Fall | 24

INTERNATIONAL LAWYERS NETWORK

ROBINSON SHEPPARD SHAPIRO LLP
FOGLER, RUBINOFF LLP
ESTABLISHING A BUSINESS ENTITY IN CANADA

ILN CORPORATE GROUP

This guide offers an overview of legal aspects of establishing an entity and conducting business in the requisite jurisdictions. It is meant as an introduction to these marketplaces and does not offer specific legal advice. This information is not intended to create, and receipt of it does not constitute, an attorney-client relationship, or its equivalent in the requisite jurisdiction.

Neither the International Lawyers Network or its employees, nor any of the contributing law firms or their partners or employees, accepts any liability for anything contained in this guide or to any reader who relies on its content. Before concrete actions or decisions are taken, the reader should seek specific legal advice. The contributing member firms of the International Lawyers Network can advise in relation to questions regarding this guide in their respective jurisdictions and look forward to assisting. Please do not, however, share any confidential information with a member firm without first contacting that firm.

This guide describes the law in force in the requisite jurisdictions at the dates of preparation. This may have been some time ago and the reader should bear in mind that statutes, regulations and rules are subject to change. No duty to update information is assumed by the ILN, its member firms, or the authors of this guide.

The information in this guide may be considered legal advertising.

ESTABLISHING A BUSINESS ENTITY IN CANADA

"Establishing a Business Entity in Canada"
Ms. Sharon G. Druker, Ad. E.
Partner
Robinson Sheppard Shapiro LLP – Montreal

"Establishing a Business Entity in Canada"
Mr. Michael Slan
Partner
Fogler, Rubinoff LLP – Toronto

"Establishing a Business Entity in Canada"
Mr. Ryan Wachtel
Lawyer
Fogler, Rubinoff LLP – Toronto

INTRODUCTION

Bilingual and Bi-Juridical

Canada is a bilingual, bi-juridical, and multi-cultural country, composed of 10 provinces and 3 territories. English and French are federally mandated official languages pursuant to the *Official Languages Act* (Canada). French is the official language in the Province of Québec pursuant to the *Charter of the French Language* (Québec). The legal system of all provinces and territories (other than the Province of Québec) is based upon the Common Law, derived from England. Québec (like the American State of Louisiana) is governed by the Civil Law system, derived from the French Napoleonic Code, as reflected in the *Civil Code of Lower Canada* adopted in 1866 (one year prior to Confederation) and replaced as of January 1st, 1994, by the *Civil Code of Québec* (the "CCQ").

Levels of Government and Jurisdiction

Canada has several levels of government: federal, provincial/territorial, and municipal. The allocation of exclusive jurisdiction between the federal and provincial/territorial governments was established under the *British North America Act* of 1867 at the time of Confederation.

Generally speaking, most matters regarding private property, commerce and business fall under provincial/territorial jurisdiction, with the exception of sectors such as airlines, marine transportation and pollution, railways and cross-border and extra-provincial transportation and telecommunications, all of which are federally regulated.

The federal government also deals with bankruptcy, competition, foreign investment, criminal and family law, as well as an array of other matters where it is deemed to be acting "to the general advantage of Canada". This has proven to be an ongoing source of friction between the federal government and the various provinces and territories**.**

TYPES OF ENTITIES AVAILABLE IN CANADA THROUGH WHICH TO CONDUCT BUSINESS

Corporations

In Canada, one may incorporate federally under the *Canada Business Corporations Act* (the "CBCA"), or under the corporate statute of a particular province or territory. Most provinces and territories have adopted Business Corporations Acts, which largely mirror the CBCA and replace the former letters patent systems.

Generally speaking, incorporation under the CBCA is the most appropriate option if the corporation will carry on business in more than one Canadian province or territory.

Alternatively, provincial or territorial incorporation would be better if the operations will be limited to that jurisdiction, as there are savings to be achieved by making corporate filings and otherwise complying only with the provincial/territorial rules, rather than filing annual returns and other notices at both the federal and provincial/territorial levels.

Another significant factor to consider in determining where to incorporate is the fact that the majority of Canadian jurisdictions, including Ontario and Québec, do not have residency requirements for directors of a corporation. This is beneficial to foreign companies and investors that wish to carry on business in one of these jurisdictions. However, for companies incorporated federally under the CBCA or in Manitoba, there is still a requirement that a certain percentage of the corporation's directors be Canadian residents.

In recent years, a further potential disadvantage to incorporating federally was the CBCA requirement for private corporations to maintain "a register of individuals with significant control over the corporation" (an "ISC"). This is defined as any individual who, as registered holder or beneficial owner, controls any number of shares (i) carrying 25% or more of the voting rights attached to all of the corporation's outstanding voting shares or (ii) equal to 25% or more of all of the corporation's outstanding shares measured by fair market value. Two or more individuals can each be considered an ISC if they have joint ownership or control of 25% or more of the shares in votes or value.

However, in recent years, many Canadian provinces (including British Columbia, Saskatchewan, Manitoba, Nova Scotia, Newfoundland and Ontario) have amended their respective Business Corporations Acts to require corporations incorporated under those acts to maintain registers of individuals with significant control. Therefore, this is no longer a major factor that differentiates the CBCA from those provincial statutes.

The federal and provincial statutes oblige the corporation to keep information pertaining to, amongst other things, the shareholder's name, date of birth, jurisdiction of residence for tax purposes, the date the shareholder became an individual with significant control, etc. One point of distinction between the federal and provincial acts is with respect to who may access the information on the register and for what purpose. For example, both Ontario's corporate legislation and the CBCA permit certain law enforcement officials, tax investigators and other regulatory bodies/officials to access the register. However, the CBCA permits shareholders and creditors of the corporation to access the register whereas the Ontario statute does not. It should be mentioned that there is currently a bill before Canada's House of Commons which, if passed, would expand the information required to be kept on a corporation's register to include an individual's date of birth, their address for service, their residential address, and their citizenship. Further, the bill would require that certain information respecting a corporation's register be made available to the public, including each individual with significant control's name, address for service (or residential address, if no address for service has been provided), the day such individual became an individual with significant control over the corporation, as well as a description of how such individual is an individual with significant control over the corporation.

As of May 2024, the Quebec Register of Enterprises (REQ) in which all businesses operating in Quebec must disclose their shareholders, directors, officers and ultimate beneficiaries) can now be searched not only by the name of the entity but also by the name of each related individual.

It should finally be noted that Canada also has statutes governing the formation and operation of non-profit entities at both the federal and provincial/territorial levels.

ULCs

Unlimited liability companies (ULC's), which are similar to American limited liability companies (LLC's), can currently be formed only in the Provinces of Nova Scotia, British Columbia and Alberta. These entities permit flow-through treatment for profits and losses to their shareholders, although tax treaties may limit the ability to take advantage of this favourable taxation. As the Canadian version does not provide limited liability protection, it is common practice to interpose a single purpose holding corporation between the ULC and the ultimate shareholder(s).

Partnerships / Limited Partnerships

These are formed under provincial/territorial law and are generally governed by such laws and the particular partnership or limited partnership agreement (as the case may be). Typically, in a limited partnership, the general partner (which is often a shell corporation) is responsible for all the obligations and liabilities of the limited partnership. The limited partners' liability is restricted to the amount of their respective contributions, provided that they do not become involved in the management of the limited partnership. To retain limited liability protection, limited partners must remain passive investors, rather than active participants in the operation of the limited partnership.

BRIEF OVERVIEW OF STEPS TO INCORPORATE/CONSTITUTE EACH TYPE OF ENTITY

Corporations / ULCs

Both federal and provincial/territorial corporations and ULCs (where permitted) are formed by filing articles of incorporation and notices of directors and head office with the applicable governmental authority.

Unless an automatically assigned, numbered corporation is desired, the proposed name must be searched to ensure it would not result in confusion with already existing entities. In the case of a CBCA (federal) corporation, the name must also not create confusion with any registered trademarks or pending trademark applications, as intellectual property (patents, trademarks, copyright and industrial designs) is also a matter of federal jurisdiction in Canada. An expanded search, which includes trademarks and may also extend to domain names, is not required in other jurisdictions, but is advisable to ensure that a business does not later need to change its name after having built up its brand.

Once incorporated by the issuance of a certificate of incorporation by the applicable governmental authority, the corporation or ULC must then be "organized" by: (i) the issuance of shares; (ii) the adoption of general, banking and borrowing by-laws; (iii) the confirmation, replacement or addition to the board of directors by the new shareholders; (iv) the shareholders' ratification of the by-laws; and (v) the nomination by the directors of the various officers. Multiple shareholders may enter into an agreement governing the operations of the corporation or ULC. They may also shift some or all of the powers and related liabilities of the board to the shareholders (known as a "unanimous shareholders' agreement", not because all of the shareholders are party to it, but because of its effect on the decision-making process).

Partnerships / Limited Partnerships

These are generally formed by the agreement of the partners in the case of a general partnership, or of the general and limited partners in the case of a limited partnership. General partnerships usually do not require any other formality in order to be created, whereas a limited partnership typically exists only from its registration date (i.e., the date that a declaration is filed under applicable provincial/territorial limited partnerships legislation). The partnership agreement or limited partnership agreement, as the case may be, takes the place of the certificate and articles of incorporation and by-laws, and will govern the issuance of partnership units and the operations of the entity.

BRIEF SUMMARY OF REGULATION OF ENTITIES

Provincial/territorial registration

Any business created under the laws of Canada or a particular province or territory, whatever its nature (unincorporated sole proprietorship, corporation, ULC, partnership, general partnership, etc.) must be registered in its home jurisdiction and file annual and updating returns or reports. If the business wishes to operate in another jurisdiction as well, the same registration and reporting requirements must be met in that additional jurisdiction. While the definition of "carrying on business" varies slightly from one jurisdiction to another, it usually involves factual tests based on having a physical presence in the jurisdiction, including having an office, employees who report to work there, or a local telephone listing, without the mind, management and control of the entity necessarily being located there.

A trust carrying on a commercial enterprise, such as a business, investment, or real estate trust (whether or not profitable), which is not managed by a registered trustee (such as a trust company), must also register with the Québec Register of Enterprises in the same manner within 60 days of beginning its operations there.

Securities Law

Securities law is a matter of provincial/territorial jurisdiction, and each province or territory has its own regulator. Unlike the other G7 countries, there is no federal regulator akin to the U.S. Securities and Exchange Commission. It should be noted that the federal Minister of Finance strongly supports the adoption of a single national securities regulator, as does the International Monetary Fund and the Ontario Securities Commission (Ontario being Canada's largest capital market). Currently, the 10 provinces and 3 territories in Canada are responsible for securities regulation. Securities regulators from each province and territory have teamed up to form the Canadian Securities Administrators ("CSA"). The CSA is primarily responsible for developing a harmonized approach to securities regulation across the country. In recent years, the CSA has developed the "passport system", through which a market participant has access to markets in all passport jurisdictions by dealing only with its principal regulator and complying with one set of harmonized laws. It is a major step forward in improving Canada's securities regulatory system by providing market participants with streamlined access to Canada's capital markets.

In Canada, shares and other securities to be issued by any organization may only be issued through a qualified prospectus. There are broad exemptions from this prospectus requirement.

National Instrument 45-106 (adopted in Québec and Ontario as Regulation 45-106, and hereinafter "NI 45-106") sets out the prospectus exemptions and replaces the exemptions previously found in the provincial/territorial securities legislation. The national rules extend the application of the provincial and territorial securities legislation beyond shares in the capital stock of companies to all forms of securities, excluding only non-convertible debt securities. Thus, warrants, options and convertible debentures are covered by the securities rules in addition to the underlying shares, if and when they are exercised.

In order to qualify for an exemption from the prospectus requirement under NI 45-106 as a private issuer, either the charter documents of the corporation or an agreement among all security holders must: (i) permit a maximum of 50 shareholders (not counting former or current employees, directors or officers); (ii) impose restrictions on the free transfer of all securities (such as board or shareholder approval); (iii) prohibit any distribution of securities other than to the permitted categories of potential security holders (generally the founders, directors and officers and their respective family members, close personal friends and close business associates), as well as those who qualify as accredited investors (generally institutions or high net worth individuals or entities).

The accredited investor exemption will apply to individuals in several circumstances, including: (i) individuals, either alone or with a spouse, having financial assets (generally cash or securities but not real estate or non-financial personal property) with net pre-tax realizable value of over $1 million; (ii) individuals, either alone or with a spouse, having net assets of at least $5 million; (iii) individuals with net pre-tax income in each of the last 2 calendar years over $200,000, or $300,000 together with a spouse, and a reasonable expectation of higher income in the current calendar year. Individual accredited investors, except those who qualify as permitted clients (as defined in NI 31-103), must complete, and sign a risk acknowledgement form, indicating how they meet the criteria for an accredited investor. The form also requires identification of any salesperson who meets with or provides information to the investor with respect to the investment. If the accredited investor requirements are not met, the corporation will not be a private issuer and must file a prospectus in order to issue shares or deal in (*e.g.,* transfer) its shares, unless another exemption under NI 45-106 is available.

Most of the other exemptions require that a filing be made with the securities regulators in each province or territory in which affected shareholders are located, which can entail significant fees being payable in the event of a large financing. This would also pose a serious problem in the event that a potential purchaser or investor wishes to obtain an opinion that the target company is indeed a private issuer, and that all securities legislation and regulations have been complied with as a pre-condition to concluding a particular transaction, as is frequently the case in Canadian deals.

Employment Law

In general, Canadian employment law is much more protective (if not overtly biased in favour) of employees than its American counterpart. Employee rights are enshrined in the *Canada Labour Code* and the *Canadian Human Rights Act* and their various provincial and territorial counterparts across Canada. This legislation prohibits any form of discrimination in the hiring and treatment of employees. Both provincial/territorial and federal privacy laws protect an employee's right to privacy and personal information.

Acts and policies which are taken for granted in the United States (such as drug testing and video or other forms of electronic surveillance, including monitoring of electronic or telephone communications) must be carefully reviewed to ensure compliance with Canadian laws, which are more stringent in these regards. For example, Ontario employers with more than 25 employees on January 1 of any year are required to have a written policy on electronic monitoring in place prior to March 1 of that same year. The policy must provide employees with information pertaining to whether the employer electronically monitors its employees, and if so, must describe how and in what circumstances employees are monitored and the purposes for which information obtained through monitoring will be used by the employer.

In many jurisdictions (including the Provinces of Ontario and Québec), the purchaser of a business is deemed to be a continuing employer and inherits the employees and their current employment rights, including compensation, seniority, vacation and other benefits. There is no concept under Canadian law of "employment at will". An employee's tenure with a predecessor corporation will be considered for the purposes of determining termination pay required by the employment standards legislation and for determining the amount of reasonable notice which must be given on termination of employment without cause. Written employment agreements may reduce, but not entirely eliminate, the non-statutory notice and severance requirements.

Under Canadian law, non-competition and non-solicitation undertakings are seen as a restraint of trade and are more restrictively interpreted and applied in an employment context than in the context of the sale of a business. Non-competition undertakings will generally be enforced if the scope of the activities covered, the geographical territory and the period of time for which the restrictions are to remain in force are all reasonable in light of the employer's legitimate need to protect its business interests. An ambiguous restrictive covenant is *prima facie* unreasonable and will be unenforceable. The Supreme Court of Canada also recently decided that non-solicitation undertakings are not subject to the same restrictions.

The Canadian courts will not generally write down an invalid clause and will invalidate a non-compete undertaking where they find that a non-solicitation undertaking would have sufficed. In Québec, an employer cannot enforce a non-competition undertaking if the employer either terminated the employment without "serious reason" or gave the employee "serious reason" to resign from the employment (CCQ 2095).

Employers in Ontario have limited ability to use non-compete clauses. The provincial legislation prohibits employers from binding any employee to a non-compete agreement, unless the employee in question is (a) an executive, meaning that they hold a designated executive position, or (b) a seller of part or all of a business, who becomes an employee of the buyer immediately following the sale. Also, employers with more than 25 employees are required to have a written "disconnecting from work" policy in place. Disconnecting from work means "not engaging in work-related communications, including emails, telephone calls, video calls or the sending or reviewing of other messages, so as to be free from the performance of work."

Privacy Rights and Data Protection

<u>Privacy</u>

Canada's federal privacy and data protection law applicable to the private sector is the *Personal Information Protection and Electronic Documents Act* (PIPEDA). PIPEDA applies to private sector organizations that collect, use, and disclose personal data (called "personal information" (PI) in Canada) in the course of a commercial activity that takes place within a Canadian province or territory, unless the province has enacted "substantially similar" legislation. Such legislation is in force in three provinces: Alberta's *Personal Information Protection Act* (PIPA AB), British Columbia's *Personal Information Protection Act* (PIPA BC) and Québec's *Act Respecting the Protection of Personal Information in the Private Sector* (Québec's Privacy Act). Québec's Privacy Act was very recently overhauled by the adoption of the *Act to modernize legislative provisions relating to the protection of personal information* (Québec), also known as Law 25 (formerly Bill 64), which implements a major reform over the next 3 years, at the end of which the Québec rules will very closely resemble those of the European Union's *General Data Protection Regulation* (GDPR).

Notably, PIPEDA also applies to the inter-provincial and international collection, use and disclosure of PI. PIPA AB, PIPA BC and the Québec Privacy Act apply to the privacy and data protection practices of organizations within the provinces of Alberta, British Columbia and Québec respectively, which are not otherwise governed by PIPEDA. In Ontario, PIPEDA is the only privacy and data protection law applicable to private sector organizations that do not collect personal health information. Canada also has privacy and data protection laws specific to the health sector and to the public sector.

It is important to note that there are potentially major reforms coming with respect to privacy legislation in Canada. If enacted, Bill C-27, a bill currently having passed first and second reading and under consideration by the Standing Committee on Industry and Technology), would repeal Part 1 of PIPEDA (the part which sets out the legislation dealing with the protection of information in the private sector, as discussed above) and would enact in its place, the *Consumer Privacy Protection Act* ("CPPA"), which strives to align Canada with the European Union's General Data Protection Regulation ("GDPR"), the California Privacy Rights Act and Quebec's recent legislation. Like PIPEDA, the CPPA would provide principle-based rules which apply across sectors and are grounded in a primacy-of-consent framework.

Unlike PIPEDA, the CPPA would include more stringent consent requirements, as well as new exceptions to those requirements (including, but not limited to, "business activity", "legitimate interest" and "public interest" exceptions). The CPPA would also significantly increase penalties for non-compliance. The CPPA will also include right of disposal language which will require organizations to dispose of personal information upon an individual's request, subject to certain exceptions, as well as the requirement that every organization implement and maintain a privacy management program.

It should also be noted that in June 2021, the Ontario government released a white paper in which it raised concerns with several "points of weakness" it identified with the *Digital Charter Implementation Act, 2020* (former Bill C-11). These "points of weakness" included: a consent framework which could allow organizations to collect and use citizens' data for commercial purposes without their knowledge, lack of protections for children and youth, and digital rights protections which "did not go far enough" in protecting individuals from new risks, such as surveillance.

<u>Anti-spam</u>

Canada's anti-spam legislation (CASL) requires the sender of a commercial electronic message ("CEM") sent from or to a computer system in Canada:

1. to have the consent of the CEM recipient;

2. to identify the CEM sender; and
3. to provide an unsubscribe mechanism.

CASL defines a CEM as any electronic message (including an email, short message service (SMS) text or social media message) that, reasonably construed, has as one of its purposes encouraging participation in a commercial activity. A CEM includes any electronic message used to promote a business or a business opportunity. Unless a CASL exemption applies, a CEM may be sent to a person only with their prior express consent or implied consent.

Even a single, first contravention of CASL could result in a penalty of up to $10 million for a corporation and a penalty of up to $1 million for the individual involved (which includes not only the individual CEM sender but anyone who aids, induces or procures a contravention). In addition, the CASL regulators may publicly identify the sender as having contravened CASL, which would embarrass the sender and harm its reputation.

If the proposed private right of action ("PRA") under CASL comes into force, CEM senders who contravene CASL may also be subject to possible class actions and significant damages awards (based on damages for actual loss and on statutory damages of $200 per contravention up to a maximum of $1 million per day). That said, by Order in Council published June 7, 2017, the federal government indefinitely suspended the coming into force of the PRA (which had been scheduled to come into force on July 1, 2017).

Consumer Protection Legislation

Each province and territory has its own consumer protection legislation, which must be carefully examined if a foreign business which deals with the consumer market wishes to establish a Canadian presence.

Depending on the nature of the business, certain permits may be required, and certain types of contracts must be made in writing and, in some cases, in a prescribed form. Consumers have certain statutory rights of rescission (cancellation) of many types of contracts within prescribed delays, which compel the business to accept the cancellation of the contract and refund any amounts already paid.

The types of transactions governed by the consumer protection legislation and regulations of various provinces and territories include contracts of sequential performance (such as education services and fitness studios), contracts for the provision of credit, long-term leases of goods, contracts for the sale or repair of automobiles and motorcycles, and sales by itinerant vendors.

Under the *Competition Act*, which applies across Canada, a person who promotes the supply/use of a product or any business interest, or who conducts any contest, lottery, game of chance or skill, or mixed chance and skill, will be considered to have engaged in reviewable conduct where: (i) adequate and fair disclosure is not made of the number and approximate value of the prizes, the area(s) to which they relate and of any fact that materially affects the chance of winning; (ii) distribution of the prizes is unduly delayed; or (iii) selection of participants or distribution of the prize is not made on the basis of skill or on a random basis.

As of October 27, 2023, Québec has abolished its rules governing publicity contests, however Québec's French language laws continue to require that all contest rules, advertising and entry platforms be translated into French if the contest is to be made available to participants in the Québec market.

Quebec is also in the process of amending its current legislation regarding consumer loans to reinforce credit disclosure and other requirements, to prohibit certain sales by itinerant merchants and further regulate others, and to create new tipping rules.

Québec Charter of the French Language

The *Charter of the French Language* (Québec)makes French the exclusive official language in the Province of Québec, although other languages (such as English) may be used in certain circumstances and under certain conditions. Several provisions not already in effect are scheduled to do so by 2025.

Legislation and regulations are published in both French and English, and both versions have equal ranking. The Act now requires all legal persons to file all court pleadings in French, or in English with a certified French translation; however, the implementation of this provision has been suspended by the Quebec courts pending the outcome of a current legal challenge. Individuals and unincorporated entities may still use either language before the courts.

Currently any party to legal proceedings may testify in English or French (or another language, with the aid of a court-appointed interpreter). Judges may render their decisions in English, but a French translation is mandatory -.

French is the official language of government, as well as all para-public organizations, including professional orders, and all Quebec parties dealing with them must do so in French; indeed, an adequate knowledge of French is a pre-requisite to professional certification.

Employees have the right to work in French, and knowledge of another language cannot be made a prerequisite of employment or promotion, unless it can be justified by the nature of the person's duties and functions; employers are required to use all reasonable means to fill the position without requiring a second language. Job offerings must be posted in French, and if also posted in another language, it must use the same method of transmission and reach the same public target of a proportionally comparable size. All written communications with Quebec staff, all training documentation and all employment applications must be provided in French, but the employment agreement may still be in another language at the request of the employee.

As of June 1, 2025, all Quebec businesses having 25 (reduced from 50) employees must obtain a francization certificate attesting to their use of French in the workplace, which must be confirmed by triennial reports. Businesses employing 100 or more people must establish a francization committee composed of management and employees, with the mandate of ensuring French is used in the workplace.

Publicity and advertising must be in French. Other languages may be used, provided that no inscription in another language is given greater prominence than that in French. For example: signage on the sides of motor vehicles, such as delivery trucks, which venture onto the territory of the Province of Québec (even if they are licensed elsewhere) must be in French; markings on products intended to be sold in Québec must be in French but may also be in another language; and software offered for sale in Québec must be available in a French version upon no less onerous conditions. The web site of any business conducted in Québec must operate in French, regardless of its head office location or where the web site is hosted or controlled, but may also operate in other languages, if so desired. There have been several recent decisions imposing fines for breaking these rules, although the resulting adverse publicity arguably has a more immediate impact.

In order to obtain provincial/territorial registration to carry on business in the Province of Québec, the entity must register and operate under the French version of its name. If the

English element is a Canadian trademark (either registered, applied for registration or established by usage at common law) and there is no registered or French equivalent, the English trademark may be used but must be accompanied by a French element (such as, "Café Second Cup").

All commercial advertising on billboards, signs, posters, or other media having an area of $16m^2$ or more and visible from any public highway, other than a sign on the firm's premises, or on or in any public transportation or accesses thereto (including bus shelters) must be in French only. Public signs and posters on or in a vehicle regularly used to transport passengers or goods (such as a delivery truck) both within and outside Québec may be in both French and another language, provided the French is displayed at least as prominently (as defined by the *Regulation respecting the language of commerce and business*, the "Regulation").

Furthermore, all signs and posters displaying trademarks in a language other than French must also contain a French generic term, descriptive element, slogan or other information about the products and services offered. This new rule applies to all signs and posters "outside an immovable" (or building), which includes signs or posters outside premises located within a larger building (for example a store or kiosk in a shopping center) or inside a building but designed to be seen from the outside. The French content must have a "sufficient presence": it must be permanent, with similar visibility and equal legibility in the same visual field (such as size, color, lighting) to that of the non-French content, and this will be assessed based upon the position from which the signage is intended to be viewed (*e.g.,* from a sidewalk, the center aisle of a shopping center or a highway).

Adhesion (non-negotiable) contracts, as well as any annexed documents, must be drafted in French, unless the parties have first been presented a French version and have subsequently expressly agreed to contract in another language (including English). The standard Quebec language clause in any contract involving one or more Québec parties, whether or not it was in fact negotiable, to the effect that: "*The parties have requested that this Agreement and all documents ancillary thereto be drafted in English. Les parties ont exigé que la présente convention ainsi que tout document ancillaire soient rédigés en anglais*." has been expanded to include an acknowledgement that the parties were represented by counsel, and that the contract was not imposed by one party on the other, was freely negotiated by both parties, and is not in fact an adhesion contract. This requirement does not apply to contracts "used in relationships outside of Québec with parties outside Québec" but will not exempt businesses which have no presence in Quebec but deal with Quebec clients or customers. All persons in Quebec have the right to be served in French and a complainant may even seek an injunction enforcing this against any business having more than five employees if the right to French service is not respected, in addition to fines against the business.

Similarly, in order to preserve the ability of Quebec entities to participate in certain sophisticated financing transactions, documents such as loan agreements, financial instruments and contracts dealing with the management of financial risks (such as currency or rate exchange agreements, the purchase or sale of options or futures), clearing house agreements, derivatives agreements (except if with a consumer), and insurance policies which emanate from outside Quebec or not widely used there and have no French-language equivalent in Québec, are all exempt from the requirement to be drafted in French.

All deeds and other documents published at Quebec land registry offices relating to immovable (real) property and all notices relating to secured creditors of movable (personal property) published at the Quebec Register of Personal and Movable Real Rights must be filed in French, or in English accompanied by a certified French translation, failing which they will be rejected.

MATTERS TO BE CONSIDERED BY AN OFFSHORE PARTY WHEN SELECTING BUSINESS ENTITY TYPE

BARRIERS TO ENTRY

Competition Act

A foreign investor must consider the *Competition Act* (Canada), which is analogous to US antitrust legislation, when seeking to acquire an interest in a Canadian business, either by acquiring assets or shares.

The first step in any acquisition is to determine whether the acquirer and target, on a consolidated basis (including their respective affiliates), will have CDN $400 million or more in aggregate asset value or gross revenues after completing the transaction. If so, the second step is to determine whether (a) in an asset deal, the aggregate value of the Canadian assets to be acquired or of the annual Canadian sales generated by such assets exceeds the annual threshold (CDN $93 million for 2024), or (b) in a share deal, the aggregate value of the Canadian company whose shares are to be acquired or of the annual Canadian sales generated by such company exceeds the annual threshold (CDN $93 million for 2024). If so, then in both cases pre-notification is required, and the acquirer must receive the approval of the Competition Bureau before it may proceed with the transaction.

Even if the financial threshold is not met, the transaction will be reviewable if it is found not to be in the public interest or to create a concentration which would unduly reduce competition. Furthermore, the Competition Bureau always retains the right under Section 92 of the *Competition Act* to review any transaction where there is a lessening of competition. Where the transaction is non-notifiable, the Competition Bureau will generally only learn of it if a third-party complaint is made.

The statutory exceptions to the application of the *Competition Act* include acquisitions of public companies or real estate, and transactions made in the ordinary course of business.

The approval may be conditional upon the divestment by the acquirer and/or target of certain businesses, but generally speaking, the Competition Bureau favours structural remedies over behavioural ones.

Investment Canada Act

A non-Canadian establishing a new business in Canada or acquiring control of an existing Canadian business must also consider the *Investment Canada Act*. Any investment by a non-Canadian to establish a new business is subject to notification, either prior to implementation or within the next 30 days. The information required includes the identification of the investor, the projected number of employees at the end of the 2nd full year of operation, the projected amount to be invested in the new business over the first 2 full years of operation, and the projected level of annual sales or revenues during the 2nd full year of operation.

The acquisition of control (as defined by certain statutory formulae) of a Canadian business is reviewable if the assets of the entity or entities being acquired exceed certain thresholds. For members of the World Trade Organization

(WTO), and members of countries who qualify as "Trade Agreement Investors" (as that term is defined in the *Investment Canada Act*), the usual thresholds of CDN $5 million for direct investments and CDN $50 million for indirect investments are replaced by an annually prescribed amount based on a comparative of the Canadian GDP (gross domestic product) in the current year to that of the previous year. Even though transactions falling under these threshold values are not automatically reviewable, notification of the transaction to the Canadian government along with the filing of forms under the *Investment Canada Act* is still required.

Any acquisition by a WTO investor (other than a state-owned enterprise) of a Canadian business, having an enterprise value in excess of $1.326 billion, may be reviewed to determine the “net benefit to Canada.” In the case of a direct acquisition of control of a Canadian business by a WTO state-owned enterprise, the acquisition is reviewable if the target business has total assets in Canada whose book value exceeds $528 million.

Similarly, the direct acquisition of control of a Canadian business by investors controlled in certain countries having a free trade agreement with Canada (*e.g.,* the United States, the United Kingdom and the European Union) is reviewable where the 2024 enterprise value exceeds $1.989 billion.

Certain transactions are automatically reviewable without consideration of any threshold, such as the acquisition of control by a non-Canadian of any Canadian business which is a cultural business.

A “cultural business” is defined by Section 14.1 of the *Investment Canada Act* as the publication, distribution and sale of books, magazines, periodicals or newspapers in print or machine readable form (other than merely printing or typesetting them); the production, distribution, sale or exhibition of film or video recordings, audio or video music recordings, music in print or machine readable form or radio communication in which the transmissions are intended for the general public; and radio, television and cable television broadcasting undertakings, satellite programming and broadcast network services.

Lastly*,* the government has the power to block transactions involving national security issues, as well as to review transactions involving state-owned entities. With a heightened focus on national security considerations, Bill C-34, the *National Security Review of Investments Modernization Act* was passed in March 2024. The Act, which is anticipated to come into force in 2025 will require new pre-closing filings in certain "sensitive" sectors even if a transaction otherwise falls below the thresholds for mandatory net benefit review. A list of sensitive sectors will be established by yet to be published regulations accompanying the Act, but the new requirement is anticipated to apply to areas such as advanced materials and manufacturing, artificial intelligence, biotechnology, and energy generation, storage and transmission.

As of August 2022, a foreign person which is not obliged to file under the *Investment Canada Act* national security rules may do so voluntarily to obtain regulatory certainty that the transaction will not be subsequently challenged, which the regulator has the authority to do for a period of 5 years following the closing date.

Immigration

The *Immigration and Refugee Protection Act* (IRPA) (Canada) permits a foreign national to apply for a work permit, if necessary, where they will be engaging in “work” in Canada. Work permits are assessed and issued under one of the following programs: 1. International Mobility Program (IMP); or 2. Temporary

Foreign Worker Program (TFWP). The IMP allows for foreign nationals to apply for a work permit directly to Immigration, Refugees, and Citizenship Canada (IRCC). Most IMP work permit categories are based on reciprocity and multi/bilateral agreements with other countries, such as the *Canada-U.S.-Mexico Agreement* ("CUSMA"), which replaced the *North American Free Trade Agreement* ("NAFTA"), and the *General Agreement on Trade in Services*. The IMP is primarily for high-skilled and high-wage occupations, but also includes work permits under the working holiday category. Work permits issued under an IMP category are usually employer-specific, although some categories allow for open work permits, including spousal work permits and post-graduate work permits, the latter two of which are expected to be curtailed by the IRCC starting in late 2024. All employer-specific work permits under the IMP require an Offer of Employment through an online employer portal prior to the submission of a work permit application.

The Temporary Foreign Worker Program (TFWP) is managed by Employment and Social Development Canada (ESDC) and is based on employer demand to fill specific positions. Employers must demonstrate that they have made efforts to find a Canadian for the position before filing a Labour Market Impact Assessment (LMIA) application with ESDC to support the foreign national's job offer. As it is an employer-driven process, an LMIA approval allows a foreign national to apply for an occupation and employer-specific work permit. Foreign nationals who require a visa to travel to Canada must file their work permit application at a visa post. Visa-exempt applicants may apply for their work permits at the port of entry.

IRCC does allow limited categories of business visitors to work in Canada without a work permit, including, but not limited to: (i) some commercial speakers, seminar leaders and guest public speakers; (ii) some performing artists, athletes, sports officials, journalists, clergy and providers of emergency services; (iii) diplomats, consular officers and other representatives or officials of other countries; and (iv) expert witnesses or investigators.

Additional procedures apply to foreign workers who intend to work in many jurisdictions, notwithstanding that immigration is a matter of federal jurisdiction. It is an offence for Canadian employers to hire anyone who is not authorized to work in Canada.

Canada has introduced a rigorous employer compliance program that requires employers to keep all documentation for a foreign worker on file for a minimum of 6 years. All employers who have foreign national employees with employer-specific work permits are subject to an inspection or employer compliance review. Employers may be selected randomly or based on a complaint. In December 2015, the government introduced a system of administrative monetary penalties (AMPs) and varying bans on employers in order to address employer non-compliance with the TFWP and IMP employee conditions. The AMPs range from $200 to $100,000 depending on the size of the employer, the severity of the violation and the number of previous violations. Employers may also be subject to a ban on hiring foreign workers for a limited or indefinite period of time, or a warning where justification for the non-compliance is accepted.

In March 2023, the Ministry of Immigration, Refugees and Citizenship announced its intention to launch a new Federal Pathway called the Economic Mobility Pathways Pilot (EMPP). The EMPP is focused on connecting skilled refugees with potential Canadian employers. In order to apply, in addition to meeting admissibility requirements and being eligible for one of Canada's designated economic immigration programs, candidates must have one of the following: (a) a positive Refugee Status Determination from the UN Refugee Agency or a refugee-hosting state; (b) evidence the person is registered or recorded as a person of concern by the UN Refugee Agency; (c) a refugee certificate from the United Nations Relief and Works Agency for Palestine in the Near East (UNRWA); (d) evidence of being registered or recorded as a person of concern with UNRWA; or (e) evidence of temporary protected status and a copy of the completed durable solution information form. In September 2024, the IRCC announced that it would be reducing the number of study permits issued to international students based on a 10% reduction from its initial 2024 target.

Canada-US-Mexico Agreement

Under CUSMA, which replaced NAFTA on July 1, 2020, citizens of Canada, the United States and Mexico can gain quicker and easier temporary entry into the three countries to conduct business-related activities or investments. All provisions are equally available to citizens of the three countries. Permanent residents of these countries who are not citizens are not covered by the CUSMA provisions. CUSMA applies to four specific categories: (i) business visitors, (ii) professionals, (iii) intra-company transferees and (iv) persons engaged in trade or investment activities, all of whom can apply to enter Canada on a work permit or as a business visitor without the need for a LMIA.

CONCLUSION

As can be seen from this summary review, although the commercial considerations involved in establishing and operating a business in Canada are substantially the same as in other jurisdictions, specific knowledge of the particularities of Canadian business law at the federal, provincial, and territorial levels is essential to carrying on that business successfully in the “Great White North.”