3

Canada

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3.1 Introduction

With a population of roughly 37 million people,¹ Canada occupies the northern half of North America and is the world's second largest country by total area, extending from the Atlantic to the Pacific and northward into the Arctic Ocean. The vast majority of Canada's 37 million people live in the southern part of the country. English and French are Canada's official languages, with French predominating in the province of Quebec, and English predominating elsewhere.

Canada is a parliamentary democracy. The national parliament, located in Ottawa, has two chambers: the Senate and the House of Commons, the real legislative power resting almost exclusively in the elected House of Commons. Canada is also a federal state in which the legislative authority is constitutionally divided between one national and 13 local jurisdictions. The 10 principal jurisdictions are known as 'provinces' and the remaining three as 'territories'. As a general rule, the federal government has jurisdiction over matters of national and international importance, while the provinces have jurisdiction over matters of local importance. Finally, Canada is also a constitutional monarchy, although its recognition of Queen Elizabeth II as head of state is more symbolic than practical.

Two distinct legal systems exist in Canada. In the largely French-speaking province Quebec, private law is established by the *Civil Code of Quebec* (CCQ), which is conceptually similar to that of France and other con-

¹ 'Population Estimates, Quarterly' (*Statistics Canada*) www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1710000901 accessed 5 March 2020.

tinental European countries.² The other provinces and territories are common law jurisdictions.

Ranking second amongst OECD high-income countries for the lowest number of procedures, cost and time required to establish a new business,³ Canada offers great opportunities from the incorporation stage, through the financing round, and to the eventual initial public offering. It is an affluent, high-tech industrial society that has a market-oriented economic system and high living standards. The country enjoys solid economic prospects due to its natural resources, skilled labour, stable political and economic systems, and modern capital infrastructure.

Over the years, Canada has also entered into numerous multilateral and bilateral international trade and investment agreements. The two most notable agreements, the 1989 *U.S.–Canada Free Trade Agreement* and the 1994 *North American Free Trade Agreement*, have contributed to a significant increase in trade and economic integration with the United States and Mexico. As of today, Canada ranks tenth in the world in overall economic competitiveness⁴ and fourteenth in the world in the global competitiveness index.⁵

Concurrently, Canada has a well-established R&D platform at the federal and provincial level, offering various incentives to entrepreneurs and resulting in a notable cost advantage, with the total cost 27.7 per cent below the US baseline.⁶

Canadians are also considered innovative and entrepreneurial. Research indicates that, in a representative year, 9.3 per cent of all Canadian homes attempted to start a business. Between 2001 and 2015, the number of businesses increased every year, except in 2013, when more businesses

² Fasken, 'Establishing a Business in Québec: Practical Considerations' (2018), available at www.fasken.com.

³ 'Competitive Alternatives: KPMG's Guide to International Business Locations Costs' (KPMG) <https://assets.kpmg/content/dam/kpmg/pdf/2016/04/competitive-alternatives-2016-summary-report.pdf> accessed 5 March 2020.

⁴ 'World Competitiveness Rankings 2018' (IMD World Competitiveness Center) www.imd.org/wcc/world-competitiveness-center-rankings/world-competitiveness-ranking-2018 accessed 5 March 2020.

⁵ 'Global Competitiveness Report' (World Economic Forum) 2017–2018 www.weforum.org/reports/the-global-competitiveness-report-2017-2018 accessed 5 March 2020.

⁶ KPMG (n 3).

disappeared (96,400) than appeared (95,400).⁷ Thus, as of December 2017, there were 21.18 million employer businesses in Canada. Of these, 1.15 million (97.9 per cent) were small businesses, 21,926 (1.9 per cent) were medium-sized businesses and 2,939 (0.2 per cent) were large businesses.⁸

3.2 Establishing a company

The choice of the best legal structure for a new business, like most legal choices, properly depends on the circumstance of the new business.

In their early stages, most Canadian businesses are in the form of sole proprietorships (64 per cent) or partnerships (20 per cent).⁹ Only 11 per cent of nascent businesses begin in an incorporated form. The form changes as the enterprise grows in revenue. Presumably, the rising revenues bring increased sophistication and maturity to the enterprise, which is signalled, in part, by more formal structures. In addition, the significant tax advantages of unincorporated structures at the outset of a business (when losses may be applied against income received by the entrepreneur from other sources) are replaced by the tax advantages of the corporate form as the business becomes more profitable (e.g. the first C\$ 500,000 of active business income of a Canadian-controlled private corporation is subject to a rate of taxation well below the top marginal rate paid by individuals).

Potentially the most important considerations in the initial structuring of a start-up are the requirements of potential investors. The difficulties inherent in predicting the identity and nature of future financing are what leads to the cardinal rule in structuring a new business: make it as simple as possible. Venture capitalists are in the business of minimizing risk and

⁷ 'Key Small Business Statistics – January 2019' (Government of Canada) www.ic.gc.ca/eic/site/061.nsf/eng/h_03090.html accessed 5 March 2020.

⁸ *ibid.*

⁹ Monica C Diochon et al., 'From Conception to Inception: Initial Findings from the Canadian Study on Entrepreneurial Emergence' (2001) Proceedings of the Administrative Sciences Association of Canada, London, Ontario, 27–29 May 2001.

have a powerful aversion to unfamiliar or complicated legal structures (except to those they impose).¹⁰

In general, the start-up sector could be described by the '2-6-2 Rule'. It provides that out of 10 investee companies, two will be 'home runs' providing the vast majority of the venture capital fund's profits; six companies will become the 'living dead', meaning they will get to a certain size, attain profitability but then fail to demonstrate a significant rate of growth thereafter; and two companies will go bankrupt as dead losses to the fund.

In Canada, the business survival rate is fairly high. After one year, 94.5 per cent of businesses survive. After the third year, the business survival rate is roughly slightly above 70 per cent, while 10 years later, it is 42.9 per cent.¹¹

The statistics also underline a positive correlation between enterprise survival rate and initial business size. Businesses that began operations with a large number of employees had a higher survival rate than businesses that began with a smaller number of employees. After 10 years, 42.4 per cent of businesses that began operations with 1 to 4 employees were still active, compared with 55.4 per cent of business that began operations with a workforce of 50 to 99 employees respectively.¹²

3.2.1 Forms of business entities

Over the years, almost every available organization form has been used in Canada to create a start-up. For instance, in the 1990s, limited partnerships were popular amongst the software development businesses. Joint ventures have also been a common form for technology-related businesses. Today, the corporate form remains the predominant form in Canada.

There are 13 provinces and territories in Canada, each providing a regulatory framework for incorporating a business. In addition to the federal framework, there are 14 jurisdictions in which a business may incorporate in Canada. The differences between incorporating in one province over

¹⁰ Bryce C Tingle, *Start-up and Growth Companies in Canada: A Guide to Legal and Business Practice* (2nd edn, LexisNexis Canada 2013) 41.

¹¹ *ibid.*

¹² *ibid.*

another are small, in comparison with the United States, where there is a well-documented market for new incorporations and re-incorporations. For instance, Delaware chartered more than half of the US publicly traded companies and 64 per cent of the Fortune 500 firms. In Canada, the governments have very little economic incentive to pursue the incorporation business, as the revenues from corporate filing represent negligible amounts of their annual budgets (unlike Delaware, which receives 20 per cent of its state revenues from franchise fees and state corporation taxes).¹³

3.2.1.1 *Sole proprietorship*

A sole proprietorship is the most basic legal structure. Indeed, the division of power is extremely simple as the owner is the only person involved and is the one managing the whole operation.¹⁴

In the early stages of a business, one might prefer the sole proprietorship form because of the simplicity inherent in the process of establishing such a form of business, as there are practically no requisite formalities.¹⁵ Although the owner might have to comply with federal, provincial and even municipal regulations that impact trade and commerce, licensing and registration,¹⁶ no specific legislation governs the sole proprietorship.

In Quebec, if the owner wishes to conduct his operations under a different name than his or her complete name, he has to register with the Quebec Business Registry, also known as the *Registraire des entreprises*, and comply with the *Act Respecting the Legal Publicity of Enterprises*.¹⁷ A similar requirement exists in Ontario under the *Business Names Act*.¹⁸

¹³ Douglas J Cumming and Jeffrey G MacIntosh, 'The Rationales Underlying Reincorporation and Implications for Canadian Corporations' (2002) 22(3) *International Review of Law and Economics* 277.

¹⁴ 'Guide to Doing Business in Canada: Business Structures' (Gowling WLG) <https://gowlingwlg.com/en/insights-resources/guides/2019/guide-to-doing-business-in-canada> accessed 5 March 2020.

¹⁵ 'Doing Business in Canada 2018 – Your Complete Guide' (Davies) www.dwpv.com/en/Insights/Publications/2018/DBIC accessed 5 March 2020.

¹⁶ *ibid.*

¹⁷ *Act Respecting the Legal Publicity of Enterprises*, CQLR c P-44.1.

¹⁸ *Business Names Act*, R.S.O. 1990, c. B. 17. See also 'Doing Business in Canada: An Introduction to the Legal Aspects of Investing and Establishing a Business in Canada' (Borden Ladner Gervais) https://blg.com/en/News-And-Publications/Documents/Doing_Business_in_Canada.pdf accessed 5 March 2020.

In reality, the simplicity of the process and the small costs associated with the creation of a sole proprietorship are the only advantages this form has to offer.¹⁹ This explains why many businesses rapidly move towards another form.

With respect to disadvantages, the sole proprietorship makes it impossible to dissociate the business from the owner, causing a confusion of patrimonies, which means that, in case of insolvency or liabilities, the assets of the owner could and will be used to meet the obligations of the business.²⁰

Additionally, except for some specific situations regarding succession law, the enterprise cannot survive the owner's death, bankruptcy or institution of protective supervision. Then, such form offers little to no possible tax planning, for any income incurred by the sole proprietorship is included in the calculation of the owner's taxable income. These and other disadvantages make it hard to find financing opportunities for sole proprietorships.

3.2.1.2 Partnerships

By definition, a partnership is the relation that subsists between persons carrying on a business in common with a view to profit. The partners may be individuals, corporations or other partnerships.

In Canada, a partnership is not a separate legal entity from its partners.²¹ It means that for tax purposes, a partnership is a flow-through entity, meaning that the partners will have to pay tax on profits and losses through their own personal tax returns. Such tax treatment is the main reason for using a partnership instead of a corporation, for each partner

¹⁹ The only costs associated with the creation of a sole proprietorship are related to the registration of the business, the procurement of permits or licences required for the operation of the business, and the registration of a federal business number, if appropriate. These requirements vary from one province to another and depend on the nature of the business itself. For instance, the costs for registration of a business are C\$ 60 in Ontario and C\$ 337 in Québec. For more information, see 'Registering a Sole Proprietorship or Partnership' (*Government of Canada*) www.canada.ca/en/services/business/start/register-with-gov/register-sole-prop-partner.html accessed 5 March 2020.

²⁰ *Borden Ladner Gervais* (n 18).

²¹ *Davies* (n 15) 9.

may offset its eligible share of the partnership's business tax losses against income from other sources.²²

Three principal types of partnerships exist in Canada. The first form, the general partnership, is similar to sole proprietorships, except that it includes more than one person. Such business structure is attractive by virtue of its simplicity and informality, but it also exposes the partners to unlimited liability for partnership obligations. In Quebec, however, a partner's personal creditors will have priority over the partnership creditors.²³

Partnership law in Canada is a matter of provincial jurisdiction. While a partnership is generally formed under the laws of a particular province, partnerships carrying on business in more than one province will be required to comply with the laws of, and may be required to register in, each such province.²⁴ For example, in Quebec, a general partnership must file a declaration of registration under the *Act Respecting the Legal Publicity of Enterprises*, which must include a French name for the partnership to carry on business in the province.²⁵ In Ontario, no extra-provincial limited liability partnership may carry on business in the province unless it has registered its firm name under the *Business Names Act*.²⁶

In Quebec, partnerships are governed by the *Civil Code of Québec* and the *Act Respecting the Legal Publicity of Enterprises*. In Ontario, the governing statutes are the *Partnerships Act*²⁷ and the *Limited Partnership Act*.²⁸ In both provinces the statutes define the rights and obligations of the partners between themselves and in relation to third parties.

With respect to registration, in Quebec, the partners will have to register with the Quebec Business Registry, also known as the *Registraire des entreprises*, and comply with the *Act Respecting the Legal Publicity of Enterprises*. A similar requirement exists in Ontario under the *Business*

²² *ibid.*

²³ *Civil Code of Quebec*, art. 2221. See also *Gowling WLG* (n 14).

²⁴ *Davies* (n 15) 9–10.

²⁵ *ibid.*

²⁶ *Partnerships Act*, R.S.O. 1990, c. P.5, art. 44.4.

²⁷ *ibid.*

²⁸ *Limited Partnership Act*, R.S.O. 1990, c. L. 16.

Names Act.²⁹ In Quebec, however, the partnership declaration must include a French name for the purpose of carrying on business in the province.

The second form of partnership is the limited partnership, a creature of statutes that is formed by the filing of a declaration of partnership under the relevant partnership statute. In a limited partnership, the limited partner's liability is limited to their investment in the partnership, but, in return, the limited partner gives up his right to participate in the partnership business.³⁰ Such partnership form is often used for private equity funds, public financing and real estate syndication.³¹

In Ontario, the *Limited Partnership Act* provides that the partners have to file a declaration signed by the general partners and must renew such declaration every five years.³² In Quebec, a limited partnership is formed by filing a declaration of registration under the *Act Respecting the Legal Publicity of Enterprises*. For every subsequent year, the limited partnership will have to file an annual declaration to maintain its registration in good standing.³³

The limited partnership is different from the 'limited liability partnership', which is a special form of partnership recognized in most Canadian jurisdictions³⁴ and principally used by law firms and other professional services firms. These limited liability partnerships are governed by provincial legislation and imply that when a partner acts in a way that engages

²⁹ *Business Names Act*, arts 2(2)–2(3.3). See also Borden Ladner Gervais (n 18) 18.

³⁰ Davies (n 15) 9.

³¹ *ibid* at 10.

³² *Limited Partnership Act* (n 28), art. 3(3).

³³ *Act Respecting the Legal Publicity of Enterprises*, art. 45.

³⁴ All jurisdictions except Prince Edward Island and Nunavut allow the creation of LLPs. See British Columbia's *Partnership Act*, RSBC 1996 c. 348, Part 6; Ontario's *Partnership Act*, R.S.O. 1990, c. P.5, art. 44.1(1) and onwards; Quebec's *Act Respecting the Legal Publicity of Enterprises* (n 17), art. 34(3); Alberta's *Partnership Act*, RSA 2000, c P-3, art. 12(1) and Part 3; Saskatchewan's *The Partnership Act*, RSS 1978, c P-3, Part IV; Manitoba's *The Partnership Act*, CCSM c P30, Part III; Newfoundland's *Partnership Act*, RSNL 1990, c P-3, Part II; Nova Scotia's *Partnership Act*, RSNs 1989, c 334, art. 51(1); Yukon's *Partnership and Business Names Act*, RSY 2002, c. 166, Part 5; Northwest Territories's *Partnership and Business Names Act*, R.S.N.W.T. 1988, c. P-1, Part III.1; and New Brunswick's *Partnership Act*, RSNB 1973, c P-4, Part III.

his liability, only his assets will be at risk and not the assets of the other partners.³⁵

Finally, the undeclared partnership is another form of partnership, which constitutes a *de facto* partnership. It means its existence is independent from any requirements, such as registration. It can arise from a written or oral agreement. In Quebec, a general or limited partnership that fails to file a declaration under the legislation becomes an undeclared partnership.

This form of business presents a lot of disadvantages as every partner is personally liable for any other partner if debts have been contracted for the use or operation of the common enterprise. Furthermore, being a *de facto* structure, partners may suffer from these shortcomings even though they did not intend to form an undeclared partnership.³⁶

3.2.1.3 Joint ventures

Joint ventures can be seen as a form of partnership which is defined by the existence of a common project.³⁷ It takes the form of an agreement between two or more parties in order to amass capital and skills.³⁸ Since such structure is a contractual relationship, it is not governed by any

³⁵ *Gowling WLG* (n 14).

³⁶ *ibid.*

³⁷ See e.g. *International Corona Resources Ltd. v Lac Minerals Ltd.* (1987) 62 O.R. (2d) p. 1 at pp. 45–6: ‘Another class is that where persons repose trust in one another where common property may or may not be involved. Examples of this class are partnerships and joint venture types of cases. A joint venture (also known as a joint adventure) is in essence a form of partnership.’; *Ben 102 Enterprises Ltd. v Ben 105 Enterprises Ltd.*, 2007 BCSC 1069, at para. 104: ‘While helpful as a definition, the foregoing is of limited value in resolving the issue at hand because, as pointed out by the authors of the *Lindley & Banks on Partnership*, 18th ed. (London: Sweet & Maxwell, 2002) at page 74, all partnerships involve a joint venture, but not all joint ventures involve a partnership. There is no issue on the facts of this case that the parties formed a joint venture. The issue is whether they formed a partnership. Whether they did or not falls to be determined by the “true account and intention of the parties as appearing from the whole of the facts.” Further, while a statement in a contract to the effect that what is created by it is not a partnership is not determinative of the issue, it surely must be important evidence of the parties’ intentions.’; *Clarksburg Contractors Limited v Saks*, 2012 ONSC 4903, at para. 28: ‘There is no precise legal definition for a joint venture. Various meanings have been attributed to them: (a) a partnership, (b) an association of two or more persons for a limited purpose without the participants becoming partners, or (c) any combination of resources by two or more persons in order to conduct a commercial venture jointly under agreed-upon rules.’

³⁸ *Davies* (n 15) 12.

particular statute, and thus the parties are free to agree on whatever terms they choose.

The specificity of the joint venture is that it is an agreement entered into for the purpose of one specific undertaking. As such, once the project is accomplished, the joint venture comes to an end.³⁹ However, the underlying contractual freedom of the agreement could allow it to exist indefinitely. The contractual freedom attached to this structure is its main advantage. Note, however, that parties to a joint venture may be subject to certain provincial registration regulations, for example the requirements under the Quebec *Act Respecting the Legal Publicity of Enterprises*.

When setting up such a structure in Quebec, it is important to specify that the contract is not meant to create a partnership. Otherwise, if the agreement meets the criteria of a partnership, it will be considered an undeclared partnership and, thus, could be subject to various rules under the CCQ. Note that although the parties expressly stipulated that they did not wish to enter into a partnership agreement, a court of law may conclude, after examining the contract and the conduct of the parties, that a type of partnership was created.⁴⁰

With respect to income allocation, profits and losses are not calculated at the joint venture level, just like they are not calculated at the partnership level, the only exception being in the case of a joint venture corporation. Instead, each co-venturer contributes assets or cash and shares in any revenue generated from those assets according to the proportion provided in the contract. The calculation of profits and losses is determined for each co-venturer separately.⁴¹

As per the division of powers, generally only one party will be in charge of the management of the project. However, the contractual freedom of this structure offers a lot of flexibility.⁴²

³⁹ Joint Ventures and Partnering (*Info Entrepreneurs*) www.infoentrepreneurs.org/en/guides/joint-ventures-and-partnering accessed 5 March 2020.

⁴⁰ Borden Ladner Gervais (n 18) 20.

⁴¹ *ibid.*

⁴² *Davies* (n 15) 12.

3.2.1.4 Corporations

A corporation is the most common form of business organization in Canada. It has a legal personality distinct from its shareholders and management and its existence is potentially perpetual since it is not affected by the departure or death of any or all of its shareholders or managers.⁴³ The corporation is a separate legal entity, and thus has rights, powers and obligations of its own similar to those of an individual: it can hold property, carry on a business and incur legal and contractual obligations.⁴⁴

Both the federal and provincial governments have enacted legislation providing for the incorporation and regulation of business corporations. A business can be incorporated federally or provincially. At the federal level, the incorporation is governed by section 5 and following of the *Canada Business Corporations Act* (CBCA), in Ontario, by section 3 and following of the *Ontario Business Corporations Act* (OBCA), and in Quebec, by sections 3 to 10 of the *Quebec Business Corporations Act* (QBCA).⁴⁵

A business corporation incorporated under federal law may carry on business as of right in the province of its incorporation and also has the capacity to carry on business beyond the limits of that province.⁴⁶ In contrast, a provincially incorporated business cannot do so as of right. Moreover, an OBCA or QBCA corporation cannot be licensed or registered under its name in another province if a confusingly similar name is already being used there by another corporation.⁴⁷

However, it is easier to obtain a desired corporate name by incorporating provincially because, unlike the CBCA, the OBCA and QBCA do not subject the proposed corporate names to pre-clearance for possible confusion with existing names. In fact, the incorporators decide for themselves whether there is any risk of other parties objecting to the names they intend to use.

⁴³ Borden Ladner Gervais (n 18) 14.

⁴⁴ Gowling WLG (n 14).

⁴⁵ Fasken (n 2).

⁴⁶ 'Doing Business in Canada 2018' (Blakes) www.blakesfiles.com/gfx/Booklets/Toronto/2018/DBiC_2018/EN/FlipBook/Doing_Business_in_Canada_2018 accessed 5 March 2020.

⁴⁷ *ibid.*

Table 3.1 CBCA vs. QBCA

	CBCA (Canada)	QBCA (Quebec)
Residency of directors	At least 25% of directors (or if fewer than three directors, at least one of them) must be Canadian residents	No Canadian residency requirement
Shareholders' meetings	In Canada	Can be held outside Quebec if permitted by the articles or if all the shareholders agree
Head office	In Canada	In Quebec
Financial tests applicable to distributions and return of capital	Must pass a solvency test and balance sheet test	Several cases where only the solvency test is required

Although the federal and provincial business corporation statutes are quite similar in most respects, there are some differences that can determine the place of incorporation, such as the ease and timeliness of incorporation, flexibility in carrying out corporate proceedings, licensing requirements, fees and taxes, director residency requirements and the extent of continuous disclosure requirements.⁴⁸ Table 3.1 illustrates some of the differences between the two systems. Note that the Quebec system applicable to the first two items is particularly appreciated by foreign investors.

Depending on the individuals forming the corporation and its board, the QBCA offers a more flexible operating framework. For instance, unlike the federal legislation, the Quebec legislation does not impose a directors' residence requirement, that is, having at least 25 per cent of Canadian residents as directors on the board. Moreover, the Quebec legislation allows the corporation, assuming all formalities were respected, to have its board meetings outside Quebec.

In addition, the QBCA offers the possibility of issuing unpaid shares as a way of financing the corporation and more flexible rules in terms of

⁴⁸ Gowling WLG (n 14).

governance. On this point, it is worth mentioning that the Quebec legislation authorizes the creation of sole shareholder corporations, and the sole shareholder may choose not to establish a board of directors and not to comply with some requirements of the QBCA relating to bylaws and meetings of shareholders and directors.

Additionally, every operating corporation (as opposed to a holding company) must register with the *Commission des normes, de l'équité, de la santé et de la sécurité du travail* to obtain an employer number, and with the competent government agencies to obtain goods and sales tax and sales tax numbers (GST and QST).⁴⁹

Shareholders are the owners of a corporation, but they usually do not manage its business or enter into transactions on its behalf. By law, they are protected from liability for the obligations of the corporation. The shareholders elect the directors of the corporation to manage its operations at the annual meeting of shareholders. Generally, directors appoint officers to whom they delegate some of their powers and these officers would be the ones managing the daily operations of the corporation.⁵⁰ Such officers include the president, the treasurer or the secretary.⁵¹

If the shareholders prefer to retain direct control of the corporation, they can enter into a unanimous shareholder agreement. Such agreement transfers the responsibility and liability for managing the corporation from directors to the shareholders.⁵²

Directors and officers have a fiduciary duty towards the corporation, meaning they have to act honestly and in good faith with a view to the best interests of the corporation.⁵³ They must always act with due care, diligence and skill and always be in compliance with the legislation and the shareholders' agreement. They also need to follow conflict of interest rules⁵⁴ or they might be personally liable if the corporate veil is lifted. This could also happen relating to unpaid taxes or employee wages. In order

⁴⁹ Fasken (n 2).

⁵⁰ *Blakes* (n 46).

⁵¹ Fasken (n 2).

⁵² *Blakes* (n 46).

⁵³ *Borden Ladner Gervais* (n 18) 23.

⁵⁴ *ibid.*

to prevent directors and officers from engaging their personal assets, the corporation should purchase insurance.⁵⁵

Another important difference between the CBCA and the OBCA, on the one hand, and the QBCA, on the other, pertains to the share structure. The QBCA allows for the creation of shares with or without par value and provides for the issuance of shares that are not fully paid up, whereas the CBCA and OBCA prohibit par value shares and the issuance of shares that are not fully paid up.

The main advantages of the corporation are the limited liability of the shareholders, the possibility of perpetual existence and the flexibility of the corporate form for financing and estate planning purposes.⁵⁶

The disadvantages include the costs associated with the incorporation, operation, annual maintenance and dissolution of the corporation. Since a corporation is a separate tax payer, shareholders cannot access directly any tax losses it may generate, and it may be more difficult to use it as a tax-efficient vehicle than an unincorporated entity like a partnership.⁵⁷

3.2.1.5 Cooperative⁵⁸

A cooperative is a particular form of corporation, because it is owned by an association of persons with common needs (e.g. access to products or services, sales of their products or services or employment).⁵⁹ These common needs are the main purpose, having priority over the maximization of profits. Such structure is based on the economic participation of its members as they provide capital and operations. There are four types of cooperatives: (1) consumer cooperative, (2) producer cooperative, (3) worker cooperative, and (4) multi-stakeholder cooperative.

Each type of cooperative has a specific goal. The consumer cooperative provides products or services to its members. The producer cooperative

⁵⁵ *Blakes* (n 46).

⁵⁶ Lavery, 'Why Incorporate?' (*Lavery*) <https://goinc.ca/en/2018/01/20/why-incorporate/> accessed 6 March 2020.

⁵⁷ *ibid.*

⁵⁸ 'Why Start a Co-operative?' (*Government of Canada*) <https://canadabusiness.ca/blog/why-start-a-co-operative-1/> accessed 5 March 2020.

⁵⁹ See, for instance, section 7 and following of the *Cooperatives Act*, S.C. 1998, c.1.

processes and markets goods and services necessary for the professional activities of its members. The worker cooperative provides employment to its members, while the multi-stakeholder cooperative exists for the benefit of different stakeholder groups (employees, clients, other individuals and organizations), mostly found in social enterprises.

Cooperatives are governed either by federal or provincial/territorial legislation,⁶⁰ and their incorporation must be done in accordance with specific applicable legislation. The applicable legislation, which depends on the choice of cooperative and the place of incorporation, is the main tool for organizing the business model and the operations of the cooperative.

Although similar to a corporation to a certain extent, the cooperative prioritizes democracy. Members of the cooperative are also usually owners and the members of the board of directors are elected on a 'one member, one vote' basis, regardless of the financial position of any shareholder. However other non-owner members could exist, for example, to support or invest in the cooperative. At each annual assembly, the member owners decide how to distribute the profits.

3.2.1.6 *Trusts*

Even though it has always been possible to use trusts as a form of business organization, it has been only recently that they started to be used for business purposes. In the past, trusts have been mainly created for personal or family purposes.

A trust is a three-party organization that has no legal personality⁶¹ of its own. The settler is the one that creates the trust and who puts the money in it for the benefit of beneficiaries. The trust is then managed by a trustee and the settler will not be able to alter it once constituted.⁶²

In a business trust, the assets and property of a business corporation are entrusted. In return, the company will receive payment in form of trust

⁶⁰ See, for example, the federal *Cooperatives Act*, S.C. 1998, c.1; Quebec's *Cooperatives Act*, CQLR c C-67.2; and Ontario's *Co-operative Corporations Act*, R.S.O. 1990, c. C.35.

⁶¹ Fasken (n 2).

⁶² 'Purpose of Business Trust' (*Laws*) <https://business.laws.com/special-business-forms/business-trust> accessed 5 March 2020.

certificates and residual interest in the trust. The corporation is then able to raise funds through the trust by issuing other trust certificates to diverse capital markets investors, who will receive a part of the benefits.⁶³

Trusts are provincially regulated.⁶⁴ In Ontario, trusts are governed by the provisions of the establishment declaration, some non-statutory principles of equity and the *Trustee Act*.⁶⁵ In Quebec, trusts are governed by the CCQ⁶⁶ and subject to the *Act Respecting the Legal Publicity of Enterprises*. Even though the common law trust and the civil trust are very similar, it must be noted that they are not the same and thus equity principles should not be automatically applied to Quebec trusts.⁶⁷

Trusts present various advantages to entrepreneurs. First, they allow greater tax efficiency for investors although some recent tax changes made it less appealing at this level.⁶⁸ Trusts could also serve to safeguard certain assets of the company from lawsuits or creditors. Furthermore, beneficiaries have a very limited liability in the profits of business.⁶⁹ However, the counterpart is the liability of the trustees for obligations which are incurred in carrying out the activities of the trust.⁷⁰

3.2.1.7 Franchise

Although they are corporations, franchises present business opportunities that deserve their own section in this chapter. For many individuals wanting to start a business, a franchise constitutes a simpler way to start a business because it benefits from the network and know-how of an already established brand. In 2018, Canada had 1,300 franchising brands and more than 75,000 units distributed through a large diversity of indus-

⁶³ Steven I. Schwarcz, 'Commercial Trusts as Business Organizations: Unravelling the Mystery' (2003) 58 *Business Lawyer* 559, 562–3.

⁶⁴ See e.g. CCQ, arts 1260–98; Ontario's *Trustee Act*, RSO 1990, c T.230.; British Columbia's *Trustee Act*, RSBC 1996, c 464.

⁶⁵ *Trustee Act*, RSO 1990, c T.230.

⁶⁶ See CCQ, Book Four, Title Six, Chapter II.

⁶⁷ Jacques Beaulne, *Droit des Fiducies* (3rd edn, Wilson & Lafleur 2015).

⁶⁸ *Davies* (n 15) 13.

⁶⁹ *Laws* (n 62).

⁷⁰ *Davies* (n 15) 13.

tries. In 2017, the number of franchise units increased up to 8 per cent and the number of franchise brands up to 22 per cent.⁷¹

A franchise is created when the franchisor and the franchisee reach an agreement, whereby the former grants the second the right to use its trade mark or trade name within a given territory.⁷² In Quebec, such contract is governed by the general principles of contract law and some specific regulatory requirements such as the *Act Respecting the Legal Publicity of Enterprises* or the *Charter of the French Language*.⁷³ Although, there is no specific legislation, there are, however, specific provisions in the CCQ for franchises providing for a general duty of good faith,⁷⁴ which is broader than the duty of fair dealing.⁷⁵

Franchise regulation is a provincial matter. Ontario has a specific law to regulate franchises, which imposes disclosure obligations on franchisors, a statutory duty of fair dealing in the performance and enforcement of a franchise agreement and prohibits a franchise agreement from contracting out of the application of the legislation.⁷⁶ It also provides the right for franchisees to associate. Other provinces also have franchise laws, such as British Columbia, New Brunswick, Prince Edward Island, Alberta and Manitoba.⁷⁷

The main advantage of a franchise is the easiness with which the franchisee acquires an already established trade mark, with an established customer base and a reputation. However, although neither party is the agent of the other, the franchisee remains subject to some degree of control by the franchisor, including how the franchisee manages the business.⁷⁸

⁷¹ 'Canadian Franchise Industry Economic Outlook 2018' (*Canadian Centre for Economic Analysis*) www.cancea.ca/cancea/reports/179/canadian-franchise-industry-economic-outlook-2018 accessed 5 March 2020.

⁷² *Davies* (n 15) 14.

⁷³ *Charter of the French Language*, CQLR c C-11; *Gowling WLG* (n 14).

⁷⁴ See CCQ, art.1375.

⁷⁵ *Gowling WLG* (n 14).

⁷⁶ See *Arthur Wishart Act* (Franchise Disclosure), 2000, S.O. 2000, c.3.

⁷⁷ See British Columbia's *Franchise Act*, SBC 2015, c. 35; New Brunswick's *Franchises Act*, R.S.N.B. 2014, c.111; Prince Edward Island's *Franchises Act*, RSPEI 1988 c. F-14.1; Alberta's *Franchises Act*, RSA 2000 c. F-23; and Manitoba's *The Franchises Act*, C.C.S.M. c F156.

⁷⁸ *Davies* (n 15) 20; *Gowling WLG* (n 14).

This review of the most common business legal organizations shows us the various possibilities offered to individuals desiring to start a business in Canada. Each structure has its characteristics, advantages and disadvantages. The choice of the structure should be made based on the needs of the project, the participating actors, the type of financing required and the location of the business.

3.3 Procedural aspects of establishing companies in Canada

3.3.1 Non-resident of Canada

As a general rule, only citizens or permanent residents are exempt from obtaining a legal authorization in order to work in Canada. Thus, a foreign individual must obtain a work permit before entering any procedure such as establishing or managing a business.

To facilitate foreign investments and attract labour forces, Canada has put in place a start-up visa allowing non-Canadians to build and implement innovative business ideas in Canada.⁷⁹ The complexity of the immigration process will be determined by various factors, such as the length of the business activities, the intentions of the foreign individual and the state of the Canadian labour market, to name a few. For instance, if a foreign individual visits Canada to negotiate sales of foreign goods to Canadian customers, this would qualify as a business visit. However, if said individual decides to establish a business of importing foreign goods in Canada, he or she will need a work permit.

The distinction between a business visitor and a foreign national requiring a work permit is a blurred line. The *Immigration and Refugee Protection Act*⁸⁰ defines ‘work’ very broadly: ‘an activity for which wages are paid or commission is earned, or that competes directly with the activities of Canadian citizens or permanent residents in the Canadian labour market’.⁸¹

⁷⁹ Fasken (n 2).

⁸⁰ *Immigration and Refugee Protection Act*, SC 2001, c 27.

⁸¹ *Immigration and Refugee Protection Regulations*, SOR/2002-227, art. 2.

The business visitor, on the other hand, is defined as a foreign individual who engages in international business activities for a short time. In addition, these individuals must meet the following general criteria:

- business visitors must have no intent to enter the Canadian labour market;
- the intended activity in Canada must be international in scope;
- the primary source of remuneration must be outside of Canada; and
- their employer's accrual of profits must be outside of Canada.

If the business visitor does not meet one of the criteria and under the legislation, he or she might need a work permit. A work permit is a document that specifies the entity that the foreign national is legally entitled to work for, the occupation and the location of employment in Canada. The work permit also has a specific validity period and sets out conditions that the foreign national must not breach.⁸²

There are two ways to obtain the work permit. In the first case, the business activity fits one of the exemptions under the law, such as (a) inter-company transfer; (b) North American Free Trade Agreement (NAFTA) professional category; (c) the EU-Canada Comprehensive Economic and Trade Agreement (CETA); (d) other free trade agreements (FTAs) with entry provisions; (e) NAFTA investor or trader categories; (f) entrepreneurs and (g) spousal employment programme.

If the application does not fit one of the aforementioned exemptions, the person will need to apply for a Labour Market Impact Assessment to Service Canada.⁸³

3.3.2 The Business Immigration Programme

This programme is specifically designed to facilitate immigration for qualified business people or persons who will contribute significantly to Canada's cultural or athletic spheres. Two categories of immigrants are eligible for this type of visa: self-employed persons and those who qualify under the 'Start-up Visa' programme.

⁸² *Gowling WLG* (n 14).

⁸³ *ibid.*

Self-employed persons are those with relevant experience who intend on becoming economically established in Canada and who have participated at a world-class level in cultural activities or athletics, or who have experience in farm management (although new applications under the farm management stream are not currently accepted).⁸⁴ In addition, an individual applying for self-employed immigration must meet certain criteria relating to education, experience, age, ability in English and/or French, as well as adaptability in Canada.⁸⁵

The 'Start-up Visa' programme seeks to link immigrant entrepreneurs with Canadian private sector funders and mentors. The programme is intended to foster innovation, job creation and the establishment of companies able to compete internationally, in addition to helping the Canadian business environment and allowing the Canadian private sector to benefit from the influx of talented innovators.⁸⁶

There are three possible ways to qualify for the Start-up Visa programme. First, the applicant can qualify by securing a minimum investment of C\$ 200,000 from a designated Canadian venture capital fund. Second, the applicant can secure a minimum investment of C\$ 75,000 from a designated Canadian angel investor group. Finally, the applicant can obtain the support of a designated Canadian business incubator.

Moreover, Start-up Visa applicants must demonstrate competence in English or French by undertaking a language test approved by the governmental agency and must have completed at least one year of post-secondary education.

3.3.3 Steps to create a company

Once immigration requirements are completed, one could start the creation of its business. In Canada, incorporating a business is fast and simple. Corporations Canada is the competent authority for the federal

⁸⁴ See 'Self-employed Person: Who Can Apply' (*Government of Canada*) www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/self-employed/eligibility.html accessed 5 March 2020. See also *Davies* (n 15) 118.

⁸⁵ 'Self-employed Person: Who Can Apply' (*Government of Canada*) www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/self-employed/eligibility.html accessed 5 March 2020.

⁸⁶ *Gowling WLG* (n 14).

incorporation, whereas the *Registraire des entreprises* is responsible for incorporation under the QBCA.⁸⁷

Due to certain legal and linguistic differences, people incorporating in Quebec need to comply with the appropriate process that fits their legal structure. Most businesses must register with the *Registraire des entreprises du Québec*. The only businesses exempted from filing a declaration of registration are sole proprietorships bearing an eponymous name, that is a name that includes the first and last name of the owner, or any undeclared partnership, tobacco retail outlet or tanning salon. The declaration of registration could be filed electronically and all the necessary information can easily be found on the website of the Quebec Business Registry.⁸⁸

Although Quebec does not require pre-clearance for possible confusion with existing names, particular care should always be taken in choosing the name of the business. In fact, the entrepreneur will be held responsible if any third party objects to the chosen name; a third party may submit a request to have the Registrar order a business to change or stop using a name.⁸⁹ It is difficult to provide a precise quantum of damages in such a case, but the assessment will be made by the court depending on the facts and the consequences the confusion had or still has on the business.

Additionally, the name must comply with the Quebec *Charter of the French Language*.⁹⁰ Finally, failure to comply with all the requirements under the *Act Respecting the Legal Publicity of Enterprise* will result in a denial of the registration. Note, however, that compliance with many requirements can be avoided should the entrepreneur decide to be a numbered business (e.g. 9005-1234 Quebec Inc.).

⁸⁷ Fasken (n 2).

⁸⁸ See 'Services Offerts au Public et aux Entreprises non Immatriculées' (*Registraire des Entreprises Québec*) www.registreentreprises.gouv.qc.ca/fr/sep/services_ligne/entreprises-nonimmatriculees.aspx accessed 5 March 2020.

⁸⁹ 'Administrative Recourse Offered by the Registraire des Entreprises' (*Registraire des Entreprises Québec*) [www.registreentreprises.gouv.qc.ca/documents/publications/in-528-v\(2019-01\).pdf](http://www.registreentreprises.gouv.qc.ca/documents/publications/in-528-v(2019-01).pdf) accessed 5 March 2020.

⁹⁰ See 'Definition and Rules Applicable to the Name of an Enterprise' (*Registraire des Entreprises Québec*) www.registreentreprises.gouv.qc.ca/en/demarrer/definition-et-regles.aspx accessed 5 March 2020.

Table 3.2 Processing fees of establishing a corporation in Canada

	Canada	Quebec
Incorporation fees		
Regular service	\$200	\$331
Priority service	None	\$496.50
Registering for sales tax		
Regular service		\$93.20
Priority service		\$144.40
Annual declaration/ report	\$20 (online)/\$40	\$88

The registration could also be refused if the application is incomplete, unsigned or inaccurate, and if the entrepreneur does not respect the form and the methods of transmission specified by the *Ministre de l'Emploi et de la Solidarité Sociale*. Finally, the registration will be refused if it is not accompanied by the due fees.

As per the processing fees, creating a corporation in Canada is not expensive. At both levels of jurisdiction, the processing time varies from one to five days from the date the application is filed. There is an additional charge for accelerated service. Table 3.2 shows some of the fees charged by the authorities.

In Quebec, once incorporated, the corporation receives a NEQ. The NEQ is the official identification number of each enterprise doing business in Quebec. The NEQ is a ten-digit reference number that simplifies dealings between a business and Quebec governing institutions. The business should also register goods and sales tax if it engages in commercial activities for an amount exceeding C\$ 30,000 per year.

At the federal level, the newly incorporated corporation will receive a business number (BN) from Corporations Canada. The NEQ and BN are also used to identify the corporations for taxation purposes.

3.3.4 Incorporation under the QBCA

There are two ways to incorporate under the QBCA. First, the business could send the articles of incorporation along with the initial declaration. Second, it could file the articles, the notice establishing the address of the head office, the list of directors, and produce the initial declaration later. In this case, the initial declaration shall be sent within 60 days from the sending of the notice.⁹¹

3.3.5 Incorporation under the CBCA

Incorporating at the federal level requires some additional preparation. At first, the entrepreneur should prepare the following information: address of the head office, the provinces in which it intends to operate, the proposed business name and the desired legal structure for the business.

Choosing the name of the business is an important step, which requires a preliminary verification because the desired name could already be taken. Prior to filing, the entrepreneur should search the Internet, the national database and produce a NUANS report.⁹²

Once the name is cleared, the articles of incorporation should be completed and signed by the owners. These articles could be filed either online or by sending the completed *Form 1 – Articles of incorporation*.⁹³ After that, the entrepreneur shall choose a registered office address and name the first board of directors. The registered office is crucial as it is the place where the corporate records and official documents are supposed to be kept. As per directors, they must be individuals who are at least 18 years old, solvent and not incapacitated.

⁹¹ See 'Produire des Statuts de Constitution avec la Déclaration Initiale' (*Registraire des Entreprises Québec*), www.registreentreprises.gouv.qc.ca/en/sepfi/services_ligne/la-constitution-et-la-continuation/S00435a.aspx accessed 5 March 2020.

⁹² Government of Canada, 'Order a Nuans Report', <https://www.nuans.com/auth/app/scr/corp/nuans/public/PreSearch.html?name=compassion+Cannabis&src=> accessed 6 March 2020.

⁹³ 'Steps to Incorporating' (*Government of Canada*), www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs06642.html accessed 5 March 2020.

After all the appropriate forms have been filed and the fees paid, the application will be completed and Corporations Canada will start reviewing the articles of incorporation along with the business name choice.⁹⁴

If the application is invalid or incomplete, Corporations Canada will ask the applicant to do a correction within the four months following the receipt of a refusal. If no correction is done, the application will be considered abandoned and application fees will be refunded. Sometimes, even if the application is valid and complete, Corporations Canada may require additional information.

Note that being registered under the CBCA does not exempt the corporation from complying with provincial legislation if the corporation engages in commercial activities in that province. For example, if the business incorporated in the province of Quebec under the CBCA, it still has to complete the registration procedure for Quebec.

3.3.6 Sole proprietorships, joint ventures and partnerships

The registration procedure is easier for sole proprietorships, joint ventures, and partnerships. First, the parties starting the business should enter (except for undeclared partnerships) into an agreement, which will legally create the business. Then, the parties have to register with the appropriate province or territory, obtain a BN (provincial or federal), and the respective tax accounts.

3.3.7 Cooperative

To incorporate a federal cooperative an application must be filed by email, fax or mail, along with the applicable fees. The list of required documents is available online and a NUANS report is necessary.⁹⁵ The procedure is similar for provincial cooperatives.⁹⁶

⁹⁴ All necessary documents have been included, the forms are completed and signed and the fee is included.

⁹⁵ 'Creating a Cooperative' (*Government of Canada*) www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs03954.html accessed 5 March 2020.

⁹⁶ Quebec Ministry of Economy and Innovation, 'Constitution' www.economie.gouv.qc.ca/bibliotheques/formulaires/cooperatives/constitution/.

3.3.8 Setting up a bank account

Setting up a bank account in Canada is very simple. The entrepreneurs need to go to a branch and provide various documents, such as the articles of incorporation, a copy of the declaration of co-ownership or a list of the directors.⁹⁷

3.4 Start-up funding

There are many different ways for an emerging business to finance its growth. In general, there are two ways to finance a business: through debt or through equity.⁹⁸ Debt instruments represent fixed obligations to repay a specific amount at a specified date in the future, the whole with interest. Equity, on the other hand, represents ownership interests entitled to dividend payments but with no specific right to a return on capital.

Generally, businesses have a combination of debt and equity financing, allowing them to maximize their business value, while minimizing the cost of capital and the risk of bankruptcy.

3.4.1 Bootstrapping

The fastest and most convenient way of financing the business is through the direct investment of the owner. In addition, such investment sends a message that the owner believes in the business, is committed for the long-term, and is willing to take the necessary risks.⁹⁹ The owner could contribute cash, personal assets, retirement funds, real estate equity loans, or cash-value insurance policies.¹⁰⁰

⁹⁷ 'Opening a Business Account' (*National Bank of Canada*) www.nbc.ca/content/dam/bnc/entreprise/pdf/quickref-business-account-opening.pdf accessed 5 March 2020.

⁹⁸ Don Hofstrand, 'Types and Sources of Financing for Start-up Businesses' (*Iowa State University Extension and Outreach*, April 2013) www.extension.iastate.edu/agdm/wholefarm/html/c5-92.html accessed 5 March 2020.

⁹⁹ '7 Sources of Start-up Financing' (*BDC*) www.bdc.ca/en/articles-tools/start-buy-business/start-business/pages/start-up-financing-sources.aspx accessed 5 March 2020; Hofstrand (n 98).

¹⁰⁰ Hofstrand (n 98).

3.4.2 Love money

Love money designates money from close connections and family. A parent or a friend could provide additional funds in exchange for a portion in the company. Although informal at first glance, 'Love money' financing should not be neglected. Studies show that, annually, this type of investment generates three times more funds than the capital from angel investors. As such, this type of financing requires the same level of diligence and same precautions as any other method.¹⁰¹

In practice, 'Love money' financing is more suited for small businesses because, in their case, the first investments are the hardest to find. It allows the company to start and demonstrate its worthiness, and eventually attract bigger investors in the future.¹⁰²

3.4.3 Common stock

Common stock is the most basic form of equity instrument. It represents an ownership interest in a corporation, including an interest to receive distributions of earnings, that is, dividends, as well as an interest in assets distributed upon the dissolution.

There are several advantages to issuing shares: the holders of common stock have no obligation to repay the amount invested, there is no obligation to pay dividends (thereby reinvesting the earnings into the business), investors could share in the growth of the corporation and, finally, investors could influence the management through their right to vote.

In contrast, issuing shares also has some disadvantages, such as the dilution of the management's interest in the corporation's growth and an increase in the voting power of non-management stockholders.

3.4.4 Venture capital

Venture capital is financing coming from individuals or companies whose business is to invest in young and promising companies in return for ownership shares in the company. In essence, venture capital funds are in

¹⁰¹ *ibid.*

¹⁰² *ibid.*

the business of making money, meaning they look for substantial returns on their investments, preferably for a seven-year period.¹⁰³ They generally target businesses with high-growth potential, often in sectors such as communications, biotechnology or information technology.¹⁰⁴

Such type of funding might not be suitable for an emerging company that is not yet profitable or has not demonstrated its potential profitability.¹⁰⁵ However, one of the advantages of venture capital is that it often comes with business guidance and advice.¹⁰⁶

3.4.5 Angel investors

Also known as angels, angel investors are individuals who invest their personal capital in one or more early-stage companies. Angels who invest in multiple companies often belong to angel networks that receive and share information about potential investments, investing strategies and entrepreneurs. Generally, these angels will have a broad industry expertise in the spaces they invest in and, as a result, will often assume roles as directors or advisory board members.

The investments made by angel investors are usually smaller than the ones made by venture capital funds. As such, they occur at earlier stages of the business. Also, despite their role as a 'mentor' or 'adviser', angel investors are interested in having a return on their investment, which might result in having similar demands and expectations as the ones venture capital funds could have.¹⁰⁷

However, there are also super angels who are high net worth individuals and whose primary profession is making seed round and other venture capital investments.

¹⁰³ *ibid.*

¹⁰⁴ *ibid.*

¹⁰⁵ *ibid.*

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid.*

3.4.6 Equity offerings and initial public offerings (IPOs)¹⁰⁸

An initial public offering of securities is another possible way of financing the business. The 'going public' is made by means of a prospectus, which must be filed with and receipted by the applicable provincial securities regulator. Note that all prospectuses filed with the Quebec financial services regulator, *Autorité des marchés financiers*, must be translated into French.

Once the business decides to go public, it has to file a preliminary prospectus, which will be reviewed by the regulators. The clearing of the preliminary prospectus is often a pressing matter, for the business is anxious to receive the proceeds of the offering and the underwriters have determined that the markets are appropriately receipting to that offering.

After the review, the regulator will issue a comment letter identifying any deficiencies or concerns. When all the deficiencies have been solved, the regulator will clear the issuer for filing the final prospectus.

The IPO process is very formal and is best suited for profitable and stable companies, which already have a strong demand for their products and/or services. It would usually not happen until after several years of exploiting the company and, as a matter of fact, is not a possibility for an initial investment.

3.4.7 Simple agreement for future equity¹⁰⁹

A SAFE is a financing contract that may be used by a start-up company to raise capital in its seed financing rounds, or also sometimes referred to as a 'friends and family round', which is an early round of financing for a start-up company, typically conducted not long after the company is formed. SAFE is a relatively recent addition to the seed financing toolkit, having been popularized by the premier start-up accelerator Y-Combinator in late 2013.

¹⁰⁸ *ibid.*

¹⁰⁹ Lavery, 'Start-up Financing: Simple Agreement for Future Equity' (SAFE) <https://goinc.ca/en/2018/01/10/start-up-financing-simple-agreement-for-future-equity-safe/> accessed 6 March 2020.

A SAFE is an investment contract between the start-up and an investor whereby the investor is granted a right to receive equity of the company on certain triggering events, such as:

- future equity financing usually led by an institutional venture capital fund; and
- sale of the company.

Generally, the price of equity received by the SAFE holder is lower than the price of the securities issued to venture capital investors.

3.4.8 Banks and other commercial lenders¹¹⁰

Debt financing from with a bank is a very common, but not the easiest way for a first financing. Indeed, banks generally require a strong business plan, a large amount of collateral and a good track record. Since interest would be quite high for a start-up, this type of financing is usually better suited for a more established business.

Banks generally provide two kinds of loans: operating loans, which are usually structured as revolving lines of credit, and term loans. Revolving operating loans are generally used to financing working capital requirements and are often payable on demand. The advantage of structuring the loan as 'payable on demand' is that it allows for simpler loan terms.

Term loans are most often made to finance the acquisition of fixed assets and are generally payable over a fixed period of time pursuant to an agreed agenda. Generally, such loans could only be accelerated if a specified event of default occurs.

If the business decides to debt finance itself, whether on an operating basis or on a term loan basis, the lenders may require security for their loans. Such security often consists of a charge covering all assets of the borrower, including inventory, accounts receivable, capital assets (e.g. machinery, equipment, real estate).

Security could also be taken in immovable property (land, buildings and property that is permanently attached to the land) and movable

¹¹⁰ Hofstrand (n 98); BDC (n 99).

property (generally anything not attached to land, including vehicles and equipment).

Where a security is taken, a lender may have to effect registrations in a number of jurisdictions across Canada in order to protect its interest.

3.4.9 Commercial finance companies¹¹¹

Commercial finance companies could be an alternative for someone with a bad track record or negative profit projections because such investors are mostly looking for collateral. The counterpart is that someone interested in this type of financing should not have limited assets or collateral and the costs associated with it are higher than with other commercial lenders.

3.4.10 Government grants and subsidiaries¹¹²

Both federal and provincial government offer financing programmes to help businesses. The choice of grants or subsidiaries will be determined by the industry of the business, its size, location, and the nature of the market. 'Innovation Canada' is an online tool put in place by the government to help entrepreneurs obtain the best possible financing for their business.¹¹³

The Business Development Bank of Canada, for instance, assists small and medium-sized business in Canada by offering financing and consulting services.¹¹⁴ The Regional Development Programs, comprised of the Western Economic Diversification Canada and the Atlantic Canada Opportunities Agency, focus on innovation, business development and community economic development. Finally, the Canada Small Business Financing Program provides and helps with the credit needs of small businesses. The federal government does not directly finance but guarantees loans made by conventional lenders to small business enterprises with few collaterals. The industrial sectors eligible are various, but the

¹¹¹ Hofstrand (n 98).

¹¹² Borden Ladner Gervais (n 18) 29–33.

¹¹³ See 'Innovation Canada' (*Government of Canada*) www.ic.gc.ca/eic/site/080.nsf/eng/home accessed 5 March 2020.

¹¹⁴ Borden Ladner Gervais (n 18) 32.

loan must be secured and the business must pay a registration fee of 2 per cent to the lender.¹¹⁵

At the provincial level, provinces administer several programmes which vary from one province to another. It is interesting to note that in the situation of an enterprise intending to market itself nationally (even if primarily based in one province), such an enterprise could apply to different provinces' programmes.¹¹⁶

3.4.11 Business incubators¹¹⁷

Also known as an accelerator, an incubator generally serves start-ups by providing them with support through different development stages. The incubator phase usually lasts up to two years, after which the business generally enters the industrial production phase.

3.4.12 Crowdfunding¹¹⁸

Crowdfunding is a recent and evolving practice of funding a business by raising money from a large number of people in small increments, typically via the Internet. From a regulatory perspective, crowdfunding could be divided into two categories: equity and non-equity. Participants in various projects on Kickstarter, GoFundMe and FundRazr engage in non-equity crowdfunding, while equity crowdfunding involves multiple participants making small investments in return for securities in a company.

The advantage of crowdfunding is that it allows the enterprise to avoid the time, complexity and expenses associated with more traditional fundraising models.

In Canada, equity crowdfunding is equivalent to distributing securities and, as such, is subject to regulatory requirements, such as filing a prospectus or applying for an available exemption.

¹¹⁵ *ibid* 32–3.

¹¹⁶ *ibid* 33.

¹¹⁷ *BDC* (n 99).

¹¹⁸ Lavery, 'Start-up Financing: Crowdfunding' <https://goinc.ca/en/2018/01/16/start-up-financing-crowdfunding/> accessed 6 March 2020.

More recently, provincial securities regulators introduced legislation specific to equity crowdfunding. For instance, in 2013, Saskatchewan was the first to react when it introduced General Order 45–925 Saskatchewan Equity Crowdfunding Exemption. Said regulation was later amended, revoked, and ultimately replaced by General Order 45–929 Saskatchewan Equity Crowdfunding Exemption.

In 2014, the securities regulators of five provinces – Saskatchewan, Manitoba, Quebec, New Brunswick and Nova Scotia – introduced start-up crowdfunding registration and prospectus exemptions. These exemptions are intended to provide an alternative source of capital to non-reporting issuers at an early stage of development.

3.5 Tax regulation¹¹⁹

3.5.1 Residence

In Canada, income tax is imposed by the federal and provincial governments. The federal government levies income tax under the *Income Tax Act*,¹²⁰ which covers federal income tax for individuals and other taxpayers, such as corporations and trusts, whether resident in Canada or not. In contrast, partnerships are considered flow-through entities, meaning they are not taxable entities.

The primary basis for taxation is residence of the taxpayer. Unlike the United States, Canada does not impose tax on the basis of citizenship. Canadian residents are generally subject to income tax in Canada on their worldwide income, regardless of the source, but are generally entitled to tax credits or deductions for foreign taxes paid.

Non-residents of Canada are subject to taxation on Canadian source income, subject to relief by way of rate reduction or, to a limited extent, elimination of Canadian tax, under a tax treaty (in regard to double taxation).

¹¹⁹ Borden Ladner Gervais (n 18) 53–9.

¹²⁰ *Income Tax Act*, R.S.C., 1985, c.1.

The term ‘resident in Canada’ is not defined by legislation and, as such, a person’s residence will be determined by common law criteria, subject to certain deeming rules. In general, courts have decided that an individual’s residence is determined on the basis of the degree to which an individual ‘settles into or maintains’ his or her ordinary mode of living at the place in question.¹²¹

In the case of trusts, they will be considered Canadian residents for income tax purposes if one or more Canadian residents exercise the central management and control of the trust.

3.5.2 Income

In general, income from business or property is equivalent to the profit from said business or property, calculated in accordance with well-accepted principles of business (accounting) practice or well-accepted principles of commercial trading.

Federal and provincial corporate income tax rates vary depending on the sector of activity and type of corporation (see Table 3.3). For instance, a business manufacturing widgets will be taxed differently from a business whose main occupation is investing and managing money. The rates will also differ depending on whether the corporation is a Canadian-controlled private corporation (CCPC) or controlled by non-residents.

Table 3.3 *Provincial tax rates on non-CCPC corporate income*

Combined federal and provincial tax rates on non-CCPC corporate income		
	Business income	Investment income
Quebec	26.7%	26.7%
Ontario	26.5%	26.5%
Alberta	27%	27%
British Columbia	27%	27%

¹²¹ *Davies* (n 15) 60.

The business will be subject to provincial tax only if it has an establishment in that province. An establishment can take various forms: an office, a branch, a plant, a warehouse or a workshop.

In addition, income includes one half of the capital gain (the legal term is: taxable capital gain) realized on a disposition of capital property.¹²² According to the *Income Tax Act*, the amount of capital gain is generally equal to the proceeds of disposition minus the sum of the adjusted cost base of the property and any costs of disposition. The adjusted cost base refers to the cost of the property plus any expenses related to its acquisition.

Employment income refers to wages, bonuses and taxable employment benefits. Under the law, the employers are required to make regular 'source deductions' for income tax and social security contributions from employees' income.¹²³ They remit these amounts to the tax authorities on behalf of the employees. If the employers fail to do so, the directors may be held personally liable. There are almost no deductions available in this category.

As per losses, Canadian tax laws do not provide for formal loss consolidation. However, there are established techniques that have been accepted by the Canadian Revenue Agency (CRA) for shifting losses between members of the same corporate group.¹²⁴ Additionally, to reduce their income, taxpayers could apply their losses against their past or future income. For instance, non-capital losses could be carried back three (3) years and forward 20 years, while net capital losses may be carried back three (3) years and forward indefinitely (although generally applied only against taxable capital gains).

Finally, the tax laws allow the taxpayer to deduct reasonable interest expenses on the funds borrowed or indebtedness incurred for the purposes of earning income from business or property. Such expense is deductible on an accrual or cash basis, whereas non-interest costs (e.g.

¹²² *ibid.*

¹²³ *ibid* 61.

¹²⁴ *ibid.*

commissions and fees) are deductible on a straight-line basis over five years.¹²⁵

3.5.3 Sales tax

Canada has two types of consumption taxes: the goods and services tax (GST) and the Quebec sales tax (QST) (see Table 3.4).

The GST is a tax that applies to most supplies of goods and services made in Canada. The GST also applies to many supplies of real property such as land, buildings, and interests in such property, and intangible personal property such as trade marks.

In other provinces, the GST and the provincial or territorial sales tax have been harmonized into the harmonized sales tax (HST). This is the case for Prince Edward Island, New Brunswick, Nova Scotia, Ontario, and Newfoundland and Labrador.

Usually, a business must register for a GST/HST account unless it provides only exempt supplies. Providing exempt supplies means that the business does not charge the GST/HST on these supplies of property and services and is generally not entitled to claim input tax credits (ITC) on property and services acquired to provide these supplies.¹²⁶ If the business is an exempt supplier, then it must register for a GST/HST account if the following two situations apply:

1. the business makes taxable sales, leases or other supplies in Canada;
2. the business is not a small supplier (i.e. it does not exceed the C\$ 30,000 threshold over four consecutive calendar quarters)

Table 3.4 *Consumption taxes*

Tax	Rate
GST	5%
QST	9.975%
Total	14.975%

¹²⁵ *ibid.*

¹²⁶ 'General Information for GST/HST Registrants' (*Government of Canada*) www.canada.ca/en/revenue-agency/services/forms-publications/publications/rc4022/general-information-gst-hst-registrants.html#H1_106 accessed 5 March 2020.

If the business is a GST/HST registrant, it generally has to charge and collect the GST/HST on taxable supplies (other than zero-rated supplies) it makes in Canada and file regular GST/HST returns to report that tax. The business can then claim ITC on its GST/HST return to recover the GST/HST paid or payable on purchases and expenses to the extent it uses, consumes, or supplies them in its commercial activities.¹²⁷

In reality, the ITC claim works as follows: (1) the business completes its GST/HST return, and (2) deducts its ITC from the GST/HST it charged its customers. The result is equal to the business's net tax. If the total amount of tax charged by the business is more than the amount of its ITC, the business has to send the difference to the government. If the total amount of tax charged by the business is less than the amount of its ITC, the business can claim a refund.

3.6 Protecting an idea or a product

3.6.1 IP framework and protection

Intellectual property protection falls primarily under federal jurisdiction in Canada and includes the *Patent Act*, *Trade Marks Act*, *Copyright Act* and *Industrial Design Act*. These laws are administered by the Canadian Intellectual Property Office.

The Canadian Intellectual Property Office of Industry Canada administers these statutes. However, matters like the unauthorized use of a trade mark (known as 'the law of passing off') or the misuse of a trade secret fall within provincial jurisdiction. In certain circumstances, the federal and provincial jurisdictions will overlap, as is the case with passing off, which is also covered in the *Trade Marks Act*. Table 3.5 shows the lengths of IP protection.

¹²⁷ 'Basic GST/HST Guidelines for Public Institutions' (*Government of Canada*) www.canada.ca/en/revenue-agency/services/forms-publications/publications/gi-068/basic-gst-hst-guidelines-public-institutions.html accessed 5 March 2020.

Table 3.5 *Overview of the length of IP protection*

Type of intellectual property	Length of protection
Copyright	End of the calendar year in which the author dies + 50 years (for works)
Trade mark	15 years, renewable
Patent	20 years from the date of the application (but adjustment possible for pharmaceutical patents)
Industrial design	10 years

3.6.2 Copyright

A copyright gives the author of a literary, artistic, dramatic, or musical work a series of rights, including the exclusive rights to produce and reproduce the work. A copyright protects the expression of ideas but not the ideas themselves. It can be used to protect many types of works, including books, music, movies and software.

Copyright registration in Canada is permitted but is not mandatory. Under Canadian copyright legislation, there is a rebuttable statutory presumption that a copyright subsists in the creator’s work and belongs to the registered owner (similar to the trade mark legislation discussed above).

Moreover, Canada is a signatory to the *Berne Convention*¹²⁸ and, therefore, copyright protection in Canada is extended to works by American citizens or works first published in the United States.

3.6.3 Trade mark

A trade mark is a symbol (such as a word, logo, slogan, name, sound, hologram, moving images, three-dimensional shape of goods or any

¹²⁸ The *Berne Convention for the Protection of Literary and Artistic Works*, usually known as the Berne Convention, is an international agreement adopted in 1886 in Berne, Switzerland, governing the protection of works and the rights of their authors.

combination thereof) adopted and used by a manufacturer or merchant to distinguish its goods and services from those of others.¹²⁹

A trade mark can only be considered registered if it has been entered into the federal Trade-Marks Register. In Canada, there are no provincial trade mark registers. Registration provides a trade mark owner with the exclusive right to use the registered trade mark throughout Canada, in association with the goods and services for which it is registered, and prevents others from using marks that are confusingly similar. Registrations are valid for a period of 15 years and are renewable indefinitely upon payment of the applicable administrative fees. There is currently no requirement to show use of the trade mark at the time of renewal. Changes to the *Trade-Marks Act* that came into force on 17 June 2019 reduce the term of protection to 10 years for registrations and renewals made after that time.

Although registration is not required to obtain legal protection – the use, advertising, or promotion of a trade mark in a particular geographical area can establish rights in and to the trade mark under common law for that specific area – it is always the preferred method of protection.

The main benefit to registration is the protection afforded to the owner of the trade mark across every province and territory in Canada. The *Trade Marks Act* provides a registry system for trade mark owners that is based on a ‘first to use’ principle. It should be noted, however, that five years after a registration is issued, it becomes incontestable on the basis of prior common law rights unless it is demonstrated that the application was filed with the knowledge of such prior right.

3.6.4 Patent

The *Patent Act* establishes what is known as a ‘first to file’ system. In Canada, the first applicant to file a patent application for an invention will be entitled to obtain patent protection for that invention.¹³⁰

A Canadian patent grants its owner the exclusive rights to make, use and sell an invention in Canada, as defined in the claims of the patent, for

¹²⁹ ‘Canada’s Intellectual Property: Patents, Trademarks & Copyrights’ (*Fasken*) www.fasken.com/fi/knowledge/doing-business-canada/2019/06/intellectual-property accessed 5 March 2020.

¹³⁰ *ibid.*

a period of 20 years from the date of the application. A patent will only be granted for inventions that are new, inventive and useful and may be obtained for devices, materials, processes and uses. Patent protection is not available for scientific principles, abstract theorems or ideas; nor is it available for higher life forms like genetically modified animals.

To be considered new or novel, the invention cannot have been disclosed in such a manner as to have become publicly available anywhere in the world. An exception to this is inventor-derived disclosures; a one-year grace period is provided for any such disclosures.

3.6.5 Industrial design

An industrial design is composed of the shape, configuration, pattern or ornament of an object or any combination thereof. The essence of an industrial design is its visual appeal along with its originality.¹³¹

Unlike other forms of intellectual property, such as trade marks and copyrights, industrial designs must be registered to benefit from legal protection and ensure the exclusive rights to the design.

Applications to register an industrial design may be filed at any time provided the design has not been made public in any way. If such is the case, the application must be filed within 12 months of publication.

Industrial design protection affords the registered owner the exclusive rights to make, import, offer for sale, sell or rent any article in respect of which the design has been applied.

3.6.6 Privacy and data protection¹³²

The privacy and data protection laws in Canada vary from one province to another and depend on various factors such as the type of information detained by the company (customer's or employee's) and the law regulating the business structure.¹³³

¹³¹ *ibid.*

¹³² *Borden Ladner Gervais* (n 18) 125–9.

¹³³ *ibid* 125.

Privacy and data laws govern mainly three aspects: the collection, use and disclosure of 'personal information'. The necessity of this type of regulation lies in the opposite needs between the businesses, which need this information for various situations, and the owner of such information, who has the right to have his or her personal information safeguarded.¹³⁴

At the federal level, the *Personal Information Protection and Electronic Documents Act*¹³⁵ (PIPEDA) must be complied with if the entity carries on business in the federal sector or if the province in which the entity carries on business has no similar legislation.¹³⁶

The obligations under such legislation are:¹³⁷

1. Accountability of the organization in control of the personal information;
2. The identification of the purpose for which such personal data are collected;
3. The individual, whose personal information will be controlled by the organization, must know and consent to the use or disclosure of his information;
4. The collection, use or disclosure of information must not exceed what is necessary according to the purposes identified (except if it is required by specific legislation or if the individual consented to extended use and disclosure);
5. The retention of information should only last for the time necessary according to the purposes identified;
6. All personal information detained and used must be accurate, complete and up-to-date;
7. Depending on the sensitivity of the information, an appropriate safeguard must protect this personal information;
8. Every organization shall make accessible its policies and practices regarding how it manages personal information;
9. Every individual is entitled to access its personal information and to be aware of the detention use and disclosure of such information by any entity;
10. Individuals should be able to address any concerns regarding compliance to these principles to the organization.

¹³⁴ *ibid* 126.

¹³⁵ *Personal Information Protection and Electronic Documents Act*, R.S.C., 1985, c. 1.

¹³⁶ *Borden Ladner Gervais* (n 18) 126.

¹³⁷ *ibid* 127–8.

In case of a breach, some laws (PIPEDA, for example) require the organization to notify the individual victim of the breach.¹³⁸ Some other obligations may arise from specific provincial legislation such as the British Columbia *Privacy Act*¹³⁹ or the Quebec *Charter of Human Rights and Freedoms*.¹⁴⁰

However, other regulations could also apply to a Canadian entity even though the regulations originate from other countries. For example, if the entity collects, uses or discloses personal information of European citizens, it will have to comply with the General Data Protection Regulation (GDPR).¹⁴¹ Businesses should implement policy and procedures on the protection of personal information to respect the requirements of the diverse laws.

3.7 Compliance with regulations

From its birth to its dissolution, a business must comply with all sorts of regulations. We have addressed the ones relating to the establishment and registration, but there are other considerations to be taken into account at early stages or even before, when deciding on the type of business or location.

This chapter being limited to the early stages of the business, this section is meant to be just a summary review of the various legislative requirements.

3.7.1 Language considerations

Canada's official languages are English and French. The province of New Brunswick is the only constitutionally bilingual province, and Quebec's only official language is French. In Canada, approximately 20 per cent of the population speaks French as a first language, including about 80 per cent of the population of Quebec and nearly 35 per cent of the population

¹³⁸ *ibid* 128.

¹³⁹ *Privacy Act*, RSBC 1996, c. 373.

¹⁴⁰ *Borden Ladner Gervais* (n 18) 128; *Charter of Human Rights and Freedoms*, CQLR, c. C-12.

¹⁴¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L119/1.

of New Brunswick. As a result, anyone intending to do business in Canada must take into account both languages.

The Quebec linguistic requirement has repercussions on the way one would establish and conduct a business. The *Charter of the French Language* or *Bill-101* makes French the everyday language of work, communication, commerce, instruction and business in Quebec.¹⁴² In other words, all corporations, including non-Quebec corporations, that do business in Quebec and offer their products in Quebec and offer their products and/or services to Quebec residents must comply with the *Charter*.

This implies that all public signs, posters and commercial advertising in Quebec have to be in French. Other languages could be permitted if certain requirements are met.¹⁴³ For instance, if a business has a website, said website must at least have a French version equal in terms of content to any other language available. Or, if a business has 50 employees or more it has to complete a francization programme.¹⁴⁴

The *Charter* also requires that packaging be in French. Inscriptions on products, wrapping, documents or objects supplied with the product, such as a warranty or directions for use, must be in French. Another language version is permitted as long as the French version is, again, equal in terms of content and prominence. There are some exceptions to these rules, including (1) products intended for use exclusively for a market outside Quebec; (2) recognized English-only trade marks; (3) educational and cultural materials; and (4) greeting cards, calendars and agendas, if not used for the purpose of advertising.

Another important consideration is the business name. The *Charter* requires that a business register a French version of its name for use in Quebec unless the statute under which it is incorporated does not permit such registration. The French version of the firm name could indicate certain listed non-French elements and, as such, it is common to register a business name consisting of an English-only trade mark together with

¹⁴² Fasken (n 2).

¹⁴³ 'Doing Business in Canada' (*Stikeman Elliott*) www.stikeman.com/en-ca/kh/guides/Doing-Business-in-Canada accessed 5 March 2020.

¹⁴⁴ Fasken (n 2).

generic French words indicating the type of business. If federally incorporated, the business is generally allowed to use an English-only name, although said businesses generally do register a French name for use in Quebec.

3.7.2 Labour law¹⁴⁵

The legislative jurisdiction over labour and employment matters is shared by the provincial and federal governments. Most businesses fall under provincial jurisdictions, with the federal government having jurisdiction over specifically designated federal works and undertakings such as transportation, banking, telecommunications and radio broadcasting.

In general, the employment relationship is governed by the laws of the province in which the services are rendered. Note, however, that the employer and employee may agree that the laws of another jurisdiction govern their contract of employment.

In all the provinces and territories, except Quebec, provincial legislation and the common law apply to employment contracts. In Quebec, the Civil Code is the governing legislation.

While the legislations vary from province to province, there are general principles that apply in most workplaces to most kinds of employment. For instance, employees are generally guaranteed certain minimum rights with respect to the terms and conditions of their employment, including minimum wages, fixed amount of work hours, overtime pay, daily and weekly rest periods, vacations and vacation pay, statutory holidays, pregnancy and parental leave, equal pay for work of equal value, minimum periods of notice of termination, and terms that govern the treatment of employees on the sale of a business.

Although these regulations may be more relevant later in the process, entrepreneurs should be aware of the differences between the provinces and take that into account when choosing a location.

For example, in Ontario under the Employment Standard Act, an employer could be ordered to reinstate an employee after dismissal in

¹⁴⁵ *Davies* (n 15).

specific situations, whereas in Quebec, employees benefit from broader rights.¹⁴⁶ In contrast, although Quebec legislation provides several broader remedies, it does not apply to senior management positions. Quebec employees may also be absent from work for an extended period if they can justify it was related to their own health or the health of their families. This right comes along with the obligation for the employer to reinstate the employee at the same position with the same wages and benefits.

As to labour relations, federal and provincial labour laws grant employees the right to form or join a trade union for the purpose of bargaining collectively with employers. These laws also oblige the employer to recognize a trade union's exclusive bargaining rights with respect to the 'bargaining unit' and to bargain in good faith with the union.

Finally, human rights legislation prohibits discrimination in all aspects of employment, including recruitment and hiring. Generally, prohibited grounds of discrimination include race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status and handicap. In addition, most provinces in Canada have also added specific provisions prohibiting various types of harassment.

In addition to provincial and federal legislation, Canadians are also protected by the *Canadian Charter of Rights and Freedoms*, a constitutional bill of rights, that applies to both federal and provincial governments, and that, since its adoption, has had a significant effect on labour relations in the public sector.

3.7.3 Environmental law

Environmental law is another area falling under federal and partly under provincial jurisdiction in Canada. These laws generally include the regulation of air, soil and water pollution, transportation and storage of dangerous goods and hazardous wastes, underground storage tanks, pesticides, migration of contaminants and radioactive substances.¹⁴⁷

¹⁴⁶ *ibid.*

¹⁴⁷ *ibid* 97.

Moreover, often, these regulations require a permit for specific commercial or industrial activities, compliance regarding contaminated sites, and assessments prior to the development of certain types of industrial projects or activities.¹⁴⁸

It may also be necessary to consult with local populations about the project and specifically with aboriginal communities. Indeed, the Crown has a constitutional obligation to consult aboriginal communities if a project might affect their protected rights. Even though the Crown has the obligation to consult, it may be sound for the business to be proactive and obtain consent from the aboriginal communities before undertaking any project.

Other regulations regarding climate change and water protection exist and must be considered before establishing a business in Canada.¹⁴⁹

3.7.4 Consumer protection

The federal and provincial government share the responsibility for consumer protection in Canada. In general, federal laws focus on ensuring consumers a safe, fair and competitive marketplace, while the provincial laws address the terms on which businesses transact with consumers.¹⁵⁰

In order to comply with these regulations, it is necessary to determine the type of products offered or services rendered, as well as the provinces where they will be offered and the channels of distribution. Since the legislative framework regarding consumer protection is wide, doing so would allow a better understanding of what applies to a specific business.¹⁵¹

At the federal level, the *Competition Act*,¹⁵² as mentioned earlier, provides provisions regarding misleading advertising or pyramid schemes.¹⁵³ There are also general labelling regulations, either specific to labelling (e.g. the *Consumer Packaging and Labelling Act*¹⁵⁴) or provisions inserted

¹⁴⁸ Borden Ladner Gervais (n 18) 87.

¹⁴⁹ *ibid* 89.

¹⁵⁰ Stikeman Elliott (n 143).

¹⁵¹ Borden Ladner Gervais (n 18) 99.

¹⁵² *Competition Act*, RSC 1985, c. C-34.

¹⁵³ *ibid*.

¹⁵⁴ *Consumer Packaging and Labelling Act*, RSC 1985, c. C-38.

in other laws such as the *Food and Drugs Act*.¹⁵⁵ Depending on the type of products, a business may also need to comply with specific regulations such as the *Textile Labelling Act*¹⁵⁶ or the *Cannabis Act*.¹⁵⁷

Also note that, in Quebec, every business must comply with the Quebec *Charter of the French Language*,¹⁵⁸ which, as previously mentioned, establishes French as the everyday language of commerce and business in the province. Concurrently, the *Consumer Protection Act*¹⁵⁹ generally requires consumer contracts to be drawn up in French. In certain situations, the parties may agree that the contract or some provisions be drawn up in another language.

3.8 Bankruptcy and dissolution

The majority of Canada's insolvency rules are enshrined in two principal federal statutes: the *Bankruptcy and Insolvency Act* (BIA), and the *Companies' Creditors Arrangement Act* (CCAA). A third statute, the *Winding-up and Restructuring Act* (WURA) specifically governs the liquidation and restructuring of certain types of companies including banks, insurance companies and trust companies. In addition to federal legislation, there are several provincial statutes dealing with creditors' rights.

Both the CCAA and the BIA can be used for reorganization proceedings and liquidations. The practice has developed to utilize the CCAA for medium to large cases and the BIA for small to medium cases, since the relative flexibility of the CCAA affords greater latitude of action to the reorganizing debtor.

3.8.1 BIA proposals

The reorganization of creditor claims under the proposal provisions of the BIA applies to the same types of corporations to which the BIA liquidation provisions apply.

¹⁵⁵ *ibid* 100; *Food and Drugs Act*, RSC 1985, c. F-27.

¹⁵⁶ *Textile Labelling Act*, RSC 1985, c. T-10.

¹⁵⁷ *ibid* 101; *Cannabis Act*, SC 2018, c. 16.

¹⁵⁸ *Charter of the French Language*, CQLR, c. C-11.

¹⁵⁹ *Consumer Protection Act*, CQLR, c. P-40.1.

Under the BIA, a company may deliver a proposal to its creditors or give notice of its intention to file a proposal. After the delivery of the notice or proposal, there is a 30-day stay period (which may, at the discretion of the court, be extended for up to six months) against the government and against other secured and unsecured creditors, other than any secured creditors who have taken possession of their security or given notice of their intention to enforce their security at least 10 days before the first filing of the notice or proposal.

During the stay period, the business is monitored by a proposal trustee while the debtor attempts to negotiate an acceptable proposal with its creditors. If a proposal is not filed within the allowed time, the debtor is deemed to have made an assignment in bankruptcy.

3.8.2 Companies' Creditors Arrangement Act

Reorganization of creditor claims under the CCAA permits an insolvent company to continue its business while attempting to reorganize its affairs by providing for a stay of proceedings during the reorganization period.

Note, however, that banks, insurance companies, railways and federal loan and trust corporations are not subject to the CCAA. In order to take advantage of the CCAA, aggregate claims against the corporation must exceed C\$ 5 million.

In response to an application by any eligible CCAA debtor company, creditor, trustee in bankruptcy or liquidator, a court may grant an order directing the filing of a plan of compromise or arrangement, and the meeting of the creditors of the debtor company to consider and vote on the terms of the plan.

Unlike the BIA, where the process is automatic, the decision to grant relief in CCAA proceedings is discretionary. In particular, a court may deny an initial CCAA application where support by the creditors is slim and there appears to be no chance that a plan will be successful.

In order to succeed, the debtor company's plan of compromise or arrangement must be approved by a majority in number representing two-thirds in value of the creditors in each class. The CCAA requires that

secured and unsecured creditors must be in separate classes; other classes may be created based on 'commonality of interest'.

3.9 Start-up environment

Canada is a very attractive market and has numerous high-growth industries. In the goods-producing sector, the largest share of high-growth firms, based upon revenue, is found in mining, quarrying, oil and gas extraction, construction and manufacturing. In the service-producing sector, industries with the highest share of high-growth are professional, scientific and technical services, as well as information and cultural industries.

The cost of doing business in Canada is much more attractive than in other countries. For instance, Canada's business costs are the lowest in 11 countries in North America, Europe, and Asia-Pacific, and roughly 9 per cent lower than the USA after taxes depending on the industrial sector.¹⁶⁰

Recently, the Economic Intelligence Unit has rated Canada as the number one place to do business in the G7 for the next five years.¹⁶¹

3.10 Conclusion

In an increasingly globalized world, Canada offers entrepreneurs a social and legal framework that, in most cases, sets them on the path of success.

First, the low cost of living plus the numerous government support programmes and tax credits are better than most offerings from countries around the world.

Second, seed capital is in abundance today in Canada. In addition to an abundance of private investments, the federal and provincial governments offer a variety of grants and tax credits, such as the FedDev Ontario

¹⁶⁰ 'Advantages of Doing Business in Canada' (*Immigration Canada Services*) www.immigrationcanadaservices.com/advantages-of-doing-business-in-canada accessed 5 March 2020.

¹⁶¹ *ibid.*

or the Industrial Research Assistance Program that provides mentorship, entrepreneurial support and financing to help new businesses succeed.

Finally, businesses have access to great technical talent. For instance, the University of Waterloo and University of Toronto are two of the best engineering schools in North America, with graduates being constantly hired by companies like Google and Facebook. With such a pool of talent, a business will always be able to find the people that will help it grow and succeed.

In short, a skilled workforce, abundant capital investments, and a stable political and economic environment make Canada one of the world's premier locations for starting a business.