Doing Business in Canada

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The following overview of certain aspects of Canadian law is designed to familiarize investors with the Canadian environment. McMillan focuses on all aspects of Canadian business law and is pleased to discuss your plans and answer your questions.

Government and Legal System

Canada has a federal government, ten provincial governments and three territorial governments. In addition, the provincial governments delegate legislative authority to local municipal governments. At all levels, governments may delegate regulatory power to specialized administrative agencies, boards or commissions. Consequently, a business may be subject to federal, provincial and municipal legislation, as well as administrative regulation. Doing business in the province of Québec has additional obligations and sensitivities, consequently we refer an investor to our "Doing Business in Québec" publication.

Business Vehicles

Investors generally conduct business in Canada through either a Canadian branch operation or a Canadian subsidiary corporation. A foreign business could also enter the Canadian market by forming an unlimited liability company, partnership, trust, or joint venture with other parties.

Various considerations must be addressed when choosing the appropriate commercial vehicle for entering the Canadian market. Tax consequences and limited liability tend to be the key considerations for most businesses. Incorporation of a limited liability subsidiary corporation is an attractive option because it ensures that Canadian operations will have a legal existence separate from that of the parent and thus the parent would not ordinarily be responsible for liabilities of the subsidiary. However, if the Canadian operations are not expected to generate profit for some years, initial operation as a branch could produce considerable tax savings (as discussed more fully below).

Corporations

Subject to certain exceptions, a business may incorporate under the federal *Canada Business Corporations Act* (the "**CBCA**") or any of the provincial or territorial corporate statutes. Unlimited liability companies may be formed under the laws of certain provinces and have different attributes than conventional corporations.

A CBCA corporation must maintain a register of registered holders and beneficial owners of shares representing 25% or more of the corporation's voting rights or fair market value, as well those with direct or indirect control over such shares. These registers are not public; however, corporations must disclose their contents to certain regulatory or governmental authorities upon request. Furthermore, shareholders and creditors can request access to this information subject to certain conditions. Many provinces have enacted similar legislation.

CBCA corporations require their boards of directors to have a minimum of 25% resident Canadians. Except for Manitoba, corporations formed under provincial legislation do not have such a residency requirement.

Partnerships

Business may also be conducted through a variety of different partnerships – a "general partnership" a "limited partnership" and a "limited liability partnership". Each have their own unique attributes and statutory requirements.

Branch operation

A foreign corporation operating through a branch in Canada generally must obtain an extra-provincial licence from each province in which it intends to conduct business.

Taxation

Foreign investors must carefully consider tax laws when structuring inbound investments. The federal, provincial and municipal governments of Canada each impose taxes on businesses in Canada.

Income tax

The federal and each provincial government impose a tax on income. The federal *Income Tax Act* (the "**ITA**") and corresponding provincial statutes impose tax on the worldwide income of Canadian residents. By contrast, non-residents are generally taxed only on income derived from Canadian sources.

Income tax on a Canadian branch

Foreign investors that are entitled to claim benefits afforded by a tax treaty with Canada generally will only be subject to tax on income from business earned through a permanent establishment in Canada. "Permanent establishment" is broadly defined in Canada's tax treaties.

The *Canada-United States Income Tax Convention* (1980), as amended (the "**US Treaty**") defines a "permanent establishment" as a fixed place through which a non-resident wholly or partly carries on business. Such fixed places of business include places of management, branches, offices, factories, workshops, sites of natural resource extraction, and building sites or construction or installation projects lasting more than twelve months. A permanent establishment also exists where a dependent agent, acting on behalf of the non-resident, has authority to conclude contracts in the name of the non-resident and habitually exercises this power in Canada. Unlike most other treaties with Canada, US residents that provide services in Canada will also generally be deemed to provide such services through a permanent establishment in Canada if the breadth or duration of such services exceed thresholds set out in the US Treaty.

In addition to basic Canadian corporate income taxes, foreign corporations may be liable to a 25% federal branch profits tax on after-tax profits in Canada that are not invested in qualifying Canadian assets. This rate is subject to reduction where the foreign corporation is entitled to the benefits afforded by a tax treaty with Canada. For example, a US resident corporation that carries on business in Canada through a permanent establishment and is entitled to claim the benefits afforded by the US Treaty is generally liable to pay a branch profits tax at a reduced rate of 3%. Further, by virtue of the US Treaty, the first CDN$500,000 of branch earnings will generally be exempt from branch profits tax. The branch profits tax is designed to equal the withholding tax that would have been levied on dividends paid by a Canadian subsidiary to its foreign parent corporation had a Canadian subsidiary been utilized to carry on the business activities in Canada.

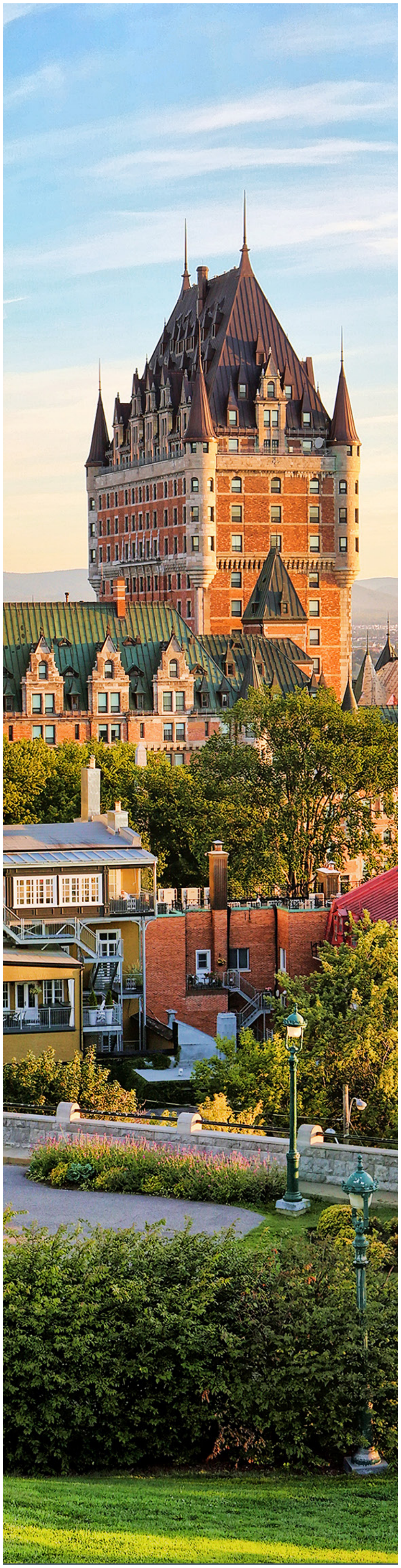
In computing the taxable income of a non-resident corporation carrying on business in Canada through a branch, the amount of deductible interest for Canadian tax purposes will be limited pursuant to certain provisions of the ITA, including Canadian thin capitalization rules.

Income tax on a Canadian subsidiary

A subsidiary incorporated in Canada is deemed to be a Canadian resident and is, therefore, subject to tax in Canada on its worldwide income. However, the federal branch profits tax does not apply to Canadian subsidiaries.

If a Canadian subsidiary borrows from its non-resident parent corporation or from other specified non-residents, the ability of the subsidiary to deduct interest is subject to the limitations imposed by Canadian thin capitalization rules. Canadian thin capitalization rules generally preclude a Canadian subsidiary from deducting interest on the portion of its interest-bearing loans from certain specified non-residents that exceed one and a half times its equity. An amount paid or credited as interest by the Canadian subsidiary to a specified non-resident that is not deductible as a result of Canadian thin capitalization rules, is generally deemed to have been paid to the specified non-resident as a dividend. Such a deemed dividend will be subject to Canadian withholding tax as described below.

Amounts paid or credited by a Canadian subsidiary to a non-resident parent on account of dividends, certain royalties, and certain interest payments are subject to Canadian withholding tax at a statutory rate of 25%. However, the applicable rate of withholding tax may be reduced by an applicable tax treaty. For example, the US Treaty reduced withholding tax rate in respect of dividends is 5% where the beneficial owner of the dividends is a US resident corporation that owns at least 10% of the Canadian subsidiary's voting stock (otherwise, the applicable US Treaty reduced rate is 15%). The US Treaty reduced withholding tax rate in respect of royalties is 10%. Conventional interest payments made to "arm's length" non-resident lenders are generally not subject to Canadian withholding tax. The US Treaty also generally eliminates Canadian withholding tax on conventional interest payments made to "non-arm's length" US resident lenders. In most of Canada's other tax treaties, the reduced rate of withholding tax applicable to "non-arm's length" lenders is 10%.



In computing taxable income, a Canadian subsidiary may generally carry unused business losses back three years and forward twenty years in accordance with the detailed rules in the ITA. However, because Canada does not have a consolidated tax reporting system, losses incurred by a Canadian corporation cannot be applied to reduce the taxable income of affiliated Canadian corporations. Where control of a corporation has been acquired, use of business losses is generally restricted to prevent trading in losses.

Transfers of goods or services between a foreign investor and its Canadian subsidiary must be executed at an arm's length price. Should the parties agree to a different price, the Canadian tax authorities may adjust the pricing or recharacterize the transaction as having been executed at an arm's length price for income tax purposes pursuant to the Canadian transfer pricing rules. Taxpayers must contemporaneously document the basis for their transfer prices in respect of non-arm's length transactions, as failure to do so may result in the imposition of penalties.

Capital gains

Foreign corporations are generally required to include in taxable income, and are subject to Canadian income tax, on a portion of capital gains realized on the disposition of certain types of Canadian property.

The types of Canadian property that may give rise to a Canadian tax liability on their disposition by foreign corporations generally include real property situated in Canada, property used in carrying on business in Canada that forms part of the business property of a Canadian permanent establishment, and shares of a Canadian company where the value of such shares is, directly or indirectly, derived principally from real property situated in Canada.

Entitlement to treaty benefits

Not all foreign investors will be entitled to the benefits afforded by an international tax treaty with Canada. For example, pursuant to a "limitation on benefits" article in the US Treaty, access to the benefits afforded by the US Treaty are generally restricted to residents of the US that either: (i) are "qualifying persons" as defined in the article; or (ii) satisfy one of certain tests relating to their establishment, operation, or ownership.

Several of Canada's newer tax treaties are subject to anti-avoidance limitations similar to the "limitation on benefits" article in the US Treaty, but that operate by denying benefits if it is reasonable to conclude that obtaining that benefit was one of the principal purposes of any arrangement or transaction, unless it is established that granting that benefit in the circumstances would be in accordance with the object and purpose of the relevant provisions of the treaty.

US resident shareholders of a Canadian unlimited liability corporation formed under the laws of the provinces of Alberta, British Columbia or Nova Scotia (a "**ULC**"), which is treated as a disregarded entity for US tax purposes, will generally not be entitled to claim certain of the benefits afforded by the US Treaty in respect of amounts paid to, or derived by, the US shareholders from the ULC.

Other Taxes

Value-added taxes

The federal government imposes a multi-stage value-added tax (referred to as the goods and services tax or the "**GST**") that applies to domestic supplies of most types of property and services within Canada at a rate of 5%. The provinces of Ontario, Nova Scotia, New Brunswick, Newfoundland & Labrador and Prince Edward Island (collectively, the "**HST provinces**") have harmonized their sales tax regimes with the GST and the combined tax is referred to as the harmonized sales tax ("**HST**").

Each HST province sets its own provincial tax rate to combine with the 5% federal GST rate. The current HST rate in Ontario is 13%, consisting of the 8% Ontario component and the 5% federal component. Québec does not impose the HST, but instead imposes the Québec sales tax ("**QST**"), which is substantially like the GST, at the rate of 9.975%. Alberta currently imposes no provincial sales tax.

Certain types of transactions are specifically exempted from GST/HST and QST (e.g., the provision of financial services) or are taxable at a 0% rate, such that no GST/HST or QST applies.

GST/HST and QST are intended to be final taxes on consumers and are not intended to be borne as direct costs for most businesses. The taxes generally apply at each point in the distribution chain. Registered businesses can generally claim input tax credits ("**ITCs**") on their GST/HST returns to recover GST/HST payable by them on business inputs, except to the extent that they relate to making exempt supplies by the businesses. Similarly, QST registrants can generally claim input tax refunds ("**ITRs**") on QST payable by them.

A non-resident of Canada who makes taxable supplies in Canada during a business carried on in Canada must generally register for the GST/HST. In addition, in certain cases, a non-resident that is not required to register for GST/HST purposes may be permitted to voluntarily register (which the non-resident may wish to do to claim ITCs). In either case, if such a non-resident registrant does not have a permanent establishment in Canada, the non-resident would generally be required to post security with the Canada Revenue Agency. The amount of security would generally be equal to 50 percent of the non-resident's net tax liability or refund (essentially the amount of GST/HST charged minus the amount of any ITCs claimed, subject to certain adjustments, as applicable) for the previous 12-month period (or an estimate of its net tax for the first 12-month period beginning on the date of registration).

Commercial imports of goods into Canada generally attract GST at the border. ITC claims may be available to recover such GST. QST may be collected at the border on the import of personal use goods into Québec by Québec residents.

Persons may also need to pay GST/HST or QST (through a self-assessment system) on imported services, intangible property and goods imported into Canada (or transferred within Canada from one province / territory to another one with a higher tax rate).

Provincial retail sales taxes

Various provinces impose a single stage general retail sales tax ("**RST**") on the end-consumer or user (tax is paid only by the final consumer, business, institution, or individual).

A licensed or registered vendor or lessor / licensor charges, collects, reports and remits the RST as agent on behalf of the provincial tax authority. Otherwise, a "consumer," "purchaser" or "user" in a province may be required to self-assess RST, and report and pay the RST to the province.

Persons making taxable retail sales, or leasing or licensing property in taxable transactions, within an RST province in which they carry on business should generally obtain an RST licence or registration number in the province. In certain circumstances, the obligation to obtain such a licence or registration may be extended to an out-of-province vendor selling goods into the province or maintaining inventory in the province, irrespective of whether the vendor carries on business in the province.

Customs duties

Canada levies customs duties on certain goods imported into Canada and applies additional excise taxes and duties on specific goods. The tariff classification and origin (tariff treatment) of imported goods determines the applicable rate of the customs duty. If the goods satisfy specific rule-of-origin criteria, they may qualify for preferential duty rates.

Provincial land transfer tax

In many provinces, a buyer of real property situated in the province must pay a provincial land transfer tax, based on the value of the consideration paid. The rate of tax varies by province.

Municipal taxes

Local governments levy annual real estate taxes on real property owners. These taxes generally are based on the assessed value of the property. Municipalities also levy local business taxes and, in some cities, such as Toronto, a municipal land transfer tax is imposed on the sale of real property.

Immigration Considerations

Entry to Canada is governed by the *Immigration and Refugee Protection Act of Canada* ("**IRPA**") and its Regulations. With any proposed entry to Canada of a foreign worker, the initial exercise is to determine if the person can work in Canada temporarily without a work permit.

Working without a work permit

A person may be exempt from the requirement to obtain a work permit if they will be in Canada as a "business visitor". The basic criteria applicable to business visitors are:

- there must be no intent to enter the Canadian labour market;
- the activity of the foreign worker must be international in scope; that is, there is a presumption of an underlying cross-border business activity, such as after-sales service; and
- there is a presumption that the foreign worker's primary source of remuneration remains outside of Canada, the principal place of business is outside Canada, and the accrual of profits occurs outside of Canada.

An example of a business visitor is a person entering Canada to consult with employees of a corporate subsidiary or branch, a customer or a supplier. Similarly, people entering Canada to provide or receive intra-company training, or to sell goods or services on behalf of a foreign business to a customer (if they are not selling to the public) are business visitors.

However, if there is payment from a Canadian source in connection with the entry, then the person is not a business visitor even if the general criteria is met. The typical example is a Canadian business engages a foreign business to provide training, consulting or some type of service. Even if the payment is not made to the foreign worker directly, there is a labour market entry, and a work permit would generally be required.

Temporary work permits

In most circumstances, individuals who are not Canadian citizens or permanent residents require a work permit to engage in work-related activities in Canada. Depending upon the country of origin, the individual may also need a visa to enter Canada. If so, the visa and the work permit must be obtained in advance of travel. Individuals from visa-exempt counties are required to obtain an electronic Travel Authorization before boarding a flight to Canada.

Subject to available exemptions, an employer and foreign worker must follow a two-step process. First, the prospective employer applies to Employment and Social Development Canada ("**ESDC**") for a Labour Market Impact Assessment ("**LMIA**"). To obtain an LMIA, the employer must satisfy ESDC that it has conducted recruitment for a Canadian citizen or permanent resident and could not find a qualified candidate to meet the minimum requirements of the role. Employers must apply for an LMIA well in advance of the individual's arrival in Canada and be cognizant of all the obligations required by the LMIA process. If the LMIA is issued, the employee must then complete the second step by applying for the work permit.

There are some work permit pathways exempt from the LMIA requirement, such as:

- **Intra-Company Transferees:** Executives, senior managers and specialized knowledge workers may be eligible to obtain a work permit as intra-company transferees from business operations outside Canada. This exemption is useful for multinational companies requiring oversight of Canadian operations or to allow foreign talent to assist in building business operations in Canada.
- **Treaty Professionals:** Canada has several international treaties that facilitate temporary entry into Canada to work for a Canadian employer, including the Canada-United States-Mexico Agreement), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership and the Canada-European Union *Comprehensive Economic and Trade Agreement*. Employers may be able to take advantage of these treaties to obtain work permits for both intra-company transferees as well as professionals who are new to the organization.

Other exemptions from the LMIA process may be available as well, depending on the circumstances of both the employer and the employee.

Permanent residence

The path to Canadian permanent residence is a separate process from that required to work temporarily, although employment in Canada may assist in obtaining permanent residency under certain federal economic immigration programs. Each economic immigration program has its own unique criteria and application process. Five common categories are:

- **Self-Employed Applicants.** To qualify, a person must have both the intention and the ability to establish a business that will make a significant contribution to specified economic activities. The person is also subject to an assessment based on education, experience, age, ability in English and/or French and adaptability.
- **Federal Skilled Worker Class.** This class includes persons who are skilled workers and who may become permanent residents based on their ability to become economically established in Canada and who intend to reside in a province other than Québec. All applicants must have at least one continuous year of work experience in one of the designated occupations. Applicants under this category are also subject to an assessment based on education, experience, age, ability in English and/or French and adaptability.
- **Federal Skilled Trades Program.** This program is open to workers who may become permanent residents based on their qualifications in a skilled trade. All applicants must have a valid job offer or a Canadian certificate of qualification in one of the designated skilled trades and at least two years of work experience. Applicants must also undergo an assessment to demonstrate their language ability in English or French.
- **Canadian Experience Class.** This class is reserved for workers who have at least one year of work experience in Canada and have gained that experience in certain classes of jobs.
- **Provincial Immigration Nominee Programs.** Several provinces have programs to facilitate the transition to permanent residence for those who can demonstrate an intention to live in that province. There are often several streams available, with different focuses and criteria for both employees and employers.

Labour and Employment Considerations

Legislative authority over labour relations and employment law is divided between the federal and provincial governments. Federal law governs employment in federal works, undertakings and businesses such as aeronautics, banking, and telecommunications. Most employment relationships in Canada are governed by provincial law.

Minimum standards

All Canadian jurisdictions have enacted minimum standards for the basic terms and conditions of employment. Such legislation may include minimum standards for matters such as minimum wage, hours of work, overtime pay or lieu time, statutory holidays, vacation, certain leaves of absence, individual and mass / group terminations and layoffs. Generally, neither employers nor employees are free to avoid or “contract out” of the minimum standards by individual contract. Employers can be subject to fines for non-compliance with employment standards legislation or be liable for unpaid wages where a statutory entitlement was not paid or was underpaid to employees. In recent years, class action lawsuits have been brought by large groups of employees for unpaid overtime and vacation pay.

Termination of employment

Of note, there is no such thing as “at will” employment in Canada. Absent just cause for termination, employees are entitled to notice of termination (or compensation in lieu thereof). Except for Québec, the amount of such notice can be contractually agreed upon, provided that such notice entitlement meets or exceeds the applicable statutory minimums and unambiguously displaces an employee’s common law entitlement. Where no such contractual term exists, or where the contractual term is ambiguous or non-compliant with statutory minimums, there is a default presumption that all employees in Canada are entitled to “reasonable notice” of termination. “Reasonable notice” is a fact-specific analysis based upon the employee’s tenure, age, character of employment, and the availability of similar employment, and is often much more significant than the employee’s statutory minimum entitlements.
A common rule of thumb for reasonable notice (outside of Québec) is that employees are entitled to one month of notice (or compensation in lieu thereof) for each year of service with the company, however each case turns on its facts, and short service, managerial and older employees often get disproportionate amounts of notice. Given the significance of this entitlement, written employment agreements with properly drafted termination provisions are highly recommended for employers in Canada.

Trade unions and labour relations

Federal and provincial legislation also govern labour relations. A trade union may be certified as the exclusive bargaining agent for an appropriate group of employees, known as the bargaining unit. Managers and other employees in a position of confidence concerning labour relations are usually excluded from the bargaining unit. Once the union is certified, the employer must bargain with the union in good faith and attempt to reach a collective agreement. A strike or lockout can be called lawfully only after certain conditions are met. Legislation also prohibits any strike or lockout during the term of the collective bargaining agreement. Any disputes arising from or subject to the agreement must be resolved through grievance and arbitration procedures.

Workers’ compensation and occupational health and safety

The federal *Canada Labour Code* and various provincial statutes regulate occupational health and safety. Most occupational health and safety legislation includes an obligation to develop and maintain certain policies and/or programs with respect to workers’ health and safety, including workplace harassment and violence. Additionally, each of the provinces has enacted workers’ compensation legislation that contains provisions related to workplace accidents and illnesses. Such legislation typically sets out a no-fault statutory system of compensation to address the claims of workers injured in the course of employment or stricken with an occupational disease. Some provincial legislation requires that certain federal employers participate in the provincial workers’ compensation schemes. In provinces that do not require participation by federal employers, such federal employers are required to have private insurance plans to cover workers who are absent due to work-related illness or injury.

Statutory withholdings and employer contributions

Canadian employers must contribute to both the Canada Pension Plan (or for Québec, to the Québec Pension Plan) and Employment Insurance on behalf of their employees. Contributions may then be deducted as a business expense for income tax purposes. Furthermore, employers must deduct from employee income and remit to appropriate authorities their employees' income tax, Employment Insurance premiums and Canada Pension Plan (or Québec Pension Plan) contributions. Some jurisdictions have other statutory withholding, contribution or premium payment obligations.

Pay equity and pay transparency

Many jurisdictions (including the federal *Pay Equity Act*) have enacted pay equity legislation mandating equal pay for work of equal value. Such legislation is generally designed to redress inequity in the wages paid to employees working in jobs traditionally held by women. Some employment standards and human rights legislation also prohibit sex or gender discrimination in compensation. The rules regarding pay equity and discrimination are complex and require a detailed review of relevant workers and wages.

Separate from pay equity legislation, pay transparency laws are evolving to further redress inequity in wages. In applicable jurisdictions, these laws require employers to prepare and submit pay transparency reports or statements to the government regulator or post public pay equity plans. Some jurisdictions require employers to disclose certain information in all public job postings (such as the expected pay range for the position, and whether artificial intelligence is used in the recruiting and hiring process).

Human rights

Federal and provincial human rights legislation prohibits discrimination and harassment in employment based on certain characteristics, such as sex (including pregnancy), gender, age, race, ancestry, ethnicity or place of origin, family, civil or marital status, religion or creed, disability, sexual orientation, gender identity or expression, political convictions, language and social condition. Such statutes typically require employers to accommodate employees with such characteristics up to the point of "undue hardship".

Pensions and retirement savings

Federally regulated pension plans are governed by the *Pension Benefits Standards Act*, and each of the provinces has unique pension benefits legislation. Such legislation sets out requirements and restrictions applicable to certain types of pension plans. Some employers provide other types of retirement savings benefits, such as contributing to an employee's Registered Retirement Savings Plan.

Public health care

Each province has a public health care system providing residents with access to medical care. Typically, a special tax is imposed to fund healthcare costs. Many employers provide their employees supplemental health, dental and vision benefits and/or disability, life, accidental death and other forms of private insurance.

Foreign Investment Review / Restrictions

Investment Canada Act

Whenever a non-Canadian investor establishes a new Canadian business or acquires control of an existing Canadian business (regardless of whether that "Canadian business" is owned by non-Canadians), a filing under Canada's foreign investment legislation – the *Investment Canada Act* ("**ICA**") – is required. Except in limited cases where an Application for Review is required (discussed below), this is an administrative Notification that can be made prior to or within 30 days following the closing of the investment. The Notification requires, among other things, detailed information concerning the nature of the Canadian business being established or acquired, the directors and officers of the investor, and the identities of the individual(s) or government that ultimately control the investor.

There is no filing fee, and, in the ordinary course, submission of the Notification does not trigger a substantive review. However, a review based on national security issues may be initiated or raised as a possible consideration within 45 days after submission of the Notification. Where the identity of the investor and/or the nature of the Canadian business may implicate Canada's national security, consideration should be given to submitting the Notification in advance of closing to preemptively identify and address national security issues.

In addition to the potential for a national security review, in limited cases investments which exceed specified financial thresholds are subject to review under a "net benefit to Canada" test and are required to file Applications for Review in place of Notifications. Ministerial approval is required for such transactions, typically pre-closing, but in certain cases post-closing because of the transaction structure. The initial review period is 45 days, but the length of the entire review process can be (and typically is) longer. The test to determine whether an investment is "reviewable" is complex, with thresholds that vary depending on the transaction structure, the nationality of the ultimate controller of the investor, whether a state-owned enterprise is involved and whether the Canadian business being acquired carries on certain cultural business activities.

Certain transactions to acquire controlling interests in Canadian entities are exempt from the provisions of the ICA (save for the provisions related to national security). Investments by certain nations which are "trade agreement signatories" may be subject to special exemption thresholds.

National security

The Minister of Innovation, Science and Industry is empowered to review, and ultimately to block, any investment that "could be injurious to national security". While no specific definition of national security is provided in the ICA, the following factors may be considered in a national security review:

- The potential effects of the investment on Canada's defense capabilities and interests;
- The potential effects of the investment on the transfer of sensitive technology or know-how outside of Canada (sensitive technology areas include Advanced Materials and Manufacturing, Advanced Ocean Technologies, Advanced Sensing and Surveillance, Advanced Weapons, Aerospace, Artificial Intelligence (AI), Biotechnology, Energy Generation / Storage / Transmission, Medical Technology, Neurotechnology and Human-Machine Integration, Next Generation Computing and Digital Infrastructure, PNT (Position, Navigation and Timing), Quantum Science, Robotics and Autonomous Systems and Space Technology);
- The potential impact on the research, manufacture or sale of goods / technology relating to control goods such as firearms and munitions;
- The potential impact on critical minerals and critical mineral supply chains;
- The potential impact of the investment on the security of Canada's critical infrastructure. Critical infrastructure refers to processes, systems, facilities, technologies, networks, assets and services essential to the health, safety, security or economic well-being of Canadians and the effective functioning of government;
- The potential impact of the investment on the supply of critical goods and services to Canadians, or the supply of goods and services to the Government of Canada;
- The potential of the investment to enable foreign surveillance or espionage;
- The potential of the investment to hinder current or future intelligence or law enforcement operations;
- The potential impact of the investment on Canada's international interests, including foreign relationships;
- The potential of the investment to involve or facilitate the activities of illicit actors, such as terrorists, terrorist organizations or organized crime; and,
- The potential of the investment to enable access to sensitive personal data that could be leveraged to harm Canada's national security through its exploitation, with such sensitive personal data, including personally identifiable health or genetic information, biometric data, financial data, private communications, geolocation data and personal data of government officials).

It is possible that national security grounds could be invoked to review investments by non-Canadians in areas as diverse as mining (particularly uranium and other materials of military importance), finance, transportation, ports, electricity, oil and gas, and pipelines.

Specific industry legislation

In addition to the ICA, other statutes contain ownership and investment restrictions with respect to specified industries, such as financial services, airlines, broadcasting and telecommunications. Any proposed investment or acquisition in these sectors therefore must be assessed considering the specific regulatory regime to which that industry is subject.

Competition, Marketing and Products Regulation

Competition Act

The *Competition Act* is Canada's primary antitrust and trade practices legislation. The *Competition Act* contains a mixture of criminal offences, discretionary reviewable practices, and private damages actions. Criminal offences, such as conspiracy, bid rigging and some forms of misleading advertising are prosecuted in criminal courts. As such, the case must be proven beyond a reasonable doubt and strict rules of evidence apply. Non-criminal reviewable practices include mergers, abuse of dominant position and anti-competitive agreements, certain agreements between competitors, resale price maintenance, refusals to deal, and various vertical market restrictions. Practices that result in a substantial prevention or lessening of competition are subject to restraint and corrective action by the Competition Tribunal (the "**Tribunal**"), a specialized adjudicative body for non-criminal antitrust matters. Administrative monetary penalties may be imposed for abuse of dominant position (up to CDN$25 million in respect of the first order, and up to CDN$35 million for subsequent orders or 3% of the benefit derived or, if the benefit derived cannot be determined, 3% of annual worldwide gross revenue). Additionally, anti-competitive agreements that are between parties who are not competitors will soon become subject to challenge and penalties and private parties will be able to apply to the Tribunal to receive a form of restitution in relation many of the non-criminal reviewable practices.

Mergers

The *Competition Act* applies to any merger, regardless of its size, that either occurs in Canada or has an impact on competition in Canada. Mergers that impact competition are regulated by discretionary administrative and civil laws rather than by criminal prohibitions. The Commissioner of Competition (the "**Commissioner**"), and ultimately the Tribunal should the Commissioner refer the case, scrutinizes the merger to determine whether it is likely to prevent or lessen competition substantially. Concentration data is a key consideration in any analysis and can lead to a presumption that a merger is anticompetitive. Ease of entry into the market, effectiveness of remaining competition, and the likelihood of business failure are other factors that the Commissioner must consider under the *Competition Act*.

Merger pre-notification

Size-of-parties and size-of-transaction tests determine whether a merger pre-notification filing is required in Canada. The size-of-parties test requires that the parties to a transaction, together with their affiliates, have Canadian assets or annual gross revenues from sales in, from or into Canada exceeding CDN$400 million. The size-of-transaction test requires that the value of the Canadian assets to be acquired, or annual gross revenues from sales in, from or into Canada exceed certain thresholds which are adjusted annually. Similar albeit more complicated thresholds apply to amalgamations and other combinations. For share acquisitions, there is an additional threshold that sets out the minimum percentage of voting shares that need to be acquired to trigger a notification obligation.

If pre-notification is required, the parties may not close the transaction until the filing has been made and a mandatory waiting period of 30 days expires. The period commences when the completed filing is delivered to the Commissioner. Filing fees are payable for any filing.

The 30-day waiting period can be extended by the Commissioner if she / he requests the parties to supply additional information, much like the second request procedure in the United States. If the Commissioner elects to require the parties to provide additional information that is "relevant" to an assessment of the transaction, a further mandatory waiting period will run until 30 days after the Commissioner's requirements have been fully satisfied (subject to early termination by the Commissioner). No form is prescribed, and the Commissioner's request is not subject to judicial oversight.

Marketing and product regulation

Several federal and provincial statutes, as well as the common law, regulate advertising and marketing of products in Canada.

Intellectual Property

The most common types of intellectual property are trademarks, tradenames, trade secrets (including know-how and show-how), patents, industrial designs and copyrights.

Trademarks

Under Canada's *Trademarks Act*, a trademark is now defined as a sign or combination of signs that is used or proposed to be used by a person for the purpose of distinguishing their goods or services from those of others. A trademark can also be a certification mark, which distinguishes goods or services of a defined standard from those that are not.

The rights associated with a trademark can be acquired through use of that mark in association with goods or services (or both) that results in the trademark having goodwill in Canada, or by registration.

Although trademark registration is not essential to acquire or protect trademark rights that are available at common law, registration does provide several significant advantages. Most importantly, a trademark registration in association with goods and/or services gives the owner the exclusive right to use the trademark throughout Canada in association with those goods and services.

A registration also confers upon the owner the right to prevent others from using the registered mark in a manner that is likely to have the effect of depreciating the value of the goodwill attaching thereto. Additionally, a registration certificate provides a rebuttable evidentiary presumption that the trademark is distinctive of the goods and services listed in the certificate and is owned by the registered owner. In addition, registrations can be filed with Canada Border Services to permit officers to detain counterfeit shipments.

Further, a Canadian trademark registration is the only means available to a foreign company to become eligible to commence arbitration proceedings against bad faith registrants of .ca domain names corresponding to the company's trademark, and to register such .ca domain names.

The Charter of the French language requires the use of French in commerce in Québec, which requires that French appear and be given equal or greater prominence than any other language appearing on labels, packaging, public signage or advertising. An exemption to some of these requirements exists for "recognized trademarks," meaning both common law and federally registered trademarks. If a non-French language trademark appears on the outside signage of a place of business, a dominant (*i.e.*, twice as large) presence of French must be added, such as a generic term, description, or slogan, providing information regarding the products or services offered. The French wording must be permanently visible, and present in a manner both like and as easily seen as the non-French mark. On a product or its packaging, the generic or descriptive components of a non-French language trademark must be translated as well, except where that trademark is the name of the product or the company making it.

Trade secrets

There is no specific legislation in Canada concerning trade secrets. Trade secrets are protected at common law by physical and organizational procedures, such as access controls, and by legal agreements, such as confidentiality and license agreements. Adequate steps must be taken by the owner of trade secrets to treat information as secret or confidential. The protection will last as long as the confidentiality is maintained, unless contractually expressed otherwise.

Patents

In Canada, letters patent are available to protect inventions. One may obtain a patent for any new or improved useful art, process, machine, manufacture or composition of matter. Under the *Patent Act*, the patent holder has the exclusive right, for the term of the patent, to make, construct, use, and sell the invention.

Industrial designs

Industrial designs protect the visual or ornamental features of useful articles to the extent that those features are not wholly functional. An application for registration must be filed within one year of the design being made available to the public by the owner of such design. Under the *Industrial Design Act*, the total term of protection is the longer of ten years from the registration date and fifteen years from the filing date, provided that the maintenance fee is paid. A registration confers to the owner the exclusive right in Canada to make, import for the purpose of trade or business, or sell, rent or offer for sale or rent any article to which the design has been applied.

Copyright

Copyright law protects the owners of a broad range of original works and performances. Such works include art (such as paintings, photographs and diagrams), literature (such as books, business documents and computer programs), drama (such as films and plays) and music. Copyright protects against unauthorized reproduction or performance of the work, as well as the sale, distribution or importation of infringing works.

Although registration is not required for copyright protection, registration under the *Copyright Act* is permitted and does provide significant benefits. A certificate of registration is a rebuttable evidentiary presumption that copyright subsists and that the registrant is the owner and is deemed to provide the public with notice that copyright subsists. This is important because only injunctive relief is available if the infringer was unaware that copyright subsisted in the work. Where the infringer has reasonable grounds for suspecting that copyright subsisted, a successful plaintiff in a copyright infringement action can seek to recover damages and an accounting of profits resulting from the infringement, or statutory damages.

Privacy & Data Protection

Canada has a complex network of laws applicable to privacy, data protection and cybersecurity, including statutes governing the collection, use and disclosure of personal information by private sector organizations, separate legislation that regulates public bodies / institutions (and, in some cases, their service providers), as well as specific statutes applicable to personal health information that is processed by certain categories of custodians. Some jurisdictions have enacted statutory privacy torts, and there is an evolving body of case law respecting common law privacy torts as well. Class action lawsuits with respect to data breaches and/or misuse of personal information are also common in Canada.

Private sector

Private sector businesses in Canada may be subject to various privacy statutes, including the federal *Personal Information Protection and Electronic Documents Act*, as well as substantially similar provincial legislation in several jurisdictions. Some of the key privacy law requirements that may be applicable to private sector businesses include:

- obtaining an individual's consent when the business collects, uses or discloses the individual's personal information, subject to limited exceptions that vary across jurisdictions;
- minimizing collection of personal information to only what is necessary in the circumstances;
- collecting, using and disclosing personal information only for reasonable purposes that are disclosed in advance (or, in Québec, for serious and legitimate reasons);
- collecting personal information by fair and lawful means;
- ensuring that personal information that is used by the business is accurate and up to date;
- ensuring that service providers handle personal information in accordance with applicable laws, including by implementing appropriate contract terms and oversight activities;
- limiting disclosures of personal information (including of employees) when engaging in commercial transactions such as mergers and acquisitions, and ensuring that agreements between parties to a transaction include statutorily mandated terms;
- implementing personal information policies that are clear, understandable and readily available;
- implementing technological, organizational, administrative and physical safeguards that are appropriate based upon the sensitivity of the personal information as well as the purposes for which the information will be used, the amount, quantity, distribution and format of the information, and the method or medium of storage;
- disposing of personal information when it is no longer required for the purpose it was collected (or for legal compliance);
- responding to complaints from individuals and/or requests from individuals to exercise their rights under applicable legislation, including providing access to personal information; and
- mandatory breach reporting in many jurisdictions.

Other industry-specific requirements

Health information custodians must also ensure that they comply with the specific (and often strict) requirements set out in privacy and data protection legislation that applies to how they process personal health information.

In addition, some organizations, such as financial institutions, may be subject to sector-specific legislation and/or regulatory requirements related to cybersecurity and/or their handling of personal information. For example, without limitation, both the Investment Industry Regulatory Organization of Canada and the Office of the Superintendent of Financial Institutions have issued guidance on cybersecurity and require reporting of certain cybersecurity incidents.

Anti-spam laws

Canada's anti-spam law – known as CASL – is one of the strictest, if not the strictest, anti-spam laws in the world. Despite the unofficial "anti-spam" moniker, the law regulates a broad range of normal commercial communications and electronic interactions, and not just nuisance emails and malicious actors. It enforces a mandatory "opt-in" regime that requires a sender to have express (or statutorily defined implied) consent prior to sending any commercial electronic messages. CASL also regulates handling of electronic transmission data and the installation of software, and applies to electronic communications or transactions into, or from, Canada. CASL is enforced by the Office of the Privacy Commissioner of Canada, the Competition Bureau, and the Canadian Radio-television and Telecommunications Commission, and violations of CASL can lead to substantial penalties.

Expert advice is required to navigate the complex legal regime applicable to privacy, data protection, and cybersecurity in Canada.

Environmental

Environmental matters in Canada are regulated at the federal, provincial and municipal levels of government. At the federal level, regulation is focused on matters of national importance and with cross-jurisdictional impacts such as prohibitions and restrictions on greenhouse gas emissions and ozone-depleting and nuclear substances, the sale, import and export of single-use and other plastic products, protection of the fisheries and fish habitat, transportation and handling of dangerous goods, import and export of hazardous wastes, and identification and monitoring of new chemicals and biological substances that require additional regulation to better protect and preserve the environment or human health. Provincial legislation, on the other hand, tends to be more comprehensive and deals mainly with contaminated land remediation and development projects, stewardship and extended producer responsibility for consumer products, as well as permits and approvals for various environmental matters in the normal course of business such as air, noise and dust emissions and wastewater, hazardous waste and excess soil management. While municipal governments regulate environmental matters to a lesser extent than their federal and provincial counterparts, their focus is on local matters such as pesticides, sewer, noise and odour emissions. The degree of overlap of environmental regulation impacting business activities in Canada will depend on the location of its operations and the nature of its activities.

Other Considerations

Consumer protection and labelling

The federal government and each of the provinces and territories have some form of consumer protection legislation, with the standard of protection provided to consumers being similar across jurisdictions. The federal legislation concerns the advertising, labeling, and sale of consumer goods sold in Canada. The provincial legislation concerns contractual matters related to the sale of goods, such as conditions of sale and warranties. The legislation also imposes: (i) information requirements for certain types of consumer agreements (and in some cases requires a written copy of the agreement to be provided to the consumer); and (ii) requirements for online sales through websites and apps. Unfair practices such as false or misleading representation are prohibited. Finally, provincial legislation also requires the licensing / registration of some types of businesses such as collection agencies, real estate agents, automobile dealers, and direct sellers.

Product packaging and labelling is regulated at both federal and provincial levels through statutes of general application and statutes applicable to specific products, including hazardous or potentially dangerous products.

The *Consumer Packaging and Labelling Act* (the "**CPLA**") is the principal federal statute regulating prepackaged products sold to consumers. It requires that these products bear accurate and meaningful labelling information, prohibits false and misleading representations, and sets out mandatory label requirements such as a product's common name and net quantity in metric units of measurement. There are detailed rules concerning, for example, label placement and labelling of imported products. The CPLA requires mandatory label information to be in English and French; in practice, mandatory and non-mandatory information is presented in both languages on most Canadian packaging. The CPLA also regulates standard container shapes and sizes.

Currency or exchange controls

Canada has no system of currency or exchange controls restricting the repatriation of Canadian business capital or earnings to non-Canadian investors.

Directors' and officers' liability

Directors and officers of corporations formed under the CBCA or provincially (except for certain provinces) have a duty of care and a fiduciary duty to the corporation. The fiduciary duty requires a director or officer to act honestly and in good faith with a view to the best interests of the corporation. This includes the disclosure of any conflicts of interest and not taking personal advantage of any opportunities which are being pursued by the corporation. On the other hand, the duty of care requires directors and officers to exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances. Directors' and officers' decisions are examined based on whether they acted reasonably considering what they knew or ought to have known at the time when the decision was made. A breach of either duty can result in personal liability for directors and officers in addition to corporate liability.

Personal liability can also extend to directors in other situations. For example, subject to certain defenses, directors can be liable for unpaid wages of employees, unpaid corporate taxes after winding up, and for breaches by the corporation of environmental legislation if the director participated in or acquiesced to the breach. Protection from personal liability may be available through insurance or corporate indemnification.

Electronic documents and signatures

Electronic documents can be used in place of written documents (subject to certain documents which require original signatures and other potential formalities) in most cases in Canada, although legislation differs between provinces.

Franchise legislation

Certain Canadian provinces have enacted franchise-specific legislation. The franchise legislation is remedial in nature, intended to address the perceived power imbalance between franchisors and franchisees. Accordingly, the provisions of the franchise legislation are broadly construed by the courts in favour of franchisee protection.

The determination of whether an arrangement comes within the definition of a "franchise" is objectively set out in the franchise legislation. Importantly, neither the intention of the parties, nor the nomenclature used in describing the agreements is relevant in determining whether a "franchise" arrangement exists. In many cases distribution, license or dealer agreements are found by courts to be "franchises" under franchise legislation based on the nature of the relationship between the parties.

There are various obligations imposed on franchisors under the franchise legislation. One of the central components of the franchise legislation is the requirement that a franchisor provide franchisees with pre-sale disclosure (in the form of a franchise disclosure document) prior to the signing of any agreement or payment of any money to the franchisor. The franchise disclosure document must present in a succinct manner all "material facts" (including certain prescribed information) relevant to permit the franchisee to make an informed business decision about whether to become or remain a franchisee. As part of the prescribed information, unless an exemption is available, unconsolidated financial statements of the franchisor entity (prepared to at least the Canadian "review engagement" standard) must be included. There are significant consequences for failing to provide a compliant disclosure document including the franchisee's right to rescind the franchise agreement up to two years after signing the franchise agreement and being refunded for payments made to the franchisor. Additionally, if a franchisee suffers loss as a result of misrepresentation or a non-compliant franchise disclosure document, it has a statutory right of action for damages against the franchisor, certain related parties (which may include the foreign parent of a franchisor entity that is directly involved in the grant of the franchise), and the director(s) and officer(s) of the franchisor entity that sign the certificate(s) to the franchise disclosure document.

Beyond pre-sale disclosure, the franchise legislation imposes a duty of fair dealing on both franchisor and franchisee in exercising their rights and performing their respective obligations under a franchise agreement. Franchisees also have the right to associate with each other and to form or join franchise associations. In each case, there are statutory rights of action for breaches of those statutory obligations. Finally, it is also important to note that franchisees cannot waive their rights under the franchise legislation, so any attempt to do so, by contract or otherwise, is void.

French language requirements in Québec

Québec is the largest Canadian province by land mass and second largest by population. French is the primary language of roughly 80% of Québec's population and it is the only province in Canada where French is the official language. In Québec, the use of French in business is governed by the *Charter of the French Language* which places some requirements on businesses not present anywhere else in Canada.

The Charter of the French Language established French as the official language of Québec and frames certain language rights for everyone in the province. The Charter of the French Language makes French the language of Government and the law, as well as the normal and everyday language of work, instruction, communication, commerce and business. We refer you to our "Doing Business in Québec" publication for more details.

About McMillan

McMillan is a leading business law firm serving clients across key industries in Canada. With recognized expertise in major business sectors, we provide legal advice through our offices in Vancouver, Calgary, Toronto, Ottawa and Montréal.

A cautionary note: The foregoing provides a summary of certain aspects of Canadian law that may interest investors considering doing business in Canada. Readers are cautioned against making decisions based on this material alone and should discuss with qualified professional advisers.

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