AYLESWORTH LLP
BARRISTERS & SOLICITORS

Guide to Doing Business in Canada

2009 Edition

We have prepared this informative Guide for clients and potential clients who already do business in Canada or who are contemplating doing business in Canada.

A PDF version of this Guide is available on our website at:

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1. INTRODUCTION

This **Guide to Doing Business in Canada** was initially developed to assist our clients. We are pleased that it has also been very helpful for many others, including senior managers of non-Canadian business enterprises who are considering setting up a business in Canada, or who are already managing a business here or dealing with one-time legal issues arising in Canada.

In particular, it provides information for those enterprises that are considering:

- Carrying on business in Canada through a branch operation; or
- Incorporating a "subsidiary" corporation to carry on business in Canada.

This Guide describes some of the major aspects of Canadian law that you will need to consider when establishing, acquiring or operating a business in Canada. Each of the Canadian provinces and territories has its own laws governing the carrying on of business within that jurisdiction. For example, in Ontario the *Business Corporations Act*, 1990 (OBCA) is applicable to corporations incorporated in Ontario. However, the Business Corporations Acts of the provinces and territories generally reflect the provisions of the *Canada Business Corporations Act* (CBCA), which is the legislation that governs federally incorporated businesses in Canada. This Guide focuses on the applicable laws of Ontario and of Canada.

ABOUT OUR FIRM

Aylesworth LLP is a highly reputable and experienced business law firm. Since 1861, we have served businesses in the Greater Toronto Area, throughout Ontario, across Canada and around the world. At Aylesworth LLP, we seek to build long-term relationships with our clients. The more familiar we are with you and your business, the better equipped we are to meet your needs.

Visit our website at **www.aylesworth.com** for further information about our firm, our lawyers, and their specific areas of practice.

CONTACTING AYLESWORTH LLP

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GET PROFESSIONAL ADVICE

As this **Guide to Doing Business in Canada** discusses a number of complex issues in a concise and general manner, we recommend that you first consult with a lawyer from Aylesworth LLP before acting upon, or refraining from acting upon, any of the information contained in this Guide.

The information provided in this Guide is for information purposes only. It is not intended to be and shall not constitute legal advice. Although every reasonable effort has been made to ensure the accuracy of the information contained in this Guide at the time of its publication, no individual or organization involved in either the preparation or distribution of this Guide accepts any contractual, tortious, or other form of liability for its contents or for any consequences arising from its use.

2. CANADA'S POLITICAL, LEGAL AND ECONOMIC ENVIRONMENT

This brief overview of our regulatory and legislative environment provides a framework for understanding the major aspects of Canadian law that you will need to consider when establishing or acquiring a business in Canada.

OUR GOVERNMENT

Canada operates under a British-style parliamentary system of government, with an elected House of Commons and an appointed Senate. Our representatives in the House of Commons, comprising 305 Members of Parliament (MPs), are elected to serve by direct popular vote. Our Senate includes up to 105 Senators who are selected on the advice of the Prime Minister of Canada and appointed by the Governor General of Canada.

Each of Canada's 10 Provinces and 3 Territories has its own legislature. Our Provinces are Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island, Quebec and Saskatchewan. Our Territories are the Northwest Territories, Nunavut and the Yukon.

Under the Canadian Constitution, there is a division of powers between the federal and provincial governments. Generally, the federal government is responsible for national and international matters, while the provincial governments are responsible for more local matters relevant to their particular provinces/territories.

OUR LEGAL SYSTEM

The Canadian judiciary system is independent from all branches of government and the actions and conduct of government, and all statutory laws, rules and regulations are subject to the scrutiny of the courts. Our Superior Court judges are appointed by the Prime Minister of Canada through the Governor General of Canada. The courts are responsible for ensuring that all laws comply with the principles of Canada's Charter of Rights and Freedoms and that all governments conduct themselves in accordance with the Constitution.

Although statute law plays an important role in regulating the conduct of business in Canada, the English common law is the underlying foundation of Canada's legal system. The province of

Quebec, however, operates under a civil law system called the Civil Code, which is based on French civil law.

A BILINGUAL COUNTRY

The *Official Languages Act* (OLA) provides for 2 official languages in Canada: English and French. Generally, Canadians have the right to receive federal government services in either English or French. The OLA does not require that all Canadians be bilingual, but rather it respects the choices of both English-speaking and French-speaking Canadians. For the most part, English is widely used throughout the country with the exception of the province of Quebec, where French is the predominant language.

The OLA affects businesses because it requires bilingual labeling of essential information on products, such as the generic name of the product, the manufacturer's address, the ingredients and any health or safety information.

OUR ECONOMY

An affluent society, Canada is similar to the United States of America, offering a market-oriented economic system, skilled labour force, abundant natural resources and high living standards. Canada's major growth sectors include manufacturing, high technology, mining and service industries. Canada's major exports include motor vehicles and parts, newsprint, wood pulp, timber, crude petroleum, machinery, natural gas, telecommunications equipment, aluminium and electricity.

VISIT CANADA VIA THE INTERNET

To find out more about Canada's history, political system, geography, economy and other attributes, visit the Government of Canada website at http://www.canada.gc.ca. To view maps and obtain other facts about Canada, visit the Natural Resources Canada website at http://atlas.nrcan.gc.ca. For another useful site that is specifically designed for business persons in other countries, visit http://www.international.gc.ca where you will find links to government services and other useful information and resources. Also see Chapter 11 – *Other Websites of Interest* in this Guide for a list of other websites where you can find more information about the topics we discuss in the chapters that follow.

3. FOREIGN INVESTMENT CONSIDERATIONS

Foreign investment in Canada by non-Canadians is subject to a regulated review process governed by the *Investment Canada Act* (ICA), a federal department called Industry Canada and a federal agency called Investment Canada. The purpose of this regulatory system is to review significant investments in Canada by non-Canadians to ensure the investments are beneficial to Canada, typically in view of the potential for economic growth and employment.

INVESTMENT CANADA

Generally, the broader objectives of this review process are to protect Canada's national identity and Canada's cultural heritage by identifying various industries and limiting non-Canadian ownership in these industries. Furthermore, by controlling foreign ownership of specific industries, the Canadian government seeks to protect them from foreign competition. These objectives are placed in operation by an initial screening that takes place in respect of all foreign investment in Canada.

ICA Notification

The ICA provides that every foreign investor (defined by the ICA as a "non-Canadian") must file a Notification with Industry Canada (unless the investment is specifically exempt under the ICA), every time a non-Canadian begins a new business activity in Canada or acquires control of an existing business in Canada.

The ICA defines a business as an entity or enterprise that:

- Undertakes to generate revenue or is capable of generating revenue;
- Is carried on in anticipation of profit; and
- Has a place of business, employees and assets in Canada.

Generally, the ICA views the acquisition of 1/3 or more of the voting shares as an acquisition of control. For unincorporated entities, the rules under the ICA are less onerous, and an acquisition of less than a majority of the voting interests is deemed not to be an acquisition of control.

ICA Application for Review

In practice, almost all foreign investments in Canada require an ICA Notification only. Some investments, however, are considered "reviewable" (that is, they are subject to a review process) and therefore require an Application for Review, such as, if:

- The non-Canadian investor is from the United States of America, Mexico or is a World Trade Organization (WTO) member, and proposes to acquire control of a Canadian business with assets, in the case of direct acquisition, valued in excess that represents approximately $312 million (Canadian dollars) in 2009 (indexed for inflation). The WTO is further discussed below and in Chapter 4 – *The North American Free Trade Agreement* (NAFTA);

- The non-Canadian investor is from a country other than the United States of America or Mexico, and is not a WTO member, and proposes to acquire control of a Canadian business whose assets, in the case of direct acquisition, are valued at $5 million

(Canadian Dollars) or more, or in the case of an indirect acquisition through a foreign corporation, are valued at $50 million (Canadian Dollars) or more. In the case of an indirect acquisition, the assets purchased represent more than 50% of the total asset value of the transaction;

- The business being acquired in Canada is one that produces uranium, provides financial or transportation services, or is a cultural business. The ICA defines a cultural business to be a business that publishes, distributes, or sells literary products (including newspapers and magazines), film or music recordings, or broadcasting services; or

- A government decreed Order-in-Council directs that a review be carried out.

In those few cases where a review is required, Investment Canada reviews each application on a case-by-case basis to determine whether the investment is of net benefit to Canada and that the investment is not detrimental to the Canadian economy. In making this determination, Investment Canada takes into account the factors that the ICA sets out.

Advance Written Opinion

The ICA provides an opportunity for an investor to apply to the Minister of Industry for an opinion concerning any question of interpretation of the Act. Generally, investors will seek an opinion with regards to:

- The status of an individual or entity as a Canadian;
- Whether or not the investor has grounds for an early implementation of the investment; or
- General questions of interpretation.

To facilitate the review, the investor must provide supporting documentation containing the material facts.

Once the Minister has provided the applicant with a written opinion, it is binding for so long as the material facts on which the opinion was based remain substantially unchanged.

Other Federal and Provincial Foreign Investment Laws

In addition to the ICA, a number of federal and provincial laws exist to regulate foreign investment in specific industry and business sectors – including banking, communications, insurance and air travel. In effect, these laws reflect Canada’s ad hoc policy of protecting key sectors of both national and various provincial economies.

Canada has a myriad of laws regarding competition and trade practices that must also be considered. In particular, the *Competition Act* contains several criminal offences, most of which deal with instances such as: conspiracy, bid rigging, price fixing and maintenance, refusal to supply goods and services, secondary boycotting, price discrimination, promotional allowances, predatory pricing, multi-level marketing and pyramid schemes, misleading advertising, abuse of dominant position, exclusive dealing, market restrictions, and tied selling. The *Competition Act* is administered by the Competition Bureau, which is part of the federal Department of Industry. The Commissioner of the Bureau has statutory responsibility for administering and enforcing the *Competition Act*, and is also able to initiate a formal inquiry.

Any of these offences are reviewable by the federal government under the *Competition Act*. These various laws and regulations, which are beyond the scope of this Guide, are mentioned only in passing so that you can be aware of their potential impact on specific investments.

FOREIGN INVESTMENT IN CANADIAN REAL ESTATE

Non-Canadians hold a significant amount of Canadian real estate. Pursuant to the federal *Citizenship Act*, a non-resident can acquire, hold and dispose of real property in the same manner as a Canadian citizen or resident. In Ontario, the *Aliens' Real Property Act* gives non-citizens the same rights as Canadians with respect to real property. There are several vehicles through which a non-Canadian investor can hold Canadian real estate, including:

- Corporation – an association of persons created by provincial or federal statute as a legal entity;
- Partnership – a business created through an agreement by 2 or more persons that is not organized as a corporation;
- Limited Partnership – a partnership that includes 1 or more partners with limited liability in respect of the dealings of the partnership;
- Co-ownership or Joint Venture – 2 or more persons who own real or personal property or an association of persons or companies jointly undertaking some commercial enterprise respectively;
- Trust – a legal entity created by a deed made by a grantor, through which a trustee is appointed to administer the assets of the trust for the benefit of designated beneficiaries; and
- Personal Ownership – ownership in an individual's personal name and capacity.

Partnerships, joint ventures, and corporations are discussed in greater detail in Chapter 5 – *Forms of Business Organization*.

Property law is a responsibility of the individual provinces. Generally, Canadian property law has developed from English common law except in Quebec, where it is governed by the Civil Code.

As there is no constitutional protection for property rights in Canada, governments can expropriate property at any time, as long as appropriate compensation is paid. Generally, the power to expropriate is only used to allow construction of schools, parks, highways, and utilities. Expropriation is regulated by a complete code of procedure as set out in federal and provincial statutes. This code, providing for the owner of the subject land to receive appropriate compensation, must be followed whenever a government uses its power to expropriate.

Financing Real Estate Acquisitions

Financing for the acquisition of real estate is normally done through institutional lenders, which generally charge an interest rate based on Canada's prime rate. Institutional lenders normally do not finance more than 75% of the property's appraised value.

Tax Implications for Non-Residents

There are various income tax implications for non-residents holding Canadian real property:

- A statutory withholding tax of 25% applies on the gross rents on real property paid to non-residents. If the investor's country has signed a bilateral Income Tax Treaty with Canada, however, this rate may be reduced.

In addition, Canada's federal *Income Tax Act* contains rules that allow certain non-residents to avoid withholding tax by electing to pay tax at normal rates on net rental income. There are also special withholding requirements in situations where a purchaser acquires Canadian real property from a non-Canadian.

- On the disposition of Canadian real property, non-residents are generally subject to the capital gains tax. For dispositions of capital property, the inclusion rate is generally 50% and the maximum tax liability to a non-resident (based on current marginal tax rates) would be approximately 25%. The capital gain is computed as the difference between the proceeds of disposition and the adjusted cost base of the property.

On a disposition of a real property, in addition to realizing a capital gain on the land, there may be a recapture of tax depreciation (referred to as Capital Cost Allowance, or CCA) taken in previous years on buildings or other depreciable property situated on the land. Recaptured CCA is fully taxed at normal rates. It is also important to note that CCA cannot be claimed if a rental property is incurring losses. Consequently, CCA cannot be claimed to either create or increase a rental loss.

- Most provinces impose a land transfer tax upon the transfer of real property. The tax rate differs from province to province. Generally, the rates range from 0.5% to 2% of the consideration paid to effect the transfer of real property. Certain provinces charge this land transfer tax on certain long-term leases and financing documents as well.

Chapter 6 – *Tax Considerations* provides further discussion of personal and corporate income tax considerations for non-Canadians.

Leasing

Another means of acquiring real property is through leasing. While there are various forms of leases, generally the lessor and lessee enter into a lease agreement for exclusive possession of lands, space, property or a building for a specified period of time, usually for specified rent or compensation. At the end of the lease period, the owner has the absolute right to retake, control and use the lands, space, property, or building, as the case may be.

ENVIRONMENTAL LAW

Matters relating to the environment are regulated at the federal, provincial and local levels in Canada.

In Ontario, the *Environmental Protection Act* (EPA) provides for administrative orders to be issued against anyone who owns or has control of a contaminated property, whether or not they

are responsible for the said contamination. However, recent amendments to the EPA provide for limited protection from statutory liability.

Generally, provinces in Canada have 2 means for the protection of the environment with respect to commercial and industrial operations. These are: a general prohibition against the discharge of contaminants as well as a system of permits or certificates required for activities which may impair the environment. In Ontario, the EPA prohibits unlawful discharges of contaminants into the environment and any parties that are responsible for such unlawful discharges are obligated to notify regulators immediately, and may often face offence liability, environmental penalties and administrative orders. In order to avoid such liability, all operational discharges must be approved by the Ministry of the Environment.

On a municipal level, by-laws have been passed to regulate matters such as noise pollution and sewer discharges, and in the event that the laws are not complied with, substantial fines may apply.

Directors and officers of a corporation have specific obligations under federal and provincial environmental laws to ensure that the corporation complies with the necessary laws. The *Canadian Environmental Protection Act, 1999*, provides that directors and officers have a statutory duty to take reasonable care to ensure that the corporation complies with all requirements under the Act.

GET PROFESSIONAL ADVICE

The preceding discussion is a summary overview of foreign investment considerations. Given the complexity of Canadian law, professional advice is recommended.

4. THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)

The *North American Free Trade Agreement* (NAFTA) and the free trade agreements that Canada has entered into with other countries offer significant opportunities and benefits for companies planning to expand their operations into Canada.

NAFTA

By establishing a continental free trade area between Canada, the United States of America and Mexico, NAFTA succeeded in creating one of the largest free trade blocks in the world – providing companies with potential competitive advantages across the entire North American market.

Coming into force on January 1, 1994, NAFTA was established under the *General Agreement on Tariffs and Trade* (GATT) and effectively extended the benefits of the 1989 *United States of America-Canada Free Trade Agreement* to include Mexico.

NAFTA's Objectives

NAFTA's main objective is to substantially remove all duties (tariffs) on goods both originating in and sold throughout Canada, the United States of America, or Mexico. To accomplish this, certain duties were eliminated in 1994 when the Agreement took effect, and others are being phased out over periods of 5, 10 or 15 years. While NAFTA eliminates all tariffs, Canada continues to apply federal and provincial sales and excise taxes to imports from both the United States of America and Mexico.

NAFTA also aims to ensure a predictable commercial environment for business planning and investment. Each country is obliged to treat investors from the 2 other countries in the same manner as its own investors. In other words, investors from the other countries are to be treated no less favourably than domestic investors are treated. This obligation is applicable whether the investor is establishing a new business, acquiring an existing business, or dealing with the conduct, operation or sale of a business.

Each of the 3 NAFTA countries is also prohibited from requiring minimum levels of equity in a business (unless the business competes in certain specified industries) located in its territory to be held by its nationals, or from requiring an investor, by reason of nationality, to sell or dispose of an investment in its territory.

Qualifying Goods

The preferential tariff treatment that NAFTA provides for certain goods applies only to those goods that meet what are called the "rules of origin", as prescribed by NAFTA.

Generally, these rules are as follows:

- Goods must originate, or be "wholly obtained or produced" in Canada, the United States of America, or Mexico, or any combination of these 3 countries;

- Goods are also considered to originate in one of the countries if such goods have been "transformed" in that country and the "transformation" results in a change of tariff classification. NAFTA sets out determinative rules regarding the processing or assembly

of goods. Goods will qualify under a specific classification if they have not subsequently undergone any processing or assembly outside of a NAFTA country that further enhances either their condition or value. This determination is referred to as the "subsequent processing test". An anti-avoidance provision prescribes that mere packaging, dilution or superficial processing that is undertaken to circumvent NAFTA rules will not qualify the goods as having originated in a different country other than the country of origin;

- The goods must be shipped to the other country without having "entered the commerce of any third party". In other words, the goods can be shipped through a third party, but such goods cannot be involved in any other commercial transactions with a third party;

- If the goods are shipped through a third party, they must not undergo operations other than unloading, reloading or any necessary operation to transport them or to preserve them in good condition; and

- The export documents must show that the goods are to be shipped from one party in the country of origin to the other party at the final destination.

Even when transformation fails to result in a change in tariff classification – and provided the goods do not infringe the subsequent processing test – the goods are considered to have been transformed and therefore to have originated in the territory where the value of the materials originating in one country plus the direct cost of assembling the goods constitutes not less than 50% of the value of the goods when such goods are exported to the territory of another party (NAFTA provides complex definitions of "value of goods" and "direct cost of assembly").

In addition, accessories to certain equipment are considered to originate in any of the countries under NAFTA where:

- The accessories are delivered with the equipment and constitute "standard equipment". In this instance, the accessories will also be deemed to have the same origin as the equipment, provided that the quantities and values of such accessories are "customary" for that equipment.

Settlement of Disputes

NAFTA contains 2 dispute-settlement mechanisms:

- A general dispute settlement mechanism that sets a consultative framework for settling disputes but, with limited exceptions, is non-binding; and

- An agreement that provides for a tri-national panel to confer binding settlement of disputes and any cases involving anti-dumping and countervailing duties. Interested parties and their counsel are permitted to participate in the panel review process. No appeal from a panel decision is available.

Countries Outside the NAFTA Free Trade Zone

Each country under NAFTA continues to impose its own tariffs for any goods that are imported from countries outside the NAFTA free trade zone, as well as for those from a party in one of the NAFTA partners where the goods fail to meet the rules of origin test.

OTHER FREE TRADE AGREEMENTS

In addition to NAFTA, Canada has also entered into free trade agreements with various other countries, which are more particularly detailed below.

Chile

The Canada-Chile free trade agreement is seen as a first step toward admitting Chile into NAFTA. The objectives of the agreement with Chile are to reduce or eliminate tariffs for industrial goods traded between the 2 countries as well as to put into place mechanisms to protect Canadian investments in Chile and to resolve disputes.

Costa Rica

The Canada-Costa Rica Free Trade Agreement seeks to eliminate tariffs on key Canadian exports. It also seeks to simplify regulations and ease border procedures for Canadians doing business in Costa Rica.

Israel

The Canada-Israel Free Trade Agreement seeks to improve market access for agri-food products of export interest to both Canada and Israel and eliminate virtually all tariffs on industrial goods.

Colombia

Colombia is a strategic destination for Canadian direct investment in areas such as mining, oil exploration, printing, shoe manufacturing, and education. The Canada-Colombia Free Trade Agreement has reduced barriers to trade and expanded opportunities for Canadian exporters and investors by enhancing market access, eliminating tariffs on Canadian exports to help make Canadian goods more competitive and ensuring a level playing field for Canadian businesses vis-à-vis their competitors.

Peru

The Canada - Peru Free Trade Agreement seeks to promote a more stable and predictable investment environment in key sectors of interest, such as natural resources and infrastructure. Canada is also a significant foreign direct investor in Peru’s mining and financial services sectors. This free trade agreement will also expand Canada’s engagement and support of development in South America.

Europe

The free trade agreement between Canada and the European Free Trade Association includes the countries of Iceland, Norway, Switzerland and Liechtenstein. These countries are significant economic partners for Canada, being Canada’s seventh-largest merchandise export destination. This Agreement emphasizes tariff elimination and will benefit Canadian industry by eliminating or reducing duties on a range of merchandise exports and agricultural products.

WORLD TRADE ORGANIZATION (WTO)

The WTO came in effect on January 1, 1995, replacing the General Agreement on Tariffs and Trade, or GATT. The WTO comprises most of the developed world.

Based in Geneva, Switzerland, the WTO is the only international organization that deals with the rules of trade among member nations. The WTO members, comprising 153 countries as of July 23, 2008, have ratified the agreements in their individual parliaments.

The WTO:

- Administers the WTO trade agreements;
- Coordinates cooperation among international organizations;
- Oversees forums for resolving trade disputes;
- Monitors national trade policies; and
- Provides technical training and assistance to developing countries.

The *Investment Canada Act* (ICA), discussed in Chapter 3 of this Guide – *Foreign Investment Considerations*, reflects many of the same principles of the WTO. The purpose of the ICA is to encourage investment in Canada by Canadians and non-Canadians in order to contribute to Canada's economic growth and create employment opportunities. The ICA also provides for the review of significant investments in Canada by non-Canadians to determine whether the investment is of "net benefit to Canada" and its effect on the Canadian economy; that is, the investment must not be detrimental to the Canadian economy.

GET PROFESSIONAL ADVICE

The preceding discussion is a summary overview of NAFTA and other free trade agreements that benefit companies that plan on doing business in Canada. Given the complexity of these agreements and the related regulations, professional advice is recommended.

5. FORMS OF BUSINESS ORGANIZATION

When establishing business operations in Canada, companies can consider several different types of organizations, each with its own advantages, business processes and tax considerations.

CARRYING ON BUSINESS IN CANADA

Non-residents will sometimes use their existing non-resident business to establish a "branch" or a permanent establishment of the foreign-owned parent organization in Canada. Or, they may decide to create a new business corporation, called a "subsidiary," under the federal *Canada Business Corporations Act* (CBCA) or the corresponding Business Corporations Act of a province or territory. For example, the *Business Corporations Act* of Ontario (OBCA) is applicable to corporations that incorporate in the province of Ontario.

From a Canadian tax perspective, it is often preferable to carry on business in Canada through a subsidiary corporation rather than through a branch.

In certain instances, other forms of business organization may also be suitable, such as:

- Co-operative Corporation – a corporation that is organized and operated on co-operative principles, as set out in the legislation that governs this form of organization;
- Joint Venture – an association of companies jointly undertaking some commercial enterprise;
- Limited Partnership – a partnership that includes 1 or more partners with limited liability in regards to the dealings of the partnership;
- General Partnership – a business owned by 2 or more persons that is organized as a partnership and not as a corporation; and
- Licensing, distribution, agency or franchising arrangement – typically contractual arrangements between the non-resident and a Canadian entity.

INCORPORATING IN CANADA

The Business Corporations Acts of the provinces and territories dealing with incorporation generally reflect the provisions of the CBCA. All of these Acts have in common the following provisions for incorporation:

- A corporate name that is distinctive and does not cause confusion with another corporation's name, trade name or trade-mark. The corporate name must also include a legal element, such as Ltd. (i.e. Limited) or Inc. (i.e. Incorporated);
- Share capital, which may be a number of different classes of shares and unlimited in the number of shares that may be issued;
- A minimum number of directors (at least 1) unless the corporation is a public corporation; and

- Limited liability for the shareholders – unless the corporation is an *Unlimited Liability Company* (ULC). ULCs are discussed later in this chapter.

The CBCA, the OBCA and many of the other provincial statutes permit the use of French and English versions of a corporate name.

The CBCA and the OBCA permit federal and Ontario corporations to carry on any business without restriction. Of course, other federal and provincial legislation will have to be considered in view of the additional regulations for specific industry segments (for example, the regulations for financial services, including banking, insurance, trust companies and real estate brokerage).

Across Canada

A corporation, whether incorporated federally or in a province or territory of Canada, can carry on business in any province or territory of Canada. However, each of the provinces and territories requires extra-provincial registrations for the licensing of corporations that are incorporated federally or in another province or territory. For example, if a corporation in Alberta wants to carry on business in Ontario, it must register in Ontario. The Ontario filing process is relatively simple. Some other provinces have more complex requirements.

Federal corporations have a significant advantage: every province must permit a federal corporation to carry on business in its province and permit the federal corporation to use its corporate name there. However, the name of a provincial corporation may not be acceptable in another province because another corporation there may have a similar or the same name. A federal incorporation may also be regarded as being more prestigious if the corporation has significant dealings with non-Canadians.

The Filing Process

Recent changes to the CBCA and to the organization of the Corporations Branch of Industry Canada in Ottawa have reduced the filing fees for federal incorporations and sped up the filing process. In addition, the incorporating documents of federal and Ontario corporations can now be filed electronically. These documents are called the “Articles of Incorporation”.

The government filing fees are currently \$250 for a federal corporation and \$360 for an Ontario corporation (\$200 and \$300 respectively for electronic registrations). There is also a fee of approximately \$55 per name for the name-search report, which must be filed with the Articles of Incorporation. While this name-search report indicates the availability of a name, it does not guarantee its distinctiveness.

The Board of Directors

The OBCA and the applicable Acts of most other provinces and territories require that a majority of the board of directors (or at the minimum 1 director where a corporation has less than 3 directors) of a corporation be “Resident Canadians”. Resident Canadians are primarily Canadian citizens who are residents of Canada or landed immigrants. As Nova Scotia, New Brunswick, British Columbia, Quebec and the Yukon are the exceptions to this requirement, non-residents may wish to incorporate their Canadian business under one of these provincial statutes to take advantage of this exception.

On the other hand, recent amendments to the CBCA have relaxed the residency requirements for directors of federally incorporated companies. As a result of these changes, only 25% of the directors of a federal corporation must be resident Canadians. If a corporation has less than 4 directors however, at least 1 director must be a resident Canadian. There is an exception: a majority of the directors of the corporation must be resident Canadians if a corporation engages in an activity in Canada in a prescribed business sector, or if a corporation is required to attain or maintain a specified level of Canadian ownership or control.

Public vs. Private Corporations

There is no general statutory distinction between a private corporation and a public corporation for provincially incorporated corporations in Ontario or federally incorporated corporations. While the securities laws of each province do provide for exemptions from the requirement to file a prospectus with the applicable securities commission, generally these exemptions apply to closely held Canadian corporations, i.e., those in which the stock is not widely dispersed and a few shareholders are in control of the corporation to their own benefit. See Chapter 10 – *Public Securities Legislation* for more details.

Government Assistance

The federal and provincial governments have substantially reduced the grants or favourable loans that were once more readily available to Canadian businesses. If this assistance is available, generally only corporations that are incorporated within Canada can access it.

However, a number of federal and provincial agencies in Canada encourage business development and expansion. These agencies help eligible businesses in a variety of ways (from feasibility analysis to financial participation). Governments are usually interested in ventures that have local and national economic benefit. Areas of particular interest include development of technology, employment, retraining and skill development, and export sales. These agencies usually require the preparation, submission and discussion of business proposals.

The Industry Canada website is helpful for locating traditional or alternative sources of private sector and government financing for a small business. Go to www.ic.gc.ca to find out more about the available provincial and federal assistance. The site also offers an extensive directory of Canadian financial providers, a powerful search engine to locate financial providers, information on different types of financing and financial providers, and tips to help you secure financing.

The Canada Small Business Financing Program is a loan guarantee program delivered by financial institutions across Canada. Interested persons are encouraged to communicate directly with the financial institution of choice to discuss how this program can respond to their specific financial requirements.

Tax Considerations

A business corporation that is incorporated either federally or provincially in Canada is a resident of Canada for tax purposes and pays tax on its earnings in Canada. Profits are distributed through dividends. Dividends paid to non-residents are subject to withholding tax. Losses are only available to reduce taxes on Canadian earnings.

For tax purposes, the Canadian tax system does not consolidate the earnings of a group of corporations with common ownership. This is the case whether the corporations are all Canadian or whether some are Canadian and some are foreign owned. Unlike partnerships, corporations are not flowthrough entities from a tax standpoint – although there is a limited exception for U.S. tax purposes.

The tax considerations for corporations are further discussed in Chapter 6 – *Tax Considerations*.

UNLIMITED LIABILITY COMPANIES (ULCS)

There are currently 3 types of Unlimited Liability Companies (ULCs) in Canada: the *Nova Scotia Unlimited Liability Company* (NSULC), the *Alberta Unlimited Liability Corporation* (ABULC), and the *British Columbia Unlimited Liability Company* (BCULC).

Nova Scotia Unlimited Liability Company

The *Nova Scotia Unlimited Liability Company* (NSULC) is a corporation incorporated under the *Nova Scotia Companies Act* (NSCA). NSULCs are becoming increasingly popular with investors from the United States of America who are acquiring Canadian businesses or establishing new Canadian businesses. They offer distinct tax advantages because, under U.S. income tax law, they are considered flow-through entities, while the NSULC pays tax on its Canadian earnings like any other corporation in Canada.

The liability of its shareholders is not limited to the capital contributed for its shares. Therefore, one downside of the NSULC is that in the event of a shortfall during windup, its shareholders face the potential of unlimited liability for the obligations of the company. However, its shares are usually held by an entity of the United States of America that has limited liability.

Alberta Unlimited Liability Corporation

On May 17, 2005, the *Business Corporations Act* of Alberta was amended to allow for the incorporation of the *Alberta Unlimited Liability Corporation* (ABULC). The relatively low tax rates in the province of Alberta provide for a strong business and commercial sector in Alberta, thus increasing the demand for ABULCs. Shareholder liability provisions for ABULCs are different from those that apply to NSULCs. The ABULC provides that shareholders are to be jointly and severally liable with the ABULC for its liabilities, acts or defaults to an unlimited extent.

British Columbia Unlimited Liability Company

On March 29, 2007, the *Business Corporations Act* of British Columbia was amended to permit a company to be incorporated in British Columbia as an unlimited liability company (ULC). A BCULC has several advantages over ABULCs and NSULCs. For example, in an ABULC, the liability of each shareholder is unlimited and is joint and several in nature during the ABULC's existence and operation. However, the liability of shareholder of a BCULC arises only if the BCULC is unable to pay its debts and liabilities on dissolution or liquidation. An ABULC is also required to have 25% of its directors resident in Canada, whereas no such requirements exist for a BCULC.

ULC Tax Benefits

For U.S. tax purposes, the significant tax advantages of an ULC include:

- A foreign tax credit for taxpayers of the United States of America for the tax paid in Canada by the ULC; and
- An increase in current values for U.S. tax purposes of the value of depreciable property of the acquired business (including goodwill), if the ULC acquires a Canadian business either as a share purchase or an asset purchase.

There are a number of significant differences between the ULCs. If you are considering incorporating under an ULC, professional advice is recommended in order for you to be fully informed of these differences and decide which jurisdiction better suits your business requirements.

Impact of the Canada-U.S. Income Tax Convention on ULCs

The Fifth Protocol (the "Protocol") to the *Canada-U.S. Income Tax Convention* came into force on December 15, 2008.

The Protocol may negatively impact U.S. investors who have a ULC in Canada. Prior to the Protocol, the payment of dividends by a ULC to a U.S. parent corporation were entitled to a reduced rate of withholding tax. However, when the Protocol comes into effect on January 1, 2010, Canadian withholding tax will apply at a 25% rate on the payment of dividends and interest by the ULC to U.S. residents.

As a result, it may be necessary to reorganize the ULC in a more tax-efficient manner to avoid the denial of Treaty benefits for ULCs.

CO-OPERATIVE CORPORATIONS

A co-operative corporation is one that is organized and operated on co-operative principles, as set out in the legislation that governs this form of organization.

Both the Ontario and federal governments permit the incorporation of corporations that are organized on co-operative principles. The earnings may be distributed as a patronage return to customers and suppliers (who are members) based on their patronage with the co-operative.

For tax purposes, these patronage returns may be deducted from the earnings of the Canadian co-operative (unlike a dividend paid by a business corporation to its shareholders out of its after-tax income). For non-residents supplying goods to the Canadian market, opportunities may exist to take advantage of these provisions by supplying the goods through a corporation that qualifies as a co-operative under Canadian tax legislation.

JOINT VENTURES

Joint Ventures are co-ownership arrangements, generally involving 2 or more corporations, to undertake a business or investment activity for a limited period of time. Typically, after the activity is completed, the Joint Venture is disbanded.

Joint Ventures are popular in certain sectors of the economy and are formed primarily for income tax reasons. Like partnerships, there are no restrictions for non-residents to participate in Joint Ventures in Canada. A non-resident can hold the Joint Venture interest through a Canadian subsidiary. However, if a foreign corporation holds the Joint Venture interest directly, this constitutes a branch operation for the non-resident corporation in Canada.

Joint Ventures are not separate entities for tax purposes. Rather, their profits or losses flow through to the Joint Venture participants, and it then becomes the responsibility of the Joint Venture participants to report the allocated income or claim the loss on their own income tax returns.

To Incorporate Your Business

If you are ready to incorporate your business, Aylesworth LLP can help you incorporate under both the OBCA and the CBCA. If required, with all requisite information, we can provide this service within 24 hours.

Visit our website at www.aylesworth.com for further information about Aylesworth LLP, its lawyers and their specific areas of practice. If you wish to contact one of the lawyers of Aylesworth LLP to discuss your plans, please contact the person directly by telephone or by email.

BRANCH OPERATIONS

Each of Canada's Provinces and Territories has extra-provincial licensing requirements for business entities that are created under the laws of a different province/territory or another country. For example, in Ontario, a business entity created under the laws of a foreign country must obtain permission from the Companies Branch of the Ministry of Consumer and Business Services, as well as an extra-provincial license, before it can carry on business or own real estate in Ontario. If this license is not obtained, there are penalties. In addition, an unlicensed business entity cannot sue in the Ontario courts.

The legislation dealing with this licensing requirement varies, depending on the jurisdiction in which the business entity was established and whether the entity is a corporation, a partnership or a limited partnership. When the business is operated as a branch of the foreign entity, the non-resident shareholders will not have the benefit of limited liability at the Canadian level.

Filing Requirements

Foreign corporations that plan to establish a branch operation in Canada must file:

- A name search report from the automated name search system owned by the Department of Consumer and Corporate Affairs, Canada, dated not more than 90 days prior to the submission of the application;

- A certificate of status, signed by an official of the governing jurisdiction who is authorized to so certify, setting out the name of the extra-provincial corporation, the date of its incorporation or amalgamation, the jurisdiction to which the corporation is subject, and that the corporation is a valid and subsisting corporation; and

- An appointment of an agent for service (to handle legal proceedings in Ontario), duly executed by the corporation.

These additional requirements are important considerations when determining whether to establish a branch operation or a subsidiary corporation.

Tax Considerations

A branch operation must pay tax as a permanent establishment on its Canadian earnings. There may be an opportunity to use losses from the Canadian branch to reduce the earnings of the foreign parent. However, a branch operation will have to file a more complex tax return in Canada than that of a subsidiary corporation because the earnings and expenses have to be allocated between the branch and the non-resident entity.

PARTNERSHIPS

Partnerships are a form of business organization involving 2 or more people or corporations combining to carry on a business or trade for profit. In Ontario, a non-resident can establish a general partnership or a limited partnership.

Partnerships are popular in certain sectors of the economy. They are most often found in the professional services, such as lawyers or accountants, where there are restrictions on incorporation. Some real estate ventures may be partnerships, usually limited partnerships, where there is a flow-through of earnings, as well as a flow-through of partnership losses and depreciation to the partners for tax purposes.

Like Joint Ventures, there are no restrictions for non-residents to participate in partnerships in Canada. A non-resident can hold the partnership interest through a Canadian subsidiary. However, if a foreign corporation holds the partnership interest directly, this constitutes a branch operation in Canada for the non-resident corporation.

General partnerships and limited partnerships created under the laws of another province/territory or country may carry on business in Ontario. However, they will have to meet the appropriate filing and licensing requirements, which are equivalent to the extra-provincial filing or license requirements for a corporation.

A limited partnership has at least 1 general partner (which can be, and usually is, a corporation) and 1 or more limited partners. The liability of the limited partners is limited to the amount of their investment in the partnership. Some limited partnership agreements can require additional capital contributions from the limited partners. The liability of the general partner (as is the case for partners in a general partnership) is unlimited.

If a foreign entity operates a branch through a Canadian partnership, the non-resident partners will not have the benefit of limited liability at the Canadian level – unless the foreign partners are limited partners.

Filing Requirements

In Ontario, the partners must complete and file an information return, indicating:

- The name of the firm under which the limited partnership is to be conducted;

- The general nature of the business of the limited partnership;
- The partners' names and addresses;
- The address of the limited partnership's principal place of business; and
- Notification if the persons carry on business under a name that is different from their legal names.

Filing this return creates the limited partnership in much the same way that filing Articles of Incorporation creates a corporation. However, a general partnership must file only a notification of its name and the names of its partners. This notification requirement is part of the Ontario legislation that governs business names, the *Business Names Act*, which requires a notification to be filed when a person or corporation carries on business under a name that is different from its legal name. A general partnership is created by agreement between the partners whether or not a filing is made.

Tax Considerations

Unlike corporations, partnerships are not separate entities for tax purposes. Rather, their profit or losses flow through to the partners – and it then becomes the responsibility of the partners to report the income or claim the loss on their own income tax returns. That is, the net loss or profit is allocated to each of the partners, who then must report this portion on their own personal income tax return.

LICENSING, DISTRIBUTION AND FRANCHISING

Non-residents of Canada can use licensing, distribution and franchising arrangements to enter the Canadian marketplace and derive income from the use of their property in Canada. These are typically contractual arrangements between the non-resident and a Canadian entity. The Canadian entity may be owned by third parties and the non resident may also have an ownership interest in it.

These arrangements include:

- Licenses to exploit intellectual property – such as patents, copyrights, industrial designs, trade-marks, confidential information, packaging and labeling;
- Agency or distribution agreements with Canadian entities for the sale of products in Canada; and
- Franchising agreements to provide a product or service in Canada using the intellectual property owned by the franchisor (for example, trade-marks, designs and business systems).

INTELLECTUAL PROPERTY

Patents

Patents cover new inventions or any new and useful improvement to an existing invention. The process for obtaining a patent in Canada is detailed in the federal *Patent Act*. The basic principle

of the *Patent Act* is that a patent is only granted to an original inventor or to his or her legal representatives. Canada does not require that a product be patented, however it is an offence to mark an article as "patented" if it is not so.

Trade-marks

The registration of a trademark is advisable because an applicant who registers a mark under the *Trade-marks Act* is granted the exclusive right to use the mark throughout Canada. Once a trade-mark application has been approved, the trade-mark is registered for a term of 15 years with the possibility for renewal. Registration can be refused for a number of reasons, for example if the trade-mark is the name or surname of an individual, is misleading, is too general, is merely descriptive or if it can be deemed to be confusing with an already registered trade-mark.

Copyright

The federal *Copyright Act* gives exclusive right to the copyright holder of any original literary, dramatic, musical or artistic work, to control the copying and other commercial exploitation of that work. The copyright holder has the exclusive right to publish, produce, reproduce, translate, broadcast, adapt, perform or cause to be performed, or produce the copyrighted works. Registration is not necessary to create copyright in a particular work, but it does serve as evidence of ownership should copyright infringement arise. Anyone using, renting, selling, distributing or importing a work without the owner's consent infringes the copyright and may be subject to criminal penalties.

Domain names

The *Canadian Internet Registration Authority* (CIRA) is responsible for the ".ca" system, which is governed by Canadian law. In order for a company to register a ".ca" name, certain requirements must be met in order to ensure that the ".ca" names remain a public resource for Canadian's social and economic development. The person who wishes to register a ".ca" domain must firstly contact a certified registrar to submit a registration request to CIRA. Domain names are granted on a first-come first-served basis. The applicant must also conduct a WHOIS search in order to ensure that the desired domain name is available, and to ensure that they are not infringing on any third-party intellectual property or other rights.

Protection of Intellectual Property

Canada has modern federal legislation protecting trade-marks, copyrights, patents, industrial designs, integrated circuit topographies, and plant breeders' rights. Registration in Canada extends intellectual property protection to all of Canada. Intellectual property is registered with the *Canadian Intellectual Property Office* (CIPO), which is a special operating agency associated with Industry Canada. CIPO is responsible for the administration and processing of the greater part of intellectual property.

The application form differs for each type of intellectual property. For example:

- Trade-mark registration usually involves a preliminary search (performed by a trade-mark agent) of existing trade-marks, an application, an examination of the application by the Trade-marks Office, the publishing of the application in the Trade-marks Journal, time for opposition (challenges) to the application, allowance and registration (if there is no opposition).

- The registration process for a patent involves many steps that are highly technical in nature.

- Copyright can exist by virtue only of creation of the work, but can, for greater certainty, also be registered. To register a copyright, you must file an application with the Copyright Office of CIPO and pay a prescribed fee.

Canada is a signatory to the *Paris Convention for the Protection of Industrial Property* and the *Berne, Universal Copyright and Rome Conventions*.

FRANCHISES

Another way of conducting business in Canada is to establish a franchise operation. In a franchise relationship, the owner of the franchise (franchisor) issues a license to the person (franchisee) to sell products and/or services under the trade-mark of the franchisor. A franchisee must usually comply with specified standards of operation as well as pay an initial fee and royalties from its continuing operations. Many businesses in the retail and hospitality areas operate as franchises.

Setting up a franchise is one of the most successful ways of starting a new business as franchising provides an excellent opportunity for rapid expansion without an enormous outlay of capital. This fast market penetration makes it a very attractive proposition to many entrepreneurs. Franchising offers an opportunity for individuals to own their own business while minimizing the risk that is inherent in opening an entirely new business on their own.

In Canada, all franchises must comply with federal competition and trade-mark legislation as well as the applicable federal and provincial legislation and regulations for carrying on a business in that jurisdiction.

Franchising in Ontario

Only 2 provinces have passed specific franchise legislation – Alberta and Ontario. Their legislation is similar. In Ontario, the *Arthur Wishart Act 2000* (AWA) deals specifically with the franchise sector and applies generally to franchise agreements entered into on or after July 1, 2000.

The AWA sets out that every franchise agreement imposes on each party a duty of “fair dealing” in its enforcement and performance. Fair dealing is defined by the AWA as the “duty to act in good faith and in accordance with reasonable commercial standards.” Franchisees also have the right to associate with each other and form an organization of franchisees.

Disclosure Document

The franchisor must provide a disclosure document at least 14 days before the agreement is signed or the initial payment is made. This disclosure document must contain:

- All material facts (as defined in the AWA);

- Financial statements;

- Copies of the franchise agreement to be signed by the prospective franchisee;

- Copies of other agreements relating to the franchise to be signed by the prospective franchisee; and
- Certain statements as prescribed by the Regulations under the AWA.

Recourse

The AWA provides for rescission by the franchisee. The Agreement can be revoked if:

- The franchisor fails to provide the disclosure document; or
- The contents of the disclosure document do not meet the requirements of the AWA.

The AWA also provides that a franchisee is entitled to damages for misrepresentation about matters such as the projected earnings of the franchise, attendant fees/costs to set up a new franchise or buy the license of an existing one, or if the disclosure document is not delivered.

Those who breach the duty of fair dealing or interfere with the freedom of franchisees to associate in a disclosure document are liable. Subject to certain exceptions, liability for misrepresentation in a disclosure document is imposed not only on the franchisor, but also on any associate, agent, or broker of that franchisor.

Franchise Law

Despite the obvious business advantages of a franchise operation and the beneficial effects of the new franchise legislation, purchasing a franchise is a very big decision that will take an enormous amount of time to research and decide upon. As franchising is a specialized area of law, it is important to seek the advice of a lawyer with extensive knowledge in this area.

GET PROFESSIONAL ADVICE

Determining the most appropriate legal organization for a Canadian venture is a critical decision for the non-Canadian enterprise that is considering doing business in Canada. The appropriate form of operation for any particular business will vary from case to case, depending not only on the Canadian tax implications but also on general business concerns and the tax consequences in the foreign jurisdiction where the investment originates.

It is also critical for non-residents to have proper commercial contracts with Canadian entities prior to doing business in Canada. Before going forward, we recommend that you get legal advice on the various legal and tax implications of the form of business you are considering.

6. TAX CONSIDERATIONS

This chapter provides a general overview of the tax implications of corporate and personal income for individuals and businesses that are considering doing business in Canada. As the federal and provincial tax statutes are complex and the provisions frequently change, professional advice is recommended.

FEDERAL AND PROVINCIAL TAXATION

In Canada, both the federal and provincial governments impose corporate and personal taxes on income, including taxing capital gains. Generally speaking, the inclusion rate for capital gains is 50%. There are also various deductions and tax credits available to individuals and corporations as prescribed in the *Income Tax Act* (ITA) and the Provincial and Territorial Acts.

In addition to the capital tax that the federal government imposes on financial institutions and large corporations, the governments of the provinces and territories also impose capital taxes on corporations that carry on business within their jurisdictions.

The federal government enforces and collects income taxes, customs duties and tariffs. It also administers the federal income tax system through the *Canada Revenue Agency* (the CRA – formerly called Canada Customs and Revenue Agency), a division of the federal Ministry of National Revenue.

Across Canada, the income tax rate is substantially uniform for both corporate and personal income. In most instances, the CRA collects corporate and personal income taxes on behalf of the provinces, with some exceptions. The province of Quebec, for example, collects its personal and corporate taxes separately, while the provinces of Alberta and Ontario collect only their corporate taxes separately.

Theoretically, the Canadian income tax system is integrated, so that the total tax applying on income should be similar, whether it is earned directly by an individual or through a corporation. However, the concept of integration does not apply in certain circumstances, such as income earned by a corporation on which the high level of corporate tax applies.

INCOME TAX

Canada bases its taxation system on the concept of residence. Individuals are considered to be residents if they "ordinarily reside" in Canada or are present in Canada for 183 days or more in a taxation year.

Under the ITA, Canadian federal income tax is levied on the worldwide income of individuals and corporations resident in Canada, but only on certain Canadian-source income of non-residents.

As of the year 2004, all provinces (with the exception of Quebec and the Territories) calculate their provincial tax on federal taxable income, rather than as a percentage of the federal tax (the former tax-on-tax method). Provincial personal income tax is calculated by applying the provincial tax rate(s) to the taxable income amount. This Tax-on-Income method, called TONI, provides greater flexibility in tailoring provincial tax systems to meet the provinces' needs and priorities.

Quebec administers its own provincial personal income taxes. The Territories continue to use the tax-on-tax method to calculate their territorial taxes.

For tax purposes, a corporation is viewed as a "person" and is therefore a taxpayer. All corporations formed in Canada after April 26, 1965 are considered to be residents of Canada. Any corporation formed on or before this date is taxed in Canada if it has actually been resident in Canada or has carried on business in Canada after that time. A foreign incorporated entity will be considered to be a resident of Canada if the company exercises its central management and control in Canada (the taxation of corporations is discussed later in this chapter.).

PERSONAL INCOME TAX RATES

2009 Federal Tax Rates

The Federal personal income tax rates for 2009 are outlined in the table below:

Taxable Income	Tax on Lower Limit	Tax Rate on Excess
$ 0 – 40,726	$ 0	15%
40,726– 81,452	8,959	22%
81,452– 126,264	21,177	26%
126,264 and over	36,616	29%

The following table shows how personal income is taxed in the various jurisdictions using 2009 Provincial tax rates. The tax rates are shown as a percentage of Federal taxable income:

2009 Provincial Tax Rates – Individuals

Provincial / Territorial tax rates (combined chart)	
Provinces / Territories	**Rate(s)**
Newfoundland and Labrador	7.7% on the first $31,061 of taxable income, + 12.8% on the next $31,060, + 15.5% on the amount over $62,121
Prince Edward Island	9.8% on the first $31,984 of taxable income, + 13.8% on the next $31,985, + 16.7% on the amount over $63,969
Nova Scotia	8.79% on the first $29,590 of taxable income, + 14.95% on the next $29,590, + 16.67% on the next $33,820 + 17.5% on the amount over $93,000
New Brunswick	10.12% on the first $35,707 of taxable income, + 15.48% on the next $35,708, + 16.8% on the next $44,690, + 17.95% on the amount over $116,105
Ontario	6.05% on the first $36,848 of taxable income, + 9.15% on the next $36,850, + 11.16% on the amount over $73,698
Manitoba	10.8% on the first $31,000 of taxable income, + 12.75% on the next $36,000, + 17.4% on the amount over $67,000

Provincial / Territorial tax rates (combined chart)	
Provinces / Territories	**Rate(s)**
Saskatchewan	11% on the first $40,113 of taxable income, + 13% on the next $74,497, + 15% on the amount over $114,610
Alberta	10% of taxable income
British Columbia	5.06% on the first $35,716 of taxable income, + 7.7% on the next $35,717, + 10.5% on the next $10,581, + 12.29% on the next $17,574, + 14.7% on the amount over $99,588
Yukon	7.04% on the first $38,832 of taxable income, + 9.68% on the next $38,832, + 11.44% on the next $48,600, + 12.76% on the amount over $126,264
Northwest Territories	5.9% on the first $36,885 of taxable income, + 8.6% on the next $36,887, + 12.2% on the next $46,164, + 14.05% on the amount over $119,936
Nunavut	4% on the first $38,832 of taxable income, + 7% on the next $38,832, + 9% on the next $48,600, + 11.5% on the amount over $126,264

Non-Residents – Taxation of Personal Income in Canada

Unlike Canadian residents who are taxed on their worldwide income, non-residents are subject to Canadian income tax on income that is derived from:

- Employment in Canada;
- Carrying on business in Canada; and
- Dispositions of certain types of properties that are located in Canada.

In addition, Canada imposes non-resident withholding taxes on certain Canadian-source income paid to non-residents, such as interest, dividends, rents and royalties.

Canada has income tax treaties with other countries that alleviate double taxation of personal income. The taxation of non-residents in Canada is subject to the overriding provisions of any applicable Income Tax Treaty between Canada and the country of residence of the non-resident. Generally speaking, these income tax treaties reduce the statutory withholding tax rate of 25% and specify the circumstances under which Canada will retain the right to impose income tax on the non-resident on various categories of income.

Canada's tax treaties typically exempt from domestic income taxation any profits from a business carried on in Canada, unless it is carried on through a "permanent establishment" located here. Each treaty defines this term for purposes of this exemption. The Canada-U.S. Tax Convention defines "permanent establishment" as a fixed place of business through which the business of a resident of a Contracting State (i.e. Canada or the U.S.) is wholly or partly carried on. "Permanent establishment" includes a place of management, a branch, an office, a factory, a

workshop, a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

In the absence of a tax treaty, a non-resident is generally considered to be carrying on business in Canada if that non-resident:

- Produces, grows, mines, creates, manufactures, fabricates, improves, packs, preserves or constructs, in whole or in part, anything in Canada;
- Solicits orders or offers anything for sale in Canada; or
- Disposes of property (other than capital property) that is Canadian real estate, timber resource property or, in certain circumstances, Canadian resource property.

A non-resident carrying on business in Canada must pay income tax in Canada on income realized from that business activity.

Estate, Succession and Gift Taxes

In Canada, there are no estate, succession and gift taxes, and Canadian municipalities generally impose only property taxes on real estate. However, all provinces, except Quebec, impose a will probate fee or estate administration tax.

Probate is a process by which the court of the governing province or territory confirms the validity of a will and the appointment of the executor or, where there is no will, the court appoints an administrator. The executor of the will or the administrator is then able to provide a third party with evidence that authority is held to deal with the assets of the deceased. Probate fees/taxes vary by province and are based on the value of the assets subject to probate. In addition to these fees, the deceased's assets that are subject to probate become a matter of public record. As taxpayers can use other methods to pass assets after death, it is important to get professional advice on your estate planning strategies.

The tax implications for non-residents holding Canadian real estate are discussed in Chapter 3 – *Foreign Investment Considerations*.

Non-Residents – Taxation of Business and Other Commercial Operations in Canada

As discussed in Chapter 1 – *Introduction*, most non-residents who wish to carry on business in Canada will choose to do so either through opening a branch office of their foreign enterprise or through a Canadian subsidiary corporation. The appropriate form of operation for any particular business will vary from case to case, depending not only on the Canadian tax implications but also on general business concerns and the tax consequences in the foreign jurisdiction where the investment originates.

From a Canadian tax perspective, however, it is often preferable to carry on business in Canada through a subsidiary corporation rather than through a branch.

If a branch is used, each year the business must allocate the income of the entire operation between Canada and the other countries in which business is carried on. This allocation frequently causes practical problems and double taxation concerns, because the Canadian

taxation rules relating to allocation of income will not necessarily be consistent with those applied in other taxing jurisdictions. Practical problems also arise when the parent company attempts to allocate head office expenses to the Canadian branch.

Canada levies a "branch tax" on the profits of a branch operation at a branch tax rate to the extent that the profits are not reinvested in the business in Canada. The tax is generally equal to the rate of withholding tax on dividends paid to non-residents (generally l0% or 15%, depending on the parent company's country of residence and the existence of an Income Tax Treaty with that country). Under certain tax treaties (such as the treaty between Canada and the U.S.), there is a lifetime exemption from branch tax of up to $500,000 (Canadian Dollars) of branch profits.

CORPORATE TAX

The federal and provincial tax rates for corporations vary. Manufacturing and small Canadian-controlled business corporations enjoy preferential tax rates on their profits. A corporation must file a corporate tax return with the CRA within 6 months of its fiscal year-end.

A *Canadian Controlled Private Corporation* (CCPC) is a private Canadian corporation that is not controlled by non-residents, by a public corporation, or by any combination of non-residents and public corporations. For tax purposes, a private corporation that is owned 50% by non-residents and 50% by residents qualifies as a CCPC. As indicated in the following table, a CCPC enjoys preferential lower tax rates on the first $300,000 (Canadian Dollars) of its taxable income from active business.

Combined Federal and Provincial Income Tax Rates – Corporations

The following table shows the combined federal and provincial income tax rates for active business income. An active business is any business carried on by the taxpayer other than a specified investment business or a personal service business. For some purposes, an active business includes an adventure or concern in the nature of trade.

Combined Federal and Provincial/Territorial Income Tax Rates for Income Earned by a Non-Canadian Controlled Private Corporation (Non-CCPC)

Effective January 1, 2009.

	General M&P Income	General Active Business Income	Investment Income
British Columbia	31.0%	31.0%	31.0%
Alberta	29.0	29.0	29.0
Saskatchewan	29.0	31.0	31.0
Manitoba	32.0	32.0	32.0
Ontario	31.0	33.0	33.0
Quebec	30.9	30.9	30.9
New Brunswick	32.0	32.0	32.0
Nova Scotia	35.0	35.0	35.0
Prince Edward Island	35.0	35.0	35.0
Newfoundland and Labrador	24.0	33.0	33.0
Yukon	21.5	34.0	34.0
Northwest Territories	31.0	30.5	30.4
Nunavut	31.0	31.0	31.0

Combined Federal and Provincial/Territorial Income Tax Rates for Income Earned by a Canadian Controlled Private Corporation (CCPC)

Effective January 1, 2009.

	Small Business Income up to $400,000*	General Active Business Income	Investment Income
British Columbia	13.5%	30.0%	45.7%
Alberta	14.0	29.0	44.7
Saskatchewan	15.5	31.0	46.7
Manitoba	12.0	32.0/31.0	47.7/46.7
Ontario	16.5	33.0	48.7
Quebec	19.0	30.9	46.6
New Brunswick	16.0	32.0/31.0	47.7/46.7
Nova Scotia	16.0	35.0	50.7
Prince Edward Island	14.2/13.1	35.0	50.7
Newfoundland and Labrador	16.0	33.0	48.7
Yukon	15.5	35.0	49.7
Northwest Territories	15.5	31.5	46.2
Nunavut	15.5	32.0	46.7

* The 2009 federal budget proposes to increase the small business income threshold from $400,000 to $500,000 on January 1, 2009. For 2009, certain provinces (British Columbia, Alberta, Manitoba, Quebec and Nova Scotia) will have provincial thresholds below the federal amount (this may change once the remaining provinces deliver their respective 2009 budgets). For these provinces, a median tax rate will apply to active business income between the provincial and federal threshold. The median tax rate is based on the federal small business rate and the applicable provincial general active business rate.

Other Income

Other taxable corporate income includes dividends, royalties, property income and capital gains. This income is taxed in Ontario at the following rates (combined federal and provincial rates):

	Interest/Rents/Royalties	Capital Gains
Canadian Controlled Private Corporations	48.67%	17.9%
Other Corporations	33%	14.1%

Transfer Pricing

The issue of transfer pricing relating to non-arm's length transactions is an important one because there have been several substantial amendments to the rules in the *Income Tax Act*.

Canada's transfer pricing system is based on a model put forth by the *Organization for Economic Cooperation and Development* (OECD). The OECD Model recommends the arm's length principle. The primary objective of the transfer pricing rules is to ensure that non-arm's length parties transact with each other as if they were dealing with each other at arm's length. Therefore, inter-company pricing and other charges for these transactions should be no higher or lower than those prices charged by parties that deal with each other at arm's length.

Inter-company transactions include charges for:

- Purchase and sale of inventory and services;
- Management fees;
- Royalties on know-how (intellectual property) and technology;
- Interest on inter-company loans; and
- Inter-company administrative fees.

To determine transfer prices, taxpayers can put forward *Advance Pricing Agreements* (APAs) for review by CRA. This allows taxpayers to prospectively confirm an appropriate transfer-pricing methodology and its application for specific cross-border transactions between related parties. CRA considers an APA to be a binding agreement.

Thin Capitalization Rules

The thin capitalization rules disallow the deduction of interest (for tax purposes) on debts that are owed by a corporation resident in Canada to specified non-residents. Thin capitalization rules are in place to prevent non-residents of Canada owning shares in resident corporations, from withdrawing profits in the form of interest payments that will be subject to a low rate of withholding tax.

The interest expense is disallowed where the debt to equity ratio held by specified non-residents exceeds a ratio of 2:1. Specified non-residents include any non-resident persons who, either alone or in combination with persons with whom the person does not deal at arm's length, own 25% or more of the voting shares, or own shares that represent 25% of more of the fair market value of all issued shares of the corporation.

Debt includes only debt which is interest-bearing, held by specified non-residents. Not included in debts are amounts owed to residents of Canada, or owed to non-residents of Canada who are neither shareholders nor related to shareholders. Equity includes the paid-up capital of a corporation as well as the retained earnings and other additional accounts.

Federal Goods and Services Tax

On January 1, 1991, the federal government introduced a 7% Goods and Services Tax (GST). This tax replaced the former Federal Sales Tax, which was generally imposed on the price of goods at the manufacturers' level or on the duty-paid value of imported goods. In 2008, the Federal Government reduced the GST to 5%.

The GST is a multi-level tax similar in structure to the Value Added Tax of other countries. Most businesses and organizations carrying on commercial activities in Canada have to register for and collect the GST on the taxable supplies of goods and services that they provide and that are consumed in Canada. However, persons and organizations whose revenues from taxable supplies do not exceed $30,000 (Canadian Dollars) in the previous 4 calendar quarters are viewed as "small suppliers" and are not required to register or collect GST.

The GST is generally collected by vendors or, in the case of imports, by the CRA. Taxable supplies include most services and virtually all goods – excluding food products, exports and medical devices. Financial intermediation services are also exempt from the GST. Businesses can claim *Input Tax Credits* (ITCs) on the GST for capital outlays and purchases of supplies and services as prescribed in the Act.

On April 1, 1998, the provinces of Nova Scotia, New Brunswick, and Newfoundland introduced the Harmonized Sales Tax (HST) of 8%. The HST extended the GST to a provincial level at a combined tax rate of 13%. The province of Quebec has a form of harmonized value-added tax called the Quebec Sales Tax at a rate of 7.5%.

Most other provinces impose retail sales taxes, which range from 5% to 12%. The only exception to this is the province of Alberta, which has no retail sales tax. In Ontario, the retail sales tax is 8%. In other words, the purchaser pays 8% Provincial Sales Tax (PST) plus the 5% GST for taxable products. There is no PST on services in the province of Ontario.

Customs and Excise

The Canadian government has several statutes which regulate customs and excise. The CRA applies the Harmonized Commodity Description and Coding System to properly classify imported goods. The United States of America and several European and Asian countries also use this system.

Individuals and companies are required to report all goods that they are bringing into, or having shipped to Canada. The CRA reviews the goods that are being imported to ensure that they abide with Canadian trade law and that the appropriate customs duties and tariffs are levied.

For companies doing business in Canada, relief from custom duties is available in certain circumstances relating to:

- Abatement and refund;

- Export drawbacks;
- Duty reduction and removal;
- Remission on importation of machinery;
- Inward processing;
- Production sharing;
- Specific product and producer remission orders;
- Defense production and development sharing remission orders;
- Discretionary duty relief;
- Temporary importation; and
- Relief based on end use.

Export drawbacks, in particular, help Canadian companies compete in export markets by allowing them, under special circumstances, to recover duties that they paid on importing goods (however, they cannot recover GST). Importers, manufacturers and exporters may be eligible.

Canada also has import and export controls for specific products under prescribed circumstances. Canada's Import Control List (ICL) is principally designed to protect the integrity of Canada's agricultural products, enforce international embargoes on trade in goods made from endangered species, and generally protect Canadian markets. These controls take the form of embargoes, quotas, format specifications, packaging, labelling, testing or degree of processing, anti-dumping and anti-subsidy import controls. For example, anti-dumping import controls are mechanisms that Canada may use to prevent foreign producers from selling their products in Canada at lower prices than they would in their home market.

Canada's Export Control List (ECL) restricts the export of specified products for security reasons. The List is divided into 7 groups: dual-use, munitions, nuclear non-proliferation, nuclear-related dual-use, miscellaneous goods and technology missile technology control regime, and chemical and biological weapons non-proliferation lists.

Scientific Research and Experimental Development (SR&ED) Tax Incentive Program

The SR&ED program is a federal tax incentive program administered by the CRA aimed at encouraging businesses to conduct research and development (R&D) in Canada.

The tax credits provided by the SR&ED program significantly reduce the cost of conducting R&D in Canada. The SR&ED program gives claimants cash refunds and/or tax credits for expenditures made in Canada, including, but not limited to, wages, materials, machinery, equipment, overhead, and contracts.

All companies based in Canada that invest in R&D have access to the tax incentives, provided that they perform qualified R&D. To qualify for the SR&ED program, work must advance the understanding of scientific relations or technologies, address scientific or technological uncertainty, and incorporate a systematic investigation by qualified personnel. This includes:

- experimental development to achieve technological advancement to create new materials, devices, products, or processes, or improve existing ones;

- basic and applied research to advance scientific knowledge;

- support work in engineering, design, operations research, mathematical analysis, computer programming, software development, data collection, clinical trials of new drugs or medical devices, or psychological research.

The following activities are not eligible for benefits under the program:

- social science and humanities research;
- commercial production of a new or improved material, device, or product, or the commercial use of a new or improved process;
- market research or sales promotion;
- quality control or routine testing of materials, devices, products, or processes;
- routine data collection;
- prospecting, exploring, or drilling for or producing minerals, petroleum, or natural gas; and
- development based solely on design or routine engineering practice.

Generally, qualifying businesses can earn an investment tax credit (ITC) of 20% of qualified expenditures. Qualifying CCPCs (discussed in more detail earlier in this Chapter) can earn an ITC of 35% up to the first $2 million (Canadian Dollars) of qualified expenditures, and an ITC of 20% on any excess amount.

Unlike some other countries, companies in Canada have the option of deferring their R&D tax deduction or tax credit. This flexibility is designed to benefit companies that invest heavily in R&D in their start-up years and wish to defer the tax benefits to later years in which they make a profit.

Tax Incentives in Ontario

There are various tax incentives for taxpayers conducting R&D in Ontario, including the *Ontario Research and Development Expenditure Deduction*, the *Ontario Innovation Tax Credit*, and the *Ontario Business-Research Institute Tax Credit*.

Ontario Research and Development Expenditure Deduction

The Ontario Research and Development Expenditure Deduction is a 4.5% non-refundable tax credit for corporations carrying on eligible SR&ED in Ontario. This deduction is targeted at large, new and/or strategic advanced technology initiatives. It allows corporations to exclude from Ontario taxable income the portion of the federal investment tax credit that relates to qualifying SR&ED expenditures.

Ontario *Innovation Tax Credit*

The Ontario Innovation Tax Credit (OITC) is a 10% refundable tax credit on annual SR&ED expenditures of up to $2 million (Canadian Dollars) annually for qualifying public and private corporations. It is aimed at encouraging qualifying businesses to undertake SR&ED in Ontario.

Qualifying expenditures are 100% of current expenses such as salaries and wages, and 40% of capital expenditures. Corporations with taxable income equal to or greater than $400,000 (Canadian Dollars) are not eligible for the OITC.

Ontario *Business-Research Institute Tax Credit*

The Ontario Business Research Institute Tax Credit (OBRITC) provides a 20% refundable tax credit for SR&ED expenditures incurred in Ontario under an eligible contract with an eligible research institute (ERI). An ERI is a public, non-profit research facility such as:

- an Ontario university or Ontario college of applied arts and technology;
- an Ontario Centre of Excellence or a Network of Centres of Excellence; and
- a non-profit organization that is an affiliated or federated college or university of an Ontario university.

Corporations that enter into approved contracts with eligible Ontario research institutes can claim up to $4 million (Canadian Dollars) per year. Small businesses may claim the 20% OBRITC in addition to the 10% OITC for a combined tax credit of 30% of qualifying expenditures.

FOREIGN REPORTING REQUIREMENTS

As Canada's tax system is a self-assessment system, the government relies on individuals, corporations, and trusts to properly report all of their worldwide income and properly claim only those expenses and tax credits as allowed in the ITA.

Individuals and corporations must file a federal income tax return. In the case of individuals, the filing date is generally April 30 of the following taxation year. For example, the personal income tax return for 2008 is filed by April 30, 2009. For corporations, the filing date is within 6 months of the end of the fiscal year.

The CRA ensures that the self-assessment system operates effectively and efficiently by conducting regular audits of its taxpayers, including individuals and entities. To assist the CRA in identifying cases of non-compliance, the federal government has introduced various projects that target businesses operating in the underground economy and impose various reporting requirements.

The Canadian federal government also recently introduced various new reporting requirements to require Canadian taxpayers to report various foreign investments and foreign sources of income. The new foreign reporting requirements require taxpayers to file information returns to report the following:

- Foreign property with an aggregate cost exceeding $100,000 (Canadian Dollars), excluding shares of foreign affiliates, property used exclusively in an active business of the taxpayer, and personal use property;
- Transfers or loans of property by the taxpayer, or the taxpayer's controlled foreign affiliate, to a non-resident trust;

- Distributions from or indebtedness to a non-resident trust in which the taxpayer has a beneficial interest; and

- Listing of controlled and non-controlled foreign affiliates (corporations and trusts).

Taxpayers must file various forms and returns with the CRA to report payments made to non-residents and taxes withheld from these payments. For example, if a taxpayer makes payments to non-residents of Canada for income such as interest, dividends, rents, royalties and pensions, then Form NR4 must be completed to report these payments. If a taxpayer makes payments to non-residents for services performed in Canada, other than in employment situations, then Form T4A-NR Return must be completed to report these payments.

GET PROFESSIONAL ADVICE

The preceding discussion is a summary overview of the Canadian tax system. Given the complexity of Canadian tax law and the various tax planning strategies that individuals and corporations can consider, professional advice is recommended to ensure the strategies are appropriate to the particular circumstances.

7. <u>BUSINESS IMMIGRATION</u>

Business persons who seek to enter Canada for an activity anywhere in the business cycle – from visiting a client for one day to establishing a bricks-and-mortar subsidiary for their employer – may apply either for temporary admission or for status as a permanent resident.

Typically, individuals will initially make an application for temporary admission and may or may not follow this process with an application for permanent residence.

TEMPORARY ADMISSION

The general rules for temporary admission are that, unless expressly exempted from any of the following requirements, foreign workers must:

- Possess the academic and vocational experience required to perform the work they seek admission to do;
- Be admissible to Canada on criminal and medical grounds; and
- Be in possession of a valid work permit issued by *Citizenship and Immigration Canada* (CIC).

Generally, however, CIC will issue a work permit and grant admission only after *Human Resources and Skills Development* Canada (HRSDC) issues an opinion letter (HRSD opinion), confirming that issuing the work permit to the foreign national will have either a positive or a neutral effect on the Canadian labour market.

Thus, a foreign worker generally requires the approval of 2 different government agencies applying 2 different sets of criteria before a foreign national may work in Canada.

What is Work?

Many employers and employees mistakenly believe that if no hands-on work is to be undertaken, then no "work" is being performed and therefore no work permit is required.

However, the definition of work is very broad and is defined as "any activity for which wages are paid or commission is earned or that competes directly with the activities of Canadian citizens or permanent residents in the Canadian labour market."

Therefore, while this definition of work includes manual labour such as laying telecommunications cable and hands-on work such as accounting, it also includes soft work activities such as "consulting, supervising and managing" in a non-industrial environment.

If a foreign worker were a "manager" or "executive," work would include normal daily managing activities such as budgeting and strategic planning.

In considering whether a person seeks to enter into the Canadian labour market, CIC officers will ask:

- If the person will be doing an activity that a Canadian should have the opportunity to do.

- If the person will be engaging in a business activity that is competitive in the marketplace.

Generally, self-employment is considered to be work since the individual will be engaging in a business activity that competes with other Canadians for business. Even unpaid employment undertaken for the purpose of obtaining work experience (such as an unpaid internship or practicum) is considered work since the individual will be performing an activity that a Canadian could have the opportunity to do.

What is Not Work?

Although it is clear that work includes almost every productive activity for which an individual is paid, some activities are not covered by this broad definition. Examples of activities not considered to be work include:

- Volunteer work for which a person would not normally be remunerated. Normally this activity would be part-time and incidental to the main reason the person is in Canada;

- Self-employment, where the work to be done would have no real impact on the Canadian labour market. This would include, for example, farmers from the United States of America crossing the border to work on land that they own; and

- Long-distance work conducted over the Internet or telephone by a visitor whose employer is outside of Canada and who is remunerated from outside of Canada.

Work without a Work Permit

There are limited, specific exceptions to the general rule requiring HRSDC confirmation and/or a work permit.

Some examples include:

- Business visitors whose primary source of remuneration for the business activity is outside of Canada and the principal place of accrual of profits remains predominantly outside of Canada.

- Foreign nationals purchasing Canadian goods or services for a foreign business or government, or receiving training or familiarization concerning these goods or services;

- Foreign nationals receiving or giving training within a Canadian parent or subsidiary of the corporation that employs them outside of Canada, so long as any production of goods or services that result from the training is incidental;

- Foreign nationals representing a foreign business or government for the purpose of selling goods for that business or government, if the foreign national is not engaged in making sales to the general public;

- Foreign nationals providing after-sales services, provided that the services are being provided as part of an original or extended sales agreement, lease agreement, warranty or service contract. Hands-on building and construction work are not covered by this provision;

- Certain foreign nationals who are engaged in the performing arts and/or their crew, film producers and guest speakers, including commercial speakers or seminar leaders seeking admission for less than 5 days; and

- Foreign nationals who are crew in the transportation industry in limited circumstances.

Non-work Activity or Work Activity not requiring a Work Permit

There are 2 categories of procedures for foreign nationals who seek to enter Canada to perform an activity that is not considered work, or who seek admission to perform work that does not require a work permit:

- If the foreign national is from a country whose citizens or residents do not require a temporary resident visa (formerly known as a visitor's visa) to enter Canada, the foreign national may appear at any port of entry with only personal identification, proof of citizenship and other supporting documents, and seek admission from CIC.

- If the foreign national is from a country whose citizens are required to be in possession of a temporary resident visa, the foreign national must apply for the temporary resident visa from a Canadian Consulate or High Commission by making a formal application, providing supporting documentation, and paying a fee before appearing at a Port of Entry to seek admission.

Work with a Work Permit and no HRSDC Confirmation

Foreign workers who seek admission to perform work that falls into certain specified categories will require a work permit, but not HRSDC confirmation, including:

- Intra-company transfers of executives, managers or specialized knowledge employees who have worked for the foreign employer in qualified positions for at least 1 year and who wish to work in the Canadian subsidiary, affiliate or branch office;

- Certain professionals under the *North American Free Trade Agreement* (NAFTA), the *General Agreement on Trade in Services* (GATS) or the *Canada-Chile Free Trade Agreement* (CCFTA);

- "Traders" or "investors" under NAFTA or the CCFTA;

- Entrepreneurs / self-employed candidates;

- Emergency Repair Personnel;

- Employees whose admission to Canada will provide “significant benefit” to Canada;
- Charitable or religious work;
- Employees whose admission to Canada reflects a reciprocal benefit conferred on Canadian workers abroad;
- The spouses or partners of most work permit holders; and
- Participants in numerous international agreements.

The admission process is as follows:

- If a temporary resident permit is not required, foreign workers must apply for a work permit at a Canadian Consulate or High Commission by submitting proper application forms, supporting documentation and the required fee. If a temporary resident permit is required, foreign workers must apply for a temporary resident visa and work permit at a Canadian Consulate or High Commission with application forms, supporting documentation and proper processing fees.
- Foreign workers must seek admission at a Port of Entry in possession of temporary resident visa, if required, and a work permit.

Note that processing an application for a temporary resident permit and/or a work permit can take from 1 day to 12 weeks depending on a number of factors.

COMMON MISCONCEPTIONS ABOUT TEMPORARY ADMISSIONS

Some of the common misconceptions about work permits and the application process for temporary admission are discussed as follows:

- **I will not be doing work so I do not need authorization.**

Almost every activity for which a person is paid constitutes work and requires authorization.

- **I will only be working in the country for a few days so I do not need authorization.**

The length of time that you will spend in Canada is irrelevant. If a person seeks admission to Canada to work for even 1 day, authorization is required.

- **My predecessor did not need any authorization so neither do I.**

Every application by an individual for admission to Canada will be adjudicated on the merits. Decisions on applications by other individuals or even previous decisions on applications by the same person do not in any way govern subsequent applications.

- **I will not be paid from within Canada so I do not need any authorization.**

The source of remuneration is irrelevant and does not determine what constitutes work.

Penalties for Non-Compliance

The *Immigration and Refugee Protection Act* (IRPA) applies laws and regulations governing work permits. See discussion below under "Penalties for Non-compliance."

Note that penalties for non-compliance with the admission requirements may be charged against an individual or a corporation. These penalties range from fines to criminal charges.

Planning Considerations for Foreign Workers Seeking Temporary Admission

Generally, you should identify those employees who may potentially be required to enter Canada as foreign workers and organize their travel and supporting documents well beforehand. Similarly, you should make advance preparations if you are an individual who may seek temporary admission to Canada.

At least 12 weeks before the employee needs to enter Canada, contact a qualified Canadian immigration lawyer to determine:

- Whether a temporary work permit is required; and
- Whether the applicant is eligible for admission to perform the required activity.

ADMISSION AS A PERMANENT RESIDENT

Canada is the destination of choice for many business persons who are attracted to our market-oriented economic system, skilled labour force, abundant natural resources and high living standards and who want to become permanent residents. In particular, Canada's safety, security, and stable economic, financial and governmental institutions are important factors in an increasingly complex world.

The *Canadian Immigration Act* provided for the admission of 3 categories of business people: investor, entrepreneur and self-employed. Until recently, the rules governing the selection attributes of these 3 categories were subject to much debate with regards to their consistency in application and their ability to achieve the objective of economic development.

The IRPA introduced major changes in the eligibility criteria for these categories. Some of the changes are clearly beneficial to new immigrants.

THE IMMIGRATION AND REFUGEE PROTECTION ACT (IRPA)

The IRPA sets out statutory changes and new regulations for business immigration. Overall, the goal of the IRPA is to develop a strong and prosperous Canadian economy through business immigration.

Section 12 of the IRPA provides that foreign nationals may be selected for admission based on their ability to become economically established in Canada. This "economic class" is comprised of business immigrants and skilled workers. Business immigrants (including investors, entrepreneurs and the self-employed) are selected to support the development of a strong and prosperous Canadian economy, one in which the benefits of immigration are shared across all regions in Canada.

The Goals of the New Regulations

The intent of the business immigration regulations is to:

- Provide an objective, legally sanctioned basis for assessing the ability of business applicants to become economically established in Canada;
- Establish a selection scheme that maximizes the economic benefits of the program across all regions;
- Provide a clear and transparent statement of program requirements for both prospective business immigrants and officials involved in assessing applications;
- Simplify the assessment of business experience in order to arrive at selection decisions that are both consistent and objective;
- Facilitate the ease and efficiency of program administration; and
- Establish mechanisms that will protect the investments made by investor applicants and optimize compliance with program requirements.

In general terms, the regulations:

- Set out, in the form of definitions, the core requirements that must be met by business immigrants;
- Establish a selection grid that delineates additional criteria to be applied in assessing business immigrant applications and assigns the weight to be given to those criteria;
- Establish procedures to be followed in evaluating applications;
- Establish processes for the handling and disbursement by CIC officials of investments made by those accepted under the investor program; and
- Set forth the conditions that will be imposed in the Entrepreneur Program.

Some of the changes to the business immigration regulations are advantageous for investors, entrepreneurs and self-employed persons who are seeking permanent admission to Canada, discussed as follows.

FOR INVESTORS

- An objective standard for business experience, parallel to that for the entrepreneur program, is established;
- The present net worth requirement of $800,000 (Canadian Dollars) (approximately $724,000 USD) remains unchanged; however, the requirement that the net worth be created by the investor’s own endeavors is removed and is replaced by a more rigorous definition of business experience through which an individual’s net worth is obtained;

- Spousal assets are now included when assessing net worth; and
- The selection grid has been altered to provide the flexibility to adjust the weight of the various criteria.

FOR ENTREPRENEURS

- A standard of business experience, parallel with that for the investor program, is established;
- A net worth requirement of $300,000 (Canadian Dollars) (approximately $270,000 USD) is introduced;
- The requirement to meet conditions after being granted entry is retained, but these conditions are defined in an attempt to be objective and transparent; and
- The regulations introduce the concept of "entrepreneur selected by a province". An entrepreneur selected by a province must meet the federal definition of an entrepreneur. In Quebec, the entrepreneur is subject to that province's determination as to what constitutes business experience.

FOR SELF-EMPLOYED PERSONS

- Only immigrants who have the intention and ability to make artistic, cultural or athletic contributions or who are self-employed farmers are eligible within the class. Other business immigrants with more generic business abilities will be required to meet the entrepreneur or investor definitions, qualify as skilled workers, or be selected as provincial nominees.

PROGRAMS FOR INVESTORS, ENTREPRENEURS AND SELF-EMPLOYED

The Immigrant Investor Program (IIP)

The IIP seeks to attract experienced business persons and capital to Canada. Investors must demonstrate qualifying business experience, a minimum net worth of $800,000 (Canadian Dollars) (approximately $724,000 USD) and must make a passive investment of $400,000 (Canadian Dollars) (approximately $362,000 USD) in an approved investment.

The IIP began in 1986. In the last 5 years, more than 7,000 investors have landed, investing more than $2.6 billion (Canadian Dollars).

The key program elements are unchanged from the current law, including a net worth requirement of $800,000 (Canadian Dollars), the amount of the required investment, and the manner in which the investment is administered.

The Entrepreneur Program

The Entrepreneur Program seeks to attract experienced business persons who will own and actively manage businesses in Canada that will contribute to the economy and create jobs.

Entrepreneurs and their dependants are admitted to Canada under specific conditions that are subsequently monitored by CIC after landing.

The Entrepreneur Program began in 1983. In the last 5 years, over 11,000 entrepreneurs have landed and have created more than 43,000 jobs.

The Self-Employed Program

Self-employed persons must have the intention and ability to create their own employment and make a significant contribution to the cultural, artistic or athletic life of Canada. Self-employed persons also include those who are able to create their own employment by purchasing and managing a farm in Canada.

The program began in 1978. In the last 5 years, over 5,000 self-employed persons have landed in Canada.

Quebec's Business Programs

Quebec operates its own *Investor Immigrant Program* (IIP) under the authority of the *Canada-Quebec Accord Relating to Immigration and Temporary Admission of Aliens*. In this Accord, Quebec undertakes to administer its investor program in a manner consistent with the spirit and objectives of the federal program. Until recently, 98% of all investments made in the IIP program were made through Quebec.

A similar construct of "entrepreneur selected by a province" is available whereby an entrepreneur selected by Quebec is an "entrepreneur" subject to that province's determination of what constitutes business experience. Contact a lawyer for further explanation.

Impact of the IRPA on Investor and Entrepreneur programs

The most significant change in the investor and entrepreneur programs is the introduction of a more objective measure of business experience. It is our government's opinion that business experience is the best predictor of future business success.

Business Experience

To be eligible for the Immigrant Investor Program, you must have:

- managed a qualifying business and controlled a percentage of equity of the qualifying business; or

- managed the equivalent of at least five full-time employees per year in a business; or

OWNERSHIP

The plain language definition of an entrepreneur is one who assumes the financial risk of an enterprise and undertakes its management.

Investors and entrepreneurs will be required to provide documentation proving that, within any 2 of the last 5 years, they owned and managed a foreign "Qualifying Business" that meets any 2 of the defined requirements for jobs, sales, net income and equity.

Qualifying Business

Means a business – other than a business operated primarily for the purpose of deriving investment income such as interest, dividends or capital gains – for which, during the year under consideration, there is documentary evidence of any 2 of the following:

(a) the percentage of equity multiplied by the number of full-time job equivalents is equal to or greater than 2 full-time job equivalents per year;

(b) the percentage of equity multiplied by the total annual sales is equal to or greater than $500,000 (Canadian Dollars);

(c) the percentage of equity multiplied by the net income in the year is equal to or greater than $50,000 (Canadian Dollars); and

(d) the percentage of equity multiplied by the net assets at the end of the year is equal to or greater than $125,000 (Canadian Dollars).

The following chart sets out the minimum requirements for a Qualifying Business at various percentages of ownership.

QUALIFYING FOREIGN BUSINESS OWNERSHIP

	OWNERSHIP		
ATTRIBUTE	100%	50%	20%
Employment	2	4	10
Sales (CAD$)	500,000	1,000,000	2,500,000
Net Income (CAD$)	50,000	100,000	250,000
Equity (CAD$)	125,000	250,000	650,000

Management Experience

As an alternative to actual ownership, investors and entrepreneurs may qualify by providing documentary proof that, over any 2 of the last 5 years, they have managed at least 50 employees in a business. Broadening the definition to include individuals who have exercised significant senior managerial control over businesses of a substantial size allows for the selection of senior management in relatively larger organizations, notwithstanding that such managers may not have an ownership interest or have assumed entrepreneurial risk directly.

However, because these standards reflect successful business experience in a first world context, they may prove problematic for even the most successful business persons in less developed economies.

CONDITIONS

The same 4 business attributes of employment, sales, net income and equity are used to define the Qualifying Canadian Business necessary for the removal of conditions imposed upon granting permanent resident status.

Entrepreneurs will be required to document that, for a period of at least 1 year within a period of not more than 3 years after landing, they owned and managed a Qualifying Canadian Business that meets any 2 of the defined requirements for jobs, sales, net income and equity.

The following chart sets out the minimum requirements for a Qualifying Canadian Business at various percentages of ownership.

QUALIFYING CANADIAN BUSINESS OWNERSHIP

	OWNERSHIP		
ATTRIBUTE	100%	50%	33.33%
Employment	2	4	6
Sales (CAD$)	250,000	500,000	750,000
Net Income (CAD$)	25,000	50,000	75,000
Equity (CAD$)	125,000	250,000	375,000

At least 1 incremental, full-time equivalent job must be created for someone other than the entrepreneur and the entrepreneur's dependants. In addition, the entrepreneur must have provided active and ongoing participation in the management of the business for at least 1 year. A minimum of 1/3 ownership is required.

The Selection Grid

Investors and entrepreneurs are assessed against the following selection grid:

FEDERAL SKILLED WORKER SELECTION GRID

EDUCATION	**Maximum 25**
University Degrees	
Ph.D., or Masters *AND* at least 17 years of completed full-time or full-time equivalent study	**25**
Two or more university degrees at the Bachelor's level *AND* at least 15 years of completed full-time or full-time equivalent study	**22**
A two year university degree *AND* at least 14 years of completed full-time or full-time equivalent study	**20**
A one year university degree *AND* at least 13 years of completed full-time or full-time equivalent study	**15**
Trade or non-university certificate or diploma	

A three-year diploma, trade certificate or apprenticeship[(1)] *AND* at least 15 years of completed full-time or full-time equivalent study		**22**
A two-year diploma, trade certificate or apprenticeship *AND* at least 14 years of completed full-time or full-time equivalent study		**20**
A one-year diploma, trade certificate or apprenticeship *AND* at least 13 years of completed full-time or full-time equivalent study		**15**
A one-year diploma, trade certificate or apprenticeship *AND* at least 12 years of completed full-time or full-time equivalent study		**12**
High School Diploma		
Secondary School educational credential		**5**
OFFICIAL LANGUAGES		**Maximum 24**
1st Official language	High proficiency (per ability)[(2)]	**4**
	Moderate proficiency (per ability)	**2**
	Basic proficiency (per ability)	**1 to maximum of 2**
	No proficiency	**0**
	Possible maximum (all 4 abilities)	**16**
2nd Official language	High proficiency (per ability)	**2**
	Moderate proficiency (per ability)	**2**
	Basic proficiency (per ability)	**1 to maximum of 2**
	No proficiency	**0**
	Possible maximum (all 4 abilities)	**8**
EXPERIENCE		**Maximum 21**
1 year		**15**
2 years		**17**
3 years		**19**
4 years		**21**
AGE		**Maximum 10**
21-49 years at time of application		**10**
Less 2 points for each year over 49 or under 21		
ARRANGED EMPLOYMENT IN CANADA		**Maximum 10**
HRSD confirmed permanent offer of employment		**10**
Applicants from within Canada and holding a temporary work permit that is:		
HRSD opinion obtained, including sectoral confirmations		**10**
HRSD opinion exempt under NAFTA, GATS, CCFTA, or significant economic benefit (i.e., intra-company transferee)		**10**

ADAPTABILITY	Maximum 10
Spouse's/common-law partner's education	3-5
Minimum one year full-time authorized work in Canada[3]	5
Minimum two year full-time authorized post-secondary study in Canada[3]	5
Have received points under the Arranged Employment in Canada factor	5
Family relationship in Canada[3]	5
TOTAL **PASS MARK**	**Maximum 100** **67***

(1) "Diploma, trade certificate or apprenticeship" refers to a post-secondary educational credential other than a university educational credential.
(2) Applicants are rated on the ability to speak, listen, read or write Canada's two official languages.
(3) Applies to either principal applicant or accompanying spouse or common-law partner.
* From 28 June 2002 to 18 September 2003, the pass mark was 75.

Self-employed persons are evaluated against a similar grid modified to reflect selection criteria applicable to their circumstances.

Officials believe that the IRPA regulations will ensure that experienced business persons with substantial investment capital will continue to be able to immigrate to Canada. It is hoped that initiating a net worth requirement for entrepreneurs ensures that investors and entrepreneurs have sufficient capital to participate in the Canadian economy.

The intention is that objective and measurable standards for business experience and net worth will make the selection requirements much more transparent to applicants and officers, thereby improving program efficiencies.

Similarly, objective and consistent standards for establishing a business in Canada will make the conditions more meaningful to applicants, as well as simpler and more efficient to administer.

Investors

Investors in the federal IIP will continue to deposit their $400,000 (Canadian Dollars) investments with *Citizenship and Immigration Canada* (CIC) for subsequent distribution to the provincial funds for investment. After 5 years, the funds will repay CIC for subsequent payment to the investors. The participating provinces will continue to be responsible for guaranteeing the payment of their respective shares.

Entrepreneurs

CIC staff in Canada are trained to both counsel entrepreneurs and apply the new conditions in a fair and transparent manner.

Reasonably soon after landing, entrepreneurs will be required to report to officers in Canada, who will reiterate what is expected in terms of establishing a qualifying Canadian business and, if applicable, refer them to participating provincial agencies for direction and technical support.

Individuals who fail to comply with their conditions will be reported under subsection 44(1) of the IRPA and may be removed from Canada. The Act also provides enforcement powers and penalties to ensure compliance with this legislation.

Immigration Trusts

The changes to immigration law will not affect immigration trusts, which will continue to be permissible under the *Income Tax Act*. The trust, which is offshore, may be created for new immigrants in order to gain up to a 5-year tax holiday on income generated by trust assets. Very significant tax savings can be accomplished through proper use of this instrument.

Maintenance of Status

One change that affects all 3 classes of business immigrants is the easing of the residency requirements in order to maintain status. Recognizing that business persons often have international interests to attend to, the new regulations impose the requirement that business immigrants reside in Canada for 2 out of every 5 years. Some absences are deemed not to be "absences" for the purpose of calculating residency. This is a very positive change from the previous requirement of 6 months in any 12-month period.

Citizenship

Unfortunately, as the residency requirements for maintenance of permanent resident status are being liberalized, the residency requirements for citizenship will become more restrictive. Under the new *Citizenship Act*, applicants for citizenship will be required to demonstrate 3 full years (1,095 days) of physical presence in the 4 years immediately preceding their application for citizenship. This is a higher standard than that currently in place and will cause concerns for mobile economic migrants.

GET PROFESSIONAL ADVICE

The preceding discussion is a summary overview of the admission requirements for non-residents who wish to work and/or reside permanently in Canada. Given the complexity of Canadian law, professional advice is recommended.

8. EMPLOYEE-RELATED MATTERS

Businesses operating in Canada must comply with rigorous employment standards and other regulations, as set out in the legislation of each province. While this section of the Guide focuses on employee-related matters that apply to businesses in Ontario, the other provinces of Canada as well as the federal government have similar legislation in the areas discussed here. The federal legislation applies to businesses that are federally regulated, such as banking, or that fall within federal jurisdiction, such as inter-provincial transportation including airlines, trucking and railways.

Employers are also responsible for remitting payments to the *Canada Pension Plan* (CPP) (in Quebec, the *Quebec Pension Plan*) and the *Employment Insurance* (EI) program, which are federally regulated and applicable throughout the provinces and territories.

EMPLOYMENT STANDARDS

The *Employment Standards Act* (ESA) in Ontario sets out certain minimum employment standards with which employers must comply. The ESA applies to most employees who are working in the province, including managerial employees and employees performing work both within and outside Ontario (if the employees' work that is performed outside Ontario is a continuation of work in Ontario).

The ESA prescribes minimum requirements in such areas as:

- Maximum hours of work in a day and week;
- Overtime pay;
- Minimum wages;
- Public holidays;
- Vacations with pay;
- Equal pay for male and female employees;
- Employee benefit plans;
- Pregnancy or adoption leave;
- Notice of termination of employment; and
- Severance pay.

Certain types of employees are exempt from all or part of the ESA. For example, certain salespeople or persons whose only work is supervisory or managerial in character are exempted from the hours of work and overtime pay provisions of the ESA.

In setting out these and other minimum requirements, the ESA does not limit an employee's civil remedies against an employer. In addition to these statutory requirements, there are general rules of common law, not found in any statute, which also significantly affect employment standards. For instance, the employment standards pertaining to the termination of employment are greatly affected by the common law. The employer may provide the departing employee with a lump sum payment as compensation for the loss of employment. The amount of this severance payment is normally calculated by reference to length of service and the salary that the departing employee would have received during a legally required period of notice. The period of notice may be stipulated by the contract of employment (or collective agreement) or by employment standards legislation or by a common law standard of reasonableness.

The ESA also sets out special rules that apply to group terminations. A group termination refers to instances in which the employment of 50 or more employees is terminated in any period of 4 weeks or less. Among other things, these special rules affect the amount of pay in lieu of notice to be received by employees subject to group terminations.

Labour Relations

In Ontario as well as in other provinces, most public sector and many private sector employees are represented by trade unions. Under the *Labour Relations Act* (LRA) (Ontario), each person is free to join a trade union of his or her own choice and to participate in its lawful activities. The Ontario Labour Relations Board administers the LRA. This Board issues collective-bargaining certificates to trade unions, considers unfair labour practice complaints, and administers and enforces the LRA.

Impact on the Purchase of a Business

In deciding whether to purchase all or even part of an established business, the purchaser should fully investigate the potential impact of the applicable employment and labour relations legislation. For example, if the vendor's employees are represented by a trade union, then the bargaining rights held by the trade union will generally be preserved for a like unit of the purchaser's employees. In other words, the purchaser will be bound by any collective agreement in existence between the vendor and the trade union.

Moreover, the ESA stipulates that, when the purchaser of a business hires employees of the vendor, then those employees' length of service is treated as service with the purchaser. This requirement applies to entitlements such as vacations with pay, paid public holidays, pregnancy leave, notice of termination and statutory severance pay.

OTHER EMPLOYEE-RELATED LEGISLATION

In addition to employee standards and labour relations, an employer must also comply with other legislation and regulations relating to:

- Equity in the workplace;
- Human rights;
- Occupational health and safety;
- Workplace safety and insurance; and
- Hospital insurance.

Some of the employee benefits, such as CPP and EI, require the employer to withhold premiums from the employee's earnings and submit them, along with the employer's contribution, to the applicable government agency.

Equity in the Workplace

An ever-increasing amount of legislation exists at both the provincial and federal levels of government on matters relating to equity in the workplace. In Ontario, this legislation includes:

- The federal *Employment Equity Act*, which applies to federally regulated employers who have 100 or more employees;

- The *Federal Contractors' Program*, which applies to employers across Canada with 100 or more permanent full-time and/or part-time employees, and who wish to bid on federal government contracts for goods or services that are each worth $200,000 (Canadian Dollars) or more; and

- The *Pay Equity Act* (Ontario), which is one of the most far-reaching acts of this nature in any Canadian jurisdiction. It strives to eliminate gender-based pay discrimination in both the private and public sectors. Ontario employers with more than 10 employees are required to have a pay equity program. Basically, the thrust of this legislation is to create workplaces with no employment barriers for certain groups – such as women, aboriginal peoples, persons with disabilities and members of visible minorities. The ultimate goal is to create workplaces where the representation of these groups across various positions is proportionate to their representation in the general workforce or the employer's recruiting area.

Overall, the legislation for equity in the workplace seeks to remove systemic barriers, encourage positive steps, and provide for the making of reasonable accommodation for members of the target groups. For example, under the Federal Contractors' Program, the Canadian government sets out specific criteria to implement employment equity. Should an employer fail to file a certificate of compliance, the government will not consider its bid on any federal contracts.

Human Rights (Ontario)

The *Human Rights Code* (the Code) prohibits discrimination in employment. This includes indirect or constructive discrimination or harassment on the basis of race, creed, colour, ethnic origin, age, sex, marital status, citizenship, ancestry, place of origin, family status, record of offences, sexual orientation or disability. In addition, the Code provides for the right to equal treatment without discrimination where a woman is or may become pregnant, or where an employee has applied for Workplace Safety and Insurance benefits.

Most other provinces of Canada have similar codes, as does the federal government for federally regulated industries.

Occupational Health and Safety (Ontario)

The *Occupational Health and Safety Act* (OHSA) places a number of statutory duties on employers in the area of health and safety. For example, the OHSA:

- Requires certain employers to establish health and safety committees and outlines minimum requirements regarding their composition and functioning. Employers that are required to establish health and safety committees include: any workplace that regularly employs 20 or more workers; construction projects where 20 or more workers are regularly employed and are expected to be regularly employed for 3 months or more; and any workplace (other than a construction project) to which a regulation concerning a designated substance applies, even if fewer than 20 workers are regularly employed;

- Imposes duties (many of a strict liability nature) on employers, supervisors, owners of a workplace and its suppliers; and

- Permits employees to refuse to work where they have reason to believe that the work is unsafe.

Significant amendments to this statute are currently being considered, which will mandate substantially greater responsibilities for employers than previously existed. Other provinces of Canada have enacted similar pieces of legislation.

Workplace Safety and Insurance (Ontario)

Many Ontario employers are subject to the provisions of *Ontario's Workplace Safety and Insurance Act* (WSIA), formerly the Workers' Compensation Act. Administered by the *Workplace Safety and Insurance Board* (WSIB), the WSIA seeks to replace the right of employees, or their families, to sue their employers for personal injury or accidents that may occur at their workplaces. The traditional concept of fault does not apply.

Employees who suffer a personal injury or have an accident in the workplace are entitled to WSIB benefits for the replacement of earnings that they lose while disabled by workplace illness or injury (benefit for loss of earnings). A number of other WSIB benefits are available, such as:

- Benefits for non-economic loss (if an employee suffers permanent impairment from a work-related injury or illness, the WSIB provides a non-economic loss benefit to compensate the employee for the physical, functional or psychological loss the impairment causes);

- Loss of retirement income benefit;

- Health care benefits (health care, prescription drugs, special clothing and footwear, transportation costs associated with a work-related injury);

- Benefits for seriously injured workers; and

- Occupational disease and survivor benefits program.

Hospital Insurance (Ontario)

Ontario imposes a tax for health insurance in the province under a system called the Employer Health Tax (EHT). This tax applies to the total amount of an employer's payroll, including wages, salaries and any other remuneration paid or credited to employees in Ontario during 1 year.

The amount of the tax varies from 0.98% to 1.95%, depending on the amount of the employer's annual payroll. These rates are currently:

- From $0 to 200,000 (Canadian Dollars) – 0.98%;
- From $200,001 to 400,000 (Canadian Dollars) – at graduated rates; and
- Over $400,000 (Canadian Dollars) – 1.95%.

Canada Pension Plan

The federally regulated *Canada Pension Plan* (CPP) provides financial assistance to Canadians when they retire. Under the CPP, employers are required to contribute to the plan on behalf of their employees who have pensionable employment. The employer withholds and submits a percentage of the employee's earnings. The employer is also required to contribute an equal amount. The total contribution is remitted to the Receiver General of Canada.

Employment Insurance

The *Employment Insurance* (EI) program provides financial assistance to people who are unemployed. Employers are required to deduct and remit EI premiums on behalf of employees who work in insurable employment, as defined under the federal *Employment Insurance Act*. Employers are also required to remit a premium on behalf of their employees. While the rate may vary from year to year, the rate is currently equal to 1.4 times the employee's premium.

Other Employment Benefits

In addition to the above legislated employee rights and benefits, certain sectors of Canadian employers provide other benefits to their employees, such as employee health benefit plans, group life and disability insurance, and contributions to savings and retirement plans.

GET PROFESSIONAL ADVICE

The preceding discussion is a summary overview of employee-related matters and legislative considerations. Given the complexity of Canadian law, professional advice is recommended.

9. PRIVACY LEGISLATION

In the global economy, companies of all sizes are increasingly reliant on electronic communication of information and business transactions. Indeed, electronic commerce (e-commerce) is becoming a prime channel for doing business. This in turn raises issues about privacy and underlines the necessity of developing uniform guidelines and protective safeguards for both individuals and companies.

As of January 1, 2004, the *Personal Information Protection and Electronic Document Act* ("PIPEDA") applies to every federally regulated business, such as banking, telecommunications and airlines, that collects, uses or discloses personal information in the course of commercial activities within a province and to all inter-provincial and international flows of personal information. PIPEDA pertains to traditional, paper-based businesses as well as on-line businesses and e-commerce transactions. The federal PIPEDA supports and promotes e-commerce by providing guidelines for the use of electronic means to communicate or record information and rules to govern the collection, use and disclosure of personal information in the course of commercial activity.

PIPEDA was enacted to protect individuals from the inappropriate collection, use and disclosure of personal information. In general, personal information is collected by private companies in order to provide products and services to their customers. They can also use such information for secondary purposes such as improving relationships with customers and developing more effective marketing strategies. PIPEDA protects customers from privacy-invasive practices used by businesses to carry out these secondary purposes.

PIPEDA is an omnibus legislation that applies all across Canada. However, if a province enacts private sector privacy legislation that is found to be substantially similar to PIPEDA, it means that an organization or an activity to which the legislation applies is exempt from the application of PIPEDA in respect of the collection, use or disclosure of personal information that occurs within that province. As of January 1, 2004, if the province enacts a private sector privacy legislation that is not found to be substantially similar to PIPEDA, the provincial law will operate concurrently with the federal law. For example, British Columbia and Alberta's Personal Information Protection Act's were declared substantially similar to PIPEDA. Thus, in these provinces, PIPEDA only applies to federally regulated businesses, and businesses carrying out cross-border transactions.

Because PIPEDA is intricate and contains other provisions, we recommend that you obtain legal advice to ensure that your company's policies and procedures are in compliance.

WHAT IS PERSONAL INFORMATION?

PIPEDA defines personal information as any factual or subjective information, recorded or not, about an identifiable individual. It includes things such as residential address and residential telephone number, home email, medical information, age, marital status, ethnic origin, colour, religion, education, criminal, employment or financial history, numerical identifiers such as the Social Insurance Number, fingerprints, blood type, and views or personal opinions.

Any information about a person that readily identifies that individual beyond their name, title, business address or business telephone number cannot be collected, used or disclosed in the course of commercial activity without that person's knowledge or informed consent.

Essentially, personal information must be:

- Collected with consent and for a reasonable purpose;
- Used and disclosed for the limited purpose for which it was collected;
- Accurate;
- Accessible for inspection and correction; and
- Stored securely.

Before collecting, using or disclosing personal information in the course of commercial activity, the individual(s) must voluntarily agree, either expressly or impliedly, to its collection, use and disclosure. Express consent is given either verbally or in writing and implied consent is given when the action/inaction of an individual reasonably infers this consent.

Information that is not considered personal is information that is publicly available, such as information found in a telephone, professional or business directory, information found in registries collected under a statutory authority, court records and published personal information that the individual has provided. Such information can be collected, used or disclosed without the individual's knowledge or consent.

PROTECTION OF PRIVACY IN ONTARIO

Ontario preserves the privacy rights of individuals by upholding the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act*. However, neither of these are deemed to be similar to PIPEDA, thus, corporations in Ontario are also subject to PIPEDA.

To transact business in Ontario using electronic means, companies must currently adhere to the standards set out in the Ontario *Electronic Commerce Act*. These standards apply not only to contracts made electronically but also to all forms of electronic communication.

PROVINCIAL LEGISLATION

Many of the provinces and territories also have legislation similar to PIPEDA. Both the federal and provincial statutes are based on the *Uniform Electronic Commerce Act* (UECA). This was adopted by the Uniform Law Conference of Canada in 1999 and followed by principles adopted by the United Nations' 1996 *Model Law on Electronic Commerce*.

THE CSA CODE

In setting out the rules, the PIPEDA incorporates the *Model Code for the Protection of Personal Information*, which is known as the CSA Code. The CSA Code was developed by the Canadian Standards Association (CSA) and has operated as a voluntary code for the private sector in recent years.

The provisions of the CSA Code require that collection, use and disclosure of personal information for commercial purposes must have the consent and knowledge of the individual.

The personal information must be accurate, up-to-date, reasonable and limited to what is necessary for the identified purposes. Companies must also implement safeguards to protect personal information from theft and unauthorized access. For example, the company should not only have physical protection such as locked cabinets and restricted access to offices, but also technological protection such as passwords and encryption. The levels of security should reflect the sensitivity of the data. PIPEDA is based on 10 privacy principles developed by the CSA, and enforced by the Privacy Commissioner of Canada and the Federal Court.

The code's 10 principles are:

1. **Accountability**: An organization is responsible for personal information under its control and shall designate an individual or individuals who are accountable for the organization's compliance with the following principles;

2. **Identifying Purposes**: The purposes for which personal information is collected shall be identified by the organization at or before the time the information is collected;

3. **Consent**: The knowledge and consent of the individual are required for the collection, use or disclosure of personal information, except when inappropriate;

4. **Limiting Collection**: The collection of personal information shall be limited to that which is necessary for the purposes identified by the organization. Information shall be collected by fair and lawful means;

5. **Limiting Use, Disclosure, and Retention**: Personal information shall not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as required by the law. Personal information shall be retained only as long as necessary for fulfillment of those purposes;

6. **Accuracy**: Personal information shall be as accurate, complete, and up-to-date as is necessary for the purposes for which it is to be used;

7. **Safeguards**: Personal information shall be protected by security safeguards appropriate to the sensitivity of the information;

8. **Openness**: An organization shall make readily available to individuals specific information about its policies and practices relating to the management of personal information;

9. **Individual Access**: Upon request, an individual shall be informed of the existence, use and disclosure of his or her personal information and shall be given access to that information. An individual shall be able to challenge the accuracy and completeness of the information and have it amended as appropriate; and

10. **Challenging Compliance**: An individual shall be able to address a challenge concerning compliance with the above principles to the designated individual or individuals for the organization's compliance.

WHAT ARE THE CONSEQUENCES OF VIOLATING PIPEDA?

PIPEDA created the office of the Privacy Commissioner of Canada (the "Commissioner") to act as ombudsman. Individuals whose rights may have been violated may complain either to the culpable company or to the Commissioner, or the Commissioner may initiate a complaint where a suspected violation of PIPEDA has or is taking place. If a violation of PIPEDA has occurred, the organization may face:

- An audit of the personal information management practices of the organization;
- An application to the Federal Court for damages;
- An investigation by the Commissioner;
- A fine of up to $10,000 (Canadian Dollars) (per incident) on a summary conviction or $100,000 (Canadian Dollars) (per incident) for an indictable offence;
- Loss of the data that it collected; or
- Adverse publicity and loss of public trust.

Under PIPEDA it is an offence to:

- Destroy personal information that an individual has requested;
- Retaliate against an individual who has complained to the Commissioner or who refuses to participate in a violation of PIPEDA; or
- Obstruct or otherwise refuse to co-operate with the Commissioner in the investigation and resolution of a complaint.

GET PROFESSIONAL ADVICE

The preceding discussion is a summary overview of the laws regulating the privacy of personal information in the Canadian business environment. Given the complexity of Canadian law, professional advice is recommended.

10. PUBLIC SECURITIES LEGISLATION

Securities legislation is primarily dealt with under provincial law. Each of Canada's Provinces and Territories has its own securities commission or similar regulatory authority and its own local *Securities Act* as well as the Act's regulations, local rules and policies, staff notices and administrative and court decisions.

The securities administrators across Canada try to work as closely together as possible to ensure uniformity of legislation. Although there is no "Uniform Securities Act" or national body similar to the Securities and Exchange Commission in the United States of America, the general principles underlying all of the provincial securities' regulatory regimes and legislation are essentially the same.

In recent years, the securities regulators have formed a group known as the *Canadian Securities Administrators* (CSA) in a further effort to harmonize securities law regulation across Canada. In addition, the various provincial governments and the federal government are in continuing debate and dialogue about the merits of replacing the existing structure with a national securities regulatory agency.

Protecting Securities Investors

Canadian securities laws are designed to protect securities investors and to ensure that they receive sufficient disclosure so that they can make informed investment decisions. The laws apply to any transaction or activity involving a trade in a security and any act in furtherance of a trade. If the trade in securities also constitutes a distribution, this triggers the requirement to file and clear a prospectus document with the applicable provincial securities regulators to qualify the securities for distribution to the public.

There are specific types of trades or activities that do not require regulation for policy reasons, and are therefore exempted from securities law requirements. Generally, a number of statutory exemptions are available based on either the identity of the purchaser or the nature of the security. Discretionary exemption orders may also be given in appropriate circumstances based on the submission of an application to the applicable provincial securities regulator.

Licensing of Market Participants

To protect consumers, the securities legislation of each province requires the licensing of market participants, as well as regulating the quality, content, and dissemination of information that investors receive. Securities laws require the registration of investment dealers, advisers, and underwriters. Their performance is carefully regulated for compliance with strict rules, including minimum capital requirements and minimum education requirements for salespersons, as well as specific requirements for financial reporting and record keeping.

The Prospectus

A prospectus that is filed with the applicable provincial securities regulator in connection with a distribution must provide "full, true and plain" disclosure of pertinent information about the issuer or vendor of the securities and about the securities themselves. Upon filing a prospectus, an issuer obtains the status of "reporting issuer".

Once the reporting issuer has completed its distribution, it must then provide continuous disclosure as required by the securities legislation of the province in which the distribution takes place. Continuous disclosure ensures investors have equal and timely access to financial and other information that is likely to significantly affect the market price of any securities of the reporting issuer. In addition, a reporting issuer must follow certain regulations regarding the timing and distribution of materials for shareholder meetings.

Canadian Public Securities Filings

Reporting issuers file their continuous disclosure documents electronically in a public Internet access system that is similar to the EDGAR system of the United States of America. Known as SEDAR (System for Electronic Document Analysis and Retrieval), the Canadian Public Securities Filings system is located at www.sedar.com.

The Ontario Securities Commission

The *Ontario Securities Commission* (OSC) administers and enforces securities legislation in the province of Ontario and regulates the largest capital market and stock exchange in Canada, the *Toronto Stock Exchange* (“TSX”). The OSC’s mandate is to:

- Protect investors from unfair, improper and fraudulent practices;
- Foster fair and efficient capital markets; and
- Maintain public and investor confidence in the integrity of these markets.

Self-Regulating Organizations

Securities regulators rely on self-regulatory organizations such as the *Investment Dealers Association* (IDA) and the TSX to carry out regulatory duties that would otherwise be the responsibility of the securities commissions or provincial government. In regulating the securities in its industry, a *Self-Regulating Organization* (SRO) can tap its own expertise.

In Ontario, an SRO is defined as an organization that represents registrants and is organized for the purposes of regulating the operations, standards of practice, and business conduct of its members and their representatives – with a view to protecting investors and the public interest. Recognized SROs are subject to the OSC’s oversight, including the right of the OSC to review their bylaws, regulations and policies, and decisions.

The Toronto Stock Exchange

The TSX is the senior equities market in Canada, accounting for approximately 95% of all equity trading in Canada. It is the 3rd most active stock exchange in North America after NYSE and NASDAQ. In 2005, more than 64 billion shares – worth more than $1.1 trillion (Canadian Dollars) – were traded on the TSX. In November 2002, the TSX become the 1st exchange in North America and the 8th stock exchange in the world to become a public company.

The TSX maintains certain minimum listing requirements. For an industrial issuer, these include minimum net tangible assets, minimum pre-tax cash flow and minimum working capital, as well as having a specified “float” of freely tradable shares and shareholders to ensure a market for the listed securities.

The TSX is owned by the TMX Group. In 2008, the TSX Group Inc. changed the name of the corporation to TMX Group Inc. As of March 2009, all electronic signage, the company's website, and associated materials now use the name "TMX".

The TSX Venture Exchange

The TMX Group also owns and operates the TSX Venture Exchange ("TSX Venture"), Canada's second national stock exchange serving the public venture capital market.

TSX Venture is the junior equity stock exchange in Canada. It was formed in November 1999 through the merger of the Vancouver and Alberta stock exchanges. TSX Venture provides a marketplace for companies too small for the TSX or NASDAQ. With offices in Vancouver, Calgary and Toronto, its listed companies are active in the technology, resources and manufacturing sectors. TSX Venture provides emerging companies with access to capital and serves as a stepping-stone to senior markets.

The Montreal Exchange Inc.

Following the restructuring of the stock markets in Canada, the Montreal Exchange became the sole financial-derivatives exchange in Canada. The Montreal Exchange demutualized in September 2000 and is now known as The Montreal Exchange Inc. or Bourse de Montréal Inc.

GET PROFESSIONAL ADVICE

The preceding discussion is a summary overview of public securities legislation. Given the complexity of Canadian securities legislation, professional advice is recommended.

11. OTHER WEBSITES OF INTEREST

To help you find more information about the topics that we have discussed, this section lists some key websites under the headings of each chapter of this Guide. Many of these websites also provide links to other useful resources.

1. INTRODUCTION

Aylesworth LLP
www.aylesworth.com

Canadian Tourism Commission
http://www.canada.travel

City of Toronto
http://www.toronto.ca

2. CANADA'S POLITICAL, LEGAL AND ECONOMIC ENVIRONMENT

Federal

Federal statutes and regulations (Department of Justice Canada website)
http://laws.justice.gc.ca

Government of Canada
http://www.canada.gc.ca

Natural Resources Canada
http://atlas.nrcan.gc.ca

Federal Publications on Business in Canada
http://www.fedpubs.com

Business Finance in Canada
http://canadaonline.about.com/od/businessfinance

Diplomatic Gateway to Canada (includes a list of Canadian Embassies and Consulates in foreign countries and foreign representatives in Canada)
http://www.international.gc.ca

Provincial and Territorial

Ontario statutes and regulations (Ontario government website)
http://www.e-laws.gov.on.ca

Alberta statutes and regulations (Alberta government website)
http://www.qp.alberta.ca

British Columbia statutes and regulations (British Columbia government website)
www.gov.bc.ca
www.pss.gov.bc.ca/qp

Manitoba statutes and regulations (Manitoba government website)
http://www.gov.mb.ca/queensprinter

New Brunswick statutes and regulations (New Brunswick government website)
http://www.gnb.ca/0062/acts/index-e.asp

Newfoundland statutes and regulations (Newfoundland and Labrador government website)
http://www.assembly.nl.ca/legislation

Northwest Territories statutes and regulations (NWT government website)
http://www.assembly.gov.nt.ca

Nova Scotia statutes and regulations (Nova Scotia government website)
http://www.gov.ns.ca/legislature

Nunavut statutes and regulations (Nunavut government website)
http://www.assembly.nu.ca

Prince Edward Island statutes and regulations (PEI government website)
http://www.gov.pe.ca/law/statutes

Quebec's Civil Code (Canadian Legal Information Institute website)
http://www.canlii.org/en/qc/laws

Saskatchewan statutes and regulations (Saskatchewan government website)
http://www.qp.gov.sk.ca

Yukon statutes and regulations (Yukon government website)
http://www.gov.yk.ca/legislation

3. FOREIGN INVESTMENT CONSIDERATIONS

Canada International (This website provides helpful links to government services and resources for citizens of other countries.)
www.canadainternational.gc.ca

Department of Foreign Affairs and International Trade
http://www.international.gc.ca

Industry Canada (Canadian government website)
http://www.ic.gc.ca

Invest in Canada (Canadian government website)
http://www.investincanada.gc.ca

Investment Canada Act
http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/Home

4. THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)

Department of Foreign Affairs and International Trade (including NAFTA and other free trade agreements.)
www.international.gc.ca/trade-agreements-accords-commerciaux

World Trade Organization (WTO)
http://www.wto.org

5. FORMS OF BUSINESS ORGANIZATION

Canada's Business Support and Financing site is accessed through Industry Canada provides links to Support Services, Financing Information, Tools, Guides and related sites)
http://www.ic.gc.ca

6. CUSTOMS AND TAXATION

Canada Revenue Agency (CRA)
http://www.cra-arc.gc.ca

Organization for Economic Co-operation and Development
http://www.oecd.org

7. BUSINESS IMMIGRATION

Citizenship and Immigration Canada
http://www.cic.gc.ca

8. EMPLOYEE-RELATED MATTERS

Federal

Canada Pension Plan (Information is available on the Human Resources and Social Development website)
http://www.hrsdc.gc.ca

Workplace and Health Bureau (A division of Health Canada)
http://hc-sc.gc.ca/ewh-semt/index_e.html

Province of Ontario

Ontario Human Rights Commission
http://www.ohrc.on.ca

Ontario Ministry of Labour
http://www.labour.gov.on.ca

Workplace Safety and Insurance Board (Ontario)
http://www.wsib.on.ca

Pay Equity Commission
http://www.payequity.gov.on.ca

9. PRIVACY LEGISLATION

Federal

Privacy Commissioner of Canada
http://www.priv.gc.ca

Province of Ontario

Information and Privacy Commissioner of Ontario
http://www.ipc.on.ca

Province of Quebec

Commission d'accès à l'information du Quebec
http://www.cai.gouv.qc.ca

10. PUBLIC SECURITIES

Ontario Securities Commission
http://www.osc.gov.on.ca

The Toronto Stock Exchange and TSX Venture Exchange
http://www.tmx.com

Canadian Public Securities Filings – SEDAR (System for Electronic Document Analysis and Retrieval)
http://www.sedar.com

GET PROFESSIONAL ADVICE

Given the complexity of Canadian law, professional advice is recommended. Visit our website at www.aylesworth.com for further information about our firm, our lawyers, and their specific areas of practice.

12. MOVING FORWARD

Our firm has provided this **Guide to Doing Business in Canada** to highlight some of the key issues you will need to consider – first, in deciding whether to expand or establish a business in Canada and then in implementing your business plan. These activities require the solid research and sound advice of legal professionals who understand the Canadian business environment.

When you are ready to acquire or establish a business in Canada, we would be pleased to assist you.

About Our Firm

Aylesworth LLP is a highly reputable and experienced business law firm. Since 1861, we have served businesses in the Greater Toronto Area, throughout Ontario, across Canada and around the world. At Aylesworth LLP, we seek to build long-term relationships with our clients. The more familiar we are with you and your business, the better equipped we are to meet your needs.

Visit our website at **www.aylesworth.com** for further information about our firm, our lawyers, and their specific areas of practice.

Contacting Aylesworth LLP

If you wish to contact one of our lawyers to discuss your plans for doing business in Canada, please contact the person directly by letter, telephone or email.

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13. ACKNOWLEDGMENTS

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