Canadian investors who are neither WTO investors nor trade agreement investors remain subject to review where the book value of acquired assets exceeds C\$5 million or C\$50 million for indirect acquisitions of control.

Cultural Heritage or National Identity

Investment proposals, including indirect acquisitions of control, that might ordinarily be only notifiable can be ordered for review where the business is related to Canadian cultural heritage or national identity. Currently, these “culturally sensitive”

businesses include the publication, distribution and sale or exhibition of books, magazines, periodicals, newspapers, films, videos and music. These acquisitions are subject to review where the book value of acquired assets exceeds C\$5 million, while indirect acquisitions of control are subject to review where the book value of the acquired assets exceeds C\$50 million (the federal Cabinet retains discretionary authority to review an investment in a cultural business falling below these thresholds).

State-Owned Enterprises

The review threshold for direct acquisitions by a SOE investor in 2022 is based on the book value of the assets of the acquired Canadian business exceeding C\$454 million. The threshold is subject to an annual index. Indirect acquisitions of control by WTO SOE investors remain exempt from review.

The Canadian government has issued guidelines on the additional considerations that the Minister of the Department of Innovation, Science and Economic Development (“**ISED**”) will take into account with respect to SOE investors. These guidelines expressly consider:

- whether the non-Canadian adheres to Canadian standards of corporate governance (including, for example, commitments to transparency and disclosure, independent members of the board of directors, independent audit committees and equitable treatment of shareholders);
- adherence to Canadian laws and practices, including adherence to free market principles;
- the effect of the investment on the level and nature of economic activity in Canada, including the effect on employment, production and capital levels in Canada;
- the extent to which the non-Canadian is owned, controlled by a state or its conduct and operations are influenced by a state; and
- whether a Canadian business to be acquired by a non-Canadian that is an SOE will likely operate on a commercial basis.

In addition to the above guidelines, amendments to the ICA in 2013 incorporated a definition of an SOE to include “an entity that is controlled or influenced, directly or indirectly, by a government or agency” of a foreign state. As well, the Minister has been given the power to determine that an otherwise Canadian-controlled entity is not a Canadian-controlled entity if the Minister is “satisfied that the entity is controlled in fact by one or more” SOEs.

Acquisitions by SOEs which do not result in the acquisition of control are not reviewed under the SOE guidelines, but may be subject to review under the national security provisions of the ICA (see below).

Factors

Where a proposed investment is reviewable, the Minister of ISED (or the Canadian Heritage Minister in the case of “culturally sensitive” businesses) will approve the investment where the proposal is considered to be of “net benefit” to Canada. In assessing net benefit, the Minister will consider, with no particular weighting, such factors as the effect of the proposed investment on economic activity in Canada, participation by Canadians in the business, productivity, competition, the compatibility of the investment with national, industrial, economic or cultural policies and the contribution by the business to Canada’s ability to compete in world markets. Often, applicants negotiate undertakings with the Director of Investments, which undertakings are designed to satisfy the net benefit to Canada criteria.

National Security

In 2009, amendments were enacted to the ICA concerning investments that may be considered injurious to national security. The amendments introduce a process similar to that found in the United States under the Committee on Foreign Investment in the United States (“**CFIUS**”) review process, pursuant to which CFIUS is authorized to review, investigate and block any transaction or investment that could result in the control of any U.S. businesses or assets by a foreign person that may raise national security concerns, or involve critical infrastructure.

Under the national security provisions of the ICA, if the relevant Minister has reasonable grounds to believe that an investment by a non-Canadian “could be injurious to national security,” the Minister may send the non-Canadian a notice under Part IV.1 of the ICA (within 45 days of a notification or application for review) indicating that an order for review of the investment may be made. The review of an investment on the grounds of national security may occur whether or not an investment is otherwise subject to a net benefit review or otherwise only subject to notification under the ICA. Moreover, a national security review can occur even if there is no “acquisition of control” of a Canadian business (i.e., minority investments that do not transfer de facto control). There is no process for investors to request pre-closing approval in order to obtain comfort.

There are significant time periods in the event of a national security review under Part IV.1 of the ICA. Once an investor has received a notice indicating that an order for review of the investment may be made, the national security review timeframe under the ICA can be as long as 200 days (or longer with the consent of the investor).

In March 2021, the Minister of ISED issued *Guidelines on the National Security Review of Investments*. The Guidelines provide information of the procedures that will be followed in the administration of the national security review process in Part IV.1 of the ICA. The Guidelines set out eleven factors that the government may consider as they relate to national security. The focus of the factors is on core areas including defence, technology, critical minerals, critical infrastructure, intelligence gathering and enforcement and access to sensitive personal data.

The Canadian government must report annually on the administration of the national security provisions of the ICA. Such annual reporting is now included in each Annual Report made under the ICA. The Report also provides information on the numbers of transactions reviewed under the national security provisions, the numbers of notices and orders issued, and the actions taken to protect national security.

The above-noted 45-day waiting period under Part IV.1 of the ICA in which the Minister may notify the non-Canadian investor of a possible national security review presents significant transaction uncertainty, particularly in the context of notifiable investments (i.e., those not ordinarily subject to review). To foreclose any risk of such a review arising after closing for investments that would not otherwise be subject to review, parties will often send the requisite notification to the Director of Investments at least 45 days before closing, thereby achieving certainty that no national security issues will arise.

This practice has been effectively confirmed in the above-noted *Guidelines on the National Security Review of Investments under the ICA*. The Guidelines strongly encourage, particularly where an investor is a SOE (or subject to state-influence), or in cases where the eleven factors may be present, to contact the Investment Review Division “at the earliest stages of the development of their investment projects to discuss the investment and, where applicable, to file a notification (or an application for net benefit review) at least 45 days prior to its planned implementation.”

Thus, investors should now be aware that the government has indicated its preference that in situations in which national security concerns are present, it prefers to manage these concerns on a

“pre-closing basis” before ownership has transferred in lieu of the current requirement in the ICA which permits an investor to wait for as long as 30 days following closing for transactions that are only subject to notification. Thus, in order to achieve absolute investment certainty, the parties to a transaction should endeavour to file as soon as possible, ideally 45 days prior to closing if the transaction circumstances permit such a step to be taken.

MERGER REGULATION

Mergers

Under the *Competition Act* (Canada), the Commissioner of Competition (the “**Commissioner**”) has authority for the administration and enforcement of the *Competition Act*, including the authority to review any merger, regardless of its size. A “merger” is defined to mean the acquisition or establishment, direct or indirect, by one or more persons (whether Canadian or non-Canadian), whether by purchase of shares or purchase or lease of assets, by amalgamation or combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person.

Merger Transaction Notification

As is the case in the United States under the Hart-Scott-Rodino (“**HSR**”) notification process, the *Competition Act* provides that the parties to certain large transactions must notify the Commissioner prior to completing a transaction. While the Commissioner may review all mergers irrespective of size, the *Competition Act* requires notification of a proposed transaction if both a parties’ threshold and a transaction threshold are exceeded.

The parties’ threshold is exceeded if the parties to the proposed transaction, together with their affiliates, have combined assets in Canada or gross annual revenues from sales “in, from or into” Canada exceeding C\$400 million. The target or transaction threshold is exceeded where, in respect of the following five forms of transactions:

- (a) the acquisition of assets in Canada of an operating business;
- (b) certain acquisitions of shares (see below) of the target corporation carrying on an operating business or of corporations carrying on an operating business controlled by that corporation;
- (c) amalgamations of two or more corporations if one or more of those corporations carries on an operating business, or controls a corporation that carries on an operating business;

(d) other forms of non-corporate combinations; or

(e) an acquisition of an interest in a combination that carries on an operating business otherwise than through a corporation,

the target (or the entity formed by amalgamation/combination) has assets in Canada or revenues from sales in or from Canada exceeding C\$93 million, which is the threshold for transactions closing in 2022.

In the case of a person acquiring shares, the threshold is also subject to the minimum requirement that such person, together with their affiliates, acquire more than 20% of the voting shares of a corporation that is publicly traded or more than 35% of the voting shares of non-publicly traded corporations.¹

Where both the parties' threshold and the transaction threshold are exceeded, notification under the *Competition Act* is required where persons, together with their affiliates, acquire more than 20% of the voting shares of a corporation that is publicly traded, or will acquire more than 50% if, prior to the proposed transaction, such persons owned more than 20%. In the case of voting shares of a corporation (none of the voting shares of which are publicly traded), the *Competition Act* requires notification (when the thresholds are exceeded) where persons acquiring such shares together with their affiliates would, as a result of the proposed transaction, own in the aggregate more than 35% of the voting shares or will acquire more than 50% if, prior to the proposed transaction, such persons owned more than 35%.

Where the above-noted thresholds are exceeded, the parties to the proposed transaction must notify the Commissioner by supplying information in accordance with the *Competition Act* and Section 16 of the Notifiable Transaction Regulations before completing the merger. Typically, counsel for the acquiring party will also file a submission concerning the competitive impact of the proposed transaction. While all of the information provided to the Commissioner is treated as confidential under the *Competition Act*, the Commissioner has taken the position that the confidentiality provisions in the *Competition Act* permit the Competition Bureau to share the information filed with them and their review with others on the grounds that such exchanges are made for purposes relating to the administration or enforcement of the *Competition*

Act. Also, the Competition Bureau has the power to speak with affected parties and others for the purposes of gathering information as part of their review. In the ordinary course, filing parties are aware of certain of and consent to these activities by the regulatory authorities.

Among the information that must be provided as part of a notification are any studies, surveys, analyses and reports "prepared or received by an officer or director ... for the purposes of evaluating or analyzing the proposed transaction." This broad information requirement is similar to that found in Item 4(c) of the HSR notification reporting form which must be submitted under the U.S. pre-merger notification rules.

Once the notification form is filed with the Commissioner, the parties must wait 30 days before completing the transaction, unless the Competition Bureau issues a supplementary information request, or SIR, within 30 days of the original filing, in which case the 30-day waiting period will commence once the parties have complied with the SIR. The Bureau has indicated that it "will only issue a SIR when the proposed transaction raises significant competition issues and additional information is required." In cases where the Commissioner has no concerns about the proposed merger, an advance ruling certificate (see below) or a "no-action letter" may be issued that will allow the parties to proceed with the proposed transaction even if the 30-day waiting period has not expired.

The *Competition Act* imposes criminal sanctions for failure to comply with the waiting period requirements. These criminal sanctions may also apply if a party fails to notify when required. In addition, administrative monetary penalties of up to C\$10,000 per day may be assessed for non-compliance. Typically, a transaction will proceed following the expiry of the waiting period, unless the Commissioner applies or threatens to apply to the Tribunal to prevent the proposed transaction from proceeding in cases where the Commissioner believes that substantive competition issues will arise from the proposed transaction.

The *Competition Act* provides limited exemptions to the notification requirements when a transaction otherwise exceeds the two financial thresholds referred to above. For example, transactions between affiliated parties are exempt from the notification requirements.

¹ In either scenario, if prior to the proposed transaction, such persons owned more than 20% (public) or more than 35% (non-public), the threshold is triggered where such persons will acquire more than a 50% voting interest.

Advance Ruling Certificates

Parties to a proposed merger, whether or not subject to transaction notification, may apply to the Commissioner for an advance ruling certificate (an “**ARC**”) with respect to such merger. The issuance of an ARC certifies that the Commissioner is satisfied that the proposed merger will not prevent or lessen competition substantially. Parties will often apply for an ARC when it is clear that no substantive competition issues will arise in connection with the proposed transaction and will often couple such application with the transaction notice filing.

The issuance of an ARC exempts the parties from the above-noted transaction notification requirements which otherwise may apply. Upon issuing an ARC, the Commissioner cannot apply to the Tribunal in respect of the proposed merger solely on the basis of information that is the same or substantially the same as the information on the basis of which the ARC was issued, provided the merger has been substantially completed within one year following the issuance of the ARC.

Challenges Before the Competition Tribunal

Under the *Competition Act*, the Commissioner may, by application made to the Competition Tribunal (the “**Tribunal**”), challenge a proposed merger (or any substantially completed merger within one year following closing) based on the grounds that the merger will prevent or lessen, or is likely to prevent or lessen, competition substantially. The Tribunal is comprised of judges of the Federal Court and non-judicial members knowledgeable in industry or economics. The *Competition Act* provides a list of factors for the Tribunal to consider in assessing whether a merger lessens competition substantially, including competition from imports and by foreign competitors; the solvency of the target business; the availability of product or service substitutes; trade and other barriers to entry; and the competitive effect of other firms in the relevant market.

If the Tribunal finds that a merger or a proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, the Tribunal is permitted to make certain orders, including the prohibition of a merger before it occurs, the dissolution of a merger after it has occurred and the disposition of assets or shares.

Recent Amendments to the *Competition Act*

On June 23, 2022, amendments to the *Competition Act* received royal assent as part of the *Budget Implementation Act, 2022* ([Bill C-19](#)). The amendments came into force immediately upon royal assent.² Certain of the amendments have significance to the Competition Bureau’s merger review analysis. In particular, a new anti-avoidance provision expressly states that the pre-merger notification requirements under the *Competition Act* will apply to any non-notifiable transaction that was “designed to avoid” the pre-merger notification regime. Moreover, the amendments have expanded the relevant factors for assessing whether a merger prevents or lessens, or is likely to prevent or lessen, competition substantially. In addition to the long-standing factors set out in Section 93 of the *Competition Act*, the amendments expressly include additional factors, namely “network effects within the market,” “whether the merger would contribute to the entrenchment of the market position of leading incumbents” and “any effect of the merger or proposed merger on price or non-price competition, including quality, choice or consumer privacy.”

May 2023

² With the exception that the amendments to the criminal conspiracy provisions will come into effect one year later, on June 23, 2023.



Financial Services

2023

Doing Business in Canada



airdberlis.com

BANKING

Chartered Banks

Canada's major banks are world-class organizations that have consistently been ranked in the top ten globally for soundness by the World Economic Forum. The private sector financing industry in Canada is dominated by six such banks, all of which are federally regulated. These banks (The Toronto-Dominion Bank, Royal Bank of Canada, The Bank of Nova Scotia, Bank of Montreal, Canadian Imperial Bank of Commerce and National Bank) are, by Canadian standards, very large, well-capitalized and have significant international interests. Canada was a signatory to the Basel Accord and the major banks have, since 2013, all exceeded the minimum capital requirements established under Basel III. These banks have also implemented the IFRS 9 reporting standard.

In addition to the six banks noted above, there are approximately 28 other domestic banks (collectively referred to as "**Schedule I Banks**"), notable among which are HSBC Bank Canada and Laurentian Bank of Canada. There are also approximately 15 subsidiaries of large international banks operating in Canada (referred to as "**Schedule II Banks**"). As well, large international banks may also operate in Canada through branches rather than solely through their subsidiary. These branches (referred to as "**Schedule III Banks**") will consist of either full-service branches, which may engage in consumer and commercial financing and other financial services activities permitted to Schedule I and II Banks (subject to certain exception), or lending branches, which have more limited powers and are more suited to cater to the borrowing needs of principally small and medium-sized businesses, credit card and consumer loan markets and commercial lending.

As in a number of other countries, the four pillars of finance in Canada (banks, securities, insurance and real estate) have largely been dismantled. Canadian banks now have significant ownership stakes in the brokerage industry, the trust industry and the insurance industry.

Other Financial Institutions and Alternate Forms of Financing

Approximately one in five Canadians use credit unions. The largest association of credit unions, Desjardins Group, is large enough to compete with the big six Canadian chartered banks. Although Canada implemented a federal credit union regulatory regime in 2012 for those institutions that

choose it, nearly all credit unions remain provincially regulated.

A large number of non-bank lenders also operate in Canada to provide asset-based lending, mezzanine debt, capital asset financing and/or accounts receivable factoring. A number of Schedule I Banks also have divisions focused on asset-based financing.

Other financial institutions in Canada, such as life insurance companies and pension funds, can also be approached for longer term funding and portfolio financing. As a result of the size of certain life insurance companies in Canada and the dismantling of the four pillars of finance, insurance companies, such as Manulife, Sun Life and Canada Life, are starting to provide more "banking" services to both businesses and consumers.

Security for Borrowing in Canada

Lenders will generally require security over some or all of the borrower's personal property, and sometimes real estate as well. Working capital loans from Canadian banks are typically secured by margined accounts receivable, and inventory and term loans are typically secured by all assets of a borrower. In the absence of (and often in addition to) security, the lender will usually require guarantees from principals or shareholders. In addition, lenders will frequently restrict borrowers from incurring additional debt, paying dividends, encumbering assets, reorganizing their business, providing financial assistance and other such matters in connection with the granting of significant term loans. Intercreditor arrangements may also be required where appropriate.

Personal property security regimes are provincially legislated, with all provinces and territories other than Quebec having (largely similar) personal property security acts modeled on Article 9 of the U.S. *Uniform Commercial Code*. These provinces and territories also have separate regimes for real property security. Several provinces (Ontario included) have enacted legislation modeled on Article 8 of the U.S. *Uniform Commercial Code* which governs, among other things, the perfection of security interests in investment property such as securities. Personal property security registry systems in Canada are notice-based, designed to disclose the existence of a security interest in collateral. Although registration protects the priority of a secured creditor's claim (on a first-in-time basis subject to certain exceptions such as purchase money security interests), registration is not necessary for the security interest to be valid and enforceable against the debtor.

BANKRUPTCY, INSOLVENCY AND REORGANIZATION

Introduction

In Canada, legislative jurisdiction over matters involving debtors and creditors is shared among the federal government and the provincial/territorial governments. The federal government has jurisdiction over “bankruptcy and insolvency,” while each provincial government has jurisdiction over “property and civil rights in the province,” which includes jurisdiction over real property and personal property security regimes. The federal government has, by statute, given the territorial governments powers similar to those of provincial governments.

There are three common types of insolvency or restructuring proceedings in Canada: (a) bankruptcy; (b) receivership; and (c) reorganization. Receivership and reorganization are the most common scenarios for insolvent companies. A bankruptcy can also run in parallel with a receivership.

The initiation of any one of these proceedings will stay the rights of creditors other than, in certain circumstances, those creditors holding security over personal property or charges against real property. The exceptions are reorganization proceedings pursuant to the federal *Companies’ Creditors Arrangement Act* (“**CCAA**”), wherein even secured creditors will usually be stayed by the initial filing. International creditors will generally have the same rights as Canadian creditors in all insolvency and restructuring proceedings.

It is not uncommon for insolvency proceedings in Canadian courts to run parallel with proceedings in the United States or other jurisdictions. Canadian courts may recognize a foreign proceeding where there is a “real and substantial connection” with a proceeding before the Canadian court, and/or may request a foreign court to initiate a parallel proceeding if significant assets of the debtor are located in that foreign jurisdiction. Common examples would be proceedings commenced under chapter 11 or chapter 15 of the United States Bankruptcy Code, recognized by a Canadian court as foreign main or foreign non-main proceedings, respectively.

BANKRUPTCY

The *Bankruptcy and Insolvency Act* (“**BIA**”) governs the bankruptcies of most individuals, estates of deceased individuals, corporations, partnerships and other entities. In addition to bankruptcy, the BIA deals with enforcement of security (and

receiverships in particular) and reorganization of insolvent debtors.

There are several ways in which a debtor may become bankrupt, the principal ones being: (a) the making by the debtor of an assignment for the general benefit of his creditors; and (b) the making of a bankruptcy order by the court on the application of a creditor. The legal effect is the same – the vesting in a trustee of all the bankrupt’s non-exempt property, but subject to the rights of secured creditors (creditors which hold security interests in the debtor’s personal property and/or charges against its real property).

Bankruptcy Administration

Bankruptcy trustees in Canada are considered officers of the court and are required to treat the interests of all stakeholders fairly and as such interests may appear. Trustees are generally not adversarial to secured creditors and do not aggressively seek to recover ordinary course payments made prior to bankruptcy.

Secured creditors will sometimes support or initiate a bankruptcy to run in parallel with a receivership, going-concern sale or liquidation. The bankruptcy will relegate to unsecured status certain statutory liens and deemed trusts which might otherwise supersede the creditor’s security.

ENFORCEMENT OF SECURITY/ RECEIVERSHIP

A receiver can be appointed either privately pursuant to contractual rights set out in a security agreement or by order of the court on application of a secured creditor. In exceptional circumstances, unsecured creditors can also have a receiver appointed on equitable grounds under provincial law.

A general secured creditor can, under provincial law, sell its collateral, but, if it is enforcing against substantially all of the assets of a business, the BIA will deem the secured creditor to be a receiver with a range of onerous reporting obligations to creditors and regulators. It is therefore not recommended that such action be taken without a licensed trustee to act as receiver.

Whether appointed by a secured creditor or by the court, the receiver’s main purpose will be to market and sell the assets and, if possible, the going-concern business of the debtor to satisfy the claims of secured creditors. A receiver may also manage the business of the debtor in order to preserve value and the business as a going concern until a sale or

sales can be completed. In that case the receiver would likely retain former employees of the debtor on a contract basis to assist with the business.

If there are surplus proceeds after the claims of secured creditors are paid out, a receiver will normally turn those over to a trustee in bankruptcy.

Notice of Intention

Secured creditors are generally free to enforce their security without interference from any trustee in bankruptcy. The BIA does, however, require that, before enforcing security on all of the inventory, accounts receivable or other property of an insolvent debtor used in relation to the debtor's business, the secured creditor must first give the debtor a 10-day notice of its intention to do so.

Private Appointment of Receiver

A security agreement will normally contain a provision authorizing the secured creditor to appoint a receiver upon the occurrence of a default in payment by the debtor or other specified events of default. If the agreement does not do so, the secured creditor will have no alternative but to seek a court appointment.

A private receiver will take direction from the secured creditor. A private receiver is not subject to general fiduciary duties to other interested parties, but is subject to certain standards set out in the BIA (for receivers) and in the provincial *Personal Property Security Act* (for enforcement of security), namely to act honestly and in good faith and to deal with the debtor's property in a commercially reasonable manner.

The BIA also imposes duties on a receiver to deliver to the debtor, certain creditors and the official receiver's office notice of its appointment, a statement of its intended plan of action, interim reports and a final report and statement of accounts. Because the BIA deems any secured creditor who enforces against substantially all of the assets of a debtor's business to be a receiver (with the forgoing duties), an enforcing general secured creditor should generally retain a licensed trustee to handle the enforcement and realization.

Court Appointment of Receiver

The BIA (as well as the statute in each province, other than Quebec, governing the rules of the provincial court) authorizes the court to appoint a receiver or receiver and manager where it is "just or convenient to do so." Even though a secured creditor may have a contractual right to appoint a receiver, it

may have no choice but to seek a court appointment (e.g., where the debtor or a third party will not give access to the charged property), or it may wish to do so (e.g., where it wishes to prevent a subsequent challenge that it acted negligently or improvidently in disposing of the debtor's property, by having the court establish the terms and conditions of sale and oversee the sale process, or where it expects to face intercreditor priority disputes).

A court receiver is an independent officer of the court and is subject to the direction of the court, not of the secured creditor. A court receiver will serve the interests of all creditors and other stakeholders, as such interests may appear, and does not, for example, prefer the interests of unsecured creditors. Like a trustee in bankruptcy, a court-appointed receiver will generally not be adversarial to secured creditors. A court-appointed receiver will normally be cooperative and collaborative with the secured creditor that brought the court application for its appointment, while still maintaining the impartiality of an officer of the court.

Effect of Appointment of Receiver

The appointment of a receiver, whether privately or by the court, does not end a corporate debtor's existence. However, the appointment does normally suspend the powers of the debtor's management to carry on the debtor's business or to deal with its property. A receiver will usually be empowered – a private receiver by the security agreement and a court-appointed receiver by the order – to carry on the debtor's business (and in doing so, to continue the employment of employees, to perform contracts, etc.) and also to dispose of the debtor's property.

Because the BIA is a federal statute with effect throughout Canada, an order appointing a receiver (or an interim receiver, as discussed below) under the BIA in one province can be enforced in other provinces.

A court-appointed receiver (and sometimes a privately-appointed receiver) will normally obtain an approval and vesting order in respect of a sale transaction of any material size. In exceptional circumstances where the value of the debtor's business is dependent on not-easily-transferable regulatory licences or permits, Canadian courts have granted reverse vesting orders. A reverse vesting order is a recent Canadian innovation, originally used in CCAA proceedings, where instead of the valuable assets being vested out of the debtor to a purchaser, the valuable assets are left in the purchaser and the unwanted liabilities are vested

out into a newly incorporated “residualco.” The receiver then sells the purchaser the equity in the debtor, effectively cleansed of its liabilities.

REORGANIZATION

Canada has four federal statutes that provide for formal reorganizations (sometimes called restructurings) between insolvent debtors and their creditors. The principal statutes are the BIA (Part III) and the CCAA. The additional statutes are the *Farm Debt Mediation Act*, which permits insolvent farmers to make arrangements with their creditors, and the *Winding-up and Restructuring Act*, which is dedicated to insolvencies of (a) corporations formed by federal parliament (or certain provincial parliaments) and subject to the authority of federal parliament, and (b) most financial institutions, including banks, trust companies and insurance companies. There recently has also been some use of the restructuring provisions of federal and provincial corporations’ statutes to restructure bond debt of corporate families wherein some, but not all, members are insolvent.

As discussed below, asset sales in reorganization proceedings are permissible. Because a reorganization is a debtor-in-possession proceeding that could preserve more value and goodwill, and because a business might be too large, risky or complicated for a receiver to operate (even with the assistance of former employees), in some circumstances a secured lender might view a reorganization proceeding as more attractive than a receivership.

Proposals Under the *Bankruptcy and Insolvency Act*

Under Part III of the BIA, insolvent individuals, corporations, partnerships and other entities may make “proposals” to their creditors. There are separate schemes for consumer proposals and commercial proposals. We focus here on commercial proposals.

A proposal is a written document that sets out the terms on which the debtor proposes to settle or compromise the claims of unsecured creditors. A proposal may, but usually does not, deal with the claims of secured creditors. A proposal will often provide for one or more of the following elements: a percentage reduction of each creditor’s claim; an extension of time for payment of claims; for corporate debtors, a conversion of claims or a portion of them into shares; or a release of claims against directors. A licensed trustee in

bankruptcy, named in the proposal, assists the debtor in preparing and, if approved, performing the proposal.

Upon the filing of a proposal through a licensed trustee with the federal regulator, the debtor obtains a number of benefits, including: (a) a stay of proceedings by creditors, including certain secured creditors and the federal and provincial/territorial governments; (b) a prohibition against enforcement of “insolvency” clauses in agreements under which the other party might terminate the agreement or accelerate payment of indebtedness; (c) the ability to obtain a super-priority charge for debtor-in-possession (“DIP”) financing; and (d) a right in certain situations to disclaim commercial leases and other contracts. The BIA allows secured creditors stayed in a BIA proposal proceeding to seek to have an interim receiver appointed by the court to protect their interests and collateral, although usually with powers limited so as to allow the debtor to remain in possession and control of most of its business and assets.

A proposal must be approved by unsecured creditors and by the court. Non-approval at either stage results in automatic bankruptcy. For creditor approval, all classes of unsecured creditors must accept the proposal by a majority in number and two-thirds in value of the unsecured creditors of each class present at the meeting and voting on the proposal. For court approval, the court must be satisfied that the terms of the proposal are reasonable and calculated to benefit the general body of creditors. Once approved by the unsecured creditors and the court, the proposal is binding on all unsecured creditors and on any secured creditors to whom it was made and who have approved the proposal (by the same requisite majorities).

A debtor may initiate the process by filing a notice of intention to make a proposal, giving it the same benefits in terms of protection from creditors, DIP financing and disclaimer of agreements. The ability to obtain an immediate stay of proceedings through a simple paper filing without any need for a court order can make this an attractive option. The debtor will then have 30 days within which to file a proposal, subject to extension or abridgement by the court. In total, the process, including all court-ordered extensions (of up to 45 days each), cannot take more than six months. Failure to file a proposal within the required time results in automatic bankruptcy. The debtor also is required to file, within 10 days of filing a notice

of intention, cash flows showing an ability to bring a viable proposal and failure to do so also results in automatic bankruptcy.

When a proposal has been fully performed, the trustee gives a certificate to that effect to the debtor and the official receiver. Where there is default, which is not remedied by the debtor or waived by the creditors, the creditors or the trustee may apply to the court for an order annulling the proposal. When a proposal is annulled, there is a deemed assignment in bankruptcy by the debtor.

The BIA also allows for an out-of-the-ordinary-course sale of the debtor's business and assets without shareholder approval, but subject to approval of the court. This may occur where a proposal does not appear possible, or only possible with the proceeds of such sale. Vesting orders are regularly granted in conjunction with sale approvals and reverse vesting orders may be granted in exceptional circumstances.

Arrangements Under the *Companies' Creditors Arrangement Act*

Because the CCAA is a more flexible statute than the proposal provisions of the BIA, CCAA reorganization is suitable for large, more complex businesses. Under the CCAA, an insolvent corporation may seek the court's assistance in making a compromise or an arrangement with its creditors, where the total of claims against the corporation or affiliated corporations exceeds C\$5 million. The debtor applies to the court, generally on notice to the significant creditors, for an order (called the initial order) that will normally impose a stay of proceedings by creditors (secured and unsecured), and also by the federal and provincial/territorial governments, for up to 10 days (reduced from 30 days by recent amendments), prohibit termination of contracts with the debtor by other parties to those contracts, and appoint a monitor (normally a licensed trustee in bankruptcy) to assist the debtor with its arrangement. Recent amendments have limited the initial relief available under the CCAA to those measures reasonably necessary for the debtor to operate in the ordinary course during the initial stay period.

The debtor may apply for an extension of the stay period and must satisfy the court that it has acted, and is acting, in good faith and with due diligence. Unlike in a BIA proposal proceeding, there is no set limit to the number or duration (particular or cumulative) of stay extensions that can be granted to a CCAA company.

The initial order will often authorize DIP financing (and create a super-priority charge in respect thereof), and permit preferential payments to critical suppliers. The recent amendments to the CCAA have limited initial relief in respect of DIP financing to that which is reasonably necessary for the debtor to operate in the normal course during the initial stay period. The CCAA also gives the debtor the right to disclaim commercial leases and other contracts.

The court will normally, in either the initial order or any subsequent order or orders that it makes, require the debtor to present a plan of arrangement to its creditors to be voted on at a meeting of creditors to be held within a specified period of time after the date of the order. If a majority in number representing two-thirds in value of the claims of creditors or of creditors of each class present and voting at the meeting accepts the compromise or arrangement, and the court sanctions it, the compromise or arrangement becomes binding on the debtor and all the creditors to which it was made.

A compromise or arrangement under the CCAA may include provision for the compromise of claims against directors, on the same basis as set out above with regard to proposals under the BIA. Recent decisions have also allowed the compromise of claims against third parties, where deemed necessary to the success of the reorganization. A CCAA plan may also involve reorganization or conversion of share capital pursuant to the *Canada Business Corporations Act* or applicable provincial corporate statute.

The CCAA also allows for an out-of-the-ordinary-course sale of the debtors' business and assets without shareholder approval, but subject to approval of the court. This might occur where a plan does not appear possible, or possible only with the proceeds of such sale. As in BIA proposal sales, vesting orders are regularly granted in conjunction with sale approvals in CCAA proceedings and reverse vesting orders may be granted in exceptional circumstances.

SUPER PRIORITIES AND OTHER CREDITOR PROTECTIONS

Bankruptcy and Receivership

The BIA provides for certain super-priority charges and other protections that will have priority over the claims of a secured creditor in bankruptcy or receivership. The main ones are:

- (a) Unpaid suppliers can repossess goods delivered within 30 days prior to the date of the bankruptcy or receivership, provided the goods are still in the receiver or trustee's possession, identifiable, in their original state and have not been sold or contracted for sale.
- (b) Non-management employees have a super-priority charge over current assets for unpaid wages and vacation pay accrued in the six months prior to the bankruptcy or receivership. This charge does not cover termination or severance pay.
- (c) Pension beneficiaries have a super-priority charge over all the debtor's assets for: (i) employee pension contributions deducted at source; (ii) any defined benefits accruing in the current plan year, determined on the basis of a going concern valuation; and (iii) any defined employer contributions. In the case of a defined benefit pension plan, the BIA super-priority charge does not currently cover special payments/actuarial wind-up deficiencies. However, a new statute which is only awaiting royal assent to become law will extend the super-priority charge to such defined benefit plan deficiencies. This will apply immediately to any newly created defined benefit plans and be effective after four years for existing defined benefit plans.

In a receivership (without a bankruptcy), certain statutory deemed trusts and related charges for unremitted source deductions and federal or HST will continue to apply, as will certain provincial statutory deemed trusts. The federal statutory deemed trusts for source deductions are preserved by the BIA in bankruptcy, but not the statutory deemed trust for HST or most provincial statutory trusts. For that reason, a secured creditor will sometimes apply for both a receivership and the bankruptcy of its debtor, with the two proceedings to run in parallel, in order to reverse the priority of the HST deemed trust and certain provincial deemed trusts. In that situation, the trustee appointed in the bankruptcy would generally be the same entity as that acting as receiver, and the receivership would be unimpeded by the bankruptcy.

The standard receivership order will create super-priority charges for the fees of the receiver and its counsel, and for any borrowings the receiver might make in order to fund the receivership and any operations.

Reorganization

Suppliers do not have 30-day goods rights in BIA proposals or CCAA proceedings.

The same wage and pension amounts that benefit from super-priority charges in bankruptcy and receivership are given effectively equivalent protection under the CCAA and the BIA proposal regimes.

A court cannot sanction a CCAA plan or BIA proposal unless it provides for immediate payment of the wage and pension amounts that benefit from charges in bankruptcy and receivership. Likewise, a court cannot approve an out-of-the-ordinary-course sale in a CCAA or BIA proposal proceeding unless it is satisfied that those same wage and pension amounts will be paid. The aforementioned extension of protections for defined benefit pension plan special payments/actuarial wind-up deficiencies in receiverships will also apply in CCAA and BIA restructurings.

As in bankruptcy, the federal deemed trust for HST loses its priority in a CCAA or BIA proposal proceeding. The situation is more complicated when it comes to provincial statutory trusts; in a BIA proposal proceeding they are generally overturned, but they may remain operational in a CCAA proceeding. The case law is not settled on the point.

The standard CCAA order will create super-priority charges for:

- (a) The fees and expenses of the debtor's counsel and of the monitor and its counsel (the "**Admin Charge**").
- (b) Any DIP financing.
- (c) Officer liabilities accrued during the CCAA proceedings.

A CCAA order may also create other charges, such as for employees benefitting from a Key Employee Retention Plan in the CCAA proceedings. While the priority of all the charges relative to each other and to existing secured claims varies from proceeding to proceeding, a DIP charge usually is subordinate only to the Admin Charge and a secured lender's pre-filing debt is usually subordinate to any court-ordered charges. The exception would be where continued cash management effects a "creeping roll-up," which the courts have found to be permissible. A full roll up, where DIP advances pay off pre-filing debt, is generally not permitted, though some courts have approved it.

Sale Processes

Generally speaking, a receiver or a company in BIA proposal or CCAA proceedings seeking to sell its business will first seek the court's approval of a marketing and sale process. Often these processes will involve two rounds, and last at least two months. While stalking horse bids are not the norm, they are not uncommon. Live auctions are a relative rarity in Canada.

Any selected transaction will require further court approval. The court will heavily weigh the views of secured creditors, but will also take into consideration other factors, such as job preservation. A sale in a BIA proposal or CCAA proceeding does not require a formal vote of creditors and unsecured creditors or equity holders will, as classes, have little influence on the court's decision.

The super-priority amounts that need to be satisfied in order to obtain court approval of an out-of-the-ordinary-course sale in CCAA or BIA proposal proceedings were discussed above.

Court approval of a sale transaction in a BIA or CCAA proceeding will be accompanied by an order vesting the assets free and clear in the purchaser. Increasingly, Canadian courts are also making reverse vesting orders, pursuant to which bad assets and liabilities are vested out of the debtor company which company then continues on as a solvent entity.

From commencement of a proceeding to the point where a secured creditor can expect distribution of substantially all the proceeds of its collateral, it will usually take about four to six months.

In a CCAA or BIA proposal proceeding, a sale transaction does not require a proposal or plan, and therefore is not subject to a vote of creditors. Parties who have an interest in the assets being sold, and certain other stakeholders, would be given notice of the motion to the court for approval of the sale and would have the opportunity to respond to that motion.

TERMINATION AND ASSIGNMENT OF CONTRACTS

Termination or Assignment by Debtor in Possession

A company in a CCAA or BIA proposal proceeding can terminate unwanted contracts other than: (a) certain types of financial contracts, security agreements and guarantees; (b) collective

agreements; (c) financing agreements if the debtor is the borrower; and (d) real property leases where the debtor is the lessor. In the case of intellectual property licences where the debtor is the licensor, the licensee is allowed continued use of the intellectual property, a protection for the licensee falling somewhere short of a full prohibition on termination.

The CCAA and BIA also allow the forced assignment of contracts by order of the court, whether or not permitted under the contracts. The court will consider a number of factors, including the proposed assignee's ability to perform under the contract. As well, all monetary defaults have to be cured before such forced assignment. For that reason, forced assignment is often used as a last resort. Certain types of financial contracts, security agreements and guarantees cannot be assigned in this manner.

In a bankruptcy, the trustee will have the same powers as above to terminate or assign contracts. In a receivership, a bankruptcy would have to be run in parallel in order for the receiver to rely on the trustee's power to force assignment of contracts.

Termination by Third Party

In any proceeding under the CCAA or BIA (including a court-ordered receivership), third parties are stayed from terminating contracts merely because of the insolvency or restructuring proceeding. The third parties will also be required to continue any contracted supply of goods or services, though they can alter the payment terms, including by requiring prepayment or cash on delivery. Lenders who are caught by a stay of proceedings may also be barred from terminating their credit facilities, and so will have to rely on the terms of those facilities to minimize their continuing obligations to provide credit.

Comparison to U.S. Proceedings

The following are some distinguishing features of Canadian insolvency and restructuring proceedings:

(a) Receivership

Other than under the laws of certain states, U.S. insolvency law has no close analogue to receivership.

(b) Court Officers

Any court-appointed receiver or CCAA monitor, and any trustee in bankruptcy or proposal trustee, will be an officer of the court and strive to maintain impartiality. A court officer will not attempt to alter the priorities among creditor classes set down by the BIA, CCAA

and provincial law. Even a trustee in bankruptcy should stand aside to allow a secured creditor to enforce without interference.

(c) Sale Processes

Stalking horse bids are not the norm, but are not unusual. Live auctions are rare.

(d) Reverse vesting orders

Reverse vesting orders are available in exceptional circumstances, but are not unusual.

(e) Committees and Representative Counsel

Committees and representative counsel are usually only seen in CCAA proceedings.

Stakeholder committees are not the norm, unless there are unsecured and/or subordinate bondholders involved. Bondholder committees will usually pay their own expenses.

If there is a significant and disparate stakeholder group that is not expected to be effectively represented in a CCAA proceeding, the court may appoint representative counsel. A common example would be representative counsel for otherwise unrepresented employees or retirees/pensioners with priority claims that need defending. Representative counsel will usually benefit from a court-ordered charge on the company's assets in the same way as the company's counsel and the monitor and its counsel.

(f) Court Procedures

Canadian filings are largely paper-based, but the notice requirements are far less onerous than in the United States; only parties with an economic interest that may be affected (or who have otherwise requested service) need be served.

Court orders are, generally, far shorter and fewer in number than in U.S. proceedings. For example, a CCAA proceeding will usually start with a single order, less than 30 pages in length.

Other than the fees and expenses of the court officer and its counsel, professional fees of other parties are not reviewed or approved by the court or any fees officer.

On the whole, the procedural expenses of a Canadian proceeding are far less than those of a U.S. proceeding.

May 2023



Real Estate, Municipal and Land Use Planning

2023

Doing Business in Canada

AIRD BERLIS

airdberlis.com

LEGAL JURISDICTION

Ownership of real property in Canada is governed primarily by provincial and territorial law, although there are also federal laws, such as the Goods and Services Tax, income tax, environmental protection legislation and foreign investment legislation that will apply. The laws of the nine “common law” provinces and the territories are substantially similar in their dealings with real property. Quebec, which operates under a civil law system, is the exception. Notwithstanding the many differences which exist with respect to the law of real property in Quebec, such differences are unlikely to be a major concern from a business perspective.

OWNERSHIP

In Canada, investors may obtain interests in real property in a variety of different forms, including full “freehold” ownership, joint venture co-ownership and leasehold interests. In the common law provinces, the two basic forms recognized for co-ownership by more than one individual, partnership or corporation (or any combination thereof) are “joint tenants” and “tenants in common.” Both forms of ownership permit the owners to hold undivided interests in the property as a whole and, unless otherwise agreed among them, the co-owners are each entitled to the possession and use of the property. Some form of condominium legislation exists in most of the provinces. In Ontario, condominiums can be created for residential, commercial or industrial purposes.

BENEFICIAL OWNERSHIP OF REAL PROPERTY

While most jurisdictions permit the registered owner of real property to be a trustee or nominee on behalf of an undisclosed beneficial owner, there is a recent trend in some provinces, most notably British Columbia and Ontario, to require the disclosure of the name and other pertinent information of the beneficial owner to the government authority. The purpose for this new requirement is to assist governments to better understand the trends in the market and to administer and enforce the payment of land transfer tax (see discussion below regarding land transfer tax).

TITLE TO REAL PROPERTY

Real property throughout Canada is conveyed by means of instruments in the forms prescribed by each of the provinces and territories. In Canada there are two systems of land recording. A “registry” or “registration of deeds” system is used in the Maritime provinces, Quebec, and small

parts of Ontario and Manitoba. Under this system, investigation of documents filed against the property and an understanding of relevant common law (or civil law in Quebec) and statutory rules is required to determine the status of title. In the balance of the country, title is recorded under the “land titles” system under which the status of title is determined and guaranteed by the provincial or territorial recording authority.

Quebec employs a system of title conveyancing which relies in large part upon notaries, who fulfill a special role in connection with the transfer of real property under the Civil Code of Quebec. A notarial form of deed (i.e., a conveyance of land which is in a prescribed form, and which is executed before and authenticated by a notary) is prepared by a notary who keeps the original document in his or her records and deposits a certified copy in the relevant land registry office.

Over the past decade, title insurance has become the norm for residential properties throughout Canada and has replaced lawyers’ legal opinions as a means to protect both purchasers and mortgagees with respect to title deficiencies. While not as common, title insurance is also frequently obtained in conjunction with the acquisition and mortgaging of non-residential properties.

SECURITY INTERESTS IN REAL PROPERTY

Most real estate financings are arranged through institutional lenders such as banks, trust companies, pension funds, credit unions and insurance companies. Credit terms will vary between institutions and will be reflective of the nature of the transaction and risks involved. Generally, lenders will not provide financing in excess of 75% of the appraised value of a property. Because many foreign lenders in Canada are subsidiaries of international banks, they frequently participate by way of syndicated loans arranged by a Canadian lending institution.

Lending institutions typically take both primary and collateral security in real property and related assets; Primary security includes a mortgage or charge; a debenture containing a fixed charge on real property or, in some cases where multiple lenders are 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; assignment of material contracts; general security agreements; and third-party guarantees.

Upon default in payment under any such mortgage or instrument, a creditor may sue the debtor and, in most cases, subject to compliance with legal procedural requirements of the particular jurisdiction, may sell or foreclose upon the interests of the debtor and subsequent holders of security interests in real property. As a result of the ability to register any number of security interests against a particular property, statutory rules (which are usually based on the order of registration under the applicable registry or land titles systems) exist to determine priority among lenders.

In Ontario, generally speaking, brokerage licences are required from the Financial Services Commission of Ontario before any individual or corporation can carry on the business of dealing in mortgages, trading in mortgages, mortgage lending or administering mortgages. Failure to obtain such a licence may result in penalties not only to the entity participating in such activities but also potentially to officers and directors of the offending entity. Similar legislation relating to the governance of mortgage brokers is in place in a number of other provinces, including British Columbia, Alberta and Quebec.

LAND TRANSFER TAXES

Most provinces and territories (Alberta being the exception) impose land transfer taxes upon the purchasers or long-term lessees of real property, payable at the time of acquisition. Such taxes may be levied at the provincial/territorial and/or municipal levels, depending upon the province, territories and municipality, and are typically calculated as a percentage of the value of the consideration paid to acquire the property, including land, building and fixtures.

In Ontario and some other jurisdictions, land transfer tax is payable on both the transfer of registered title and beneficial ownership, in the latter case even when there has been no title registration. In Ontario, for example, a graduated provincial land transfer tax rate is imposed starting at 0.5% and increasing to 2.0%, or 2.5% for residential property. For properties located within the City of Toronto, an additional graduated land transfer tax is payable starting at 0.5% and increasing to 2.0%, or 2.5% for residential property. Effective October 25, 2022, a 25% non-resident speculation tax is imposed upon the purchase or acquisition of an interest in residential property located anywhere in Ontario by individuals who are not citizens or permanent residents of Canada, or by foreign corporations (foreign entities) or taxable trustees. This tax is in addition to Ontario's (and Toronto's) current land transfer tax.

In 2016, British Columbia introduced a similar tax on the purchase by foreign nationals, entities and taxable trustees of residential properties, currently at 20% within the Vancouver and Victoria regional districts, as well the Fraser Valley Regional District, the Regional District of Central Okanagan and the Regional District of Nanaimo.

There are certain exemptions and rebates which may be claimed to avoid, postpone or reduce land transfer tax in appropriate circumstances.

GST AND HST

The GST is a federal value-added tax imposed at the rate of 5% on goods sold or rented and services provided in Canada. As a general rule, the sale or lease of real property is taxable unless there is a specific exempting provision in the legislation. For example, subject to specific qualifications, exemptions exist for: (a) the sale of used residential property (houses, condominiums, apartment buildings); (b) the sale of vacant land by an individual; (c) farmland sold to family members; and (d) residential rent for lease terms greater than one month. The provinces of Ontario, Quebec, Nova Scotia, Prince Edward Island, New Brunswick and Newfoundland and Labrador all apply a single tax which combines the provincial sales tax and the GST to create a single HST. In Ontario, the combined HST rate is 13%. The HST generally applies to all purchases and leases of non-residential real property. Sales and leases of real property that were exempt under the GST rules continue to be exempt for the purposes of HST. Sales of new residential real estate in Ontario are subject to the HST, but rebates are available for some of the provincial sales tax portion of the HST.

Foreign Investment in Real Estate

In response to recent housing supply and affordability issues, the federal government has enacted the *Prohibition on the Purchase of Residential Property by Non-Canadians Act* intended to prohibit the purchase of residential real estate by non-residents, directly or indirectly, for a two-year period beginning January 1, 2023. The definition of a non-Canadian within the Act includes individuals who are not Canadian citizens or permanent residents, corporations that are incorporated otherwise than under the laws of Canada or a province, and Canadian corporations not listed on a Canadian stock exchange that are controlled by a foreign individual or corporation. Recent regulations have clarified that a corporation is deemed a non-Canadian if it is controlled by more than 10% of non-Canadians.

Exceptions to the non-Canadian restrictions exist for publicly traded Canadian corporations and Canadian REITs, and amendments to the regulations have introduced a further exception for the acquisition by a non-Canadian of residential property for the purposes of “development” if there exists a good faith intention to develop at the time of purchase.

Vacant Home Taxes

Also in response to housing supply and affordability issues, federal, provincial and municipal governments have developed various forms of vacancy tax on underused residential properties. Federally, the Underused Housing Tax is an annual 1% tax on the ownership of vacant or underused housing in Canada that applies mostly to non-resident, non-Canadian owners. Some provinces, including British Columbia, have further imposed a speculation and vacancy tax that again is intended to apply to property owners with foreign income. At the municipal level, both Toronto and Vancouver apply a 1% and 3% tax, respectively, on the assessed value of underused and vacant homes, regardless of the resident status of owners.

In all cases, these vacancy taxes are based on declarations made by the property owners and require timely disclosures to determine if the tax is applicable.

LAND USE REGULATIONS

General

All land in Canada is subject to some form of regulation respecting its use and development. The scope of such regulation can vary from the simple to the complex and can involve regulation by the federal, provincial/territorial and municipal (local) levels of government, including special purpose bodies. The construction and use of buildings is likewise subject to public regulation in all parts of Canada. With minor exceptions, one or more public permits or licences must be obtained before constructing, occupying or making changes to the use of commercial and industrial buildings as well as residential properties. Public regulations of land use across Canada are generally put in place following consultation with stakeholders, including property owners, in an orderly and open fashion. The existence and details of the regulations (be they province-wide or area-specific) are publicly available and generally well known or readily accessible to all whose interests are touched by them, including landowners, project proponents, architects, contractors and the like.

Generally speaking, land use regulation across Canada has elements of flexibility and is subject to review and reconsideration to meet changing needs and objectives. Land use regulation is intended to produce an outcome that protects and balances private and public interests without officious or unfair interference in the use and enjoyment of land. Land use regulations are normally not retroactive, though new policies often do come into force immediately upon approval and apply on a go-forward basis. The regulatory frameworks of Canada and the provinces and territories provide appeal or review opportunities for persons who seek exceptions or changes to the regulations applying to their properties or influencing their property interests. The nature and extent of these rights of appeal and review vary from the simple (e.g., a request to a municipal building official to allow a variation in the use of building materials that is a satisfactory substitute for the literal requirements of a building code) to the complex (e.g., a request to change the land use provisions on a large area of agricultural land to permit its development as a new urban community). The latter may involve administrative, political and quasi-judicial tribunal decisions at several government levels, possibly extending over a period of several years. Guidance and advice from professionals such as land use planners, environmental and traffic engineers and/or market research consultants will often be necessary.

Municipal Zoning

All but the most sparsely populated areas of Canada are governed by local municipal governments or planning boards which, in most cases, exercise through zoning and other controls the most influential powers over land use. These powers are exercised in accordance with senior government policy as well as master policy plans (often known as Official Plans) as determined and laid down by the relevant municipal council. These regulations are unique to each municipality, based on local preference and enacted with public notice and citizen input. Zoning regulations typically implement the policies contained in the relevant master policy plan. These regulations may often be amended on a general or site-specific basis based upon a successful application by a landowner or owner’s agent. Appeal rights may also be available for unsuccessful applications. However, some jurisdictions (Ontario, for example) may impose a multi-year “freeze” on development applications that seek to amend planning instruments (master policy plans, zoning by-laws, etc.) that have only recently been adopted. Whether these development freezes apply often depends on the status of the local planning

instruments. A professional with knowledge of the local planning regime will frequently be needed to assist.

Subdivision of Land

The division of parcels of land or interests in land or buildings is generally controlled in relation to all lands under provincial and territorial jurisdictions. When land is divided to create separate building lots, to add land to an existing ownership, to create rights such as rights-of-way, easements, or mortgages over parts of land parcels or to divide buildings into separate condominium units, one or more government approvals are almost always required. Decisions on applications to subdivide land will be based on applicable statutory and local policy tests (for example, will the proposed new lot comply with the prevailing zoning standards for lot size or frontage?) and may include a public hearing or other form of input from interested landowners and stakeholders.

Development Agreements

Development agreements between a landowner and a municipality are used to ensure that adequate infrastructure is available or will be made available to accommodate the proposed development without adversely affecting the surrounding area. A development agreement can require that a landowner fulfill certain obligations imposed by a municipality as a condition of granting approval of an application. These obligations can include the provision of technical studies to the satisfaction of the municipality, the requirement to obtain relevant permits, the gratuitous conveyance of land for road widenings or transit infrastructure, or the completion of sanitary works, for example.

Despite the fact that some provinces do not provide the statutory authority for municipalities to enter into development agreements, the courts have upheld such agreements as necessary to control and direct development. Each province has its own statutory regime which expressly permits municipalities to enter into development agreements or does not expressly provide the legislative authority to enter into such agreements. Courts have also interpreted development agreements as being forms of land use regulation as opposed to commercial contracts between the developer and the municipal authority.

Heritage Conservation

Buildings may be subject to prohibitions against modification or demolition as a result of their architectural or historical significance. Such controls may be absolute or temporary. Lands and buildings

of cultural heritage interest are often identified and listed on individual inventories that exist at the municipal, regional, provincial and/or national level. The criteria by which cultural heritage properties are identified typically focus on materials, design, historical associations and/or contextual value.

Properties determined to be of significant heritage value or interest may be designated under provincial statute and thereby gain legal protection against future alterations or demolition. Designation is not essential for protection but is often undertaken to enhance the listed property's prospect for long-term survival. Permission to alter or demolish a heritage designated property is often at the discretion of the local municipal council or planning board, which often takes direct advice from a local heritage advisory committee. In most jurisdictions, there are limited rights of appeal to a provincially-appointed administrative tribunal should an application be refused.

Significant Natural Areas, Flood Plains

As a general rule, government regulations do not sterilize land by prohibiting all land uses or prohibiting the construction of all buildings. The exceptions to this general rule occur when health and safety risks are significant – for example, in the case of flood plains and erosion prone lands, or when the lands are in an area of scientific or natural interest. In the latter circumstances, regulatory control is often exercised by special purpose bodies such as watershed commissions or conservation authorities established by statute. While development within these highly protected areas may still be possible, additional approvals will be required from the commissions and/or authorities tasked with protecting the area.

Municipal Infrastructure, Community Benefits and Development Charges

Municipal governments in all provinces plan for and provide various forms of infrastructure for their residents, such as water and sewers, roads and streets, solid waste collection and disposal, and parks and recreation. Municipal governments in urban contexts also often provide police and fire protection, public transit, tourism bureaus, libraries and economic development services. The primary means by which these services are paid for is taxation on land. However, the provinces of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick and Nova Scotia, as well as the Yukon and Northwest Territories, also impose a formalized system of levies applicable to the development of land.

Development charges are one-time payments, usually collected prior to the issuance of building permits, that local and regional governments may collect from land developers to offset costs related to increased services that are incurred as a direct result of new development. Developers pay development charges for these increases rather than the costs being borne by the existing taxpayers who are not creating the demand for the new infrastructure or services. The demand created by new development also does not always relate to physical works or services that are provided adjacent to the lands being developed. For example, new development may be required to pay a development charge related to increasing the size of arterial roads or water infrastructure elsewhere in the municipality in anticipation of future development.

Local school boards may also impose a similar development charge of their own, termed an “educational development charge.” These charges may be imposed if a school board needs to acquire a new school site(s) to accommodate students resulting from new growth, although the levy may apply to both residential and non-residential development.

The imposition of a new development charge is typically preceded by a public process, including notice and input from the affected community, and the completion of a detailed background study. There is often an ability to challenge the imposition of a new development charge, either directly with the municipal government or on appeal to the courts or an administrative tribunal.

Recently in Ontario, changes to provincial legislation have created a new “community benefits charge” that acts as a companion to development charges. The community benefits charge is intended to allow municipalities to recoup increased costs related to growth where such costs are not covered by development charges. These costs include buying new lands for parks or other local municipal initiatives. The charge in Ontario is capped at 4% of the value of the land being developed as of the day before the first building permit is to be issued, thereby allowing the municipality to benefit from the increase in the land’s value arising from the development approval.

Several provinces, including British Columbia and Ontario, also require developers to contribute land, or cash in lieu of land, towards parkland acquisition. Typically, the development of institutional and industrial uses is exempt from parkland dedication requirements, but commercial and residential uses

can be required to convey between 2% and 5% of land for parkland purposes, or an alternative rate of up to 20% can be paid, depending on the size of the development site.

AFFORDABLE HOUSING

Municipal governments in a number of provinces across Canada are increasingly requiring the provision of affordable housing units within new residential developments and redevelopments. Some municipalities, including Toronto, Vancouver and Montreal, have inclusionary zoning policies either proposed or in place which would require a certain percentage of units within a proposed development to be set aside as long-term affordable units. The goal of these programs is to locate affordable units within market-rate developments, although many of these programs have provisions for locating affordable units off-site.

May 2023



NOW LEASING

Commercial Leasing

2023

Doing Business in Canada

AIRD BERLIS

airdberlis.com

GENERAL

In Canada, a lease is both a contract and an interest in land. The parties to a commercial lease are free to agree upon such terms as may be negotiated and, in the process, may generally contract out of local provincial legislation governing commercial tenancies.

INITIATING DOCUMENTATION

In Canada, unlike some other jurisdictions, commercial tenants are not often presented with a landlord form of lease at the outset. Instead, the tendency is for commercial landlords to determine if there are the makings of a business deal by producing shorter form leasing documentation at the outset of the relationship. Such documentation can take the form of any one or more of the following: (i) an offer to lease, (ii) a letter of intent or “LOI” (iii) a proposal to lease and (iv) a summary term sheet. A decided benefit to adopting this approach is to expend minimal resources in pursuit of settling core business terms, thereby building valuable momentum for the eventual negotiation of the many “boilerplate” provisions in a lease. If the parties are able to settle the terms of a shorter form leasing document, this will often trigger mobilization of construction forces (i.e., designs, plans, applications for permitting, etc.), thereby enhancing the prospects of emerging from this process with a binding lease. Another justification for this process, in the retail context, is that a landlord may wish to swiftly secure a commitment from a major tenant in order to facilitate marketing efforts in attracting other tenants or perhaps satisfy co-tenancy requirements to which a landlord may be bound. Care needs to be taken to ensure that the lease contains all terms from the preceding documentation in order that a successful merger occurs.

A notice of an agreement to lease is capable of registration in our land titles system in order to preserve priorities, but many landlords restrict such registration unless and until a binding lease is settled for the premises in question. Lenders prefer not to grant non-disturbance agreements on the strength of offers to lease above, but may do so depending on the circumstances. On balance, the sequence of an offer to lease followed by a lease represents the industry norm in Canada, although there can be variations on this theme depending upon, among other things, the popularity of the project in question. Ultimately, most Canadian landlords adhere to the “no lease no keys” policy to satisfy the demands of the lending community.

Ordinarily, initiating documentation is non-binding or, alternatively, conditional on settling a final form of lease. In order to achieve a binding lease (whether by way of an agreement to lease or a lease) all of the essential elements need be addressed, including: (a) identifying the landlord and the tenant, (b) a proper description of the premises, (c) the rental structure, (d) the length of the term, and (e) the commencement date. If any of the aforementioned essential elements are missing, then in all likelihood the resulting agreement to lease or lease will be found to be unenforceable.

Given that a lease is also a conveyance, it is recommended practice that a sub-search of the lands be conducted at this early stage to ensure that there are no pending encumbrances, limitations or restrictions that could impact the settled terms of a lease. A sub-search of title also serves to confirm ownership of the parcel. Moreover, local zoning by-laws need be accessed to ensure that the tenant’s planned business can in fact be operated from the premises. Landlords in Canada rarely make any representations or warranties in this regard.

Initiating documentation is not to be taken lightly in Canada as it often sets the stage for the lease negotiations that follow. Any extraordinary rights, including, but not limited to, co-tenancy, restrictive covenant, rights of first refusal, leasehold allowance, rent free period, additional rent cap or non-consent transfers, ought to be worked into the initiating documentation. It is also important to settle landlord and tenant work at this early stage, especially if a tenant wants to avoid accepting the premises in “as is” condition.

LEASE NEGOTIATION

An offer to lease will usually contain a provision requiring the tenant to execute a lease agreement within a certain time period. A failure to do so may result in the offer to lease being declared null and void. Typically, a landlord’s form of an offer to lease will provide that the landlord’s standard form of lease is to be used though tenants with bargaining power may persuade a landlord to substitute the tenant’s form of lease instead.

The ultimate goal is for the initiating document to “merge” upon execution and delivery of the lease, such that the lease will be the only document governing the relationship between the landlord and the tenant. In some cases, but relatively infrequently, the parties will agree that certain terms (for example, construction details) set out in the offer to lease are to “survive” and continue to govern following execution and delivery of the lease.

Landlords' standard lease forms are becoming increasingly complex documents, and foreign tenants should leave ample time to navigate through the negotiation process. While landlords will, in general, entertain reasonable amendments to their standard form of lease, some tenants may not take full comfort from diluted "step down" provisions, thereby necessitating more intense lease discussions. While landlords strive to preserve uniformity among the many leases across their portfolio, tenants are known to challenge standard provisions to reflect their own company policies and to ensure consistency among their own portfolios.

Most tenants are presented with fully "net" leases, such that all operating costs are typically charged back to tenants with very few limits, caps or exceptions. Management or administration fees are payable to landlords as well (usually calculated as a percentage of such operating costs or a percentage of gross revenue from the project). There is no "universal list" of standard inclusions or exclusions of such costs. Typically, all such costs are estimated by landlords with tenants making all payments based on those estimates, and adjustments are made when landlords obtain additional information with respect to the actual costs incurred. Landlords will typically resist any audit rights but will frequently agree to provide reasonable supporting information so that tenants can ascertain the amounts that are payable. Landlords' standard lease forms typically have very strict requirements with respect to use of the premises and conduct of tenants' business operations, as well as extensive restrictions to any potential transfers of leasehold interests.

Almost all of the obligations with respect to the repair, maintenance and insurance relating to the premises are passed on to the tenant, with very few exceptions. Canadian commercial leases now often contain very broad provisions relating to landlord's control or alterations of the building or the project, including rights of relocation. Other provisions that are becoming typical requirements, but may create an administrative hassle for foreign tenants, include, for example, a requirement to pay all rent by pre-authorized debiting or electronic funds transfer. Canadian leases also contain very specific insurance requirements, with insurance providers and policies often subject to landlord's approval. Foreign tenants should involve their local insurance brokers early in the negotiation to review these provisions and ensure compliance. Foreign tenants should be aware that environmental laws, as discussed elsewhere in this publication, are different from those in the United States or other parts of the world and therefore counsel should be engaged to

ensure that appropriate protections are negotiated into a lease to limit liability for pre-existing or ongoing environmental contamination.

LEASE TAXES

Consistent with a net lease, tenants are expected to share or reimburse their landlords with respect to taxes (and, for that matter, operating costs) imposed as a result of leasing of their space.

Realty taxes can be a significant liability in commercial real estate leases. For example, in Ontario, realty taxes are assessed using the income stream/revenue model, and separate assessments are no longer available, although one can endeavor to obtain assessors notes from which an assessment can hopefully be "reconstructed." Frequently, tenants from foreign jurisdictions tend to look for billing certainty, but realty taxes are rarely capped or fixed by landlords in Canada, who instead prefer to reserve very wide discretion in how taxes are allocated. In the absence of separate assessment type language in the lease, foreign tenants often strive for a "proportionate share" formula and, in some cases, a Canadian landlord will commit to this allocation methodology.

The rate of sales taxes (GST or HST) charged to tenants varies from province to province. HST is exigible against taxable supplies, which includes all rent paid by a tenant to a landlord under a lease, but in most cases, this is a "flow through" tax that is "neutral" as long as a tenant is registered to collect such sales taxes in its business dealings. GST or HST is also chargeable on leasehold inducements and allowances.

LEASES IN QUEBEC

Quebec is governed by the Civil Code which contains many tenant-friendly provisions. As a result, landlords will typically attempt to obtain waivers in the lease to those Civil Code provisions, and proper legal guidance is highly recommended to maneuver in such regime.

May 2023



Environmental

2023

Doing Business in Canada



airdberlis.com

JURISDICTION

In Canada, the federal government has a much smaller role in environmental regulation than does the U.S. federal government. The authority to create laws dealing with the environment is shared between the provincial and federal government. Each province and territory in Canada has its own environmental protection legislation, whose statutes are the primary regulatory tools. In Ontario, the primary environmental statute is the *Environmental Protection Act* (“**OEPA**”), first enacted in 1971. Other environmental statutes in Ontario include the *Ontario Water Resources Act*, *Safe Drinking Water Act, 2002*, the *Clean Water Act, 2006*, and the *Environmental Assessment Act*. Similar types of legislation are found in most provinces.

The federal government is responsible for limited interprovincial environmental legislation as well as international rules. For instance, the transportation of dangerous goods that occurs across provincial borders or international borders is governed by federal legislation. The federal government also takes the lead in negotiating international environmental initiatives and treaties (e.g., Paris Agreement or the Great Lakes Treaty). In addition, the federal government presides over the *Canadian Environmental Protection Act* (“**CEPA**”) which, despite its name, has limited applicability beyond federal lands and toxic substances. It is through CEPA that greenhouse gasses have been listed as toxic and allow for their regulation by the federal government.

Municipalities, using localized public health and welfare as justification, have entered the environmental domain for more than two decades (e.g., lawn pesticides, green roof standards, sewer discharges and local emissions), enacting by-laws that can have a significant impact on facility design, operation and development. It is important to appreciate that particular requirements vary from municipality to municipality which may be in addition to federal and provincial requirements in the same area.

Most governments have endorsed “polluter pays” and “get tough on polluters” policies, though legislation does not necessarily rely on this principle to find liability and obligations to address pollution. These policies have resulted in several governments amending their environmental statutes to permit the issuance of administrative penalties, or environmental tickets, for relatively minor events of non-compliance and characterizing events of non-compliance as continuing offences with each day constituting a new offence. However, even

these “minor” administrative penalties can result in significant payments and may also serve as an aggravating factor in any subsequent prosecution. Most jurisdictions provide director and officer liability for certain issues of environmental non-compliance with some requiring an actual environmental harm to impose such liability.

Government ministries or agencies, such as the Ontario Ministry of the Environment, Conservation and Parks (“**MOECP**”), can issue orders to persons who have management or control of property (i.e., officers and directors) to investigate, mitigate and/or remediate. Director’s Orders have been issued under the OEPA, which attribute no-fault liability personally to directors and officers of bankrupt corporations. In one case, prior to a determination on the merits, the MOECP entered into a settlement agreement with the former directors and officers of the bankrupt corporation who paid approximately C\$4.75 million for remediation costs. The extent of liability will be an issue for directors, especially where insolvency of the company is a risk.

The potential for class proceedings greatly increases the quantum of damages that may be available, though to date no “traditional”, or otherwise, environmental class proceeding has succeeded in Canada. Novel torts however are arising in the context of climate change litigation, including youth successfully arguing in an Australian court that a duty of care is owed by governments to children when making regulatory decisions under environmental protection legislation. Similar claims have not succeeded in Canada to date.

In Ontario, using class proceedings to prosecute environmental torts has also just become harder as the *Class Proceedings Act* was recently significantly amended to make certification under it even more difficult than it was before.

WATER

Canada has no single over-arching water quality protection statute administered by the federal government akin to the *Clean Water Act* in the United States. That being said, the federal government is responsible for the *Fisheries Act* which, although ostensibly directed at the regulation of Canadian fisheries, has been used increasingly in recent years by the federal Department of Fisheries and Oceans to regulate water pollution in Canadian waterways. Aside from the federal *Fisheries Act* and the *Canadian Navigable Waters Act*, each province and territory has its own water quality statute(s) which it administers through its Ministry of the Environment or Natural Resources. These statutes generally

establish water quality standards, water taking/transfer limits, permitting and approval regimes and enforcement measures. The quantum and quality of water takings (ground and surface) and discharges by industry are also regulated with water transfers becoming increasingly controversial.

AIR

The federal government has air emission regulatory tools contained in the CEPA. The federal government passed a number of regulations to limit or reduce air emissions, including regulations for heavy duty vehicles (including full-size pickups, semi-trucks, garbage trucks and buses) and electricity generation from coal. CEPA necessitates the reporting of emissions where the substance is listed in the National Pollutant Release Inventory substance list and the amount of the emission is in excess of the reporting threshold. The National Pollutant Release Inventory is a publicly accessible database that tracks the release, disposal and transfer of pollutants.

Provincial and territorial legislation is generally of more importance to commercial and industrial emitters in Canada. For large emitters the federal government has reporting obligations while the provinces tend to issue permits and approvals for emissions related to facilities. Ontario has incorporated several of the U.S. Environmental Protection Agency's air modeling practices into its legislation. Reporting obligations of emissions are increasingly becoming the norm as reporting thresholds are progressively lowered.

Climate change-related legislation is a patchwork across the country. Several provinces have worked with certain U.S. states through the Western Climate Initiative (“**WCI**”) on emissions trading programs. In addition, carbon taxes are used in some jurisdictions, including British Columbia and Alberta. In late 2011, Quebec, a WCI Partner, adopted a regulation under its *Environmental Quality Act*, which creates a cap-and-trade system for greenhouse gas emissions. In 2016, Ontario enacted the *Climate Change Mitigation and Low-carbon Economy Act* (“**Climate Change Act**”), which created a cap-and-trade system. Ontario began trading in 2017 and joined the emissions trading bloc in place between Quebec and California with its first participation in a joint auction occurring in early 2018. In July 2018, the newly-elected Ontario government repealed the *Climate Change Act* and ended Ontario's participation in cap and trade. However, the province of Nova Scotia joined the WCI in May 2018 and began auctioning in 2020.

In early 2019, the federal government implemented a federal carbon pricing system for provinces that have not designed their own pollution pricing systems in accordance with the federal government's climate action plan. The *Greenhouse Gas Pollution Pricing Act* is comprised of an output-based pricing system and a fossil fuel tax. In September 2020, the Supreme Court of Canada heard appeals from three provincial Courts of Appeal (Ontario, Saskatchewan and Alberta) regarding the constitutionality of this legislation and additional provinces joined these proceedings as intervenors. The Supreme Court of Canada handed down its decision in March 2021, ruling that the federal government has the right to impose minimum carbon-pricing standards on the provinces. As a result, any province that does not have its own equivalent program is obligated to follow the federal rules.

LAND

Important to cross-border transactions, an entity cannot contract out of its regulatory liability under Canadian law as easily as may be done in the United States. The U.S. expectation is often that a U.S. corporation that wishes to engage in business with or by a Canadian corporation can, in its agreement with the Canadian entity, insert provisions whereby the U.S. entity limits liability that may result from the Canadian operations or assets. However, Canadian law is such that a party cannot contract out of its regulatory liability for events or actions that occur in Canada. The best that can be done is to negotiate indemnities. Thus, a U.S. corporation that acquires contaminated land in Ontario one day could be subject to statutory orders and penalties to clean-up the property the next day. That being said, environmental legislation across Canada is primarily (but not exclusively) drafted and interpreted by the courts in accordance with the “polluter-pays” principle. Accordingly, the focus of regulators and the courts is typically on the entity responsible for the pollution, at least as a first option, whether that entity was the immediate previous owner or a more remote former owner. Nonetheless, it is clear that under the OEPA, persons can be ordered to take measures to address contamination they did not cause.

Ontario is one of the provinces to have substantive and directed legislation for the remediation of contaminated lands or brownfields. The OEPA provides certain basic immunity from the MOECP orders under the OEPA (the MOECP's primary enforcement tool). These include orders with respect to a once-contaminated property where prescribed remediation has been conducted and proper filings

with the MOECP have been made by a property owner or entity in control. What is not included in the amendments is any funding mechanism similar to the *Comprehensive Environmental Response, Compensation, and Liability Act* in the United States, meaning that the remediation of brownfields in Canada, including Ontario, remains primarily market-driven. In some instances, municipalities may work with the developer to create incentives for the remediation of brownfields through a community improvement plan, waiver of development charges, and property tax incentives.

Where a proposed land use, such as mining and waste disposal, may result in long-term environmental management costs even after operations have ceased, the government may require financial assurance to be provided at the time of permitting the facility to avoid the potential for a legacy of unfunded environmental contamination. Financial assurance is intended to ensure that legacy environmental issues are properly funded and to avoid issues should a company get into financial distress. The adequacy of such financial assurance and the priority ranking of environmental obligations in bankruptcies and restructurings continues to be a highly-contentious area.

TOXIC SUBSTANCES

The CEPA regulates the production, manufacture, use and disposal of toxic substances, excluding pesticides which have a separate combination of federal and provincial regulation. Through this legislation, the Minister of the Environment can require samples and information with respect to a substance. The CEPA contains penalty provisions, including mandatory minimum fines and maximum fines up to C\$12 million. The federal government continues to review its classification of several substances to ensure that the proper safeguards are in place given the current state of scientific knowledge about the health and environmental impacts of the substance. Provincial legislation or municipal by-laws may impose similar or more restrictive standards, including the preparation of plans to reduce the use of certain toxic products.

Most recently, the federal government has weighed in on plastics pollution, releasing regulations under CEPA which prohibit single-use plastics. These regulations prohibit the manufacture, import and sale of single-use plastic checkout bags, cutlery, foodservice ware made from or containing certain plastics, ring carriers, stir sticks and straws, subject to accessibility laws for persons with disability related needs. These rules were the subject of a

judicial challenge in the Federal Court of Canada in March 2023. No decision has been released yet.

SPECIES PROTECTION

Regulation exists at both the federal (e.g., *Species at Risk Act*) and provincial levels (e.g., in Ontario, the *Endangered Species Act, 2007*, “**ESA**”) to protect both species and the habitat of such species. These acts set out permitting, monitoring, reporting and remediation requirements for activities that affect a listed species or its habitat, with considerable fines for non-compliance. Endangered species legislation can have a significant impact on the timing and costs of every kind of development, from infrastructure to housing.

More recently, the ESA has been amended to create exemptions, including conditional exemptions, for certain types of activities. Recently established is also a “species conservation charges” regime for the Species at Risk Conservation Fund. This will allow proponents to undertake activities to contribute to the fund, instead of completing beneficial actions for species affected by their activities. This will be administered by the Species Conservation Action Agency and is for species designated as conservation fund species. This regime came into force on April 29, 2022.

Canada’s oldest environmental statute is the *Migratory Birds Convention Act*, first enacted in 1917 which was significantly updated in 1994. This federal statute contains regulations to protect migratory birds, their eggs, and their nests from destruction by wood harvesting, hunting, trafficking and commercialization. Prosecutions continue under this statute. The U.S. has a corresponding law to implement the treaty.

ENVIRONMENTAL AND IMPACT ASSESSMENT

Canada has recognized infrastructure deficits in transportation, energy and water/sewer which necessitate large capital investments over a number of years. Infrastructure projects usually require the completion of provincial and/or federal environmental assessment processes to ensure any potential impacts are properly mitigated. Infrastructure will also benefit from funds received from the sale of carbon allowances.

In Canada, the primary legislation in place federally for environmental assessment was the *Canadian Environmental Assessment Act*, first passed in 1992. Under this regime, if the federal government was the proponent or if the project involved federal funding, permits, or licencing, the Act would apply.

In 2012, significant amendments were made to the regime, which resulted in the enactment of the *Canadian Environmental Assessment Act, 2012* (“**CEAA, 2012**”). The CEAA, 2012 restricted the type of projects subject to a federal environmental assessment, stipulated timeframes for completing assessments and permitted the federal government to delegate an environmental assessment to another jurisdiction or substitute the process of another jurisdiction to help avoid duplication of environmental assessments for both federal and provincial governments.

In 2019, the federal government repealed CEAA, 2012 and passed the *Impact Assessment Act* (“**IAA**”). The IAA broadens the scope of assessments to include positive and negative environment, economic, social and health impacts, as well as to require gender-based analysis and an assessment of the impacts of a project on Indigenous Peoples and their rights. The federal assessment agency was rebranded the Impact Assessment Agency of Canada and will lead all federal impact assessments, including coordinating between regulatory bodies and provinces in the case of joint reviews. Each province also has requirements for environmental and impact assessment for certain projects within provincial jurisdiction. Like the plastics regulation under CEPA, the IAA is currently the subject of a court proceeding challenging the regime as unconstitutional. The Supreme Court of Canada heard arguments in March 2023. The court’s opinion is pending.

Public and agency consultation is a mandatory requirement of the environmental and impact assessment process. Consultation with Indigenous Peoples usually forms a significant part of such assessments as treaty and Indigenous rights are protected by the Canadian Constitution. Several recent court cases have provided further clarification of the Crown’s consultation obligations which vary depending upon the existence and wording of a treaty, the nature of the historic Indigenous claim and the potential infringement of such rights. The traditional use of impact benefit agreements has in many cases been replaced as governments have encouraged project proponents to align or partner with Indigenous Peoples as equity partners.

WASTE AND RECYCLING

The storage, transfer and disposal of hazardous and non-hazardous waste is regulated provincially and, in some circumstances, federally. Development of new waste facilities, such as landfills, can be controversial and subject to significant review and public consultation. Most governments are

actively encouraging recycling and mandate industry-funded stewardship programs to divert certain waste streams (e.g., tires, paper, cardboard, electronic) from landfills. Several provinces, including Ontario, are moving toward a “producer responsibility model” where instead of funding recycling programs, producers are made responsible for the full life-cycle of their products and packaging, including its collection through either a single agency or, uniquely in Ontario, multiple organizations through the private sector. Ontario is also transitioning hazardous and special waste to a producer responsibility model. Several jurisdictions have mandated goals to reduce waste to specified targets providing new opportunities for innovation. Failure to register, file and remit payments can lead to fines. Regulation of recycling and waste diversion is expected to increase.

ENVIRONMENT, SOCIAL AND GOVERNANCE CONCERNS

CORPORATE GOVERNANCE AND SECURITIES REGULATION

In addition to the common law, exposing individuals and businesses to civil liability in nuisance, negligence and trespass, other claims are possible under statutory regimes, such as capital market regulation. In 2022, the Canadian Securities Administrators proposed a *National Instrument for Climate-Related and Environment, Social and Governance Disclosure Requirements*, but no final decision has come of this yet.

The *Canadian Business Corporations Act*, since 2019, has explicitly recognized that environmental considerations are relevant when directors and officers are considering the best interests of the corporation.

GREENWASHING

In Canada, misleading marketing related to the “green credentials” of products are regulated through the *Competition Act* and other federal legislation.

Under the *Competition Act*, promoting, directly or indirectly, the supply or use of a product which is false or misleading in a material respect is reviewable and can and has led to substantial fines for greenwashing. Companies should be aware of Canada’s guidelines for environmental claims, updated in December 2021, addressing the *Competition Act*, the *Consumer Packaging and Labeling Act*, and the *Textile Labelling Act*, and their associated regulations.

HOUSING

Developers are frequently addressing natural heritage and natural hazard limitations in development applications related to development proposals. Zoning and natural features are regulated at the provincial level in Canada, though federally regulated lands are not subject to provincial zoning rules.

Ontario, in an attempt to address the critical need for housing, has for more than a year been introducing changes to the planning framework in Ontario, impacting both municipal approval processes, appeal rights from municipal decisions, and permitting functions by conservation authorities.

In broad strokes, Ontario has taken steps to remove protections from previously protected lands for increased housing development, used existing ministerial zoning powers more frequently and introduced new ministerial zoning powers. It has also moved to limit the function of conservation authorities to a review of natural hazards. Natural heritage concerns are to be redirected to others to manage and review.

Conservation authority permits are now required to be issued in all cases where ministerial zoning order powers are used, and new regulations are anticipated which will make conservation authority permits exempt from formal application requirements when regulatory requirements are met, paralleling similar changes in other environmental spheres, such as the management pollution releases and species at risk.

Among other proposed changes, setbacks from provincially significant wetlands are also expected to be reduced through changes to regulations administered by conservation authorities.

Ontario has also released a draft proposal which will make both the expansion of settlement boundaries and the creation of new housing lots in prime agricultural areas easier, while eliminating the requirement for density targets, except in very specific situations.

In addition, Ontario has changed the manner in which wetlands are evaluated and identified, with the likely impact that fewer wetlands will be protected, including by eliminating the concept of “wetland complexes.”

NOTABLE CANADIAN CLIMATE LITIGATION

Worldwide, there is significant litigation aimed at addressing governments and corporations’ obligations to address climate change, with varying degrees of success.

Most recently in Canada, in the case of *Mathur et al. v. Ontario*, seven youth garnered significant attention through their lawsuit aimed at the Ontario government, following the province’s decision to cancel its involvement in the cap-and-trade program. The claim was based in the theory that this decision was a violation of their *Charter of Rights and Freedoms* rights under section 7, the right to life, liberty and security of the person, and section 15, the right to non-discrimination, guaranteeing equal protection under the law. It further sought a declaration that Ontario violated an unwritten constitutional principle that governments cannot engage in conduct that will, or unreasonably be expected to, result in future harm, suffering or death of a significant number of its own citizens.

Most lawsuits of this nature have failed at the preliminary stage of “justiciability,” but this litigation passed that initial hurdle and was ultimately heard on the merits in September 2022. The Superior Court released reasons dismissing the application in April 2023, but while doing so made a number of notable comments and findings, including:

- Ontario’s target fell severely short of what scientific consensus required, thus increasing the risk to Ontarians’ life and health;
- The court rejected Ontario’s arguments that its emissions were globally insignificant, recognizing that “every tonne of CO2 emissions adds to global warming and leads to a quantifiable increase in global temperatures that is essentially irreversible on human timescales”; and
- Positive rights are not currently recognized under the Charter. But the court found that the applicants made a compelling case that climate change and the existential threat that it poses to human life could justify the imposition of positive obligations under section 7 of the Charter, though it did not find so on the facts of this case.

The applicants are seeking leave to appeal to the Court of Appeal.

NOTABLE CANADIAN INDIGENOUS RIGHTS LITIGATION

In Canada, the Crown, federally and provincially, has what is known as a duty to consult. This duty requires the Crown to understand how and when their activities could have an adverse impact on Aboriginal and treaty rights. It reflects the “honour of the Crown.” It is a corollary of section 35 of the *Constitution Act, 1982*, which states: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

More recently, we see, for example in Ontario, governments infusing this obligation to consult into land-use planning decisions by ensuring that First Nations are consulted as part of land-use planning decisions, as well as through infrastructure projects under environmental assessment regimes. However, it should be noted that the substantive duty rests with the Crown and cannot be delegated to municipalities. Municipalities may address the procedural obligations but not the substantive obligations of the duty to consult.

Duty to consult litigation in Canada has been robust. There is a low bar to trigger a threshold to consult: “When the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.” The honour of the Crown gives rise to different duties in different circumstances; in instances where there is significant impairment of a right, greater consultation will be required.

Case law also addresses breaches of treaty rights. A particularly significant decision was released in 2021, *Yahey v. British Columbia*. It considered whether the treaty rights of the Blueberry River First Nations had been infringed by the cumulative impacts of industrial developments within their territory, including forestry, oil and gas, renewable energy and agriculture.

The court concluded British Columbia had, over a period of many years – by allowing industrial development in the First Nation’s territory at an extensive scale without assessing cumulative impacts and ensuring that the First Nation would be able to continue meaningfully exercising its treaty rights in its territory – breached Treaty 8. This decision was not appealed.

This critical decision was a departure from prior litigation and is likely to have an impact on regulatory risks where similar claims may be made.

May 2023



ESG

2023

Doing Business in Canada

AIRD BERLIS

airdberlis.com

Environmental, social and governance (“**ESG**”) and sustainability matters are becoming increasingly important to governments, investors, public and private companies and their stakeholders. While “ESG” and “sustainability” are often used interchangeably, these terms represent different concepts. ESG is a set of criteria used to evaluate the sustainability and ethical impact of a company or investment. The “environmental” aspect assesses a company’s impact on the natural world and its efforts towards sustainability. The “social” aspect focuses on a company’s treatment of employees, customers, communities and broader societal impacts. The “governance” aspect evaluates the company’s leadership, transparency and accountability practices. ESG serves as a framework to measure and promote responsible and sustainable business practices, addressing not only financial performance but also the broader impact of organizations on the planet and society.

Sustainability refers to the ability of a company or investment to meet present needs without compromising the ability of future generations to meet their own needs. It encompasses environmental, social and economic considerations. In this context, sustainability involves practices that minimize negative environmental impacts, promote social well-being and maintain long-term financial stability. It entails responsible resource management, ethical business practices, community engagement and a commitment to addressing social and environmental challenges, all while aiming for long-term value creation and resilience.

There is growing investor demand for ESG and sustainability information from businesses operating in Canada, as investors increasingly recognize that these factors can affect a company’s long-term financial performance. Institutional investors in particular are placing more emphasis on ESG factors when making investment decisions, and many ESG and sustainability-focused financing tools (both debt and equity) have been developed in the market in response to this demand. Consumers are also becoming more conscious of the environmental and social impacts of the products and services they consume and are increasingly calling upon companies to implement sustainable practices and resolve any sustainability-related issues. Finally, a number of jurisdictions (in Canada and abroad) have begun developing or have implemented legislation that will require the disclosure of a company’s sustainable practices, in whole or in part. As the foundation of strong disclosure is strong performance, companies find themselves increasingly compelled to consider the sustainability of their operations and procedures.

KEY ESG AND SUSTAINABILITY CONSIDERATIONS FOR BUSINESSES OPERATING IN CANADA

Corporate Governance and Risk Oversight

Corporate governance and the risk oversight of ESG matters are key issues for businesses operating in Canada. Corporate governance is widely viewed as the “spine” or framework through which effective sustainability policies may be developed and implemented within an organization. Ultimately, the corporate governance mechanisms that are adopted by the company will depend on its stage of growth, its ESG-related needs and goals, and the level of expertise it already possesses.

Corporate governance is a key issue within the ESG framework for several reasons:

1. **Accountability and Transparency:** Effective corporate governance ensures that companies are accountable to their stakeholders, including shareholders, employees, customers and the wider society. It promotes transparency in decision-making processes, financial reporting and disclosure of material information. Transparency is vital for assessing a company’s environmental and social impact, and understanding its commitment to responsible business practices.
2. **Risk Management:** Good corporate governance practices help identify, assess and mitigate risks, including those related to environmental and social factors. By implementing robust governance structures, companies can better manage risks associated with climate change, resource scarcity, human rights violations, supply chain disruptions and other ESG-related issues. This, in turn, can enhance their long-term sustainability and resilience.
3. **Stakeholder Engagement:** Corporate governance fosters active engagement with stakeholders, enabling their voices to be heard in decision-making processes. The extent to which a company engages with its external stakeholders can lead to the development of meaningful plans and practices to address certain ESG-related issues. However, the Supreme Court of Canada has established that a director’s fiduciary duty (i.e., to act honestly and in good faith, in the best interests of the corporation for which they are directors) is owed primarily to the corporation. While directors may consider the interests of external stakeholders in exercising their judgment, there is no explicit requirement

to do so, and the courts will ultimately defer to the business decisions made by the directors that lie within a range of reasonable alternatives. Therefore, while there is a compelling business reason to consider external stakeholder interests when developing ESG-related strategies, there is currently no legal requirement to do so.

4. **Long-Term Value Creation:** Sound governance practices are closely linked to long-term value creation. Companies with strong governance frameworks tend to perform better financially, attract investment and enjoy a positive reputation.¹ By prioritizing ESG considerations, companies may enhance their competitiveness, attract and retain talent, and build relationships with customers who increasingly value responsible and sustainable business practices.
5. **Regulatory and Legal Compliance:** Corporate governance frameworks often incorporate legal and regulatory requirements. Compliance with applicable laws and regulations is critical for managing ESG risks and avoiding potential legal issues or reputational damage. Governance practices can help companies stay abreast of evolving regulations and proactively integrate them into their operations.
6. **Ethical Leadership and Culture:** Corporate governance sets the tone at the top and promotes ethical behaviour throughout the organization. Strong governance structures encourage ethical decision-making, integrity and responsible behaviour among executives and employees. This commitment to ethical leadership and culture reinforces the company's commitment to ESG principles.

Corporate governance plays a pivotal role in embedding ESG considerations into a company's strategy, operations and culture. It provides a framework for addressing environmental and social challenges, managing risks and creating long-term sustainable value for all stakeholders.

As discussed further under the heading "Voluntary and Mandatory Disclosures – Companies Publicly Listed in Canada," all Canadian publicly listed companies are required, on an annual basis, to

disclose certain corporate governance matters to their shareholders.

Diversity and Inclusion

A company's ability to implement and maintain meaningful diversity on its board, its senior management team and throughout its organizational structure is one of the most impactful aspects of its ESG performance.² Over the past several years, proxy advisory firms have exhibited an increased interest in demonstrated diversity on a public company's slate of nominee directors. Should an issuer fail to demonstrate diversity on its board, or a commitment to diversity otherwise, a proxy advisory firm may advise shareholders to vote against a director, an entire slate of directors or any other related matters at an issuer's annual meeting, thus impacting the leadership and direction of the company.

Public companies in particular are required to disclose the diversity present on their boards and senior management. At the federal level, Canada has implemented new disclosure requirements under the *Canadian Business Corporations Act* ("CBCA") requiring public companies existing under the CBCA to make certain disclosures about the diversity of their boards and executive officers. The disclosure requirements centre on representation of four designated groups: women, Indigenous Peoples, persons with disabilities and visible minorities. Among other things, CBCA companies must annually disclose whether or not they have targets in place to enhance representation by these four groups and, if not, to provide an explanation for the lack of such targets. Most recently on April 13, 2023, the Canadian Securities Administrators (the "CSA") proposed and solicited feedback on two alternative approaches to enhance existing disclosure requirements set out in Form 58-101F1 *Corporate Governance Disclosure*, which currently does not require issuers to report on its diversity at the board level. Under the CSA's proposals, issuers will be required to report on the extent to which Indigenous Peoples, LGBTQ2SI+ persons, racialized persons, persons with disabilities or women are nominated on and serve on an issuer's board. An approach has not been finalized to date.

¹ McKinsey and Company, for example, has noted that the spirit of governance involves proactively anticipating and managing violations before they occur, and ensuring transparency and dialogue with regulators instead of formalistically submitting a report and letting the results speak for themselves. Inherently, such practices demonstrate transparency, awareness and proficiency that tends to attract investment and create value. [<https://www.mckinsey.com/capabilities/strategy-and-corporate-finance/our-insights/five-ways-that-esg-creates-value>].

² The Ontario Securities Commission, for example, noted in its CSA Notice and Request for Comment – *Proposed Amendments to Form 58-101F1 Corporate Governance Disclosure of National Instrument 58-101 Disclosure of Corporate Governance Practices and Proposed Changes to National Policy 58-201 Corporate Governance Guidelines* that in its consultations, it found that diversity on boards and in executive officer positions is a critical component of good corporate governance and remains an important consideration in investment and voting decisions.

Voluntary and Mandatory Reporting

With the exception of supply chain reporting for certain entities operating in Canada (as discussed further under the heading “Supply Chain Monitoring and Reporting”), it is not currently a legal requirement in Canada for businesses to publish ESG and sustainability reports. Nonetheless, as noted above, the business reasons for doing so are compelling for many entities doing business in Canada.

Companies seeking to integrate ESG and sustainability considerations into their operations may consider the wide array of practices and legal frameworks emerging in Canada and globally. For instance, the Corporate Sustainability Reporting Directive (“**CSRD**”), a European Union (“**EU**”)-based ESG reporting mandate that entered into force on January 5, 2023, will require non-EU companies meeting certain thresholds and companies with securities listed on a regulated EU market to report on the impacts of the company’s activities on people and the environment, and how various sustainability matters affect the company. The CSRD reporting requirements will cover a wide array of ESG topics including Scope 1, Scope 2 and Scope 3 greenhouse gas emissions, respect for human rights as defined by core United Nations and EU human rights conventions, and descriptions of how the company identifies and manages sustainability-related risks.³

ESG investing continues to grow in popularity. Many companies have elected to disclose their ESG performance to attract and retain investment. Some companies do so voluntarily by way of quarterly or annual sustainability reports, for example, that are prepared in accordance with ESG reporting frameworks (such as those developed by the Global Reporting Initiative, the Task Force on Climate-Related Financial Disclosure (“**TCFD**”) and the Sustainability Accounting Standards Board). There is currently a great deal of overlap in the reporting requirements set out in the various frameworks that have been published which can result in confusion among companies in selecting the appropriate framework or combination of frameworks under which to report their sustainability performance. The variety of frameworks has also led to confusion among investors in the evaluation of the financial performance and longevity of a company, and comparing the performance of companies utilizing different ESG reporting frameworks. As a result,

there has been increasing market demand for a comprehensive, high-quality global baseline of sustainability disclosures focused on the needs of the world’s financial markets and the participants in those markets.

It is in this context that the International Financial Reporting Standards Foundation formed the International Sustainability Standards Board (“**ISSB**”) in 2021 to develop a consolidated set of reporting standards, drawing on the frameworks that have already been published by various entities, to assist companies in producing high-level sustainability-oriented disclosures that investors can rely upon to make informed financial decisions. On June 26, 2023, the ISSB published its inaugural standards for sustainability and ESG-related disclosure: IFRS S1 – *General Requirements for Disclosure of Sustainability-Related Financial Information* (“**IFRS S1**”) and IFRS S2 – *Climate-Related Disclosures* (“**IFRS S2**” and, with IFRS S1, the “**ISSB Standards**”). The ISSB Standards were developed in heavy reliance on the TCFD framework and structures its disclosure requirements around the TCFD’s four key pillars: (a) governance, (b) strategy, (c) risk management and (d) metrics and targets (the “**Four Pillars**”). IFRS S1 requires disclosure across all Four Pillars of all material sustainability-related risks and opportunities that could affect an entity’s prospects. IFRS S2 requires disclosure across all Four Pillars of all climate-related risks and opportunities that could affect an entity’s prospects and that might be useful to primary users of general-purpose financial reports in deciding whether to provide resources, financial or otherwise, to the entity. The ISSB Standards will come into force on January 1, 2024, with certain transition relief for the first annual reporting period. Entities looking to comply with the ISSB Standards will need to disclose any sustainability- and climate-related risks and opportunities identified in respect of the third quarter or entirety of 2023.⁴ In addition, the Canadian Sustainability Standards Board (“**CSSB**”) was formed in April of 2023 to “support the uptake of ISSB standards in Canada, highlight key issues in the Canadian context and facilitate interoperability between ISSB standards and any forthcoming CSSB standards.”⁵

³ Canadian companies that (i) have annual net turnover in the EU exceeding €150 million for each of the last two consecutive financial years and (ii) have at least one large subsidiary, one subsidiary listed on an EU regulated market, or one branch in the EU that generated over €40 million in annual net turnover the preceding financial year, will be required to report under the CSRD in respect of all its entities, not just the EU subsidiary or branch.

⁴ For a more detailed breakdown of the ISSB Standards, please see our article published here: [<https://www.airdberlis.com/insights/publications/publication/progress-in-standardizing-voluntary-esg-and-sustainability-reporting>].

⁵ Canadian Sustainability Standards Board, [<https://www.frascanada.ca/en/cssb>].

Supply Chain Monitoring and Reporting

As investors, governmental bodies, consumers, various stakeholders and the general public continue to exhibit an interest in the ESG performance of various entities, the supply chain risk management practices of an organization have increasingly come into focus. Through effective supply chain risk management, an organization may revise supplier agreements and implement the necessary mechanisms to identify and mitigate certain ESG-related risks, such as corruption, an excessively large carbon footprint, pollution and waste, and use of poor and even illegal labour practices. If left unaddressed, these ESG-related risks may expose the organization to other financial, regulatory, legal or operational risks.

Of particular concern is an organization's ability to identify and prevent forced labour and child labour in the organization and its supply chain. Accordingly, on May 11, 2023, the federal government of Canada passed Bill S-211, *An Act to enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to amend the Customs Tariff* ("**Bill S-211**"). In summary, Bill S-211 sets out new import bans and requires federal government institutions and a broad range of other public and private companies – including certain international companies that conduct business or hold assets in Canada – to report on steps taken to reduce and prevent the risk of forced labour and child labour being used in their respective supply chains.⁶

Ultimately, the entities that are required to report under Bill S-211 must file an annual report with the Minister of Public Safety and Emergency Preparedness and publish the same on its website on or before May 31 of each year.⁷

⁶ Any Canadian federal government department or ministry of state, any body or office listed in Schedule 1 of the Access to Information Act, and any parent Crown corporation or wholly-owned subsidiary of such a corporation within the meaning of section 82 of the Financial Administration Act will be required to report under Bill S-211. Furthermore, any corporation or unincorporated organization (including a trust or partnership that: (a) has a place of business in Canada, does business in Canada or has assets in Canada and that, based on its consolidated financial statements (i) has at least CAD \$20 million in assets, (ii) has generated at least CAD \$40 million in revenue and (iii) employs an average of at least 250 employees; (b) is listed on a stock exchange in Canada; or (c) is otherwise prescribed by any regulations that may accompany Bill S-211, which have not yet been released, will be required to report under Bill S-211. Bill S-211 also notes that the government institutions and private sector entities described previously must be engaged in (a) producing, selling or distributing goods in Canada or elsewhere, where "production of goods" is defined as the "manufacturing, growing, extracting and processing of goods"; (b) importing goods produced outside of Canada into Canada; and (c) controlling an entity engaged in any of the foregoing activities, where "control" is defined as any direct or indirect control or common control in any manner (consequently a parent company that controls one or more subsidiaries, in the manner prescribed by Bill S-211, will be required to report on the activities of these subsidiaries).

⁷ The report must set out a number of matters in relation to the entity's prior fiscal year, including: (a) the organization's structure, activities and

Regardless of their obligation to report under instruments such as Bill S-211, certain companies have decided to conduct due diligence to both identify any forced labour or child labour in their respective supply chains and track the effectiveness of certain frameworks and policies to ensure that the risk of forced labour and child labour is reduced. Companies have also decided to implement supplier codes of conduct to set out, for example, certain necessary prohibitions and monitoring procedures regarding suppliers' labour practices and specifically the use of forced labour or child labour. Entities may also choose to train directors, officers and internal personnel on their duties in light of the pending obligations under Bill S-211, and proactively review and update contracts with existing suppliers to ensure that any risks associated with forced labour or child labour are promptly addressed and mitigated.

Companies Publicly Listed in Canada

Companies that are listed on Canadian stock exchanges may be subject to additional mandatory ESG disclosure requirements. On October 18, 2021, the CSA released the proposed National Instrument 51-107 *Disclosure of Climate-related Matters* ("**NI 51-107**"). While NI 51-107 is yet to be finalized, should the CSA adopt NI 51-107 in its current form, or something similar, issuers will potentially be required to disclose:

- the governance mechanisms (i.e., a description of the company's board of directors' oversight of climate-related risks and opportunities, as well as management's role in assessing and managing those same risks and opportunities),
- risk management procedures (i.e., a description of the issuer's processes for identifying, assessing and managing climate-related risks, including a description of how those processes are integrated into the issuer's overall risk management),
- strategies developed to identify, assess and mitigate or capitalize upon climate-related risks and opportunities (i.e., would include a description of the climate-related risks and

supply chains; (b) the organization's policies and due diligence processes in relation to forced labour and child labour; (c) the parts of the organization's business and supply chains that carry a risk of forced labour or child labour being used, and the steps it has taken to assess and manage that risk; (d) any measures taken to remediate any forced labour or child labour; (e) any measures taken to remediate the loss of income to the most vulnerable families that results from any measure taken to eliminate the use of forced labour or child labour in its activities and supply chains; (f) the training provided to employees on forced labour and child labour; and (g) how the organization assesses its effectiveness in ensuring that forced labour and child labour are not being used in its business and supply chains.

opportunities the issuer has identified over the short-, medium- and long-term, and the impact on the issuer's business, strategy and financial planning), and

- the goals the entity has set for itself in reducing its greenhouse gas (“GHG”) emissions (i.e., a description of the metrics used by the issuer to assess climate-related risks and opportunities, in addition to a description of the targets used to manage those same risks and opportunities, along with the issuer's performance against these targets).

The climate-related strategy, risk management, metrics and targets disclosure of proposed Form 51-107B would also require disclosure regarding GHG emissions, which would require, among other things, disclosure of all direct GHG emissions (Scope 1), indirect GHG emissions (Scope 2), and all other indirect GHG emissions not disclosed under Scope 2 (Scope 3) and their related risks. If the GHG emissions are not disclosed, the issuer must provide reasons for not doing so. The issuer must also disclose the reporting standard used to calculate and disclose the GHG emissions.

Certain existing national instruments may currently apply to an issuer's disclosure of climate-related information. For instance, Form 51-102F1 *Management's Discussion and Analysis* and Form 51-102F2 *Annual Information Form* note that “materiality” is the deciding factor when determining whether information is required to be disclosed, and the latter specifically requires issuers, when completing their annual information forms, to note material risk factors that may influence an investor's decision to purchase the issuer's securities. National Policy 58-201 *Corporate Governance Guidelines*, National Instrument 52-110 *Audit Committees* and National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* set out guidelines for adopting corporate governance mechanisms and internal controls and procedures to identify and manage principal risks and opportunities, including climate-related risks and opportunities. The details of an issuer's corporate governance policies and practices are ultimately disclosed in an issuer's continuous disclosure documents, if required. While the CSA is exhibiting an increased interest in an issuer's ESG-related disclosures and may impose regulatory penalties on an issuer for failing to publish adequate public disclosures, proxy advisory firms in Canada such as Glass Lewis, Board Games, and ISS Corporate Solutions are also exhibiting an increased interest in an issuer's ESG

performance and may take such action as advising shareholders to vote against incumbent or nominee directors in an issuer's upcoming annual general meeting if, for example, an issuer's disclosure on governance practices, including board diversity, are insufficiently detailed or exhibit an inadequate commitment to good governance by the entity.

Regardless of whether a company chooses to disclose its ESG performance voluntarily or ultimately pursuant to mandatory disclosure requirements, it must be mindful not to engage in the practice of “greenwashing,” whereby a company may make misleading, or potentially misleading, unsubstantiated, overly broad or untrue claims about the sustainability of its operations, products or services. A company that greenwashes its products or services runs the risk of undermining its brand image, losing customer trust, triggering investigations from consumer protection authorities, and even sparking shareholder activism or litigation, whereby a company may be sued for damages arising from such misleading statements. In observing an increase in the practice of greenwashing among public companies listed on Canadian stock exchanges, the CSA has set out guidance in CSA Staff Notice 51-364 *Continuous Disclosure Review Program Activities for the fiscal years ended March 31, 2022 and March 31, 2021* for such issuers when making voluntary or mandatory ESG-related disclosures.⁸

Sustainable Finance

As businesses look to support their operations, foster their growth and capitalize on the opportunities presented by investor demand around ESG, there are a number of sustainable financing options they can pursue:

1. **Green Bonds:** Green bonds are debt securities issued by companies to fund sustainable projects or investments and have attracted

⁸ In their guidance, the CSA noted that: (1) all statements regarding an issuer's current or anticipated ESG performance must be factual, balanced and substantiated; (2) certain statements regarding, for instance, an issuer's ESG-related targets, forecasts or projections, may constitute forward-looking information (“FLI”), and must therefore be supplemented by disclosure regarding material factors or assumptions used to develop the FLI, material risk factors that may cause any anticipated results to differ substantially, and any policies implemented by the issuer to update such FLI; (3) issuers should exercise caution when using promotional language; and (4) disclosures about any ESG ratings must be accompanied by additional details to provide context as to how such ratings were awarded. Depending on the nature and extent of the deficiencies in an issuer's ESG disclosures, the CSA may add the issuer to its default list, issue a cease-trade order and/or refer the issuer to enforcement. The CSA may also require an issuer to refile a document correcting any previously noted deficiencies (e.g., by issuing a clarifying news release), commit to making disclosure enhancements on a prospective basis or file a missing document. The CSA may inform issuers specifically of changes that it wishes to see in its next set of applicable continuous disclosure documents or may require the issuer to deepen its awareness on a particular topic.

interest from domestic and international investors seeking socially responsible and environmentally sustainable investment opportunities. The proceeds from these bonds must be used for projects with a positive environmental impact, such as renewable energy, energy efficiency or sustainable agriculture. Green bonds can be differentiated from the narrower category of climate bonds – used to finance projects which reduce the impacts of climate change specifically, such as by reducing carbon emissions. In this way, green bonds have the potential to address a broader range of issues, such as biodiversity, which are becoming a greater focus in the ESG discourse.

Canada is considered a global leader in green bond issuance. The country's strong commitment to sustainable development and environmental stewardship has driven the growth of the green bond market. Green bonds in Canada have been issued by a diverse range of entities, including government agencies, municipalities, provinces, corporations and financial institutions. As of September 2021, Canada had witnessed significant growth in green bond issuance and, since 2014, the cumulative issuance of Canadian green bonds had surpassed US\$39 billion (approximate amount) across various sectors.⁹

Transparency and accountability are crucial in green bond markets. Issuers typically provide regular reports on the use of proceeds, impact assessment and adherence to environmental standards. Verification by third-party organizations may also be conducted to ensure compliance with green bond principles.

2. **Green Loans:** Green loans are similar to green bonds in that the funds are tied to sustainable projects or investments. However, the structure is that of a loan and may be offered by a bank or other financial institution. This differs from green bonds, which are available for public listing or private placement. Given these differences, green loans are typically for smaller monetary amounts. This may be offset, however, by the lower transaction costs typically associated with green loans.

The Canadian government has been actively supporting green finance and sustainability through various programs and initiatives. For

instance, the Canada Infrastructure Bank offers low-cost financing options for projects that support green infrastructure development. Many Canadian companies have been accessing green loans to fund sustainable projects. These loans are often used to finance renewable energy projects, energy efficiency initiatives, green building construction, sustainable transportation and other environmentally friendly ventures. Canadian banks and financial institutions play a significant role in promoting green loans. Several major banks in Canada have developed specific green loan products and frameworks to support sustainable initiatives.

To ensure credibility and transparency, lenders and borrowers often follow established frameworks and guidelines for green loans. Internationally recognized frameworks like the Green Loan Principles and the Green Bond Principles are used to guide the issuance and reporting of green loans.

3. **Sustainability-Linked Bonds:** Sustainability-linked bonds are a relatively new type of bond that ties the financial terms and structural characteristics of the bond to the sustainability performance or ESG metrics of a company. For example, the interest rate or repayment terms may be adjusted based on the company's ability to meet certain sustainability targets.

One of the benefits of this type of bond is that the funds are not reserved for specific projects or purposes in the way that green or climate bonds are. Instead, sustainability-linked bonds can be used to finance general corporate activities, making them an attractive option for companies who, while not directly involved in activities like renewable energy, are seeking to improve their sustainability performance and take advantage of investor demand for ESG products. However, the flexibility of sustainability-linked bonds also presents a greater risk of actual or perceived greenwashing. Companies should therefore be careful to develop clear and credible ESG metrics, and transparent reporting and disclosure practices when pursuing financing through sustainability-linked bonds.

4. **Sustainability-Linked Loans:** Sustainability-linked loans are similar to sustainability-linked bonds. However, given the loan structure, sustainability-linked loans share the same differentiating factors as green loans, discussed above. However, unlike green loans or green bonds that specifically finance environmentally

⁹ Canada: Value of green bonds issued 2014 to 2021 | Statista, [<https://www.statista.com/statistics/1289366/value-of-green-bonds-issued-in-canada/>].

friendly projects, sustainability-linked loans provide borrowers with more flexibility in the use of funds. The focus is on improving overall sustainability performance rather than funding specific green projects. Sustainability-linked loans are designed to incentivize borrowers to achieve predetermined sustainability performance targets, commonly known as key performance indicators (“**KPIs**”). These targets are related to ESG objectives and are linked to the terms and conditions of the loan.

The key feature of sustainability-linked loans is the link between the loan’s pricing and the borrower’s performance against the predefined KPIs. If the borrower achieves the agreed-upon targets, they can benefit from a lower interest rate or other financial incentives. Conversely, failure to meet the targets may result in higher costs.

Sustainability-linked loans are not limited to specific industries or sectors. They are available across a wide range of sectors, including but not limited to energy, manufacturing, transportation, real estate, retail and financial services. This allows businesses from various industries to integrate sustainability into their operations and financing strategies. To enhance transparency and comparability, market participants, including financial institutions and organizations like the Loan Market Association and the International Capital Market Association, have developed frameworks and guidelines for sustainability-linked loans. These initiatives aim to standardize key principles and definitions in the market. Sustainability-linked loans often require third-party verification of the borrower’s performance against the agreed KPIs. Independent auditors or sustainability consultants assess the borrower’s progress and provide assurance to lenders and other stakeholders.

5. **Green Crowdfunding:** Crowdfunding is a way for companies to raise funds through small amounts of capital from a large number of individuals or organizations, typically via internet platforms. There are several crowdfunding platforms that have been specifically designed for sustainable projects. These platforms can help companies, particularly sustainability-related startups, reach a wider audience of socially and environmentally conscious investors, who often become customers once the product or service offering becomes available.

6. **Social Impact Bonds:** Social impact bonds are a type of pay-for-performance contract by which the government pays investors based on the achievement of agreed-upon social outcomes. This allows the financial risk associated with social programs and services to be transferred from service providers and governments to investors. While there have been some pilot projects for social bonds in Canada, such as the City of Toronto’s Social Debenture Program, social impact bonds have not yet gained much traction in the Canadian context. Nonetheless, social impact bonds remain an important option to watch for companies involved in the provision of social services.

Choosing the appropriate sustainable finance option will depend on the particular needs and ESG-related goals of the company.

Tax

Companies looking to do business in the electrification, clean energy, clean manufacturing, emissions reduction, critical minerals, infrastructure, electric vehicles and batteries, and major projects sectors may want to consider the recent tax incentives set out in the Canadian government’s recent federal budget (“**Budget 2023**”). Budget 2023 proposed to introduce the Clean Hydrogen Investment Tax Credit (the “**CH Tax Credit**”), a fully refundable tax credit on the purchase and installation cost of eligible equipment. The CH Tax Credit would generally be available only in respect of projects that produce all, or substantially all, hydrogen through their production process and only for projects that produce hydrogen from electrolysis or natural gas. A number of requirements would have to be satisfied in order to obtain the credit.

Budget 2023 also proposed to expand the eligibility of the existing Clean Technology Investment Tax Credit (a 30% refundable credit) to include geothermal energy systems that are eligible for Class 43.1 of the *Income Tax Regulations*, and also proposed the introduction of a refundable investment tax credit (equal to 30% of the capital cost of eligible property associated with eligible activities) relating to clean technology manufacturing and processing, and critical mineral extraction and processing. Budget 2023 also proposed to expand the eligible activities that qualify for the reduced tax rates for zero-emission technology manufacturers to include certain nuclear manufacturing and processing activities, and provided additional design details in relation to the existing tax credit for carbon capture, utilization and storage.

Finally, Budget 2023 also proposed to amend the *Income Tax Act* (Canada) to include lithium from mines as a mineral resource, such that any eligible expenses made after the date Budget 2023 was announced would qualify as Canadian exploration expenses and Canadian development expenses. Under Budget 2023, lithium from brines would be eligible for the Critical Mineral Exploration Tax Credit, a 30% non-refundable tax credit.

Looking Ahead

While the legal and regulatory aspects surrounding ESG are still rapidly evolving, a number of key developments in the ESG sphere that companies doing business in Canada may need to consider can be anticipated at this time, including:

- Increased sustainability reporting for public and private companies, whether by way of mandatory disclosure requirements or increased investor and stakeholder pressure to publish voluntary sustainability disclosures;
- Consolidated reporting standards leading to harmonization in the sustainability reporting landscape and greater confidence among investors in understanding and assessing companies' ESG performance;
- The advent of climate reporting in Canada, wherein issuers may be required to report on all or some of their Scope 1, Scope 2 and Scope 3 GHG emissions;
- An increased focus on biodiversity;
- An enhanced understanding of the importance of diversity beyond gender; and
- The increased use of sustainability finance mechanisms.

September 2023



Cannabis

2023

Doing Business in Canada

AIRD BERLIS

airdberlis.com

CANNABIS LAWS BEFORE LEGISLATION

Prior to 1999, the *Controlled Drugs and Substances Act* (“**CDSA**”) effectively imposed a blanket prohibition on all cannabis in Canada. In 1999, legal access to dried marijuana for medical purposes was first introduced as an exception under the CDSA. The legalization of medical marijuana in Canada was then driven primarily by decisions of the Ontario Court of Appeal, the Federal Court of Canada and the Supreme Court of Canada, where the courts ruled that access to cannabis as a medicine is a constitutional right and compelled the federal government to implement a regulatory framework for the production and supply of medicinal cannabis products to patients across the country.

CANNABIS FOR MEDICAL PURPOSES

Prior to the implementation of the *Cannabis Act* in 2018, cannabis for medical purposes was permitted pursuant to exceptions created under the *Narcotic Control Regulations* (“**NCR**”) and the *Access to Cannabis for Medical Purposes Regulations* (“**ACMPR**”).

The NCR provided “licensed dealers,” such as testing laboratories, with legal exemptions from the CDSA, permitting them to possess, produce, sell, import, export, transport and deliver cannabis. The ACMPR provided individuals, licensed cannabis producers and “designated persons” with legal exemptions from the CDSA prohibitions, such that licensed cannabis producers could grow and sell, and medical patients were able to purchase, possess and consume, medical marijuana each without risk of criminal prosecution.

On October 17, 2018, the *Cannabis Act* (and under it, certain regulations including the *Cannabis Regulations*) came into force, at which time, licences that were issued under the NCR or the former ACMPR were automatically deemed to be licences issued under the *Cannabis Act*.

Cannabis regulated under the *Cannabis Act* includes any phytocannabinoids contained in the plant (whether originating in the plant or produced synthetically), such as THC or CBD, whether together or alone.

Part 14 of the *Cannabis Act* substantially recreates the ACMPR and permits individuals with a qualifying “medical document” to lawfully possess up to 30 times their daily prescribed amount of medical cannabis for their own medical purposes, to a maximum of 150 grams of dried cannabis.

Individuals can also register under the *Cannabis Act* for authorization to produce cannabis for their own medical purposes. This authorization can be exercised personally or can be delegated to a “designated person” who acts on their behalf.

CANNABIS FOR RECREATIONAL PURPOSES

Since the enactment of the *Cannabis Act* in October 2018, Canadian adults have been permitted to possess up to 30 grams of dried cannabis (or equivalent) per person in public spaces and, subject to provincial restrictions, cultivate up to four cannabis plants per dwelling.

Commercial production of cannabis – whether for medical or recreational purposes – remains the purview of businesses licensed by Health Canada under the *Cannabis Act*.

The *Cannabis Act* provides for six classes of cannabis licence: (i) cultivation; (ii) processing; (iii) analytical testing; (iv) research; (v) sale for medical purposes; and (vi) cannabis drugs. Each class of licence has different licensing requirements and permits different activities. Of particular importance are the cultivation and processing licence classes, each of which have “standard” and “micro” licence subclasses.

Cultivation licences authorize the growing and harvesting of cannabis, and ancillary activities such as trimming and milling. The regulations permit various methods of growth, including aeroponics, hydroponics, traditional soil, aquaponic, vertical and stacked vertical, but all finished products must pass analytical testing for chemical residues (including pesticides) and microbial contaminants. Regardless of the cultivation method, compliance with Good Production Practices, as set out in the regulations, is mandatory.

A processing licence is required for the production of cannabis products, other than by means of cultivation. On October 17, 2019, three new classes of cannabis (edibles, topicals and extracts) were legalized in addition to the initial five permitted forms: dried flower; fresh flower; oil; plants; and seeds. A processing licence is required in order to manufacture these new classes.

Both cultivation and processing licences allow for the bulk sale of cannabis to other industry participants if applicable requirements are met and, once all licence conditions have been removed, the sale of retail-packaged recreational cannabis

products to provincial wholesale agents (discussed further below). Cultivation and processing licence holders can sell directly to medical patients if they also hold a licence for medical sale. Analytical testing licences do not allow for any sale activities, while research licence holders are permitted limited bulk sale activities.

Becoming a licence holder under the *Cannabis Act* is a lengthy process with significant initial and continuing regulatory obligations. For example, all licence holders must be ordinarily resident, have a head office or operate a branch office in Canada. Multiple individuals must pass rigorous security checks and applicants must have a fully-built production facility that complies with rigorous building and security requirements. Once a licence is issued, licence holders must comply with a complex set of regulations under the *Cannabis Act* to maintain their licence, including production, shipping, labelling, storage, destruction of product, inspection and record keeping requirements.

Health Canada publishes a useful licensing guide which can be found [here](#).

PROVINCIAL REGULATION OF RECREATIONAL CANNABIS

The *Cannabis Act* delegates authority to the provinces to regulate the distribution and sale of recreational cannabis within each province. Accordingly, the provinces play a significant role in regulating recreational cannabis, and businesses seeking to carry on a cannabis-related business in Canada will need to consider the impact of both federal and applicable provincial legislation.

Six provinces/territories, including Quebec, New Brunswick, Nova Scotia, Prince Edward Island, Northwest Territories and Nunavut, have government-only retail distribution – for both physical and online retail. Five jurisdictions, including Alberta, British Columbia, Newfoundland & Labrador, Ontario and Yukon, have implemented a hybrid system in which the government alone is authorized to make online sales of recreational cannabis products and privately-owned retailers are licensed (by the applicable provincial regulatory agency) to sell recreational cannabis from bricks-and-mortar locations. Manitoba and Saskatchewan are the only two provinces that have stayed out of retail sale entirely and instead elected to allow private licensed retailers to operate both online and physical sale of cannabis to recreational users in the province.

CANNABIDIOL (CBD) AND INDUSTRIAL HEMP

Industrial hemp is a cannabis plant that contains only negligible THC but may contain significant concentration of CBD – one of the cannabis plant's non-intoxicating cannabinoids. Interest in industrial hemp has grown in parallel with the interest in CBD-only cannabis products, as well as 2019's passage of the *Agriculture Improvement Act of 2018* (known as the "Farm Bill") in the United States. The Farm Bill legalizes the commercial production, distribution and sale of industrial hemp and derivative products, including CBD concentrate. (It is notable, however, that there are still U.S. Food & Drug Administration roadblocks to the legal sale of CBD products on a federal basis in the United States.) In Canada, though the cultivation of industrial hemp (and certain other hemp-related activities) requires only an Industrial Hemp Licence, any extraction activity to derive CBD concentrates can only be done with a *Cannabis Act* processing licence. For the purposes of the *Cannabis Act*, CBD and THC (and any other cannabinoid) are treated in identical fashion – other than in connection with product composition rules.

ADDITIONAL BUSINESS CONSIDERATIONS

Regulatory

The regulations under the *Cannabis Act* and provincial legislation detail the basic cannabis legalization framework, covering matters including criminal prohibitions, licensing, packaging and labelling rules, strict cannabis promotion rules, cannabis tracking through its lifecycle, and many other areas. Licence holders and prospective licensees face the challenge of navigating a regulatory regime that is characterized by broadly-drafted legislative prohibitions in an environment currently lacking in interpretive regulatory guidance or case law.

Cannabis licence applicants that plan to carry on cultivation, production or packaging of cannabis products will also be required to obtain a cannabis licence from the Canada Revenue Agency. More information can be found [here](#).

Access to Capital Markets

Historically, cannabis companies have been able to successfully raise capital privately or through listings on the public stock exchanges in Canada, being the TSX, the TSXV, the CSE and the Cboe Exchange. Companies have also raised debt financing in Canada through credit unions, financial institutions and alternative lenders.

The funding landscape for cannabis companies in Canada has changed dramatically in recent years. Cannabis companies had historically raised funds by issuing additional equity both privately and on the public markets. Beginning mid-2019, however, such equity fundraising has declined significantly, mirroring general declines and continued volatility in cannabis company valuations. The Canadian cannabis industry is now seeing an uptick in the number of companies seeking creditor protection or being placed into receivership, as well as consolidations and dispositions of non-core assets.

LICENSING

To offset brand risk and maximize capacity utilization, many Health Canada licence holders are actively seeking out cannabis brand and product developers with whom they can engage in contract manufacturing, white labelling and similar licensing or joint venture arrangements. Licensing arrangements for new or crossbred genetics are also on the rise between licence holders. More information on acquiring cannabis genetics under the *Cannabis Act* can be found [here](#).

Marketing and Promotion

The *Cannabis Act* includes strict limitations on branding, packaging and promotion of cannabis products (as well as accessories and services related to cannabis), and licence holders are accordingly taking a deliberate and careful approach to marketing and promotion. More information on cannabis promotion rules can be found [here](#).

September 2023



Technology/E-Commerce

2023

Doing Business in Canada

AIRD BERLIS

airdberlis.com

Canada has a thriving technology sector that supports key economic drivers, including such technologies as e-commerce, connected vehicles, artificial intelligence, cybersecurity, financial technology, medical technology, space and aviation technology, general software development, and many more. The legal framework governing the technology sector is shared by the federal and provincial governments. Commercial activity in technology involves multiple legal regimes, including intellectual property law as it relates to the internet (copyright and trademarks), broadcasting and telecommunications law, privacy and personal data security, consumer protection (e.g., the oversight over deceptive marketing practices under the *Competition Act*), anti-spam (CASL), transportation and aviation safety regulation, import/export controls, confidentiality and trade secrets, education and health.

The scope of legislative and judicial jurisdiction over technology is in flux. In recent judicial decisions, the Canadian courts have shown a willingness to assume jurisdiction over non-Canadian businesses even if they have no physical presence in Canada. Even “virtual businesses” may be found to be “carrying on business” in Canada.

TECHNOLOGY

Import/Export Controls

Importing certain technologies into Canada may obligate importers to comply with requirements under the *Defence Production Act* (Canada), the *Controlled Goods Regulations* (Canada), the *Export and Import Permits Act* (Canada) and even the U.S. International Traffic in Arms Regulations (ITAR) and the U.S. Export Administration Regulations, the latter of which are both “long arm” laws that extend beyond the borders of the United States into Canada. The Controlled Goods Program, which is governed under the Controlled Goods Regulations, is mandated to protect goods and/or controlled technologies within Canada and to prohibit controlled goods and/or controlled technology from being accessed by unauthorized persons.

Canada’s export control regime is regulated by multiple domestic laws, international agreements and diplomatic obligations, including an Export Control List. Export permits may be required to not only ship goods outside Canada, but to provide services associated with designated technologies, discuss designated technologies with certain employees, participate in phone or video conversations about designated technologies, correspond by email, fax

or otherwise through cyberspace about designated technologies, and sometimes even before leaving Canada’s borders on business trips. Factors such as the nature, characteristics, origin of componentry, uses to be made of the technology, destination and end users of the technology are all relevant to whether an export permit is required.

U.S. companies working with businesses in Canada should be mindful of areas of conflict between Canada’s export control laws and U.S. export control laws. For example, Canadian companies may be subject to fines and other penalties should they agree to be bound by U.S. export control laws. In addition, directors and officers may face penalties under Canadian law for complying with any instruction by, or policy of, a U.S. entity, contrary to Canada’s policies relating to the trading between Canada and Cuba.

E-commerce Statutes

Canada’s federal government and the Canadian provinces have adopted electronic commerce statutes that deal with issues arising from conducting business electronically. For example, Ontario legislates e-commerce under the *Electronic Commerce Act*, while this area is also subject to the federal *Personal Information Protection and Electronic Documents Act*. Canada’s e-commerce statutes typically set out standards to be met in order to use an enforceable electronic signature and requirements to be met in order for a document that would otherwise have to be in writing to be valid in electronic form. In some provinces – for example, Quebec – there are special rules applicable to consumers that pertain to both appearance and language used that affect enforceability of the document. These e-commerce statutes also set forth how and when an offer and acceptance of a contract distributed electronically may be made.

Insolvency

Canadian bankruptcy and insolvency laws underwent revisions in 2009 to afford greater protection to contractual users of technology (and other intellectual property). One of the key terms set forth in Canadian bankruptcy and insolvency legislation is that insolvent parties are generally permitted to “disclaim” (terminate) an agreement for the use of intellectual property, subject to the right in the counterparty to continue to use the intellectual property, provided that the user continues to make all payments and to carry out all user obligations called for in the original agreement. Of course, because of the exercise of

the disclaimer, the user cannot expect to continue to receive support, updates and other benefits from the insolvent intellectual property owner.

It is unclear which intellectual property rights enjoyed by intellectual property users are protected from being disclaimed. While one may assume all statutory intellectual property rights would be protected, Canada also protects common law intellectual property rights for trademarks and trade secrets. The insolvency legislation provides no guidance as to what the “right to use” (which is afforded protection) means. As mentioned, the legislation does not obligate the licensor to continue to provide maintenance or support should the licensor become insolvent.

On the other side of the coin, there is little, if any, protection for a licensor should its licensee become insolvent. There can be serious consequences for the licensor of valuable, limited use intellectual property arising from the Canadian courts’ broad right to assign licence agreements to third parties in the event of an insolvency. Imagine, for example, the insolvency of a chartered Canadian bank (of which there are few in Canada). A licence of software that is solely dedicated and useful to banks could be assigned to another bank without the concurrence of the licensor, depriving the licensor of a potential sale to the assignee.

.ca Domain Names

Internet domain names are verbal representations of a numerical address used to identify and locate websites on the internet. Each internationally recognized country is entitled to one top level domain (“**TLD**”), referred to as a country code top level domain, or ccTLD. Canada’s ccTLD is the .ca domain. The .ca domain is currently administered by the Canadian Internet Registration Authority.

Registration in the .ca domain is available only to applicants who can demonstrate Canadian presence requirements, namely, Canadian citizens, permanent residents or their legal representatives, corporations incorporated under the laws of Canada or any province or territory of Canada, trusts, partnerships, associations and other individuals and entities that meet certain requirements. Generally, the registration and transfer processes for .ca domain names are not particularly sophisticated or complicated. Dispute resolution processes in the .ca domain were established in 2001.

Applicability of Sale of Goods Legislation

In Canada, certain rights and obligations will follow the acquisition or sale of technology that falls within the scope of provincial sale of goods legislation. Canadian courts tend to treat computer system acquisitions as sales of goods while transactions involving pure service, maintenance, training or programming are typically viewed as incidental to the sale of goods and therefore not subject to sale of goods legislation – and therefore not subject to the statutory protections contained in such legislation. Software supplied solely pursuant to a licence agreement is typically not subject to sale of goods legislation unless some sort of property is transferred to the licensee. If software is provided together with hardware or other goods (e.g., as a “system”), the software may become subject to sale of goods legislation.

Libel Action Over the Internet

Cyber-libel is posting a statement or image on the internet which tends to lower the reputation of a person in the community. The post has to be false and malicious. It is still unclear in Canadian jurisdictions as to whether email, blogs and the content of websites constitute a broadcast for the purposes of defamation law. If they do, short limitation periods may apply. As information on the internet is widely disseminated in a short period of time, there is a high probability of significant damages resulting from a cyber-libel.

An issue that has arisen in the context of cyber-libel is the anonymous posting of defamatory statements or images to the internet. Although it is possible to obtain early mandatory orders or discovery from third parties that allow one to learn the identity of the cyber-libeller, it is often an expensive exercise. In addition, this information may not prove to be useful since the publisher may have posted the defamatory statement or image from an internet café or other public resource that does not keep records of its users. While the law in jurisdictions within North America vary by province or state, as a result of a recent Supreme Court of Canada decision, the law in Canada is now closer to that generally applicable in the United States. In Canada, those who post statements and images which are false and defamatory may escape liability if they can demonstrate that the material was published responsibly.

In the United States, internet service providers (“**ISPs**”) are generally protected from liability in respect to the content of others. In Canada, such immunity is less clear.

Cyberbullying/Revenge Porn

Amanda Todd, a young teenager, was a Canadian victim of cyberbullying. It was determined that she had been extorted by one Aydin Coban, a resident of the Netherlands, into indecently exposing herself, and she ultimately committed suicide. Coban was tried and convicted in Canada and is currently serving a 13-year prison term in Canada. As a result of Todd's bullying and subsequent suicide, the Canadian federal government passed the *Protecting Canadians from Online Crime Act* (Canada), now part of the Canadian *Criminal Code*. It created the criminal offence of non-consensual distribution of intimate images (revenge porn) and has been in force since 2014.

Assigning and Sublicensing Technology Licences

For a software licence to be assignable, the Canadian courts look to whether or not the licence is "personal" to the parties. If the courts determine that a licence is personal, the licence may not be assignable or capable of being sublicensed to third parties, barring any language in the licence to the contrary.

Enforceability of Shrink-wrap, Click-wrap and Browse-wrap Licences in Canada

The key for enforceability of the shrink-wrap, click-wrap and browse-wrap agreements is whether or not it can be established that both parties to the contract were aware of the terms of the agreement and agreed to them. Canadian courts have tended to prefer forms of agreements where the terms of such agreement are brought to the attention of the person, with the person having to click "I Accept" prior to being bound to such terms, over those forms of agreement where the person is bound by the terms as a result of simply landing on a website.

Use of Non-Canadian Form Agreements in Canada

Foreign technology companies that wish to use their standard commercial precedents to carry on business in Canada should ensure that certain "Canadian-specific" legal issues have been addressed in the form of agreement which is to be used. Some of these issues include the following:

Sale of Goods Act Conditions: Canadian practice relating to technology agreements is to ensure that any disclaimer of implied warranties contained in a technology agreement also disclaims the implied conditions imposed by sale of goods legislation.

Ownership Rights: Canadian law does not recognize the concept of a "work made for hire," which is a phrase often contained in U.S.-based agreements. In a software scenario, typically, the author of the computer program is the first owner of copyright in the program. If the author is employed for the purpose of creating software, then the employer will generally be the first owner of copyright in the software. The law is similar for inventions and trade secrets. In a situation in which a copyrighted work is being created for a customer by a contractor, the contractor, as author, will be the owner of the work unless the contractor has entered into a written assignment of such copyright in favour of the customer. It is also standard practice in Canada to have such a written assignment accompanied by an express waiver of moral rights in the work.

Cryptocurrencies

From the legal point of view, cryptocurrencies in Canada are not generally illegal to receive or possess. However, trading in cryptocurrencies is regulated if the trades are accomplished through a "crypto asset trading platform" - a kind of online market that permits cryptocurrency exchanges. Failure to register and submit to regulation attracts significant penalties. Crypto asset trading platforms are subject to the usual anti-money laundering and "know your client" rules by which all securities traders are bound.

So-called "stablecoins" (cryptographic currencies that are supported by established fiat currencies like the U.S. dollar) are considered to be part of a class of securities called derivatives and are regulated as securities. At present, securities regulators in Canada are not licensing trading platforms that propose to deal in stablecoins or that offer margin accounts to traders in cryptographic currencies.

Connected and Autonomous Vehicles

Connected vehicles are motor vehicles that can send and receive messages to and from other connected vehicles and roadside infrastructure. Those messages may pertain to time, place and distance of the connected vehicle and may contain road safety and awareness information. The intention is to allow users to drive on Canadian roads more safely.

Transport Canada, the federal regulator in Canada, has published a National Policy Framework for Connected and Automated Vehicles that encourages the promotion of the technology, including sensors, telecommunication and real-time positioning of vehicles that allow drivers to "see around corners" and learn of dangers that cannot otherwise

be known on the road. The regulator has also published a Safety Framework for Automated and Connected Vehicles that provides relevant guidance to manufacturers. These publications recognize that road accidents will still happen but that new technologies are likely to make such accidents far less frequent than currently is the case.

The relevant legislation is the *Strengthening Motor Vehicle Safety for Canadians Act* (Canada). That legislation allows for the speedy suspension or modification of existing laws to allow alignment with laws in force in other countries, especially the United States, since it is seen that safety depends in part on a uniform driving experience, no matter in which country a person is driving.

As for testing of autonomous vehicles, the Province of Ontario has permitted testing on Ontario roads (subject to certain caveats) since 2016, and Transport Canada has published guidelines for best practices for such testing.

Thanks to enabling legislation and interest in various municipalities, Canada is currently regarded as being advanced in technologies pertaining to connected and autonomous vehicles, as well as their testing and use.

June 2023



Intellectual Property

2023

Doing Business in Canada

AIRD BERLIS

airdberlis.com

Overview. International business interests recognize their increasingly valuable “intellectual property” to be an amalgam of:

- human capital (the experience, know-how, skills and creativity of their employees);
- intellectual assets (inventions, methods, processes, documents, designs and databases that are codified); and
- intellectual property rights (those intellectual assets for which legal protection is sought, acquired, maintained and enforced).

Companies seeking to successfully carry on business in Canada must develop familiarity with the Canadian intellectual property regime which comprises four primary federal statutes: the *Patent Act*, *Copyright Act*, *Trade-marks Act* and *Industrial Design Act*. Industry Canada, through its agency, the Canadian Intellectual Property Office (“**CIPO**”), maintains a database of registered patents, copyrights, trademarks and industrial designs and administers the four primary federal statutes. Other forms of intellectual property, notably trade secrets/confidential information, are governed by provincial common law and, in the province of Quebec, by the Civil Code.

Patents

Overview. Canadian patents protect function and are statutory monopoly rights granted for specific inventions involving a product, machine, process or composition of matter, including new and useful improvements of existing inventions.

Patent monopoly rights are only available in Canada through registration. As in most countries, to obtain a valid Canadian patent, three conditions must be demonstrated in connection with the invention: *novelty* (not previously disclosed to the public), *utility* (functional and operative) and *non-obviousness* (not obvious to a person of ordinary skill in the relevant art).

Securing Patent Protection. Canadian patents are granted to inventors who are first to file a patent application as opposed to first to invent. To assist inventors to secure needed benefits from disclosure, such as financing of further research and development, Canada provides a one year “grace period” which allows inventors and their assignees to disclose inventions before filing a patent application, without running afoul of novelty or obviousness requirements.

Canada is a signatory to the *Patent Cooperation Treaty* (“**PCT**”), as well as other multilateral treaties that seek to generally harmonize patent protection globally. The PCT procedure provides for filing a standardized international application, although that application may be ultimately granted or rejected in each designated state, according to its local law.

A set of initiatives known as the Patent Prosecution Highway (“**PPH**”) provides for accelerated patent prosecution procedures. It permits national Patent Offices to expedite the prosecution of patent applications for the same invention which are filed in multiple jurisdictions, and prevent avoidably inconsistent results. Presently, Canada has PPH agreements in place with various national Patent Offices, including in the United States, Japan, Germany and Korea.

Pending Canadian patent applications are laid open to public inspection 18 months after the earlier of the actual Canadian filing date or the date on which it was first filed elsewhere, also known as “the priority date.”

CIPO charges maintenance fees, payable annually from the second anniversary of the filing date, during prosecution of the patent application and after issuance, in amounts that increase over the patent term.

Canada’s *Patent Act* provides for formal opposition proceedings, before a patent is issued, based on prior publications, published patent applications and prior issued patents. It also provides a procedure for re-examination of an issued patent.

Ownership, Exploitation and Transfer of Patent Rights. An inventor – a person who conceives the invention and reduces it to a definite and practical form – is considered the owner of an invention unless it is assigned to others. In determining whether an employee or his/her employer owns an invention invented by the employee, Canadian courts will consider a number of factors, including whether the employee was hired for the specific purpose of inventing, whether the employee was privy to confidential information of the employer used in connection with the invention, and whether the problem solved by the invention was the problem which the employer directed the employee to solve. As a result, it is prudent to address issues of intellectual property ownership and related rights by way of agreement.

An owner of a Canadian patent or patent application may sell or assign that property and the rights relating to it, and Canadian patents and applications are commonly licensed in and out.

Infringement and Enforcement of Patents. An issued Canadian patent provides the owner with rights to exclude others from commercially exploiting (manufacturing, using, selling and inducing others to do so) the invention which is disclosed and claimed in the patent, generally for a non-renewable period of 20 years following the date of filing the patent application. As a result of the Comprehensive Economic and Trade Agreement, patent term extensions of up to two years are available in Canada for approved drugs under a Supplementary Protection Certificate regime. Further, as a result of the Canada-United States-Mexico Agreement, starting no later than January 1, 2025, time will be added to the patent term for any Canadian patent issuing on an application filed on or after December 1, 2020, if the Canadian patent office causes delays in the process of granting the patent under the proposed legislation.

The right of the patent owner to exclude others from such activities is enforceable in court proceedings and, in the same proceeding, the court often will deal with challenges to the validity of the patent as defendants routinely assert invalidity of some or all patent claims by way of counterclaim in order to avoid judgment. Most patent actions are commenced in the Federal Court as it has exclusive jurisdiction over patent invalidity claims. Federal Court actions are heard by judge alone – no right to jury trials is provided in the *Federal Court Act* – and, unlike Provincial Superior Court decisions, any order or judgment is enforceable across Canada without further formalities.

An array of civil remedies is available for infringement of Canadian patent rights. These include:

- *Interlocutory or permanent injunctions.* Injunctions require the defendant to cease activities which infringe the patent rights during the time the case is pending (interlocutory) or following judgment, during the balance of the patent term. Interlocutory injunctions in Canadian patent cases are exceptionally rare.
- *Damages.* These are monetary compensation for the patent owner's losses as a result of the defendant's infringement. Punitive damages for wilful infringement and other egregious conduct are available, but rarely awarded.

- *Accounting of Profits.* This is an alternative to the damages remedy which allows the patent owner to receive the profit which the defendant made from the infringement and is of particular use in cases where the patent owner would have been, for any number of reasons, unable to make the sales made by the infringer.
- *Seizure or destruction* of the infringing products or the tools used to make them.

Damages (described in the *Patent Act* as “reasonable compensation” and usually taking the form of a reasonable royalty) are also available to the patent owner in most countries as compensation for infringement that occurs before the patent is issued, beginning from the date the patent application is laid open to the public.

Trademarks

Overview. Trademarks protect elements used to distinguish the products and services of one person or corporation in the marketplace from another. Examples of cognizable elements which may be eligible for Canadian trademark protection include:

- Words (names and slogans and including combinations of one or more letters and numerals);
- Symbols (labels, designs or devices);
- Three Dimensional Shapes (the shape of products or their packaging); and
- Colours (coloured words and symbols and coloured products).

Canada also permits certification marks (marks which identify goods and services of a particular quality, standard or origin), official marks (prohibited trademarks of Canadian governmental authorities) and geographical indication protection through certification marks.

So, unlike other forms of intellectual property where rights arise from creation, Canadian trademark rights arise only from use of a trademark in the course of trade. The requirement of use also operates to limit trademark rights in another fundamental way. Absent a determination that the trademark has acquired additional meaning to consumers, the right to its exclusive use is enforceable only with respect to the specific product or services in relation to which the trademark is registered.

Securing Trademark Protection. The person who first uses the trademark in association with the products or services has priority, and the entitlement to adopt and register it. In Canada however, trademark rights

exist in unregistered trademarks and such rights arise from distinctiveness and use, whether or not they meet other requirements of registration.

CIPO maintains a registry of trademarks and provides the opportunity to register and renew, examine, search and oppose a trademark application. Registration is generally dependent on the trademark meeting two criteria:

- it is distinctive (that is, it functions to distinguish the products and services of the trademark owner from those of others); and
- it is not clearly descriptive or deceptively misdescriptive.

Failure to file a Canadian trademark application within a specified time does not, as in the patent regime, result in an irrevocable waiver of right to protection in Canada. Trademark applications can be filed at any time, but priority rights in a Canadian trademark based on the early filing of trademark applications elsewhere are available, and it is usually prudent to file applications before the use or adoption of the trademark becomes publicly known.

Canadian trademark applications can be filed at CIPO based on use, proposed use or on a prior application for registration of the mark in a foreign country that is a signatory to the Paris Convention for the Protection of Industrial Property (the “**Paris Convention**”). Canada has signed the *Madrid Protocol* (allowing for a single international trademark application, filed in the trademark office in the home country in a single language, to obtain registrations in multiple countries). It is no longer necessary to apply for a trademark based on use or proposed use.

A Canadian trademark application requires a list of products and/or services which the registration seeks to cover. The *Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks*, establishing an international classification of products and services, has been signed and new applications are required to use Nice classifications. A revised fee schedule has been implemented and it is now more expensive to file a trademark in Canada for multi-class trademark applications.

If and when the CIPO examiner finds the trademark to be registrable, those who believe a registration for the Canadian trademark should not be granted have the opportunity to initiate opposition proceedings, triggered by official publication of the trademark application in the Canadian *Trade-marks Journal*. The deadline for commencement of an opposition

proceeding is two months from advertisement.

A Canadian registration is in force for 10 years, subject to indefinite renewal. Renewal fees are currently required every 10 years. There is no requirement in Canada that an owner proves it is still using a trademark in order to maintain or renew a trademark registration. It is only if challenged that a trademark registration may be cancelled if the owner cannot demonstrate that the trademark is still in use. A Canadian trademark registration may be cancelled for non-use at any time following three years after the registration date, if the owner has not used the trademark within the previous three years.

Because trademark rights are dependent on use, they are not static and distinctiveness can be acquired, increased or lost. A term that is descriptive of products or services can acquire distinctiveness with use over time, if Canadian consumers come to recognize it as an indicator of a particular source. A term which is distinctive can acquire additional distinctiveness, which may be used to support its registration for a broader range of products and services. Conversely, a term that is distinctive can, with misuse over time, become descriptive or generic. Loss of trademark distinctiveness may vary from country to country, as in the case of ASPIRIN: now a generic term in the United States, but still protectable as a trademark in Canada.

Ownership, Exploitation and Transfer of Trademark Rights. The owner of a Canadian trademark has the exclusive right to its use, meaning the right to use the trademark and the right to exclude others from using it. Registered trademarks provide the owner with an exclusive national right to use the trademark in association with the products or services for which the mark was registered. In Canada, that includes the right to be free of use of: a) a confusingly similar trademark by another and b) use of the registered trademark by another in a manner which may depreciate its goodwill.

In relation to products, “use” in Canada generally means the placement of the trademark on the product or on the packaging for the product at the point of sale or when possession is passed to the purchaser of the product. In relation to services, “use” generally means use of the trademark incidental to the provision of the services or use in advertising of the services.

Registration provides the owner with significant procedural and substantive advantages. These include the right to register the trademark in

other member states of the Paris Convention and a presumption of validity and ownership of the trademark. In addition, registration of a trademark acts as an absolute defence to claims for damages or profits during the period of registration if the trademark is later found to infringe another trademark.

An owner of a Canadian trademark or pending trademark application may sell or assign that property and the rights relating to it. Licensing is the primary means by which foreign company trademarks are used by Canadian domestic businesses. Trademark licences may be secured on a variety of terms, including territory, exclusivity/non-exclusivity, use and compensation. The use of the trademarks by licensees will support distinctiveness and enure to the benefit of the licensor owner. However, in exchange for that benefit, Canada requires a trademark owner to include in any licence the right and obligation of the owner to control the nature and quality of the trademarked products or services of the licensee.

Infringement and Enforcement of Trademark Rights. “Infringement,” in the Canadian trademark sense, is the use of a mark which is so similar, in relation to the same or related products or services, that confusion or deception is likely to occur. Policing and enforcing Canadian trademark rights, however, includes not only ensuring that third parties do not infringe by misuse of the trademark commercially, but also preventing use of the trademark as (or instead of) the product description in publications, as such activities can result in loss of distinctiveness and therefore loss of trademark rights.

The range of available civil remedies for Canadian trademark infringement includes interlocutory and permanent injunctions, compensatory damages (resulting from the infringement, including lost sales and depreciation of goodwill in the trademark) or an accounting of profits, and delivery up or disposal of all products bearing the trademark.

Criminal prosecution and penalties may also result from trademark infringement, particularly in the case of counterfeit products.

Well-known or “famous” trademarks may be given protection in Canada beyond the scope of similarity of the products or services for which they are registered, where an infringing mark is used in a manner clearly prejudicial to the distinctiveness of the famous mark. Fame is not, however, a trump card in Canadian enforcement proceedings, covering all possible products or services. Canadian judicial

anxiety to avoid conferring overly-broad protection often results in limitation of rights.

In Canada, unregistered trademarks may be protected in their geographic area of use by an action of passing-off or unfair competition (to prevent another trader from misrepresenting its goods and services as those of the trademark owner). Such actions can be brought at common law or under section 7 of the *Trade-marks Act*. There are four required elements for a plaintiff to prove:

- a reputation in the marketplace;
- misrepresentation by the defendant to a prospective or actual customer of goods or services supplied by the plaintiff;
- actual public confusion or a likelihood of confusion; and
- damages resulting from the confusion.

Significant defences and limits exist on the enforceability of unregistered trademarks. For example, unregistered trademarks cannot establish a claim of passing off against lawful use of a registered trademark.

“Black market” (or “counterfeit” product manufactured, packaged and/or labeled by persons other than the trademark owner to appear like the authentic product) and “grey market” goods (genuine trademarked products that are authorized for distribution in a specific region, but are diverted for sale into a different one) deserve special mention in connection with trademark enforcement. Counterfeiters are subject to infringement actions in the case of registered trademark rights and passing off actions in the case of unregistered rights. Grey marketers cases involve different consideration because they are genuine and the trademark was applied by the owner (or an authorized representative of the owner). There can be no valid assertion of a passing off claim or public confusion to support a claim of trademark infringement. Canada subscribes to the so-called principle of trademark “exhaustion” (when the trademark owner has put the product into the stream of commerce under the trademark, it cannot object to further sales of the same product in the course of trade). In Canada, it is only in circumstances where the grey market products are not put into the stream of commerce by a domestic entity which owns the trademark, or the grey market products vary from genuine goods, such as where the packaging is not compliant with local law, or copyright can be asserted in packaging elements, that there is a likelihood that the importation and sale of grey market products can be inhibited.

Copyright

Overview. Copyright recognizes the rights of creators in original literary, dramatic, musical and artistic creativity, which usually involves mass communications, through virtually any medium from printed publications, films, television and sound recordings, public performances and communications signals to computer systems for information storage and retrieval. Canada is a signatory to the Berne Convention and other multilateral treaties which generally harmonize copyright protection, globally. In Canada, as elsewhere, copyright law recognizes the sole right to produce or reproduce a work or a substantial part of it, in any form. It protects only the creator's original form of expression of ideas, for example, the arrangement of words in a novel or the sequence of musical notes in a score, not the ideas themselves. The protection afforded by Canadian copyright law centres on the act of reproduction, which is the legal basis for most exploitation of literary, artistic, musical and dramatic works. As a result, copying or other reproduction of a work, in whole or substantial part, requires the authorization of the rights holder. However, more broad protection of copyright is enshrined in the *Copyright Act* so that the rights holder's authorization is also required to:

- produce or publish a work in any material form;
- perform the work in public (e.g., public readings, dramatic or musical performances);
- make an audio, visual or audio-visual recording of the work;
- communicate the work to the public by telecommunication; and
- translate, adapt or otherwise modify the work.

The protection of copyright in Canada is also extended to "neighbouring rights." These rights afford protection to those who assist in the dissemination or communication of the creator's works to the public, specifically:

- rights of performing artists in their performances of the works;
- rights of producers of phonograms which include the works; and
- rights of broadcasting organizations in radio and television programs which include the works.

Neighbouring rights are an area of increasing complexity in Canadian copyright law as a result of advances in transmission technologies (e.g., cable, satellite and internet) and in the means of fixation of works (e.g., digital media).

Computer programs are protectable under Canada's *Copyright Act* as literary works. The fact that a computer program is created using well-known programming techniques or contains unoriginal elements is not a bar to copyright protection if the program as a whole is original. Some databases that contain original content may be given protection as "compilations" under the *Copyright Act*, although there is no specific database protection, and most databases likely would not be covered by copyright. A web page's look, layout and appearance can be protected by Canadian copyright as original literary and artistic works and/or compilations. Underlying mathematical calculations, algorithms, formulae, ideas, processes or methods contained in information technology are not protected by Canadian copyright laws, although they may be protected in some cases under patent law.

The term of copyright in Canada, as in the majority of Berne Convention countries, is generally the life of the author and 70 years after their death. In cases of joint creators, the term of protection for copyright usually extends from the death of the last author to die.

In Canada, the term of copyright for anonymous or pseudonymous works and sound recordings is the lesser of 75 years after the work is first published and 100 years after the work is made.

Recognition is given to a division of rights within copyright – between "economic rights" and "moral rights." Economic, or exploitation, rights are emphasized and relate to the copyright holder's exclusive right to use, authorize or prohibit use of a work and include the rights of:

- reproduction (copying by either analogue or digital means);
- communication to the public by telecommunication (public performance, public display and transmission over the internet or other digital networks);
- distribution (selling, lending or renting of tangible copies); and
- modification (translation or adaptation of works).

Moral rights, also provided in the *Copyright Act*, are non-economic and recognize the creator's parental and dignitary rights to control their identification with the work and how it is treated by others. These rights are:

- the "paternity" right (the right to be identified as the creator of the work or to remain anonymous); and

- the “integrity” right (the right to prohibit alteration, mutilation or other modification of the work and its use in association with a product, service, cause or institution if such use would result in prejudice to the honour or reputation of the author).

Securing Copyright. The primary requirement for Canadian copyright is that the work must be an “original” creation. The ideas in the work need not be new, inventive or even of a particular quality, but the form (whether literary, artistic, musical or dramatic) in which ideas are expressed must be an original creation of the creator, not copied from another work, and involve an exercise of non-mechanical skill and judgment. Canada also requires the work to be fixed in some tangible form and for the creator to be a citizen or resident of a Berne Convention or WTO member state. If these conditions are satisfied, a creator’s copyright arises automatically on creation of a work and, unlike other types of intellectual property, there is no formal requirement for Canadian registration or notification in order for copyright to subsist in a work. Registration is however, significant in the enforcement of copyright as it constitutes deemed notice to infringers in Canada and gives rise to rebuttable presumptions that the work is validly protected by copyright and that the owner named in the registration is the true owner.

Ownership, Exploitation and Transfer of Copyright. In Canada, as in most other Berne Convention and WTO member states, the creator (or author) is generally the first owner of the copyright in a work. Where the creator is an employee who creates a work within the scope of his or her employment, while he or she remains the author of the work, the employer will generally be entitled to copyright ownership. If the creator is an independent contractor, he or she is the first owner of copyright unless there was an agreement to the contrary.

Generally, copyright (except for moral rights) may be assigned (geographically, by subject matter and otherwise) or licensed by the owner. However, in Canada, assignments are invalid unless in writing and, if the creator is the first owner of copyright, it cannot be assigned for a term beyond 25 years after the death of the creator. Beyond that time, the rights revert to the estate of the creator. In the case of moral rights, while those rights may not be assigned, their waiver is permitted in Canada.

Unique to the field of copyright commercialization is the use of copyright collective and reproduction rights. Organizations which license the use of works on behalf of large numbers of creators and other rights holders in their large portfolios collect licence

royalties for that use, and distribute the royalties back to rights holders. The statutory regime governing Canadian copyright collectives is contained in the *Copyright Act*. Copyright collectives often specialize in licensing of different categories of works (e.g., text/image-based works or musical works) and representation of different rights holders (e.g., creators or neighbouring rights holders).

Infringement and Enforcement of Copyright. Copyright in Canada is infringed by and enforceable against a person who, without the rights holder’s consent, does any act that only the rights holder can do under the *Copyright Act*. Activities constituting infringement in Canada include the act of providing an internet-based service (or other digital network service) primarily for the purpose of enabling acts of copyright infringement if an actual infringement of copyright occurs by that same means as a result of the use of that service.

Some activities which would normally be restricted by copyright are, in Canada, exempted from action for infringement. The most important of these activities are collectively described as “fair dealing” (similar to “fair use” under U.S. copyright law) and include copying for the purpose of research or private study, copying for the purpose of parody, satire, criticism, review or news reporting (usually provided the name of the author, performer or maker or broadcaster is given in the source), educational use exemption and exemptions for libraries, museums and archives. Exemptions are also provided through the doctrine of “exhaustion of rights,” applicable in many countries. The doctrine provides that, after the copyright owner has sold or otherwise transferred ownership of a copy of a work, the owner of that copy may generally dispose of it without further authorization of the rights holder, for example, by giving it away or even by resale. It is also not an infringement of Canadian copyright for an individual to transfer legally-obtained works from one format to another for personal use.

The range of remedies provided for copyright infringement in Canada includes injunctive relief, damages, accounting of profits and delivery up of infringing works and the means to produce them. Unlike patent and trademark law, where the remedies of damages and accounting of profits are alternative remedies, a person who infringes copyright in a work in Canada is liable in a civil action to pay damages and also to account for the profits resulting from the infringement. As well, statutory damages are available which fix a range for damage and allow Canadian rights holders to obtain monetary judgments without the requirement to

prove specific loss. A Canadian copyright owner may elect, before final judgment in an infringement proceeding, to recover statutory damages for an amount between C\$500 and C\$20,000 to each infringed work infringed for commercial purposes, and between C\$100 and C\$5,000 for all works in the event of copyright infringements for non-commercial purposes, as determined by the court. In special circumstances, the courts have granted “site-blocking orders” against third-party ISPs to block Canadian internet subscribers from accessing sites hosting infringing copyrighted material.

Certain acts of copyright infringement in Canada expose infringers to criminal penalties, including fine and imprisonment. For example, where a work is controlled by a technological protection measure, which is circumvented knowingly and for commercial purposes, the person responsible may be liable on conviction on indictment, to a fine not exceeding C\$1 million or to imprisonment for a term not exceeding five years or to both; or, on summary conviction, to a fine not exceeding C\$25,000 or to imprisonment for a term not exceeding six months or to both.

Federal Court of Appeal Approves Site-Blocking Order. A site-blocking order requires Canada’s internet service providers (ISPs) to block their subscribers from accessing certain websites hosting unlawful content. Federal Court of Appeal set a precedent for what might become the single most effective tool for taking down harmful content from the internet (leave application to the Supreme Court dismissed).

Industrial Designs

Overview. A Canadian industrial design, known in the United States as a “design patent,” relates to the visual features of shape, configuration, pattern or ornament, or any combination of these features, applied to a finished article made by an industrial process. “Shape” and “configuration” cover three-dimensional designs while “pattern” and “ornament” cover two-dimensional designs (such as engraving and embossing). Canadian industrial designs protect a wide range of designs applied to mass-produced finished manufactured products, for example, wallpaper, textile patterns, ornamentation on cutlery, the user interface graphics for mobile phones, and the visual features of a running shoe. Because industrial designs are directed to aesthetic features that appeal to the eye, features that are entirely functional cannot be the subject of industrial design protection.

In 2018, Canada acceded to the *Hague Agreement Concerning the International Registration of Industrial Designs* (the Hague System) and introduced a number of modernizations measures to its industrial design regime.

Securing Industrial Design Protection. The *Industrial Design Act* provides a system for the registration of designs and grants to a successful applicant the exclusive right to prevent others from making, importing for trade or business, renting, selling or offering for sale or rent any article in respect of which the design is registered (or a design not differing substantially therefrom) in Canada for ten years from the date of registration, subject to the payment of maintenance fees at the fifth year. The term of protection is now the later of ten years after the date of registration of the design and 15 years following the filing date of the application. A claim of ownership of a design may only be made if there is a registration of that design under the *Industrial Design Act*. No claims of ownership may be made without registration.

For a design to be registrable, it must be original (although the standard will change to a novelty standard once the amendments are brought into force). Only the owner of a design may apply for and obtain an industrial design registration. If the design was created by an employee of a company, then the employer is considered to be the owner of an industrial design, barring an agreement to the contrary. As a practical matter, the degree of originality required for Canadian industrial designs is greater than that required for copyright, but less than the novelty requirement of patents.

Ownership, Exploitation and Transfer of Industrial Design Rights. The ownership and right to protection of an industrial design presumptively belongs to the creator of the design.

Where the design is created by an employee or by an independent contractor, Canadian law provides that the employer or the person who commissioned the design has entitlement to it where the creation or production of the design falls within the scope of employment duties for which the employee or contractor is paid.

The owner of an industrial design, whether registered or unregistered, may assign rights to the design, but the assignment must be in writing and recorded in the office of the relevant governmental authority, which in Canada is the Commissioner of Patents. An owner of an industrial design may also license rights in the design but, as is the case of an assignment, the licence must be recorded.

Infringement and Enforcement of Industrial Design Rights.

A registered Canadian industrial design confers on the owner an exclusive right to make, sell, rent or import for the purpose of trade any article in respect of which the design or a design not substantially different has been applied. The registration prevents others from exploiting an industrial design by giving the owner the exclusive right to do any of the following for industrial or commercial purposes:

- make articles in which the design is embodied or to which the design is applied;
- import such articles; and
- sell, offer for sale or rent such articles.

The rights are limited, however, so that:

- protection extends only to the design or a substantially similar design (meaning one which differs only in immaterial respects) applied to an article;
- features embodied to a useful article that are dictated solely by a utilitarian function of the article are not protected; and
- any method or principle of manufacture or construction is not subject to protection.

An action for design infringement can be brought by the owner of the design or by an exclusive licensee, and a full range of remedies is available to enforce the right, as is generally the case in enforcement of other intellectual property rights. These include injunctive relief, recovery of damages or profits, punitive damages and the disposal of any infringing article. If a defendant establishes it was not aware and had no reasonable grounds to suspect that a design was registered, the *Industrial Design Act* precludes a court from awarding any remedy (in particular, damages) other than an injunction. This provision does not apply, however, if all or substantially all products to which the registration pertain, or the labelling or packaging of such products that were distributed in Canada were marked with “D” in a circle and the name or usual abbreviation of the name of the proprietor.

Trade Secret/Confidential Information

Overview. The most common form of intellectual property protection used by Canadian business is the maintenance of information as a “trade secret” or, as the concept is more broadly known, “confidential information.” Scientific, technical, financial and marketing information all come within the scope of confidential information in Canada and encompass such diverse material as formulae,

processes, computer programs and code, layouts, interfaces, databases, product concepts and designs, operations manuals, research data and documents, supplier, distributor and customer lists and information about customers and their needs and preferences. If the information is:

- of a commercial nature;
- used in business to provide a competitive advantage; and
- kept in confidence,

it qualifies for legal protection in Canada as confidential information.

Securing Confidential Information Protection.

Unlike the other forms of Canadian intellectual property, confidential information does not engage a government-operated registration process. Rather, protection is implemented by individual businesses under a wide variety of practical regimes. Establishment of rights requires only that the “owner” take steps to ensure confidential information does not become generally known. In the normal course, employing security measures at the facilities and on the electronic systems where the information is stored, and securing confidentiality agreements from employees, contractors, suppliers, licensees and others who may have required access to the information, is sufficient to give rise to the obligations of confidence and trust.

The simplicity of the legal concept of confidential information is in contrast to the increasing practical problems of maintaining information as confidential. The:

- increasing volume of data which is susceptible to designation as confidential information;
- proliferation of innovation and, in particular, the use of computer systems for information storage and transfer which has led to cyber espionage and theft of confidential information on an unprecedented scale;
- increasing mobility of workforces in the global market and the increasing complexity of distribution and supply chains; and
- proliferation of outsourcing, together with digital communication

have all conspired to make it increasingly difficult to control access and use of confidential information. For many businesses, the issue is not restricted to protecting their own information. It includes avoiding unwanted exposure to confidential information of third parties, such as former employers or newly-hired employees.

Ownership, Exploitation and Transfer of Rights.

The concept of “ownership” is problematic in the case of confidential information. Canadian law does not prohibit either independent development of the same information or its acquisition by any proper means (for example, after the restrictive terms of an employment contract or licence expire). As a result, an “owner” of confidential information has no monopoly right in the information, but rather only an enforceable remedy for breach of an express or implied contract or, in the absence of either, for breach of relationships of confidence or trust. Canadian courts have cast doubt on whether confidential information can be considered as purely “property.”

In considering the issue of “ownership” of confidential information as between the employer and the employee or contractor who developed them, Canadian courts have had recourse to the same principles which apply to the ownership of inventions – the nature of the employment or contracting relationship and the specific issue of whether the development was within the scope of the employee’s or contractor’s duties. Even in the absence of an employment agreement setting out obligations of confidence, employees are under a clear common law duty not to disclose confidential information, in particular trade secrets of present or former employers, whether created by the employee or others. This duty is more onerous where the employee has a senior position with the company and, as a result, is impressed with fiduciary duties.

Confidential information is assignable and licensable as with most other forms of intellectual property in Canada, and non-disclosure agreements relating to confidential information are a frequent component of joint venture arrangements and various forms of business collaboration.

Infringement and Enforcement of Rights.

The enforcement of confidential information rights, whether based on legal notions of property, contract or fiduciary obligation, arises from evidence that the information is:

- confidential;
- communicated by the holder to the recipient in circumstances of confidence; and
- misused by the recipient to secure a commercial advantage over others without access to the information.

The enforcement of confidential information rights, unlike other forms of intellectual property, is governed

by Canadian provincial law. Since employees, consultants, independent contractors and joint venturers are most often privy to such information, provincial contract law and employment law relating to employee contracts is most frequently engaged in the protection of confidential information.

Canadian courts accept that employees have a right to exploit the knowledge, skills and experience acquired in the course of employment. However, there is an enforceable, concurrent obligation imposed on employees to act in good faith towards the employer with respect to the use and disclosure of confidential information and, even after the employment ends, not to use or disclose, in particular, trade secret information. Employers often seek to enshrine and enlarge the obligation in employment contracts, prohibiting the post-employment use and disclosure of general confidential information. Such restrictive covenants, like agreements not to compete, are critically reviewed by Canadian courts to ensure they do not constitute an undue restraint of trade. The distinction between the former employee’s rights and obligations regarding confidential information is not always easy to draw.

International Conventions and Treaties

Canada is a signatory to the Canada-United States-Mexico Agreement and is a member of the International Convention for the Protection of Industrial Property which affects patents, trademarks and industrial designs. Canada is a signatory to the Patent Cooperation Treaty, which provides a common system for the filing of a patent application in signatory countries, and is a part of the Global Patent Prosecution Highway pilot program, which allows fast track prosecution of a patent that has been examined by the patent office of any participating country. Canada is also a member of the Berne Convention, the Universal Copyright Convention and the World Trade Organization, each of which bear on protection for copyright owners who are citizens of convention countries.

The *Combating Counterfeit Products Act* provides Canadian Border Services Agencies additional tools for combatting the import and export of counterfeit goods. Civil and criminal remedies deal with possession and dealing of counterfeit goods.

The Trans-Pacific Partnership Agreement (“**TPP**”) was originally concluded on October 5, 2015, by 12 countries and was signed on February 4, 2016. On January 30, 2017, the United States notified TPP signatories of its intention to not ratify the TPP, effectively withdrawing from the TPP. As a result, the TPP could not be entered into force.

On November 10, 2017, the 11 remaining members of the TPP (Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam) agreed on the core elements of a new agreement, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“**CPTPP**”). The 11 countries form a trading bloc representing 495 million consumers and 13.5% of global GDP, providing Canada with preferential access to key markets in Asia and Latin America.

The CPTPP came into force on December 30, 2018. It is noteworthy that with the CPTPP, Canada is the only G7 nation with free trade agreements with all other G7 members, and with free trade access across the Americas, Europe and the Asia-Pacific region.

The first six CPTPP parties made their first tariff cut on December 30, 2018, eliminating duties on 89% of tariff lines between them, followed by a second tariff cut on January 1, 2019 (except for Japan, which made its second tariff cut on April 1, 2019).

August 2023



Privacy and Data Protection Laws in Canada and Canada's Anti-Spam Legislation

2023

Doing Business in Canada

AIRD BERLIS

airdberlis.com

Canada has well-established federal and provincial privacy and data protection statutes, in both private and public sectors, as well as growing protection over privacy rights throughout the common law.

Data breaches in Canada are evolving as a significant area of law relating to prevention, response (governmental and public) and litigation. Class action lawsuits involving data breaches are a growing response to data breaches in Canada and the damages awards have increased the exposure of businesses in Canada accordingly.

Privacy laws across Canada at the federal and provincial level are undergoing significant changes. At the time of publication, Quebec had recently passed amendments to its legislation that significantly enhance the rights of individuals and increases obligations and risks to organizations. These changes largely take effect over three years, starting in September 2022. As of September 2022, the following provisions in Quebec's amended privacy laws took effect: *Designation of a person in charge of the protection of personal information for an organization, mandatory reporting of confidentiality incidents, provisions governing the communication of personal information in the context of a commercial transaction and communication of personal information for research purposes*. As of September 2023, the majority of the proposed revisions take effect, including the following: *Requirements surrounding governance policies and practices, privacy impact assessments, transparency and privacy notices, restrictions around using identification, geolocation tracking and profiling technologies, new consent requirements, privacy by default design requirements, requirements surrounding automated decision-making, regulations surrounding transfers of personal information outside of Quebec, requirements surrounding retention and destruction of personal information, creation of the right to be forgotten as well as the notable enforcement mechanisms*. As of September 2023, obligations surrounding data portability will take effect.

The Canadian federal government introduced draft legislation, the *Digital Charter Implementation Act*, in June 2022 designed in part to replace the federal *Personal Information Protection and Electronic Documents Act* ("PIPEDA"). The *Digital Charter Implementation Act* would implement three different pieces of legislation significantly impacting privacy rights: (i) the *Consumer Privacy Protection Act*, (ii) the *Personal Information and Data Protection Tribunal Act* and (iii) the *Artificial Intelligence and Data Act*. While we anticipate changes will be made over the

next readings of these draft pieces of legislation, we expect many of the core concepts and provisions to remain. The *Consumer Privacy Protection Act* would take the place of Part 1 of PIPEDA and would include significant changes to permitted information handling practices, establish additional rights to individuals and increase the powers of the Office of the Privacy Commissioner of Canada. The *Personal Information and Data Protection Tribunal Act*, when in force and effect, would establish an administrative tribunal to hear appeals of certain decisions made by the Privacy Commissioner under the *Consumer Privacy Protection Act* and impose penalties for the contravention of certain provisions of that Act. The *Artificial Intelligence and Data Act* regulates international and interprovincial trade and commerce in artificial intelligence systems by requiring that certain persons adopt measures to mitigate risks of harm and biased output related to high-impact artificial intelligence systems. The *Artificial Intelligence and Data Act* mandates public reporting of AI systems and risks in certain instances and authorizes the Minister to order the production of records related to artificial intelligence systems. The *Artificial Intelligence and Data Act* also establishes prohibitions related to the possession or use of illegally obtained personal information for the purpose of designing, developing, using or making available for use an artificial intelligence system, and to the making available for use of an artificial intelligence system if its use causes serious harm to individuals.

Additionally, the Province of Ontario underwent a consultation process to determine whether it should introduce new privacy legislation which, if introduced, would significantly change the rights and obligations under privacy laws within the province. Additional provinces across Canada are also reviewing their privacy legislation (or lack thereof) with a view to co-ordinating with their provincial and federal counterparts. Please keep these processes in mind when reviewing the following summary of privacy laws.

Given requirements from the European Union and the Quebec legislation surrounding requiring substantially similar protections to personal information to permit data transfers, we expect the various pieces of legislation at the federal and provincial level to have many similarities.

Canadian businesses are often subject to multiple pieces of legislation at the federal and provincial levels that protect the privacy rights of individuals. For instance, PIPEDA regulates the collection, use and disclosure of personal information ("Personal

Information) in the course of “commercial activities.” Legislation substantially similar to PIPEDA exists in various provinces, including British Columbia’s *Personal Information Protection Act*, S.B.C. 2003 c. 63, Alberta’s *Personal Information Protection Act*, S.A. 2003, c. P-6.5, and Quebec’s *Act respecting the protection of personal information in the private sector*, R.S.Q., c. P-39.1.

Various provinces have also enacted legislation which regulates the collection, use and disclosure of personal health information. Most notably, Ontario’s *Personal Health Information Protection Act* (“**PHIPA**”) regulates personal health information when collected, used or disclosed to health information custodians in the provision of providing health care.

Depending on the nature of an organization’s activities and the use made of Personal Information, compliance involves complex processes such as privacy audits and data mapping, privacy impact assessments for new undertakings involving Personal Information, staff training, implementation of security systems, improvements to storage systems, development of privacy policies (internal and external) and the implementation of other protective measures, including ensuring contractual provisions exist with third parties who may have access to the Personal Information in the organization’s possession or control.

Canadian privacy considerations affect an organization expanding into or operating in Canada in a few ways: First, an organization itself will have to comply with PIPEDA and other privacy legislation with respect to Personal Information that it collects, uses, discloses, stores or otherwise processes on individuals who are not employees of the organization. Organizations may also have to also comply with privacy legislation in relation to its employee information. To the extent a provincially regulated organization has employees located in the provinces of B.C., Alberta or Quebec, or otherwise has Personal Information on residents of those provinces, it will need to consider the impact of such provincial privacy laws on Personal Information. Secondly, organizations will want to ensure that all third parties to whom they grant access to, or use of, the Personal Information have undertaken personal impact assessments to determine whether the privacy rights afforded in their jurisdiction will be upheld by the third parties who have access to otherwise process the Personal Information. The privacy impact assessment involves due diligence on the third party’s practices, controls and safeguards, as well as an understanding of the laws

that apply to the third party which may undermine the third party’s ability to properly protect the Personal Information, contractual provisions in place regulating the third party’s use, disclosure and security around the Personal Information, and certain audit rights to ensure such third party complies with its obligations. Thirdly, organizations will need to have plans in place to prevent data breaches, including technological measures and human resources training for employees, contractors and every third party who may have access to their systems. Finally, organizations will need to have a breach response plan in place for the inevitable data incursion and/or data breach. Such response plans should include the appropriate members of the breach response team, including third parties to assist, such as IT forensic, insurance, and public response organizations.

Many privacy laws across Canada, at the federal and provincial level, impose mandatory breach notification requirements. For example, businesses subject to PIPEDA have an obligation to report a privacy breach to the Office of the Privacy Commissioner of Canada and the individuals whose information has been breached if there is a reasonable risk of significant harm resulting from the breach, as well as obligations in certain circumstances to report privacy breaches to third-party organizations. In addition, there are extensive record-keeping obligations pertaining to all privacy breaches, not just those that are reported, for organizations subject to PIPEDA.

Overview of PIPEDA

The purpose of PIPEDA, as with other privacy laws across Canada, is to balance the right of privacy of individuals with the need of businesses to use Personal Information for reasonable purposes in order to operate successfully. “Personal Information” is specifically defined as “information about an identifiable individual.” It does not include certain business contact information. It includes such information as race, ethnic origin, colour, age, marital status, religion, education, medical, criminal, employment or financial history, address and telephone number, Social Insurance Number, fingerprints, blood type, tissue or biological sample, and views or personal opinions that are linked to an individual.

PIPEDA applies to organizations in Canada that collect, use or disclose Personal Information in the course of all commercial activity. “Commercial activities” are defined to mean “any particular transaction, act or conduct or any regular course of conduct that is of a commercial character.”

While some people may believe that the legislation applies only to organizations with a business in Canada, the Federal Court of Canada has held that the federal Privacy Commissioner has a broad right to investigate organizations that collect, use or disclose personal information of Canadians.

What Does an Organization Need to Do?

PIPEDA outlines several key principles to protect Personal Information. It also requires that Personal Information be used or disclosed only for purposes for which it was collected. Once an organization collects Personal Information, it maintains ongoing obligations with respect to its use and safeguarding.

Obtain Informed and Meaningful Consent: The foundation of PIPEDA and all of Canada's privacy laws is to obtain informed, meaningful consent for the collection, use and disclosure of Personal Information. Historically, Canada has relied more heavily on implied consent to satisfy the consent requirements. However, privacy commissioners across Canada are moving toward requiring express consent (positive opt-in model) to establish informed and meaningful consent.

Be Accountable: An organization must be responsible for Personal Information under its control and shall designate an individual or individuals who is/are accountable for the organization's compliance with the following principles. The obligation to be accountable continues to apply even if the organization outsources certain functionalities to third parties and organizations must ensure that the third parties to whom Personal Information is disclosed or to whom access to Personal Information is given adhere to Canadian privacy laws.

Identify the Purpose: The purposes for which Personal Information is collected shall be identified by the organization at or before the time the information is collected. This is a broad obligation and, in addition to the more common purposes for which data is collected, organizations should also identify practices such as using artificial intelligence and/or predictive behaviour mechanisms, as well as rights to deidentify personal information and commercialize such data to third parties.

Be Accurate: Personal Information shall be accurate, complete and up-to-date as is necessary for the purposes for which it is to be used.

Be Open: An organization shall make readily available to individuals specific information about its policies and practices relating to the management of Personal Information.

Give Individuals Access: Upon request, an individual shall be informed of the existence, use and disclosure of his or her Personal Information and shall be given access to that information. An individual shall be able to challenge the accuracy and completeness of the information and have it amended as appropriate.

Secure Personal Information: Ensure appropriate security safeguards are in place to secure the Personal Information.

Notification of Breach: Where there is a breach of security safeguards, or a failure to implement appropriate security safeguards, the organization has an obligation to notify the Office of the Privacy Commissioner of Canada and the individuals whose information has been breached if there is a reasonable risk of significant harm resulting from the breach, as well as obligations in certain circumstances to report privacy breaches to third party organizations.

Record Keeping: There are extensive record keeping obligations pertaining to all privacy breaches, not just those that are reported, for organizations subject to PIPEDA.

Provide Recourse: An individual shall be able to address a challenge concerning compliance with the above principles to the designated individual or individuals for the organization's compliance.

What Are the Risks if an Organization Does Not Comply?

Breaches of privacy legislation can impose both statutory and common law liability. Penalties under the *Quebec Act* and proposed under the *Digital Charter Implementation Act* can result in fines and penalties of several millions of dollars.

Until such time as the Digital Charter Implementation Act is in force and effect, complaints by individuals under PIPEDA, the current regime, are heard by the federal Privacy Commissioner who has the authority to receive and investigate complaints and to try to resolve these disputes (similarly, complaints in the provinces are heard by the relevant provincial privacy commissioner). The Privacy Commissioner also has the right to make public any information relating to an organization's Personal Information management practices if it is in the public interest to do so. Public disclosure of the details of the complaint can be the most damaging to a business, and is a destructive consequence of misusing Personal Information. The individual making the complaint can also apply to court for damages.

PIPEDA creates offences for obstructing an investigation or audit; destroying Personal Information that is the subject of an access request; or disciplining a whistleblower.

An organization that engages in these activities can be fined up to C\$10,000 for a summary conviction or C\$100,000 for an indictable offence.

Persons can also seek remedies from court for breaching PIPEDA, other privacy statutes and common law obligations. While individual damage awards have been somewhat limited to date for breaching privacy rights, the courts are expanding these damage awards and are more accepting to certifying class action lawsuits relating to breaches of individuals' privacy rights.

Processing of Personal Information in the United States

As indicated above, an organization has an obligation to safeguard the Personal Information processes and not to disclose it to third parties without consent.

There is a sensitivity in Canada regarding the outsourcing of any data management services outside the country. Many concerns can be dealt with by undertaking personal impact assessments to understand the risk involved in outsourcing to the third party, selecting third parties with appropriate safeguards to address safeguarding obligations, ensuring adequate data protection agreements are in place with the third parties, and ensuring appropriate notice requirements with individuals are satisfied. However, legislation exists in certain provinces which applies to the public sector and prohibits the disclosure of storage or access to Personal Information outside of Canada.

Data Breach Notification in Canada

Arguably, Canada has had breach notification obligations for as long as privacy laws existed. An organization is not able to use or disclose Personal Information for purposes that had not previously been consented to by the individual without such individual's notice and consent. However, to clarify and to formalize this, PIPEDA and Alberta's *Personal Information Protection Act* ("**PIPA**") have mandatory breach notification obligations, as does PHIPA. Quebec also has breach notification obligations commencing in September 2022. Businesses subject to PIPEDA and Alberta's PIPA have an obligation to report a privacy breach to the Office of the Privacy Commissioner of Canada and the individuals whose information has been breached

if there is a reasonable risk of significant harm resulting from the breach, as well as obligations in certain circumstances to report privacy breaches to third-party organizations. In addition, there are extensive record-keeping obligations pertaining to all privacy breaches, not just those that are reported, for organizations subject to PIPEDA.

Common Law Right to Privacy

The common law tort of invasion of privacy continues to develop throughout Canada and the provinces in various ways. For example, in the last few years, Ontario has recognized the common law torts referred to as Intrusion on Seclusion, Public Disclosure of Private Facts and Publicity Placing a Person In False Light. While the courts initially limited the damages to approximately C\$20,000 for a breach, except in extraordinary circumstances, in recent months the courts appear more willing to increase the damage awards for an individual breach to more substantive dollar values.

Canada's Anti-Spam Legislation

Anti-spam legislation in Canada has been in force since 2014 (*An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act*) ("**CASL**"). CASL is arguably one of the strictest regimes in the world regulating the communication of commercial electronic messages in terms of the scope of application, requirements and the penalties imposed upon failure to comply. The legislation requires businesses to comply with its requirements surrounding the sending and disseminating of commercial electronic messages ("**CEMs**"), including its strict consent and detailed content obligations. This legislation has extremely broad application and includes CEMs sent via email, text, SMS, BBM and direct social media communications. CEMs are considered to be messages that encourage participation in a commercial activity and include offering, advertising or promoting a product or service.

In 2015, further provisions concerning the unsolicited installation of computer programs and software came into force. These provisions prohibit the installation of a computer program to another person's computing device (such as a smartphone, laptop, or other connected device) in the course of commercial activity without the express consent of the device owner or an authorized user.

The Competition Bureau and the Office of the Privacy Commissioner of Canada jointly enforce Canada's anti-spam legislation. The legislation is enforced through regulatory measures, including significant administrative monetary penalties. Businesses and individuals who are subject to the legislation, including directors, officers and agents, that do not comply risk significant financial penalties that can range up to C\$1 million per violation for individuals and C\$10 million for businesses. CASL was supposed to statutorily permit a private right of action for breaching its terms as of July 1, 2017, which would have created further financial repercussions for violations of the legislation. However, the effective date for the statutory private right of action has been postponed indefinitely.

May 2023



Labour and Employment Regulation and Benefits

2023

Doing Business in Canada

AIRD BERLIS

airdberlis.com

Responsibility for labour and employment legislation in Canada is split between the federal and provincial or territorial governments in accordance with the nature of the undertaking in which the employer is engaged. Employees of businesses which fall under federal jurisdiction are subject to federal labour laws. These include such businesses as broadcasting, interprovincial trucking, banks, airlines and railroads. Employees of businesses which are not “federal undertakings” will fall under the applicable provincial or territorial jurisdiction.

The core labour and employment legislation in Canada consists of legislation governing employment standards and further, a framework for dealing with the establishment of labour rights and relations. The federal government and each province and territory have legislation dealing with these areas. In addition, the federal, provincial and territorial governments each have additional employment-related legislation dealing with human rights and occupational health and safety. Workers’ compensation legislation exists in each province and territory. Many jurisdictions have legislation aimed at pay equity, employment equity and employee privacy.

In every Canadian jurisdiction, the rights of employees on termination of employment are governed in part by statute and in part by common law, except where there is a union representing employees, in which case the terms of the collective agreement apply. The obligations of an employer to provide notice or payment in lieu of notice at common law may be augmented or limited where appropriate by the terms of any contract entered into between the employer and the employee, which contract must generally be entered into prior to the commencement of employment. However, the employer cannot provide payments or other benefits that are below the minimum thresholds and protections contained in the applicable employment standards legislation.

Employment and labour legislation is consistently being amended to respond to the realities of Canadian workplaces. As an example, both the federal government and provincial governments took considerable steps to amend employment standards and labour legislation to respond to issues arising from the COVID-19 pandemic and its aftermath.

EMPLOYMENT STANDARDS LEGISLATION

Each jurisdiction in Canada has minimum standards by which employers must abide. While an employer

and employee may agree to benefits in excess of these minimum requirements, they may not “contract out” of the minimum standards. Areas that are the subject matter of legislation include: (a) minimum wage; (b) hours of work, overtime pay and rest periods; (c) vacation time, vacation pay and holidays; (d) leaves of absence such as bereavement leave, sick leave, compassionate care leave, court leave, family responsibility/emergency leave, reservist leave and education leave; and (e) layoff and termination of employment.

Notice of Termination

As will be discussed more fully under the heading “Employee Rights and Obligations Under Common Law,” unlike in other countries, there is no “at-will” employment in Canada. When an employer terminates the position of an employee in Canada (without cause), the employee is generally entitled to a minimum amount of notice from the employer by statute, and in some provinces, severance pay. Each statute provides for the circumstances that constitute termination, and the length of notice required in those circumstances. Notice may be given in advance of the termination date (working notice), or paid to the employee in a lump sum or as salary continuance while the employee does not attend work (pay in lieu of notice). The requirements vary widely across Canada, but an employer is generally obliged to provide an employee with one to two weeks’ notice per year of service, currently up to a maximum of eight weeks’ notice. For federally-regulated industries, an employee is entitled to two weeks’ notice of termination after three months of service. Statutory notice may be greater where there is a mass or temporary layoff.

In addition to the notice of the termination of an employee’s employment, employees working in Ontario or for federal undertakings may also be entitled to severance pay when their employment is terminated. The provincial severance pay provisions generally provide for payment of a lump sum equivalent of an employee’s wages calculated based on their length of service. Thresholds for payment can include the employer’s payroll and the employee’s length of service.

Note that the requirement to provide notice of termination (or pay in lieu of notice) and severance pay (where applicable) is a minimum requirement. Reasonable notice at common law (which generally applies across Canada except for Quebec) and is set out below, addresses the generally greater notice requirement where there is a termination without cause.

Mass and Temporary Layoffs

Generally, where an employer terminates the employment of 50 (but as little as 10 in select jurisdictions) or more employees at an establishment within a four-week period, a special set of termination rules apply. The notice period for employees in a mass termination is determined by the number of employees affected. As well, notice of mass termination must be sent to the applicable Ministry of Labour.

For federally regulated businesses, employers must give the federal government 16 weeks' notice and set up a joint planning committee to reduce the number and impact of terminations.

Employment legislation varies across provincial and territorial jurisdictions on the permissible length of temporary layoffs. In addition, non-unionized employees have common law protections against wrongful dismissal, which include notice provisions that may extend beyond those imposed by statute. If an intended temporary layoff is found by a court to be constructive dismissal, the employee may be deemed to have been terminated at the time the layoff commenced.

The estimate of "common law" reasonable notice is more of an art than a science. In estimating the appropriate "reasonable notice period," Canadian courts will consider the employee's age, length of service, overall remuneration and position, as well as the existence of any employment agreement and inducement or enticement from former employment. The "common law" period of reasonable notice is inclusive of any statutory amounts and is subject to the concept of mitigation, which means monies earned by the employee during the reasonable notice period could be deducted from any common law damage award (but not from the statutory minimum).

Human Rights

Human rights legislation protects people from discrimination in a number of situations, including employment.

Employees are protected from unfair treatment in Canadian workplaces based on the following prohibited grounds: race; religion; age; disability; sex/gender; marital status; and pregnancy/childbirth. Other grounds are defined in only some provinces, including ancestry; nationality/citizenship; language; civil status; drug or alcohol dependence; family status; family affiliation; gender identity; gender expression; political beliefs and activity;

criminal conviction; and social condition. However, most jurisdictions will imply broad protections even if not specifically defined in the statute. Employers are prohibited from making employment decisions, including hiring, firing and promoting employees, based on any of the prohibited grounds. In addition, they must not condone or ignore discrimination, violence or harassment (or threats) in the workplace.

An employer may end employment if related to a prohibited ground only if the work restriction is related to a *bona fide* occupational requirement of the workplace/position and the employer is otherwise unable to accommodate the individual. If the discrimination relates to a non-prohibited ground, human rights tribunals do not have the jurisdiction to deal with the complaint.

Damages for a breach of human rights legislation have been expanded significantly by courts and tribunals across Canada over the last few years.

PAY EQUITY

Jurisdictions across Canada have different types of pay equity/equal pay legislation, which represent different principles. These laws generally prohibit against discriminatory pay practices or require that classes of jobs performed on a majority basis by men be compensated similarly to comparable classes of jobs performed on a majority basis by women.

EMPLOYMENT EQUITY

Employment equity is a concept that addresses the barriers to equal treatment of employees and the process of ensuring such equal treatment. People with disabilities, people of minority backgrounds and others may face discrimination in hiring, promotion and payment of benefits, as well as inadvertent systemic discrimination. Quebec and the federal government are currently the only jurisdictions that have employment equity legislation. In Ontario, the *Employment Equity Act* was in force for just over a year in the 1990s before it was repealed. Most other jurisdictions deal with employment equity through human rights legislation.

ACCESSIBILITY

As of January 1, 2012, all employers in Ontario who provide goods or services to members of the public or other third parties, and that have at least one employee in Ontario, must comply with various regulations pursuant to the *Accessibility for Ontarians with Disabilities Act, 2005* (the "AODA"). This legislation was enacted to make the province of Ontario fully accessible to disabled persons by

2025. The AODA requires, amongst other things, that employers establish policies and procedures which ensure that goods or services are provided in a manner that respects the dignity and independence of persons with disabilities and affords them equal opportunity to use or benefit from the goods or services and train its employees with respect to these requirements. Organizations with 20 or more employees are required to file an AODA compliance report. The AODA also requires employers to implement policies and procedures which integrate accessibility within the workplace and the career advancement of employees with disabilities.

OCCUPATIONAL HEALTH AND SAFETY

Workplace health and safety in Canada is regulated by both the federal government and each province and territory.

Businesses that are defined “federal undertakings,” such as banks, shipping companies, transportation companies, aeronautics and railway businesses, and their employees, are governed by the *Canada Labour Code, Part II*. There are numerous regulations and codes prescribed under that legislation. Orders to comply can be issued to persons found to be in breach of the legislation. There does not need to be an injury or death for there to be such a prosecution.

All other businesses and individuals are regulated by the workplace health and safety laws of the individual province or territory in which they operate. Each province or territory has its own statute and regulations, which address a wide variety of activities, including construction projects, industrial establishments, mines, training and designated substances, such as lead, mercury and asbestos. There is strong enforcement and an emphasis on issues that include, but are not limited to, longstanding and recurring injuries and deaths from lack of guarding of manufacturing and industrial equipment, and lack of proper fall arrest equipment. There is also particular emphasis on health and safety concerns regarding workplace harassment, sexual harassment and workplace violence, both provincially and federally. Companies are required to have complaint policies and procedures, and to provide appropriate training, monitoring, supervision and investigations on those policies and procedures. The legislation sets out which workplace party has what legal duties to workers. All persons, from the individual workers to senior management to company directors, have obligations. The provincial regulations are very specific with respect to the manner in which workplace tasks are to be performed or workplace safeguards are to be put in place.

In Ontario, the main governing legislation is the *Occupational Health and Safety Act*, which sets out procedures for dealing with workplace hazards and enforcement, and the *Workplace Safety and Insurance Act, 1997*, which governs a mandatory insurance system for work-related injuries and diseases.

Provincial workplace obligations are generally viewed as part of an Internal Responsibility System, under which each party, including individuals, have their own duty. It is no defence to such a prosecution to say that another party also breached its duty. Provincial legislation sets out broad definitions of those who have duties, including employers, supervisors and constructors. This is in order to make it clear that such persons owe health and safety obligations not only to their direct employees, but also to the workers of their contractors.

Provincial authorities, for example the Ministry of Labour, Training, Immigration, Skills and Development in Ontario, commonly have the authority to issue workplace orders to those they find to be in contravention of the legislation. This can be during an inspection or during an investigation. These orders have the force of law, and failure to comply often results in prosecution. Inspection “blitzes” are announced in advance for a particular industry or sector.

Prosecutions under provincial legislation are done on the basis of strict liability. This means that once the prosecution proves, beyond a reasonable doubt, that an offence has occurred (e.g., a worker was not wearing the prescribed safety equipment), in order to escape liability, the defendant must prove, on a balance of probabilities, that it took all reasonable precautions to prevent the offence from occurring, commonly referred to as “due diligence.” Corporations, as well as individuals who are not under investigation, have a positive duty to cooperate with provincial investigators. Therefore, the prosecution can often prove the offence and attack the due diligence defence through the interviews and evidence of company personnel.

The purpose of provincial health and safety legislation is prevention. There does not need to be an injury or death for there to be a breach and a prosecution.

Sentencing courts have increasingly less tolerance for preventable offences. Financial penalties for businesses can be significant for serious cases, in the hundreds of thousands of dollars. For individuals, most provinces have a lower maximum

fine, but there is also the possibility of jail time for repeat or egregious offenders or when deterrence otherwise requires it. Recently in Ontario, maximum financial penalties have been raised to C\$500,000 for individuals (from C\$100,000) and C\$1,500,000 for corporations (from C\$500,000). The possibility of jail time for individuals remains the same. In line with the recent and increasing attention being paid to deterrence by way of sentencing, the maximum financial penalty for director and officer offences in Ontario has now been raised to C\$1,500,000 (from C\$100,000).

Cases of a serious workplace injury or death are often investigated by both provincial health and safety personnel and the metropolitan police service in the jurisdiction in which the incident takes place. In 2004, following a severe mining accident involving fatalities, the Canadian government made changes to the federally-enforced *Criminal Code of Canada* that created clear criminal liability obligations on businesses for the negligent conduct of their decision makers related to workplace safety. As well, the legislation created a defined workplace duty on those businesses and individuals who have the authority to direct how another person does work or performs a task, to take reasonable steps to prevent bodily harm to that person, or to any other person, arising from that work or task.

In a criminal prosecution related to workplace safety, there must be an injury or death for there to be an offence. As well, the burden of proof throughout remains on the prosecution to prove all of the elements of the offence beyond a reasonable doubt.

Criminal prosecutions and jail sentences for workplace injuries and deaths are still relatively rare in Canada as compared to provincial prosecutions. However, we have seen some increase in criminal charges over the last several years, which is in keeping with trends in other countries. In Canada, there is every indication that this trend will continue.

In a tragic incident, five workers died when a swing stage on which they were working collapsed. One worker was severely injured. There were insufficient tie offs on the swing stage. The company pleaded guilty to provincial OHS charges and was sentenced to a fine of C\$200,000. The Ontario Court of Appeal raised the fine to C\$750,000, despite the company's lack of financial resources. The Court said that this penalty survived any bankruptcy of the company. The project manager, who had also gone up on the swing stage, was convicted of five counts of criminal negligence causing death and one count of criminal negligence causing bodily injury. This was the first

criminal conviction of an individual in Canada for a workplace incident. The project manager, who had been a "stickler for safety" prior to the incident, was sentenced to 3 ½ years in prison on each count, served concurrently. The trial judge said that on this occasion, the project manager had preferred the interests of the company in getting the job done, over the safety of his workers. On January 30, 2018, the appeal court upheld both the conviction and the sentence.

WORKERS' COMPENSATION

Workers' compensation legislation creates a provincially or territorially regulated no-fault insurance program that is funded by employers in most industries. Workers' compensation legislation is intended to facilitate the recovery and return to work of employees who sustain injuries arising out of and in the course of employment or who suffer from an occupational disease. The legislation provides compensation and other benefits to workers and the survivors of deceased workers. Employers in businesses or industries specified in the regulations pay annual premiums based on the risks associated with worker activities in their industry. In some jurisdictions, premiums are adjusted to reflect the employer's claim history, permitting rebates for employers who have relatively injury-free workplaces or increasing premiums for workplaces that have proven more dangerous than expected.

LABOUR RELATIONS LEGISLATION

Each province and territory has legislation that regulates the relationship between employers and employees of provincially regulated industries where a union represents or seeks to represent a business' employees. Such legislation also governs the establishment of union collective bargaining rights, and the negotiation and administration of collective agreements once such rights have been established. The *Canada Labour Code* regulates labour relations for federal works, undertakings or businesses.

Each province or territory, and the federal government, has a labour relations board that adjudicates labour relations disputes. When a provincially or territorially regulated employer carries on business in multiple jurisdictions, unions must seek certification from the labour board of the applicable province.

Labour relations legislation has two main purposes: (a) to permit employees to organize without interference from their employers; and (b) to

permit collective bargaining between employers and employees represented by bargaining agents. The legislation governs the formation and selection of unions, collective bargaining procedures, the conduct of employees and employers in unionized workplaces, and the adjudication of complaints alleging a violation of the particular legislation.

Certification of Unions

Rules concerning the certification of unions vary and applicable legislation sets out the manner in which unions can establish bargaining rights, as well as the rules surrounding the termination of such rights. Once a union is certified as the representative of a bargaining unit and has given notice to the employer, the employer has a duty to bargain with that union in good faith to reach a collective agreement.

Each provincial labour relations legislative framework also specifically deals with employers involved in the construction industry. These vary from province to province, as well as federally, and are often quite different from the normal rules for non-construction employers.

Disputes between an employer and union once certified (that is, once a collective agreement is negotiated) are referred to a sole arbitrator or Board of Arbitration for adjunction. Labour relations legislation requires a collective agreement to have this dispute resolution process in place.

Strikes and Lockouts

Before a bargaining unit can strike or its employer can lock them out, certain statutory conditions must be satisfied. In all jurisdictions, a strike or lockout is unlawful while a collective agreement is in effect. In certain jurisdictions a lawful strike or lockout can only begin once attempts at negotiation and conciliation have been exhausted.

The labour relations board in each jurisdiction can make declaratory orders with respect to the legality of a strike or lockout and the order can be filed in court to become enforceable as a judgment. In addition, a court may issue an injunction, prohibiting a strike or lockout, or restrict legal picketers where there is illegal conduct which includes the risk of physical injury or property damage.

Employers are prohibited from hiring permanent replacement workers during the course of strike. However, some jurisdictions permit the employer to hire workers while its unionized employees are on strike.

Picketing

Picketing is regulated by labour relations statutes, tort law and criminal law in Canada. Lawful picketing includes communication of information; however, intimidation, threats, assaults and blocking of premises is unlawful. It is lawful for striking workers to picket at the employer's place of business as long as there is a legal strike/lockout in effect. Depending on the nature of the picketing and interference, it is also generally lawful to picket the premises of third parties who deal with or are affiliated with the employer as long as such picketing is for informational purposes.

Impact on Sale of a Business

If all or part of a business is sold, bargaining rights are protected. However, if the nature of the business has changed substantially, the labour relations board may terminate the bargaining rights of the union.

There are also successorship provisions which bind any purchaser of the business to a validly executed collective agreement to which the employer is bound. The definition of "sale" is very broadly worded for the purposes of determining a successorship.

EMPLOYEE RIGHTS AND OBLIGATIONS UNDER COMMON LAW

All Canadian provinces and territories are common law jurisdictions, with the exception of Quebec (where the *Civil Code of Quebec* governs). Common law rights can be characterized as those established by the courts based on jurisprudence—or judge-made law—also called the common law. Common law employee rights exist in addition to the rights granted by employment standards legislation, however, any payments made by an employer under the applicable employment standards legislation will be deducted from the common law assessment.

In Canada, certain contractual terms are implicit in a written employment contract (subject to permissible contract provisions to the contrary) or where no written contract of employment exists.

Employee Duties

All employees have at least three duties that are implied terms (unless there are explicit terms) of their employment: (a) duty of good faith and fidelity to their employer; (b) duty to exercise skill and care; and (c) duty to obey.

After employment has terminated, all employees have an implied duty to not remove confidential information and not misuse confidential information.

Non-fiduciary employees are free to compete as soon as employment has terminated, subject to a valid restrictive covenant (discussed below) prohibiting such competition.

Fiduciary employees have more extensive duties than those that apply to all other employees. Generally stated, fiduciary employees are those who have authority to guide the affairs and affect the direction of the employer. In most cases, top management are considered fiduciary employees and, in certain situations, other employees who fulfill a sufficiently critical role and to whom the employer has a particular vulnerability (“key personnel”) may be found to be fiduciaries. A fiduciary’s general duties have been described as requiring loyalty, honesty, good faith with a view to the employer’s best interests and avoidance of conflicts of interest, and a prohibition regarding self-dealing.

Termination of Employment & Reasonable Notice

Whether termination of employment occurs with or without cause will determine the rights and obligations of the employer.

Termination with cause follows from an employee’s breach of an express or implied term of the employment contract. “Cause” is narrowly construed by Canadian courts. If an employer intends to terminate the employment of an employee *with* cause, the employer is not required to provide the employee with notice of termination. Due to such consequence, with-cause terminations are generally reserved for serious cases of misconduct. If an employer intends to terminate the employment of an employee *without* cause, the employer must provide the employee with reasonable notice of termination, during which the employee continues to work under the normal terms of employment, or pay in lieu of notice.

An employer may not contract out of the statutory minimum notice period (discussed above) and severance pay, if applicable. However, a contract of employment that includes a term limiting reasonable notice to the period prescribed in employment standards legislation may be valid, provided that the limit is clear and was the subject of consideration and, further, that such term appropriately and unambiguously provides for statutory minimums. Absent an enforceable limiting term, an employee whose employment is terminated without cause will be entitled to reasonable notice of termination at common law. Although determining a reasonable notice period is not based

on a static formula, reasonable notice is calculated based on assumptions about how long it will take the employee to find alternative work of a similar nature. The assumptions are based on a number of factors, including the following: the character of the employment; the employee’s length of service and remuneration; the age of the employee; and possibly the availability of similar employment having regard to the experience, training and qualifications of the employee and, in some cases, whether there has been inducement/enticement from formerly secure employment.

If an employer has not provided an employee with adequate notice, the employee may commence an action for wrongful dismissal, seeking damages equivalent to what the employee might have earned (which includes a calculation of benefits and perquisites) during the “reasonable notice period” which is established by the court. Also, employers should note that if a former employee can prove that the employer’s conduct in the manner of termination caused him or her mental distress or was done in bad faith, additional damages may be awarded to the former employee. Reasonable notice periods typically do not exceed 24 months, although recent case law suggests that this limit is no longer considered a “ceiling.”

Any period of “reasonable notice” determined by a court of competent jurisdiction is subject to the employees’ duty to “mitigate” their damages by seeking alternate or self-employment. Generally, damages at common law for wrongful dismissal will deduct any monies earned by the employee during the common law period of reasonable notice.

Restrictive Covenants

Restrictive covenants are explicit contractual obligations that survive the termination of employment. They typically consist of non-competition or non-solicitation clauses. Restrictive covenants may also include protection of the employer’s intellectual property beyond those protections already afforded to employers by common law and statute.

To be enforceable, such covenants must be reasonable in both scope (geographically) and application to the specific industry. There is a strong policy inclination in employment law disputes towards ensuring an individual’s ability to make a living doing what he or she knows best and avoiding restraints on trade. Therefore, restrictive covenants and in particular non-compete provisions are highly scrutinized by Canadian courts. Courts have the discretion to strike down a restrictive covenant that

limits the employee's ability to compete, if it is found to be excessively broad in time, geography or scope of activities prohibited. Non-solicitation covenants, providing they are reasonable and validly executed, are far more defensible. However, restrictive covenants which constitute consideration arising from a sale or legitimate business arrangement are more likely to be enforceable.

Notably, non-competition clauses and non-competition agreements are now statutorily prohibited in Ontario with only two narrow exceptions: following the sale of a business or for certain C-suite, executive level employees. Other restrictive covenants, such as non-disparagement and non-solicitation agreements, remain permissible. Although other provinces have not yet followed suit in expressly prohibiting non-competition clauses or agreements, such clauses remain subject to intense scrutiny, as outlined above.

EMPLOYMENT AND RETIREMENT BENEFITS

Old Age Security & Canada Pension Plan

Old Age Security and Canada Pension Plan (“**CPP**”) are federally legislated pension programs. CPP is administered as a joint federal-provincial program.

Employment Insurance

The federal Employment Insurance Plan (“**EI**”) is employer- and/or employee-funded insurance regulated by the federal government which covers employees in every jurisdiction in Canada.

Employers deduct premiums from employees' insurable earnings and remit these deductions along with the employers' premiums. Employer premiums are paid at a rate of 1.4 times the amount of the employee's premiums. Employer contributions are a business expense that can be deducted from the calculation of income.

EI benefits are paid to employees whose employment is terminated without cause or who are on maternal, parental, sick or compassionate care leave, or other permitted statutory leave, and who satisfy the regulatory requirements, which include a minimum period of employment. No benefits are generally paid to employees who quit their employment or who are terminated with cause. Since January 2011, self-employed individuals have been able to access EI special benefits, notably maternity, parental, sickness and compassionate care (and other statutory) benefits.

Regular benefits (i.e., paid to those whose employment has been terminated) last for a maximum of forty-five weeks depending on unemployment rates in the individual's region and the number of qualified insurable hours accumulated during the prior period of employment. Benefits paid are taxable income for the individual.

Employers can reduce their EI premiums by providing equal or superior benefits to employees through private insurance plans.

Health Plans

In Canada, a public health-care system provides almost all critical medical services to legal residents. Currently, Canada's public health-care system does not cover supplementary health-related costs such as prescription drugs and routine dental visits.

Employers in Canada do not have an obligation to provide benefit packages to employees. However, it is common for employers to provide their employees with private supplemental health coverage, the particulars of which can vary greatly. If an employer chooses to offer supplemental health-care coverage, employers cannot discriminate in the scope of the coverage.

Wage Earner Protection Program (“WEPP”)

For workers of an employer in bankruptcy or receivership, the WEPP provides compensation if employment has been terminated with unpaid wages, vacation pay, severance pay (if applicable) and termination pay. Such compensation is limited to wages and certain other types of pay which accrued between the date six months prior to a restructuring event and the date of the bankruptcy or the imposition of receivership. If there is no restructuring event, then compensation is provided for wages and certain other types of pay for the six-month period preceding the date of the employer's bankruptcy or receivership. Under the WEPP, the employee will receive no more than the equivalent of four weeks of insurable EI earnings, minus certain prescribed amounts.

May 2023



Infrastructure Opportunities in Canada:

Alternative Financing and Procurement and
Public-Private Partnerships

2023

Doing Business in Canada

AIRD BERLIS

airdberlis.com

Over the last 30 years, Canada has become one of the leading markets globally for delivering much-needed public infrastructure by way of public-private partnerships (“**PPPs**” or “**P3s**”) and alternative finance and procurement (“**AFP**”), the name given to PPPs in Ontario.

Within Canada, Ontario has been – and based on current project pipelines, will continue to be – the most active jurisdiction in terms of number and value of projects completed and under procurement. Ontario Infrastructure and Lands Corporation, or Infrastructure Ontario (“**IO**”), is an agency of the Government of Ontario that was created in 2005 to procure and deliver AFP projects. Since then, more than 85 projects have reached financial close. There are also currently 13 civil projects and 35 social projects in procurement or pre-procurement, valued at more than \$35 billion. Key projects in active procurement include the Yonge Street North Subway Extension and Advance Tunnel, several highway projects, including the Garden City Skyway Twinning, 18 health-care projects and three justice complex projects. There are also \$45 billion of projects under construction, mainly in health care, justice, transit and transportation. The extent of the projects being delivered through IO provides affirmation of the Government of Ontario’s commitment to P3s.

IO has recently embraced a broader set of procurement and contracting approaches. For instance, IO has completed an Alliance contract for Union Station and is using the Progressive Design Build model for various transit projects (see below for a discussion on the use of Alliance and Integrated Project Delivery models). As well, IO added a new category of projects using a Rapid Procurement and Delivery methodology. As a result of COVID-19, IO has worked with ministries and broader sector partners to help deliver vital infrastructure smarter, better and faster than traditional methods. IO has worked with the Ministry of Long-Term Care to successfully procure the rapid delivery of four new long-term care facilities using a Modified Construction Management model. Additionally, IO has begun to use the Canadian Construction Documents Committee (“**CCDC**”) template form of agreements to deliver traditional construction projects under a design-build-bid delivery methodology. For instance, IO is using the CCDC 5B Construction Management at Risk form of agreement to deliver the Ontario Place Site Servicing Renewal Project, and is using the CCDC 2 Stipulated Price Contract form of agreement to deliver the Quinte Healthcare Corporation: Prince Edward County Memorial Hospital Project.

In Ontario, the provincial government completed a comprehensive overhaul of *Ontario’s Construction Lien Act*. The new *Construction Act* came into effect on October 1, 2019. The amendments are meant to achieve three objectives: (a) modernize the language to address commercial realities in today’s construction industry – notably PPP procurement models; (b) accelerate payment by introducing a mandatory prompt-payment regime; and (c) expedite the resolution of construction disputes by introducing a mandatory adjudication regime.

In many respects, the changes to this legislation have been welcomed by the PPP sector. This legislation explicitly addresses distinctive characteristics of PPP projects through certain exemptions to the prompt-payment and adjudication regimes. For example, public bodies (for instance, Crown entities) and the operation and maintenance portion of PPP projects are exempt from prompt-payment requirements, and project milestone phases are accommodated by exempting PPP projects from mandatory adjudication of substantial completion. Many of the impacts on the PPP sector resulting from the changes to the *Construction Act* remain to be seen as projects are only now entering into construction with the application of the new regime. Other Canadian provinces and territories, as well as the federal government, are reviewing these legislative changes and considering whether to adopt similar regimes in their own jurisdictions.

British Columbia has also been at the forefront of P3 procurement in Canada. Infrastructure BC (previously Partnerships BC), established in 2002 by the British Columbia provincial government, has participated in 74 projects. There are currently 16 projects under construction, including the Pattullo Bridge Replacement Project, the Broadway Subway Project and the Royal Columbian Hospital Redevelopment Project - Phase Two and Three, with another five projects in procurement, including two hospitals, a highway reinstatement program, a secondary school replacement project and the Surrey Langley SkyTrain Project (broken into three components: guideway, stations, and systems and trackwork). The Sea-to-Sky Highway, connecting Vancouver to Whistler, and used by many during the 2010 Winter Olympics and Paralympics, was one of the earliest signature PPP projects in Canada. Additionally, Canada Line, a rapid transit line connecting the Vancouver International Airport to downtown Vancouver, is considered a benchmark for successful rapid transit P3s in Canada. British Columbia has brought the P3 model of project procurement and delivery to new asset classes not previously seen in Canada, including a biofuel waste-

to-energy facility and a worker accommodation facility.

Overall, British Columbia has confirmed its support of large infrastructure projects with a three-year commitment of \$22.9 billion to be spent on projects such as transportation, post-secondary facilities, health facilities and low- and middle-income housing.

In the summer of 2018, the British Columbia government announced that major infrastructure projects in British Columbia will be built using a new Community Benefits Agreement which, according to the government, will include a targeted approach to maximizing apprenticeship opportunities and a focus on priority hiring and training of Indigenous people and women. Importantly, under the Community Benefits Agreement, within 30 days of employment on the jobsite, any non-worker or worker from another affiliation will be required to join the union for work specific to the project. The first horizontal infrastructure projects to be delivered using this framework will be the Pattullo Bridge Replacement Project, the four-laning projects on the Trans-Canada Highway between Kamloops and Alberta and the Broadway Subway Project, while the first vertical infrastructure project to use the Community Benefits Agreement will be the Cowichan District Hospital Replacement Project.

While Ontario and British Columbia have been the most active jurisdictions in using a PPP approach, several PPP projects have been procured in other provinces, as well as federally and municipally. The Province of Quebec has executed major road, hospital and prison projects using a PPP model. The Province of Alberta has also employed the PPP approach and has completed a number of PPP road and school projects and an expansion of a water and wastewater treatment facility. In addition, the City of Edmonton has reached financial close with respect to its Valley Line Southeast LRT Project and its Valley Line West LRT Extension, with the latter procured as a design-build-finance. Also active in the PPP market is the City of Calgary, which is currently procuring the Green Line LRT Project. New Brunswick, Nova Scotia, Manitoba, the Northwest Territories and Nunavut have also been active in the PPP market, with the City of Moncton's DBF Downtown Centre project having reached financial close in New Brunswick, and the Northwest Territories' closing of the Stanton Hospital P3. Nova Scotia has also recently reached financial close on its project to twin Highway 104, which will be delivered as a DBFOM project (further defined below), and has embarked on the redevelopment of the QEII Health Sciences Centre.

After disbanding its P3 Secretariat in 2009, the Province of Saskatchewan reinvigorated its PPP program with the establishment of SaskBuilds Corporation, a Treasury Board Crown Corporation, in October 2012. SaskBuilds' first project, a long-term care facility, reached financial close in 2014. SaskBuilds has now closed two major projects: the Regina Bypass project and the two joint-use schools projects (consisting cumulatively of 18 elementary schools), and the Saskatchewan Hospital North Battleford project is currently under construction. Saskatoon and Regina, the two largest municipalities in the province, have also completed other projects, including a civic operations centre, a stadium and a wastewater treatment plant.

COVID-19 still has an impact on the administration and drafting of P3 agreements and all forms of construction contracts. Government sponsors have been responding to market concerns about COVID-19 and have altered their template P3 agreements to better address and more fairly allocate the risks associated with COVID-19.

Apart from the innovative PPP approach to contracting, government authorities are using other innovative approaches to project delivery. Currently, Integrated Project Delivery ("IPD") and Alliancing ("**Alliance**"), Progressive Design Build and Construction Management procurement models and forms of contracts are under significant review and are beginning to be used by owners in an attempt to further create greater cost and schedule certainty, reduce disputes, increase collaboration and better manage risks. The IPD model has its origin in the United States, while Alliance is a model used in the United Kingdom and Australia. These models are used to deliver projects from several million dollars to over a billion dollars and which vary in complexity, although the model is often used to deliver projects that must balance many competing interests and deal with complex issues and risks. Both models are similar in their approach and goals for project delivery. Five years ago, only one IPD or Alliance project was underway in Canada, while today Ontario, Alberta and Saskatchewan have completed or have underway at least 10 IPD projects and one Alliance project. The models are now in use by federal, provincial and municipal authorities. British Columbia has announced that the new Cowichan District Hospital Redevelopment Project will be procured and delivered using the Alliance model.

IPD and Alliance processes and contracts are different from traditional project delivery models as the focus is on shared responsibility. All project parties set goals together, share information and

accept all parties as equals. They also share the financial risk and the reward. The intent is that the entire team succeeds or fails together, so one party does not win while another party loses. In its implementation, the parties include at a minimum the owner, the designer and the construction contractor who are involved in forming the project, setting goals and identifying risks. Decision making is by a governance committee of the parties and payment is driven by a risk and reward regime with actual costs paid, but profits earned through success of project goals. As well, under the IPD and Alliance model, the parties agree to limit or waive claims against the other parties for most events.

The IPD model is a different way of thinking to complete a project and the CCDC has released its own IPD form of contract, the CCDC-30. IPDs are not expected to remove the use of traditional forms of contracts, but it is a market that is going to continue to grow and to represent a portion of the market. An ongoing review of the uses and success of the IPD and Alliance models will inform owners what projects are best able to capitalize on their use.

FINANCING TO INFRASTRUCTURE PROJECTS

While the term “public-private partnership” or “PPP” has been used to describe a wide variety of transactions involving public and private participants – including the contracting out of services, the creation of non-share capital corporations (such as NavCan) and monetization of public assets through concession agreements – the present use of the term “PPP” typically refers to long-term arrangements entered into between public authorities and private sector entities pursuant to detailed contractual arrangements under which the private sector entity is required to design, build, finance and maintain and/or operate public infrastructure for a fixed period. These arrangements are effected through an agreement (typically referred to as a “project agreement” or “concession agreement”) entered into between the public authority and the private sector entity which sets out the respective obligations and responsibilities of each party and allocates risks between them. In Canada, a wide range of PPP structures has been used, including traditional Design-Build, Build-Finance (which many consider to be outside the spectrum of PPPs), DBF (Design-Build-Finance), DBFO (Design-Build-Finance-Operate) and DBFM or DBFOM (Design-Build-Finance-Maintain or Design-Build-Finance-Operate-Maintain), based on the U.K. Private Finance Initiative model, providing for a long-term

concession and including significant financing and risk assumption by the private sector. In the Canadian context, PPPs are not thought to include privatizations of public assets, as in the case of full or substantial divestiture of assets by the public sector.

PPPs are often used as an alternative means of procuring and financing infrastructure where there is insufficient public sector capital to meet immediate infrastructure investment needs. PPPs allow the public sector to access new sources of financing and achieve the benefits that private sector skills and management can bring, thereby creating efficiencies and value for money.

The fundamental principle underlying all PPPs is that risk should be allocated to the party best able to manage that risk. The risks typically allocated to the private sector include design, timely construction, operation and/or maintenance (where those are part of the project agreement) and financing. Milestones for project delivery, a fixed price contract and specified service standards are key components of the risk allocated to the private sector. The principal risks that are retained by the public sector, or shared with the private sector, will depend on the project type and the jurisdiction, but will typically include certain changes in law, insurance costs, uninsurable events, certain supervening events outside the control of the concession company (such as force majeure and catastrophic climate events, public sector strikes, protest actions and the like) and risks related to pre-existing but undiscoverable environmental conditions. Risks relating to adequacy of design, construction, maintenance and life cycle repairs typically reside with the private sector.

In Canada (as in the U.K.), PPPs typically are structured using a project finance approach under which a special purpose vehicle (“SPV”) is established for the sole purpose of delivering a project and its related services. The SPV will enter into the project agreement with the public sector authority and will then “drop down” most of the design, construction and operational risks to subcontractors. The SPV will enter into financing arrangements with private sector debt providers, the debt coming from one or more of several sources (e.g., domestic and international banks, pension funds, insurance companies or bond investors) on a limited recourse basis. The lenders’ principal recourse will be to the payment stream available to the SPV under the project agreement over the term of the concession. Canadian PPP projects are usually highly leveraged (with approximately 90% of the project costs being financed by way of senior debt, while the SPV’s

owners will typically contribute about 10% of the project costs by way of equity).

While PPPs were initially implemented in the face of considerable criticism (particularly from labour unions concerned about possible public sector job losses), as new roads, hospitals, schools and other public infrastructure are commissioned and built using a PPP model, the criticism has become much more muted. The PPP approach has become increasingly popular in Canada as many governments face significant budgetary deficits and conclude that P3s provide an innovative means of addressing Canada's significant infrastructure deficit without imperiling public finances.

With respect to performance security, the Ontario *Construction Act* introduces standardized bonding requirements which may not conform with the "standard" requirements of PPP lenders. Accordingly, the *Construction Act* acknowledges the special financing structures of the PPP sector by exempting these projects from certain bonding requirements. For example, the project agreement between the public body and the private sector entity does not have to conform with the bonding requirements if the aggregate coverage value in the project agreement exceeds the amounts prescribed by regulation.

Of note is the increasing attention given to the Canada Infrastructure Bank ("**Bank**"). The Bank was created to co-invest with private sector and institutional investors in new, revenue-generating infrastructure projects. The federal government has authorized the Bank to invest \$35 billion in such projects, and it is currently participating in 13 projects, including in the transit and green energy generation sectors. The Bank will act as a centre of expertise on infrastructure projects and will offer this expertise to provincial, territorial and municipal governments wishing to undertake revenue-generating projects.

The federal government is also providing infrastructure funding through the Investing in Canada Plan ("**Plan**"). This Plan will fund more than \$180 billion over 12 years to support projects across Canada in the areas of public transit, green infrastructure, social housing and the movement of goods. The flow of funds for infrastructure projects is expected to remain strong as governments seek to stimulate economic growth and to rebound from COVID-19. Within the federal government, Infrastructure Canada is responsible for investing \$30 billion in COVID-19 Resilience infrastructure projects, while Ontario has set aside \$1 billion to

be invested in COVID-19 Resilience infrastructure projects. Ontario is planning to direct these funds towards long-term care, education and municipal projects.

As a final point on funding, governments involved in transit projects, such as subways or rail, are attempting to leverage government-owned land around such projects to attract investment by developers. Governments are working to have developers build residential and commercial space around major transit nodes to create a transit-oriented development ("**TOD**"). In return for the land provided by the government, the government will obtain a commitment from a developer to build certain density and contribute funds or construction services to upgrade a current transit station or create a new transit project, such as a subway. Within Ontario, the government has passed two pieces of legislation, the *Transit-Oriented Communities Act, 2020* and the *Building Transit Faster Act, 2020* to facilitate TOD projects which, in turn, help support its transit projects.

May 2023



Energy

2023

Doing Business in Canada

AIRD BERLIS

airdberlis.com

The exploration, development, transmission and sale of energy has been the backbone of the Canadian economy, and Canada is blessed with a diversity of energy resources. Reserves of crude oil found in western Canada are among the largest in the world and Canada is one of the leading producers of both oil and natural gas. The world's longest crude oil and liquids pipeline system is operated by a Canadian company. A Canadian company owns one of the most extensive natural gas transmission networks in the world. A significant portion of Canada's energy, primarily oil, natural gas and electricity, is exported to the United States. Shale discoveries in the United States and eastern Canada will continue to have an impact on natural gas in Canada. Pipeline capacity will continue to be an issue to get product to international markets.

The provinces of British Columbia, Quebec, Manitoba, Newfoundland and Ontario have abundant sources of hydroelectric power, and Canada is a world-leading producer of hydropower. The largest nuclear power generating facility in North America is located in Ontario. The province of Saskatchewan is home to some of the largest known high-grade uranium deposits, making it the world's second largest uranium producer. Coal is also mined and used primarily in the western provinces and for export.

Canadians have been recognized as among the largest per capita users of energy in the world. Several Canadian provinces have taken steps to reduce the level of energy consumption both on the part of large industrial users and individual consumers, especially where this will help achieve certain carbon reduction goals. Laws and government programs that support investment in infrastructure, additional generation, conservation and improved energy efficiency and carbon sequestration have the ability to transform the way new and existing Canadian companies meet their own and the Canadian market's energy needs over the coming decades and represent significant investment opportunities. Energy investments and opportunities will be impacted by Canada's climate change commitments and, given the diversity of the various regions in the country, these opportunities will vary widely across the country. Canada's federal government has minimum standards for reducing greenhouse gases as do most provinces.

NATIONAL MANAGEMENT & REGULATION

The Canadian energy sector is governed by both federal and provincial laws. At the federal level, the Canadian Energy Regulator regulates matters that transcend provincial boundaries and provides

advice to the Government of Canada on national energy issues. It has been given a mandate to study and keep under review a broad range of energy-related matters under federal jurisdiction, including the production, transmission, distribution and sale of energy, and sources of energy, both in and outside Canada.

Thus, the Canadian Energy Regulator regulates the construction and operation of interprovincial and international pipelines, international electricity transmission lines and designated interprovincial electricity transmission lines; it deals with traffic, tolls and tariffs for the pipelines within its jurisdiction; and it grants approval for the export and import of oil and natural gas and the export of electricity. Deference to social licence, including Aboriginal and environmental constituencies, and a shifting focus towards decarbonization have resulted in significant challenges to Canada's oil and gas sector and related infrastructure development.

PROVINCIAL REGULATION

In addition, most provinces have established a regulatory body to deal with economic regulation of natural monopolies in the energy sector, such as the transmission and distribution of electricity and natural gas, as well as licensing of competitive activities, including generation of electricity and retailing of electricity and natural gas. In Ontario, for example, this body is the Ontario Energy Board. In the natural gas field, the Ontario Energy Board does not regulate the price of the commodity purchased by consumers, but it licenses marketers who sell gas to small volume consumers. It also approves rates charged by utilities for the distribution of gas and exercises powers in relation to the construction of gas distribution facilities, the creation and operation of gas storage areas, the sale or amalgamation of gas distribution utilities and the approval of franchise agreements between distribution utilities and municipalities.

On the electricity side, the Ontario Energy Board sets transmission and distribution rates and approves the budget and fees for the Independent Electricity System Operator. The Ontario Energy Board also licenses electricity market participants; sets the rate for standard supply service by electricity distributors that supply the commodity directly to customers; approves the construction of certain transmission facilities; and approves certain business arrangements within the regulated part of the electricity industry. Regulators typically focus on the economic and customer rate impact of the decisions being made on rates, tariffs and new infrastructure.

Many provinces, including British Columbia, Manitoba, Saskatchewan, Quebec and the Maritimes have, generally speaking, retained vertically integrated government-owned electricity monopolies in the electricity generation, transmission and distribution sector. Alberta has adopted a market-oriented approach, with competitive generation resources and a mix of investor- and municipally owned utilities in the transmission and distribution sectors. Ontario has pursued a “hybrid” approach, with a mix of regulated/government-owned (hydro-electric and nuclear) and competitive generation. Unregulated generation resources are generally subject to long-term power purchase agreements between the generator and the province’s “single buyer,” the Independent Electricity System Operator. The Ontario government has retained a significant stake in Hydro One, the publicly listed transmission and distribution company, while much of the remaining distribution sector is municipally owned.

ENERGY GENERATION

While the generation, transmission and distribution of electricity generally fall under the jurisdiction of the provinces of Canada, nuclear energy is accorded special treatment. Nuclear energy is seen to be a matter of national interest, as is Canada’s effective participation in the international control of nuclear energy. The Government of Canada has established the Canadian Nuclear Safety Commission which regulates the development, production and use of nuclear energy, as well as the use of nuclear substances and certain prescribed equipment and information. In Ontario, the current government has recommitted to nuclear resources remaining a significant portion of the province’s generation capacity. Progress continues for the proposed disposal of nuclear waste using a deep geological repository. Canada’s nuclear industry is evolving with the development of small modular reactors to assist with the transition away from fossil fuels and the electrification of the economy. The generation of renewable energy, particularly the wind, solar, hydro and biomass/biogas industries, has very quickly become a multi-billion-dollar business in Canada. Most provinces have embarked on programs to develop and procure renewable energy from independent power producers. Energy storage offers additional opportunities for renewable development. While natural gas will continue to play a role in power generation, as the dispatch capability makes it especially adept at providing the necessary response to peaks in demand, this resource faces new challenges as governments at all levels face pressure to decarbonize electricity

generation. While coal continues to be used for approximately 9% of the electricity generated in Canada, the federal government announced in 2018 regulations to phase out coal generation by 2030. Coal will continue to be used for metallurgical purposes.

TRANSMISSION AND DISTRIBUTION

Canada has an extensive pipeline system to deliver natural gas from British Columbia, Alberta and Saskatchewan to eastern Canada and the United States. The distribution and transmission of natural gas is regulated but open to private sector ownership. Investment will continue to be required to expand the system’s capacity and flexibility. The development and evolution of the natural gas market and infrastructure system will continue to be impacted by the development of shale gas in the northeast United States, the changing needs of the oil sands, access to export markets and LNG. Recent drops in the price of oil have slowed development of the oil sands.

Proposed new pipelines that would connect Alberta to the Pacific Coast thereby opening up new markets in places such as China have faced legal and regulatory challenges. The federal government stepped in to purchase one such project to continue to move it forward. In addition to reviewing large project applications, the Canadian Energy Regulator provides oversight of oil and gas exploration on frontier lands such as the Arctic and offshore. The use of rail for shipping oil and fuel is regulated by Transport Canada, which increased its safety requirements following the tragic and devastating explosion at Lac-Mégantic. However, the inability to increase pipeline capacity has led to greater use of rail for oil transport.

A significant portion of the electricity generated in Canada is transmitted from the province of origin to neighbouring provinces and to the United States. Most provinces have an Open Access Transmission Tariff (“OATT”) for the transmission of electricity to ensure access to US markets. The ownership of the electricity grid is a combination of public and private sector ownership with provincial regulators regulating the rate of return. To meet the needs of the changing economy, several jurisdictions have embarked on multi-billion-dollar initiatives to expand their supply portfolio and improve the transmission system. This includes both expansion and development of new infrastructure, but also the use of smart technology to improve the efficiency of the existing system.

CONSERVATION INITIATIVES

Energy conservation has also been given prominence as a key objective of both the federal and provincial governments. At the federal level, Natural Resources Canada continues to operate the Office of Energy Efficiency (“**OEE**”), which is the starting point for businesses and individuals to collect information on government grants, rebates and incentive programs for research and development into new technologies and energy efficiency upgrades. For businesses, the OEE offers incentives as varied as grants for the retrofitting of factories to rebates on the purchase of fuel-efficient fleets. Provincial programs may also exist to encourage energy efficiency upgrades.

In many provinces, a wide range of opportunities have been realized through the promotion of conservation, demand management and the addition of smart technology. Canada has invested significant amounts for the development of a “smart grid.” Using technology to track and manage electricity from the point of generation all the way to the end-use appliance allows valuable efficiencies to be gained.

Electrification of Transportation and Industry

Climate change has forced a transition to renewable energy for climatic reasons, which has resulted in electricity use being encouraged in situations where fossil fuels have traditionally been the fuel of choice. Combined with energy storage, renewables are becoming much more prevalent across the country and this will continue as the fossil fuel fleet ages and emissions regulations tighten. Canada and many provinces encourage the increased use of electric vehicles and are supporting many communities in the development of a widespread electric vehicle charging network with varying financial incentives. Significant investment will continue as electric vehicle technology improves and prices reduce. Mass transportation and industry will also need investment as this transition continues.

Distributed Energy Resources

A significant trend in the electricity sector globally has been the emergence of new technologies that can support locally owned facilities for electricity generation, control and storage. These facilities and technologies are referred to as Distributed Energy Resources (“**DERs**”). While large power plants continue to play an essential role, smaller-scale technologies, such as solar panels and onsite battery storage, enable customers and communities to produce and even distribute their own electricity, reducing their reliance on centralized resources.

Initiatives such as net metering, government-funding mechanisms and community energy plans are likely to play an increasing role in supporting DERs as part of grid resiliency and decarbonization efforts.

May 2023



Dispute Resolution

2023

Doing Business in Canada

AIRD BERLIS

airdberlis.com

CANADA'S COURT SYSTEM

The purpose of Canada's court system is to assist people in resolving their disputes in a just and equitable manner. In fulfilling this mandate, the courts interpret and apply laws and address issues that impact upon all facets of Canadian society. With the exception of the province of Quebec, which administers a predominantly civil law system, the provinces and territories of Canada have a legal system similar to those used in the United States and Great Britain, and administer the common law.

Canada's court system is organized in a four-tier system. At the bottom of the hierarchy are the provincial and territorial courts. These courts hear cases involving either federal or provincial/territorial laws and deal with a wide array of matters including, but not limited to, criminal offences, family law matters (except divorce) and provincial/territorial regulatory offences.

Provincial and territorial court judgments are appealed to the provincial/territorial superior courts.¹ Superior courts have "inherent jurisdiction." As such, superior courts are able to hear cases pertaining to any area that is not specifically limited to another level of court. Within the purview of the superior courts are trials for the most serious criminal offences as well as divorce cases and cases involving large sums of money. Appeals from decisions of the superior courts and provincial/territorial courts are heard by an appellate division or a court of appeal for the applicable province or territory. Constitutional questions raised in appeals involving individuals, governments or governmental agencies are also heard by the court of appeal.

Running parallel to this system is the Federal Court system. Both the Federal Court and Federal Court of Appeal are similar to the superior courts except that they also have jurisdiction over civil law. An important distinction between the federal courts and the superior courts of the provinces and territories is that while the former can only deal with matters specified in federal statutes, the latter have jurisdiction in all matters except those specifically excluded by statute. The Federal Court has jurisdiction over interprovincial and federal-provincial disputes, intellectual property proceedings, citizenship appeals, *Competition Act* cases and cases involving Crown corporations or departments of the Government of Canada. Importantly, only the federal courts have jurisdiction

to review decisions, orders and other administrative actions of federal boards, commissions and tribunals.

At the apex of the court structure sits the Supreme Court of Canada. The Supreme Court hears appeals from all other Canadian courts. It has jurisdiction over disputes in all areas of the law, including administrative law, civil law, constitutional law and criminal law.

THE INDEPENDENCE OF THE COURTS

Judicial independence is a cornerstone of the Canadian judicial system. It is for this reason that Canadian courts are kept separate from the legislature and the executive. This also means that any government action may be reviewed by the courts for compliance with the Constitution of Canada and the *Canadian Charter of Rights and Freedoms*.

Three means are used to ensure judicial independence, namely security of tenure, financial security and administrative independence. In terms of tenure, once appointed, a judge is permitted to serve on the bench until a specified age of retirement and can only be removed if an independent investigation demonstrates good reason. Financial security requires that judges be paid adequately and in a manner that does not leave them in a position of dependence or susceptible to pressure. Canadian governments are also prohibited from altering judges' salaries or benefits without first consulting with an independent commission. Administrative independence means that interference with the way in which courts manage the litigation process and exercise their judicial functions is prohibited.

CLASS ACTION PROCEEDINGS

Legislation permitting class action proceedings can now be found in all of the Canadian provinces and territories (except Prince Edward Island), as well as the Federal Court of Canada.

Unlike ordinary proceedings, a class action proceeding is commenced on behalf of a "class" of persons. This necessitates that a person/persons who is/are representative of the potential class assume the role of plaintiff and represent the interests of that class. A critical first step in commencing the action is having the action judicially approved or "certified" as a class proceeding. Among other things, a certification order will name the representative plaintiff or plaintiffs, define the "class" and approve a "workable plan." Once the proceeding has been certified, the action will proceed in a similar fashion to a traditional lawsuit, complete with documentary

¹ As Nunavut does not have a territorial court, both territorial and superior court matters are heard by the Nunavut Court of Justice, which is a superior court.

and oral discovery, pre-trial procedures, and the exchange of expert reports. If the proceeding is not certified, it continues as a regular action for one plaintiff only. In most Canadian provinces and territories, class actions are case managed by one judge. However, in all of the provinces but Quebec, a new trial judge is assigned once the matter reaches the trial stage.

ALTERNATIVE DISPUTE RESOLUTION

Alternative Dispute Resolution (“ADR”) is a field of law that has grown exponentially over the last 30 years. ADR refers to methods of settling disputes between would-be litigants using means other than court-based traditional litigation. ADR includes a variety of techniques, including negotiation, conciliation, mediation and arbitration. Interest in ADR continues to grow. The most common reasons cited by both lawyers and their clients for choosing ADR processes include: the faster resolution of disputes; the guarantee of privacy, confidentiality and avoidance of adverse publicity; the reduction of legal costs; the ability to choose an adjudicator or mediator; the possibility of mutually-advantageous resolutions/solutions; and the promise that relationships will remain intact.

Two of the most significant ADR techniques are arbitration and mediation. In arbitration, the parties refer their dispute to a neutral third party whom they have selected for judgment. The result is a binding and enforceable ruling. Parties may choose arbitration as a dispute resolution mechanism by specifying so in their contract, or they may jointly elect to submit to arbitration after a dispute arises. In addition, various provincial and territorial statutes either expressly or impliedly provide for arbitration. Examples of these statutes include: the *Expropriations Act*, *Insurance Act*, *Hospital Labour Disputes Arbitration Act* and the *Municipal Arbitrations Act*. With the exception of criminal law matters and matters governed by special statutes, any matter that is properly the subject of litigation may be dealt with by arbitration.

Mediation is an informal process wherein a neutral third party assists the parties to a dispute to reach their own mutually-agreed upon solution. A striking difference between mediation and other forms of dispute resolution processes, such as litigation or arbitration, is that in mediation the mediator has no authority to impose a solution. The mediator’s role is simply to ensure communication and facilitate fruitful negotiations. Importantly, mediations are not binding. Parties often enter into mediation on the basis that if an agreement is not reached, they may resume the litigation process.

In the last several years, a strong trend line has developed towards moving disputes to mediation at an early date. Historically, mediation generally occurred after examinations for discovery were complete and expert reports exchanged. These days, parties frequently move cases into mediation before those stages have been completed. As mediation represents an exit strategy from litigation, this is a sound development. It does mean that in planning a dispute and litigating a dispute, parties should be thinking early on about identifying the best possible mediator for the case and exploring and developing strategies for a successful mediation.

While in some cases mediation is voluntary, in other situations it is mandatory. In Ontario, for instance, the Rules of Civil Procedure require that mandatory mediation be used in all case-managed actions, with minor exceptions, within 90 days after the first defence has been filed, unless a court orders otherwise. The goal of mandatory mediation is to help the parties resolve their disputes outside of court early in the litigation process, thus saving them both time and money. The purpose of case management is to decrease the expense and delay in the administration of lawsuits by giving the courts a greater supervisory role over the progress of cases. Currently, case management applies in Ottawa, Windsor and Toronto. Mediation is still popular in areas of Ontario where case management does not apply.

SERVING FOREIGN PROCESS AND ENFORCING FOREIGN JUDGMENTS

Canada is a signatory to the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*. The Hague Convention provides for protocols governing the service of foreign process on residents of Canada. When a party is seeking to serve process originating from a jurisdiction that is not a signatory to the Hague Convention, it is important to ensure that the service in Canada complies with the rules of the originating jurisdiction.

In order to enforce a foreign judgment in a civil or commercial matter in Canada, the party seeking to enforce the judgment will first need to have the judgment recognized by one of the superior courts of the provinces and territories. Canada is party to a number of international conventions providing for the reciprocal recognition and enforcement of judgments, and certain provinces have reciprocal enforcement legislation covering additional (albeit limited) foreign jurisdictions, which allow for a streamlined recognition and registration process. In

order to have a foreign judgment from a jurisdiction not covered by convention or legislation recognized, the party will need to bring a proceeding in the superior court for recognition and enforcement.

ed, the party will need to bring a proceeding in the superior court for recognition and enforcement.

VIRTUAL PROCEEDINGS

Both Canada's courts and ADR processes are becoming increasingly technology friendly, allowing for e-filing of court documents and attendance by video at nearly all attendances which would have previously been conducted in person. In Ontario, for example, recent amendments to the Ontario *Rules of Civil Procedure* provide that a party seeking a hearing or other step in a proceeding may propose that it be conducted by video conference. Any opposing party may object, but the general trend within the profession is to embrace this improved access to court hearings.

May 2023



Commercial Arbitrations

2023

Doing Business in Canada

AIRD BERLIS

airdberlis.com

Canada, as is the case with other advanced jurisdictions, is experiencing significant growth in the use of arbitrations to resolve commercial disputes.

Although Toronto, in particular, is fortunate to have the Commercial List of the Ontario Superior Court, an expeditious court facility, many corporations, both domestic and foreign, have found that arbitration has additional advantages, including procedural flexibility, access to expert arbitrators and excellent arbitration facilities.

Toronto has become a significant centre not only for domestic arbitrations, of which there are many, but also for international arbitrations, a growing number of which corporations are choosing to conduct in Canada.

There are several reasons for this choice. Canada has an excellent reputation for high quality legal services and fair adjudications. Canadian commercial counsel, both in Toronto and elsewhere, are very capable. Canadian courts, and the legal system in Canada generally, are known for the fairness of their rulings. Expenses incurred are often much less than what is paid for comparable proceedings in other international centres such as London, New York, Hong Kong and Singapore.

Last but not least, Canada has available to those who choose it as their arbitration venue a large number of excellent arbitrators, both in the ranks of retired judges and seasoned legal counsel.

Arbitrations can offer a number of advantages: speedy determination of disputes; finality, without costly appeals; and the opportunity for the successful party to obtain full indemnification for costs.

May 2023

AIRD BERLIS

**We are committed to being the
Canadian gateway for our clients.**



Brookfield Place, 181 Bay Street, Suite 1800
Toronto, Canada M5J 2T9
T 1.416.863.1500 F 1.416.863.1515

Other articles and papers written by our professionals can be viewed at:

airdberlis.com

Doing Business in Canada offers general comments on legal developments of concern to businesses, organizations and individuals, and is not intended to provide legal opinions. Readers should seek professional legal advice on the particular issues that concern them.

© 2023 Aird & Berlis LLP

Parts of this booklet may be reproduced with acknowledgment.
