Doing Business in Canada

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Contents

Forms of Business Organization in Canada 1
Financing a Foreign Business Operating in Canada 4
Aboriginal Law 7
Business Immigration 10
Canada's Anti-Spam Law 12
Climate Change 14
Construction Law 17
Corporate Governance 20
Dispute Resolution 23
eCommerce Law 25
Employment & Labour 27
Energy: Oil & Gas 30
Environmental Law 33
Foreign Investment 36
Franchaise Law 39
Fraud Law 41
Government and Legal System 44
Infrastructure Opportunities In Canada 46
Intellectual Property Law 48
International Trade 51
Mergers & Acquisitions 54
Offences Under the Competition Act 56
Outsourcing 59
Pensions and Benefits 62
Privacy 65
Private Equity 68
Procurement Law 71
Renewable Energy 73
Restructuring & Insolvency 76
Tax 78
Technology 81
Transfer Pricing 83

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Forms of Business Organization in Canada

Canadian business laws are well developed. Several different types of business structures are available in Canada. Each features unique advantages and disadvantages.

Business Corporations

The corporation is the most common business organization in Canada. As a separate legal entity, the assets and liabilities of a corporation belong to the corporation, not to its shareholders. Shareholders may receive dividends from the corporation and are entitled to receive the assets of the corporation upon liquidation once the corporation's debts and other obligations have been discharged.

Corporations in Canada can be incorporated federally under the *Canada Business Corporations Act* (CBCA) or provincially under comparable legislation with slight variations. A provincially incorporated corporation must first register or obtain an extra-provincial license to conduct business in another province.

A corporation is created upon filing articles of incorporation that outline the rights, restrictions, privileges and conditions attached to each class of shares offered by the corporation. A corporation may issue as many shares and classes of shares as it likes, but one class must always offer full voting rights to the shareholders. A corporation also typically adopts by-laws governing various administrative matters.

A corporation is a legal entity with the rights, powers and privileges given to it by its articles and by-laws and governing statute. Corporations created under the CBCA (or corresponding provincial statutes) have the powers of a natural person, with some exceptions. Consequently, a corporation may hold property, enter into contracts and sue and be sued in its own name.

A corporation is managed by its directors. The CBCA requires that at least 25 percent of the directors of a corporation incorporated under the CBCA be Canadian residents. Boards with fewer than four directors must have at least one resident director. Most provincial business corporations legislation contains a similar requirement. The directors may appoint officers (who are not subject to residency requirements) to manage the daily affairs of the corporation. Both directors and officers can incur personal liability if they cause the corporation to act in breach of applicable laws and in some other circumstances.

Branches of Foreign Corporations

A branch operation of a foreign parent company must be either licensed or registered in each province where it intends to operate. The tax consequences of setting up a branch office vary considerably between the provinces as does the liability faced by the parent company for the operations and conduct of the branch.

Unlimited Liability Subsidiary Companies

The provinces of Alberta, British Columbia and Nova Scotia allow the Canadian subsidiary of a foreign-owned corporation to incorporate as an *unlimited liability company* (ULC). A ULC operates much like a partnership in that the shareholders of the ULC have unlimited liability. As an alternative to a branch office, a ULC may permit any losses of the Canadian corporation to be deducted by the foreign corporation.

Partnerships

A partnership is the legal relationship between individuals carrying on business in common with a view to profit. A partnership can be composed of individuals or two or more entities, including corporations or other partnerships. A partnership is not a separate legal entity. Generally speaking, partners are jointly and severally liable for any losses caused to non-partners, although this liability can be limited in some types of partnerships. Additionally, the income and losses of a partnership are considered to flow through directly to the partners for tax purposes.

Partnerships are governed by provincial law. Some provinces require that partnerships be registered. There are three types of partnerships in Canada: general, limited and limited liability partnerships.

General Partnerships

A general partnership features unlimited personal liability of each partner for the liabilities of the partnership, and the exposure of each partner's personal assets in the event the partnership's assets are insufficient to cover its obligations. Each partner may enter into partnership obligations that effectively bind the other partners.

Limited Partnerships

Limited partnerships feature both limited and general partners. The liability of a limited partner is limited to its investment in the partnership so long as it remains uninvolved in the management of the partnership. General partners are responsible for the management of the business and face unlimited personal liability just as they would in a general partnership. This arrangement is beneficial for passive investors looking to receive returns proportional to their initial investment.

Limited Liability Partnerships

Most provinces permit limited liability partnerships for eligible professions. This arrangement limits exposure by shielding partners from liabilities arising from the acts of another partner not directly under their care or direct supervision.

Joint Ventures

Two or more parties may form a joint venture for the purpose of carrying out a specific undertaking. In Canada, a joint venture may be conducted by separate corporations, general or limited partnerships, or simply by parties engaging in the joint ownership of assets. The parties pool capital and skill, but essentially establish a contractual relationship governing the business and providing for the distribution of profits. As a joint venture is not a legally recognized entity for tax purposes, its income and losses are taxed in the hands of each party to the joint venture.

Parties intending to create a joint venture are advised to draft a joint venture agreement which expressly states that no partnership is being established and which explicitly sets out the parties' respective rights and obligations. Should the law decide that a partnership exists in substance, the parties' joint venture agreement will be of no legal effect.

Sole Proprietorships

In a sole proprietorship, business is conducted by an individual without incorporation. Sole proprietorships are generally simple and subject to minimal regulation. For example, registration may be required if a business operates under a name other than that of the proprietor and some categories of business require special licenses to operate.

Profits earned by a sole proprietorship, as well as liability for any debts or other liabilities, are allocated to the sole proprietor. At law, no distinction is drawn between the proprietorship and the individual conducting it. The proprietor's personal assets are at risk should the business become unable to meet its obligations. The sole proprietor is also liable for any tortious or illegal activities of the business although, to some extent, liability insurance can help reduce this exposure.

The sole proprietorship model is well suited to many small enterprises as it avoids many of the expenses associated with incorporation. A sole proprietorship can be easily wound up at the end of its life or sold at the option of the owner. For tax purposes, a sole proprietorship provides some advantages. The owner can generally deduct business losses against the owner's other types of income and avoid experiencing double taxation in the hands of both the business entity and the owner.

Trusts

While trust structures are used to conduct business in Canada, recent legislative changes have reduced some of the tax advantages that once made them popular among foreign investors. Under Canadian law, a trust is not a separate legal entity. Trust assets are held by the trustee who is then liable for all obligations arising out of the trust's operations. While trusts are generally structured in a manner intended to minimize investor liability, investors may be exposed to personal liability arising from the operation of the trust in certain circumstances.

Conclusion

Canadian law provides considerable flexibility to foreign businesses seeking to establish a presence in Canada. The choice of an appropriate business structure in these circumstances requires careful planning and sound advice. Tax and liability considerations are usually key factors in this decision.

Bennett Jones' Corporate Commercial Group

The Bennett Jones Corporate Commercial Group advises a broad range of clients from start-ups to large TSX public companies, both domestic and foreign. Our expertise spans mergers and acquisitions, financings, governance, shareholder and partnership arrangements, executive/employee compensation arrangements, director protection (including indemnities and D&O insurance), commercial contracts of all kinds, international corporate structurings, enterprise formation and reorganization, and private equity/venture capital fund formation.

bennettjones.com/Corporate_Commercial_Law

Financing a Foreign Business Operating in Canada

There is a wide range of financing options available in Canada for new or developing businesses. These options can be categorized as debt or equity financing, or a combination of both. A third option – government assistance programs – exists to provide start-up capital and loans for financing business operations.

External Debt Financing

Debt financing provides businesses with a loan of money that must be repaid to the lender over time, typically with interest. Loans are most often provided by banks or financial institutions who generally offer financing in the form of an operating or term loan (or a combination thereof). To a lesser extent, debt financing might be sourced from parent companies, shareholders or related persons, or by offering debt securities to the public.

Operating Loans

Operating loans provide revolving financing to cover day-to-day operational expenses, such as working capital requirements. This type of loan is generally provided on a short- to medium-term basis. The amount of capital available to the borrower is typically based on the value of the businesses' assets. Operating loans generally provide access to a larger sum of financing than might be available from competing loan products where available credit is based on cash flows or leverage.

Term Loans

Term loans are typically medium- to long-term loans made to a business for a specific purpose, such as to fund capital projects or to finance the acquisition of an asset. They are generally repayable over a fixed period of time on a mutually agreed schedule. Often, the loan will be demanded in full or accelerated by the lender should a default or other specified event occur. Term loans are amortized over the life of the loan with interest payable on the principal.

Security

The lender may choose to provide a loan on either a secured or unsecured basis. With a secured loan, the lender takes an interest in some or all of the assets of the borrower to secure the obligation. Security can be taken over real property or personal property. Security over real property is typically taken through a mortgage or charge. The common law provinces have all enacted personal property security legislation dealing with the registration and enforcement of security interests taken in personal property. In addition, the federal *Bank Act* permits banks to take security interests in raw materials, work in progress, finished inventory and some assets and equipment through an alternative registry system. In addition to security, the lender may also require guarantees to support the loan.

Most debt financing is provided to businesses directly from banks. Canada's banking system is highly respected for its history of stable performance and efficient practices. In Canada, chartered domestic banks, along with foreign banks and non-chartered domestic banks, are closely regulated by the federal government. Canadian banks are also well capitalized. These features have aided their performance during the recent global financial crisis. Foreign banks operating in Canada mainly provide commercial banking services, as opposed to retail banking services.

In addition to the banking system, Canada has a wide range of sophisticated financial institutions, such as life insurance companies, credit unions, and trust and loan companies who also offer financial assistance. Life insurance companies cannot take deposits, but can provide medium- to long-term financing. Credit unions also provide financing. Trust and loan companies are able to take deposits as well as provide loans.

Capital assets might also be acquired by a business on a conditional sales basis or through a lease. Under either a true lease or financing lease, a business is able to pay for assets over their useful life from its cash flows, eliminating the need for significant capital at the point of purchase. In other situations, a factoring company may be used to improve cash flow. Factoring companies purchase the accounts receivable of the business at a discounted rate and then attempt to collect the receivables.

In a securitization, certain assets of a company are pooled and transferred into a separate legal entity which finances the purchase of this portfolio by issuing debt or debt-like instruments into the capital markets, secured by the portfolio assets.

Equity Financing

In addition to debt, a corporation can seek equity financing to fund its operations. Equity financiers receive a share in the ownership of the business in return for their contribution. Unlike debt financing, equity financing is typically done on an unsecured basis, but requires compliance with securities legislation.

Private Placements and Public Offerings

Public offerings are a means of raising capital, although the viability of this option depends on the conditions of the market and the amount and terms of financing sought to be raised. The process is typically achieved through the distribution of a prospectus describing the issuer and its securities by a registered investment dealer to the public. This process is both time and capital intensive, restricting its viability to situations where large sums of money are to be raised. The expense of going public continues after the initial offering, as significant continuous disclosure requirements are imposed on public companies.

There are three main stock exchanges in Canada: the Toronto Stock Exchange, TSX Venture Exchange (a junior exchange) and Montreal Exchange, which trades exclusively in derivatives. Each exchange has requirements that must be met prior to receiving listing approval.

The Canadian securities market is regulated provincially, rather than federally. The legislation is broadly comparable to securities legislation in the United States and is designed to protect investors and maintain the integrity of our capital markets. Although regulations vary from province to province, the system aims to present a cohesive set of rules for participation in the Canadian capital market.

As an alternative to a public offering, funds can also be raised by way of a private placement. Given the expense of a public offering, this option presents an attractive alternative depending on the capital requirements of the business. Private placements can be conducted more expeditiously and at a lower cost than a public offering as the issuer does not need to prepare a prospectus. The placement is typically made by an investment banker who acts as agent for the issuer, although private placements can be completed directly by the issuer.

Venture Capital

Venture capital firms make an equity investment in businesses with high growth potential from a pool of private or publicly sponsored capital. Typically, businesses which attract venture capital investment are in the early stages of development and might not be established enough for a public offering or have enough cash flow history to attract debt financing. A venture capitalist (VC) makes a capital investment in exchange for a minority equity position. Because of the risks associated in investing in less mature businesses, VCs will often request a significant level of control over management and business decisions of the company.

Merchant Banks

Merchant banks typically provide financing in exchange for an equity interest in the business or provide subordinated debt or mezzanine financing, ranking behind senior debt but ahead of equity holders. Merchant banks are often involved in M&As, buyouts, recapitalizations, and reorganizations.

Government Assistance Programs

Government financing exists at the federal and provincial levels to support the development of small- to medium-sized businesses in various industries. Funds are available, depending on the size and location of the business, mainly in the form of repayable loans.

Conclusion

A broad range of financing options exists in Canada to finance a foreign business. Each alternative has unique legal and commercial considerations that should be carefully addressed by the foreign business in consultation with its Canadian legal advisors.

Bennett Jones' Financial Services & Capital Markets Groups

The Bennett Jones Financial Services Group routinely advises on the structuring and documentation of domestic and cross-border loan facilities. Our broad experience and expertise ranges from large, syndicated, multi-jurisdictional senior secured debt financings arranged by both domestic and foreign corporate banks to mid-market asset-based and mezzanine loan transactions.

Our Capital Markets Group advises on a broad range of corporate finance transactions and on securities law matters generally, including acting on public offerings and private placements; advising on continuous disclosure requirements and applications for exemptive relief from securities regulators; and dealing with stock exchanges and clearing systems.

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Aboriginal Law

Aboriginal peoples continue to shape the investment climate of Canada. Where investments involve the development of resources, land or infrastructure, Aboriginal peoples are not only potential rights holders but also future employees for industry, a voting base for Canadian politics, and often in need of public services such as education and health.

An understanding of Aboriginal peoples' rights and interests will assist a corporation's successful investment in Canada. Companies that invest in Canada need to consider applicable Aboriginal law; relevant industry practices; community and government expectations; and the political, administrative and traditional structures of each neighbouring Aboriginal community.

Aboriginal Rights

Aboriginal rights relate to the customs, practices and traditions that are integral to an Aboriginal group. Some rights may relate to an Aboriginal cultural practice that is not connected to land; other rights are connected to land, such as the right to hunt, fish and trap or practice other customs and traditions upon certain tracts of lands. Aboriginal groups may also have Aboriginal title to the land itself.

Canada's Aboriginal Peoples

The term "Aboriginal peoples" refers to three distinct cultural groups: Indians, Métis and Inuit, each with their own distinct culture, heritage, language, customs, practices and beliefs. The term "First Nation" is often used instead of "Indian" to avoid historical issues associated with the term "Indian." The Métis are mixed blood descendants of both First Nations and early Europeans, and are distinct from both First Nations and Inuit. The Inuit people predominately reside in the Northern regions of Nunavut, Northwest Territories, Northern Quebec, and Northern Labrador.

The Indian Act

The Constitution Act, 1867 gave the federal government jurisdiction to make laws in relation to "Indians, and Lands reserved for the Indians." One such law, the *Indian Act*, originally organized Indians into groups or "bands" which were allocated the then newly created reservations for their community's use and benefit. Today, individuals entitled to be registered under the *Indian Act* are classified as "status Indians." Therefore, persons identifying themselves as Indian can be a status Indian or a non-status Indian. Status Indians have access to a wide range of programs and services offered by federal agencies and provincial governments.

A Growing Base in Canada

Over 1.4 million people (4.3 per cent of the population) in Canada identify themselves as Aboriginal. Half of them are registered Indians under the *Indian Act*; 15 per cent are non-status Indians; 30 per cent are Métis; and 4 per cent are Inuit. Over half of Aboriginal people live in urban centres, predominantly in Ontario and the western provinces.

The Aboriginal population has been growing faster than the general population of Canada, with almost half of all Aboriginal people aged 24 years or younger. Relative to non-Aboriginal people, a larger proportion of Aboriginal people suffer socio-economic disadvantages, including higher rates of poverty, unemployment, inadequate living conditions and domestic violence. These social realities are relevant to both governments and businesses that operate near Aboriginal communities.

Constitutional Framework

The *Constitution Act*, 1982 recognizes and affirms the Aboriginal and treaty rights of Aboriginal peoples in Canada. This affirmation shifted the Canadian business landscape. Attention has turned towards understanding and reconciling Aboriginal rights and interests. A growing body of case law has created new norms for industry's approach to Aboriginal and community relations that continue to evolve with each new court decision.

Aboriginal Treaties

Many First Nations negotiated treaties with the Crown whereby interests in their traditional lands were ceded in return for the protection of specific rights (to hunt, trap, and fish on particular tracts of land) and other benefits. Most treaties were made in the late 19th and early 20th century. Modern treaties continue to be negotiated. The terms of each treaty vary according to the circumstances of the preceding negotiations. Most of Canada is covered by treaty, although a significant portion, including most of British Columbia, is not. Aboriginal rights in those areas are asserted, but largely undefined. In Atlantic Canada, there are peace treaties which are distinguished from numbered treaties whereby First Nations' interests in their traditional lands were ceded. Aboriginal title in Atlantic Canada is not settled.

Aboriginal Title

Aboriginal title is *sui generis* (unique) because it arises from Aboriginal occupation of the land before the assertion of British sovereignty. To establish a claim for Aboriginal title, the Aboriginal group asserting title must show that:

1. the land was occupied prior to British sovereignty in 1846;
2. if present occupation is relied on as proof of pre-sovereignty occupation, there is continuity between present and pre-sovereignty occupation; and
3. at sovereignty, the occupation was exclusive.

Aboriginal title entitles the group the exclusive right to use, control and benefit from the land, including their resources. Aboriginal title is collective and cannot be encumbered in ways that would prevent future generations of the group from using it. It also cannot be conveyed to any party other than the Crown. If land is subject to Aboriginal title, then the Crown must seek consent from the Aboriginal title holders before allowing the use of the land. If the consent cannot be obtained, then the Crown must justify any infringement to the Aboriginal title.

In 2014, the Supreme Court of Canada recognised the first claim to Aboriginal title in Canada and clarified how the Crown and Aboriginal interest may be reconciled. To justify an infringement of Aboriginal title, the Court held that the government must show that:

(1) it discharged its procedural duty to consult and accommodate (see the duty to consult section below);

(2) its actions were backed by a compelling and substantial objective; and

(3) the governmental action is consistent with the Crown's fiduciary obligation to the group.

Compelling and substantial public purposes may include the development of agriculture, forestry, mining and hydroelectric power.

Governments may also need to reassess conduct undertaken prior to Aboriginal title being established if, going forward, the prior Crown conduct does not reconcile with the Crown's duty to uphold the honour of the Crown (see "duty to consult" below) in its dealings with Aboriginal title holders.

Proving Aboriginal rights through the courts (or reaching modern treaties) could require many years of effort. Assessing the strength of Aboriginal rights claims is essential before investing in the land and resource base. Agreements with affected Aboriginal groups can help manage investment risk.

Crown's Duty to Consult and Accommodate

The Crown must act honourably in all of its dealings with Aboriginal peoples to reconcile its interests with the pre-existing Aboriginal rights. The duty to consult with Aboriginal peoples arises based on the principle of upholding the honour of the Crown.

The duty to consult is triggered when the Crown has knowledge of asserted or actual Aboriginal rights and is contemplating conduct that might adversely affect the asserted Aboriginal right. The duty to consult calls for meaningful engagement with the Aboriginal group on the proposed conduct. Consultation seeks to identify potential adverse impacts on asserted or established Aboriginal or Treaty rights, and then to avoid or minimize the adverse impacts or provide for other accommodation.

The duty to consult will be proportionate to the strength of the claim and the potential for harm. The duty to accommodate only arises where the consultation reveals a potential impact on the claimed right. In the case of proven Aboriginal title, consent may be required. In all cases, the Aboriginal group does not have an absolute veto over the Crown's ultimate decision. The Crown may justify an infringement in pursuit of a valid and compelling public interest.

Role of Project Proponents

Although the duty to consult is imposed on the Crown, project proponents, who have a vested interest in the outcome, will be delegated certain procedural duties by the government (such as providing certain project information to Aboriginal communities). Each government may have guidelines and procedures to assist the parties in meeting the Crown's consultation obligations.

Project proponents may also consult bilaterally with the neighbouring Aboriginal groups to garner community support. A failure to consult properly may delay project approvals and increase the risk of litigation.

Private Mutual Benefit Agreements

In Canada, investment success relies on the effective management of community and Aboriginal relationships. A corporate social responsibility strategy that includes benefit sharing agreements with Aboriginal communities may help avoid potential conflicts and build support for a project.

The potential application of other legislation to benefit sharing agreements or other similar agreements should be considered on a case by case basis, including anti-bribery and anti-corruption laws prohibiting certain payments to public officials (which have been broadly defined to include Aboriginal band officials). Under the *Extractive Sector Transparency Measures Act, 2014*, certain companies must disclose payments made to foreign and domestic governments if the total of the payments is over $100,000. This requirement includes monetary or in-kind payments made by industry to Aboriginal or indigenous governments. However, such payments will be exempt through to May 31, 2017. Businesses must create the internal systems to consider the other legal implications of agreements with Aboriginal groups and comply with such legal requirements.

Bennett Jones Aboriginal Law Group

Our Aboriginal Law Group helps project proponents develop major energy projects, including securing approvals, consulting with Aboriginal communities, and entering into commercial arrangements with Aboriginal businesses and organizations. We draw on our top-tier, cross-departmental expertise in the energy, environmental, corporate commercial, regulatory, litigation and tax arenas to shepherd significant projects and other ventures through to fruition.

bennettjones.com/AboriginalLaw/

Business Immigration

The Canadian immigration process has become increasingly complex and can be very time-consuming. As such, it is prudent for an employer to start the process early to ensure that a worker is able to be in Canada in the time frame required. To receive the appropriate permit to work in Canada, a U.S. citizen or permanent resident must normally follow a two-step process, as outlined below. Non-U.S. citizens must also undergo a Consular application.

Labour Market Opinion

Should no exemptions apply, the first step in the process is to apply for a Labour Market Opinion (LMO) through the Service Canada office of the Canadian government. To qualify for an LMO, the employer must demonstrate that there are no qualified workers in Canada able to perform the services required. Normally this requires the employer to advertise in Canada for qualified individuals. When it can be demonstrated that no such Canadian individuals are able or willing to accept the job, the position will be opened for acceptance by a foreign worker. In some cases where the employee is currently employed by an affiliated company and possesses proprietary or specialized knowledge, the advertising requirement may be bypassed and the time necessary to process the confirmation shortened. Regardless, the standard processing time for such an application is approximately eight weeks. In urgent, exceptional circumstances, the office will occasionally expedite the application process. The following information is required to apply for an LMO:

(a) Foreign worker's name, sex, residential address, date and place of birth.

(b) Name of the employer, including address, Revenue Canada taxation number, number of employees, date the corporation was organized, contact person and fax number.

(c) A detailed position description, including the education and experience requirements for the position.

(d) Recruitment efforts undertaken (such as advertising, industry contacts and letters of support from Union representatives).

Work Permit

Once the LMO has been issued, the individual is entitled to apply at Immigration Canada for a Work Permit when the foreign worker arrives at the Port of Entry seeking to enter Canada. He or she must demonstrate that he or she: meets the requirements for the job position that were previously described to Service Canada; is otherwise admissible to enter Canada; and has no criminal convictions that would bar his or her entrance into Canada. An Immigration processing fee of $150.00 must also be paid.

Exceptions

A number of exceptions may apply which will greatly shorten the application process. The North American Free Trade Agreement (NAFTA) provides a number of categories that allow U.S. citizens to work in Canada without having to undergo the confirmation process; however, these workers are still generally required to pay the $150 fee and obtain a work permit. The most commonly used categories of exemption are as follows:

Professional Category

NAFTA allows people with designated educational degrees (*i.e.*, engineers, geologists, scientific technicians, economists and accountants) to enter Canada to provide employment services in their field of expertise. They must present a corporate letter of support together with their degrees or certificates. This provision is frequently used and will likely be of considerable benefit. Normally, this category requires the foreign worker to possess a university degree. However, the scientific technician category allows entry to individuals who have a two-year scientific diploma or can otherwise indicate considerable expertise as a scientific technician.

Intra-company Transferees

Executives, senior managers and employees with specialized knowledge may be transferred to Canada. An executive or manager must exercise significant managerial authority and responsibility. Individuals will generally *not* qualify if they only manage front-line workers.

An employee who has expertise that is not available elsewhere (generally propriety or internal corporate information) may apply as a specialized knowledge worker and avoid the confirmation process. Note, however, that many immigration officers refuse to apply this provision. Instead, they require the company to undergo the LMO process. Also, to qualify, the worker must have worked abroad for an affiliated company for at least one year in the past three years.

After-Sales Services/Installation

Workers who are coming to Canada to provide after-sales service or installation work on goods manufactured outside of Canada, but sold to a Canadian company, are entitled to provide these services in Canada. As long as the individual provides extensive supporting documentation, he or she is entitled to enter Canada without having to obtain a work permit or otherwise deal with lengthy immigration application processes. The most critical, mandatory piece of information required is a copy of the *original* sales invoice or contract that specifically states that after-sales services, installation or training services are included.

Business Visitor

The business visitor category permits an individual to enter Canada without formal immigration documentation where that person's admission does not directly impact the Canadian labour market. The person must be receiving no pay or remuneration from a Canadian source. This means that the business visitor cannot be paid directly by a Canadian client; but, in some limited cases, the Canadian client may pay the U.S. corporation which, in turn, pays a salary to the employee. The employee may not do hands-on or productive work for a Canadian company.

Accordingly, general sales calls, pre-sale customer visits or marketing visits to clients in Canada as well as product training and paid customer training are permitted, provided the original sales agreement includes the necessary provision(s) as outlined above. Attendance at conferences sponsored by others is also permissible under the general business visitor category and no work permit is required. Actually producing goods or services for the client is not permissible.

Conclusion

This is a very brief summary of the business immigration process in Canada. There are numerous additional categories and exceptions that may apply. Individuals who do not qualify for any of the above provisions may qualify under a less frequently used provision. Immigration applications vary extensively depending on the particular qualifications of the individual seeking to come to Canada. A slight change in an individual's qualifications may make a significant difference in whether the employee qualifies to enter Canada.

Bennett Jones LLP's Business Immigration Group

Bennett Jones' Business Immigration Group is highly experienced in all facets of immigration law and, in particular, business immigration. Led by Kevin Zemp, a former immigration officer, our Group provides extensive advice and expertise on the movement of company personnel and priority workers. We are also licensed to provide U.S. immigration services and offer a wide range of U.S. work permit and residency assistance. With the ongoing integration of the North American economy, our clients rely on our ability to provide high-level advice on both sides of the border in efficiently transferring their personnel and retaining high-priority workers.

bennettjones.com/immigration/

Canada's Anti-Spam Law

Many Canadian and international organizations with a Canadian presence utilize electronic communications in the course of business. Organizations that do so should be mindful of Canada's Anti-Spam Law (CASL), which came into force in July, 2014. CASL regulates the transmission of electronic messages for commercial purposes. Businesses in the software industry should also pay attention to the application of CASL, as it regulates the installation of software on computer systems located in Canada. CASL creates a number of legal issues for organizations doing business in Canada.

Scope

CASL applies to "commercial electronic messages" (CEMs). The Federal Government has broadly defined the scope of a CEM to include any message sent to an electronic account that encourages participation in a commercial activity, whether or not such message is sent with an expectation of profit.

Generally speaking, a CEM will fall within the scope of CASL where it is received in Canada, regardless of where it is sent. The CRTC, which is responsible for enforcing CASL, has entered into reciprocal enforcement agreements with its counterparts abroad.

Jurisdiction

The Federal Government asserts jurisdiction over the regulation of commercial electronic messages. This jurisdiction is not absolute, particularly in fields of exclusive provincial legislative jurisdiction such as, for example, health care or education.

Consent under CASL

CASL prohibits the sending of CEMs unless the sender has the consent of the recipient. Consent can either be express or implied. Express consent is consent obtained from a person by way of a positive action, whether in writing or orally. The person obtaining consent must meet various formalities at the time consent is obtained for the consent to be valid. On the other hand, implied consent arises based on factual situations and does not require any positive action on the part of the person giving consent. An example of implied consent arises where a customer purchases a product or service from a business.

U.S. businesses should note that the express consent requirement under CASL is not consistent with the approach under the US *CAN-SPAM Act of 2003* (legislation that set standards for sending commercial emails); particular attention to detail will be required to try and maximize compliance under both regimes.

A prospective sender must address the requirement of consent under CASL and ensure that it has sufficient consent to the collection and use of applicable personal information under applicable privacy law. (See the Privacy chapter for more details.)

CASL also creates various important exceptions to consent, which may arise depending on the nature of the CEM or the situation in which it is sent. An example of an exception is the so-called "B2B exception" which permits personnel of an organization to send CEMs to personnel of another organization so long as both organizations have an existing relationship and the communication concerns the recipient's activities.

Compliance with Formalities

CASL provides that any non-exempt CEM must contain certain specific, prescribed information and a prominently displayed unsubscribe mechanism to be compliant. The sender must disclose its identity, or the identity of the person on whose behalf the CEM is sent, along with other specific, prescribed contact information. Finally, the unsubscribe mechanism must be able to be "readily performed," and must take effect in no more than ten business days.

U.S.-based organizations may find that the information required under CASL can be readily integrated with a CAN-SPAM compliance program. However addressing the Canadian consent regime is more complex.

Exemptions

CASL exempts a number of types of CEMs from compliance with the legislation, including certain CEMs sent within an organization or between organizations that have a relationship, as well as more specific exemptions for some CEMs sent by registered charities and political parties. However, the exemptions under CASL have not yet been tested in court and, as such, there is still a degree of uncertainty with respect to their application.

CASL and the Software Industry

In addition to regulating the transmission of CEMs, CASL also regulates the installation of software. Generally speaking, CASL provides that an organization that installs software on a computer system controlled by another person must seek the consent of that person before doing so. Consent is also required in the context of certain updates or patch installations.

As with the communication provisions of CASL, the consent requirements add specific, prescribed requirements such that a "normal" consent may not be sufficient.

The software provisions under CASL are of wide application and particular importance to software distributors which have Bring Your Own Device (BYOD) policies and IT help desk functions. Such organizations may need to comply with enhanced consent and notification requirements in some cases.

While some "self-installations" are exempt from CASL, the question turns on whether a computer program is capable of performing various specific, prescribed, generally more invasive functions. Where software is capable of performing such functions (for example, sending GPS data to the software developer or a third party), the person providing the software must actively disclose the existence of these functions and seek a separate consent in respect of each function from the user. Consent cannot be bundled into the end-user license agreement that governs use of the software generally.

Penalties for Non-Compliance

CASL provides for stiff penalties in the event of non-compliance: individuals may be fined up to $1M per violation and organizations may be fined up to $10M per violation. Enforcement actions taken to date have resulted in penalties ranging from the low five figures to several million dollars. However, most legitimate businesses should take comfort in knowing that due diligence forms a defence to CASL liability. As CASL requires an alleged violator to prove that he or she has complied with the law, businesses should seek to develop policies and procedures in respect of CASL compliance before sending CEMs or providing software to Canadians.

Conclusion

There are many legal issues for businesses to bear in mind when communicating with, or providing software to, Canadians. A well-considered plan that addresses the key legal and business factors applicable to such practices are elements of a successful strategy.

Bennett Jones Anti-Spam Group

Bennett Jones has more highly ranked technology lawyers than any tier 1 law firm in Canada. Coupled with the firm's national depth and breadth of operations, the Bennett Jones Anti-Spam Group has the experience and expertise to assist foreign businesses in navigating the complex requirements involved in compliance with Canada's anti-spam law.

bennettjones.com/CASL or bennettjones.com/anti-spam/

Climate Change

The evolving patchwork of Canadian federal and provincial climate laws and programs has created material risks and opportunities for businesses operating in Canada. Understanding climate change policy and legislation is necessary for those considering carrying on business in Canada.

Canada's greenhouse gas (ghg) emissions per capita are high relative to most European countries, Japan and most developing countries. However, Canada's ghg emissions per capita are similar to those of the United States and Australia. Canada's total reported ghg emissions were 589 megatonnes (measured in carbon dioxide equivalents or CO2e) for 1990, 740 megatonnes CO2e for 2005 and 692 megatonnes CO2e for 2010.

In December 2011, Canada gave notice of its intention to leave the Kyoto Protocol effective December 2012. However, Canada remains a party to the United Nations Framework Convention on Climate Change and has made a commitment under the 2010 Cancun Agreements to reduce its ghg emissions by 2020 to 17 percent below 2005 levels in alignment with the United States.

Domestic GHG Emissions Reporting

The federal government and Alberta require facilities emitting over 50,000 tonnes/yr of ghgs to report their emissions annually. Some provinces (*e.g.*, British Columbia, Ontario and Québec) have lower facility reporting thresholds.

Federal Approach

The current federal government takes a sector-by-sector approach, aligned with the United States where appropriate. This has resulted in a performance standard in the transportation sector for light duty vehicle emissions, which is closely aligned with the U.S. standard, and a proposed emissions standard, again U.S.-aligned, for heavy-duty vehicles. As well, a proposed standard for coal-fired electricity generators has been published although U.S. alignment is uncertain. Upstream oil and gas, oil sands upgraders and refineries appear likely to be the next regulated Canadian sectors. A voluntary plan with a fuel efficiency target for Canada's aviation sector is now in place.

The federal government has also made significant grants available for carbon capture and storage and clean energy projects.

Provincial Initiatives

Alberta

In 2003, Alberta enacted the *Climate Change and Emissions Management Act* (CCEMA) targeting a 50-percent reduction in ghg emissions intensity (emissions per dollar of gross provincial product) from 2000 by 2050. In 2007, the *Specified Gas Emitters Regulation* (SGER) was implemented under the CCEMA. SGER requires facilities which emitted greater than 100,000 tonnes CO_2e/yr in 2000 to reduce their ghg emissions intensity by 12 percent from their 2003 to 2005 baseline. Facilities which were started up after 2000 have their obligation phased-in at two percent per annum after the first three years of operations until the 12-percent intensity reduction target is reached.

SGER uses a market mechanism approach, authorizing emissions trading in both environmental performance credits (generated when a regulated facility reduces beyond its SGER target) and offset credits (reductions produced in accordance with government-approved protocols outside of regulated facilities). As well, the SGER authorizes the use of fund credits obtained by paying $15/tonne to a government fund which is invested to produce ghg emissions reductions.

Alberta has also made up to $2 billion available to support carbon capture and storage projects.

Western Climate Initiative

California led a group of seven U.S. western states in forming the Western Climate Initiative (WCI) – a regional initiative to reduce ghg emissions in those states by 15 percent below 2005 levels by 2020. The provinces of British Columbia, Manitoba, Ontario and Québec all joined the WCI. When six U.S. states left the WCI in 2011, the WCI effectively became a California/Canadian provinces organization. The WCI includes the use of market mechanisms like emissions trading as well as a low carbon fuel standard.

Québec

While not a western province, Québec is a member of the WCI and has continued to pursue the WCI program. The province is putting in place the regulation needed to create (as of January 1, 2013) a cap-and-trade system capable of independent operation and/or of linking with California. The regulation will require industrial facilities with ghg emissions exceeding 25,000 tonnes CO2e per year to acquire and tender to the government ghg allowances and/or offsets equal to its ghg emissions.

Allowances will be auctioned (perhaps in tandem with California) although many will be issued *gratis* to certain industries. The aggregate allowances will be capped to produce an overall provincial emissions reduction. Up to eight percent of a facility's emissions can be covered by offsets. In 2015, the obligations to tender allowances and offsets will extend to fossil fuel distributors for the CO2 emissions from combustion of the distributed fuel.

Québec also has a modest carbon tax on gasoline, diesel and natural gas.

British Columbia

Prior to joining the WCI, British Columbia set an ambitious target of reducing ghg emissions by 33 percent below 2007 levels by 2020. To accomplish this target, the province introduced:

- a revenue-neutral carbon tax on combustion of fossil fuels;
- a low carbon fuel standard regulation;
- a requirement for the broad government sector to be carbon neutral commencing in 2011; and
- the potential for a cap-and-trade system.

British Columbia's carbon tax is $30/tonne from and after July 1, 2012. The "carbon neutral government" requirement resulted in the creation of the Pacific Carbon Trust, a government-owned entity that acquires approved offsets in British Columbia and sells them at $25/tonne to regulated government departments and entities. There are no current plans to implement a cap-and-trade system, with reliance placed on the other measures.

Ontario and Manitoba

Ontario has cap-and-trade authorizing legislation but has not moved to implement such an emissions reductions scheme. Instead, the province is relying on prohibition of the use of coal in the generation of electricity after 2014 and the development of renewable energy under the *Green Energy Act* feed-in-tariff program.

Manitoba has moved very slowly on the WCI agenda.

Saskatchewan

Saskatchewan passed the *Management and Reduction of Greenhouse Gases Act* (MRGGA) in 2010 but the legislation is not yet in force. The MRGGA establishes the authority and framework for provincial emissions reduction goals and investments in low-carbon technologies. The provincial target is to reduce emissions by 20 percent from 2006 levels by 2020.

Maritime Provinces

Nova Scotia has a climate change action plan and a provincial target to reduce GHG emissions by 10 percent below 1990 levels by 2020. It has also introduced a renewable electricity plan which mandates that 25 percent of electricity come from renewable sources by 2015. Given this plan, the federal government has agreed that its coal-fired electricity regulation may not need to be in force in Nova Scotia.

The other Maritime provinces - New Brunswick, Prince Edward Island, Newfoundland & Labrador - have emissions reduction plans but little relevant legislation.

Conclusion

The Canadian federal government's sector-by-sector approach to achieving ghg emissions reductions, with its limited application to date, has resulted in provincial initiatives to fill the vacuum. While many of the provincial actions incorporate market mechanism approaches, not all do and those that do, employ a wide variety of structures. This creates a significant challenge for business and the need to keep well informed about developments at all levels.

Bennett Jones Climate Change Group

The Bennett Jones Climate Change Group has international experience in climate change transactions that is unparalleled in North America, and a detailed knowledge of Canadian climate change issues and policies. Consequently, our climate change lawyers are positioned at the forefront of Canadian climate change developments. We regularly advise our clients on the appropriate policies and activities to deal with the Canadian patchwork of existing and planned regulation as well as on facilitating the financing, contractual structures and projects that enable them to reduce risks from climate change regulation and take advantage of the opportunities such regulation creates.

bennettjones.com/climatechange

Construction Law

Canada's expansive natural resource sector and dynamic infrastructure sector (including a robust P3 market) have made it a jurisdiction ripe with construction-related opportunities from coast to coast to coast. For that reason, Canada has become a target destination for international owners, builders, designers, engineers, suppliers and lenders alike.

However, construction in Canada does bear its share of unique risks and challenges, including (among other things) the remoteness of many major projects; labour availability and cost; currency risk; market access for resources; and severe winter climatic conditions. Construction projects in Canada are also subject to a wide range of legislation, regulation, and common law rights and obligations that are (in several respects) unique to Canada and vary from province to province. Proper First Nation and community engagement continues to be a prerequisite to the commencement of successful Canadian construction projects.

Construction Contracting Strategy

The contract structuring of major project construction in Canada is similar in form and substance to structures used elsewhere internationally. For the sake of price certainty and risk aversion, owners often prefer undertaking a project with a single engineering, procurement and construction contractor on a turn-key, lump-sum, fixed-price basis. However, owners often undertake projects by sourcing any combination of engineering, design, procurement, supply and construction/construction management from multiple parties.

Where engineering, procurement and construction are undertaken by one contractor, such obligations may also be split into separate contracts governing offshore and onshore work respectively, so as to avoid local taxation and reduce project capital costs. The ideal contracting structure and compensation regime (e.g., fixed price, unit rate or reimbursable, target price, etc. (or any combination thereof)) for any particular project will depend on an owner's internal resources to manage the project, the clarity of scope prior to project initiation, ability to finance the project, and the owner's appetite for internalizing risk.

Bidding and Tendering

Canadian courts look to the intent of the party issuing the tender to determine the extent of binding obligations created by the tender. In a typical tender or bidding process, a contract (Contract "A") is deemed to be formed between the issuer and all compliant bidders upon submission of bids. The issuer is only permitted to accept bids which are substantially compliant with the terms of the tender. This Contract A governs the rights and obligations of the issuer and each bidder until the contract for the work or scope of supply is entered into by the issuer and the successful bidder (Contract "B").

The common law also imposes obligations of good faith and a duty of fairness on the issuer to evaluate bids fairly and in accordance with the terms of the tender, and to treat bidders equally. An issuer's failure to comply with the terms of its tender, or any breach by it of its duty of fairness (e.g., awarding the bid to a non-compliant bidder), may give rise to liability to an unselected compliant bidder for damages on the basis of loss of anticipated profit.

The Competition Act (Canada), which governs the conduct of business in Canada, contains both criminal and civil provisions designed to maintain and encourage competition. Criminal provisions in the Act include prohibitions against "conspiracy," including where a party agrees with a competitor to fix prices, allocate customers or geographic markets, or restrict output or supply. The Act also prohibits "bid rigging," where one or more bidders agree to not submit or to withdraw a bid, or where submitted bids were arrived at by agreement or arrangement between two or more bidders.

Construction Liens

Each province has its own legislation governing rights of contractors, subcontractors and suppliers to liens on projects improved by goods or services provided, to secure the right to payment for such goods or services. Such liens operate as a charge against the owner's right to the land on which the project is constructed. Contracting parties cannot contract out of such lien rights; however, certain lands, including public highways, irrigation districts, railroads, and federal and provincial Crown lands, are not lienable.

Lien legislation requires an owner to withhold a certain percentage of amounts payable to its contractors and suppliers for the satisfaction of any liens arising in respect of the goods or services provided. Such amount is required to be withheld until expiry of a period after substantial completion or completion of the applicable contract. Certain provinces likewise require contractors

to withhold from amounts payable to subcontractors until substantial completion or completion of the applicable subcontract. Often, owners and contractors will put in place security (e.g., a letter of credit) in lieu of withholding to satisfy obligations under the applicable lien legislation. The lien legislation in each province sets out deadlines to preserve the registration of a claim for lien and to perfect a claim for lien by starting a law suit. Strict compliance with lien legislation timelines is a must.

Occupational Health and Safety

Each province in Canada has legislated certain requirements regarding occupational health and safety on a construction site. In several provinces, such legislation requires identification of a "prime contractor" who is responsible for ensuring compliance with such legislation by all persons on site.

Taxation Considerations

Some tax issues to consider in the construction context are: whether a foreign contractor should open a branch or a subsidiary (there are transfer pricing issues related to subsidiaries in general as well as particular forms of subsidiaries (e.g., corporation/ ULC/other)); applicable GST, HST and duties; implications of applicable international trade agreements on the import of goods and services; employee and other source deductions; and a possible 15-percent withholding tax (depending on the corporate structure in place).

Temporary Foreign Workers

Considering the demands currently placed on the Canadian construction labour market, a contractor doing business in Canada should be familiar with the requirements and process to retain and process foreign workers to perform work on Canadian projects.

Other Considerations

- Each province administers a workers' compensation program which requires registration and maintenance of a workers' compensation account for its employees working in such province;
- Each province has legislation in place that governs limitations periods and stipulates the time period to commence actions in such province. This legislation also pertains to the time period owners can bring an action for latent defects in construction work;
- Each province legislates requirements for certain trades people to have specific credentials prior to performing particular work;
- Professionals engaged in a Canadian construction project, including engineers, need to be licensed to practice in Canada and are typically subject to the oversight of their respective provincial, professional self-regulatory association (such as the Association of Professional Engineers and Geoscientists of Alberta). Engineering work product also is generally subject to local engineering review and approval.
- While not a legislative requirement, many owners require contractors to obtain a "certificate of recognition" as a condition to being selected to perform work. Such a certificate is issued by the province and certifies that the contractor has a health and safety program meeting a particular standard;
- Contractors should also be aware of the various labour laws and labour affiliations (Non-Union/Building Trades/CLAC) that may impact various projects or the labour supply of trades performing work on a project;
- Extra-Provincial Registrations – businesses not formed in a Canadian province – may need to be extra-provincially incorporated in the province where work is to be undertaken prior to conducting business;
- Foreign contractors typically required to place insurance and/or bonds by an insurer or surety registered to provide insurance or bonds in Canada or the province of the project.

Conclusion

The Canadian construction industry is a robust, resource-driven market. Although it varies from province to province, Canadian construction law ensures accountability between contracting parties. It also encourages and enforces safe and effective construction practices in the face of risks and challenges that are both common to construction projects around the globe and unique to Canada.

Bennett Jones Construction Law Group

Our strong construction contracts team, combined with our litigation and corporate commercial practices and state-of-the-art technical and document management systems, provide full legal support to the construction industry in this increasingly complex, hybrid area of commercial law and litigation. Our services fall into the five major categories of: venture structuring, contract negotiation, financial risk management, construction challenges and construction claims. Our clients include owners, designers, contractors and lenders in the construction business, government and private sector, as well as the businesses that finance and underwrite construction projects of all kinds.

bennettjones.com/Industries/Construction

Corporate Governance

As in other parts of the world, corporate governance in Canada has received greater scrutiny and been the subject of many developments in the past 15 years. It has evolved through a broad public dialog precipitated by studies prepared on behalf of the Canadian Securities Regulators, the Toronto Stock Exchange and other interested groups.

Corporate directors and officers in Canada are subject to general fiduciary duties established by corporate law. The growth of the modern corporation has necessitated the delegation of many director responsibilities to professional managers. While corporate law fiduciary duty obligations permit delegation of certain matters, they do not prescribe or focus on the process for proper supervision where substantial delegation occurs. Modern corporate governance has centered on the development of structures, processes and controls to enhance the operation of a board that supervises professional management of a complex organization.

Governance Landscape

The governance landscape in Canada comprises minimum legal requirements contained in securities legislation in addition to underlying corporate law fiduciary duties. Securities regulators have also adopted policies that identify and require discussion of governance in areas where best practices are emerging and changing. Institutional shareholders have funded professional commentators that seek to advance best practices for professional directors and improve the transparency of the functioning of the board and the management of the corporation. Their involvement facilitates shareholder evaluation of a board and its management and enhances accountability and shareholder democracy. Serving as a director now requires orientation, education and ongoing learning.

Fiduciary Duties Under Corporate Law

Under Canadian corporate law, directors and officers are required to act honestly and in good faith with a view to the best interests of the corporation. Directors must act prudently, on a reasonably informed basis, and be free from conflict in discharging their duties. Canadian courts recognize that they are ill-suited to second guessing the application of business expertise where an appropriate degree of prudence and diligence was brought to bear on a decision, and the decision was free from any conflict of interest. The courts will defer to a reasonable decision in these circumstances: this is known as the *business judgment rule*. However, the courts will readily question decisions where adequate attention was not paid or a conflict of interest existed, and will take action accordingly.

The fiduciary duties that directors owe to the corporation are not owed to the corporation's shareholders or creditors. A board must consider these stakeholders' interests. If a board acts in a manner that is unfair or prejudicial to these interests, an oppression remedy that exists under Canadian corporate law provides a broad right of action.

Governance Rules in Securities Law

Most recent legislative developments around corporate governance in Canada have been implemented through the securities regulatory process. While securities laws are a matter of provincial jurisdiction in Canada, a high degree of uniformity has been achieved between the provinces through the adoption of national instruments or substantially equivalent local legislation. Canadian securities regulators have also adopted policies providing a number of guidelines and recommendations, which are not law, to all public issuers. Securities rules require issuers to disclose their position concerning the items covered in these guidelines. This obligation enables ongoing public dialogue and the evolution of best governance practices and, as a practical matter, imposes rules on companies that do not want to suffer public embarrassment.

Governance Recommendations

The Canadian securities regulators have made the following governance recommendations:

1. **Independence:** The board should have a majority of independent directors.
2. **Independent Chair or Lead Director:** The chair of the board should be independent. Where this is not appropriate, an independent director should be appointed to act as lead director. In either case, the director should act as an effective leader of the board and ensure that the board's agenda will enable it to successfully carry out its duties.
3. **Meetings in camera:** Independent directors should regularly hold scheduled meetings in which non-independent directors and members of management are not in attendance.
4. **Mandates:** The board should adopt a written mandate in which it explicitly acknowledges responsibility for the stewardship of the issuer including the responsibility for:

(a) satisfying itself concerning the integrity of the senior officers;
(b) adopting a strategic plan on at least an annual basis that takes into account the opportunities and risks in the business;
(c) identifying the principal risks of the issuer's business and ensuring implementation of appropriate systems to manage these risks;
(d) succession planning;
(e) adopting a communication policy for the issuer;
(f) the issuer's internal control and management information systems; and
(g) developing the issuer's approach to corporate governance, including developing a set of corporate governance principles and guidelines that are specifically applicable to the issuer.

The mandate should also provide measures for receiving shareholder or stakeholder feedback and the expectations and responsibilities of the directors, including board meeting attendance and material review.

5. **Position Descriptions:** The board should develop clear positions for the chair of the board and the chair of each board committee. As well, the board, together with the CEO, should develop a clear position description for the CEO and management's responsibilities.
6. **Orientation and Continuing Education:** The board should ensure that all new directors receive comprehensive orientation so that they fully understand the role of the board and its committees, and how each individual is expected to make a contribution. Continuing education for all directors should also be provided.
7. **Code of Business Conduct and Ethics:** Boards should adopt a written code of business conduct which would be applicable to directors, officers and employees, and should constitute written standards that are reasonably designed to promote integrity and deter wrongdoing. The code should cover:

   (a) conflicts of interests;
   (b) protection and proper use of corporate assets and opportunities;
   (c) confidentiality of corporate information;
   (d) fair dealing with stakeholders; and
   (e) compliance with laws and the reporting of any illegal or unethical behavior.

8. **Director Nominations:** The board should have a nominating committee composed entirely of independent directors. The committee should have a written charter that clearly establishes the purpose, responsibilities, member qualifications and manner of reporting to the board as a whole. The nominating committee shall consider what competencies and skills the board as a whole should possess, what competencies and skills existing directors possess, and identify any particular needs.
9. **Board Size:** The board should also consider the appropriate size of the board to facilitate effective decision making.
10. **Compensation:** A compensation committee composed of independent directors is also recommended. The committee should have a written charter that establishes its purpose, responsibilities, member qualifications and manner of reporting to the board.
11. **Assessment:** The board, its committees and each individual director should regularly be assessed regarding his, her or its effectiveness and contribution. Such assessment should consider individual director performance as well as the board as a whole (or committee) in relation to its mandate and charter.

Other Corporate Governance Influences

Corporate governance in Canada is strongly influenced by institutional shareholders and institutionally funded commentators and organizations. Various individuals and organizations have devoted significant time to corporate governance review and the funding of non-profit institutions with a full-time focus on governance. These commentators draw attention to lapses and constantly assess and suggest improvements to current practices. The views of these commentators are important, particularly where the votes of their institutional investor clients are required. These investors tend to follow adviser recommendations on election of directors, say on pay and equity compensation pool matters.

Conclusion

Corporate governance in Canada continues to evolve rapidly as new issues and topics arise. Issuers accessing Canadian markets require a full appreciation of the current expected state of practice if they are to be effective participants in Canadian capital markets.

Bennett Jones' Corporate Governance and Director Protection Group

The Bennett Jones Corporate Governance and Director Protection Group understands the challenges and risks inherent in board membership. Our Group works with our clients to address these ongoing challenges in ways that meet the expectations of our clients' stakeholders and improve our clients' businesses. We draw on the varied experiences and expertise of a team of professionals that includes senior corporate and securities law practitioners, current and former directors, in-house counsel, and senior-level government officials, judges and regulators. We give directors and senior management practical guidance in a rapidly changing governance climate.

bennettjones.com/governance/

Dispute Resolution

Dispute resolution in Canada follows procedures in line with other leading western legal systems, including those of the United Kingdom and the United States. The independence and impartiality of the Canadian judiciary is beyond question, and the litigation process is well-established and ably suited to complex commercial matters. In the last two decades, class actions across a broad range of subjects have become a common feature of the Canadian legal landscape. At the same time, a robust private alternative dispute resolution industry has also matured.

Independence of the Courts

As described in the chapter, "An Introduction to Canada's Government and Legal System," the Canadian judiciary consists of federal and provincial courts. Commercial disputes in Canada are typically litigated in the superior courts of a province, which include a trial and appellate level court. Justices of the superior courts, the federal courts, and the Supreme Court of Canada are all appointed by the federal government. All such appointments are drawn from experienced members of the legal profession.

The Canadian judiciary is widely regarded as non-partisan and independent of other branches of the Canadian government. The independence of the judiciary is assured by both explicit and implicit aspects of Canada's Constitution. Three essential conditions of judicial independence in Canada include: security of tenure, financial security and institutional administrative independence. Not only must the judiciary actually be independent; equally importantly, it must also be seen to be independent. Independence of the judiciary in Canada is recognized as a fundamental requirement of the rule of law.

Litigating Through the Courts

Each province in Canada is a common law jurisdiction, with the exception of Québec, which follows the French civil system. Litigation in the common law provinces is similar to litigation in other common law countries. The process is governed by jurisdiction-specific rules of procedure that follow the same general pattern. First, pleadings are filed outlining each party's position, following which the parties are required to exchange all documents and records relevant to the litigation. Depending on the matters at issue, this production may be extensive and includes both paper and electronic records.

Following production, parties have an opportunity to orally examine opposing parties, with different provinces having different rules as to the type and number of persons that may be examined. Before proceeding to trial, other steps may be required such as attending a mandatory dispute resolution process or a pre-trial conference with the court. If a matter is not resolved, it will proceed to trial. An appeal from a trial judgment by an unsuccessful party is allowed as of right from a superior trial court to the relevant appellate court. A further appeal to the Supreme Court of Canada is only permitted in a small number of cases deemed to be of national importance.

Notwithstanding similarity to other common law jurisdictions, the following characteristics of litigation in Canada are noteworthy:

- Civil jury trials, while possible, are not common. Almost all commercial matters are heard by a judge alone.
- General damage awards tend to be significantly lower than those in the United States. The Supreme Court of Canada has placed a cap on damages for pain and suffering in personal injury cases.
- While punitive damages are available, Canadian courts have followed the English tradition of awarding these types of damages less frequently and in lesser amounts than in the United States.
- While all lawyers are qualified as both barristers and solicitors, it is the virtually invariable practice in litigious matters to retain a litigation specialist.

Costs

The general rule in Canada is that the unsuccessful party is responsible for bearing the costs of the successful party, as well as its own costs. *Costs* include at least partial compensation for legal fees, plus disbursements. Two scales of recovery for legal fees are generally available: partial (also referred to as *party and party costs*) and substantial or full (also referred to as *solicitor-client costs*). The former scale is awarded in the vast majority of cases, with substantial or full indemnity costs typically being reserved for cases of egregious behaviour. Nevertheless, costs are almost always in the discretion of the court. Disbursements are generally substantially reimbursed. The most significant disbursement is often an expert's fee. While different provinces treat disbursements differently, many allow full recovery for these expenses.

Class Actions

The Canadian class action regime is the most liberal in the western world in that a very wide range of subject areas has been accepted as appropriate for class treatment by the Canadian courts. Securities, price fixing, product liability and other consumer protection cases are all regularly certified as class proceedings. Further, there is a limited amount of public funding made available to plaintiffs to facilitate class actions. As a result, a specialized class action bench and bar has developed as the stakes for these complex proceedings tend to be significant. Although class actions are more heavily case managed and settlements require court approval, following certification, a class action will proceed as a traditional piece of complex litigation through discovery and trial. The above descriptions about Canadian litigation also apply to class proceedings.

Alternative Dispute Resolution

Canada has a sophisticated environment for dispute resolution outside the courts through arbitration, mediation and other ADR mechanisms. Arbitration is regularly selected in cross border transactions involving Canada, from one-off sale of goods contracts to multi billion-dollar investments in the oil sands. Canadian law allows businesses a virtually unfettered ability to tailor their commercial dispute resolution processes to meet their needs or particular requirements of a deal.

International agreements often incorporate external arbitration rules, such as rules of the ICC or AAA, with appropriate additions or clarifications. In some cases, provincial or federal laws or trade agreements (including the North American Free Trade Agreement) may require disputes to be arbitrated. Arbitration is a standard part of multi-step ADR clauses in long-term agreements, along with mandatory negotiations and mediation. Arbitration is often chosen to streamline the dispute resolution process, obtain industry expertise on the decision making tribunal and maintain confidentiality while ensuring the enforceability of the ultimate award.

Canadian arbitration legislation closely follows the UNCITRAL Model Law on International Commercial Arbitration. Canadian courts recognize the commercial arbitration process. They avoid unnecessary interference with commercial parties' arbitration agreements and give deference to procedural orders and awards issued by both international and domestic tribunals. Foreign awards are enforced under the New York Convention and the Model Law, usually without judicial review of the merits.

Conclusion

Parties doing business in Canada can be confident that commercial disputes are resolved according to the rule of law in a fair and just manner. In some provinces, parties may take advantage of specialized commercial courts with commercially experienced judges; most provinces and territories have highly skilled commercial arbitrators. This expertise ensures that business disputes can be resolved and adjudicated on a timely and efficient basis and in accordance with recognized commercial principles.

Bennett Jones Commercial Litigation Group

The Bennett Jones LLP Commercial Litigation Group has extensive experience in all aspects of business litigation including commercial, securities, corporate, product liability, class action, regulatory, shareholder and partnership disputes. We understand our clients' businesses and work with them to avoid disputes. Our Group forcefully and effectively represents our clients before courts, tribunals and regulatory bodies when disputes do arise. These core strengths assist our clients in achieving desired business results.

bennettjones.com/Commercial_Litigation/

eCommerce Law

Many businesses promote and sell their products and services to Canadians by means of electronic commerce on the internet. Canadian laws facilitate certainty about many of the issues of particular concern to internet-based businesses.

Enablement of Electronic Transactions

Based on a national model law standard, legislation has been enacted federally and provincially in Canada to provide a framework to facilitate online commerce. For example, the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) and, for illustrative purposes, two provincial statutes – Ontario's *Electronic Commerce Act* and Alberta's *Electronic Transactions Act* – apply to the purchase and sale of goods on the Internet.

A key element of these laws is that they ensure that, with limited exceptions, electronic records will satisfy the writing, record keeping and provision of original documentation required by numerous statutes of general application. A key principle of these laws is a requirement to consent to dealing electronically. Certain classes of documents – such as trusts, wills, estates and real estate documents – are exempted from the provisions enabling the use of electronic forms of contracting. However, Ontario recently liberalized its law to permit use of electronic contracts in the real estate sector.

Consumer Protection

Provincial electronic commerce legislation also may provide consumer protection for certain internet-based agreements. For example, Ontario's *Consumer Protection Statute Law Amendment Act*, 2002 applies to the purchase and sale of goods on the Internet. Similarly, Manitoba's *Consumer Protection Act* and Alberta's *Fair Trading Act* provide protections for consumers transacting online. These laws generally adopt a model form of internet sales regulation that regulates consumer transactions on the internet. For instance, Internet sales agreements must be prefaced by an extensive list of information which must be disclosed in a "clear, comprehensible and prominent" and "accessible" manner.

Further, before the conclusion of an online purchase, a confirmation screen summarizing the purchase details must be displayed to the buyer. Some provincial statues also require that a copy of the online agreement be delivered to the consumer, and stipulate that a document be signed by an "electronic signature" to satisfy any legal requirement.

Remedies for non-compliance include a right to require a credit card issuer to reverse a charge.

Anti-Spam Law

Canada's Anti-Spam Law (CASL) came into force in July, 2014. CASL regulates the transmission of commercial electronic messages where such messages are received in Canada. The statute generally requires that organizations sending such messages have the consent of the recipient. CASL also regulates the installation of software and updates on computer systems located in Canada. (See the Canada's Anti-Spam Law chapter for more details.)

Privacy Compliance

Businesses that collect, use or disclose personal information during the course of commercial activity must comply with the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) or the applicable provincial private sector legislation. Federal guidelines under PIPEDA limit the collection or use of personal information for purposes of behavioural advertising.

As is the case under Alberta's *Personal Information Protection Act*, PIPEDA has recently been amended to provide for mandatory data-breach notification in certain situations. (The federal amendments should be in force once regulations have been promulgated. See the Privacy chapter for more details.)

Online Agreements

Online "click-wrap" and "browse-wrap" agreements have been enforced by Canadian courts: where the buyer had knowledge of the terms of the agreement at the time of sale; where there is proof of established prior business conduct; or via the subsequent conduct of the user. Electronic transactions legislation (as noted above) provides statutory recognition of such agreements where the user has assented to the terms of the agreement. See the Technology chapter for more details on license agreements.

Websites

A web page's design, layout and appearance, as well as most of its content, are protected by copyright. Distinctive second level domain names may be afforded trademark protection in Canada under either under the statutory or common law systems of protection. A trademark owner may assert its rights against cyber squatters under Canadian trademark law. The Canadian Internet Registration Authority offers an alternative dispute resolution process to deal with disputes relating to any .ca domain name.

Québec language laws may require electronic contracts and websites to have French translations if the parties or transactions have an office or employees in Québec. In certain circumstances, however, a contract may be written only in English if the contracting parties have an express agreement to that effect.

Foreign websites and Internet transmissions may be subject to Canadian law if there is a real and substantial connection between the activities in question and Canada.

Advertising and Marketing

In Canada, laws that govern traditional advertising and marketing practices, such as the federal Competition Act and the federal *Criminal Code*, also apply to online advertising and marketing. CASL (as discussed above, and in the Canada's Anti-Spam Law chapter) also governs online marketing practices.

Copyright Infringement

Infringement of copyright occurs when anything is done to a work (e.g., reproduction, in whole or substantial part, of the work) that is reserved exclusively to the copyright owner without the owner's consent.

Website intermediaries in Canada have immunity from copyright infringement claims in respect of content posted on their websites so long as they do not facilitate infringements. Unlike the notice and takedown system under the DMCA in the United States, or the EU approach, there is no statutory basis for a "notice and takedown" remedy for copyright infringement in Canada, although some website operators do use that approach to distance themselves from the dispute. Instead, Canada's copyright law sets out a "Notice and Notice" approach whereby the copyright holder can send a notice of infringement to the intermediary who must save the evidence of alleged infringement for a period and also forward the notice to the applicable end user. (See the Intellectual Property Law chapter for more details.)

Conclusion

Businesses that promote and sell their products and services to Canadians by means of electronic commerce on the internet can rest assured that Canada's electronic commerce law is well developed and permits considerable flexibility in electronic transactions.

Bennett Jones' Intellectual Property Group

For companies bringing new products, services or technology into Canada, Bennett Jones' Electronic Commerce Group efficiently and creatively works to assist the establishment of online businesses targeting Canadians or addressing novel business methods.

bennettjones.com/ecommerce

Employment & Labour

The relationship between an employer and an employee in Canada is heavily regulated. All jurisdictions in Canada – both federal and provincial - have enacted legislation (statutes and regulations) governing various aspects of the employer-employee relationship. Additionally, employers in the common law provinces are bound by the applicable common law principles (e.g., judge-made law) and, in Québec, because it is a civil law jurisdiction, by the Civil Code. If employers ignore these differing options, they do so at their peril.

In this chapter, we highlight certain statutes that will apply to all employers in Canada and then discuss certain issues that most employers grapple with which arise out of the common law.

More than 90 percent of employers in Canada are provincially regulated. Employers carrying on business activities such as inter-provincial transportation, telecommunications, broadcasting, airlines and inter-provincial shipping are federally regulated. In all jurisdictions, employers are subject to the following types of statutory requirements.

Employment Standards

All jurisdictions in Canada have legislation setting out mandatory minimum terms of employment for issues such as minimum wages, hours of work, overtime, statutory holidays, vacation pay, termination pay and leaves of absence. With limited exceptions, the parties cannot contract out of or below such minimum standards.

The applicable threshold for each standard varies amongst the jurisdictions across Canada. For example, the threshold for hours of work before overtime is payable is 40 hours per week in British Columbia and 44 hours per week in Ontario.

Labour Relations

Approximately 30 percent of the Canadian workforce is unionized. Each jurisdiction has legislation setting out the process by which a union can acquire bargaining rights (*i.e.*, through a card check process and without a vote or through a sign-up of union cards as a precondition to a secret ballot vote).

All jurisdictions prohibit certain *unfair labour practices.* These restrictions affect what an employer is lawfully permitted to do during a union organizing campaign and impose a duty of good faith in the collective bargaining process. The applicable labour relations board, not a court, has jurisdiction over claims of unfair labour practices or unlawful strikes or lockouts.

Human Rights

All jurisdictions have legislation prohibiting discrimination and harassment on certain specified grounds. Such grounds vary by jurisdiction but generally include age, gender, race, disability, religion, sexual orientation, ethnic origin, nationality and family status.

Depending on whether an employee is union or non-union and the jurisdiction in which the employee is employed, a discrimination or harassment complaint could end up before a human rights tribunal (quasi-judicial), a court or an arbitrator appointed pursuant to a collective agreement.

Duty to Accommodate

Each jurisdiction prohibits employers from discriminating on the basis of disability and requires employers to accommodate a disabled employee up to the point of undue hardship. Employers must take significant steps, such as modifying the injured employee's duties, permitting time off and modifying schedules of work.

Drug and Alcohol Testing

The term *disability* has been broadly interpreted to include addictions to drug and alcohol. There are limitations on pre-employment and random alcohol and drug testing and whether such testing will be permissible will vary by jurisdiction.

Occupational Health and Safety

Each jurisdiction has occupational health and safety (OHS) legislation that provides duties and obligations to which all workplace parties are subject. Employers have a general duty (as well as specific duties) to ensure the health and safety of workers and to take all

reasonable precautions to ensure worker safety. The definition of *worker* under OHS legislation is very broad and generally applies to all persons working at a workplace, including contractors and subcontractors. Supervisors and employees are also personally obliged to comply with their duties under OHS legislation.

The legislation requires the creation of a health and safety committee to take steps such as monitoring health and safety issues in the facility and to receive and deal with OHS-related concerns in the workplace.

Failure to comply with applicable OHS legislation can result in significant fines and possibly incarceration for individuals and, in the most serious cases, possible prosecution of members of management and/or directors under the *Criminal Code*.

Workers' Compensation

All provinces have workers' compensation legislation. This employer-funded accident insurance system is administered by a government administrative body. Employers who participate in a workers' compensation scheme may not be sued by an injured worker for injuries or illnesses suffered during the course of employment.

Whether an employer is required to register with the applicable workers' compensation board and to participate in the workers' compensation system depends on the province and, in some cases, the nature of the employer's activities.

Generally, the rate as a percentage of payroll that employers will be required to contribute to the workers' compensation system varies by industry type or business activity.

Privacy in the Workplace

The federal jurisdiction and certain provinces (*i.e.*, British Columbia, Alberta and Québec) have adopted privacy legislation regulating the collection, use and disclosure of personal information in the course of a commercial activity and in the administration of the employment relationship. An employer's obligations vary depending on whether the employer is federally or provincially regulated and depending on the provinces in which the company is doing business. (See the Privacy chapter for more details.)

Some Canadian court decisions have suggested that employees have an expectation of privacy when using company technology. As a result, employers need to draft clear technology use policies to rebut that expectation of privacy.

Termination of Employment

In the absence of just cause (*e.g.*, willful misconduct, gross insubordination or neglect of duty), a termination will be considered *without cause* and the employee is entitled to notice of termination. Each jurisdiction has minimum employment standards legislation requiring a minimum amount of notice of termination or pay in lieu of notice. There is no such thing as *at will* employment in Canada; a contract for employment at will is unenforceable as it is an attempt to contract out of minimum standards legislation.

In addition to statutory notice of termination, under the common law, an employee is entitled to reasonable notice of termination. Such notice depends on factors such as length of service, age of the employee, character of the position and availability of reasonable alternate employment; it generally varies from zero to 24 months.

A written employment contract entered into at the start of the employment relationship commonly specifies the parties' agreement concerning the amount of notice (or pay in lieu of notice) the employer will provide the employee on termination without cause. A valid and binding contract can rebut the presumption of reasonable notice at common law.

Confidentiality and Restrictive Covenants

Employees generally have an implied duty of confidentiality. However, many employers who wish to expressly define what constitutes confidential information or trade secrets have employees execute a confidentiality or non-disclosure agreement.

In contrast to the duty of confidentiality, with the exception of a very limited class of fiduciary employees, Canadian courts will *not* imply a duty not to solicit or compete with an employer following termination of employment.

As courts in Canada are reluctant to enforce non-competition clauses, an employer must prove that the non-competition clause is truly necessary to protect the employer's legitimate proprietary interest and that the clause is reasonable in the circumstances (*i.e.*, in terms of the definition of the prohibited activity and the temporal and geographic scope). Prohibitions against solicitation of the employer's employees and customers are more likely to be enforced but must be drafted narrowly to protect the employer's legitimate proprietary interests.

Conclusion

Canada has a complex myriad of federal and provincial employment and labour legislation, common law principles and contracts that may govern the employment relationship. Companies hiring employees in Canada will want to adopt certain best practices (*e.g.*, use of written employment contracts) at the outset of the employment relationship to maximize flexibility and limit potential liability.

Bennett Jones' Employment Services Group

The Bennett Jones Employment Services Group is a multidisciplinary team of lawyers who practice in all our offices and represent a wide variety of private and public sector employers. Whether the situation calls for preventive measures or decisive action, we work with employers to: manage employees and independent contractor; mitigate employment risks; enforce legal rights; and resolve disputes. As legal counsel, we view our role as a combination of advisor (assisting clients to avoid or minimize labour and employment problems and disputes) and advocate (where disputes cannot be avoided).

bennettjones.com/employmentservices

Energy: Oil & Gas

The regulatory framework that sets the stage for doing business in the Canadian energy industry is multifaceted. This summary highlights some of the key legal considerations when engaging in Canadian oil and gas project development and investment.

There are three primary areas of focus for oil and gas development in Canada: (i) conventional and unconventional project developments in the provinces of Alberta, British Columbia and Saskatchewan; (ii) projects in northern Canada; and (iii) offshore projects along Canada's east coast. Each area has a different legislative landscape and may require a variety of regulatory and environmental approvals from both federal and provincial authorities. Moreover, oil and gas project developments often require consultation with aboriginal groups, thereby adding another layer to the regulatory approval process.

Federal Approvals

Constitutionally, Canadian provincial governments have the authority to regulate the development of natural resources. As a result, the provinces prescribe royalty rates for energy developments. However, federal and provincial governments share jurisdiction over the environment, which means that energy projects may require multiple regulatory approvals and assessments.

National Energy Board

The primary federal energy regulatory body in Canada is the National Energy Board (NEB). Inter-provincial and international pipelines, international power lines, and energy imports and exports are all regulated by the NEB. Furthermore, the NEB regulates offshore oil and gas developments in the Northwest Territories, Yukon, Nunavut, and other offshore areas prescribed by the *Canada Oil and Gas Operations Act*. The NEB also regulates oil and gas activities in frontier lands (including those located in the Northwest Territories and Nunavut) pursuant to the *Canada Petroleum Resources Act*.

Federal Environmental Legislation

Certain energy projects will also trigger the application of other federal legislation, including the *Fisheries Act*, the *Migratory Birds Convention Act*, *1994*, the *Species at Risk Act* and the *Navigable Waters Protection Act*. As a result, the timelines for obtaining all necessary federal regulatory approvals are project-specific.

Canadian Environmental Assessment Act

In some instances, energy projects may require a federal environmental assessment under the *Canadian Environmental Assessment Act* (CEAA). The timeline for CEAA assessments varies from project to project and may involve public hearings in some circumstances.

Provincial/Territorial Approvals

Each province and territory maintains its own regulatory regime for oil and gas developments.

Alberta

The Ministry of Energy is responsible for overseeing the oil and gas regulatory regime in Alberta in accordance with the *Mines and Minerals Act*, the *Oil and Gas Conservation Act* and the *Gas Resources Preservation Act*. Most large-scale energy projects also require an assessment pursuant to the Alberta *Environmental Protection and Enhancement Act* (EPEA). Further, many energy projects, including oil sands projects, will also require approvals under other provincial legislation such as the *Environmental Protection and Enhancement Act* or the *Water Act*. Oil and gas projects may also be subject to the *Alberta Land Stewardship Act*, which requires activities to comply with Land-Use Frameworks (LUF). There are currently seven LUF planning regions in Alberta.

Currently, the Energy Resources Conservation Board (ERCB) and Alberta Utilities Commission are the primary energy regulators in Alberta, and are responsible for upstream energy development, intra-provincial electricity transmission and pipeline projects, and local utility matters. However, new legislation is expected to establish a single integrated energy resource regulator which may alter the regulatory framework for project developments.

British Columbia

In British Columbia, the Oil and Gas Commission oversees oil and gas exploration, development, pipeline transportation and reclamation activities. The *Oil and Gas Activities Act* sets out the regulatory framework for oil and gas activities in British Columbia, including shale gas, which has recently seen a significant increase in development and interest. Under the British Columbia *Environmental Assessment Act* (EAA), oil and gas development proposals that exceed thresholds set out by the *Reviewable Projects Regulation* are subject to an assessment and require certification before the project may proceed.

Together with the federal government, Alberta and British Columbia have agreed to a cooperative environmental assessment process if assessments are required under the CEAA and either Alberta's EPEA or British Columbia's EAA.

Saskatchewan

The Ministry of Energy and Resources provides oversight for oil and gas project developments in Saskatchewan pursuant to the *Department of Energy and Mines Act* and the *Oil and Gas Conservation Act.* At the request of the Minister of Environment, an environmental assessment, pursuant to the *Environmental Assessment Act*, may be required before environmentally sensitive oil and gas development projects may proceed.

Northern Canada Approvals

As specified above, the NEB has regulatory authority over oil and gas activities and operating licences in the Northwest Territories, Nunavut and specific offshore areas. Under the *Canada Petroleum Resources Act*, the Department of Indian Affairs and Northern Development issues exploration, production and significant discovery licences. Certain oil and gas development activities may also require approval from the Department of Fisheries and Oceans, the Canadian Environmental Assessment Agency, or other federal departments.

While the Yukon government is responsible for onshore oil and gas development, the federal government retains responsibility and authority for offshore oil and gas developments.

Offshore East Coast Approvals

Unlike development in other provinces, east coast offshore oil and gas development is jointly regulated by the governments of Newfoundland and Labrador and Nova Scotia together with the federal government. The Canada-Newfoundland and Labrador Offshore Petroleum Board and the Canada-Nova Scotia Offshore Petroleum Board, under accord agreements between the federal and provincial governments, hold regulatory authority over offshore oil and gas activities. Depending on the oil and gas development activity, other federal legislation may also apply, such as the CEAA, the *Fisheries Act* and the *Canadian Environmental Protection Act*.

Aboriginal Issues

Aboriginal issues may play a significant role in the oil and gas project development lifecycle in Canada. The federal and provincial governments have a duty to consult with, and potentially accommodate, aboriginal groups if aboriginal or treaty rights may be adversely affected by energy project developments. This responsibility is generally delegated to project developers. Project developers may also need to provide funds to enable the aboriginal community to review and participate in the consultation and review process.

Climate Change and Emissions Trading

Greenhouse gas (GHG) and air emissions may be regulated by both the federal and provincial governments. Currently, the federal government intends to align its GHG regulatory policy with the yet to be announced GHG policies and reduction targets of the United States. As a result, legislation has not been enacted to regulate GHGs on a federal level.

Although most provinces have enacted legislation addressing GHG reporting, currently, Alberta is the only province to have enacted mandatory GHG emissions reductions. Under the Alberta *Climate Change and Emissions Management Act*, specific facilities must reduce GHG emissions intensity by 12 percent below baseline levels. Legislation is expected from members of the Western Climate Initiative (British Columbia, Manitoba, Ontario and Québec) to establish a cap-and-trade system by 2012 with the goal of reducing GHG emissions to 15 percent below 2005 levels by 2020. The provinces of Québec and British Columbia have also enacted carbon taxes to reduce GHGs.

Conclusion

While Canada is a resource leader with numerous oil and gas project developments and investment opportunities, its unique and nuanced regulatory landscape needs to be efficiently navigated to ensure success and satisfaction with particular oil and gas project developments and investments.

Bennett Jones Energy (Oil & Gas) Group

The Energy (Oil & Gas) Group at Bennett Jones has decades of first-class experience and regularly assists clients as they navigate complex energy project developments, mergers and acquisitions, foreign exploration and international investment opportunities in Canada and around the world. With a global presence in virtually every energy industry segment, including oil and gas, electricity (both conventional and renewable), power projects, mining and renewable fuels, our group is poised to provide the necessary support and expertise to help our clients achieve their desired business outcomes.

bennettjones.com/oilandgas

Environmental Law

Companies doing business in Canada should identify and manage the risks associated with legal liability for harm that has been (or may be) caused to the environment. Environmental legislation (statutes and regulations) in Canada are made and enforced by all three levels of government: federal, provincial/territorial and municipal. In addition to environmental legislation, Canadian tribunals and courts provide decisions that interpret this legislation which also form part of Canadian law (known as the common law).

Companies typically require approvals (permits, licences, registrations and the like) for activities that can impact or relate to the environment, such as discharges into the atmosphere or water. Failure to obtain or comply with a necessary approval is an offence. Such offences can result in significant fines and penalties against a company, as well as individuals, including a company's officers and directors. Most environmental statutes also authorize environmental agencies to issue administrative orders to a broad range of parties.

Further, there are civil actions that can be commenced, based on legislation or common law, for matters such as damage caused by contamination. These actions are typically based on breaches of legislation or the common law actions of nuisance, negligence, trespass and strict liability.

Federal and Provincial Legislation

The key federal environmental protection legislation – the *Canadian Environmental Protection Act, 1999* – regulates the manufacture, use, import and export of substances that the federal government has deemed toxic. There is also federal legislation that regulates interference with fish and fish habitat, species at risk, migratory birds and other matters under federal jurisdiction.

Each province (and, to a lesser extent, the territories) has its own environmental protection legislation.

Key areas of environmental regulation include federal and provincial legislation that regulates the:

- release of substances into the environment including related reporting requirements;
- remediation of contaminated sites;
- licensing of emissions and effluent;
- assessment of environmental impacts prior to licensing of certain activities;
- import and export of certain substances;
- transportation of dangerous goods;
- storage of hazardous materials;
- generation, storage and disposal of wastes;
- treatment of sewage (which typically includes industrial sewage and stormwater); and
- protection of wildlife and fish, including endangered species, and their habitats;

In addition, it is noteworthy that certain federal and provincial environmental legislation creates a range of offences relating to environmental matters including:

- unlawfully discharging contaminants or pollutants into the environment;
- failing to immediately report certain incidents, such as the unlawful release, discharge or spill of a chemical into the environment;
- failing to comply with orders issued by regulators; and
- engaging in certain activities without obtaining approval or failing to comply with the terms of any approval obtained.

Maximum penalties permitted under legislation can be quite significant, including fines in the millions of dollars per day that the offence is committed and, potentially, prison sentences (although these are rare and typically are reserved for egregious behaviour).

Municipal Legislation

Many municipalities are active environmental regulators, usually through their urban planning and zoning powers. Since the Supreme Court of Canada upheld a municipal by-law prohibiting pesticide applications (despite the existence of federal and provincial government licensing to do so), municipalities have been increasingly exploring the extent of these powers to regulate environmental matters including by enacting community right-to-know by-laws about the presence of toxic substances used within municipal boundaries.

Environmental Assessments

Certain government initiatives, as well as designated private projects, may be subject to a requirement to conduct a provincial and/or federal environmental assessment (essentially an assessment of the potential effects of the proposal or activity on the environment). An environmental assessment may need to be completed prior to the issuance of project-related licenses or government funding, or prior to the disposition of Crown lands. It is important for project proponents to fully assess and mitigate scheduling, regulatory and litigation risks associated with environmental assessments.

Common Law Environmental Liabilities

Civil actions can be commenced, including class actions for damages that have been suffered even, in some circumstances, where there has been legislative compliance. Injunctions can also be obtained requiring, for example, closure of a facility that is the source of pollution.

A potentially wide net of liabilities for environmental contamination exists under the common law based on nuisance, negligence, trespass and strict liability. Purchasers of property, landlords and tenants, parent and successor corporations, purchasers of assets or shares of a business, lenders and even underwriters should be aware of these risks.

Personal Liability

Directors and officers of companies doing business in Canada can be held personally liable for environmental matters. For example, federal and some provincial environmental legislation impose a direct, positive duty on directors and officers to take reasonable care to prevent the corporation from committing an offence, such as causing contamination. In some cases, the risk of personal liability can turn on the operational control (or willful blindness) exercised; failure to comply with the duty to proactively take reasonable care can be an offence even, potentially, where an officer or director may not have operational responsibilities.

Officers and directors can face the risk of substantial fines and, potentially, prison sentences (although these are rare and typically are reserved for egregious behaviour by officers and directors of small companies).

Corporate Disclosure

Canada's securities regulators are increasingly less tolerant of boiler plate language about the disclosure of environmental liabilities in corporate documents. Canada's financial institutions continue to make financing for most commercial transactions contingent on the completion of satisfactory environmental due diligence.

Managing Risk

As with other business risks, environmental risks must be identified and managed. This can include, for example, due diligence for a purchase, sale, merger or financing transaction, and the implementation of policies and procedures for operations to prevent (and, if necessary, respond to) environmental incidents. An extraterritorial company would likely want to ensure that its Canadian subsidiary has taken such steps to protect the value of the business.

Climate Change

Climate change has become an important and complex business concern – one that can have a direct impact on a company's profitability, growth prospects, governance, risk analysis and compliance assessments, as well as reputational branding and business sustainability.

Risks relating to climate change include mandatory reporting and reduction of greenhouse gas emissions as well as increasing pressure on companies to be "green" and adapt to the effects of climate change. There are, however, opportunities and incentives available such as participating in emissions trading markets in some cases, achieving competitive advantage, reducing costs and gaining the goodwill of stakeholders.

Business Sustainability

In Canada, successful businesses often have comprehensive, forward-looking strategies for addressing environmental impacts. The most developed strategies integrate consideration of social impacts and long-term profitability to find ways of ensuring business sustainability.

Canadian legislation does not expressly require the implementation of business sustainability strategies. It is important, however, to note that corporate law requires directors and officers of Canadian companies to act in the best interests of the corporations they serve. This encourages (and arguably requires) such business leaders to think broadly about the opportunities and risks their companies face. Many Canadian investors and lenders have also come to expect that companies demonstrate a commitment to sustainability. Trends such as these suggest that profitably doing business in Canada may sometimes require surpassing simple compliance with environmental laws (which is, of course, the minimum standard required).

Bennett Jones' Environmental Law Group

Bennett Jones' Environmental Law Group assists a broad range of clients in every industry – from natural resources to energy to manufacturing to waste management – in identifying, managing and resolving environmental risks and issues locally, nationally and internationally.

Working across Canada in both of Canada's official languages, our firm's fully integrated team delivers superior client service in a practical fashion. The Environmental Law Group works closely with our exceptional Public Policy Group, which has in-depth knowledge of Canadian governmental and international affairs, cross-border issues and policy development. Members of our Public Policy Group include the former Governor of the Bank of Canada, the former Chief of Staff to the Prime Minister, two former Canadian Ambassadors to the United States, the former Premier of Alberta, a former Justice of the Supreme Court of Canada, the former Deputy Prime Minister of Canada and the former Commissioner of the Competition Bureau of Canada.

bennettjones.com/environment

Foreign Investment

In addition to certain industry sector regulations that may apply, both the *Investment Canada Act* and the *Competition Act* subject foreign investments to review in Canada. While the Canadian government encourages foreign investment, foreign investors need to understand the legislation at the early stages of any proposed investment so as to manage the review process and facilitate such investment.

Investment Canada Act

The *Investment Canada Act* (ICA) governs foreign investments in Canada. The purpose of the ICA is to review significant investments, with the goal of encouraging foreign investment, economic growth and employment opportunities in Canada. The ICA applies to foreign investments to acquire control of a Canadian business, establish a new Canadian business or acquire an interest in a Canadian business, where such acquisition may be "injurious to national security."

Review Threshold & Process

A *direct acquisition* will generally be subject to review if the book value of the Canadian business' assets exceeds CDN$330 million. This threshold is reduced to CDN$5 million if the investor or vendor is not a World Trade Organization (WTO) member or if the Canadian business relates to Canadian cultural heritage.

Recent draft regulations would increase the threshold to initially CDN$600 million (rising to CDN$1 billion), with the value to be based on the assets' "enterprise value" (not book value). Acquisitions of control of Canadian businesses by non-WTO foreign investors will continue to be subject to book value tests.

An indirect acquisition (*i.e.*, the acquisition of a non-Canadian parent) is generally not reviewable if either the foreign investor or the vendor is a WTO investor.

An acquisition of control of a Canadian business not subject to review, as with the establishment of a new Canadian business, is subject only to a notification, which may be filed at any time prior to the closing or within 30 days thereafter.

If subject to review, the investment may only be completed once the Minister of Industry is satisfied that the investment is of "net benefit" to Canada. Investments in Canadian businesses that relate to Canada's cultural heritage are reviewed by the Department of Heritage.

Net Benefit

In assessing the (undefined) "net benefit" to Canada, the Minister considers the effect of the investment on economic activity, efficiency, innovation and competition; Canadian participation going-forward; and the compatibility of the investment with national policies.

Foreign investors are required to provide contractual undertakings to support the claim of "net benefit." Undertakings typically relate to capital and other expenditures, R&D, employment, head-office location and Canadian participation. Investors may be required to provide security to support such undertakings.

State-Owned Enterprises

A foreign investor that is a state-owned enterprise must demonstrate that its corporate governance and reporting structure are typical of a public Canadian company. It must also demonstrate the commerciality of its decision making and provide contractual undertakings to support these standards.

Timing of Review

The ICA provides for an initial 45-day review period which may be extended for an additional 30 days; any further extensions must be agreed upon by the investor. The timing of the Minister's review may extend beyond 75 days for more significant investments that involve complex issues to be addressed with additional (negotiated) undertakings.

National Security Review

Foreign investment in Canada may also be subject to a separate review process if there are reasonable grounds to believe that the investment *could* be injurious to national security. Where the Canadian government concludes an investment *would* be injurious to national security, it may take any measure considered advisable to protect national security, including blocking the investment.

Only two investments have (publicly) raised national security issues under the ICA; both of these investments occurred prior to the introduction of the current national security review provisions in 2009.

Competition Act

The *Competition Act* (CA) is federal legislation that authorizes the Commissioner of Competition to review mergers and requires notification of certain larger transactions. The purpose of the CA is to maintain and encourage competition in Canada.

Substantive Review under the Merger Provisions

The Commissioner may review any merger to assess the impact on competition resulting from such merger. A merger is defined broadly to include the direct or indirect acquisition or establishment of control over a significant interest in the whole or part of a business. The Competition Tribunal, on application of the Commissioner, may make an order to block or make other remedial orders in respect of mergers that are determined to prevent or lessen competition substantially.

Whether a merger would likely prevent or lessen competition substantially depends on the competitive dynamics of the affected markets, including (among other factors): the presence of barriers to entry, the availability of acceptable substitutes, the degree of remaining competition, whether the entity acquired was a vigorous competitor, and efficiencies arising from a transaction.

The Commissioner endeavors to complete reviews within 14 to 45 days from receipt of all relevant information, depending on the complexity of a transaction from a competition perspective. Reviews may extend beyond this period if there are competition concerns or the Commissioner requires additional information to complete her review.

Pre-Merger Notification

The acquisition of more than 20 percent or 35 percent of the voting shares of a public or private corporation, respectively, the acquisition of more than 35 percent of an unincorporated entity, an amalgamation and other combinations will generally be subject to notification where certain financial thresholds are satisfied. These threshold tests are (generally):

(a) *the size of the transaction test*: the aggregate value of the assets in Canada to be acquired exceeds CDN$77 million, or the gross revenues from sales in or from Canada generally from these assets exceeds CDN$77 million; and

(b) *the size of parties test*: the parties (together with their affiliates) have assets in Canada that exceed CDN$400 million in aggregate value, or had gross revenues from sales in, from or into Canada that exceed $400 million.

If subject to notification, the parties must file a notification with the Commissioner, the cost of which is $50,000.

Statutory Waiting Period

The parties may not close the transaction until the statutory waiting period of 30 days expires, provided that the Competition Tribunal has not granted an order prohibiting closing. A request for supplementary information extends the waiting period by another 30 days once all requested information has been submitted.

Although the parties may close the transaction by the end of the waiting period, the Commissioner may not have completed her substantive review by then. The parties may wish to delay closing until the Commissioner has completed her review and determined that the transaction will not raise any substantive issues under the CA.

Typically, parties will request an Advance Ruling Certificate (ARC) concurrent with (or in lieu of) filing a pre-merger notification. The Commissioner will only issue an ARC on completion of her review and if the transaction does not raise any substantive issues under the CA. If an ARC is issued, the parties are not required to file a pre-merger notification and the Commissioner is prohibited from challenging the transaction. Where the Commissioner does not issue an ARC but has concluded that there are not sufficient grounds to challenge the transaction, she will issue a *no–action letter*.

Conclusion

While the Canadian government encourages foreign investment, foreign investors are strongly encouraged to consult with legal counsel in the early stages of any proposed transaction/investment. Such counsel can assist in managing any issues which would otherwise arise and expedite and focus the review process under both the ICA and the CA.

Bennett Jones Antitrust, Competition and Foreign Investment Group

The Bennett Jones Antitrust, Competition and Foreign Investment Group advises national and international clients on a full range of complex Canadian and international merger transactions and other investments in Canada. We advise on the coordination of pre-merger strategies in Canada and across multiple jurisdictions; preparation and filing of pre-merger notifications under the CA and applications for review under the CA; and securing requisite regulatory approvals in Canada. Among other state-owned investments, Bennett Jones LLP secured the approval of Statoil ASA's acquisition of North American Oil Sands – the first SOE investment in Canada – and SINOPEC's acquisition of Daylight Energy Ltd. – the first Chinese SOE acquisition of a viable oil and gas corporation in Canada. Our excellent working relationships with competition counsel worldwide, the Competition Bureau and the Canadian government allow us to lead negotiations and advocate competition and investment issues effectively on behalf of clients whose interests span the globe.

bennettjones.com/antitrustandcompetition/

Franchise Law

A robust economy and high standard of living make Canada an attractive market for business expansion through franchising.

Franchising is a popular way for companies to rapidly expand their businesses. In a franchising relationship, the franchisor provides the franchisee with a license to operate a proprietary system under the franchisor's brand for a fixed period of time. In exchange for access to the franchisor's system, the franchisee usually pays an ongoing royalty payment to the franchisor.

In Canada, five of the ten provinces currently have specific legislation governing the relationship between franchisors and their franchisees. These provinces are: Alberta, Manitoba, Ontario, New Brunswick and Prince Edward Island. Legislation governing franchises in these provinces is substantively similar, with some minor variances among the provinces. In British Columbia, a private member's franchise legislation bill was introduced in the provincial legislature by a member of the opposition party in May, 2015. It is unclear at this time whether this bill will become law in its current form, or the current B.C. government will introduce either amendments to the bill or its own franchise legislation bill.

None of the three territories in Canada – Northwest Territories, Yukon and Nunavut – have franchise legislation.

Disclosure

A franchisor's obligation to disclose material aspects of its business to potential franchisees is one of the most critical components of franchise legislation in Canada. In the five provinces with franchise legislation, franchisors have an obligation to provide a disclosure document to a potential franchisee at least 14 days before the parties enter into a franchise agreement. The disclosure document's purpose is to familiarize the franchisee with all material aspects of the franchisor's business that would influence a potential franchisee's decision to purchase a franchise. A disclosure document includes:

- Information about the franchisor and its principals, including information about criminal convictions and bankruptcy proceedings;
- Details of the investment to be made by the franchisee in the franchised business, including working capital requirements;
- Lists of both existing franchised businesses and franchisees that have left the franchise system;
- Earnings claims for the franchised business, if any; and
- Financial statements for the franchisor.

In provinces with franchise legislation, failing to provide (or omitting material facts from) a disclosure document can have serious consequences for the franchisor. Depending on the nature of the defect in the disclosure document, franchisees in these provinces may have a statutory right to rescind the franchise agreement or obtain damages from the franchisor.

Fair Dealing

Provinces with franchise legislation include an explicit obligation of fair dealing by the parties to a franchise agreement. This is an important obligation in franchise law, as there is typically an imbalance in negotiating power between the parties. Franchisors must be careful in their dealings with franchisees, as heavy-handed business practices could give rise to legal claims for violating this legislated fair dealing covenant.

Additionally, the Supreme Court of Canada has extended the fair dealing obligation beyond provinces that specifically legislate fair dealing for franchises. The Court held that an obligation of good faith performance applies to the parties to any commercial contract. This means that the parties must not lie or engage in deceptive practices during the performance of the contract, which is akin to the fair dealing provision in the five provinces with franchise legislation.

Withholding Taxes

Canadian franchises of non-Canadian franchisors may have additional tax issues, depending on the corporate structure of the parent franchisor. For instance, the Canadian franchisee may be liable for withholding taxes on royalties paid to the non-Canadian franchisor. It is important for both the franchisee and franchisor to obtain tax advice before entering into the franchise agreement, to clarify their respective obligations under the franchise agreement.

Personal Guarantees

It is typical for a franchisee to incorporate a company to operate the franchised business. Incorporation helps shield the franchisee from personal liability arising from the operation of the franchised business, and also offers tax benefits to the franchisee.

A common feature of franchise agreements is the personal guarantee of the franchisee. Franchisors ask for a personal guarantee of one or more of the principals of the incorporated franchisee so that the franchisor may collect on the franchisee's debts should the incorporated franchisee encounter financial difficulty. While a franchisor will not entirely eliminate the personal guarantee from the franchise agreement, a franchisor might be willing to negotiate a cap on the guarantee or a specified time period for which the personal guarantee applies.

The validity of a personal guarantee may depend on compliance with legislative requirements (*e.g.*, in the province of Alberta, the *Guarantees Acknowledgment Act*). Especially for franchisors, complying with legislative requirements for personal guarantees is critical to ensure that a personal guarantee is valid and binding on the franchisee.

Deemed Franchises

Business owners must be careful that they do not try to avoid franchise laws and become "accidental franchisors" in provinces with franchise legislation. This can occur when a business enters into a licensing agreement with a person or company, but maintains control over how the licensee conducts its business. Though the provinces with franchise legislation each use slightly different language, each jurisdiction defines a franchise as having the following three elements:

- The business is associated with a brand or trademark;
- An ongoing payment is made to the franchisor; and
- The franchisor maintains control over how the franchisee conducts its business.

Licensing agreements typically have the first two elements, so whether or not a business is found to be a franchise usually depends on the degree of control exerted by the licensor over the licensee. The finding of a franchise can have disastrous consequences for an accidental franchisor. For instance, the accidental franchisor likely did not provide disclosure to the licensee that was compliant with provincial franchise law. As a result, the licensee/franchisee may have a statutory right to damages or rescission of the agreement.

Conclusion

Franchisors should be aware that although Canadian franchising law shares many similarities with franchising law in other jurisdictions, Canada does have its own specific franchising laws. Businesses considering expanding into Canada through franchising should consult with experienced Canadian counsel to ensure that their franchise documents are compliant with Canadian law.

Bennett Jones' Franchising Law Group

Representing clients in the franchise industry for over 25 years, Bennett Jones provides comprehensive legal services and advice to emerging and established franchisors and franchisees in the food service, clothing, hotel, retail and professional services industries Canada and internationally. We advise on the structuring, operation, expansion, acquisition and disposition of franchises domestically and internationally, particularly in the United States. We also advise on expansion into Canada by U.S. and other internationally-based franchisors. Our franchise team has a deep understanding of Canadian franchise legislation and its implications for both franchisors and franchisee.

bennettjones.com/FranchiseLaw/

Fraud Law

Advances in technology, telecommunications and electronic fund transfer have brought about a marked increase in the amount of fraud perpetrated across borders. While Canada is not immune from these developments, combating fraud is a priority for Canada. Civil courts have extraordinary powers that assist victims in locating and preserving assets and evidence to ensure they are not dissipated or destroyed by fraudsters. This proactive assistance makes the recovery of a substantial amount of their losses a strong possibility for fraud victims. The criminal justice system is also looking to enact measures to deter potential frauds and protect potential victims.

Common International Fraud Schemes

International fraud can take many forms including:

- ssecurities fraud;
- bust-outs (involving the ordering of high volumes of merchandise and then quickly declaring bankruptcy);
- credit and debit card schemes;
- high-yield investment schemes;
- Internet scams;
- telemarketing scams;
- forged or misappropriated letters of credit;
- cheque kiting;
- money laundering schemes;
- kick-backs;
- accounting manipulations;
- loan-back schemes;
- mortgage and commercial loan fraud; and
- employee collusion and theft.

Unscrupulous individuals rely on both the perceived and real difficulties of pursuing cross-border claims to avoid the consequences of their fraudulent schemes.

Anti-Fraud and Corruption Legislation

Scandals around the world have brought on calls to strengthen corporate governance standards and improve the enforcement of laws governing capital markets activities. In response, Canada has made important legislative amendments and enactments that:

- help combat fraud and corruption, both domestically and abroad;
- provide greater protection and remedies for consumers as well as improved enforcement procedures; and
- require companies to take an active role in reporting fraud and suspicious transactions.

The Canadian parliament is now considering imposing a two-year mandatory minimum sentence on fraudsters where the proceeds of the crime exceed CDN$1 million. The proposed legislation would also obligate the criminal courts to consider a restitution order, which would help to make victims whole within the criminal process.

Canada has also introduced stiff sentences to confront the corruption of public officials both at home and abroad. Those who are found guilty of bribing a Canadian or foreign public official can face a prison sentence of up to five years. A Canadian public official found guilty of accepting a bribe is treated even more harshly and can be imprisoned for up to 14 years.

Commencing Proceedings

Plaintiffs in cross-border fraud litigation must consider several issues:

- whether to pursue criminal fraud charges in Canada;
- what interim relief is available to ensure funds or assets are not dissipated before judgment is obtained;
- what mechanisms are available to locate assets or property;
- how to obtain evidence from citizens in another country;
- how to participate in a cross-border civil class action;
- what the requirements are for a Canadian court to assume jurisdiction; and
- when a judgment obtained in the plaintiffs' home country will be enforced in Canada.

Civil or Criminal Charges

A criminal fraud conviction may result in the issuing of a restitution order at sentencing that can be converted into a judgment to be enforced against a defendant's assets. (If proposed legislation is enacted, consideration of such an order will be mandatory.) However, there is always a risk that by the time a court gets around to considering a restitution order, the proceeds of the fraud will have vanished, in safe havens or elsewhere.

Moreover, the Canadian criminal justice system is not currently well-equipped to deal with the distribution of assets of a fraud among a large number of victims with varying claims. Accordingly, the most advantageous recovery strategy in fraud actions in Canada may be the use of *civil* remedies, including the injunctive relief listed below, even before contacting the police.

Locating and Preserving Assets

There are powerful common law remedies available in Canada to assist in locating and preserving assets and evidence from a fraud to ensure that such assets are not dissipated or destroyed before judgment:

- A **Mareva injunction** freezes the assets of the defendant prior to judgment. The party seeking such an injunction must (among other things) establish a strong *prima facie* case and show that there is a real risk of dissipation of assets. In certain circumstances, such a risk can be inferred from the defendant's fraudulent conduct.

  In some circumstances, a worldwide Mareva injunction can be obtained to restrain the defendant from disposing of his/her assets anywhere in the world. The order must then be recognized and enforced in all jurisdictions where the defendant's assets are located.
- An **Anton Piller order** permits the plaintiff's representatives to enter the defendant's premises to remove and preserve evidence, including information on computers.
- A **Norwich Pharmacal order** (a discovery order) is made against third parties. This order allows the plaintiff to trace the proceeds of the fraud by compelling a defendant's financial institutions to disclose the defendant's banking records to the plaintiff.
- A **Disclosure order**, although not always granted in Ontario, requires the defendant to disclose the nature and location of his/her assets, thus allowing the plaintiff to identify and freeze assets accordingly. Courts have held that disclosure of the nature and location of assets is necessary to give effect to an order restricting the disposition of assets.

Undertaking

With the exception of a Norwich Pharmacal order, a plaintiff seeking any of the remedies described above may be required to provide an undertaking as to damages. This undertaking protects the defendant in the event that the granting of the injunction is ultimately shown to have been unwarranted and harm has arisen from the interim granting of that injunction. Such an undertaking will generally be required of foreign litigants seeking relief in Canada.

Production

Cross-border litigants may also ask the court to exercise its power to order the production of relevant documents in the possession or power of a party or witness within that court's jurisdiction, giving plaintiffs access to documents located outside of Canada.

Class Action Certification

Canadian courts have confirmed that class actions involving investment fraud are certifiable and that a non-resident can be part of a certified class. Class actions can play a significant role in combating certain frauds that target multiple victims, such as telemarketing or securities fraud that may extract nominal sums from hundreds or thousands of individual victims.

Jurisdiction

The powers granted to Canadian civil courts to take immediate, proactive steps that allow victims to recover their assets make it advantageous for victims of fraud to commence proceedings in Canada. However, for a Canadian court to assume jurisdiction, there must be a real and substantial connection between the fraud and Canada. Such a connection can be found to exist, for example, where the fraud has been committed from Canada; the rogue has assets in Canada; or the victims, witnesses and documents are located in Canada.

Enforcement of Foreign Judgments and Orders

Canadian courts have developed a liberal stance towards enforcing foreign judgments. Through the use of Letters Rogatory (letters of request), common law countries are typically receptive to approving the enforcement of foreign orders, provided that there is a practice of reciprocating such assistance from the requesting country.

Conclusion

Canada has adopted and expanded common law and statutory principles to reflect and combat the increasing prevalence of cross-border fraud. In fraud cases, however, the race often goes to the swiftest; proactive plaintiffs who can establish a real and substantial connection between the fraud and Canada may chose to commence proceedings in Canada so as to take advantage of the litigation fraud strategies unique to this jurisdiction.

Bennett Jones' Fraud Law Group

Partnering with the Bennett Jones Fraud Law Group gives you access to leading lawyers who have acted for the victims of high-profile frauds based inside and outside of Canada. With damage mitigation and recovery being our primary goals, our team draws on our combined years of experience to quickly assess situations arising from fraud and formulate assertive, results-oriented action plans. We have particular experience in securities fraud matters involving insider trading, stock market manipulation and allegations of other criminal activity by directors and officers. Our group meets regularly with our clients to assess existing risk management systems and help prevent future losses.

bennettjones.com/Fraud

Government and Legal System

Canada is a prosperous society with a highly educated workforce, substantial natural resources, modern infrastructure, well-functioning public organizations and sound financial institutions. The country's high standard of living and quality of life is sustained through a diversified, open economy that respects the rule of law, pursues free trade, supports innovation, fosters competition and welcomes foreign investment.

Population

Canada is a very large country with a relatively small population. It is the second largest country in the world in terms of area and is ranked 37th in terms of inhabitants. Canada's vast territory stretches from the Atlantic Ocean to the Pacific Ocean, across six time zones, and from the same latitude as Rome, Italy, to beyond the magnetic North Pole. However, nearly 90 percent of the country's population of 34 million lives in southern Canada within 160 kilometres (100 miles) of the long border with the Lower 48 American states. Over 50 percent of Canadians reside in the corridor from Québec City to Windsor (opposite the American city, Detroit).

Natural Resources

As a result of Canada's relatively small and concentrated population, vast tracts of the country are uninhabited and unspoiled. This hinterland contains a substantial storehouse of natural resources, including a coniferous boreal forest greater in size than the continent of Europe, a wide range of valuable minerals, metals and other materials, nine percent of the world's renewable (and 20 percent of its surface) freshwater, substantial natural gas deposits, and a massive deposit of bitumen that contains proven reserves of 178 billion barrels of oil (at current prices using available technology), and total reserves exceeding 1.6 trillion barrels.

From Colony to Country

Canada is a federation, like the United States, and a constitutional monarchy and Parliamentary democracy, like the United Kingdom. Its political structure and legal system reflect its roots as (first) New France and then British North America.

A colony of France for 160 years beginning in the early 17th century, and of Britain for an additional century thereafter, Canada became a country in 1867 through the union of the three British colonies of Nova Scotia, New Brunswick and the original Province of Canada (which subdivided into the Canadian provinces of Ontario and Québec). Subsequent expansion transformed the western territories into additional provinces so that, today, Canada is a federation of 10 provinces, with three remaining territories in the Far North.

Division of Powers

Canada is a more decentralized federation than the United States. Under the division of powers agreed to at the time of Canada's Confederation in 1867, the federal government is generally responsible for national and international matters. The provincial governments are responsible for matters that are more local or private in nature, as well as property and civil rights. The power of both the federal and provincial governments to act unreasonably has subsequently been constrained through the entrenchment of certain rights and freedoms in the *Canadian Charter of Rights and Freedoms*.

Developments since the mid-19th century and the complexities of modern societies have caused an unavoidable overlapping of federal and provincial jurisdictions. This overlap has created inevitable tensions and has required extensive inter-governmental delegation and collaboration as well as the harmonization of provincial legal frameworks. In particular, the assignment of jurisdiction over health and education matters to the provinces has necessitated the development of a complex scheme of federal-provincial fiscal transfers.

Head of State

Canada's Head of State remains Queen Elizabeth II, as Queen of Canada. Her largely ceremonial role is fulfilled on a daily basis by an appointed Canadian Governor-General.

Parliament of Canada

Like the British Parliament at Westminster, the Parliament of Canada is bi-cameral, with an elected House of Commons and appointed Senate (with limited, subordinated powers). The leader of the political party that holds the largest number of seats in the House of Commons is the Prime Minister and he or she forms a government that must maintain the confidence of the House. As in the United Kingdom, a permanent professional civil service, up to the level of Deputy Minister, is charged with providing advice to the various Ministers.

In contrast with the bi-cameral federal Parliament, single legislatures now exist at the provincial level. While municipalities have a significant role in the delivery of public services and regulation of economic activity, they remain creatures of provincial statute without their own constitutional basis. Municipalities have limited powers of taxation, both in absolute terms and relative to their growing responsibilities.

There are three remaining territories (in the north of Canada) which remain under federal jurisdiction although with their own territorial legislatures now possessing province-like powers. In addition, Canada's aboriginal peoples exercise limited self-government in certain regions and areas pursuant to treaties and agreements.

Official Languages

Canada is officially bilingual at the national level. However, the French language is spoken primarily in the province of Québec, as well as in adjacent areas of Eastern Ontario and Northern New Brunswick, which is an officially bilingual province. While Québec has remained a relatively homogeneous French-speaking society, continuing waves of immigration throughout the 20th century have caused the rest of Canada (and particularly the largest cities) to become multi-racial and multicultural, with English as the *lingua franca*.

Legal System

There are three branches of government in Canada – the executive, legislative and judicial. The independence of Canadian courts from the executive and legislative branches of Canadian government is a well-established principle that is scrupulously observed and defended as a fundamental requirement of the rule of law. Commercial court proceedings are usually heard in the federal courts or the superior courts of the provinces (which are presided over by federally-appointed judges)

There is one criminal law across Canada and it is rooted in the British common law. Most provinces across Canada have private legal systems based on the English common law and legal precedents. However, matters of private law in Québec (*i.e.*, contract, family and property matters) continue to be governed by a Civil Code. Meanwhile, corporate/business laws in *all* provinces, including Québec, have been heavily influenced by American legal developments and innovations. In short, Canada's legal system reflects its dual French and English roots, and North American reality.

Bennett Jones' Governmental Affairs & Public Policy Group

Staffed by individuals who have played leading roles in the shaping of public policy in Canada and the development of appropriate business responses, the Bennett Jones' Governmental Affairs & Public Policy Group is a unique resource among Canadian law firms. Our Group provides clients with strategic legal and policy advice on domestic and international matters ranging from financial services regulation and competition and investment policy to energy, environmental and border measures.

bennettjones.com/publicpolicy/

Infrastructure Opportunities In Canada

Infrastructure development has helped define Canada. Currently, Canadians lead the world's infrastructure development projects. The infrastructure required for resource development projects such as the oil sands are some of the largest projects undertaken in the world today.

Public infrastructure development and redevelopment have gained prominence in Canada (as in other western democracies) where infrastructure deficits have arisen as a result of years of under-spending on public infrastructure projects.

Public-Private Partnership (P3) models have been embraced by most Canadians with minor variations. Roads, bridges, hospitals and other public infrastructure have been developed by private sector proponents under design-build finance maintain structures with a long-term concession period of 25 to 35 years.

Public/Private Partnerships

Canada has embraced the public/private partnership model for procuring public infrastructure assets. The federal government, through P3 Canada, and many provincial governments, through provincial agencies, have endorsed and promoted public/private partnerships as a means of addressing the growing infrastructure deficit resulting from many years of inadequate expenditures on maintenance and refurbishment.

P3 Canada

P3 Canada's mandate is to encourage P3 projects across the country led by a province, territory, municipality or First Nation by providing advice and financial support. The P3 Canada Fund (administered by P3 Canada) is a merit-based program, designed to incent consideration of P3s in public infrastructure procurements to achieve value for taxpayers and other public benefits. Each infrastructure project considered by the P3 Canada Fund must contribute to one of the following: fostering economic growth; supporting a cleaner environment; and/or promoting stronger communities.

P3 Canada closed its second round of financings from the P3 Canada Fund on June 30, 2010, with 68 proposals received for projects across Canada in water or wastewater projects; energy or green energy projects; and transportation or transportation-related projects. More than half of the projects were lead by municipalities and 12 of these projects were First Nations projects. P3 Canada is now working on its third round of financings from the fund.

Provincial Organizations

The provinces – led by British Columbia and Ontario – have turned to P3 financing to procure their infrastructure requirements. Ontario styles P3 as alternative finance and procurement (AFP) and channels provincial spending on infrastructure through the Ontario Infrastructure and Land Corporation (Infrastructure Ontario), a Crown corporation. The province is currently procuring the sports venues for the 2015 Pan Am Games through a series of AFP procurements led by Infrastructure Ontario. In British Columbia, Partnerships BC carries out a similar role to that of Infrastructure Ontario.

Provincial infrastructure organizations have procured social infrastructure including hospitals, jails, courthouses and highway infrastructure in Ontario, Québec and British Columbia, and schools and highways in Alberta and the Maritimes. In the Province of Québec, the Centre hospitalier de l'Université de Montréal reached financial closing in June, 2011 on a $1.973-billion new hospital in Montreal.

Alberta and Nova Scotia have both completed P3 procurements of bundles of school buildings packaged into single P3 projects.

Ontario has utilized a form of AFP structure that does not include any operational or maintenance phase under the style "build finance." The build-finance program was used to catch up on a back log of designed and tender-ready project work that had been deferred.

Financing

Financing for P3 projects has typically been provided by foreign banks and pension funds with an appetite for longer term bonds. Canadian banks participate in shorter term construction financing but have no appetite for the longer term bonds issued by P3 projects. Canadian banks will partner with funds to facilitate bank financing through construction and longer-term privately placed bond financing for the operating term. The project vehicle is usually a limited partnership structure with equity investment from project proponents and pension funds.

Process

The usual process for the provincially lead procurement process begins with a request for qualifications (RFQ). Proponents pre-qualify with teams including construction, operations and financial players. The authority selects a short list of three pre-qualified proponent teams and moves to a request for proposals (RFP). The RFP will include an extensive project agreement and will require each proponent team to submit a financing solution. If selected, the proponent team will be expected to execute the project agreement and achieve a commercial close, immediately followed by a financial close within a 30-day period.

Payment mechanisms in social infrastructure have been based on an availability payment concept. Market testing has been included to recalibrate operating costs periodically over the concession term. No Canadian jurisdiction has introduced a statutorily prescribed form of P3 procurement model.

Conclusion

Currently, Canada enjoys a robust pipeline of P3 projects. P3 markets are expanding with the entry of municipalities and other smaller, domestic government units as well as the increasing participation of international funders and construction companies. The trend away from a dependence on a requirement for long-term financing that was in limited supply is now reversing. Milestone payments and substantial completion payments introduced to alleviate the funding constraints resulting from the recent financial crisis are becoming less common.

Bennett Jones Public Infrastructure Projects Group

The Bennett Jones LLP Public Infrastructure Projects Group has led the development of Canadian P3 and AFP models. Our Group has unparalleled construction project expertise that was earned on some of Canada's most complex projects. We couple our international construction practice with leading public and private project finance expertise and experience, structuring public sector infrastructure procurement for multiple levels of government and acting for teams successfully delivering public infrastructure as well as their advisors, investors, lenders and team members.

bennettjones.com/infrastructure/

Intellectual Property Law

Intellectual property (IP) portfolios are valuable assets that must be properly acquired, advantageously exploited and thoroughly protected in all commercially significant jurisdictions. Companies considering doing business in Canada need to be aware of several key differences between Canadian IP laws and those of other countries. Some of those differences are discussed below.

Jurisdiction

The federal government has exclusive jurisdiction under the Constitution for copyright and patent law and also has jurisdiction for the *Trademarks Act* under its trade and commerce power. The law of confidential information exists under provincial jurisdiction as do common law trademark rights.

Copyright

Copyright subsists in original literary, musical or dramatic works that are the product of skill and judgment, and are fixed in a tangible form. Registration is not required to create the right, although registration does create beneficial rebuttable presumptions. A sample of the work is not filed with the registration application. Marking the work with a copyright notice, although not required, is typically done and creates benefits under certain international treaties and beneficial presumptions as to ownership.

The copyright owner has the sole right to produce, reproduce, perform or publish any translation of a work. The author of a work owns moral rights, including a right of integrity (involving mutilation or distortion of the work) and a right of association (to have the author's name associated with the work or remain anonymous). Moral rights may not be assigned, only waived.

Canada is a member of the Berne Convention and also adheres to (among other treaties) the *WIPO Copyright Treaty.*

Copyright Infringement

Infringement of copyright occurs when anything is done (e.g., reproduction, in whole or substantial part, of a work) that is reserved exclusively to the copyright owner without the owner's consent. A copyright registration is not necessary to commence an action for infringement in Canada.

In interpreting Canadian copyright law, Canadian courts aim to strike a balance between the rights of owners of copyright works (including an economic reward for its creation) and the rights of users.

Assignments and Licenses of Copyright

Copyrights are assignable but assignments must satisfy certain formalities. Registration of copyright assignments is recommended. A copyright owner may license rights under copyright to another, although licenses should be in writing.

Patents

In Canada, patents are granted only to the original inventor (or that person's legal representatives) on a *first-to-file* basis, not on a *first-to-invent* basis. Generally, all inventive subject matter may be patentable and while lower life forms *are* patentable, methods of medical treatment and higher life forms *are not* patentable. Like many countries, Canada's patent law seeks to find tangible invention in business methods or software implemented inventions.

As Canada is a signatory to the *Paris Convention* and the *Patent Co-operation Treaty,* applications may be filed in Canada on the basis of foreign applications (claiming priority to the first filing date).

Advanced Examination

An applicant may accelerate the examination of a patent application in Canada by paying the required fee and filing a statement that failure to advance the application is likely to prejudice the applicant's rights.

Filing of Prior Art and Claim Amendments

If the Patent Examiner so requests, an applicant for a Canadian patent must identify the prior art cited in corresponding patent applications in other jurisdictions. An applicant may voluntarily do so to ensure that the prior art is entered on the record.

Claim amendments may be filed without affecting the scope of issued claims. The prosecution history of a patent application cannot be used to construe patent claims in Canadian litigation.

New Matter, New Application

If an applicant wishes to introduce new matter into a pending patent application, the applicant must file a new patent application. An applicant may not file a continuation-in-part patent application in Canada.

Assignments and Licenses of Patent Rights

Patents are assignable but must satisfy certain formalities. Registration of patent assignments is recommended. A patent owner may license rights under the patent to another. There are no marking requirements on patented goods.

Trademarks

Trademark applications may be filed in Canada on the basis of actual use in commerce or proposed use. Canada has recently adhered to the *Singapore Treaty* and is now beginning to use the Nice classification system. At present, for one filing fee, an applicant may file an application covering *different goods/services*, provided it has either actual use or a *bona fide* intention to use the trademark in association with those wares/services.

Applications may be filed on the basis of foreign applications (claiming priority under the *Paris Convention*) and registration and use abroad. Canada has enacted legislation to adhere to the Madrid Protocol and will do so pending promulgation of applicable regulations.

Enforcement of Trademark Rights

Trademarks, whether registered or unregistered, may be enforced in Canada's Federal or Superior Courts. Rights afforded to registered trademarks include the right to exclusive use of the mark across Canada in association with the goods/services and to prevent the depreciation of goodwill associated with the mark.

An improper registration may be expunged. Trademarks must be continually used to provide enforceable rights. In appropriate circumstances, a party may apply to remove a registration for non-use.

Assignments and Licenses of Trademark Rights

Trademarks are assignable with or without associated goodwill but must satisfy certain formalities. Registration of trademark assignments is recommended. A trademark owner may license the use of the trademark to another, provided the owner retains control over the character and quality of the wares/services associated with the trademark.

Confidential Information

Canadian law provides remedies for the protection of confidential information provided that there is a relationship requiring confidentiality and the information is secret.

Enforcement of Secrecy Obligations

An action may be brought in a Superior Court to enforce confidentiality and non-use obligations. Injunctive relief is a common remedy.

Assignment or License of Confidential Information

Confidential information is not property (at least for criminal law purposes) and care must be taken in transactions involving the transfer or license of such rights.

IP Litigation

Most IP litigation takes place in the Federal Court of Canada, where juries are prohibited. IP litigation also occurs in Canadian Superior Courts; but, as juries in such courts cannot grant injunctions, this effectively eliminates jury trials in Canadian IP cases.

Border Measures

Canada has introduced new border measures under the *Combating Counterfeit Products Act*. These measures provide additional copyright and trademark prohibitions on the import and export of counterfeit trademark goods as well as new border assistance remedies in respect of the import of counterfeit goods. Intellectual property rights owners can now register and file a request for assistance with the Canadian Border Services Agency officials to share information on (and seek to intercept) counterfeit goods on arrival in Canada.

Anti-Competitive Conduct

Canadian legislation prohibits the abuse of IP rights to unduly prevent or lessen competition and provides remedies in the event of anti-competitive acts.

Domain Name and Internet Disputes

Canadian Superior Courts may grant orders for the identification of anonymous posters of infringing content on websites. Claims of domain name and website misuse may be brought before Canadian Superior Courts, which can order the transfer of a domain name or other injunctive relief. Special immunities are available for internet intermediaries in certain cases. (See the eCommerce chapter for more details.)

No Treble Damages

A successful IP owner/litigant is entitled to damages caused by the infringing acts of (or, in some cases, an award of the net profits made by) the infringer. A punitive damages award for intentional infringement or other misconduct is rarely made, even in cases of demonstrated, deliberate and intentional infringement.

Anton Piller Order

An Anton Piller order is essentially a private search warrant that can authorize the search of businesses, computers, private homes, etc. to locate and preserve relevant evidence. Such an order is difficult to obtain.

Litigation Costs

A successful party in Canada is entitled to an award of costs from the other side. The amount usually covers a small portion of the fees paid to counsel and reimbursement of many out-of-pocket expenses necessarily incurred in the litigation.

Conclusion

Canada's intellectual property law is well developed. It permits considerable flexibility in transactions involving IP rights and provides protection linked to important international treaties. An independent judiciary in Canada provides for the enforcement of IP rights where needed.

Bennett Jones' Intellectual Property Group

For companies bringing new products, services or technology into Canada, Bennett Jones' Intellectual Property Group efficiently and creatively works to identify, protect and address any intellectual property risks and, where necessary, clear a path to market entry. Our team combines extensive intellectual property expertise with renowned transactional and litigation skills to address the full spectrum of dealings with intellectual property. We are qualified to file and prosecute patent and trademark applications before both Canadian and U.S. offices and file internationally. We appear as counsel before all levels of the Canadian courts and international tribunals.

bennettjones.com/ip

International Trade

Canada's international trade laws regulate the import and export of goods and services; the manner in which goods and services are procured or sold across borders; market access commitments made by Canada and its trading partners pursuant to trade agreements; and the protection of foreign investments in Canada and Canadian investments abroad. Most of the applicable laws and regulations are administered by the Canada Border Services Agency (CBSA) and the Department of Foreign Affairs and International Trade. The CBSA has responsibility for administering the customs laws as well as a host of product regulations at the border.

International Trade Law

Canada's international trade law is generally administrative in nature. Federal government officials administer these laws. Their decisions are subject either to judicial review by the Federal Court or to appeal before administrative tribunals and then to the Federal Court. In exceptional cases, the Supreme Court of Canada hears appeals from the Federal Court.

For the most part, Canada's international trade laws are either based on (or incorporate) Canada's international treaty obligations. To the extent that the applicable international treaty so provides, disputes may also be brought before dispute resolution panels such as those established by the World Trade Organization (WTO). Similarly, investment disputes under investment treaties may be arbitrated before dispute panels appointed by the parties to the dispute pursuant to the applicable treaty and international arbitration rules.

Counsel advising companies in cross-border commercial transactions must integrate intimate familiarity with business objectives and a thorough understanding of the impact of international trade laws to facilitate the attainment of those objectives. This includes structuring transactions to secure effective market access while ensuring import duty, tax and regulatory efficiencies. Close co-operation with expert counsel and client personnel in other specialized areas such as tax, intellectual property and commercial law is essential to address overlapping legal obligations and optimize business results.

Customs and Border Administration

Canadian customs laws govern the application of customs duty, commodity tax, interest and penalties in respect of imported goods by reference to their values including transfer prices, tariff classification, origin and applicable tariff preferences. Customs valuation establishes the base on which duty (and, indirectly, commodity taxes) are applied to imports. Tariff classification involves a technical analysis of the nature and use of goods, and the interpretation of an international harmonized classification system of potentially applicable descriptions, together with the application of special interpretative rules.

Tariff classification and tariff treatment establish the amount of duty and commodity taxes that are payable for imports into Canada. Tariff treatment involves the interpretation of special rules of origin that establish whether or not goods originate from a particular Canadian treaty partner and are therefore eligible for a reduced rate of duty. In the case of import transactions between affiliated entities, it is essential to consider the transfer pricing aspects of income taxation and to adopt a unified approach to minimize the aggregate exposure to customs duties, commodity tax and income tax. All of these issues impact import tax planning and structuring, and may be the subject of disputes.

Export Controls and Sanctions

Canadian exports are subject to export controls governing military, dual-use and other categories of products; country-specific trade sanctions, restrictions and exemptions; and anti-circumvention laws affecting Canadian exports of U.S. origin goods. Canada has recently become an active enforcement jurisdiction with respect to sanctions, notably with regard to Iran, Syria and Russia. Canada also regulates international trade in energy goods such as oil, gas and electricity. In addition, Canada maintains a blocking law that prohibits compliance with certain foreign extraterritorial measures, notably the U.S. Cuba embargo. This law can place Canadian subsidiaries of U.S. and other foreign companies in conflict with respect to their obligation to comply with Canadian and foreign laws.

Companies that export from Canada must determine early on in their business planning whether their products are subject to export controls; if so, they need to consult expert counsel to help them design and implement tailored compliance programs and procedures to avoid export control contraventions and minimize compliance costs.

Foreign Corrupt Practices

Companies doing business across borders are potentially subject to the foreign corrupt practices laws of Canada and other jurisdictions. These laws prohibit the payment of bribes and other benefits to government officials to obtain a business advantage. Canadian enforcement of foreign corrupt practices laws has increased significantly since the establishment of a dedicated international anti-corruption unit of the Royal Canadian Mounted Police (RCMP) in 2007.

The RCMP is pursuing a growing number of criminal investigations in this area, including co-operation with the U.S. Justice Department, the Securities and Exchange Commission, and other countries' enforcement agencies. Several convictions have resulted in substantial fines of approximately $10 million and imprisonment of an individual executive. Search warrants have been executed against several companies in Canada in foreign corrupt practices investigations. As a result of increasing enforcement activity in this area, international businesses must be diligent in ensuring that their international operations are executed in a compliant manner. Securing the advice of experienced counsel familiar with international best practices, as well as Canada's enforcement agencies and their investigative procedures, is essential to minimize legal exposure.

Trade Remedies

As a signatory to the WTO, Canada has adopted antidumping, anti-subsidy and safeguard measures to protect its domestic industries against imports of unfairly traded goods. Trade remedy cases involve two types of investigations: the CBSA investigates whether imported goods are unfairly priced or subsidized in anti-dumping and countervailing duty cases, while the Canadian International Trade Tribunal holds an inquiry to determine whether the imports have injured domestic production. These investigations and inquiries are conducted within very short time frames and following complex rules. Cases are often initiated with little merit, but with the objective of burdening exporters and importers with the imposition of preliminary duties and the cost of defending a case. The assistance of experienced trade counsel in these cases is essential to attaining a favourable result.

Investment Treaties

Canada has concluded foreign investment protection agreements with more than 28 countries that safeguard Canadian investments abroad and foreign investments in Canada. Investment disputes may be initiated by investors for various causes such as expropriation or failure to treat foreign investments in a manner that is consistent with national treatment (i.e., treatment equal to that accorded to domestic companies). Dispute settlement takes place before arbitration tribunals appointed jointly by the investor and the defending government. Tribunals may issue damage awards against offending governments, which are enforceable under international law. Companies that encounter discriminatory or arbitrary treatment by the host government in countries where they invest should consult expert counsel early on to familiarize themselves with their rights as investors and to avoid inadvertent waiver of those rights.

International Trade Policy and Negotiations

Canada participates in international trade negotiations bilaterally with numerous partners (e.g., the U.S., E.U., India and Japan) and multilaterally in fora such as the WTO. Canada seeks to advance the interest of its citizens and their international trade and investments by negotiating treaties covering trade in goods, services and intellectual property. The domestic laws, regulations and policies of Canada and its trading partners must comply with treaty obligations. International trade and investment treaties open new markets and play an important role in the international trade and regulatory environment for companies doing business in Canada. Companies actively engaged in international trade should consult expert counsel familiar with both the nuts and bolts of trade laws and the machinery of international negotiations to advance their interests in trade negotiations.

Product Regulation and Standards

Goods imported into Canada must meet federal and provincial product standards; consumer product safety regulations; marketing, packaging and labeling requirements; and other product regulations. These laws apply equally to imports and domestically produced goods. As the border is the first opportunity for the enforcement of Canadian product regulation on imported goods, the CBSA has the jurisdiction to enforce a broad range of product regulation. Failure to comply with applicable rules may result in delayed entry or seizure of non-compliant goods. Compliance with product regulation became even more important with the passage of the Canada Consumer Product Safety Act in 2011. The Act introduced a stricter consumer protection regime with enhanced procedures for recalls, seizures and penalties. Companies that source product from outside of Canada should consult experienced counsel early in the procurement process to ensure that their supply chain is familiar with Canadian standards and to mitigate the risk of non-compliance and potential issues at the border or in the ultimate disposition of their products.

Conclusion

Canada employs a wide range of international trade and investment laws to regulate trade in goods, services and intellectual property as well as to safeguard Canadian investments abroad. Companies considering doing business in Canada need to be aware of several aspects of international trade law, including Canadian customs laws, export controls, foreign corrupt practices laws, trade remedies, foreign investment protection agreements, international trade negotiations and product regulations.

Bennett Jones' International Trade & Investment Law Group

Our depth of experience and integrated approach to international trade advice makes Bennett Jones uniquely well-suited to serve our clients' needs across the full span of international trade matters, from technical nuts-and-bolts regulation to high-level trade policy and international negotiations. Our international trade lawyers are intimately familiar with all of the government agencies and departments that administer Canada's trade laws. We have represented leading international and Canadian firms, including Fortune 500 companies and corporations listed on leading Canadian and international exchanges, in trade investigations and proceedings. We safeguard our clients' interests by developing creative and resourceful solutions to international trade and investment issues in a competitive commercial environment.

bennettjones.com/internationalbusiness

Mergers & Acquisitions

Significant legal requirements may arise under corporate and securities laws when acquiring or investing in a Canadian company or business in Canada. In a proposed acquisition, the ownership structure of the target business will have a significant impact on the degree of regulation that will apply. A target business that is a publicly-traded entity will be subject to a significantly greater degree of regulation than a privately-held entity. Whether the business is organized as a corporation or partnership, or a unit or division of a corporation or partnership, will also impact the degree of regulation to which the proposed acquisition will be subject.

Public Company Acquisitions

Acquisitions of control of (or investments in) publicly-traded entities in Canada are subject to regulation under applicable securities laws and the rules of the stock exchange on which the target's securities are listed. Publicly-traded entities must also comply with applicable corporate, trust or partnership laws, incorporating statutes and judicial decisions.

Reporting Obligations

A buyer of publicly-traded securities is required to report the acquisition of beneficial ownership or power to control or direct 10 percent or more of the target entity's outstanding voting or equity securities calculated on a partially-diluted class basis. Promptly upon reaching the 10-percent threshold, a buyer must issue a news release followed by, within two days, the filing of an early warning report, which must disclose the purpose of the investment. Any increase of more than two percent, or any material change in the purpose of the investment, must also be reported in the same manner. In addition, upon reaching the 10-percent threshold, the buyer will also be deemed to be an insider of the entity. Insiders are required to publicly file reports disclosing their interest in such securities.

Take-Over Bids

An offer made by a person that would result in such person beneficially owning 20 percent or more of a class of a corporation's outstanding voting or equity securities, (if accepted) constitutes a take-over bid and must comply with applicable securities laws. Generally, these laws require that a take-over bid offer be made on the same terms and for identical consideration to all holders of securities of the class subject to the take-over bid. A bidder is required to prepare and mail the offer and a take-over bid circular describing the offer to the target's securityholders. Provided certain conditions are satisfied, Canadian securities laws provide limited exceptions from the take-over bid rules, including the acquisition of:

- up to five percent of a class of securities per year in the public market; and
- an unlimited number of securities by private agreement with five or fewer sellers at a price of no more than 115 percent of the trading price of the securities.

A potential buyer may send an unsolicited (hostile) offer directly to securityholders of the target without obtaining the support of the target's board of directors. In a negotiated (friendly) transaction, the target enters into a support agreement with the buyer pursuant to which the target agrees not to solicit other offers, subject to a fiduciary out allowing the target to accept a superior proposal in certain prescribed circumstances.

Typically a target that accepts a superior proposal is required to pay a break fee ranging from two to four percent of the total consideration offered under the bid. Most bids are conditional on at least 66 2/3 percent of the securities being deposited to ensure the acquisition of 100 percent of the target's securities through a second-step transaction (described below). A Canadian take-over bid cannot be conditional on obtaining financing for the acquisition.

A buyer who acquires at least 66 2/3 percent of the securities of a target through a take-over bid can use a second-step squeeze-out transaction to acquire all the remaining securities. of the target This may be achieved by way of a second-step amalgamation, arrangement or other transaction. A buyer who acquires 90 percent or more of the securities sought can compulsorily acquire the remaining securities by providing a prescribed notice and depositing the purchase price with a depository.

Arrangements, Amalgamations and Asset Sales

Alternatively, a buyer may acquire all of the outstanding securities of a target corporation through an arrangement or amalgamation, or the assets of a target through an asset sale under applicable Canadian federal, provincial or territorial corporate laws. An arrangement, amalgamation or sale of all or substantially all of a corporation's assets requires the approval of at least 66 2/3 percent of the votes cast at a special meeting called to consider the proposed transaction. The buyer will require the cooperation and support of the target under a definitive agreement that typically includes non-solicitation, fiduciary-out and break-fee provisions similar to those in a support agreement for a friendly take-over bid.

Private Company Acquisitions

In transactions where the target business is a privately-held entity, the buyer will have to comply with the target's incorporating statute, articles of incorporation, by-laws, any shareholders agreement, partnership agreement and any applicable partnership legislation, as applicable. The buyer may also have to comply with take-over bid rules (described above) if the target has more than 50 securityholders and no exemption from these rules is available. Absent regulatory approvals and any applicable industry-specific regulations, there may be few other applicable legal requirements.

The terms and conditions under which an investment or acquisition is made in a privately-held entity will largely depend on the business deal struck. A purchase agreement typically includes post-closing price adjustment mechanisms, representations and warranties, ordinary course covenants and indemnity provisions for any post-closing claims for breach of a representation or warranty.

The structure of the transaction will likely have significant legal implications. Tax considerations often drive the structure of a transaction. Other factors may also be relevant. For instance, when the target is a stand-alone unit within a corporation's organization and the buyer is not interested in buying other units owned by the corporation, there may be no other alternative than to proceed by way of an asset sale.

Other Considerations

Certain sectors, such as media, telecommunications and banking, are subject to additional regulations and oversight which may restrict foreign ownership. Further, investments in (or acquisitions of) a Canadian business may be subject to the *Investment Canada Act* and/or the *Competition Act*.

Conclusion

Depending on the ownership structure of the target business, a buyer of a Canadian business may have to comply with significant requirements under applicable Canadian corporate and securities laws. For publicly-listed entities, a buyer will have reporting obligations upon acquiring 10 percent or more of the target's voting or equity securities. The buyer also will generally have to make an offer for all of the target's securities of that class if it offers to purchase 20 percent or more of the target's voting or equity securities (including securities it already owns), unless an exemption from these requirements is available. While acquisitions of privately-held entities tend to be subject to fewer regulations, a buyer will have to comply with corporate law requirements and, in some limited circumstances, significant securities law requirements.

Bennett Jones Mergers & Acquisitions Group

The Bennett Jones Mergers & Acquisitions Group has worked on some of the most complex take-over bids, mergers, acquisitions, divestitures and corporate reorganizations in Canadian business history. With clients operating in a wide range of jurisdictions and industries, we have ranked among the top firms in Canada in handling the highest number and dollar volume of deals both domestically and internationally. Our lawyers are dedicated to providing clients with innovative strategies to best achieve their objectives. In recent years, we have been lead counsel in over $90 billion worth of transactions. We are also known for our "firsts" – having devised many Canadian original bids, takeover strategies and expansion efforts, including the first major "permitted bid" transaction, the first and only bid for a public company prior to the date of its listing on a stock exchange, the first and only successful "just say no" defence in the retail sector and the (then) largest cross-border oil and gas stock merger ever.

bennettjones.com/Practices/Mergers_and_Acquisitions/

Offences Under the Competition Act

The Competition Act, which is Canada's antitrust legislation, restricts anti-competitive business practices. The Act is designed to ensure fair competition in the Canadian marketplace. Over the last 26 years, the Act has evolved to become more responsive and flexible with regards to the identification and prevention of anti-competitive business behaviour. Companies considering doing business in Canada need to be aware that certain business practices are prohibited.

Companies and individuals engaging in prohibited practices may incur significant penalties ranging from costly monetary fines to the imprisonment of culpable individuals. Conversely, the enforcement of these penalties offers protection for (among others) foreign companies entering the Canadian market for the first time.

There are both criminal and civil offences under the *Competition Act*. Criminal offences are investigated by the Competition Bureau and, if referred by the Commissioner of the Bureau, are further investigated by the Director of Public Prosecution who may also prosecute. Civil offences are heard by the Competition Tribunal, which is a specialized, independent adjudicative body composed of both judicial and lay members. While the Minister of Industry is responsible for the Act, it has only a minor role in its administration.

Antitrust investigations have the potential to be expensive for companies and may also damage corporate reputations, even absent a conviction. For this reason, it is important to avoid conduct that could be seen as contravening the Act.

Criminal Offences

Part VI of the Act prescribes criminal penalties for conspiracy, bid-rigging, misleading representations and deceptive telemarketing. Along with many other jurisdictions, Canada has recently been more strictly enforcing these penalties and fining offenders. This emphasis on enforcement of the Act's penalty provisions has also resulted in prison sentences for executives of offending companies.

Conspiracy

The conspiracy provisions of the Act prevent competitors, including persons who would reasonably be likely to compete, from manipulating prices for the supply of a product; allocating territories or markets for the production or supply of a product; or reducing the production or supply of a product. The penalty for conspiracy is imprisonment for a maximum of 14 years or $25 million, or both.

Bid-rigging

Bid-rigging, whereby an agreement is made with another bidder prior to or during a call for tenders, unbeknownst to the person making the call for tenders, is also an offence. The penalty for bid-rigging is imprisonment for a maximum of 14 years or a fine determined by the court, or both.

Misleading Representations

The making of false or misleading representations to the public is also prohibited by the Act. Both the literal meaning and general impression conveyed by the person are taken into account when determining whether the representations were misleading. As with bid-rigging, the penalty for making misleading representations to the public is imprisonment for a maximum of 14 years or a fine determined by the court, or both.

Deceptive Telemarketing

To avoid the deceptive telemarketing provisions of the Act, proper disclosure must be made when making representations over the telephone. This includes, for example, disclosure of the number of prizes to be won in a contest or disclosing that in order to receive one low-priced product a person must buy another product. The penalty for deceptive telemarketing is imprisonment for a maximum of 14 years or a fine determined by the court, or both.

Civil Liability for Criminal Offences

Commission of any of these criminal offences also brings potential exposure to civil liability. Any person who has suffered damages as a result of these criminal offences may bring a private action to recuperate such damages. However, generally only damages that are proven to have resulted from the commission of the criminal offences are allowed. Other types of damages, such as punitive damages, are generally not allowed. These private party claims tend to be started in the form of class actions, and rely heavily on the criminal conviction of the company.

Foreign Assistance

A foreign competition authority that is party to a mutual legal assistance treaty with Canada may request the assistance of the Commissioner in pursuing its own investigation. Anti-competitive business practices do not need to have taken place in Canada for the Commissioner to assist, nor is the consent of the person alleged to have engaged in anti-competitive practices necessary. However, an order of a judge is required for the evidence gathered in the Commissioner's investigation to be sent abroad, to avoid abuse of these treaties.

Civil Offences

Part VIII of the Act prescribes civil penalties for reviewable trade practices such as refusal to deal, tied selling, price maintenance and abuse of dominance. If the Tribunal finds that a person has engaged in a reviewable trade practice, it may make an order preventing the person from continuing the prohibited activity and require that person to take any action necessary to rectify the competitive harm caused by this activity. Failure to comply with an order of the Tribunal can result in criminal penalties.

Refusal to Deal

The refusal to deal provisions of the Act prevent suppliers from arbitrarily declining to sell goods to buyers who are willing and able to meet the usual trade terms of the supplier, if such action is likely to have an adverse affect on competition in the market. The Tribunal may order that the supplier accept the buyer as a customer.

Tied Selling

Tied selling, which refers to a supplier supplying one product to a customer so long as the customer buys another product, may also be an offence if it results in a substantial lessening of competition. The Tribunal may order that a supplier, or all suppliers in an exclusive industry, refrain from engaging in this practice.

Price Maintenance

The price maintenance provisions of the Act restrict the ability of a person to artificially inflate or discourage the reduction of prices if such conduct will have an adverse affect on competition in the market. The Tribunal may order that a person stop engaging in this activity.

Abuse of Dominance

Abuse of a dominant position is also restricted by the Act. Persons who substantially control a class of business throughout Canada and are engaging in anti-competitive business practices may be prohibited from engaging in such practices. In addition to making an order prohibiting abuse of a dominant position, the Tribunal may also impose an administrative penalty of $10 million ($15 million for repeat offenders).

Parties That May Bring a Complaint

Private parties, as well as the Bureau, may bring a complaint to the Tribunal concerning these civil offences. The only exception is an allegation of abuse of dominance, an investigation into which may only be initiated by the Bureau.

Conclusion

Canada is one of the fairest and most transparent countries in the world in which to do business. This insistence on fairness helps to protect companies interested in coming to Canada to do business. Canadian regulatory authorities will not hesitate to enforce the provisions of the Act where companies are engaging in unfair business practices. Complying with Canadian competition legislation can be a difficult task for companies unaccustomed to these rules. In particular, companies should be careful to avoid committing the criminal offences of conspiracy, bid-rigging, misleading representations and deceptive telemarketing, as well as the civil offences of refusal to deal, tied selling, price maintenance, and abuse of dominance.

Bennett Jones' Antitrust, Competition & Foreign Investment Group

Our antitrust and competition group is committed to providing every client with best-in-class competition advice and representation. Our group includes internationally recognized practitioners including several former Competition Bureau and Department of Justice officials. We draw on our extensive depth and breadth of expertise in advising clients on the most complex domestic and international competition matters.

bennettjones.com/antitrustandcompetition/

Outsourcing

Most Canadian industries employ a broad range of third party service structures to ensure that certain operations and business processes are performed more efficiently and effectively than customers are able (or even know how) to do themselves. Canada remains at the forefront of such integrated enterprise solutions.

Jurisdiction

Canada's federal system provides for distinct law-making jurisdiction between the federal and provincial levels of government. Nonetheless, a combination of federal and provincial laws may apply to aspects of outsourcing transactions. Companies considering doing business in Canada should be aware of this overlapping jurisdiction.

Federal Law

Canada's federal law applies throughout Canada in such areas as income tax, intellectual property (IP), evidence and corporate law. Certain businesses may be subject to related federal laws. For example, the *Office of the Superintendant of Financial Institutions Act* applies to federally regulated enterprises, as do labour and employment standards, and privacy regulations. Canada's Anti-Spam Law (CASL) may also apply to certain outsourcing deals. (See the Intellectual Property Law chapter for more details.)

Telecom Sector Outsourcing

Licences granted under the *Telecommunications Act* may be subject to conditions that prevent or restrict an outsourcing transaction. For example, non-Canadian controlled entities may be restricted from carrying on the business of a telecommunications carrier in Canada. Certain outsourced services of foreign-controlled telecommunications enterprises may be regulated (and, therefore, prohibited) service activities. Call centres are regulated by the Canadian Radio-television and Telecommunications Commission and telemarketers must comply with do-not-call regulations.

Financial Sector Outsourcing

The Office of the Superintendent of Financial Institutions Canada (OSFI) oversees federally regulated financial institutions in Canada. OSFI Guideline B-10 applies to federally regulated entities that outsource (or contemplate outsourcing) one or more business activities to a supplier. The OSFI has also held that Guideline B-10 applies to technology outsourcing deals, including those involving cloud computing.

Provincial Law

Provincial laws cover many outsourcing-related areas such as: contract law; remedies and the enforcement of rights; labour and employment standards; real property; privacy; evidence; and corporate law. Provincial laws regulating outsourcing transactions require that certain corporate records and information be kept (or accessible) within the province. Some provincial privacy and personal health information laws restrict security requirements and public sector outsourcing.

Technology Export Laws

The *Export and Import Permits Act* (EIPA) may restrict exports of advanced technology (*i.e.*, technical information or software) from Canada. The EIPA requires compliance with the Area Control List (a list of countries for which the control of export of any goods is required) and the Export Control List (a list of specific goods that are controlled for specific purposes).

The EIPA may substantially impact the outsourcing of technical information or software that is specifically regulated. Communication security devices, such as advanced encryption, may be subject to the EIPA. Breach of the EIPA may result in substantial fines, imprisonment and other penalties.

Intellectual Property and Confidentiality Laws

IP aspects of outsourcing transactions in Canada include whether: foreign laws will respect the parties' contractual intentions; international IP treaties apply; and IP and confidentiality rights are enforceable outside Canada. (See the Intellectual Property Law chapter for more details.)

Public Sector Outsourcing

All federal government outsourcing procurement is directly managed and administered by Public Works & Government Services Canada. The application of foreign corrupt practices legislation can directly influence outsourcing procurement. Privacy regulation also applies to outsourcing by federal public sector entities.

Created in 2011, Shared Services Canada oversees the specialized procurement of information technology, communications, data management and related supply chain management issues through a common procurement and back-office infrastructure across many federal government ministries, departments and other agencies.

Provincial laws regulate the procurement of goods and services by provincial public sector entities. Privacy regulation also applies to outsourcing by applicable provincial public sector entities. Provincial sale of goods legislation implies certain conditions and warranties in a contract for the sale of goods (not services) including: reasonable quality; fitness for purpose; conformity to sample; and merchantability.

Outsourcing and Financial Information

Enterprises that outsource financial business or information technology (IT) activities into (or from) Canada must be cognizant of: federal and provincial evidence laws; GAAP standards prescribed by the Canadian Institute of Chartered Accountants; provincial securities commission requirements; and provisions concerning the electronic maintenance of commercial records under the *Income Tax Act and Customs Act*.

Legal Structures

A wide range of commercial, corporate and legal structures may be used in outsourcing transactions, resulting in different levels of governance, service management and risk management. Traditional outsourcing - involving a services agreement under which the supplier provides a well defined set of services to the customer according to a defined payment schedule - may be evidenced by a comprehensive agreement or a number of documents that address, for example, the service specification; quality and performance obligations; IT operations; dispute resolution; and change of control.

Shared Service Outsourcing

Multiple customers (public or private) may consolidate a common business process, back-office function or other aspect of their infrastructure into a single, commonly utilized entity or operation. This shared service outsourcing provides cost efficiencies and increased production quality.

Multi-sourcing

Customers who have service agreements with different suppliers for specific services must create a central management control facility to monitor and manage service integration among several suppliers.

Joint Venture or Partnership

Where the customer and supplier structure the outsourcing relationship as a joint venture, each party contributes certain assets, technology and capital to the entity performing the services for the customer.

Design, Build, Operate and Transfer

Where the supplier creates the necessary infrastructure to provide the relevant services, the supplier may operate the infrastructure for a period of time on a turn-key basis and subsequently transfer the ownership and operation to the customer.

Outsourcing & Data Protection

While outsourcing is generally permitted, some provinces restrict the extraterritorial transfer of certain public sector personal information. In the private sector, disclosure of information to outsource data processing is generally permitted, subject to privacy legislation. As discussed above, OSFI Guideline B-10 may also apply to technology outsourcing deals in the financial sector.

The Personal Information and *Electronic Documents Act* (PIPEDA) regulates the collection, use and disclosure of personal information for federally regulated commercial entities across Canada. Alberta, British Columbia and Québec have substantially equivalent private sector data protection legislation. Many provinces also have specialized health information legislation governing the disclosure of personal health information that is collected and used through the public healthcare system.

Asset Transfers

A transfer in the ownership of chattels can generally be affected by exchanging consideration for possession. The transferred assets must be grouped into real estate, chattels and intangible property, and then all asset classes must be effectively conveyed. A bill of sale may evidence the transfer of title to most chattels. Compliance with provincial laws will ensure that title is properly transferred. National and provincial security interest searches (including lien searches) must also be undertaken.

Confidentiality of Customer Data

Confidentiality obligations regarding customer data are integral to most outsourcing transactions and agreements.

They can arise through:

- PIPEDA and provincial medical records and health information protection laws, including those requiring mandatory data-breach notification;
- Agreements to comply with applicable data protection, privacy and safe-harbour laws outside of the jurisdiction where the outsourcing services will be provided;
- Third-party and customer contractual and trade-secret confidentiality, non-disclosure and information protection obligations; and
- Common law or equitable duties of confidence and non-disclosure arising from fiduciary relationships (i.e., joint ventures).

These are primary obligations in outsourcing agreements. Customer records remain the property of the outsourcing party. (See the Privacy chapter for more details.)

Conclusion

Third-party service structures help companies perform more efficiently and effectively. Many aspects of such outsourcing transactions may be subject to both federal and provincial laws, regulation, public policy and common law requirements in Canada.

Bennett Jones Procurement & Outsourcing Group

The Bennett Jones Procurement & Outsourcing Group has wide-ranging experience with complicated, long-term product and service contracts. We have extensive experience in drafting complex agreements, preventing or resolving employment issues with outsourced personnel and ensuring that agreements are met. Our firm was lead counsel to Bearing Point and 19 large Ontario hospitals in the structural and commercial organization of the largest health sector outsourcing and shared-service transaction in Canadian history at the time of the transaction.

bennettjones.com/procurement_and_outsourcing

Pensions and Benefits

Pension and benefit plans in Canada are delivered through a mix of public and private channels. Provincial governments provide basic universal health care to residents, while most employers supplement that coverage with private plans providing additional coverage for uninsured services. The federal government provides a modest set of pension programs to provide a basic level of retirement income that is supplemented by employer-sponsored pension plans and individual savings.

The provision of retirement income in Canada is based on the following: 1) government-sponsored retirement plans, 2) employer-sponsored pension plans, and 3) personal savings (tax-assisted and not). While the federal *Income Tax Act* (ITA) provides certain rules for employer-sponsored plans, the most prevalent kind of retirement plan – the registered pension plan – is also subject to federal or provincial pension minimum standards legislation. Employers with operations across the country must comply with these various rules. Most employers in Canada also provide a variety of health and welfare benefits, typically through products delivered by private sector (*e.g.*, insurance company) providers.

Government-Sponsored Retirement Plans

All employees in Canada engaged in virtually all employment participate in the Canada Pension Plan (CPP), except for employees in Québec who participate in a parallel scheme, the Québec Pension Plan (QPP). Both of these government plans are mandatory schemes and are funded by equal contributions from employers and employees. Employers are required to make or deduct and to remit such contributions from employees' income at source. Currently, the employer contribution rate for the CPP is 4.95 percent on employment earnings above the basic exemption amount and below a yearly maximum ($48,300 in 2011), for a combined maximum contribution in 2011 of $4,435.20. CPP/QPP provide certain benefits to their contributors, subject to eligibility, including a basic retirement pension, death and survivor benefits, and benefits for permanent disability. Two other federal programs supplement these plans: Old Age Security (OAS) and the Guaranteed Income Supplement (GIS). Both OAS and GIS are income-tested to some extent and are financed out of general tax revenues. These public plans only replace a modest amount of the pre-retirement income of a worker earning the average industrial wage.

Employer-Sponsored Retirement Plans

Unless mandated to do so by a collective bargaining agreement, employers in Canada need not establish a pension plan. However, once an employer voluntarily decides to establish a pension plan, it is subject to numerous statutory and regulatory requirements. The most prevalent type of employer-sponsored plan is the registered pension plan (RPP), which may be either defined benefit (DB) or defined contribution (DC), or both. DB plans are still common in the civil service (i.e., government departments) and the broader public sector (i.e., universities, hospitals, etc.) and in some unionized environments; but, DC pension plans are increasingly prevalent among Canadian employers. RPPs must comply with either federal or provincial pension benefits standards legislation and the ITA.

Other common types of tax-assisted employer-sponsored plans include the group Registered Retirement Savings Plan (RRSP) and the Deferred Profit Sharing Plan (DPSP), commonly known as capital accumulation plans (CAPs). These latter plans (as well as DC pension plans) typically provide employees with investment choice, and are subject to a set of regulatory guidelines dealing with CAP governance and disclosure of information to CAP participants.

Common Law/Civil Code

In addition to pension and income tax legislation, the common law will apply to RPPs (except in Québec, which is governed by civil law through the *Civil Code of Québec*). Since the pension plan documents form the basis of the pension promise and often exceed statutory minimum standards, contractual or trust law principles are also used to determine the rights and obligations of plan sponsors, administrators, plan members and beneficiaries in relation to such issues as: surplus entitlement, the right to take contribution holidays and the use of plan assets to pay plan administrative expenses (which are also subject to detailed regulation under applicable pension benefits standards legislation). Civil actions alleging breach of contract, breach of trust or fiduciary duty, as well as negligent misrepresentation, are fairly prevalent in Canada.

Income Tax Act & Pension Benefit Statutes

All RPPs must comply with the ITA's registration requirement to benefit from the tax-sheltering of contributions and the tax deferral of benefits. The ITA places limits on contributions to an RPP and restrictions on the types of benefits payable.

RPPs covering employees in federally regulated employment are subject to the *Pension Benefits Standards Act*, 1985 (PBSA). For all other employers, the provincial pension legislation of an employee's province of employment applies. A memorandum of agreement between the provinces provides that pension plans are generally registered in the province where the plurality of plan members are employed.

Provincial pension statutes are similar (but not identical) and impose rules relating to such items as:

- eligibility for membership;
- vesting and locking-in of benefits;
- retirement age;
- benefits on retirement, death and termination of employment;
- disclosure of information;
- transfer rights;
- funding and solvency requirements;
- pension fund investments;
- the responsibilities of the plan administrator; and
- events such as plan terminations and asset transfers.

Failure to comply with the ITA or pension standards legislation can lead to sanctions such as regulatory orders, fines, imprisonment and (in certain cases) the de-registration of the RPP.

Collective Bargaining Regime

Where a collective agreement requires the maintenance of an RPP, union consent may be necessary to amend the plan and disputes over plan administration will usually require recourse to arbitration instead of the courts.

In certain sectors, a group of unrelated employers may agree to make stipulated contributions to an RPP which is not administered by the employer(s), usually pursuant to a collective agreement. Such multi-employer pension plans are typically administered by a board of trustees and are subject to specialized rules under pension and income tax legislation.

Supplementary or Top Up Plans

Employers may also provide supplementary or top up retirement plans to employees, particularly executives. Such plans may either be funded or unfunded. If unfunded, they are paid from general revenues of the employer and, if funded, they will typically be classified as a Retirement Compensation Arrangement (RCA) under the ITA, which is subject to distinct tax treatment. As such plans are typically in the nature of a contractual promise to pay, the common law of contracts (or the civil law of obligations in Québec) also governs these types of arrangements.

Health and Welfare Benefits

Employers often provide a variety of health and welfare benefit plans to their employees (and in some instances, retirees), such as:

- group long-term disability insurance;
- group life insurance;
- accidental death and dismemberment insurance;
- short-term disability;
- dental care;
- extended health care;
- prescription drug; and
- employee assistance plans.

These plans may be underwritten by insurers or provided on a self-insured "administrative services only" basis. As a result of recent legislative changes, employee life and health trusts now provide an opportunity to move health and welfare liabilities off an employer's balance sheet or to segregate retiree benefits from those provided to active employees.

Conclusion

Employers must contend with a complex and, at times, contradictory regulatory regime. For example, federal income tax authorities seek to limit contributions made to pension plans, while federal and provincial pension regulators have an interest in maximizing funding and benefit security. The economic downturn of the past few years has increased pressure on employers providing DB pension plans in particular, with a number of jurisdictions acting to introduce various forms of solvency funding relief. Also, rules of general application outside of the province of Québec may not apply to an employer's Québec operations.

Bennett Jones Pensions and Benefits Law Group

The Bennett Jones LLP Pensions and Benefits Group provides pensions and benefits advice to a wide range of employers across industry sectors in Canada. We have extensive experience in helping new employers navigate the complex pensions and benefits regulatory environment. Our lawyers have specialized expertise in all aspects of pensions and benefits law issues including: regulatory compliance, pension plan administration and fund investment matters, review and interpretation of plan documentation, asset transfers, surplus issues, pension governance, and generally crafting solutions to the full range of pension issues facing the human resource and financial functions of companies. The first textbook for pensions law in Ontario was written by a member of our Group who is also the author of the forthcoming *Halsbury's Laws of Canada* volume on pensions.

bennettjones.com/pensionsbenefits

Privacy

Changes in the accumulation, storage and use of personal data – whether by government, employers, financial institutions or health care providers – have given rise to new and more serious privacy concerns. Given the recent evolution of privacy law worldwide and in Canada specifically, organizations considering doing business in Canada need to be aware of aspects of the Canadian legislative landscape that both address and impact the precarious balance between safeguarding personal privacy and the organization's need to collect and use personal information.

Privacy Compliance

As of January 1, 2004, most organizations operating in Canada have been required to ensure that they collect, use and disclose personal information in accordance with applicable federal and provincial privacy legislation. That legislation regulates (in part) on the basis of:

- The nature of the information;
- The nature of the organization;
- Where an activity occurs; and
- The nature of the relationship of the organization with the individual.

Personal Information

Although the definition of personal information varies by jurisdiction, it generally refers to any information about an identifiable individual – other than the individual's name, title and business contact information when used or disclosed for the purpose of contacting such individual in his or her capacity as a representative of an organization.

Consent

Canada's private sector privacy laws generally require that, before or at the time personal information is collected, individuals are made aware of:

- The scope and nature of the personal information being collected;
- The purposes for which their personal information is being collected, used or disclosed;
- The jurisdictions outside of Canada where such information may be processed or stored; and
- The name of a person who is able to answer individual questions on behalf of the collecting organization.

For the consent of an individual to such collection to be valid, it must be given voluntarily and without reliance on deceptive or misleading collection practices. As a consent given for one purpose is not valid for other purposes, organizations should try to anticipate their use and disclosure requirements in advance and develop their consent practices to address same.

Federal and Provincial Legislation

While federal and provincial privacy legislation are similar, they do differ in a number of areas, resulting in a complex patchwork of privacy obligations that need to be addressed. Generally, federal private sector privacy legislation applies to commercial activities involving personal information between provinces or across national borders, or undertaken by federal works, undertakings or businesses. Federal legislation also applies to commercial activities involving personal information within a province, unless the province has enacted substantially similar legislation. Thus far, Alberta, British Columbia and Québec have enacted legislation that is substantially similar to the federal legislation.

The federal legislation does not generally apply to an employee's personal information, unless the individual is an employee of a federal work, undertaking or business, or the information is disclosed in the course of commercial activities. To some degree, the various provincial private sector privacy laws do apply to an employee's personal information.

Jurisdiction

Where an organization undertakes activities, with respect to personal information, outside of a single jurisdiction, the organization will need to determine which jurisdictions' privacy legislation applies, the various obligations that arise therefrom, and the best policies and practices to address those various obligations.

How Privacy Impacts Your Business

Subject to certain exceptions, most organizations operating in Canada are now required, in part, to:

- Appoint a person within the organization to be accountable for the organization's privacy activities;
- Disclose the purpose and obtain the consent of an individual for the collection, use and disclosure by the organization of the individual's personal information;
- Only use or disclose such personal information for the disclosed purpose, unless the organization has obtained the individual's consent for any new purpose;
- Allow the individual to access his or her personal information, challenge the accuracy of same, and withdraw his or her consent to the collection, use and disclosure by the organization of his or her personal information;
- Safeguard the personal information in its custody or control;
- Implement privacy policies and practices;
- Train staff in respect of its privacy policies and practices; and
- Only retain personal information for as long as is reasonably necessary to fulfill the disclosed purpose.

Dealings with Third Parties

Many organizations exchange personal information with other organizations and individuals. These exchanges can include the outsourcing of certain activities to third parties (such as benefits administration or data processing), the exchange of information between business partners and the transfer of information as a result of the purchase or sale of a business.

Each organization will need to review how and why it exchanges personal information with third parties, and the agreements governing those information exchanges, to determine if applicable privacy legislation permits such activities to continue and whether those agreements need to be amended.

Outsourcing Risks

In addition to being responsible for its own compliance activities, organizations that use the services of third parties in their handling of personal information may be held responsible for the activities of such third parties.

As a result, organizations are well advised to ensure that they have fully reviewed the activities of their service providers with respect to the organization's personal information and that their agreements properly protect the organization. Such protection may be achieved by requiring service providers to be compliant with applicable legislation and by ensuring that the organization can look to its service providers for indemnification should a problem arise.

Transaction Risks

The obligation to only collect, use or disclose personal information where the organization has the consent of the individual may extend to disclosure or collection activities related to a purchase, sale, merger, amalgamation, securitization or other transaction involving personal information. Federal and provincial legislation differ on whether consent is required to disclose personal information in the context of these types of business transactions.

Organizations are well advised to consider the need for consent to transfer personal information as part of a business transaction, and the requirements of the various exemptions to such consent requirement, when designing the structure of a transaction. Careful planning to take advantage of one of the business transaction exemptions to the consent requirement can significantly reduce the costs of privacy compliance associated with such transaction.

How Your Business Becomes Compliant

While every organization's approach to privacy compliance needs to be tailored to the organization's specific activities and needs, at a minimum, an organization should consider:

- Appointing an individual to be accountable in respect of the organization's privacy activities (often this individual is referred to as a Privacy Officer);
- Assessing the organization's activities in respect of personal information;
- Establishing policies and practices to govern the organization's activities in respect of personal information; and
- Training the organization's staff in respect of the organization's privacy policies and practices.

Conclusion

Privacy compliance can be a complex task requiring an organization to balance the need to comply with multiple privacy obligations with the need to adopt practical and manageable policies and practices. Companies considering doing business in Canada are well advised to review their expected activities in Canada in the context of applicable privacy legislation.

Bennett Jones' Privacy Law Group

Bennett Jones' Privacy Law Group has performed groundbreaking work with governments, employers, institutions and both public and private information gatherers, advising on the legal implications of privacy protection and data dissemination. Our group offers both compliance and enforcement advice including in the context of corporate transactions.

bennettjones.com/Practices/Privacy/

Private Equity

Facing significant and powerful incentives to expend capital and consummate transactions, global private equity investors have had a number of compelling reasons to fix their sights on Canada. On the aggregate, the volume of Canadian-based activity has reflected that keen interest.

Private equity funds (also known as financial sponsors) have become increasingly visible and frequent participants in all facets of the Canadian economy. Such sustained global interest is attributable to several factors including:

- large-scale and long-term demand for capital in Canadian energy, mining and infrastructure projects;
- Canada's relatively high incidence of privately-held companies facing generational and succession challenges;
- divisions of public companies and related non-core asset packages that are ripe or otherwise available for divestiture; and
- the formal termination of the Canadian income trust as a competitor to private equity for deal flow.

Private Company Investments

Investments in Canadian-based private companies can be structured in a number of ways, depending largely on the financial sponsor's investment preference or style and its underlying fund structure and tax orientation. Funds seeking a minority interest in a target company, either alone or as a co-investor, often secure treasury issuances of either equity or debt securities of the target portfolio company. The use of mezzanine instruments has been facilitated by the recent elimination of Canadian withholding tax on cross-border interest payments. Private company investments are typically limited to issuances of sales to either accredited investors (under applicable Canadian securities laws) or others (*i.e.*, target company employees) who have valid securities law exemptions.

Economics of Investment

Significant investments are frequently structured around four principal areas of focus. First, the economics of the investment – specifically, whether the acquired securities in the target are equity, debt or a combination thereof – is a function of due diligence, negotiating leverage and the target's risk profile. Equity investments will take the form of common shares where the sponsor is satisfied with a *pari passu* standing with existing common shareholders. Financial sponsors at times, however, favour preferred share investments which provide a blank canvas upon which to craft the target corporation and financial sponsor's economic relationship.

Preferred shares may provide for preferential dividends (as cash pay or payment-in-kind forms of property), anti-dilution protection and a liquidation preference. Such shares can offer a mechanism for distributable cash on an exit transaction or liquidation event to be returned to the preferred shareholder in priority to common shareholders. Preferred shares must strictly comply with Canadian corporate law principles and respect the rights of shareholders with inferior rights. Governance and fiduciary duty considerations inform these negotiations.

Shareholders Agreement

Secondly, a shareholders agreement (whether unanimously executed or otherwise) reflects the financial sponsor's views about governance; pre-emptive rights; and tag-along, drag along and other liquidity rights. A shareholders agreement can facilitate the financial sponsor's exit from a portfolio investment within a prescribed time period. A shareholders agreement can also address qualification (*i.e.*, registration) rights.

Incentive Programs

Third, either a modified or new management incentive program can be structured through the use of stock options, performance warrants or performance shares to incentivize management to create significant near-term value in the target. This approach gives effect to the investor's time value of money and reinforces alignment between the private equity investor and the management team. These programs typically are weighted towards performance-vesting criteria through which management can earn a significant equity stake or profits interest in the business upon the realization of certain cash-on-cash or internal rate-of-return criteria to the financial sponsor. Delicacy and effective tax-planning are critical components in structuring such programs.

Tax Structuring

Finally, effective tax structuring is paramount for an efficient portfolio company investment and exit. Non-residents of Canada should heed Canada's recently revised thin-capitalization rules, withholding tax and other substantive considerations. Tax structuring will often lead the overall transaction.

PIPE Transactions

Private Investment in Public Equity (PIPE) transactions allow Canadian reporting issuers to quickly and efficiently raise capital via private placement financing. Familiar with PIPE transactions particularly in the Canadian mining and oil and gas sectors, financial sponsors typically acquire equity or equity-linked securities, often at a discount to the market price, directly from the issuer on a private placement basis. Typically, they can resell their securities at the end of the statutory hold period (typically four months), subject only to control person restrictions.

Applicable stock exchange rules limit the type of transaction that can be effected without obtaining shareholder approval. The TSX, for example, requires shareholder approval of a financing if (among other things):

(i) the transaction will materially affect control of the issuer (presumptively satisfied if a new shareholder acquires more than 20 percent of the voting securities of the issuer);

(ii) shares are acquired at a discount that exceeds certain permitted thresholds;

(iii) the aggregate number of listed shares issuable in the transaction exceeds 25 percent of the issued and outstanding shares prior to closing of the transaction (in cases where the shares are acquired at a value that falls within a permitted discount);

(iv) the securities acquired are convertible into listed shares and contain anti-dilution features that exceed TSX thresholds; or

(v) the transaction involves the issuance of securities to insiders that exceeds permitted thresholds.

In addition, while financial sponsors may acquire certain investor, pre-emptive and approval rights, control of the issuer must be carefully considered. Finally, although PIPE transactions take place under exemptions from applicable Canadian securities laws (which would otherwise impose a prospectus requirement on the issuer), any issuance that results in a shareholder acquiring 10 percent or more of an issuer's voting securities will trigger "early warning" and insider reporting obligations.

Going-Private Transactions

In a going-private transaction, a reporting issuer (*i.e.*, a public company) is taken private by an investor or group of investors. Private equity sponsors, management and/or significant shareholders often lead the investor syndicate. Such transactions are motivated by a financial sponsor's interest in a target entity at an attractive valuation and the selling shareholders' concurrent interest in liquidating their position (or rolling their equity into an ongoing investment). Private equity-sponsored going-private transactions in Canada are frequently executed as club deals, an important part of which is negotiating the rights and obligations among the investor syndicate members.

Target boards need to be particularly mindful of process in such transactions, especially where there are real or apparent conflicts of interest. Having an independent or special committee of the board, along with obtaining a fairness opinion, are measures that are frequently sought and may be required in certain cases.

Canadian court-based plans of arrangement have become the most frequent mode of execution for going private transactions. Plans of arrangement are governed by applicable federal or provincial corporate law statutes, and shareholder approval by special resolution (*i.e.*, 66 2/3 percent) is the standard. Shareholder dissent (*i.e.*, appraisal) rights are typically provided in the approval process. If the transaction is subject to OSC Rule 61-501, enhanced disclosure, independent valuation and majority-of-the-minority shareholder approval requirements must also be secured. Other regulatory requirements (i.e., under the *Competition Act*, *Investment Canada Act*, etc.) may also apply to the subject transaction.

Conclusion

Private equity investment in Canadian-based target companies is on the rise. Such investment may take the form of a private company investment, a PIPE transaction or a going private transaction.

Bennett Jones Private Equity Group

The Bennett Jones Private Equity Practice Group draws on the firm's significant strengths in mergers and acquisitions; securities; domestic and cross-border tax structuring; and senior debt, high-yield and mezzanine financings in advising both domestic and global financial sponsors and other investors. Our practice is focused on leveraged buyouts, recapitalizations and restructurings, primarily on behalf of leading Canadian and foreign private equity sponsors across a wide variety of industries. We also advise private equity fund sponsors as well as institutional investors on the complex issues that are involved in the fund formation process.

bennettjones.com/privateequity/

Procurement Law

Outside of the province of Québec, procurement law in Canada derives from both a prolific body of common law and a broad range of provincial and federal statutes. Regardless of the province, federal government procurement entity or particular aspect of common law and judicial oversight in Canada, the prevailing governance principles for all private and public sector procurement transactions are: equal and unbiased treatment toward all vendors; value for money standards; honesty; and transparency of the process to promote and foster equal treatment, fairness and adherence to a good-faith process.

Federal Procurement

Almost all sourcing, procurement and supply chain management within the federal government of Canada is centralized within Public Works and Government Services Canada (PWGSC). Pursuant to the D*epartment of Public Works and Government Services Act*, the Minister responsible for PWGSC has mandated numerous procurement policies, contracting protocols, guidelines and strict regulations.

Federal legislation that is integral to most of PWGSC's procurement activities includes the *Financial Administration Act* and related regulations, the *Defence Production Act*, the *Federal Accountability Act* and related foreign corrupt practices legislation. This foundational legislation has given rise to a detailed financial controls policy framework in which PWGSC must operate. This framework is promulgated and administered by the Treasury Board of Canada Secretariat. The general policy categories include the: Treasury Board Contracting Policy; Treasury Board Common Services Policy; Treasury Board Contracts Directive; Treasury Board Procurement Review Policy; and the "Code of Conduct For Procurement."

Woven into this elaborate procurement law and regulatory and policy framework is the proactive oversight of the Auditor General of Canada who regularly recommends improved procurement administration, governance and operational practices across that office's mandate. Those selling goods or services to any part of the federal government are well advised to be cognizant and considerate of the Auditor General of Canada's reports and frequent constructive recommendations.

Dispute Resolution

In the federal arena of procurement dispute resolution, generally speaking, federal government ministries, departments and agencies are willing (and prefer) to resolve disputes through internal escalation and settlement negotiation processes. However, for small procurement transactions (less than $100,000), the Office of the Procurement Ombudsman (created pursuant to the *Federal Accountability Act*) exists to investigate complaints and allegations of unfairness and a lack of transparency.

Federal procurement disputes that cannot otherwise be resolved internally are directed to the Canadian International Trade Tribunal (CITT). This tribunal was created under the *North American Free Trade Agreement* (NAFTA) and the Canadian International Trade Tribunal Act. The CITT's "Procurement Review Process: A Descriptive Guide (2009)" sets out the complaint process guidelines. These guidelines cover suppliers to government institutions who have a dispute with (or complaint about) such an institution. A large body of procurement law (decisions and determinations) now exists at both the CITT and at the Federal Court of Appeal (the court that has jurisdiction to review CITT determinations).

Shared Services Canada

In 2011, the federal government announced the creation of Shared Services Canada, a new Canadian agency to conduct, streamline, consolidate, manage and oversee the specialized procurement of information technology, communications, data management and related supply chain management issues through a common procurement and back-office infrastructure across many federal government ministries, departments and other agencies.

Provincial Procurement

Each province in Canada typically procures goods and services through a purchasing government department, ministry or agency. British Columbia has created Procurement and Supply Services as a centralized resource to standardize and consolidate the procurement and supply arrangements across all ministries and departments of the province. Although the province of Ontario spends far more each year buying goods and services than any other province, very little has been done to consolidate those activities into the hands of a single professional, specialized and best practices-oriented procurement organization. The Ontario Treasury Board has the mandate to direct (and control) public expenditures and Ontario's Ministry of Finance has set various standards and guidelines. Procurement activities in the province are controlled through various ministries, direct funding agreements and agency (such as Ontario Buys) expenditures that promote a series of sector-specific procurement consolidation activities.

Despite efforts to promote the most basic standards and consistency of procurement practice across multiple procurement organizations, there is a wide discrepancy and vast inconsistencies across all parts of the Ontario public sector concerning the nature, quality and sophistication of procurement documentation, management standards, contract formulation processes and administrative practices.

Private Sector Procurement

Since a great deal of the public sector's procurement law arises directly out of the legal duty of public officials to act fairly and in good faith, the laws related to private sector procurement are far more liberal and flexible. However, rapidly developing laws and practices related to good corporate governance in Canada, especially for public companies, may impose duties on executive officers to ensure that the financial (including value for money), ethical and competitive nature of their expenditure activities (especially procurement) are consistent with corporate management and risk management best practices.

Generally, the private sector is voluntarily moving toward a preference for a competitive tendering process that structurally favours equal treatment, discourages procurement bias and otherwise ensures that all corporate expenditure decisions are in the best interests of the corporation and free from any conflicts of interest. Publicly traded and highly regulated private sector enterprises may be subject to a broad range of securities, regulatory and audit requirements that mandate procurement activities and expenditures to be transparently fair, equitable and in the company's best interests. Whereas, a few years ago, large corporations would not hesitate to rely on a single executive's decision to sole source the procurement of an expensive and mission-critical good or service, today, the same corporations have implemented detailed competitive tendering processes that may lead to multi-track vendor negotiations before a vendor is selected.

Trade and Procurement

Canada is a signatory to the WTO GPA, the recent Canada-United States Agreement on Government Procurement and the NAFTA which also contains (at Chapter 10) significant procurement-related commitments. Compliance with the WTO GPA and the NAFTA is ensured through a procurement review process under the terms of the *Canadian International Trade Tribunal Act*. The CITT has the power to investigate complaints from suppliers about non-compliance with such trade agreement commitments. The CITT's jurisdiction extends only to designated contracts, which means procurements that are:

1. by federal departments, agencies and state enterprises that are specifically listed in the agreements; and
2. for purchases in excess of value thresholds stipulated in the agreements.

Canada has also entered into free trade agreements with a number of countries and associations that directly ensure non-discriminatory procurement access, such as with the United States and Mexico (1989), Israel (1997), Jordan (2009), the European Free Trade Association (2009) and Panama (2010). As of 2011, negotiations are continuing with Turkey, Korea, India and the Caribbean Community.

The federal government, the provinces and the territories have also signed the Agreement on Internal Trade (AIT). Chapter 5 of the AIT provides extensive commitments with respect to non-discrimination and transparency in procurement. Several provinces have entered into supplemental agreements that further ensure procurements are carried out in an open, non-discriminatory and transparent manner.

Conclusion

Federal, provincial and private sector procurement activities in Canada may be subject to a wide range of common law and federal and provincial legislative, regulatory and public policy requirements, as well as judicial oversight. Several agreements that Canada has entered into (or is in the process of negotiating) provide for significant procurement-related commitments.

Bennett Jones Procurement & Outsourcing Group

The Bennett Jones Procurement & Outsourcing Group has deep expertise in the drafting of procurement criteria and documents, the enforcement of procurement rules, and the Requests for Qualifications (RFQ), Requests for Proposals (RFP) and Invitations to Tender processes. Our procurement experience includes the selection process in pipeline, construction and public infrastructure projects and advising on offshore procurement. Our clients include land developers, oil and gas companies, non-profit organizations and government agencies. We have acted for the Prime Minister's office, the federal government, the Department of National Defence and numerous provinces in public sector procurement transactions.

bennettjones.com/procurement_and_outsourcing

Renewable Energy

Having reviewed Canada's renewable energy policies and assessed its price stability, investors, developers and manufacturers from around the world are choosing to enter the Canadian renewable energy market. The process of developing renewable power generation in Canada takes into account the securing of land interests; the availability of grid connection; regulatory matters; investment structures; tax issues; government incentive programs; and immigration concerns.

Land Interests

In Canada, renewable energy developers often structure their land interests by an option to acquire a lease or an option for an easement to the relevant lands. Then, if the project proves viable, developers move forward and exercise the option to actually acquire the lease or easement in question. Option agreements are normally structured to grant the renewable energy developer a right to access the relevant lands to access their renewable energy characteristics and then to use those lands if the energy developer determines to proceed.

Such options allow the developer to register a notice of the option on the title to the prospective site in the applicable land registry office. Registration serves as notice of the developer's rights under the option to third parties. Whether proceeding by means of an easement or a lease, the developer will need a comprehensive document that provides security of tenure (*i.e.*, the undisturbed right to use the land) for the period required and that deals with (among other things) the payments due under the option and lease/easement.

Grid Connection

Interconnection requirements for renewable energy projects vary widely from jurisdiction to jurisdiction across Canada. Depending on the availability of grid connection, interconnection requirements may represent the most difficult aspect of renewable power development. Usually, approvals must be obtained from the local distribution company (LDC). The LDC seeks to ensure that each project meets the safety, design and operational requirements necessary to ensure the reliability of the transmission and distribution system.

Developers are generally asked to participate in a connection impact assessment (CIA) which is conducted by the LDC. If the assessment states that reliable connection is possible, a connection cost estimate is issued and a connection cost recovery agreement is entered into between the developer and the LDC. In addition to the grid connection requirements, all jurisdictions across Canada require electricity generators to obtain some form of generation licence.

Regulatory Matters

Under Canada's constitutional division of powers, electricity generation, transmission and distribution are primarily governed at the sub-national or provincial/territorial level. As a result, significant differences exist amongst Canada's provincial/territorial electricity markets. Some aspects are regulated federally. Such aspects include international and interprovincial power transmission, atomic energy and aspects of energy projects that overlap with areas of federal jurisdiction. Typically, these areas include federal lands, waterways, aviation and fisheries.

As stated above, most regulatory matters concerning renewable power development are the responsibility of the province/territory. In response to the growing needs of the renewable power development industry, one province – Ontario – passed the *Green Energy and Green Economy Act* (Ontario) to (among other things) create a single-window renewable energy approval (REA) process for renewable power projects located in the province.

In nearly every Canadian province/territory, municipal approvals are required for renewable power projects, including site plan approvals and building permits. In most regions, official plan amendments are also needed.

Generally, each renewable power project must address environmental issues at the federal, provincial and/or municipal levels, including:

a) air and noise limits;
b) threatened habitat or endangered species;
c) wetlands and other protected areas;

d) bat and bird species or habitat (wind power specific);
e) archaeological or historical sites; and
f) telecommunications and aviation.

Both the federal and provincial governments have a legal duty to consult and, if appropriate, accommodate aboriginal communities where their proposed conduct may impact on established or asserted aboriginal rights. This duty arises when approvals are sought for proposed projects that may impact aboriginal or treaty rights. Governments may (and very often do) delegate this duty to project proponents. Failure to fulfill this duty can result in delays, litigation, failure to obtain applicable approvals or even a court order quashing such approvals.

Investment Structures

Generally, entrants to Canada's renewable power marketplace will establish a Canadian entity to make investments or engage in development activities. The three most common investment structures are outlined below.

Corporations

As a common law jurisdiction, Canada allows entities to establish limited liability share capital corporations federally or under any of Canada's 10 provinces and three territories. Such corporations are relatively easy to establish. Initial decisions relate to share capital and ownership structure, registered office, name and selection of directors. Generally, a corporation is considered a separate entity from its shareholders and its subsidiaries under Canadian corporate and tax laws.

General Partnership

Two or more persons may form a general partnership to carry on business. A critical, and often fatal, feature of a general partnership is that the partners have unlimited liability for the acts of their partners in the partnership.

Limited Partnership

Limited partnerships are created pursuant to provincial statute. They consist of a general partner, who is responsible for conducting the business of the limited partnership (often a corporation with limited assets), and limited partners who invest in the business but do not make any of the decisions related to the conduct of the business. Provided that this is the case, limited partners are not liable for the debts and obligations of the partnership – only the general partner is.

Tax Matters

The *Income Tax Act* (Canada) provides accelerated capital cost allowance (tax depreciation) for certain capital assets (Class 43.2) acquired before 2020 and used in systems that convert energy, including solar, wind, water, certain waste fuels and waste heat to electricity or heat systems. The depreciation rate is 50 percent on a declining balance basis.

The *Income Tax Act* also provides for a current deduction for the Canadian Renewable and Conservation Expense. This expense is a defined class of pre-production development costs paid to arm's length persons in connection with a project in which it is reasonable to expect that at least 50 percent of the capital cost of depreciable property will be described in Class 43.2.

Where the project proponent has decided to structure the project as a limited partnership, the tax deductions and losses that can be allocated to limited partners will be limited to the partners' at-risk amount. This amount is generally the cost of the limited partners' interest plus any income previously allocated, less distributions and losses/deductions previously allocated. Amounts that cannot be claimed in one year can be deducted in a subsequent year when the at-risk amount permits.

Government Incentive Programs

Generally, Canadian governments are very supportive of renewable power development. They have evidenced such support through a number of programs featuring grants, above-market power purchase rates, low-cost loans, rebates on production and tax incentives. Examples include the federal government's Sustainable Development Tech Fund, which provides grants for late-stage clean power solutions. Another example is the province of Ontario's *Green Energy and Green Economy Act*, which pays above-market rates to renewable energy developers based on fuel type. Opportunities of this nature can be significant.

Immigration Matters

In our experience, Canadian renewable power participants often use their own experienced labour pool. Whether these situations are temporary or permanent, renewable power developers need to be aware of the regulations concerning a foreign national working in Canada.

Conclusion

Canada is open for investment in the development of renewable power. Many leading developers, investors and manufacturers are taking note of Canada's favourable renewable energy policies and price stability. Finding the right legal advisor who understands your project's particular needs and challenges is critical to maximizing your success.

Bennett Jones' Renewable Energy Group

Bennett Jones' lawyers provide timely and expert advice on a wide range of issues important to the renewable energy market in Canada. As Canada's leading energy law firm, our lawyers have deep experience helping developers, investors and manufacturers in wind, solar, hydro, biomass, biowaste, biofuels and geothermal successfully commercialize projects.

bennettjones.com/renewableenergy

Restructuring & Insolvency

Companies doing business in Canada must be aware of and understand the consequences when they, or the companies with which they are dealing, encounter financial difficulties. There are important differences between the restructuring and insolvency laws of Canada and those of other countries. A brief overview of applicable Canadian legislation, including key departures from the U.S. regime, is provided below.

Restructuring and insolvency laws in Canada include:

- bankruptcy under the *Bankruptcy and Insolvency Act* (BIA);
- receivership by court appointment or by private appointment;
- restructuring under the *Companies' Creditors Arrangement Act* (CCAA);
- restructuring under the BIA; and
- liquidation or restructuring under the *Winding-up and Restructuring Act* (WURA).

The first two categories largely focus on the liquidation of a company's assets and the distribution of the proceeds to creditors. The next two categories provide an opportunity for a company to restructure its balance sheet and/or operations. Since the WURA process is typically used only by government-regulated financial institutions, it is not discussed further below.

Bankruptcy

The term ***bankruptcy*** in Canada is a narrowly defined legal term (essentially, a legal status conferred under the BIA), distinguishable from a receivership or a restructuring. The closest U.S. parallel is a Chapter 7 proceeding. A company may become bankrupt under the BIA if: (i) it makes a voluntary assignment into bankruptcy; (ii) creditors apply to the court to have it adjudged bankrupt; or (iii) it is the subject of a failed restructuring proposal under the BIA (discussed below).

Upon bankruptcy, all of the bankrupt's property vests in the trustee in bankruptcy for the general benefit of the bankrupt's creditors, but subject to the rights of secured creditors. The BIA also imposes a broad statutory stay of proceedings in respect of the bankrupt and its property that precludes unsecured creditors from commencing or continuing any proceeding for the recovery of a claim against the bankrupt.

To the extent that the liquidation of the debtor's assets generates monies in excess of that which is required to pay "super-priority" amounts (mostly relating to employee obligations), secured creditors and certain statutorily preferred creditors, the net proceeds are ultimately distributed *pro rata* to the bankrupt's unsecured creditors.

Receivership

A receiver may be appointed by court order or by a private instrument (much less common today) under the terms of a security agreement. A court-appointed receiver is an officer of the court who operates under the guidance and direction of the court and who is accountable to all of the debtor's creditors. The order appointing the receiver may confer very broad powers upon the receiver and almost invariably contains a stay of proceedings with respect to rights against the debtor's assets and the receiver.

Alternatively, a secured creditor may privately appoint a receiver where the security documents so permit. The private receiver's duties, rights and obligations are governed by the applicable security document and the relevant law, and the receivership is not backed by a court order. This used to be a fairly common remedy; however, today, far more receivers are court appointed.

In either case, the debtor typically loses possession or control of the specified assets and those assets are often sold to pay creditors in order of priority.

CCAA Restructuring

Under the CCAA (the functional parallel of U.S. Chapter 11, but a somewhat more flexible process), a debtor may effect a financial and/or operational restructuring. To qualify, the debtor company (including affiliates) must owe a minimum of $5 million to its creditors and must be insolvent. Although other stakeholders may do so, the debtor is typically the one to initiate the application.

Unlike in Chapter 11 proceedings, the granting of CCAA protection and a stay of proceedings is not automatic upon filing; rather, the Court must grant it. The scope and terms are within the Court's discretion. The initial stay period is a maximum of 30 days, but the debtor can (and almost always does) seek extensions. There is no maximum duration to the length of the stay; however, CCAA restructurings tend to be completed more quickly and cheaply than comparable Chapter 11 restructurings.

The debtor remains in possession of its property and can continue to carry on business largely in the ordinary course. However, a court-appointed officer (the monitor) oversees the process and reports to the court and the creditors on the debtor's financial affairs. As an officer of the court, the monitor has a duty to be impartial as between the debtor and creditors.

The debtor must submit a plan containing the terms of the deal being put to its creditors. To be approved, a plan requires the double majority (two-thirds in value and a majority in number) of each class of creditors (typically only one or two classes in CCAA proceedings) to vote in favour of the plan. A plan which does not receive the requisite number of votes from a class of creditors will not bind such class. Unlike in Chapter 11, there is no formal cram-down process. Once the necessary classes of creditors approve the plan, it must be court-sanctioned (akin to confirmation of a Chapter 11 plan) before it becomes binding. If a plan is rejected by the creditors or the court, bankruptcy is not automatic.

BIA Restructuring

Restructuring under the BIA is often the choice for smaller companies (and the only restructuring choice for individuals) as it is generally a cheaper and more expeditious process than that under the CCAA. The proposal is commenced by filing either a Notice of Intention to Make a Proposal (NOI) or the proposal itself.

Unlike the CCAA, but similar to Chapter 11 proceedings, a stay of proceedings is automatic upon filing. The initial stay (and proposal filing) period is a maximum of 30 days, and extensions are limited to 45-day increments, not to extend beyond a total of six months, during which time the debtor must file its proposal. The six-month maximum means that BIA proposal proceedings are usually faster than CCAA proceedings.

The debtor remains in possession of its property and may carry on its business in the ordinary course. However, a proposal trustee is appointed to oversee the business and financial affairs of the debtor and to report to the court and creditors.

The proposal sets out the terms of the deal being put to creditors. If the proposal is not filed within the required time period or if it does not receive the requisite number of votes from any individual class of creditors (double-majority requirement as in the CCAA), the proposal will not be binding on that class (again, there is no formal cram-down in Canada). Once the necessary class(es) of creditors approve the proposal, it must be court-approved before it becomes binding. If a proposal fails to obtain the requisite approvals from the unsecured creditors or the court, or if it is not filed before a required deadline, the debtor is deemed to have made a voluntary assignment into bankruptcy.

Conclusion

Although Canadian restructuring and insolvency laws have many similarities to other systems and, in particular, the U.S. regime, the differences can be significant. Accordingly, if one is doing business in Canada and encounters financial difficulties, it is critical to seek advice from experienced Canadian counsel to help navigate what can be dangerous waters.

Bennett Jones' Restructuring & Insolvency Group

Bennett Jones has one of the most experienced and active restructuring, insolvency and bankruptcy practices in Canada. We cover the entire range of restructuring and insolvency issues, acting for creditors, debtors and estate fiduciaries, including monitors and trustees. Our lawyers have played a significant role in most major Canadian restructurings over the past several years and we have one of the most active cross-border practices in Canada, particularly involving international restructurings across the United States, the United Kingdom, continental Europe and Central America. We have been and continue to be the most sought-after and busiest Canadian counsel representing bondholders in particular, but also other major creditor groups (primarily non-Canadian creditors) and certain court officers. We are known as the Canadian go-to firm for non-Canadian creditors in particular.

bennettjones.com/Restructuring_Insolvency/

Tax

The Canadian tax consequences of doing business in Canada are complex given the Canadian tax system and the breadth of laws that govern domestic and foreign enterprises. This summary highlights some of the tax issues to be considered in structuring a Canadian business.

Income Taxes

Canadian corporate income taxes are levied by the federal and provincial governments. Federally, the *Income Tax Act* (Canada) (ITA) provides that every person resident in Canada in a taxation year is taxable on their worldwide income for the year. Subject to relief under an applicable bilateral income tax treaty, a non-resident person who

- is employed in Canada;
- carries on business in Canada; or
- disposes of taxable Canadian property in a taxation year
- is subject to tax in Canada on the resulting income.

Non-residents who receive certain forms of passive income (such as dividends, rents, royalties and management fees) from a Canadian resident may be subject to a withholding tax equal to 25 percent of the amount paid. Withholding tax can also apply to payments made between non-residents if the payments relate to a Canadian business or certain types of Canadian property.

Canada has entered into tax treaties with 92 countries which, among other things, restrict Canada's ability to tax non-residents carrying on business in Canada and reduce or eliminate the rate of withholding tax otherwise applicable.

Carrying on Business

There is no "bright line" test for determining whether a non-resident is carrying on business in Canada. The ITA deems a non-resident to be carrying on business in Canada if the non-resident

- produces or otherwise expends labour on anything in Canada;
- solicits sales or offers anything for sale in Canada; or
- disposes of certain real properties or resources properties situated in Canada.

Permanent Establishment

A non-resident entitled to the benefits of a tax treaty will not be subject to Canadian income tax on its income from carrying on business in Canada unless that business is carried on through a permanent establishment. The definition of permanent establishment varies from treaty to treaty; however, generally it includes a place of business with a certain degree of permanence, such as a place of management, branch, office, factory, workshop or place of extraction of natural resources. A non-resident will also be deemed to have a permanent establishment in Canada if it carries on business through a dependent agent who has, and regularly exercises, the authority to enter into contracts in Canada on its behalf.

Organizational Structures

A non-resident can carry on business in Canada through a Canadian subsidiary, a fixed branch or a sales agent. The decision on structure is dependent on various considerations, including

- the availability of financing;
- market acceptance;
- Canadian and home country tax consequences; and
- commercial liability.

Non-residents entitled to relief under a tax treaty may wish to commence operations in Canada through an independent agent or a dependent agent with limited authority; this type of arrangement should not give rise to a permanent establishment.

A Canadian subsidiary will be subject to tax on its worldwide income. The after tax profits can be distributed to shareholders as dividends, a return of paid-up capital or a repayment of debt. Dividends will be subject to withholding tax, while paid-up capital can be returned to a non-resident shareholder on a tax-free basis.

Branch income is determined substantially in the same manner as for a subsidiary corporation with certain differences to account for the fact that a branch is not a separate legal entity. A branch's after tax income will be subject to an annual 25 percent branch tax. Broadly, branch tax is payable on a branch's profits which are repatriated to the non-resident corporation (*i.e.*, the amounts that are not reinvested in the Canadian business).

Financing Considerations

Interest on borrowed money used to earn income from a business is deductible in computing a branch or Canadian subsidiary's Canadian taxable income. The ITA includes thin capitalization rules which will deny a deduction for interest on debts owing to specified non-resident persons if the subsidiary's debt-to-equity ratio in relation to the specified non-residents exceeds 1.5:1. The 2013 Budget extended the thin capitalization rules to non-resident corporations that carry on business in Canada. These rules apply on a 3:5 debt-to-asset ratio, intended to mirror the 1.5:1 debt-to-equity ratio for Canadian corporations. This may also increase the branch tax under Part XIV of the ITA.

Interest (other than participating debt interest) paid by a resident of Canada to a non-resident, arm's length lender is not subject to Canadian withholding tax. Interest paid by a Canadian resident to a non-arm's length resident of the United States is no longer subject to Canadian withholding tax.

Transfer Pricing

A Canadian taxpayer that engages in a transaction with a non-arm's length non-resident must comply with the ITA's transfer pricing rules. These rules follow Organisation for Economic Co-operation and Development (OECD) principles and generally require such transactions to occur at a price and on terms similar to those that would exist if the transaction were between arm's length parties. The ITA imposes a contemporaneous documentation obligation to support the transfer price used. Prices can be adjusted, transactions re-characterized and penalties imposed when the transfer price used is determined to be inappropriate. (See the Transfer Pricing chapter for more details.)

Filing Requirements

A corporation that is either resident in Canada or carries on business in Canada is required to file a corporate tax return within six months after the end of its taxation year. In addition, every Canadian resident, or non-resident carrying on business in Canada, is required to annually report transactions with non-arm's length non-residents having a value in excess of C$1 million.

Non-residents who dispose of most kinds of taxable Canadian property must satisfy reporting obligations at the time of disposition to avoid a source deduction from the purchase proceeds. Such non-residents may also be required to file a Canadian income tax return.

Goods and Services Tax

The goods and services tax (GST) is a five percent value-added tax imposed under the Excise Tax Act (Canada) (ETA) on the supply of virtually all goods and services in Canada. GST paid by a recipient of a supply is collected and remitted by the supplier. Any GST paid in the course of commercial activities is recoverable through input tax credits, which are applied against GST collected.

Under the ETA, a supply of goods or services is subject to GST if it is made in Canada. GST also applies at the time the goods are imported into Canada. A supply of goods to a recipient in Canada who intends to immediately export the goods will not be subject to GST.

General Considerations

A Canadian subsidiary will generally be subject to GST in the ordinary course. A non-resident that is registered under the GST regime, or that makes or is deemed to make a taxable supply in Canada in the course of carrying on business in Canada, will be required to collect and remit GST in respect of its supplies.

Such non-resident suppliers are, as a result, generally required to register under the GST regime. For registration purposes, a non-resident may be required to post security if it does not have a permanent establishment in Canada.

Although the GST regime is relatively straightforward conceptually, it is quite complicated in practice, with various exceptions and subtleties.

Provincial and Harmonized Sales Taxes

In Nova Scotia, Newfoundland, New Brunswick, and Ontario the GST has been harmonized with a provincial sales tax component so that a single value-added harmonized sales tax (HST) is imposed on essentially the same tax base as GST. Québec imposes Québec sales tax at the rate of 7.5 percent on a similar (but not identical) tax base to that on which GST is imposed. British Columbia, Manitoba, Saskatchewan and Prince Edward Island impose sales taxes at varying rates. There is no provincial sales tax in Alberta.

Conclusion

Establishing or investing in a Canadian business can be a complex undertaking. Several federal and provincial tax considerations, including many that are not discussed in this brief overview, are relevant to non-residents.

This summary has been prepared as a general overview of certain Canadian tax matters that may be relevant to establishing or investing in a business in Canada. It does not discuss all relevant Canadian tax considerations and therefore should not be regarded as exhaustive in subject matter or comprehensive in discussion. The law herein is stated as of July 31, 2015.

Bennett Jones' Tax Law Group

Bennett Jones has provided practical and effective advice to clients who are looking to establish or invest in a Canadian business. Our tax lawyers have acted in many of Canada's largest and most innovative cross-border transactions. We have extensive experience providing tax advice in respect of commercial maters as well as tax litigation matters.

bennettjones.com/tax

Technology

Many Canadian businesses are involved in researching and developing cutting-edge technology in a number of areas including: information technology, high-tech, life sciences, pharmaceuticals, clean technology, environmental technology and energy technology. Several issues may arise for businesses considering licensing, acquiring or investing in Canadian technology.

Jurisdiction

There is no specific, exclusive legislative jurisdiction applicable to technology assets. Applicable jurisdiction may depend on the field in which the technology is used. For example, the Federal Government has exclusive legislative jurisdiction in areas such as aviation, nuclear power or defense, whereas the provinces have exclusive legislative jurisdiction in sectors such as health care or education. There are intellectual property rights underlying most technology and that jurisdiction is also split between the Federal Government and the Provinces, depending on the type of intellectual property. (See the Intellectual Property Law chapter for more details.)

Security Interests

When acquiring technology assets, it is important to ensure that the assets are not encumbered by any third-party security interest. In Canada, federal intellectual property statutes and the *Personal Property Security Act* (PPSA) of each province operate concurrently. This means that a secured party may address its security interest in intellectual property rights via filings under both the provincial PPSA registry and under the federal intellectual property regimes.

Canada's insolvency legislation provides some protection to intellectual property licensees in the event of a licensor's bankruptcy. Under the federal *Companies' Creditors Arrangement Act* and the federal Bankruptcy and Insolvency Act, in most cases, the licensee's right to use the licensed intellectual property is not affected by the licensor's bankruptcy for the duration of the license agreement, provided the licensee continues to perform its obligations under the license agreement in relation to that usage.

Ownership and Assignments

Before acquiring or investing in a company's technology, it is prudent to verify the company's ownership of (or right to use) the technology. To avoid any uncertainty, employment and consulting contracts should include explicit assignment clauses to give the employer all rights, title and interest in any technology developed by its employees or contractors.

In Canada, all intellectual property rights may be assigned, except for an author's moral rights, which exist under the *Copyright Act* and may be waived but not assigned. (See the Intellectual Property Law chapter for more details.)

Licences

Generally, the law of contracts permits a wide range of flexibility in contractual arrangements, subject to limitations such as capacity, certainty of terms and public policy considerations. When acquiring technology assets that include a license, limitations on license scope and confidentiality restrictions can affect the transferability of a license agreement. One should assess whether a license can be assigned or sublicensed.

Open source software (OSS) embedded in a software product may have been obtained under terms that may restrict the purchaser's freedom to modify the product or limit the OSS developer's liability. Some OSS licenses place downstream constraints upon recipients in relation to derivative works, including requirements to disclose the source code thereof. When acquiring software technology, it is critical to determine whether the technology includes any OSS and to check the seller's written OSS policies, compliance reviews and version control systems.

Financing

Research-intensive businesses may qualify for favourable tax treatment under the federal *Income Tax Act*. Prior to acquiring or investing in a company's technology, the tax impact of the form of investment should be considered.

Many technology businesses benefit from a range of grants, repayable loans or other assistance from a range of federal and/or provincial government agencies and departments. In many cases, agreements for such assistance may contain restrictions or limitations on a technology businesses' ability to commercially exploit the technology developed with such assistance. Alternatively, these agreements may contain government use licenses.

Early stage technology businesses may enter into a range of financing and equity arrangements in trying to grow the business. Sometimes, a degree of informality may exist in such arrangements. In some cases, third parties may acquire overriding revenue claims, distribution rights or rights in the technology itself under such arrangements.

Before acquiring or investing in a company's technology, any prior commitment or licenses that may impact the company's use or exploitation of the technology should be assessed.

Exporting Technology

The export of information, technology or goods from Canada is subject to export laws, including the *Export and Import Permits Act*. The export of some technologies may require export permits issued by the Export Controls Division of Foreign Affairs and International Trade Canada.

Pharmaceuticals

In Canada, pharmaceutical products and devices are governed by an array of federal and provincial legislation. *The Food and Drug Act* sets out the prescribed procedure for new drug submissions and abbreviated new drug submissions, through which a Notice of Compliance (NOC) may be issued for a new drug. A NOC is a prerequisite to the sale of a new drug on the Canadian market.

The *Patented Medicines (Notice of Compliance) Regulations* is an enforcement scheme for pharmaceutical patents that allows a brand name drug company to obtain a two-year automatic injunction against generic competition, by linking health approval of the generic with a requirement to address applicable patent issues. Brand name drug companies can file a patent list with Health Canada for certain patents relevant to the approval for the patented drug.

Depending on the timing of a drug submission, a brand name drug company generally has 30 days within the issuance of a drug-related patent to submit it to the patent list. Therefore, when acquiring pharmaceutical technology, it is prudent to ensure that any newly issued patent that is eligible for listing is submitted to Health Canada within the prescribed time limit.

In Canada, pharmaceutical wholesalers and manufacturers are subject to legislation and regulations governing the provincial formularies which deal with the use of discounts, rebates, professional allowances, requirements for pharmaceutical pricing, and the accreditation of manufacturers and wholesalers of medications.

E-commerce

Legislation has been enacted federally and provincially to govern online commerce. (See the eCommerce chapter for more details.)

PIPEDA Compliance

Businesses that collect, use or disclose personal information during the course of commercial activity must comply with the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) or the applicable provincial private sector legislation. (See the Privacy chapter for more details.)

Online Agreements

Online "click-wrap" and "browse-wrap" agreements have been enforced by Canadian courts: where the buyer had knowledge of the terms of the agreement at the time of sale; where there is proof of established prior business conduct; or via the subsequent conduct of the user. The key to enforcement is "assent" of the user to the proposed terms. Canadian courts have also honoured foreign arbitration clauses in click-wrap agreements and similar contracts of adhesion.

Conclusion

There are many legal issues for a technology-intensive business to bear in mind in licensing, acquiring or investing in Canadian technology. A well-considered plan that addresses the key legal and business factors applicable to such transactions are elements of a successful strategy.

Bennett Jones Technology Law Group

Bennett Jones has more highly ranked technology lawyers than any tier 1 law firm in Canada. Coupled with the firm's national depth and breadth of operations, the Bennett Jones Technology Law Group has the experience and expertise to assist foreign businesses in navigating the complex federal and provincial requirements involved in licensing, acquiring or investing in Canadian technology.

bennettjones.com/ip

Transfer Pricing

A high priority enforcement area for Canadian revenue authorities, transfer pricing has traditionally been considered an income tax matter. Increasing border enforcement means that customs implications must also be considered in developing sound transfer pricing policies. Companies engaging in intercompany transfers of goods, services and/or intellectual property need to develop a unified approach that considers both Canadian income tax and customs valuation laws.

Establishing an Arm's Length Price

Canadian taxpayers engaging in transactions with a non-resident related party must comply with the transfer pricing rules of the *Income Tax Act* (ITA). These rules follow Organisation for Economic Co-operation and Development (OECD) principles and generally require such transactions to occur on arm's length terms. Non-arm's length terms, notably price, are subject to readjustments by the Canada Revenue Agency (CRA) and may result in income tax reassessments plus penalties and interest.

Arm's length pricing is also prescribed by the *Customs Act* in relation to cross-border intercompany transfers. An importer must be able to demonstrate that the relationship did not influence the prices paid (or payable) in the sale for export to Canada as a precondition to use of the transaction value method (*i.e.*, valuing imported goods based on the prices paid by the Canadian purchaser to the related party vendor). Non-arm's length prices necessitate the use of an alternative valuation method, which often results in higher value declarations and applicable customs duties/taxes.

The arm's length pricing requirements described above apply to transfers of goods, intellectual property, management services, and other intercompany services and cost allocations. Acceptable methods for determining an arm's length price generally follow the OECD's *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (OECD Guidelines).

Contemporaneous Documentation

The ITA requires taxpayers to provide contemporaneous documents supporting transfer prices within three months after being served with a written request to do so by the CRA. If a taxpayer does not provide the documents within this time period, it will be deemed not to have made reasonable efforts to use arm's length transfer prices. Taxpayers may be liable for penalties where transfer pricing readjustments exceed a certain threshold and the taxpayer did not make such reasonable efforts.

Contemporaneous documentation supporting declared values for duty must also be maintained for each import transaction. In an audit, the Canada Border Services Agency (CBSA) will request all applicable customs, commercial/accounting, and tax documents to verify that the declared values for duty are based on arm's length prices and correspond to the amounts paid by the Canadian purchaser.

The most common way to evidence arm's length pricing for both income tax and customs valuation is to complete a transfer pricing study, policy and/or agreement pursuant to which prices have been established in accordance with applicable standards. Commercial documents (*e.g.*, purchase orders, invoices, contracts, accounting records, *etc.*) should also be prepared and maintained. These documents should be consistent with the transfer pricing study, policy and/or agreement.

Transfer pricing studies for income tax and customs valuation purposes are not necessarily the same. A uniform approach should be undertaken that accounts for both similarities and disparities between income tax and customs valuation transfer pricing principles.

Management Fees and Other Services

A wide variety of services are often provided by one member of a multinational group to other members within the group. The *bona fides* of payments for such services (which may be of an administrative, technical, financial or commercial nature) are increasingly scrutinized by Canadian authorities. Multinationals must be positioned to justify these payments for both income tax deductibility and customs valuation purposes.

CRA guidance indicates that a Canadian taxpayer must be able to justify payments for management fees and other intragroup services with regard to: (1) whether a service has been provided and (2) the arm's length value of the service. The CRA prefers the direct method of charging, which attaches specific charges to services; that method should be used where possible, including if similar services are provided to arm's length parties. However, an indirect method, (*i.e.*, an allocation of pooled costs,) will often be necessary. In such cases, taxpayers should keep records of the composition of the cost pools to: justify the amounts in each pool; separate out any elements that are non-deductible or restricted under Canadian tax law; and select an appropriate allocation key.

The CBSA examines several kinds of post-importation payments (including management fees and cost-sharing arrangements, such as contributions to worldwide research and development) to determine whether they are "subsequent proceeds" that must be included in the declared values for duty. Subsequent proceeds are defined in the *Customs Act* as the "value of any part of the proceeds of any subsequent resale, disposal or use of the goods by the purchaser that accrues (or is to accrue) directly or indirectly, to the vendor."

Where the payment cannot be established as providing a benefit to the importer's Canadian operations, or the quantum is considered unreasonable, it will be characterized as a dutiable subsequent proceed. In determining whether or not the amount is unreasonable, the CBSA will look closely at the method of charging for the amount. A cost-based method will generally be considered a legitimate approach. On the other hand, a percentage of net sales method is likely to be considered inappropriate because it is likely not to be representative of the services rendered with respect to the importer's operations in Canada.

Advanced Pricing Arrangements

An Advanced Pricing Arrangement (APA) is an arrangement between a taxpayer and the CRA in which the taxpayer receives confirmation of the appropriate transfer pricing methodology to apply to specified cross-border non-arm's length transactions for specified taxation years. The CBSA will generally accept transfer prices established through an APA negotiated between the CRA and the taxpayer as evidence of the arm's length prices in cross-border import transactions. Customs and commercial documents must evidence that the declared values for duty correspond to prices established pursuant to the terms of the APA.

Transfer Pricing Adjustments

Multinationals commonly establish transfer pricing either on the basis of a formula or a reconsideration of transfer pricing on a retroactive basis. As a result, multinationals will adjust transfer prices, often at year-end and, in some cases, will do so after importation. The ITA requires taxpayers to amend prior income tax filings when downward transfer pricing adjustments have the effect of increasing income tax. Upward transfer pricing adjustments that have the effect of reducing income tax can also be the subject of amended income tax filings, but such downward tax adjustments are not automatic.

The *Customs Act* requires importers to correct value for duty declarations to reflect upward transfer pricing adjustments within 90 days of having reason to believe that the original declaration is incorrect. This obligation also applies to downward transfer pricing adjustments when the correction of values for duty would not result in a refund of customs duties (*i.e.*, revenue-neutral corrections).

Importers may seek refunds of customs duties in cases where transfer prices are adjusted downward after importation if the adjusted prices paid (or payable) were the subject of an agreement in writing at (or prior to) importation. This is a new policy development: the CBSA historically denied refund claims of related party importers who sought to amend declared values for duty to account for adjustments that decrease transfer prices after importation.

The new policy, which permits refunds of customs duties dating back four years, presents significant cost-saving opportunities for importers. However, such refunds are not automatic and the CBSA can be expected to test the importer's documentation to verify eligibility for the refund. Prudent related party importers will engage Canadian legal counsel with customs valuation and transfer pricing expertise to assist in their applications for customs duty refunds.

Voluntary Disclosures and Dispute Resolution

Companies who have been non-compliant with the transfer pricing aspects of Canadian income tax or customs valuation requirements should consider making a voluntary disclosure. Voluntary disclosures permit the orderly reporting of prior non-compliance to the CRA or CBSA, as applicable, to mitigate exposure to penalties. Prescribed conditions must be met for a voluntary disclosure to be accepted by the Canadian authorities.

Non-compliant companies who have been subject to penalties and/or reassessments have recourse through administrative and judicial appeal mechanisms that are set out in the ITA and *Customs Act*. In addition, taxpayers who are resident in a country with which Canada has a bilateral income tax treaty may seek relief under the Mutual Agreement Procedure (MAP, commonly referred to as Competent Authority proceedings) in income tax transfer pricing disputes. The Canada-U.S. tax treaty includes provisions for binding arbitration if the dispute is unresolved after two years. Certain conditions apply.

Conclusion

Canadian companies that participate in intercompany transfers of goods, intellectual property and/or services need to establish a unified approach to transfer pricing that meets applicable income tax and customs valuation standards. Such an approach requires careful planning and sound advice.

Bennett Jones Transfer Pricing Group

The Bennett Jones LLP Transfer Pricing Group delivers a unified approach to tax and customs transfer pricing where enterprises transfer goods, services and/or intellectual property across borders. Working collaboratively with economists and other transfer pricing consultants, we seek to maximize transfer pricing benefits for our clients while mitigating risk. Where transfer pricing inquiries or disputes arise, we offer experienced, effective counsel to defend our clients' interests.

bennettjones.com/TransferPricing/

For more information about the firm, please visit online at www.bennettjones.com

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Disclaimer

This guide is not intended to provide legal advice, but to highlight matters of interest in this area of law. If you have questions or comments, please call one of the contacts listed on our website.

Bennett Jones is an internationally recognized Canadian law firm founded and focused on principles of professional excellence, integrity, respect and independent thought. Our firm's leadership position is reflected in the law we practise, the groundbreaking work we do, the client relationships we have, and the quality of our people.

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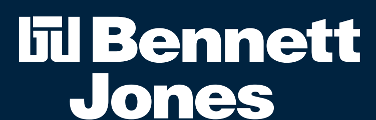

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