Doing Business in Canada

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MESSAGE FROM THE MANAGING PARTNER

I am honoured to present this year's edition of *Doing Business in Canada*. In today's shifting global landscape, staying informed is essential to making sound business decisions. This annual publication provides an update on legal and business developments in Canada. Written by legal professionals who are deeply versed in global trends and structures, it is designed to equip you with the knowledge needed to capitalize on opportunities in the Canadian market.

While global trade dynamics are complex, particularly with ongoing uncertainty around U.S. tariffs, Canada stands out as a stable and attractive destination for investment and expansion. The country offers a range of advantages, including access to global markets 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 leading 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 legal services to advance their interests and add value to their businesses.

Our team is well-equipped to advise on international business activities, with a particular focus on taxation, corporate finance (including mergers and acquisitions), securities, financing and real estate investments. We closely monitor material changes announced and proposed in Ontario, British Columbia and across Canada, keeping our clients and contacts informed through publications, communications and presentations.

We are also pleased to announce the opening of a new office in the heart of downtown Vancouver, marking a significant milestone in the firm's growth. This expansion reflects our commitment to clients in British Columbia and our goal of strengthening relationships in the region. The Vancouver office is currently home to 13 lawyers practising in Aboriginal law, financial services, real estate, energy, mining, natural resources, corporate, M&A, procurement, construction and infrastructure. Many of these lawyers are members of our Indigenous Practice Group, which we launched last year and has since experienced significant growth. The group offers national expertise and works closely with Indigenous peoples, organizations and governments to help advance their goals in ways that respect their distinct rights, interests and perspectives.

Throughout this publication, we provide a broad overview of Canadian federal and provincial law as it relates to various sectors, industries and practice areas, while highlighting notable regulatory updates from the past year. New to this year's edition are dedicated sections on Franchising and Advertising, which address key legal considerations under Canadian franchise laws and advertising regulations, including disclosure obligations, digital marketing standards and compliance with the *Competition Act*.

Our firm has built a reputation for excellence, integrity and client service. I am optimistic for our future and confident that we can support your success in the Canadian market. If you have any questions, please reach out to me, your relationship partner or one of my colleagues listed on our website. We would be happy to assist.

Jill Fraser
Managing Partner
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June 2025

Introduction

Doing Business in Canada

AIRD BERLIS

2025
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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, regulatory, constitutional, administrative law and public policy matters. As one of Canada's leading 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 originating outside of Canada; (2) Canadian transactions involving jurisdictions outside of Canada; and (3) all Canada-wide transactions. We take a focused approach to addressing the Canadian legal needs for each type of transaction. 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 global network of partners committed to upholding 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 150 cities worldwide, which is ranked as one of *Chambers Global's* "Elite" Leading Law Firm Networks.

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 *Best Law Firms in Canada*; the *Lexpert 500 Cross Border Guide*; 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*, among others.

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: the 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 actively recognize and celebrate diversity and foster an inclusive environment where everyone feels a sense of belonging.

DISCLAIMER

This publication provides a general overview of Canadian national and provincial law and 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 provinces of Ontario and British Columbia.

This publication is current as of May 2025, or as noted in the individual chapters. All dollar amounts are in Canadian dollars unless stated otherwise.

Please note that the contents of this publication are considered a summary only and should not be considered legal advice. We recommend that you consult one of our lawyers for guidance on any specific legal issue.

If you have any questions or comments regarding the materials, please 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.

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Constitution, Government and Legal System

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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*

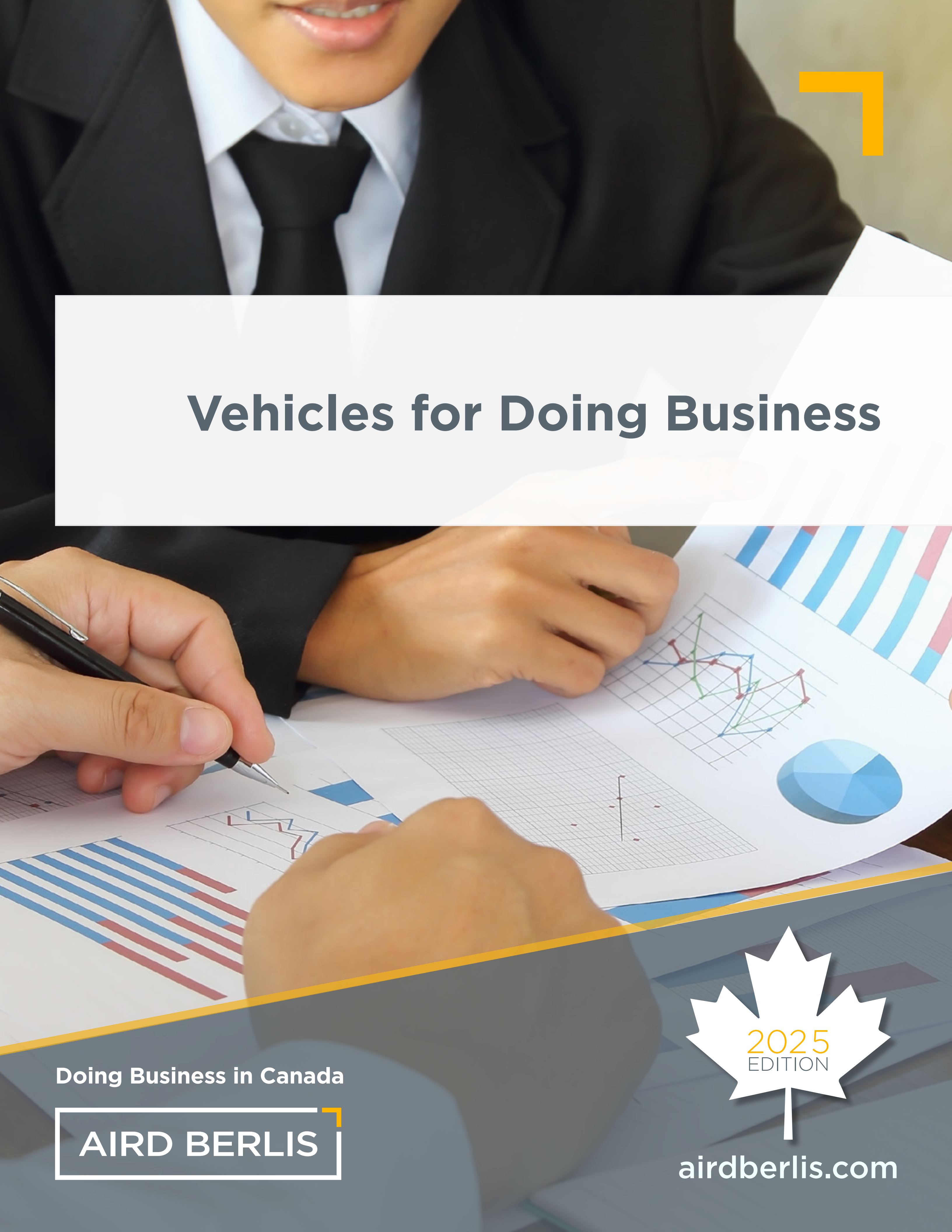
Peoples Act in 2021, the federal government took a significant step forward in Canada's implementation of the United Nations Declaration on the Rights of Indigenous Peoples ("**UNDRIP**") which requires the federal government to take all measures necessary to ensure that federal laws are consistent with 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 2025



Vehicles for Doing Business

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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.

Starting in June 2019, regulations pertaining to privately held federal corporations and certain provincial corporations came into force (including Ontario corporations as of January 1, 2023), requiring 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 record of registered shareholders. For federal corporations, this information must now also be filed with the federal government and is publicly accessible.

Unlimited Liability Companies

The corporate 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 in certain scenarios.

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.

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Advertising

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The advertising of consumer products in Canada is governed by federal statutes including the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act*, the *Food and Drugs Act*, the *Safe Food for Canadians Act*, the *Canada Consumer Product Safety Act* and the *Customs Act*, along with their related regulations, as well as provincial consumer protection legislation and the Quebec *Charter of the French Language*.

Making false and misleading representations to the public for the purpose of promoting a product or business interest is prohibited in Canada, including under sections 52 and 74.01 of the *Competition Act*. In 2024, significant amendments were made to the *Competition Act*, including clarification of the prohibition on drip pricing and revisions to the deceptive marketing provisions to specifically prohibit greenwashing. In particular, this includes making a representation to the public about the environmental benefits of a product or business activity, such as protecting or restoring the environment or mitigating the effects of climate change, that is not substantiated.

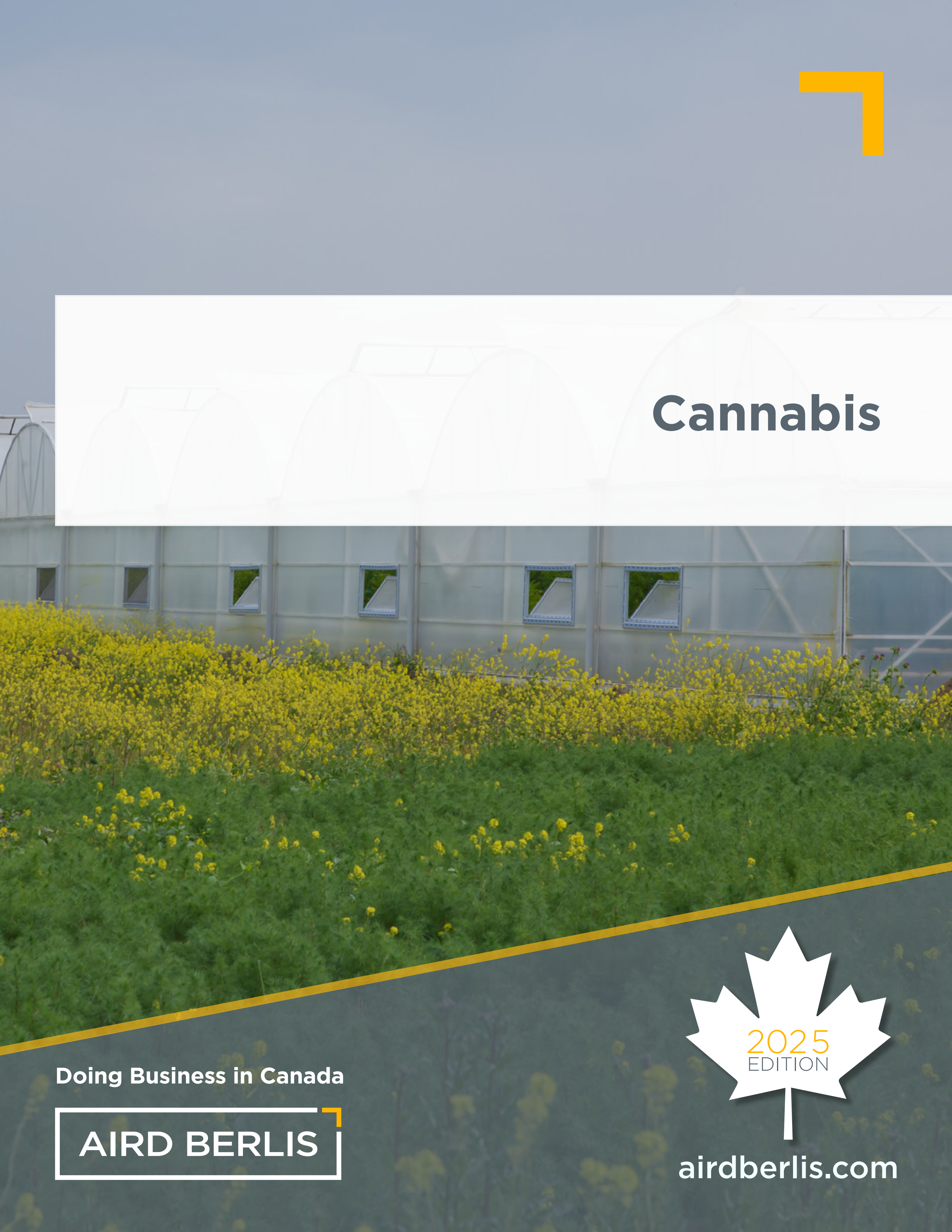
The consequences of contravening Canada's prohibitions against false and misleading advertising can be significant. Under the *Competition Act*, a contravention of civil provisions can result in a prohibitory order, a requirement to publish a corrective notice, significant administrative monetary penalties (the greater of $10 million for a first offence and $15 million for subsequent offences for corporations or three per cent of a company's annual worldwide gross revenues) and/or an order to pay an amount to be distributed among the persons to whom the products were sold.

A contravention of the act's criminal provisions, where false or misleading representations are made knowingly or recklessly, may result in fines or imprisonment. Starting in June 2025, private parties will be permitted to bring applications to the Competition Tribunal in relation to civil deceptive marketing prohibitions, further increasing the likelihood of enforcement action.

Civil litigation, including class proceedings, for contraventions of the civil deceptive marketing provisions of the *Competition Act*, as well as consumer protection legislation, is also possible in Canada and may carry significant cost consequences.

Enforcement action and litigation regarding misleading advertising in Canada has been consistent for many years, with an expected increase in focus on issues such as drip pricing, greenwashing and maple-washing (false or misleading country-of-origin labelling).

June 2025



Cannabis

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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.

Recognizing the very heavy regulatory burden and expense imposed by the *Cannabis Act* and *Cannabis Regulations*, the federal government has recently initiated efforts at streamlining the regulatory regime, including in the areas of licensing, personnel and physical security requirements, production requirements, packaging and labelling, as well as record keeping and reporting.

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 in 2019, however, such equity fundraising began to decline significantly, mirroring general declines and continued volatility in cannabis company valuations. The Canadian cannabis industry has now seen a significant 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.

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.

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Commercial Leasing

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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.

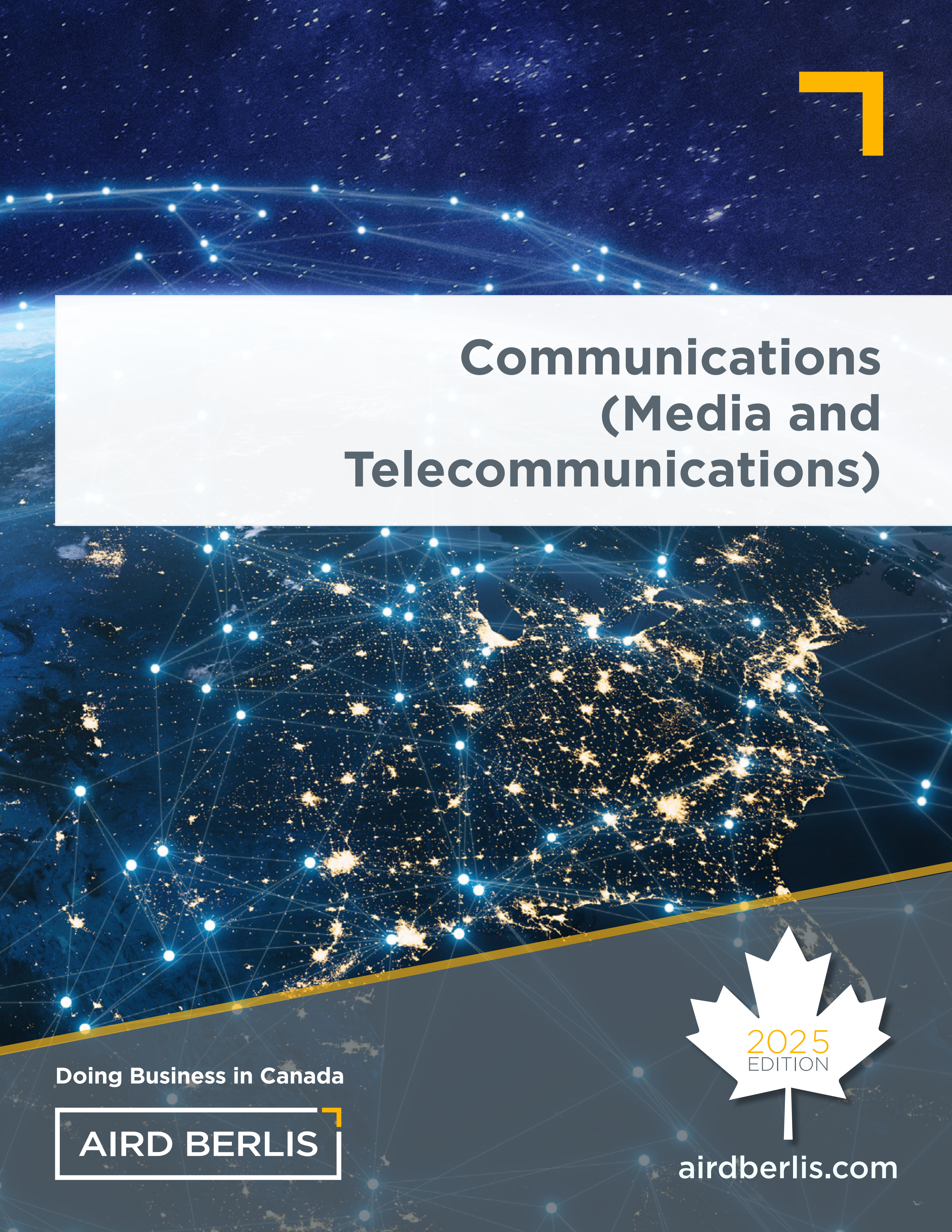
Realty taxes can be a significant liability in commercial real estate leases. For example, in Ontario, realty taxes are assessed using the income stream/revenue model, and separate assessments are no longer available, although one can endeavor to obtain assessors notes from which an assessment can hopefully 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 2025



Communications (Media and Telecommunications)

Doing Business in Canada

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The Canadian courts have determined that enterprises engaged in telecommunications and broadcasting undertakings clearly fall within the scope of federal jurisdiction as "interprovincial undertakings." These judicial determinations have been the basis for establishing federal regulation in the communications sector, which is overseen by the Canadian Radio-Television and Telecommunications Commission ("**CRTC**"), an administrative tribunal that operates at arm's length from the federal government.

The Telecommunications Sector

Under the *Telecommunications Act*, the CRTC has jurisdiction over all telecommunications service providers ("**TSPs**"), including wireline and wireless telecommunications common carriers[1] and internet service providers ("**ISPs**"). Among the Act's stated objectives is to ensure that Canadians in all regions of Canada have access to reliable, affordable and high-quality telecommunication services. While the CRTC operates independently, the Minister of Innovation, Science and Economic Development ("**ISED**") exercises ministerial oversight over policy development of the telecommunications sector. Further, the ISED policy framework extends to the allocation and use of wireless spectrum under the *Radiocommunication Act*.

The Broadcasting Sector

The CRTC has jurisdiction over broadcasting undertakings (including more recently "online undertakings," see below) operating in whole or in part in Canada, under the policy framework of the Minister of Canadian Heritage, who is responsible for Canadian broadcasting policy.

The Last Decade Has Seen Significant Legislative and Regulatory Evolution in the Telecommunications and Broadcasting Sectors

The pace of change in the legal and regulatory regimes governing telecommunications and broadcasting noticeably picked up following the federal government announcement in 2019 to undertake the *Broadcasting and Telecommunications Legislative Review* ("**BTLR**"), an initiative announced by the Ministers of ISED and Canadian Heritage. The Ministers jointly appointed a "Panel of Experts" to review the legislative and regulatory framework governing the broadcasting and telecommunications sectors. The stated purpose of the review was to "examine the existing legislative framework and tools in the context of the digital age and what changes may be needed" to support both telecommunications objectives (promoting competition and affordability for internet and mobile wireless, and net neutrality) and media/broadcasting policy objectives (content creation in the digital environment, cultural diversity and strengthening Canadian media undertakings).

The BTLR Panel issued its Report in January 2020 along with 85 recommendations spanning the telecommunications and media sectors. The Panel's Report presented a broad, sweeping set of proposals to re-work the legislative "plumbing" in the communications sector with a view, as it describes, to "better prepare the country for an era of constant and rapid technological change."

New Policy Direction in the Telecommunications Sector

The issuance of the BTLR Report should be viewed in the context of the ongoing structural changes in the competitive landscape of the telecommunications sector. These developments prompted the government to issue a reformulated Policy Direction to the CRTC in 2023 (the "**Telecom Policy Direction**").[2] Section 8 of the *Telecommunications Act* permits the government to issue directions to the CRTC "of general application on broad policy matters" with respect to the statutory Canadian telecommunications policy objectives. The Telecom Policy Direction supplanted previous policy directions made in 2006 and 2019.

Among the multiple policy objectives in the Telecom Policy Direction are those requiring the CRTC to "promote competition, affordability, consumer interests and innovation."[3] The CRTC is also required to pursue "principles of effective regulation." When making decisions of an "economic nature," it must balance objectives, such as fostering competition, promoting investment in high-quality networks, improving consumer choice, supporting the provision of innovative services and encouraging the provision of services at reasonable prices for consumers.[4]

1 However, unlike the Federal Communications Commission in the United States, the CRTC does not award spectrum licences to wireless telecommunications carriers; that function is exercised by the Minister of Innovation, Science and Economic Development under the *Radiocommunication Act*.

2 *Order Issuing a Direction to the CRTC on a Renewed Approach to Telecommunications Policy*, SOR/2023-23 (https://laws.justice.gc.ca/eng/regulations/SOR-2023-23/page-1.html).

3 The Telecom Policy Direction also directs the CRTC to: ensure that affordable access to high-quality telecommunications services in all regions of Canada; enhance and protect consumer rights; reduce barriers to entry into the market for telecommunications services; enable new technologies and differentiated service offerings; and stimulate investment in research and development and in other intangible assets that support the offer and provision of telecommunications services.

4 Moreover, the principles of effective regulation will also require the CRTC to ensure that its proceedings and rulings are transparent, predictable and coherent; based on sound and recent evidence and that its proceedings and decisions are conducted in a timely manner.

The Telecom Policy Direction has already had significant influence on the CRTC's regulatory framework. Below, we summarize recent developments in the communications sector following the issuance of the Telecom Policy Direction.

Fixed Internet Competition

The CRTC has continued to adapt its regulatory framework to enable independent ISPs to provide competitively priced services to both business and residential customers in competition with facilities-based incumbent telephone companies and cable carriers. The CRTC's "wholesale framework" mandates that the access facilities operated by the large incumbent telephone companies and cable carriers must provide wholesale access services to non-facilities-based competitors at regulated rates.

The wholesale framework is a notable exception to several decades in which the CRTC has exercised its "forbearance" power under the *Telecommunications Act* to effectively liberalize (deregulate) most services or classes of services provided by telecom carriers at the retail level. The statutory forbearance power may be exercised if the CRTC finds that there is sufficient competition for those services to protect the interests of users.

The wholesale regime must strike a balance (see *principles of effective regulation* above) in a market in which facilities-based providers are both suppliers to and competitors with their wholesale customers. In November 2023, as part of its ongoing review of the wholesale high-speed access framework, the CRTC directed large incumbent telephone companies to provide temporary wholesale access to their fibre-to-the-premises networks in Ontario and Quebec within six months following the date of the decision. The CRTC also established interim rates that wholesale-based competitors will pay those incumbent companies for access. However, this decision has proved highly controversial: shortly after the decision was released, Bell Canada, the largest incumbent telephone company in Canada, sought leave to appeal the CRTC's decision to the Federal Court of Appeal (as well as an interim stay of the decision pending the Court's determination on the appeal request). Bell has also petitioned the federal government to rescind or vary the decision.

Mobile Wireless Competition

The Telecom Policy Direction expressly directs the CRTC to improve upon its hybrid mobile virtual network operator (MVNO) model which it established in 2021 to encourage broader service-based competition. This leaves open the potential for the CRTC to adopt a full MVNO model, if needed, to support competition in the sector. The CRTC is also required to revise its rules "if the effectiveness of the approach in fostering mobile wireless competition is lessened due to changes in the mobile wireless market structure or circumstances of competition."

Measures to Enhance and Protect the Rights of Consumers in Telecommunications Markets

The CRTC has increased its focus on protecting consumers from unacceptable sales practices, promoting clarity and transparency of pricing information and service plan characteristics in marketing materials and ensuring that consumers can easily cancel, downgrade, transfer or change their telecom services.

CRTC oversight of TSPs under the *Telecommunications Act* extends to regulating unsolicited telecommunications under section 41 of the Act: the CRTC may order, prohibit or regulate the use by any person of the telecommunications facilities of a telecommunications service provider for the provision of unsolicited telecommunications to the extent that the CRTC considers it necessary to prevent undue inconvenience or nuisance (giving due regard to freedom of expression). The CRTC has been relatively proactive in the area of unsolicited telecommunications, including establishing detailed Unsolicited Telecommunications Rules and overseeing a rigorous "Do Not Call List" regime that governs unsolicited telecommunications.

More recently, the CRTC has extended its unsolicited telecommunications regime to rules with respect to authentication and verification of caller ID information for Internet Protocol voice calls (known as the STIR/SHAKEN framework).[5]

The CRTC has the power to impose monetary penalties on individuals and corporations that contravene the unsolicited telecommunications rules, with the power to levy fines of up to $50,000 and $15 million, respectively, for violations of the rules.

Measures Supporting Deployment and Universal Access

The CRTC is required to adopt measures to support the objective of universal access to high-quality fixed Internet and mobile wireless services, including funding mechanisms and mandating improved access to support structures, such as

5 STIR [Secure Telephony Identity Revisited] / SHAKEN [Signature-based Handling of Asserted information using toKENs] framework to authenticate and verify caller identification (ID) information for Internet Protocol (IP)-based voice calls.

telephone poles and conduits, as well as identifying and addressing other barriers to timely deployment of telecommunications networks.

OWNERSHIP AND CONTROL OF TELECOMMUNICATIONS CARRIERS

Amendments to the *Telecommunications Act* in 2012 removed the ownership limitations for smaller facilities-based telecommunications carriers, specifically those with annual revenues from the provision of telecommunications services in Canada that represent less than 10% of the total annual revenues for the sector. This effectively eliminated the foreign ownership restrictions for all but the large "incumbent" Canadian telecommunications carriers. Non-Canadian ownership in the latter class of carriers is limited to up to a direct or indirect one-third voting interest of a holding company which has a wholly-owned subsidiary operating company operating as a telecommunications carrier.

PROMOTION OF SECURITY INTERESTS IN THE TELECOMMUNICATIONS SECTOR

The proposed amendments to the *Telecommunications Act* through Bill C-26, currently before the Senate, add the promotion of security as an objective of Canadian telecommunications policy. These amendments are expected to grant the Governor in Council and the Minister of Industry broad new powers to secure Canadian telecommunications systems, including the authority to direct telecommunications service providers to refrain from providing or using any products or services determined to be a security risk.

BROADCASTING REGULATORY FRAMEWORK

Current Regulatory Landscape

The CRTC supervises and regulates all aspects of the Canadian broadcasting system pursuant to the *Broadcasting Act* through its licensing and exemption powers over Canadian-owned and controlled broadcasting undertakings. Under the legacy provisions of the *Broadcasting Act*, conventional "free-to-air" television stations and terrestrial radio stations are subject to requirements providing for minimum levels of Canadian content on their services. These requirements were extended to discretionary television programming services and newer technologies such as satellite radio services, along with expenditure requirements pursuant to which specified percentage of revenues from broadcasting operations must be allocated toward expenditures for Canadian programs.

Further, broadcasting distributors (known as "broadcasting distribution undertakings" or "BDU"s) are required to give priority to the carriage of Canadian services and to contribute a certain percentage of their revenues from customers (subscribers) to the production of Canadian programming (primarily through allocating a percentage of revenue to recognized Canadian production funds).

RECENT AMENDMENTS TO CANADIAN BROADCASTING LEGISLATION

In February 2022, following the issuance of the BTLR Report, the Minister of Canadian Heritage introduced an *Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts* ("**Bill C-11**"). Bill C-11, which came into force in April of 2023, provided for significant amendments to the *Broadcasting Act*. The amended Act confers on the CRTC the express authority to directly regulate "online undertakings," a new category of "broadcasting undertaking," whether carried on in whole or in part within Canada, that transmit programs over the Internet, including on an on-demand basis.[6] This expanded statutory authority is in addition to the CRTC's existing authority over licensed (and exempt) Canadian-owned and controlled broadcasting undertakings under the Act.

An expanded broadcasting policy provides that the broadcasting system in Canada must serve the needs and interests of all Canadians, "including Canadians from Black or other racialized communities and Canadians of diverse ethnocultural backgrounds," while also providing opportunities for Indigenous persons and programming "that reflects Indigenous cultures" and "that is in Indigenous languages" as well as "programming that is accessible without barriers to persons with disabilities."[7]

The "Regulatory Policy" in section 5 of the Act requires the CRTC to ensure that each broadcasting undertaking contributes to the implementation of the objectives of the Canadian broadcasting policy in a flexible manner that is appropriate in consideration of the nature of the services provided by the undertaking. Canadian-owned and controlled broadcasting undertakings must employ and make "maximum use, and in no case less than predominant use," of Canadian creative and other human resources in the creation, production and presentation of programming. In contrast, foreign online undertakings are required

6 Government Briefing Deck issued with Bill C-10 (Predecessor to Bill C-11) November 3, 2020.

7 *Broadcasting Act*, section 3(1).

to make "the greatest practicable use" of Canadian creative and other human resources and contribute in an equitable manner to strongly support the creation, production and presentation of Canadian programming, taking into account the linguistic duality of the market they serve.

Prescriptive Approach to Defining Canadian Content

The amended Act expressly provides that the CRTC can make regulations prescribing what constitutes a "Canadian program" (commonly referred to as "Canadian content"). The CRTC's discretion to determine the scope of eligible content is limited to specified criteria which the CRTC must consider including whether Canadians own copyright in relation to a program to control and benefit in a "significant and equitable manner" from its exploitation. The Act also prescribes other criteria as to what constitutes a Canadian program, such as key creative positions "primarily held" by Canadians, furthering Canadian artistic and cultural expression, and collaborating with Canadians operating in the broadcasting sector, including independent producers.[8]

Policy Direction Provides Guidance on New Regulatory Framework

In late 2023, the Government of Canada published its *Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework)* (the "**Policy Direction**").[9] The Policy Direction gives binding, high-level direction to the CRTC as it engages Canadians and all interested parties to design and implement the new regulatory framework for the broadcasting system. Key elements of the Policy Direction include redefining Canadian programs and increased support for equity-seeking groups, Indigenous persons, Canadian creators, independent broadcasters and community-run media outlets.

The Policy Direction also clarifies and arguably narrows the scope of the CRTC's regulatory focus over content made available on the platforms of social media services.

The Policy Direction directs the CRTC generally to develop a flexible and adaptable regulatory framework with minimal regulatory burden on the broadcasting system and to foster collaboration between Canadian and foreign broadcasting undertakings.

8 *Broadcasting Act,* section 10(1.1).

9 *Order Issuing Directions to the CRTC (Sustainable and Equitable Broadcasting Regulatory Framework)*, SOR/2023-239 ("Policy Direction"), section 11.

IMPLEMENTATION OF THE NEW BROADCASTING REGULATORY FRAMEWORK

Following passage of Bill C-11 as the amended Act, the CRTC commenced public proceedings to establish a regulatory framework to address the wider scope of regulation contemplated in the amended Act.[10] To date, the CRTC made the *Online Undertakings Registration Regulations* (the "**Registration Regulations**")[11] and established a number of conditions of service for certain online undertakings.[12] These apply to most online undertakings (other than services which fall under a specified exemption threshold based on annual turnover). Upon coming into effect, these conditions of service replaced many of the provisions previously set out in the (now repealed) *Digital Media Exemption Order* ("**DMEO**") which had effectively exempted all online streaming services from any element of CRTC regulation. Following the repeal of the DMEO, online undertakings are no longer exempt from CRTC regulation.

Broadcasting Fees Regulations

In *Broadcasting Regulatory Policy CRTC 2024-65*, the CRTC established the *Broadcasting Fees Regulations*, which will require traditional broadcasters and online streaming services to remit "broadcasting fees" to the CRTC on an annual basis. An exemption threshold level of $25 million for "broadcasting ownership groups" has been established along with an exemption for each service earning up to $2 million in annual broadcasting revenues in Canada. A broadcasting ownership group's fee revenue is calculated by aggregating the total annual broadcasting revenues in Canada of each individual broadcasting undertaking with an annual revenue of more than $2 million within the ownership group. Broadcasting fees are not payable on the first $25 million in revenue earned by a broadcasting ownership group.

Base Contribution Decision

In June 2024, the CRTC issued its "base contribution" decision, marking Step 1 in establishing the overall contribution framework governing online undertakings. Under this decision, most non-Canadian online streaming services are subject to a newly implemented requirement to contribute

10 *The Path Forward – Working towards a modernized regulatory framework regarding contributions to support Canadian and Indigenous Content*, Broadcasting Notice of Consultation CRTC 2023-138, May 15, 2023.

11 Broadcasting Regulatory Policy CRTC 2023-329 and Broadcasting Order CRTC 2023-330.

12 Broadcasting Regulatory Policy CRTC 2023-331 and Broadcasting Order CRTC 2023-332.

5% of their annual turnover from broadcasting operations towards expenditures on the acquisition or production of Canadian content, as well as to a range of specified Canadian production and content funds.

Step 2 will involve further examination of policy elements based on information gathered in Step 1. Step 3 aims to finalize tailored contribution requirements for each applicable undertaking or ownership group. This public process on contributions forms part of the CRTC's broader regulatory plan to modernize Canada's broadcasting framework.

Additional elements of the new framework, such as definitions of Canadian content, Indigenous broadcasting policy and barrier-free programming, are expected to be implemented no earlier than mid-2025. The CRTC has initiated a three-step proceeding to address contributions to the Canadian broadcasting system from online undertakings, including non-Canadian video streaming platforms.[13]

Treatment of Social Media Services Under the *Broadcasting Act*

The *Broadcasting Act* and the Policy Direction expressly provides that social media creators and individual users who upload content remain exempt from the Act.[14] However, among the most controversial elements of the amended Act are the provisions with respect to CRTC regulatory oversight over social media services. Pursuant to section 4.2 of the Act, the CRTC may "prescribe" regulatory obligations in respect of certain types of "programs" uploaded by users (i.e., programs that either (directly or indirectly) that generate revenue or that have been broadcast "in whole or in significant part, by a broadcasting undertaking" (i.e., licensed television services or subscription video on demand streaming services).

The ostensible objective of delineating certain "programs" on social media services as being potentially subject to Canadian content contribution requirements is based on equitable treatment of programs consumed on different platforms, regardless of how they are transmitted. Therefore, to the extent that commercial, revenue-driven traditional entertainment content (but not "user generated content") is made available on social media platforms, the social media service providing the platform may be subject to regulatory obligations that are similar or akin to those imposed on streaming entertainment services.

At this time, the CRTC has not made a decision on whether requirements related to discoverability and showcasing of Canadian content are applicable to social media services under the Act.

FOREIGN OWNERSHIP RULES IN THE BROADCASTING SECTOR

In what appears to be an increasingly less frequent area of focus (in view of the CRTC's statutory oversight over foreign online undertakings under the amended *Broadcasting Act*), the CRTC continues to exercise oversight with respect to Canadian ownership and control of licensed (and most exempt) broadcasting undertakings. Pursuant to the Direction from the Canadian government to the CRTC made under the *Broadcasting Act*, non-Canadians are permitted to own and control, directly or indirectly, up to 33 1/3% of the voting shares and 33 1/3% of the votes of a holding company which has a wholly-owned subsidiary operating company licensed under the *Broadcasting Act*. Furthermore, the Direction specifies that the Chief Executive Officer and at least 80% of the board of directors of a licensee that is a corporation must be resident Canadian citizens. Additionally, a non-Canadian may not exercise "control in fact" over a licensed broadcasting undertaking. Factors such as the level of ownership of equity through non-voting shares and total equity are relevant to the analysis of control in fact.

OTHER DEVELOPMENTS IN DIGITAL MEDIA - REGULATORY FRAMEWORK FOR NEWS ORGANIZATIONS

On June 22, 2023, the *Online News Act* received Royal Assent, officially becoming the first-ever legislation in Canada that regulates online communications platforms that make news content available to Canadians. The purpose of the *Online News Act* is to enhance fairness in the Canadian digital news marketplace and contribute to the sustainability of news businesses, in both the non-profit and for-profit sectors, including independent local ones.

The CRTC is responsible for overseeing the *Online News Act*, including the exemption criteria, the eligibility of news businesses, the Code of Conduct, prohibitions on discrimination and undue preference and administering the bargaining framework under the Act. The CRTC is also responsible for making regulations about how groups of news businesses are structured and how they carry out their obligations under the Act.

13 Broadcasting Notice of Consultation CRTC 2023-138.

14 Broadcasting Regulatory Policy CRTC, 2024-65, para 155.

The *Online News Act Application and Exemption Regulations* sets out which news organizations are exempt from the formal bargaining process under the Act. The CRTC has initiated public consultations related to the bargaining, mediation and arbitration process[15] in addition to the proposed *Cost Recovery Regulations*.[16] Once complete, the public process will inform how the CRTC will implement the new regulatory framework for news businesses.

June 2024

15 Online News Notice of Consultation CRTC 2024-55.

16 Online News Notice of Consultation CRTC 2024-111.

Energy

Doing Business in Canada

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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. In addition, new roles for distribution utilities to become distribution system operators are also being explored.

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Environmental

Doing Business in Canada

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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, subsequently allowing 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 assign responsibility for addressing 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. 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 ("**MECP**"), can issue orders to persons who have management or control of property (e.g., officers and directors) to investigate, mitigate and/or remediate pollution. Director's Orders have been issued under the OEPA, which attribute no-fault liability to corporations and/or individuals, including to directors and officers personally. In one case, prior to a determination on the merits, the MECP entered into a settlement agreement with the former directors and officers of a bankrupt corporation who paid approximately $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.

In Ontario, using class proceedings to prosecute environmental torts has also become harder as the *Class Proceedings Act* was significantly amended a few years ago to make certification 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.

The *Ontario Water Resources Act, 1990* ("**OWRA**"), governs the quality and quantity of both surface water and groundwater within the province of Ontario. The purpose of the OWRA is to provide for the conservation, protection and management of Ontario's water and for its efficient and sustainable use, in order to promote the province's long-term social and economic well-being. The OWRA is administered by the MECP and prohibits the discharge of polluting material in or near water (section 30), prohibits or regulates the discharge of sewage (section 31), enables the designation and protection of sources of public water supply (section 33) and regulates well drilling and construction (sections 36 to 50).

In 2006, Ontario introduced the *Clean Water Act, 2006* (“***Clean Water Act***”), to protect existing and future sources of drinking water. The *Clean Water Act* mandates the creation of source protection areas and regions to ensure the safety of drinking water supplies. It governs the preparation, amendment and review of source protection plans by source protection committees within each source protection area or region. The Act also expands on the effect of source protection plans by addressing conflicts, monitoring requirements and annual progress reporting. Additionally, the *Clean Water Act* regulates threats to drinking water.

Similar legislation was enacted in British Columbia. In 2016, the province brought into force the *Water Sustainability Act* (“**WSA**”) to ensure a sustainable supply of fresh, clean water. The Act governs both groundwater and surface water in B.C. Under the WSA, the *Groundwater Protection Regulation* (“**GWPR**”) specifically governs activities related to wells and groundwater across the province. The GWPR sets minimum standards for well construction, maintenance, deactivation and decommissioning, and recognizes the individuals certified to drill wells, install well pumps and perform related services.

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* (“**GGPPA**”) is comprised of an output-based pricing system and a fossil fuel tax. In September 2020, in *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, 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, holding that the federal government has the jurisdiction to impose minimum carbon-pricing standards. As a result, any province that does not have its own equivalent program is obligated to follow the federal rules.

The purpose of the GGPPA is to reduce greenhouse gas emissions by ensuring that carbon pollution pricing applies broadly across Canada. The federal backstop system has two components: (1) a regulatory charge on fossil fuels and (2) an output-based pricing system. The federal backstop applies, in whole or in part, in provinces and territories that request it or that do not implement a system meeting the minimum national stringency criteria (Canada Gazette, 2025). Effective April 1, 2025, in accordance with subsection 166(4) of the GGPPA, the *Regulations Amending Schedule 2 to the Greenhouse Gas Pollution Pricing Act* and the *Fuel Charge Regulations* (SOR/2025-107) reduced fuel charges to zero under Part 1.

NOTABLE CANADIAN CLIMATE LITIGATION

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

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 youth argued that this decision was a violation of their *Canadian 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 can reasonably 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 Ontario Court of Appeal heard the appeal of *Mathur* on January 15, 2024. On appeal, the applicants argued that the application judge mischaracterized their claim as seeking to impose positive obligations on the provincial government to combat climate change. The Court agreed with the applicants but declined to decide the application, citing the seriousness of the matters, the additional issues raised and the potential need for further evidence. Instead, the application was remitted for a new hearing before the same or another justice of the Superior Court (*Mathur v. Ontario*, 2024 ONCA 762). On December 17, 2024, the applicants applied for leave to appeal. On May 1, 2025, the Supreme Court of Canada denied leave to appeal and leave to cross-appeal the decision of the Court of Appeal. As a result, the matter will return to the Superior Court to be resolved based on the Court of Appeal's ruling.

The Federal Court of Appeal ("**FCA**") recently heard two challenges to federal climate policy: the La Rose claim, brought by a group of 15 children and youth from across Canada, and the *Misdzi Yikh* claim, brought by two houses of the Wet'suwet'en First Nations. In both claims, the plaintiffs alleged that the federal government's approach to climate change infringes on their constitutional rights. The plaintiffs did not specify any particular regulations and statutes; instead, they claimed that Canada's overall approach to climate change is deficient. In 2020, the Federal Court rejected both claims without leave to amend on the grounds that they were not justiciable.

However, the FCA disagreed, at least in part, holding that the claimants' section 7 claims could proceed, while their section 15 claims could not. The Court held that the section 7 claims were linked to Canada's failure to meet its commitments under the Paris Agreement, which were later ratified by Parliament. The FCA seemingly opened the door to further environment-related Charter challenges, explaining that while the claims were "novel," they were not doomed to fail: "The law is not static and unchanging – actions that were deemed hopeless yesterday may succeed tomorrow." The Court noted that the effects of climate change are widespread and grave, and disproportionately threaten

Indigenous communities and youth; climate change might thus constitute the "special circumstances" necessary to establish positive rights under section 7 of the Charter.

LAND

Crucially for cross-border transactions, contracting out of regulatory liability under Canadian law is much more difficult than it is in the United States. In the U.S., it is often expected 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 does not allow a party to contract out of its regulatory liability for events or actions that occur in Canada. The best that can be done is to negotiate indemnities. As a result, 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 *Environmental Protection Act* ("**EPA**") provides certain basic immunity from the MECP orders under the OEPA (the MECP'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 MECP have been made by a property owner or entity in control. The EPA does not include 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. These may take the form of community improvement plans, waivers of development charges and property tax incentives, including tax increment financing ("**TIFs**").

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 complications should a company fall 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 in order to assess toxicity. Under the CEPA, a substance is defined as "toxic" if it has an immediate or long-term harmful effect on the environment or biological biodiversity, or if it constitutes, or may constitute, a danger to human life or health. The CEPA contains penalty provisions, including mandatory minimum fines and maximum fines up to $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 for the release, storage and disposal of hazardous materials, including the preparation of plans to reduce the use of certain toxic products. Provinces and territories generally adopt federal standards for the transportation of dangerous goods.

Most recently, the federal government weighed in on plastics pollution by releasing regulations under CEPA that add "plastic manufactured items" to the List of Toxic Substances (in Schedule 1 of the CEPA). 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 new rules were the subject of a judicial challenge in the Federal Court of Canada in March

2023. In its decisions from November 16, 2023, the Federal Court struck down the classification of plastics as unconstitutional and unreasonable. The federal government has since appealed the decision. On January 25, 2024, the FCA granted an interim stay of the Federal Court's initial decision, meaning that the regulation of single-use plastics under the CEPA remains in effect. The FCA also ordered an expedited appeal, but a hearing date has not yet been set.

SPECIES PROTECTION

Regulation exists at both the federal level (e.g., *Species at Risk Act*, "**SARA**") and the provincial level (e.g., in Ontario, the *Endangered Species Act, 2007*, "**ESA**") to protect both species and their habitats. These acts set out permitting, monitoring, reporting and remediation requirements for activities that affect listed species or their habitats, 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.

At the provincial level, the ESA has recently been amended to create exemptions, including conditional exemptions, for certain types of activities (including early exploration mining) and certain protected species. The Ontario government also established 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.

SARA is designed to meet Canada's commitments under the international Convention on Biological Diversity. The Act seeks to prevent wildlife from disappearing and to manage wildlife of special concern through protection of both threatened species and their habitats. Under SARA, an independent committee identifies at-risk species and assesses their conservation status. If the species is designated as extirpated, endangered or threatened, SARA dictates that the federal government must prepare a Recovery Strategy (designed to stop or reverse species decline).

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

The Ontario ESA has been fundamentally changed by the recent enactment of Bill 5, *Protect Ontario by Unleashing Our Economy Act, 2025*, omnibus legislation that amends a series of other environmental and resource development laws. Bill 5 makes the following changes to the ESA: First, it shifts nearly all species-related authorizations to a registration-first approach. Second, it establishes a framework with clear expectations and rules for proponents to follow, focusing on activities most likely to have a direct negative impact on species. Third, it establishes a new Species Conservation Program to support voluntary initiatives such as habitat restoration that protect and conserve species. Fourth, it strengthens Ontario's ability to enforce species protection laws to ensure proponents comply with the rules and expectations of this new approach.

British Columbia does not have a dedicated *Endangered Species Act*. Instead, the province relies on various pieces of legislation that collectively govern threats to species at risk and the management of their habitats. Examples include the *Wildlife Act, Forest and Range Practices Act* ("**FRPA**"), *Oil and Gas Activities Act* ("**OGAA**"), *Ecological Reserves Act, Park Act, Land Act* and the *Mineral Tenures Act*. The *Wildlife Act* protects most vertebrate animals from direct harm, with exceptions for regulated activities such as hunting or trapping. It also authorizes direct management of wildlife or human activities. Both the FRPA and the OGAA include regulations identifying wildlife species at risk. Under the FRPA, efforts are focused on species within forest or range practices, while the the OGAA ensures permit applications are in line with Wildlife Habitat Areas ("**WHAs**") for any oil or gas activities. The *Ecological Reserves Act* provides for the establishment and administration of ecological reserves, which help with the protection of at-risk species and their habitats.

ENVIRONMENTAL 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 first 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.

The IAA has resulted in litigation. On October 13, 2023, the Supreme Court handed down its holding on a constitutional challenge to the IAA, originally raised as a reference question by the provincial government of Alberta. The Supreme Court held that while the assessment scheme in the IAA that governs federal lands or matters outside Canada was constitutional, the "designated projects" scheme for non-federal lands was unconstitutional. In response, the federal government issued interim guidance on the IAA, stipulating that it would revise the legislation.

The IAA was amended on June 20, 2024, in respose to the SCC's decision. Key changes include modifying the definition of federal effects (section 2) from "effects within federal jurisdiction" to "adverse effects within federal jurisdiction," which now includes "non-negligible adverse changes." Both the screening (section 16) and decision-making phases were amended, along with expanded opportunities for cooperation among jurisdictions (sections 31-45, section 43.1).

In Ontario, the *Environmental Assessment Act* ("**EAA**") serves as the primary statute governing the environmental assessment process. The EAA's stated purpose is to "consider potential environmental effects before an infrastructure project begins." In past iterations of the Act, major infrastructure projects triggered a full environmental assessment unless narrow exemption criteria were met, with the requirement largely depended on the identity of the proponent. However, the provincial government has subsequently introduced a "streamlined" project-list environmental assessment process. Under this process, projects are classified and subjected to either comprehensive environmental assessments or an environmental screening process based on their listed categorization. If a project is not expressly listed or designated, no environmental assessment is required. In other words, the past focus on who is undertaking the project has shifted to what the project is.

In Ontario, class environmental assessments are required for a variety of projects, including minor transmission facilities, municipal infrastructure projects, provincial parks and conservation reserves, government property, remedial flood and erosion control projects, resource stewardship and facility development projects, waterpower projects, provincial transportation facilities and municipal expressways, and activities under the *Mining Act* conducted by the Ministry of Northern Development and Mines. Once a Notice of Completion has been issued for a project under section 16, a request may be made for the Minister to require a comprehensive environmental assessment, but only on the grounds that the order may prevent, mitigate or remedy adverse impacts on the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada, as recognized and affirmed by section 35 of the *Constitution Act, 1982*.

B.C.'s *Environmental Assessment Act* allows for the Environmental Assessment Office ("**EAO**") to review all major projects within the province, even if the project does not meet the prescribed requirements for review (section 10). The Act allows the EAO to assess projects based on their potential environmental, economic and social impacts in the context of sustainability (British Columbia, 2020). In particular, the *Environmental Assessment Act* outlines measures to support reconciliation with Indigenous peoples in B.C. in line with the *United Nations Declaration on the Rights of Indigenous Peoples* ("**UNDRIP**") (SBC 2018, c 51).

DUTY TO CONSULT: NOTABLE CANADIAN INDIGENOUS RIGHTS LITIGATION RELATED TO ENVIRONMENT MATTERS

Public and agency consultation is a mandatory requirement of the environmental and impact assessment process. Consultation with Indigenous peoples usually plays a significant role, as treaty and Aboriginal rights are protected by the Canadian Constitution. Recent court cases have further clarified the Crown's consultation obligations, noting that the scope of this obligation varies based on the strength of the asserted Aboriginal or treaty rights and the potential severity of the impact on those rights. While impact benefit and community benefit agreements are still being negotiated, an increasing number of resource developments are proceeding through joint ventures or partnerships with Indigenous peoples as equity partners.

The duty to consult requires the Crown to understand how and when government decisions or actions could have an adverse impact on Aboriginal and treaty rights. The duty to consult reflects the "honour of the Crown," which is a constitutional principle that requires that the government acts honourably and in good faith in all dealings with Indigenous peoples. The duty to consult is not expressly set out in any legislation; rather, 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."

Because the duty to consult and accommodate is not defined in statute, the doctrine has been developed and clarified through jurisprudence. Duty to consult litigation in Canada has been robust. In *Delgamuukw v. British Columbia* (1997), the Supreme Court stated that the nature and scope of the duty vary depending on the circumstances. Where a proposed action may significantly impair a right, a deeper level of consultation is required. This means that consultation functions as a spectrum.

In its landmark 2004 decisions, *Haida Nation v. British Columbia (Minister of Forests)* and *Taku River Tlingit First Nation v. British Columbia*, the Supreme Court of Canada established that the Crown has the duty to consult Indigenous peoples. 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." This means that the duty to consult can and does arise in instances of asserted but unproven Aboriginal rights.

In *Tsilhqot'in Nation v. British Columbia* (2014), the Supreme Court explained that section 35 and the duty to consult doctrine is intended to protect Aboriginal and treaty rights while also furthering reconciliation.

Courts have also stipulated that government must approach their consultative duties in good faith, providing adequate funding and timely information to Indigenous rights-holders. In *Mikisew Cree First Nation v. Canada* (2018), the Supreme Court held that the creation (or amendment) of legislation, including environmental legislation, does not necessarily trigger the consultation process.

In other decisions, courts have explained who is responsible for the duty to consult and accommodate—and who it is owed to. Governmental bodies retain ultimate responsibility for consultation, as the honour of the Crown cannot be delegated. However, they may delegate *procedural aspects* of consultation to project proponents, such as developers or mineral exploration corporations. In *R v Van der Peet* (1996), the Supreme Court set out the test for determining whether an Aboriginal right exists in any given context, while *R v Powley* (2003) modified this test for Métis individuals and communities. *Behn v Moulton Contracting* (2013) further clarified that Aboriginal rights are inherently collective in nature. As such, an Aboriginal rights-holder seeking rights related to the duty to consult must do so on a representative basis (i.e. on behalf of their Indigenous community).

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 and 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 that British Columbia had breached Treaty 8 over a period of many years. This breach occurred by allowing extensive industrial development in the First Nation's territory without assessing cumulative impacts and ensuring that the First Nation would be able to continue meaningfully exercising its treaty rights in its territory. This decision was not appealed. Although prior legal decisions have recognized the significance of cumulative effects when it comes to the duty to consult, the *Yahey* case is one of the first holdings to link cumulative effects with treaty rights. This is likely to have an impact on regulatory risks where similar claims may be made.

More recently, governments, including Ontario, have incorporated the 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. While the substantive duty rests with the Crown, an Ontario court has held that where an Aboriginal rights claim is toward the light end of the consultive spectrum, the Crown can rely on statutory planning processes to fulfil its duty to consult. Further, under Ontario's *Provincial Planning Statement* and the *Planning Act*, planning authorities are mandated to engage with Indigenous communities and encouraged to develop co-operative relationships.

Earlier this year, the Federal Court released its decision in *Kebaowek First Nation v. Canadian Nuclear Laboratories*, which is one of the first decisions to outline how UNDRIP may be utilized as an interpretive aid, particularly with respect to the standard of "free, prior and informed consent" ("**FPIC**") found in several articles of UNDRIP. The Federal Court held that UNDRIP functions as an interpretive lens to assess whether the Crown has fulfilled its obligations prescribed at law. For example, in the context of the duty to consult, the Court held that Canada's adoption of UNDRIP requires more than the mere application of the common law duty to consult obligations. With regard to FPIC, the Court held that it is not a veto or a right to dictate outcomes, but rather a right to a robust process. The Court found that FPIC requires robust processes tailored to consider the impacted Indigenous Nation's laws, knowledge and practices, and employs processes that are directed towards finding mutual agreement.

WASTE AND RECYCLING

The storage, transfer and disposal of hazardous and non-hazardous waste are primarily regulated at the provincial level, with some federal involvement in certain circumstances, such as controlling transboundary movements of hazardous waste and recyclables. Municipalities are responsible for the collection, recycling, composting and disposal of household waste. Development of new waste facilities, such as landfills, can be controversial and subject to significant review and public consultation. In Ontario, environmental regulation of new waste facilities is largely governed under updated sections of the EAA.

Most provinces and territorial 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, have adopted a "producer responsibility model" where producers are 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. In Ontario, waste diversion is overseen by the Resource Productivity and Recovery Authority ("**RPRA**"). Under the producer responsibility model in Ontario, producers are fully responsible for municipal hazardous waste (e.g., paint, antifreeze and batteries), electrical waste (e.g., computers, televisions and stereos), used tires and blue box materials, including paper, plastic, glass and metal. Blue Box services are transitioning; producers will be fully responsible for these services by the end of January 1, 2026.

The *Resource Recovery and Circular Economy Act, 2016*, along with various regulations, provides the RPRA the statutory means of ensuring compliance with its regulatory schemes. Regulated parties that fall under these statutes must follow their regulations. In the event of non-compliance, the RPRA has the authority to impose Administrative Monetary Penalties as an alternative to court proceedings. While these penalties cannot exceed $1 million, they may still be substantial and are intended to ensure a regulated party cannot gain a competitive market advantage by opting for non-compliance. Examples of contraventions that might attract administrative penalties include failure to meet resource recovery performance targets, failure to respond to information requests, failure to submit reports on time, or submitting incomplete, inaccurate or misleading information.

Several jurisdictions have mandated goals to reduce waste to specified targets providing new opportunities for innovation. The federal government has introduced ambitious plans to reduce food waste and plastic waste, for instance. Within waste diversion processes and regulations, failure to register, file and remit payments can lead to fines. Regulation of recycling and waste diversion is expected to increase.

In British Columbia, the *Recycling Regulation* (B.C. Reg. 449/2004) under the *Environmental Management Act* provides a framework for producers to implement Extended Producer Responsibility ("**EPR**") programs. EPR refers to a system that regulates the life cycle management of certain products, including recycling (Government of British Columbia, 2024). The *Recycling Regulations* sets out specific responsibilities for producers (sections 3-8), outlines steps for product expansion and provides guidance for the management of regulated products (section 13).

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.

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.

The *Competition Act* has criminal and civil regimes. Under both sets of provisions, directly or indirectly promoting the supply or use of a product which is false or misleading in a material respect is reviewable and can lead to substantial fines for deceptive marketing. To determine whether a claim is misleading, courts will consider the "general impression" conveyed, as well as the claim's literal meaning. Further, under the civil regime, any "green" marketing claim must be supported by concrete evidence obtained through adequate and proper testing.

Companies should be aware of Canada's guidelines for environmental claims greenwashing, updated in December 2021, addressing the *Competition Act*, the *Consumer Packaging and Labeling Act*, and the *Textile Labelling Act*, and their associated regulations. The guidelines clarify that the Competition Bureau will take action to combat false, misleading or unsubstantiated environmental claims. . They also offer best practices for businesses to avoid greenwashing in their ads, slogans, logos and packaging that are backed up be adequate evidence and data.

On June 24, 2024, Bill C-59 received royal assent, amending certain sections of the *Competition Act*. These changes include improvements to the deceptive marketing practices provisions and expressly classify greenwashing as reviewable conduct (section 74.01(1)). Effective June 20, 2025, private litigants will be able to bring applications under section 103.1(1) to seek leave from the Competition Tribunal to address reviewable conduct under section 74.1.

LAND DEVELOPMENT AND CONSERVATION

Developers frequently address 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.

In an attempt to address the need for housing, Ontario has sought to introduce changes to the planning framework in Ontario, impacting 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. The province 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 in all cases where ministerial zoning order powers are used. Additionally, new regulations have exempted conservation authority permits from formal application requirements when regulatory requirements are met. This change mirrors similar changes in other environmental spheres, such as the management pollution releases and species at risk. Conservation authorities can only make regulations for land actually owned by the authority in question. Furthermore, the conditions attached to conservation authority permits have been further reduced.

The *Conservation Authorities Act* was amended in 2024. Notable amendments include restricting authorities from making regulations related to lands not owned by the authority, reducing the number of prohibited activities that require permits, and introducing new exceptions and limits on the conditions an authority may attach to a permit.

In April 2024, Ontario Regulation 41/24: *Prohibited Activities, Exemptions and Permits* came into effect, revoking 36 existing conservation authority regulations and consolidating them into a single ministerial regulation governing prohibited activities, exemptions and permits under the Act. The changes are designed to streamline approvals under the Act, with a focus on natural hazards, and to improve clarity and consistency in decision-making.

The new regulation refines where development is prohibited. It updates the definition of "watercourse" and adjusts the scope of development restrictions around wetlands. Certain low-risk development activities will be exempt from requiring permits from the conservation authority.

The approved regulation also restricts the conditions conservation authorities are authorized to attached to permits. Conditions imposed by conservation authorities must be directly related to mitigating the impact of natural hazards or any public safety risks arising from natural hazards and must be necessary to support the permit's administration or implementation (e.g., reporting and compliance requirements).

Finally, new rules have been introduced to ensure that conservation authority permits are administered transparently and consistently. These rules require, among other things, that conservation authorities create publicly available maps, updated annually, showing areas where permits are required; refrain from requesting additional studies or technical information after an application is confirmed complete; and issue an annual report on permitting statistics.

Contrary to the prevailing provincial trend, the Ontario government reversed its prior decision to open a significant parcel of protected lands within the province's Greenbelt for housing development. Developers will not be compensated for lands that will be returned to the Greenbelt through legislation.

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ESG

Doing Business in Canada

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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:

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.

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.

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.

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.

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.

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.

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 and on April 23, 2025, the CSA paused its proposed reforms to Form 58-101F1 *Corporate Governance Disclosure*, indicating it expects to revisit the project in future years.

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.

Involvement of Indigenous Peoples

Many reporting frameworks view a company's ability to engage with Indigenous stakeholders and address their concerns as just one aspect of its overall ESG practices, ancillary to its broader ESG strategies. However, it is becoming increasingly understood that the integration of Indigenous peoples and the prioritization of their generational knowledge, practices and ingrained values regarding sustainability are crucial for ensuring a company's ESG initiatives are meaningful, robust, resilient and successful for all stakeholders involved. As noted by the Coalition for the Human Rights of Indigenous Peoples, "Indigenous peoples have long maintained ways of life and systems of law that embody principle and values which are now being described as 'sustainable development."[3]

The Truth and Reconciliation Commission of Canada's Calls to Action includes a call for corporate entities to do their part in advancing reconciliation with Indigenous peoples by adopting the United Nations Declaration on the Rights of Indigenous Peoples ("**UNDRIP**") as a reconciliation framework. This entails applying its principles, norms and standards to corporate policies and core operational activities involving Indigenous peoples, their lands and resources.[4]

At a corporate level, implementing UNDRIP can take multiple forms, and the meaningful participation of Indigenous peoples in an organization's decision-making and operations can vary depending on the specific needs and circumstances of each Indigenous community. Generally, companies should strive to implement the following:

Meaningful Consultation on Projects: Under the UNDRIP, project approvals generally require meaningful consultation with affected Indigenous communities. This process should accommodate any impacts on their rights and interests and consider Indigenous knowledge. Consultation should be a two-way dialogue with Indigenous communities aimed at minimizing the impacts of the project on each Indigenous community and exploring the opportunities that are created by the involvement of Indigenous communities. Furthermore, consultation should be an ongoing matter beyond obtaining initial approvals for such projects. Maintaining a meaningful dialogue ensures that the evolving needs of surrounding Indigenous communities are continuously identified and met.[5]

3 See declarationcoalition.com for the Coalition for the Human Rights of Indigenous Peoples' statements regarding the involvement of Indigenous Peoples in sustainability-related matters and issues.

4 Truth and Reconciliation Commission of Canada: Calls to Action | Canadian Religious Conference (crc-canada.org)

5 Environmental, Social and Governance Project and Indigenous Peoples Engagement Report (statcan.gc.ca)

Hiring Indigenous Peoples and Decision-Makers: The retention of Indigenous peoples as employees, whether on the site of projects that affect Indigenous communities or elsewhere, can ensure that an organization meaningfully contributes to the economic advancement of Indigenous peoples and, by extension, Indigenous communities. Engaging Indigenous peoples in decision-making capacities, whether as directors or otherwise, can ensure that Indigenous values and generational wisdom, particularly those concerning sustainability matters, are truly respected in an organization and engrained in a company's operations and business practices.[6]

Encouraging Indigenous Investment: Retaining Indigenous investment in projects has been identified as a meaningful step towards reconciliation by multiple third-party Indigenous-led organizations on account of the consequent economic benefits for Indigenous communities. By encouraging investment in projects by Indigenous peoples, whether through Indigenous capital institutions or other means, companies can satisfy the Truth and Reconciliation Commission's calls to action to advance reconciliation efforts in the private sector while also attracting additional capital for applicable projects and ongoing operations.[7]

THE REPORTING LANDSCAPE

Mandatory Reporting Requirements

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 January 1, 2024, the *Fighting Against Forced Labour and Child Labour in Supply Chains Act* (the "**Act**") came into force. In summary, the Act sets out new import bans and requires federal

6 FNMPC_Conference_Overview_v6.pdf

7 FNMPC_Conference_Overview_v6.pdf

government institutions and a broad range of other public and private companies[8] – 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.[9] Ultimately, the entities that are required to report under the Act must file an annual report with the Minister of Public Safety and Emergency Preparedness and publish the same on a prominent place on its website on or before May 31 of each year.

Regardless of their obligation to report under instruments such as the Act, 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 the Act, 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.

Climate-Related Risks and Measures

In March 2023, the Office of the Superintendent of Financial Institutions ("**OSFI**") published Guideline B-15: Climate Risk Management ("**Guideline B-15**"), setting out its expectations for the management and disclosure of climate-related risks[10] by over 350 federally regulated financial institutions in Canada ("**Institutions**"). Specifically, Guideline B-15 requires Institutions to report on the climate-related risks identified by the Institution and any governance mechanisms[11] implemented by the Institution to address such risks. For domestic systemically important banks and internationally active insurance groups headquartered in Canada, Guideline B-15 will be effective fiscal year-end 2024. For all other Institutions required to adhere to Guideline B-15, OSFI has noted that Guideline B-15 will become effective at fiscal year-end 2025. Once Guideline B-15 becomes effective, Institutions must publish the applicable disclosures on their websites no later than 180 days after fiscal year-end and must publish their relevant disclosures on an annual basis, at minimum (the Institution may choose to report on its climate-related risks more frequently on a voluntary basis).

8 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 the Act. 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 $20 million in assets; (ii) has generated at least $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 the Act, which have not yet been released, will be required to report under the Act. The Act 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 the Act, will be required to report on the activities of these subsidiaries).

9 The report must set out a number of matters in relation to the entity's prior fiscal year, including: (a) the steps taken by the organization to reduce and prevent the risk of forced labour or child labour being used in the organization's business and supply chains; (b) the organization's structure, activities and supply chains; (c) the organization's policies and due diligence processes in relation to forced labour and child labour; (d) 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; (e) any measures taken to remediate any forced labour or child labour; (f) 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; (g) the training provided to employees on forced labour and child labour; and (h) how the organization assesses its effectiveness in ensuring that forced labour and child labour are not being used in its business and supply chains.

10 Guideline B-15 identifies three types of climate-related risks: physical risks (i.e. financial risks that arise from the increasing severity and frequency of climate-related extremes and events, longer-term gradual shifts of the climate, and indirect effects of climate change), transition risks (i.e. financial risks related to the process of adjustment towards a low-greenhouse gas economy, which can emerge from current or future government policies, legislation and regulations to limit greenhouse gas ("**GHG**") emissions, or new technologies, changes in market and consumer sentiment with respect to a low-GHG economy), and indirect risks (the risk of climate-related claims under liability policies, litigation and direct actions against Institutions for failing to manage climate-related risks).

11 Guideline B-15 requires Institutions to report on its climate-related governance (i.e. information on the Institution's board of directors' oversight of climate-related risks and opportunities, and management's role in assessing such climate-related risks and opportunities), strategy (i.e. information on the climate-related risks and opportunities the Institution has identified over the short-, medium- and long-term; the impact of climate-related risks and opportunities on the Institution's businesses, strategy and financial planning; the Institution's climate transition plan; and the resilience of the Institution's strategy, taking into consideration different climate-related scenarios, including a scenario which limits warming to the level aligned with the latest international agreement on climate change, or lower), risk management (i.e. information on the Institution's process for identifying and assessing climate-related risks; the Institution's processes for managing climate-related risks; and how processes for identifying, assessing and managing climate-related risks are integrated into the Institution's overall risk management), and metrics and targets (i.e. information on the metrics used by the Institution to assess climate-related risks and opportunities in line with its strategy and risk management process; the Institution's Scope 1 and Scope 2 GHG emissions; the Institution's Scope 3 GHG emissions; the targets used by the Institution to manage climate-related risks and opportunities, and the Institution's performance against these targets; and any prudential cross-industry and industry-specific metrics).

Voluntary Reporting Frameworks

With the exception of supply chain reporting for certain government and private entities and climate-related risk reporting for financial institutions, 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.[12]

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 came 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.[13] 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.[14] The CSSB is currently in the process of adapting the ISSB standards within Canada, and has sought feedback from the general public on its proposed methodology for adapting these standards.

12 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.

13 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].

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

Potential Forthcoming Reporting Obligations

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**"). However, also on April 23, 2025, the CSA paused its efforts to consider and finalize NI 51-107, indicating it expects to revisit the project in future years.

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 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.[15]

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:

Green Bonds: Green bonds are debt securities issued by companies to fund sustainable projects or investments and have attracted 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.[16]

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.

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.

15 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.

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

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.

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 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.

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.

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 tax incentives set out in the Canadian government's 2024 federal budget ("**Budget 2024**"). Budget 2024 delivered on the Canadian government's previously expressed intention to establish the Clean Hydrogen Investment Tax Credit (the "**CH Tax Credit**"), which provides a tax credit of up to 40% of the costs associated with the purchase and installation 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 2024 also maintained the existing Clean Technology Investment Tax Credit (the "**CTI 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. Additionally, Budget 2024 maintained that the eligible activities qualifying for reduced tax rates for zero-emission technology manufacturers include certain nuclear manufacturing and processing activities. The budget provided additional design details related to the existing tax credit for carbon capture, utilization and storage. Furthermore, Budget 2024 expanded the CTI Tax Credit to include the cost of investments in eligible property primarily used (50% or more of the production value) to produce qualifying critical minerals. It also included certain other adjustments to provide greater clarity to businesses involved in polymetallic extraction and processing.

Finally, Budget 2024 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;
- an increased focus on biodiversity;
- an enhanced understanding of the importance of diversity beyond gender; and
- the increased use of sustainability finance mechanisms.

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BANKING

Chartered Banks

Canada's banking system has 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 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, large, well-capitalized and have significant international interests. Canada was a signatory to the Basel Accord and the major banks have all exceeded the minimum capital and liquidity requirements established under Basel III.

In addition to the six banks noted above, there are approximately 29 other domestic banks (collectively referred to as "**Schedule I Banks**"). There are also approximately 14 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 subsidiaries. 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 exceptions), or lending branches, which have more limited powers and are more suited to cater to the borrowing needs of 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 dealers, insurance companies and trust companies) have largely been dismantled. Canadian banks now have significant ownership stakes in the brokerage industry, the insurance industry and the trust industry. More recently, Canadian banks have also been allowed to invest in the financial technology sector.

Other Financial Institutions and Alternate Forms of Financing

Almost one in four Canadians use credit unions. 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 insurance companies and pension funds, provide long-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, provide some 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 real estate. 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*. The provinces and territories also have separate regimes for real property security. Several provinces 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, though it is the most common means of perfection of a security interest.

BANKRUPTCY, INSOLVENCY AND REORGANIZATION

Introduction

In Canada, legislative jurisdiction over matters involving debtors and creditors is shared among the federal government and the provincial and 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 proceeding 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 federal *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 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 typically do not 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 a 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 may also have a receiver appointed on equitable grounds under provincial law. Provincial securities regulators may also have statutory powers to appoint receivers over publicly traded debtors.

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 or substantially 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 10 days' 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 foregoing duties), a 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-appointed receiver is an independent officer of the court and is subject to the direction of the court, not of the secured creditor. A court-appointed 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 court's 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 under the BIA appointing a receiver (or an interim receiver, as discussed below) 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, which has been 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; and 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 as a DIP financing and as a 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 any 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 under a proposal, 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 $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, 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. Under the CCAA, the relief available during the initial 10-day stay period is limited 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 CCAA order will often authorize DIP financing (and create a super-priority charge in respect thereof) and permit preferential payments to critical suppliers. Initial relief in respect of DIP financing is limited 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 it is deemed necessary to ensure 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 the applicable provincial corporate statute.

The CCAA 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 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:

- 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's or trustee's possession, identifiable, in their original state and have not been sold or contracted for sale;
- 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; and
- 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; (iii) any defined employer contributions; and (iv) special payments and actuarial wind-up deficiencies.

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 protections for defined benefit pension plan special payments and actuarial wind-up deficiencies in receiverships also applies 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:

- the fees and expenses of the debtor's counsel and of the monitor and its counsel (the "**Admin Charge**");
- any DIP financing; and
- 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 are 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 then continues on as a solvent entity.

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

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 such 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:

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

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.

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

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

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.

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 less than those of a U.S. proceeding.

May 2025

Foreign Investment and Merger Regulation

2025 EDITION

Doing Business in Canada

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REGULATION OF FOREIGN INVESTMENT

The *Investment Canada Act* (the "**ICA**") applies when a "non-Canadian" (a non-Canadian-controlled entity or natural person) establishes a new business in Canada or acquires, either directly or indirectly, control of a Canadian business. Direct acquisitions of control that exceed annual 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 of the Department of Innovation, Science and Economic Development ("**ISED**") is satisfied that the investment "is likely to be of net benefit to Canada." Certain amendments to the ICA, primarily related to the scope of national security reviews and maximum penalties, came into effect on September 3, 2024 and are discussed in the relevant sections below. Additional amendments are anticipated to come into force upon further consultation and changes to the ICA's regulations.

Review Thresholds: WTO Transactions

By reason of the Agreement Establishing the World Trade Organization ("**WTO**") between Canada and certain other countries (there are currently 166 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 in non-cultural businesses or by investors other than state-owned enterprises ("**SOE**"), which are addressed below, is $1.386 billion in "enterprise value" for 2025.

The review threshold is even higher for specified "trade agreement investors," set at $2.079 billion in enterprise value for 2025. This higher review threshold applies to European Union investors falling under the Comprehensive Economic and Trade Agreement between Canada and the European Union as well as to other Free Trade Agreement ("**FTA**") investment partners benefiting from Canada's Most-Favoured-Nation trade commitments, namely the United Kingdom, United States, Mexico, Chile, Colombia, Panama, Peru, Honduras, South Korea, Japan, Singapore, New Zealand, Australia, New Zealand, Brunei and Vietnam.

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).

Factors

Where a proposed investment is reviewable, the Minister (or the Minister of Canadian Heritage in the case of "culturally sensitive" businesses) will approve the investment if it 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 are designed to satisfy the net benefit to Canada criteria.

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 $5 million for direct investments or $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. "Culturally sensitive" businesses include the publication, distribution and sale or exhibition of books, magazines, periodicals, newspapers, films, audio recordings, videos and music. These acquisitions are subject to review where the book value of acquired assets exceeds $5 million. Indirect acquisitions of control are subject to review by the Minister of Canadian Heritage where the book value of the acquired assets exceeds $50 million. The federal Cabinet also 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 an SOE investor in 2025 is based on the book value of the assets of the acquired Canadian business exceeding $551 million. The threshold is subject to an annual index. Indirect acquisitions of control by WTO SOE investors remain exempt from review, but are still subject to notification.

The Canadian government has issued guidelines on the additional considerations that the Minister 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 (including, for example, export destinations, the degree of participation by Canadians in its operations in Canada, the support for innovation, research and development in Canada).

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 that 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).

Notification of Non-Reviewable Investments

In view of the above-noted high monetary thresholds that 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. A notification may be filed up to 30 days after closing and must include a description of the Canadian business being established or acquired; details relating to the investor's officers, directors and shareholders; sources of financing for the proposed investment; the estimated enterprise or book value of the investment; and whether the investor is owned, controlled or influenced, directly or indirectly, by a foreign government.

A notification must be 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 also marks the start of the initial 45-day period during which any investment can be reviewed under the national security provisions in Part IV.1 of the ICA (see below).

National Security Reviews

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, Part IV.1 applies even to minority investments where there is no "acquisition of control" of a Canadian business.

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 more than 200 days and can be extended with the consent of the investor.

On March 5, 2025, revisions to the *Guidelines on the National Security Review of Investments* (the "**Guidelines**") were published by ISED to reflect the changes brought by the 2024 amendments to the ICA, discussed further below. Broadly, the Guidelines provide information about the procedures that will be followed in the administration of the national security review process under Part IV.1 of the ICA. The Guidelines set out a non-exhaustive list of 12 factors the government may consider as they relate to national security. The focus of these factors is on core areas including defence, technology, critical minerals, critical infrastructure, intelligence gathering and enforcement and access to sensitive personal data.

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 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.

The *National Security Review of Investments Regulations* provides a channel for parties to achieve transactional comfort: a voluntary pre-clearance filing mechanism for investments not otherwise subject to the mandatory notification requirements, namely non-controlling and other minority investments. In such circumstances, a non-Canadian may choose to voluntarily provide the requisite information to determine whether their investment may be subject to national security review. Following a party's voluntary filing, the Minister has an initial 45 days to determine whether it will pursue a national security review, subject to an additional right to extend this period by a further 45 days.

Where a non-Canadian investor elects not to file under the above-noted voluntary filing mechanism, the Minister retains the right to commence a national security review up to five years after the implementation of the investment. The filing path chosen depends on the investor's preference as some parties may prefer the regulatory certainty of a voluntary filing as opposed to the continued exposure of an impending review for five years.

Irrespective of the mechanism chosen, the Guidelines strongly encourage, particularly where an investor is an SOE (or subject to state-influence), or in cases where the above-noted 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 and at least 75 days prior to commercial closing where an application of net benefit review is required."

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 at least 45 days prior to closing if the transaction circumstances permit such a step to be taken.

Recent Amendments to the *Investment Canada Act* Relating to National Security

In March 2024, the Government of Canada introduced significant reforms to the ICA with the passing of the *National Security Review of Investments Modernization Act* ("**Bill C-34**"). Bill C-34 signaled Canada's robust approach to national security enforcement as well as its continued efforts to more closely align with the national security regimes of its allies such as the United Kingdom and United States.

Bill C-34 is being implemented in a phased approach. The following provisions came into force on September 3, 2024:[1]

- authority for the Minister to extend the national security review of investments an additional 45 days;
- authority for the Minister to impose conditions during a national security review;
- authority for the Minister to conclude national security reviews by accepting undertakings to mitigate national security risk;
- improved information sharing with international counterparts;
- new rules for the protection of information during the course of judicial review;
- clarification on the net benefit review factors; and
- clarification of the transparency of the national security review process.

The following provisions require regulatory amendments and will come into force at a future date (which has not yet been proclaimed):

- a new filing requirement prior to the implementation of investments in "sensitive sectors";

1 https://ised-isde.canada.ca/site/investment-canada-act/en/investment-canada-act/modernization

- stronger penalties for non-compliance;
- new ministerial authority to review any state-owned enterprise investment for net benefit;
- clarification that the ICA's national security review applies to acquisition of assets; and
- advancement of a national security review to the section 25.2 stage for corruption convictions.

The amendments are intended to more effectively detect national security risks while improving enforcement methods against these risks. As noted above, specific investments in "prescribed business sectors" will be subject to a mandatory pre-closing filing, even where the investment falls below the threshold for a net benefit review. While the regulations precisely defining the contents of a "sensitive sector" have yet to be published, a non-exhaustive list of potential sensitive sectors (based on areas identified by government officials during Study of the Bill) foreseeably include the following: advanced materials and manufacturing, advanced ocean technologies, advanced sensing and surveillance, advanced weapons, aerospace, artificial intelligence, biotechnology, energy generation, storage and transmission, medical technology, neurotechnology and human-machine integration, next-generation computing and digital infrastructure and space technology.

A proposed investment in a sensitive sector will be prohibited from closing for an undisclosed period. Where an investor fails to comply with this mandatory review notification, penalties of up to $500,000 are applicable. Bill C-34 also bolsters the government's compliance powers, increasing the maximum monetary penalties for non-compliance up to $25,000 per day.

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 as the acquisition or establishment, direct or indirect, by one or more persons (whether Canadian or non-Canadian), whether by purchase or lease of shares or 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 Under the Act

Under Part IX of the *Competition Act*, the parties to transactions of specified size must notify the Commissioner prior to completing a merger transaction. While the Commissioner may review all mergers irrespective of size, the *Competition Act* requires notification of a proposed transaction if both a parties size threshold and a "size of the target" threshold are exceeded.

The parties size 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 $400 million. The "size of the target" threshold is exceeded when the target corporation (or the entity formed in the case of an amalgamation/combination) has assets in Canada or revenues from sales "in, from or into" Canada exceeding $93 million, which continues to be the threshold for transactions closing in 2025.

In the case of mergers involving the acquisition of shares over the target threshold, the acquiring person, together with its affiliates, must 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.[2]

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 the regulations ("**pre-merger notification**") before completing the merger.

Among the information that must be provided as part of a pre-merger 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 under the U.S. pre-merger notification rules.

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 in lieu of filing a pre-merger notification. The issuance of an ARC certifies that the Commissioner is satisfied that the proposed merger will not prevent or lessen

2 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.

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 pre-merger notification requirements which otherwise may apply. Upon issuing an ARC, the Commissioner cannot challenge 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.

In the absence of an ARC (or a no-action letter in the alternative), a notifiable merger transaction may proceed upon the expiry of the 30-day waiting period following the filing of a pre-merger notification, unless the Commissioner applies to the Tribunal to prevent the proposed transaction from proceeding where the Commissioner believes that substantive competition issues will arise from the proposed transaction (see below). The 30-day waiting period can be extended by the Competition Bureau through the issuance of a supplementary information request, or SIR, within 30 days of the original filing, in which case a further 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."

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 ("**AMPs**") of up to $10,000 per day may be assessed for non-compliance.

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, as are certain acquisitions of real property or goods in the ordinary course of business under specified conditions.

Challenges Before the Competition Tribunal

The Commissioner may, by application made to the Competition Tribunal (the "**Tribunal**"), challenge a proposed merger (or any substantially completed non-notifiable merger within three years 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*

Bill C-19 (*Budget Implementation Act, 2022*)

On June 23, 2022, amendments to the *Competition Act* received royal assent as part of Bill C-19, the *Budget Implementation Act, 2022*. Certain amendments have significance to the Competition Bureau's merger review analysis. In particular, an anti-avoidance provision expressly states that the pre-merger notification requirements under the *Competition Act* will apply to any transaction or proposed transaction "designed to avoid" the pre-merger notification regime. Moreover, Bill C-19 has 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 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."

Bill C-19 also introduced significant amendments to the *Competition Act* impacting commercial and employment practices. Amendments to section 45(1.1) of the *Competition Act* which came into force as of June 23, 2023, introduce criminal prohibitions against-wage fixing and no-poaching agreements. Section 45(1.1) deems a criminal offence for two or more employers to agree to fix salaries/wages or terms and conditions of employment, or to agree not to poach each other's employees. The prohibition is limited, however, to *reciprocal obligations* between employers not to solicit or hire *each other's* employees. Moreover, the prohibition only applies to agreements between *unaffiliated* employers.

Bill C-56 (*Affordable Housing and Groceries Act*)

Bill C-56 has upended what was heretofore a relatively static legislative landscape in Canadian competition law. The significant amendments to the *Competition Act* in Bill C-56 include market study powers for the Commissioner of Competition, expanded competition collaboration provisions, repeal of the efficiencies exceptions for anti-competitive mergers and collaborations, revisions to the legal test for abuse of dominance, amendments to the legal test addressing business collaborations with an anti-competitive purpose and increased financial penalties.

Market Study Powers

Newly enacted market study powers give the Commissioner a broad ability to compel production, by way of a court order, of information disclosure under section 11 of the Act, ranging from requiring market participants to submit to oral examinations under oath to providing specific data and records. The Commissioner does not need a reason to initiate a market study, other than the action being in the public interest. Therefore, a market study may be initiated even if there are no grounds for the existence of anti-competitive conduct.

Competitor Collaborations

Bill C-56 has also expanded the competition collaboration provisions in section 90.1 of the Act to include "civil collaborations" amongst non-competitors. This amendment came into force on December 15, 2024, and expanded the existing competitor collaboration provisions, which previously only applied to *agreements* between competitors. Under the amendments, the Commissioner is able to issue conduct orders with respect to any breach, even where the entities have not entered into any form of agreement or arrangement. Further, the amendments stipulate that section 90.1 may apply to entities' past conduct.

Repeal of the Efficiency Defence

Prior to Bill C-56, section 96 of the Act provided that the Commissioner may not prevent a merger where the proposed efficiencies of the merger would be greater than and offset any potential anticompetitive effects. The efficiencies defence was widely criticized amongst scholars as a 'loophole' for the passage of anticompetitive mergers.

Abuse of Dominance

The amendments also vastly expanded the scope of conduct covered under the Act's abuse of dominance provisions. Previously, section 79 stipulated that an abuse of dominance may be found where a dominant firm engaged in both "anticompetitive acts" *and where* "the practice had, or was likely to have, the effect of substantially lessening competition." However, the new amendments have effectively made the above requirement disjunctive, allowing for an abuse of dominance to be found where a dominant firm *either* engaged in anticompetitive acts *or* as a result of their conduct, engaged in activities that had, or were likely to, substantially lessen competition.

Bill C-56 raises the AMPs for a finding of abuse of dominance from $25 million for an initial offence to $35 million for subsequent offences. Both components of section 79 must be present for an AMP to be issued.

Bill C-59 (*Fall Economic Statement Implementation Act, 2023*)

Bill C-59 was tabled as part of Parliament's (2023) Fall Economic Statement, and received royal assent on June 20, 2024, coming into force that same day. Among other changes, Bill C-59 strengthens the powers of the Commissioner to review and block anticompetitive mergers, prohibits businesses from refusing to deal with another business under certain circumstances, among others. The below details the legislation's specific effects on merger review in Canada.

Bill C-59 expanded the scope of transactions falling under the $93 million "target threshold" for notifiable transactions in section 110 of the *Competition Act* to include "sales into Canada" of a Canadian operating business when calculating the transaction size. It also significantly extended the limitation period for the Commissioner to challenge non-notifiable mergers that have not voluntarily notified the Commissioner, from one year to three years. Bill C-59 also expanded the list of non-exhaustive list of factors the Tribunal can consider in deciding whether a merger harms competition, adding the following:

- network effects as another example of a barrier to entry in a market;
- the possible entrenchment of leading incumbents' market position; and
- effects on both price competition and non-price competition, such as quality, choice or consumer privacy.

Additionally, Bill C-59 repealed several sections of the *Competition Act*, including section 92(2), which prohibited the Tribunal from making an order with respect to a merger "solely on the basis of evidence of concentration or market share." The repeal of section 92(2) creates a presumption that a merger "is *presumed* to be anti-competitive if it significantly increases concentration or market share." The presumption applies if the following conditions are met:

- the competition index post-merger increases or is likely to increase by more than 100; and
- either (i) the index is or is likely to be more than 1,800 post-merger or (ii) the combined market share of the parties to the merger is or is likely to be more than 30%.

Finally, Bill C-59 prohibits parties from closing a transaction while there is an application for an "interim order" with the Bureau. This prohibition prevents the parties from closing until the application for the injunction is heard and disposed of, effectively "pausing" the clock on the applicable time period for merger reviews in certain circumstances.

June 2025

Franchising

Doing Business in Canada

AIRD BERLIS

2025 EDITION

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Franchising continues to be a growing industry in Canada, both internally from Canadian companies looking to expand and externally from international companies trying to enter the Canadian market.

Although Canada shares many cultural similarities with the United States, consumer preferences may vary greatly, even among provinces, and it would be beneficial for foreign companies looking to do business in Canada to conduct market research and testing before using franchising as a vehicle for expansion.

Franchising is the 12th largest industry in Canada and is projected to grow by four per cent from 2025, with total franchise-related GDP estimated to reach $133.3 billion in 2026.[1] The number of franchised establishments is also expected to grow slightly from last year to approximately 67,600 units by the end of 2026.[2] The largest growth is projected in Ontario, Alberta and British Columbia.[3]

Franchisors looking to franchise in Canada should be aware that provincial legislation is currently in place in six provinces: Alberta, British Columbia, Manitoba, New Brunswick, Ontario and Prince Edward Island. It is also anticipated that Saskatchewan will introduce its own franchise legislation in 2026. Although Quebec does not have specific franchise legislation, the *Civil Code of Quebec* may impose similar obligations on franchisors. While there has been discussion of introducing harmonized franchising legislation across Canada, there is currently no federal legal regime.

WHAT IS A FRANCHISE?

The statutory definition of "franchise" is exceptionally broad and is almost identical across the provinces that have franchise legislation. A franchise means a right to engage in a business where the franchisee is required by contract or otherwise to make a payment or continuing payments, whether direct or indirect, or a commitment to make such payment or payments, to the franchisor, or the franchisor's associate, in the course of operating the business or as a condition of acquiring the franchise or commencing operations and,

a) in which,

   i. the franchisor grants the franchisee the right to sell, offer for sale or distribute goods or services that are substantially associated with a trade-mark, trade name, logo or advertising or other commercial symbol that is owned by or licensed to the franchisor or the franchisor's associate, and

   ii. the franchisor or the franchisor's associate has the right to exercise or exercises significant control over, or has the right to provide or provides significant assistance in, the franchisee's method of operation, including building design and furnishings, locations, business organization, marketing techniques or training, or

b) in which,

   i. the franchisor, or the franchisor's associate, grants the franchisee the representational or distribution rights, whether or not a trade-mark, trade name, logo or advertising or other commercial symbol is involved, to sell, offer for sale or distribute goods or services supplied by the franchisor or a supplier designated by the franchisor, and

   ii. the franchisor, or the franchisor's associate, or a third person designated by the franchisor, provides location assistance, including securing retail outlets or accounts for the goods or services to be sold, offered for sale or distributed or securing locations or sites for vending machines, display racks or other product sales displays used by the franchisee ("franchise")[4]

It is important that companies operating in these provinces be mindful of whether their business relationship could be deemed a franchise.

Franchising comes in many forms and is not limited to the traditional fast-food restaurant concept many people associate with it. In fact, various business relationships that the parties never intended to be franchises may fall under provincial legislation.

There are two main types of franchising in Canada: (1) business format franchising and (2) product franchising. Both types involve the grant of a right by the franchisor to the franchisee, along with the obligation of the franchisee to make a payment or ongoing payments to the franchisor.

The most common structures that occur in business format franchising, which often involves licensing certain trademarks, training on the franchisor's methods of operation and enforcement of system standards across the network, are as follows:

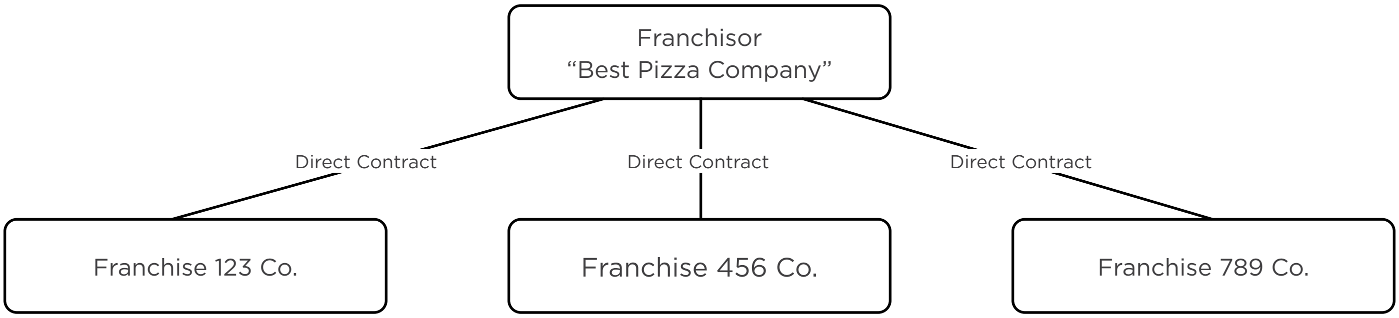
1 Canadian Franchise Association, Canadian Franchise Industry Economic Outlook 2025, April 2025, Executive Summary.

2 Ibid.

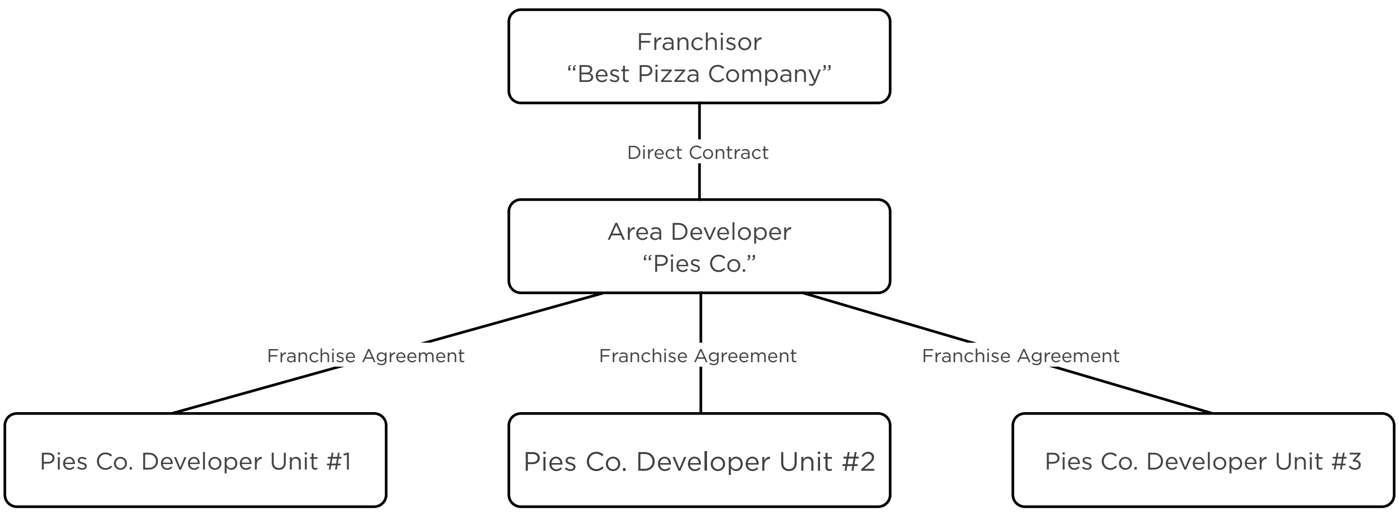
3 Ibid.

4 Section 1(1) definition of "Franchise" pursuant to the Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000, c. 3 | ontario.ca.

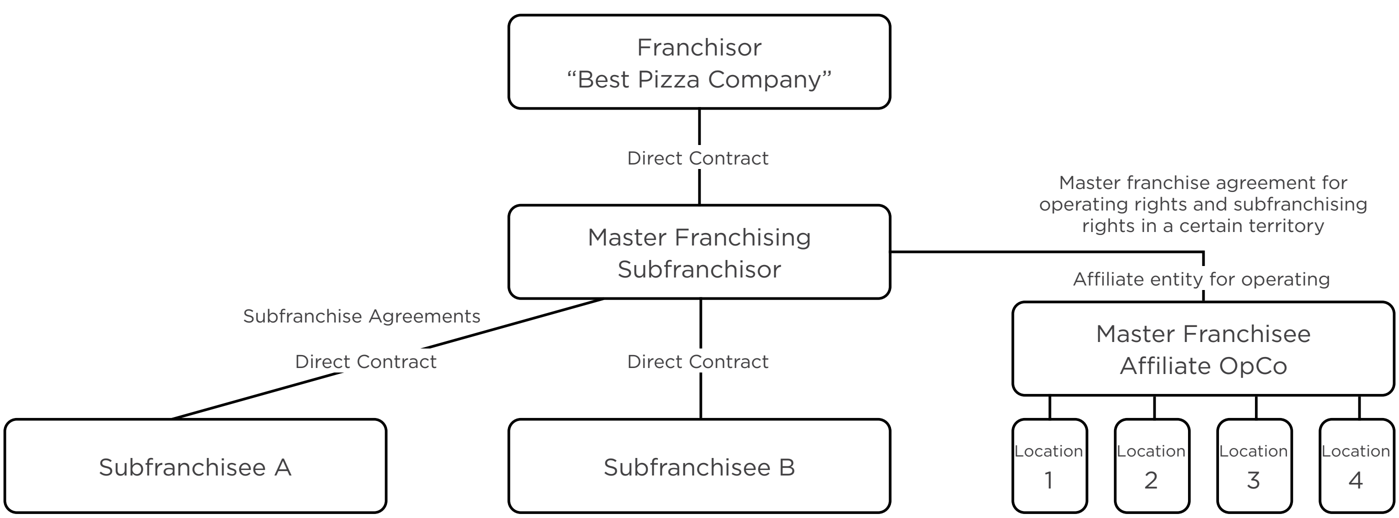
Unit franchising involves a direct contractual relationship between the franchisor and a franchisee for the license and grant to operate a single location.



Area development franchising involves the franchisor granting a franchisee a specific territory or region in which they have the right to develop, build and operate a certain number of locations.



Master franchising involves the franchisor granting a franchisee rights to both operate individual locations themselves (or through an affiliate) and subfranchise locations to third parties within a specific territory and for a specified number of locations.



Some common structures in product franchising in Canada are as follows:

Trademark licensing arrangements for goods and services involve a franchisor granting a franchisee the right to sell certain products and services under specific trademarks or trade names, but without necessarily prescribing a method of operation.

Product distribution arrangements for goods and services involve a franchisor granting a franchisee the right to sell products and services without a specific trademark, trade name or brand affiliation.

Significantly, the courts have held that the parties' intention will not be considered in determining whether a business relationship constitutes a "franchise" under applicable provincial legislation. As well, parties cannot "contract out" of being deemed a franchise, even if their agreements contain express language to that effect, because a franchisee's rights under franchise legislation cannot be waived. Instead, based upon a case by case determination, the court looks to see whether or not the franchisor had exercised significant control or had the option to exercise significant control over the franchisee's method of operation or if the franchisor provided significant assistance to the franchisee.

Certain relationships are exempt from being a "franchise" under statute, such as employer-employee relationships, partnerships, co-operatives, Crown agreements and others.

THE LEGAL FRAMEWORK

Canadian franchise legislation is remedial and designed to address the purported imbalance of power and informational gap in the franchisor-franchisee relationship. As courts typically recognize franchisors as more sophisticated and better resourced, and franchisees as less sophisticated with limited resources, Canadian courts generally interpret franchise legislation broadly in the franchisee's favour.

Broadly speaking, franchise legislation can be broken down into three main components:

- disclosure regime for franchisors;
- duty of fair dealing for both; and
- right to associate for franchisees.

DISCLOSURE

Franchisors are subject to a rigorous pre-contractual disclosure obligation. They must provide prospective franchisees with all the information necessary to make an informed decision about whether to invest in the franchise.

Franchisors must wait 14 days from delivery of the franchise disclosure document before signing a franchise agreement with a prospective franchisee or entering into any other agreements relating to the franchise, except for confidentiality or non-disclosure agreements. During this period, a franchisor is also prohibited from accepting payment from a prospective franchisee, with certain carve-outs for deposits.

A franchisor's disclosure document must include a long list of prescribed information and must also disclose all "material facts" that could reasonably be expected to have a significant impact on the value of the franchise or the franchisee's decision to acquire it.

The franchisor's obligation to disclose material facts is over and above the prescribed information already required and has been interpreted by the courts as non-exhaustive. Although there has been significant litigation over what constitutes a "material fact" for the purposes of franchise disclosure, regulators have not provided further guidance or clarity.

Given the onerous obligations imposed on franchisors to provide a fully compliant franchise disclosure document, franchisors are advised to seek legal counsel experienced in franchising to prepare a national franchise disclosure document that can be used across disclosure provinces.

Additionally, it is a best practice for franchisors to provide prospective franchisees in non-disclosure provinces with a form of franchise disclosure document. This is especially the case when a system intends to have multi-provincial franchisees that may own numerous locations.

Since the Canadian regime differs significantly from that of other jurisdictions, such as the United States, when it comes to disclosure of all material facts, it is unlikely that a foreign franchise disclosure document would be considered compliant in Canada.

A franchisor's failure to deliver a compliant franchise disclosure document, or to provide one at all, may entitle the franchisee to power statutory rights of rescission. Franchisees can claim damages under the statutory regime, which is designed to return them to the position they would have been in had they not acquired the franchise.

Unfortunately for some accidental franchisors who fall into this quagmire, rescission claims can reach into the millions of dollars and take years to resolve. Having qualified litigation counsel with specific expertise in franchising can make a significant difference.

FAIR DEALING

Franchise legislation imposes on both parties to a franchise agreement a duty of fair dealing in the performance and the enforcement of their respective obligations.

This includes the duty to act in good faith and in accordance with reasonable commercial standards. A party that fails to meet the duty of fair dealing may face a right of action for damages brought by the other.

Courts have interpreted this obligation on a case-by-case basis and in the context of the specific franchise agreement. The Canadian landscape on this duty has evolved over many years through various circumstances and widely different facts.

However, it is well established that the duty of good faith and fair dealing is meant to secure the performance of the contract at hand. It is not intended to replace the contract, rewrite its terms or imply new ones.

Parties should observe standards of honesty, fairness and reasonableness, but franchisors are not required to put a franchisee's interests ahead of their own. The duty is not freestanding; it is grounded in the contractual rights and obligations set out in the franchise agreement.

At the end of the day, there is often no bright-line test for determining whether a party has breached its duty of fair dealing. It is often easier to identify bad faith through conduct that is dishonest, oppressive or unconscionable toward the weaker party.

RIGHT OF ASSOCIATION

As the purpose of franchise legislation is to address the perceived power imbalance between franchisors and franchisees, it is unsurprising that franchisees are protected by law from penalty or interference from the franchisor for associating with each other or forming organizations.

Courts have interpreted this right to include the ability to take collective action, including bringing a class action against the franchisor.

On the other hand, this right does not go so far as to require franchisors to recognize franchisee associations. From a practical perspective, although not required, it may make good business sense for franchisors to work collaboratively with franchisee associations.

A hallmark of a healthy franchised network is open communication and transparency between franchisors and franchisees. This helps foster mutual respect and trust between commercial parties that intend to build a long-term relationship.

June 2025

Infrastructure

Doing Business in Canada

AIRD BERLIS

2025 EDITION

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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.

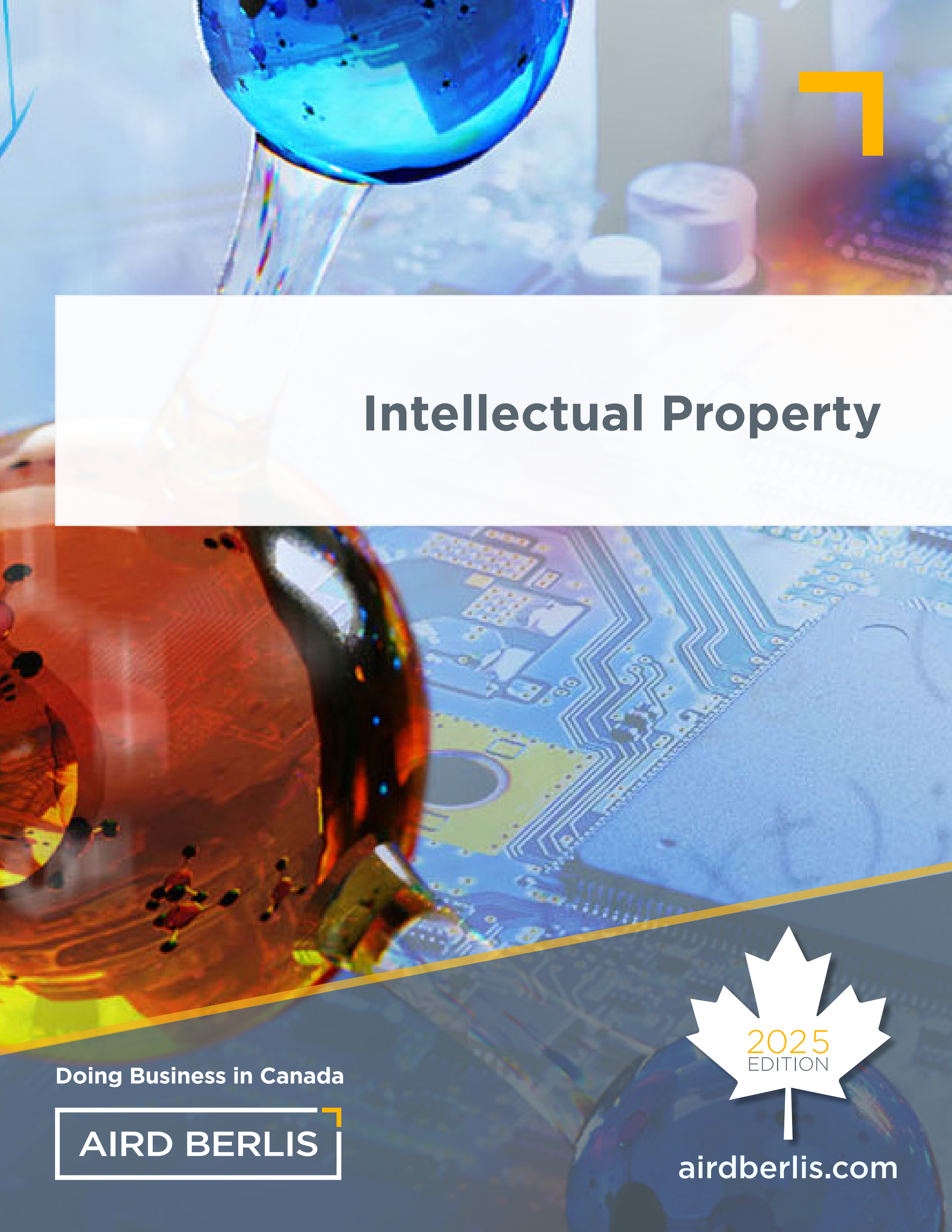
With respect to performance security, the Ontario *Construction Act* introduces standardized bonding requirements which may not conform with the "standard" requirements of PPP lenders. Accordingly, the *Construction Act* acknowledges the special financing structures of the PPP sector by exempting these 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 2025



Intellectual Property

2025 EDITION

Doing Business in Canada

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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 statues: the *Patent Act*, *Copyright Act*, *Trademarks Act* and *Industrial Design Act*. Innovation, Science and Economic Development 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 and confidential information, are governed by provincial common law and, in the province of Quebec, by the Civil Code of Quebec.

Patents

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 is a partner in PPH programs with 32 other intellectual property offices around the world.

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 the invention unless it is assigned to others. In determining whether an employee or their employer owns an invention created 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 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. 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 Courts 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 and allows the patent owner to receive the profit which the defendant made from the infringement. An 'accounting' 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 opened to the public.

Trademarks

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);
- tastes, textures, sounds and scents;
- three-dimensional shapes (the shape of products or their packaging); and
- colours (colours, coloured words, symbols and 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.

As of April 1, 2025, amendments to the *Trademarks Act* and *Regulations* grant the Registrar of Trademarks the ability to remove official marks from the Canadian Trademark Register. An official mark is any badge, crest, emblem or mark that has been adopted and used by a public authority in Canada. Unlike registered trademarks, official marks do not need to be renewed and, as such, can exist indefinitely. The wide protections afforded to official marks have made it difficult for applicants to overcome objections based on official marks. This amendment provides a less cumbersome path to challenge official marks.

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. However, priority rights in a Canadian trademark, based 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**"), are available. It is therefore usually prudent to file applications before the use or adoption of the trademark becomes publicly known.

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).

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 trademark 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. The ability to oppose a trademark application is triggered by its official publication, or "advertisement," of the trademark application in the Canadian *Trademarks Journal*. The opposition proceeding must be commenced within two months from the advertisement of the trademark.

A Canadian registration remains 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 confusingly similar trademark by another; and
- 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 key advantage 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 *Trademarks 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

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 their employment, while they remain the author of the work, the employer will generally be entitled to copyright ownership. If the creator is an independent contractor, they are the first owner of copyright unless there is 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 collectives in relation to reproduction rights. Organizations that 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 with attribution), 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 $500 and $20,000 to each infringed work infringed for commercial purposes, and between $100 and $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 internet service providers ("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 $1 million or to imprisonment for a term not exceeding five years or to both; or, on summary conviction, to a fine not exceeding $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 ISPs to block their subscribers from accessing certain websites hosting unlawful content. The 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). As of 2024, real-time dynamic site blocking has been approved by the Federal Court.

Industrial Designs

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 at 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 Secrets and Confidential Information

The most common form of intellectual property protection used by Canadian businesses 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 from 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.

Criminal prosecution and penalties may also result where a trade secret has been maliciously obtained, communicated or made available. In the criminal context, a trade secret is defined more narrowly than the broader category of confidential information as described above. In this context, a trade secret must be shown to (i) not generally be known in the relevant trade or business; (ii) derive economic value from its secrecy; and (iii) have been the subject of reasonable efforts to maintain its secrecy.

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.

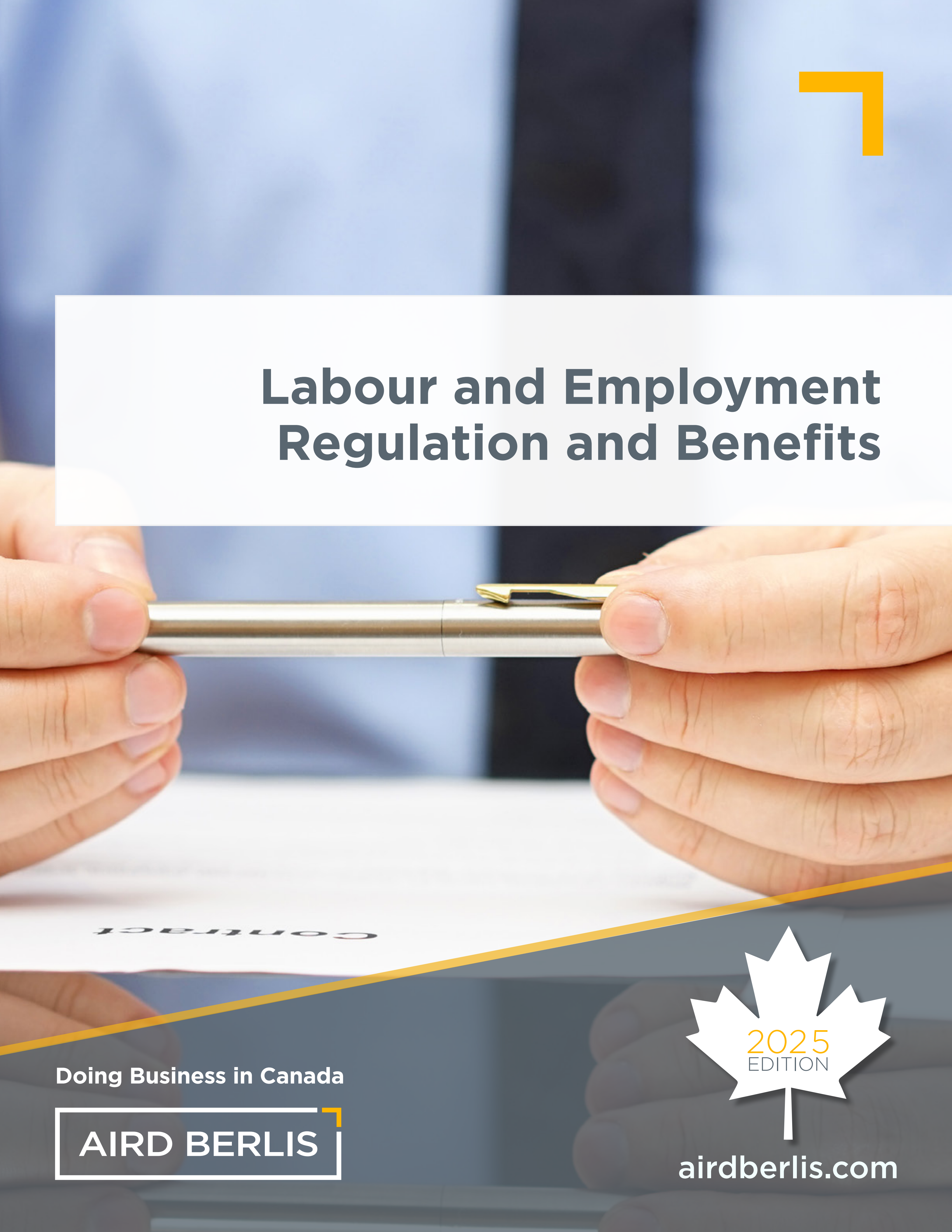
The Trans-Pacific Partnership Agreement ("**TPP**") was originally concluded on October 5, 2015, by 12 countries and was signed on February 4, 2016. On January 30, 2017, the United States notified TPP signatories of its intention to not ratify the TPP, effectively withdrawing from the TPP. As a result, 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 nearly 500 million consumers and 14.4% 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). On July 16, 2023, the CPTPP Parties signed an Accession Protocol with the United Kingdom. The CPTPP will enter into force for the U.K. once all CPTPP members and the U.K. complete their respective ratification processes.

May 2025



Labour and Employment Regulation and Benefits

2025 EDITION

Doing Business in Canada

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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 and/or transparency, 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, including the rise of remote or hybrid working relationships.

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. 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 to a maximum of eight weeks' notice. 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 discussed below, addresses the often 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 AND PAY TRANSPARENCY

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.

Further, select jurisdictions across Canada have implemented pay transparency legislation, which is distinct from pay equity/equal pay legislation. These laws vary across jurisdictions but can require employers to disclose certain information with respect to compensation in publicly advertised job postings, such as compensation ranges, or prohibit employers from making inquiries about a job applicant's current compensation or compensation with a previous employer.

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 that 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. This broad obligation has recently been confirmed by the Supreme Court of Canada.

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 co-operate 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 $500,000 for individuals (from $100,000) and $2 million for corporations (from $1.5 million). 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 $1.5 million (from $100,000).

Additionally, recent amendments to Ontario's *Occupational Health and Safety Act* have imposed a new mandatory minimum penalty of $500,000 for corporations that have been convicted of two offences involving a "serious injury," where the underlying incidents both occurred within a two-year period. However, further clarity on the interpretation and application of this new standard has yet to be provided and is likely to be established through regulation.

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. Also, 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 OHSA charges and was sentenced to a fine of $200,000. The Ontario Court of Appeal raised the fine to $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.

The federal government has recently amended its legislation to include specific anti-harassment, anti-sexual harassment and anti-violence provisions and duties.

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: in the context of a sale of a business (provided certain requirements are satisfied) 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 seven weeks' maximum insurable earnings under the *Employment Insurance Act*, minus certain prescribed amounts.

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Commercial Arbitration

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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.

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Dispute Resolution

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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.

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.

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

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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 both the federal and provincial levels, are undergoing significant changes. Recent amendments to Quebec's provincial legislation, now fully in force, provide individuals with significantly enhanced rights and impose increased 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 took 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 2024, *obligations surrounding data portability took effect*.

The Canadian federal government previously introduced draft legislation, the *Digital Charter Implementation Act*, 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* ("**CPPA**"); (ii) the *Personal Information and Data Protection Tribunal Act* ("**PIDPTA**"); and (iii) the *Artificial Intelligence and Data Act* ("**AIDA**"). This draft legislation died on the order table during the last federal election. It's not clear whether the new government will re-table this or similar legislation; however, we expect legislation similar to those proposed under the CPPA. We also expect an effort to separate the proposed CPPA and PIDPTA from those under AIDA, as the AIDA provisions faced significant industry challenges in their earlier form.

In the draft form, the CPPA 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 PIDPTA, when in force and effect, would establish an administrative tribunal to hear appeals of certain decisions made by the privacy commissioner under the CPPA and impose penalties for the contravention of certain provisions of that Act. AIDA 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.

AIDA would have mandated 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. AIDA would have also established 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. There were significant challenges to the AIDA as drafted, due in part to the vagueness of its application.

In November 2023, the federal government proposed amendments to AIDA, which we believe will be captured in some manner under new AI legislation introduced by the current government. The proposed amendments include:

- a new definition of "artificial intelligence systems" that takes after the definition of the Organization of Economic Co-operation and Development, and a new definition of "machine learning model";
- an initial list of high-impact AI systems, such as content moderation and prioritization on communications platforms (e.g., social media and search engines), employment-related decisions, biometric information processing, healthcare and emergency services and law enforcement;

- new powers for the Artificial Intelligence and Data Commissioner, such as inspections, audits and compelling companies to produce assessments required under AIDA; and
- alignment of AIDA with the European Union's *Artificial Intelligence Act* ("**EU AI Act**").

The European Union Parliament voted in favour of the EU AI Act on March 13, 2024. The EU AI Act may potentially impact Canadian companies exporting AI-enhanced regulated products or systems used in high-risk areas within the European Union. These companies will be compelled to adhere to intricate new compliance regulations. Moreover, Canadian businesses providing online services with AI components accessible to EU consumers may also be affected.

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 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 (unless the organization is federally regulated). Organizations will also have to also comply with privacy legislation in relation to its employee information for federally regulated organizations. To the extent a provincially regulated organization has employees located in the provinces of British Columbia, 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. In a recent landmark decision, the Supreme Court of Canada ruled that internet protocol ("**IP**") addresses attract a reasonable expectation of privacy. This is because they can reveal deeply personal information about individuals, including their identity, as contained in or inferred from their internet activity, particularly when combined with other information or data sets.

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 a replacement for 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 $10,000 for a summary conviction or $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. Businesses subject to PIPEDA, PIPA, PHIPA and Quebec's Act respecting the protection of personal information in the private sector (enforced by the Commission d'accès à l'information, or **CAI**) have an obligation to report a privacy breach to the regulator in their respective jurisdictions in certain circumstances. For example, organizations subject to PIPEDA and PIPA need to notify regulators 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 $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 $1 million per violation for individuals and $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.

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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, to administer and enforce the payment of land transfer tax (see discussion below regarding land transfer tax), to guard against money laundering and to address issues related to housing affordability.

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. Since October 2022, a 25% non-resident speculation tax has been 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. For example, the province introduced an enhanced rebate in 2023 to remove the provincial portion of the HST on new purpose-built rental housing, such as apartment buildings, student housing and seniors' residences, for projects that begin construction between September 14, 2023, and December 31, 2030, and complete construction by December 31, 2035.

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.

This federal Act was recently extended to January 1, 2027. 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

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, Toronto, Windsor and Vancouver apply a 3% tax on the assessed value of underused and vacant homes, regardless of the resident status of owners. The Cities of Hamilton, Sault Ste. Marie and Ottawa also have a vacant home tax, with differing rates.

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.

PROPERTY TAXES

Unless expressly exempted by legislation, all real property in Canada is subject to assessment and taxation. Each province has its own property assessment and taxation framework, whereby the assessment valuation process is generally carried out by an "assessing authority" and the taxation process is carried out by the municipality itself. The assessment value of a property will be dictated by a province's specific assessment legislation, which is usually based on the market value of the property determined as of a fixed base year date. In many cases, properties will be classified in a particular property tax class. Municipalities set tax or mill rates to be applied to the assessment values of each tax class. Property taxes are calculated by multiplying the tax or mill rate to the property's assessed value. Updates to the base year date used for property assessment values vary by province. All provinces have an appeal process for property owners to dispute the assessment value of their properties, usually with very strict appeal deadlines. Property taxes fund municipal services such as fire, police, public schools, parks and roads.

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 generally 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. Municipal powers are exercised in accordance with provincial or regional 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 development is carried out in an orderly manner. Examples of development agreements can include: (i) ensuring adequate infrastructure is available or will be made available to accommodate the proposed development without adversely affecting the surrounding area; (ii) ensuring appropriate vehicular and pedestrian access is provided to a site; or (iii) providing for appropriate landscaping. 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. 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. 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.

Expropriations

From time to time, public authorities need to acquire private lands in order to construct or maintain public works or provide public benefit. Where an amicable sale of land is unable to be negotiated, many public authorities, including all levels of government, school boards and utilities, have the statutory authority to acquire these lands through expropriation. The process to acquire public lands and determine the appropriate compensation is set out in provincial and federal legislation. The Supreme Court of Canada has determined that the overriding principle of any expropriation regime is to fully and fairly compensate a land owner whose property has been taken. This includes compensation for the fair market value of the land as well as damages naturally resulting from the expropriation and any legal or consulting fees incurred by the owner that are reasonably necessary to determine the compensation.

In some cases, land owners may be entitled to compensation even when their land has not been directly taken by an expropriating authority, but where the value of their land has been reduced as a result of the construction of public works (e.g., highway construction that prevents access to a local business). Additionally, where the actions of an expropriating authority have the effect of sterilizing the use of private land, compensation may be owed for the constructive or *de facto* expropriation of those lands, even if no land is acquired by the authority.

May 2025

Securities Regulation

Doing Business in Canada

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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.

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 but even broader than 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, secured and unsecured 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 therefore, 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 $150,000 paid in cash; (c) the "asset acquisition" exemption permits a person to acquire securities on a prospectus and registration-exempt basis where the purchaser satisfies the purchase price by transferring assets with a fair market value of no less than $150,000; and (d) the "private issuer" exemption.

In November 2022, Canadian securities regulators adopted a new prospectus exemption applicable to reporting issuers called the "listed issuer financing exemption" (commonly referred to as the LIFE exemption) pursuant to which certain reporting issuers may distribute freely tradable equity securities without a prospectus. Subject to certain conditions, the LIFE exemption allows reporting issuers listed on a Canadian exchange to raise the greater of $5 million or 10% of the issuer's market capitalization to a maximum total dollar amount of $10 million in a 12-month period by distributing securities to investors. Unlike most prospectus exemptions, securities issued under the LIFE exemption are not subject to a customary four-month hold period.

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, substantial purchase or asset acquisition 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 shareholders of more than 10%) 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) and insiders that are 10% or over shareholders must file an additional "early warning report" following certain trades (see Takeover Bids below). 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+.

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 the 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 immediately 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 or disposed of by a person holding 10% or more on a partially diluted basis.

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 typical 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 such a transaction (which is based on the economic result and not on the form) is contemplated, then the process must be overseen by an independent committee of the board of directors, a valuation must be done by an independent valuator and there must be a vote of the approval of the "majority of the minority shareholders," with the last two requirements subject to certain prescribed exemptions.

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 $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.

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Canadian Income Tax Considerations

2025 EDITION

Doing Business in Canada

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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. For 2024, the capital gains exemption amount is $1.25 million. Starting in 2026, this amount will be adjusted annually as it is indexed to the rate of inflation. Additionally, beginning in 2025, an entrepreneur's incentive will provide a tax-advantaged capital gains inclusion rate of one-half on up to $2 million in capital gains per individual realized over their lifetime. The limit will be phased in with $200,000 increments beginning January 1, 2025, until reaching a value of $2 million in 2034. 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 October 1, 2024, taxpayers will also need to plan around the new excessive interest and financing expense limitation (“**EIFEL**”) in addition to thin capitalization rules.

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.

EIFEL

The EIFEL rules limit the deduction of net interest and financing expenses by corporations and trusts to a fixed ratio of 30% of "adjusted taxable income" ("**ATI**") for tax years beginning on or after January 1, 2024. There is a transitional ratio of 40% for taxation years beginning on or after October 1, 2023, and before January 1, 2024. In general terms, net interest and financing expenses is a taxpayer's interest and financing expenses ("**IFE**") less its interest and financing revenues ("**IFR**"). Generally, if the net IFE exceeds the aggregate of the fixed ratios of ATI, the amount of interest in excess of the fixed ratios cannot be deducted by the taxpayer in that taxation year. However, it can be carried forward for use or application in future years, provided certain conditions are met.

The types of expenses that are subject to the EIFEL rules are captured in the definition of "IFE" and include, inter alia, deductible interest and amounts deemed to be interest under the ITA, certain deductible financing/borrowing costs, capitalized expenses that have been included in a taxpayer's UCC or resource expenditure pool, deductible lease financing amounts, amounts economically equivalent to interest or other financing/borrowing costs and certain fees/expenses incurred in the course of entering into or in relation to a financing agreement or arrangement.

The IFR of a taxpayer for a taxation year includes, inter alia, amounts included in computing a taxpayer's income for the year, such as interest income, a fee or similar amount in respect of a guarantee, amounts economically equivalent to interest or other financing/borrowing costs, lease financing amounts and other financing-related income and gains. The IFR is important for the EIFEL rules as it permits a taxpayer to deduct a corresponding amount of IFE.

A taxpayer's adjusted taxable income generally represents their earnings before interest, taxes, depreciation and amortization calculated for tax purposes ("tax EBITDA"). In general terms, it comprises the taxpayer's taxable income (or for non-residents, taxable income earned in Canada) for the year, which is then adjusted to (i) add back deductions for IFE, capital cost allowance, terminal losses and other deductions and amounts; and (ii) remove inclusions for IFR, recapture of capital cost allowance and other amounts.

We note that there are exceptions to the application of the EIFEL rules for "excluded entities," which include:

- Canadian-controlled private corporations with taxable capital employed in Canada of less than $50 million (together with any associated corporations);
- Groups of Canadian-resident corporations and trusts with an aggregate net IFE of $1 million or less; and
- Canadian-resident corporations and trusts, and groups consisting of such corporations and trusts, that carry on substantially all of their

business, if any, and all or substantially all of their undertakings and activities in Canada. Generally for this exclusion to apply, the group's foreign affiliate holdings must be de minimis, a non-resident cannot hold a significant interest in any group member, and group members cannot have a significant amount of IFE payable to a non-arm's length entity that is not tax-indifferent.

There is also is an exception carved out for IFE that is incurred in relation to certain Canadian public-private partnership infrastructure projects. Additionally, any interest that is denied under the thin-capitalization rules described above are excluded from the computation of IFE.

Similar to the thin capitalization rules, the EIFEL rules could apply indirectly to partnerships, as the partnership would allocate its IFE and IFR to its 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, 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

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%.

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.

DIGITAL SERVICES TAX

Originally proposed in 2021, the Digital Services Tax ("**DST**") aims to tax digital services in Canada. Until the treaty implementing the Pillar One tax regime under the multilateral approach comes into force, the government is moving forward with legislation to implement DST. Once the legislation comes into force, DST will apply retroactively from January 1, 2022.

DST will apply at a rate of 3% on taxable Canadian digital services revenue earned by domestic and foreign taxpayers that meet both of the following conditions:

- the taxpayer, or a consolidated group of which the taxpayer is constituent entity, had total revenue of at least €750,000,000 in the immediately preceding calendar year; and
- the taxpayer, or a consolidated group of which the taxpayer is a constituent entity, earned more than $20 million in Canadian digital services revenue in the particular calendar year.

Canadian digital services revenue is revenue sourced from users in Canada in a calendar year from (i) online marketplace services; (ii) online advertising services; (iii) social media services; and (iv) user data revenue. DST will apply to Canadian digital services revenue only to the extent that it exceeds the $20 million deduction, which is shared among taxpayers that are constituent entities of a consolidated group.

GLOBAL MINIMUM TAX

The *Global Minimum Tax Act* was enacted on June 20, 2024, and introduces a 15% global minimum tax on the income of certain large multinationals.

The legislation includes an income inclusion rule (IIR) and a qualified domestic minimum top-up tax (QDMTT) for multinational enterprises with annual revenues in excess of €750,000,000, applicable to fiscal years of covered multinationals that begin on or after December 31, 2023.

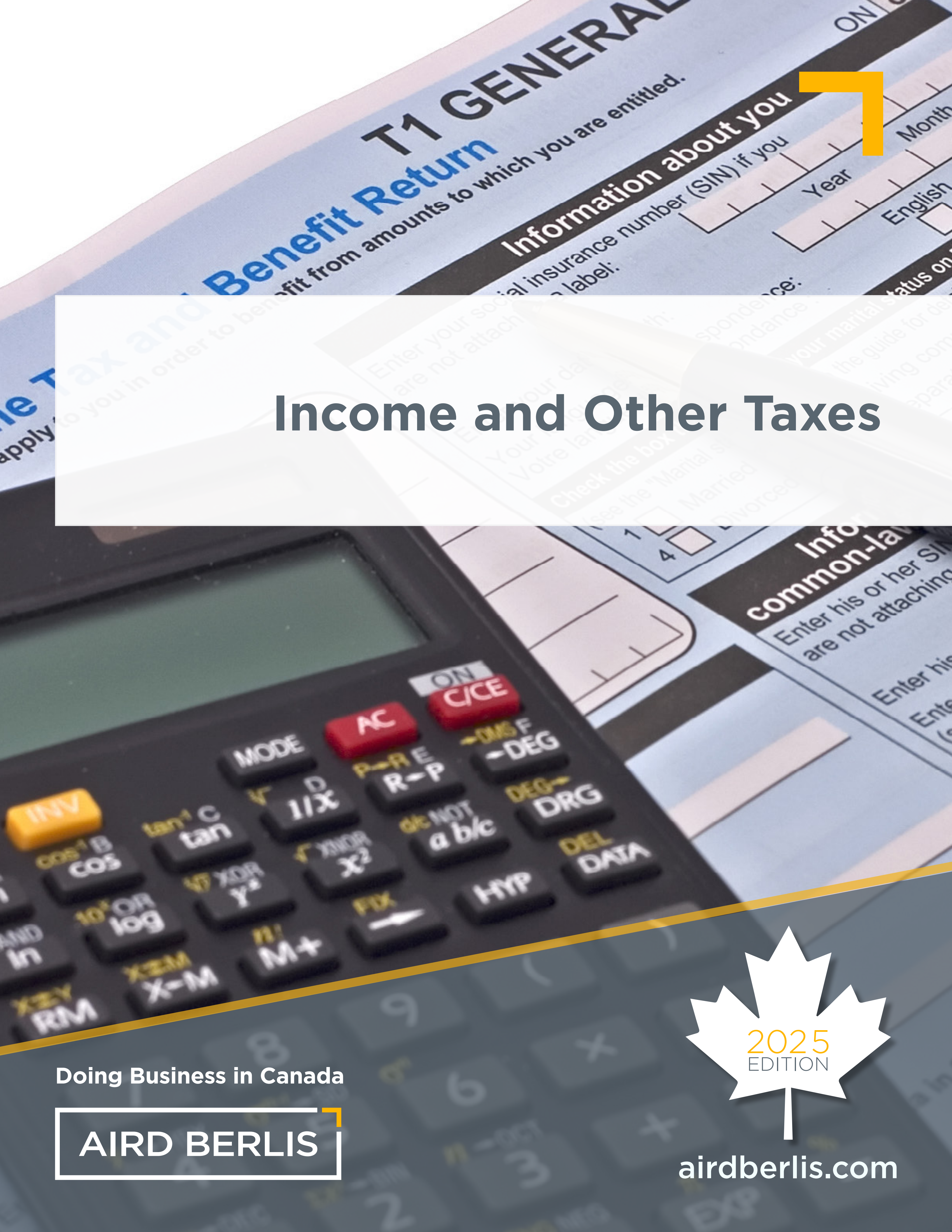
The legislation contains safe harbours in line with the OECD guidance and provides temporary and permanent exemptions from the strict application of the rules.

The IIR will require a Canadian ultimate parent entity to levy a top-up tax to the extent that the effective rate of tax of a foreign enterprise in a particular jurisdiction is below 50%. Where Canada is not the ultimate parent of the multinational group, but the ultimate parent entity has not adopted its own IIR, then Canada will apply the rule and levy a top-up tax where it is the highest intermediate entity within the group.

The QDMTT will take priority over the IIR, allowing Canada to collect any shortfall in tax where it might otherwise accrue to a jurisdiction other than Canada that has the IRR or an undertaxed profits rule (UTPR).

Draft legislation relating to the UTPR is expected to be released in line with other jurisdictions, with an expected start date in 2025.

June 2024



Income and Other Taxes

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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 $5,554, and an additional 36% surtax on provincial tax payable in excess of $7,108. The top marginal rate of tax for an individual resident in Ontario for 2024 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% for capital gains realized before June 25, 2024; 26.67% for the first $250,000 of capital gains realized on or after June 25, 2024; and 35.69% for capital gains exceeding the $250,000 threshold realized on or after June 25, 2024. 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 $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 2024. 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 $100 million and total assets of at least $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 $1 million while the minimum amount is $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 $100,000 and the annual net tax (whether remittable or refundable) is less than $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 2024 is $3,867.50.

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 2024 is $1,049.12. The maximum annual employer premium per employee for 2024 is $1,468.77.

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 $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 $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 $200,000 to up to 1.95% for payroll in excess of $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 $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.

ANTI-AVOIDANCE

Changes to the general anti-avoidance rule ("**GAAR**") were introduced in Budget 2023. These changes were enacted into law on June 20, 2024.

Under the GAAR's previous legislative regime, the Canada Revenue Agency ("**CRA**") could apply the GAAR to deny a tax benefit resulting from an avoidance transaction that may reasonably be considered to have resulted in a misuse or abuse of the ITA, or in an abuse having regard to the provisions at issue read as a whole.

Measures have been introduced to strengthen the efficacy of the GAAR. Specifically, these measures include the introduction of a preamble, a lower threshold for the avoidance transaction purpose test, an economic substance rule, a penalty, voluntary reporting and an extended reassessment period. All changes to the GAAR, except for the penalty, are effective for transactions occurring after 2023. The penalty is in effect for transactions that occur on or after June 20, 2024.

A preamble has been added to the beginning of section 245 to codify the GAAR's purpose. However, it is intended to be informative and not meant to inform the GAAR's "analytic framework." The preamble clarifies that the GAAR serves as a limit on tax planning. While individuals can still benefit from the ITA's tax incentives, the freedom to tax plan "does not extend to misusing or abusing the tax rules," according to the Department of Finance. Additionally, the preamble codifies the balance the GAAR is intended to strike between the government's responsibility to protect the tax base and the fairness of the tax system, and the requirement for certainty for taxpayers planning their affairs.

The introduction of a lower threshold for the avoidance transaction purpose test is meant to ensure that the GAAR "prevent[s] abusive tax avoidance when a tax benefit is achieved in the context of a transaction with a primarily non-tax purpose." Under prior legislation, the GAAR applied to an avoidance transaction unless the transaction was undertaken for **primarily** genuine purposes other than obtaining a tax benefit. The amendments to the legislation change this threshold. Under the changes, an avoidance transaction will be considered an avoidance transaction if the transaction or series of transactions results in a tax benefit, unless it may reasonably be considered that obtaining a tax benefit was not **one of the main purposes** for the transaction.

An economic substance rule has been added to the GAAR, introducing an indicator for determining whether a transaction may be a misuse or abuse of a provision or the whole of the ITA. Specifically, if an avoidance transaction is significantly lacking in economic substance, this will be an important consideration that tends to indicate misuse or abuse. The legislation provides non-exhaustive factors that may establish a lack of economic substance, including a lack of opportunity for gain or profit and risk of loss for the taxpayer, the expected value of the tax benefit exceeding the expected non-tax economic return and the purpose for entering the transaction being to obtain the tax benefit.

Voluntary reporting, a new penalty and an extended reassessment period have also been introduced. Taxpayers will have the option to voluntarily report transactions they believe may come within the ambit of the GAAR, using either the GAAR's new voluntary disclosure rules or the new mandatory disclosure rules. If a taxpayer voluntarily reports, this will preclude the application of the new penalty and the extended reassessment period. The new GAAR penalty will result in a 25% penalty on the amount of tax payable if a taxpayer's tax increases as a result of the GAAR. Further, under the extended reassessment period, transactions subject to the GAAR may be assessed up to three years beyond the normal reassessment period.

In addition to voluntary reporting precluding the application of the new penalty, the penalty may not apply if it is reasonable to conclude that the "transaction or series would not be subject to the GAAR at the time it was entered into." To benefit from this exemption, it must be reasonable to conclude that the transaction would not give rise to the application of the GAAR because the transaction undertaken was "identical or almost identical" to one published in administrative guidance or a court decision.

MANDATORY DISCLOSURE RULES

Undergoing certain transactions in Canada may result in information reporting requirements to the CRA. In recent years, Canada has expanded its existing rules for mandatory disclosure to better align with best practices from the Organisation for Economic Co-operation and Development ("**OECD**") Base Erosion and Profit Shifting ("**BEPS**") Project and Action Plan on mandatory disclosure. There are now three sets of mandatory disclosure rules to be cognizant of when doing business in Canada.

1. The Reportable Transaction Rules

In 2023, Canada expanded the existing regime for "reportable transactions" to lower the threshold for when reporting will be required, applicable to transactions entered into after June 22, 2023. Under the new rules, if a transaction qualifies as an "avoidance transaction" and meets one of three generic hallmarks, an information return must be filed to report the transaction. Previously, two generic hallmarks were required under a narrower definition of "avoidance transaction." An avoidance transaction exists where it can reasonably be considered that obtaining a tax benefit is one of the main purposes, either for the transaction itself or for a series of transactions of which the transaction is a part. The three generic hallmarks (of which only one is required to trigger disclosure) are:

- a contingent fee arrangement, where a promoter or advisor (or any person non-arm's length thereto) is entitled to a contingent fee that is either:
  - based on the amount of the tax benefit that results from the transaction or series;
  - contingent upon obtaining the tax benefit that results from the transaction or series; or
  - attributable to the number of persons that participate in the transaction or a similar transaction, or that have been provided access to advice or an opinion given by the advisors or promoters in respect of the tax consequences from the transaction or series or a similar transaction or series;
- where an advisor or promoter (or any non-arm's length person thereto) obtains confidential protection, that is, where there is an agreement to prohibit disclosure of the details of the structure that gives rise to tax benefits to any person or the tax authorities; and
- where the taxpayer or transaction participant, or an advisor or promoter, obtains contractual protection, that is,
  - a form of insurance, protection, indemnity, compensation or guarantee that protects against the failure to achieve tax benefits or pays or reimburses fees, expenses, taxes, interest and penalties in the course of a dispute of the tax benefit; and
  - any form of undertaking provided by a promoter (or any non-arm's length person thereto) to assist a person in the course of a dispute in respect of a tax benefit from the transaction or series.

Notably, the hallmark for contractual protection will <u>not be met</u> solely by the presence of standard professional liability insurance or an agreement integral to an arm's length sale where it is reasonable to consider the insurance or protection is intended to ensure that the purchase price paid under the agreement takes into account any liabilities of the business immediately prior to the sale or transfer, and is obtained primarily for purposes <u>other than</u> to achieve any tax benefit from the transaction or series.

The following persons must file an information return in respect of a reportable transaction (or series):

- every person for whom a tax benefit results or is expected to result from the "tax treatment" of the reportable transaction, series or other such transactions that are part of the series;
- every person who has entered into the reportable transaction for the benefit of a person described in paragraph (a); and
- every advisor or promoter (or non-arm's length person thereto) in respect of a reportable transaction who is or was entitled to a contingent fee or a fee in respect of a contractual protection.

The following information must be disclosed on the prescribed form for a reportable transaction (or series):

- identification of the person required to disclose and the person obtaining the tax benefit;
- a description of the reportable transaction in sufficient detail for the Minister to be able to understand the tax structure;
- the date the reportable transaction is required to be disclosed (90 days from the date the transaction was entered into or the time of becoming contractually obligated to enter into the transaction);
- identification of the advisors and/or promoters in respect of the reportable transaction;
- the amount and nature of the tax benefit, including whether it is recurring, and in which years the tax benefit is expected to be used;
- the legislative provisions applied; and
- calculation of any late-filing penalty.

Information is not required to be disclosed if it is reasonable to believe the information is subject to solicitor-client privilege.

2. The Notifiable Transaction Rules

In 2023, Canada introduced a new regime for "notifiable transactions." An information return must be filed in respect of certain transactions and substantially similar transactions that the Minister of National Revenue (with the concurrence of Canada's Department of Finance) designates as objectionable or offensive. Transactions and series of transactions that have been designated to date include:

- straddle loss transactions using a partnership;
- transactions to avoid Canada's 21-year deemed realization rule for a trust;
- the manipulation of bankrupt status to reduce a forgiven amount in respect of a commercial obligation;
- transactions undertaken to avoid a deemed acquisition of control; and
- back-to-back arrangements intended to circumvent the thin capitalization rules or part XIII tax.

The scope of the notifiable transaction regime is significantly broad, as a notifiable transaction includes a transaction that is "substantially similar" to one that is designated. The term "substantially similar" is defined to refer to "any transaction, or series of transactions, in respect of which a person is expected to obtain the same or similar types of 'tax consequences'…and that is either factually similar or based on the same or similar tax strategy; and is to be interpreted broadly in favour of disclosure."

The same persons as noted above in respect of a reportable transaction (or series) must file an information return in respect of a notifiable transaction (or series).

The prescribed form for reportable transactions is the same as for notifiable transactions. The following specific information must be included in respect of a notifiable transaction (or series):

- identification of the person required to disclose and the person obtaining the tax benefit;
- identification of which type of notifiable transaction is being disclosed;
- the date the notifiable transaction is required to be disclosed (90 days from the date the transaction was entered into or the time of becoming contractually obligated to enter into the transaction);
- the nature of the tax benefit, including whether it is recurring, and in which years the tax benefit is expected to be used;
- whether the transaction is the same as a transaction designated by the Minister or substantially similar;
- a brief description of the reason you are disclosing the notifiable transaction; and
- calculation of any late-filing penalty.

Information is not required to be disclosed if it is reasonable to believe the information is subject to solicitor-client privilege.

3. The Rules for Uncertain Tax Treatments

In 2023, Canada also introduced new rules that require certain corporations to disclose tax treatments in respect of which uncertainty is reflected in their financial statements for the year. These rules only apply to corporations that meet the following criteria:

- the corporation has audited financial statements prepared in accordance with IFRS or other country-specific generally accepted accounting principles ("**GAAP**") relevant for corporations that are listed on a stock exchange outside Canada;
- the carrying value of the corporation's assets is greater than or equal to $50 million at the end of the year; and
- the corporation is required to file a return of income for the year.

Consequences for Non-Compliance

Where the foregoing mandatory disclosure rules are not complied with, the limitation period for reassessment will not commence in respect of the reportable transaction, notifiable transaction or the uncertain tax treatment until the particular transaction or tax treatment has been disclosed. As a further consequence of non-compliance, the third condition of Canada's general anti-avoidance rule – that the transaction or series results in a misuse or abuse of the provisions that give rise to the tax benefit – will not apply until the return for a particular reportable or notifiable transaction (or series) has ben disclosed.

Penalties for late-filing or a failure to file will also apply. Taxpayers who fail to file an information return in respect of a reportable or notifiable transaction as required may be subject to penalties up to the greater of $25,000 (or $100,000 for corporations with assets or total carrying value of $50 million or more) or 25% of the tax benefit. Promoters or advisors who fail to file the same return may be subject to penalties equal to the total of 100% of the fees charged to a person for whom a tax benefit results, $10,000 and $1,000 per day the failure continues, up to $100,000.

Failure to report an uncertain tax treatment may result in penalties up to a maximum of $100,000.

A person will not be subject to penalties for failure to disclose a reportable transaction, notifiable transaction or uncertain tax treatment where the person required to file the return exercised the same degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances. With respect to notifiable transactions, the CRA's guidance is that this due diligence defence will generally be available where a person asks their advisors about potential reporting obligations and is informed that no such reporting obligations exist. For reportable transactions and uncertain tax treatments, an objective standard of a "reasonably prudent person" will apply, based on the facts and circumstances of each case.

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Doing Business in Canada

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Canada has a thriving technology sector that supports key economic drivers, including technologies such as e-commerce, connected vehicles, artificial intelligence, cybersecurity, financial technology (including cryptocurrencies and other blockchain applications), 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 (patents, copyrights, trademarks and trade secrets), broadcasting and telecommunications law, privacy and personal data security, consumer protection (e.g., oversight over deceptive marketing practices under the *Competition Act*), anti-spam (CASL), transportation and aviation safety regulation, import/export controls, confidentiality, 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 providing services in Canada 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), as well as 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 that have a military application or a national security significance, and to prohibit such controlled goods and/or technologies from being accessed by unauthorized persons or exported/re-exported to certain countries.

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 not only to ship goods outside Canada, but to provide services associated with designated technologies, discuss designated technologies with certain employees of non-Canadian citizenship, 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, intended uses, destination and end users of the technology are all relevant to whether an export permit is required.

In 2018, Canada introduced the Brokering Control List to comply with the Arms Trade Treaty. This list identifies specific goods and technology that require a brokering permit. The permit authorizes the arranging or negotiation of transactions leading to the movement of controlled goods and technology between two foreign nations.[1]

The Area Control List is a list of countries for which export permits are required for any goods and technology exported from Canada, regardless of whether such goods and technology are on the Export Control List.[2] As of this writing, the only country on Canada's Area Control List is the Democratic People's Republic of Korea (i.e., North Korea).[3]

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.[4] For example, Canadian companies may be subject to fines and other penalties should they agree to be bound by U.S. export control laws. For this reason, Canadian counsel will often have their Canadian clients agree to comply with such U.S. laws only to the extent permitted by applicable law or by the laws of Canada.

In addition, under the *Foreign Extraterritorial Measures (United States) Order, 1992*, a Canadian corporation and its directors, officers, managers or employees may be prohibited from complying with any extraterritorial measures imposed by other countries, such as U.S. embargoes against Cuban businesses. In this regard, entities must be cognizant around directives, instructions or communications related to such relationships received from individuals who hold influence over the Canadian corporation's policies within Canada. This prohibition extends to any act or omission that amounts to compliance with U.S. extraterritorial

1 Brokering Controls (international.gc.ca)

2 https://laws-lois.justice.gc.ca/eng/regulations/SOR-81-543/index.html

3 Area Control List (justice.gc.ca)

4 Foreign Extraterritorial Measures Act (FEMA)

legislation concerning Cuba, irrespective of whether such compliance is the sole intent behind the action or omission.[5]

E-commerce Statutes

Subject to a few exceptions, 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 elements of 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 for the use of enforceable electronic signatures and establish requirements for documents 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 format/appearance and the language used that affect the enforceability of an electronic document. These e-commerce statutes also set forth how and when an offer and acceptance of a contract distributed electronically may be made – provisions that may not neatly align with the *United Nations Convention on Contracts for the International Sale of Goods*.

Insolvency

Canadian bankruptcy and insolvency laws underwent revisions in 2009 and 2019 to afford greater protection to contractual users of intellectual property (including technology-related intellectual property). Amendments made to the bankruptcy, insolvency and restructuring laws in 2019 provided some clarity on the impact of intellectual property sales or dispositions in the context of bankruptcy, receivership or restructuring. The goal was to ensure that the bankruptcy, insolvency or restructuring of a company that grants rights to use intellectual property does not wholly impede the grantee's rights to use that intellectual property, provided the grantee continues to make all required payments and fulfill all other contractual obligations. However, if the bankrupt or insolvent company exercises its right to "disclaim" the original contract, the user cannot expect to continue to receive support, updates or other benefits from the intellectual property owner under that contract.

It is unclear which intellectual property rights enjoyed by users are protected from being disclaimed. While one may assume that all statutory intellectual property rights are protected, Canada also recognizes common law intellectual property rights in trademarks and trade secrets. The insolvency legislation provides no guidance as to what constitutes the "right to use" (the particular right that is protected). Because the legislation does not obligate a bankrupt grantor of a "right to use" intellectual property to continue providing maintenance or support, the benefit of the provision must be regarded as limited.

On the other side of the coin, there is little, if any, protection for a licensor should its licensee become insolvent. Serious consequences may arise for licensors of valuable, limited-use intellectual property due to the broad authority of Canadian courts' right to assign licence agreements to third parties in insolvency proceedings, particularly where the market for such licences is limited. In effect, the insolvency of a licensee could cost the licensor a new sale if the licensee's bankruptcy trustee is willing to sell the licence for less than the original licensor is charging.

.ca Domain Names

Internet domain names are verbal representations of numerical addresses 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, Aboriginal peoples,[6] corporations incorporated under the laws of Canada or any province or territory, foreign corporations with an extra-provincial licence to operate in 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

5 Foreign Extraterritorial Measures (United States) Order, 1992 (justice.gc.ca)

6 Canadian Presence Requirements – CIRA

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 the posting of defamatory statements made online – such as through social media, blogs, emails or websites – that harm a person's reputation. 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, including AI-generated images (discussed below) that are defamatory in nature. Certain jurisdictions in Canada have privacy statutes that make it a tort to violate someone's privacy, including using someone's likeness or image without consent, especially if it causes harm or is used for commercial gain.

Although it is possible to obtain early mandatory orders or discovery from third parties that allow one to learn the identity of a 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.

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-cut.

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 the bullying suffered by Todd and her 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 March 2015.

If an AI-generated image falsely implies misconduct or damages a person's reputation, it may be considered defamatory. Further, the surge of generative artificial intelligence platforms and technologies, like deepfakes, has aggravated the menace of revenge porn and cyberbullying, making it easier for individuals with malicious intent to create and distribute manipulated content without the consent of the victims. Most Canadian provinces, with the notable exception of Ontario, have enacted specific legislation to tackle this menace. British Columbia is the latest province to enact the *Intimate Images Protection Act*, which came into force in January 2024. It applies retroactively to March 6, 2023. The Act created new civil rights and remedies, including an expedited process for a person whose intimate images have been distributed without consent or who has received threats of such distribution, to swiftly seek orders to stop and prevent the spread of these images.[7]

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 licensee. If a court determines that a licence is personal, the licence may not be assignable or capable of being sublicensed to third parties, subject to 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 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. Accordingly, browse-wrap licences are best avoided.

7 Intimate images and consent - Government of British Columbia (gov.bc.ca)

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 "work made for hire," which is a phrase often contained in U.S.-based agreements. In a software scenario, typically, the author of a 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 situations where a copyright-protected work is created expressly for a customer by a contractor, the contractor, as author, will own the work unless the contractor has entered into a written assignment of 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.

These are in addition to the inclusion of appropriate clauses to address specific Canadian regulatory matters, such as privacy, data security, anti-spam and any laws (currently under discussion) governing the use of artificial intelligence.

Cryptocurrencies

The chief legal concern arising from crypto assets in Canada is whether they qualify as securities or derivatives, which is crucial to determine the applicable legal framework. If they are found to be securities or derivatives, they become subject to prospectus requirements, dealer and adviser registration, disclosure and reporting requirements, custody requirements and investor protection measures. The determination of whether securities law applies to crypto assets typically arises in two distinct scenarios: during the initial coin offering (ICO) of these assets and their trading on crypto asset trading platforms. Further, securities regulators have begun to differentiate between types of crypto assets, such as stablecoins, utility tokens and governance tokens – applying different analyses depending on their function.

While cryptocurrencies are not considered legal tender, it is not generally illegal to receive or possess them in Canada. However, trading in cryptocurrencies will be regulated if crypto trades are accomplished through a "crypto asset trading platform" – an online market that offers users the ability to transfer, hold and exchange various crypto assets. Failure of these online markets to register and comply with regulations 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.

The term "value-referenced crypto asset" commonly refers to stablecoins. According to the Canadian Securities Administrators ("**CSA**"), stablecoins can replicate the value of a single fiat currency and are backed by reserves of assets in that currency, or they can be non-fiat-backed stablecoins pegged to assets other than fiat currency. A value-referenced crypto asset is designed to maintain a stable value over time by referencing the value of a fiat currency, or any other value, right or combination thereof. The CSA considers value-referenced crypto assets as potentially being categorized as securities and/or derivatives.

The CSA has introduced regulatory guidance targeting issuers and registered crypto asset trading platforms involved in trading value-referenced crypto assets. The guidance includes requirements to contact regulators, provide undertakings for fiat-backed stablecoins and cease offering of certain value-referenced crypto assets. Additional obligations include compliance with prescribed disclosures, disclaimers and updated policies in effect as of April 30, 2024.

Canada Revenue Agency, Canada's taxation authority, treats cryptographic tokens (including cryptocurrencies) as commodities for taxation purposes, triggering various kinds of tax obligations depending on the circumstances.

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.

Certain jurisdictions in Canada follow the standards for driving automation levels established by the Society of Automotive Engineers International, ranging from Level 0 (no automation) to Level 5 (full automation). As with motor vehicle transportation in general, regulation of autonomous or automated vehicles in Canada involves the federal, provincial/territorial and municipal governments.

In 2024, Transport Canada released its *Safety Framework for Connected and Automated Vehicles 2.0*. The guidelines contained in that publication aim to establish a baseline of consistent best practices across provinces and territories for automated and connected driving systems, subject to Canada's *Motor Vehicle Safety Act*.[8] The framework outlines policies and instructions for the use of connected and automated vehicles (CAVs) on Canada's public roads. It outlines the regulatory and oversight regime, including non-regulatory guidance for cybersecurity and testing, and details upcoming changes to the Canada *Motor Vehicle Safety Standards* (CMVSS) to accommodate Advanced Driver Assistance Systems (ADAS), Vehicle-to-Everything (V2X) communication and cybersecurity and data privacy protections.

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.

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8 https://laws-lois.justice.gc.ca/eng/acts/M-10.01/

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