

*Notes for speech by Julian Payne on "Canadian federal and provincial jurisdictions for business"*

**Speeches by Julian Payne,  
President, Canadian Chamber of Commerce of the Philippines  
To the  
Davao Chapter (January 22, 2015) & Cebu Chapter (January 28, 2015)  
Of the Canadian Chamber of Commerce of the Philippines  
On  
Canadian federal and provincial jurisdictions for business<sup>1</sup>**

Mr Chairman, Members and friends of CanCham

I have often spoken before on the challenges and opportunities that Canadian business has in getting established and working in the Philippines. Today I will put the shoe on the other foot: I will talk about some challenges and opportunities that Filipinos may face who want to establish business in Canada. One set of challenges and opportunities for business arises due to the regulatory environment given Canada's federal system of government.

Before getting to the core of the subject, I must clarify that this discussion has little to do with the different problems business may face doing business in a country with a Presidential system versus a parliamentary system of government.

In fact there are at least four combinations of government systems that affect the regulatory environment for business that can be summarized with an example of each:

- A presidential system with a unitary structure of government (such as the Philippines)
- A parliamentary system with a unitary structure of government (such as the UK)
- A presidential system with a federal structure of government (such as the USA)
- A parliamentary system with a federal structure of government (the case with Canada)

Note that a country with a President does not necessarily mean it has a presidential form of government (such as India). It depends on whether the President is merely a titular Head of State or a Head of State and Executive Head of an Administration (Philippines).

In my talk today I will first address four general points:

1. Key differences between a unitary and federal system that affect business
2. Key variances between different federal systems that may also affect business
3. Key features of the Canadian federal system of government
4. Jurisdictions of Canada's federal and provincial governments

Then I will discuss five subjects as examples in Canada where jurisdiction has implications for business:

5. Incorporation of businesses
6. Individual and corporate income tax rates
7. Sales tax rates
8. Employment and labor standards
9. Environment

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<sup>1</sup> The full text was summarized in oral presentations with some details omitted

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## 1. Key differences between a unitary and federal system that affect business

There are provinces in the Philippines and provinces in Canada. But because the Philippines has a unitary form of government and Canada has a federal form of government, the status of their provinces is fundamentally different.

There are States in the USA and Provinces in Canada. As these two countries both have a federal form of government, the status of States in the USA and Provinces in Canada are not fundamentally different. However they do differ in significant degree and certain specifics. So do not let the names of political units mislead you or assume Canadian federalism is the same as federalism in the USA.

The fundamental difference between a unitary system of government and a federal system of government is that in a federal system:

- The Central government does not have all the sovereign powers that it would have with a unitary structure of government.
- The state/province has sovereign powers in certain areas designated in a constitution.
- The state/provincial government is not subject in any way to the authority, oversight, or laws set by Central government in the areas of state/provincial jurisdiction; and
- The state/province approves its own policies, laws, regulations and implementation arrangements for activities within state/provincial jurisdiction.

The implications of these differences for business is that, with a federal system, it is of critical importance to know and understand whether it is Central government or the state/provincial government that has jurisdiction over the business functions (such as incorporation of a business) and business sector of interest (such as environment) of relevance for the particular business.

This is much more complicated than assuming there are clear jurisdictions because:

- Sometimes a federal constitution indicates a shared jurisdiction (such as immigration in the Canadian Constitution).
- Sometimes a federal constitution is silent about the jurisdiction for a sector (such as environment in the Canadian Constitution).
- Sometimes a federal constitution gives special jurisdictions and rights(s) to one or more states/province and not to other provinces within the same country.

The question of whether Central government or state/provincial government has jurisdiction is of critical importance to business because:

- It establishes which level of government has the final authority to set policy, laws, regulations, and implementation arrangements as well as the geographic coverage.

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- If it is the states/provinces that have final sovereign jurisdiction, it is almost certain the regulatory environment will differ in different states/provinces within the same country (such as in Canada where one province has no sales tax and others have varying kinds).

**The bottom line: the issue of whether the Central government or the states/provinces (and if state/provincial, which state/province) have jurisdiction may affect what is the best market for a business and where a business may be ideally located, depending on the nature of the business.**

## **2. Key variances in different federal systems that may also affect business**

When the Constitution of the USA was written the framers intended a weak Central government and strong States (the historical context to "States rights"). In contrast when the "Fathers of Confederation" set out Canada's constitutional arrangements in 1867 they intended a strong Central government with weak provinces<sup>2</sup>.

In fact the reverse situation evolved. In Canada the provinces are very strong with wide jurisdiction, including with respect to business. In the USA the states are relatively weak with the Central government having wide jurisdiction, including with respect to business. This has been in large part due to judicial interpretation. However, de facto strength of states/provinces has also been affected by the fact that some specific areas of jurisdiction given to state/provinces have over the decades grown in significance importance Some experts have also concluded that a major reason for this reversal in Canada has been that provinces in Canada have been given a shared jurisdiction to raise corporate and individual income taxes and "money speaks".

In considering doing business in a country with a federal system, business cannot assume that all federal systems are the same in their impact on business. The USA and the Canadian federal systems differ significantly in ways that affect business.

**The bottom line: those who wish to do business in one federal country, instead of or in addition to another federal country, must look at each case to see which has states/provinces most suitable for their business in terms of both business subject matter and regulatory environment.**

## **3. Key features of the Canadian federal system of government**

In summary, the main features of Canada's federal system include:

- **Within the Canadian Constitutional document itself**, there is no complete and exclusive division of jurisdictions for all and every type and area of relevance to business. Some areas are designated as exclusive for the Central government and others for Provinces; some areas are shared between Central government and the Provinces; and some areas are not covered at all.

<sup>2</sup> For a good history and description of the differences between Canadian and US federalism see article by Martha A Field on "The Differing Federalisms of Canada and the United States" in *Law and Contemporary Politics*, 1992 which is hereby acknowledged.

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- **Within the Canadian Constitutional document itself**, there are some cases of an asymmetric distribution of jurisdictions given to and between the Provinces, notably but not exclusively jurisdiction with respect to civil law, education and language in the Province of Quebec. All are not the same.
- **In addition to the Canadian Constitution document itself**, the involvement of the Central government and the Provinces in jurisdictions is also affected by:
  - Additional laws and agreements between the Central government and Provinces.
  - Financial arrangements between the central government and the Provinces.
  - Delegations of authorities and implementation from the Central government to the Provinces.
  - Assignment of authorities and implementation by the Provinces to the Central government.
  - Judicial interpretations and decisions.
- **In some cases treaties signed by tribes of Indigenous Peoples in Canada** with the sovereign of Great Britain before Canada become independent still survive and remain in force with these relevant to the geographic areas covered by such treaties. These often have provisions that relate to land ownership and taxes.
- **The residual power** for jurisdiction in the Canadian Constitution is given to the Central government with the Provinces given only specified jurisdictions (this in contrast to the USA where the residual power is given to the States).
- **Notwithstanding the residual power given to the Central government**, by various judicial decisions and interpretations as well as by financial powers, the Provinces in Canada are now very strong and have wide and extended jurisdiction including in many of the emerging and growing areas relevant to business.
- **There are Territories in Canada** (Northwest Territories, Nunavut, and Yukon) as well as provinces. These territories are extensions of the Central government and do not have the sovereign power of the Provinces but do have delegated powers which vary.

#### 4. **Division of jurisdictions between federal and provincial governments**

In the Canadian Constitution itself:

- Section 91 sets out the main specific jurisdictions given to the Central government.
- Section 92 sets out the main specific jurisdictions given to the Provinces.
- Other sections cover other areas such as Agriculture and Immigration.

##### **(a) Section 91: Federal Government Powers**

Section 91 gives the Canadian Parliament the power "to make laws for the peace, order and good government of Canada." It defines and outlines the responsibilities and duties of the federal or national government as follows:

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- Part 1 the right to change the Act with respect to the powers given to the provincial legislatures
- Part 2 regulation of trade between countries
- Part 2a employment insurance
- Part 3 raising money by any method of taxation
- Part 4 the postal service
- Part 5 the census and keeping of national statistics
- Part 6 the armed forces and defence
- Part 7 determining the salaries of politicians and all employees of the federal government
- Parts 9-13 matters related to the seas and Great Lakes such as lighthouses, fishing, coastal boundaries and ferries between provinces
- Parts 14-20 matters related to banking, the printing of money, the organization of new banks, and the setting of interest rates for borrowing
- Part 21 bankruptcies, whether individual or business
- Part 22 inventions and patents
- Part 24 Indian affairs, reserves, and land claims
- Part 25 citizenship, immigration, and deportation
- Part 27 criminal law
- Part 28 federal jails and penitentiaries

#### **(b) Section 92: Provincial Powers**

Section 92 defines and outlines the specific powers given to the provincial governments in which the federal government may not interfere as follows:

- Part 2 provincial taxes (i.e., provincial sales tax)
- Part 4 hiring, paying, and supervising provincial employees
- Part 6 establishing and maintaining provincial jails and juvenile detention centres
- Part 7 establishing and maintaining hospitals
- Part 8 organizing and setting up municipal governments
- Part 9 licensing of shops, bars, and auctions
- Part 10 interprovincial communication and transportation (e.g., ships, railways, canals)
- Part 13 civil and property rights
- Part 14 enforcement of provincial laws

The question is how does this affect or have implications for business in practical terms?

To illustrate how the division of jurisdictions between the Central government and the Provinces can affect the business environment and business decisions as well as the challenges and opportunities the Canadian federal system sets for business, it is useful to refer to following five specific examples<sup>3</sup>.

- Incorporation of businesses
- Individual and corporate income tax rates
- Sales tax rates
- Employment and labor standards
- Environment

<sup>3</sup> There are many other existing examples in other areas with these five being selective for illustrative purposes.

## 5. Incorporation of businesses & Directorships<sup>4</sup>

### (a) Incorporation

In Canada businesses can be incorporated by the Central government (then called "Federal corporations") or Provincial Governments (then called Provincial corporations).

Federal corporations are incorporated under the *Canada Business Corporations Act*. They can carry on business anywhere in Canada under their registered corporate name. However, carrying on business in a Province/Territory a Federal Corporation is subject to extra-provincial/territorial registrations requirements in each Province/Territory. As a Federal corporation, a company must also be registered in the province in which it is based and the province(s) in which it is "carrying on business"....meaning registration requirements in up 13 provincial and territory jurisdictions to cover all of Canada.

Provincial Corporations are incorporated under the applicable provincial legislation which differs from one province to another. A Provincial corporation can carry on business only in the province which it is incorporated unless and until it applies for an extra-territorial registration to carry on business<sup>5</sup> in one or more other provinces.

The registered name for a Federal Corporation is protected all across Canada. The registered name for a Provincial Corporation is only protected in province of incorporation. The name has to be re-approved in application for extra-territorial registration in any other province.

All provinces require a Provincial Corporation to have a registered address within the province where the corporation intends to carry on business and/or that an agent of the corporation register and reside in the province.

### (b) Directorships

The residency requirements for Directors differ for Federal Corporations and some Provincial Corporations, depending on the province:

- **Federal:** 25% resident Canadian Directors required
- Alberta: 25% resident Canadian Directors required
- British Columbia: **No** resident Canadian Directors required
- Manitoba: 25% resident Canadian Directors required
- New Brunswick: **No** resident Canadian Directors required
- Newfoundland: 25% resident Canadian Directors required
- Nova Scotia: **No** resident Canadian Directors required
- Ontario: 25% resident Canadian Directors required
- Prince Edward Is. **No** resident Canadian Directors required
- Quebec: **No** resident Canadian Directors required
- Saskatchewan: 25% resident Canadian Directors required

<sup>4</sup> This material is drawn from various web sources including that of "New Business Now" which is hereby acknowledged.

<sup>5</sup> Note that the definition of "carrying on business" varies from province to province.

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Unlike in the Philippines, there are no citizenship requirements for Directors either by Central government or by the Provinces and the residency requirements apply only to Directors (not Officers and/or shareholders).

### **The bottom line:**

- **If foreign businesses wish to incorporate in Canada, and not wish to appoint any resident Directors, an option is to incorporate a Provincial Corporation (not a Federal Corporation) in British Columbia, New Brunswick, Nova Scotia, Prince Edward Island, or Quebec**
- **If a foreign business wishes to carry on business in several provinces with no resident Directors in Canada, it may wish to explore incorporation in one of those five provinces that do not require any resident Directors and then apply for extra-territorial registration if it intends to carry on business in the other province(s) of interest.**

## **6. Individual and Corporate income tax rates**

In Canada, both the Central government and the Provinces have jurisdiction and the authority to impose both individual and corporate income taxes.

While the federal rates for both individual and corporate income taxes apply across the country, the provincial rates apply only to the applicable province and differ from one province to another. Examples of federal rates and the rates for the four provinces<sup>6</sup> where most Filipinos who migrate to Canada now reside are as follows:

### **(a) Individual income tax rates**

<b>Federal income tax</b>	15% on first CAD 44,701 taxable income 22% on next 44,700 up to CAD 89,401 26% on next 49,185 up to CAD 138,586 29% on taxable income over CAD 138,586
<b>Alberta</b>	10% of taxable income
<b>British Columbia</b>	5.1% on first CAD 37,871 taxable income 7.7% on next CAD 37,871 10.5% on the next CAD 11,218 12.3% on the next CAD 18,634 14.7% on the next CAD 44,408 16.8% on amounts over CAD 150,000

<sup>6</sup> The rates given are those updated in 2014 as posted on the website of the Canada Revenue Agency (CRA). Readers should check with CRA for latest rates and for exemptions/tax deductions as well as with provincial agencies for latest rates and exemptions/tax deductions in each province.

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<b>Manitoba</b>	10.8% on first CAD 31,000 taxable income 12.7% on next CAD 36,000 17.4% on the amount over CAD 125,795
<b>Ontario</b>	5.1% on first CAD 40,922 9.2% on the next CAD 40,925 11.2% on the next CAD 68,153 12.2% on the next CAD 70,000 13.2% on amounts over CAD 220,000

### The bottom line:

- If one expects to earn a low taxable income, it is best to live in BC or Ontario.
- If one expects to earn a high taxable income, it is best to live in Alberta

### (b) Corporate tax rates

#### Federal rate

The Central government has two main corporate tax rates, a general rate and one for small businesses.

The basic rate of Part I tax is 38% of taxable income, with this reduced to 28% after federal tax abatement and further reduced after the general tax reduction, **to a net tax rate effective January 1 2012 of 15%.**

For Canadian-controlled private corporations claiming the small business deduction, the net tax rate is **11%**.

#### Provincial or territorial rates

Most provinces and territories also have two rates of income tax: a lower rate and a higher rate. Manitoba is the exception and just has a single rate.

The lower rate applies to companies with a business income eligible for the federal small business deduction. Most provinces or territories choose to use the federal business income limit. Others establish their own limits for small businesses.

The higher rate applies to all other income. The following table gives the differing corporate income tax rates for the province and territories<sup>7</sup>:

<sup>7</sup> The rates given are those updated in 2012 as posted on the website of the Canada Revenue Agency (CRA). Readers should check with CRA for latest rates and for exemptions/tax deductions as well as with provincial agencies for latest rates and exemptions/tax deductions in each province.

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By provinces	Lower rate	Higher rate	Income limit for lower rate <sup>8</sup>
• Alberta	3.0%	10.0%	CAD 500,000
• British Columbia	2.5%	11.0%	CAD 500,000
• Manitoba	nil	12.0%	CAD 425,000
• New Brunswick	4.5%	12.0%	CAD 500,000
• Newfoundland	4.0%	14.0%	CAD 500,000
• Nova Scotia	3.0%	16.0%	CAD 350,000
• Ontario	4.5%	11.5%	CAD 500,000
• Prince Edward Island	4.5%	16.0%	CAD 500,000
• Quebec	8.0%	11.9%	CAD 500,000
• Saskatchewan	2.0%	12.0%	CAD 500,000

#### For territories

• Northwest Territories	4.0%	11.5%	CAD 500,000
• Nunavut Territory	4.0%	12.0%	CAD 500,000
• Yukon Territory	4.0%	15.0%	CAD 500,000

## 7. Sales taxes

In Canada, both the Central government and provincial governments have the jurisdiction and authority to impose sales tax. Most (but not all) provinces do impose such taxes on top of what the federal government imposes.

There are three types of sales taxes in Canada:

- Good & Services Tax (GST), a value added tax levied by the Central government;
- Provincial Sales Tax (PST) levied by the provinces; and
- Harmonized Sales Tax, a blended combination of the PST and GST used in some provinces, collected by the Central government, and a portion remitted to the province

The federal GST rate is 5% and applies in all the Provinces as GST or included in HST.

All the Provinces collect some sort of sales tax with the exception of Alberta which has none. The three territories also have none. Five provinces (British Columbia, Manitoba, Quebec and Saskatchewan) all have separate PST with the PST not the same in these provinces<sup>9</sup>. The Province of Ontario and the four Atlantic Provinces (New Brunswick, Newfoundland, Nova Scotia and Prince Edward Island) all use the HST but the HST is not the same as the provincial shares differ<sup>10</sup>. In summary<sup>11</sup>:

<sup>8</sup> In addition to lower limit ceiling, other conditions and/or exemptions may apply in specific cases.

<sup>9</sup> In the case of the five (5) Provinces with separate PST: in Quebec the PST is a value added tax; and in the other four Provinces with PST, the PST is a cascading tax.

<sup>10</sup> In the case of five (5) provinces using HST, the total HST rate will change as the Central governments GST rate changes

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Province	GST	PST	HST	Total
• Alberta	5.0%	0.0%	n/a	5.0% lowest
• British Columbia	5.0%	7.0%	n/a	12.0%
• Manitoba	5.0%	8.0%	n/a	13.0%
• New Brunswick	n/a	13.0%	n/a	13.0%
• Newfoundland	n/a	n/a	13.0%	13.0%
• Nova Scotia	n/a	n/a	15.0%	15.0% highest
• Ontario	n/a	n/a	13.0%	13.0%
• Prince Edward Island	n/a	n/a	14.0%	14.0%
• Quebec	5.0%	9.975%	n/a	14.975%
• Saskatchewan	5.0%	5.0%	n/a	10.0%

### Territory

• Northwest Territories	5.0%	0.0%	n/a	5.0% lowest
• Nunavut Territory	5.0%	0.0%	n/a	5.0% lowest
• Yukon Territory	5.0%	0.0%	n/a	5.0% lowest

**The bottom line: If sales tax is an overriding business consideration, carry on business in the Province of Alberta or in one of the three territories in the north.**

## 8. Jurisdictions for Employment and labor standards

Under the Canadian Constitution both the Central government and the Provinces have jurisdiction and authority to enact labor standards. Whether the Central government's standards or the standards of a Province apply depends on whether the nature of a business falls under the jurisdiction of the Central government or the Provinces.

In fact the Central government's jurisdiction over labor matters is narrow and derives from the right of the Central government to exclusive jurisdiction for subject expressly set out in Section 91 of the Canadian Constitution and expressly exempted from provincial jurisdiction by Section 92. The residual is covered by the provinces with this differing from one province to another.

The importance of the provinces' role as a result is dramatically confirmed by the simple fact that provincial standards cover about 90% of Canada's total work-force while the Central governments standards cover only 10%.

### (a) Central government jurisdiction for labor standards

The *Canada Labor Code* establishes minimum standards of employment and guaranteed employment rights that apply to Employers in the following areas:

<sup>11</sup> The rates given are those for 2014 as posted on the website of the Canada Revenue Agency (CRA). Readers should check with CRA for latest rates and exceptions of goods and services exempted from GST/HST and with provincial agencies for latest PST rates and exemptions from PST in each province

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- Operations that function on behalf of the Central government which includes the government, state corporations, and private business which are the operation of federal legislation.
- Air transport, aircraft and airports.
- Chartered banks.
- Post Offices.
- Extra-provincial shipping and related services.
- Operations that connect one province to another province (with this including such things as: bridges, buses, ferries, pipe-lines, railways, telephone & telegraphs, cable systems, trucking, and tunnels).
- Radio and television broadcasting (including cable TV).
- Specific types of work that Parliament (Central government) determines to be for the entire country's advantage or the advantage of two or more provinces. This has included such areas as: flour mills, grain elevators, and uranium mining.

### **(b) Provincial government jurisdiction for labor standards**

The Provinces have the power to enact labor laws given the property and civil rights sub-section of the Canadian Constitution. Given that the right to enter into contracts is considered a civil right and that labor laws impose certain restrictions on contracts between Employers and Employees. The Provinces also have the authority to legislate on "local works and undertakings" which allows them to legislate labor standards.

### **(c) Standards for work on land reserved for Indigenous people**

This is a complicated and complex area where either Central government and/or a Province's labor legislation may apply, depending another whole range of conditions and circumstances of the work being carried out.

## **9. Jurisdictions for business relating to the environment<sup>12</sup>**

No mention is made in the Canadian Constitution to "environment". For jurisdiction, "environment" is deemed as a collective term that refers to numerous issues, many which fall under jurisdiction of either the Central government or the Provinces ... or both.

### **(a) Federal jurisdiction for environment**

The Central government's jurisdiction is based on five sub-sections in Section 91:

- Public property, which means federally, owned property (Section 91 (1A)).
- Sea coast and inland fisheries (Section 91, (12)).
- Navigation and shipping (Section 91 (10)).
- Indians and lands reserved for Indians (Section 91 (24))
- Criminal law (Section 91 (27)).

<sup>12</sup> This section of the speech draws on information in Parliament of Canada research publication on "Federal and Provincial Jurisdiction to Regulate Environmental Issues" published in 2013 which is here acknowledged.

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The jurisdiction of the Central government also derives from:

- Section 132 which deals with boundary waters and migratory birds
- The residual jurisdiction that the Central government has

### **(b) Provincial jurisdiction for environment**

The jurisdiction of the Provinces is based on:

- Property and civil rights (Section 92 (13))
- Management of provincial Crown lands (Section 92 (5))
- Municipal institutions in a province (Section 92 (8))
- Generally all matters of a local or private nature in a province (Section 92 (16))

This leads to the following situation concerning jurisdiction over environment:

#### **For environmental issues relating to water**

- Oceans
  - Territorial sea within provincial boundary - Province (except re marine pollution)
  - Territorial sea outside provincial boundaries - Central government
  - Exclusive economic zone - Central government
- Fisheries, shipping, and navigation - Central government
- Rivers and lakes in the territories - Central government
- Rivers and lakes in provinces - Provinces
- Drinking water and waste water - Provinces & territories

#### **For environmental issues relating to air**

- Toxic substances - Central government
- International air pollution - Central government
- Industrial emission - depends on jurisdiction for the specific activity
  - Provinces for emissions from specific sites (factories etc.)
  - Central government for overarching strategy
- Greenhouse gases & climate change - both Central government and Provinces

#### **For environmental issues relating to land**

- Nuclear activities - Central government
- Terrestrial protected areas - Central government
- Wildlife and species at risk - Provinces except for:
  - Wildlife on federal lands
  - Aquatic species
  - Migratory birds
- Waste management - Provinces and territories

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### **For jurisdiction to require an Environmental Assessment**

- Provincial jurisdiction is broad based on jurisdiction over property and civil rights
- Central government jurisdiction is based on possible impact on any area of Central government jurisdiction including but not limited to:
  - A change that may be caused to fish and fish habitat, aquatic species & migratory birds
  - A change that may be caused to the environment on federal lands or lands of another province or outside Canada
  - An effect to the environment relating to Aboriginal peoples

### **CONCLUSIONS**

In considering whether to establish a business in a country with a federal system of government, it needs to be recognized and taken into account that:

- Federal systems of government pose special challenges for business.
- The question of whether the Central government or the States/Provinces have jurisdiction is a very important factor for business to consider.
- In most cases the jurisdictions of both Central government and the States/Provinces will have to be considered for conduct of a business activity.
- It may well be more advantageous to locate in one State/Province than another.

In the case of Canada:

- Given the wide jurisdictions that the provinces have over matters affecting business, provincial policies, laws, regulations and implementation arrangements are very important factors to consider for all those doing business in Canada.
- Given the differing policies, laws, regulations and implementation arrangements that the various Canadian provinces have, those doing business in Canada need to explore and consider which particular province offers the best regulatory environment for the specific business of interest.
- The issues to be addressed in establishing a business in a federal system to a company's best advantage can be complex and are specific to the country: it is most advisable to consult a corporate law specialist familiar with both the federal and provincial laws and regulations in Canada if considering establishing a business in Canada.

Thank you.