

BORDEN LADNER GERVAIS
& ACC NATIONAL CAPITAL REGION

Doing Business in Canada

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BLG
Borden Ladner Gervais

Program & Speakers

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CORPORATE
COMMERCIAL

LABOUR &
EMPLOYMENT

IP PATENTS &
TRADEMARKS

PROCUREMENT

Q&A



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Corporate Commercial

Agenda

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- The Canadian System of Government
- Business Organization Structuring Options
- Foreign Investment Regulation
- Raising Capital
- Language Considerations
- Dispute Resolution

The Canadian System of Government

- Canada's legal system combines a federal structure of government with two of the world's major legal traditions
 - English common law and French civil law
- English common law applies in 9 Provinces and 3 Territories. French civil law applies in the Province of Quebec
- Legislative powers are distributed between the federal and provincial governments

The Canadian System of Government

Federal jurisdiction includes:	Provincial jurisdiction includes:
<ul style="list-style-type: none"> • Criminal law • Patents and trademarks • Competition law • Banking law • International trade regulation • Transportation law (railways, airlines, navigation, shipping etc.) • Telecommunications law • Criminal law • Immigration law • Fisheries 	<ul style="list-style-type: none"> • “property and civil rights” which covers: <ul style="list-style-type: none"> • Local marketing and services • Regulation of trades and professions • Transfer of property/ Real Estate transactions • Land-use planning • Municipal law • Natural Resources • Most contractual and commercial relationships between parties i.e. Contract law • Labour relations • Occupational health and safety • Consumer protection • Securities law

Taxation powers are shared amongst the federal, provincial and municipal governments

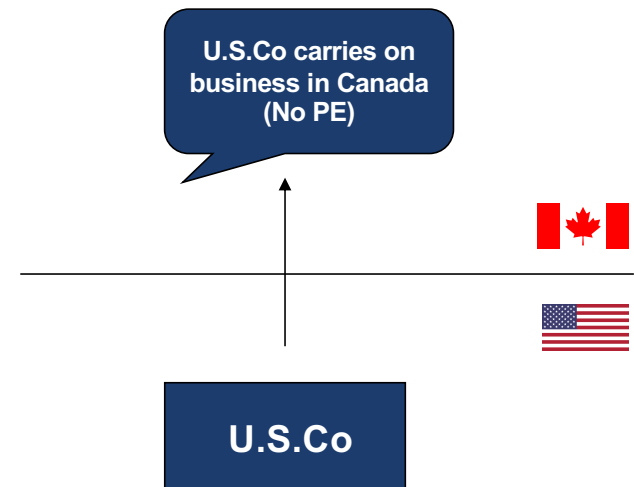
Three Possible Scenarios:

1. A non-resident carries on business in Canada with no permanent establishment.
2. A non-resident carries on business directly in Canada through a permanent establishment (a “Branch”).
3. A non-resident carries on business in Canada through a Canadian subsidiary. If incorporating a Canadian subsidiary:
 - *federal v. provincial incorporation*
 - *public v. private corporation*
 - *use of a unanimous shareholders agreement*
 - *share capital v. debt*

Scenario 1. No PE

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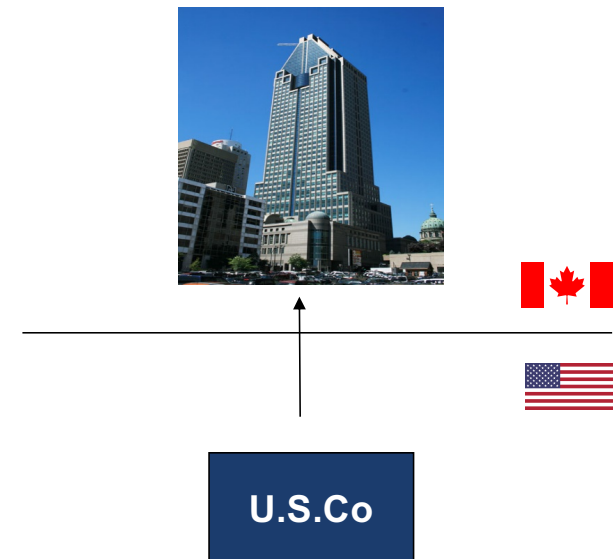
- i. Should not be liable for Canadian Income Tax.
- ii. May require Reg. 105/102 of the Income Tax Act (Canada) waivers.
- iii. GST/QST registration may be required (different test of “carrying on commercial activity”)



Scenario 2. PE

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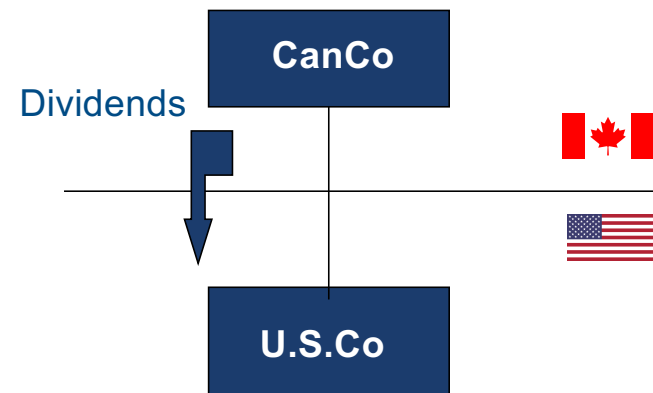
- i. Liable for Canadian Income Tax (+ branch tax).
- ii. Caution Reg. 105/102 (Income Tax Act (Canada))
- iii. GST/QST registration should be required



Scenario 3. Canadian Subsidiary

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- i. Canadian subsidiary will be liable for Canadian Income Tax as required by ITA.
- ii. No 105/102 waiver
- iii. Will need to register for GST/QST.
- iv. Withholding tax will apply on dividend distributions to foreign parent.



Summary Table

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	Scenario 1. No PE	Scenario 2. PE	Scenario 3. Canadian Sub.
Tax Rate on General Active Business Income (Cda)	26.9% or *0% <small>*reduced by treaty</small>	26.9%	26.9%
Branch Tax (PART XIV Tax/ 219 ITA)	25% or *0% <small>*reduced by treaty</small>	25% <small>*subject treaty reduction</small>	N/A
Withholding Tax (212 ITA) (dividends, interest, etc.)	N/A	N/A	25% <small>*subject treaty reduction</small>
Total Tax	51.9% or *0% <small>*reduced by treaty</small>	51.9%	51.9%

Branch v. Subsidiary:

○ **Branch:**

- If the Canadian operation incurs significant losses in its early years, carrying on business in Canada directly through a branch will ensure deductibility of losses for foreign tax purposes
- Foreign corporation's books and records relating to its non-Canadian operations may be opened to inspection and audit by the Canadian taxation authorities
- Income tax authorities impose a “branch tax” on any non-resident corporation carrying on business in Canada
- Foreign parent corporation directly exposed to all of the liabilities of the Canadian operation

- **Subsidiary:**

- Many foreign investors prefer to carry on business through a Canadian subsidiary
- More convenient for administrative purposes:
 - *can make the process of execution of documents simpler*
 - *can minimize Canadian withholding tax requirements in respect of payments made by the subsidiary*
- Credibility as a Canadian Company
- Generally limits the liability of the foreign parent corporation to its investment in the Canadian subsidiary

Foreign Investment Regulation

- Generally, there are few limitations on foreign investment in Canada. Those that do exist include:
 - All foreign investment over certain financial thresholds is subject to a federally-administered investment review process
 - Any foreign investment considered potentially harmful to Canadian national security is subject to a federally-administered investment review process
 - Investments in some specific sectors are subject to special rules, including foreign ownership restrictions (ie. financial institutions, telecommunications, air transportation and cultural industries)
 - Investment reviews are done under the *Investment Canada Act*

Foreign Investment Regulation

Notification and “Net Benefit” Review – Financial Tests

- All investments in Canada by non-Canadians to establish a new business or acquire an existing business require the filing of either: (a) a simple “notification” of the investment; or (b) a much more in-depth “application for review”.
- Currently, for Private Sector WTO investments, an application for review is required where the book value of the Canadian assets being acquired exceeds \$1 Billion as of April 2019 (and adjusted based on GDP growth starting January 2021)
- There are separate thresholds for State-owned enterprise WTO investments, and Non-WTO investments and Investments in cultural businesses

Foreign Investment Regulation

- Review is conducted to determine whether the proposed transaction results in a “net benefit” to Canada. The transaction cannot be completed until the federal government authorities reviewing it determine it will result in a net benefit to Canada
- Result of the review might involve the foreign investor having to give undertakings to the federal government relating to matters such as maintenance of jobs and/or head offices in Canada, etc. These are negotiated in each transaction individually

Foreign Investment Regulation

The National Security Review Process

- Separate from the “net benefit” review process
- Review process initiated at the Minister’s discretion.
- Review process applies to a broader range of investments than the “net benefit” review process
 - Target/new business does not need to satisfy all the requirements of a “Canadian business” – sufficient if the entity has one of the following:
 - *A place of operations in Canada;*
 - *One or more individuals employed in Canada; OR*
 - *Assets in Canada used in carrying on operations.*
- Applies if there are concerns that the investment could be injurious to Canada’s national security.

Foreign Investment Regulation

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Other Restrictions:

- Investments in some specific sectors are subject to special rules, including foreign ownership restrictions:
 - Financial institutions;
 - Telecommunications;
 - Air transportation; and
 - Cultural industries.

Raising Capital

- Listing on Canadian exchanges can broaden the scope of investors and improve public profile.
- Companies that are listed in Canada are subject to ongoing reporting and disclosure obligations.
- Securities law is a provincial jurisdiction, despite efforts at harmonisation, traps still exist for the unwary when seeking to raise capital in multiple jurisdictions
- Canada also has a very strong 'exempt' market.
 - Exempt market transactions can be an excellent way to raise capital while avoiding the costs and other burdens associated with becoming a listed company

Language Considerations

- Canada has two official languages: English and French.
- The *Consumer Packaging and Labelling Act* requires certain labelling information to be provided in French and English.
- The official language of the province of Quebec is French. Every inscription on products sold in Quebec must be in French and businesses operating in Quebec must have French names.

Dispute Resolution in Canada

- There are 3 divisions of Canadian courts:
 - Federal Court
 - *Hears claims against the federal government, and claims pertaining to federally regulated industries.*
 - Provincial Superior Court
 - *Provincial Superior Courts have inherent jurisdiction, and hears most civil disputes*
 - Provincial Court
 - *Hears small claims (< \$25,000) and criminal youth and traffic matters*

Dispute Resolution in Canada

- Appellate System
 - There are 2 levels of Appellate courts in Canada.
 - The first level consists of the Federal Court of Appeal (FCA), and the provincial courts of appeal
 - *The FCA hears appeals from the Federal Court*
 - *The Provincial Courts of Appeal hear appeals from provincial Superior Courts, and provincial tribunals*
 - The second level is the Supreme Court of Canada (SCC)
 - *The SCC is Canada's highest court*
 - *The SCC hears appeals from the Federal Court of Appeal, and the provincial courts of appeal*

Dispute Resolution in Canada

○ Alternative Dispute Resolution

- Negotiation
 - *Should always be explored, sometimes disputes settle for unexpected reasons*
- Mediation
 - *Negotiation facilitated by an impartial third party (usually a senior lawyer)*
 - *Quicker and cheaper than litigation, and also confidential*
 - *Dependent on parties' willingness to compromise, and may not resolve the dispute*
- Arbitration
 - *Adversarial process which parties agree to, where an outside arbitrator imposes a legally binding resolution (essentially private litigation)*
 - *Quicker and cheaper than litigation, and also confidential*

Labour & Employment

(ALMOST) EVERYTHING YOU NEED TO
KNOW ABOUT CANADIAN VS U.S. LABOUR
LAW

Federal v. Provincial Jurisdiction

- Provincial legislation governs all aspects of the workplace unless employees are employed “on or in connection with the operation of any federal work, undertaking or business...”
- Employers will be federally regulated if:
 - Their business itself is a federal work/undertaking; or
 - Their business is integral to, dependant on, or a vital part of a federal work/undertaking



No “At Will” Employment – Minimum Notice Requirements

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- “At will” employment does not exist in Canada!
- In the absence of just cause, all employees are at least entitled to notice of termination (or pay in lieu of such notice) under employment standards legislation (which provides minimum standards)
- The specific statutory notice (or pay in lieu) required varies from province to province, and there are often special notice requirements for group terminations (50 or more employees)

Contractual Notice

- A written employment agreement may limit an employee's entitlement to notice to that required under applicable employment standards legislation (or some other amount above and beyond the minimums)
- If there is no written employment agreement limiting an employee's entitlement to notice, or if the agreement or specific clause limiting notice is unenforceable (as it would be if, for example, it contains an "at will" termination clause), then the employee is entitled to reasonable notice of termination under the common law

2 Ways to Bring the Employment Relationship to an End

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(i) Dismissal without Notice

- Resignation
- Dismissal for just cause
- Retirement
- Frustration

(ii) Dismissal with Notice

- Without cause Dismissals
- Constructive Dismissal

Common Law Reasonable Notice: The Factors

- Age
- Employability
- Length of service
- Salary level
- Position

Just Cause Dismissal = No Notice

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“Serious misconduct on the part of the employee which is inconsistent with the fulfillment of the express or implied conditions of service.”

Conduct that may Breach the Employment Relationship

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1. Dishonesty
2. Sexual harassment
3. Off-duty conduct
4. Insubordination
5. Incompetence
6. Absenteeism
7. Theft
8. Competing with Employer
9. Violence
10. Criminal Conduct

Conduct that may not Breach the Employment Relationship

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1. Lifting a disabled person on a forklift
2. Harassing during a company event
3. Stealing from lunch program
4. Running away on vacation
5. Hunting on sick leave
6. Drinking on the job
7. Revealing trade secrets
8. Brawling with a customer
9. Fraudulent salary increases
10. Falsifying expense reports

Human Rights Legislative Overview

The Ontario *Human Rights Code*

- Section 5 of the Act prohibits discrimination on the following grounds:

*“5(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, **sex**, sexual orientation, gender identity, gender expression, **age**, record of offences, marital status, family status or **disability**.”*

The Disabled Employee

Yes:

- Post traumatic stress disorder
- Gambling
- Lack of stature
- Smoking
- Pteromerhanophobia
- Kleptomania

No:

- The flu

Maybe:

- Internet pornography addiction
- Being tired

The Duty to Accommodate

Hydro-Québec, [2008] 2 SCR 561

- “What is really required is not proof that it is impossible to integrate an employee who does not meet a standard, but proof of undue hardship, which can take as many forms as there are circumstances.”

Legalization of Cannabis

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What did not Change?

- Employers still have the legal obligation to provide a healthy and safe workplace for their employees
- Employers can still expect and require that employees come to work fit for duty and to remain fit throughout their workday while performing their duties
- Just as in the case for alcohol, the legal status of cannabis does not entitle employees to use it at work, or be under its influence while they perform their work, except in exceptional circumstances such as when the duty to accommodate is triggered under human rights legislation

Human Rights and Cannabis

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Ontarians don't have absolute right to be stoned at work: human rights commission



'Safety supersedes etiquette'

Etiquette Expert Lizzie Post weighs in on good and bad pot etiquette for hosts wondering how to handle smokers.

Wage and Hour Class Actions

- Canada is experiencing an increase in wage/hour/overtime/misclassification class actions
- Gig Economy
- Seeing an increase in the role of unions in connection with class claims
 - Backing the class claim and organizing at the same time
 - Referring to the class claim in support of campaign



Intellectual Property: Patents & Trademarks

Patents: An Overview

Patents – The Basics

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protect technological innovations

exclusive right to
exploit economically
(make, sell, use, import)

protect

where you **sell**
where you **produce**
where you **innovate**

inventions that are

novel and
‘inventive’ over the
state-of-the-art

obtained by application to
a governmental office



Innovation, Science and
Economic Development Canada
Canadian Intellectual Property Office

20
years

from the filing date*
of the patent
application



Paris Convention

PCT – The
International Patent
System

PPH

Patents – Aspects in Common

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1
year

disclosure grace
period

3-5
years

duration of
'prosecution' of
patent application



reach-back
royalties

Patents – What is different

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United States

Canada

few exceptions	patent-eligible subject matter	categorical and effective exclusions
yes, general	patent term extension	no, except pharma
structured, fee per search/exam	flow of prosecution	flexible, one search/exam fee
yes	continuation practice	no
no	search/exam deferral	yes, 4* years
yes, (\$460 / \$100 / \$820)	excess claims fees	no
after grant (3½, 7½, 11½ years)	maintenance fees	annually, 2 nd anniversary

Patents – Prosecution Strategy

US first, then CA second

- defer examination in CA (4 years)
- finish US portfolio (base application + continuations)
- combine all → PPH

CA first, then US second

- *advanced ‘special order’ examination in CA*
- *CA success → US PPH*
- *relatively low-cost advanced examination in US*
- *potentially broader scope in CA*

Patents – COVID-related Extension (Canada)

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August
10
2020

Most deadlines are extended, with further extensions possible

Trademark Changes

Trademark Changes

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Prosecution

Canada's New *Trademark Act* – Most Significant Changes in over 50 Years

Madrid
Protocol

Madrid
Protocol
applications
now
possible

Nice

Agreement

Nice
Classification
mandatory for
applications filed
after June 17/19
and eventually for
registrations

Singa
-pore
Treaty

Harmonizing
admin.
registration
procedures

Canada's adherence to all three major Treaties became official on June 17, 2019 with the coming into force of the amended *Trademarks Act*. With the new *Act* comes a host of regulations and new practice notices (some of which have not yet been drafted). Some amendments (particularly those under Bill C-86) are not yet in force.

Trademark Changes

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Prosecution

Declarations of Use/Basis for Registration

No longer required at any stage (as a requirement for registration)

Classification according to Nice

Now required

Examination

Distinctiveness, Utilitarian Functionality, Divisionals and Letters of Protest;
Specification of Goods/Services in ordinary commercial terms still required

Trademark Changes

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Prosecution

Streamlined Procedure

Advertised application granted registration automatically – payment of registration fees no longer required for applications filed after June 17/19

Renewals

Term reduced from 15 to 10 years; Renewal fees per Class

Change of Title

Simplified procedure for recording Assignments

The Procurement Regime

Overview

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- Procurement by Canadian government institutions accounts for billions in annual spending.
- Procurement in Canada is regulated by national and international trade agreements, domestic regulations and policies.

Trade Agreements

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- The most relevant trade agreements to US suppliers are:
 - Canadian Free Trade Agreement (“CFTA”) and
 - World Trade Organization Agreement on Government Procurement (“WTO AGP”)

Canadian Free Trade Agreement (“CFTA”)

- Summer of 2019 – replaces Agreement on Internal Trade

Application: CFTA applies to all major areas of the federal government, the territories, provinces and the Mush sector – municipalities, universities, school boards, hospitals.

- When are CFTA obligations triggered?

CFTA applies to the acquisition of all goods and services with some exceptions, some areas of non-application, and \$ threshold application triggers.

CFTA (cont'd)

- \$ thresholds (Article 504.3) for the CFTA application are: departments, ministries, agencies, boards
 - \$25,000 for goods
 - \$100,000 for services
 - \$100,000 for construction
- Mush Sector
 - \$100,000 for goods or services
 - \$250,000 for construction
- Crown Corporations Government Enterprises
 - \$500,000 or greater for goods and services
 - \$5,000,000 for construction

CFTA (cont'd)

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- CFTA (Article 504.11) does not apply to:
 - Employment contracts
 - Non-legally binding agreements
 - Grants, loans, equity infusions
 - International cooperation agreements
 - Real estate
 - Measures necessary to protect intellectual property
 - Acquisition of certain financial services
 - Health or social services
 - Professional services
 - Charitable services
 - Certain military agreements relating to the stationing of troops

- Local Content and Canadian Content or Supplier Restrictions
 - Local preferences – preferring goods of one province, territory, municipality or area over another area is prohibited (Article 503.3)
 - However, restricting procurements to Canadian suppliers or to Canadian goods or services is permitted in limited circumstances, but only where (Article 503.4):

The preference for Canadian goods or services does not contravene international obligations, the measure is not taken to avoid competition or to discriminate against another party's goods, services or suppliers.

CFTA (cont'd)

- Canadian preference restrictions have not been tested by the courts. Arguably, these restrictions are only allowed when they fall below other international treaty obligations such as in the WTO AGP since another trade agreement represents “other international obligations”.
- If invoked, Canadian content restrictions can require 80% of a bid price to be representative of services supplied by Canadians. See the following:
www.buyandsell.gc.ca/policy-and-guidelines/supply-manual/section/3/130
- Canadian content for goods is determined by the “Rules of Origin” under the Canada, United States and Mexico Agreement (“CUSMA”). Specific Rules of Origin are lengthy and complex.

CFTA (cont'd)

BLG

- CFTA Article 8.1 allows the Canadian government to invoke a national security exemption to prohibit any bidder in circumstances where a foreign owned or controlled entity may obtain access to sensitive national security information.

CFTA (cont'd)

- CFTA Obligations – how procurements must be run
 - Full open tendering publicly advertised
 - No description of quantities of goods or services to evade thresholds
 - No use of options that contravene the chapter
 - No local content preferences
 - No scheduling of events to restrict supply or access
 - No specifying quantities or deliverable schedules which unduly preventing suppliers from meeting requirements
 - No use of price discounts or margins in favour of specific suppliers
 - Use of prior experience for qualifications must be strictly limited to relevant criteria necessary to meet the supply requirements

CFTA (cont'd)

- CFTA Obligations – how procurements must be run (cont'd)
 - No preferential sharing of information
 - No use of qualifications which unduly restrict bidders
 - Evaluation criteria must be clear and specified
 - Award only to compliant bidders – compliant with mandatory criteria and evaluation criteria
 - Open, transparent, non-discriminatory practices
 - Use of financial, technical, legal and commercial criteria must be strictly necessary to perform work
 - Only functional description of goods and services is permitted – no brand specificity or supplier specific requests

- CFTA Obligations – how procurements must be run (cont'd)
 - Evaluations must be conducted strictly in accordance with published criteria
 - Treat all bidders fairly – equally and consistently
 - Award only in accordance with published criteria – no cancellations unless in the public interest

○ Notices

- All procurements must be the subject of public notice on government of Canada or other acceptable websites
- Procurements must remain open for bidding a reasonable period of time having regard to the complexity of the procurement, and the time to prepare and deliver a response

CFTA (cont'd)

- Limiting Tendering – where governments can circumvent the requirements of the CFTA (Article 513)
 - Limiting tendering is permitted if it is not used to avoid competition or unduly discriminate and where:
 - No tenders were submitted, or
 - No tenders conformed to the essential requirements of a solicitation, or
 - No supplier satisfied the mandatory or essential criteria, or
 - Goods or services can only be supplied by one supplier with no reasonable alternatives such as:
 - Works of art
 - Procurement to protect patents or trade-marks
 - Where there is an absence of competition for technical reasons

CFTA (cont'd)

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- Supply is controlled by one bidder
- To ensure compatibility with existing goods
- Where work must be performed on suppliers' premises
- Urgency
- Ordering goods in the commodity markets
- Purchases under exceptional circumstances, i.e. unusual disposal
- Confidential or privileged matters

World Trade Organization Agreement on Government Procurement (“WTO AGP”)

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- The requirements under the WTO AGP are similar to and overlap with the CFTA
- Thresholds for the application of the WTO AGP are as follows:
 - Central government entities
 - \$130,000 for goods and services
 - \$5,000,000 for construction
 - Sub-central entities
 - \$355,000 for goods and services
 - \$5,000,000 for construction
 - All other entities
 - \$355,000 for goods and services
 - \$5,000,000 for construction

WTO AGP (cont'd)

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- Notice requirements

- Tenders which are subject to the WTO AGP must use a 40 day notice period. Procurement documents must be published and available to bidders for a period of 40 days before closing.
- 40 days for a response may be reduced to 10 days in certain circumstances.

Canadian International Trade Tribunal (“CITT”)

- Enforcement of trade agreement obligations – complaints
 - Complaints in relation to procurements subject to trade agreements are entertained by the Canadian International Trade Tribunal (“CITT”)
 - CITT has strict time limits:
 - 10 days to file a complaint, or
 - 10 days from response to a written notice of objection to which a reply is received
 - CITT may issue injunctive relief
 - CITT is required to dispose of a complaint within 135 days of acceptance of the complaint for inquiry

CITT (cont'd)

- CITT has power to issue recommendations requiring:
 - Cancellation of a procurement
 - The issuance of a new solicitation
 - A new evaluation
 - Awarding the contract to the complainant, and/or
 - Awarding lost profits
- The government's ability to resist CITT's recommendations is limited.
- Provincial and Mush sector procurement challenges take place before Superior Courts of provinces.
- Trade agreements require creation of CITT like provincial complaints tribunals – not yet implemented.

Canadian Policy Restricting Conduct of Suppliers, Government Depts. and Employees

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- Canada also regulates government procurement, including the conduct of bidders through a variety of policies and codes:
 - 1) The Suspension Policy
 - 2) Values and Ethics Code for the Public Sector
 - 3) Policy on Conflict of Interest and Post-Employment Activity
 - 4) *Conflict of Interest Act*, S.C. 2006 c.9.s.2
 - 5) Treasury Board Contracting Policy
 - 6) *The Financial Administration Act*

Canadian Policy Restricting Conduct of Suppliers, Government Depts. and Employees (cont'd)

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- In 2015, Canada introduced its Integrity Regime to ensure Canada only does business with “ethical” suppliers.
- The central pillar of the Integrity Regime is the Suspension Policy which applies to all procurement, staffing, standing offers, supply arrangements or contracts with any government department.
- The Suspension Policy is implemented through its incorporation by reference into procurement documents via Standard Acquisition Clauses and Conditions (“SACC”) and the deeming provisions of the government contract regulations under the *Financial Administration Act*. Suspended suppliers are unable to participate in Canadian procurements.

Canadian Policy Restricting Conduct of Suppliers, Government Depts. and Employees (cont'd)

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- Suspension policy has both automatic and discretionary implementation.
- A bidder is automatically suspended and ineligible if convicted of certain offences under:
 - *The Criminal Code of Canada*
 - *The Financial Administration Act*
 - *The Competition Act*
 - *The Income Tax Act*
 - *The Excise Tax Act*
 - *The Corruption of Foreign Public Officials Act*
 - *The Controlled Drugs and Substances Act*
 - *The Lobbying Act*

Canadian Policy Restricting Conduct of Suppliers, Government Depts. and Employees (cont'd)

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- The suspension policy may be invoked on a discretionary basis if a supplier has:
 - Committed a similar offence to offences which give rise to automatic ineligibility
 - An affiliate of a supplier has committed an offence that would cause automatic ineligibility
 - The supplier has breached the terms of an administrative agreement, or
 - The supplier has committed an offence outside of Canada that would, if committed in Canada, give rise to ineligibility

Thank You

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