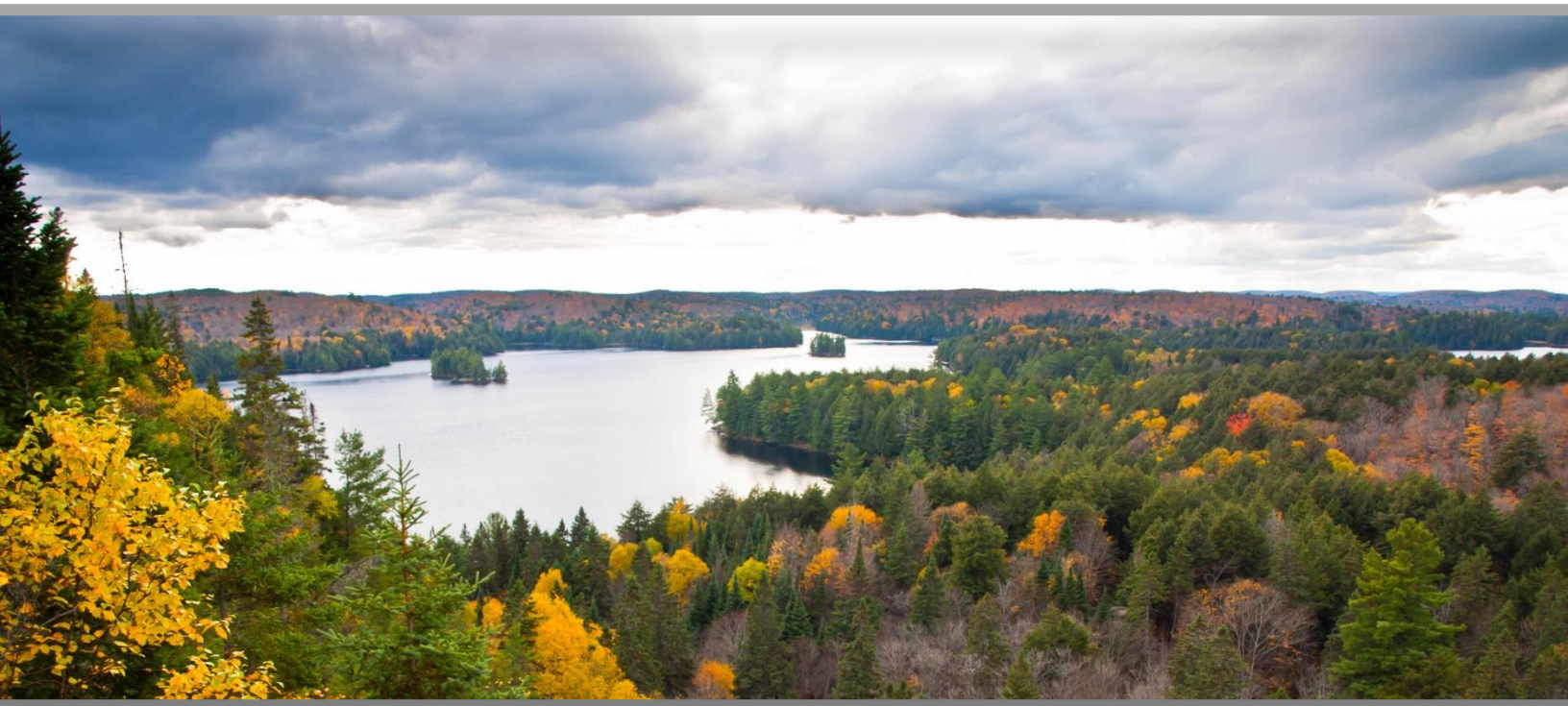
Polten & Associates

DOING BUSINESS IN ONTARIO, CANADA

A LEGAL GUIDE



POLTEN & ASSOCIATES
LAWYERS AND NOTARIES

181 UNIVERSITY AVENUE, SUITE 2200, TORONTO, ONTARIO, M5H 3M7, CANADA

ERIC P. POLTEN EPOLTEN@POLTENASSOCIATES.COM

PETER GLEZL PGLEZL@POLTENASOOCIATES.COM

TORONTO AREA: 647 724 4175

TOLL FREE: +1 866 322 6521

FAX: +1 416 947 0909

DOING BUSINESS IN ONTARIO, CANADA is a business guide developed by Polten & Associates to provide executives, foreign counsel and potential investors with an overview of the legal framework of doing business in Canada, with particular reference to the Province of Ontario. As it constitutes neither legal nor other professional advice, readers are urged to consult legal counsel for advice on specific issues. This publication is current as of January, 2015 or as may otherwise be indicated herein.

To learn more, and for our list of our lawyers and their areas of expertise, please visit us at **WWW.POLTENASSOCIATES.COM**

DOING BUSINESS IN ONTARIO, CANADA

CONTENTS

CANADA'S PARLIAMENTARY DEMOCRACY

Canada is a federal state divided into 10 provinces and 3 territories. Canada's parliamentary democracy operates on the federal and on the provincial level.

The federal parliament consists of the House of Commons and the Senate. The House of Commons has 308 elected Members of Parliament or MPs (this number will rise to 338 following the next election), who exercise most of the federal legislative powers. Each Member of Parliament is elected in and therefore represents one geographical constituency called a riding. The political party with the highest number of MPs forms the government and its leader becomes the Prime Minister. The 105 members of the Senate are appointed by the Governor General on the recommendation of the Prime Minister; they may serve up to the age of 75. The role of the Senate is to analyze, amend or reject bills approved by the House of Commons. Senators' powers include introduction of their own bills, which must not result in spending of public funds or increase of tax rates.

Provinces and territories have their own legislative powers conferred to them by the constitution. The provincial parliaments, which are often called Legislative Assemblies, have only one chamber equivalent to the House of Commons. In the provincial context, the head of the political party which has received the most votes in the provincial election becomes the province's Premier, who presides over the provincial/territorial government.

The third level of government, formed on the level of cities and other municipalities, derives its powers from legislation enacted by the provinces and territories.[1] The primary legislative instruments of these municipalities are by-laws, which are enacted by the municipal councils. Municipal elections are held to select the members of each municipal council and the mayor.

[1] e.g. *Municipal Act, 2001* S.O. 2001, c. 25

FEDERAL AND PROVINCIAL JURISDICTION

The federal government has the authority to regulate matters that affect Canada as a whole. For this reason, the federal parliament is equipped with powers related to matters of national importance such as income taxation, cross-border trade[2], banking and currency, intellectual property, transport and communication, customs duties, criminal law etc.

The principle of subsidiarity, which prescribes that decisions affecting individuals should be made by the level of government closest to them, has guided the courts in providing a broad interpretation of provincial powers that now encompass private property law, provincial corporate law, sales tax, real estate transactions, consumer protection and other matters that directly impact individuals.

The wording of the Canadian Constitution is not precise with regard to the exact extent of federal and provincial powers and therefore court decisions have significant political impact, restricting the application of or even invalidating federal and/or provincial legislation.

[2] Interprovincial and international

CANADA'S LEGAL SYSTEM (COMMON LAW AND CIVIL LAW)

The legal system in Canada is based on the common law tradition, being judicially-made interpretations and applications of legislation adopted by the respective governments. Over time, the practices set down by the courts came to define the rules of different fields of law, thereby forming a body of rules referred to as common law. Another example of how the courts exercise strong influence over the legal rules resides in the court's power to interpret legislation adopted by the federal and provincial governments. In this way, the court may even create a new rule by providing a new interpretation of the existing law.

An exception to the prevailing common law system is the civil law system of the province of Quebec, which has enacted a Civil Code. Just as in continental Europe, the Quebec courts interpret the Quebec Civil Code rather than any practices created through previous court decisions.

SYSTEM OF COURTS

Canada has a system of provincial and federal courts with the Supreme Court of Canada at the top of the hierarchy. The jurisdiction of the federal courts is mainly limited to issues regulated by federal laws and claims against the federal government. In addition to the courts, there are a number of independent tribunals, which deal with an assortment of matters such as employment or municipal issues.

Commercial disputes can also be resolved through arbitration under the United Nations Convention on the Settlement of Investment Disputes, which was ratified by Canada in 2013. Persons or entities coming from two states that are signatories to the convention can refer resolution of their dispute to arbitration by the International Centre for Investment Disputes ("ICSID"). In addition, disputes with foreign governments arising under different free trade agreements and investment protection treaties may also be resolved within the ICSID framework.

FORMS OF CANADIAN BUSINESS ORGANIZATIONS

When starting a business, choice of legal entity is one of the most significant first steps that affect liability, taxes, financing and other issues. Entrepreneurs who want to carry on business in Canada are offered the following choices:

- **Corporation**
- **Branch of a foreign corporation**
- **Sole proprietorship**
- **General Partnership**
- **Limited Partnership**

Business Name

Special attention should be paid to the selection of the business name. To prevent confusion on the part of the public, registration of the business requires proof that the name of the business is not similar to an existing business name. For the purpose of choosing a genuine new name that will not stand in conflict with another business name, one should consider conducting a "NUANS" (New Upgraded Automated Name Search), a service which lists all similar corporate names and trademarks.

Corporation

The corporation is the most common legal entity in Canada. Corporations are separate legal entities from their owners, the shareholders. A separate legal entity means the corporation may possess rights and/or incur liabilities without this having any effect on the shareholders. Shareholders own the corporation through their ownership of its shares. Shares can have different rights attached to them and on the basis of these rights, various classes of shares are distinguished. The most common types of shares are common shares and preference shares. Common shares typically confer on the shareholder a right to vote and receive dividends and/or proceeds upon dissolution of the company.

Private and public corporations

Two different kinds of corporations can be distinguished: “private corporations” and “publicly offered corporations”. A publicly offered corporation that aims to trade in its securities, such as its shares and other debt instruments, must be registered with a regulatory authority (e.g. Ontario Securities Commission) and comply with a considerable number of requirements. The application procedure is time consuming and expensive, which is why some corporations prefer a “buy-out” of a publicly offered corporation to continue carrying on business under its shell. However, with regard to the ability of a corporation to sell its own shares, there are exemptions that enable a private corporation to offer its shares for sale.

Incorporation and fees

Establishing a corporation requires the filing of its articles of incorporation, which set out the rights, privileges and other conditions attached to the individual class of shares issued by the corporation. Normally, a corporation would also adopt by-laws, which govern its internal procedures. Upon filing and payment of the fees, incorporation is automatic and the corporation is created on the date of the issuance of the certificate of incorporation. Incorporating electronically is always the cheaper option. The fee for federal incorporation is $200.00 CAD and for incorporation in Ontario is $300.00 CAD.

Corporations can be incorporated either under federal (Canada Business Corporations Act - CBCA) or under provincial laws, such as the Ontario Business Corporations Act. With the exception of Ontario, corporations incorporated elsewhere in Canada are required to obtain an extra-provincial license to carry on business activities in other provinces. Federally incorporated corporations may conduct business anywhere in Canada subject to certain registration or licensing requirements.

Directors

General duties

Management of a corporation is exercised via a board of directors. Directors owe fiduciary duties to the corporation as those managers. Breach of a director’s obligation may result in his/her personal liability. Some of the directors’ duties may be delegated to the management of the corporation. The standard of liability of the corporation’s officers is substantially similar to that of the directors.

The fiduciary duty requires the directors to act honestly and in good faith and in the best interest of the corporation. In certain instances, the interests of the corporation and the interests of the shareholders may be contradictory, which makes it necessary to conduct research on the relevant statutes and case law in order for the directors to understand their duties in specific situations. Part of the fiduciary duty of a director pertains to the avoidance of conflict of interest. Most frequent cases concern personal interest of the directors in certain contracts of the corporation and advantage arising out of information they can acquire by virtue of their position.

The directors have a duty of care while performing their duties. The minimum standard requires directors "to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances." Courts enforce this minimum standard through a principle called the "business judgment rule", which focuses on the process of reaching the decision in question rather than on the consequences of the decision itself. The process of making a decision should include the conduct of fundamental inquiries and consideration of the interests of all stakeholders.

Remedies against directors or officers

Shareholders and other stakeholders have the following options in pursuing an action against a director or an officer:

- Oppression remedy – in respect of oppressive or unfairly prejudicial acts of the directors/officers or their unfair disregard of the stakeholders' interests
- Derivative action – an action seeking to acquire leave allowing initiation of legal proceedings in the name of the company
- Order for compliance – applied for with the purpose of compelling the directors, officers and/or the corporation to act, or to refrain from engaging in a breach of their duty.

It is important for foreign investors to be aware of the residency requirements pertaining to directors of corporations. According to the Canada Business Corporation Act (CBCA) and the Ontario Business Corporations Act (OBCA), at least 25% of the directors of a corporation need to be resident Canadians.

Shareholders, being the owners of the corporation, do not have managerial rights and normally do not have the power to bind the corporation. Under the CBCA and the OBCA, some or all powers of the director's may be transferred to the shareholders.

Branch of a foreign corporation

A foreign entity (foreign company) is allowed to carry on business in Canada by registering as an extra-provincial corporation.[3] The choice between establishing a branch or incorporating a subsidiary is normally based on tax considerations. Should the investor opt for a branch, the corporation must register in each province where it wishes to carry on business.[4]

Sole proprietorship

Sole proprietorship is the simplest form of business entity. Characteristic of this form is the fact that it draws no distinction between the business owner and the business itself. The start-up costs of a sole proprietorship are low and formation requirements are minimal. As mentioned, there is no distinction between the owner and the business and, therefore, the owner is exposed to full personal liability for losses of the business and the business assets are exposed to personal liabilities of the owner. Another inconvenience of this form of entity is the difficulty related to a sharing of the business, contrastable to the simplicity of incorporating a company.

For a proper understanding of the issue of liability, the two following aspects need to be addressed:

Liability	Liabilities of the sole proprietorship are also liabilities of the owner. The owner is therefore personally liable for the business's obligations. This personal liability extends to personal assets of the owner that are not necessarily connected to the business.
Assets	Assets of the sole proprietorship are deemed personal assets of the owner. One should therefore take into account the fact that the personal liability of the owner arising from any transaction (even outside the business) may pose risk to the assets of the business.

[3] e.g. *Extra-Provincial Corporations Act*, R.S.O. 1990, c. E.27
[4] In Ontario, one must apply to the Ministry of Government Services for a licence

Formation of a sole proprietorship does not require any formalities except for registration of a business name. This is only required if the sole proprietor intends to carry on business under a name that is different from his/her own.

General partnership

A Canadian partnership has many of the features of a sole proprietorship except that it must include at least two partners. As in the case of a sole proprietorship, partnership liabilities are considered personal liabilities of the partners and the partnership's assets are considered assets of the partners.

Formation

Formation of a partnership requires no special filings. Statutes regulating partnerships consider a business carried on by two or more partners in common for the purpose of profit to be a partnership. This applies even to business partners who have no intention of forming a partnership. Businesses that are formally incorporated are exempted from application of this rule and cannot become partners in this way.

Unless the name of the partnership is composed of the partners' names, the partnership needs to register its name.

Acting on behalf of the partnership and joint liability of partners

Partnerships are governed by default statutory rules some of which may be altered by a partnership agreement. Statutory rules which may not be altered by a partnership agreement include the following:

- Any partner may act on behalf of the partnership.
- All partners are jointly and severally liable for the debts and obligations of the partnership.

Management, share in profits etc.

On the other hand, those statutory default rules related to obligations between partners may generally be altered by a partnership agreement. Two examples of the amendable rules include: (i) every partner's equal share in the profits and the capital of the partnership and (ii) each partner's

right to participate in management of the partnership. The simple majority required for a decision related to the ordinary business of the partnership may also be altered as necessary.

Common provisions of a partnership agreement regulate the following issues:

- Partnership name
- Division of partnership profits
- Division of partnership property
- Division of liability among the partners
- Regulation of right to make management decisions
- Restrictions upon the ability to act on behalf of the partnership
- Procedure related to expelling of a partner from the partnership

Although the formation of a partnership may be quick and its start-up costs are normally low, the joint and several liability of the partners requires a high degree of trust among the partners.

Limited partnership

The Canadian limited partnership is composed of at least two different types of partners: general partners and limited partners. As in normal partnerships, general partners have full personal liability for the liabilities of the business. On the other hand, liability of the limited partners is limited to the amount of capital invested in the limited partnership, unless the partner takes part in control of the business or allows his/her name to be part of the business name. A person may be a general partner and a limited partner in the same limited partnership.

To be valid, formation of a limited partnership must be registered with the "company register".

Limited partners, who are considered investors, are protected from actions taken by the general partners, and their partnership interest may be assigned. Limited partnership agreements regulate similar issues to those in a partnership agreement, but additional issues relating to the rights and obligations of the limited partners, such as sharing of profits, should be dealt with.

Joint Venture

A joint venture is formed by two or more parties. This form of business organization is not regulated by any legislation, but it is solely based on a contract. The joint-venture agreement should identify the purpose of the joint venture including the rights and obligations of the individual parties. In order for the parties to continue carrying on business as separate entities, the joint-venture agreement should state that no partnership is being established.

TAXATION

In this chapter, we look at the regulation of taxation in Canada. In particular, we summarize the most important issues pertaining to income tax, sales tax and other taxes of importance for foreign investors.

Income Tax

In Canada, there are federal and provincial corporate income taxes. According to the federal Income Tax Act, persons resident in Canada are taxable on their worldwide income. 'Persons' in the meaning of the Income Tax Act are most importantly individuals, corporations and partners of partnerships.

Corporations incorporated in Canada are generally considered residents of Canada for income tax purposes. A corporation incorporated outside of Canada is deemed a resident if its central management and control is located in Canada. This is generally the case, if the members of the superior decision-making authority of such a corporation are Canadian residents and if the decisions are issued in Canada.

A person's residence is defined by the rules of common law complemented by specific statutory rules. An individual is considered a resident of Canada if that person regularly lives in Canada. This assumption is subject to other factors including location of personal property, spousal, and social and economic interests. If you sojourned in Canada for 183 days or more (the 183-day rule) in the tax year, you may be considered a deemed resident of Canada.

Residents are taxed on their worldwide income and non-residents on the income resulting from:

- employment in Canada;
- carrying on business in Canada; and
- taxable gains from the disposition of taxable Canadian property.

How is carrying on business in Canada defined? There is no clear definition, which means the interpretation is considerably fact specific. A non-resident is deemed to have carried on a business if he/she:

- produced, grew, mined or otherwise invested labour in Canada;
- solicited orders or offered anything for sale in Canada;
- disposed of certain property situated in Canada.

Be aware of tax treaties that Canada has entered into with approximately 90 countries, since these can eliminate double taxation and reduce or eliminate withholding tax, which is set at the rate of 25%**.** This pertains mainly to payments to non-residents regarding most types of passive income, e.g. dividends and rents.

Corporate Income Tax Rate

The Corporate Income Tax rate consists of federal and provincial rate. Depending on the taxable income and the province, the combined tax rate is between 15% and 31%. Some tax benefits may be granted to new businesses. Needless to say, corporations that are considered residents in Canada or those that carry on business in Canada must file a corporate tax return.

Income Tax Rate of Individuals

The income tax rate of individual's is structured in a similar way, consisting of federal and provincial income tax, both of which are progressive. The federal income tax rates are:

- 15% for the first $43,953 of taxable income, **+**
- 22% on the portion of taxable income over $43,953 up to $87,907, **+**
- 26% on the portion of taxable income over $87,907 up to $136,270, **+**
- 29% of taxable income over $136,270.

The federal rate is then combined with the additional provincial tax rate, which is also usually progressive and ranges from 4%[5] to 21%. These combined can reach a top marginal tax rate as high as 50%.

Goods and Services Tax

Goods and Services Tax (GST) is a value-added tax imposed on delivery of almost all goods and services in Canada. The tax applies to goods and services, real property and intangible property supplied within Canada as well as to goods and services imported to Canada. It does not apply to goods and services ready for export. At present, the rate is 5%.

Provincial Sales Taxes and Harmonized Sales Tax

Some provinces including Ontario have introduced a combination of their local Sales Tax and GST called *Harmonized Sales Tax* (HST). In Ontario, the GST of 5% is combined with the 8% rate of the provincial sales tax the result of which is a 13% HST rate.

[5] 5.05% in Ontario

INVESTING IN CANADA

The Investment Canada Act ("ICA") defines the rules for foreign and therefore non-Canadian investors who want to invest in Canada. The Canadian government aims to foster investment while monitoring the level of investments and ensuring the result provides a net benefit to Canada. Transactions that are monitored by the government are generally of larger size or related to a protected industry.

The investments that are regulated by the ICA are subject to a review or notification.

Review

A review is performed before the transaction is completed and it is thus subject to an approval issued by the Investment Review Division of Industry Canada under the direction of Minister of Industry. Investments pertaining to culture or Canadian national identity are reviewed by Department of Canadian Heritage and the Minister of Canadian Heritage.

Transactions that are reviewable are primarily acquisitions of Canadian businesses, the asset value of which equals or exceeds the following threshold:

1. $354 million dollars for direct acquisitions by or from World Trade Organization (WTO) investors. Indirect acquisitions by or from WTO investors are not reviewable.
2. $5 million for a direct acquisition and $50 million for indirect acquisitions. Should the asset value of an indirectly acquired Canadian business, which has over $5 million in assets, exceed 50% of the global transaction, the transaction is reviewable.

The definitions of direct and indirect acquisitions are set out comprehensively in the Investment Canada Act, as are any exceptions to the abovementioned general rules.

Notification

Establishment of a new Canadian business or acquisition of control over a Canadian business by a non-Canadian, which is not reviewable, is still notifiable. The notification is filed within 30 days of the closing of the transaction, and its purpose is to provide specific information regarding the business, its shareholders and its assets.

FINANCING OF BUSINESS IN CANADA

A business can be financed through debt financing and/or equity financing.

Lenders may be persuaded to assume a lower interest yield in return for sharing in the profit of the business or for having the choice to convert the debt into shares of the business (convertible debenture).

Equity financing

Due to greater risks associated with certain business investments, some corporations need to raise money from the owners and from more "risk prone" institutions such as venture capitalists, or through grants. Public corporations issue securities to acquire their financing through an offering to the public or through private placement. The issuance of these securities must comply with registration and prospectus requirements.

The regulation of securities in Canada is provided by the individual provinces and territories. The Canada Business Corporations Act (CBCA), which is a piece of federal legislation, contains certain provisions related to insider trading, but as stated above, the main part of the securities' regulation stems from provincial legislation, i.e. the Ontario's Securities Act. Among the main goals of the legislation is that of protecting the investors by providing them with information rights and setting standards of conduct for persons in managerial or other positions.

There is a securities commission or similar authority entrusted with enforcing compliance with the individual legislation in each of the provinces and territories. Such commissions are not to be confused with the Canadian Securities Administrators (CSA), which is an organization that coordinates the proposed provincial pieces of legislation and has been pursuing the aim of harmonising all the securities laws.

The primary obligations set forth by the various pieces of securities legislation can be categorised as follows:

Disclosure requirements

Prospectus requirement

This requirement involves preparation of a prospectus, which then needs to be approved by the authorised Securities Commission. In sum, the company will first prepare a preliminary prospectus, which it will file. Once all the questions of the Commission have been resolved, the company will file its final prospectus. A prospectus is a document that outlines the activities of the company and provides the particulars of the securities being issued. It must contain all the information required by the securities laws and regulations.

One of the main exemptions to the prospectus requirement is the "private issuer exemption", which allows the issuer to sell to purchasers where each one of the purchasers buys as principal. It is also required that a purchaser not be a member of the "public". Individuals who comply with this condition include persons such as directors of the company, current holders of securities of the company, employees and their relatives, friends or business associates. [6]

Continuous disclosure requirement

All individual pieces of securities legislation require public companies to prepare quarterly and annual financial statements including MD&A[7]. In addition to this, the issuers of these statements are required to report any material changes in their affairs and to submit an annual information form. These documents may be filed in the form of simplified prospectuses into which they are incorporated by reference.

Registration requirement

Conducting trade activity as a business requires registration, the aim of which is the protection of investors. The registration requirement ensures that the market dealers have the needed proficiency and meet other continuing regulations.

[6] Other prospectus requirement exemptions include: minimum amount investment exemption, accredit investor exemption and distributions to executive officers, employees and consultants.
[7] Management Discussion and Analysis

Debt financing

The debt financing industry encompassing banks or other institutional lenders is ruled by strong competition and borrowers are advised to ask for proposals from different lenders in order to identify the offer with the best terms. The borrower shall then submit a credit application, which will need to be accepted by the lender. The borrower will receive a term sheet setting out the terms and conditions of the transaction and a list of the required documentation. The loan agreement is concluded upon the signing of the term sheet, unless a more complex loan agreement is needed to govern the transaction. Depending on the borrower's credit-worthiness and the terms of the loan, a security or several different types of securities may be required. Banks will normally require that they be assigned priority over both unsecured and other secured lenders.

Security Interest in Personal Property

Each province has the authority to introduce specific regulation pertaining to security interests. In the case of Ontario, such regulation is embodied in the *Personal Property Security Act* ("PPSA").[8] In order for a transaction to fall within the scope of the Ontario PPSA, the transaction must establish a security interest in personal property regardless of the form. The rules of this act provide the basic principles with respect to the effectiveness of security agreements, perfection of the security interest, its priority, registration, and assignment as well as the rights and remedies in case of default.

Attachment and registration

The enforceability of a security interest against third parties requires "attachment" of the security to the collateral. Requirements of an attachment are enumerated in the PPSA (s.11 of the Ontario PPSA). Once the security is attached to the collateral in accordance with the rules set forth in the PPSA, the security interest must be "perfected" either through registration or by obtaining possession of the collateral. Every jurisdiction with its own Personal Property Security Act has a

[8] R.S.O. 1990, c. P-10. The province of Quebec and its civil law system regulates security under the Civil Code of Quebec

separate registry of security interests. It is a matter of choice whether the registration is performed in the jurisdiction where the assets are located or at the place of the debtor's chief executive office. Potential creditors or purchasers may perform searches through each registry or with the help of search service providers who can perform a search in all Canadian PPSA jurisdictions.

Priority of security interests

Every security interest has a certain priority in relation to other security interests regularly determined by the time of perfection of the security interest. Specific situations and certain collateral break the "first to perfect" principle giving rise to super priority. One example of this "super priority" is the "purchase-money security interest", which is a scenario where the creditor provides funds to the debtor for the purpose of acquiring the collateral. Provided that all conditions are met, the creditor's security interest acquires priority over any other security interests.[9]

Default

Upon default, the secured party and the debtor have recourse to the rights and remedies set out in the security agreement as well as those set out in the PPSA.

The secured party may take possession of the collateral and dispose of it subject to a minimum 15 days' notice. The notice is not always required, particularly in cases where the goods are perishable. Disposition of the collateral discharges the security interest of the secured party performing the disposition and if the disposition is made to a buyer who buys in good faith for value, it also discharges any subordinate security interests. The secured party may also propose to accept the collateral in satisfaction of the obligation secured.

Apart from having the right to be informed of the secured party's intentions, fulfillment of specific conditions by the debtor provides the right to redeem the collateral or reinstate the security agreement.

Other relevant legislation

An example of another important piece of legislation pertaining to security interests is Ontario's *Fraudulent Conveyances Act*[10], the purpose of which is to prevent transactions that intend to defeat, hinder, delay or defraud creditors.

[9] For exemption, see the *Bank Act*, S.C. 1991, c. 46
[10] R.S.O. 1990, c. F.29

A major amount of legislation relevant to security interests deals with consumer protection. Part VII of the Ontario Consumer Protection Act sets out the rules on the disclosure of the "costs of borrowing" and other disclosure obligations, rules pertaining to charges and the required insurance.

Regulation of bankruptcy falls under the responsibility of the federal government. The federal *Bankruptcy and Insolvency Act*[11] acknowledges security interests created under provincial laws. Nevertheless, the order of priority starts with "super priority" claims, which mainly include wages and payroll deductions of employees. These are followed by further classes of claims in the following priority: secured claims, preferred creditors' claims, unsecured claims, postponed claims and equity claims.

Main types of security interests:

- General Security Agreements (GSAs)

GSAs establish a security interest in all the present and future property of the debtor including all after-acquired inventory, accounts receivable and other property. A GSA can be adjusted to suit the specific requirements of the parties to the security contract.

- Debenture

The above-mentioned GSA typically does not cover real property. On the other hand, the debenture compensates for this by combining security in real property with a security in personal property in one document. A different type of security called convertible debenture can be converted into a fixed number of issuer's common shares.

- Pledge

Debtors have the option to pledge securities or other negotiable instruments in order to create a security interest. The main conditions of this transaction include the item having to be negotiable and duly endorsed. Creditors will generally require the debtor to pledge its shares, which is perfected by retaining control or by registration under the PPSA.

- Assignment of accounts receivable

In this case, the debtor will assign either all of his receivables or only specific receivables.

[11] R.S.C. 1985, c. B-3

INTERNATIONAL TRADE

International trade agreements lay down rules that need to be followed by both federal and provincial levels of government. Their main purpose is to provide preferential treatment for goods and services to the parties to the agreement, to protect investors and sometimes to provide dispute settlement mechanisms. This in turn limits nations in their flexibility in issuing new national / provincial legislation or adopting new policies.

The key principle of international trade agreements is the principle of non-discrimination, which has two main component rules: (i) the rule of the most favoured nation and (ii) the rule of national treatment.

According to the rule of the most favoured nation, Canada is obliged to treat the goods and services of the country party to the agreement the same way it treats "the most favoured nation". Consequently, no other nation may be treated better than the one which is party to the trade agreement. It must be pointed out that this principle does have certain exemptions.

The rule of national treatment prohibits Canada from giving local / domestic businesses preferential treatment over foreign businesses once these have entered the market.

WTO, NAFTA, FTAs and BITs

Canada is a member of the World Trade Organisation (WTO), which supervises trade between all of its members. The volume of the trade operating under WTO rules represents over 96% of the world's global trade. The WTO agreement liberalizes trade in respect of goods, services and intellectual property. This is achieved by the lowering of tariffs and other barriers, providing a dispute settlement procedure and reviewing governments' trade policies. Complaints against the policies of member states can only be raised by other states, not by private investors.

The North-American Free Trade Agreement (NAFTA) is a trade agreement concluded by Canada, the U.S. and Mexico, which entered into force in 1994. Its main purpose was elimination of duties on

trade between these countries. The NAFTA agreement allows investors to claim damages without government engagement.

Free Trade Agreements (FTAs) set preferential tariffs thereby enhancing access to the markets of the countries concluding such agreements. These agreements may also include the rule of the "most favoured nation" and the rule of "national treatment", rules on investment protection and procedure for settlement of disputes. Such a treaty is currently being negotiated with the European Union.

The purpose of bilateral investment treaties (BITs) is to protect investment originating from countries which are parties to the treaty. What exactly the protection encompasses can be established only on case-by-case basis. In principle, foreign investors should enjoy treatment roughly similar that enjoyed by the domestic investors. Additionally, investors are protected from expropriation of their investment, whether direct in the form of nationalisation or indirect through policies implemented by the host states. Canada has entered into 28 investment protection treaties that are currently in force, with three more becoming enforceable in a short period of time.

Importing into Canada

Regulation of importation of goods into Canadian territory falls under the jurisdiction of the federal government. The main two pieces of legislation are the Customs Tariff and the *Customs Act*[12]. The executive body collecting the tariff duties is the Canada Border Services Agency (CBSA).

What are the steps involved in importing goods?

1. **Obtain a Business number**

Before importing goods into Canada, one must first apply for a business number or BN with the Canada Revenue Agency (CRA).

2. **Identify the goods**

One should obtain as much information as possible about the goods, their nature and their composition, in order to determine the type of treatment the goods will receive. The goods are classified according to the Customs Tariff.

[12] R.S.C. 1985, c. 1 (2nd Supp.)

Canada is a signatory to the Harmonized Commodity and Description and Coding System. This is an international product classification system maintained by the World Customs Organisation (WCO). The Canadian Customs tariff is being continually adjusted to comply with this system, with possible consequences for the duty rates.

Each good needs to have its 10-digit tariff classification number determined. The number can be determined based on the Customs Tariff, by making an inquiry with the Border Information Services or by asking CBSA for an advanced ruling. This number and the good's country of origin are then used to establish the applicable rate of duty. In general, the country of origin is where the product is "substantially manufactured". In contrast, the origin of goods that are granted preferential treatment depend on the tariff classification of their components and the completed product.

3. Goods must be permitted for import

Goods that are not permitted include, for example, goods produced by prison labour.

4. Identify the country of origin

This step in the procedure involves identification of not only the country from which the product was shipped. One needs to identify the place where the product was produced, including its parts, as well as where it was assembled.

5. Permits, certificates and other restrictions

CBSA acts on behalf of different government departments by enforcing compliance with legislation, requiring permits, certificates and/or inspections. CBSA has helpful reference guides available to the importers.[13] Other restrictions include marking requirements[14] and/or special import measures pursuant to the *Special Import Measures Act* (SIMA)[15], which regulates, among other matters, anti-dumping and countervailing duties.

6. Tariff treatment and rate of duty

After determining the goods' tariff classification, the importer will be able to see the different tariff treatments the goods are subject to depending on their country of origin. The applicable treatment,

[13] http://www.cbsa-asfc.gc.ca/publications/dm-md/d19-eng.html
[14] http://www.cbsa-asfc.gc.ca/publications/dm-md/d11/d11-3-1-eng.html
[15] R.S.C. 1985, c. S-15

whether “preferential treatment” or “most favoured nation treatment”, is determined based on the trade treaties Canada is a party to and on the proof of origin the importer is able to produce to the CBSA. Only then can the importer determine the rate of duty.

7. Goods and Services Tax (GST), excise tax and excise duty

According to the Excise Tax Act, GST of 5% is payable on most goods that are being imported, whereas some, such as prescription drugs and medical devices, are tax-exempt.

Excise tax is levied on goods such as fuels and certain passenger vehicles.

Excise duty is paid on alcohol and tobacco products.

8. Value of the goods

The Customs Act provides for several methods of valuation on which the value for duty is based. The primary method of determining the value for duty is to look at the transaction value paid by a Canadian buyer as evidenced by an invoice from the vendor. Notice that the transaction value can then be subjected to certain statutory additions or deductions in order to arrive at the value for duty. Other common methods are based on the value of identical goods or value of similar goods.

The value for duty must be in Canadian dollars using the rate of exchange from the date of direct shipment. After establishing the price in Canadian dollars, you add the customs duty to arrive at the value for tax. This will enable you to calculate the GST. Adding up the customs duty and the GST will give you the total payable amount.

9. Release of the goods

The goods are normally released at the CBSA office where they arrive to Canada. The CBSA will notify you of the shipment’s arrival. There are two basic clearance processes that differ based on the time of payment:

a. *Full accounting and payment of duties method*, which requires the full payment in order for the goods to be released.
b. *Release of goods prior to the payment of duties method* is used with large volume importers, who are required to post a security with the CBSA and pay the duties later.

REAL ESTATE

Types of interest

Canadian real estate law recognises two basic types of interest in land, freehold and leasehold. Freehold is an interest equivalent to full ownership, an interest of an indefinite duration. Leasehold is an interest for a specified maximum period.

Other types of rights over land include

- **Easements:** A non-possessory right of use over land of another, e.g. right of way.
- **Profits-a-prendre:** A non-possessory right to take the resources from the land of another, e.g. to extract minerals or hunt wild game.
- **Restrictive covenants**: Restricts specified activities in respect of the land

Title registration

Ontario has two co-existing systems that record land titles, **the registry system** and **the land titles system**.

The registry system provides registration of the deeds affecting the land without determining their quality, thereby leaving the responsibility for the quality of title to the individuals. The quality of titles within the registration system is based primarily on the priority in time of registration.

On the other hand, the land titles system provides a higher degree of certainty. Being regulated by detailed legislation, the land authority determines the quality of the title securing this determination through provision of indemnities through a government-administered assurance fund. Most of the property in Ontario has been converted to the land titles system.

Acquisition and Sale of Real Estate in Canada

Real estate in Canada is normally bought and sold through a real estate broker. The agreement of purchase and sale is an agreement which is concluded by the issuance of the offer to purchase by the seller and through an acceptance of the offer by the vendor. Often, the local real estate boards provide standard forms as well as other agreements used in course of a purchase and sale. Some transactions may require a more complex agreement that addresses a lot more issues.

It is often critical to have a lawyer overlook the terms of the agreement. In addition to that, lawyers help buyers by examining the title to the real estate property and by conducting research in respect of related issues such as taxes (land transfer tax, capital gains tax, withholding tax, harmonized sales tax) or environment matters. The scope of the due diligence, which is usually performed by the buyer, should at least include road access, easements and lease reviews. The Law Society of Upper Canada as well as other providers offer the purchasers title insurance, which in certain cases may save legal costs.

Land Use Planning

Each province regulates the way real estate is used and developed. Despite the regulation falling under the responsibility of the provincial government, many of the functions have been delegated to municipalities.

The use of land is controlled through official plans and zoning by-laws. The Ontario *Planning Act*[16] requires all counties and municipalities to adopt their own Official Plan, which determines the long-range physical development of the land. The zoning by-laws regulate almost all aspects of use of each parcel of land including permissible types and sizes of the buildings. Construction of a building requires a building permit and the same is true for alterations or additions.

Pursuant to the Ontario Planning Act, subdivision of land in Ontario requires the consent of the local Committee of Adjustment. The same may be required in respect of transfers, mortgages or leases pertaining to only part of the land. The application to the committee will normally involve preparation of a draft plan of subdivision and the applicant agreeing to provide a number of services in respect of the land, such as building roads,.

[16] R.S.O. 1990, c. P.13

Employment and labour relations are governed by provincial legislation. This applies to both labour law relations regulating union activities, as well as to employment law governing relations between employers and their employees.

Federal regulation exists with respect to federally regulated employers such as those providing telecommunication, interprovincial transportation and bank services. The applicable *Canada Labour Code*[17] governs the relations between these employers and their employees as well. Most of the employment relations are governed by the law of the province where the work is performed. An employer operating in different provinces must comply with each specific provincial regulation.

The following information is based on the assumption that the employees are not unionized, since in such cases, a different set of rules substitute the statutory regime.

Employment contract

The rules governing a particular employment relationship are mainly the rules set out in the employment contract. Many of the general contract rules of the common law apply to employment contracts as they do to any other contracts. Provincial legislation provides for the minimum standards that cannot be lowered or waived. On the other hand, contract terms exceeding the minimum standard are considered binding upon the employer.

Employment standards

Ontario's main piece of legislation in the area of employment law is the Ontario *Employment Standards Act 2000*[18] with much of the important information being contained in the companion Regulations. The regulations set minimum standards for such aspects of employment as the minimum wage, hours of work, hours of overtime and overtime pay, rest periods, vacations and vacation pay, leaves of absence and minimum periods of notice of termination.

Minimum wage

All jurisdictions in Canada have enacted regulations governing the provision of minimum wages to certain employees. In Ontario, the minimum wage has been $11.00 an hour since June 1, 2014.

[17] R.S.C. 1985, c. L-2
[18] S.O. 2000, c. 41

However, the Ontario Exemptions, Special Rules and Establishment of Minimum Wage Regulation[19] provides for special minimum wage rates that apply, for instance to students under the age of 18 who work less than 28 hours a week during their school years, or to employees who, as a regular part of their employment, serve liquor directly to customers. The minimum wage legislation applies regardless of how the employee's wages are calculated. This means that it is the employer's responsibility to ensure that wages comply with the regulations even where employees are not paid on an hourly basis.

Hours of work, overtime and overtime pay

In principle, employers in Ontario cannot require or permit an employee to work more than eight hours in a day, and 48 hours in a week. However, an employer and an employee can agree in writing to work a specified number of hours in excess of this regular ceiling up to 60 hours per week if the following conditions are met. Firstly, the employer has to provide the employee with the "Information Sheet about Hours of Work and Overtime" produced by the Director of Employment Standards.[20] Secondly, approval from the Director of Employment Standards to assign the excess hours must have been granted upon the employer's application.

Working overtime "triggers" the right to overtime pay. As in many other jurisdictions, the statutory rate according to the Ontario Employment Standards Act, 2000 is at least one and one-half times the regular rates of the affected employees. In Ontario, employees are generally entitled to overtime pay for each hour of work in excess of 44 hours in each work week.

Vacation entitlement

The minimum vacation entitlement for employees in the Province of Ontario is two weeks for each vacation entitlement year. The vacation entitlement year commences on the date that the employment relationship commenced. According to the Ontario Employment Standards Act, 2000, the vacation shall be completed no later than ten months after the end of the vacation entitlement year for which it is given. During vacation, employees shall receive vacation pay of at least 4 % of the wages earned during the period for which the vacation is given. Although they seldom do, employers have the right to dictate when employees can take their annual vacations.

Pregnancy/parental leave

In Ontario, pregnancy entitles the pregnant employee to pregnancy leave of 17 weeks, which is followed by 35 weeks of parental leave (37 weeks if the pregnancy leave is not taken). The

[19] O. Reg. 285/01, s. 5

[20] http://www.labour.gov.on.ca/english/es/pdf/info_hours.pdf

employer has the obligation to reinstate the employee to the position the employee most recently held with the employer, if it still exists, or to a comparable position, if it does not. Both pregnancy and parental leave are unpaid by employer.

Personal Emergency Leave and other leaves

In Ontario, some employees have the statutory right of up to ten days of unpaid job-protected leave each calendar year due to illness, injury and certain other emergencies and urgent matters. This is known as "personal emergency leave" and only employees who work for employers who regularly employ at least 50 employees are eligible for it. All other employees have to rely on other levels of legal protection. Firstly, if an employee is dismissed, constructively or otherwise, because of personal illness, he or she may be able to sue for wrongful dismissal. Secondly, the employment contract may include a term entitling the employee to sick leave with or without pay.

Employees in Ontario are entitled to several other types of leaves such as family medical leave, organ donor leave, family caregiver leave, critically ill child leave or crime-related child death or disappearance leave. For example, family caregiver leave provides employees with up to eight weeks of leave of absence without pay in cases of serious medical conditions.

Human rights

The Ontario *Human Rights Code*[21] prohibits discrimination with respect to employment. This includes the right to receive equal treatment without discrimination based on race, origin, sexual orientation, gender identity, physical or mental disability and a list of other factors. The right to equal treatment does not apply to cases where employer can prove the factor to be a bona fide occupational requirement.

In Ontario, human rights are administered by the Ontario Human Rights Tribunal. If a person believes that his/her rights under the *Human Right Code* were infringed, he/she can apply directly to the Tribunal for an order for monetary compensation, restitution or other redress.

Protection against unlawful dismissal in Ontario

In Ontario, statutory and common law provisions regulate the issue of how an employment relationship can be terminated, and how an employee can respond to being fired.

[21] R.S.O. 1990, c. H.19

Termination of the employment relationship

Termination with due notice or pay in lieu

Following the first three months, the employer has the duty to give the employee a reasonable notice of termination or pay in lieu thereof. The parties are free to set a notice period in the employment contract. The Ontario *Employment Standards Act, 2000*, section 57, sets out minimum notice periods that correspond to the employee's period of employment, starting at a minimum of one week up to a minimum of eight weeks. In a common law jurisdiction like Ontario, judges have far more powers than judges in civil law jurisdictions and there are certain factors that judges will usually consider, especially the employee's age, position, length of service with the employer, level of compensation and probability of finding alternative employment. An employee who is not satisfied with the notice given can consider suing for damages for wrongful dismissal.

Termination of 50 or more employees effective within a four week period is subject to considerably more stringent administrative requirements.

The employee in turn is legally obligated to provide the employer with reasonable notice of his or her intended resignation from his or her employment. Yet, this does not mean that the notice period the employer would have to give, if he/she decided to dismiss an employee, and the reasonable notice the employee would have to give are identical because the respective notice obligations serve different purposes. While reasonable notice on the employer's part is supposed to help the employee to cope with the imminent unemployment, the purpose of determining reasonable notice on the employee's part is to give the employer enough time to react to the future absence of the employee by, for instance, hiring or training a replacement. Not surprisingly, reasonable notice for an employee is, generally speaking, considerably shorter than reasonable notice for an employer.

Summary dismissal

Where the employee's conduct constitutes a breach of his or her fundamental obligations to the employer, such conduct amounts to just cause and gives the employer the right to end the employment relationship without notice. In each and every case, a contextual approach has to be taken while assessing the existence of a just cause for dismissal.

Resignation

An employee who wishes to end his or her employment can resign. If the employee does this freely and voluntarily he or she will be entitled neither to claim wrongful dismissal nor to claim severance pay or pay in lieu of notice.

Constructive dismissal

A constructive dismissal occurs where an employer significantly changes a fundamental term or condition of the employment without the employee's actual or implied consent and the employee thus decides to quit and sue for damages. The doctrine of constructive dismissal was recognized by the courts after employers had tried to avoid liability for wrongful dismissals by making the working environment unbearable for employees, i.e. by implicitly forcing employees to resign. It can be observed that the courts usually take the economic situation into consideration while assessing cases of alleged constructive dismissal; when the economy does well, courts tend to be less sympathetic to changes in the work place. Accordingly, when the economy is on a downturn, the courts generally have allowed a company to introduce changes with negative effects on employees if this is done in order to keep the company in business.

Restrictive covenants in employment relationships

Restriction on employee's post-termination activities must be (i) limited to protection of the legitimate interests of the employer, (ii) must be reasonable in terms of scope, duration and geographic limit and (iii) must comply with public policy. Two of the most frequently used restrictive covenants include the non-solicitation and non-competition clauses.

Severance pay

Under certain circumstances specified in more detail in the Ontario *Employment Standards Act, 2000,* a terminated employee who was employed by the employer for five or more years is entitled to a severance pay calculated by multiplying the employee's regular wages for a regular work week by the sum of the number of years of employment the employee has completed and the number of the remaining months of employment that the employee has completed, divided by 12. The maximum payable amount will not exceed 26 weeks. The entitlement of federally regulated employees is different.

Employment equity

The purpose of employment equity legislation is to eliminate discriminatory practices and improve the employment opportunities of those groups that have not enjoyed the same level of access to the Canadian labour market. This legislation primarily concerns women, aboriginal peoples, persons with disabilities and members of visible minorities.

In Ontario, the only piece of applicable legislation in this regard is the federal *Employment Equity Act*[22]. The scope of application extends to federally regulated employers with 100 or more

[22] S.C. 1995, c. 44

employees and certain employers bidding for federal government contracts. The Ontario *Employment Equity Act, 1993*[23] was repealed by the Ontario Conservative government in 1995.

Pay equity

The framework created by pay equity legislation aims to prevent discrimination with regard to payment of female employees. Legislation has been adopted by both federal and provincial levels of government. The Ontario *Pay Equity Act*[24] creates obligation for employers in the private sector in Ontario, who employ ten or more employees and for all employers in the public sector.

Workers' compensation

Compensation with respect to injuries suffered in the workplace is not claimed from an employer, but from a statutorily established accident fund. Ontario's main piece of legislation in this regard is the *Workplace Safety and Insurance Act, 1997*[25], the provisions of which should facilitate re-entry into the labour market and provide compensation and other benefits to employees for workplace injuries. The compensation for workplace injuries is provided by a no-fault insurance system, which most employers must participate in and contribute to based on their payroll, the type and nature of business they carry on and their accident record. Employers that are exempted from the mandatory coverage may opt-in with respect to particular employees.

Occupational Health and Safety

Laws regulating the field of occupational health and safety were adopted by both the federal and provincial legislators. Specific rules of the Ontario *Occupational Health and Safety Act*[26] impose obligations on employers and employees as well as other persons to secure a safe work environment. In general, the employer has the duty to provide information, instruction and supervision to the employee to protect his/her health and safety. Some employers are required to form joint health and safety committees made up of workers and managers to identify situations that may be a source danger, make recommendations, keep records, resolve complaints and perform other related tasks.

[23] S.O. 1993, c. 35
[24] R.S.O. 1990, c. P.7
[25] S.O. 1997, c. 16, Sched. A
[26] R.S.O. 1990, c. O.1

The central right of an employee with respect to occupational health and safety is his/her right to refuse work that can be reasonably deemed unsafe. Exercise of this right must not be punished by the employee's dismissal or by any disciplinary penalties.

Violations of this legislation may result in substantial penalties and may even give rise to criminal liability pursuant to the *Criminal Code*[27].

[27] R.S.C. 1985, c. C-46

CONSUMER PROTECTION

A wide variety of legislation has been adopted by both federal and provincial levels of government.

Ontario's *Consumer Protection Act, 2002*[28] covers consumers' rights and warranties and includes provisions defining and prohibiting unfair practices such as false, misleading and deceptive representations or unconscionable business practices. Harmed consumers are provided with remedies including damages and the right to rescind their agreements. The statute also contains regulations addressing the issues of consumer protection in respect of consumer agreements, such as future agreements, internet agreements, credit and leasing agreements. Also, Ontario has adopted its own *Sale of Goods Act*[29], which defines certain contractual terms in consumer transactions and other contractually non-regulated transactions.

Part of Canada's *Competition Act*[30] covers the topic of trade practices with respect to false or misleading representations to the public, which can be punishable by substantial fines and can even lead to criminal prosecution. Other relevant pieces of consumer-protection legislation include:

Federal Legislation	***Ontario Legislation***
• Canada Consumer Product Safety Act, 2010 • Competition Act, 1985 • Environment Protection Act, 1999 • Motor Vehicle Safety Act, 1993 • Consumer Packaging and Labelling Act, 1985 • Textile Labelling Act, 1985 • Income Tax Act, 1985 • Anti-spam law, 2014	• Wireless Services Agreements Act, 2013 • Travel Industry Act, 2002 • Motor Vehicle Dealers Act, 2002 • Collection Agencies Act, 1990 • Consumer Reporting Act, 1990 • Bailiffs Act, 1990 • Real Estate and Business Brokers Act, 2002 • Condominium Act, 1998 • Ontario New Home Warranties Plan Act, 1990 • Energy Consumer Protection Act, 2010 • Electricity Act, 1998 • Technical Standards and Safety Act, 2000 • Personal Property Security Act, 1990 • Repair and Storage Liens Act, 1990 • Freedom of Information and Protection of Privacy Act, 1990 • Personal Health Information Protection Act, 2004

[28] S.O. 2002, c. 30, Sched. A
[29] R.S.O. 1990, c. S.1
[30] R.S.C. 1985, c. C-34

PRODUCT LIABILITY

Product liability claims are based either on breach of contract or negligence.

There are several classes of persons who are exposed to product liability claims.

- **Manufacturers** represent the most common defendants in product liability cases. Included are sub-manufacturers, whose products can be incorporated into a larger product.

- **Importers, distributors and retailers** that are shown to have acted negligently may be held liable even though they have played no role in the product's manufacture. Duty of care by this class of defendants owed to the consumer is not the same as that of the manufacturers. Factors such as reliability of the supplier, feasibility of testing and the effort invested into marketing are taken into account.

- **Individual employees of suppliers** or their quality control managers may be affected, but the courts are normally unlikely to lean in favor of this kind of liability.

- **Installers and repairers** may end up having liability extended to them where the initial installation and later repair is determined to have caused the defect.

- **Inspectors** who perform inspection and fail to detect a defect may have liability imposed upon them despite their not being involved in either manufacture or distribution of the product.

Negligence

Standard of evidence requires the plaintiffs to show that (i) the product was defective when it left the manufacturer's hands, (ii) it failed in normal use and (iii) caused the injury. Often there is no contract between the manufacturer and the ultimate user, forcing many product liability claims to allege negligence. The presence of a defect in a product is often sufficient to imply negligence in the

manufacturing process. On the other hand, liability of a retailer or a repairer and the issue of their negligence may extend the litigation process beyond what is usual in strict contract liability cases.

The defectiveness of a product implies non-compliance with reasonable standards. The mentioned non-compliance in product liability cases can cover a range of different situations including design defects, breach of duty to warn in respect of inherently risky products, failure to adhere to the state of the art practice, failure to issue warning to purchasers after becoming aware of the defect, etc.

The class of protected persons extends to anyone whose injury was foreseeable, whether a consumer or a user. The principle of foreseeability represents a limit to the liability, meaning in principle that only foreseeable injury caused by a defective product is compensable.

Contractual product liability

Product liability claims based on a contract are claims based on strict liability without the need to prove negligence. The liability provides the buyers with a promise of the soundness of the product, an implied warranty.

The Ontario *Sale of Goods Act*[31] provides that contracts for the sale of goods imply warranties of fitness for purpose and of merchantable quality. The implied warranties of that Act are limited to business suppliers. Parties can contract out of the implied terms, except in the case of consumer or retail sales.

[31] *Supra.*

DISPUTE RESOLUTION

Litigation

Federal and provincial court system

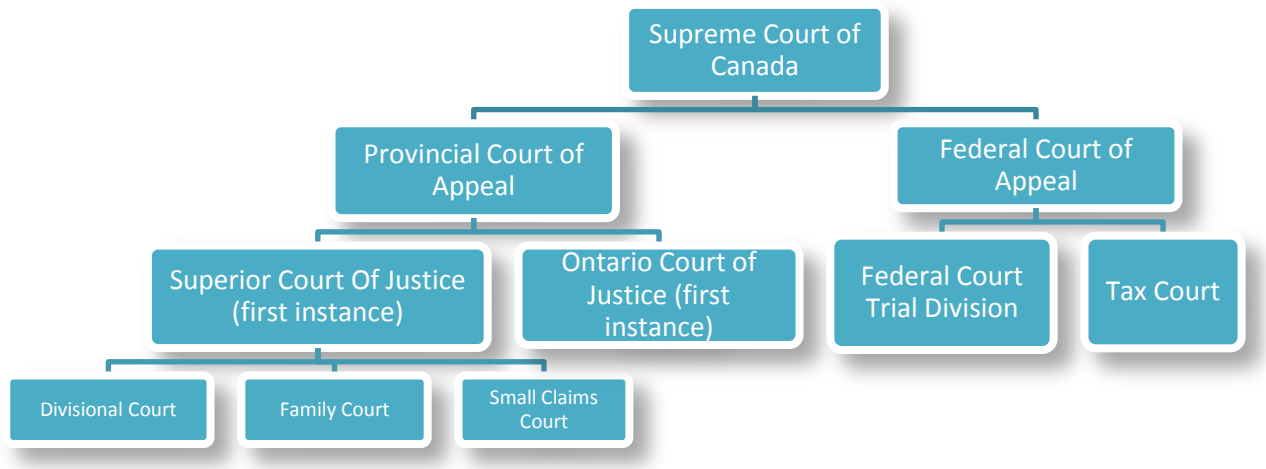
Canada has two parallel court systems – federal and provincial. Unless the Federal Court of Canada has been assigned jurisdiction, such as in cases pertaining to taxes and intellectual property, administration of justice in the civil courts lies within the jurisdiction of the provinces. As in all other provinces and territories with the exception of Quebec, Ontario administers the common law.

Both the federal and the provincial courts have a trial and an appellate level with the Supreme Court of Canada being at the top of the hierarchy.

Ontario courts

Most proceedings involving civil law are initiated at the Ontario courts of first instance, which are (i) the Superior Court of Justice and (ii) the Ontario Court of Justice. The Superior Court of Justice has three specialized branches, the Divisional Court, the Family Court and the Small Claims Court, each of which has differing jurisdictions. A decision of the court of first instance may be appealed to the provincial Court of Appeal with the possibility of being eventually appealed to the court of highest instance of Canada's court system, the Supreme Court of Canada.

This tree chart illustrates the Canadian system of courts from the perspective of the province of Ontario:



Rules of Civil Procedure

The empowerment of the jurisdiction of courts is found in various statutes and regulations. The statute that lays down the basic rules regarding the jurisdiction of Ontario's courts is the *Courts of Justice Act*[32]. The rules of procedure of the courts, including the general *Rules of Civil Procedure*, *Rules of the Small Claims Court* and *Family Law Rules*, are regulations found in the *Courts of Justice Act*.

Costs

In most cases, the losing side bears at least part of the legal costs of the winning side. The awarding of costs, their amount and even the possibility of the winning party paying the costs of the losing side, lies within the discretion of the court. In order to keep the costs within a reasonable range, the courts consider the following factors, among others:

- Funds that the winning party recovered
- Importance of the issue (severity of the impact on damaged/injured party)
- Complexity of the proceedings
- Conduct of any party, including negligence and mistake

[32] R.S.O. 1990, c. C.43

- Experience of the lawyer, rates charged and the time spent

The amount of the costs recovered depends on the court's choice of scale. The court chooses between the more frequently used (i) partial indemnity scale, and the less frequent (ii) substantial indemnity scale. The substantial indemnity scale roughly equals 1½ times the amount awarded under partial indemnity. The judge decides who is awarded the costs after which he/she has the option to determine the costs himself/herself ("fixing the costs") or to leave that up to an assessment officer ("assessment of costs"). All in all, it is the courts who decide whether and how much to award for costs.

Alternative dispute resolution

Alternative dispute resolution refers to methods of resolving disputes outside of courts, which include mediation and arbitration.

Mediation

Mediation involves the assistance of a mediator, an impartial person, in negotiation and resolution of the dispute. The task of the mediator is not to decide who is right and wrong, but to facilitate negotiation and find a solution satisfactory for everyone.

In 1999, Ontario started a Mandatory Mediation Program[33], which established mandatory mediation for case managed civil actions as well as for contested estates, trusts and substitute decisions. This does not mean that the parties are forced into a settlement. Mediation rather provides the parties with an opportunity to find a mutually acceptable agreement while allowing them to walk away and continue the litigation process.

The advantages to mediating a commercial dispute in Ontario ensue from the provisions of *Commercial Mediation Act, 2010*[34]. Parties to a commercial dispute, settled through mediation, can register their settlement agreement with the court, thereby gaining the advantage of this agreement being treated like a judgment for enforcement purposes. The Act also sets out rules on the appointment of mediators, obligations of the mediator, the conduct of the mediation and confidentiality.

[33] Applicable to Toronto, Ottawa and the County of Essex
[34] S.O. 2010, c. 16, Sched. 3

Arbitration

Arbitration is a method of alternative dispute resolution, the result of which is a binding decision handed down by the arbitrator. The advantages may include faster, less expensive and less formal proceedings and a higher level of confidentiality. The arbitrator, normally being an expert in the area of disagreement, hands down his/her decision based on the facts, contracts and the applicable laws.

In Ontario, arbitration is subject to either the *International Commercial Arbitration Act*[35] or the *Arbitration Act, 1991*[36]. The former applies to disputes where the parties have their place of business in different countries. The rules applicable to the arbitration are based on the UNCITRAL Model Law on International Commercial Arbitration.

In contrast, the arbitration rules set out in the *Arbitration Act, 1991* are applicable to non-labour domestic arbitrations.

According to the *Consumer Protections Act, 2002*,[37] arbitration clauses in consumer agreements are invalid insofar as they prevent the consumer from exercising a right to commence a class action in the court.

[35] R.S.O. 1990, c. I.9
[36] S.O. 1991, c. 17
[37] S.O. 2002, c. 30, Sched. A

ENFORCEMENT OF FOREIGN JUDGMENTS

Enforcement of foreign judgments is generally performed by Canadian courts without any further litigation having to take place, with the exception of judgments contrary to Canadian public policy and judgments issued in proceedings contrary to natural justice.

In the province of Ontario, the recognition of civil and commercial titles follows common law principles, which are based on the adjudication of provincial courts as well as the Supreme Court of Canada. Under common law, the basic requirements for recognition of a judgment are:

- the issuing court had properly asserted jurisdiction,
- the judgment was final and conclusive and
- their recognition is not excluded.

A proper assertion of jurisdiction as defined by the Supreme Court of Canada is based on the "real and substantial connection test". This test has evolved over time and a judgment is nowadays assumed to pass the test under the following conditions:

- the defendant is resident in the jurisdiction of the issuing court,
- the defendant does business in the jurisdiction of the issuing court,
- the location of the tort is in the jurisdiction of the issuing court, or
- the contract relating to the subject-matter of the judgment was made in the jurisdiction of the issuing court.

If a monetary judgment ought to be recognized, the foreign judgment must state a definite sum of money, including a final order for costs. A non-monetary judgment has to be sufficiently definite, meaning that it be phrased in such a way that a third party, who is not familiar with the subject-matter, understands the scope of the decision.