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Doing Business in Canada: British Columbia

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Legal System

1. What is the legal system (civil law, common law or a mixture of both)?

British Columbia has a common law legal system and is regulated by:

- Provincial statutes that apply exclusively within the province.
- Federal statutes that apply across Canada.

Foreign Investment

2. Are there any restrictions on foreign investment (including authorizations required by central or local government)?

British Columbia does not impose any general stand-alone restrictions on foreign investment. General issues of foreign investment are governed by the federal *Investment Canada Act* 1985.

3. Are there any exchange control or currency regulations?

There are no exchange control or currency regulations.

4. What grants or incentives are available to investors? Are any of these aimed specifically at foreign investors?

British Columbia provides provincial tax credits, exemptions and deductions to encourage business investment and innovation, including tax credits and deductions for research and development, mining exploration, film and television production, and sales and property tax exemptions for the purchase of certain machinery.

Federal government incentives are also available.

Business Vehicles

5. What is the most common form of business vehicle used by foreign companies to conduct business in your jurisdiction?

The most common form of business entity used by foreign companies is the corporation. Corporations can be incorporated under the provincial *Business Corporations Act 2002*. However, corporations can also be incorporated federally under the Canada *Business Corporations Act 1985*. The following applies to corporations incorporated in British Columbia:

- Registration formalities. The corporate name must first be reserved with the Registrar of Companies. The incorporators then enter into an incorporation agreement and file an incorporation application with the Registrar of Companies. These filings, together with payment of the requisite fee, are carried out electronically.
- Share capital. There can be one or more classes and/or series of shares. While it is not necessary to prescribe a maximum number of shares, it is possible to do so.
- Non-cash consideration. Consideration can take the form of past services, property, and/or money. The value of the consideration received must equal or exceed the issue price set for the share.
- Rights attaching to shares. A corporation can set out in its articles various rights attaching to its shares, including:
 - voting;
 - dividends;
 - share of assets on liquidation or dissolution;
 - priority on liquidation or dissolution; and
 - conversion, redemption and retraction.

Rights can vary among different classes of shares.

- Foreign shareholders. There are no restrictions preventing foreigners from being shareholders.

- Management structure. A company must have at least one director and a public company must have at least three directors. Once a corporation has been created the shareholders elect a board of directors to be responsible for management of the corporation. There are no residency requirements for directors.
 - Directors' liability. Directors of corporations operating in British Columbia are subject to a number of potential forms of liability arising from various federal and provincial bodies of legislation, as well as common law, and include:
 - fiduciary duties owing to the corporation, shareholders and directors, including a duty of care to act honestly, exercise reasonable care and place the corporation's interests ahead of personal interests;
 - liability for wages and related benefits, wrongful dismissal, termination pay, workplace safety and protection fines, human rights violations, and sexual harassment; and
 - liability for unpaid taxes and certain government remittances.
 - Parent company liability. Shareholders are not liable for a subsidiary's obligations.
 - Reporting requirements. Corporations are required to:
 - file notices as to changes in directors;
 - file an annual report; and
 - make annual accounting records available for inspection.
- For public corporations, regardless of where they are incorporated, the provincial Securities Act 1996 imposes additional reporting requirements that include:
- annual information forms;
 - press releases;
 - information circular for shareholders' meetings;
 - acquisition reporting requirements; and
 - security distribution requirements.

Employees

6. What are the main laws regulating employment relationships?

Employer and employee relations in British Columbia are governed by the:

- Labour Relations Code 1996.
- Employment Standards Act 1996.
- Human Rights Code 1996.
- Workers' Compensation Act 1996.
- Common law.

These laws apply to all employers and employees of provincially regulated businesses in British Columbia unless stated otherwise (federal equivalents apply to employees of federal undertakings in British Columbia). The *Employment Standards Act 1996*, does not apply to students, volunteers and members of professional associations. The *Workers' Compensation Act 1996*, applies to all employers and workers in British Columbia, except as exempted by the Worker's Compensation Board.

The *Employment Standards Act 1996*, specifically prohibits contracting out of any of its minimum standard requirements.

Once a foreign employee obtains a work permit, that employee is then subject to the laws and standards applicable in British Columbia.

7. Is a written contract of employment required? Are any agreements and/or implied terms likely to govern the employment relationship?

A written contract is not usually required, but it is often recommended. Certain terms are implied into employment relationships unless a written employment contract provides otherwise. For example, an implied term exists that an employer must provide reasonable notice of termination to an employee unless the employer has just cause for termination (usually due to serious misconduct on the part of the employee). Reasonable notice is determined by considering a number of factors, including the employee's:

- Age.
- Length of service.
- Position.
- Marketability.

An employee is roughly entitled to one week's notice for each year of service. Employers often provide pay in lieu of notice, rather than provide the actual notice. This implied term may be defeated by a written employment contract that provides for a certain amount of notice or pay in lieu of notice on termination (if the amount agreed meets or exceeds the minimum amount required by the *Employment Standards Act*).

8. Are employees entitled to management representation and/or to be consulted in relation to corporate transactions (such as redundancies and disposals)?

Employees are not entitled to management representation or to be consulted in relation to corporate transactions except for unionized workplaces.

9. How is the termination of individual employment contracts regulated?

An employee can be dismissed for just cause without any liability for the employer. Examples of just cause may include:

- Theft.
- Dishonesty.
- Assault.
- Harassment.
- Fraud.
- Insubordination.
- Continued incompetence or neglect of duty (after specific warnings).

If an employee is dismissed for just cause, this relieves the employer from the following potential liability set out in the *Employment Standards Act 1996*:

- One week's notice or pay in lieu, if the period of employment is more than three consecutive months.
- Two weeks' notice or pay in lieu, if the period of employment was 12 consecutive months.
- Three weeks' notice or pay in lieu, if the period of employment was three consecutive years.
- One additional week or pay in lieu for every additional year to a maximum of eight weeks' notice.

The employer must also provide reasonable notice of termination, or pay in lieu, under common law when terminating an employee. This can be reduced under a written employment contract that provides for a set amount of severance pay on termination (which must meet or exceed the amounts due under the *Employment Standards Act 1996*). If a court determines that the employer has acted in bad faith in the manner of terminating the employee, the employee may be entitled to additional damages.

Unionized employees have much stronger protection against dismissal under the *Labour Relations Code 1996*. For example, if the employer terminates an employee and an arbitrator determines that the employer did not have just cause, the arbitrator is empowered to reinstate the employee (with or without back pay).

If an employer breaches the provincial *Human Rights Code 1996* in terminating an employee, such employer may be exposed to liability for that breach.

10. Are redundancies/mass layoffs regulated? If so, please give details.

If the employment of 50 or more employees at a single location

is to be terminated within any two-month period, the employer must give written notice of group termination to all of the following (*Employment Standards Act 1996*):

- Each employee who will be affected.
- A trade union certified to represent, or recognized by the employer as the bargaining agent of, any affected employees.
- The Minister of Labour.

The notice of group termination must specify the number of employees affected, the effective date(s) and reason(s) for termination, and the length of the notice must be:

- At least eight weeks before the effective date of the first termination, if 50 to 100 employees will be affected.
- At least 12 weeks before the effective date of the first termination, if 101 to 300 employees will be affected.
- At least 16 weeks before the effective date of the first termination, if 301 or more employees will be affected.

For unionized workplaces, there is an additional obligation on employers to provide 60-days' notice of certain changes that negatively affect the job security of a significant number of employees to whom a collective agreement applies.

11. Do foreign employees require work permits and/or residency permits? If so, how long does it take to obtain them and how much do they cost?

To work temporarily in Canada, foreign nationals require a work authorization, commonly known as a work permit (C\$150 per applicant).

If the foreign national is from a country that is a party to the Canadian Visa Waiver program, applications for work permits can be made in person at a Canadian Port of Entry (land, air or sea) and there is no need to apply for a temporary resident visa. However, if the foreign national is from a country that is not a party to this program, they must apply for both their work permit and a temporary resident visa (additional cost of C\$75 for single entry and C\$150 for a multiple entry visa) through a foreign visa office. Depending where the application is submitted, processing times range from two days to three months.

Tax

12. In relation to employees, what constitutes tax residency in your jurisdiction?

Generally, an individual is subject to provincial tax on his worldwide income from all sources if the individual is resident in British Columbia on 31 December of the particular taxation year.

An individual is considered to be resident in the province where he/she has significant residential ties.

13. What income tax or social security contributions must the following pay:

- Tax resident employees.
- Non-tax resident employees.
- Employers, in relation to their employees.

Tax resident employees

Income tax. A person who is resident in British Columbia (*see Question 11*) during a taxation year is subject to the following taxes on their worldwide income from all sources:

- Federal tax. Federal tax rates in 2006 are as follows:
 - 15.25% on taxable income less than or equal to C\$36,378;
 - 22% on taxable income greater than C\$36,378 and less than or equal to C\$72,756;
 - 26% on taxable income greater than C\$72,756 and less than or equal to C\$118,285; and
 - 29% on taxable income greater than C\$118,285.
- Provincial tax. Provincial tax rates in 2006 are as follows:
 - 6.05% on taxable income less than or equal to C\$33,755;
 - 9.15% on taxable income greater than C\$33,755 and less than or equal to C\$67,511;
 - 11.7% on taxable income greater than C\$67,511 and less than or equal to C\$77,511;
 - 13.7% on taxable income greater than C\$77,511 and less than or equal to C\$94,121; and
 - 14.7% on taxable income greater than C\$94,121.
- Canada Pension Plan (CPP). The contribution rate is 4.95%, payable on earnings up to a maximum of C\$42,100 and with a basic personal exemption of C\$3,500.
- Employment Insurance (EI). This is payable at 1.87% on earnings up to C\$39,000.

Non-tax resident employees

Generally, a non-tax resident is taxed on his British Columbian-sourced income at the same rates as a tax resident.

Employers

Employers are required by federal law to deduct certain amounts from the income of their employees for EI premiums, CPP contributions and income tax.

14. In relation to business vehicles, what constitutes tax residency in your jurisdiction?

The common law test of residency for a corporation is that it is resident where its central management and control is situated. The federal *Income Tax Act* 1985 provides that a corporation incorporated in Canada after 26 April 1965 is deemed to be a resident in Canada throughout its taxation year.

A corporation is also deemed to be a resident of Canada if:

- Before 18 June 1971, it was a foreign business corporation that was controlled by a corporation resident in Canada.
- During the 10-year period ending on 18 June 1971, it carried on business in a country other than Canada but during this period paid dividends to shareholders resident in Canada on which the shareholders paid tax to the government of the other country.
- At any time in the taxation year or in any preceding taxation year commencing after 1971, it was resident in Canada or carried on business in Canada.

15. Please give details on the main taxes that potentially apply to a tax resident business vehicle (including rates).

A corporation resident in Canada is taxable on its worldwide income. Generally, the federal corporate income tax rate in 2006 for general income is 22.12% and the British Columbia tax is 12%.

16. How are the activities of non-tax resident business vehicles taxed?

A non-resident corporation is subject to tax under the federal *Income Tax Act* 1985, on its taxable income from carrying on a business in Canada and from the disposition of taxable Canadian property.

17. Please explain how each of the following is taxed:

- Dividends paid to foreign corporate shareholders.
- Dividends received from foreign companies.
- Interest paid to foreign corporate shareholders.
- Intellectual property (IP) royalties paid to foreign corporate shareholders.
- Dividends paid. These are generally subject to non-resident withholding tax at the rate of 25%.
- Dividends received. A person resident in Canada must include dividends paid by a foreign corporation in his taxable income. A corporation resident in Canada may, in computing taxable income, deduct dividends paid by a controlled foreign

affiliate which are paid out of the exempt surplus of the foreign corporation.

- Interest paid. These are generally subject to non-resident withholding tax at the rate of 25%.
- IP royalties paid. These are generally subject to non-resident withholding tax at the rate of 25%.

18. Are there any thin capitalization rules (restrictions on loans from foreign affiliates)? If so, please give details.

The federal *Income Tax Act* 1985 contains thin capitalization rules which restrict the deductibility of interest on certain loans from foreign affiliates to the extent that the loan exceeds two times the capital of the corporation.

19. Must the profits of a foreign subsidiary be imputed to a parent company that is tax resident in your jurisdiction (controlled foreign company rules)?

The federal *Income Tax Act* 1985 contains controlled foreign corporation rules which require that a resident taxpayer include in his income for a taxation year the participating percentage of foreign accrual property income of every share owned by the taxpayer in a controlled foreign affiliate.

20. Are there any transfer pricing rules? If so, please give details.

There are transfer pricing rules in the federal *Income Tax Act* 1985, which generally provide that where a taxpayer and a non-arm's length non-resident person enter into one or more transactions and where either:

- The consideration paid in the transaction is not an arm's-length amount, the consideration paid will be deemed to be the arm's-length amount.
- The transaction is not one which would have been entered into had the parties been at arm's length and it may reasonably be considered that the transaction was not entered into other than to obtain a tax benefit, the nature of the transaction entered into will be deemed to be that which would have been entered into had the parties been at arm's length.

21. How are imports and exports taxed?

The federal *Customs Act* 1985 imposes liability for customs duties on a person who reports the importation of the goods calculated on the basis of the value for duty of the goods as is determined under the rules contained in the federal *Customs Act* 1985.

The federal *Excise Tax Act* 1985 requires every person who is liable to pay duty on goods imported into Canada or who would be liable to pay duty if the goods were dutiable, to pay GST at 6% on the value of the goods. An importer of record is therefore generally required to pay GST on imported goods. A registrant who imports goods can recover GST paid on such imports to the extent they are imported for use in the registrant's commercial activities. Input tax credits on imported goods are claimed in the same manner as for domestic purposes. Special rules are provided for imports of goods into Canada by unregistered non-resident vendors. Under the federal *Excise Tax Act* 1985, recipients of certain imported services and intangible personal property must self-assess tax and may be able to recover GST paid on the same basis as described above.

The provincial *Social Service Tax Act* 1996 imposes a retail sales tax of 7% on purchases and leases of tangible personal property brought into the province for the consumption or use of the purchaser or lessee.

Competition

22. Are restrictive agreements and practices regulated by competition law in your jurisdiction? If so, please give brief details.

The federal *Competition Act* 1985 governs most business conduct in Canada. It contains both criminal and civil provisions aimed at preventing anti-competitive practices in the Canadian marketplace.

Intellectual Property

23. Please outline the main intellectual property rights that are capable of protection in your jurisdiction.

Patents

- Nature of right. Under the federal Patent Act 1985, in order to patent an invention, it must:
 - be novel;
 - possess utility; and
 - not be obvious.
- How protected. A patent application must be filed with the Canadian Intellectual Property Office.
- How enforced. The patentee can sue the patent infringer for damages.
- Length of protection. Patents last for 20 years from the filing date provided the prescribed maintenance fees are paid. In rare

circumstances, the life of patent rights can be extended by an Act of Parliament according to an extension of a particular patent to a particular patent holder.

Trademarks

- Nature of right. Rights arise in a trademark in Canada as soon as it is used in association with wares or services.
- How protected. A trademark holder can, under the common law action for passing off, prevent subsequent use of the same or a confusingly similar trademark for similar wares and/or services. However, without registration under the federal Trade-marks Act 1985 such protection is limited to the geographic area in which there can be said to be reputation in the trade mark.
- Only registration under the federal Trade-marks Act 1985, with the Canadian Intellectual Property Office, gives the full protection available by law. It also allows an action to be brought in any court of competent jurisdiction to prevent depreciation of goodwill in the trade mark.
- How enforced. The right holder can sue under common law and/or the Trade-marks Act 1985, the latter of which empowers a court to grant injunctive relief and the recovery of damages or profits where justified.
- Length of protection. A trademark is valid for 15 years, but can be renewed indefinitely.

Industrial Designs

- Nature of right. To qualify for protection, a design must:
 - be original; and
 - not have been published in Canada or elsewhere more than one year before the filing date.
- How protected. Protection is through registration, under the federal Industrial Design Act 1985, with the Canadian Intellectual Property Office which examines applications on a “first-to-file” basis.
- How enforced. The right holder can sue for infringement under the federal Industrial Design Act 1985, which provides the court may make orders for relief by way of injunction and/or the recovery of damages or profits.
- Length of protection. The owner of a registered industrial design has exclusive rights to it for ten years provided the prescribed maintenance fees are paid.

Copyright

- Nature of right. There are four categories of works which are protected by copyright law:
 - literary works;

- artistic works;
- dramatic works; and
- musical works.

Copyright does not exist in ideas themselves, but only in the original, fixed expression of ideas.

- How protected. Copyright automatically subsists in a work in Canada on the creation of an original work (whether or not the work was published), if at the time the work was created, the author was:
 - a Canadian citizen;
 - a British subject;
 - a citizen of a country that is a member of an international agreement for the protection of copyright to which Canada is a party.

Although registration of copyright is not necessary, it is prudent. A registration application must be filed with the Canadian Intellectual Property Office.

- How enforced. Copyright can be enforced through common law remedies and/or federal Copyright Act 1985 remedies such as injunctive, monetary, and/or other forms of relief.
- Length of protection. In most works, copyright subsists for the life of the author, plus 50 years. If a work was not published before the death of the author, copyright will subsist until publication and for a period of 50 years after publication.

Confidential information

- Nature of right. Trade secrets and other confidential information are maintained in strict confidence by the owner of such information and such owners rely on contractual obligations placed on the recipients of the information to ensure information protection. The legal protection of trade secrets and confidential information from disclosure and unauthorized use is based on court rulings under common law.
- How protected. Generally, to be protected, the information in question must have been acquired in circumstances that produce an obligation of confidence. The most common example is the employer-employee relationship.
- How enforced. Owners of trade secrets may seek redress through the courts in certain circumstances if their secrets are disclosed or misused. The grounds for redress often include breach of confidence and fiduciary duty under common law. There is a duty on the owner of trade secrets to document their creation and use, as well as the measures taken to keep them confidential.
- Length of protection. The length of trade secret protection depends on the owner's ability to maintain the information in confidence.

Marketing Agreements

24. Are marketing agreements regulated in your jurisdiction?

- Agency. While there is no specific legislation governing agency in British Columbia, people who act as agents/brokers in certain industries are regulated by specific legislation, including the:
 - provincial Real Estate Services Act 2004;
 - provincial Mortgage Brokers Act 1996;
 - provincial Securities Act 1996; and
 - provincial Motor Dealer Act 1996.
- Distribution. There is no specific legislation governing distribution in British Columbia.
- Franchising. There is no specific legislation governing franchising in British Columbia.

E-Commerce

25. Are there any laws regulating e-commerce (such as electronic signatures and distance selling)? If so, please give brief details.

E-commerce is principally regulated in British Columbia by the:

- Provincial Electronic Transactions Act 2001.
- Provincial Business Paper Reduction Act 1998.
- Federal Personal Information Protection and Electronic Documents Act 2000.

The provincial *Electronic Transactions Act* 2001 provides some measure of certainty as to the validity of electronic contracts and electronic signatures. In addition, the *Personal Information Protection and Electronic Documents Act* 2000, which applies to companies that operate under federal jurisdiction (that is, shipping

companies, railways, airlines, banks and telecommunications companies) and to all private sector entities operating in provinces without equivalent provincial legislation, provides numerous guidelines relating to electronic signatures.

Data Protection

26. Are there any data protection laws? If so, please give brief details.

Data protection laws which have application in British Columbia can be divided into those governing:

- Privacy data protection and disclosure. This is principally regulated by the federal Privacy Act 1985, which protects and regulates the personal information about a person held by a government institution (rules for access to such information are governed by the federal Access to Information Act 1985).
- Information for electronic commerce purposes. This is principally regulated by the federal Personal Information Protection and Electronic Documents Act 2000, which protects personal information in the hands of private sector organizations and provides guidelines for the collection, use and disclosure of that information in the course of commercial activity.

Product Liability

27. Are there any laws regulating product liability and product safety? If so, please give brief details.

Generally, under common law, product manufacturers have a post-sale duty to warn consumers and users of their products of defects and dangers that become known to the manufacturer after its products were manufactured and sold into the marketplace. In addition, post-sale duties for certain types of products exist under common law. ■



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Trevor R. Scott provides strategic and legal advice in diverse business areas. He has extensive experience in debt and equity financings for public and private companies, representing both issuers and investment banks. He also regularly advises on business acquisitions, divestments and take-over bids, including compliance issues with the *Competition Act* and assisting foreign investors with *Investment Canada Act* matters. Scott also advises on corporate governance matters. Scott is chair of the Securities Law Subsection of the Canadian Bar Association (British Columbia Branch). He also is a member of the Securities Law Advisory Committee, which is a committee of leading lawyers that provides advice to the British Columbia Securities Commission on legal and policy issues relating to securities regulation. Scott is also involved in various professional organizations including membership in the Vancouver, Canadian and International Bar Associations. Scott regularly lectures and writes articles on mergers and acquisitions, corporate finance and other corporate matters.



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