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DOING BUSINESS IN CANADA

Doing Business in Canada

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DOING BUSINESS IN CANADA

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INTRODUCTION

The global financial crisis of 2008 and 2009 revealed the strengths and weaknesses of the world's financial systems. It is universally recognized that Canada's well-regulated financial institutions proved to be a model of prudence to the world. While the Canadian and American economies are interrelated, Canada has forged its own path to become a leader in reducing barriers to global commerce. Canada offers a stable and potentially lucrative market for international businesses and investors.

Over 90% of Canadians live within 160 kilometers (100 miles) of the U.S.-Canada border. As a result, Canada and the United States share many economic imperatives and cultural influences. The economic and material aspirations and realizations of the Canadian and U.S. populations are strikingly similar.

From a historic perspective, however, Canada remains significantly different than the United States. Canada today is a highly multicultural society which generally respects and enshrines cultural heritage rather than encouraging the population to form a homogeneous melting pot. Colonized by the British and French, Canada remains a bilingual country; English and French are the two official languages. Approximately 59% of the population has English as their mother tongue while about 23% of the population is French-speaking (mostly in the province of Québec). The remaining 18% speak other languages.

Canada remains an attractive location for the establishment or expansion of business in North America. During the past decade, there has been a marked trend toward fiscal conservatism. Federal and provincial governments made serious efforts to reduce deficits and balance budgets. Budget surpluses have been achieved on the federal level and in many provinces. Inflation and interest rates have remained low.

Except in certain industry-specific situations where cultural values are at risk, Canada is receptive to foreign investment. Despite its relatively small population, Canada is one of the strongest trading nations in the world. Although historically Canada was an exporter of raw materials and an importer of manufactured goods, shipments from Canada are now balanced between raw materials and finished goods. In addition, Canada is recognized internationally as a world leader in such areas as fibre optics and telecommunications.

This book provides a general overview as of July 2013 of particular matters of interest to businesses considering entry into the Canadian market. Where appropriate, descriptions of both federal and provincial laws are provided. However, this book should not be considered an exhaustive review, and

particular businesses may be subject to industry-specific legislation and other legal requirements which are not dealt with in this book. Accordingly, before undertaking any business transaction involving entry into Canada, it is prudent to seek the advice of counsel.

1. WHAT LAWS INFLUENCE THE RELATIONSHIP BETWEEN LOCAL AGENTS AND DISTRIBUTORS AND FOREIGN COMPANIES?

Foreign companies doing business in Canada will be influenced by legislation, the common law and various international treaties. Canada's Constitution creates mutually exclusive jurisdictions for federal and provincial legislation. For example, Canada's intellectual property, competition, bankruptcy and criminal laws are solely within the purview of the federal government. Provincial legislative authority is granted for the regulation of trade and commerce, education and health within the province. However, the jurisdictional distinctions are often blurry, and the subject matter of federal and provincial legislation sometimes overlaps. In addition, Canada has entered into many international trade and tax treaties with other countries which will influence foreign companies doing business in Canada.

2. HOW DOES THE CANADIAN GOVERNMENT REGULATE COMMERCIAL JOINT VENTURES BETWEEN FOREIGN INVESTORS AND LOCAL FIRMS?

Legislation by the federal government and each of the provincial governments regulates ventures between foreign investors and local firms, including agents and distributors. From a contracting perspective, there is no material distinction between business parties who are foreign and those who are local.

The foreign investor will have to comply with the direct investment provisions noted below in question 3 and discussed in more detail in the Foreign Investment & Merger section of this Guide.

In addition, many obstacles to foreign investment have been removed as a result of the various free trade agreements that Canada has negotiated with other countries, such as the North American Free Trade Agreement discussed in detail in the International Trade section of this Guide.

3. WHAT ROLE DOES THE GOVERNMENT OF CANADA PLAY IN APPROVING AND REGULATING FOREIGN DIRECT INVESTMENT?

Non-Canadians who acquire control of an existing Canadian business or who wish to establish a new unrelated Canadian business are subject to the federal Investment Canada Act (ICA). In either case the non-Canadian investor must submit either a Notification or an Application for Review to the federal government. A Notification must be filed each and every time a non-Canadian commences a new business activity in Canada and each time a non-Canadian acquires control of an existing Canadian business where the establishment or acquisition of control is not a reviewable transaction. Only in certain circumstances does the ICA seek to review or restrict new investments by non-Canadians. In general terms, the transactions which are subject to review under the ICA are larger transactions, and transactions in certain politically and culturally significant sectors (as noted below in question 5). Securities transactions and venture capital deals, acquisitions of control in connection with realization on security, certain financing transactions and certain direct and indirect acquisitions of control by insurance companies are exempt from the ICA. For all other transactions a Notification needs to be filed.

More detailed information on the ICA and direct investment in Canada can be found in the Foreign Investment & Merger section of this Guide.

4. CAN FOREIGN INVESTORS CONDUCT BUSINESS IN CANADA WITHOUT A LOCAL PARTNER? IF SO, WHAT CORPORATE STRUCTURE IS MOST COMMONLY USED?

There is nothing preventing a foreign investor from conducting business in Canada without a local partner. All businesses, foreign or local, must register in the appropriate jurisdiction to conduct business; however, these are administrative filings.

Most foreign investors, however, would incorporate a new company in a Canadian jurisdiction in order to carry on their business. This Canadian subsidiary may be a standard limited liability corporation or it might be an unlimited liability corporation, depending on the tax characteristic of the parent's jurisdiction. More detailed information on the forms of business organization in Canada can be found in the Forms of Business Organization section of this Guide. In addition, the taxation of foreign investors and their Canadian subsidiaries is discussed in detail in the Taxes and Duties section of this Guide.

5. WHAT STEPS DOES THE CANADIAN GOVERNMENT TAKE TO CONTROL MERGERS AND ACQUISITIONS WITH FOREIGN INVESTORS OF ITS NATIONAL COMPANIES OR OVER ITS NATURAL RESOURCES AND KEY SECTORS (E.G., ENERGY AND TELECOMMUNICATIONS)?

As discussed in question 2, non-Canadians who acquire control of an existing Canadian business, or who want to establish a new unrelated Canadian business, are subject to the federal Investment Canada Act (ICA). The transactions subject to review include businesses within a prescribed type of business activity that is related to Canada's cultural heritage or national identity, and transactions where the Minister responsible has reasonable grounds to believe that an investment by a non-Canadian could be injurious to national security. Notice of the transaction is given to the Review Division of Industry Canada. When a transaction is reviewable under the ICA, the investor is required to file an extensive pre-closing filing called an Application for Review with supporting documents. When a review is conducted, the investor is prohibited from closing the transaction until the Minister's approval is obtained. Investment reviews under the ICA proceed in tandem with reviews under the Competition Act.

Merger or antitrust review and prenotification in Canada are governed by the Competition Act. Mergers that exceed a certain size threshold require the Commissioner of Competition to be notified prior to completion. Whether a notification filing is required is determined by the value of the assets in Canada and the annual gross revenues from sales in, from or into Canada of the parties to the transaction, and of the target corporation itself.

There are sectors in Canada, such as telecommunications and other broadcast-related sections, that have ownership restrictions imposed by the federal government. In addition, Canada has anti-dumping legislation which imposes duties to prevent unfair competition with domestic Canadian goods.

More detailed information on the direct investment and competition laws in Canada can be found in the Foreign Investment & Merger section of this Guide.

6. HOW DO LABOUR STATUTES REGULATE THE TREATMENT OF LOCAL EMPLOYEES AND EXPATRIATE WORKERS?

For employers in Canada, the employment relationship is governed by various federal and provincial acts that provide minimum standards for most employees. In most cases, individual or collective agreements will be governed by these minimum standards. Accordingly, Canada cannot be considered a jurisdiction in which there is employment at will. There are minimum standards which mandate that employees are entitled to receive either notice of the termination of their employment or pay in lieu of notice if their employment is terminated without cause. The legislative requirements are minimum standards only and do not restrict an employee's right to sue for breach of contract, wrongful dismissal or other damages arising from the termination of his or her employment. In the absence of a written contract to the contrary, termination of employment without cause generally requires significantly longer notice periods than those provided by the legislation. Appropriate reasonable notice periods have been established by common law through the litigation process on a case-by-case basis. The courts consider various factors, including the employee's age, length of service, position, remuneration, how the employee came to be employed, their chance of finding replacement employment and the manner of dismissal. The judge will consider all of these factors to determine the appropriate "reasonable notice" period.

Reasonable notice established by the common law in Canada often greatly exceeds the obligations of U.S. employers to their employees. The grounds for termination for cause in Canada are also very limited and reserved for the most serious misconduct (for example, where the termination results from acts of dishonesty of the employee, or where the employee has been warned in writing various times and provided with assistance, yet continues to perform below expectations).

More detailed information on employment law in Canada can be found in the Employment Law section of this Guide. In addition, more detailed information on business visitors (temporary residents), temporary workers, professional workers under the various international trade agreements and permanent residents can be found in the Immigration Restrictions section of this Guide.

7. HOW DO LOCAL BANKS AND GOVERNMENT REGULATORS DEAL WITH THE TREATMENT AND CONVERSION OF LOCAL CURRENCY, REPATRIATION OF FUNDS OVERSEAS, LETTERS OF CREDIT AND OTHER BASIC FINANCIAL TRANSACTIONS?

Banking, currency and negotiable instruments are regulated uniformly in Canada by the federal government. Specifically, all banks in Canada are regulated by the federal government. *The Bank Act*, S.C. 1991, c. 46 is the main federal statute which regulates Canadian banking. Canadian banks are divided into three distinct categories. Schedule I banks are domestic banks that are allowed to accept deposits which may be eligible for deposit insurance. Schedule II banks are foreign bank subsidiaries that are authorized to accept deposits which may be eligible for deposit insurance. Foreign bank subsidiaries are controlled by eligible foreign institutions. Schedule III banks are foreign bank branches of foreign institutions that are authorized to do banking business in Canada.

8. WHAT TYPES OF TAXES, DUTIES AND LEVIES SHOULD A FOREIGN INVESTMENT IN CANADA EXPECT TO ENCOUNTER?

When doing business in Canada, you can expect to encounter sales and transfer taxes, income and capital taxes, and custom and excise duties.

Canada has a 5% goods and services tax (GST) which applies to most goods and services on the purchase price. Those engaged in commercial activity in Canada having worldwide sale of goods and services subject to GST greater than CND30,000 per year must register to collect GST. Registration entitles businesses to input tax credits (ITCs) equal to the full amount of GST paid by them on all business purchases. Some nonresidents carrying on business in Canada are also required to register to collect GST. Most Canadian provinces charge a sales tax ranging between 5% and 10% on tangible property and certain services. Harmonized Sales Tax (HST) has been implemented in Nova Scotia, New Brunswick, Newfoundland, British Columbia and Ontario. HST applies to all goods and services that are subject to GST and ranges between 12% and 15%. Registrants for HST are entitled to claim ITCs. The province of Québec administers its own sales taxes together with the GST. The rate of the Québec sales tax is 9.975%. In addition, a land transfer tax, ranging from .02% to 2%, is payable on the acquisition of real property in each province.

Canada imposes a federal income tax on nonresidents who conduct business or sell real property in Canada. Canada also imposes a federal nonresident withholding tax on certain Canadian source payments. This requirement can be waived if the non-resident is carrying on business through a permanent establishment. Canada has entered into bilateral treaties with many countries which contain tax relief provisions. A foreign tax credit may be available in the nonresident's own jurisdiction. A corporation incorporated in Canada will be considered a resident of Canada for income tax purposes. This means the corporation will be subject to Canadian income tax on its worldwide income. Foreign businesses can also be carried on through branch operations. Provinces and territories typically impose income tax on corporations carrying on business within the province and some impose a capital tax on corporations.

All goods entering Canada go through a customs inspection at the point of entry. Documentation accompanying goods ascertains the transaction value of the goods (the price paid for the goods by the importer, subject to adjustments for royalties, shipping fees and transportation). The amount of customs duty is determined by the customs tariff that sets out a specific list describing the class of goods and setting out the corresponding rate of duty. Member countries of North American Free Trade Agreement (NAFTA) receive a preferential duty rate. Imported goods, such as alcohol and tobacco, are subject to a special duty under the customs tariff that is equal to the excise duty paid by Canadian producers.

There are special anti-dumping duties for imported goods sold in Canada at prices that are below the prices in the home market. Dumping occurs when the "normal value" of the imported goods exceeds the "export price." These anti-dumping duties are imposed to provide Canadian producers with relief from unfair import competition.

More detailed discussion of this topic can be found in the Taxes and Duties section of this Guide.

9. HOW COMPREHENSIVE ARE THE INTELLECTUAL PROPERTY LAWS OF CANADA, AND DO THE LOCAL COURTS AND TRIBUNALS ENFORCE THEM OBJECTIVELY, REGARDLESS OF THE NATIONALITY OF THE PARTIES?

Canada offers a fully developed and modern intellectual property law regime. Through federally based legislation that governs the acquisition and enforcement of intellectual property rights throughout Canada, parties are able to register and protect all aspects of intellectual property, including trade-marks, copyright, patents of invention and industrial designs. Canada is also a party to all of the major world intellectual property law treaties and conventions, including the Patent Cooperation Treaty, the Berne Convention and the various World Intellectual Property Organization treaties. Parties, including those based in foreign jurisdictions, have the ability to enforce their intellectual property rights in either the superior courts of the Canadian provinces, or, more often, in the Federal Court of Canada, which courts are required to enforce Canada's laws fairly and objectively, regardless of a party's national origin.

A more detailed discussion of this topic can be found in the Intellectual Property section of this Guide.

10. IF A COMMERCIAL DISPUTE ARISES, WILL LOCAL COURTS OR ARBITRATION OFFER A MORE BENEFICIAL FORUM FOR DISPUTE RESOLUTION TO FOREIGN INVESTORS?

Whether or not foreign investors will benefit more from bringing a dispute to private arbitration or to the courts will depend on the nature of the dispute. For example, a foreign investor may benefit from having a complex commercial matter arbitrated privately, as the parties can attempt to select an arbitrator who has experience and knowledge related to the subject matter at issue. Private arbitration can also be beneficial because it is generally a much faster process than court proceedings. In either case, Canadian law, and in particular Canada's Charter of Rights and Freedoms, guarantees equality under the law, which extends to foreign participants in court or arbitration proceedings, such that neither party to a dispute should benefit (or suffer) from the fact of their national origin.

SALES AND TRANSFER TAXES

GOODS AND SERVICES TAX

Canada has a 5% value-added tax imposed on goods and services called the Goods and Services Tax (GST). The GST is applied to each transaction in the production and distribution chain, including most services and including the importation of most goods and services into Canada. It is charged on the "value of the consideration," meaning, in general terms, the purchase price, except that in the case of imported goods, GST is based on the duty paid value (which includes customs duty). Goods exported from Canada are not subject to GST. There are limited exemptions from GST such as most financial services (including, for this purpose, insurance premiums, loan interest and share purchase transactions), specified goods (including most grocery items) and others.

All persons, including corporations, partnerships and sole proprietorships who are engaged in a commercial activity in Canada having worldwide sales of goods and services subject to GST greater than CND30,000 per year, must register to collect GST. The concept of "commercial activity" is quite broad and includes not only carrying on a business in Canada but also single ventures and the sale of real estate. Businesses which register for GST are entitled to input tax credits equal to the full amount of the GST paid by them on all business purchases. The input tax credit system effectively reduces the tax (on a net basis) on each business entity to the value added by such entity. Unregistered persons are not required to collect GST on their sales but are also not entitled to recover GST paid on their purchases as input tax credits.

Nonresidents who conduct business in Canada or who are deemed to carry on business in Canada by virtue of, among others, soliciting orders in Canada or offering for sale certain goods such as books or periodicals for delivery in Canada are required to register for and collect GST. Certain nonresidents who are not carrying on business in Canada may voluntarily register to collect and remit GST. Registration would be desirable if such supplier wishes to obtain input tax credits for GST paid to Canadian suppliers. A nonresident without a permanent establishment may be required to post security in connection with its obligation to collect and remit GST.

PROVINCIAL SALES TAX

With the exception of the province of Alberta, each province charges a sales tax on tangible personal property and certain services. Sales taxes in the Canadian provinces generally range between 5% and 10%.

Most provinces provide exemptions from sales taxes for certain goods, such as basic groceries. As well, exemptions for certain purchases of production machinery are contained in most provinces' legislation. However, there is variation from province to province in the services which are subject to taxation. For example, British Columbia and Québec extend sales tax to lawyers' accounts.

Five provinces, namely Nova Scotia, New Brunswick, Newfoundland, Ontario and Prince Edward Island, have harmonized their provincial sales tax with GST to implement a Harmonized Sales Tax (HST) system. The HST applies to all goods and services that are otherwise subject to GST and is administered under the Excise Tax Act. It is applied at the single rate on taxable supplies for goods and services made or deemed to be made in the participating provinces, replacing the former dual systems of provincial retail sales tax and GST.

Supplies made in the non-participating provinces will remain subject to GST and the provincial retail sales tax of the particular province. For example, British Colombia, once a participating province in the HST system, recently reverted to a provincial sales tax system. Thus, supplies made in British Columbia are subject to the current provincial sales tax of 7% and the GST of 5%.

Finally, the Province of Québec administers its provincial tax together with the GST. The rate of the Québec sales taxes is currently 9.975%.

LAND TRANSFER TAX

A land transfer tax is payable on the acquisition of real property in each province and rates vary between 0.02% and 2% based on the consideration paid for the real property. Generally the rate increases incrementally as the amount paid for the property increases. In addition, other provincial and municipal fees may also apply.

INCOME AND CAPITAL TAXES

FEDERAL INCOME TAX

Canada imposes federal income tax on nonresidents who conduct business in Canada or sell real property located in Canada. In general terms, this is restricted to income derived from Canadian business activities and Canadian investments.

In addition, Canada imposes a federal nonresident 25% withholding tax on certain Canadian source payments such as dividends, rent, royalties, management fees and interest paid to nonresidents. In these circumstances, subject to limited statutory exemptions, the Canadian payer is required to withhold tax from the gross amount of the dividend, interest, etc. and remit this

to the Receiver General for Canada as tax on behalf of the nonresident recipient. However, where the nonresident carries on business in Canada through a permanent establishment in Canada, in certain cases a waiver from such nonresident withholding tax may be available upon application to the Canadian federal tax authority. Also, a foreign tax credit may be available in the nonresident's own jurisdiction in respect of the Canadian nonresident withholding tax.

Canada has entered into bilateral tax treaties with many countries. The Canada-U.S. Income Tax Convention (1980) as amended by various Protocols (the Convention) is an example of a tax treaty which contains certain relieving provisions. For example, in the absence of a permanent establishment in Canada (as defined in the Convention), a U.S. person (not limited to an individual) who is subject to tax in the United States and who carries on business in Canada will not be subject to Canadian federal income tax on business income earned in Canada. A permanent establishment is defined as a fixed place of business through which the business of the nonresident is carried on and includes, for example, an office or factory. It should be noted that the definition of "permanent establishment" in the Convention may differ from the definition of the same term as applicable for provincial tax purposes. The Convention also provides for a reduction in withholding tax rates on certain types of Canadian source income distributed to U.S. persons as described below.

A U.S. corporation may conduct business in Canada either by incorporating a Canadian subsidiary corporation or by means of a Canadian branch operation.

CANADIAN SUBSIDIARY CORPORATION

A corporation incorporated in Canada (whether federally or provincially) will be considered to be a resident of Canada for income tax purposes and therefore will be subject to Canadian income tax on all of its worldwide income under Part I of the Income Tax Act (Canada) (the Act).

Canadian corporate tax rates include federal tax and provincial tax. Depending on the province where the corporation carries on business through a permanent establishment, the combined tax rate effective 15 January 2013 ranges from 11% to 27% on active business income not exceeding CND500,000 earned by a Canadian-controlled private corporation (CCPC), from 25% to 31% for active business income exceeding CND500,000, from 25% to 31% for active business income earned by other corporations, and from 25% to 31% for investment income earned by other corporations (interests, rents, taxable capital gains, etc.). The following table sets out the combined federal and provincial income tax rates for income earned by a CCPC effective 15 January 2013.

Combined Federal and Provincial Tax Rates for Income Earned by a CCPC

	Small Business Income up to CND400,000	***Active Business Income CND400,000 to CND500,000***	***General Active Business Income***	***Investment Income***
Alberta	14.0	14.0	25.0	44.7
British Columbia	13.5	13.5	25.0	45.7
Manitoba	11.0	23.0	27.0	46.7
New Brunswick	15.5	15.5	25.0	46.7
Newfoundland and Labrador	15.0	15.0	29.0	48.7
Northwest Territories	15.0	15.0	26.5	46.2
Nova Scotia	14.5	27.0	31.0	50.7
Nunavut	15.0	15.0	27.0	46.7
Ontario	15.5	15.5	26.5	46.2
Prince Edward Island	12.0	12.0	31.0	50.7
Québec	19.0	19.0	26.9	46.6
Saskatchewan	13.0	13.0	27.0	46.7
Yukon	15.0	15.0	30.0	49.7

(Note: Certain credits against tax or reduced rates may be available, e.g., for manufacturing and processing activities.)

Assuming that the Canadian subsidiary repatriates profits to its foreign parent, nonresident withholding tax may apply at a rate of 25%, as described above. This withholding is generally reduced by the various tax treaties. For example, according to the Convention, the reduced rates of withholding tax on interest, dividends and royalties are as follows:

Dividends paid to U.S. parent corporation	5% or 15%*
Interest paid to U.S. parent corporation	0% or 15%**
Royalties paid to U.S. parent corporation	0% - 10%***

* The 5% withholding tax rate applies when the beneficial owner is a company that owns 10% or more of the voting stock of the company paying the dividends.

** The 0% withholding tax rate applies to all interest except "participating debt interest" which is subject to withholding tax at a rate of 15%.

*** The 0% withholding rate applies on certain types of royalties such as copyright royalties and payments for the use of computer software.

CANADIAN BRANCH OPERATION

If a nonresident corporation conducts business in Canada through a permanent establishment and does not incorporate a Canadian subsidiary, tax under Part I of the Act will also be applicable at the rates described above in respect of income from Canadian business operations.

In addition, a so-called branch tax is imposed on the after-tax profits of the Canadian branch operations which are not, in general terms, reinvested in Canada. The branch tax is intended to be roughly equivalent to the withholding tax which would have been payable on dividends paid by a Canadian subsidiary to its foreign parent. The rate of Canadian branch tax is 25%. This rate has been reduced by the Convention to 5% for branches of U.S. corporations. In addition, the Convention provides for a one-time exemption for the first CND500,000 of Canadian net profits. The CND500,000 exemption must be shared among associated corporations if the associated corporations conduct the same or similar businesses in Canada.

A U.S. foreign tax credit should be available in respect of Canadian income taxes paid for the Canadian branch operation, subject to the rules in the Internal Revenue Code.

CHOOSING BETWEEN A CANADIAN SUBSIDIARY AND CANADIAN BRANCH OPERATION

There are a number of considerations relevant to this issue. Non-income-tax considerations such as regulatory compliance or the desirability of segregating Canadian assets and liabilities from U.S. assets and liabilities are relevant. Tax considerations include the following:

- The desirability of utilizing any Canadian start-up losses against U.S. income
- If a Canadian branch structure is utilized, a Canadian income tax return must still be filed and a certain amount of disclosure about the U.S. parent will accordingly be necessary
- If a Canadian branch structure is utilized, the ability to subsequently incorporate the branch on a tax-free basis must be considered both from a Canadian and U.S. tax perspective
- If a Canadian branch structure is utilized, one will typically pay the higher of the two tax rates of the two jurisdictions

CAPITAL TAX

Canada, provinces and territories do not impose a capital tax on corporations except for financial institutions.

Before 2006, Canada imposed a "large corporations tax." This was essentially a federal capital tax at the rate of 0.20% on capital used in Canada by a

corporation in excess of CND50 million. This CND50 million threshold (technically a capital deduction) had to be shared among a related group of companies. This capital tax has been eliminated.

CUSTOMS AND EXCISE DUTIES

CUSTOMS DUTIES

All goods entering Canada must go through customs inspection at the point of entry, at which time they are valued and duty, if any, is levied. In 1988, Canada adopted a classification system known as the Harmonized System. This system provides for classification of goods by their essential or intrinsic character, not according to their use.

Documentation accompanying goods must show origin, nature of the goods, their intended use and their value and/or price. The primary basis for appraisal of goods imported into Canada is the transaction value of the goods. The transaction value is the price paid or payable for the goods by the importer of the goods, subject to adjustments for elements such as royalties, shipping fees and transportation. Where the price paid or payable for the goods cannot be ascertained, the Customs Act provides for other methods of valuation to be used.

The valuation for goods imported into Canada is governed by the Customs Act and its associated regulations. The Customs Act dictates that where the vendor and purchaser do not deal at arm's length, it must be shown that the relationship with the foreign importer did not influence the price paid or payable for the goods, or the importer of the goods must demonstrate that the transaction value of the goods satisfies several criteria set out in the Customs Act. If the transaction value is not reliable, the following valuation methods are considered:

- Transaction value of identical goods
- Transaction value of similar goods
- Deductive value
- Computed value

If the valuation is still not satisfactory in the circumstances, the residual basis of appraisal provides for the application of one of the above methods in a flexible manner. The most appropriate method will be the method that can be most closely applied using information available in Canada.

The amount of customs duty is determined by reference to the customs tariff that sets out a specific list describing the class of goods and setting out the corresponding rate of duty. The country of origin of a good is the second criterion in the determination of the appropriate duty rate. The country of

origin can be generally defined as the place where a specific good is grown, extracted, produced or manufactured. Canada applies varying duty rates (preferential and non-preferential) to goods depending on the basis of their origin.

Duties on goods meeting the rules of origin under the North American Free Trade Agreement (NAFTA) and being so certified are permitted to enter Canada under the preferential duty rate accorded to American and Mexican origin goods. Effective January 1998, all goods meeting the criteria for origination in the United States are entitled to enter Canada duty-free. Tariffs on virtually all originating goods traded between Canada and Mexico were eliminated in 2008, with the exception of Canadian agricultural goods in the dairy, poultry, egg and sugar sectors (which are exempt from tariff elimination).

In order to benefit under the application of NAFTA, goods must meet criteria establishing "rules of origin." These complex rules dictate which goods are eligible to benefit under NAFTA. Goods that originate solely within a free trade area, goods with a 50% or 60% "regional value content" of North American content and direct assembly cost, or significant parts of which are determined to have originated in North America, are adjudged to be "originating" and are therefore able to benefit from the preferential duty treatment under NAFTA. In some cases, goods will be classified as having originated in the country of a signatory to NAFTA and benefit under NAFTA even if some parts that comprise that good were imported from outside of that country's borders.

EXCISE DUTIES

Under the *Excise Act*, alcohol, beer, malt liquor, tobacco and related products are subject to excise duties. These duties are not applicable to imported goods that are not further manufactured or processed in Canada. However, imported goods of such categories are subject to a special duty under the customs tariff that is equal to the excise duty.

ANTI-DUMPING DUTIES

Pursuant to the Special Import Measures Act (SIMA), there are special anti-dumping duties for imported goods sold in Canada at prices that are below the prices in the home market.

In addition, where goods sold in Canada are subsidized by the exporting country, a countervailing duty may be imposed. These anti-dumping and countervailing duties may be imposed as additional charges, over and above the normal customs tariffs. SIMA is designed to provide Canadian producers with relief from unfair import competition.

In order for an anti-dumping duty to be levied, two conditions must be met:

- The President of the Canada Border Services Agency appointed under subsection 7(1) of the Canada Border Services Agency Act (the President) must have found the imported goods to have been dumped
- The dumping of the imported goods must have been found by the Canadian International Trade Tribunal (the Tribunal) to have caused, be causing or be likely to cause material injury to production in Canada of like goods

Accordingly, if there are no "like goods" produced in Canada, anti-dumping duties cannot be levied.

Dumping occurs when the "normal value" of the imported goods exceeds the "export price." The normal value is generally the price at which the exporter sells similar goods in its domestic market under competitive conditions at a profit to arm's-length purchasers comparable to the importer. Where there are no comparable purchasers (i.e., purchasers who are at the same or substantially the same trade level, and who purchase the same or substantially the same quantities, as the importer), the normal value may be derived by adding the goods' cost of production, an amount for administrative, selling and other costs and an amount for profit. It may also be derived by reference to the prices at which the exporter sells the goods to importers in third countries.

Generally, the export price means the lesser of the exporter's sale price of the goods and the price at which the importer has purchased or agreed to purchase the goods, after deducting:

- All costs, charges and expenses incurred in preparing the export of the goods to Canada
- Import duties and taxes imposed by Canadian law
- Every other cost, charge and expense associated with the export of these goods

If the normal value exceeds the export price, the imported goods will be found to have been dumped.

Criteria utilized in determining whether or not there has been material injury to production in Canada of like goods include the following:

- Price suppression and/or erosion of sales by Canadian producers of like goods
- Loss of market share by Canadian producers of like goods
- Reduced employment of persons in Canadian production facilities
- Reduced utilization of Canadian production capacity of like goods
- Inventory build-ups

Generally, an anti-dumping duty can be commenced by filing a written complaint with the President.

If the President is of the view that there is evidence that imported goods are being dumped, and there is a reasonable indication that such dumping has caused, or is threatening to cause injury to production in Canada of like goods, the President may then commence an investigation. Notice of the investigation must be given by the President to the Secretary of the Tribunal, the exporter, the importer, the government of the country of export, the complainant and any other prescribed persons. If a preliminary determination of dumping is made, the President must provide an estimated "margin of dumping" for the imported goods to which the preliminary determination applies. The margin of dumping is the amount by which the normal value of the imported goods into Canada exceeds the export price for such goods. The importer of the impugned goods under the preliminary determination is the party liable for payment of such dumping duties. Failing that, the subsequent purchaser of those goods in Canada is liable for this penalty.

A final determination is thereafter made by the President within 90 days after making the preliminary decision. At the time of receipt of notice from the President of a preliminary determination, the Tribunal is required to commence its inquiry and hold a public hearing to determine whether or not the dumping is causing, or will likely cause in the future, material injury to production in Canada of like goods.

COUNTERVAILING DUTIES

In order for a countervailing duty to be imposed, SIMA requires that two conditions must exist:

- The President must make a finding that the imported goods have been subsidized
- The Tribunal must find that the subsidized goods have caused, are causing, or are likely to cause material injury to production in Canada of like goods

The definition of subsidy includes any financial or other commercial benefit to people engaged in the production, manufacture, growth, distribution, export or import of the goods in issue as a result of a scheme or program provided by or implemented by the country of export.

If subsidization and material injury have been found, the imported goods will be subject to countervailing duties in the amount of the subsidy.

CONCLUSION

Canada has become a world leader in reducing global trade barriers. Free trade with the United States and Mexico and freer trade with other countries have lowered many of the barriers to entering into the Canadian market. Canada, with its rich resources and vibrant marketplace, presents many opportunities for foreign businesses and investors. The foreign investor is encouraged to explore the competitive advantages of Canada. Sensitivity to the cultural, administrative and legislative differences in Canada will assist an enterprise's entrance into the Canadian market.

Through the general information provided in this book, we have attempted to illustrate the highly multicultural society that is Canada and to provide an overview of some of the main issues faced by foreign businesses and investors in Canada. It is important for foreign businesses and investors wishing to invest in Canada or enter into trade with Canadian businesses to understand the laws and culture of this country and to seek the advice of counsel at the appropriate time.

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