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Doing Business in Canada 2023

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2023

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Foreword

Welcome to the 2023 edition of Baker McKenzie's Doing Business in Canada, a practical guide to the business and investment legal framework and developments in Canada.

Canada has experienced one of the fastest economic recoveries from the pandemic, reflective of its resilience during a period of global economic uncertainty. The OECD's Canadian economic forecasts show a GDP growth of 1.3% in 2023 and 1.5 % in 2024, continuing its reputation as one of the best G20 countries in which to invest.

Ranked the 9th largest economy in the world for 2022, Canada boasts one of the most highly educated workforces in the world, with the fastest growing population and highest rate of immigration among the G7 countries, stable political and financial systems, and a business-friendly environment.

Canada continues to focus on building stronger trade relationships through the EU-Canada Comprehensive Economic and Trade Agreement and the Trans-Pacific Partnership, among many other active free trade agreement negotiations. The country also offers businesses easy access to more than 460 million consumers in the North American market.

Baker McKenzie is the leading global law firm in Canada and recently celebrated the 60th anniversary of its Toronto office. Our lawyers specialize in developing innovative and pragmatic business solutions for many of the world's and Canada's largest multinational, domestic and privately held companies with business interests in Canada and around the world.

As market leaders in cross-border transactions, disputes and advisory matters, our strength is the ability to combine our knowledge of Canadian federal, provincial and local laws with an international perspective to provide clients with services no other Canadian law firm can. We work closely with colleagues across our offices in the Americas, Europe and Asia to stay abreast of the regulatory, investment and trade trends in those regions and to help clients achieve their domestic and international business objectives.

We hope that you find this guide a useful and practical resource. If you need any assistance, please do not hesitate to contact us. A list of our lawyers in Canada and their areas of practice and industry focus may be found here: People | Baker McKenzie.

1. Constitutional Matters

1.1 Origins of the Canadian Constitution

Canada was created by the passage of the *British North America Act, 1867*, which was later renamed the *Constitution Act, 1867* by the Parliament of the United Kingdom. The *Constitution Act, 1867* united three colonies of British North America and provided for the future admission of additional colonies and territories. Today, Canada is comprised of 10 provinces (British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland and Labrador) and three territories (Yukon, Northwest Territories and Nunavut).

For 115 years Canada was not an entirely independent state since the Parliament of the United Kingdom enjoyed ultimate legislative authority. This changed when the United Kingdom passed the *Canada Act 1982*, which repatriated Canada's Constitution and brought an end to the United Kingdom's overarching legislative authority. The *Canada Act 1982* contains the *Constitution Act, 1982*, the Canadian *Charter of Rights and Freedoms*, a constitutional amending formula and a provision that makes the Constitution of Canada the "supreme law of Canada".

1.2 An Overview of Canadian Federalism

Canada's system of federalism divides governmental powers between the federal parliament and 10 individual provincial governments.

1.3 Division of Legislative Powers

The division of legislative powers in Canada is set forth in sections 91 and 92 of the Constitution Act. These provisions define which level of government can legitimately exercise legislative, executive and/or judicial authority with respect to a given matter.

The Constitution Act confers absolute jurisdiction on either the federal or provincial governments. However, since many matters do not compartmentalize easily, there are many matters which have some form of shared jurisdiction. This approach has, in some areas, resulted in the development of complex arrangements designed to facilitate the roles of both government levels.

For instance, section 91 of the Constitution Act grants the federal government jurisdiction over "trade and commerce". Yet, section 92 grants the provincial governments jurisdiction over "property and civil rights". Given the overlap in these areas, sections 91 and 92 have been interpreted in such a way as to provide for an "intergovernmental" approach to the regulation of business in Canada. Accordingly, a business which intends to import or export products will find itself partially governed by federal legislation and partially by provincial legislation.

1.4 Canadian Common Law and the Civil Code

Canada's legal system is comprised of two distinct systems of law: the "civil law" system in Québec and a "common law" system in all other provinces and territories.

The common law system, which originated in the United Kingdom, is a system of rules based on the principle of "precedent".

Whenever a decision maker issues a judgment that is intended to be legally enforceable, the decision becomes a precedent. Precedents are used to decide similar cases in the future so that decision-makers will derive similar and predictable outcomes.

The common law exists solely in case law and cannot be found in a codified form.

Alternatively, the civil law system in Québec finds its origins in Roman law. The civil law system holds jurisprudence to be subordinate to statutory law. Court decisions are used only to interpret the intentions and allowable authority of law-makers. Instead, the decision-makers will rely on a written *Civil Code of Québec* that sets out standards of acceptable behaviour or conduct in private legal relationships. Respected academic doctrine may also play a role in a court's interpretive process of the *Civil Code of Québec*.

2. Establishment of Business

2.1 Canadian Corporate Law

(a) Canadian Corporations

A corporation may be formed under the laws of any province or territory or under federal law. A corporation is not restricted to carrying on business in its jurisdiction of incorporation. However, if the corporation wishes to carry on business in a province other than the one in which it is incorporated, it will need to register or obtain an extra-provincial licence. The commentary that follows relates generally to private or closely-held non-offering corporations, as opposed to public (offering) corporations. The commentary also highlights provisions of the federal *Canada Business Corporations Act* (CBCA). Other corporate statutes may also be of interest to investors. For example, in contrast to the federal CBCA, almost all provincial and territorial corporate statutes do not impose Canadian residency requirements for directors.

(b) Incorporation Procedure

Incorporation is achieved by filing Articles of Incorporation (Articles). The Articles set out important details regarding the corporation, including the name and any restrictions on the business to be conducted by the corporation. Upon incorporation, the CBCA confers all the powers of a natural person on a corporation. It is typical to provide that the authorized capital consists of an unlimited number of shares. There are no requirements under the laws of any jurisdiction in Canada for a minimum paid-in capital.

Unless otherwise provided for in its Articles, all shares of a federal corporation are fully participating, voting common shares without par value. More complex share provisions may be designed with wide flexibility as to the rights and conditions that may be attached. Shares of federal corporations are not properly issued until they are fully paid for in money, property or past services.

Incorporation may be effected rapidly and inexpensively. Often the most pressing initial matter is to choose a corporate name that is not confusingly similar to that of an existing corporation or trade-mark.

A corporate name may be in English or any other language as long as only letters from the English alphabet and Arabic numerals are used. A system of incorporation by number may be used to incorporate without a prior name search. Corporate names consisting of a number plus words such as “Canada Ltd.” are commonplace. The name may be changed for a nominal fee at a later time. It is not unusual to see corporations operating under their number names with one or more registered “doing-business as” names. The name must include one of the following indicators of limited liability: “Limited”, “Ltd.”, “Incorporated”, “Inc.”, “Corporation” or “Corp.” (or their French equivalents).

A corporation formed in one province is usually required to register or to obtain an extra-provincial licence in any other province or territory where it carries on business. A corporation formed under the CBCA is empowered to carry on business throughout Canada, but is subject to provincial laws of general application, including the requirement to register or to obtain an extra-provincial licence.

(c) Corporate Formalities

The board of directors of a corporation has the responsibility to manage the business and affairs of the corporation. Typically, this includes such things as adopting a business plan, approving a budget, approving annual financial statements and other matters that are outside of the ordinary course or day-to-day running of the business of the corporation. The directors’ mandate can be accomplished directly by the board of directors, or indirectly by delegating permissible tasks to committees of the board of directors, or in some cases, to officers of the corporation.

Corporations may have one or more directors, and may provide in their Articles for a minimum and maximum number of directors, with the precise number to be established from time to time. Corporations governed by the CBCA must have a board of directors composed of at least 25% resident Canadians and, if there are fewer than four directors, at least one must be a resident Canadian. As of March 12, 2023, all provinces (other than Manitoba) and territories in Canada do not impose Canadian residency requirements for directors.

There is no Canadian residency requirement for corporate officers, but, like directors, officers must be individuals. It is common for corporations to have at least a president and a secretary. The same individual may fill both offices.

The corporate formalities required to operate a Canadian corporation are minimal. All resolutions of shareholders and directors may be passed by unanimous written consent without the necessity of convening formal meetings. This is true even in respect of annual business, which generally includes the approval of financial statements, the appointment of auditors (if required), the election of directors and the appointment of officers.

In June 2019, the CBCA was amended to introduce the requirement for private CBCA corporations to prepare and maintain a register of "individuals with significant control" (ISC Register). In general, an individual with significant control (ISC) is an individual who either: (i) is the registered holder, the beneficial owner or who has direct or indirect control over a "significant number of shares"; or (ii) has direct or indirect influence that, if exercised, would give the individual control in fact of the corporation. A "significant number of shares" means shares having 25% or more of all voting rights attaching to the corporation's outstanding voting shares or any number of shares equal to 25% or more of all of the corporation's outstanding shares measured by fair market value.

The ISC Register must contain prescribed information on each ISC including their name, date of birth, address and jurisdiction of residence for tax purposes. The ISC Register must be kept with the corporate records of the corporation (typically at its registered office address). If requested, a corporation is required to disclose the ISC Register to shareholders, creditors, prescribed regulatory authorities in Canada and Corporations Canada. The ISC Register is not, however, otherwise currently publicly available.

Similar legislative provisions relating to ultimate beneficial ownership disclosure have or are being introduced in provincial corporate statutes across Canada. The disclosure requirements and obligations vary from province to province.

(d) Auditors and Public Disclosure of Financial Information

Private corporations may, by shareholder resolution, dispense with the appointment of an auditor. There is no requirement for private corporations to make public disclosure of financial information.

(e) Unanimous Shareholders' Agreements

Although the board of directors has a statutory duty to manage the corporation, the CBCA and the corporate statutes of many of the other provinces provide that a "Unanimous Shareholders' Agreement" may be concluded whereby shareholders restrict some or all of the powers of the directors to manage the business and affairs of the corporation.

(f) Unlimited Liability Companies

The provinces of Alberta, British Columbia and Nova Scotia permit the incorporation of an unlimited liability company (ULC). A ULC is treated, for Canadian tax purposes, as an ordinary corporation but may have special U.S. tax status.

There are differences between an Alberta, British Columbia and Nova Scotia ULC. For example, shareholders of a Nova Scotia ULC are jointly and severally liable for any obligations of the corporation only upon its dissolution and cannot be pursued by creditors during the corporation's corporate existence. The liability of shareholders of an Alberta ULC, however, is less restricted and shareholders are jointly and severally liable for any liability, act or default of the corporation and for any action commenced up to two years following its dissolution or two years from the date the shareholder ceased to be a shareholder of the ULC.

(g) Branch Operations

Branch operations in Canada are a possible alternative to incorporation. A non-Canadian corporation may commence a business in Canada by obtaining an extra-provincial licence in each province or territory where it carries on business. The definition of carrying on business differs by province but usually includes having a representative or agent in that province or another form of physical presence.

2.2 Partnerships

(a) Introduction

Although provincial legislation establishes some mandatory requirements, a partnership may largely be structured to suit a particular business initiative. Persons considering business organization in Canada should thoroughly consider the issue of liability, as a partnership will not automatically provide the limited liability associated with incorporated companies.

The various provincial statutes define a "partnership" as a relationship existing between persons carrying on a business in common with a view to generating a profit. A partnership does not necessarily require a formal written agreement between the parties. Canadian courts may imply a partnership where the requisite elements are present.

(b) Formation of the Partnership

Under Canadian law, the intent of the parties is critical to the partnership relationship. A partnership may arise in one of two ways. First, the parties may enter into a "partnership agreement", which may be either written or oral. For certainty in the event a dispute arises, it is preferable to define the partnership relationship in a formal written agreement. The agreement should clearly stipulate the objects of the partnership, the partners' responsibilities, the respective share of profits and losses of each partner, as well as a mechanism for dissolution.

Second, a partnership may arise absent any formal written agreement. In this case, the court will examine the substance of the relationship between the parties and determine whether it constitutes a partnership within the language of the applicable provincial legislation. Such a finding may have important consequences with respect to the liability of those persons conducting business by way of this "implied" partnership. The uncertainties associated with this "implied" partnership underline the aforementioned recommendations regarding a formal, written partnership agreement.

Similar to other Canadian provinces, the *Partnerships Act* regulates partnerships in Ontario, whether or not they arise pursuant to a written agreement. There is no federal partnership legislation.

(c) Limited Partnership

The common form of a Canadian partnership is the "general partnership". This denotes that all partners are subject to unlimited liability for the obligations of the partnership. However, most Canadian provinces also allow the more restricted form of liability associated with a "limited partnership", wherein a partner's liability may be restricted to the amount of their contributed capital. As a general rule, limited partners are not permitted to participate actively in the management of the

partnership, although the general partners may be restricted from taking certain action absent the consent of the limited partners. A limited partnership is prohibited unless there are one or more general partners with unlimited liability. The applicable provincial legislation should be examined to determine the requirements and consequences of this structure.

(d) Joint-Ventures

While not regulated or formed by statute in Canada, a joint venture may be established by an agreement between two or more parties wishing to do business together by investing money, assets, intellectual property, services or other resources into a specific project. Typically, this agreement will include specifics about the scope of the business operations, ownership interests, control and decision-making, profit-and-loss sharing, dispute resolution, the rights and obligations of each joint-venturer, and the exit strategy. It may also be useful to include non-compete and non-solicit provisions. Where the joint venture takes the form of a corporation, the agreement may (but need not be) in the form of a unanimous shareholders' agreement.

3. Income Taxation and Transfer Pricing

3.1 Introduction to Income Taxation

Each of the provinces and territories of Canada, as well as the federal government, impose an income tax. The federal government collects personal income taxes for all provinces except Québec and corporate taxes for all provinces except Alberta and Québec. The provincial taxing statutes are generally similar to those of the federal *Income Tax Act* (ITA).

3.2 Basis of Taxation

(a) Residents

Canadian resident "persons", which includes individuals, corporations, trusts and estates, are liable to tax in Canada on their income from all sources worldwide.

Canadian courts have held that a "resident" individual is a person who regularly, normally or customarily lives in Canada. The ITA extends this meaning to include any person who has sojourned (temporarily stayed) in Canada for 183 days of a calendar year. For income tax purposes, a corporation is considered to be a resident in Canada if its central management and control is exercised in Canada. In addition, a corporation incorporated in Canada (or any of its provinces or territories) after April 26, 1965, is deemed to be a resident of Canada. A trust is generally a resident in Canada if its central management and control is in Canada, although the ITA also deems certain non-resident trusts with Canadian-resident contributors or beneficiaries to be resident in Canada.

Income may be earned from employment, business, property, dispositions of capital property and from other sources. Income from employment includes remuneration paid to an employee and many benefits associated with employment. Income from business or property is computed according to well-accepted business principles (generally, but not always, in accordance with generally accepted accounting principles), except to the extent that such rules are specifically modified by the ITA. One-half of any capital gain from the disposition of capital property is included in income for tax purposes and taxed at ordinary rates. The portion of any capital gain realized upon the disposition of a resident individual's principal residence is normally exempt from income tax. A lifetime capital gains exemption (which is C$971,190 for 2023) is available for capital gains realized upon the sale of certain shares of a Canadian qualified small business corporation by a Canadian resident individual.

Non-resident individuals proposing to take up residence in Canada should give special attention to the impact of this move on their tax status. On commencing Canadian residency for the purposes of the ITA, an individual will generally receive a "step-up" to fair market value in the adjusted cost basis of certain assets the individual owns on that day. On ceasing to be a resident of Canada for the purposes of the ITA, an individual is generally deemed to have disposed of certain property at its fair market value and, as a result, may realize a gain at that time. Certain exceptions exist for specific property when the individual has been resident in Canada for less than 60 months within the previous 10 years.

(b) Non-Residents

Non-residents of Canada (for the purposes of the ITA) are subject to taxation on their income from employment exercised in Canada, on their income from carrying on business in Canada, and on one-half of their gains realized from the disposition of "taxable Canadian property" (as that term is defined in the ITA), such as real estate situated in Canada or deemed "taxable Canadian property". Non-residents are also subject to taxation in Canada on certain Canadian-source income, such as interest on non-arm's length debt, dividends, royalties and trust income. Such income is subject to "withholding tax".

The expression “carrying on business in Canada” has a very broad meaning under the ITA and in common law doctrines, including soliciting orders in Canada through an agent.

Under Canada’s income tax treaties, profits earned by a treaty resident from carrying on business in Canada are generally not subject to tax in Canada unless the profits are allocable to a “permanent establishment” maintained by the treaty resident in Canada. The term “permanent establishment” in a treaty generally refers to a fixed place of business or to employees and dependant agents in Canada that have and exercise a general authority to conclude contracts in Canada. A treaty resident may also be deemed to have a permanent establishment in Canada in certain circumstances (e.g, the Canada-U.S. tax treaty may deem a U.S. resident to have a permanent establishment in Canada if the U.S. resident performs services in Canada on the same or connected projects for a period of 183 days or more in any 12-month period).

3.3 Rates of Taxation

(a) Individuals

Federal and provincial income tax is levied at marginal rates on individuals. The maximum rates of tax for individuals, combining the federal and provincial rates, range from 44.5 to 54.8% for 2023, depending on the province in which the individual resides on December 31 of the particular year, although tax rates are frequently adjusted.

(b) Corporations

For 2023, the general combined federal and provincial corporate tax rates range from 23 to 31%, although tax rates are frequently adjusted and depend on the province to which the income is allocable. The tax rate on income from manufacturing activities is significantly less in some provinces.

Non-resident corporations that carry on business in Canada are also subject to a branch tax as discussed below.

(c) Small Business Deduction

A lower rate of taxation on the first C$500,000 of business income may be available to a “Canadian-controlled private corporation” (CCPC). A CCPC is, in general terms, a private Canadian-resident corporation that is not controlled, either directly or indirectly, by a public corporation(s) or by a non-resident(s) of Canada. Subject to certain qualifications, foreign investors may hold up to 50% of the voting shares of a Canadian corporation without disqualifying it for the reduced rate.

(d) Other Tax Credits

A federal investment tax credit is available for expenditures related to research and development. There are also provincial and territorial tax incentives for research and development.

3.4 Calculation of Income

(a) Loss Utilization

Losses from business and property that are not utilized in the year that the loss is incurred may be carried back three years and forward 20 years. In addition, capital losses may be carried back three years and forward indefinitely to offset capital gains. However, in both cases, restrictions apply on a change of control of the corporation.

In defined categories of corporate amalgamations and dissolutions, losses of an amalgamating or dissolving corporation may be carried forward and deducted by the amalgamated or surviving corporation, as the case may be.

In Canada, each corporation is taxed as a separate entity. It is not possible to file consolidated tax returns. To utilize losses realized in one corporation against income earned in a related corporation, it is necessary to amalgamate corporations or transfer income sources between corporations in certain approved situations.

(b) Depreciation and Recapture

Taxpayers are entitled to depreciate the cost of assets acquired by them for the purpose of producing income from property or business (including certain intangible capital expenditures, such as goodwill). Depreciable properties are categorized by class, and a maximum rate of depreciation (called "capital cost allowance" (CCA)) is prescribed for each class. In general, CCA is calculated on a diminishing balance basis, but for some classes the "straight line" method of depreciation is applied. Taxpayers who do not claim CCA in a year may claim it in a subsequent year. In certain instances, a taxpayer may be entitled to an accelerated rate of CCA.

When the taxpayer disposes of an asset on which CCA has been claimed, the taxpayer may be required to "recapture" CCA previously deducted and include that amount in income.

An "available for use" rule establishes a date when the tax depreciation may commence, usually when the asset becomes available for use by the taxpayer in a business. The CCA allowed for the first year in which an asset is acquired is normally one-half of the amount that would otherwise be allowed. As of June 21, 2019, the Canadian government enacted temporary rules that would suspend the application of the half-year rule and provide for increased CCA deductions in the first year CCA is claimed for certain property acquired after November 20, 2018, and available for use before 2028. A phase out of the deduction applies to property that becomes available for use after 2023.

(c) Deductibility of Expenses

Generally, reasonable expenses of doing business are deductible from revenues for the purpose of calculating the income that is subject to tax. However, specific rules apply to certain types of expenses.

In the case of a branch operation, expenses incurred outside Canada on behalf of the Canadian business, including a reasonable proportion of foreign head office administrative expenses, may be deductible in computing the income of the Canadian business.

(d) Interest Deductibility

Reasonable interest on funds borrowed and used in the business is generally deductible in computing income under the ITA. The deduction reduces the corporation's taxable income, but the interest payment will generally be subject to Canadian withholding tax if paid to a non-arm's length non-resident person.

By capitalizing a Canadian subsidiary with debt, a non-resident shareholder could significantly increase the amount of money received from its subsidiary by, in effect, taking out the subsidiary's profits in the form of interest payments on loans made to the subsidiary rather than dividends. Therefore, there are some restrictions on the amount of related party debt on which interest may be deducted under Canada's "thin capitalization" rules. Interest on funds borrowed from specified non-resident shareholders (generally, non-residents that are part of the corporate group) exceeding one and a half times the equity of the corporation will not be deductible by the corporation (and will generally be deemed to have been paid as dividends for withholding tax purposes). The ITA defines equity by reference to the corporation's paid-up capital, contributed surplus and retained earnings.

As well, the Canadian Department of Finance has proposed a set of rules, entitled the "Excessive Interest and Financing Expenses Limitation" rules (EIFEL rules). These rules are intended to address concerns that Canadian taxpayers that are part of a multinational group are deducting excessive

interest and other financing costs in computing their Canadian taxable income. If applicable, the EIFEL rules will generally restrict the deductibility of net interest and other financing expenses to a fixed ratio of 30% of "adjusted taxable income." As of January 2023, these measures are stated to apply to entities with taxation years beginning on or after October 1, 2023.

A loan made by a related non-resident to another person on condition that the other person will lend to the related Canadian corporation may be deemed to be a direct loan from the non-resident to the Canadian corporation under the ITA's anti-avoidance provisions. For this purpose, certain "specified rights" will be treated in the same manner as a loan. These rules generally prevent the non-resident corporation from entering into so-called "back-to-back" loans (except in certain limited situations) in an attempt to avoid the application of the "thin capitalization" rules, or to subject interest payments to a lower rate of Canadian withholding tax (e.g., based on preferential treaty rates).

(e) Loans to Non-Residents

A corporation resident in Canada will, in certain circumstances, have imputed interest income on loans made to or indebtedness incurred by certain non-residents to the extent that the interest payable on the loan or indebtedness is less than a reasonable rate. The imputed income generally applies on loans and indebtedness that are outstanding for more than two years.

3.5 General Anti-Avoidance Rule

The general anti-avoidance rule, also known as the "GAAR", appears in federal as well as in most provincial income tax legislation. If the Canada Revenue Agency (CRA) determines that a transaction results in a reduction, deferral, or avoidance of tax that is not in accordance with tax policy objectives, it can recharacterize the tax consequences of the transaction under this rule to deny the tax benefit. For the GAAR to apply, the following three requirements must be met:

(i) a tax benefit results from a transaction or as part of a series of transactions;

(ii) the transaction constitutes an avoidance transaction, i.e., one not reasonably undertaken or primarily arranged for a bona fide purpose other than to obtain a tax benefit; and

(iii) the transaction results in abusive tax avoidance, as the tax benefit received is inconsistent with the object, spirit, or purpose of the provisions relied on by the taxpayer.

While taxpayers carry the burden of refuting the first and second requirements of the GAAR, the Minister must establish the third requirement to successfully re-characterize the transaction.

The Canadian Department of Finance is currently reviewing the GAAR with a stated aim of strengthening and modernizing the provisions. The public consultation period ended on September 30, 2022. As a result, it is possible that amendments will be made to the GAAR in the near future that may broaden the ambit of the rules.

3.6 Income from Foreign Affiliates

Canada imposes tax on "foreign accrual property income" (FAPI) derived outside Canada by a "controlled foreign affiliate" (CFA) of a taxpayer resident in Canada. A non-resident corporation is considered to be a CFA of the taxpayer if, in general terms, the taxpayer controls the voting shares of the corporation (or would control the voting shares of the corporation if the taxpayer owned all of the shares of the corporation owned by the taxpayer, non-arm's length persons, and any set of four other Canadian resident persons and persons not at arm's length with such Canadian resident persons). The foreign corporation must also be a "foreign affiliate" (FA) of the Canadian corporation. That is, the Canadian taxpayer's equity percentage (generally, a measure of direct and indirect equity interest) in

the non-resident corporation must be at least 1% and the total of the equity percentages of the taxpayer and related persons cannot be less than 10%.

The income of a foreign affiliate may be characterized as FAPI, which in simplified terms is passive investment income. The Canadian shareholder of a CFA must include FAPI in computing its income as it accrues. Further, the earnings of a foreign affiliate will be characterized as exempt surplus, taxable surplus or hybrid surplus, and are included in computing such notional surplus accounts of the foreign affiliate. Such characterization may be relevant to the Canadian tax treatment of distributions from the foreign affiliate to the Canadian shareholder(s).

Exempt surplus generally consists of income of an FA resident in a country (Designated Treaty Country) with which Canada has concluded a tax treaty or a tax information exchange agreement (TIEA) from an active business carried on in a Designated Treaty Country or in a country that has a TIEA with Canada. Exempt surplus is not taxable in a Canadian corporate shareholder's hands even when it is repatriated to Canada.

Taxable surplus generally consists of active business income (or income that is deemed to be active business income) earned from a business carried on in a country that is not a Designated Treaty Country and includes income other than income from an active business carried on in a Designated Treaty Country. Taxable surplus may be taxable in a Canadian corporate shareholder's hands when it is repatriated to Canada, and may be eligible for a deduction relating to foreign tax paid. Active business income earned in a country (non-qualify country) that Canada has formally approached and requested to conclude a TIEA will be taxed as FAPI if that country does not conclude the TIEA within five years of the request and does not otherwise have a tax treaty with Canada or has not ratified the Organization for Economic Cooperation and Development's "Convention on Mutual Administrative Assistance in Tax Matters".

Hybrid surplus generally consists of any capital gain from the sale of foreign affiliate shares by a foreign affiliate. Hybrid surplus may be taxable in a Canadian corporate shareholder's hands when it is repatriated to Canada, and is eligible for a deduction for half of the amount of the hybrid surplus with the effect that half of the amount is not subject Canadian corporate tax and the other half is included in the corporate shareholder's income subject to a deduction relating to foreign tax paid.

3.7 Withholding Tax

Canadian source dividends, rents, royalties (including lump sum payments for the use of property in Canada), interest paid or credited to non-arm's length persons or for non-arm's length debt, income from a trust, management and administration fees, and amounts for services rendered in Canada paid to a non-resident of Canada are all subject to a Canadian non-resident withholding tax. Withholding taxes may be reduced or eliminated if the non-resident is resident in a country with which Canada has concluded a tax treaty. However, a non-resident's eligibility for benefits under a particular tax treaty may be limited by the application of the OECD Multilateral Instrument (MLI) by Canada as of December 1, 2019 to certain tax treaties. Where the MLI does not apply to a particular tax treaty, certain treaty provisions may also limit a non-resident's access to treaty benefits, in particular with regards to the United States, which applies a "Limitation on Benefits" provision or "LOB" intended to deny treaty benefits in certain situations.

In some cases, if a non-resident of Canada has received a loan or has become indebted to a Canadian corporation, the amount of the loan or indebtedness is deemed to be a dividend paid to the non-resident by the Canadian-resident corporation and subject to dividend withholding tax. The non-resident may be entitled to a refund of the withholding tax when it repays the indebtedness to the Canadian corporation.

(a) Dividends

Dividends or deemed dividends paid by a Canadian resident to a non-resident shareholder are subject to a 25% non-resident withholding tax under the ITA which may be reduced to as low as 5% for dividends paid to shareholders resident in countries with which Canada has entered into a tax treaty.

(b) Rental income from Real Property

Gross rental income from real property paid or credited by a Canadian resident to a non-resident is subject to a 25% withholding tax. However, non-residents may in some circumstances elect to be taxed on their net rent under Part I of the ITA.

(c) Royalties

Royalties paid or credited by a Canadian resident to a non-resident are subject to a 25% withholding tax under the ITA, which is generally reduced to 10% for royalty payments to persons resident in those countries with which Canada has entered into a tax treaty. Withholding on certain royalty payments may be reduced to nil under specific treaties for payments for the use of, or the right to use, computer software or for the use of, or right to use, any patent or any information concerning industrial, commercial or scientific experience (but not including a payment for such information in connection with a rental or franchise agreement).

Absent a treaty exemption, Canada considers payments for the right to use custom software to be royalties and subjects these royalties to withholding tax subject to certain exceptions (e.g., for payments in respect of a copyright for the production or reproduction of software). However, payments for the right to use pre-packaged or "off the shelf" software are considered to be payments for the acquisition of tangible personal property rather than royalty payments and are not subject to withholding tax.

(d) Interest

Interest paid or credited by a Canadian resident to a non-resident with whom the Canadian resident is dealing at arm's length is exempt from withholding tax unless it is for a non-arm's length debt or is "participating debt interest". In general terms, "participating debt interest" is interest which is contingent or dependent on the use or production from property in Canada or computed by reference to revenue, profit, cash flow, commodity price or any other similar criterion or by reference to dividends paid or payable to shareholders. Non-arm's length interest is subject to a 25% withholding tax under the ITA, which is generally reduced to 10% for payments to persons resident in those countries with which Canada has entered into a tax treaty. The 2007 protocol to the U.S. tax treaty with Canada has reduced the withholding tax on non-arm's length interest payments (other than interest similar to "participating debt interest") to nil.

(e) Services Rendered in Canada

The rendering of services in Canada by a non-resident may constitute "carrying on business in Canada" within the meaning of the ITA. While the profits of such businesses are taxable in Canada under the ITA, Canada's income tax treaties usually provide that such profits are taxable by Canada only if the non-resident maintains a permanent establishment in Canada. Non-residents from treaty countries will wish to avail themselves of treaty protection by taking appropriate precautions to ensure that the activities of their employees or agents in Canada do not create a permanent establishment in Canada.

Although a non-resident rendering services in Canada may not be liable to Canadian taxation, Canadian residents who pay for such services are required in the first instance to withhold and remit 15% of such payments to the Receiver General of Canada (Regulation 105 Withholding), unless a

waiver of this requirement is obtained from the CRA. An additional 9% withholding tax applies for services rendered in Québec. If the non-resident is not liable to Canadian taxation, it should be entitled to a refund of the Regulation 105 Withholding if it files a Canadian tax return claiming the refund.

(f) Services Rendered by the Non-Resident in its Own Country

It is not uncommon for a non-resident transferor of technology to render services to a Canadian resident transferee in the transferor's own country, for which a separate service charge may be levied. Such services will generally not constitute carrying on business in Canada. If the services are managerial or administrative in nature, the payments may, however, attract Canadian withholding tax as discussed below (See Section 3.7(g) – *Management and Administration Fees*, below.)

Subject to any relief provided by an applicable tax treaty, withholding tax at the rate of 25% is also levied on payments by a resident of Canada to a non-resident in connection with services of an industrial, commercial or scientific nature without reference to the *situs* (location) of such services, where payment is based in whole or in part on:

(i) the use to be made of the services or the benefit to be derived from same;

(ii) the production or sales of goods and services; or

(iii) profits;

unless such fees are paid in connection with the sale of property or the negotiation of a contract.

(g) Management and Administration Fees

Management and administration fees paid or credited by a Canadian resident to a non-resident are also subject to a 25% non-resident withholding tax under the ITA. The withholding tax is not dependent on the *situs* of the services. Under an exempting provision, a payment for services that include management or administration activities will not be subject to withholding tax in Canada if either:

(i) the services performed by the non-resident were performed in the ordinary course of a business carried on by it that included the performance of such services for a fee and the parties were dealing at arm's length; or

(ii) the payment was made to reimburse the non-resident for reasonable expenses incurred on behalf of the Canadian resident.

Under many tax treaties that Canada has concluded with other countries, management or administration fees are not subject to Canadian withholding tax.

3.8 Branch Tax

The ITA levies an additional 25% tax on a non-resident corporation carrying on business in Canada through a branch. This tax is imposed on after-tax Canadian profits of such corporations that are not reinvested in Canada. The branch tax is in lieu of the withholding tax that would be levied were the corporation resident in Canada and paying dividends to non-resident shareholders. The branch tax may be reduced under an applicable tax treaty to the treaty withholding tax rate on dividends. In some treaties, such as that with the U.S., there is a cumulative exemption from branch tax on the first C$500,000 of the branch's after-tax profits.

3.9 Capital Tax

Canada no longer imposes a federal capital tax on corporations, nor do most provinces.

3.10 Partnerships and Joint Ventures

Income (or loss) of a business carried on as a partnership will be calculated at the partnership level as if the partnership were a separate person. Generally, all applicable deductions from the partnership business must be taken at the partnership level. However, liability for tax on partnership profits flows through to the partners in accordance with their entitlement to the profits or losses of the partnership. For example, CCA is an expense that must be claimed at the partnership level if the partnership owns the property. This may be disadvantageous if one of the partners does not wish to claim maximum depreciation in the year.

One of the reasons parties contemplating an unincorporated joint venture usually choose to combine their resources on a non-partnership basis is to ensure that deductions for tax purposes are available at the participant level. Since the ITA contains no specific rules regarding computations of the income of an unincorporated, non-partnership joint venture, each joint venture participant is free to calculate its income and losses from the joint venture separately.

3.11 Foreign Tax Credits

The ITA provides a tax credit where a Canadian resident has paid foreign taxes on business and non-business income earned in a foreign jurisdiction. Thus, subject to certain limitations, additional Canadian tax will generally be payable only where the total Canadian tax exceeds the total foreign tax on such income.

3.12 Transfer Pricing

Canadian resident corporations, as well as non-resident corporations carrying on business in Canada, are required to comply with Canada's transfer pricing legislation as set out in the ITA. Generally, the CRA, which administers the ITA, follows the 2022 Organisation for Economic Co-operation and Development (OECD) *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* and generally follows the guidance from the OECD's work on Base Erosion and Profit Shifting (BEPS). The CRA has issued a variety of documents with guidance including Information Circulars, Interpretation Bulletins and Transfer Pricing Memoranda that set out its views on a variety of topics related to transfer pricing.

Taxpayers must be able to demonstrate that their transactions with related parties are conducted on terms and conditions that would have prevailed if they were dealing at arm's length. The CRA has the authority to adjust prices or other terms and conditions of transactions to the extent they are not consistent with what arm's length parties would have agreed to. Moreover, the CRA has the authority to recharacterize a transaction if it is one that arm's length parties would not have entered into and it was only entered into by the taxpayer to obtain a tax benefit.

Should the CRA make an adjustment to a taxpayer's transfer prices, the CRA may also impose a transfer pricing penalty of 10% of the adjustment if the adjustment exceeds the lesser of C$5 million or 10% of revenue. This penalty will apply regardless of whether there is a tax deficiency (e.g., even if there are loss carry forwards that result in no additional taxes owing).

Penalties do not apply if the taxpayer has made reasonable efforts to determine and use arm's length transfer prices. Canadian legislation notes that contemporaneous documentation that is "complete and accurate in all material respects" is necessary (but not necessarily sufficient) to avoid penalties. This documentation requires the disclosure of relatively detailed descriptive information about the taxpayer's business operations, financial results and other relevant information. In addition, economic analysis supporting the arm's length nature of the terms and conditions of the intercompany transactions is essential.

In the event that the CRA proposes adjustments that exceed the penalty threshold or proposes to recharacterize a transaction, the auditor is required to refer the matter to the CRA's Transfer Pricing Review Committee (TPRC) for consideration. The objective is to ensure consistency in the application of penalties and recharacterizations across the country. The TPRC will review the file, the CRA auditor's recommendations and the taxpayer's written submission, and make a determination as to the applicability of penalties or the proposed recharacterization. If the taxpayer has not prepared contemporaneous documentation, then it is deemed not to have made reasonable efforts and penalties will apply. Proper contemporaneous documentation is therefore an important aspect of a taxpayer's compliance efforts in Canada.

To aid the CRA in its enforcement activities related to transfer pricing, taxpayers are required to file form T106. Form T106 must be filed if the taxpayer enters into transactions with an aggregate value of C$1 million or more during the taxation year with related parties. The information reported includes, *inter alia*, the identity(ies) of the counterparty(ies), the nature and quantum of the transactions, the transfer pricing method applied and the existence of contemporaneous documentation. These forms are to be filed by the tax filing deadline for the taxpayer with the Ottawa Technology Centre, Validation and Verification Division, Other Programs Unit. (They are not filed with the tax return.) There are also late filing, failure to file, and false statement or omission penalties that may apply with respect to form T106. In addition, Canada has also implemented "Country-by-Country Reporting" as contemplated by the OECD's work on BEPS, which creates additional reporting obligations for multinational enterprises with consolidated revenues in excess of €750 million.

Transfer pricing disputes can be resolved in a number of ways. These include the normal appeals process including potential litigation, competent authority negotiations under one of Canada's many bilateral income tax conventions with other countries, and/or through the advanced pricing agreement procedure. Each of these has different ramifications and costs and any transfer pricing dispute analysis should address one or more of these alternatives.

The CRA has given transfer pricing a high priority in its tax audits. As a result, it has become one of the areas of most concern to multinational corporations doing business in Canada.

4. Sales Tax

4.1 Federal Goods and Services Tax/Harmonized Sales Tax

(a) General

The Goods and Services Tax (GST) is a federal value added tax. In general, GST applies at a rate of 5% on most property and services supplied in or imported into Canada. However, the provinces of Ontario, New Brunswick, Newfoundland and Labrador (Newfoundland), Nova Scotia and Prince Edward Island (PEI) (collectively, the Participating Provinces) have harmonized their respective provincial sales tax systems with the federal GST. In these provinces, the GST is replaced by the Harmonized Sales Tax (HST). The HST applies at a rate of 13% on supplies made in Ontario and at a rate of 15% on supplies made in Nova Scotia, New Brunswick, Newfoundland and PEI. Businesses registered to collect GST are automatically registered to collect HST. Regardless of how many provinces/territories in which a supplier makes supplies, only one GST/HST registration is required.

As a general rule, GST/HST is collected throughout the production and distribution chain. Businesses at each level of the chain charge GST/HST on their domestic sales and are able to claim a full refundable credit, known as an "input tax credit" (ITC), for any GST/HST paid on purchases of property and services used in the course of doing business.[1]

Persons required to collect and remit GST/HST must register with the Canada Revenue Agency (CRA) and file GST/HST returns following each reporting period, generally remitting the difference between the GST/HST charged on sales and ITCs claimed for the period. If the ITCs exceed the amount of GST/HST charged on sales in any reporting period, the difference is refunded.

The GST/HST base is very broad, covering the vast majority of "supplies" made in Canada.[2] A "supply" is the provision of property or a service in any manner including a sale, transfer, barter, exchange, licence, rental, lease or gift. GST/HST is not payable on a limited number of supplies specifically designated as "zero-rated" supplies (which are subject to tax at a rate of 0%) and "exempt" supplies (which are exempt from tax). Zero-rated supplies include basic groceries, exports, agricultural and fishing products, prescription drugs and medical devices. Exempt supplies include certain domestic financial services, healthcare services and educational services. The key difference between zero-rated supplies and exempt supplies is that the vendor or lessor making zero-rated supplies is entitled to recover the GST/HST it has paid by claiming ITCs, whereas vendors or lessors making exempt supplies generally cannot.

(b) Registration and Collection Requirements

Effective July 1, 2021, there are two GST/HST registration systems. The first system has been in place since the initial implementation of the GST/HST and applies to most suppliers resident in or carrying on business in Canada (the Standard System). The second system is for non-resident suppliers who do not carry on business in Canada (the Simplified System).

(i) The Standard System

As a general rule, all persons engaged in a "commercial activity" in Canada must register to collect the GST/HST under the Standard System if they make taxable supplies in Canada. However, non-residents who do not carry on business in Canada are specifically excluded from the requirement to register under the Standard System.

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[1] Unless the business makes "exempt" supplies, which are discussed further below.

[2] As part of the harmonization, certain property and services that were not taxable under the former provincial retail sales tax regime, qualify for a point of sale rebate of the provincial portion of the HST in Participating Provinces. As a result, these items are effectively exempt from the provincial portion of the HST.

For GST/HST purposes, residency is determined by applying various deeming provisions found in the *Excise Tax Act* (ETA) and criteria developed under case law. The ETA provides, in part, that a corporation is deemed to be a resident if it is incorporated or continued in Canada, and not continued elsewhere. Pursuant to general legal principles, a corporation that is not incorporated or continued in Canada may still be considered to be resident in Canada if the central management and control of the corporation is exercised in Canada. However, a non-resident corporation that has a "permanent establishment" in Canada, as defined for GST/HST purposes, is deemed to be resident in Canada in respect of activities carried on through that establishment. For example, a person may have a permanent establishment in Canada as a result of making supplies through a traditional office in Canada. Alternatively, a person may be considered to have a permanent establishment due to activities of a person conducted through a server or computer located in Canada.

Non-residents are required to register for GST/HST under the Standard System if they carry on business in Canada and make taxable supplies in Canada. The term "carrying on business in Canada" is not defined in the ETA. Rather, the determination of whether a non-resident is carrying on business in Canada is a question of fact which historically also involved consideration of the case law. However, in 2005, the CRA issued a policy statement (GST/HST P-051R2) setting out its interpretation of what constitutes "carrying on business in Canada", which states that the determination requires an analysis of all of the facts and circumstances including overall business activity and presence in Canada. When evaluating a non-resident's status, the CRA indicates that it will consider a dozen factors in the context of the particular business activity and specific facts and circumstances.

Non-resident persons generally are also required to register under the Standard System if they solicit orders for, or offer to supply, books, newspapers, magazines and other prescribed publications that are to be sent by mail or courier to recipients in Canada. In addition, the ETA generally requires non-resident persons who enter Canada to sell admissions for a place of amusement, a seminar, an activity or an event to register for GST/HST purposes and collect GST/HST on the admissions.

Effective July 1, 2021, non-resident suppliers of "qualifying tangible personal property supplies" (generally, sales of goods made from a Canadian inventory) are also required to register under the Standard System. Distribution platform operators (DPOs) that facilitate such supplies through their platforms can also be required to register under the Standard System. The registration threshold for suppliers is generally C$30,000 in sales revenue made to non-resident consumers and Canadian residents who are not registered under the Standard System, over a rolling 12-month period. In the case of a DPO, the registration threshold is generally C$30,000 in such sales revenues from sales facilitated through the DPO's specified distribution platform. The supplier threshold excludes sales made through DPOs; therefore, non-residents who whose supplies are exclusively made through registered DPOs are generally not required to register.

Once registered under the Standard System, suppliers are required to charge applicable GST/HST on their taxable supplies made in Canada.

(ii) The Simplified System

Effective July 1, 2021, non-residents suppliers who do not carry on business in Canada are also required to register under the Simplified System if they exceed a sales threshold. DPOs and accommodation platform operators (APOs) (collectively, Platforms) that facilitate certain supplies through their platforms can also be required to register under the Simplified System. The Simplified System is effectively designed to require non-resident suppliers and DPOs to collect GST/HST on "specified supplies" (generally, supplies of intangible personal property and services, subject to some exceptions) made to Canadian residents who are not registered under the standard system (Canadian Consumers).

The Simplified System registration threshold for suppliers is generally C$30,000 in sales revenue from specified supplies made to Canadian Consumers over a rolling 12-month period. In the case of a DPO, the registration threshold is generally C$30,000 in such sales revenues from sales facilitated through the DPO's specified distribution platform. The threshold applicable to APOs includes revenues from Canadian accommodations facilitated on the APO's platform that are made by suppliers who are not registered under the Standard System.

The Simplified System registration process is more streamlined compared to the Standard System and can be completed online.

DPOs registered for GST/HST are deemed to be the supplier of specified supplies facilitated through their platform and made to Canadian Consumers by non-resident suppliers who are not registered under the Standard System.

Similarly, APOs registered for GST/HST are deemed to be the supplier of short-term Canadian accommodations facilitated through their platform and made by suppliers who are not registered under the Standard System.

Where the Platform is the deemed supplier, the Platform is required to collect and remit applicable GST/HST on the underlying supply that it facilitates.

(c) Imports

GST at a rate of 5% is generally payable on the duty-paid value of commercial goods imported into Canada. The duty-paid value is the value for duty determined for customs purposes plus any customs duties and excise duties and taxes. The GST payable on imported goods is collected by the Canada Border Services Agency at the same time customs duties are collected. Persons resident in the Participating Provinces who import non-commercial (also called casual) goods into Canada pay HST, rather than GST, calculated at the applicable rate on the duty paid value of the goods. Non-commercial goods are goods other than those imported for sale or for any commercial, industrial, occupational or institutional use.

GST/HST also applies to services and intangible property (such as intellectual property rights) imported into Canada. GST/HST is not imposed, however, on these supplies when imported by registrants for use in a "commercial activity", as this term is defined for GST/HST purposes. Where the imported service or intangible property is for use other than in a commercial activity (e.g., in providing an exempt supply such as domestic financial services), the GST/HST applies on a self-assessment basis.

(d) Exports

GST/HST applies only to supplies of property and services "made in Canada". Supplies of property and services that are made outside Canada are beyond the scope of the GST/HST. Special deeming rules are contained in the legislation to determine when a supply is made inside or outside of Canada. Furthermore, certain supplies of property and services that are made in Canada are specifically designated as zero-rated exports and are not subject to GST/HST. Therefore, as a general rule, the GST/HST does not apply to property and services exported from Canada. Exporters are entitled, however, to claim ITCs to recover any GST/HST paid on property and services for use in their commercial activities, thereby completely removing any GST/HST component from the exported property and services.

4.2 Provincial Sales Taxes and *Ad Valorem* Taxes

(a) General

At one time, most Canadian provinces had some form of provincial retail sales tax (PST). Today, only three provinces continue to impose a separate PST whereas five provinces have harmonized their PST with the federal GST. In addition, the province of Québec has its own provincial value-added tax (QST).

Most provinces impose specific taxes on certain products, such as fuel, gasoline and tobacco (e.g., cents per litre tax for fuel and gasoline, cents per cigarette or tobacco stick for tobacco). Effective April 2019, federal legislation came into force to impose a carbon charge regime in provinces that had not adopted carbon pricing mechanisms. As a result, carbon pricing in the form of cap and trade, carbon tax or output based pricing system applies depending upon the provincial/territorial jurisdiction.

QST is virtually identical to the GST/HST, but applies in respect of supplies made in Québec. The QST applies at a rate of 9.975% on taxable property and services supplied in Québec.

The following provinces impose PST on most types of tangible personal property, software and certain services referred to as 'taxable services' acquired for consumption or use in the province: Manitoba (7%), British Columbia (BC) (generally 7%) and Saskatchewan (6%) (collectively, the PST Provinces). Alberta and the Canadian territories do not have a PST nor have they adopted into the federal HST regime.

The PST tax base is generally narrower than that of the GST in that PST generally applies only to sales or leases of tangible personal property, most types of computer software, certain services related to tangible personal property (e.g., installation, assembly, adjustment, repair, configuration, modification, upgrading and maintenance services) and other services, such as telecommunication services and specified professional services. Certain types of tangible personal property and taxable services may qualify for exemption from PST. Such exemptions vary by province.

Under the PST legislation, vendors are required to collect and remit applicable PST on retail sales of tangible personal property, non-custom software and taxable services made in the province. Persons who acquire taxable goods, software or services outside the province for consumption or use in the province are generally required to self-assess and remit the applicable PST. However, unlike the GST/HST, which generally applies on all taxable sales made in Canada, PST is a tax on consumption or use so that it is only payable by persons who purchase property or services for their own consumption or use or for the consumption or use by others at their expense. Persons who purchase property or services for resale are generally exempt from paying PST if they provide the vendor with their PST registration number.

In recent years, PST rules have been amended to require online marketplaces to register for and collect PST on taxable sales made by sellers through the marketplace. This obligation is broadly similar to the new GST/HST obligations for Platforms described above.

(b) PST and QST Registration Requirements

(i) PST

Generally, persons who have a "presence" in a province are required to register for PST in that province. In this regard, the PST provinces generally use criteria similar to the CRA's "carrying on business" test to determine whether a non-resident has a "presence" in the province. (See Section 4.1(b) – *Federal Goods and Services Tax/Harmonized Sales Tax – Registration and Collection Requirements*.) However, as a result of relatively recent amendments, the PST Provinces now impose requirements to register on non-resident persons even if they do not carry on business in the province.

In Saskatchewan, a person is generally required to register if the person makes a sale of tangible personal property or taxable services for use or consumption in or relating to Saskatchewan. Online marketplace facilitators and online accommodation platform operators are deemed vendors and thus required to register whether or not they carry on business in Saskatchewan, if they make or facilitate the marketplace in which the retail sale for consumption or use in or relating to Saskatchewan takes place.

Manitoba imposes a requirement to register on a non-resident seller who does not carry on business in the province if:

(A) the seller:

i. causes property to be delivered in Manitoba,

ii. solicits orders for the property from persons in Manitoba, and

iii. accepts orders that originate in Manitoba; or

(B) the seller holds the property in inventory in Manitoba at the time of accepting the purchaser's order.

Online accommodation platforms and online sales platforms are considered "vendors" under the legislation and are generally required to register for and collect Manitoba PST on taxable sales facilitated through their platforms.

Persons located outside BC but in Canada are generally required to register for BC PST if:

(A) in respect of taxable goods, they do all of the following:

i. sell taxable goods to customers in BC;

ii. accept orders from customers located in BC;

iii. deliver the goods to locations in BC; and

iv. solicit persons in BC for orders or meet (or expect to meet) a C$10,000 BC taxable sales threshold over a rolling 12-month period; or

(B) in respect of software or telecommunication services, they do all of the following:

i. sell taxable software for use on or with an electronic device ordinarily situated in BC or sell or provide taxable telecommunication services to customers in BC;

ii. accept orders from customers located in BC for such items; and

iii. solicit persons in BC for orders of such items.

Persons located outside BC – whether inside or outside of Canada – are required to register for BC PST if:

(A) in respect of taxable goods, they do all of the following:

i. sell taxable goods to customers in BC;

ii. accept orders from customers located in BC; and

iii. hold the goods in inventory in BC at the time of sale; or

(B) in respect of software or telecommunication services, they do all of the following:

i. sell taxable software for use on or with an electronic device ordinarily situated in BC or sell or provide taxable telecommunication services to customers in BC;

ii. accept orders from customers located in BC for such items; and

iii. meet (or expect to meet) a C$10,000 BC taxable sales threshold over a rolling 12-month period.

Similar to the other PST provinces, “online marketplace facilitators” are generally required to be registered for BC PST and collect PST on the taxable sales made through their platforms. The provision of “online marketplace services” (effectively services made by online marketplace facilitators to online marketplace sellers) are specifically enumerated BC PST taxable services.

(ii) QST

The QST rules generally impose similar registration requirements on non-residents as described above for GST/HST purposes. Québec first adopted a simplified registration system for non-resident e-commerce suppliers and platforms in 2019. However, upon the adoption of the GST/HST Simplified System in July 2021, Québec amended its QST rules regarding e-commerce supplies to effectively harmonize with the rules for GST/HST as described above.

5. Customs and International Trade

5.1 Canadian Importation Process

The *Customs Act* governs the administration of the Canadian importation process and enforcement of Canada's customs laws. Goods imported into Canada must be reported to the Canada Border Services Agency (CBSA) and applicable duties and taxes must be paid. The amount of customs duty payable will depend upon the tariff classification, the origin and the value of the goods, as determined for customs purposes.

(a) Business Number – Importer/Exporter Account Number

Canadian individuals or businesses engaged in commercial importation must obtain a Business Number (BN) to account for their goods. The CBSA uses BNs to identify a business and to process customs accounting documents. Application forms are available from all CBSA offices that clear commercial shipments and online from the CBSA's website at www.cbsa-asfc.gc.ca.

(b) Customs Brokers

Importers may engage and authorize a licensed customs broker to act as its agent in dealings with the CBSA. Only customs brokers who are licensed by the CBSA are authorized to account for goods and pay duties and taxes on behalf of an importer on a commercial basis.

A customer broker's service typically includes:

- obtaining the release of imported goods;
- paying any duties that may apply;
- obtaining, preparing and presenting or transmitting the necessary documents or data;
- maintaining records; and
- responding to any CBSA concerns following payment.

(c) Tariff Classification of Imported Goods

Canada's *Customs Tariff* is based on the international *Harmonized Commodity Description and Coding System*. The classification of goods under the *Customs Tariff* is used to determine the rate of duty that applies, for statistical purposes and to determine if the goods being imported are subject to any prohibitions, quotas or anti-dumping or countervailing duties.

(d) Valuation of Imported Goods

To ascertain the quantum of customs and taxes applicable to an imported good, importers determine the value of the goods in question. The primary method of valuing goods for Canadian customs purposes is the transaction value method. The transaction value is the price actually paid or payable for the goods when sold for export to Canada to a purchaser in Canada, subject to certain adjustments, provided the vendor and the purchaser are not related, or if they are related, provided that it can be shown that the relationship has not influenced the price. In other words, the value for duty is usually based upon the selling price between the exporter and the importer. Where the transaction value method cannot be used (e.g., if there is no sale for export to Canada), the *Customs Act* provides the following alternative methods of valuation:

(i) transaction value of identical goods;

(ii) transaction value of similar goods;

(iii) deductive goods;

(iv) computed value; and

(v) residual method.

These methods must be applied in the order set out above; however, the importer has the choice of applying the computed value method before the deductive value method.

(e) Tariff Treatment

Goods imported into Canada from most WTO countries are entitled to Most-Favoured-Nation tariff treatment. There are, however, a number of preferential duty rates available for imported goods originating from countries that are party to a preferential trade agreement with Canada. For example, pursuant to the *Canada-United States-Mexico Agreement* (CUSMA), goods which are imported into Canada from the United States and Mexico and which meet the CUSMA rules of origin are entitled to enter free of duty. Canada has also implemented free trade agreements with Australia, Chile, Colombia, Costa Rica, the European Union, Honduras, Israel, Japan, Jordan, Malaysia, Mexico, New Zealand, Panama, Peru, Singapore, South Korea, Ukraine, the United Kingdom, Vietnam and the European Free Trade Association, which consists of Iceland, Liechtenstein, Norway and Switzerland.

On September 21, 2017, the EU-Canada Comprehensive Economic and Trade Agreement (CETA) came into force. The CETA extends preferential duty rates to goods which are imported from a European Union country and which meet the CETA rules of origin.

In December 2018, the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) came into force for Canada, Australia, Chile (February 2023), Japan, Malaysia (November 2022), Mexico, New Zealand, Peru (September 2021), Singapore and Vietnam (January 2019). It has not yet come into force for Brunei. The CPTPP extends preferential duty rates to goods what are imported from Australia, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam and which meet the CPTPP rules of origin.

Goods originating in certain “developing” countries, such as Cambodia and the Philippines are entitled to preferential rates of duty under the General Preferential Tariff provided certain local content requirements are met.

Finally, pursuant to the *Customs Tariff*, the Canadian Government is authorized to impose a surtax on origin goods for various purposes, including as a response to acts, policies or practices of the government of a country that adversely affect, or lead directly or indirectly to adverse effects on, trade in goods or services of Canada.

5.2 Import Controls

The Canadian Government restricts the importation of certain goods, such as dairy, meat and poultry products to promote various domestic policy objectives and to implement intergovernmental arrangements or commitments. Goods that are subject to import controls are contained in an Import Control List established under the *Export and Import Permits Act* (Canada) (EIPA). Persons who wish to import goods found on the Import Control List must first obtain an import permit from the Trade Controls Bureau of Global Affairs Canada (GAC).

5.3 Export Controls

The EIPA not only controls the import of certain goods into Canada, but also controls the export of certain goods and technologies from Canada.

To control certain exports from Canada, the EIPA authorizes Canada’s federal Cabinet to establish an Export Control List (ECL) and an Area Control List (ACL). Goods and technologies listed on the ECL

include military goods and technologies, dual-purpose industrial goods and technologies which have both civilian and military applications, nuclear-related goods and technologies and miscellaneous non-strategic goods. Exporters whose goods or technologies are found on the ECL are required to obtain an export permit to export such goods to all destinations with one general exception: it is not necessary to obtain an export permit if the country of final destination is the United States, except in the case of nuclear-related goods and certain other items.

There are also country specific export controls. The ACL contains a list of countries to which all exports are subject to controls and for which an export permit must be obtained, whether or not the goods are contained on the ECL.

Except in specific circumstances where General Export Permits (GEPs) are available, exporters must apply to the Trade Controls Bureau of GAC for a specific export permit. GEPs authorize the export of certain goods to eligible countries without requiring the exporter to apply for a specific export permit, provided prescribed conditions are met.

In 2018, Canada amended the EIPA and the *Criminal Code* as part of its accession to the *Arms Trade Treaty*. The amendments established a new controls regime in Canada for brokering transactions that relate to the movement of goods or technology (on a new Brokering Control List) from a foreign country to another foreign country.

5.4 Controlled Goods Program

The Government of Canada has established the Controlled Goods Directorate, which, under the authority of the *Defence Production Act* and the *Controlled Goods Regulations*, administers Canada's Controlled Goods Program. The Controlled Goods Program is aimed at safeguarding certain controlled goods and related technology within Canada from access by unauthorized persons.

The *Defence Production Act* requires any person or company possessing or transferring certain controlled goods and technology to be registered under the Controlled Goods Program. "Controlled goods" generally include military, nuclear weapon-related and missile technology-related goods. Failing to register under the Controlled Goods Program can result in criminal penalties, including fines or imprisonment.

5.5 Trade and Economic Sanctions imposed by the United Nations Act, the Special Economic Measures Act, the Freezing Assets of Corrupt Foreign Officials Act and the Justice for Victims of Corrupt Foreign Officials Act

Canada imposes trade and economic sanctions against certain countries, and individuals and entities of certain countries.

In general, all persons in Canada and Canadian citizens (and under certain sanctions, permanent residents) outside Canada are subject to the jurisdiction of the Canadian sanctions. Certain sanctions prohibit the import of goods and technology from, or the export of goods and technology to, certain countries and also prohibit the dealing with certain named persons including dealing in property of the named persons or providing financial or related services to named persons. In addition, certain sanctions require Canadians to disclose the existence of property in their possession or control that they have reason to believe is owned or controlled, directly or indirectly, by certain named persons or by an entity owned or controlled by (or on behalf of) certain named persons, as well as information about a transaction or proposed transaction in respect of such property.

Pursuant to the *United Nations Act*, Canada enacts regulations to implement sanctions and embargoes authorized by the United Nations Security Council. Consequently, the export of specified

goods and services to countries, individuals or entities subject to the sanctions of the United Nations Security Council may be restricted or controlled pursuant to the *United Nations Act* regulations. Additionally, under the *Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism and the Regulations Implementing the United Nations Resolutions on Taliban, ISIL (Da'esh) and Al-Qaida*, the export of any goods to certain listed terrorist organizations and individuals is also prohibited.

The *Special Economic Measures Act* provides for the making of regulations that restrict investment in and dealings with certain states in order to implement the decisions or resolutions of international organizations of which Canada is a member, or where a grave breach of international peace and security has occurred that has resulted in or is likely to result in a serious international crisis. In general, the import or export of certain goods, and dealings with certain countries/ geographic regions or named persons including the direct or indirect provision of financial services to these countries or named persons, are prohibited.

The *Freezing Assets of Corrupt Foreign Officials Act* allows the Government of Canada to make orders or regulations to seize or freeze the assets of persons who misappropriated or inappropriately acquired the property of a foreign state by virtue of either their office or a personal business relationship. Such persons are referred to under the legislation as "politically exposed foreign persons". The *Freezing Assets of Corrupt Foreign Officials Act* requires certain business entities in Canada to determine on a continuing basis whether they have in their possession or control, property that they have reason to believe is the property of a politically exposed foreign person.

The *Justice for Victims of Corrupt Foreign Officials Act* allows the Government of Canada to make regulations that restrict dealings with certain foreign nationals who have committed human rights abuses or who are responsible for or complicit in acts of significant corruption. In general, dealings with named foreign nationals, including the direct or indirect provision of financial services to those named foreign nationals, is prohibited.

5.6 Free Trade Agreements

The CUSMA, the negotiated replacement to the North America Free Trade Agreement (NAFTA), is a comprehensive free trade agreement consistent with Article XXIV of the General Agreement on Tariffs and Trade, 1997. This means that Canada, the U.S. and Mexico have agreed to eliminate customs duties and other restrictive regulations of commerce on "substantially all the trade" between the three countries in "originating" goods.

The CUSMA came into effect on July 1, 2020.

Unlike the members of the European Union, which is a customs union, the CUSMA parties do not have a common external tariff that applies to goods imported from outside the free trade area. To ensure that goods are not imported into the country within the free trade area with the lowest external tariff and simply transhipped duty free to the others, special rules of origin are required to ensure that only goods produced within the free trade area benefit from free trade treatment. The rules of origin are complex and must be carefully analyzed by corporations doing business in North America who wish to take advantage of the preferential rates of duty under the CUSMA.

In addition to the NAFTA and the CUSMA, Canada has entered into a number of additional free trade agreements with other countries. Two of the most important of these agreements are the CETA and the CPTPP.

CETA is a free-trade agreement established between Canada and the member states of the European Union and eliminates virtually all customs duties between Canada and the European Union.

CPTPP is a free trade agreement established between Australia, Brunei (not yet ratified), Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. On implementation, the

CPTTP eliminated or will phase out substantially all tariffs for goods that originate in countries for which the CPTPP is in force. Brunei is expected to follow suit upon completion of their domestic ratification process. Other countries including China, South Korea, Taiwan and the United Kingdom have also applied to join the CPTPP.

6. Regulation of Foreign Investment

6.1 Introduction: Notification and Approval Procedures under the *Investment Canada Act*

Investments made into Canada by non-Canadians are subject to the federal *Investment Canada Act* (ICA), which provides for the notification or review of acquisitions of control of a Canadian business, investments to establish a new Canadian business, investments in cultural businesses and investments which may be injurious to Canada's national security. The ICA is a statute of broad application, and in addition to direct acquisitions of businesses in Canada, also applies to indirect acquisitions of foreign corporations with Canadian subsidiaries, as well as acquisitions of businesses that are not currently controlled by Canadians.

Generally, non-Canadians who acquire control of an existing Canadian business must, at minimum, submit a filling in the form of either a suspensory pre-closing filing (i.e., a reviewable transaction), or an administrative notification, which may be filed before or up to 30 days after closing (i.e., a notifiable transaction). Whether an acquisition is merely notifiable or reviewable will depend on the transaction structure and different factors, such as the value of the Canadian business being acquired.

In addition to the ICA, other federal statutes regulate and restrict foreign investment in specific industry sectors, such as telecommunications, book publishing, broadcasting and banking.

(a) Non-Canadians

Whether or not an investor is a non-Canadian is determined by the nationality of the individual who ultimately beneficially owns or controls the investor. Non-Canadians who are a citizen or resident of a country that is a member of the World Trade Organization (a WTO Investor), or citizen or resident of a country that has a trade agreement with Canada, are given special status under the ICA for most transactions.

(b) Canadian Business

A "Canadian business" is defined as "a business carried on in Canada that has (a) a place of business in Canada, (b) an individual or individuals in Canada who are employed or self-employed in connection with the business, and (c) assets in Canada used in carrying on the business". While each of these elements must be present, it is possible to meet them even with relatively minimal Canadian activities.

6.2 Reviewable Transactions

(a) Control Rules

The acquisition of control of an existing business in Canada, whether direct or indirect, may be subject to review under the ICA. For corporations, the acquisition of a majority of voting shares is deemed to be an acquisition of control. The acquisition of one-third or more, but less than a majority of voting shares is presumed to be an acquisition of control unless it can be shown that the acquired interest does not give the investor control "in fact" over the Canadian business. An acquisition of less than one-third of voting shares is not an acquisition of control, and is not subject to the ICA's mandatory filing requirements, but may still be notified voluntarily.

A "direct acquisition" for the purpose of the ICA occurs when control of a Canadian business is acquired directly (as opposed to through an acquisition of a foreign parent). Different financial

thresholds for review apply, depending on the identity of the investor, the transaction structure and the type of Canadian business.[3]

An "indirect acquisition" for the purpose of the ICA occurs when control of a Canadian business is acquired through the acquisition of a non-Canadian parent entity. For WTO Investors, indirect acquisitions are not reviewable regardless of value but are notifiable within 30 days of the closing of the transaction. (See Section 6.3 – *Notifiable Transactions*, below.) For non-WTO Investors, an indirect acquisition is reviewable under the ICA if: (i) the target Canadian business's asset book value is C$50 million or more, and less than or equal to 50% of the asset value for the entire transaction; or (ii) the target Canadian business's asset value is C$5 million or more, and greater than 50% of the asset value for the entire transaction.

(b) Non-WTO Investments

If neither the seller nor the buyer in a transaction is a WTO Investor, a review under the ICA will be triggered if:

(i) the asset book value of the target Canadian business is C$5 million or more in a direct acquisition; or

(ii) the asset book value of the target Canadian business is C$50 million or more in an indirect acquisition.

(c) Cultural Business

The abovementioned thresholds also apply where the Canadian business is a cultural business, meaning that its activities are related to Canada's "cultural heritage or national identity". In addition, the Minister of Canadian Heritage may exercise discretion to review the acquisition or establishment of a cultural business, regardless of whether the thresholds above are met. The applicable regulations define "cultural heritage or national identity" to include the publication, distribution or sale of books, magazines, periodicals, newspapers or music in print or machine-readable form, the production, distribution, sale or exhibition of films, videos, audio or video recordings, and radio communications and broadcasting. The Department of Canadian Heritage (Canadian Heritage) conducts the review process for such transactions, but may, in some cases, consult with the Department of Innovation, Science, Economic Development (ISED). Parallel reviews by Canadian Heritage and ISED are also possible.

(d) The Review Process

Acquisitions that are subject to review cannot be completed until the Minister of Innovation, Science, and Industry (ISI) and/or the Minister of Canadian Heritage for investments involving cultural businesses determines that the proposed investment is of "net benefit" to Canada. To obtain such approval, the non-Canadian files an application for review to the applicable Minister(s) explaining why the acquisition will result in a "net benefit" to Canada. This approval process for reviews may take as long as 75 days, but can be extended. Cultural business reviews usually require at least 75 days to complete, and national security reviews (See Section 6.6 – *National Security*, below) can take even longer (200 days or potentially longer).

Failure to comply with the waiting periods may subject the investor to fines of up to C$10,000 per day. However, new proposed amendments to the ICA, if passed, would increase penalties to C$25,000 per day, and introduce a new penalty of C$500,000 for failure to submit a filing for a reviewable transaction.

[3] Thresholds are adjusted annually based on changes in Canada's nominal gross domestic product.

(e) The Substantive Assessment

In assessing whether an investment will be of "net benefit" to Canada, the ICA requires the applicable Minister(s) to consider the following factors, where relevant:

(i) the effect of the investment on the level and nature of economic activity in Canada (including effects on employment resource processing, utilization of parts, components and services in Canada, and on exports from Canada);

(ii) the degree and significance of participation by Canadians in the Canadian business and in any industry or industries in Canada;

(iii) the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;

(iv) the effect of the investment on competition within any industry or industries in Canada;

(v) the compatibility of the investment with national industrial, economic and cultural policies; and

(vi) the contribution of the investment to Canada's ability to compete in world markets.

In reviewable transactions, the non-Canadian investor is generally required to make time-limited legally binding undertakings to the Government of Canada as a condition of receiving "net benefit" approval. The undertakings are specific to the Canadian business being acquired, but often relate to maintaining a presence in Canada, capital investments and employment levels. Compliance with these undertakings is monitored after closing of the transaction. Undertakings may be renegotiated if they are not substantially performed due to unforeseen circumstances.

6.3 Notifiable Transactions

The establishment of a new business in Canada or the acquisition of control of an existing Canadian business, if not reviewable, is "notifiable" under the ICA.

The notification process requires the filing of a prescribed form which, among other things, requires information regarding the parties to the transaction, the names of board members, any influence a foreign state may have on the investor, the investor's five highest paid officers and sources of funding for the acquisition.

(a) Establishment of New Business

A non-Canadian establishing a new business in Canada must file a notification with the Investment Review Division of ISED (or Canadian Heritage) prior to or within 30 days of the establishment of the business. If the proposed investment potentially raises national security concerns, filing prior to closing is generally recommended. This filing may be unnecessary if the new business is related to a Canadian business already being carried on by the foreign investor.

(b) Acquisition of Control

A notification must also be filed with respect to any indirect or direct acquisition of control of a Canadian business that is not a reviewable transaction. Such notification is also required prior to or within 30 days of the closing of the transaction.

6.4 Investments by State Owned Enterprises (SOE)

(a) Filing Consideration

Special rules apply where the investor is an SOE. SOEs are defined broadly under the ICA to include foreign governments and agencies, and individuals or entities that are controlled or influenced, directly

or indirectly, by such governments and agencies. It is the Canadian government's policy that the governance and commercial orientation of SOEs be considered if an investment is subject to review. SOEs will be subject to review if the asset value of a target Canadian business exceeds the prescribed amount for direct acquisitions. Direct acquisitions of control by a WTO Investor that is an SOE are reviewable if the Canadian business has a book value of its assets over C$512 million.[4] Additionally, the applicable Minister(s) have the power to determine that an SOE has acquired "control in fact" of a Canadian business (notwithstanding the control rules set out in the ICA), thereby potentially subjecting investments to review that would otherwise have been excluded.

Guidelines issued by ISED in 2012 reiterate the policy considerations for having unique rules applicable to SOEs and specify how the Minister intends to implement them. Since these guidelines were published, the ICA has been amended to create a separate regime that governs investments by SOEs in Canada.

The applicable Minister will examine various considerations in interpreting the standard factors of the "net benefit" review process set out above. The Minister will consider the corporate governance and reporting structure of the SOE including:

(i) the adherence of the SOE to Canadian standards of corporate governance (e.g., commitments to transparency and disclosure, the existence of an independent board of directors) and Canadian laws and practices (notably, free market principles);

(ii) the effect of the investment on the level and nature of economic activity in Canada, including how it will effect employment, production and capital levels;

(iii) the extent to which the SOE's conduct and operations are owned, controlled and influenced by a foreign state; and

(iv) whether or not the Canadian business to be acquired by the SOE will likely operate on a commercial basis.[5]

To resolve any issues that may arise from these considerations, the guidelines recommend providing specific undertakings such that the Minister can conclude that the investment is in the "net benefit" of Canada.

SOEs are also expected to disclose any susceptibility to state influence in order to "demonstrate their strong commitment to transparent and commercial operations". The extent of this disclosure has been specified in the Investment Canada Regulations (ICR), requiring the SOE to identify any direct or indirect state ownership or control (i.e., whether or not they have a special veto or other decision-making rights).

(b) Critical Minerals

Pursuant to Canada's Critical Mineral Policy which was introduced in October 2022, acquisitions of control by SOE investors in Canadian businesses and assets in "critical minerals" sectors, which are subject to net benefit review, will only receive approval on an exceptional basis. Under the national security provisions of the ICA (as discussed further below), any investment by SOE investors in Canadian businesses and assets in "critical minerals" sectors will support a finding that there are reasonable grounds to believe that the investment could be injurious to Canada's national security.

[4] This number is adjusted annually based on growth in Canada's nominal gross domestic product.
[5] In determining whether or not the SOE will likely operate on a commercial basis, the Minister of ISED will consider (i) where the Canadian business will export and process its goods or services, (ii) the participation of Canadians in its operations, (iii) the impact of the investment on productivity and industrial efficiency in Canada, (iv) the support of on-going innovation, research and development in Canada, and (v) the appropriate level of capital expenditures to maintain the Canadian business in a globally competitive position.

6.5 Disclosure Requirements

In addition to the disclosure requirements for SOEs, the ICR outline information that must be disclosed in notifiable and reviewable filings. The list is extensive and is set out in Schedule I of the ICR. It generally requires that the investor disclose information about itself, the investment, the Canadian business being acquired or established, and information relating to cultural heritage or national identity.

6.6 National Security

Stand-alone provisions of the ICA, which are separate to those relating to filings (including the "net benefit" review), provide the applicable Minister with broad powers to examine any investment in Canada made by a non-Canadian (including minority investments) on the basis that the Minister reasonably believes that the investment "could be injurious to national security".

All foreign, direct or indirect, investments in Canadian businesses are subject to screening. No sector-specific screening process exists under the ICA, although investments in certain sectors may attract higher scrutiny under national security provisions, including those related to critical minerals, critical infrastructure, the supply of "critical goods and services" and sensitive personal data.

A transaction cannot close without approval if, prior to closing, the Minister has given notice to the non-Canadian investor that the Minister has concerns relating to the investment's impact on Canadian national security. If the transaction has already closed, the federal cabinet may order a divestiture.

Although the term "national security" is not defined in the ICA, Guidelines on the National Security Review of Investments issued and updated by the Canadian government in 2021 contain a non-exhaustive list of factors the government will consider in assessing investments for national security risks and should assist investors in determining whether their investment may present concerns.

In addition to establishments of new Canadian business, and acquisitions of control of Canadian businesses, the national security provisions of the ICA notably also apply to the establishments or acquisition, in whole or in part, of entities that satisfy relevant criteria relating to their connection to Canada.

Under regulations in force as of March 13, 2015, various timelines within which the Governor in Council must complete national security reviews were extended. Such reviews can take up to 200 days or longer if the Minister and the investor have agreed to an extension.

(a) Voluntary Filings for Minority Investments

Non-Canadian investors who wish to obtain certainty that their minority investment is not injurious to national security may submit a voluntary notification, which includes information similar to the mandatory notification. The Canadian government has 45 calendar days after receiving a complete notification to initiate a national security review or provide notice to the non-Canadian of a potential national security review. If action is not taken during this first 45 days, then the transaction can be implemented.

However, where a voluntary filing is an option for a non-Canadian minority investor and the investor chooses not to make a filing, the Canadian government retains jurisdiction to commence a national security review up to five years after implementation of the investment, as compared to 45 days.

6.7 Proposed Amendments to the ICA

On December 7, 2022, the Minister of ISI introduced legislation to amend the ICA, known as the *National Security Review of Investments Modernization Act*. The amendments are the most extensive reforms to the ICA since 2009, and are intended to further support Canada's ability to screen, review

and impose conditions on foreign investments on national security grounds. Key amendments include new mandatory pre-closing filings for prescribed business sectors, new protectionary measures, increased information sharing capabilities with allies, increase penalties and new measures for the protection of sensitive information during judicial reviews of decisions under the ICA.

The proposed amendments are subject to Canada's legislative process and may be revised as they undergo public consultation and parliamentary debate. The Canadian government has also signalled that many details will not become known until the adoption of regulations after the legislation has been finalized.

7. Competition Act

7.1 General

Canadian "antitrust" law is contained in the federal *Competition Act*, which includes both criminal and non-criminal provisions. The *Competition Act* is administered by the Competition Bureau, which is led by the Commissioner of Competition (Commissioner).

(a) Criminal Offences

Criminal offences include conspiracy,[6] bid-rigging and certain misleading advertising or deceptive marketing practices. Prosecutions are brought before criminal courts where strict rules of evidence apply. Penalties include fines or imprisonment, or both. Individuals as well as companies may be charged. Upon application by the Commissioner, prohibition orders (i.e., court orders forbidding certain activities) and interim injunctions (i.e., temporary court orders forbidding certain activities until a hearing is held) may also be obtained from the court.

(b) Non-Criminal Offences

Non-criminal reviewable matters include mergers, price maintenance, misleading advertising, collaborative behaviour, abuse of dominance, refusal to deal, consignment selling, exclusive dealing, tied selling, market restriction and delivered pricing. These matters are reviewed by the Competition Tribunal (Tribunal) under non-criminal law standards, generally on reference by the Commissioner, and may be resolved by the issuance of an order by the Tribunal terminating the restrictive practice and prescribing ameliorative actions. In some instances the Tribunal may impose an administrative monetary penalty.

(c) Civil Rights of Action

A private right of civil action is available if there has been a violation of the criminal provisions of the *Competition Act* or a failure to comply with an order of the Tribunal or a court. The private party must be able to prove "loss" or damage as a result of the violation. There is a two-year limitation period for filing a private action under the *Competition Act* and if the private party is successful, it will be entitled to payment of the damages it suffered (but, unlike in the United States, it is only the proven actual damages that can be awarded).

The *Competition Act* permits private individuals and corporations to bring applications directly to the Tribunal with respect to certain non-criminal reviewable matters, including abuse of dominance.

7.2 Mergers

The *Competition Act* also contains a merger control regime that provides for mandatory, pre-merger notification for transactions that meet certain financial thresholds and the substantive review of non-notifiable transactions for up to one year after closing.

(a) Notification Thresholds

Part IX of the *Competition Act* requires pre-notification of an acquisition of more than 20% of the voting shares (or if greater than 20% are already held, of more than 50% of the voting shares) of a public corporation that directly or indirectly carries on an operating business of more than 35% of the voting shares (or if 35% are already held, of more than 50% of the voting shares) of a private

[6] The *Competition Act* was amended in 2022 to include a new employment conspiracy provision, which prohibits agreements between employers, including "no poach" and "wage fixing" agreements. The provision comes into effect on June 23, 2023.

corporation that directly or indirectly carries on an operating business, where the following two thresholds are met:

(i) the parties, together with their affiliates, have assets in Canada or annual revenues from sales in, from or into Canada exceeding C$400 million; and

(ii) the book value of the assets in Canada or the annual gross revenues from sales (generated from those assets) in or from Canada of the target corporation exceed C$93 million.[7]

Similar provisions exist with respect to the acquisition of assets, amalgamation or acquisition of interest in a combination. Where the applicable thresholds are met, the parties to the transaction are required to provide prescribed information relating to the parties, their affiliates and the transaction to the Commissioner.

(b) Merger Review Process for Notifiable Transaction

The *Competition Act* imposes a two-stage merger review process, similar to that in the U.S.

To obtain clearance from the Commissioner for a notifiable transaction, the parties to the merger file a request for an advance ruling certificate (ARC), and may also file a pre-merger notification. If only an ARC request is filed, the statutory waiting periods are not triggered and the parties must obtain an ARC, or no-action letter together with a waiver of the requirement to file a pre-merger notification from the Commissioner to close the transaction.

Filing a pre-merger notification triggers a 30-day statutory waiting period that prevents the parties from closing the transaction until the waiting period expires or the Commissioner grants early clearance. In complex transactions, within 30 days following receipt of the pre-merger notification, the Commissioner may issue a supplementary information request (SIR) to the notifying parties requiring the production of interrogatory responses, documents and data. A SIR triggers a second 30-day statutory waiting period, which commences when all information requested in the SIR has been received.

The Competition Bureau endeavours to complete its review of transactions within its service standards, which are 14 calendar days for non-complex transactions, and 45 calendar days for complex transactions. A filing fee of C$77,452.36 is payable for each notifiable transaction. The filing fee may be paid entirely by one party or split between the parties to the transaction.[8]

(c) Non-Notifiable Mergers

Mergers that are not subject to pre-merger notification and clearance may still be reviewed and challenged if the Commissioner believes that the merger may result in a substantial lessening or prevention of competition. Typically, the parties to the merger will be asked to provide information voluntarily, and/or the Commissioner will seek a court order compelling the parties to provide interrogatory responses, documents and data. The Commissioner may challenge a non-notifiable merger up to one year following its completion.

(d) Substantive Merger Review

The Merger Enforcement Guidelines issued by the Competition Bureau outline the criteria that are used to determine the likelihood that a merger may result in a substantial lessening or prevention of competition. The market share of the merged firm and post-merger industry concentration are only two of many factors considered. While not determinative, the higher the market share (i.e., greater

[7] This threshold may change on an annual basis based on fluctuations in Canada's Nominal Gross Domestic Product.
[8] The filing fee may be adjusted annually.

than 35%) and the greater the concentration will be after a merger (i.e., the four firm concentration ratio is greater than 65%), the more likely that the Commissioner will be concerned about the transaction.

7.3 Price-Fixing and Cartels

The *Competition Act* creates a criminal enforcement regime for the most egregious forms of cartel agreements (e.g., price-fixing, market allocation or output restriction, and agreements between employers), while allowing for other forms of potentially anti-competitive competitor collaborations (e.g., joint ventures and strategic alliances) to be reviewed under a civil provision which prohibits agreements only where they are likely to substantially lessen or prevent competition.

The *Competition Act* provides for a maximum fine of C$25 million[9] or up to 14 years' imprisonment, or both, for breaches of the cartel provisions.

The Competitor Collaboration Guidelines issued by the Competition Bureau are intended to assist firms in assessing the likelihood that a competitor collaboration will raise concerns under the criminal or civil provisions of the *Competition Act*.

7.4 Bid-Rigging

Bid-rigging is an agreement between parties (bidders) whereby one or more bidders agree to manipulate the outcome of a tendering process, for example, by purposefully refraining from submitting bids or by withdrawing bids. If the person calling for bids or tenders is aware of bid coordination, this creates a defence under the bid-rigging provisions of the *Competition Act* (although the conduct may still be subject to the cartel provisions). Parties engaged in bid-rigging are liable to a fine at the discretion of the court or imprisonment for up to 14 years, or both.

7.5 Resale Price Maintenance

It is a civil reviewable practice for a person who engages in the business of producing or supplying a product to influence upwards the price, or to discourage the reduction of the price, at which any other person engaged in the business supplies a product. This provision also addresses refusal to supply a product or any other discrimination against another person engaged in business because of the low pricing policy of that person. Price maintenance may be the subject of an order of the Tribunal only if it has had, is having or is likely to have an "adverse effect on competition" in a market. Suppliers who suggest retail prices to customers must clearly state that their customers are under no obligation to accept the prices suggested. The Tribunal may order the respondent to stop engaging in such practice or to accept the other person as a customer on usual trade terms.

Criminal prohibitions against price discrimination and predatory pricing formerly contained in the *Competition Act* have been repealed. These practices are now dealt with exclusively under the civil provisions of the *Competition Act* dealing with abuse of dominance which require a demonstration of substantial anti-competitive effects. While distribution practices have rarely been challenged under the abuse of dominant position provisions, in case of a successful challenge, the Tribunal has authority to impose administrative monetary penalties of up to a maximum of the greater of C$10 million (C$15 million for subsequent occurrences) and three times the value of the benefit obtained from the anti-competitive conduct (or 3% of annual worldwide gross revenues if that amount cannot be reasonably determined).

[9] As of June 23, 2023, the C$25 million limit on fines will be removed and fine amounts will be at the discretion of the court.

7.6 Misleading Advertising and Deceptive Marketing Practices

The *Competition Act* contains civil and criminal tracks dealing with misleading advertising and deceptive marketing practices. Misleading advertising remains a criminal offence where a false and misleading representation is made knowingly or recklessly. Criminal provisions are generally reserved for fraud-like conduct. In the case of less serious deceptive conduct, there is a civil regime with a civil burden of proof. The *Competition Act* also contains a criminal offence specifically dealing with deceptive telemarketing practices.

The misleading advertising provisions prohibit representations to the public that are materially false or misleading, performance representations not based on adequate and proper tests, false testimonials, drip pricing and misstatements as to the ordinary price of a product. The *Competition Act* also contains separate provisions addressing misleading advertising through electronic means, including misleading representations contained in the sender information, URL and the electronic message itself.

Penalties for a criminal offence include fines in the discretion of the court and/or prison terms. In certain circumstances, directors and officers may also be held liable for the offence committed by the corporation.

Penalties for a civil offence include prohibition orders, temporary cease-and-desist orders, correction notices, restitution and administrative monetary penalties. The maximum penalty for individuals is the greater of C$750,000 (C$1 million for each subsequent violation), and three times the value of the benefit derived from the deceptive conduct, if that amount can be reasonably determined. For corporations the maximum penalty is the greater of C$10 million (C$15 million for each subsequent violation), and three times the value of the benefit obtained from the deceptive conduct (or 3% of annual worldwide gross revenues if that amount cannot be reasonably determined).

The *Competition Act* also contains provisions against double ticketing, pyramid selling, “bait-and-switch” selling (where a product is advertised at a bargain price and a reasonable supply is not available) and selling above an advertised price.

7.7 Other Non-Criminal Reviewable Matters

Practices such as exclusive dealing, tied selling, refusal to deal and market restriction are not illegal per se but, depending on the circumstances, may lead to an order prohibiting their continuation. While these matters are not always anti-competitive, they may have anti-competitive consequences in certain circumstances.

8. Advertising and Labelling of Goods for Sale

8.1 Introduction

There is considerable legislation, at both the federal and provincial levels, relating to the advertising and labelling of prepackaged consumer products. The primary federal labelling statute is the *Consumer Packaging and Labelling Act* (CPLA). Labelling, advertising and other regulatory requirements are also found in customs and importation laws, in the federal *Competition Act* and in federal product-specific legislation, such as the *Food and Drugs Act*, the *Hazardous Products Act*, the *Precious Metals Marking Act*, the *Radiocommunication Act*, the *Telecommunications Act* and the *Textile Labelling Act*. Labelling is also affected by product liability law, which imposes a general duty to warn against reasonably foreseeable harms.

8.2 Consumer Packaging and Labelling Act and Regulations

The CPLA and its regulations apply, with some exceptions, to all prepackaged products (which are defined as any products packaged in a container in the manner in which they are ordinarily sold to, used by or purchased by a consumer without being repackaged). The label of a prepackaged product must generally contain the following mandatory information:

(a) Net Quantity Declaration

The net quantity must be declared on the principal display panel of the product in English and French, in metric units, or by numerical count, depending on the product. It must generally be declared by volume where the product is a liquid or gas and by weight where the product is a solid. The declaration must be accurate within prescribed tolerances.

(b) Product Identity Declaration

The identity of the prepackaged product must be shown on the principal display panel in both English and French, using the common or generic name or the function of the product.

(c) Dealer Declaration

The term “dealer” may include a manufacturer, processor or producer, an importer or packer, or a distributor or retailer of a product. The dealer’s name and the address of its principal place of business must be shown in English or French, anywhere on the outer surface of the package except the bottom, with some exceptions. The address must be sufficient to allow a postal delivery to be made.

In the case of an imported product, the name and address must be preceded by the words “Imported by” or “Imported for” (and their French equivalent) unless the geographic origin of the product is stated. There are specific regulations for the size of the type in which information required by the CPLA must be shown.

8.3 Imported Goods Regulations/Country of Origin Claims

The marking of certain goods imported into Canada is governed by the *Marking of Imported Goods Regulations*, which require specified goods imported into Canada to be marked in English or French to indicate the country of origin. The markings are required to be conspicuous, legible, sufficiently permanent and capable of being easily seen during ordinary handling of the goods. Different marking rules apply depending on whether goods are imported from *Canada-United States-Mexico Agreement* (CUSMA) or non-CUSMA countries.

Guidelines developed under misleading advertising laws govern when “Product of Canada”, “Made in Canada” and similar markings may appear on products sold in Canada. Special requirements apply to such claims on food products.

Pursuant to the *Safe Food for Canadians Act* (SFCA) and its regulations, importers of food into Canada as well as anyone preparing food for export or inter-provincial trade in Canada are subject to licensing and documentation requirements as required by the Canadian Food Inspection Agency.

8.4 Product Specific Legislation

(a) The Food and Drugs Act and Regulations

Detailed regulations under the *Food and Drugs Act* (FDA) apply to drugs, natural health products, medical devices, cosmetics and human foods sold or advertised in Canada. The FDA prohibits a person from packaging, labelling, selling or advertising any of these products in a manner that is false, misleading or deceptive, or that is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety. Any product that is not packaged or labelled as required under the FDA is deemed to be misleading or deceptive. The particular requirements that apply to products regulated by the FDA include the following:

(i) Drugs

Products falling within the definition of a drug (generally including any substance manufactured, sold or represented for use in the diagnosis, treatment, mitigation or prevention of a disease, disorder or abnormal physical state, or its symptoms, or for restoring, correcting or modifying organic functions) must be pre-approved by Health Canada through the issuance of a drug identification number (DIN). Over the counter drugs such as sunscreens, anti-dandruff shampoo and medicated skin care products also require a DIN. Drugs are subject to specific packaging, labelling and advertising requirements. Drug establishment licensing and compliance with good manufacturing practices requirements are also required.

(ii) Natural Health Products

Products falling within the definition of a Natural Health Product (NHP) (generally including any drug-like product whose sole medicinal ingredients are natural substances, such as vitamins and minerals, fungi, algae, plants or plant material, and extracts or isolates thereof) are required to obtain premarket approval from Health Canada in the form of a product licence and be issued an NHP number. As with drugs, specific packaging, labelling and advertising requirements apply. Site licensing and compliance with good manufacturing practices requirements are also required.

(iii) Medical Devices

Medical devices (generally including any article, instrument or apparatus manufactured, sold or represented for use in purposes similar to those for drugs) may be required to obtain premarket authorization and hold a licence. As with drugs and NHPs, specific packaging, labelling and advertising requirements apply.

(iv) Cosmetics

Cosmetics (generally including any substance manufactured, sold or represented for use in cleansing, improving or altering the complexion, skin, hair or teeth) are subject to packaging and labelling requirements, as well as ingredient restrictions and limitations on advertising and labelling claims. Cosmetic labels are required to carry an ingredient listing. Cosmetics must be registered with Health Canada within 10 days of their date of first sale in Canada.

(v) Foods

Human foods must comply with a wide range of compositional, packaging, advertising and labelling requirements in order to be sold or advertised in Canada. Detailed standards apply to the composition, strength, potency, purity, quality and other properties of certain foods. Food additives are highly regulated and some types of foods may be sold only in standard container sizes. A variety of

information is generally required to appear on the label of prepackaged foods, including a list of ingredients, allergens and potential allergens, and a best before date for products with a shelf life of less than 90 days.

Most prepackaged foods sold in Canada are also required to carry a Nutrition Facts table (NFt), setting forth the nutritional content of foods in accordance with detailed requirements in the FDA and the SFCA. Although the Canadian NFt shares its name with the U.S. nutrition information panel, prepackaged foods sold in Canada are prohibited from displaying the U.S. table, whether alone or in combination with the Canadian NFt.

Detailed requirements also apply to claims made about the nutrient content of a food outside the NFt. Although as a rule health-related claims are prohibited on foods, the FDA permits structure-function claims regarding the biological role of certain nutrients. Claims using the wording prescribed in regulations may also be made about the relationship between a diet featuring certain nutrients and the reduction of risk in relation to certain diseases.

Recent amendments to the FDA will require all manufacturers to add a nutrition symbol for most prepackaged products containing nutrients of public health concern (i.e., saturated fat, sugars and/or sodium) at or above specified thresholds, by no later than January 1, 2026. Very few exceptions will apply, including a limited list of prescribed foods and foods that do not carry an NFt.

At the provincial level, Québec has several laws relating to food, including legislation governing dairy product substitutes (for which government pre-approval of labels is required) and maple products. It also imposes labelling, consignment and payment obligations for the recycling of beer and soft drinks in non-returnable containers.

Additionally, Ontario regulates nutrition disclosure under the *Healthy Menu Choices Act*, 2015, which requires food service premises with a minimum number of locations in Ontario to display prescribed information, including the number of calories for every standard food item and self-serve item on menus and menu boards, labels and display tags and information to help educate customers about their daily caloric requirements.

An Act to amend the Food and Drugs Act (prohibition of food and beverage marketing directed at children) (Bill C-252), which was introduced in February 2022, proposes to amend the FDA to prohibit all advertising of "foods and beverages that contribute to excess sugar, saturated fats or sodium in children's diets" to children. While Bill C-252 has passed its second reading, there remains significant industry pushback, given the newly introduced *Code for the Responsible Advertising of Food and Beverage Products to Children*,[10] which prohibits advertisements that are primarily directed at children of foods that fail to meet specific nutrition criteria.

(b) Hazardous Products

The *Hazardous Products Act* regulates packaging and labelling requirements for potentially hazardous consumer products such as bleaches, cleaners, solvents, petroleum distillates and other household products, as well as for certain commercial/industrial products that may be hazardous to users in the workplace. Manufacturing and design standards for consumer products such as cribs, hockey helmets, tents and car seats are also prescribed.

(c) Electrical Equipment

Electrical equipment sold in Canada is subject to standards published by the Canadian Standards Association (CSA). Although the relevant standards are voluntary, many of them have been adopted

[10] The *Code for Children's Food and Beverage Advertising* and its companion *Guide* were developed as a collaborative effort by Ad Standards, the Association of Canadian Advertisers, the Canadian Beverage Association, Food, Health & Consumer Products of Canada and Restaurants Canada.

by statutory reference as mandatory requirements through provincial electrical safety codes. Manufacturers of most electrical products or components sold or offered for sale in Ontario are required to register with the Ontario Electrical Safety Authority.

Pursuant to telecommunications and radiocommunication laws, telecommunications terminal equipment, wireless devices and a wide variety of electrical products that emit radio interference are required to conform to standards and comply with marking requirements established by Industry Canada. In some cases, certification or registration is also required.

(d) Textiles

A disclosure label must be affixed to most consumer textile articles sold in Canada providing mandatory information relating to fibre content in English and French, as well as the identity of the dealer.

(e) Jewellery

Any jewellery comprising precious metals (defined as gold, palladium, platinum and silver, and an alloy of any of those metals and any other metal and an alloy thereof) that carries a quality mark is required to be marked in accordance with the *Precious Metals Marking Act* and *Precious Metals Marking Act Regulations*. Also, the *Children's Jewellery Regulations*, made under the *Canada Consumer Product Safety Act*, regulate how much lead can be contained in children's jewellery.

(f) Environmental Labelling

As of November 2021, the Competition Bureau of Canada archived its comprehensive guide on environmental claims, entitled *Environmental claims: A guide for industry and advertisers* (Guide), which was primarily based on the Canadian Standards Association CAN/CSA-ISO 14021 standard. While the Bureau considered the Guide to reflect industry best practices at the time of publishing, the Bureau now takes the position that the Guide no longer reflects its current policies or practices and does not reflect the latest standards and evolving environmental concerns. This new position is directly reflected in the Bureau's investigation of, and subsequent C$3 million penalty, to settle concerns over coffee pod recycling claims.

(g) Product Stewardship/Waste Diversion

Several Canadian provinces, including Ontario and Québec, have recently imposed sweeping changes to their waste management legislation to implement an Extended Producer Responsibility (EPR) regime or expand its scope. EPR regimes make "producers" of prescribed products and packaging responsible for the collection and disposal or recycling of the products at the end of their life cycle. Producers may now be required to arrange, establish or operate collection and management systems, and comply with registration, reporting and financial obligations. These obligations can be triggered by the sale of goods in a province in which such laws apply and in some cases may apply even where the producer does not have a place of business in Canada.

8.5 Standards

The Standards Council of Canada (SCC) coordinates and oversees the National Standards System. The SCC accredits Canadian standards organizations (including the Canadian General Standards Board, CSA, Underwriters' Laboratories of Canada, and the Bureau de normalisation du Québec), and also approves National Standards of Canada.

The SCC maintains a database of standards developed by Canadian standards organizations. International Standardization Organization standards, American National Standards Institute standards and other U.S.-developed standards are often referenced in the Canadian standards database or incorporated in Canadian standards.

Unless specifically mandated by law or regulation, there is no obligation for a Canadian manufacturer or importer to comply with the voluntary system of Canadian standards. However, where there is a statutory obligation for a product to meet a standard, the product must bear a label issued by the appropriate standards organization.

As a result of standards-related harmonization, certification of compliance with CSA standards can be given by either the CSA or certain other designated standards bodies. Products that are already approved for sale in the U.S. may be permitted for sale in Canada without further inspection. U.S. standards organizations may also be able to certify U.S. products according to Canadian standards, and label them as such for importation into Canada. Products accredited according to European standards may not receive automatic accreditation in Canada; an analysis must generally be undertaken at the individual product level.

8.6 Advertising/Marketing

The federal *Competition Act* prohibits representations to the public that are false or materially misleading, are not based on adequate and proper tests, contain false or unauthorized testimonials or make misstatements as to the ordinary price of a product. Very significant civil financial penalties and even criminal penalties can be imposed. The *Competition Act* also contains restrictions against various other sales and marketing practices, including pyramid selling, deceptive telemarketing, “bait-and-switch” selling, selling above an advertised price and a newly adopted express prohibition against drip pricing.

The *Canadian Code of Advertising Standards* (Code) and related guidelines administered by Ad Standards (AS), an industry self-regulatory body, establish extensive advertising standards and guidance. These include standards and guidelines related to comparative advertising, advertising to children and the use of survey data to substantiate advertising claims. While technically voluntary, the Code is used to adjudicate trade disputes brought using the AS dispute resolution procedure, as well as to resolve consumer complaints. An adverse finding can restrict the ability to conduct advertising through AS member media. Industry guidelines broadly similar to the Code have been developed for the pre-clearance of broadcast advertising, which is required by most Canadian broadcasters.

Certain legal requirements relevant to advertising and marketing are contained in the Ontario *Consumer Protection Act* and other provincial trade practices legislation. For example, Ontario and several other Canadian provinces have adopted detailed regulations governing stored-value “gift” cards issued by merchants to consumers. These regulations impose disclosure requirements and generally prohibit the use of expiry dates. Similarly, Ontario and Québec also have rules which prohibit the expiration of some reward points.

Legal requirements can also be triggered by the use of certain protected images in advertising. Permission and/or a licence must generally be obtained to depict images of Canadian banknotes or coins and, in the case of coins, royalties may be payable. Similar consent requirements also apply to images or references to the Royal Canadian Mounted Police and to Canadian or foreign flags, coats of arms and emblems.

8.7 Anti-Spam Legislation

Canada has adopted anti-spam legislation known as “CASL” to regulate the harms of malware, viruses and fraud associated with unsolicited electronic communications. The core provisions of CASL prohibit sending commercial emails and certain other electronic communications without the recipient’s express consent and compliance with prescribed message formalities, unless an exemption applies.

These provisions apply to a “commercial electronic message” (CEM), defined as a message that encourages participation in a commercial activity, such as by offering, advertising or promoting a

product, a service or a person engaged in a business activity. This does not need to be the primary or predominant purpose of the message for CASL to apply. A message requesting consent is itself a CEM.

CASL allows senders to rely on implied consent in certain circumstances, including where they are in an existing business or non-business relationship with the sender. For example, consent can be implied where the recipient has made a purchase from the sender within the past two years, or made a commercial inquiry to the sender within the past six months.

CASL generally provides exemptions for, among others, parties in personal or family relationships, organization-to-organization communications, solicited communications, legal communications, service messages, limited access accounts, foreign recipients in jurisdictions with their own equivalent anti-spam legislation, and fundraising communications by registered Canadian charities and political parties. The onus to prove valid consent is with the sender.

In addition to the regulation of CEMs, CASL prohibits the alteration of message transmission data, the rerouting of message destinations and the unauthorized collection of email addresses. CASL also expands existing civil and criminal laws prohibiting false or misleading representations to include those in electronic communications, such as email headers, sender information, subject lines and URLs.

CASL also generally prohibits installing a computer program on a third person's computer system in Canada without express consent and prescribed disclosures.

CASL generally applies to any computer system located in Canada used to send, route or access a message, or install a program. CASL imposes penalties per violation as high as C$10 million for organizations and C$1 million for individuals.

The Government of Canada suspended a private right of action under CASL, preventing it from coming into force. If it came into force it would have allowed individuals (including class action plaintiffs) to ask a court to award statutory damages for noncompliant CEMs up to a maximum of C$1 million per day, in addition to compensatory damages for actual loss.

8.8 Contests/Sweepstakes

Product labels, websites and advertising are often used to promote contests and sweepstakes, which are subject to various disclosure requirements under the *Competition Act* as well as restrictions under the federal *Criminal Code*.

The *Competition Act* requires adequate and fair disclosure of, among other information, the number and approximate value of prizes, the regional allocation of prizes (if any) and any facts known to the advertiser that materially affect the chances of winning.

The required information is generally included in a set of legally reviewed contest rules and regulations, which contain numerous other disclosures and legal protections for contest sponsors. Because there is usually insufficient room to include these "full rules" everywhere a contest is publicized, "short rules" can be developed that contain essential information and tell consumers where they may consult the full rules. As contest rules are a contractual document, generally, they may not be modified by the contest sponsor after a contest has begun; special steps should be followed if modifications are essential.

Due to restrictions under the *Criminal Code*, no purchase or equivalent may be required to enter a contest or sweepstakes that involves any element of chance. In addition, since games of pure chance are prohibited as illegal lotteries, contests and sweepstakes must contain a skill requirement (usually an arithmetic question). Accordingly, care must be taken to ensure that entrants have a "no purchase

necessary" means of entering a contest and that promotional materials do not imply that a prize has been won before the prospective winner has satisfied the skill requirement. The *Competition Act* also contains specific provisions restricting the use of deceptive prize notices. The ultimate distribution of prizes must also not be unduly delayed.

The collection of personal information from individuals for administering a contest, or for other stated purposes, should be conducted in accordance with a privacy statement providing for implied or express consent appropriate to the information being collected and addressing retention, destruction and any data transfer and disclosure issues.

As noted below, additional requirements apply to contests and sweepstakes that are open to residents of Québec, such as registration, recordkeeping requirements and payment of fees. Most notably, in June 2021, legislation was passed to relax the rules for international contests and sweepstakes (i.e., those open to participants from outside Canada).

8.9 French Language Requirements in Québec

Goods sold in or into the province of Québec are required to comply with the French language labelling requirements of the *Charter of the French Language* (Charter).

The Charter requires that all inscriptions on a product, on its container, on its wrapping or on a document or object supplied with it, including directions for use and warranty certificates, be drafted in French. A version in another language can also be shown, but only if it is not given greater prominence than the French version.

Particular labelling rules apply to certain types of products, such as computer software, toys and games. Various outright exemptions from the Charter's labelling requirements also apply. One such exemption generally allows "recognized" English trademarks to be used without translation provided a French version of the mark has not been registered in Canada. The exemption must be interpreted carefully, however, and there remains a risk of enforcement action if an English mark is not fully registered in Canada at the time of relying on the exemption. Moreover, trademarks on storefront signage in a language other than French must be accompanied by a descriptor or slogan in French.

Pursuant to amendments to the Charter, beginning in 2025, organizations will no longer be able to rely on the broader category of "recognized" trademarks, which traditionally included registered trademarks, trademark applications and common law trademarks. Once in effect, organizations will only be able to rely on the Charter's trademark exemption if the trademark is a "registered trademark" in Canada, as defined by the *Trademarks Act*. Similarly, the Charter will require French translations of any non-French generic term or product description contained within a trademark. In other words, if a registered trademark on a product package includes a generic term or a product description in a language other than French, the Charter will now require that the generic term or product description appear in French on either the product packaging or a support that is permanently affixed to the product.

Under the Charter, French is generally also required to be used in all commercial documents and publications, including catalogues, brochures, folders, commercial directories and other similar publications. As a website is considered a commercial publication under the Charter, it must be either in French or bilingual if the operator is a Québec resident or if the website is directed at Québec residents.

Generally, all public signs, posters and commercial advertising in Québec must be either in French or multilingual. If they are multilingual, the French version must be "markedly predominant". French must be used exclusively for commercial advertising displayed on billboards, on signage having an area of 16 square metres or more and visible from a public highway, and on public transportation and bus

shelters. Commercial advertisements on television, radio and in periodicals must also be offered solely in French unless the media in question is published in another language.

8.10 Other Québec Laws

Québec laws also impose other unique advertising and marketing requirements, including restrictions on advertising to children, registration, payment and reporting requirements for contests and sweepstakes, special rules for premium offers, particular rules for contracting with consumers, Québec-specific regulations governing false or misleading representations and product stewardship laws.

9. Protection of Intellectual and Industrial Property Rights

9.1 Patents

Patents confer on an inventor a time-limited right to prevent others from making, using or selling an invention as defined in a patent in Canada. Canadian patents issuing from applications filed since 1989 remain in effect and expire 20 years from the application filing date (subject to the timely payment of applicable fees) and cannot be renewed beyond this 20-year term. An exception exists for certain pharmaceutical patents by which the term of an eligible patent may be extended for a period of up to two years as detailed below.

Under Canadian law, patents can protect any art, process, machine, manufacture or composition of matter, or any improvement thereof, provided that these are new, useful and inventive (non-obvious). Patents must be registered pursuant to the process provided by the *Patent Act*.

Canada is a party to the *Paris Convention* which promotes international protection of patents, (as well as trade-marks and industrial designs) among member countries. Under the *Paris Convention*, a patent application filed in another Convention member country may receive priority consideration if a corresponding application is filed in Canada within one year.

In Canada, the first person to file a patent application has priority over later applicants. A patent application is not accessible for public inspection until 18 months after the application filing date. Where a *Paris Convention* priority claim is made, publication occurs 18 months after the priority filing date.

A foreign patent applicant does not need to assign a Canadian patent agent in order to prosecute a patent. However, the Patent Office strongly recommends retaining a Canadian patent agent, who may be best equipped to ensure the patent application corresponds to Canadian patent law. Additionally, recent amendments to the *Patent Act* have created, for the first time, the ability to protect communications between a patent agent (including non-lawyer agents) and inventors/patent applicants pursuant to agent-client privilege. This privilege is also available to foreign patent agents if they meet certain criteria.

The *Patent Act* requires that an exclusive licensee be registered at the Patent Office. While there is no statutory provision governing the failure to register, it is advisable to do so. A patent or patent application may be assigned in whole or in part; it is recommended that any such assignment be recorded in the Patent Office.

In the case of a straightforward patent application (provided a request for examination is promptly filed), and where no substantive objections are raised by the Patent Office, it will likely take between two and three years for such an application to issue (i.e., receiving a Notice of Allowance). In certain circumstances, it may be possible for an applicant to request an expedited examination process.

Recent amendments to the *Patent Act* created three key changes. First, in an effort to reduce the prosecution of a large number of patent claims, the Patent Office now charges excess fees for filing more than 20 patent claims. These fees are calculated and payable when examination is requested and calculated again when the final fee is paid (i.e., when the patent application is allowed). The calculation of excess claim fees is based on the greatest number of claims that are pending in the patent application at any time between the date examination is requested and the date the final fee is paid. Second, in an effort to streamline the patent prosecution process, the Patent Office may now grant a Conditional Notice of Allowance for patent applications that only require minor defects to be resolved before the patent is granted. Lastly, an applicant may file a request for continued examination and pay a prescribed fee after a Notice of Allowance or Conditional Notice of Allowance is granted in order to make additional amendments to a granted patent, which includes adding patent claims or correcting errors.

Infringement and invalidity proceedings are prosecuted in the Federal Court, where a number of judges have technical and intellectual property backgrounds. Unless exceptional circumstances exist, most proceedings within the Federal Court reach trial within two to three years due to the robust case management practices utilized by the Court.

9.2 Trade-marks

Due to the 2019 amendments to Canada's *Trademarks Act*, trademark registrations will no longer indicate whether a mark is based on use or proposed use. This means that trademarks can be applied for in Canada regardless of whether they have been used, and without a declaration of proposed use. Furthermore, the 2019 amendments expanded the *types* of marks that can be applied for, now including protection for colour marks alone, as well as, amongst other things, protection for scent, taste, and texture.

On June 17, 2019, Canada also joined the Madrid Protocol. Accordingly, Canadian applicants can now file applications globally with the International Bureau of the World Intellectual Property Association (WIPO), or for other participating countries to file applications designating Canada. These so-called "Madrid applications" are subject to the same examination processes as applications filed nationally in Canada, but offer cost savings for client's filing in multiple jurisdictions and could be examined faster than national applications.

Due to the amendments to Canada's Trademark legislation and issues as a result of the COVID-19 pandemic, there has been a significant backlog in examining trademark applications. To address this backlog, the Canadian Intellectual Property Office (CIPO) introduced an additional step to the trademark application process, which is not mandatory. Once an application has been filed, an automated system will review the goods and services specifications in the pending application and issue a pre-assessment letter to the applicant if the program identifies any issues in the specifications and does not identify any goods and/or services from CIPO pre-approved specification list. The applicant can then either decide to amend their application to address the issues identified by the AI program, or ignore the pre-assessment letter and wait for the application to be assigned to an Examiner. If the applicant addresses the issues, its application will be examined faster.

Once the AI program has reviewed the application and the pre-assessment letters have been sent to the applicants, the trademark is assigned to an Examiner. The Examiner reviews the application for compliance with various procedural and substantive requirements under the *Trademarks Act*, including reviewing the statement of goods and services again, considering the distinctiveness of the mark, and/or determining whether a mark is confusing with a senior mark. If the Examiner finds that the application as filed is not registrable, an "office action" will be issued inviting the applicant to make submissions to overcome any objections. Once the Examiner is satisfied that the application is compliant and the mark is registrable, the proposed mark will be advertised in the *Canada Gazette*. At this stage, interested third parties may oppose the mark if desired. Interested third parties are entitled to file a statement of opposition within two months from the date of advertisement (or within three months if an extension is granted). If no opposition is filed within the allotted time, or if an opposition is filed but is not successful, the application will proceed to registration.

A trademark registration is valid for a period of 10 years and renewals are available upon payment of a fee. Upon application by an adverse party, and any time after the registration has been registered for at least three years, a registration can be removed from the Register if it has not been used during the previous three years.

Assuming no significant difficulties in the examination process and no third party opposition, a mark may proceed to registration within 24 to 36 months from the date the application is filed. While this time frame is longer than for some other countries, CIPO is hopeful that the AI pre-assessment system will reduce the backlog.

It is prudent to have a detailed trademark availability search performed before filing a trademark application. Such a search provides an assessment of current and pending third-party trademark applications which may conflict with a proposed mark, as well as common law trademarks and trade names which create hurdles to registration. A properly conducted availability search can predict likely issues before they arise in examination or opposition, and can identify marks which are unlikely to register before making a significant investment in a trademark application or beginning to do business in connection with a mark. If a number of possible marks are being considered, an availability search can help determine the strongest mark from the available options.

Use of a trademark in Canada also gives rise to certain common law rights whether or not a mark is registered; however, registration is advisable to ensure maximum protection of a trade-mark under Canadian law.

Under Canadian law, both registered and unregistered trademark rights may be licensed or transferred to others. To show that a mark is in use by its owner, use of a mark by a licensee is deemed to be used by the trademark owner, provided that the licence allows the owner to exercise control over the character or quality of the product or service sold by the licensee in connection with the mark.

9.3 Dot-ca (.ca) Domain Names

The Canadian Internet Registration Authority (CIRA) administers the dot-ca domain name registry. Dot-ca domain names are generally only available for registration by Canadian individuals or entities (e.g., individuals, partnerships and corporations), which satisfy certain Canadian presence requirements. Non-Canadian owners of *registered* Canadian trade-marks may register domain names which are identical to those trade-marks. There are no restrictions on the number of dot-ca domain names a particular entity may own. Dot-ca domain names must be acquired through a certified CIRA Registrar. Registrations are paid on an annual basis, and can be pre-paid for up to 10 years.

The CIRA *Domain Name Dispute Resolution Policy* (CDRP) provides a binding arbitration process intended to enable quick and inexpensive resolution of disputes involving dot-ca domain name registrations. The CDRP is broadly similar to the *Uniform Domain Name Dispute Resolution Policy* (UDRP), which is in place for many other top-level domains, but be aware that subtle and significant differences do exist between the CDRP and the UDRP, both procedurally and substantively.

As part of their domain name registration agreement, registrants agree to submit to CDRP proceedings, which may be initiated where a complainant asserts that: (a) the registrant's dot-ca domain name is confusingly similar to a trade-mark in which the complainant had rights prior to the date of registration of the domain name and continues to have such rights; (b) the registrant has no legitimate interest in the domain name; and (c) the registrant has registered the domain name in bad faith.

CDRP disputes are administered by independent dispute resolution providers certified by CIRA. Dot-ca domain name disputes may also be resolved in the local courts. A list of certified Registrars and the rules and regulations regarding dot-ca domain names are available at www.cira.ca.

9.4 Industrial Designs

Industrial design registrations protect new and original patterns, shapes, configurations or ornamentation (or any combination of such features) applied to any article. Only the aesthetic aspect of a design is protectable as an industrial design. An industrial design cannot be obtained for features that are dictated solely by the function of a finished article.

An industrial design application must be filed within 12 months of the date on which the design was first made public in Canada. The exclusive right granted by a registered industrial design has been

increased from 10 years to 15 years (under the new Hague System, discussed below). Payment of a maintenance fee is required to maintain exclusive right to the design beyond five years after the registration date.

Under the *Paris Convention*, where an industrial design application is filed in another Convention member country, within six months of that foreign filing date, an application claiming the foreign priority date may be filed in Canada.

On November 5, 2018, Canada acceded to the Hague Agreement Concerning the International Registration of Industrial Designs (Hague System) and implemented changes to modernize Canada's industrial design regime. The Hague System allows applicants to file applications in up to 69 countries globally with WIPO, or for other participating countries to file applications designating Canada. The Hague System offers cost savings and has been implemented to increase the ease of doing business in Canada.

For a registered industrial design to enjoy maximum protection under the *Industrial Design Act*, it is advisable to ensure that the capital "D" in a circle, together with the name or the usual abbreviation of the name of the proprietor, appears on all (or substantially all) the articles to which the registration pertains, or on the article's labels or packaging. Marking the product in this manner will increase the likelihood of demonstrating that the infringer should have known the design was registered and increase the likelihood of entitlement to remedies such as damages or profits.

A straightforward industrial design application, assuming no objections from the Industrial Design Office, will likely be registered within 12 to 18 months from the application date. Some of the grounds considered by the Register prior to registration is whether the design is "novel". Applications are made available to the public at registration or 30 months from the earliest priority date, whichever comes first.

9.5 Copyright

In Canada, copyright exists in original musical, dramatic, artistic and literary works, including computer programs, and in records and other means by which sounds are mechanically reproduced. In most cases, copyright subsists for the life of the author, plus 70 years. Copyright arises automatically upon creation of a work and does not depend upon registration pursuant to the *Copyright Act*. However, registration gives rise to a presumption in favour of the registered owner that facilitates litigation.

Copyright may be held in every original musical, dramatic, artistic and literary works where the author is a citizen or resident of Canada or another treaty country, which includes countries that are party to the Berne Convention or the Universal Copyright Convention or that are members of the World Trade Organization.

As there is no substantive examination process in place in Canada, copyright applications generally proceed very quickly to registration - often within weeks of filing. Unlike many other countries, the Canadian authority does not require a copy of the work to be filed with a copyright application. A certificate of ownership is issued upon registration, which is regarded as *prima facie* evidence that the person registered is the owner of the copyright. Any portion of a copyrighted work can be assigned, and any interest in the copyright can be granted by licence. No copyright assignment or exclusive licence is valid, however, unless it is in writing. A copyright assignment or licence does not have to be registered with the Canadian authority.

In Canada, authors also enjoy certain "moral rights" in their works, which can be waived, but cannot be assigned. Moral rights include the right to be associated with a work by name or by pseudonym, the right to remain anonymous and the right to the integrity of the work (which may include the right to

restrain mutilation or distortion of the work or uses which would harm the honour or reputation of the author).

There are no formal copyright notice requirements in Canada. However, where possible it is advisable for copies to bear a proper copyright notice including the copyright symbol (©), name of the owner and the year of first publication. The notice should be marked in such a manner and location as to give reasonable notice that copyright is claimed in the work, such that it would be difficult for a potential infringer to argue that they were unaware of the copyright claim.

9.6 Integrated Circuit Topography Act

The *Integrated Circuit Topography Act* (ICTA) protects the topography (i.e., the design) of integrated circuit products. Registration under the ICTA grants the registrant the exclusive right to reproduce, import or commercially exploit (i.e., sell, lease, offer, or exhibit for sale or lease) all or any substantial part of the topography of the integrated circuit product, and to manufacture, import or commercially exploit an integrated circuit product incorporating all or any substantial part of such topography. This protection lasts for up to 10 years from the filing date of the application for registration. The term of protection ends on the tenth calendar year either from the date of filing or the date of first commercial exploitation, whichever is the earlier. No renewal is possible. A topography may be registered only if it is original, if an application is before or within two years after the topography is first commercially exploited and if the topography's creator is a Canadian national or is an individual or legal entity that produces topographies or integrated circuit products in Canada. Under the ICTA, reciprocal protection exists for foreign nationals of countries that directly or through membership in an intergovernmental organization afford protections for topographies pursuant to a convention or treaty that Canada is also party to, foreign nationals whose countries afford Canadian nationals substantially equal topography protection, or a national of a member of the World Trade Organization.

9.7 Trade Secrets/Confidential Information

Trade secret protection is available for any business information that derives commercial value from its secrecy. Trade secrets need not (and indeed, cannot) be registered. To the extent that information is always treated as confidential, and never becomes publicly known, trade secret protection arises automatically and can last indefinitely. However, trade secrets must always be treated as confidential in order to be protected. Once a trade secret becomes publicly known, its owner can no longer restrain its unauthorized use by third parties. Trade secret protection may not be reliable if the "secret" is susceptible to discovery by reverse engineering or by analysis of existing public domain information.

Businesses wishing to rely on trade secret protection are strongly advised to engage intellectual property counsel to conduct a thorough analysis to determine whether trade secret protection will be appropriate and reliable in their particular circumstances and to develop appropriate nondisclosure and confidentiality agreements and best practices. Furthermore, certain jurisdictions have enacted legislation to restrict non-compete clauses in employment agreements. Therefore, non-compete agreements generally should not be solely relied on to protect trade secrets.

In Canada, trade secret owners can sue at common law for trade secret misappropriation (e.g., by way of breach of confidence, breach of contract, breach of fiduciary duty and interference with contractual relations). Trade secret theft is also addressed under Canada's criminal laws: The misappropriation of trade secrets is criminalized under the *Criminal Code*, with a punishment of imprisonment for up to 14 years. The *Security of Information Act* (titled "Economic Espionage") also makes it is a crime to communicate a trade secret to another person, group or organization, or to obtain, retain, alter or destroy a trade secret when these acts are undertaken in association with, for the benefit of or sponsored by, foreign economic entities.

10. Banking and Payments in Canada

10.1 Banking

(a) Introduction

In Canada, the business of banking is governed under the *Bank Act* (BA) and banks are federally regulated by the Office of the Superintendent of Financial Institutions (OSFI) and the Financial Consumer Agency of Canada (FCAC). The federal government has sole jurisdiction over banks. Generally, OSFI is responsible for prudential regulation and establishing guidelines for capital, reporting and business practices, and the FCAC is responsible for consumer protection.

The provinces, on the other hand, are significantly involved in the regulation of financial sectors, including credit unions, loan and trust companies, mortgage brokers, insurance companies and insurance brokers/agents, securities dealers and advisers, and other market intermediaries, as well as other financial services providers such as consumer finance companies. Such regulatory power and authority is either exercised alone or in conjunction with federal regulatory authorities.

Federally regulated deposit taking institutions must be members of the Canada Deposit Insurance Corporation (CDIC). CDIC is a statutory corporation that provides deposit insurance for certain types of small deposits made to member institutions (up to C$100,000).

Provincial legislation generally does not apply to the banking activities of banks; however, certain provincial provisions can apply to banking activities.

(b) Licensing and Regulatory Restrictions

(i) Activities that require approvals or licensing

While the business of banking is not defined under the BA, authorized banks are permitted to offer financial services in Canada. These include services for the management of money, the provision of credit, banking and investment, or any combination of these activities.

Generally, if a foreign bank wishes to offer a financial service in Canada or acquire a licensed Canadian Bank, unless an exception applies, it will be required to obtain the prior approval of the Minister of Finance or OSFI. However, it is possible for a foreign entity to participate in the financing of a Canadian business or project without the need to obtain a banking licence or prior approval of the Minister of Finance or OSFI. Such financing activity is known as “suitcase banking”. This essentially means that the foreign entity must provide such financial services from outside of Canada and in providing the services it must avoid doing anything that would constitute “carrying on business” in Canada. The application of “suitcase banking” rules is fact specific and it requires a detailed examination of the proposed activity.

Banks formed in Canada must be incorporated or be continued under the BA. OSFI administers the application process for certificates of incorporation and makes recommendations to the Minister of Finance, who makes the ultimate determination. Once approved, a new bank will be listed under Schedule I of the BA and will be referred to as a Schedule I bank.

Schedule III banks are foreign banks that are authorized to operate branches in Canada. The activities of a branch can be restricted to lending or may be “full-service”, which includes the offer of retail deposit accounts.

(ii) Restrictions on activities

Federal legislation restricts the types of activities in which financial services providers may engage. For example, banks are only permitted to carry on the “business of banking”, and may not “deal in

goods, wares, or merchandise or engage in any trade or other business", subject to certain exceptions. Federally regulated financial institutions are also restricted from making certain types of investments.

(iii) Prudential regulation

OSFI has an interest in ensuring the sound financial management of banks and other financial institutions. This is achieved by publishing guidelines and advisories, which fall into four general categories: (i) capital adequacy requirements; (ii) limits and restrictions on lending; (iii) accounting and disclosure; and (iv) sound business and financial practices.

Legislation also requires banks to adopt their own policies that are best suited to their business and operations. Banks are required to maintain adequate capital, and adequate and appropriate forms of liquidity pursuant to the BA. This is measured by compliance with OSFI's Capital Adequacy Requirements Guideline.

(iv) Anti-money laundering and terrorist financing

Banks are considered "reporting entities" under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA) and are therefore subject to record keeping, customer identification and transaction reporting requirements. See Chapter 25 - *Money Laundering and Terrorist Financing*.

(c) Risk of Insolvency

Insolvencies of banks and trust companies are generally governed by the *Winding Up and Restructuring Act* (Canada) which has procedures similar to the BIA, as well as provisions specific to customer deposits, the business of authorized foreign banks and restructuring of Canadian insurance companies. The BA sets out the hierarchy of payment priorities in the event of the insolvency of a bank.

The *Canada Deposit Insurance Corporation Act* gives the CDIC the power to, among other things, assume control of a failing bank on a temporary basis and to provide financial support in order to assist in a sale to a viable buyer.

10.2 Payments and Money Transmission

(a) Introduction

Payments Canada operates Canada's payment clearing and settlement systems. Membership in Payments Canada is mandatory for Canadian banks as well as for certain trust and loan companies that accept deposits.

The national payments system is Lynx, a high value payment system, which facilitates the irrevocable transfer of wire payments between participating financial institutions in Canadian dollars and a retail system, the Automated Clearing Settlement System or "ACSS", which currently operates on a batch basis. Payments Canada is also launching a real time retail payment system, the Real-Time Rail (RTR), which will allow Canadians to initiate and receive payments within seconds, anytime of the day or night, 365 days per year. RTR payments will be irrevocable. It will be operated by Payments Canada and overseen by the Bank of Canada. All participants will meet strict requirements from the Bank of Canada and Payments Canada to ensure the system meets the risk-management standards for designated financial market infrastructures.

(b) AML and Money-Services Businesses

Requirements under the PCMLTFA apply to money services businesses (MSBs), which are reporting entities under such legislation. MSBs include businesses in Canada that offer any of the following:

- foreign exchange dealing: transactions involving the exchange of one type of currency to another (e.g., exchanging C$ to US$), but excluding purchases of goods or services made with foreign currency;
- issuing or redeeming money orders or similar negotiable instruments;
- money transferring: transferring funds from one person or entity to another using an electronic funds transfer network or any other method, which could in principle capture digital wallet platforms and online payment systems such as Google Pay; and
- virtual currency dealing: transferring virtual currency at the request of a customer, or receiving a transfer of virtual currency for remittance to a beneficiary, which could potentially capture digital wallet platforms that carry virtual currency payment cards and virtual currency payment systems.

Amendments to the PCMLTFA extended these regulatory requirements to foreign money services businesses (FMSBs), which include businesses that offer any of those activities to customers in Canada.

MSBs and FMSBs are required to separately register with FINTRAC as a condition to doing business in Canada.

(c) Additional Oversight for Retail Payments

The federal *Retail Payment Activities Act* (RPAA) creates a regulatory regime for retail payment activities by payment service providers (PSP) in Canada. A PSP is defined to include payment processors, digital wallet providers, currency transfer services, and other payment technology service providers and platforms.

Once the regulations under the RPAA are adopted and in force, new rules will apply to any retail payment activity that is performed by a PSP with a place of business in Canada, as well as any retail payment activity performed for an end user (such as a consumer) in Canada by a PSP that does not have a place of business in Canada but directs retail payment activities to individuals and entities in Canada.

11. Debt Financing and Taking Security in Personal Property

11.1 Debt Financing

Canada benefits from a strong, efficient and stable banking industry. External financing for both private and public corporations is available through Canadian chartered banks, Canadian subsidiaries or branches of foreign banks, certain government agencies (such as the Business Development Bank of Canada and Export Development Canada) and other financial institutions, such as trusts and loan companies, credit unions and caisses populaires.

Third-party lenders offer two principal forms of debt financing: operating financing and term financing. Operating financing is typically a revolving loan provided to supplement a corporation's working capital requirements on a short-term to medium-term basis. Term financing is generally provided on a medium-term to long-term basis for larger capital investments. Both operating and term loans generally bear interest at a fluctuating rate and may require the borrower to grant some form of security over its assets. In some instances the shareholders of the borrower may be asked to guarantee the obligations of the borrower.

11.2 Taking Security in Personal Property

Each Canadian province and territory has enacted personal property security legislation governing the taking of security in personal property. Other than Québec's legislation, the relevant statutes within each province are referred to as the *Personal Property Security Act* (PPSA). Such statutes are similar to and are generally based upon Article 9 of the *Uniform Commercial Code* in the U.S. Québec, being the only civil law jurisdiction in Canada, has included personal property security legislation in the *Civil Code of Québec*. Each of the provincial personal property security statutes and the *Civil Code of Québec* provides a comprehensive set of rules governing the rights of creditors and debtors when personal property is used as collateral to secure payment of a debt or performance of an obligation. The legislation also provides for provincial computer-based registry systems for the perfection by registration of security interests in personal property such as equipment, inventory, accounts receivable and intangibles.

The types of transactions to which these personal property security statutes normally apply include loans, chattel mortgages, conditional sales, assignments of book debts or accounts receivable, equipment leases, consignments by way of security and assignments of rents.

To ensure priority over other creditors and over a trustee-in-bankruptcy, a creditor must follow the required steps to perfect the security interest as set out in the personal property security legislation applicable in the relevant province, including, in most cases, the filing of a registration form. It is also possible to perfect a security interest in certain types of property by registration, possession, or "control". Priority among secured creditors is generally determined by the time of filing of the registration statement; however, there are several exceptions to this, for example, a supplier of goods (and, except in Québec, a lender of funds to acquire specific goods) may be entitled to special priority treatment with respect to the goods financed. Shares of a corporation or other "investment property" that is pledged as security may also be subject to special priority rules under the applicable provincial personal property security statutes.

In Québec, an instrument called a "hypothec" is used to charge movable (personal) property. A universal hypothec can be used to charge all of the debtor's personal property or a specific hypothec may be used to charge specific personal property of the debtor. Recent changes to Québec's French language laws require that the charging language in any hypothec be drawn up exclusively in French or be accompanied by a certified French translation.

Each of the relevant provincial statutes contain conflict of laws provisions which will indicate which jurisdictions' laws should apply to any given situation. To properly perfect the security interest,

registrations may likely need to be made in each province in which tangible collateral is located. Applications for registration of personal property in Québec's provincial registry must also be drawn up exclusively in French.

Canadian chartered banks may also take security over certain assets of their customers (e.g., the inventory of a manufacturer) pursuant to the Bank Act (Canada). Such security can be advantageous because, unlike security taken under the provincial personal property security statutes, security taken under the *Bank Act* (Canada) is effective across Canada.

If collateral includes rights in intellectual property, aircraft, ships, railway rolling stock and certain other classes of collateral, separate Canadian federal statutes may apply and govern the perfection, preservation and enforcement of such rights.

12. Bankruptcy and Insolvency

12.1 Introduction

In Canada, the bankruptcy of an individual, partnership, estate or corporation is dealt with exclusively under the *Bankruptcy and Insolvency Act* (BIA). In a bankruptcy, a trustee in bankruptcy is appointed over all the assets of the bankrupt debtor. The assets are sold and the proceeds are distributed to creditors of the debtor. The *Winding Up and Restructuring Act* (WURA) governs the liquidation and restructuring of financial institutions.

Canadian law also provides several mechanisms that allow an insolvent debtor the chance to restructure through a compromise with creditors. For individuals, the reorganization or compromising of debts may only be accomplished under the BIA. An insolvent entity may restructure under either the BIA or it may use the *Companies' Creditors Arrangement Act* (CCAA) if it meets certain monetary thresholds. Under both the BIA and CCAA, both the debtor and all "interested persons" have an express statutory duty to act in good faith.

Bankruptcy and insolvency laws are under federal jurisdiction. The BIA, the CCAA and the WURA apply with equal force across the country. These statutes are administered through the courts of the respective provinces and territories. The provinces and territories have jurisdiction over property and civil rights, which includes contract law and creditor rights.

12.2 Types of Creditors

(a) Priority Creditors

The major priority claims include governmental claims for taxes withheld from employees' wages, wage arrears, pension contribution arrears and environmental liabilities. The federal *Wage Earner Protection Program Act* provides a fund to pay wages of employees of a bankrupt employer, up to four times the worker's maximum employment insurable earnings (C$8,278.83 for 2023) less 6.82% as prescribed by applicable regulations. There is then a corresponding priority charge on the bankrupt's "current assets" to partially secure the payments made to former employees.

(b) Secured Creditors

A secured creditor is a party that holds a mortgage, pledge, charge, lien or privilege over the property of the debtor as security for a debt. The property constituting the secured collateral may be personal (tangible or intangible) or real property. The taking and enforcement of security is governed primarily by provincial statutes and usually requires registrations in public registration systems.

Under the provisions of the BIA, the distribution of proceeds of the sale of the assets in a bankruptcy is subject to the rights of secured creditors. In other words, secured creditors in a bankruptcy or receivership enjoy a priority over everyone else, subject to certain exceptions. The first exception is that rights of secured creditors are subject to the claims of priority creditors.

Depending on the type of security agreement and its wording, secured creditors may enforce their security in a variety of ways, including the repossession or disposition of secured property. Security agreements frequently provide for the appointment of a private receiver upon default under the agreement. Alternatively, a court may be asked to appoint a receiver over the property in question. In either case, the receiver has the duty and obligation to collect and realize on the property that is the subject of the appointment. The law imposes duties of honesty and good faith on all receivers and requires the secured creditor and receiver to act in a commercially reasonable manner. A court-appointed receiver also has a fiduciary duty to all stakeholders, not just to the secured creditor that sought the appointment.

Following default under a security agreement, the BIA requires that the secured creditor provide an insolvent debtor with at least 10 days' notice if it intends to enforce security against all or substantially all of the debtor's property. This requirement may be waived by the debtor but only after the notice is served and not before.

(c) Preferred Creditors

The BIA provides for certain "preferred creditors" whose unsecured claims (or a portion thereof) are granted priority over other unsecured creditors of the bankrupt. For example, municipal taxes and certain landlord arrears are preferred claims that are to be paid in full before unsecured creditors. Each class of preferred creditor will be paid to the amount of their entitlement before preferred creditors in the next class receive payment.

(d) Unsecured Creditors

Unsecured claims are the claims of those creditors that do not enjoy any security or special priority; e.g., trade suppliers, utility arrears and judgment creditors.

Unpaid suppliers of goods have certain rights to repossess goods delivered any time in the 30 days prior to bankruptcy or receivership, but the claim to repossess must be made within 15 days after the bankruptcy or receivership. The goods must also be in the possession of the trustee or receiver, be identifiable, be in the same condition as they were on delivery and not have been resold at arm's length. These latter conditions can make it more difficult for an unpaid supplier to benefit from this right.

12.3 Bankruptcy/Liquidation

(a) Procedure

Under the *BIA*, a bankruptcy may be initiated voluntarily by an insolvent debtor or involuntarily through a court proceeding by a creditor or creditors whose claim(s) is or exceeds C$1,000. A bankruptcy application sets out the debt owed by the debtor, the name of the proposed trustee in bankruptcy and a description of the act of bankruptcy that the creditor believes has been committed. The bankruptcy application must be verified by an affidavit of the creditor. The bankruptcy application requires at least 10 days' notice before it can be heard (though that can be reduced by the court) and must be personally served. The court must find that one of a list of acts of bankruptcy has occurred before a bankruptcy order is made against the debtor. The typical act of bankruptcy alleged is "generally failing to pay debts when they are due" but it can also include the giving of preferences to other creditors and fraud. The debtor may dispute the bankruptcy application in which case the court will set a date for an expedited trial of the issues and then decide whether an act of bankruptcy has been committed.

Upon the bankruptcy order being made, a trustee in bankruptcy, subject to certain exceptions, takes control over all property of the debtor. The trustee is a private-sector individual (most often an accountant) licensed by the Superintendent of Bankruptcy, a senior administrative official of the federal government that carries out regulatory, administrative, and supervisory duties at arm's length from the Government of Canada. The trustee is responsible for collecting all of the assets and liquidating them in order to distribute to creditors in accordance with their prescribed priorities and *pro rata* within each class of creditors.

The exceptions to the general rule are significant. First, subject to any priority claims and the obligation to prove its secured claim if requested by the trustee, secured creditors are entitled to deal with the collateral of the debtor over which they hold security. Second, property of the debtor does not include property held in trust for others. Third, property that is exempt from seizure in the province in which the property is located and within which the debtor resides does not become the trustee's property.

(b) Stay of Proceedings

Once a bankruptcy order has been made, the BIA imposes an automatic stay of proceedings against all creditors except secured creditors exercising their rights to enforce against their security. In limited circumstances, the court may lift the stay and allow civil actions against the bankrupt debtor to proceed. This chiefly occurs where there are allegations against the debtor of obtaining property by fraud, embezzlement, collusion or breach of trust while acting in a fiduciary capacity because those types of claims are not discharged by the bankruptcy process.

(c) Priority of Claims

The proceeds from the realization of the debtor's property are applied in a priority scheme set out in the BIA. As noted above, these include the priority claims, secured creditors, preferred creditors, the unsecured creditors and finally, the shareholders.

Most significantly, the trustee is obliged to pay a levy to the government. This is a percentage of the amount collected and available as a dividend to all classes of creditors. It is payable immediately after trustees' fees are paid and before any other creditor is paid.

12.4 Reorganization or Liquidation

(a) Reorganization

Under the BIA and the CCAA, commercial reorganizations focus on the preservation of the business enterprise as a whole. Both statutes recognize that going concern values may be greater than liquidation values and that a reorganization may also preserve jobs. Under a BIA proposal and under the CCAA, secured creditors will (subject to further court order) be stayed while the restructuring plan or proposal is being formulated.

Under the BIA, there are only a few restrictions on the ability of a debtor to continue business operations during the reorganization period. Under the CCAA, relief granted by the court may prescribe any number of provisions for the ongoing restructuring of the business during the reorganization process, depending on the nature of the business and its special circumstances and needs.

(b) Liquidation

Both the BIA and CCAA can be used to liquidate the assets of a business in what are called liquidating proposals or a liquidating CCAA. In a liquidating proceeding under these statutes, the aim is to maximize returns for creditors rather than to restructure the debtor as a going concern. Typically, the debtor will conduct a court-supervised sales process for all or portions of its business by way of a vesting order that transfers legal title in lieu of traditional legal conveyancing. Canadian courts will also approve a reverse vesting order which is a transfer of the shares in the debtor with all of the liabilities and creditor claims being transferred to a new company.

(c) Under the *BIA*

To reorganize under the BIA, the debtor must make a formal proposal to the creditors or give notice that it intends to do so. Once a proposal has been made, or notice given, a stay of proceedings is imposed on all creditors, including secured creditors. Under the stay, no agreement may be terminated or amended, no claims for accelerated payment may be made and no enforcement steps may be taken. Contracts continue in the usual manner. One exception to this is that lenders are not required to advance further funds nor are trade creditors required to provide further credit.

Once notice of intention to make a proposal has been given, the debtor has 30 days to develop a proposal. The stay is in effect during this period. At the court's discretion, the automatic stay may be

extended, on notice to creditors, for up to a maximum of six months in increments of up to 45 days at a time.

The stay of proceedings may be lifted and the time to file a proposal may be terminated if:

- the debtor is not acting in good faith and with due diligence;
- the debtor is not likely to make a viable proposal or one acceptable to the creditors within the period of time to do so; or
- if the creditors generally would be materially prejudiced by the continuation of the stay of proceedings.

If no proposal is filed, or the time to file expires or is terminated, there is an automatic assignment into bankruptcy.

If a proposal is filed, arrangements are made by a trustee to have the creditors consider and vote on the proposal. This normally occurs within 21 days from when the proposal is filed. To succeed, proposals require a double majority (two-thirds of the creditors voting in terms of value and a majority of creditors in number).

Creditors may be divided into classes based on a "commonality of interests" test that is often determined by the nature of the debt, the existence of any security and the remedies available. Usually the debtor will propose the classes. Unsecured creditors normally vote as a single class. Once creditors have accepted a proposal, the court must approve it and then the proposal is binding on the debtor and on all classes of creditors.

(d) Under the CCAA

CCAA proceedings are commenced by an initial court application by the debtor, but are not automatically granted. The court has broad discretion to grant protection under the CCAA. The "initial" order by the court will give the company a 10 day stay of proceedings that is limited to relief that is reasonably necessary for the continued operations of the debtor in the ordinary course of business for no longer than the initial 10-day stay period. The court typically extends the stay of proceedings upon a further comeback hearing brought by the debtor, often resulting in a stay period spanning many months. There is no time limit on how long the stay of proceedings can be extended, so long as the extension is not prejudicial to the creditors as a whole. During the stay of proceedings, the debtor normally continues operations while it attempts to restructure.

A key provision of the CCAA process is the appointment by the court of an independent "Monitor" to supervise the restructuring. The Monitor is almost always an accounting firm and acts as an officer of the court reporting to the court and creditors on the status of the CCAA proceeding.

The CCAA authorizes the court to: (i) approve secured debtor-in-possession (DIP) financing and grant a priority charge for the DIP lender; (ii) grant priority charges for professional fees related to the restructuring; and (iii) to indemnify directors and officers against post-filing liabilities.

The CCAA provides rules for disclaiming and assigning executory (unperformed) contracts in certain circumstances. Unlike in the United States Chapter 11 regime, a company cannot disclaim collective agreements under the CCAA.

The compromise that the debtor puts to its creditors is called the Plan of Compromise or Arrangement. There are no restrictions on what a Plan of Compromise or Arrangement may include. Typically, there is an offer to pay a certain amount to creditors, either as a lump sum or over time. The plan requires the approval of a majority of creditors in the class and two-thirds of the creditors in value within that class. Creditor classes are not defined in the CCAA. These classes are usually created by

the debtor and are often set out in the proposed reorganization plan. A "commonality of interest" test is frequently used. The particular classes in which creditors are placed can be a major source of litigation and cost. The debtor, for example, will not be anxious to have one creditor in a separate class on its own if that creditor is likely to vote against any plan. The creditor, however, may feel that its interests are so unique that it should be in a class of its own and can dispute the classes proposed by the debtor.

Once the Plan of Compromise or Arrangement has been voted on and accepted by the creditors, the court holds a "sanction" hearing at which the plan is considered for approval. If there is sizable creditor support, court approval is usually granted.

If a class of creditors or shareholders does not approve the Plan of Compromise or Arrangement or if the court does not approve, then the debtor does not automatically go into bankruptcy. It is possible for the debtor to submit a new or amended Plan of Compromise or Arrangement. However, in the event of non-approval, it is common that the senior secured creditor or unsecured creditors will immediately seek to lift the stay of proceedings to exercise their available remedies against the debtor. This typically results in the debtor being placed into bankruptcy.

(e) Under the WURA

WURA deals with the winding up or restructuring of financial institutions. As Canada's banking system is very stable, there have been very few cases commenced under this statute.

At the point the winding up order is made, the company must cease to carry on business, a stay of proceedings is imposed and an official called the "liquidator" is appointed. The liquidator is simply the custodian of the assets. The assets are not vested in the liquidator (i.e., do not belong to the liquidator for the benefit of the creditors) as would be the case with a trustee in bankruptcy. The liquidator sells the assets of the debtor and then distributes the proceeds to creditors. The WURA is silent and therefore flexible on how this is accomplished.

12.5 Receiverships

Secured creditors have the right to seek the appointment of a receiver to deal with the collateral given as security for debts owing by a borrower or debtor. The appointment may be made privately, by way of security agreement or by way of court order. Judgment creditors may also seek the appointment of a receiver from the court.

In a private appointment, the powers of the receiver are as set out in the security agreement. If court ordered, the court order that appoints the receiver also sets out the powers and duties of the receiver. Generally, a receiver will have the power to seize and sell assets and distribute proceeds. A court appointed receiver will have the additional benefit of a court ordered stay of the actions of other creditors and may also have investigatory powers.

12.6 International Insolvency

The BIA and CCAA have incorporated a modified version of the (United Nations Commission on International Trade Law) UNCITRAL *Model Law on Cross-Border Insolvency*. These provisions provide a complete code for the recognition of foreign insolvency proceedings in Canada.

(a) Enforcement of Foreign Orders

Generally, a foreign stay of proceedings against creditors does not automatically apply in Canada and an application to a Canadian court for recognition of a foreign proceeding must be brought. In making a recognition order, the court will determine whether the foreign proceeding is a foreign "main" proceeding or a foreign "non-main" proceeding. A foreign "main" proceeding means that the debtor has its centre of main interests in that jurisdiction. In the absence of evidence to the contrary, a

debtor's registered office address is deemed to be the debtor's centre of main interests. Recognition of a foreign main proceeding gives rise to a mandatory stay of proceedings unless the debtor is already subject to proceedings under the BIA or CCAA. If the court finds that the foreign proceeding is a "non-main" proceeding, then it is within the discretion of the court what subsequent relief is granted.

Once a foreign proceeding is recognized by the court, various obligations are imposed on the "Foreign Representative" including the obligation to inform the court of any substantial change in the foreign proceeding or its authority thereunder, informing the court of any additional foreign proceedings in respect of the debtor and publishing notice of the recognition of the foreign proceeding. The Foreign Representative may initiate proceedings under the BIA or CCAA, as the case may be.

In matters of corporate reorganization, Canadian judges and practitioners have shown considerable willingness to cooperate and assist their counterparts in other jurisdictions. In a number of cases, parallel proceedings in Canada and elsewhere have been dealt with by negotiating "cross border insolvency protocols" based on the International Bar Association's model *Cross-Border Insolvency Concordat*. These protocols are aimed at coordinating and harmonizing the equitable disposition of assets in multiple jurisdictions and the conduct of proceedings in the relevant countries in the best interests of all the creditors.

(b) Non-Canadian Creditors

Foreign creditors to a Canadian insolvency are treated no differently from Canadian creditors of the same class, as long as their claims are valid and not contrary to public policy. A creditor need not reside or carry on business in Canada for its claim to be valid. A creditor need not be resident in Canada to commence insolvency proceedings against a debtor in Canada.

12.7 Discharge

Corporations may not be discharged from bankruptcy until all of their debts have been satisfied (either by way of repayment of all debts or by way of an accepted proposal to creditors). Individuals are granted discharges either absolutely or on a conditional basis. Conditional discharges typically require a certain amount of money to be repaid by the debtor at regular intervals over a specified period of time. There are eight enumerated classes of debts that are not released from bankruptcy including debts arising from fraud, sexual assault and criminal fines. Otherwise, discharge has the effect of releasing debts and giving the debtor a fresh start.

13. Labour and Employment

13.1 Introduction

An employer in Canada will be governed by either federal employment/labour laws or provincial/territorial employment/labour laws, depending on the nature of its business. Employment/labour laws will typically include such things as employment/labour standards, labour relations, human rights, pay equity, occupational health and safety, and workers' compensation/workplace safety and insurance legislation. References in this chapter to "province", "provincial" or "provincially" include "territory", "territorial" or "territorially" as the context requires.

Federally regulated employers include those involved in the following federal undertakings: aeronautics, airlines, atomic energy, banks, inter-provincial bus, railways, shipping and navigation, telecommunications, transportation operations and trucking. In addition to these specific areas, if the employer's business is vital, essential or integral to a core federal undertaking, the employer may be federally regulated for employment/labour law purposes.

All other employers are provincially regulated for employment/labour law purposes. In fact, more than 90% of employment relationships in Canada are provincially regulated. Typically, the legal regulation of a company's employment relationships will therefore depend on the province in which each employee works. Employment relationships in Canada's common law provinces (all provinces but Québec) are governed by the principles of common law (primarily contract law) and statute. In the province of Québec, employment relationships are governed by Québec's civil law and statute.

13.2 Employment/Labour Standards Legislation

Each jurisdiction in Canada, including the federal jurisdiction, has enacted legislation prescribing certain minimum employment/labour standards within that jurisdiction. Employment/labour standards are continuously evolving as a result of legislative amendments or reforms undertaken by governments from time to time. Employment/labour standards operate in conjunction with, but not as a replacement for, the common law or the civil law in Québec. An employer may provide its employees with greater rights than those contained in the jurisdiction's employment/labour standards legislation, but it may not offer less than the minimums prescribed by the statute.

Employment/labour standards legislation prescribes minimum requirements for, among other things, the payment of wages, work hours, paid vacation, public holidays, overtime pay and leave entitlements. These statutes also provide for an internal mechanism for the enforcement of the prescribed standards. Non-unionized employees who feel that they have been denied any of the prescribed employment/labour standards may pursue these standards at little or no cost to themselves through administrative processes established by the applicable provincial or federal ministry of labour.

A jurisdiction's employment/labour standards legislation will typically exempt certain categories of employees from specific provisions such as hours of work, minimum wages, overtime pay, public holidays and vacation pay. For example, managerial employees will be exempt from the overtime provisions in most provinces. These exemptions differ, sometimes significantly, across Canada's various jurisdictions.

Employment/labour standards legislation also includes requirements for notice of termination, or pay in lieu of notice. These are minimum requirements only, and, as noted below, the courts have a broad discretion to award damages for wrongful dismissal which will exceed the statutory minimum standards. Generally, statutory notice of termination is calculated on an individual basis using a sliding scale based upon the affected employee's length of service. However, in the case of mass terminations, every province except Prince Edward Island prescribes longer periods of notice based on the number of employees terminated, regardless of the individual's length of service. In the

majority of cases, an employer can satisfy its obligation to provide statutory notice of termination by providing pay in lieu of such notice.

In certain jurisdictions, employment benefits provided by the employer must be maintained during the applicable statutory notice period, even if pay in lieu of notice is provided.

Ontario and the federal jurisdiction also provide for the payment of statutory severance pay to employees in addition to statutory notice in certain circumstances. In Ontario, severance pay is payable only in the following circumstances:

(i) when 50 or more employees have their employment severed within a six-month period as a result of the permanent discontinuance of all or part of the employer's business at an establishment; or

(ii) when one or more employees have their employment severed by an employer with a "payroll" of C$2.5 million or more. Ontario courts have recently decided that this threshold relates to an employer's global payroll.

In either situation, an employee with five or more years of service is entitled to severance pay calculated as one week of regular wages for a regular work week multiplied by each year of service, prorated for partial years. Severance pay is capped at a 26-week maximum. Employers cannot satisfy their severance pay obligations by providing working notice.

Statutory notice or pay in lieu of notice (and severance pay, where applicable) is not required for certain employees described in provincial legislation. For example, in many provinces, employees are not entitled to receive notice, pay in lieu of notice or severance pay where their employment has been terminated for "just cause" or, in Ontario, for wilful misconduct or neglect of duty which has not been condoned by the employer. However, it is typically difficult for an employer to successfully establish that the employee's conduct was such as to preclude them from the statutory minimums on termination.

In most jurisdictions, human rights, employment/labour standards and various other statutory tribunals have the authority to reinstate an employee if they find that the rationale behind the employee's termination was illegal. For example, if an employer is found to have dismissed an employee as a result of the employee taking a statutory leave of absence, it is likely that the employee will be reinstated with back pay.

Finally, the employment/labour standards legislation in three jurisdictions (federal, Nova Scotia and Québec) provides for reinstatement where the employer cannot establish that it had good/just cause to terminate an employee's employment, where the employee has reached a certain length of service. This is different from most other jurisdictions where employers are entitled to terminate employment so long as: (i) the reason for termination is not otherwise illegal; and (ii) the appropriate termination entitlements are provided. For example, employees in Québec with two or more years of service will be entitled to reinstatement if their employer has dismissed them without "good and sufficient cause".

13.3 Common / Civil Law Termination Entitlements

In Canada, including Québec, an employee who is dismissed *without cause* is, by default, entitled to "reasonable notice", or pay in lieu of such notice, inclusive of the minimum statutory entitlements discussed above. Courts have used a variety of factors to determine the appropriate reasonable notice period. An employee's position, length of service, salary and age are the main factors which a court will take into account when determining the length of reasonable notice. It is also relevant whether or not an employee was induced to leave prior secure employment.

Reasonable notice is generally in the range of three to six weeks per year of service and can be as high as 27 to 30 months. Additionally, if a court finds that an employee suffered actual damages as a

result of an employer's egregious conduct in the course of the termination, or that the employer committed an independent actionable wrong, the amount of damages may be increased. If successful, the affected employee will also be able to recover an amount in respect of their legal costs and any other reasonable costs incurred in the search for alternative employment.

Employees who successfully bring a wrongful dismissal claim will be entitled to recover any and all compensation and benefits that they would otherwise have been entitled to during the reasonable notice period. This would include all of the employee's cash compensation, such as wages, commissions, bonuses and pension contributions, as well as the value of other entitlements that the employee enjoyed as a result of the employment relationship and which the employee would have received had they been provided with reasonable notice. In addition, a dismissed employee is entitled to continuation of all employee benefits throughout the reasonable notice period.

Outside of Québec, where an employment contract specifically sets out the required period of notice, the courts will usually accept the contractual notice provision provided it clearly displaces the employee's entitlement to notice at common law, is unequivocal, reasonable and, at a minimum, equal to the notice of termination required by the applicable employment standards legislation. Courts regularly scrutinize contractual termination provisions and, in recent years, there have been an increasing number of decisions invalidating such provisions for a wide range of reasons. In this environment, it is particularly important for employers to regularly review their employment agreements to determine if any amendments are necessary.

In the province of Québec, additional considerations on termination of employment apply as a result of certain obligations imposed by the *Civil Code of Québec*.

13.4 Labour Relations Legislation (Trade Unions)

In Canada, unions are not mandatory. However, approximately 30% of the workforce is unionized (and in the private sector, this number stands at approximately 16%). Unions seeking to represent employees must apply to the applicable labour relations board for certification in accordance with the relevant provisions of the jurisdiction's labour relations statute.

The requirements for collective bargaining and collective agreements are similar in all jurisdictions. All collective agreements must contain a no-strike and no-lockout provision for the life of the agreement. Bargaining during the life of the agreement is rare on any issue. The collective agreement must also include a mandatory dispute arbitration process to resolve any disagreements that arise during the term of the agreement. Disputes regarding, for example, unfair labour practices, certification and decertification are handled by the appropriate labour relations board.

13.5 Human Rights Legislation

Human rights legislation has been enacted in all Canadian jurisdictions. Human rights legislation prohibits discrimination in employment on a number of grounds, which vary by jurisdiction. These grounds will generally include race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences (only in certain jurisdictions), marital status, family status and disability. New grounds of discrimination evolve over time; for example, the Ontario government recently introduced legislation that would, if implemented, add genetic characteristics as a prohibited ground (though as of January 1, 2023, this has not been implemented). Moreover, all jurisdictions prohibit harassment in employment (including sexual harassment) on any of these grounds. Employees with a discrimination claim will be entitled to file a complaint with the relevant human rights tribunal for redress. Such tribunals typically have the authority to order reinstatement as a remedy. In some provinces, such as Ontario, employees may also be able to raise discrimination claims through the courts, as part of a broader lawsuit (typically, wrongful or constructive dismissal).

13.6 Other Legislation

Each jurisdiction has enacted a number of other statutes that govern the employment relationship. Key statutes are described below.

(a) Workers' Compensation

Workers' compensation legislation typically provides for compensation from an insurance scheme funded by employers in the event that a worker is injured in the course of their work. Payment into such a scheme is mandatory for the majority of employers. Premium rates will vary depending on the industry and the employer's claims history. New employers should contact the relevant workers' compensation authority to determine whether registration is required and to determine the process for such registration.

(b) Occupational Health and Safety

Occupational health and safety legislation establishes multiple obligations on employers aimed at ensuring safe workplaces. Employers are required to adhere to specific standards and may face regulatory fines, compliance orders, or imprisonment for breaching this legislation. One common obligation is the employer's obligation to take all reasonable precautions to protect the health and safety of its workers. Regulations typically contain many specific responsibilities, which are imposed on employers to ensure that their workplaces are safe for employees (e.g., regulations concerning toxic substances, hazardous equipment and personal protective gear). Also, some legislation requires employee participation in the process (e.g., employers in Ontario who regularly employ 20 or more workers are responsible for establishing and maintaining a Joint Health and Safety Committee).

Importantly, a number of Canadian jurisdictions have now introduced laws which identify a number of specific positive obligations for employers, relating to the prevention of workplace violence and workplace harassment, including workplace sexual harassment. Employers in these jurisdictions will need to have policies and programs in place with respect to workplace violence and harassment, that include, among other things, procedures for workers to report incidents or complaints of workplace violence or harassment, and how incidents or complaints will be investigated and dealt with. In Québec, provisions regarding "psychological harassment" are included in the applicable employment standards legislation, rather than occupational health and safety legislation. Psychological harassment encompasses harm to an employee's dignity and psychological or physical integrity, and, as a result of recent legislative amendments, expressly includes sexual harassment. Notably, even in jurisdictions that do not have specific legislation regarding workplace violence and harassment, such conduct may lead to employer liability.

(c) Equal Pay and Pay Equity

All jurisdictions in Canada require employers to pay men and women equal pay for equal or similar work; that is, work that is performed in the same establishment, requiring substantially the same skill, effort and responsibility and performed under similar working conditions. Exceptions, which vary by province, may include situations where the pay rate is based on a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or factors other than sex.

In addition, pay equity laws apply to private sector employers in Ontario and Québec with 10 or more employees and to employers in the federal jurisdiction. They also apply to public sector employers in certain other provinces. Pay equity laws require female and male employees to be paid the same if they perform work of equal value in the same establishment, even if they do entirely different jobs. These laws seek to redress systemic discrimination in compensation for work performed by employees in predominantly female job classes.

Employers subject to pay equity laws are typically required to have pay equity plans setting out: the gender of each job class in their workplace; the method of comparison used to determine the value of the work performed by each job class (which must be a gender neutral comparison system); the results of such comparisons showing the male comparator for each female job class; all positions and job classes in which differences in compensation are permitted and the reasons for such differences; and how the compensation in female job classes who are not paid the same as their male comparator will be adjusted to achieve pay equity. In the event that a female job class does not have a male comparator, the employer will typically be required to use some form of proportional value comparison to determine if that female job class is entitled to a pay equity adjustment.

In addition, the federal government recently introduced a new proactive pay equity regime that received Royal Assent on December 13, 2018, and became effective on August 31, 2021. The new *Pay Equity Act* requires federal public and private sector employers with 10 or more employees to establish pay equity plans within set time frames. In establishing a pay equity plan, employers will be expected to identify and rectify differences in compensation between predominantly female and predominantly male job classes for which the work performed is of equal value. Under the Act, a Pay Equity Commissioner will be responsible for, among other things, conducting compliance audits and imposing administrative monetary penalties for compliance violations.

On February 19, 2019, the Ontario government initiated public consultation on pay transparency reporting requirements. This step follows the government's delay of the coming into force of the *Pay Transparency Act, 2018*. The *Pay Transparency Act, 2018* was introduced by the previous government and was scheduled to come into force on January 1, 2019. The current government indicated that "[c]omplying with the Act's current reporting requirements would have significantly increased costs for businesses and affected some sectors more than others." As of January 1, 2023, the *Pay Transparency Act, 2018* is still not in force.

(d) Privacy Legislation

Privacy legislation governs the collection, use and disclosure of personal information. In certain Canadian jurisdictions (Alberta, British Columbia, Québec and the federal jurisdiction), such legislation governs employee personal information. Employers must comply with the relevant privacy legislation in their jurisdiction. In Manitoba, privacy legislation was passed into law but has not come into force. In other Canadian jurisdictions, privacy legislation does not currently apply to employee information (other than employee health information, which may be covered by legislation applicable to the collection, use and disclosure of health information more broadly); however it is certainly possible that each respective government will introduce such legislation in the near future. Furthermore, Canadian courts have also recognized common law torts relating to privacy, such as the tort of "intrusion upon seclusion", which are not tied to legislation. Accordingly, compliance with the basic principles of privacy legislation is generally recommended as a best practice.

(e) French Language Legislation

Since 1977, the *Charter of the French Language* has existed in Québec. The *Charter* confirms that French is the official language of the province and imposes obligations in the province to ensure the continued widespread use and protection of the language.

In 2022, the Québec National Assembly introduced amendments to the *Charter* and other laws to strengthen existing French language requirements and impose new obligations in areas such as employment. Among other things, employers must adhere to the following rules if they employ any individuals in Québec:

- An employer must provide any mandatory employment documentation, such as training documents and company manuals and policies, as well as any written communication, in French.

- If a contract consists of terms that are imposed and are non-negotiable, the employer must provide the contract in French first.
- Job postings and applications must be made available in French. Postings and job application forms can be made available in another language (e.g., English), under certain conditions.
- An employer should not require an individual to have knowledge of a language other than French to obtain or keep a position, unless there has been a documented assessment of why the other language is required.
- An employer must take all reasonable steps to prevent discrimination or harassment with respect to the use of the French, and cannot retaliate against any employee who seeks to enforce their rights under the *Charter*.
- Existing "Francization" requirements that applied to businesses with 50 or more employees have now been extended to businesses with at least 25 employees.

These requirements, as well as strengthened compliance and enforcement powers, apply to any employer who carries out activities in Québec, including federally-regulated employers.

13.7 Payroll Taxes/Deductions

In Canada, employers are required to register for payroll taxes/deductions accounts in order to remit income tax, Canada Pension Plan (CPP)/Québec Pension Plan (QPP) and employment insurance premiums.

(a) The Canada Pension Plan

The CPP is a government-sponsored plan designed to replace employment income in case of retirement, death or disability. CPP benefits are supported through mandatory contributions from employers and employees, who are required to contribute equally. Employer and employee CPP contribution rates are reviewed and updated annually. For 2023, employees and employers are required to contribute 5.95% each (totalling 11.9%) of an employee's salary between C$3,500 and C$66,600 per year. Therefore, the maximum an employer will pay in respect of an individual employee is C$3,701.00. The QPP is the equivalent of the CPP in Québec for employees working in that province. In 2023, the contribution rate is 12.80% of an employee's gross earnings, as the employer pays half (6.40%) and then deducts the other half at source from the employee's pay.

(b) Employment Insurance

Employment insurance (EI) legislation provides employees with temporary income replacement as a result of employment interruptions due to work shortages, sickness, non-occupational accidents, maternity leave, parental and adoption leave, and family medical leave. EI is financed through employee and employer premiums. The employer premium rate is currently 1.4 times the employee premium rate. These rates are reviewed and updated annually. For 2023, the employee premium rate is C$1.63 for every C$100 of an employee's income, up to a maximum income of C$61,500. Therefore, the maximum employee premium is C$1,002.45. In 2023, the employer premium rate is C$2.28 for every C$100 of an employee's income, up to a maximum income of C$61,500. Therefore, the maximum premium an employer will pay in respect of an individual employee is C$1,403.43. These amounts differ in the province of Québec.

(c) Workers' Compensation Legislation

Workers' compensation legislation exists in every Canadian jurisdiction. Workers' compensation systems are generally funded by assessments paid by covered employers to the relevant workers'

compensation board. Premium rates vary based on province, industry, an employer's experience with claims, and other factors. Generally the premium payment is calculated by multiplying the company's annual insurable earnings by the premium rate and dividing by 100.

(d) Other Payroll Taxes/Deductions

Additional payroll taxes/deductions may be required in each jurisdiction. For instance, Ontario imposes the Employer Health Tax (EHT) based on the gross remuneration that a corporation pays to its employees who report to, or who are paid through, all offices or permanent establishments of the corporation that are situated in Ontario. As of January 1, 2023, EHT rates range from 0.98% on annual total Ontario remuneration less than C$200,000 and up to 1.95% for annual total Ontario remuneration in excess of C$400,000.

14. Pensions

14.1 Introduction

Canada's retirement income system is a mixture of public pensions, private savings and registered pension plans.

14.2 Retirement Savings Plans in Canada

(a) Public Pensions

(i) Canada Pension Plan

The Canada Pension Plan (CPP) is a national insurance program that provides income for Canadians when they retire or are indefinitely incapable of pursuing gainful employment.

Unlike other Canadian provinces, the province of Québec administers its own social insurance plan (QPP) with similar benefits for Québec residents. CPP and QPP are funded by contributions from employees and employers.

At age 65, retirees are eligible for a modest government pension based on the number of years during which they contributed and/or had contributions made on their behalf to the CPP.

In 2016, the Government of Canada passed legislation to increase CPP benefit payments from one-quarter to one-third of CPP eligible earnings. To fund this enhancement, increased employer and employer contribution rates began to be phased in over a seven year period, beginning January 1, 2019.

(ii) Old Age Security

Old Age Security (OAS) pension is a government benefit that is based on age, legal status and residence in Canada. OAS pension is taxable and subject to repayment for high-income earners.

Canadian citizens and legal residents are generally eligible for a full OAS pension at age 65 if they have resided in Canada for at least 10 years after age 18.

In addition to OAS pension, there are OAS benefits which may be payable based on income and marital status, including the Guaranteed Income Supplement for low income earners, and allowances payable to certain spouses and spouse survivors.

Because public pensions provide only modest benefits for retirees, most employees plan to save for retirement through other retirement savings vehicles, as discussed below.

(b) Private Savings (Registered Retirement Savings Plan)

Individual retirement savings are normally contributed to a "Registered Retirement Savings Plan" - a tax-deferred vehicle specifically designed to assist Canadians in saving for retirement. A registered retirement savings plan (RRSP) is an individual-based savings vehicle available to all Canadians to defer paying tax on savings intended for retirement. Generally, an individual can contribute up to 18% of their annual income to an RRSP, subject to a varying annual maximum.

An individual who is covered by a registered pension plan may also make RRSP contributions, but the RRSP contribution limit is reduced based on the contributions made through the registered pension plan. Individual contributions to an RRSP may be deducted from taxable income and the interest earned is taxed when the taxpayer makes a withdrawal from the RRSP. Typically, amounts are withdrawn after retirement when one's annual income and subsequent tax liabilities are much lower than when in full-time employment.

Many Canadian employers who do not provide a registered pension plan make contributions to their employees' individual RRSPs as an employment benefit. Subject to the limits set out above, such amounts are generally contributed directly to the RRSP without income tax deductions.

(c) Registered Pension Plans

Some Canadian employees are members of a "registered pension plan".

Registered pension plans are registered with, and regulated by, the federal Canada Revenue Agency (CRA) and provincial pension regulator(s). The federal government regulates pensions under the *Income Tax Act*, and the provincial governments regulate pensions under provincial pension legislation that establishes minimum standards for pension plans and administrators. A small percentage of Canadian employers are federally regulated. For federally regulated employers, minimum standards are established under the federal *Pension Benefits Standards Act*.

The two most common types of registered pension plans are outlined below.

(i) Defined Contribution Pension Plans

A defined contribution pension plan (DC Plan) is a plan in which a specific amount is regularly contributed to an investment vehicle on behalf of each plan member. Contributions can be made by the employer only or by both the employer and employees. Upon retirement, the employee will be entitled to the total amount accrued in their account, plus investment earnings.

Typically, in a DC Plan, the employer makes a contractual promise to the employee to contribute a certain percentage of income to the DC Plan. The amount of the retirement benefit that will be paid upon retirement is not specified. The investment risk generally remains with the employee and the amount available to an employee on retirement will depend on the overall performance of the markets and investment vehicles in which the DC Plan contributions have been invested.

DC Plans for workplace pensions have become increasingly popular with Canadian employers due to the relative ease in administration and the perceived shift of the investment risk from the employer to the employee when compared to a defined benefit pension plan.

(ii) Defined Benefit Pension Plans

In a defined benefit pension plan (DB Plan), employees are promised a specific monthly or annual pension benefit upon retirement. The contributions made to the DB Plan during the employee's working life are actuarially determined to meet the benefit promised to the employee upon retirement. The employer is generally liable to make up for a shortfall between the contributions made and the amounts promised to members on retirement.

DB Plans are usually the preferred choice of employees, but present a higher risk for employers due to their administrative complexity and funding requirements. For these reasons, DB Plans have become less common (particularly in Canada's private sector) and are largely being replaced by DC Plans or hybrid DB/DC plans.

14.3 Administering a Registered Pension Plan in Canada

Pursuant to applicable pension standards legislation, there are limitations around who is eligible to act as an administrator for a registered pension plan. Eligible administrators typically include the employer, a pension committee, a board of trustees comprised of the employer and employee representatives, or the insurance company that provides the pension benefits.

The primary role of the administrator is to ensure that the pension plan and associated pension fund are administered in accordance with the relevant statutes, the pension plan text and common law obligations. Specific duties of the administrator include the following:

- applying to register the plan and any amendments;
- filing required reports, including actuarial valuation reports;
- remitting appropriate fee payments required under applicable pension legislation;
- ensuring that all contributions under the pension plan are paid when due; and
- satisfying prescribed disclosure and information requirements to plan members.

Provided there is permitting language in the pension plan text, an employer may legally delegate its authority as administrator to an agent, such as a third party professional, but ultimately remains responsible for the administration of the pension plan and related pension fund.

14.4 Fiduciary Duty of the Administrator

Both the common law and legislation impose fiduciary obligations on all administrators of registered pension plans. Employers, therefore, will find themselves wearing two “hats” when making decisions concerning a pension plan: one as administrator with a fiduciary duty to act in the best interests of the beneficiaries of the pension plan; and one as employer with an obligation to act in the best interests of the company. When these two roles conflict in the context of a pension issue, an employer has a duty to prefer the interests of the beneficiaries of the pension plan.

14.5 Buying a Company with a Pension Plan

When a business is being purchased or sold, depending on whether assets or shares are being transferred, the parties to the transaction may be required to negotiate specific terms regarding the pension plan of employees affected by the transaction.

In a share transaction, the purchaser generally buys the company “as is”, including any pension plans the company may have. Therefore, the purchaser normally assumes all obligations and liabilities of the purchased business, including the pension plan (unless of course it is sponsored by a parent/affiliate that is not part of the acquisition). It is therefore critical for the purchaser to obtain full disclosure regarding the pension plan and, in particular, the plan’s funded status. An under-funded pension plan could present a substantial liability for the purchaser.

In an asset transaction, the purchaser is buying only those parts of the company that form part of the deal. The terms of the agreement of purchase and sale must therefore specify who is responsible for the pension plan of the employees affected by the deal. In the absence of any language in the agreement, the employees (and their pension plan) remain with the seller. As with a share transaction, the purchaser will want to obtain full disclosure of the status of the pension plan and its funded status in order to assess whether it will assume responsibility for the plan. In an asset transaction, the purchaser will need to consider whether (and how) to mirror or otherwise address the fact that transferring employees will no longer be able to participate in the seller’s pension plans.

15. Immigration

15.1 General

Canadian immigration legislation facilitates both the temporary and permanent movement of workers, with a policy emphasis on the transition of most temporary foreign workers to permanent resident status. Over the past decade, the level of temporary entry has substantially increased due largely to labour market demand. As a result, the federal government has heavily invested in strengthening immigration selection programs, most notably with the introduction of the Express Entry Program, which has redefined the way economic migrants apply for Canadian permanent residence. More recently, in an effort to respond to the needs of Canadian employers in various locations and industries, new application programs have been introduced such as the Global Skills Strategy and the Atlantic Immigration Pilot Program.

Federal and provincial governments continue to balance the expansion of economic immigration with the need to enforce temporary foreign worker compliance to protect the Canadian labour market from abuse. Both levels of government have introduced programs to monitor, fine and sanction employers and employees for non-compliance, and are increasingly involved in the enforcement of employer compliance and program integrity. Now more than ever, compliance with foreign worker and immigration programs is increasingly crucial for domestic and multinational companies carrying on business in Canada. Global mobility policies and an inspection readiness approach are key to successfully navigating the current employer compliance landscape.

15.2 Work Permits

The main work permit classifications are divided into two programs: (i) the Temporary Foreign Worker Program (TFWP), where there is a requirement to obtain a Labour Market Impact Assessment (LMIA) before applying for a work permit; and (ii) the International Mobility Program (IMP), where a work permit can be obtained without first obtaining an LMIA. Under the IMP, work permits may be occupation-, location- and employer-specific, or open to any position, location or employer, depending on the category.

(a) The Temporary Foreign Worker Program: LMIAs and the Global Talent Stream

An employer seeking to hire a foreign national must usually undergo extensive recruitment activities before applying for an LMIA to prove that there are no willing, qualified and able Canadian citizens or permanent residents who are interested in filling the position. Employers are required to maintain detailed records of recruitment activities for a period of six years and should be prepared to be audited by the government as part of an initiative to ensure employers are compliant with the TFWP. LMIA applications and employer compliance inspections continue to be adjudicated by Employment and Social Development Canada (ESDC), which is the federal government department responsible for overseeing Canada's labour market.

There are some LMIA applications that are exempt from the recruitment requirement. One of these is the Global Talent Stream (GTS), which offers two possible avenues for applying for a work permit (Category A and B), both of which have a standard processing time of two weeks.

Category A is for high-growth companies that are looking to hire unique and specialized talent, and that have been referred to the GTS by one of the stream's Designated Partners. Category B is for employers seeking to hire highly-skilled foreign workers with occupations found on the Global Talent Occupations List. These occupations have been determined by the government to be in-demand, so the list may be updated to reflect labour market needs.

Employers will be required to work with a special GTS sub-division of the ESDC to develop a Labour Market Benefits Plan (LMBP). The LMBP will identify the activities that the employer will commit to undertake in exchange for, or as a result of, the hiring of foreign workers. Employers applying under Category A must commit directly or indirectly to creating jobs for Canadian citizens and permanent residents. Those applying under Category B are required to commit to increasing skills transfer and training investments for both Canadian citizens and permanent residents. Employers in both categories will need to commit to at least two additional complementary benefits (these cannot be the same as the mandatory benefits). Progress reviews will be completed by the ESDC on an annual basis to measure how well each employer is meeting the specified commitments detailed within their LMBP.

Employers looking to utilize the GTS will need to ensure that the wages being offered to the foreign worker candidate(s) meet the requirements of the stream and of the category being pursued. Employers will be accountable for annually reviewing and adjusting wages to ensure they remain in line with the prevailing wage requirements.

As a general rule, foreign nationals require a positive LMIA to obtain a Canadian work permit. However, there are many exceptions to this rule, most of which fall under the IMP. A significant number of the work permits provided to foreign nationals each year in Canada are LMIA-exempt. Companies should always first consider whether these exemptions are available to new foreign hires/assignees, as LMIA-exempt work permit applications are typically more straightforward and processed faster. The IMP offers more certainty and predictability, and would therefore be the preferred application route for an employer seeking to bring foreign talent to Canada.

(b) Business Visitors: Exemption from Work Permit Requirement

Some individuals are able to enter Canada to perform certain business activities without first obtaining a work permit. To be eligible for the Business Visitor work permit exemption, the individuals must not be conducting activities that constitute an entry into the Canadian labour market. Examples of Business Visitor activities include: attending conferences, conducting negotiations, attending business meetings, soliciting business, engaging in high-level discussions, attending training sessions and/or providing internal training sessions. Generally, Business Visitors should not engage in hands-on work or provide any billable services. Some foreign nationals may also qualify for a work permit exemption if they are entering Canada to provide after-sales service to a client. Individuals entering Canada as Business Visitors should be prepared to provide relevant documentation at the time of entry to satisfy an officer that they meet the entry requirements and, if applicable, to demonstrate that the after-sales services are part of the original sales agreement.

(c) Global Skills Strategy: Exemption from Work Permit Requirement

Individuals who are entering Canada to perform high-skilled, hands-on work for a very short period of time may be eligible for one of the work permit exemption categories under the Global Skills Strategy. Qualifying individuals must be working in a high-skilled position, and they must be seeking to enter Canada to work for a maximum of either 15 consecutive days within a six-month period, or 30 consecutive days within a 12-month period. Some eligible researchers may also qualify for a work permit exemption that would enable them to enter Canada for a period of 120 consecutive days within a 12-month period, depending on where their research is performed.

(d) International Mobility Program: LMIA-Exempt Work Permits

Since 2015, employers hiring through the IMP have been required to submit an Offer of Employment form (IMM 5802) and pay an Employer Compliance Fee (C$230 per position) via an online portal. The employer must submit the form and payment and provide proof of same to the employee prior to the submission of the work permit application. There is also a C$100 open work permit holder fee which is required for open (not employer-specific) work permit applications.

The following IMP work permit categories are most commonly used by Canadian employers:

(i) Intra-Company Transferees

Multinational companies seeking to assign foreign employees to Canadian positions often use the LMIA-exempt intra-company transferee (ICT) category. There are a number of corporate relationships that may qualify under this category (e.g., parent-subsidiary, sister corporations, branch or representative offices, etc.). The Canadian entity must be able to demonstrate that it is actively doing business in Canada and that it is not simply a "shell" company.

To qualify as an ICT, the applicant must be employed by a foreign entity at the time of the application and must occupy a similar position to that which they will assume in Canada. They must also have at least one year of continuous, full-time employment with the company in a similar position during the three years preceding the date of application.

The ICT category is divided into various sub-categories, but the most commonly used are: "Specialized Knowledge" workers and "Senior Managerial" workers. Senior Managerial workers (executive and managerial-level staff) must generally manage other employees, although management of crucial company functions or processes may also qualify.

The Specialized Knowledge category was revised in the summer of 2014 by increasing the threshold level of specialized knowledge and, in some cases, introducing a minimum wage requirement. The foreign national must now have both an advanced level of specialized knowledge that is rare within the industry and uncommon within the Canadian marketplace; and an advanced level of proprietary knowledge of the company's products, services, research, equipment and/or techniques. The proprietary knowledge must be so specialized that it is not ordinarily held by others within the company.

In some cases, the Specialized Knowledge worker must be paid a salary that is equal to or greater than the prevailing wage for the position in the specific geographic region where they are working in Canada. All of these requirements should be clearly set out for the assessing officer to determine that the worker qualifies for the ICT work permit.

The initial work permit may be issued for up to three years, and extensions can be obtained for up to two years at a time. Senior Managerial workers may hold an ICT work permit for a maximum period of seven years, whereas Specialized Knowledge workers are limited to a maximum period of five years.

(ii) International Agreements

Many international agreements allow international assignees, depending on their nationality, to obtain a work permit without an LMIA, as long as they have employment opportunities in Canada. The most commonly used of the agreements for international employment transfers are still the *Canada-United States-Mexico Agreement* (CUSMA) and the *General Agreement on Trade in Services* (GATS), which allow certain professionals and skilled workers to come to work in Canada for periods of up to three years (90 days in the case of GATS), subject to extensions.

Other international free trade agreements (FTAs) which can provide immigration pathways for foreign nationals include: *Canada-Chile FTA*; *Canada-Peru FTA*; *Canada-Colombia FTA*; *Canada-Korea FTA*; *Canada-Panama FTA*; *Canada-European Union Comprehensive Economic and Trade Agreement*; *Agreement on Trade Continuity between Canada and the United Kingdom of Great Britain and Northern Ireland; and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (CPTPP). The CPTPP applies to some countries in the Asia-Pacific region, including: Australia, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

(iii) Reciprocal Employment

This category can be used for international exchanges, both in public and private sector contexts. The purpose of this LMIA exemption is to provide complementary opportunities for international work experience and cultural exchange.

Multinational companies can also use this exemption category if the company offers equivalent employment opportunities for their Canadian employees abroad. To benefit from this category, the company should have an official global mobility policy that facilitates reciprocal employment opportunities for its employees, and should have appropriate documentation to demonstrate same. There should be clear evidence of a bilateral exchange between Canada and the particular foreign entity, as entry under this exemption category should result in a neutral labour market impact.

(iv) Provincial Nominee Programs (PNPs)

PNPs are offered by each province and territory, and may result in a nomination for permanent residence in Canada. One of the major benefits of receiving a nomination in most PNP categories is the ability to receive an LMIA-exempt work permit based on that nomination.

(v) International Student Work Permits

There are several opportunities for foreign students to work in Canada while studying and to obtain an LMIA-exempt work permit after graduation. During full-time studies, study permit holders are eligible for both on- and off-campus work. Off-campus work is normally limited to 20 hours per week during an academic session, and 40 hours per week during scheduled breaks. As of the effective date of this publication, there is a temporary public policy in force that authorizes eligible students to work more than 20 hours per week off-campus during an academic session. This policy is in force until December 31, 2023. Co-op work permits are also available to qualifying international students.

Students that have graduated from a recognized post-secondary institution in most full-time degree/diploma-granting programs are eligible to apply for a Post-Graduation Work Permit. These range from eight months to three years in duration, depending on the length of the study program, and are “open” work permits, meaning they are not employer-, occupation-, or location- specific.

(vi) Family Member Work Permits

Spouses, common-law partners, or working-age dependent children of most foreign workers are eligible for an open work permit if the foreign worker is authorized to work in Canada for at least six months. In this situation, the spouse or child of the foreign worker in Canada can obtain an open work permit for the same duration as the foreign worker. This type of open work permit will allow the spouse or child to work in any occupation, with any employer (including self-employment), with the exception of employment in childcare, healthcare or primary/secondary education. If a spouse or child would like to work in any of these restricted industries, they must first pass an immigration medical examination.

(e) Work Permit Extensions

All foreign workers must ensure that they maintain valid status while in Canada. The regulations aim to facilitate continuity of work and include a policy of “maintained status” provided that the foreign worker submits an application to extend their status before their work permit expiry date. Foreign workers who apply for a work permit extension before their current work permit expires are permitted to continue working in Canada under the terms and conditions of their expired work permit until the extension application is decided. This is one of a few circumstances in which a foreign national can work without having a work permit. Applicants should avoid leaving Canada while on maintained status. While the Canada Border Services Agency may permit their re-entry to Canada before the

extension application is decided, it will likely be as a visitor, and the foreign national will lose their maintained working status upon departing Canada.

15.3 Visa Office vs Port-of-Entry

Work permit applications are normally submitted to a visa office (VO) for processing prior to the foreign worker's trip to Canada. If a foreign worker's nationality is on the list of visa-exempt countries, they will have the option of bypassing the VO and applying for a work permit directly at the port-of-entry (POE). When the applicant applies for their work permit at the POE, it is processed on the spot. The POE process also has less document requirements.

If applying via VO, processing times and required documentation will vary depending on the country where the application is being made. Applications must be submitted online with very limited exceptions. Biometrics must be provided in-person at a visa application centre (VAC) after submitting the online application. Once the application has been processed, the VO will ask the applicant to submit their passport for Temporary Resident Visa (TRV) issuance before issuing the approval decision. The applicant will receive the actual work permit document at the POE by presenting the approval letter to the immigration officer at the time of arrival.

15.4 Biometrics

Biometrics are required for almost all non-Canadian citizens applying for a visitor record, work or study permit, or permanent residence. Exceptions to this requirement include U.S. nationals and visa-exempt nationals only visiting Canada for a short time. Biometrics can be provided as part of an application submitted at a VO, or upon arrival in Canada at a POE (for visa-exempt nationals). For those applying from inside Canada for an extension of their current temporary status, biometrics will be required if they have not been provided within the past 10 years. Applicants will only be required to give their biometrics once every 10 years.

15.5 Authorization to Enter Canada

Depending on the nationality of the foreign national, an entry visa, better known as a TRV, may be required to authorize the individual's entry to Canada. A TRV is a travel document and is separate from a work permit, which is a status document that authorizes the individual's work activities after they have successfully entered Canada. As a general rule, TRV-requiring nationals must submit their initial temporary immigration application overseas before their trip to Canada. A VO will approve the temporary application (e.g., work permit, visitor record or study permit) and insert a TRV directly into the individual's passport.

With the exception of American citizens, TRV-exempt individuals (including U.S. Green Card holders) are required to have a valid electronic Travel Authorization (eTA) to travel to/transit through Canada by air. The eTA application process is a quick online application with a C$7.00 fee, payable by credit card. An eTA is usually issued on the date of application, subject to any admissibility issues. It is electronically linked to the individual's passport and valid for a period of up to five years or until the passport's expiry date. When an individual renews their passport, they must also obtain a new eTA before traveling to Canada by plane. Those who require an eTA will not be allowed to board a flight to Canada without a valid eTA.

Canadians with dual citizenship travelling to or transiting through Canada are required to carry a valid Canadian passport to board a flight to Canada. This requirement does not apply to dual Canadian-American citizens who are travelling to Canada with a valid U.S. passport.

15.6 Employer Compliance and Enforcement

The federal government recently implemented a more stringent employer compliance regime which directly affects employers sponsoring foreign workers under the TFWP and IMP. New immigration compliance and enforcement regulations include a requirement for employers to provide the most recent information to foreign nationals about their rights in Canada and to provide access to health care services for workers who are injured or who become ill at the workplace. Immigration compliance rules and regulations are enforced through routine immigration inspections and penalties for findings of non-compliance.

Employers may be selected for inspection from the first date of the work permit issuance and up to six years after. Under the IMP, employers must comply with the following conditions:

- remain actively engaged in the business;
- comply with federal and provincial laws;
- provide the foreign national with employment in the same occupation and with wages and working conditions that are substantially the same as, but not less favourable than, those listed in the Offer of Employment form;
- provide a workplace free of abuse;
- demonstrate that any information provided at the time of application was accurate; and
- retain documents related to compliance.

Therefore, employers should track and maintain up-to-date records with respect to work permit holders for a period of six years from the time of work permit issuance. Here are a few examples of documents (originals or copies) that should be kept on file for immigration compliance purposes:

- work permits (expired and current);
- signed employment contracts (signed by both employer and employee);
- job descriptions (previous and current);
- wage information (previous and current);
- bonus, alternative compensation, benefit, registered retirement savings plan, etc. information (previous and current);
- submitted offer of employment forms;
- details regarding hours of work per week (timesheets, payroll statements etc.);
- collective bargaining agreements (if applicable); and
- work-sharing agreements (if applicable).

An employer is compliant if it can demonstrate that it has complied with the work permit conditions, or if it is able to justify any failure to do so under the enumerated grounds. An employer is non-compliant if it is unable to justify any violations of the work permit conditions.

The government has committed to inspecting one out of four employers each year. Inspections can be randomly initiated, triggered by a whistle-blower or other sources, or based on a previous finding of non-compliance. Inspectors have wide investigatory powers including on-site visits and interviews with foreign workers or other employees (with consent).

When there is a finding of non-compliance following an inspection, employers face a range of potential consequences, depending on the frequency and severity of the violation. Penalties include warning letters, administrative monetary penalties, temporary or permanent bans from accessing immigration programs, revocation or suspension of work permits, and online publication of the business's name, violation and penalty. Voluntary disclosures may reduce fines, but should be discussed with counsel prior to submission.

To avoid being found non-compliant, employers should designate an internal immigration compliance officer and should conduct regular internal reviews of the foreign worker population. Employers should implement a review process before any changes to the terms and conditions of a foreign worker's employment take effect to make sure the change is consistent with the work authorization. Some changes may require a new work permit before the change can take effect.

15.7 Applying for Canadian Permanent Residence - Economic Streams

If a foreign worker wishes to stay in Canada permanently, there are various ways they may qualify for permanent resident status. Under the Economic Class, foreign nationals can submit their applications for permanent residence directly to the federal government via the Express Entry Application Management System, provided that they qualify for one of the following federal categories: (i) Federal Skilled Worker Program; (ii) Canadian Experience Class; or (iii) Federal Skilled Trades Program.

Alternatively, applicants can apply for permanent residence with the support of a province or territory by applying under a PNP category. Provinces and territories have created their own PNP selection criteria based on each province and territory's specific needs. Most PNPs have moved the provincial stage of the application process to province-specific online portals. Applicants can therefore usually submit the first stage of the PNP application to the provincial government online. Once the provincial nomination is approved, the second stage involves the submission of an application for permanent residence to the federal government. Depending on the province and category, applications must be submitted for processing either via the Express Entry System or via the new Permanent Residence Online Application Portal.

All permanent residence applicants will eventually be subject to medical examinations and security checks at the federal level, before approval.

15.8 Once Permanent Resident Status Has Been Obtained

Once an applicant has obtained Canadian permanent resident status, they generally have the same rights as Canadian citizens, with the exception of voting or running for political office. However, permanent resident status may be revoked if they are charged with a criminal offence where the potential penalty exceeds six months.

Permanent residents are generally able to work for any employer in any location, be self-employed or engage in any course of study without first obtaining the permission of the Government of Canada.

Permanent residence status is granted indefinitely once the individual completes the landing process and can only be lost following a determination of status or by revocation. Upon becoming a permanent resident, the individual will receive a Permanent Residence Card (PR Card) which is issued in five year increments. It is important to note that the PR Card does not in itself confer permanent residence status on the individual. Moreover, the expiration of a PR Card does not automatically result in the loss of permanent residence status.

A valid PR Card is required to re-enter Canada as a permanent resident via commercial vehicle. If an individual is outside Canada without their valid PR Card, they may need to apply for a Permanent Resident Travel Document (PRTD) before entering Canada as a permanent resident via commercial

vehicle. Some exceptions may apply depending on an individual's nationality and mode of transportation into Canada.

A PR Card renewal or PRTD application automatically triggers a status determination by the reviewing officer. If a positive determination is made, a new PR card or PRTD will be issued. However, a negative determination will result in the official loss of permanent resident status.

To maintain permanent resident status, the individual must be physically in Canada for at least 730 days in the five-year period preceding the date of application for a new PR Card (or PRTD). Certain exceptions may apply, allowing for longer absences from Canada. For example, a permanent resident who is absent from Canada for more than 1,095 days within any five-year period may retain permanent resident status if accompanied by a Canadian citizen spouse, common-law partner or parent (if the applicant meets the "dependent child" definition) while outside Canada. Also, a permanent resident may retain status under certain circumstances while they or their permanent resident spouse or common-law partner is working outside Canada on a full-time basis for a Canadian business or the Canadian government. Finally, immigration officers have the jurisdiction to consider humanitarian and compassionate reasons that justify the retention of permanent resident status.

16. Real Property

16.1 Non-Resident Persons and Corporations

There are generally few prohibitions or direct restrictions on foreign ownership of Canadian lands. However, some provinces have begun to impose a combination of taxes, registration or reporting requirements on real estate acquired or owned by non-residents of Canada. The following is a summary of both direct and indirect restrictions.

As real property is often part of an acquisition of a business, the *Competition Act* and the *Investment Canada Act* must also be considered. The federal *Competition Act* provides for the review of certain commercial transactions for potential lessening or preventing of competition in a relevant market, where the party's assets or revenue exceed certain thresholds. Under the federal *Investment Canada Act*, non-residents seeking to acquire control of existing Canadian businesses or to establish new Canadian businesses are subject to governmental review where the value of the transaction exceeds certain amounts (the review exemption threshold is significantly greater for investors who are residents of World Trade Organization member countries), or where the business falls within certain "sensitive" categories.

(a) Indirect Restrictions on Foreign Ownership: Taxes, Registrations and Reporting Requirements for Foreign Entities:

- To own and operate real estate in Ontario, Québec and British Columbia, foreign entities may need to obtain a licence.
- British Columbia introduced a 15% land transfer tax on foreign persons and entities that purchase residential property in the Vancouver Regional District. The City of Vancouver has also created a vacancy tax beginning in 2017 calculated as 1% of the assessed value of the vacant residential properties.
- In 2017, Ontario introduced a Non-Resident Speculation Tax (NRST) of 15% of the purchase price on the purchase of residential property in the Greater Golden Horseshoe Area by foreign entities, taxable trustees or buyers who are not citizens or permanent residents of Canada.

(b) Direct Restrictions on Foreign Ownership:

- There is a temporary two year ban on the acquisition of a legal or equitable interest in or a right in a residential property by non-Canadian individuals or foreign-controlled entities. The ban became law on January 1, 2023 for a two year period. There are some exceptions to the exceptions to this rule. More information can be found in the *Prohibition on the Purchase of Residential Property by Non-Canadians Act* and the *Prohibition on the Purchase of Residential Property by Non-Canadians Regulations*.
- Prince Edward Island (PEI) (see the PEI Land Protection Act.), Alberta (see the *Agricultural and Recreational Land Ownership Act*.), Manitoba, Saskatchewan and Québec have some permanent restrictions on foreign ownership of land. Non-residents may apply for an exemption from the Alberta, Saskatchewan and Manitoba restrictions, and Canadian citizens and permanent residents (and corporations controlled by the same) are not subject to Alberta, Saskatchewan and Manitoba restrictions. Direct legal advice should be sought in those jurisdictions for specifics about these restrictions.

16.2 Governing Law

The laws governing real property law in Canada generally fall within the jurisdiction of the provinces and, with the exception of Québec, follow the principles of the English common law. An exception to provincial regulation is that certain federal statutes govern real property used for federal facilities.

16.3 Real Property Interests/Title

Real property interests may include fee simple ownership, leasehold interests, the creation of charges and mortgages as security for obligations, easements and rights-of-way, as well as many other interests such as condominium and mining rights.

All provinces maintain a system of public land title registration where ownership can be verified and through which interests in land are registered. The purpose of the system is to provide notice to the public about the various interest that parties have in land. Priority of registration is paramount and the right first registered enjoys priority over any subsequently registered rights. In some cases, title is subject to certain exemptions, guaranteed by the relevant province.

Land titles systems are in place in British Columbia, Alberta and Saskatchewan. Ontario, Manitoba, Nova Scotia and New Brunswick are in various stages of converting from registry based systems to land titles systems. Prince Edward Island, Newfoundland & Labrador and Québec all continue to use registry based systems.

Generally, a purchaser or lender will retain a lawyer to carry out various title and off-title searches to determine ownership, encumbrances and matters such as zoning and restrictions affecting the property. Title insurance, which protects against certain losses suffered due to title related problems and fraud, is becoming increasingly common and may be arranged through the lawyer. Different ownership structures are available, including separating legal and beneficial ownership, co-tenancies, joint ventures and partnerships. Additionally, corporations that are incorporated or continued under Ontario corporate law, with ownership interests in real property in Ontario, must maintain records and a register of ownership interests of such property in Ontario.

16.4 Real Property Interests as Security

Real property ownership and leasehold interests may be mortgaged or charged by the owner as security for the repayment of money and the performance of contractual obligations. Priority among several creditors holding security upon the same real property interest is generally governed by the sequence of registration of these security interests in the public registration system, unless changed by agreement among the creditors. Enforcement procedures against solvent debtors or owners are generally regulated by provincial statutes, whereas enforcement procedures against insolvent debtors or owners are largely regulated by federal statutes.

16.5 Land Use Regulation

The regulation of land use (zoning) is also governed by provincial statute. In most provinces, however, much of the power to formulate and enforce land use policies has been delegated by statute to local municipalities, subject to an appeal process to a provincial body. Virtually all land in those areas of Canada that are organized for municipal purposes is subject to land use regulation. Therefore, approvals and permits must be obtained for almost any type of use, development, subdivision or construction.

Municipalities typically control land use and the density of the development through official plans and zoning bylaws. The ability of an owner to subdivide property is restricted and regulated in a number of provinces, including Ontario. Development charges are also imposed by many municipalities on new developments within their jurisdiction.

Construction of new projects is also subject to provincial and municipal legislation. Building codes set specific standards for the construction of buildings, and most municipalities require building permits before the commencement of construction. Building codes also regulate the maintenance of existing structures.

16.6 Leasing

(a) Commercial Leasing

The prevailing practice among most commercial landlords in Canada is to enter into a binding offer to lease with a tenant rather than drafting a non-binding "Letter of Intent" and then preparing a full lease that reflects the business terms of the offer. Offers to lease are in most instances fully binding contracts and will limit a tenant's ability to negotiate the lease; accordingly, such offers should be reviewed by legal counsel prior to execution or, alternatively, be conditional upon review by legal counsel.

Commercial leases usually fall into two categories: net lease or gross lease. The most typical form of commercial lease is a net lease which requires a tenant to pay specified base or minimum rent; often calculated based upon a rate per square footage of the premises, plus additional rent comprising a proportionate share of realty taxes, insurance, utility and common area maintenance charges. In a retail lease, a tenant may also be required to pay rent based on a percentage of its annual sales. In a gross lease the tenant agrees to pay a fixed amount and that fixed amount includes the tenants share of operating expenses and realty taxes.

Generally, registration of a notice or caveat of lease is recommended to maintain the priority of a tenant's leasehold interest. In the event that the leased premises are subject to a prior mortgage, it is advisable for a tenant to insist that the holder of such mortgage agree to enter into a non-disturbance agreement to agree not to disturb the tenant's quiet enjoyment of the leased premises if such holder enforces its rights under the mortgage against the landlord to eliminate the risk of the tenant being evicted.

Most commercial leases are for a 5-year or a 10-year term. Often, the leases will provide the tenant with extension or renewal rights. Some provinces set a maximum term for leases. In Québec, the maximum term of a lease, including renewals, is 100 years. In Ontario, a lease for a term of 21 years or more is generally considered void if the lease only applies to a portion of the landlord's real property unless planning consent is obtained or unless the lease is in respect of a part of a building only, and a lease for a term of 50 years or more is subject to land transfer tax on the fair market value of the land.

(b) Residential Leasing

Residential leases are regulated by provincial legislation. In some cases, the applicable legislation will override the terms of the lease contract, regardless of the intention of the parties. In some provinces, including Ontario, the ability of the landlord to increase residential rents is limited by provincial regulation.

16.7 Land Transfer Tax

The acquisition of real property gives rise to municipal or provincial land transfer taxes in many provinces of Canada. The transfer taxes are payable at the time the transfer is registered in the land registry. Land transfer tax rates vary by province and in certain cases (such as in Ontario) are also applicable to the conveyance of unregistered (beneficial) ownership and to long-term leases in excess of 50 years.

Some transfers can be exempt from paying land transfer tax if the transfer falls within a specific exemption provided for by the applicable provincial statute.

Land transfer tax rates for each province and territory vary but generally are in the range of 1 to 3% of the value of the property being transferred. Direct legal advice should be sought in those jurisdictions for specifics about these restrictions.

16.8 Sales Taxes

Subject to certain exceptions, Goods and Services Tax/Harmonized Sales Tax (GST/HST) is calculated upon the purchase price of real property; however, a GST/HST-registered purchaser will not be required to pay GST/HST to the vendor on closing, but rather is required to self-assess the applicable GST/HST, against which it may claim input tax credits. The net effect is that no GST/HST is actually paid in most commercial real estate transactions.

16.9 Property Taxes

Real property taxes are levied at the provincial and municipal level, and rates, usually calculated upon the value of the property, vary by municipality and by use.

17. Environmental Protection

17.1 Division of Powers for Environmental Protection

The Canadian federal government and the provincial/territorial governments both have jurisdiction over environmental protection. Consequently, many activities fall within the overlap between federal and provincial/territorial statutory powers. Transportation of dangerous goods, for example, falls within both federal and provincial/territorial legislative jurisdiction. Federal regulation applies to all domestic consignments by air, ship and rail, as well as all interprovincial and international (including Canada-U.S.) transportation. Provincial/territorial regulation applies to transportation that takes place within a single province or territory.

(a) CEPA

The central piece of federal legislation regulating the environment is the *Canadian Environmental Protection Act* (CEPA). Liability under the CEPA is focused on matters of national concern, such as the importation of chemicals into Canada, ocean dumping and international air pollution.

Two important aspects of the current CEPA are intergovernmental cooperation and cradle-to-grave (i.e., beginning to end of the life cycle) regulation of toxic substances, which is designed to decrease the risk of spills or accidents by imposing preventative restrictions on all aspects of the use of toxic substances. The objectives of CEPA are pollution prevention and the minimization or "virtual elimination" of contamination and/or the creation of pollutants in the first place.

(b) Forthcoming Amendments to the CEPA

In early 2022, Bill S-5 *Strengthening Environmental Protection for a Healthier Canada Act* was introduced by Parliament. If passed, it will introduce significant reform to CEPA for the first time in more than 20 years. Bill S-5 proposes recognizing the right to a healthy environment, requirements to prioritize, manage and phase-out certain toxic chemicals, and new considerations when evaluating chemicals in the environment.

(c) Other Federal Statutes

Other federal statutes that deal with specialized environmental matters include the *Fisheries Act*, the *Canadian Environmental Assessment Act*, the *Arctic Waters Pollution Prevention Act*, the *Canada Shipping Act, 2001* and the *Transportation of Dangerous Goods Act, 1992*. The federal government has also published proposed regulations that set out zero-emission vehicle sales targets for manufacturers and importers that require 100% of new vehicles sold in Canada to be zero emission by 2035.

(d) Provincial Statutes

Each Canadian province and territory also has its own environmental legislation. The provinces and territories oversee the day-to-day task of environmental management.

The trend in the provinces and territories has been towards widening the net of environmental liability and attacking pollution offenders at the source, whether as owners or occupiers of property, owners of contaminants or, increasingly, directors and officers of the polluting corporation. Innocent occupiers of contaminated land have, at times, also been found liable for clean-up obligations.

17.2 Corporate Environmental Liability

Environmental laws in Canada are public welfare statutes. This means that when an offence occurs and environmental damage must be remedied, the government will look to the deepest pocket – or the easiest pocket to reach – before dipping into the public purse. Corporations have traditionally

been seen as the deep pockets which should bear the brunt of environmental liability. Owners and previous owners of property, occupants and previous occupants, as well as persons who have or had charge, management or control of the source of contamination, may all be within the reach of regulatory authorities.

Corporations in Canada are viewed as “persons” who are subject to the same environmental liability as any other individual. One test for environmental liability used in Canada is “control”. The test of control is a factual one, based on an assessment of the corporation’s position with respect to the activity undertaken that causes pollution. If the corporation can and should control the activity at the point where pollution occurs, migrates or otherwise creates an adverse impact, then it will be responsible for the pollution. As a result of this test of control, parent companies may be held liable for the environmental offences of both their agents and subsidiaries.

Some provinces also apply liability to parties deemed to “occupy” or “operate” a contaminated site through their participation in joint ventures.

17.3 Director and Officer Liability

Under public pressure to enact more stringent environmental protection laws and to hold alleged polluters accountable, governments in Canada are increasingly imposing express personal liability provisions for directors and officers in environmental statutes. The rationale is that the possibility of personal prosecution is an effective means of ensuring that those ultimately responsible for overseeing and directing the corporation have a personal stake in the environmental behaviour of the corporation and its employees.

Most commonly, statutory provisions create liability for directors and officers who authorize, acquiesce or participate in an environmental offence. A director or officer who actually approves an action that is an offence, even if the action is not carried out personally, is considered to have authorized it. On the other hand, failure to take action, or wilful blindness or negligence, despite awareness of the commission of an offence or of an omission to act, may constitute acquiescence. A director or officer is considered to cause or permit a corporate offence if the director or officer was in a position of influence and control to prevent the commission of the offence but failed to act. How much control will result in liability is determined by a factual assessment of proximity to the activity at the point at which pollution occurs.

The defence of due diligence is available to directors and officers for environmental liability. The defence was introduced in the 1978 case, *R. v. Sault Ste. Marie*, in which the Supreme Court of Canada created a new category of offences now known as “strict liability” offences. Essentially, strict liability offences preserve administrative ease of proof, since *mens rea*, or the mental element, is not an ingredient of the offence. In other words, an accused will be found liable so long as the offence was committed, regardless of their intention. An accused may be acquitted, however, if, on the balance of probabilities, all reasonable care or due diligence was exercised to avoid the particular event giving rise to the charges. Since the decision in *Sault Ste. Marie*, the defence of due diligence has been incorporated into both federal and provincial environmental statutes.

The fact that all corporate formalities have been met may help to establish due diligence, but it is not conclusive. However, failure to adhere to corporate formalities increases the likelihood of liability. The due diligence that must be established is that of the director alone and is determined by whether the director exercised all reasonable care by establishing a proper system to prevent the discharge of the contaminant and taking reasonable steps to ensure the effective operation of the system. Case law suggests that the due diligence requirement becomes more stringent the closer a director is to the impugned activity.

17.4 Enforcement and Compliance

Penalties under environmental legislation in Canada include regulatory fines in the millions of dollars and imprisonment.

There are two enforcement categories under the CEPA: inspection and investigation. If, during the course of an inspection, it is determined that a provision under the CEPA has not been complied with, the inspector may issue a warning, ticket, direction, Ministerial order or injunction, depending on the severity of the violation. In addition, a civil suit may be brought by the Crown to recover costs in certain circumstances. An investigation involves the gathering of information from a number of sources and may include, where necessary, obtaining a search warrant.

The two most significant enforcement tools under the CEPA are Environmental Protection Alternative Measures (EPAMs) and Environmental Protection Compliance Orders (EPCOs). EPAMs are negotiated settlements that allow persons who are in violation of the CEPA to negotiate with the federal government to take corrective action without the need to proceed with a lengthy court case. Certain conditions attached to the use of EPAMs under the CEPA are significant. For example, an EPAM is available only to persons who accept responsibility for the act or omission that forms the basis of the offence. This does not necessarily mean admitting guilt, but it does mean admitting the facts constituting the offence. Another condition attached to the use of EPAMs involves publication. The EPAM will be accessible to the public as it is to be filed as part of the court record and may be posted on the CEPA website. An EPCO will enable a provincial officer to put an immediate stop to illegal or potentially illegal activities or to require action to be taken to correct a violation. The order could be directed to an owner, or a person who has the charge, management or control of a substance or property or to a person who causes or contributes to the contravention of the Act.

Offences under the CEPA are quasi-criminal and carry with them heavy fines and/or imprisonment terms. Penalties for certain breaches of CEPA and its regulations or for a failure to comply with the terms of an authorization or direction include a fine of up to C$6 million or imprisonment up to three years, or both.

At the provincial or territorial level, one of the most common conflicts with environmental legislation occurs when a situation is discovered that may necessitate notification to provincial authorities. The consequences for failure to report can be severe. In Ontario, for instance, generally every person who contravenes the *Environmental Protection Act* is guilty of an offence and can be liable for each day or part of a day that the offence occurs or continues, for a fine of up to C$100,000 or imprisonment for a term of up to one year, or both.

17.5 Environmental Audits

Environmental audits are increasingly commonplace, reflecting increased awareness of environmental concerns and the increased risk of government enforcement actions.

Auditing makes good sense for companies that want to organize their activities to minimize the environmental problems that they will face. Audits are also being used to ensure compliance with environmental legislation and as a means of demonstrating corporate due diligence. With the introduction of the ISO 14000 environmental management standards, environmental auditing has become even more common. In addition, audits may be required for lending purposes, in purchase and sale transactions, for landlord/tenant purposes or simply to identify areas of potential risk. Environmental audits are not, however, generally mandated by any government legislation or regulation in Canada.

Although there are many benefits associated with the use of environmental audits, a major concern is the confidentiality of the audit report. Current legislation does not help alleviate this concern. For example, the Enforcement and Compliance Policy of Environment Canada states that during routine

inspections, environmental audits will not be requested. However, where there is a concern that an offence has been committed, inspectors will look to any environmental audit reports then in existence to aid in the determination of regulatory compliance. One means of protecting the confidentiality of environmental audits has been to rely on solicitor-client privilege, which protects communications made to solicit legal advice and communications in connection with actual or anticipated litigation.

17.6 Purchasing Contaminated Real Estate

Anyone purchasing or acquiring real estate should be aware of the sources of potential liability, as well as the statutory and common law remedies. Purchasers must be especially aware of the heavy burden of liability that they may face as a result of unwittingly or recklessly acquiring contaminated land. In real estate matters, Canadian law does not provide for an “innocent purchaser” defence. Provinces such as Ontario impose liability for ownership or occupation regardless of who bears responsibility for the contamination on the property.

Generally, there is no implied warranty to a purchaser that property will be free from defects or that the land can be used for any particular purpose. Instead, the general principle when buying land in Canada is “buyer beware”, unless the purchaser has stipulated otherwise in a contract.

When commercial or industrial land is being sold, it is not unusual for the vendor to sell the property “as is, where is”. In such case, the transaction is usually conditional on the satisfaction of the purchaser with respect to the condition of the property; hence, the purchaser is responsible for conducting all necessary due diligence. Typically, the purchaser conducts a Phase I Environmental Site Assessment. If the Phase I report highlights any environmental concerns, a more intrusive Phase II Environmental Site Assessment is usually conducted. A Phase II assessment often involves the collection and laboratory analysis of soil and groundwater samples measured against applicable regulatory criteria. In this manner, the purchaser may determine for itself the environmental condition of the property.

An intrusive environmental site investigation, however, is merely a snapshot in time and is only as comprehensive as the results from the areas tested. Untested areas, including those areas between boreholes, may still hold some surprises. Therefore, even with a satisfactory Phase II report, a purchaser could inadvertently acquire toxic real estate and its related liabilities.

17.7 Retroactive Liability of Owners and Occupiers

In many cases, environmental problems have been in existence for a number of years; at times pre-dating the environmental laws now in force. Generally, there is a statutory presumption against retroactivity unless the language of the statute states otherwise.

However, the inclusion of retroactive environmental liability has become increasingly common in Canadian legislation. The *Environmental Protection Act* (EPA) in Ontario, for example, is now understood to include past potential environmental offenders within the net of liability. Under the EPA, a *previous* owner of the source of a contaminant, as well as those persons who were in occupation of the source of contaminant, may be subject to an administrative order such as a control order. That order requires that the discharge of a contaminant into the natural environment be reduced or stopped. In addition, ancillary steps such as conducting studies and filing reports may be required. Previous owners and occupants may also be subject to a stop order, which is issued when the discharge of a contaminant endangers human health or property. In addition, persons who caused or permitted the discharge of a contaminant into the natural environment could be subject to a clean-up order. Only an administrative Record of Site Condition protects a prior owner/occupant from legacy administrative liability.

17.8 Leasing a Contaminated Site

A tenant should be aware that it may be responsible for contamination at a site even if it did not cause the contamination. Typically, a tenant leases both the land and buildings at a site. Case law in Canada suggests that a tenant who has control and management of buildings that are a "continuing source of contaminant" may be required to clean up the contamination. When a tenant leases land, the tenant has occupation of the soil and may therefore be responsible for its condition even if it results from a prior occupant's conduct. Thus, a current tenant may be liable for contamination that it did not cause simply by being in actual possession of land. A current tenant would also be held liable for additional contamination that occurs during its tenancy.

17.9 Prohibitions and Waste Management

(a) Federal Plastics Ban

In 2021, the federal government classified plastics as a "toxic substance" under the CEPA. This has allowed the government to propose and implement a number of requirements and prohibitions related to plastics. For example, the manufacture, import and sale of certain single-use plastics has been prohibited. In addition, the federal government has announced its intention to implement recycled content requirements in plastic products.

(b) Provincial Waste Management Legislation

Waste management is generally regulated at the provincial and territorial level. Many provinces have implemented wide-sweeping change to waste management laws and introduced Extended Producer Responsibility (EPR) regimes that shift responsibility for product waste away from governments and consumers and require producers of the products and packaging to be responsible for their full life-cycle.

In Ontario, for example, new regulations impose requirements on producers of electrical and electronic equipment, batteries, tires, and blue box materials (including most product packaging) to arrange, establish or operate a collection or management system, submit certain annual reports and comply with certain record keeping and audit obligations, and arrange, establish or operate promotion and education systems. In some cases, these requirements may apply to producers of products that do not have a place of business in Canada.

Québec has also expanded the scope of its EPR legislation to apply to new product categories, including household appliances and air conditioners, agricultural products, pressurized fuel containers and pharmaceutical products, and to redefine existing in-scope product categories.

18. Judicial System and Litigation

18.1 Introduction

Each province and territory in Canada has established a system of courts for the administration of justice. In addition, certain specialized federal courts exist to deal with income tax, intellectual property and other federal subjects. Since the provinces exercise jurisdiction over "property and civil rights" under Canada's constitution, dispute resolution in Canada is predominantly handled by provincial (and territorial) court systems. One consequence of this has been the development of diverse provincial (and territorial) legal systems across Canada.

While provinces (and territories) operate the provincial (and territorial) courts, the federal government is responsible for the appointment of most judges. The provinces (and territories) appoint some provincial (and territorial) court judges, in particular those who deal with specific criminal matters and small civil matters.

18.2 The Supreme Court of Canada

The Supreme Court of Canada is the final court of appeal in Canada for all matters. The Supreme Court holds three sessions a year and hears on average between 65 and 80 appeals a year. Decisions by the Supreme Court are binding upon all lower courts of Canada.

The Supreme Court is composed of the Chief Justice of Canada and eight judges who are all appointed by the Governor General on the advice of the Prime Minister. Appointments to the Supreme Court of Canada are subject to the constitutional requirement that three judges must be appointed from Québec. By convention, the remaining judges are appointed with three from Ontario, two from Western Canada and one from Atlantic Canada.

Leave to appeal to the Supreme Court is required on most matters.

A quorum consists of five members, but appeals are typically heard by panels of seven or nine judges.

18.3 The Federal Courts

(a) The Tax Court of Canada

The Tax Court is a specialized federal court dedicated to hearing appeals brought by taxpayers against assessments levied by the Canada Revenue Agency (CRA). Either the taxpayer or the CRA may appeal a decision of the Tax Court to the Federal Court of Appeal.

Currently, the Tax Court of Canada is composed of a Chief Justice, an Associate Chief Justice and 22 additional judges.

(b) The Federal Court

The Federal Court of Canada is a superior court with nationwide jurisdiction. The Federal Court consists of a Chief Justice, an Associate Chief Justice and 37 additional judges.

Unlike provincial courts, which exercise inherent jurisdiction, the Federal Court's jurisdiction is limited by statute. Accordingly, the Federal Court has exclusive jurisdiction over select legal matters, including disputes relating to intellectual property, shipping and navigation, and matters of national security.

(c) The Federal Court of Appeal

The Federal Court of Appeal is a Canadian appellate court that hears appeals from decisions rendered by the Federal Court and the Tax Court of Canada.

The Federal Court of Appeal is presently composed of a Chief Justice and 18 additional judges.

18.4 The Provincial and Territorial Courts

Each of Canada's 10 provinces and three territories has developed its own system of provincial and territorial courts. The typical structure involves a trial division and an appellate division. The structure of the Ontario court system is described below. However, subtle differences exist between the provinces and territories, and reference should be made to the applicable enabling and governing legislation to determine the operation and structure of the court systems in particular provinces and territories.

(a) The Trial Courts in Ontario

The Court of Ontario has two divisions: the Superior Court of Justice and the Ontario Court of Justice.

The Superior Court of Justice exercises original trial jurisdiction in civil matters in Ontario. While jury trials are available, most trials of commercial matters normally take place before a single judge. The Superior Court is divided into various branches, including: (i) the Small Claims Court; and (ii) the Divisional Court.

(i) The Small Claims Court, which provides a comparatively less formal forum for the disposition of disputes, has jurisdiction in civil matters where the amount in issue does not exceed C$35,000 exclusive of interest and costs.

(ii) The Divisional Court hears appeals from some judgments and orders of justices of the Superior Court of Justice and also hears appeals from decisions of administrative tribunals. Appeal hearings in the Divisional Court take place before a panel of three judges (except in cases of appeals from the Small Claims Court, which take place before a single judge).

The other branch of the Court of Ontario is the Ontario Court of Justice. The Ontario Court of Justice oversees matters relating to family law, civil law and the majority of criminal law matters, as well as matters that are provincial offences. Generally, proceedings in the Ontario Court of Justice are heard and determined by a single judge.

(b) The Court of Appeal for Ontario

The Ontario Court of Appeal exercises general appellant jurisdiction and is the last provincial avenue of appeal in Ontario.

The Ontario Court of Appeal is composed of the Chief Justice of Ontario, the Associate Chief Justice of Ontario and 28 other judges. Hearings before the Court of Appeal take place before at least three appellate court judges.

18.5 The Litigation Process

Civil litigation in all provinces and territories is composed of three stages: a pleadings stage, a discovery stage and a trial stage.

A pleading is a formal written statement of a party's claims or defences. Effectively, pleadings allow the parties to set out their positions and the substantive elements of the claim or the defence.

Discovery is the pre-trial phase in which each party obtains the arguably relevant evidence from the opposing party. The procedural and substantive laws governing pre-trial discovery in each province

and territory are designed to enable each party to the litigation to obtain all documents and detailed evidence relevant to the adverse party's case prior to trial. Essentially, parties are afforded the opportunity to assess the strengths and weaknesses of their cases and those of the opposing party. Doing so is designed to help parties move towards settling a case or resolving some of the issues prior to trial. These rules vary from jurisdiction to jurisdiction. Unlike depositions in the United States, provincial civil litigation rules do not usually provide for discovery of more than one representative of each of the parties without consent or leave of the court.

Between the discovery and trial stages, the courts have various "pre-trial" procedures with the aim of promoting settlements and speeding up the litigation.

Following discovery, litigants in Canada proceed to a trial, normally conducted by a judge alone. In certain matters, trials may be heard before a jury, made up of 6 jurors in civil cases and 12 jurors in criminal cases. Jurors are typically members of the community in which the trial is being heard, depending on the jurisdiction. However, jury trials are far less common in Canada than in the United States.

18.6 Simplified Procedure

In Ontario, cases involving a claim of less than C$200,000, but more than C$35,000, are subject to the "Simplified Procedure"[11], wherein some procedural mechanisms are either limited or eliminated. For example, the time limit for oral examinations for discovery is lowered to three hours regardless of the number of parties to be examined and cross-examinations on affidavits in advance of motions are eliminated. Additionally, jury trials are unavailable under the simplified procedure. All actions proceeding under the simplified procedure are also limited to a five-day summary trial. Therefore, the simplified procedure generally allows litigants to have a trial of their matter heard more quickly than under the ordinary rules.

The simplified procedure also imposes a limitation on costs and disbursement awards. Subject to the provisions of any other act or the adverse cost awards for failing to use the simplified procedure when required under the Ontario *Rules of Civil Procedure*, costs will be capped at C$50,000 and reimbursements will be limited to C$25,000 exclusive of HST. The limitations on cost recovery do not apply to actions commenced before January 1, 2020.

While it is possible for a plaintiff in a lawsuit to voluntarily select the simplified procedure for a case involving more than the monetary limit, defendants can object to that choice and force the matter to be dealt with under the ordinary procedure. The simplified procedure does not apply to class actions, construction lien actions, case managed actions, family law proceedings or actions before the Small Claims Court.

18.7 Jurisdiction

To adjudicate a matter before it, a Canadian court must have jurisdiction over the dispute by virtue of either domestic law or international convention.

Nonetheless, Canadian courts have long recognized the general principle of international law that allows a party commencing a civil action to select the jurisdiction where they wish the dispute to be heard. Yet, the plaintiff's choice of jurisdiction is not necessarily determinative. To establish jurisdiction over a dispute, a Canadian court must be satisfied that there is a "real and substantial connection" between the litigation and the jurisdiction. The inquiry proceeds in two stages. First, the plaintiff must establish that a "presumptive connecting factor" connects the litigation to the jurisdiction.

[11] Other Canadian jurisdictions have similar streamlined litigation regimes.

Second, the defendant is granted the opportunity to rebut the presumption and demonstrate that the connection is insufficient to establish a real and substantial connection.

The Supreme Court of Canada has identified four presumptive connecting factors in the context of tort claims:

(i) the defendant is domiciled or resident in the province;

(ii) the defendant carries on business in the province;

(iii) the tort was committed in the province; and

(iv) a contract connected with the dispute was made in the province.

It is important to note that the above list is not exhaustive. The Supreme Court has left open the possibility of other connecting factors for the discretion of the lower court.

Even if a real and substantial connection is established, however, a defendant to an action may argue that there is a more appropriate forum to resolve the dispute than the one chosen by the plaintiff. Canadian common law courts have developed a test, according to which a multitude of factors are examined to determine whether one jurisdiction is clearly more appropriate than another to ensure fairness to the parties and an efficient resolution of the dispute.

Although courts may apply the substantive law of another jurisdiction, the law of their own forum will be applied to all procedural matters.

18.8 Contractual Forum Selection Clause

The parties to litigation in Canada are generally free to select a forum for the adjudication of their disputes through forum selection clauses. Express selections are generally respected, however, courts may find such clauses unenforceable if the party seeking to continue the matter establishes “strong cause” that the forum selection clause should be displaced. The court might consider, for example, gross inequality of bargaining power, sophistication of the parties, whether the contract is a standard form contract and the relative costs of litigating the matter in either jurisdiction. Whether the court will find the clause unenforceable will depend on the circumstances. Additionally, if the jurisdiction selected in the contract has no connection whatsoever to the subject matter of the dispute and one or more of the litigants argues that the jurisdiction is inconvenient, the court may override the contractual forum selection clause.

Similarly, Canadian courts will generally honour a contract in which the parties to a dispute had agreed that any disputes arising from or concerning their relationship will be governed by the substantive laws of another jurisdiction. Canadian courts often hear such disputes, and the parties are required to prove the substantive law of the foreign jurisdiction through testimony from a lawyer who is an expert on the law of that jurisdiction. If no such evidence is presented, Canadian courts will generally consider the foreign law to be the same as the law of the province or territory in which the case is being heard.

18.9 UNCITRAL

As part of a response to globalization, the Canadian federal and provincial governments have begun to enact corporate and commercial legislation to reflect the international character of the Canadian economy. An example is Canada’s uniform acceptance of the (United Nations Commission on International Trade Law) *UNCITRAL Model Law on International Commercial Arbitration* (Model Law), which has been adopted by all the provinces. In addition, Ontario and British Columbia have adopted the 2006 amendments to the Model Law into their respective International Arbitration legislation.

18.10 Alternative Dispute Resolution

There has been a rise in the use of alternative dispute resolution (ADR) processes over the few decades. ADR is a refers to the multitude of ways that parties can settle disputes (either with or without the help of a third party).

Three of the main types of ADR are: negotiation, mediation and arbitration.

(a) Negotiation

Negotiation is broadly defined as any form of direct or indirect communication whereby parties who have opposing interests discuss the form of any joint action which they might take to ultimately resolve the dispute between them. There are a number of advantages to using negotiation as a dispute resolution tactic, including:

(i) negotiation is the most flexible form of dispute resolution and the parties can shape the negotiation in accordance with their own needs;

(ii) negotiation may preserve, or in some cases enhance, the relationship between the parties;

(iii) negotiation can remain completely confidential without the need to involve any third party; and

(iv) negotiation may be less expensive and reduce the delays of other processes, particularly litigation.

(b) Mediation

Mediation is, in effect, a negotiation between disputing parties that is assisted by a neutral party. While the mediator cannot impose a settlement, the presence of the mediator often helps to alter the dynamics of the negotiation and shape the final settlement. There are a number of advantages to mediation as a dispute resolution mechanism, including:

(i) mediation allows the parties to design a process which suits their needs;

(ii) the presence of the neutral-third party allows for a controlled dialogue; and

(iii) the presence and expertise of a mediator allows the parties to explore more creative settlement options openly.

(c) Arbitration

Like litigation, arbitration uses an adversarial approach that requires a neutral third party to render a decision. As with negotiation and mediation, there are several advantages to using arbitration as a dispute resolution mechanism, including:

(i) the parties can select an arbitrator (e.g., on the basis of expertise or experience);

(ii) the rules of procedure can be as formal or informal as the parties and their counsel determine; and

(iii) the cost of proceedings can be more easily contained.

See also Chapter 20 - *Arbitration*

19. Class Actions

19.1 Introduction

Class actions are permitted by legislation in all 10 Canadian provinces. The Federal Court Rules also allow for class actions. In some instances, Canadian courts have certified national classes to allow defendants residing in jurisdictions without class action legislation to participate in class proceedings.

In Ontario, class actions are regulated under the *Class Proceedings Act, 1992*. Under the legislation, a motion must be made to a judge of the Superior Court of Ontario for an order certifying a traditional lawsuit as a class proceeding.

In Ontario, a class action may be dismissed for delay within a year of the statement of claim being filed unless the plaintiff takes proactive steps, such as filing their certification motion or the court ordering that the proceeding not be dismissed and establishing a timetable.

19.2 Goals of Class Actions Legislation

There are three goals in class action legislation: (i) to achieve judicial economy or "litigation efficiency"; (ii) to improve access to justice; and (iii) to modify the behaviour of actual or potential wrongdoers.

Class actions are meant to achieve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. They are meant to improve access to justice by determining claims that might not otherwise be litigated on an individual basis due to economic and/or social barriers. Courts view the deterrence element of class actions as an important tool to modify the behaviour in actual or potential wrongdoers on a large scale.

19.3 Certification

In Ontario, before certifying a class proceeding, a court hearing a motion for class certification must be satisfied that:

(i) the pleadings in the action disclose a cause of action;

(ii) there is an identifiable class of two or more persons that would be adequately represented by the representative plaintiff;

(iii) the claims of the class members raise common issues;

(iv) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(v) there is a representative plaintiff who: (A) would fairly and adequately represent the interests of the class; (B) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying the class members of the proceeding; and (C) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

In Ontario, a class proceeding will be preferable if it is superior to all reasonably available proceedings and if common questions between the class members predominate over any issues of individual class members.

The test for certification is broadly similar in all common law provinces.

The Federal Rules provide that a court must be satisfied that the pleadings "disclose a reasonable cause of action".

The Ontario legislation also stipulates that the following issues will not, themselves, constitute restrictions to the certification of class proceedings:

(i) the relief claimed includes damages that require individual assessment after determination of the common issues;

(ii) the relief claimed relates to separate contracts involving different class members;

(iii) different remedies are sought for different class members;

(iv) the number of class members or the identity of each class member is not known; and

(v) the class includes a subclass or subclasses whose members have claims that raise common issues not shared by all.

In Ontario, an order for certification can be appealed to the Ontario Court of Appeal.

An order certifying a class proceeding is not a determination of its merits. However, the pressure that is brought to bear on a defendant once a class proceeding has been certified often results in the settlement of the lawsuit. Defendants usually strenuously resist certification because a class action allows many claims that would not be litigated on an individual basis to be asserted en masse with minimal risk or cost to the class members. In some instances, defendants consent to certification either as part of a settlement agreement or, if a defendant has a strong case on the merits, to resolve many claims at once rather than having to defend a multiplicity of lawsuits.

Once a class action is certified, the parties are required to notify potential class members who will then have the ability to either opt-in or opt-out of the action, depending on the provisions of the governing legislation of the relevant jurisdiction.

Distinct rules apply in Québec, where the equivalent certification process is called “authorization”. Facts pleaded by the plaintiff are assumed to be true, the plaintiff does not need to file evidence, and the defendant generally cannot cross-examine or file evidence on the motion. The plaintiff only needs to show that they have an arguable case.

19.4 Trial of Common Issues

Following the class certification, the certified common issues of the proceeding will be litigated. The action on the common issues will proceed much like a traditional lawsuit, with documentary and oral discovery, pre-trial procedures, exchange of expert reports and, absent any resolution, trial of the common issues.

After the common issues have been litigated, the court has discretion to determine any individual issues that may be litigated separately.

19.5 Settlement

Many class proceedings are resolved by way of settlement before the proceeding reaches the trial of the common issues. A settlement in a class proceeding will not be binding unless it has been approved by a court as fair, reasonable and in the best interests of the class. Such approval cannot be granted until after the class proceeding has been certified. Once it is granted, however, the settlement binds all members of the class (subject to a class member’s right to opt-out, as the case may be).

20. Arbitration

20.1 Legislative Framework

In Canada, each of the provinces has enacted legislation governing domestic and international arbitration, respectively.

The Canadian Parliament and the provincial legislatures except Québec's have implemented legislation adopting the *United Nations Convention on the Reciprocal Recognition and Enforcement of Foreign Arbitral Awards* (New York Convention). The federal government and each of the provinces except Québec have adopted variations of the (United Nations Commission on International Trade Law) *UNCITRAL Model Law on International Commercial Arbitration* (Model Law), ensuring relative uniformity in the international arbitration process across Canada. Further, in many provinces, the Model Law principles have been adopted to form the basis of legislation concerning domestic arbitrations. In Québec, which operates on a French civil law tradition, the Model Law provisions are tracked within the Civil Code of Québec and the Code of Civil Procedure.

In 2014, the Uniform Law Conference of Canada Project released a draft *Uniform International Commercial Arbitration Act*, which adopts the 2006 amendments to the Model Law and is open for adoption into federal and provincial legislation.

In 2017, Ontario was the first province to adopt the amendments with its *International Commercial Arbitration Act*. British Columbia followed in May 2018 by amending its own *International Commercial Arbitration Act*. In 2019, the Alberta Law Reform Institute recommended that Alberta adopt the 2006 amendments, but Alberta has yet to amend its act. Prince Edward Island has also introduced a bill to bring its *International Commercial Arbitration Act* in line with the 2006 amendments. The bill was first read by the Legislative Assembly in February 2022; however, it has not yet received royal assent.

Each of the federal and provincial domestic and international arbitration acts sets out basic procedural law governing arbitrations, but the detailed rules of procedure for the conduct of any particular arbitration are left to the parties to decide by agreement, or failing agreement, by order of the arbitral tribunal.

20.2 Role of Courts in Arbitration

Canadian courts are generally favourable to arbitration and will grant a mandatory stay of proceedings in favour of arbitration when there is a valid arbitration agreement. The courts do, however, retain limited authority to refuse a stay of proceedings under the Model Law when they find that the arbitration agreement is null and void, inoperative or is incapable of being performed. In domestic arbitrations, the courts have somewhat broader rights to refuse a stay, although those rights are also premised on the grounds enunciated under the Model Law.

In both domestic and international arbitrations, most Canadian legislation allow an arbitral tribunal to grant broad interim relief. Courts are also able to make orders if called upon, such as for the detention, preservation and inspection of property, interim injunctions or such other interim measures of protection deemed by the court to be appropriate in the circumstances. A party may seek interim relief at any stage of an arbitral proceeding and may not even need to have commenced a proceeding provided that the applicant demonstrates the dispute will be taken to arbitration and the protection of the court is required in the intervening period.

20.3 Limits on Arbitration

While Canada is generally a favourable climate for arbitration, there are circumstances in which arbitration agreements will be prohibited or of limited effect. For instance, consumer protection legislation in some provinces provide that, insofar as an arbitration or other dispute resolution clause

in a consumer contract purports to remove the ability of a consumer to commence an action or a class action, the arbitration clause is of no force and effect.

In addition, arbitration agreements included in employment contracts will be invalid and unenforceable if they are deemed to be unconscionable. An arbitration agreement may be deemed to be unconscionable if there is an inequality in bargaining power between the parties and a resulting improvident bargain. For example, a court may find an arbitration agreement unconscionable where it would effectively deny the party with the weaker bargaining power any access to a remedy.

20.4 Institutional and Ad Hoc Arbitration

Arbitrations governed by institutional rules may be heard in Canada, as can ad hoc arbitrations, whereby the parties or arbitrators determine the procedure under which the arbitration will be conducted.

The International Chamber of Commerce, the American Arbitration Association/International Centre for Dispute Resolution (ICDR)/ICDR Canada, the Alternative Dispute Resolution Institute of Canada, the Vancouver International Arbitration Centre and the London Court of International Arbitration are the institutional arbitrations most frequently seen in Canada.

There are a number of private dispute resolution centres in Canada offering various services to assist in the arbitration process. These centres will arrange for appropriate facilities for hearings, provide the necessary administrative support during the process and provide parties with a list of arbitrators for appointment consideration.

20.5 Enforcement of Arbitration Awards

A domestic arbitral award, while binding between the parties, will not by itself confer enforcement rights. To enforce the award, a judgment recognizing the award is necessary. Provided the period for appeal has lapsed, the court is required, on application, to render judgment in accordance with the terms of the award.

Under the Model Law, an arbitral award may be enforced by the court, irrespective of the country in which the award was made. The court is required to enforce the award unless the defendant can bring itself within one of the exceptions contained in the Model Law.

Under the Model Law, the court may refuse to recognize or enforce an arbitral award if:

(i) a party to the arbitration agreement was under some incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or failing any indication thereof, under the law of the country where the award was made;

(iii) the party against whom the award is sought to be enforced was not given proper notice of the appointment of the arbitrator or the arbitral proceedings or was otherwise unable to present its case;

(iv) the award deals with a dispute not contemplated or not falling within the terms of the submission to arbitration or contains a decision on matters beyond the scope of the submission to arbitration;

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or failing such an agreement, was not in accordance with the law of the country where the arbitration took place; or

(vi) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, the award was made.

Once recognized by a Canadian court, a foreign arbitral award is enforceable in the same manner as a judgment or order of that court.

Canada is a signatory to the New York Convention, which provides for mutual recognition and enforcement of arbitral awards in countries that are signatories to the Convention. The federal government and each of the provincial governments have enacted legislation to adopt the provisions contained in the New York Convention. Therefore, arbitral awards rendered in foreign countries that are a party to the New York Convention are summarily enforceable in Canada upon confirmation by the court.

If an arbitral award is rendered in a country that is not a signatory to New York Convention, the party seeking to enforce the award will be required to prove the award under the requirements of the common law or, if in the province of Québec, under the provisions of the *Civil Code of Québec*.

20.6 Power to Appeal or Set Aside an Award

Under Canada's domestic arbitration legislation, a party may, with leave of the court, appeal an award on a question of law if the arbitration agreement is silent on the rights of appeal. A court may grant leave to appeal only if it is satisfied that the importance to the parties of the matters at stake justifies an appeal and the determination of the question of law at issue will significantly affect the rights of the parties. If the arbitration agreement specifically permits appeal, it is as of right and the necessity of leave will not be required. Alternatively, if the arbitration agreement specifically excludes appeals, providing that an award is final and binding, there will be no right of appeal irrespective of the importance of the issue or the impact on the rights of the parties.

On a domestic appeal, the court may confirm, vary or set aside the award or remit the award to the tribunal with the court's opinion on any question of law that was raised on the appeal. The court may also give directions on the conduct of the arbitration. However, an appeal may be brought only after an award has been made.

International awards rendered pursuant to the Model Law are final, without a right of appeal. The same specifically provides that no court shall intervene and there is no provision in the Model Law for appeals. As noted above, however, it permits a court to set aside an award if the arbitral tribunal lacked jurisdiction to make the award, exceeded its jurisdiction in making the award or where there was a lack of proper conduct or procedure in the arbitration procedure.

21. Product Liability

21.1 Introduction

Many business enterprises involve the design, manufacture, distribution and sale of products. If a product causes damage, those responsible can be held liable for any resulting damage or loss under Canadian law.

Canadian product liability law may be found in the law of negligence and contract. Under Canadian contract law, manufacturers and others may be liable for damage caused by breach of contractual warranties and conditions. Under Canadian negligence law, anyone who carelessly designs, manufactures or distributes a product may be held responsible for any resulting damage or injury.

As mentioned in Chapter 1 - *Constitutional Matters*, the Canadian legal system is comprised of co-existing provincial and territorial regimes, one or more of which may govern a particular product liability claim. Although the standards of liability and the size of damage awards vary between provinces, the various regimes have many similarities. Still, those particularly concerned with product liability should consult the laws of the appropriate jurisdiction where the enterprise operates.

21.2 Consumer Product Safety Laws and Mandatory Recalls

The *Canada Consumer Product Safety Act* (CCPSA) is federal legislation which imposes record keeping and mandatory reporting obligations relating to consumer products on members of the supply chain. The CCPSA prohibits the manufacture, import, advertising or sale of consumer products that pose an unreasonable hazard to human health and safety. A manufacturer, importer or seller of a consumer product in Canada that has become aware of any event, defect, incorrect or deficient label, or packaging in connection with their product that has resulted or may reasonably be expected to result in death or serious adverse health effects must report the incident to Health Canada within two days.

Under the CCPSA, the Minister of Health has broad powers to order a mandatory recall, take corrective measures or order testing of any consumer product where it is reasonably believed that there is a danger to human health and safety. Recalls are carried out to remove consumer products from the Canadian market that may pose a risk to human health or safety. The recall process generally includes stopping all manufacturing, importing, distributing, advertising and selling of the affected products, as well as communicating to consumers the actions they should take to prevent exposure to the danger posed by the affected products.

The CCPSA provides for administrative monetary penalties (AMPs) to be imposed on persons who fail to comply with orders issued by the Minister of Health. AMPs are accompanied by Notice of Violation Reports which inform Canadians as to the nature of the product and company at issue as well as the nature of the CCPSA non-compliance and contravention of the Minister's Order.

In addition to mandatory recalls, the CCPSA also provides for voluntary recalls that are negotiated with Health Canada. A regulated party might decide to initiate a voluntary recall because of a health or safety issue relating to their product, a part or component of their product including its packaging or in relation to warnings, instructions or labels that are associated with their product.

Depending on the product, other safety-related legislation and regulatory regimes may apply. For example, a recall of a drug or medical device would be governed by the *Food and Drug Regulations* and the *Medical Devices Regulation*, respectively.

21.3 The Law of Contract

Unlike negligence, which is discussed in Section 21.4 – *The Law of Tort*, below, contractual liability does not require proof of fault. Liability under contract requires only proof that a warranty or condition was broken and that damages ensued.

Warranties and conditions are promises made by contract. They typically address things like quality, performance and durability and can be either express or implied. A breach of contractual warranty claim is often the remedy of choice for cases involving defective or dangerous products.

An injured consumer or business can usually sue for breach of warranty only where they have a contractual relationship with the party that is being sued. In most cases, Canadian courts will find that a contract exists between the manufacturer and the seller of the goods.

(a) Express and Implied Warranties

Most manufacturers provide express warranties for things like quality, performance and durability. Manufacturers must ensure that their products possess the attributes that are promised to consumers. These types of warranties are enforced under provincial sale of goods legislation such as the Ontario *Sale of Goods Act*.

Manufacturers and retailers may limit their exposure for damages for breach of warranty by providing general disclaimers of warranties or other exclusionary clauses. The disclaimer of warranties and conditions implied under the sale of goods legislation must be in explicit, clear and direct language. The exclusionary language must include reference to conditions as well as warranties in order to exclude implied conditions under the sale of goods legislation.

Provincial sale of goods legislation imply certain warranties and conditions into most sales contracts, including:

(i) Warranty of Fitness for Intended Purpose

The law implies a term that the product must do what it was intended to do. Also, the court can imply a warranty for a particular purpose if the buyer tells the seller about an intended but extraordinary purpose, the seller suggests that the product is suitable and the goods are normally supplied in the ordinary course of the seller's business. It would be prudent for a seller to point out that its products are unsuitable for some collateral but reasonably anticipated purpose.

(ii) Warranty of Merchantable Quality

The law provides that products must be of merchantable or saleable quality. This means that the product should be in such condition that a buyer acquainted with all of the facts would still buy the product at the stipulated price. However, where a buyer has inspected a product before accepting it, there may be no liability for any patent defects that the buyer's inspection should have uncovered. The law also recognizes that a manufacturer or vendor cannot warrant that its goods will be perfect. Therefore, buyers usually have no legal recourse for minor defects that do not cause appreciable harm.

21.4 The Law of Tort

(a) Negligence

The law of negligence provides a remedy to individuals who have been harmed by conduct that falls below societal standards. In product liability law, this means that those responsible for bringing a product to market may be held responsible for damages that arise from their negligent actions.

To sue in negligence, a claimant must show that: (i) the other party owed it a duty of care in connection with the product; (ii) the other party's actions or omissions in connection with that product breached the applicable standard of care; (iii) the other party's breach caused an injury that is not too remote and (iv) the claimant actually suffered harm. A risk, or increased risk, of harm is not legally compensable. The claimant's own conduct may also create a bar to recovery.

Anyone who might reasonably come into contact with a product may sue in negligence. There is no requirement for a contractual relationship between the injured party and the proposed defendant. In addition, anyone that contributes to the design or manufacture of a product or its components, including those with intermediate care and control, can be held liable for failing to exercise reasonable care. This includes distributors.

Manufacturers are most commonly named as defendants in product liability cases. Claims against manufacturers may relate to the negligent manufacture of a product, the negligent design of a product or a failure to warn consumers about reasonably foreseeable dangers associated with a product. Distributors have duties similar to those of manufacturers and may be liable for negligence relating to a failure to inspect the products, a failure to warn consumers of potential safety risks or for selling a product to a consumer knowing that the consumer intends to use the product for an improper and unsafe purpose.

(b) Strict Liability

In some countries, manufacturers are held strictly liable for injuries caused by their defective products. If a product sold is not fit for its specific purpose and the goods are not of merchantable quality, the seller will be strictly liable without the plaintiff having to prove fault or negligence. The plaintiff may rely upon a breach of these conditions to repudiate the contract or claim damages or both.

Strict liability is available in contract law, however there is no strict liability in tort law for manufacturers in Canada. In other words, there is no strict liability for manufacturers for damages or injuries caused by a defective or dangerous product that is based on a negligence claim. Nonetheless, those doing business in Canada should be aware of certain trends in Canadian courts. First, manufacturers of potentially dangerous or technically complex products may be held to a higher standard of care. Second, the court might impose liability by presuming negligence where a product causes an injury, unless the manufacturer can rebut that presumption. Third, if a manufacturer breaches a statutory standard, the courts may impose liability without proof of negligence or an express contractual undertaking.

(c) Negligent Manufacture

Manufacturers have a primary duty to produce products that are reasonably safe for consumers. A consumer who alleges that a manufacturer negligently designed a product must prove that the product is defective in the sense that it falls short of what a consumer could reasonably expect of the product in the circumstances or that it was not made in accordance with the manufacturer's specifications. If it is proven that a defect originated during the manufacturing process, the court will generally presume that negligence has occurred and the manufacturer will bear the burden of proving that it was not responsible for the defect. A manufacturer must show that it followed proper procedures and protocols related to employee training, inspection and quality control.

(d) Negligent Design

A design defect typically arises when the product is manufactured as intended but the design creates a malfunction or creates an unreasonable risk of harm that could have been avoided by using an alternative design. A manufacturer may be held liable if a consumer is able to identify a design defect in a product, establish that the defect created a substantial likelihood of harm and prove that there exists an alternative design that is safer and economically feasible to manufacture. Courts will

generally apply a risk-utility test, which requires the consideration of a variety of factors to determine whether a reasonable alternative exists that would have been safer for consumers. This area of law does not apply to claims for pure economic losses resulting from non-dangerous, negligently-designed consumer products.

(e) Duty to Warn

Manufacturers also have a duty to warn of the dangers associated with their products, even when their products are properly designed and manufactured. This duty includes dangers that the manufacturer actually knows or ought to know about their products. Most manufacturers fulfil this duty by including proper warnings in their product literature and affixing prominently placed warnings on the product itself. Although a manufacturer must continue to warn even after the product is sold, there is no duty to warn of dangers associated with a product if those risks are obvious or avoidable through the exercise of common-sense care by the consumer. A manufacturer that does not have direct contact with the ultimate consumer may discharge its duty to warn by providing warnings to "learned intermediaries": i.e., experts such as doctors, who interact directly with consumers.

21.5 Misstatement or Misrepresentation

Manufacturers and distributors may be held liable for false statements they make about their products or services. In other words, where someone makes an assurance regarding a product, the buyer or consumer is entitled to rely upon it. If it is wrong, buyers can recover their associated losses. A claim for misrepresentation may arise in the context of a contract between the consumer and manufacturer, or it may result from a consumer's reliance on an oral or written statement, referred to as "negligent misrepresentation". Typically, there is no contract between the manufacturer and the consumer or between the retailer and the purchaser.

Canadian courts may impose liability where statements are fraudulently or negligently made or where those statements are held to be a warranty. To avoid liability, the substance of any statements about a product or service must be true.

21.6 Breach of Statute

Statutes set specific standards that regulate some business activities. Non-compliance with these standards can be compelling evidence in a product liability case. Conversely, compliance with statutory standards can help support a defence.

21.7 Contribution and Indemnity

Where a manufacturer or retailer is alleged to be responsible for damage caused by a defective product, they often look to others to share in any liability. In practice, the injured party will usually sue only the seller and the manufacturer. However, the parties being sued may look to others involved in the manufacturing or distribution process for contribution and/or indemnity (e.g., the manufacturer of sub-components). For instance, retailers will often claim contribution and indemnity from the manufacturer of the allegedly defective product and other entities involved in the distribution chain. Manufacturers may look to those involved in the design of the product.

If more than one party is held responsible, the court may apportion responsibility. However, all of the responsible parties may remain individually liable to the injured plaintiff for all damages. The court will also examine whether an injured party's own conduct contributed in some way to the injury or loss, in which case the defendant's responsibility can be reduced or even eliminated.

21.8 Damages

In a Canadian product liability lawsuit, the court may award damages to compensate the injured party for virtually all losses caused by the defective product. Damages are generally compensatory in

nature, but punitive and exemplary damages are also available as an exceptional remedy. The court essentially tries to put the injured party in the position that they would have been in if no damage had been suffered.

For claims in breach of warranty, as with most claims in either contract or tort, plaintiffs typically have a duty to take reasonable steps to mitigate their losses. Where a plaintiff fails to take reasonable steps to mitigate, the court will often assess damages as if the plaintiff had taken those steps.

The injured party must generally decide between pursuing a claim in contract or in negligence prior to trial. There are few limits on the damages that a court can award. Generally, any foreseeable damages connected to the wrongdoing may be recovered. For personal injury damages, the greatest component awarded by Canadian courts is typically the amounts awarded for loss of income and cost of care.

Damages may be assessed under several categories such as pre-trial pecuniary loss, non-pecuniary loss, lost future income, future care, economic loss, family claims, punitive damages, interest, taxes and legal costs.

Generally, there is no right in tort protecting against the negligent or intentional infliction of pure economic loss (e.g., lost profits, value, and goodwill). As noted above, a plaintiff typically must demonstrate that they suffered bodily or property damages in order to sustain a tort claim.

In addition to granting damage awards, Canadian courts also allow for various types of interim relief in certain limited circumstances. Interim relief can include interlocutory injunctions to prevent specified conduct, Mareva injunctions to seize and secure a defendant's assets to satisfy any judgment, orders for the interim preservation of property, and Anton Piller orders to grant a plaintiff access to a defendant's premises to inspect and secure evidence for trial.

21.9 Limiting and Excluding Liability

A limitation period restricts the period of time in which an action may be started. It is very important to confirm the applicable period in a relevant jurisdiction as soon as an injury occurs or a claim is made. Most Canadian jurisdictions have their own limitation periods. Canadian common law provinces require that a tort or contract action must be commenced within either two or six years of the date that the plaintiff reasonable became aware of the claim. Typically, the limitation period begins to run from the date of injury or the date that the injured party became aware of or should have become aware of the claim.

A manufacturer or vendor can include contract terms that attempt to exclude or limit their liability for negligence, implied warranties or the statutory implied conditions under sale of goods legislation. Exclusion clauses may be used as a complete defence to a claim in contract or in negligence. However, implied warranties cannot typically be excluded from consumer sales. Most non-consumer sale contracts expressly exclude these warranties by including prominent language to that effect.

Courts occasionally refuse to apply exclusion clauses on the basis of a lack of adequate notice to the consumer, misrepresentation, ambiguity, inconsistency with other provisions in the contract or unconscionability. Therefore, it is very important to have this language reviewed by legal counsel to ensure that it is sufficient and enforceable, particularly where it is included in a standard-form agreement.

21.10 Avoiding and Minimizing Liability

(a) Insurance

Those carrying on business in Canada should obtain insurance coverage for product liability or product recall claims. While product liability insurance is expensive and often carries significant

deductibles, it is usually a prudent investment. Coverage may be available to cover loss of sales, product recall expenses, brand rehabilitation expenses and certain other extra expenses.

Foreign manufacturers selling products in Canada should ensure that their local insurance covers foreign claims. Insurance benefits may also include the legal cost of defending any claims. For this reason and because the insurer usually bears the major risk, the insurer may insist on the right to choose the legal firm to defend the lawsuit. Insured parties may wish to consider retaining the right to exercise some control over the selection of counsel and the conduct of the defence.

(b) Risk Management and Loss Prevention

Businesses should have risk-management and loss-prevention programs to prevent and manage product liability claims. These should include a regular review of: (i) quality control procedures; (ii) packaging/labelling to ensure that appropriate instructions and warnings are included; (iii) contracts to ensure that they offer adequate and enforceable protection; and (iv) advertising materials. In addition, they should include procedures to allow for customer identification where practicable to facilitate quick communication of information upon discovery of a problem. In the event of a lawsuit, a judge may examine these programs in assessing the reasonableness of the steps taken to avoid and manage consumer injuries.

22. White-Collar Crime

22.1 Criminal Liability for Corporations and Corporate Officials

(a) Contributions

Under the federal *Criminal Code*, executives, officers and directors of a corporation do not enjoy immunity from criminal or quasi-criminal liability. The *Criminal Code* addresses criminal activity by organizations, including corporations. It imposes serious penalties for negligence, including violations of workplace health and safety and the failure to comply with securities laws.

Liability extends beyond corporate entities to include organizations. Organizations are defined in section 2 of the *Criminal Code* as "(a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or (b) an association of persons that (i) is created for a common purpose, (ii) has an operational structure, and (iii) holds itself out to the public as an association of persons". This includes organized criminal gangs, governmental institutions as well as non-profit organizations.

Organizations may face liability for actions committed by a "representative" who plays an important role in the establishment of an organization's policies or is responsible for managing an important aspect of the organization's activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer. The inclusion of the word "managing" extends senior officers into the operational level. The *Criminal Code* defines a representative as "a director, partner, employee, member, agent or contractor of the organization". This includes situations where corporations outsource their work. Damages caused by contractors are therefore potentially covered by section 2 of the *Criminal Code*.

The Crown bears the burden of proof to demonstrate beyond a reasonable doubt that a person is a senior officer. However, courts have interpreted the term "senior officer" broadly to encompass a wide range of individuals involved in the management of a business.

(b) Subjective Intent Crimes

Section 22.2 of the *Criminal Code* stipulates that an organization may be found guilty of an offence other than negligence if at least one of its senior officers:

(i) acting within the scope of their authority, is a party to the offence;

(ii) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or

(iii) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.

A corporation will only be found to be a party to the offence if the senior officer was acting with the intent of benefiting the organization. In addition to the criteria of section 22.2, the senior officer's intent must also be proven by the Crown beyond a reasonable doubt.

Corporate compliance by a senior officer, consisting of the following elements: leadership; risk assessment; standards and controls; training and communication; and monitoring and audits, may support a defence based on taking reasonable measures.

(c) Criminal Negligence

The Crown must prove beyond a reasonable doubt two elements to render an organization liable for the negligence of a representative. First, the Crown must prove that a representative or representatives acting within the scope of their authorities were parties to the offence. Second, there must be proof that a senior officer who is responsible for the aspect of the activities demonstrates a "marked" departure from the standard of care that could be reasonably expected to prevent the representative from being a party to the offence.

Section 22.1 of the *Criminal Code* "recognizes the organic structure of the modern corporation" where decisions are not made by one person but rather through the collective efforts of its senior officers and representatives.

Case law illustrates that an organization's due diligence systems play an important role in providing evidence that reasonable standards were applied or reasonable measures were taken.

(d) Remediation Agreements

In 2018, the *Criminal Code* was amended to create a remediation agreement regime. Canadian remediation agreements may be more commonly known as deferred prosecution agreements. Remediation agreements are entered into by the Crown and a corporate defendant facing criminal liability. Under a remediation agreement, the corporate defendant avoids prosecution in exchange for its agreement to certain terms and conditions.

Canada's first remediation agreement was entered into in 2022 in the context of fraud and conspiracy charges against an engineering and consulting company. The charges arose from a lengthy bribery investigation. Terms of the agreement include payment of a financial penalty, cooperation in any related investigation or prosecution and reporting obligations. If the terms of the agreement are satisfied, the charges will be withdrawn.

22.2 Securities Regulations

Breaches of some provisions of Ontario's *Securities Act* (OSA) may lead to quasi-criminal responsibility. A person may be found liable to a fine of up to C$5 million or imprisonment for up to five years less a day, or to both, for making a misleading or untrue statement in a securities filing or prospectus or for contravening Ontario securities law. These penalties do not apply to statements made to the Ontario Securities Commission (OSC) in a submission in respect of a proposed rule or policy. The OSA also provides for the defence of due diligence for violations of certain provisions.

The OSA bans insider trading and tipping for a person or company in a "special relationship" with an "issuer" who has knowledge of a material fact or material change that has not been generally disclosed. (See Section 28.7 – *Securities – Insider Trading and Tipping*, below.) These are strict liability offences and no mens rea needs to be established by the prosecution for a person to be found guilty of insider trading or tipping. This does not deny the accused the defence of due diligence. Furthermore, in addition to imprisonment of up to five years less a day, anyone found guilty of insider trading or tipping is liable to a minimum fine equal to the profit made or the loss avoided by the person or company as a result of the contravention and a maximum fine equal to the greater of (a) C$5 million, and (b) the amount equal to triple the amount of the profit made or the loss avoided by reason of the contravention. If it is not possible to determine such profit or loss, the maximum fine is C$5 million.

The OSC has strengthened white-collar crime enforcement through increased use of administrative monetary penalties of up to $1 million for each failure to comply, trading bans and disgorgement orders. These enforcement mechanisms are more flexible, as they do not engage the presumption of innocence and other constitutional safeguards for an accused.

23. Information Technology

23.1 Electronic Commerce

Electronic transactions are widely used and increasingly encouraged, especially in consumer transactions, and they are legally valid in Canada unless expressly prohibited and provided certain standards of authentication are met. Federal and provincial e-commerce legislation provides greater certainty in the use of electronic means of conducting business and other transactions.

The federal *Personal Information Protection and Electronic Documents Act* clarifies the status of electronic documents and digital signatures in areas governed by federal law. Provincial legislation addresses similar issues for transactions and documentation subject to provincial jurisdiction. Ontario's *Electronic Commerce Act, 2000* is a representative example of such provincial legislation and addresses issues such as electronic signatures, contracts and evidence.

Legal principles relating to electronic commerce also continue to emerge through the application and interpretation of existing law in areas such as contracts, taxation, securities, criminal law (including libel and fraud), banking, payment systems, sale of goods and services, consumer protection, intellectual property and privacy.

23.2 Communications Law

In Canada, as in most other countries, the Internet and other "new media" have flourished in an environment of little or no direct regulation. In 2012 the Canadian Radio-television and Telecommunications Commission (CRTC) upheld a 1999 decision that Internet content would generally not be subject to regulation in Canada under the existing *Telecommunications Act and Broadcasting Act*. In particular, telecommunications-analogous new media services provided over the Internet, such as PC-to-PC voice conversations, are generally not subject to regulation. Similarly, broadcasting, as defined in the *Broadcasting Act*, does not encompass alphanumeric or text-based new media services that are sufficiently "customizable" by individual users and do not constitute transmission "to the public". This generally includes all Internet-based and mobile point-to-point broadcasting services.

However, the regulatory climate surrounding online streaming services (i.e., broadcasting via the Internet) is evolving. On February 2, 2022, the Government of Canada introduced Bill C-11, *An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts*, known by its short title as the *Online Streaming Act*. At the effective date of this publication, Bill C-11 has cleared the House of Commons and completed third reading in the Senate. It proposes to expand the definition of "broadcasting undertaking" under Canada's *Broadcasting Act* to include online undertakings, such as streaming content on online platforms. This would impose new requirements on providers of online streaming content, such as minimum Canadian content and language requirements, and may impose contribution fee requirements for online streaming services.

23.3 Jurisdiction in Cyberspace

Jurisdiction generally depends on establishing a nexus between the person(s) and/or action(s) to which a law or regulation applies. In the context of disputes, it requires finding a territorial connection between a court and the dispute in question. The breadth of this discretion is constrained in two ways. First, a "real and substantial connection" is required between the cause of action and the jurisdiction. Secondly, the jurisdiction in question must not be *forum non conveniens*, i.e., relatively less appropriate in which to hear a dispute than in another jurisdiction.

With respect to the Internet, some courts in Canada have followed a "passive versus active" test that looks to the predominant type and level of activity taking place on a website. "Passive" sites that

simply provide information generally will not be subject to laws or courts outside their own jurisdiction. On the other hand, “active” sites that specifically target users in particular jurisdictions or involve a high level of interaction with users could in theory fall under the authority of courts in any jurisdiction from which the site can be accessed. The courts in Canada are increasingly likely to assume jurisdiction where the reach of online sites encourages use in Canada.

Many Canadian provinces provide a statutory mechanism for the enforcement of judgments from certain reciprocating foreign jurisdictions under conventions or other bilateral arrangements. Otherwise, Canadian courts will recognize foreign judgments provided that there is a “real and substantial connection” between the subject matter of the action or the damages suffered by the plaintiff and the jurisdiction rendering the judgment. That is so even if the defendant does not attorn to the jurisdiction of the foreign court or is not otherwise within its jurisdiction. This is unlikely to change in the context of cyberspace.

23.4 Artificial Intelligence

In Canada, the regulation of artificial intelligence is evolving. For example, Québec’s Bill 64, *An Act to modernize legislative provisions as regards the protection of personal information*, was recently passed and introduced new privacy disclosure requirements whenever technology, including artificial intelligence, is used to make automated decisions about a data subject (i.e., data subjects must be informed about the nature of the technology used and what decisions are automated before personal information is collected or used for those purposes). In another example, at the federal level, Bill C-27, *An Act to enact the Consumer Privacy Protection Act, the Personal Information and Data Protection Tribunal Act, and the Artificial Intelligence and Data Act and to make consequential and related amendments to other Acts*, proposes restrictions on certain artificial intelligence systems, including restrictions on having artificial intelligence systems produce certain biased outputs and restrictions on processing personal information that may have been obtained without lawful justification. At the effective date of this publication, Bill C-27 has not been enacted.

24. Privacy

24.1 Privacy Principles

Most Canadian businesses, and many foreign businesses that deal with Canadian individuals or entities, are likely to be subject to or affected by federal and/or provincial (or territorial) privacy laws. These privacy laws apply to the collection, use and disclosure of personal information, which is information that, alone or combined with other information, allows an individual to be personally identified. Many provinces also have specific health-sector privacy legislation that governs the collection, use and disclosure of personal health information by healthcare providers or individuals or entities who receive personal health information from healthcare providers.

There are important differences between the various privacy laws in Canada. For example, certain laws include mandatory breach notification while others do not. Yet, they all reflect certain key principles aimed at ensuring that each individual controls their personal information. Some of the key principles are as follows:

(i) *Consent* - Organizations need to obtain the consent of individuals for the collection, use and disclosure of their personal information. The required consent may be express or implied depending on the circumstances including the sensitivity of the personal information.

(ii) *Limiting Collection, Use, Disclosure and Retention* - The collection, use and disclosure of personal information must be reasonable and limited to the extent necessary for the purposes identified. Further, personal information must not be retained longer than necessary for the purposes identified or as required by law.

(iii) *Right of Access* - Individuals have a right to access and correct their personal information collected and maintained.

(iv) *Security Rules* - Personal information must be protected from loss, theft, unauthorized access and inadvertent disclosure.

24.2 PIPEDA and Substantially Similar Provincial Privacy Legislation

At the federal level, the *Personal Information Protection and Electronic Documents Act* (PIPEDA) applies (a) to the federally-regulated private sector (e.g., banking, transportation, telecommunications), (b) to commercial transactions where personal information is transferred across borders and (c) in provinces where personal information is collected, used or disclosed in the course of commercial activities and no provincial private sector privacy legislation has been enacted and deemed substantially similar to PIPEDA by the federal government. On June 16, 2022, federal Bill C-27, *An Act to enact the Consumer Privacy Protection Act, the Personal Information and Data Protection Tribunal Act and the Artificial Intelligence and Data Act and to make consequential and related amendments to other Acts*, was introduced. If it is passed and enters into force, Bill C-27 would effectively replace PIPEDA as Canada's private sector privacy law and would introduce new requirements and administrative penalties.

Provincial private sector privacy legislation has been deemed substantially similar to PIPEDA in British Columbia, Alberta, Québec and, in relation to personal health information, Ontario, New Brunswick and Newfoundland and Labrador. PIPEDA is therefore the privacy law of general application in all provinces except where substantially similar legislation exists or where PIPEDA would otherwise not apply. PIPEDA and the provincial equivalents apply directly to businesses that handle personal information in the course of their commercial activities. It should be noted, however, that due to the constitutional division of powers, PIPEDA applies only to businesses in relation to their employees if they are federally regulated entities. However, provincial privacy statutes deemed substantially similar to PIPEDA may apply to the collection, use, and disclosure of personal

information from private sector employees, depending on the province in which the employees are based.

24.3 Public Sector Privacy Legislation

Additionally, there are federal and provincial public sector privacy laws that apply to personal information held by governments and other public sector entities. While these laws do not apply directly to commercial businesses they can be relevant to private sector companies that supply or otherwise transact business with public sector entities in Canada such as universities, hospitals and public health authorities.

24.4 Personal Health Information Privacy Legislation

Most provinces and territories have privacy legislation that applies specifically to personal health information collected, used or disclosed by health information custodians. Personal health information generally includes “identifying information” about an individual in any form that relates to the health of an individual or the provision of health care. “Identifying information” means information that identifies an individual or that could be utilized, either alone or with other information, to identify an individual. Custodians are specified in each relevant statute but generally consist of individuals and organizations that have custody or control of personal health information as a result of their powers or duties (e.g., hospitals, pharmacies, laboratories, nursing homes, ambulance services and healthcare practitioners such as physicians, nurses, physiotherapists, massage therapists, dentists, pharmacists). Even where a person or organization is not a health information custodian, these laws can be applicable to the extent that a person or organization supplies or otherwise transacts with a health information custodian.

24.5 Cross-Border Transfer of Personal Information

Except for the public sector privacy legislation in British Columbia and Nova Scotia, Canadian privacy law does not prohibit the transfer of personal information to another jurisdiction, by hosting it in the cloud or otherwise, provided that prescribed requirements are satisfied. For example, transparency regarding personal information handling practices is generally required across Canada under both federal and provincial privacy legislation, and individuals must be made aware when their personal information will be transferred or hosted outside the country and will be more directly subject to access by foreign governments, law enforcement and security agencies, and courts. In Québec, Bill 64, *An Act to modernize legislative provisions as regards the protection of personal information*, requires that businesses conduct a privacy impact assessment whenever they communicate personal information collected from data subjects in Québec outside of the province. In short, cross-border transfer requirements may need to be satisfied before such a transfer.

British Columbia and Nova Scotia prohibit public sector organizations from storing or transferring outside Canada personal information under their control without the informed consent of the relevant individuals. While the *USA PATRIOT Act* was the impetus for the relevant restrictions, these restrictions apply to transfers anywhere outside Canada including cloud instances. There are generally two potential solutions to achieve compliance in these circumstances: (a) ensure that data is anonymized before it leaves Canada or (b) ensure that the consent of relevant individuals is obtained in advance.

24.6 Privacy Tort

In 2012, the Ontario Court of Appeal recognized a tort of “intrusion upon seclusion” in *Jones v. Tsige*, a case in which a bank employee repeatedly accessed the bank records of her ex-husband’s new girlfriend over a four-year period, and awarded C$10,000 in general damages for this privacy intrusion. The new tort was founded on the following elements: (a) the defendant’s conduct must be intentional (and reckless conduct would meet this standard); (b) the defendant must have invaded,

without lawful justification, the plaintiff's private affairs or concerns; and (c) a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. Proof of harm to a recognized economic interest is not necessary. The Court of Appeal emphasized that given the intangible nature of the interest protected, damages for intrusion upon seclusion will ordinarily be measured by a modest conventional sum.

The tort of "intrusion upon seclusion" sets a relatively high standard to be met. More recently, in 2022, the Ontario Court of Appeal in *Owsianik v. Equifax* clarified that while a business's failure to take appropriate data protection measures may be actionable in different ways, it generally does not support a cause of action where a third party maliciously hacked the security safeguards of the business.

24.7 National Do Not Call List

Individuals and corporations can be fined for initiating calls to listed consumers contrary to the unsolicited telecommunications rules of the Canadian Radio-television and Telecommunications Commission.

24.8 Anti-Spam Legislation

Canada's Anti-Spam Legislation (CASL) has significant privacy implications relating to the transmission of commercial electronic communications. CASL generally prohibits sending a "commercial electronic message" (broadly defined to include email, text messages, social media communications and any other message sent by telecommunication) to a recipient who has not expressly consented to receiving it and unless it complies with prescribed formality requirements. Subject to certain exceptions, it applies if a computer system located in Canada is used to send or access the message. CASL has significant compliance implications for marketing initiatives and many other forms of electronic business communications.

CASL also applies to the installation of computer programs, generally prohibiting the installation of a program on another person's computer system in the course of a commercial activity without obtaining the express consent of the owner or authorized user of that computer system in the prescribed manner. A computer system includes laptops, desktops, mobile devices, gaming consoles and other connected devices.

CASL is amongst the most restrictive and onerous anti-spam legislation globally. With respect to penalties, it provides for administrative monetary penalties of up to C$10 million for organizations and C$1 million for individuals for violations of the core provisions of the legislation. The penalties apply per violation, which allows them to be separately assessed each day a violation continues. Organizations may be held vicariously liable for acts committed by agents or employees, and individual officers and directors may be held personally liable.

See Section 8.7 – *Advertising and Labelling of Goods for Sale - Anti-Spam Legislation*, above, for more information regarding CASL from a marketing and advertising perspective.

25. Money Laundering and Terrorist Financing

25.1 Introduction

Canada's money laundering and terrorist financing laws have come under increased scrutiny. In 2022, an independent provincial commission, the Cullen Commission, released its final report after a multi-year inquiry into money laundering in British Columbia. The findings in the report highlight weaknesses in both federal and provincial money laundering reporting and enforcement regimes.

Curbing money laundering remains a focus of the federal government, which is studying the creation of a national financial crime agency and has committed to implementing a federal beneficial ownership registry in 2023.

Canada's money laundering and terrorist financing laws include the following legislation:

(i) the *Criminal Code*, which makes money laundering a criminal offence through its "proceeds of crime" provisions and also provides for the listing of individuals and entities regarded by the Canadian government as having knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity or as having acted on behalf of, at the direction of, or in association with such a person;

(ii) the *United Nations Act*, under which Canada implements United Nations Security Council resolutions by means of regulations that provide for the listing of individuals and entities believed to be involved in or associated with terrorist activity and the freezing of assets owned or controlled by such persons;

(iii) the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA) and its applicable regulations, which establish various client identification, record-keeping and reporting requirements for financial entities and intermediaries with respect to large cash transactions, large virtual currency transactions, electronic funds transfers and suspicious financial transactions and requires the reporting of currency or monetary instruments to Canadian customs officials when C$10,000 or more is moved across Canada's borders; and

(iv) the *Charities Registration (Security Information) Act*, which provides a process to disqualify an organization from registration as a charity where there is reason to believe that it is aiding and abetting a terrorist group.

25.2 FINTRAC Reporting

The Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) is Canada's independent financial intelligence agency with a mandate to collect, analyze and disclose financial information to police and intelligence agencies under the PCMLTFA.

Those required to report to FINTRAC suspicious transactions, terrorist activity and, depending on the type of activities in which they are engaged, large cash, large virtual currencies and electronic funds transfers of C$10,000 or more include: financial entities (such as banks, caisses populaires, credit unions, trust and loan companies and agents of the Crown that accept deposit liabilities); life insurance companies, brokers and agents; securities dealers, portfolio managers and investment counsellors; money services businesses (MSBs) including foreign exchange dealers, payment service providers and crowdfunding platforms; accountants and accounting firms; real estate brokers, sales representatives and developers; casinos; dealers in precious metals and stones; and public notaries.

FINTRAC has an information disclosure mandate to share financial intelligence with governmental, security and law enforcement agencies including the Canada Border Services Agency, Canada Revenue Agency, Canadian Security Intelligence Service, Communications Security Establishment and police forces including the Royal Canadian Mounted Police, as well as international agencies.

25.3 Canada Revenue Agency and Tax Implications

Once FINTRAC has determined that it has reasonable grounds to suspect that designated information would be relevant to investigating or prosecuting a money laundering or terrorist activity financing offence, it must disclose the information to the Canada Revenue Agency if it also determines that the information is relevant to an offence of obtaining or attempting to obtain a tax rebate, refund or credit to which a person or entity is not entitled, or of evading or attempting to evade paying taxes or duties imposed under a federal statute administered by the Minister of National Revenue. The threshold for disclosing information to the Canada Revenue Agency is a "reasonable grounds to suspect" that the information being disclosed is relevant to a designated tax offence. Further, FINTRAC may disclose to the Canada Revenue Agency information where it has reasonable grounds to suspect that the information would be relevant to ensuring compliance with the *Income Tax Act*.

To further augment the reporting of tax evasion, Part XV.1 of the *Income Tax Act* requires certain financial institutions and intermediaries under the PCMLTFA to report to the Canada Revenue Agency international electronic funds transfers of C$10,000 or more requested by clients.

25.4 Client Identification and Record-Keeping: "Know Your Client"

A clear "know your client" policy is the most effective protection against being used unwittingly to launder money or participate in the illicit activities of clients. Knowing clients, requiring identification and being alert to unusual transactions can help to deter and detect money laundering schemes.

The general policy behind the client identification and record-keeping provisions in the PCMLTFA is that a client relationship should not be approved until the identity of the potential client is satisfactorily established according to the procedures set forth in the statute and regulations. FINTRAC has published extensive guidance regarding the implementation of "know your client" requirements. A reporting entity should not formalize a client relationship until the client's identity is established as required by law.

Record-keeping obligations vary by reporting entity but, as applicable, include obligations to maintain records such as signature cards, new account applications, account operating agreements, account holder information, large cash transaction records, receipt of funds records, copies of official corporate records, copies of suspicious transaction reports, trade authorizations, powers of attorney, beneficial ownership records, account statements, guarantees, foreign currency exchange transaction tickets, credit card account records and client credit files.

FINTRAC provides guidelines on the particular record-keeping and client identification requirements by business sector.

25.5 Compliance Obligations of Reporting Entities

In addition to the client identification, record-keeping and reporting requirements, financial institutions and intermediaries subject to the PCMLTFA must appoint a compliance officer, identify risk, establish policies and procedures to control risk and ensure compliance with their anti-money laundering and anti-terrorist financing obligations, prepare a compliance manual describing those policies and procedures, train personnel in compliance procedures, develop a review process to monitor compliance and changes to the law, and implement a self-assessment program to determine the effectiveness of measures taken to identify and control risk. There is a particular focus on identifying business and sector-specific risk and addressing the identified risk elements in the required compliance program.

FINTRAC has the authority to complete on-site or desk audits to assess the compliance of reporting entities with the PCMLTFA (referred to as compliance examinations). Reporting entities are selected based on various risk assessment methodologies.

25.6 Registration of Money Services Businesses

MSBs must be registered with FINTRAC. There is no charge for registration, which requires the disclosure of certain information about the business and its activities. MSBs are those engaged in the business of remitting or transmitting funds, dealing in virtual currency, crowdfunding platform services, foreign exchange dealing or issuing or redeeming money orders, travellers' cheques or other similar negotiable instruments (excluding cheques payable to a named person). As MSBs are not licensed or otherwise regulated as such in Canada in a manner similar to banks, securities dealers and other financial services businesses, registration allows for more effective oversight of their activities by FINTRAC.

25.7 Politically Exposed Persons and Heads of International Organizations

Reporting entities also must take reasonable measures to determine if a client is a domestic or foreign politically exposed person (PEP), a Head of an International Organization (HIO), or a family member or close associate of a PEP or a HIO at account opening and following certain transactions. A PEP is a person who holds or has ever held an office or position in or on behalf of a Canadian government (federal/provincial/municipal) in the last five years or of a foreign state as identified in the PCMLTFA, including heads of state, heads of political parties, members of legislatures, deputy ministers, judges, senior military officers, ambassadors and heads of state-owned companies or banks, as well as prescribed family members.

If a client is identified as a PEP or a HIO or as a family member or a close associate, reporting entities have heightened compliance obligations including establishing the source of their funds, obtaining senior management approval to review transactions and keep accounts open, and treating these accounts or transactions as high risk. This means applying enhanced ongoing monitoring of activities in these accounts to detect suspicious transactions.

25.8 Terrorist Property

The PCMLTFA requires that reporting entities submit a terrorist property report to FINTRAC if they have property in their possession or control that they know is owned or controlled by or on behalf of a terrorist or terrorist group. This includes information about any transaction or proposed transaction relating to that property. In this context property means any type of real or personal property in the possession or control of the reporting entity including cash, bank accounts, insurance policies, money orders, deeds, securities and travellers' cheques.

A terrorist or a terrorist group includes anyone that has as a purpose or activity facilitating or carrying out any terrorist activity. It can be an individual, a group, a trust, a partnership or a fund. It can also be an unincorporated association or organization. A terrorist or terrorist group includes those persons or groups identified in the "List of Names" compiled pursuant to the *Criminal Code*, and the *United Nations Act* and their respective regulations.

25.9 Economic Sanctions

Certain reporting entities also have an obligation to continuously determine and disclose property in their possession or control that is held by or on behalf of designated persons pursuant to sanctions regulations enacted under the *United Nations Act*, the *Special Economic Measures Act*, the *Justice for Victims of Corrupt Foreign Officials Act*, and the *Freezing Assets of Corrupt Foreign Officials Act*.

Reporting entities typically enact sanctions compliance policies, which include screening protocols to meet their obligations. If a reporting entity discovers that it has property of a designated person in its possession or control, it is required to disclose the existence of the property to the Royal Canadian Mounted Police or the Canadian Security Intelligence Service, without delay.

25.10 Cross-Border Reporting

The cross-border importation and exportation of currency or monetary instruments of C$10,000 (or the equivalent in foreign currency) or more must be reported to the Canada Border Services Agency. “Monetary instruments” means securities (including stocks, bonds, debentures and treasury bills) and negotiable instruments (including bank drafts, cheques, promissory notes, travellers’ cheques and money orders, other than warehouse receipts or bills of lading) in bearer form or in such other form as title to them passes on delivery.

An important clarification to the definition, however, provides that securities or negotiable instruments “that bear restrictive endorsements or a stamp for the purposes of clearing or are made payable to a named person and have not been endorsed” are excluded from the definition of monetary instruments and therefore remain outside the application of the PCMLTFA.

26. Anti-Corruption Compliance

26.1 Foreign and Domestic Bribery and Corrupt Practices Legislation

Canada's anti-corruption and bribery law is primarily contained in the *Corruption of Foreign Public Officials Act* (CFPOA), which implements Canada's international obligations under the *Anti-bribery Convention* of the Organisation for Economic Co-operation and Development (OECD). The CFPOA reflects the language of the OECD Convention, the U.S. *Foreign Corrupt Practices Act* (FCPA) and existing domestic anti-bribery provisions in the Canadian *Criminal Code* that apply in relation to Canadian public officials.

The CFPOA applies to Canadian citizens, permanent residents of Canada, companies and other organizations incorporated or formed in Canada, and to persons anywhere in the world whose acts or omissions have a "real and substantial connection" to Canada. While the CFPOA applies to corrupt practices in relation to foreign public officials, the *Criminal Code* includes Canada's domestic anti-corruption provisions. The *Criminal Code* creates a number of bribery, corruption and "influence peddling" offences that capture the payment of bribes, benefits and advantages to domestic public officials in Canada. The *Criminal Code* also establishes the offence of corruptly giving "secret commissions" in the context of agency relationships.

26.2 Corruption of Foreign Public Officials Act

There are two main offences under the CFPOA: (a) the bribery offence and (b) the books and records offence.

(a) Bribery Offence

Pursuant to the bribery offence, it is an offence, in order to obtain or retain an advantage in the course of business, to directly or indirectly give, offer or agree to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or any person for the benefit of a foreign public official:

(i) as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or

(ii) to induce the official to use their position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.

"Foreign public official" means:

(i) a person who holds a legislative, administrative or judicial position of a foreign state;

(ii) a person who performs public duties or functions for a foreign state, including a person employed by a board, commission, corporation or other body or authority that is established to perform a duty or function on behalf of the foreign state, or is performing such a duty or function; and

(iii) an official or agent of a public international organization that is formed by two or more states or governments, or by two or more such public international organizations.

Although the definition does not include members of political parties that are in opposition, caution should be exercised in those circumstances as well.

It is not necessary to prove that a bribe was actually paid to a foreign official to establish a violation of the CFPOA. It is sufficient for the party committing the offence to believe that a bribe was being paid to such an official. The concept of conspiracy applies in relation to CFPOA offences. Where there is a

conspiracy, the prosecution need not prove the identity of the recipient of a proposed bribe as this could put foreign nationals at risk.

Furthermore, the doctrine of wilful blindness applies to the level of intent required and imputes knowledge to an accused whose suspicion is aroused to the point where they see the need for further enquiries, but deliberately choose not to do so.

(b) Books and Records Offence

Pursuant to the books and records offence, all transactions and expenditures must be adequately and accurately identified in books and records. The offence is drafted as follows:

Every person commits an offence who, for the purpose of bribing a foreign public official to obtain or retain an advantage in the course of business or for the purpose of hiding that bribery:

(i) establishes or maintains accounts which do not appear in any of the books and records that they are required to keep in accordance with applicable accounting and auditing standards;

(ii) makes transactions that are not recorded in those books and records or that are inadequately identified in them;

(iii) records non-existent expenditures in those books and records;

(iv) enters liabilities with incorrect identification of their object in those books and records;

(v) knowingly uses false documents; or

(vi) intentionally destroys accounting books and records earlier than permitted by law.

In contrast to the United States, there is no parallel civil enforcement mechanism relating to proper books and records. However, some provincial securities regulators have relied on their authority to investigate misrepresentations in issuers' continuous disclosure filings to uncover bribery.

(c) Exemptions and Enforcement

The CFPOA contains two exemptions. The first exemption allows for payment of reasonable expenses incurred in good faith by or on behalf of a foreign public official. To qualify for the exemption, any payment or benefit made to cover reasonable expenses must be directly related to the promotion, demonstration or explanation of a person's products and services or the execution or performance of a contract between the person and the foreign state for which an official performs duties or functions. The payment cannot be made in furtherance of any personal interest. The second exemption is when the payment is permitted or required under the laws of the foreign state or public international organization for which the impugned foreign public official performs duties or functions.

Facilitation payments (e.g., payments made for acts of a routine nature such as the issuance of a permit or the processing of official documents) are prohibited under the CFPOA.

Enforcement of the CFPOA has slowly ramped up since its enactment in 1999. However, what was once a theoretical risk of enforcement has now become a real risk to Canadian businesses that do not have formal and effective anti-bribery policies, training, monitoring and enforcement, including controlling the foreign practices of their branches, agents and sales representatives. Enforcement proceedings with respect to charges under the CFPOA against corporations and individuals have resulted in fines in the range of C$10 million and/or imprisonment. Certain accused have also pursued guilty pleas, pleading guilty to fraud charges under the *Criminal Code* and paying fines up to C$100 million or have negotiated remediation agreements.

Canadian anti-corruption enforcement pales in comparison to enforcement of the FCPA in the U.S. Canadian businesses should consider the application of the FCPA to their operations, particularly those businesses that have U.S. affiliates or those Canadian corporations that may be acquisition targets for U.S. purchasers.

26.3 Criminal Code Anti-Corruption Provisions

All advantages granted to Canadian public officials are illegal if made in violation of the *Criminal Code* of Canada.

Section 121 of the *Criminal Code* makes it an offence to: (i) directly or indirectly give or offer to give to an official a loan, reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with the transaction of business or any matter of business relating to the government or a claim against the government, or any benefit that the government is authorized to bestow; (ii) having dealings of any kind with the government, pay a commission or reward to or confer an advantage or benefit of any kind on an employee or official of the government with respect to those dealings, unless the head of the branch of government has consented in writing; or (iii) give or offer to a minister of the government a reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with (A) the transaction of business with or any matter of business relating to the government, or a claim against the government, or any benefit that the government is entitled to bestow, or (B) the appointment of any person to an office.

For purposes of the *Criminal Code* provisions, “official” means a person who holds an office or is appointed or elected to discharge a public duty. “Office” includes an office or appointment under the government, a civil or military commission, and a position or employment in a public department. “Government” means the Government of Canada, the government of a province of Canada, or Her Majesty in right of Canada or a province. Accordingly, the definition of “official” in this context is broad enough to include those who hold an office with government controlled enterprises.

Facilitation or “grease” payments are illegal under the *Criminal Code* in relation to Canadian public officials.

Section 426 of the *Criminal Code* establishes the offence of corruptly giving “secret commissions” in the context of agency relationships. It is an offence to corruptly give, agree to give or offer to give, directly or indirectly, to an agent, any reward, advantage or benefit of any kind as consideration for doing or not doing any act relating to the affairs or business of the agent’s principal, or for showing or not showing favour or disfavour to any person with relation to the affairs or business of the agent’s principal. The term “corruptly” means secretly or without requisite disclosure.

26.4 Penalties

Under both the CFPOA and the anti-bribery provisions of the *Criminal Code*, penalties may include imprisonment for up to 14 years. Potential fines are unlimited. Corporate officials and employees can be convicted of the foregoing CFPOA and *Criminal Code* offences personally, and the actions of middle managers are sufficient to make a company criminally liable. A corporation also may be liable as a party to an offence committed by a “senior officer”. There is no limitation period for prosecution.

26.5 Commercial Bribery

Canada’s anti-bribery laws generally apply to public officials and not to private sector transactions. However, as noted above, there is a prohibition in the *Criminal Code* against secret commissions in the agency context and the general law of fraud applies more broadly to any business relationship. For example, it is illegal for an agent to be paid a commission for referring business to a company where this is not disclosed to the agent’s principal.

26.6 Debarment

Canada's Integrity Regime is administered by Public Services and Procurement Canada and it applies to all federal procurement and real property transactions. The regime debars suppliers from contracting with the federal government for a set period of time ranging from 5 to 10 years if convicted of a prescribed offence.

Prescribed offences include the following Canadian or similar foreign offences: frauds against the government; corruption, collusion, bid-rigging or any other anti-competitive activity under the *Competition Act*; money laundering; income and excise tax evasion; bribing a foreign public official; secret commissions; prohibited insider trading; forgery and other offences resembling forgery; and falsification of books and documents. (For a full list see the Integrity Regime: http://www.tpsgc-pwgsc.gc.ca/ci-if/ci-if-eng.html.)

Canada proposed amendments to the Integrity Regime in 2018, which include the creation of a discretionary debarment period, in contrast to the mandatory debarment periods under the current regime. Canada has not announced if, or when, these amendments will be considered or enter into force.

(a) Test for Reduction of Term of Ineligibility

Under the current regime, a bidder remains ineligible for 10 years when they have been convicted of a listed offence in the last three years; however, this term can be reduced by five years if the supplier has cooperated with legal authorities or addressed the causes of the misconduct that led to their ineligibility.

(b) Actions of Affiliates

Suppliers will no longer be automatically ineligible for the actions of affiliates, unless it can be demonstrated that there was any participation or involvement from the supplier in the actions that led to the affiliate's conviction.

(c) Suspension Regime

The Government of Canada will have the ability to suspend a supplier for up to 18 months if the supplier has been charged with, or has admitted guilt to, a listed offence.

26.7 Remediation Agreements

Canada amended the *Criminal Code* and introduced a deferred prosecution agreement regime, referred to as "Remediation Agreements", in 2019. Pursuant to the regime, an accused must be invited by the (prosecuting) Crown to negotiate an agreement, and all agreements are subject to court approval, amongst other terms.

27. Public Procurement

Public procurement in Canada is governed by a complex set of laws, regulations, policies and trade agreements.

The federal government buys billions of dollars' worth of goods and services every year. Two Canadian government departments create policies and procedures for federal government contracting. The Treasury Board of Canada, in its role as "general manager" of the Government of Canada, manages the government's financial, personnel and administrative responsibilities under the *Financial Administration Act* and regulations. In this capacity, the Treasury Board provides the policy framework for federal government contracting. Public Services and Procurement Canada (PSPC) is the Canadian government's principal purchasing agency.

PSPC procurement activities are governed by two key manuals that detail federal government contracting requirements which, along with the federal government's Directive on the Management of Procurement, establish the framework for federal government contracting. The Supply Manual describes federal supply procedures and includes relevant laws, regulations and policies. The Standard Acquisition Clauses and Conditions Manual (SACC Manual) provides standard terms and conditions for federal government contracting.

Suppliers can identify public procurement opportunities, both federal and provincial, through the MERX electronic tendering service. Suppliers must demonstrate to the satisfaction of the government or public agency that they have the legal, technical, financial and management competence to discharge the contract. The eligibility of suppliers may be restricted by requiring bidders to meet pre-established bid criteria. In particular, security clearance may be a critical factor. It can take some time to process the necessary requirements. Security screening requirements for the contractor and its personnel may be stipulated as a mandatory requirement of bids and contracts.

Government procurement contracts must comply with certain trade agreements, namely the *United States-Mexico-Canada Agreement* (CUSMA), the World Trade Organization's *Agreement on Government Procurement and the Canadian Free Trade Agreement*. (See also Section 5.6 – *Customs and International Trade - Free Trade Agreements*, above.) The emphasis is on encouraging a greater degree of openness and equal opportunity for access to government business. Exclusions to the application of trade agreements include emergency situations, security considerations, works of art, continuing services and confidential matters.

Governments use various methods to solicit competitive bids, including requests for qualifications, requests for proposals and requests for standing offers for ongoing arrangements to purchase goods or services from a supplier. Sole source contracting is a non-competitive method by which the government may purchase goods and/or services, although it is generally permitted only under certain conditions, such as when the product or service is required immediately due to a pressing emergency, the expenditure is relatively low in value or there is only one qualified company (such as a business that has developed a proprietary technology).

Government suppliers must avoid the following practices:

(a) *Contingency Fees Payable to Sales Representatives* - The federal government imposes certain restrictions on the payment of commissions to third parties such as sales representatives or consultants when paid in respect of sales made to the federal government (including military sales). Payment of a commission that is contingent upon sales would contravene federal government procurement policies and, where applicable, the federal *Lobbying Act* and *Government Contracts Regulations* under the *Financial Administration Act*.

(b) *Unregistered Lobbying* - Depending on the specific circumstances, including the nature of any sales and marketing activities involved, employees and sales representatives of suppliers may need to register as lobbyists under the federal *Lobbying Act* or provincial equivalents, which provide very broad definitions of lobbying.

(c) *Bribery, Corruption and Conflict of Interest* - Corruption, collusion and conflict of interest are generally prohibited by the federal *Code of Conduct for Procurement*. Anti-bribery provisions are found in the *Criminal Code* with respect to dealings with government officials. The SACC Manual contains corruption and conflict of interest clauses which require federal suppliers to acknowledge that government officials and employees who are subject to the provisions of the *Conflict of Interest Act* or other federal conflict of interest codes cannot derive any direct benefit resulting from the contract. If these clauses are breached, the supplier may be considered to have breached its government contract. Furthermore, government conflict of interest provisions may be contravened if a supplier engages former public officials, employees or military personnel to assist in obtaining a government contract.

The federal government has a relatively formal system of complaint and redress in place to resolve issues that arise in the procurement process, including recourse to a specialized tribunal, the Canadian International Trade Tribunal (CITT). The CITT's mandate includes conducting inquiries into complaints by potential suppliers concerning procurement by the federal government that is covered by the trade agreements. Suppliers have recourse to the courts for losses incurred in relation to federal supply arrangements that fall outside the trade agreements. However, the provinces tend to have more informal complaint mechanisms in place and recourse to the courts is generally the only option if a satisfactory outcome is not achieved through direct consultation with the responsible government entity.

Along with various federal measures aimed at reducing bribery and corruption, as discussed above, the federal government has enhanced its approach to debarment in its Integrity Framework, imposing a wider range of integrity certifications for bidders and contractors which represents a more aggressive approach to debarment for corrupt practices.

At the provincial level, Québec has the most robust legislative environment applicable to public procurement, having enacted legislation (*An Act respecting contracting by public bodies* and its numerous regulations) aimed at addressing widespread public sector corruption by improving integrity and transparency in the contracting process, including a register of enterprises ineligible for public contracts as a result of past conduct.

See Section 26.6 – *Anti-Corruption Compliance – Debarment*, above, for information regarding Canadian debarment rules that are part of an Integrity Framework applicable to all federal procurement and real property transactions.

28. Capital Markets

28.1 Introduction

Canada does not have a national securities regulator. The securities laws of each of the 13 provinces and territories of Canada govern securities matters, including the issuance and trading of securities and the registration of dealers, advisors and investment fund managers. These securities laws are similar but not always identical across all jurisdictions. The Canadian Securities Administrators (CSA), an umbrella organization of the provincial and territorial securities regulators, has attempted to harmonize and coordinate the securities rules across Canada by implementing various national and multilateral instruments.

28.2 Prospectus Requirement: Distribution of Securities

A company or issuer wishing to distribute securities to the public must file a prospectus with the applicable securities regulatory authorities and deliver it to each prospective purchaser. Certain exemptions are available from this prospectus requirement, which may help a company or issuer raise funds without the time and expense of preparing a prospectus. (See Section 28.3 – *Prospectus Exemptions* below.)

The prospectus (as well as documents incorporated by reference therein in the case of a short form prospectus) must contain prescribed, detailed disclosure. A prospectus sent to a resident of the Province of Québec must be translated into French.

The issuer must provide full, true and plain disclosure in the prospectus about all material facts relating to the issuer and the securities being offered. For misrepresentation in the prospectus, the issuer, its board of directors, certain officers, securities dealers and/or other experts may be liable for damages up to the full amount of the purchase price and, in certain cases, rescission.

Once a receipt is issued for the final prospectus by the relevant securities authority, the issuer becomes a "reporting issuer" in Canada. (See Section 28.9 – *Reporting Requirements of Reporting Issuers*, below.)

Qualifying U.S. issuers may use the multijurisdictional disclosure system to offer securities in Canada by complying with U.S. securities law requirements supplemented by simpler Canadian disclosure.

28.3 Prospectus Exemptions

An issuer can more readily access financing if it is able to rely on an exemption from the prospectus requirements. Some common prospectus exemptions for non-private issuers include issuances of securities to (a) "accredited investors", which include high net-worth individuals and certain institutions or (b) non-individual investors who purchase at least C$150,000 securities in cash. These exemptions require the issuer to file a report of trade with, and pay fees to, the securities regulatory authorities in the jurisdictions where there are purchasers.

Shares issued through such a "private placement" are generally not freely tradable unless an exemption is available or other conditions are met. Typically this requires that the shares be held for at least four months if the issuer is already a reporting issuer in Canada.

A new "Listed Issuer Financing Exemption" allows certain issuers with securities trading on a Canadian securities exchange to distribute a limited number of freely tradable equity securities.

28.4 Registration Requirement: Trading or Advising

Any person or company engaging in, or holding themselves out as engaging in, the business of (a) trading in securities as principal or agent, or (b) advising as to investing in, or buying or selling,

securities, must be registered (as a dealer or advisor, respectively) with the applicable provincial or territorial securities regulatory authority(ies), unless an exemption is available. Investment fund managers are also required to register, subject to limited exemptions. Registration requirements include, among others, minimum working capital, insurance and other financial requirements. Certain exemptions are available to international dealers, advisors and investment fund managers dealing with specified clients and securities. These international dealers, advisors and investment fund managers must also file applicable forms and fees, submit to the jurisdiction, and appoint an agent for service of process.

28.5 Insider Reporting and Early Warning Reporting Requirements

Certain reporting insiders of a reporting issuer are required to file insider reports. These reporting insiders include directors and certain senior officers, as well as any person that acquires, directly or indirectly, beneficial ownership of, or control or direction over, more than 10% of the voting securities (on a partially diluted basis). They must file, within 10 days, an insider report disclosing all securities holdings and, within five days, a report of any subsequent change in ownership.

Furthermore, any person (together with anyone acting jointly or in concert), who acquires beneficial ownership of, or the power to exercise control or direction over, voting or equity securities of 10% or more of any class of securities of a reporting issuer (on a partially diluted basis) has early warning reporting requirements. Subsequent reporting is required for specified changes in ownership/control or for a change in a material fact contained in a previous report. The report must include the purpose and future intentions for such acquisitions or dispositions. This serves as a signal to the market that there is a potential influence of control over a reporting issuer and that, perhaps, a take-over bid may occur.

Certain eligible institutional investors such as investment managers, may comply with the insider reporting and early warning requirements by filing alternative monthly reports.

28.6 Acquisitions

To acquire a company that is a reporting issuer, a person (offeror) typically proceeds by way of a take-over bid, statutory plan of arrangement or amalgamation.

(a) Take-Over Bids

A take-over bid occurs when a person offers to acquire outstanding voting or equity securities of a class from other security holder(s) such that its holdings (together with the holdings of anyone acting jointly or in concert) would be 20% or more of such securities.

(i) Take-over Bid Exemptions

Take-over bid exemptions include: (A) "*private agreement*" exemption - whereby purchases are made by private agreement with no more than five sellers in Canada and the price paid, including commissions, is not more than 115% of the "market price" of the securities; and (B) *foreign take-over bid exemption* - where less than 10% of the outstanding securities subject to the take-over bid are held by Canadians, the published market on which the greatest dollar volume of trading of that class of securities occurred during the 12 months immediately prior to the bid was not in Canada, and Canadian security holders are entitled to participate in the bid on terms at least as favourable as the terms that apply to the general body of security holders of the same class.

(ii) Formal Take-over Bid Mechanics

Unless an exemption is found, the offeror must comply with securities laws, including the requirement to deliver a circular with mandated disclosure to all target security holders in Canada (which may have to be translated into French for Québec security holders). If securities of the offeror are to be used as

full or partial consideration for target securities, the offeror will also have to provide prospectus level disclosure in the materials sent to target security holders and, in certain cases, may thereafter become a reporting issuer in Canada.

A non-exempt take-over bid must (a) remain open for a minimum of 105 days (or a minimum of 35 days if it is a specified friendly transaction, with the consent of the target's board, or if the target announces another specified alternative transaction), (b) be subject to a minimum 50% tender requirement (excluding securities held by the bidder or its joint actors), and (c) be extended for another 10 days if the minimum tender is reached.

The CSA does not pre-clear the disclosure documents. Therefore, a take-over bid may be launched fairly quickly by sending a circular to target security holders or by publishing an advertisement describing the bid, with documents delivered thereafter.

(iii) Defensive Tactics

In Canada, directors of a target corporation do not have the ability to "just say no" to a take-over bid. Directors have fiduciary duties to act in the best interests of the corporation. Ultimately, the target's security holders will determine the outcome of an unsolicited take-over bid. Shareholder rights plans or "poison pills" are of limited use given the minimum offering period and minimum tender requirements now in place which provide the target board more time to seek value enhancing alternatives. The CSA will continue to interfere if a target engages in what they perceive as unlawful defensive tactics which deprive shareholders of the ability to respond to a bid.

(iv) Acquiring Non-Tendered Shares

Generally, if the offeror acquires 90% or more of the target securities (other than securities held by the offeror and its joint actors) within 120 days of the take-over bid, it may use the "compulsory acquisition" provisions in corporate statutes to purchase the remaining securities at the same take-over bid price.

If less than 90% of the shares are tendered to the bid, the offeror may effect a "second stage" transaction and call a meeting of shareholders to approve a plan of arrangement, amalgamation or some other form of reorganization.

Shareholders will also be entitled to dissent and to be paid fair value for their shares in either case.

(b) Plans of Arrangement and Amalgamations

In a friendly acquisition, a viable alternative to a take-over bid is often a plan of arrangement. It is a court-approved process that requires the parties to enter into a definitive arrangement or "merger" agreement and a circular to be delivered to target shareholders for a special meeting called to approve the arrangement. The CSA typically does not review or comment on merger disclosure documents (except in the case of material conflict of interest transactions). The arrangement must be approved by two-thirds of the votes cast by shareholders who vote at the meeting and sometimes requires minority approval of disinterested shareholders. Dissenting shareholders are entitled to be paid fair value for their shares. Advantages of a plan of arrangement over a take-over bid include structuring flexibility to deal with different issues at one time, such as tax issues and competing interests of multiple classes of securities, including options, and usually allowing an offeror's securities to be used as consideration without having to be registered in the U.S. However, it can be more costly than a take-over bid, and there is no guarantee of court approval.

Alternatively, a friendly acquisition may be effected by an amalgamation of two or more corporations which are governed by the same corporate statute. It does not require court approval. The documentation and requirement to hold a shareholders' meeting are similar to a plan of arrangement, but an amalgamation may not be practical as it does not offer the same structural flexibility.

28.7 Insider Trading and Tipping

Subject to limited exceptions, it is an offence for a person or company in a special relationship with a reporting issuer (and in some jurisdictions, a non-reporting issuer whose securities are publicly traded) (a) to purchase or sell (or to recommend the purchase or sale of) securities of the reporting issuer with the knowledge of a material fact or material change that has not been generally disclosed, or (b) to inform, other than in the necessary course of business, another person of a material fact or material change with respect to the reporting issuer before it has been generally disclosed. If convicted, the penalty includes imprisonment up to five years less a day and/or a fine of up to C$5 million (and in certain cases, triple the amount of profit made or loss avoided). (See also Section 22.2 – *White Collar Crime – Securities Regulations*, above.)

28.8 Corporate Governance

Reporting issuers must disclose their corporate governance practices and how they differ from the non-mandatory guidelines of the Canadian securities regulatory authorities (which have been influenced by the *United States Sarbanes-Oxley Act of 2002*). Subject to limited exceptions, the audit committee members must be independent. Pressure from investors has also heightened corporate governance standards, especially for larger issuers, with regards to executive compensation and the composition of boards of directors. Non-venture issuers (including Toronto Stock Exchange (TSX) issuers) must disclose any director term limits and other mechanisms of renewal of the board as well as information regarding the representation of women on the board of directors and in executive officer positions. Furthermore, corporations subject to the *Canada Business Corporations Act* also have diversity disclosure obligations pertaining to women, Aboriginal peoples, persons with disabilities and members of visible minorities.

28.9 Reporting Requirements of Reporting Issuers

Canadian securities law, as well as the rules and policies of stock exchanges, require a reporting issuer to comply with two general types of disclosure reporting obligations: (a) *continuous disclosure* - relating to disclosure of (and if applicable, sending to security holders) corporate information at regular intervals, such as annual and interim financial statements, related management's discussion and analysis and information circulars for shareholder meetings; and (b) *timely disclosure* - relating to reporting material information as they occur through the filing of material change reports and/or the issuance of news releases. Material information includes the issuances of additional securities, corporate reorganizations, significant corporate acquisitions or dispositions and non-arm's length transactions. As of the effective date of this publication, the CSA has not yet finalized its proposed national instrument on climate-related disclosure rules. The CSA also does not yet specifically mandate environmental and social related disclosures (other than the corporate governance matters set out above) but issuers must disclose such issues if they constitute "material" information.

Certain foreign reporting issuers may be able to comply with these obligations by complying with the rules of their jurisdiction, filing certain disclosure documents with Canadian securities regulatory authorities and, if applicable, delivering their documents to Canadian security holders.

28.10 Civil Liability for Secondary Market Disclosure

Reporting issuers are also subject to civil liability for continuous and timely disclosure violations. Investors who buy and sell shares in the secondary market have a limited statutory right to sue public companies, their officers and directors and others who are responsible for public misrepresentations about the issuer and for failure to make timely disclosure of material changes.

28.11 Stock Exchanges

Issuers wishing to list on a stock exchange in Canada must file a listing application and supporting documents and show that they meet minimum financial, public float and other listing requirements of the relevant exchange. Issuers listed on a recognized exchange are “reporting issuers” in Canadian jurisdictions and, thus, are subject to reporting requirements set forth in Section 28.9 – *Reporting Requirements of Reporting Issuers*, above.

In Canada, most public companies are listed on the TSX or the TSX Venture Exchange, both of which are operated by TMX Group Limited. The TSX is the largest stock exchange in Canada by market capitalization. There are also other stock exchanges as well as alternative trading systems that match buyers and sellers on different electronic trading platforms with lower transaction costs. Certain international public companies may seek a dual listing on a Canadian stock exchange.

Baker McKenzie delivers integrated solutions to complex challenges.

Complex business challenges require an integrated response across different markets, sectors and areas of law. Baker McKenzie's client solutions provide seamless advice, underpinned by deep practice and sector expertise, as well as first-rate local market knowledge. Across more than 70 offices globally, Baker McKenzie works alongside our clients to deliver solutions for a connected world.

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