



DOING
BUSINESS
IN CANADA:
A LEGAL OVERVIEW

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TABLE OF CONTENTS

1	INTRODUCTION
2	A SNAPSHOT OF CANADA
3	FOREIGN INVESTMENT IN CANADA
4	BUSINESS STRUCTURES
5	SECURITIES
6	REAL ESTATE
7	INCOME AND SALES TAXES
8	IMMIGRATION
9	LABOUR AND EMPLOYMENT
10	INTELLECTUAL PROPERTY
11	PRIVACY
11	CIVIL/COMMERCIAL LITIGATION
11	ALTERNATIVE DISPUTE RESOLUTION
12	INSOLVENCY AND RESTRUCTURING

INTRODUCTION

Canada has always been a great place for non-Canadians to do business. Moreover, during the last decade, it has stood out among the world's nations as one of the most stable business environments, whether measured in terms of its currency, political climate, highly educated and trained workforce or ability to both develop and attract world-class talent.

Torkin Manes LLP is proud of its involvement in assisting both companies and individuals in developing new, and acquiring existing, Canadian businesses. We believe that foreign investment benefits both Canadians and the global economy. With this in mind, we have created *Doing Business in Canada: A Legal Overview* to highlight some of the fundamental issues that foreign businesses and decision-makers need to consider when evaluating Canada as a possible investment destination.

This brochure provides basic information only and cannot be treated as an exhaustive overview of any specific legal or business issue. While reasonable efforts have been made to ensure the accuracy of the information contained in this brochure at the time of publication, none of Torkin Manes LLP, its partners, employees, agents or affiliates accepts any legal liability for improper reliance on it.

We hope you enjoy *Doing Business in Canada: A Legal Overview*. Torkin Manes LLP has assisted thousands of foreign businesses and individuals with their business investments in Canada and we hope to do the same for you. For more information, or should you require assistance with any legal issues relating to a prospective business investment in Canada, we would invite you to visit our website at www.torkinmanes.com which also contains a complete list of our lawyers and their areas of expertise. We look forward to being of service to you.

Torkin Manes LLP
Suite 1500
151 Yonge Street
Toronto, Ontario, Canada
M5C 2W7
Telephone: 416.863.1188
Toll-Free: 1.800.665.1555
Fax: 416.863.0305
www.torkinmanes.com



A SNAPSHOT OF CANADA



It has been said that Canada is one of the most unique and enjoyable places in the world for a non-Canadian to explore. Here we highlight some of the most basic facts of the Canadian landscape that may be relevant to any potential foreign investor's investigation of Canada as a place to do business.

THE LAND

In size, Canada is the second largest country in the world. It has more coastline than any other country reaching north to the Arctic, west to the Pacific Ocean and east to the Atlantic Ocean. Of perhaps greater interest is that its southern border with the United States is the longest two-nation border in the world and stretches for almost 8,900 kilometres or just over 5,500 miles.

Canada is made up of ten provinces and three territories. The provinces are (from west to east): British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland and Labrador. The territories are (from west to east): Yukon, Northwest Territories and Nunavut.

THE POPULATION

The population of Canada (as of 2011) is approximately 34,000,000. This statistic is very misleading in that over two-thirds of Canadians live within 200 miles (or 322 kilometres) of the United States border, including those that

live in the three largest Canadian cities: Toronto, Montreal and Vancouver, which together represent about one-third of the entire Canadian population.

THE ECONOMY

Canada has the ninth largest economy in the world with an affluent, high-tech industrial society, the overall output of which exceeds one trillion dollars. Canada is a party to various free-trade agreements, which include the 1989 US-Canada Free Trade Agreement and the 1994 North American Free Trade Agreement (NAFTA) (which includes Mexico). It is the United States' largest trading partner and foreign supplier of energy, including oil, gas, uranium and electric power. Further, Canada's major banks are among the strongest in the world, owing to the financial sector's tradition of conservative lending practices and strong capitalization.

THE POLITICAL AND LEGAL STRUCTURE

Canada operates as a western style democracy built upon the British parliamentary system of government. Each of the provinces and territories has its own legislature and Canada's constitution delineates responsibilities and rights between its national and provincial/territorial governments, with the bulk of such responsibilities and rights falling into one sphere or the other (although some areas of regulation are shared). The English Common Law underpins the federal law of Canada and the laws of all provinces and territories, save for the laws of Quebec which are based on the Napoleonic Civil Code.

THE LANGUAGE

Canada has two official languages, English and French, with its residents largely being able to demand services from the federal government in either language. However, the vast majority of French speaking Canadians reside in the Province of Quebec.

FOREIGN INVESTMENT IN CANADA

FOREIGN INVESTMENT

Foreign investment has traditionally been welcome in Canada. However, all foreign investments in Canada, either through the acquisition of control of an existing Canadian business or through the establishment of a new Canadian business, require notification to the federal government. More specifically, a foreign investor will need to provide detailed information concerning the target business and the foreign investor. If the investment exceeds certain monetary thresholds or is in a specific type of business (such as cultural or financial services), the Canadian government will review the investment to ensure that it will provide a net benefit to Canada and will meet governmentally-prescribed standards.

COMPETITION

Competition in Canada is encouraged in order to promote the efficiency and adaptability of the Canadian economy and expand opportunities for Canadian participation in world markets while at the same time recognizing the vital role of foreign competition in Canada. Oversight for competition in Canada is the responsibility of the federal Competition Bureau, an independent law enforcement agency.

Parties to a proposed merger that exceeds certain prescribed monetary thresholds are required to notify the Competition Bureau prior to the completion of the transaction and to supply prescribed information relevant to the proposed merger and its potential effect on competition. The parties are not permitted to complete the transaction until a prescribed waiting period has ended.

The Competition Tribunal is an adjudicative body responsible for considering competition complaints in Canada. Practices such as refusal to supply, price maintenance, exclusive dealing, tied selling, market restriction, abuse of dominant position and delivered pricing, while not illegal in and of themselves, are subject to review by the Competition Tribunal. The Tribunal may impose administrative monetary penalties if a practice is found to be anti-compet-

itive in that it prevents or lessens, or is likely to prevent or lessen, competition. In addition, federal legislation imposes criminal prohibitions against certain practices and behaviours which restrict competition and provides persons who have suffered loss or damage as a result of a breach of a criminal prohibition the right to sue for damages.



BUSINESS STRUCTURES



Canada, like most jurisdictions, provides for various vehicles through which a person can conduct business. Although it is possible to do business in Canada without establishing a formal presence here, there are often regulatory, tax and/or practical reasons why one should adopt a formal Canadian structure. The following is a brief summary of different types of business structures available in Canada.

CORPORATION

A foreign enterprise seeking to conduct business in Canada may wish to establish a subsidiary corporation in Canada that is owned, in whole or in part, by the foreign enterprise. Generally, a foreign enterprise can elect to incorporate its subsidiary either federally under the laws of Canada or provincially under the laws of any one of its provinces or territories, however, certain corporate statutes impose a minimum residency requirement for directors.

SOLE PROPRIETORSHIP

A sole proprietorship is a business method by which an individual conducts business on his/her own account. All benefits, including assets and income, as well as all obligations and liabilities, belong exclusively to the sole proprietor.

PARTNERSHIP

A partnership is a contractual relationship between two or more persons carrying on business together with a view to earning a profit. There are two types of partnerships typically utilized to conduct business depending upon the liability exposure of the partners, namely, general partnerships and limited partnerships.

BRANCH OPERATION

Operating a Canadian branch of a foreign business does not involve the creation of a separate entity, rather, it is the establishment of a Canadian-based office. For a foreign business to operate through a branch operation in Canada, the branch must be registered as an extra-provincial entity in each province and territory in which it intends to carry on business. Branch operations are subject to many of the same federal and provincial or territorial disclosure and filing obligations which apply to Canadian corporations.

SECURITIES

In broad terms, securities legislation in Canada regulates the sale of securities, the giving of advice in relation to securities and the managing of investment funds.

The Canadian securities regime is in many ways similar to that of the United States and other jurisdictions. For example, as in the United States, issuers who wish to sell their securities to the public must provide a comprehensive disclosure document, called a prospectus, or must qualify for certain exemptions from this requirement. Those in the business of trading and advising in relation to the purchase and sale of securities or the management of investment funds must meet certain qualifications and be registered to do so. The resale of securities in Canada, including those involved in such activity, is also governed by securities legislation, the rules of self-regulatory organizations and the rules of the stock exchanges in Canada on which securities trade.

However, there are critical differences between Canadian securities legislation and those of other jurisdictions such as the United States. For example, unlike other jurisdictions where federal securities legislation is paramount, in Canada there is no national securities statute. Instead, each province and territory of Canada has the authority to enact its own securities legislation. Despite ongoing efforts to harmonize securities legislation across the Canadian provinces and territories, the laws and regulation differ and it is therefore critical that one be aware of the requirements of securities legislation in the particular provinces and territories of Canada in which one conducts securities activities.

There are three stock exchanges in Canada, which may be distinguished by the liquidity of their markets, from highest to lowest, as follows: the Toronto Stock Exchange, the TSX Venture Exchange and the Canadian National Stock Exchange. Many companies whose shares are listed on Canadian stock exchanges also choose to list their shares on exchanges outside of Canada.



REAL ESTATE

Investing in Canadian real estate is one of the many ways in which business can be conducted in Canada, whether it be a part, or the core, of a primary business. The Canadian real estate market is generally viewed as one of the most stable markets in the world and provides investors with a wide range of opportunities. A summary of some of the particular issues that affect real estate investment in Canada follows.

OWNERSHIP STRUCTURES

While a foreign investor can hold title to a Canadian property in its own name, subject to certain exceptions and potential tax implications, it is common for purchasers of Canadian real estate to hold title to real property through a corporation.

Title to Canadian property can also be held by a nominee (or trustee) for the beneficial ownership of one or more investors. Though the nominee is shown in the public records as the owner of the property, the beneficial owner is considered the owner of the property for tax and accounting purposes.

LAND TRANSFER TAX

In most provinces and territories in Canada, land transfer tax is payable to the government by the purchaser upon the purchase of real property. Tax rates vary by jurisdiction; however, they often increase in percentage as the value of the land increases.

SALES TAXES

The operation and sale of different types of real property (such as leases and sales of commercial properties and sales or rentals of new or substantially renovated residential properties) are subject to various federal, provincial and/or territorial sales taxes.



ENVIRONMENTAL MATTERS

In Canada, environmental matters are governed by a combination of federal and regional legislation. It is common for purchasers of Canadian real property and lenders to such purchasers to perform various types of environmental inspections when assessing potential investments in real property. As well, most lenders taking real property security will require a borrower to provide various representations, warranties and indemnities regarding environmental matters that could potentially affect a borrower's property.

LAND DEVELOPMENT AND INCOME PRODUCING PROPERTIES

All provinces and territories have planning legislation in place governing the manner in which land may be used and developed. The use and development of land is also governed by official plans and zoning and other by-laws in effect in the municipality in which the land is located. As well, commercial and residential rental properties will often be governed by specific legislation that addresses the respective rights and obligations of landlords and tenants. Those looking to invest in Canadian residential rental properties should be aware that, generally speaking, the provincial and territorial legislation governing the relationship between residential landlords and tenants is quite onerous, especially with respect to matters relating to residential rents and repairs.

INCOME AND SALES TAX

INCOME TAX

Canada imposes income tax on its residents and non-residents who carry on business in Canada through a “permanent establishment”, dispose of property located in Canada or are employed in Canada. Income taxes are imposed by both the federal and provincial or territorial governments on corporations and individuals.

A corporation is taxed at a flat rate of income tax. The tax rate is comprised of a standard federal rate and a regional rate which varies by province or territory. The combined rate differs depending on the nature and size of the business activity carried on and the type of income. One half of all capital gains is included as income and is therefore taxable. Capital losses may be used to offset capital gains and business losses may be used to offset income. Capital and business losses may be carried back or forward for the prescribed periods.

On certain types of payments (for example, interest, dividends and royalties) made to non-Canadian resident owners of Canadian companies, there may be withholding tax that the payor must deduct and remit to the Canada Revenue Agency (CRA).

SALES TAX

Goods and services are also taxed in Canada at both the federal and regional level. The federal Goods and Services Tax (or GST) is 5% and for all provinces/territories (except Alberta), sales tax is imposed either as GST plus the applicable Provincial Sales Tax, known as PST, or as the combined Harmonized Sales Tax (HST) which incorporates both the federal GST and the provincial PST.

CANADA REVENUE AGENCY

The CRA administers: (i) tax laws for the Government of Canada and for most provinces and territories; (ii) various social and economic benefit and incentive programs delivered through the tax system such as the Scientific Research and Experimental Development Tax Credit; and (iii) the registration and administration of charities in Canada.

The CRA is responsible for auditing and assessing penalties against taxpayers. It has its own internal appeals procedure, decisions of which may be further appealed to the courts.



IMMIGRATION

Canadian immigration law generally prohibits any person other than a Canadian citizen or permanent resident from gaining the right to work in Canada without first securing a work permit. Often, the spouse or common-law partner and dependent children of a work permit holder are entitled to accompany the foreign worker to Canada and in some cases are eligible to receive work permits of their own.

The federal government is responsible for immigration in Canada (except in the Province of Quebec where the Federal and Quebec governments share such responsibilities). An individual who seeks to become a permanent resident of Canada is required to fall within one of the following classes of immigration: (i) Family; (ii) Federal Skilled Worker; (iii) Canadian Experience; (iv) Provincial Nominees; (v) Business; or (vi) Refugee.

Federal Skilled Workers are those who qualify under an established program with points being assigned for various factors such as age, education, work experience, Canadian work experience, language proficiency in English and/or French, arranged employment and adaptability.

The Canadian Experience Class includes those who have accumulated the prescribed amount of qualifying full-time work experience in Canada in the prescribed period preceding the filing of their applications for permanent residence.

The Provincial Nominee Class includes those who qualify under various accords struck by the Federal government with most provincial/territorial governments in Canada. These Provincial Nominee Programs generally include categories that govern immigration by skilled workers, those in strategic occupations and investors/entrepreneurs.

The Business Class includes entrepreneurs, investors and self-employed would-be immigrants. Individuals applying under this class must have prescribed business experience and/or skills as well as minimum net worth or financial assets.



LABOUR AND EMPLOYMENT

Labour and employment in Canada is governed by a myriad of legislation. Most businesses are generally subject to the provincial/territorial legislation in the jurisdiction in which the business is operating although certain federal statutes will also apply to them. Federally regulated businesses, such as banks, air transportation and radio and television broadcasting, are governed by federal legislation.

EMPLOYMENT STANDARDS

Federal and provincial/territorial employment standards legislation lay out certain minimum standards for all employment situations. Standards differ depending upon the legislation. In general, employment standards legislation creates minimum standards regarding payment of wages, hours of work, overtime pay, minimum wage, termination and severance, public holidays, vacation and vacation pay and leaves of absence, including maternity leave, parental leave, personal emergency leave and bereavement leave.

LABOUR RELATIONS

Many employees in both the private and public sectors are represented by collective bargaining agents or unions. Provincial and territorial labour relations legislation provides for both the establishment of bargaining rights which permit the union to negotiate on behalf of a group of employees and for procedures in respect of the negotiation of collective agreements. There is also legislation at the federal level which governs collective bargaining.

OCCUPATIONAL HEALTH AND SAFETY

Occupational health and safety legislation is also in place across Canada to provide for safe working environments and imposes numerous obligations on employers to ensure safe and healthy working conditions.

WORKERS' COMPENSATION INSURANCE

Regulated at the provincial/territorial level, workers' compensation insurance legislation establishes an insurance plan which provides benefits to an employee injured in the workplace.

EQUALITY AND HUMAN RIGHTS

Provincial, territorial and federal human rights legislation prohibits discrimination with respect to employment on certain enumerated grounds such as race, colour, ethnic origin, sex, sexual orientation, age, marital status, family status and disability.

Pay equity legislation is currently in effect federally and in certain of the provinces/territories. This legislation provides that men and women are to be paid equally for work of equal value and aims to eliminate systemic gender discrimination in compensation.

SOCIAL INSURANCE PROGRAM

Canada also has a federally mandated social insurance program which provides for three types of benefits: disability benefits, survivor benefits and a retirement pension. This legislation imposes obligations on employers to make contributions into the program.



INTELLECTUAL PROPERTY

It will often be vital in establishing a new business in Canada to protect any existing or future intellectual property rights. Intellectual property, such as patents, trade-marks, copyright and industrial designs, is protected in Canada by a multitude of federal legislation.

PATENTS

A Canadian patent provides an inventor with a monopoly to make, use or sell his or her invention (including business methods) for a period of 20 years from the date the patent is filed. Patents are not renewable. In order to be patentable, the patent invention must be novel, non-obvious and have utility. Patents are granted to the first to file an application and not the first to invent the invention. Foreign patents will not protect inventions in Canada.

TRADE-MARKS

A Canadian trade-mark is a word, symbol and/or design used to distinguish the wares and/or services of one person or organization from those of others in the marketplace. Unlike a patent, it is not necessary to register a trade-mark in order to acquire rights to it, but unregistered marks do not enjoy the same level of national protection as registered marks. Registration of a trade-mark provides the exclusive right to use of the trade-mark for 15 years and can be renewed every 15 years on an indefinite basis.

COPYRIGHT

A copyright in Canada protects all original literary, dramatic, musical and artistic works upon creation of the work. Although not required, a copyright may be registered. The author of the work is automatically the first owner of the copyright and is generally afforded copyright protection, that is, the sole right to produce, reproduce, perform or publish the work or any substantial part of it, for the lifetime of the author, the remainder of the calendar year in which the author dies and a period of 50 years following the end of that calendar year. Copyright only protects the expression of an idea in some fixed form (including, text, drawing, sculpture) but, subject to some exceptions, does not protect the idea itself.

INDUSTRIAL DESIGN

An industrial design is defined as “features of shape, configuration, pattern or ornament and any combination of those features that, in a finished article, appeal to and are judged solely by the eye”. It is only protected if it is registered and, upon registration, the proprietor of a design is afforded the exclusive right to the design for a period of ten years.

TRADE SECRETS

A trade secret is any data or information (including recipes, formulas, customer lists, functionalities and specific know-how) that has economic or commercial value for a business that it treats as confidential. Trade secret infringement occurs when the information at issue is confidential, communicated in confidence and misused by the party to whom it was communicated and, as a result of which, the owner of the information suffers a detriment. Careful protection of trade secrets through the use of protective contracts with third parties, employee training, monitoring and physical and organization methods, is essential in maintaining their confidential nature and value.

DOMAIN NAMES

Only certain persons or corporations who meet Canadian presence requirements can apply for and hold a “.ca” domain name, including for example, a corporation registered under the laws of Canada or any provincial/territorial laws or the owners of certain registered trade-marks.



PRIVACY

In Canada, federal legislation regulates the collection, use and disclosure of personal information in the private sector. “Personal information” as the term is known in Canada is broadly defined in the legislation and includes any “information about an identifiable individual”, whether public or private, with limited prescribed exceptions. The legislation also applies to all personal information that flows across provincial or national borders in the course of commercial transactions.

The federal legislation does not apply in provinces/territories with privacy legislation that is substantially similar to it except with respect to federal works, undertakings or businesses that operate in those jurisdictions. Organizations that operate inter-provincially are required to deal with both provincial and federal privacy legislation. In addition, certain jurisdictions also have legislation in place specifically governing the collection and use of personal health information.

CIVIL/COMMERCIAL LITIGATION

In Canada, there are two different court systems, the provincial courts and the federal courts.

The majority of commercial litigation in Canada proceeds through the provincial courts and is typically commenced in the superior court of the applicable province. Indeed, the provincial superior courts have inherent jurisdiction over most civil, commercial and even criminal proceedings. Each province is also vested with its own appellate court.

In contrast, the Federal Court of Canada is a statutory court, which only has jurisdiction to hear cases involving a limited number of specified federal matters, including, but not limited to, national security, claims involving the federal Crown and certain intellectual property matters. Appeals from decisions of the Federal Court of Canada are heard by the Federal Court of Appeal.

The Supreme Court of Canada is the highest court of Canada and is the final appellate court for both the provincial and federal court systems. Its decisions are binding on all other courts in the country.



ALTERNATIVE DISPUTE RESOLUTION

An emerging trend in Canada has been the increased use of voluntary alternative dispute resolution procedures (ADR) in place of litigation. Typical ADR methods include mediation and arbitration. Used properly, ADR can be highly effective from the perspectives of time, cost and privacy when compared with the usual form of court litigation. Mediations are typically utilized when parties are of the view that independent facilitators can assist them in reaching negotiated settlements. Arbitrations are used in place of a court where the parties contractually agree to have an arbitrator hear their dispute and rule on it with binding authority. A third ADR process, known as “medi-arb”, is a combination of mediation and arbitration procedures.

INSOLVENCY AND RESTRUCTURING

In Canada, an individual or legal entity is said to be insolvent when he, she or it is unable to meet his, her or its financial obligations as they become due. Generally, insolvency proceedings may include a stay of other proceedings which immediately stops creditors from pursuing their individual claims and to cooperate with the insolvency proceedings undertaken by the debtor. A summary of the three main types of insolvency proceedings in Canada follows.

BANKRUPTCY

Bankruptcy proceedings may be voluntary when they are initiated by a debtor or involuntary when they are commenced by a creditor by application to a Court. Upon bankruptcy, all other legal proceedings against the debtor for the collection of debts are suspended and the bankrupt's assets are put into the hands of a trustee in bankruptcy who will proceed to sell the assets and then distribute the net proceeds to those creditors with claims that have been submitted to, and accepted by, the trustee in bankruptcy. Upon discharge from bankruptcy of an individual, most pre-bankruptcy claims are released (although conditions may be imposed). Statute created entities such as corporations may only be discharged following satisfaction of the claims of all creditors.

PROPOSALS OR RESTRUCTURING

Restructuring proceedings recognize that a business may be more valuable if it continues and there may be a benefit to avoiding liquidation of all the assets. Restructuring proceedings therefore involve negotiations and compromises between the debtor and its creditors, which allow the debtor to maintain control of its assets and ultimately continue its business.

RECEIVERSHIPS

In a receivership, a receiver or receiver-manager is appointed, either privately by a creditor in accordance with the terms of a security agreement, or by a Court, to take possession and control of the debtor's business. Receivership provides an opportunity to remove poor management and substitute it with the receiver. Generally, a receiver will proceed to liquidate the assets of the business to satisfy the amount owing to the creditor. However, the receiver may continue to operate the business if it believes that it will enhance the recovery for creditors.



www.torkinmanes.com



TORKIN MANES LLP
SUITE 1500
151 YONGE STREET
TORONTO, ONTARIO, CANADA
M5C 2W7
TELEPHONE: 416.863.1188
TOLL-FREE: 1.800.665.1555
FAX: 416.863.0305
WWW.TORKINMANES.COM