FORMS OF BUSINESS ORGANIZATION

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DOING BUSINESS IN CANADA

This publication has been prepared to provide an overview to foreign investors and business people who have an interest in doing business in Canada. The material in this publication is intended to provide general information only and not legal advice. This information should not be acted upon without prior consultation with legal advisors.

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CND Canadian Dollar

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

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

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

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

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

This book provides a general overview as of July 2013 of particular matters of interest to businesses considering entry into the Canadian market. Where appropriate, descriptions of both federal and provincial laws are provided. However, this book should not be considered an exhaustive review, and particular businesses may be subject to industry-specific legislation and other legal requirements which are not dealt with in this book. Accordingly, before undertaking any business transaction involving entry into Canada, it is prudent to seek the advice of counsel.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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The first issue facing foreigners setting up a business in Canada is the type of entity which should be used to operate the business. Among the most commonly used are:

- Canadian corporations
- Unlimited liability companies
- Branch of foreign corporation
- Various forms of partnerships
- Co-tenancies and joint ventures
- Agency and distribution arrangements
- Franchise arrangements

The choice of form of business organization is dependent upon a number of factors. The nature of the business and taxation issues which may revolve around the desirability to consolidate income for tax purposes are two important criteria. Availability of incentive or assistance programs may also impact the decision. Foreign investors should obtain professional legal and accounting advice to determine the most advantageous method of conducting business.

CANADIAN CORPORATIONS

Most businesses in Canada are carried on by corporations. A corporation is a distinct legal entity which has perpetual existence and is afforded the same right to own property and the right to conduct business as is enjoyed by a natural person.

There are several advantages to utilizing a corporate form of organization. First, the liability exposure of the shareholders of a corporation is limited to the amount of their equity investment. Second, a corporation offers investors access to a wider variety of capital and financing opportunities than most other forms of organization. Since a corporation is a flexible form of organization for business, various classes of shares and debt instruments may be utilized to provide different levels of shareholder and lender participation which reflect the degree of risk inherent in the investment. Thirdly, there can also be additional tax benefits to incorporation since corporate tax rates are often lower than individual tax rates.

Canadian corporations can either be private or public corporations. Private corporations are generally those which have restrictions on the right to transfer shares (generally the consent of a majority of the directors or shareholders), a limit on the number of shareholders and prohibitions on distributing their securities to the public. Articles of incorporation often contain restrictions to ensure that the corporation is a private corporation. Such restrictions exempt the corporation from additional regulatory and securities law rules that apply to public corporations in areas such as proxy solicitation, takeover bids and public financial disclosure.

Corporations may be incorporated and organized under either the federal Canada Business Corporations Act (the CBCA) or the equivalent legislation of each of the provinces. Incorporation and organization under the CBCA does not automatically give rise to a right to conduct business in each province. A federal corporation must register in each province in which it proposes to conduct business. Similarly, a provincial corporation may conduct business in another province, provided an extra-provincial license is obtained. There are some exceptions. For example, Ontario and Québec corporations may conduct business in each other's provinces without a license. Owing to a reciprocal arrangement between Nova Scotia and New Brunswick, corporations incorporated in one of these provinces are also exempt from the registration requirements of the other. Alberta and British Columbia have enacted the Trade, Investment, and Labour Mobility Agreement (TILMA), which helps to simplify or eliminate additional registration and disclosure obligations for companies registered in one province but carrying on business in the other. The aim of the legislation is to make the expansion of companies more cost effective by eliminating additional registration and reporting costs. The New West Partnership Trade Agreement, which came into effect in 2010, builds upon TILMA and adds the province of Saskatchewan as a signatory.

Specific statutes set incorporation, organization and operational standards for certain highly regulated business undertakings such as insurance companies, banks, credit unions and trust companies.

When consulted by a foreign company wishing to conduct business in Canada through a Canadian subsidiary, a lawyer will compare the features of the CBCA and the provincial statute of the province in which the head office of the subsidiary will be located in order to determine the preferred corporate statute under which to incorporate and organize. Although the statutes are substantially similar, there are slight differences in the areas of public disclosure of financial statements and residency requirements for directors, which may affect the choice of incorporating jurisdictions.

Residency requirements vary from province to province. There are no residency requirements for directors in British Columbia, Québec and Nova Scotia. However, in Ontario, Alberta, Saskatchewan, and Manitoba, 25% of the directors must be resident Canadians. In most jurisdictions with residency requirements, a "Canadian resident" is defined as a Canadian citizen residing in Canada, or a permanent resident. The CBCA requires that at least one quarter of the directors be resident Canadians, and where there are fewer than four directors, that at least one director must be a resident Canadian. However, in certain businesses, and film or video distribution, the CBCA requires that a majority of the directors be resident Canadians. This latter residency requirement is reduced to one-third for holding companies meeting specified financial criteria. Permanent residents may lose their status as resident Canadians for CBCA purposes unless they become citizens within one year of first eligibility.

There are other factors which may tip the scales in deciding whether or not the federal jurisdiction or the provincial jurisdiction should be utilized for incorporation. For example, certain financing incentives provided by one level of government may dictate incorporation within that jurisdiction. There is also a perception that certain businesses that supply goods or services to a particular province should strongly identify with that province, making it advisable to incorporate within that jurisdiction.

Corporate names may have separate English and French versions. In such cases, the versions may be used interchangeably. If a corporation wishes to do business with the government of Québec, it is necessary to adopt a French version of its corporate name.

Federal and provincial corporate statutes provide shareholders with dissent and appraisal rights which may require a corporation to acquire a dissenting shareholder's interest for its fair value if a corporation implements a fundamental change. Corporate legislation also contains statutory oppression remedies which give courts broad rights to grant equitable remedies where shareholders or creditors have been subject to corporate activity which is unfairly prejudicial or unfairly disregards their respective interests. These remedies are in addition to any remedies flowing from fiduciary duties which have been compromised.

UNANIMOUS SHAREHOLDER AGREEMENT

The term "unanimous shareholder agreement" (USA) is used to refer to a shareholders' agreement amongst all of the shareholders of a corporation whereby some or all of the powers of the board of directors have been delegated to the shareholders. In some provincial corporate statutes, USAs are explicitly recognized, while in others they are not. In those provinces that recognize USAs, they are used to restrict the scope and nature of the powers of directors to manage the business and affairs of the corporation which are stipulated by the governing statute. Further, any shareholder who is party to a USA may be specifically delegated all or some of the rights, powers and duties of directors and the directors are accordingly released from their duties and liabilities. In provinces where USAs are not explicitly recognized, the directors of a company subject to a USA may not necessarily be relieved from their obligations as directors. USAs are often prepared in jurisdictions that explicitly recognize them, even if a corporation has only one shareholder. Shareholders in closely held corporations will often want to customize their relationship to provide for an arrangement which is different from that contemplated in the provincial corporate statute, CBCA, or at common law.

USAs can regulate a specific topic or every detail of a corporation's operation. The following are some subjects which are commonly covered in USAs:

- **Board of Directors**: Shareholders may wish to stipulate the size of the board of directors and often wish to indicate the number of directors a certain shareholder or shareholders group will be entitled to nominate.
- **Dividends**: Shareholders may wish to establish a dividend policy.
- **Share Transfers**: Shareholders may want to set up mechanisms to restrict share transfers (which may be subject to a right of first refusal, buy/sell or other liquidity arrangement) and the issuance of additional securities.
- **Dispute Resolution**: Shareholders may want to resolve their disputes by such means as arbitration, instead of by means of the relative voting power of different shareholders.
- **Financing Arrangements**: Shareholders may wish to stipulate a policy for financing the business which, for example, could stipulate when equity versus debt financing will be utilized.

UNLIMITED LIABILITY COMPANIES (ULC)

ULCs are of particular interest to U.S. companies with Canadian operations because of the favorable tax treatment they can receive. ULCs can elect for U.S. tax purposes to be treated as a "disregarded entity," thereby "flowing through" the income of the ULC to the U.S. parent for taxation in the parent's hands. This election does not affect the ULC's tax treatment under Canadian tax laws.

While a ULC has a separate legal existence from its shareholders, the shareholders may be liable for the obligations of a ULC in certain limited circumstances. For example, if the ULC is wound up or liquidated, its shareholders are liable for the debts of the ULC if its assets are not sufficient to satisfy creditors. Past shareholders may also be liable in some circumstances. On a day-to-day basis, however, shareholders of a ULC are not responsible for the obligations incurred by it.

Until recently, Nova Scotia was the only Canadian jurisdiction that contemplated three types of companies:

- Those limited by shares (the familiar corporate structure where shareholders hold shares in the company)
- Those limited by guarantee (where a shareholder guarantees a specified amount of the company's liabilities)
- Unlimited liability companies (ULCs)

ULCs are no longer unique to Nova Scotia. Alberta's and British Columbia's legislation now include ULCs as well. On 17 May 2005, through amendments to the Business Corporations Act (Alberta), Alberta's legislation regarding ULCs came into effect. And, on 29 March 2007, British Columbia passed amendments to the Business Corporations Act (British Columbia) allowing for ULCs.

Each Canadian jurisdiction allowing the registration of ULCs is different. These differences should be taken into account, particularly for U.S. companies with Canadian operations. For example, Nova Scotia's legislation includes well-defined limits on liability of shareholders, particularly past shareholders. The liability provisions in Alberta's legislation are broader than Nova Scotia's and British Columbia's. Furthermore, Alberta's legislation contains residency requirements for directors, whereas Nova Scotia's and British Columbia's do not.

Conversely, Alberta's ULC legislation is much different. First, there is a residency requirement for directors: 25% of the directors must be Canadian residents. Second, the legislation allows an Alberta ULC to convert to a limited liability corporation and vice versa. Third, shareholder liability is unlimited and is joint and several in nature while the company is in existence. This liability is broader than under the Nova Scotia and British Columbia legislation.

BRANCH OF FOREIGN CORPORATION

Often, foreign investors wish to conduct their Canadian operations as a branch of a foreign corporation or U.S. subsidiary. Foreign corporations are generally entitled to conduct business in this manner in most areas of commercial activity, provided that extra-provincial licenses to conduct business are obtained in the provinces and territories where the business is carried on. Incorporation often makes it easier for small- and medium-sized businesses to deal with Canadian suppliers and customers. If independent financing for the Canadian operation is required, local financing is much easier to obtain through the use of a Canadian-owned subsidiary. The failure to create a separate corporate entity will expose the foreign corporation to all liabilities incurred in the Canadian operations.

The tax treatment for branch operations is discussed elsewhere in this book. Income tax must be paid in Canada on Canadian branch profits. The ability to claim a full foreign tax credit at the parent corporation level must be considered to ensure that double taxation is avoided. Accordingly, the taxation of the foreign corporation and the projected income or losses which will be incurred by Canadian operations are important (and usually determinative) factors to be considered.

GENERAL PARTNERSHIPS

A partnership is a relationship that exists between two or more people (individuals, corporations, partnerships or other entities) who conduct a business in common with a view to earning profit. In a general partnership, it can generally be said that:

- Each partner is liable for all of the debts and liabilities of the partnership
- Net income will be determined at a partnership level and such net income will be allocated to the partners
- A partner may not be entitled to be a creditor of the partnership (although a party related to the partner is entitled to be a creditor)
- Unless otherwise specified by a partnership agreement, all partners must contribute equally to the capital of the partnership and are entitled to share equally in the profits of the partnership; likewise, all losses would be shared equally
- The liability of a partner in connection with partnership liabilities extends to the full extent of that partner's personal assets

Partnerships are governed by provincial statutes. Written partnership agreements can override many of the provisions of various partnership acts, and it is advisable to enter into a partnership agreement in order to avoid certain arbitrary provisions of these statutes. As stated above, in the absence of a written agreement to the contrary, partners may be equally liable for partnership obligations, notwithstanding their unequal capital contributions or profit-sharing arrangements.

Under Canadian tax law, partnerships do not pay income taxes. Although net income is calculated at the partnership level, the net income is allocated to the partners, who are obligated to pay tax. A foreign partner allocated income from a Canadian partnership would, therefore, be obligated to pay Canadian income tax on the foreign partner's share of partnership income.

LIMITED PARTNERSHIPS

A limited partnership restricts the exposure of passive individual partners from the liabilities of the partnership. Limited partnerships are creatures of provincial statutes. These statutes contain subtle differences with respect to the exposure of individuals to liability in excess of the capital invested in the partnership by such individuals. These differences are dependent on the province in which a limited partnership is organized.

A limited partnership consists of one or more general partners (who are exposed to unlimited liability) and one or more limited partners. A limited partner may become liable as a general partner if the limited partner takes part in the control of the business. In other words, in some circumstances, the limited partner will have unlimited liability as a result of its participation in the control of the business. In some provinces, the extent to which a limited partner is exposed to liability is limited to the result of the acts such limited partner performs in the management and operation of the business of the limited partnership.

A limited partnership does not come into existence until it is registered under the laws of the province in which it is established. Typically, registration requires filing forms which provide specific information about the identity of the general partner. These forms may or may not require the identities of the limited partners. There is no requirement that the limited partnership agreement itself be filed in an office where it may be scrutinized by the public.

Limited partnerships are useful vehicles where there is a desire to flow through income and expenses and yet limit the liability of the individual participants in a particular venture. However, in order to achieve this limited liability the investment of the limited partner/investor must be passive in nature.

LIMITED LIABILITY PARTNERSHIPS

Some provinces (including British Columbia, Alberta, Saskatchewan, Manitoba, Ontario and Nova Scotia) have amended their Partnership legislation to recognize a new type of legal entity known as a "limited liability partnership."

General partnership law imposes unlimited personal liability on partners for all of the partnership's debts and liabilities. Generally, under the amended provisions of the provincial partnership legislation, all of the partners in a limited liability partnership remain personally liable for their own actions, and for the actions of those they directly supervise or control. The amended legislation provides, however, that a partner will not be liable for liabilities of the limited liability partnership resulting from any negligent act by another partner or employee of the limited liability partnership not under the partner's direct supervision or control. Generally, this limitation of liability does not protect a partner if the partner knew of the negligence at the time it was committed and failed to take reasonable steps to prevent its commission. Manitoba's legislation provides further protection for partners. Pursuant to other provincial legislation, a limited partner loses his/her limited liability status and becomes liable as a general partner when s/he takes part in management or control of the business of the partnership. But in Manitoba, a limited partner is only liable for the debts of the partnership to a person who does not know that s/he is a limited partner. This condition limits the circumstances in which a limited partner can lose his/her limited liability protection.

Limited liability partnerships are only available to "eligible professions," the meaning of which varies from province to province. There is usually a requirement on partners in a limited liability partnership to maintain a minimum prescribed amount of liability insurance.

Provinces that recognize limited liability partnerships will usually recognize extra-provincial limited liability partnerships and require certain filings be made with respect to the limited liability partnership.

CO-TENANCIES AND JOINT VENTURES

Real estate investments are often held in the names of co-tenancies or joint ventures. A co-tenancy is not a tax-paying entity, nor is it a relationship such as a partnership which is treated like an entity for the purposes of calculating net income. Accordingly, there is some flexibility available in the preparation of financial statements for co-tenancies. Each co-tenant or joint venturer may determine the amount of depreciation expense which will be utilized by it in the calculation of income for tax purposes.

In the case of joint ventures, agreements are virtually always negotiated prior to undertaking joint venture activities. Since a joint venture is not recognized as a distinct and separate entity, it cannot sue or be sued. The joint venture agreement will delineate the respective rights and liabilities of the joint venturers, including their right to bind other parties.

The use of a co-tenancy or joint venture assumes that the parties are not in a partnership relationship. Accordingly, where a joint venture structure is contemplated, care must be taken to analyze whether or not the joint venture structure will survive the scrutiny of a third party who may seek to impose full liability on each co-tenant as if it was a partner in a general partnership. Notwithstanding language contained in the typical joint venture which confirms that the parties are joint venturers and not partners, if the threshold partnership test of carrying on business in common with a view to a profit is met, there is a risk that the co-tenancy will be deemed to be a partnership and the individual co-tenants liable as partners in a general partnership.

AGENCY & DISTRIBUTION ARRANGEMENTS

In some cases, the decision to expand into Canada may be realized without actually having the foreign business entity conduct business in Canada. Entering into a distribution contract or agency agreement in Canada does not, in and of itself, constitute carrying on business in Canada. Accordingly, it is often appropriate for a foreign entity to consider the use of a Canadian agent or distributor to expand its business operations into Canada.

In each case, the relationship should be governed by contract to avoid ambiguity and to ensure that necessary controls and methods of recourse are clearly established. Generally speaking, if an agency relationship exists, the agent will have the right to bind its principal to contractual commitments. A distributor does not have such rights and is generally considered to be an independent contractor.

The ownership and protection of intellectual property rights and exclusivity rights are often given insufficient emphasis when establishing an initial distributor or agency relationship with a Canadian entity. This can create significant problems when the relationship between the parties changes. In addition, termination rights must be considered. In the absence of a written contract, a Canadian agent or distributor will be entitled to reasonable notice before the termination of its contract. If insufficient notice of termination is given, a court may award damages in lieu of notice.

FRANCHISE ARRANGEMENTS

Franchising is yet another method which may allow foreign businesses to enter the Canadian market. In Canada, regulation of the franchisor/franchisee relationship falls within provincial jurisdiction. Five provinces have enacted legislation dealing specifically with franchises, namely Alberta, Ontario, New Brunswick, Manitoba and Prince Edward Island. Of course, other federal and provincial laws which affect businesses generally (as described elsewhere in this publication) will continue to apply as well.

PROVINCE OF ALBERTA

The Franchises Act regulates franchise trading in Alberta. The Act applies to the sale of any franchise made on or after 1 November 1995, if the franchise is to be operated in whole or in part in Alberta, and if the purchaser is an Alberta resident or has a permanent establishment in Alberta for the purposes of the Alberta Corporate Tax Act. Franchise sales made prior to 1 November 1995 are still subject to certain sections of the Act, namely those dealing with statutory exceptions, fair dealing, a franchisee's right to associate, contravention of the right to associate, other remedies and self government.

The Franchises Act also governs all franchise-related agreements and imposes a duty of "fair dealing" on both parties to the agreement. Under the Franchises Act, a franchisor is required to give a prospective franchisee a disclosure document at least 14 days before any payment is made or any agreement is signed, whichever is earlier. The contents of the disclosure must contain all material facts about the franchise including, but not limited to, those facts required by the Franchises Regulations.

If a franchisee suffers a loss because of a misrepresentation in the disclosure document, the franchisee has a right of action against the franchisor and every person who signed the disclosure document. In addition, if a franchisor fails to give a prospective franchisee the disclosure document within the time allotted, the franchisee has the right to rescind all of the franchise agreements no later than 60 days after receiving the disclosure document or no later than two years after the franchise was granted, whichever occurs first. The franchisor is then responsible for compensating the franchisee for any net losses the franchisee incurred in acquiring, setting up and operating the franchise.

PROVINCE OF ONTARIO

Ontario's Arthur Wishart Act (Franchise Disclosure), 2000 is similar to the Alberta Act, but there are some important differences. First, unlike the Alberta Act, the Ontario Act applies even if the potential franchisee does not reside in or have a permanent establishment in Ontario. All that is needed is that the prospective franchise be intended to be operated in Ontario.

Secondly, the content of the disclosure document required in Ontario has differences. For example, the Ontario document must include various warnings, including that independent legal and financial advice in relation to the franchise agreement should be sought prior to entering into the franchise agreement, and that a prospective franchisee is strongly encouraged to contact any current or previous franchisees prior to entering the franchise agreement. The Ontario Act requires disclosure of significant information about all directors and officers of the franchisor, while Alberta restricts the requirement to directors and officers who are active in management of the franchise. The Ontario Act also requires a franchisor to disclose various licenses and permits the franchisee may need. The Alberta Act has no such requirements, but does require franchisors to recite certain sections of the Alberta Act relating to franchisees' rights to rescission, cancellation and damages.

Unlike Alberta, Ontario requires a franchisor to provide a disclosure document to a prospective franchisee before taking a deposit, a deposit agreement or a confidentiality agreement. The effect of failing to provide the disclosure document on time (or at all) is the same as in Alberta; however, the Ontario Act gives the franchisee more potential compensation than the Alberta Act. The Ontario Act requires a franchisor to refund all money received from the franchisee, repurchase any inventory, supplies and equipment at a price equal to the purchase price paid by the franchisee, and to compensate the franchisee for any losses incurred in acquiring, setting up and operating the franchise.

PROVINCE OF PRINCE EDWARD ISLAND

In 2005, Prince Edward Island enacted the Franchises Act, followed by the Franchises Act Regulations in 2006. This legislation is modeled after Alberta and Ontario's legislation and the Uniform Law Conference of Canada draft Model Bill released in August 2005. The Act contains several features common to other franchise legislation including the duty to deal in good faith and the freedom of franchisees to associate.

PROVINCE OF QUÉBEC

Franchisors who are considering an expansion to the province of Québec must consider two important statutes: the Civil Code of Québec and the Charter of the French Language. The Québec Civil Code governs all business relationships in the province of Québec. For example, the Civil Code applies to "contracts of adhesion" which are defined as a contract drafted by one party and imposed upon the other. Most franchise agreements are contracts of adhesion because they are basically non-negotiable. When a franchise agreement is considered to be a "contract of adhesion," the Civil Code requires it be written in clear and understandable language. The agreement may not refer to provisions in other contracts unless those provisions are expressly brought to the franchisee's attention. Any abusive or overly onerous provisions will not be enforceable.

The aim of the Charter of the French Language is to preserve and promote the French language in Québec. The Charter requires that most contracts, advertisements, websites, and other documents and services be made available in French in Québec. Public signs and commercial advertising may be in English as well as French, but the French must predominate.

PROVINCE OF NEW BRUNSWICK

The New Brunswick legislature passed the *Franchises Act* in 2007. Similar to Prince Edward Island's legislation, it is modeled after the Uniform Law Conference of Canada Model Bill and covers issues such as disclosure, fair dealing, right to associate and right of rescission.

PROVINCE OF MANITOBA

Manitoba enacted the Franchises Act in 2012. Like the New Brunswick and Prince Edward Island legislation, it too is modeled after the Uniform Law Conference of Canada Model Bill and speaks to the issues of disclosure, fair dealing, right to associate, and right of rescission.

OTHER PROVINCES

The Québec Code and Alberta, Ontario, Manitoba, New Brunswick and Prince Edward Island acts all impose duties of good faith on franchisors and franchisees. The common law of the other provinces may do so as well. Generally, in Canada it is likely that each party to a contract is required to act honestly, fairly and reasonably, and must not without proper cause prevent the other party from enjoying the fruits of the contract. In addition, most of the provinces of Canada have also enacted laws regarding trade and business practices, consumer protection, advertising, income and sales tax, and other business and property-related issues.

ONLINE SEARCHES

Corporate Registry information is available online; however, the information available through online services varies from province to province. The services available may include Corporation Profile Reports, Certificates of Status, Corporations Business Names Lists, Business Names Report, Partnership Business Names Reports, Partnership Business Names List, online incorporation of corporations and various governmental filings, etc. In some provinces, online services are only available to authorized service providers and additional information is available for subscribers. The following table outlines how to obtain online Corporate Registry information.

Web Site Help and Enquiries		
ALBERTA http://www.servicealberta.ca/corporate_registry.cfm	**+1.877.427.4088**	**+1.780.427.7013**
BRITISH COLUMBIA http://www.bcregistryservices.gov.bc.ca/bcreg/corppg/index.page?	**+1.877.526.1526**	**+1.250.387.7848**
CANADA www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/home		**+1.866.333.5556**
MANITOBA http://www.companiesoffice.gov.mb.ca	**+1.888.246.8353**	**+1.204.945.2500**
NEW BRUNSWICK www.snb.ca/e/6000/6600e.asp	**+1.888.762.8600**	**+1.506.684.7901**
NEWFOUNDLAND & LABRADOR http://www.gs.gov.nl.ca/registries/companies.html		**+1.709.729.3317**
NORTHWEST TERRITORIES www.justice.gov.nt.ca/CorporateRegistry/index.shtml		**+1.867.920.8987**
NOVA SCOTIA https://accesstobusiness.snsmr.gov.ns.ca/a2b_web/portal/businesslogin.jsf	**+1.800.670.4357**	**+1.902.424.5200**
NUNAVUT http://nunavutlegalregistries.ca/index_en.shtml		**+1.867.975.6590**
ONTARIO http://www.ontario.ca/en/business/STEL02_163367	**+1.800.268.7095**	**+1.888.745.8888**
PRINCE EDWARD ISLAND http://www.gov.pe.ca/corporations	**+1.902.368.4550**	**+1.902.368.4577**
QUÉBEC http://www.registreentreprises.gouv.qc.ca/en/default.aspx	**+1.877.644.4545**	**+1 888.644.4545**
SASKATCHEWAN https://www.isc.ca/CorporateRegistry/Pages/default.aspx		**+1.306.787.2962**
YUKON TERRITORY http://www.community.gov.yk.ca/corp	**+1.867.667.5314**	**+1.800.661.0408**

The following table summarizes residency requirements for directors of corporations in Canada.

PROVINCE	LIMITED LIABILITY	UNLIMITED LIABILITY
Alberta	At least 25% of directors must be resident Canadians.	At least 25% of directors must be resident Canadians.
British Columbia	No residency requirement	No residency requirement
Canada (Federal)	At least 25% of directors must be resident Canadians. If a corporation's board is comprised of three or fewer directors, at least one must be a resident Canadian.	N/A
Manitoba	At least 25% of directors must be resident Canadians. If a corporation's board is comprised of three or fewer directors, at least one must be a resident Canadian.	N/A
New Brunswick	No residency requirement	N/A
Newfoundland and Labrador	At least 25% of directors must be resident Canadians	N/A
NW Territories	No residency requirement	N/A
Nova Scotia	No residency requirement	No residency requirement
Nunavut	No residency requirement	N/A
Ontario	At least 25% of directors must be resident Canadians. If a corporation's board is comprised of three or fewer directors, at least one must be a resident Canadian.	N/A
Prince Edward Island	No residency requirement	N/A
Québec	No residency requirement	N/A
Saskatchewan	At least 25% of directors must be resident Canadians. If a corporation's board is comprised of three or fewer directors, at least one must be a resident Canadian.	N/A
Yukon Territory	No residency requirement	N/A

CONCLUSION

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

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

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