

# Foreign Trade, Investment and Immigration.

Section B of Stikeman Elliott's *Doing Business in Canada*





# Foreign Trade, Investment and Immigration

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# Foreign Trade, Investment and Immigration

## FOREIGN TRADE AND TRADE AGREEMENTS

In recent years, Canada has been a full participant in the effort to reduce global trade barriers. Free trade agreements have been negotiated with the United States and several other countries. Moreover, regulation relating to foreign investment has been streamlined to make it easier to complete multi-jurisdictional transactions.

### Canada's Trading Relationship with the United States

Canada and the United States have long been each other's largest trading partners with trade between the two countries having reached US\$1.5 billion per day. Access to the U.S. market, greatly enhanced by free trade accords, can be one of the most attractive aspects of doing business in Canada. Nearly every major Canadian city is within a few hours, by road or rail, of major American markets. One striking example of the closeness of the economic ties between the two countries is the almost seamless integration of Canada's industrial heartland of southern Ontario and Quebec with America's Northeastern and Midwestern states – particularly with respect to the auto industry and other heavy industry – but increasingly also with respect to high technology, communications and other growing areas of business.

### Free Trade Agreements

Canada is one of the leading trading nations in the industrialized world. Since the 1980s, successive Canadian governments have recognized the benefits of international trade liberalization and have negotiated a series of free trade agreements. The first of these was the Canada-U.S. Free Trade Agreement (FTA) of 1989. A few years after implementation of the FTA, when the United States and Mexico were embarking upon bilateral free trade negotiations, Canada was invited to join the discussions. The fruit of these trilateral negotiations was the North American Free Trade Agreement (NAFTA), which has largely governed the trading relationships among Canada, the United States and Mexico since 1994.

Canada has subsequently concluded bilateral free trade arrangements with Chile, Israel and Costa Rica. Negotiations toward further agreements are underway in a number of forums.

### NAFTA

The core of NAFTA consists in objectives and provisions that resemble those in the FTA. Most of the rights and obligations of the FTA are reiterated in one form or another in NAFTA. Rather than repealing the FTA, Canada and the United States agreed by exchange of diplomatic notes that NAFTA will,

as long as it remains in force between them, take priority over the FTA.<sup>1</sup> In addition, NAFTA encompasses several separate bilateral commitments between Canada and Mexico and the United States and Mexico.

NAFTA improved upon the FTA in many respects. Some of these are discussed at greater length below, but we should mention in passing a few others. One significant change is the presence in NAFTA of intellectual property provisions (made possible by Canada's decision to dismantle its compulsory licensing scheme respecting pharmaceutical patents). NAFTA also includes provisions addressing certain environmental concerns. Finally, NAFTA incorporates new provisions respecting anti-competitive and private business practices as a means of attaining the other objectives of the agreement.

### ***Rules of Origin***

NAFTA incorporates more detailed rules of origin than the FTA. Initially the modification of the rules of origin for automotive goods, which increased the North American content requirement from 50% to 65% were particularly significant. In addition, the rules of origin for textiles and apparel goods were also tightened through the rule of origin known as "yarn forward" (i.e. textile and apparel goods must be produced from yarn made in a NAFTA country in order to qualify for preferential treatment). The net effect of this tightening is offset, at least in part, by increases in the tariff rate quotas applicable to goods that do not otherwise meet the NAFTA rules of origin.

In July 2006, Canada, the United States and Mexico implemented measures to liberalize the NAFTA rules of origin applicable to cocoa preparations, cranberry juice, ores, slag and ash, leather, cork, certain textile products, feathers, glass and glassware, copper and other metals, televisions and automatic regulating or controlling instruments. Generally, the changes make it easier for manufacturers of these products to meet the NAFTA rules of origin and to qualify for duty-free treatment under NAFTA.

### ***Tariff Elimination***

Under NAFTA, tariff elimination between Canada and the United States continues to be governed by the FTA tariff elimination schedule. As a result, duties on goods that remained dutiable (approximately 50% of the trade that was dutiable prior to the FTA) were gradually eliminated by January 1, 1999, when trade became duty-free. Tariffs between Canada and Mexico were either eliminated on the coming into force of NAFTA, or were scheduled to be phased out in five or ten equal annual stages. For certain import-sensitive commodities, Mexican tariffs will be phased out over a period of up to fifteen years.

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<sup>1</sup> Therefore the FTA provisions that Canada and the United States decided not to fully incorporate in NAFTA remain effective as between the two parties.

**Government Procurement**

NAFTA allows suppliers of Canadian building materials competitive access to U.S. government construction contracts. Moreover, the United States has agreed to lift certain restrictions that had limited the access of Canadian high technology telecommunications equipment suppliers in respect of rural electrification projects. NAFTA also provides for greater access by Canadian and American businesses to Mexican procurement contracts. Accompanying these developments is a right of access of NAFTA government suppliers to a dispute resolution body in each NAFTA country, whose role is to enforce basic rules of fairness and non-discrimination in the procurement process.

**Trade in Services**

With respect to trade in services generally, NAFTA expanded upon the FTA by establishing a clearer set of rules and obligations to facilitate trade in services between the countries and by expanding the scope of the FTA to include land transportation and specialty air services, among others. There has also been a limited opening of financial services to entry from firms based in other NAFTA countries.

**Foreign Investment Review**

Although NAFTA does not prevent its signatories from screening foreign investment, it has required them to remove or reduce restrictions on foreign ownership in most industries, thereby resulting in a more open investment regime.

**Telecommunications**

The primary effect of the FTA and NAFTA on the communications industry has been in the area of “enhanced” or “value-added” telecommunications. Neither the FTA nor NAFTA applies generally to basic point-to-point telecommunications or to broadcasting, although NAFTA does restrict certain activities of national basic telecommunications service monopolies as a means of ensuring that they do not engage in anti-competitive behaviour. Unlike the FTA, which left the issue of what is an “enhanced” service to be determined by the regulatory body of each country, NAFTA specifically defines “enhanced or value-added services” as telecommunications services that use computer processing applications that:

- act upon the format, content, code, protocol or similar aspect of a customer’s transmitted information;
- provide a customer with additional, different or restructured information; or
- involve customer interaction with stored information.

Thus, enhanced services include most services beyond basic and long-distance telephone services — for example, electronic mail, on-line information and data retrieval or processing, and even alarm systems.

Each NAFTA country is required to give other NAFTA countries' carriers and providers of "enhanced or value-added services" the better of national treatment (no less favourable than treatment granted carriers of its own country) and most-favoured-nation treatment (no less favourable than treatment granted carriers of any other country). However, NAFTA countries may nonetheless maintain licensing schemes in respect of such services on reasonable and non-discriminatory terms. NAFTA also requires equal access to public telecommunications networks. Notably, NAFTA countries are not allowed to restrain trade by imposing discriminatory rules regarding the attachment of terminal equipment (or any other equipment) to public telecommunications transport networks.

Telecommunications covered by NAFTA are also subject to the general NAFTA rules respecting investment. Canada, like Mexico and the United States, has taken reservations that permit the retention and application of the Canadian ownership and control requirements described above.

### ***Energy***

NAFTA, like the FTA before it, has reduced the scope of regulatory intervention in the trade in energy, particularly between Canada and the United States. As a starting point, the FTA and NAFTA confirm that trade in electricity and other energy goods will be subject to GATT rights and obligations as well as to the provisions of the FTA and NAFTA Agreements. The tariff elimination provisions of the agreements eliminate existing duties on energy imports and exports and ensure that no new tariffs will be instituted. Canada is also exempt from U.S. oil import fees. The parties agreed to lift most restrictions on energy imports and exports, subject to the conditions under which GATT allows restrictions (these include short supply, conservation of an exhaustible resource, national security or the imposition of price controls). No taxes, duties or charges on the export of any energy good from the U.S. to Canada or vice versa will be imposed unless such taxes, duties or charges are also imposed on such energy goods when destined for domestic consumption.

### ***The Future of NAFTA***

On a final note, NAFTA is not exclusionary in nature and expressly provides an accession clause, similar to the provisions for accession to the WTO, permitting other nations to join the free trade area. For example, the Canada-Chile Free Trade Agreement (CCFTA) is anticipated to be a prelude to Chile's accession to NAFTA.

### Other Free Trade Agreements

In 1996, Canada and Chile concluded the CCFTA, and in 1997 a free trade agreement was entered into between Canada and Israel. More recently, Canada entered into a free trade agreement with Costa Rica, which came into force in 2002.

Finally, it should be noted that Canada is an active participant in efforts to create a hemispheric trade pact, known as the Free Trade Area of the Americas (FTAA) that would include virtually all of the countries in North, South and Central America. In addition, Canada is currently negotiating potential agreements with the Central America Four (Guatemala, El Salvador, Honduras, Nicaragua), European Free Trade Association (Iceland, Norway, Switzerland, Liechtenstein), Singapore, the Republic of Korea (South Korea), the Dominican Republic, the Andean Community (Colombia and Peru in particular) and the Caribbean Community (CARICOM). Canada has also launched initiatives with the European Union and Japan and has entered into trade, investment and economic agreements with other nations.

### REGULATION

The *Investment Canada Act* (ICA) allows the federal government to screen proposed foreign investments to ensure that they are likely to produce a “net benefit to Canada.” The ICA was passed in 1985 and represented a marked change from its predecessor, the *Foreign Investment Review Act* (FIRA), which required that non-residents prove that their investments would produce a “significant benefit to Canada.”

All acquisitions of control of a Canadian business by a “non-Canadian” are subject to the provisions of the ICA – even where the Canadian business is already foreign-controlled (e.g. a Canadian subsidiary of a U.S. corporation). One common misconception is that the use of a Canadian-incorporated acquisition vehicle takes the transaction outside the scope of the ICA. That is not the case: it is the nationality of the persons ultimately controlling the acquisition vehicle that is determinative for ICA purposes.

Depending on the nationality of the investor, the nature of the Canadian business and the book value of the assets of the Canadian business, a foreign investment may be subject either to advance review and Ministerial approval, or merely to *ex post* notification. A notification is essentially an administrative formality constituting notice of the investment (with certain required information in respect of the investment) to be filed within thirty days of closing. A review application, on the other hand, is more onerous and may constitute a bar to closing until receipt of requisite approval(s) under the ICA.

## Exempt Transaction Types

Exempt from the provisions of the ICA are certain transactions involving:

- securities dealers and venture capitalists acting in the ordinary course;
- tax-exempt vendors;
- banks;
- the acquisition of government-owned or government-controlled businesses;
- involuntary acquisitions;
- the temporary acquisition of a business in connection with the facilitation of financing arrangements;
- the acquisition of a business in connection with the realization of security;
- corporate reorganizations;
- the acquisition of a business the revenue of which is generated from farming carried out on real property acquired in the same transaction; and
- certain investments by specified insurance companies.

It should be noted, however, that other legislation might also apply to a transaction falling under one of these exemptions.

## Reviewable Transactions

### **General**

The basic rules under the ICA, before it was amended to liberalize the restrictions on NAFTA and World Trade Organization investors, required every “non-Canadian” investor who acquired control of a “Canadian business” to file an application with the Minister of Industry prior to making an investment if:

- the investor proposed a direct acquisition of a Canadian business with assets with a book value of \$5 million or more; or
- the investor proposed an indirect acquisition of a Canadian business (i.e., an acquisition of a Canadian business through the acquisition of shares of a corporation incorporated outside of Canada) with (i) assets of \$50 million or more or (ii) assets valued between \$5 million and \$50 million if the Canadian assets acquired represented more than half of the assets acquired in the total transaction. It should be noted that an indirect acquisition of a Canadian business with assets valued in excess of \$50 million (subject to WTO investor rules) is subject to review (even where the assets of the Canadian business represent less than 50% of the value of the assets acquired in the total transaction), but the application in respect of such an acquisition may be filed up to 30 days following closing.

### **Current Standards for WTO Investors**

“WTO investors” (i.e. those investors controlled by citizens of WTO-member countries) have been given substantially more freedom to invest in Canada. Also, the ICA provisions relating to the acquisition of a Canadian business under the control of a (non-Canadian) WTO investor by an investor of a third country make it significantly easier for WTO investors to sell their Canadian businesses.

As a result of the WTO amendments, an investment will be reviewable if the *asset value* of the Canadian business being acquired, as stated in the consolidated audited financial statements in the year immediately preceding the investment, exceeds the following thresholds:

- if the investor is not a WTO investor, and if the investment is not controlled immediately prior to the investment by a non-Canadian WTO investor, then the general thresholds stated above apply;
- if the investor or vendor is a WTO investor, any **direct** investment (i.e. acquisition of the Canadian business itself) of \$295 million or more is reviewable with respect to transactions closing in 2008.<sup>2</sup> It should be noted that the purchase price has no bearing on this determination. Rather, it is the book value of all the global assets used in connection with the Canadian business – regardless of whether the assets themselves are located in Canada – that is relevant for the purposes of this monetary threshold; or
- if the investor or vendor is a WTO investor, an **indirect** acquisition (i.e. the acquisition of an entity outside Canada that controls a Canadian business) is exempt from review except in very limited circumstances as described below.

### **Exceptions Relating to Certain Kinds of Business**

Notwithstanding the higher thresholds generally applicable to WTO investors, they too are subject to the lower thresholds applicable to non-WTO investors in relation to investments in certain sensitive industries. For example, if the Canadian business:

- engages in the production of uranium and owns an interest in a uranium-producing property;
- provides a financial service;
- provides a transportation service; or
- is a “cultural business”;

the lower thresholds applicable to non-WTO investors (set out in above under “General”) will also apply to WTO investors. Moreover, in the context of these sensitive industries, indirect acquisitions are treated as direct acquisitions and are therefore subject to the \$5 million pre-merger review threshold if the assets of the Canadian business represent more than half of the assets acquired in the total transaction.

<sup>2</sup> The threshold monetary level is increased annually pursuant to an indexation formula.

### **When is a Canadian Business “Acquired”?**

Under the ICA, a business is “acquired” through the acquisition of control of that business. The ICA contains detailed rules for determining when control of an existing business has been acquired by a non-Canadian.

A corporation doing business in Canada might be acquired through a share purchase or an asset purchase. While the ICA allows for Ministerial discretion with respect to characterizing specific transactions, the basic rule is that any transaction in which a non-Canadian acquires the majority of voting shares of a corporation is considered an acquisition of control of that corporation. There is also a presumption that an acquisition of one-third to one-half of the voting shares of a corporation is an acquisition of control (this presumption may be rebutted by demonstrating that there is no control in fact). The acquisition of less than one-third of the voting shares is not considered an acquisition of control.<sup>3</sup> The acquisition of all or substantially all of the assets of a Canadian business is also considered an acquisition of control.

For entities that are not corporations (e.g. partnerships), the ICA deems as “acquisitions of control” all and only those transactions in which the majority of voting *interests* is acquired. This is subject to a general provision, applicable to corporations and non-corporations, that one cannot preclude the application of the ICA by structuring an acquisition as many small transactions, each of which falls below the relevant thresholds. Such multiple transactions will be treated as one transaction, even in cases where they are demonstrably unrelated to one another.

The ICA also provides for indirect acquisitions of control, including acquisitions of non-Canadian entities that control Canadian business entities. The ICA is clear that such indirect acquisitions are acquisitions for its purposes. In general, for the purposes of the ICA, where one entity controls another entity, it is deemed to control indirectly any entities that are controlled, directly or indirectly, by that other entity.

### **Ministerial Approval**

Except as noted below, an investment for which there is a requirement to file an application for review cannot be completed until the Minister of Industry (or in some cases, as discussed below, the Minister of Canadian Heritage) has, or is deemed to have, issued the net-benefit-to-Canada ruling. Once the Minister has received an application for approval of a proposed transaction, a notice must be sent to the applicant within 45 days advising that the Minister is, or is not, satisfied that the investment will be of net benefit to Canada. If the Minister is unable to make this determination within 45 days, the Minister may extend the period by 30 days (or longer if the investor agrees). If the Minister fails to send a notice

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<sup>3</sup> The one possible exception is with respect to a cultural business in which case, notwithstanding that less than one-third of the voting shares are being acquired, the Minister can decide on the facts whether control has been acquired.

in the prescribed time, he or she is deemed to be satisfied that the investment will be of net benefit to Canada.

There are exceptions to the general rule that an investment subject to review cannot be completed until the Minister has, or is deemed to have, issued a net benefit ruling:

- Where the Minister is satisfied that delaying the implementation of the investment until the completion of the review would result in undue hardship to the non-Canadian or would jeopardize the operations of the subject Canadian business;
- An indirect acquisition (i.e. the acquisition of an entity in Canada through the acquisition of a corporation incorporated outside of Canada); and
- An acquisition of a business involved in an activity appearing on a prescribed list of activities related to Canada's cultural heritage or national identity, where the federal Cabinet has decided that it is in the public interest to review the acquisition even though it is below the threshold at which review would otherwise take place.

In the case of these investments, the review may take place after the completion of the investment, and the investments would remain subject to the net-benefit-to-Canada standard.

Finally, it is typical for the Minister to require investors to provide legally binding undertakings as a condition to receiving a net-benefit-to-Canada ruling.

***When is an Investment "Likely to be of Net Benefit to Canada"?***

In order for an investment to be found "likely to be of net benefit to Canada," it need only be demonstrated that, on balance, it is likely to produce some benefit to Canada. In making this determination, the Minister will take into account the:

- effect of the investment on the level and nature of economic activity in Canada;
- degree and significance of participation by Canadians in the Canadian business and the relevant Canadian industry;
- effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;
- effect of the investment on competition within any industry in Canada;
- compatibility of the investment with national industrial, economic and cultural policies; and
- effect of the investment on Canada's ability to compete in world markets.

The Minister will also consult with provincial government likely to be affected by the proposed investment. Additionally, the Minister will consult with other federal departments that may have experience or general authority over the matters that factor into the net benefit ruling (e.g. the Competition Bureau, the Canadian Transportation Agency, or the Canadian Radio-television and Telecommunications Commission). Generally speaking, the Minister will not sign the net benefit ruling until it has received a positive response from the relevant federal departments or agencies and provinces.

### **Investments by State-Owned Enterprises (“SOEs”)**

On December 7, 2007, Canada's Minister of Industry announced that the government would apply special guidelines to the review of Canadian investments by state-owned enterprises (SOEs) under the ICA.<sup>4</sup> In addition to the factors that the Minister of Industry typically considers in deciding whether to approve reviewable investments (as discussed above), the Guidelines identify the “governance and commercial orientation of SOEs” as central considerations in reviewing SOE investments.<sup>5</sup>

The Minister will also scrutinize the commercial orientation of the SOE in relation to its prospective operation of the target business, in particular, regarding: “where to export; where to process; the participation of Canadians in its operations in Canada and elsewhere; the support of on-going innovation, research and development; and the appropriate level of capital expenditures to maintain the Canadian business in a globally competitive position”. A central concern of the government is that foreign states may buy up “strategic resources” such that they are in a controlling market position. This would allow the foreign state to limit supply to Canadian customers and instead, funnel the resources to the home country. The government may also be concerned about the non-exploitation of resources such that the proposed investment would reduce the level of economic activity in Canada.

Finally, the Guidelines outline the types of binding commitments or undertakings an SOE may be required to provide to pass the “net benefit” test. These include commitments to appoint Canadians as independent directors, the employment of Canadians in senior management, the incorporation of the target business in Canada and the listing of shares of the acquiring company or the target Canadian business on a Canadian stock exchange.

<sup>4</sup> The Guidelines define an SOE as an “enterprise that is owned or controlled directly or indirectly by a foreign government.”

<sup>5</sup> The Guidelines state that the Minister will assess the SOE's adherence to Canadian standards of corporate governance, such as commitments to transparency and disclosure, independent directors, audit committees and equitable treatment of shareholders, as well as compliance with Canadian laws and practices. The Minister will also consider how, and to what extent the investor is owned or controlled by a state. For example, how is the state directly involved, if at all, in the operation of the SOE?

## Notifiable Transactions

### *General*

As discussed above, the ICA excludes many transactions from the review process. Most such transactions are, however, still subject to a notification requirement. For instance, non-Canadians undertaking acquisitions that do not meet the thresholds discussed above (Reviewable Transactions) must nevertheless notify Investment Canada within 30 days of making their investment. Non-Canadians establishing new businesses in Canada must do the same unless the new business is “related” to its existing business. No notice is required if an investment is for an expansion of the non-Canadian’s existing business, although the expansion into a related business that is deemed to bear on Canada’s cultural heritage or national identity is subject to notification and potentially reviewable.

Once notification has been made in the prescribed form, the investment may proceed without further government attention unless it is an investment in a prescribed type of business activity bearing on Canada’s cultural heritage or national identity.

### *Cultural Businesses*

A “cultural business” is a business that does any of the following:

- publishes, distributes or sells books, magazines, periodicals, newspapers or music in print or in machine-readable form, unless all that it does is print or typeset books, magazines, periodicals or newspapers;
- produces, distributes, sells or exhibits audio, film, video or music-video recordings; or
- broadcasts through the media of radio, television or cable television, provides satellite programming or broadcast network services, or engages in radio communication, other than broadcasting, in which the transmissions are intended for direct reception by the general public.

The Minister responsible for the review of proposed acquisitions of “cultural businesses” is the Minister of Canadian Heritage, while the Minister of Industry is responsible for the review of all other proposed acquisitions. Where a proposed acquisition involves both a cultural and a non-cultural business, both the Minister of Canadian Heritage and the Minister of Industry will have jurisdiction.

An investment in a business relating to Canada’s cultural heritage or national identity may be reviewed on the order of the federal Cabinet even where the thresholds for review set out above (Reviewable Transactions) have not been met. The federal Cabinet has 21 days following notification of such an investment to decide whether to proceed with a review and to notify the investor if a review is to be conducted.

### **Sanctions**

The ICA provides that where the Minister believes that a non-Canadian investor has acted contrary to the provisions of the ICA, the Minister may send a demand letter requiring compliance. If the investor fails to comply with this demand, the Minister may seek court-imposed sanctions.

### **Possible Amendments to the ICA**

In June 2005, the former liberal government introduced Bill C-59, *An Act to Amend the Investment Canada Act*. The proposed amendments would have considerably broadened the Government's ability to review – and block – a range of foreign investments, and enabled the federal cabinet (upon the recommendation of the Minister of Industry) to review any foreign investment that, in the opinion of the Governor in Council, “could be injurious to national security”, regardless of the value of the assets of the target Canadian business or whether “control” is acquired. While Bill C-59 died on the order paper following the election of a new Conservative government, the ICA is back in the spotlight with the government's recent announcement that it intends to review the ICA “with the aim of maximizing the benefits of foreign investment for Canadians while retaining our ability to protect national interests.”

## **IMMIGRATION**

Canada's *Immigration and Refugee Protection Act* (IRPA) has been in effect since June 28, 2002. With few exceptions, this law requires that every prospective immigrant apply for and obtain a visa before entering Canada. While the federal government has primary authority over immigration, it has allowed the provinces to exercise considerable discretion in this field, if they so choose, with respect to their own jurisdictions. Quebec exercises significant authority over immigration, as do (to a somewhat lesser extent), Newfoundland & Labrador, New Brunswick, Manitoba, Saskatchewan and British Columbia.

Most of Canada's immigration law is found in the IRPA and its associated regulations, manuals and operating memoranda. The federal Department of Citizenship and Immigration directs Canada's citizenship and immigration policy and programmes which is developed mainly with a view to satisfying the needs of the country's labour market. As a general principle, the admission of foreign workers must not adversely affect Canadian labour market conditions.

Outside Canada, the immigration programme is administered by visa officers at Canadian Embassies, High Commissions, and Consulates. Applicants usually have to submit an application at the Canadian post abroad that is responsible for handling applications from their country of residence. The time that it takes to process applications varies, depending on where the application is made.

## Temporary Entry

Those who are neither Canadian citizens nor permanent residents may be granted admission to Canada temporarily. Temporary entry is permitted without a work permit for business purposes provided the person is a permanent employee of a corporation outside Canada carrying on business in Canada, and provided that their activity within Canada is limited to meeting and consulting with other employees of a Canadian parent company, subsidiary or branch office, selling goods to parties other than the general public, or to purchasing Canadian goods and services.

In most other cases, a work permit is required by persons who seek admission to Canada to study or work on a temporary basis. Businesspersons and temporary foreign workers falling into this category must generally apply for a work permit at a Canadian Consulate or High Commission outside of Canada prior to arrival, unless their country of origin is one of the countries exempt from this requirement. Exempt countries include the United States, Japan, the United Kingdom, France, Germany, most other European Union countries, and certain Commonwealth countries. Those applicants who qualify for entry under an exemption category (i.e. NAFTA, GATS, or other exempt category, as discussed below) may apply for their employment authorizations upon their arrival at a port of entry to Canada. A work permit is usually issued for an initial period of six months to one year (with exceptions for senior executives), but can be extended.

In order for individuals who require employment authorization to be admitted to Canada, the Canadian employer must request a Labour Market Opinion (“LMO”) with respect to the temporary employment through the Foreign Worker Unit of the Service Canada Centre, which must be satisfied that employment opportunities for Canadians will not be adversely affected by employing a foreign worker. NAFTA and GATS provide exemptions to the LMO requirement (discussed below), as do certain categories of the Regulations.

## International Agreements

NAFTA makes it easier for U.S. and Mexican businesspersons to work temporarily in Canada on the basis of a streamlined application process under which they are not required to obtain employment authorization and under which they may apply for a work permit at a port of entry. GATS provides similar rules for slightly more restricted categories of citizens of WTO member nations. Other international agreements may apply, such as the Canada-Chile Free Trade Agreement or other bilateral agreements.

The following categories of businesspersons may enter Canada to work temporarily without having to apply for a work permit or who may be admitted to Canada at a port of entry:

- Businesspersons who are categorized as “business visitors” (or as persons seeking to engage temporarily in the trade of goods or services or in investment activities within Canada) (the “business visitor” category);
- Businesspersons seeking entry temporarily to carry on substantial trade in goods and services between the U.S. or Mexico and Canada and who will be employed in a supervisory or executive capacity (the “traders” category);
- Investors wishing to enter Canada for the purpose of developing and directing Canadian operations of a business of a U.S. or Mexican corporation in which he or she has invested or will invest significant amounts of capital (the “investors” category);
- Specified professionals who meet education and experience qualifications set out in NAFTA, who will carry out professional work while temporarily in Canada (the “professionals” category); and
- “Intra-company transferees”, being senior executives or managers who have been employed by the company, an affiliate or subsidiary for at least one year within the three-year period immediately prior to the application, and who are coming to Canada to work temporarily for the same company, affiliate or subsidiary (the “intra-company transferee” category).

## Permanent Residence

### *General*

The permanent residence visa application procedure generally commences with the completion of a pre-application questionnaire upon which a preliminary assessment is made. The applicant is then required to complete the necessary application for permanent residence forms and schedules. For those applicants destined for Quebec, an application for a certificate of selection is also required.

Each applicant and his or her spouse and dependents (defined below) must meet the medical and security requirements for admission to Canada. Dependent children of a sponsored foreign national may be included in that person’s application. If one family member is inadmissible, the entire application will fail.

A dependent child is either a biological child or an adopted child. Children can be dependent if they meet one of the following conditions:

- They are under 22 and unmarried or not in a common-law relationship;
- They have been full-time students since before age 22, attend a post-secondary educational institution and have been substantially dependent on the financial support of a parent since before age 22 and,

if married or a common-law partner, since becoming a spouse or a common-law partner; or

- They are 22 or over and have been substantially dependent on the financial support of a parent since before age 22 because of a physical or mental condition.

### **Categories of Applicant**

Those applying for permanent resident status in Canada are assessed according to selection standards designed to determine whether an immigrant is capable of successfully establishing himself or herself in Canada. The IRPA establishes three principal classes under which a prospective immigrant may apply: refugee, economic and family. “Refugees” are foreign nationals with special humanitarian needs; “Economic immigrants” are people with the resources to create new businesses and new jobs for Canadians or who have special skills needed in Canada; and “Family” immigrants are near relations of Canadian citizens and permanent residents.

### **The Point System**

The IRPA includes regulations setting out specific selection criteria for each class of applicant. For the economic class (see below), the regulations create a “point system” whereby each candidate for admission is awarded points with respect to a number of criteria of admission. These criteria include education, age, work experience, pre-arranged employment, knowledge of the English and French languages, and personal adaptability. The Regulations provide for administrative discretion by immigration officers in awarding points in appropriate cases where special circumstances warrant.

#### ECONOMIC CLASS IMMIGRANTS

Economic class immigrants fall into two main streams: skilled workers and business immigrants.

“Skilled workers” are assessed on a point scale, as described below. Candidates must score at least 75 out of a possible 100 points to be considered. Among the most important criteria are education (25 points), knowledge of official languages (24 points) and employment experience (21 points). Age, arranged employment in Canada and personal adaptability are each worth 10 points.

“Business immigrants” fall into the following three categories:

1. **Investors.** The investor program is available for prospective immigrants wishing to settle in any Canadian jurisdiction except Quebec. Persons qualifying in this class must have a minimum net worth of \$800,000 or more, accumulated through their own efforts as businesspersons. Applicants must make an investment of \$400,000, payable to the Government of Canada. This investment is allotted to the participating provinces and territories, whose

- governments use the funds for job-creation or economic development purposes. The original \$400,000 is returned to the investor after five years. Investor Class immigrants are not required to start a business in Canada, nor are any terms or conditions imposed on them with respect to their immigration status (this distinguishes the Investor Class from the “Entrepreneurial” and “Self-Employed” categories). The province of Quebec administers its own Immigrant Investor Program, where investments must be made through a designated brokerage firm. The same criteria applies for Quebec, but to take advantage of the Quebec program, the investor must intend to invest and settle in Quebec.
2. **Entrepreneurs.** Entrepreneur applicants must have a legally obtained net worth of at least \$300,000, and must intend and be able to own and actively manage at least one-third of a business that will contribute to the Canadian economy and create at least one full-time job, other than for the entrepreneur and family members. Entrepreneurs and their family members are granted conditional permanent residence. They must report to an immigration officer in Canada on their progress in establishing a business that meets specified requirements and show that they have met these requirements for at least one year within three years of admission to Canada.
  3. **Self-employed persons.** The self-employed immigrant is an immigrant who has the intention and the ability to establish or purchase a business in Canada that will create an employment opportunity for him or herself and make a significant contribution to the economy, cultural and artistic life, or athletic excellence of Canada. This category of immigrant includes professionals such as farmers, artists, dancers and sport personalities. Generally, an initial substantial capital investment will be required. The approval process may also involve a review or recommendation by provincial authorities, and local licensing requirements will apply. A professional who applies as a self-employed person must be qualified to practice his or her profession in Canada at the time of application.

Once applicants have fulfilled the requirements of one of these three categories, they are then assessed on a point scale similar but not identical to the one used for skilled workers. This time, the most important criteria is work experience (35 points), followed by education (25 points), and English and French language proficiencies (24 points). Age (10 points) and adaptability (6 points) are also taken into consideration. However, applicants need only obtain 35 of a possible 100 points to pass.

#### FAMILY CLASS IMMIGRANTS

Family class applicants must be sponsored by a Canadian citizen or permanent resident who is at least nineteen years of age and can include the

Canadian sponsor's spouse, common-law or conjugal partner, or his or her dependent children (as described in the legislation – see above), parents or grandparents, minor children to be adopted in Canada or orphaned children under 18 who are brothers, sisters, nieces, nephews or grandchildren.

The sponsor must provide an undertaking either to help the family member and his or her dependants to establish themselves in Canada or, in the case of the young or infirm, to provide for their lodging, care and support. The point system described above does not apply to applicants in the family class.

## IMPORT/EXPORT

### Import Regulations

#### **Customs Act Requirements**

Most statutes regulating the importation of goods into Canada are administered in conjunction with the federal *Customs Act*. Under the *Customs Act*, persons bringing goods into Canada must report to Canadian customs officials, make due entry of the goods and pay any duties and tax owing upon importation. Where imported goods are subject to import controls under legislation other than the *Customs Act*, customs officers have the authority to enforce such regulations at the time of importation. A wide range of enforcement provisions are available to Canadian customs officials, including criminal sanctions and civil penalties that may involve the seizure and forfeiture of goods and the imposition of fines. Customs officials also have substantial audit powers to ensure compliance with import controls, and importers are required to keep extensive books and records.

The Administrative Monetary Penalty System (AMPS) largely replaces the potential use of seizure and forfeiture for technical customs violations. AMPS is designed to encourage compliance with the *Customs Act*, the *Customs Tariff*, and with the *Special Import Measures Act* and associated regulations through the introduction of an extensive array of graduated monetary penalties, which take into consideration both the type of infraction and the compliance history of any particular entity.

#### **Duties on Imports**

The *Customs Tariff* imposes duties on a wide range of goods. Rates of duty depend on the country of origin and the nature of the product being imported. The country of origin is determined in accordance with the *Customs Tariff* (or with various free trade agreements between Canada and other countries) and will help determine which tariff rate is applicable. The classification of a product is determined under the Harmonized Commodity Description and Coding System, which is also used in the U.S. and most countries of Europe and Asia. The Canadian system for determining the value of goods for duty purposes is based on the international Customs Valuation Code pursuant to the *General Agreement on Tariffs and Trade* (GATT).

### **Taxes on Imports**

The Goods and Services Tax (GST), a federal tax with a current rate of 5%, will be imposed on most goods imported into Canada. The GST is imposed on the value for duty of imported goods, plus any applicable duties. Special excise taxes and duties may also be levied with respect to certain goods. Excise taxes are levied on a limited number of goods imported into Canada, including certain automobiles, air conditioners for automobiles and gasoline products. Excise duties are imposed on spirits, wine, beer and tobacco, as well as on cigars and cigarettes produced or manufactured in Canada. An additional customs duty is levied on spirits, wine and beer when they are imported into Canada, in an amount equal to the excise duties that would have been imposed had they been manufactured in Canada. In the case of spirits, wine and tobacco products, the duty payment may be deferred to the time of sale to a retailer.

### **Duty Relief**

Duty relief in the form of drawbacks or exemptions may be available where goods are (i) imported and subsequently exported; (ii) used in the manufacture of products that are ultimately exported; (iii) used in the production of goods if an equal amount of a similar domestic or imported material is used to make the product for export; or (iv) used in Canada for prescribed purposes or in specified industries. NAFTA limits the availability of drawbacks for exports to the United States and Mexico. Duty relief may also be available where certain imported machinery is not available in Canada and under free trade agreements between Canada and other countries.

### **Packaging and Labelling**

Generally, packaging and labelling requirements can be broken down into four broad categories: pre-packaged goods requirements, textile requirements, food and drug requirements and hazardous product requirements. These are discussed in sequence, below. Where precious metal articles are marked for quality, they are subject to the *Precious Metals Marking Act* and accompanying regulations. In addition to product specific requirements, as a result of Quebec's Charter of the French Language there may be particular language requirements for labelling and packaging when doing business in Quebec<sup>6</sup>.

Much of the legislation affecting the importation of goods into Canada relates to product standards or is designed to prevent unfair or misleading marketing practices and address potential health and safety concerns. The *Consumer Packaging and Labelling Act* and accompanying regulations apply, with some limited exceptions (including drugs), to all pre-packaged consumer products sold in Canada. A pre-packaged product is any product that is packaged in a container in such a manner that it is ordinarily sold

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<sup>6</sup> See Section 8, Canada's Languages.

to, or used or purchased by a consumer without being re-packaged. Each product must have a label containing a declaration of net quantity clearly and prominently displayed, and must be easily legible and in distinct contrast to all other information on the label. The label must also identify the person by or for whom the product was manufactured, and its principal place of business, the identity of the product in terms of its generic name or in terms of its function, and any other prescribed information respecting the nature, quality, age, size, material content, composition, geographic origin, performance, use or method of manufacture or production of the product. Further requirements include bilingual labelling, application of labels, font size and typeface and location of information on the label.

The *Consumer Packaging and Labelling Act* also contains broad prohibitions against false and misleading representations that may, for example, affect the inclusion of environmental claims on product labels. In addition, the *Marking of Imported Goods Order* made under the *Customs Tariff* lists specific goods that must be legibly and conspicuously marked, stamped, branded or labelled to indicate the country of origin. The packaging of each product must be manufactured, constructed and displayed in such a way that the consumer will not be misled about the quality or quantity of product it obtains. The regulations also prescribe standardized container sizes for a limited number of products.

The Competition Bureau (Industry Canada) is responsible for the administration and enforcement of the *Consumer Packaging and Labelling Act* and accompanying regulations as they relate to non-food products. The Canadian Food Inspection Agency is responsible for the administration and enforcement of the *Consumer Packaging and Labelling Act* and regulations as they relate to food products.

Labelling of textiles is governed by the *Textile Labelling Act* and accompanying regulations. Any consumer textile article imported into Canada to which the Textile Labelling Act applies must have a label affixed to it containing prescribed information, the textile fibre content of the article, and the dealer's name and postal address. The regulations also prescribe the manner in which trademarks or descriptive terms may be shown, and the use of particular words and expressions. However, dealers may import incompletely or improperly labelled consumer textile articles provided the dealer labels the articles in Canada, notifies an Industry Canada inspector at the time of, or prior to the importation with prescribed details about the articles, and gives an inspector an opportunity to inspect the articles after labelling.

Some textile articles are subject to country of origin marking requirements as a result of the *Marking of Imported Goods Order*. A number of textile articles must also be covered by an import permit issued by the Department of Foreign Affairs and International Trade.

The *Food and Drugs Act* imposes labelling and packaging standards in respect of food, drugs, cosmetics and medical devices as a means of protecting consumers from fraud, injury and other deceptive practices. The regulations stipulate which food and drugs must carry a label when offered for sale and the content of the label including, for example, the name of the manufacturer or distributor and the address of its principal place of business. “Food” includes any article manufactured, sold or represented for use as food or drink, and “drug” includes any substance manufactured, sold or represented for use in the diagnosis, treatment or prevention of disease, the restoration or correction of organic functions or the disinfection of premises in which food is manufactured, prepared or kept.

The *Food and Drugs Act* regulations set out requirements in regards to labelling, food additives, freezing and compulsory ingredients for some foods. For example, the name of the food, the identity of the manufacturer, the durable life of the product, special storage instructions, and the ingredients, energy content, and core nutrients of the product must be shown on the packaged food labels, and in some circumstances security packaging is required. The Canadian Food Inspection Agency is responsible for the administration of the *Food and Drugs Act* as it relates to food.

Narcotics and controlled and restricted drugs may only be imported by a pharmaceutical manufacturer or distributor or other person licensed by the Minister of Health. Package information must include the name of the drug, the identity and location of the manufacturer, a quantitative list of the ingredients, the lot number of the drugs, instructions for use, and the net amount of the drug in the container. Legislative and regulatory responsibility, as it relates to non-food products, resides with Health Canada.

As provided in the *Hazardous Products Act*, many hazardous products cannot be advertised in, sold in, or imported into Canada. Still other hazardous products are subject to restrictions with respect to advertising, sale or importation. The *Hazardous Products Act* does not apply to materials regulated by the *Explosives Act*, the *Food and Drugs Act*, the *Pest Control Products Act*, the *Tobacco Act* or the *Nuclear Safety and Control Act*. The *Controlled Products Regulations* prescribe the information that must be contained on labels and material safety data sheets by suppliers of specified hazardous controlled products destined for use in the workplace. Included among the labelling requirements are applicable product and supplier identifiers, hazard symbols and appropriate information respecting risk and precautionary and first aid measures. The Minister of Health is responsible for the administration of the *Hazardous Products Act*.

#### **Miscellaneous Products**

There are also various legislative controls imposed on the importation of agricultural products, specific food products, grain, alcoholic beverages,

radiation emitting devices, offensive weapons and oil and gas. Legislation that further touches on, and regulates the importation and labelling of many products includes environmental protection legislation and language legislation.

#### **Quantity Limits on Imports**

The entry of certain goods into Canada may be quantitatively limited if the goods appear on the Import Control List. The majority of the items on the list may be classified as clothing, footwear, textiles, fabrics, yarns or animal and agricultural produce. Implementation of the Uruguay Round Agreement has required Canada to change its import controls for certain products to a system of Tariff Rate Quotas. The Import Control List may be added to, if an inquiry by the Canadian International Trade Tribunal reveals that goods are being imported or are likely to be imported in such quantities and under such conditions so as to pose serious injury to Canadian producers of like or directly competitive goods. Importers wishing to import goods that have been placed on the Import Control List are required to apply to the Department of Foreign Affairs and International Trade for a permit to import such goods. Although only Canadian residents may apply for import permits, a person is permitted to apply for an import permit on behalf of another person who will actually import the goods.

#### **Anti-Dumping**

Special import measures will apply where imports have adverse effects on the development and expansion of Canadian industry. These measures are designed to protect Canadian producers from competition from foreign goods that are being sold in Canada for artificially low prices. For example, an anti-dumping duty is imposed where the Canadian International Trade Tribunal has determined that the dumping of goods has caused or is threatening to cause material injury to a domestic industry; countervailing duties may otherwise be imposed where findings have been made that imported goods have been subsidized by a foreign government to the detriment of Canadian producers.

#### **Export Regulations**

Except for most exports to the U.S., personal effects, and commercial goods valued at less than \$2,000, exporters must submit to a customs office an Export Declaration in prescribed form detailing the product to be exported from Canada. This declaration is mainly for statistical purposes.

Pursuant to the *Export and Import Permits Act*, goods and technology subject to export control are placed on an Export Control List. Goods and technology may be listed for a number of reasons, including: to control the export of arms or similar products, the eventual use of which may be detrimental to Canada, to limit or keep under surveillance the export of

certain non-agricultural products in circumstances of surplus supply and depressed prices, and to ensure the adequate supply of articles required for Canada's defence or other needs. The products found on the list generally include animal and agricultural products, wood and wood products, certain industrial machinery and electronic devices, transportation equipment, metals, minerals and other manufactured products, chemicals, metalloid and petroleum products, arms, munitions and military, naval or air stores and atomic energy materials and equipment along with other miscellaneous goods and materials. Exports to certain countries may also be subject to certain restrictions, as set out in the Area Control List.

Anyone wishing to export goods and technology named in the Export Control List must first apply to the Department of Foreign Affairs and International Trade for an export permit. Even where a permit is issued, it will likely contain important restrictions relating to the quality or quantity of the goods in question, to the persons or the places to which they may be sent, and so forth. These export permits are available to Canadian residents only.

The export of energy products including oil, natural gas, and electricity is controlled by requiring that exporters obtain export licenses or orders from the National Energy Board. The importation and the domestic distribution of energy goods are also regulated by the National Energy Board<sup>7</sup>.

### Government Programs

There are a number of programs that have originated with the Canadian government to provide services to Canadian exporters and foreign importers:

- The Export Development Canada (EDC) was established by the federal *Export Development Act* to facilitate and develop trade between Canada and other countries by providing financial services to Canadian exporters and foreign buyers. The principal services offered by the EDC are insurance, guarantees and export financing.
- The Program for Export Market Development is designed to improve Canada's international trade performance by offering financial assistance to Canadian businesses seeking to participate in various trade promotion and export activities.
- Trade Commissioners operating out of Canadian Embassies, High Commissions, Consulates and International Trade Centres within Canada assist Canadian companies seeking export markets by collecting and analyzing information on legislation, key contacts, commercial practices and business opportunities abroad and intervening on behalf of exporters with local authorities.

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<sup>7</sup> See Section 18, Energy and Natural Resources, for further information.

- The International Business Opportunities Centre works with Canada's Trade Commissioners abroad to connect Canadian companies with foreign business opportunities.
- International Trade Centers have been established, regionally, by Industry Canada to assist Canadian business to identify the products and services necessary to meet the business' export needs, and to provide export-counseling services.
- The Canadian Companies Capabilities is a computerized database on Canadian companies, their products and the markets they serve, which is available through Industry Canada at <http://strategis.ic.gc.ca>.
- Virtual Trade Commissioner (formerly World Information System for Exports) is a computerized database used by the Canadian trade officers to match Canadian sources of supply of goods and services with foreign customers.
- ExportSource is a comprehensive online federal government resource for export information, which brings together all available federal government trade-related information, plus export-related information from non-federal and private sector sites.
- The federal Canadian Commercial Corporation is an export sales agency, which assists in the development of trade between Canada and other nations on a government-to-government basis and generally assists Canadians in the import and export of goods and commodities.
- In addition, all of the provincial governments have export-related promotion programs, ranging from loans and insurance programs to incentives for participation in trade fairs overseas.

# Canadian Business Law – Worldwide

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