Doing Business in Canada
Global Experience, Canadian Expertise™

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Our firm updates our Doing Business in Canada publication twice per year to provide interested parties with news about recent developments in Canada. Recently, we have become aware of numerous material changes announced and proposed in Ontario and across Canada that may be relevant, and our firm has notified various participants in numerous ways, including publications, communications and presentations.

The legalization of recreational cannabis in October 2018 has attracted global attention and resulted in a great number of new business opportunities, both domestically and internationally. In addition, it appears that the expansion of the legally available products, such as edible products containing cannabis, will occur in October 2019, subject to certain judicial challenges. Our firm has developed a recognized expertise based on our early and extensive involvement in the legalized cannabis space. Our large multidisciplinary cannabis team is recognized in Chambers. The firm is well positioned to provide expert legal advice relating to financing, intellectual property, leasing, employment, mergers and acquisitions, and insolvency, as well as regarding the integration of Canadian and non-Canadian rules and expectations.

Further, Aird & Berlis continues to recognize, promote and encourage diversity, which is essential for an open and inclusive society. We have appointed one of our partners as our Diversity and Inclusion Partner, with the mandate to continue to lead the firm’s diversity and inclusion initiatives.

I want to assure you of our firm’s ongoing dedication to you and to the practice of law in Canada. Our firm continues to be your gateway to Canada. We are fully committed to a simple refrain: Global Experience, Canadian Expertise. Our commitment to our clients is simple – we deliver high-quality Canadian legal services to advance their interests and add value to their business.

Our firm is very active in numerous international organizations. We have a number of lawyers who are officers, members of advisory boards and/or participants in the International Bar Association. Lawyers from our firm are active throughout the year in many other international organizations and conferences. We attended and/or participated in international insolvency, intellectual property, transportation and gaming conferences. We are proud of the depth of our firm’s international connections and the relationships that our lawyers and patent agents have with many people around the globe. I wish to reiterate our firm’s dedication to being your chosen Canadian law firm on multinational, binational and Canadian domestic transactions and on other legal matters. We believe that our creativity and flexibility will permit us to anticipate and adapt to these changes to the benefit of our clients.

Members of our firm are recognized by numerous national and international directories, including Chambers Global, Chambers Canada, Who’s Who Legal, Legal 500, Martindale-Hubbell Law Directory, Martindale-Hubbell Bar Register of Preeminent Lawyers, the Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada and The Canadian Legal Lexpert Directory, to name just a few. Also, the number of Aird & Berlis lawyers who have active leadership roles with 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) continues to grow.

Our updated Doing Business in Canada publication is designed to provide you with a brief summary of some issues involved when entering the Canadian business market. If you have any questions, please do not hesitate to contact me and I shall arrange contact with the appropriate person.

Toronto, Canada, October 2019

“Steven Zakem, Managing Partner”
Canada welcomes international participants in its economy and business community. A focus of Aird & Berlis LLP is to represent international clients investing in Canada and to assist domestic clients in their business and financial dealings with international participants. At Aird & Berlis LLP, we have extensive experience and expertise in acting for international and Canadian clients. We are very proud of the international recognition given to various members of our firm by authoritative guides, including: The International Who’s Who of Business Lawyers; Chambers Canada; Chambers Global: The World’s Leading Lawyers in Business; The Legal 500 Canada; Martindale-Hubbell Bar Register of Preeminent Lawyers; Legal Media Group Guides to the World’s Leading Lawyers; International Tax Review – North America Guide; The Canadian Legal Lexpert Directory; The Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada – "40 Repeatedly Recommended Canadian Corporate Mid-Market Lawyers;" The Lexpert Guide to the Leading US/Canada Cross-border Corporate Lawyers in Canada; and The Best Lawyers in Canada.

We are the Canadian gateway for our international clients. We represent a broad range of business entities and individuals. We act for international entities doing business in Canada and Canadian entities doing business abroad. We are dedicated to providing counsel to our clients with respect to their international business activities with a particular focus on taxation, corporate finance (including mergers and acquisitions), securities, financing and real estate investments. We make your business our business and we are ready to assist your business at any time.

Our dedication to the international business arena has been exemplified by our commitment to our international practice. Our lawyers’ commitment is evidenced by our active participation in various international associations where we learn from our colleagues around the world including: AIJA (International Association of Young Lawyers); American Bankruptcy Institute; American Bar Association; American Intellectual Property Law Association; American Real Estate Society, Association of Commercial Finance Attorneys; Inter-American Bar Association; International Association of Restructuring, Insolvency, and Bankruptcy Practitioners; International Bar Association; International Council of Shopping Centers; International Fiscal Association; International Municipal Lawyers Association; International Project Finance Association; International Swaps and Derivatives Association; International Trademark Association; and International Women’s Forum; among many others.
Constitution, Government and Legal System
Canada was created in 1867 and currently consists of 10 provinces and three territories. Canada is a parliamentary democracy and constitutional monarchy with Queen Elizabeth II as its head of state. The Governor General, to whom The Queen has delegated all of her 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 Queen’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.

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.

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.

October 2019
Vehicles for Doing Business
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 constituting 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 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 have minimum Canadian residency requirements for directors. In June 2019, new regulations pertaining to federal corporations and certain provincial corporations came into force, which now require corporations to actively collect and maintain certain information regarding beneficial shareholders with “significant control” over the corporation, in addition to the pre-existing obligation to maintain a database of registered shareholders.

Unlimited Liability Companies
Unlimited liability companies are flow-through entities that may appeal to foreign entities for tax purposes, and are available under the incorporate statutes of certain provinces.

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.

October 2019
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 cooperation between provincial and territorial regulators. Currently, such “organic” development is evidenced by coordination 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 the U.S. definition, to be any document evidencing title to or an interest in, among other things, the capital, assets, profits or property of a person or corporation. In addition, a number of different types of agreements and instruments involving monetary consideration are specifically included in the definition of “security,” including, among other things, notes, stocks, treasuries, bonds, debentures, options or privileges on a security.

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

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

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

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

The regulation of trading in the “secondary market” is generally referred to as the “closed system.” In the closed system, every trade that is a “distribution”
Securities Regulation

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

EXEMPTIONS FROM THE PROSPECTUS REQUIREMENT

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

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

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

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

CONTINUOUS DISCLOSURE REQUIREMENTS AND OBLIGATIONS

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

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

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

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, etc.

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

The Toronto Stock Exchange (“TSX”) is Canada’s largest stock exchange. The TSX also oversees and administers the Montréal Exchange (primarily a derivatives exchange) and the TSX Venture Exchange (the “TSXV”), which is a listed exchange for more junior companies. The Canadian Securities Exchange (“CSE”), formerly known as CNSX Markets Inc., is another Canadian stock exchange focused on listing more junior companies, as it offers simplified listing processes and is generally considered to impose less onerous reporting and continued listing requirements on its issuers. Over the past few years, the CSE has become an increasingly popular stock exchange for companies developing businesses in emerging sectors, including cannabis and blockchain.

TAKEOVER BIDS

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

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

A takeover bid must be made in compliance with the substantive and procedural requirements of the regulating statute of the applicable province or territory in the absence of an exemption from the takeover bid requirements. Generally speaking, a takeover bid offer is to be made to all security holders of a given class on identical terms. A formal offer requires preparation of a takeover bid circular satisfying certain statutory disclosure requirements, which circular must be sent to all shareholders of the target. However, it is not necessary to make an offer for all shares and the offeror may determine the number of shares for which it wishes to bid, subject to a mandatory minimum tender requirement of more than 50% of the outstanding securities of the class that are subject to the bid, excluding those beneficially owned, or over which control or direction is exercised, by the bidder and its joint actors. On a partial bid, shares must be taken up pro-rata to those tendered to the offer. Conditions, other than financing, may be attached to the bid. For instance, it is common to make a purchase conditional upon obtaining a minimum level of acceptance, frequently two-thirds (the threshold for approval of certain fundamental corporate
transactions in most jurisdictions) or 90% (the level which gives the offeror the right to acquire the balance of the shares outstanding). Subject to certain exemptions which may shorten the period, a takeover bid must remain open for a minimum deposit period of 105 days. Furthermore, after the minimum tender requirement has been achieved and all other terms and conditions of the bid have been complied with or waived, bids are required to be extended by the offeror for an additional 10 days.

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

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

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

**CAPITAL POOL COMPANIES**

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

A financing, through an agent who is registered under applicable securities laws, must be completed in conjunction with the CPC IPO. The gross proceeds to the Capital Pool Company from the CPC IPO must be equal to or greater than C$200,000, and the gross proceeds of the CPC IPO plus all subsequent private placements prior to the Qualifying Transaction (as hereafter defined), must not exceed C$5 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.

*October 2019*
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 taxable 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 where the person sojourns (which generally means to visit or temporarily stay) in Canada for 183 days or more in a calendar year.

In Canada, individuals pay tax at graduated rates based on their income levels. In Ontario, individuals are liable to a 20% surtax on provincial tax payable in excess of C$4,740, and an additional 36% surtax on provincial tax payable in excess of C$6,067. Accordingly, the top marginal rate of tax in Ontario for 2019 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 47.40% for non-eligible dividends while the top marginal rate of tax for eligible dividends is 39.34%. The effective top marginal tax rate on capital gains realized by an individual resident in Ontario is 26.76%. The top marginal rates vary between provinces and territories.

**CORPORATIONS**

Under the ITA, the taxation of a corporation varies depending on the jurisdiction of incorporation, the type of corporation, the type of income and the activities carried on by the corporation. As discussed in the context of individuals above, a corporation resident in Canada is liable for tax in Canada on its worldwide income. Credit for Canadian taxes is generally available in respect of foreign taxes paid in respect of foreign source income. A corporation is deemed to be resident in Canada if it is incorporated in Canada. A corporation will also be resident in Canada if its “central management and control” are in 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. 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 Nova Scotia and Prince Edward Island to a low of 26% in Alberta. The combined federal and provincial corporate income tax rate in Ontario is 26.5%. These tax rates are reduced under the ITA for small businesses that are Canadian-controlled private corporations ("CCPCs") and for corporations that carry on manufacturing or processing activities. A CCPC is a private corporation that is a Canadian corporation, other than a corporation controlled directly or indirectly by a non-resident, by one or more public corporations or by a combination of non-residents and public corporations. Depending on the facts, a corporation which is 50% owned by Canadians and 50% owned by non-residents may qualify as a CCPC and therefore be subject to a reduced rate of tax. A CCPC is generally subject to a reduced rate of tax on the first C$500,000 of business income it earns each year. In Ontario, the combined federal and provincial corporate
Income and Other Taxes

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 individually 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 recent years. However, beginning in 2007, certain publicly-traded business trusts which meet the definition of “SIFT trust,” other than trusts which meet the definition of “real estate investment trust,” as defined in the ITA, became subject to tax on certain income. Where this tax applies, the SIFT trust essentially loses its ability to flow-through income to beneficiaries in respect of such income. As a result of the tax on SIFT trusts, most business trusts other than REITs converted to corporations before the end of 2010.

Other Taxes

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

GST/HST and Provincial Sales Taxes

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

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

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

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

Non-residents of Canada that register for GST/HST purposes but do not have a permanent establishment in Canada are required to provide a security deposit equal to 50% of the net tax remittable or refundable to the non-resident for the immediately preceding 12-month period. For the first year after registration, the non-resident is required to estimate its net tax for security purposes. Thereafter, the security will
be 50% of the net tax remittable or refundable in the previous fiscal year. The maximum amount of security required is C$1 million while the minimum amount is C$5,000. A non-resident may post security in the form of cash, certified cheque or money order and certain types of bonds. However, no security need be provided if the annual taxable supply of a non-resident does not exceed C$100,000 and the annual net tax (whether remittable or refundable) is less than C$3,000.

**PAYROLL TAXES**

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

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

Canada Pension Plan contributions are deducted from most types of remuneration payable, including salaries, wages, bonuses and commissions. An employer is required to deduct contributions from the amounts and benefits paid and provided to employees. The same amount must also be contributed by the employer as its share of the Canada Pension Plan contributions. The maximum employee contribution for 2019 is C$2,748.90.

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 2019 is C$860.22. The maximum annual employer premium per employee for 2019 is C$1,204.31.

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

The first C$490,000 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 over C$5 million. Remuneration includes all payments, benefits and allowances required to be included under sections 5-7 of the ITA in the income of the employee from an office or employment, or would be required to be included if the employee were a resident of Canada. Payments of salaries and wages would be considered remuneration for this purpose.

The rate of tax is as follows (based on the amount of the taxable total Ontario remuneration):

- **< C$200,000** – 0.98%
- **Between C$200,000 - C$400,000** – rates range from 1.101% to 1.829%, depending on the exact amount
- **> C$400,000** – 1.95%

**CAPITAL TAXES**

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

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

**STAMP DUTIES**

Canada does not impose stamp duties.

*October 2019*
Canadian Income Tax Considerations for Non-Residents Making Investments in Canada
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 generally remains at the historical tax cost of such assets to the corporation whose shares are acquired.

Due to differing tax concerns for Canadian sellers and foreign buyers, a purchase and sale may be structured to accommodate potentially conflicting interests. Canadian individual sellers may wish to take advantage of their capital gains exemption by selling shares of Canadian private corporations that meet certain criteria. As of 2019, the amount of the capital gains exemption is C$866,912 and is adjusted annually as it is indexed to the rate of inflation. A Canadian seller may also prefer to sell shares if there would be significant recaptured capital cost allowance on an asset sale. A non-resident seller of shares of a Canadian private corporation may insist on a share sale in order to take advantage of a treaty exemption for capital gains. Alternatively, non-resident purchasers may wish to get a “step-up” in their basis of the assets held by a business, benefit from a “double-dip” regarding the deduction of financing costs 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 by a branch of a foreign corporation is only taxable in Canada if that business is carried on through a “permanent establishment.” 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.

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. As such, the usual rate of branch tax is 25%. However, similar to withholding tax, 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. 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, the payer must withhold 15% of the gross amount 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 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 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 the United States regards unlimited liability companies 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 are treated as dividends 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) may 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. 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 a unlimited liability company to a U.S. resident are not entitled to 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 person who would otherwise be entitled to 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.

**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.

**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 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 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.

Recent amendments greatly extend the application of the thin capitalization rules by the expansion of the back-to-back loan 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.

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

**CANADIAN ACQUISITION CORPORATION**

In most cases, non-resident purchasers should interpose a Canadian corporation to acquire the shares of an existing Canadian corporation. This structure may have several advantages, including the ability to benefit from an increase in the Canadian tax cost of the non-depreciable capital property (such as shares of subsidiary corporations or land) of the Canadian operating corporation if it is subsequently wound-up into 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 dividends then could 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.

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. 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, 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 and at any time in the 60-month period prior to the date of disposition, 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, as the case may be.

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 investing in TCP, particularly where the fund has other funds 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 withhold and 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, 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) 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 the 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).

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 the 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
Canadian Income Tax Considerations

Aird & Berlis LLP

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 will benefit from a rollover under subsection 85(1) or section 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 ensure that the Canadian shareholders benefit from a rollover and are not deemed to receive any non-share consideration that could give rise to a Canadian tax liability 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 payee 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.\(^1\)

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 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.

\(^1\) Under the Canada-U.S. Treaty, the rate of withholding tax is reduced to 15% or to 5% if the beneficial owner of the dividends is a corporation which controls, directly or indirectly, at least 10% of the voting power of the Canadian corporation. Most of Canada’s treaties have similar provisions.

\(^2\) 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%.
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 will apply 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 currently listed 84 of its tax treaties as being covered by the MLI. The MLI will come into force for Canada on December 1, 2019. At this time, the MLI will also have come into force in over 30 other countries, including Australia, Belgium, France, India, Ireland, Israel, Luxembourg,
Malta, Netherlands, Russia, Singapore and the United Kingdom. The United States is not a signatory to the new MLI. The MLI will apply to many of Canada’s tax treaties, with an effective date as early as January 1, 2020 for withholding taxes and for other taxes, such as capital gains, for taxation years beginning after June 1, 2020 (which, for calendar year taxpayers would be January 1, 2021). Consequently, starting in 2020, an analysis of each party’s position under the MLI will be required in order to determine whether a benefit will be available under many of Canada’s tax treaties.

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.

October 2019
Regulation of Foreign Investment and Merger Regulation
REGULATION OF FOREIGN INVESTMENT

The Investment Canada Act (the “ICA”) is federal legislation that applies to every acquisition of control of a Canadian business as well as an investment to establish a new Canadian business. Acquisitions of control that exceed specified statutory monetary thresholds are subject to a “net benefit” review which precludes the investor from completing the acquisition until the investment has been reviewed and the Minister is satisfied that the investment “is likely to be of net benefit to Canada.”

Notification Procedure

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

The notice is filed with the Director of Investments who issues a receipt if the notice is complete. The receipt indicates that the establishment, or acquisition, of the business is not reviewable under Part IV of the ICA.

Review Thresholds: WTO Transactions

By reason of the Agreement Establishing the World Trade Organization (“WTO”) between Canada and certain other countries (there are currently 164 WTO members), direct acquisitions by non-Canadians who are WTO investors and direct acquisitions of Canadian businesses controlled by WTO investors have been subject to historically higher thresholds for review under the ICA. The review threshold for WTO investments (by investors other than State-Owned Enterprises (“SOE”), which is addressed below) is now C$1.045 billion in “enterprise value,” up from C$1 billion in 2018.

For certain trade agreement investors, review thresholds are now set at C$1.568 billion in enterprise value, following the application of the Comprehensive Economic and Trade Agreement (“CETA”) between Canada and the European Union. This higher ICA review threshold under CETA will apply not only to European Union investors, but also to other Free Trade Agreement (“FTA”) investment partners, due to Canada’s Most-Favoured-Nation (“MFN”) commitments. MFN treatment will be accorded to United States, Mexico, Chile, Colombia, Panama, Peru, Honduras, South Korea, Japan, Singapore, New Zealand, Australia and Vietnam, all of which are FTA partner countries.

Enterprise Value: Methodology

Regulations made under the ICA provide for a detailed methodology for calculating the enterprise value when an acquisition of control of a Canadian business has occurred. The calculation of enterprise value depends on the type of transaction contemplated (i.e., where the acquired entity is a publicly traded entity, a non-publicly traded entity, or if the transaction involves the acquisition of assets).

Under these rules, where any portion of the total consideration to be paid by the investor is not known at the time the investment is implemented, the value of this unknown portion is deemed to be the amount that the investor represents and determines in good faith to be the fair market value. This provision will be applicable to contingent payment scenarios, including transactions with potential earn-outs the value of which may not be known at the time of the closing of the investment transaction. The provision also ascribes value in scenarios in which there is inadequate market price information, such as non-publicly traded shares.

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

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

Review Thresholds: Non-WTO Transactions

Investments by non-WTO investors remain subject to review where the book value of acquired assets exceeds C$5 million or C$50 million for indirect acquisitions of control.
Cultural Heritage or National Identity

Investment proposals, including indirect acquisitions of control, that might ordinarily be only notifiable can be ordered for review where the business is related to Canadian cultural heritage or national identity. Currently, these “culturally sensitive” businesses include the publication, distribution and sale or exhibition of books, magazines, periodicals, newspapers, films, videos and music. These acquisitions are subject to review where the book value of acquired assets exceeds C$5 million, while indirect acquisitions of control are subject to review where the book value of the acquired assets exceeds C$50 million (the federal Cabinet retains discretionary authority to review an investment in a cultural business falling below these thresholds).

State-owned Enterprises

In 2012, the Canadian government released guidelines on what additional considerations the Minister of the Department of Innovation, Science and Economic Development (the “ISED”) would take into account when reviewing proposed investments by SOE (the “SOE Policy”) were published amplifying the scope of the elements the government will consider important in determining the extent to which an investor is an SOE. The SOE Policy sets out additional factors that the Minister will take into account when assessing proposed investments by SOEs (see below). In addition, as part of amendments made in June 2013, a definition of an SOE was enacted 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.

Direct acquisitions by non-Canadian WTO SOE investors are subject to review where the book value of the assets of the acquired Canadian business exceeds C$416 million (up from C$398 million in 2018). Indirect acquisitions of control by WTO SOE investors remain exempt from review.

Factors

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

As well, the SOE Policy states that SOE investors will have to satisfy the Minister about the investment’s “commercial orientation; freedom from political influence; adherence to Canadian laws...that promote sound corporate governance and transparency; and positive contributions to the productivity and industrial efficiency of the Canadian business.”

National Security

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

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

There are significant time periods in the event of a national security review under Part IV.1 of the ICA. Once an investor has received a notice indicating that an order for review of the investment may be made, the national security review timeframe under the ICA can be as long as 200 days (or longer with the consent of the investor).
In December 2016, the Minister of ISED issued Guidelines on the National Security Review of Investments under the ICA. The Guidelines provide information to investors about the administration of the national security review process under the ICA and set out nine factors that the government considers when assessing whether an investment poses a national security risk. The focus of the nine factors are on three core areas: defence, technology and intelligence gathering and enforcement.

Pursuant to the Budget Implementation Act, 2017, No. 1, the ICA was amended to require annual reporting on the administration of the national security provisions of the ICA. The annual reporting on the administration of the national security provisions of the ICA is now included in each Annual Report made under the ICA. The Report also provides information on the numbers of transactions reviewed under the national security provisions, the numbers of notices and orders issued, and the actions taken to protect national security.

According to ISED’s most recent Annual Report on the Investment Canada Act, as of March 31, 2018, 15 national security reviews have been ordered for review by the Governor-in-Council between FY 2012-13 and FY 2017-18, resulting in 13 Orders-in-Council to either disallow or impose conditions on the affected investments.

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

This practice has been effectively confirmed in the above-noted Guidelines on the National Security Review of Investments under the ICA. The Guidelines expressly state that where investors are aware that any of the nine factors set out above in the guidelines “may be present,” it would be prudent for the parties to contact the Investment Review Division “at the earliest stages of the development of their investment projects to discuss the investment and, where applicable, to file a notification (or an application for net benefit review) at least 45 days prior to its planned implementation.”

Thus, investors should now be aware that the government has indicated its preference that in situations in which national security concerns are present, it prefers to manage these concerns on a “pre-closing basis” before ownership has transferred in lieu of the current requirement in the ICA which permits an investor to wait for as long as 30 days following closing for transactions that are only subject to notification. Thus, in order to achieve absolute investment certainty, the parties to a transaction should endeavour to file as soon as possible, ideally 45 days prior to closing if the transaction circumstances permits such a step to be taken.

**MERGER REGULATION**

**Mergers**

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

**Merger Transaction Notification**

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

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

(a) the acquisition of assets in Canada of an operating business;

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

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

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

the target (or the entity formed by amalgamation/combination) has assets in Canada or revenues from sales in or from Canada exceeding C$92 million, which is the threshold for transactions closing in 2018, as announced by the Competition Bureau following its annual review of the pre merger notification transaction size threshold.

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

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

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

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

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

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

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. If issued,
the ARC certifies that the Commissioner is satisfied that the proposed merger will not prevent or lessen competition substantially. Parties will often apply for an ARC when it is clear that no substantive competition issues will arise in connection with the proposed transaction and will often couple such application with the transaction notice filing.

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

**Challenges before the Competition Tribunal**

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

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

**CANADA’S ANTI-CORRUPTION LEGISLATION**

**Bribery Offences**

In 1999, Canada ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions through the enactment of the *Corruption of Foreign Public Officials Act* (“**CFPOA**”). The legislation was largely unenforced, with only one conviction under the CFPOA in the first six years after enactment. Canada has since, however, begun to commit resources to anti-corruption, with the Royal Canadian Mounted Police establishing dedicated enforcement units.

Under the current CFPOA, every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official. Additionally, it is an offence under the CFPOA to keep false books or records for the purpose of bribing a foreign public.

The CFPOA provides exemptions for payments that are not illegal under the domestic law of the foreign country or the payment of certain reasonable expenses incurred in good faith by the foreign public official on their behalf. Amendments to the CFPOA not currently in force will remove a currently available exemption for facilitation payments.

**Transparency in the Extractive Sector**

The stated purpose of the *Extractive Sector Transparency Measures Act* ("**ESTMA**") is “to implement Canada’s international commitments to participate in the fight against corruption through the imposition of measures applicable to the extractive sector.”

The ESTMA affects commercial developers of “oil, gas or minerals” who have a sufficient connection to Canada. Developers who meet certain criteria must report to the Minister regarding payments they make to various parties (payees).

The ESTMA defines “payee” broadly to include any domestic or foreign government, trust, board, commission, corporation or other body or authority, including bodies established by two or more governments, or government delegates. For financial years starting after June 1, 2017, Aboriginal governments will also be considered payees.

**October 2019**
**BANKING**

**Chartered Banks**

Canada’s major banks are world-class organizations that were ranked first globally for soundness by the World Economic Forum for eight years in a row before slipping to third in 2016 and then rebounding to second in 2017 and 2018. The private sector financing industry in Canada is dominated by six such banks, all of which are federally regulated. These banks (The Toronto-Dominion Bank, Royal Bank of Canada, The Bank of Nova Scotia, Bank of Montreal, Canadian Imperial Bank of Commerce and National Bank) are, by Canadian standards, very large, well-capitalized, and have significant international interests. Canada was a signatory to the Basel Accord and the major banks have, since 2013, all exceeded the minimum capital requirements established under Basel III. These banks have also implemented the IFRS 9 reporting standard.

In addition to the six banks noted above, there are approximately 26 other domestic banks (collectively referred to as “Schedule I Banks”), notable among which are HSBC Bank Canada and Laurentian Bank of Canada. There are also approximately 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 subsidiary. These branches (referred to as “Schedule III Banks”) will consist of either full-service branches, which may engage in consumer and commercial financing and other financial services activities permitted to Schedule I and II Banks (subject to certain exception), or lending branches, which have more limited powers and are more suited to cater to the borrowing needs of principally small and medium-sized businesses, credit card and consumer loan markets and commercial lending.

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

**Other Financial Institutions and Alternate Forms of Financing**

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

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

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

**Security for Borrowing in Canada**

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

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

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

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

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

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

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

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

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

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

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

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

Whether appointed by a secured creditor or by the court, the receiver’s main purpose will be to market and sell the assets and, if possible, the going-concern business of the debtor to satisfy the claims of secured creditors. A receiver may also manage the business of the debtor in order to preserve value and the business as a going concern until a sale or
sales can be completed. In that case the receiver would likely retain former employees of the debtor on a contract basis to assist with the business.

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

**Notice of Intention**

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

**Private Appointment of Receiver**

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

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

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

**Court Appointment of Receiver**

The BIA (as well as the statute in each province, other than Quebec, governing the rules of the provincial court) authorizes the court to appoint a receiver or receiver and manager where it is “just or convenient to do so.” Even though a secured creditor may have a contractual right to appoint a receiver, it may have no choice but to seek a court appointment (e.g., where the debtor or a third party will not give access to the charged property), or it may wish to do so (e.g., where it wishes to prevent a subsequent challenge that it acted negligently or improvidently in disposing of the debtor’s property, by having the court establish the terms and conditions of sale and oversee the sale process, or where it expects to face intercreditor priority disputes).

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

**Effect of Appointment of Receiver**

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

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

**REORGANIZATION**

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

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

**Proposals Under the Bankruptcy and Insolvency Act**

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

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

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

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

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

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

The BIA also allows for an out-of-the-ordinary-course sale of the debtors’ 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.
Arrangements Under the Companies’ Creditors Arrangement Act

Because the CCAA is a more flexible statute than the proposal provisions of the BIA, CCAA reorganization is suitable for large, more complex businesses. Under the CCAA, an insolvent corporation may seek the court’s assistance in making a compromise or an arrangement with its creditors, where the total of claims against the corporation or affiliated corporations exceeds C$5 million. The debtor applies to the court, generally on notice to the significant creditors, for an order (called the initial order) that will normally impose a stay of proceedings by creditors (secured and unsecured), and also by the federal and provincial/territorial governments, for up to 30 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. 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. Pending amendments to the CCAA will reduce the initial stay period to a maximum of 10 days.

The initial order will often authorize DIP financing (and create a super-priority charge in respect thereof), and permit preferential payments to critical suppliers. The CCAA also gives the debtor the right to disclaim commercial leases and other contracts.

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

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

The CCAA also allows for an out-of-the-ordinary-course sale of the debtors’ business and assets without shareholder approval, but subject to approval of the court. This might occur where a plan does not appear possible, or possible only with the proceeds of such sale.

SUPER PRIORITIES AND OTHER CREDITOR PROTECTIONS

Bankruptcy and Receivership

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

(a) Unpaid suppliers can repossess goods delivered within 30 days prior to the date of the bankruptcy or receivership, provided the goods are still in the receiver or trustee’s possession, identifiable, in their original state and have not been sold or contracted for sale.

(b) Non-management employees have a super-priority charge over current assets for unpaid wages and vacation pay accrued in the six months prior to the bankruptcy or receivership. This charge does not cover termination or severance pay.

(c) Pension beneficiaries have a super-priority charge over all the debtor’s assets for: (i) employee pension contributions deducted at source; (ii) any defined benefits accruing in the current plan year, determined on the basis of a going concern valuation; and (iii) any defined employer contributions. In the case of a defined benefit plan, the BIA super-priority charge does not cover special payments/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.

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

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

(a) The fees and expenses of the debtor’s counsel and of the monitor and its counsel (the “Admin Charge”).

(b) Any DIP financing.

(c) Officer liabilities accrued during the CCAA proceedings.

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

Sale Processes

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

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

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

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

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

TERMINATION AND ASSIGNMENT OF CONTRACTS

Termination or Assignment by Debtor in Possession

A company in a CCAA or BIA proposal proceeding can terminate unwanted contracts other than:
(a) certain types of financial contracts, security agreements and guarantees; (b) collective agreements; (c) financing agreements if the debtor is the borrower; and (d) real property leases where the debtor is the lessor. In the case of intellectual property licences where the debtor is the licensor, the licensee is allowed continued use of the intellectual property, a protection for the licensee falling somewhere short of a full prohibition on termination.

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

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

**Termination by Third Party**

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

**Comparison to U.S. Proceedings**

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

(a) **Receivership**

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

(b) **Court Officers**

Any court-appointed receiver or CCAA monitor, and any trustee in bankruptcy or proposal trustee, will be an officer of the court and strive to maintain impartiality. A court officer will not attempt to alter the priorities among creditor classes set down by the BIA, CCAA and provincial law. Even a trustee in bankruptcy should stand aside to allow a secured creditor to enforce without interference.

(c) **Sale Processes**

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

(d) **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.

(e) **Court Procedures**

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

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

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

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

*October 2019*
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.

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, for example, a graduated provincial land transfer tax rate is imposed starting at 0.5% and increasing to 2.0%, or 2.5% for residential property. For properties located within the City of Toronto, an additional graduated land transfer tax is payable starting at 0.5% and increasing to 2.0%, or 2.5% for residential property. Effective April 21, 2017, a 15% non-resident speculation tax was imposed upon the purchase or acquisition of an interest in residential property located in the “Greater Golden Horseshoe” area of southern Ontario by individuals who are not citizens or permanent residents of Canada, or by foreign corporations (foreign entities) or taxable trustees. This new 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 located in the Greater Vancouver Regional District.

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.

**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, project proponents, architects, contractors and the like.

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

Municipal Zoning

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

Subdivision of Land

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

Development Agreements

Development agreements between a landowner and a municipality are used to ensure that adequate infrastructure is available or will be made available to accommodate the proposed development without adversely affecting the surrounding area. A development agreement is a generic term that generally means an agreement that is required by a municipality as a pre-condition to development approval that ensures that the landowner fulfills the obligations that the municipality has imposed in granting the approval.

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

Heritage Conservation

Buildings may be subject to prohibitions against modification or demolition as a result of their architectural or historical significance. Such controls may be absolute or temporary. Lands and buildings of cultural heritage interest are often identified and listed on individual inventories that exist at the municipal, regional, provincial and/or national level. The criteria by which cultural heritage properties are identified typically focus on materials, design, historical associations and/or contextual value.

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

**Significant Natural Areas, Flood Plains**

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

**Municipal Infrastructure 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, 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” ("EDC"). EDCs may be imposed if a school board will need 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. 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.

*October 2019*
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. Instead, the tendency is for commercial landlords to determine if there is 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 an “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.

October 2019
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 has since been 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

Cannabis for medical purposes was and continues to be regulated by a single united federal legislative system, which applies equally across all provinces and territories in Canada. Prior to the coming into force of the Cannabis Act on October 17, 2018, cannabis was a Schedule II prohibited substance under the CDSA. This meant that possession, production, distribution and the import/export of cannabis remained criminal offences in Canada, unless an exception was available under CDSA or regulations made thereunder. The two main exceptions for cannabis were found 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 the ACMPR made under the CDSA was repealed and reintroduced as Part 14 of the Cannabis Regulations in a substantially similar form. Under the transitional provisions of the Cannabis Act, licenses that were issued under the NCR or the former ACMPR were automatically deemed to be licenses issued under the Cannabis Act.

Cannabis regulated under the Cannabis Act includes any phytocannabinoids contained in the plant, such as THC or CBD, whether together or alone.

Under Part 14 of the Cannabis Act, individuals with a qualifying “medical document” can lawfully possess up to 30 times their daily prescribed amount of medical marijuana for their own medical purposes, to a maximum of 150 grams of dried marijuana. Medical marijuana is typically obtained directly from a Health Canada licence holder. 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

Until the Cannabis Act became law in October 2018, cannabis could only be lawfully produced, distributed, possessed or consumed for medicinal (or scientific) purposes. With the passage of the Cannabis Act, Canadian adults became entitled to possess up to 30 grams of dried cannabis (or equivalent) per person in public spaces and to (subject to provincial restrictions) cultivate up to four cannabis plants per dwelling.

Commercial production of recreational cannabis is the purview of businesses licensed by Health Canada under the Cannabis Act. There are currently 237 organizations holding cultivation, processing and medical sale licences - in addition to those holding research, analytical testing and cannabis prescription drug licences - with many more in the application queue.

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 product 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.

Both cultivation and processing licences allow for the bulk sale of cannabis to other industry participants if applicable requirements are met – and directly to medical patients if the cultivator or processor also holds a licence for medical sale. Analytical testing licences do not allow for any sale activities, while research licence holders are permitted limited 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 various 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.

More information about Health Canada’s cannabis licensing is available here.

Health Canada publishes a useful licensing guide which can be found here.

REGULATION OF EDIBLES, EXTRACTS AND TOPICALS

Amendments to the Cannabis Regulations authorizing the production of three new forms of cannabis came into force on October 17, 2019 (the “Amendments”).

The Amendments introduce, among other things, new classes of permitted cannabis: edible/drinkable cannabis; cannabis extracts (which includes cannabis oil); and cannabis topicals. Cannabis concentrates currently used in cannabis oil (or that will be used in edibles, extracts or topicals) are regulated under the Cannabis Act whether they contain material levels of THC or other cannabinoids, such as cannabidiol (CBD), even if such concentrates contain no THC at all. Cannabis products in the new permitted forms will be available as early as mid-December 2019, though widespread distribution is likely to be delayed as industry participants work to develop a robust supply chain.

A processing licence (standard or micro) is required in order to manufacture the new classes of cannabis, and to package and label them for sale to medical or recreational users. A licence for sale for medical purposes would authorize the holder to sell directly to medical patients, otherwise Health Canada licence holders can only sell cannabis for recreational end-use to provincially-authorized retailers or, depending on the province, to the applicable provincial wholesale agent. The Amendments also modify, among other things, the good production practices rules to further mitigate contamination risks and to address the risk of foodborne illness associated with edibles.

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. The provinces also have authority to impose rules in various other regulatory areas, including places of consumption, transportation, personal cannabis cultivation rules and minimum permitted age of consumption. 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 and instead elected to allow private licensed retailers to operate both online and physical sale of cannabis to recreational users in the province.
In December 2018, Ontario announced a change to its plan to permit an unlimited number of private licensed cannabis retail stores (with a limit of 75 per operator) and instead has chosen to take a phased approach to the licensing of brick-and-mortar retail cannabis stores. Citing cannabis product supply shortages, Ontario elected to operate lotteries to award the right to apply to the province’s regulator, the Alcohol and Gaming Commission of Ontario, for one of 75 cannabis retail licences. These lotteries were conducted in January and August 2019, and have been marred by poorly conceived processes and (failed) litigation by disqualified applicants. At the date of writing, there are only 25 cannabis retail stores operating in Ontario. Failing any further amendment to Ontario’s cannabis legislation, the cannabis retail market will open to all would-be retail participants (except for holders of Health Canada cultivation or processing licences) on July 3, 2020.

**CANNABIS**

**CANNABIS ACT 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 continues to grow in parallel with the interest in CBD-only cannabis products, as well as with the recent 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 are treated in identical fashion.

**IMPORT/EXPORT**

Cannabis may only be imported or exported by Health Canada licence holders and only for medical or scientific purposes. In addition to holding an appropriate cannabis licence, would-be importers must obtain an import or export permit from Health Canada. Health Canada will only issue an import permit if certain conditions are satisfied, including provision of proof that the export of cannabis from the source country is lawful under the laws of such country. Other permits may also be required for import of certain forms of cannabis. For example, importing live cannabis plants requires a permit from the Canada Food Inspection Agency.

**ADDITIONAL BUSINESS CONSIDERATIONS**

**Regulatory**

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

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

**Access to Capital Markets**

Debt financing has been made available in Canada through credit unions, financial institutions and alternative lenders. Additionally, cannabis companies successfully raise capital privately or through listings on the public stock exchanges in Canada, being the TSX, the TSXV, the CSE and the new NEO Exchange. The TSX and TSXV are currently not accepting new listings of companies with any U.S. cannabis market operations. Such companies have generally accessed the Canadian capital markets by listing on the CSE or, recently, the NEO Exchange. Finally, streaming deals, modelled off a form of financing often used within Canada for mining companies, have become a common financing alternative in the Canadian cannabis market. In streaming deals, investors provide upfront financing to licensed producers in exchange for rights to future production of cannabis.

**LICENSING**

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

**Marketing and Promotion**

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

**Supply Constraints**

Since 2017, industry participants had forecasted cannabis shortages in connection with legalization of the recreational market. Until the second half of 2019, anecdotal reports of supply shortages were common in certain regions nationwide. Relying on producer inventory and sales data gathered through the Cannabis Tracking System, Health Canada has disputed that any actual shortages existed. In its most recent report, Health Canada reports that in July 2019, total finished inventory of dried cannabis held by cultivators, processors, distributors and retailers was approximately five times the total monthly sales that month and cannabis oil finished inventories were more than 10 times total sales. (The most recent Health Canada report can be found here).

It remains to be seen whether 2020 will see a more successful rollout of newly-permitted cannabis edibles, topicals and extracts.

*October 2019*
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 (and the related Clean Water Act, 2006), the Toxics Reduction Act, 2009 and the Environmental Assessment Act. Similar types of legislation are found in most provinces.

Provincial responsibility for environmental regulation is not exclusive but shared with the federal government, and to a lesser extent municipal governments. The federal government is responsible for limited interprovincial environmental legislation. 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. Municipalities, using localized health impacts as justification, have entered the environmental domain (e.g., lawn pesticides, sewer discharges and local emissions), enacting by-laws that can have a significant impact on facility design, operation and development. For example, the City of Toronto’s Environmental Reporting and Disclosure By-law imposes reporting requirements for a prescribed list of substances. 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. These policies have resulted in several governments amending their environmental statutes to permit the issuance of administrative penalties, or environmental tickets, for relatively minor events of non-compliance and characterizing events of non-compliance as continuing offences with each day constituting a new offence. However, even these “minor” administrative penalties can result in significant payments and may also serve as an aggravating factor in any subsequent prosecution. Most jurisdictions provide director and officer liability for certain issues of environmental non-compliance with some requiring an actual environmental harm to impose such liability.

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

The courts also regulate environmental matters at common law. Individuals and businesses operating in Canada may be exposed to civil liability in nuisance, negligence and trespass, amongst other claims or failure to comply with statutory obligations. The potential for class proceedings greatly increases the quantum of damages that may be available.

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 Navigation Protection Act, each province and territory has its own water quality statute(s) which it administers through its Ministry of the Environment or Natural Resources. These statutes generally establish water quality standards, water taking/transfer limits, permitting and approval regimes and enforcement measures. The quantum and quality of water takings (ground and surface) and discharges by industry are also regulated with water transfers becoming increasingly controversial.

AIR

The federal government has air emission regulatory tools contained in the CEPA. The federal government passed a number of regulations to
limit or reduce air emissions, including regulations for heavy duty vehicles (including full-size pick-ups, 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. However, 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 in preparation for emissions trading.

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. In early 2019, the federal government implemented a federal carbon pricing system for provinces that have not designed their own pollution pricing systems in accordance with the federal government’s climate action plan. The Greenhouse Gas Pollution Pricing Act is comprised of an output-based pricing system and a fossil fuel tax. Saskatchewan, New Brunswick and Ontario are challenging the federal government’s plan in the courts.

LAND

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

Ontario is one of the provinces to have substantive and directed legislation for the remediation of contaminated lands or brownfields. The OEPA provides certain basic immunity from the MOECP orders under the OEPA (the MOECP’s primary enforcement tool). These include orders with respect to a once-contaminated property where prescribed remediation has been conducted and proper filings with the MOECP have been made by a property owner or entity in control. What is not included in the amendments is any funding mechanism similar to the Comprehensive Environmental Response, Compensation, and Liability Act in the United States, meaning that the remediation of brownfields in Canada, including Ontario, remains primarily market-driven. In some instances, municipalities may work with the developer to create incentives for the remediation of brownfields through a community improvement plan and property tax incentives.

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

TOXIC SUBSTANCES

The CEPA regulates the production, manufacture, use and disposal of toxic substances, excluding pesticides which have a separate combination of federal and provincial regulation. Through this legislation, the Minister of the Environment can
require samples and information with respect to a substance. The CEPA contains penalty provisions, including mandatory minimum fines and maximum fines up to C$12 million. The federal government continues to review its classification of several substances to ensure that the proper safeguards are in place given the current state of scientific knowledge about the health and environmental impacts of the substance. Provincial legislation, such as the OEPA and Toxic Reductions Act, 2009, and in some situations municipal requirements, such as in the City of Toronto, may impose similar or more restrictive standards, including the preparation of plans to reduce the use of certain toxic products.

ENDANGERED SPECIES

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

ENVIRONMENTAL AND IMPACT ASSESSMENT

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

The previous federal government made significant alterations to the federal environmental assessment process with 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. The current federal government passed the Impact Assessment Act (“IAA”) to repeal and replace the CEAA, 2012. 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.

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

WASTE & RECYCLING

The storage, transfer and disposal of hazardous and non-hazardous waste is regulated provincially and, in some circumstances, federally. Development of new waste facilities, such as landfills, can be controversial and subject to significant review and public consultation. Most governments are actively encouraging recycling and mandate industry-funded stewardship programs to divert certain waste streams (e.g., tires, paper, cardboard, electronic) from landfills. Some provinces, like Ontario, are moving toward a “producer responsibility model” where instead of funding recycling programs, producers are made responsible for the full lifecycle of their products and packaging. Several jurisdictions have mandated goals to reduce waste to specified targets providing new opportunities for innovation. Failure to register, file and remit payments can lead to fines. Regulation of recycling and waste diversion is expected to increase.

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Canada has a thriving technology sector that supports key economic drivers such as e-commerce over the Internet. The legal framework governing the technology sector is shared by the federal and provincial governments. E-commerce activity implicates several legal regimes, including intellectual property law as it relates to the Internet (copyright and trademarks), broadcasting and telecommunications law, privacy, consumer protection (for example, the oversight over deceptive marketing practices under the *Competition Act*), anti-spam (CASL), and personal data security.

The scope of legislative and judicial jurisdiction over the Internet is in flux. In recent judicial decisions, the Canadian courts have shown a willingness to assume jurisdiction over non-Canadian businesses even if they have no physical presence in Canada. Even these “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 *Defense Production Act* and *Controlled Goods Regulations*. The Controlled Goods Directorate, which is governed by the *Controlled Goods Regulations*, is mandated to protect goods and/or controlled technologies within Canada and to prohibit controlled goods and/or controlled technology from being accessed by unauthorized persons.

Canada’s export control regime is regulated by multiple domestic laws, international agreements and diplomatic obligations. Export permits may be required to not only ship goods outside of Canada, but to provide services associated with designated technologies, discuss designated technologies with certain employees, participate in phone or video conversations about designated technologies, correspond by email, fax or otherwise through cyberspace about designated technologies, and even before leaving Canada’s borders on business trips. Factors such as the nature, characteristics, origin of componentry, uses to be made of the technology, destination and end users of the technology are all relevant to whether an export permit is required.

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

**E-commerce Statutes**

Canada’s federal government and the Canadian provinces have adopted electronic commerce statutes that deal with issues arising from conducting business electronically. Ontario legislates e-commerce under the *Electronic Commerce Act*, while this area is also subject to the federal *Personal Information Protection and Electronic Documents Act*. Canada’s e-commerce statutes typically set out standards to be met in order to use an enforceable electronic signature and requirements to be met in order for a document, that would otherwise have to be in writing, be satisfied by communicating such document electronically. These e-commerce statutes also set forth how and when an offer and acceptance of a contract distributed electronically may be made.

**Insolvency**

Canadian bankruptcy and insolvency laws underwent revisions in 2009 to afford greater protection to licensees of technology. One of the key terms set forth in Canadian bankruptcy and insolvency legislation is that such legislation permits insolvent parties to “disclaim” (terminate) a licence agreement; provided, however, a licensee’s right to use the intellectual property cannot be disclaimed.

It is unclear which intellectual property rights enjoyed by licensees are protected from being disclaimed. While one may assume all statutory intellectual property rights would be protected, Canada also enjoys common law intellectual property rights for trademarks and trade secrets. The legislation provides no guidance as to what the “right to use” (which is afforded protection) means. The legislation does not obligate the licensor to continue to provide maintenance or support should the licensor become insolvent. From a licensor’s perspective, there is little, if any, protection should the licensee become insolvent. There can be serious consequences for the licensor arising from the Canadian courts’ broad right to assign licence agreements to third parties in the event of an insolvency.

**.ca Domain Names**

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

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

**Applicability of Sale of Goods Legislation**

In Canada, certain rights and obligations will follow the acquisition or sale of technology that falls within the scope of provincial sale of goods legislation. Canadian courts tend to treat computer system acquisitions as sales of goods while transactions involving pure service, maintenance, training or programming are typically viewed as incidental to the sale of goods and therefore not subject to sale of goods legislation. 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, the software may be subject to sale of goods legislation.

**Libel Action over the Internet**

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

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

**Assigning and Sublicensing Technology Licences**

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

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

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

**Use of Non-Canadian Form Agreements in Canada**

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

**Sale of Goods Act Conditions:** Canadian practice relating to technology agreements is to ensure that any disclaimer of implied warranties contained in a technology agreement also disclaims the implied conditions imposed by sale of goods legislation.
Ownership Rights: Canadian copyright law does not recognize the concept of a “work made for hire,” which is often contained in U.S.-based agreements. In a software scenario, typically, the author of the computer program is the first owner of copyright in the program. If the author is employed for the purpose of creating software, then the employer will generally be the first owner of copyright in the software. The law is similar for inventions and trade secrets. In a situation in which a copyrighted work is being created for a customer by a contractor, the contractor, as author, will be the owner of the work unless the contractor has entered into a written assignment of such copyright in favour of the customer. It is also standard practice in Canada to have such a written assignment accompanied by an express waiver of moral rights in the work.

Import/Export Law Controls: Canada has its own export control legislation which must be considered when determining export restrictions which must be adhered to by a Canada-based customer.

**INTELLECTUAL PROPERTY**

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

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

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

**Patents**

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

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

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

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

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

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

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

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

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

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

**Infringement and Enforcement of Patents.** An issued Canadian patent provides the owner with rights to exclude others from commercially exploiting (manufacturing, using, selling and inducing others to do so) the invention which is disclosed and claimed in the patent, generally for a non-renewable period of 20 years following the date of filing the patent application. As a result of the Comprehensive Economic and Trade Agreement, patent term extensions of up to two years are available in Canada for approved drugs under a Supplementary Protection Certificate regime.

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

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

- **Interlocutory or permanent injunctions.** Injunctions require the defendant to cease activities which infringe the patent rights during the time the case is pending (interlocutory) or following judgment, during the balance of the patent term. Interlocutory injunctions in Canadian patent cases are exceptionally rare.
- **Damages.** These are monetary compensation for the patent owner’s losses as a result of the defendant’s infringement. Punitive damages for wilful infringement and other egregious conduct are available, but rarely awarded.
- **Accounting of Profits.** This is an alternative to the damages remedy which allows the patent owner to receive the profit which the defendant made from the infringement and is of particular use in cases where the patent owner would have been, for any number of reasons, unable to make the sales made by the infringer.
- **Seizure or destruction** of the infringing products or the tools used to make them.

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

**Trademarks**

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

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

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

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

**Securing Trademark Protection.** The person who first uses the trademark in association with the products or services has priority, and the entitlement to adopt and register it. In Canada however, trademark rights exist in unregistered trademarks and such rights arise from distinctiveness and use, whether or not they meet other requirements of registration.

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

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

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

Canadian trademark applications can be filed in CIPO based on use, proposed use or on a prior application for registration of the mark in a foreign country that is a signatory to the Paris Convention for the Protection of Industrial Property (the “Paris Convention”). Canada has signed the Madrid Protocol (allowing for a single international trademark application, filed in the trademark office in the home country in a single language, to obtain registrations in multiple countries). On June 17, 2019, the Madrid Protocol was implemented. It is no longer necessary to apply for a trademark based on use or proposed use.

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

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

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

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

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

- a) a confusingly similar trademark by another and
- b) use of the registered trademark by another in a manner which may depreciate its goodwill.
In relation to products, “use” in Canada generally means the placement of the trademark on the product or on the packaging for the product at the point of sale or when possession is passed to the purchaser of the product. In relation to services, “use” generally means use of the trademark incidental to the provision of the services or use in advertising of the services.

Registration provides the owner with significant procedural 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.

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

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

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

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

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

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

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

Significant defences and limits exist on the enforceability of unregistered trademarks.

“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. Counterfeitters 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
Copyright

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

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

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

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

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

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

The term of copyright in Canada, as in the majority of Berne Convention countries, is generally the life of the author and 50 years after his or her death. In cases of joint creators, the term of protection for copyright usually extends from the death of the last author to die. Canada has legislation pending that would increase the term of copyright.

In Canada, recognition is given to a division of rights within copyright – between “economic rights” and “moral rights.” Economic, or exploitation, rights are emphasized and relate to the copyright holder’s exclusive right to use, authorize or prohibit use of a work and include the rights of:

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

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

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

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

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

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

Unique to the field of copyright commercialization is the use of copyright collective and reproduction rights. Organizations which license the use of works on behalf of large numbers of creators and other rights holders in their large portfolios collect licence royalties for that use, and distribute the royalties back to rights holders. The statutory regime governing Canadian copyright collectives is contained in the Copyright Act. Copyright collectives often specialize in licensing of different categories of works (e.g., text/image-based works or musical works) and representation of different rights holders (e.g., creators or neighbouring rights holders).

Infringement and Enforcement of Copyright. Copyright in Canada is infringed by and enforceable against a person who, without the rights holder’s consent, does any act that only the rights holder can do under the Copyright Act. The 2012 amendments to the Copyright Act have included in activities constituting infringement in Canada the act of providing an Internet-based service (or other digital network service) primarily for the purpose of enabling acts of copyright infringement if an actual infringement of copyright occurs by that same means as a result of the use of that service.

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

The range of remedies provided for copyright infringement in Canada includes injunctive relief, damages, accounting of profits and delivery up of infringing works and the means to produce them. Unlike patent and trademark law, where the remedies of damages and accounting of profits are alternative remedies, a person who infringes copyright in a work in Canada is liable in a civil action to pay damages and also to account for the profits resulting from the infringement. As well, statutory damages are available which fix a range for damage and allow Canadian rights holders to obtain
monetary judgments without the requirement to prove specific loss. A Canadian copyright owner may elect, before final judgment in an infringement proceeding, to recover statutory damages for an amount between C$500 and C$20,000 to each infringed work infringed for commercial purposes, and between C$100 and C$5,000 for all works in the event of copyright infringements for non-commercial purposes, as determined by the court.

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

Industrial Designs

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

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 pertains, or the labelling or packaging of such products that were distributed in Canada were marked with “D” in a circle and the name or usual abbreviation of the name of the proprietor.

Trade Secret/Confidential Information

Overview. The most common form of intellectual property protection used by Canadian business is the maintenance of information as a “trade secret” or, as the concept is more broadly known, “confidential information.” Scientific, technical, financial and marketing information all come within the scope of confidential information in Canada and encompass such diverse material as formulae, processes, computer programs and code, layouts, interfaces, databases, product concepts and designs, operations manuals, research data and documents, supplier, distributor and customer lists and information about customers and their needs and preferences. If the information is:
- of a commercial nature;
- used in business to provide a competitive advantage; and
- kept in confidence,
it qualifies for legal protection in Canada as confidential information.

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

The simplicity of the legal concept of confidential information is in contrast to the increasing practical problems of maintaining information as confidential. The:
- increasing volume of data which is susceptible to designation as confidential information;
- proliferation of innovation and, in particular, the use of computer systems for information storage and transfer which has led to cyber espionage and theft of confidential information on an unprecedented scale;
- increasing mobility of workforces in the global market and the increasing complexity of distribution and supply chains; and
- proliferation of outsourcing, together with digital communication
have all conspired to make it increasingly difficult to control access and use of confidential information. For many businesses, the issue is not restricted to protecting their own information. It includes avoiding unwanted exposure to confidential information of third parties, such as former employers or newly-hired employees.

Ownership, Exploitation and Transfer of Rights. The concept of “ownership” is problematic in the case of confidential information. Canadian law does not prohibit either independent development of the same information or its acquisition by any proper means (for example, after the restrictive terms of an employment contract or licence expire). As a result, an “owner” of confidential information has no monopoly right in the information, but rather only an enforceable remedy for breach of an express or implied contract or, in the absence of either, for breach of relationships of confidence or trust. Canadian courts have cast doubt on whether confidential information can be considered as purely “property.”
same principles which apply to the ownership of inventions – the nature of the employment or contracting relationship and the specific issue of whether the development was within the scope of the employee’s or contractor’s duties. Even in the absence of an employment agreement setting out obligations of confidence, employees are under a clear common law duty not to disclose confidential information, in particular trade secrets of present or former employers, whether created by the employee or others. This duty is more onerous where the employee has a senior position with the company and, as a result, is impressed with fiduciary duties.

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

**Infringement and Enforcement of Rights.**

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

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

The enforcement of confidential information rights, unlike other forms of intellectual property, is governed by Canadian provincial law. Since employees, consultants, independent contractors and joint venturers are most often privy to such information, provincial contract law and employment law relating to employee contracts is most frequently engaged in the protection of confidential information.

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

**International Conventions and Treaties**

Canada is a signatory to the North American Free Trade 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* came into force in 2015 (with concurrent amendments to the *Copyright Act*, the *Trade-marks Act* and the *Customs Act*). The amendments provide the Canadian Border Services Agencies additional tools for combatting the import and export of counterfeit goods. New civil and criminal remedies were created to deal with possession and dealing of counterfeit goods. These changes were implemented to comply with Canada’s international obligations under the Madrid Protocol, the Nice Agreement and the Singapore Treaty.

The Trans-Pacific Partnership Agreement ("TPP") was originally concluded on October 5, 2015, by 12 countries (Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam). It was signed on February 4, 2016, by all 12 parties. 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 due to its requirements of ratification by at least six states having an aggregate GDP of more than 85% of the GDP of all signatories.

On November 10, 2017, the 11 remaining members of the TPP agreed on the core elements of a new agreement, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP"). Once fully implemented, the 11 countries will form a trading bloc representing 495 million consumers and 13.5% of global GDP, providing Canada with
preferential access to key markets in Asia and Latin America.

On October 29, 2018, Canada became the fifth country to ratify the CPTPP. However, the CPTPP did not come into force until December 30, 2018, 60 days after its ratification by Australia, which was the sixth country to ratify the CPTPP in accordance with the specified threshold for the agreement to come into force. 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 makes its second tariff cut on April 1, 2019).

In contrast to the now defunct TPP, Canada will not be required to implement CPTPP obligations for patent term adjustment and copyright term protection, allowing Canada to maintain its existing regime. This means that Canada will not have to change its laws to enable patent owners, in some circumstances, to apply for an extension of the term of a patent following unreasonable delays in the processing of patent applications. As well, Canada can continue to provide a copyright term of “life of the author plus 50 years” consistent with multilateral standards, and Canada's longstanding policy. According to the Canadian government, other suspensions on IP secured by Canada “will protect future Canadian policy flexibility.”

COMMUNICATIONS LAW AND DIGITAL MEDIA

Companies operating in the telecommunications and broadcasting sectors in Canada comprise inter-provincial undertakings, falling under the legislative authority of the federal government and are overseen by the legislative framework established in the Telecommunications Act, the Radiocommunication Act and the Broadcasting Act. Broadcasting is generally administered by the Canadian Radio-television and Telecommunications Commission (“CRTC”) under the supervision of the Department of Canadian Heritage (“Canadian Heritage”), which is responsible for cultural matters, including Canadian broadcasting policy. Regulation of the telecommunications sector overseen by the CRTC under the policy framework of the Department of Innovation, Science and Economic Development (“ISED”). ISED is also responsible for the allocation and use of wireless spectrum in Canada pursuant to spectrum licences and radio authorizations issued under the Radiocommunication Act.

Broadcasting

The CRTC supervises and regulates all aspects of the broadcasting system pursuant to the Broadcasting Act through its licensing and exemption power. The CRTC also exercises statutory oversight with respect to Canadian ownership and control of broadcasters. Pursuant to regulations made under the Broadcasting Act, the CRTC has set out Canadian content requirements for all broadcasters (including free-to-air and discretionary television programming services, AM and FM terrestrial radio stations and satellite radio services). These requirements also compel broadcasting distribution undertakings to give priority to the carriage of Canadian services, to contribute a certain percentage of revenue to the production of Canadian programming and to provide efficient delivery of programming services.

The communications regulatory and policy environment has had to evolve in the face of challenges posed by new technologies and new service offerings. In recognition of the impact of the entry of “over-the-top” (“OTT”) online video services into Canada, the CRTC has exempted all internet-based and mobile point-to-point broadcasting services from CRTC regulation, provided such services adhere to the terms and conditions of its digital media exemption order.1 Pursuant to its exemption order, the CRTC does not impose any requirements for exempt digital media undertakings to support Canadian content, including new media content.

However, there has been increasing pressure from certain industry stakeholders to require all OTT providers (including Netflix) that engage in “broadcasting” activities in Canada to make financial contributions toward Canadian content. Proposals have also been put forward which would require Internet service providers (“ISPs”) to devote a percentage of their revenues toward Canadian content in view of the increased prominence of broadcasting content on Internet services that are accessed via ISP facilities.

Canada’s international trade obligations are relevant to (and, in some cases, potentially conflict with) Canadian domestic policies and rules relating to

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1 The CRTC has exempted from regulation the provision of broadcasting services that are delivered and accessed over the internet or delivered using point-to-point technology and received by way of mobile devices. These services are governed under the CRTC’s Exemption order for digital media broadcasting undertakings (Broadcasting Order CRTC 2012-409).
Canadian culture, including in the broadcasting sector. In that regard, as noted above (see: “Intellectual Property - International Conventions and Treaties”), the CPTPP came into force on December 30, 2018.

Pursuant to the provisions found in the annexes to the CPTPP, Canada reserves the right to adopt or maintain a measure that affects cultural industries and that has the objective of supporting, directly or indirectly, the creation, development or accessibility of Canadian artistic expression or content. Moreover, pursuant to side letters entered into between the Government of Canada and each of the CPTPP signatories, Canada may adopt or maintain discriminatory requirements on service suppliers or investors “to make financial contributions for Canadian content development.”

Telecommunications

Under the Telecommunications Act, the CRTC has jurisdiction over all telecommunications service providers, in particular telecommunications common carriers2 such as wireline telephone companies, wireless carriers and Internet Service Providers. Among the Telecommunications Act’s stated objectives is to ensure that Canadians in all regions of Canada have access to reliable and affordable telecommunication services of high-quality. This objective is getting increased prominence with Budget 2019.

The CRTC has the authority to forbear from regulating one or more services or classes of services provided by a carrier if the CRTC finds that there is sufficient competition for those services to protect the interests of users. Among other services, retail Internet and mobile wireless services have been forborne from price regulation. The large telecommunications carriers continue to be subject to tariff filing requirements and other ongoing regulatory obligations in specific areas. In particular, all entities acting as telecommunications common carriers, including telcos and cable carriers, are required by the CRTC to provide wholesale services at regulated rates that allows independent ISPs to provide Internet services at the premises served by the carrier’s wireline network. In 2015, the CRTC extended mandated access to include “fibre to the premises” facilities.

The CRTC and ISED can impose monetary penalties on companies that contravene the Telecommunications Act, the Radiocommunication Act and the regulations and rules promulgated thereunder.

In February 2019, the Minister of Innovation, Science and Economic Development tabled a Proposed Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation (the “Policy Direction”). 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 policy objectives relating to Canadian telecommunications that are set out in the Act.

The Policy Direction, which came into force on June 17, 2019, will likely have a significant impact on the telecommunications regulatory framework overseen by the CRTC. The Policy Direction mandates the CRTC to engage in regulatory measures that will “promote competition, affordability, consumer interests and innovation.” The Policy Direction directs the CRTC to “encourage all forms of competition” and to “reduce barriers to entry and barriers to competition for new and smaller telecommunications service providers.”

The government’s Regulatory Impact Analysis Statement which accompanied the issuance of the Policy Direction noted that, despite progress in the advancement of consumer outcomes, significant issues remain in the telecom sector, including:

- the exercise of market power among Canada’s incumbent telecom carriers;
- the high prices (relative to those in peer countries) for comparable baskets of telecommunications services;
- the affordability of telecommunications services for Canadians (and particularly for low-income Canadian families);
- findings by the Canadian Competition Bureau that the national mobile wireless incumbents coordinate their behaviour, resulting in higher prices for Canadians;
- substantial concerns expressed by Canadians regarding the sales practices used by large telecommunications carriers; and
- a decreasing, but still significant, number of Canadian households remain without access to high-quality services, particularly in areas that are underserved by competition.

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2 However, unlike the Federal Communications Commission, the CRTC does not award spectrum licences to wireless telecom carriers; that function is exercised by the Minister of Innovation, Science and Economic Development under the Radiocommunication Act.
The Broadcasting and Telecommunications Legislative Review

Many of the above-noted issues governing the broadcasting and telecommunications sector will be considered as part of the Broadcasting and Telecommunications Legislative Review, an initiative announced in 2018 jointly by the Canadian Ministers of Innovation, Science and Economic Development and Canadian Heritage. The Ministers struck a “Panel of Experts” to review the broadcasting and telecommunications suite of legislation (Broadcasting Act, Telecommunications Act and Radiocommunication Act) and the accompanying regulatory frameworks. The review “is intended to examine the existing legislative framework and tools in the context of the digital age and what changes may be needed” to support the objectives of content creation in the digital age, net neutrality, cultural diversity, and how to strengthen the future of Canadian media and content creation. The review will also address how to best promote competition and affordability for internet and mobile wireless.

The Broadcasting and Telecommunications Legislative Review Panel published a consultation document in 2018 focusing on four key themes: reducing barriers to access by all Canadians to advanced telecommunications networks; supporting the creation, production and discoverability of Canadian content; improving the rights of the digital consumer; and renewing the institutional framework for the communications sector. The Review Panel completed an external consultation process (including written submissions) which closed in January 2019. In June 2019, the Review Panel issued a “What We Heard” report summarizing the comments and submissions received by the Panel.

The Panel has announced that the contributions and submissions it has reviewed as part of the consultation process will be taken into consideration in the work leading to the development of its Final Report, which is anticipated to be presented to the federal government in January 2020. Clearly, many, if not all, of the issues outlined in this chapter will be addressed in the Panel’s Final Report.

Ownership and Control of Telecommunications Carriers and Broadcasters

The legal requirements relating to Canadian ownership and control of broadcasting undertakings are set out in the Direction from the Governor in Council (i.e. the Canadian federal government Cabinet) to the CRTC made under the Broadcasting Act. Under the Direction, 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. The Direction also provides that the Chief Executive Officer and 80% of the members of the board of directors of a licensee that is a corporation must be resident Canadian citizens. There are no explicit restrictions on the number of non-voting shares that may be held by non-Canadians at either the holding company or licensee level. However, the Direction prohibits a broadcasting licensee from being controlled by non-Canadians as a question of fact. Factors such as the level of ownership of equity through non-voting shares and of total equity are relevant to the analysis of control in fact.

Similar restrictions apply to primarily “incumbent” Canadian carriers pursuant to the Telecommunications Act and associated regulations. However, there is no requirement that the CEO be a resident Canadian of a company operating pursuant to this legislation.

In 2012, in response to ongoing pressure for further deregulation and increased competition, the ownership rules governing telecommunications carriers were liberalized through the removal of the ownership requirements for wireline and wireless telecommunications carriers that have annual revenues from the provision of telecommunications services in Canada that represent less than 10% of the total annual revenues for the sector. Foreign ownership restrictions prohibiting non-Canadian control continue to apply to the large (“incumbent”) telecommunications carriers.

PRIVACY AND DATA PROTECTION LAWS IN CANADA AND CANADA’S ANTI-SPAM LEGISLATION

Canada has a growing array of 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 the next significant area of law relating to prevention, response (governmental and public) and litigation. Class action law suits 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.

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, the federal Personal Information Protection and Electronic Documents Act ("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, 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 in a few ways: First, an organization itself will have to comply with PIPEDA and other privacy legislation with respect to Personal Information on third parties (such as existing or prospective customers, visitors, etc.) it collects and controls. Federally-regulated organizations will have to also comply with PIPEDA in relation to its employee information. To the extent a provincially-regulated organization has employees located in the provinces of B.C., Alberta or Quebec, or otherwise has Personal Information on residents of those provinces, it will need to consider the impact of such provincial privacy laws on Personal Information. Secondly, organizations will want to ensure that all third parties to whom they grant access to or use of the Personal Information have contractual provisions in place governing the third party’s use, disclosure and security around the Personal Information, as well as certain audit rights to ensure such third party complies with its obligations. Thirdly, organizations will need to have plans in place to mitigate 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.

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

Overview of PIPEDA

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

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

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

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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.

**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.

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

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

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

Persons can also seek remedies from court for breaching PIPEDA, other privacy statutes and common law obligations. While individual damage awards have been somewhat limited to date for breaching privacy rights, the courts are expanding these damage awards and are more accepting to certifying class action law suits 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 great deal of sensitivity in Canada regarding outsourcing of any data management services outside the country. Many concerns can be dealt with through adequate data protection agreements combined with appropriate notice requirements. However, the Privacy Commissioner of Canada is considering the requirement for opt-in and express consent prior to the disclosing or sharing of Personal Information outside of Canada. In addition, legislation exists in the provinces of British Columbia and Nova Scotia, 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 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, Alberta has mandatory breach notification obligations through its privacy legislation, as does PIPEDA. The Canadian government recently passed amendments to PIPEDA that, among other changes, introduce mandatory breach notification requirements. 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.

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 and Public Disclosure of Private Facts. While the courts initially limited the damages to approximately C$20,000 for a breach, except in extraordinary circumstances, in recent months the courts appear more willing to increase the damage awards for an individual breach to more substantive dollar values.

Canada’s Anti-Spam Legislation

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

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

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

October 2019
Responsibility for labour and employment legislation in Canada is split between the federal and provincial or territorial governments in accordance with the nature of the undertaking in which the employer is engaged. Employees of businesses which fall under federal jurisdiction are subject to federal labour laws. These include such businesses as broadcasting, interprovincial trucking, banks, airlines and railroads. Employees of businesses which are not “federal undertakings” will fall under the applicable provincial or territorial jurisdiction.

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

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

Employment and labour legislation is routinely amended. In June 2017, the Government of Ontario released a number of legislative proposals which will, if enacted, substantially amend Ontario’s workplace laws.

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

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

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

Generally, where an employer terminates the employment of 50 (but as little as 10 in some 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-union 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 employer’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 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; social condition and source of income. 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 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 over the last few years, expanded significantly by courts and tribunals.

PAY EQUITY

Jurisdictions across Canada have different types of pay equity/equal pay legislation, which represent different principles. Each of these laws prohibits disparity between wages for men and women.

EMPLOYMENT EQUITY

Employment equity is a concept that addresses the barriers to equal treatment of employees and the process of ensuring such equal treatment. People with disabilities, people of minority backgrounds and others may face discrimination in hiring, promotion and payment of benefits, as well as inadvertent systemic discrimination. Quebec and the federal government are currently the only jurisdictions that have employment equity legislation. In Ontario, the Employment Equity Act was in force for just over a year in the 1990s. It was repealed and Ontario now promotes workplace diversity through the Equal Opportunity Plan. 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. AODA also requires employers to implement policies and procedures which integrate accessibility within the workplace and the career advancement of employees with disabilities.

**OCCUPATIONAL HEALTH AND SAFETY**

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

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

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

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

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

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

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

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

Sentencing courts have increasingly less tolerance for preventable offences. Financial penalties for businesses can be significant for serious cases, in the hundreds of thousands of dollars. For individuals, most provinces have a lower maximum fine, but there is also the possibility of jail time for repeat or
egregious offenders. Recently in Ontario, maximum financial penalties have been raised to C$100,000 for individuals (from C$25,000), and to C$1,500,000 for corporations (from C$500,000). The possibility of jail time for individuals remains the same.

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

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

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

In a tragic incident, five workers died when a swing stage on which they were working collapsed. One worker was severely injured. There were insufficient tie offs on the swing stage. The company pleaded guilty to provincial OHSA charges and was sentenced to a fine of C$200,000. The Court of Appeal raised the fine to C$750,000, despite the company’s lack of financial resources. The Court said that this penalty survived any bankruptcy of the company. The project manager, who had also gone up on the swing stage, was convicted of five counts of criminal negligence causing death and one count of criminal negligence causing bodily injury. This was the first criminal conviction of an individual in Canada for a workplace incident. The project manager, who had been a “stickler for safety” prior to the incident, was sentenced to 3½ years in prison on each count, served concurrently. The trial judge said that on this occasion, the project manager had preferred the interests of the company in getting the job done, over the safety of his workers. On January 30, 2018, the appeal court upheld both the conviction and the sentence.

WORKERS’ COMPENSATION

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

LABOUR RELATIONS LEGISLATION

Each province and territory has legislation that regulates the relationship between employers and employees of provincially regulated industries where a union represents or seeks to represent the business’ employees. The Canada Labour Code regulates labour relations for federal works, undertakings or businesses. 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. Each province or territory, and the federal government, has a labour relations board that adjudicates labour relations disputes.

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

Each province and territory has labour relations legislation which governs the establishment of union collective bargaining rights, and the negotiation and administration of collective agreements once
such rights have been established. For employers in the federal jurisdiction, the *Canada Labour Code* contains these provisions.

Issues relating to collective bargaining and unfair labour practices are addressed by provincial and federal labour relations legislation. Rules concerning the certification of unions vary, (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.

The labour relations legislative framework also 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 (i.e., “primary picketing”) 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 (i.e., “secondary picketing”) 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 the 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. If an employer intends to terminate the employment of an employee without cause, the employer must provide the employee with reasonable notice or pay in lieu thereof.

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 will be valid, provided that the limit is clear and was the subject of consideration (e.g., it was accepted at the time of the original offer of employment) and further, appropriately provides for statutory minimums. An employee whose employment is terminated without cause is generally 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 renumeration; 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. 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.
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

The federal Canada Health Act requires that every province and territory in Canada must have a basic health insurance program that covers the costs of medically necessary treatment, including physician costs and hospital stays. Each province and territory then has discretion to offer additional benefits under its health insurance plan.

Wage Earner Protection Program ("WEPP")

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

October 2019
Infrastructure Opportunities in Canada: Alternative Financing and Procurement and Public-Private Partnerships
Over the last 18 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 75 projects have reached financial close. There are also currently 17 projects in procurement: 13 transit, a highway expansion, a bridge replacement, a courthouse and a new correctional complex; and 23 projects under construction, mainly healthcare, justice, transit and transportation projects.

Of note is the Ontario provincial government’s enactment of the Construction Lien Amendment Act, 2017. In December 2017, the Ontario government enacted Bill 142, the Construction Lien Act Amendment Act, 2017, which is the first comprehensive overhaul of Ontario’s Construction Lien Act in more than 30 years, going so far as to rename it the Construction Act. The amendments aim 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 have been welcomed by the PPP sector. The new 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. Bill 142’s ultimate impact on the PPP sector remains to be seen, as many amendments have not yet come into effect.

British Columbia has also been at the forefront of PPP procurement in Canada. Partnerships BC, which was established in 2002 by the British Columbia provincial government, has overseen the delivery of more than 52 projects. There are currently six projects under construction with another seven projects in procurement, including three hospitals, two high schools, two highway expansions, a courthouse, a correctional centre, a hydroelectric generating station, a bridge replacement, a subway and a waste treatment facility. 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 recently 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.

In May 2017, British Columbia saw a change in its government and that government announced that one large P3 project (the George Massey Tunnel Replacement Project), which was in procurement, was going to be suspended pending further review. Since suspending that procurement, the British Columbia government has confirmed its commitment to replace the Pattullo Bridge, expand SkyTrain service towards the University of British Columbia (the Broadway Subway Project), replace St. Paul’s Hospital in downtown Vancouver and replace Burnaby General Hospital in Burnaby, B.C.

The British Columbia government has also confirmed its commitment to seeing the Surrey SkyTrain Expansion Project proceed. The Surrey SkyTrain Expansion Project was originally intended to be British Columbia’s first LRT project. However, following local civic elections in the City of Surrey, direction was shifted in favour of expanding the existing SkyTrain line deeper into Surrey.

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 First Nations’ people and women. Importantly, under the Community Benefits Agreement, within 30 days of employment on the job site, any non-worker or worker from another affiliation will be required to join the union for work specific to the project. The first projects to be delivered using this framework will be the Pattullo Bridge project, the four-laning projects on the Trans-Canada Highway between Kamloops and Alberta, and the Broadway Subway 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 roads and schools 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 anticipates procuring the Valley Line West LRT Extension as a P3. 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 recently issued procurement documentation for the twinning of Highway 104, which will be delivered as a design-build-finance-operate-maintain project, 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.

The federal government established PPP Canada to work with the public and private sectors to support PPPs and to encourage the further development of Canada’s PPP market. The federal government has also created the P3 Canada Fund to support provincial, territorial, municipal, First Nations and other partners in the development of PPP projects. The P3 Canada Fund is contributing funding to major PPP projects across the country, including projects procured by provincial procurement agencies and municipalities. PPP Canada is also involved in the procurement of the Champlain Bridge Replacement Project, one of the largest Canadian PPP projects to date, as well as several other projects such as the Edmonton LRT P3 – Valley Line and the Regina Bypass projects. Note that PPP Canada was dissolved effective March 31, 2018, as the Canada Infrastructure Bank is expected to take on much of the role originally played by PPP Canada.

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), 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 UK 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 UK), 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 government’s Bill 142 (discussed above) introduces standardized bonding requirements which may not conform with the ‘standard’ requirements of PPP lenders. Accordingly, Bill 142 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.

Recently, the federal government created the Canada Infrastructure Bank, which is primarily focused on co-investing with private sector and institutional investors in new, revenue-generating infrastructure projects. The Bank is expected to focus on public transit, trade and transportation and green infrastructure. It is expected that some money from the P3 Canada Fund described above will be reallocated to the Canada Infrastructure Bank. 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.

To date, the Bank has invested in the Réseau express métropolitain project in Montréal, a 67-km, light rail, high-frequency network with 26 stations. The Bank provided a $1.28 billion, 15-year loan.

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The exploration, development, transmission and sale of energy is 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. Another 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 and will require investment to accommodate the changing transportation patterns.

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 efficiency 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.

**NATIONAL MANAGEMENT & REGULATION**

The Canadian energy sector is governed by both federal and provincial or territorial laws. At the federal level, the newly-rebranded 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.

Within the scope of its jurisdiction over extra-provincial energy matters, the Canadian Energy Regulator role extends to construction and operation of facilities, tolls and tariffs and approval of transactions. 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. The construction of major pipeline projects has been very controversial and many projects have stalled or been abandoned.

**PROVINCIAL REGULATION**

In addition, most provinces have established a regulatory body to deal with activities such as the distribution 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.
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. Ontario has forecasted nuclear will continue to form a significant source of electricity for the coming decades. The future of specific nuclear facilities and the long-term management of nuclear waste will be the subject of debate for years to come.

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. 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. The majority of Canadian provinces do not use coal for energy generation or have plans to reduce coal usage. Ontario, for example, has closed all of its coal-fired generating stations and passed legislation permanently banning new and existing facilities from burning coal for the sole purpose of generating electricity. The remaining coal facilities will be impacted by the move to reduce carbon emissions and may be phased out prior to what would be their normal expected operating life.

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 provinces like Ontario, a wide range of opportunities have been opened up through the promotion of conservation and reduced energy consumption. In addition to energy generating opportunities summarized above, businesses also have opportunities to enroll in the Industrial Conservation Initiative, which allows them to save money on ‘Global Adjustment’ costs by reducing consumption during peak hours. Further, businesses that invest in more energy efficient equipment and processing may also qualify for government support.

Canada is a ‘smart grid’ technology leader. Referring to the efficiencies gained when electricity is managed and tracked by technology from the point of generation all the way to end-use, both existing and new Canadian businesses are emerging as global players in the energy management field.

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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. 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 and oral evidence.
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.

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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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