

## **Thinking About Expanding Your Business? A Snapshot on Investing in Canada.**

Canada and the United States enjoy an economic partnership unique in the world, sharing one of the world's largest and most comprehensive trading relationships. Growth in bilateral trade between Canada and the U.S. has averaged almost six per cent annually over the last decade. In 2008, total trade between the two countries exceeded C\$650 billion, with C\$1.78-billion worth of goods crossing the border every single day. For this reason, U.S.-based businesses looking for their first international foothold invariably look to Canada first.

While Canada is geographically proximate and closely tied to the U.S. by a common language and culture, there are distinctive legal, business and regulatory differences of which any business looking north of the border should be aware.

### **Taxation**

Tax considerations will drive the structure of virtually any expansion into Canada. Certain structures may allow for consolidation for U.S. tax purposes; however, new restrictions in the recently amended Canada-U.S. Tax Treaty should be kept in mind. There may be Canadian withholding tax on cross-border payments of dividends, interest or royalties, or payments to non-residents in respect of services performed in Canada. Canada's tax treaty with the U.S. contains certain exemptions from and reductions in Canadian withholding and other taxes that may be applicable in certain circumstances. Canadian transfer pricing rules require cross-border payments for goods and services to be made on arm's-length terms. Businesses with existing investments or business interests in Canada should consider the impact of the recent changes to the Canada-U.S. Tax Treaty on existing structures.

### **Foreign Investment Review**

Every acquisition of control of a Canadian business or the establishment of control of a new Canadian business by a non-Canadian is notifiable or reviewable under the Investment Canada Act. Generally speaking, an investment that is reviewable cannot be completed until the responsible federal minister has declared the investment likely to be of "net benefit to Canada." A monetary threshold test applies to the determination of whether an investment is reviewable. A higher threshold applies to investments by non-Canadians that qualify as "World Trade Organization (WTO) investors" or if the Canadian business that is subject of the investment is already controlled by a WTO investor. This higher threshold does not apply to investments in the following sensitive areas: uranium production, transportation services, financial services and cultural businesses. Recent amendments to the Investment Canada Act (which will come into force once the relevant regulations have been finalized) increase the investment review threshold limit significantly, restrict the lower review thresholds only to cultural businesses and introduce a new "national security" review of investments.

Beyond the Investment Canada Act, there are Canadian ownership and licensing restrictions on businesses providing, among others, telecommunications, transportation and financial services. Canada has also identified certain culturally sensitive areas, such as publishing and broadcasting, that may be subject to ownership restrictions.

### **Corporate and Securities Laws**

Canadian corporate legislation exists at both the federal and provincial levels while securities legislation only exists provincially. Mergers and acquisitions transactions are broadly similar to those in the U.S. Private transactions are effected as share or asset purchases while public transactions proceed as take-over bids (tender offers), amalgamations (mergers) or plans of arrangement (a court-supervised process more flexible than a merger).

### **International Trade**

Canada is a member of the WTO and a party to the various WTO trade agreements. Canada and the U.S. are both parties to the North American Free Trade Agreement (NAFTA). Therefore, many of Canada's customs and trade laws should be similar to those applicable in the U.S.

All goods imported into Canada are subject to Canada's customs and sales tax laws. Issues such as tariff

classification, valuation, origin, marking and labelling should be considered before commencing to ship goods to Canada. It is important to properly structure the Canadian business in order to minimize or eliminate customs duties and taxes whenever possible. Determining whether NAFTA rules of origin are satisfied (and supplying documentation if they are) will avoid potential civil liability for non-compliance with customs laws and manage customs costs.

As Canada's Export and Import Permits Act imposes significant restrictions on the movement of goods into, around and out of Canada, it may impact the valuation of operations and strategic planning. However, virtually all domestic regulation in Canada is subject to NAFTA, and certain American parties may request review of an alleged violation by a NAFTA panel.

#### Antitrust

Mergers that exceed certain prescribed thresholds are subject to mandatory pre-merger notification under the Competition Act. These mergers cannot be completed until the parties have submitted their respective notifications and the mandatory waiting period has expired, been waived or terminated early. All mergers, regardless of whether they are subject to pre-merger notification, are subject to the substantive provisions of the Competition Act.

#### Intellectual Property

Canada's patent eligibility is based on "first to file," unlike its American "first to invent" counterpart. Novelty bars, the obviousness test and prosecution history estoppel all differ vastly from the U.S.

The importance of licences is heightened in Canadian trade-mark law, which requires licences even for wholly owned subsidiaries. Canada has not adopted the Nice International Classification System, which provides a distinct cost advantage. Registrants can also renew trade-mark registrations without proof of use.

#### Privacy

Canadian privacy legislation requires informed consent to the collection, use and disclosure of personal information, instead of merely notice of those purposes as permitted in many jurisdictions in the U.S. Public as well as non-public personal information is covered by legislation, which applies to affiliated organizations and third parties. There are both provincial and federal privacy standards that apply to the collection, use and disclosure of personal information before, during and after a transaction.

#### Information Technology

Federal misleading advertising, provincial consumer and French language protection laws may apply when parties use the Internet for sales or advertisement purposes. Provincial sales taxes may apply to software licences depending on the server and user locations. This may result in double tax if not structured strategically. Custom software use by an affiliate may result in loss of provincial sales tax exemptions.