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ESTABLISHING A BUSINESS IN CANADA

A stable political environment, strong financial system and skilled workforce, combined with access to major North American markets, make Canada an attractive destination for business investment. Foreign investors are often surprised at how simple and flexible the rules for establishing a business enterprise in Canada can be. This article is intended to summarize some of the key aspects of forming a corporation in Canada.

THE LEGISLATIVE FRAMEWORK

Canada is a federal state composed of ten provinces and three territories. Legislative powers are divided between the federal government and the provincial or territorial governments. Federal law applies equally in all provinces and territories. Provincial law applies only in the specific province. In some areas – for example corporate law – legislation has been enacted by both the federal and the provincial / territorial governments.

REGULATION OF FOREIGN INVESTMENT

As a general rule, Canada welcomes foreign investments and sets few restrictions on foreign investors. Nevertheless, foreign investments are monitored and there is also limited screening of certain transactions, usually depending on the size and nature of the investment.

The *Investment Canada Act* (the "**ICA**") is the primary legislation concerned with the establishment of new Canadian businesses and the acquisition of control of existing Canadian businesses by non-Canadians. Investments in certain business sectors may be subject to sector-specific legislation. The ICA requires a foreign investor to file either a notification of investment or an application for review of the investment. Investments to establish a new Canadian business are always subject to notification. However, the determination of whether an investment is subject to review will generally depend on the size of the investment and on the business sector in which the investment is being made. In terms of the size of an investment, the ICA sets special thresholds for investments by WTO investors or under the control of WTO investors. Investments that are under the stipulated thresholds (which are adjusted on a yearly basis) will usually only be notifiable, unless they are in a specified business sector. Investments in defined cultural businesses are typically subject to review and must be found to be of "net benefit" to Canada in order to be allowed.

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BUSINESS ORGANIZATIONS

The federal and provincial governments have all enacted legislation providing for the creation of various forms of businesses. The choice of the most appropriate form of business structure will depend upon the particular circumstances of the investor. The main structures available to investors setting up a new Canadian business are:

- establishing a Canadian branch office;
- setting up a partnership;
- incorporating a Canadian subsidiary.

The incorporation of a Canadian subsidiary is the form of entity most often used by investors to carry on business in Canada. The main advantages of the corporation as a business structure are that a corporation has its own legal personality, provides limited liability for its shareholders, and allows for the possibility to effectively plan the re-distribution of profits to the shareholders.

KEY ASPECTS OF INCORPORATING

The following are some of the general principles that apply to the establishment of private corporations in Canada:

- Investors may chose to incorporate under federal or provincial corporate legislation. The rules governing federal corporations are substantially similar to those governing provincial corporations, with some limited exceptions.
- A corporation incorporated under the laws of one jurisdiction (federal or provincial) may carry on its business activities in other jurisdictions. Depending on the nature of the activities and the province in which they are carried out, a corporation may be required to register in a province. Registration is usually a straightforward process that can be completed at a reasonable cost.
- The process of incorporation at both the federal and provincial levels is simple and quick.
- There are typically no restrictions on the types of business activities that may be exercised by a corporation.
- A corporation must have at least one shareholder. Shareholders may be companies or individuals. There is no Canadian residency requirement for shareholders.
- There is no minimum capital requirement. Therefore, an investor may capitalize the corporation with as little as CAD$1. In most jurisdictions, this information is not public, nor is information about the corporation's shareholder(s) or finances.
- The corporation is incorporated when articles of incorporation are filed with the relevant corporate authority and an incorporation certificate is subsequently issued. The articles of incorporation set out, among other things, the share structure of the corporation, which can be created based entirely on the needs of the shareholders.
- The shareholders elect directors. Directors must be individuals and they may, but need not be, shareholders. The directors typically manage the affairs of the corporation.
- The corporation must have at least one director. Several jurisdictions require at least 25% of the directors to be Canadian residents, unless the corporation has fewer than four directors, in which case at least one of them must be a Canadian resident.
- The daily operations of a corporation are normally carried out by the officers, who are appointed by the directors. Officers can be non-residents of Canada.
- A corporation can be domiciled at a law firm. The law firm can also provide qualified individuals to satisfy the Canadian residency requirement for directors.

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