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BLAKES GUIDE TO DOING BUSINESS IN CANADA

Doing Business in Canada is intended as an introductory summary. Specific advice should be sought in connection with particular transactions. If you have any questions with respect to *Doing Business in Canada*, please contact our National Managing Partner, Rob Granatstein, in our Toronto office by telephone at 416-863-2748, by fax at 416-863-2653 or by e-mail at robert.granatstein@blakes.com. Blake, Cassels & Graydon LLP produces regular reports and special publications on Canadian legal developments. For further information about these reports and publications, please contact Alison Jeffrey in our Toronto office by telephone at 416-863-4152, by fax at 416-863-2653 or by e-mail at alison.jeffrey@blakes.com.

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BLAKES GUIDE TO DOING BUSINESS IN CANADA

I. INTRODUCTION

This Guide provides non-Canadians with an introduction to the laws and regulations that affect the conduct of business in Canada and, in particular, in the province of Ontario. In some cases, this Guide also identifies issues in the provinces of Alberta and British Columbia. Because of Canada's federal structure, the authority to make laws and regulations is divided between the federal and provincial governments by the Canadian Constitution although, in some areas of divided authority, both federal and provincial laws may apply.

For reasons rooted in history, Canada has two legal traditions, the civil law tradition of codified law in the province of Quebec, and the common law tradition of judge-made law in the other provinces of Canada. The province of Quebec, as Canada's only province whose majority population is French speaking, has also adopted a Charter of the French Language making French the official language of Quebec. Quebec also collects its own income taxes and has shared jurisdiction over immigration to Quebec with the federal government. A more detailed discussion of the laws of the province of Quebec is contained in Blakes *Doing Business in Quebec*.

The discussion under each heading in this Guide is intended to provide only general guidance and is not an exhaustive description of all provisions of federal, provincial and local law with which a business might be required to comply. Particular businesses or industries may also be subject to specific legal requirements not referred to in this Guide. For this reason, the reader should not rely solely upon this Guide in planning any specific transaction or undertaking, but should seek the advice of qualified counsel.

The law is stated as of September 1st, 2008.

II. GOVERNMENT AND LEGAL SYSTEM



With a population of approximately 33 million people and second only to Russia in area, Canada is a land rich in natural resources and among the world's leading industrialized nations. Home to some of the globe's most innovative and largest businesses, Canada has a highly skilled workforce and is a world leader in a variety of sectors, including manufacturing, high technology, energy and natural resources.

While closely aligned in both commerce and culture to its southern neighbour, the United States, Canada has also enjoyed great success in forging strong trade ties with many countries in Asia, Europe, the Middle East, South America and other regions.

1. Canadian History in Brief

Canada is a relatively young country that gained independence from Britain in stages over the course of a century. It started on its path as a self-governing nation in 1867, when the British Parliament passed the *British North America Act*. This legislation formed Canada's written constitution until 1982, when Britain formally relinquished its authority over the Canadian constitution.

As its roots might suggest, Canada is a parliamentary democracy based closely on the British form of government. It has established two levels of government — a federal authority that governs matters of national interest, and the 10 provinces that govern matters of a more local interest. The Canadian Constitution also sets out the specific powers and jurisdictional limits for each level, with the intended result that each should have exclusive domain over certain aspects of government.

For example, the federal government has been allotted authority over the regulation of trade and commerce, banking, patents, copyright and taxation. The provinces have authority over property and civil rights and the administration of justice on a provincial level. As would be expected, there are areas of overlap. Indeed, the division of powers between the federal and provincial governments has been a long-standing source of contention among those who govern Canada.

The evolution of Canada's history has been greatly influenced by three world powers — Britain, France and the United States. That said, while Canada's two official languages are English and French, the country is decidedly and increasingly multicultural, attracting talented new immigrants from all corners of the world.

2. Federal Government

Canada's federal government is based in Ottawa, Ontario. Similar to the U.S. federal government, the Parliament of Canada has two legislative bodies through which proposed bills must pass before becoming law — the House of Commons, which has elected representatives, and the Senate, which is comprised of appointees for life.

The Members of Parliament (MPs) are elected representatives from over 300 "ridings" or regions across Canada who sit in the House of Commons. The federal government itself is headed by a Prime Minister, who is usually the leader of the ruling political party in the House of Commons. The Prime Minister chooses members of the federal Cabinet from the elected Parliamentarians and these "Ministers" are responsible for overseeing individual federal departments.

Canada has four principal political parties — Liberal Party of Canada, Conservative Party of Canada, Bloc Québécois and New Democratic Party of Canada. The political party that controls the most seats in the House forms the ruling government of the day. The Official Opposition is the party that holds the second highest number of seats.

Canada's House of Commons is the only constitutionally authorized body to introduce legislation to raise or spend funds. Once a new law or amendments to existing laws are voted on and approved by the House of Commons, the proposed legislation must then be debated and voted upon by the Senate.

This Upper House of Parliament is made up of over 100 Senators appointed by the Governor General, on the advice of the Prime Minister. Senators, theoretically, provide a check against potential excesses of the governing party. If the Senate approves a law or its amendments, the bill is ready for royal assent. The timing of the royal assent ceremony is chosen by the ruling government and, unless the bill fixes a date on which it is to come into force, it comes into force on the date of royal assent. This time period can be mere days or many months, depending on the political timetable.

3. Provincial and Territorial Governments

Similar to the U.S. system of states, each Canadian province has its own elected Premier (similar to a U.S. governor), provincial Cabinet of Ministers, a Legislative Assembly (i.e., lawmakers), political parties and court system.

Municipalities and their governments are considered "creatures" of the provinces and derive their authority from provincial laws. Canada also has territories, which can be created by the Parliament of Canada under its constitutional authority. While not full-fledged provinces, territorial governments are often delegated powers within the federal domain and have government structures similar to provinces.

Some of the laws that provinces are responsible for include family law, health law, labour standards, education, social services and housing. Similar to Parliament, voters in provinces elect members to sit in the provincial legislature based on ridings.

These elected officials are Members of the Legislative Assembly (MLAs) or Members of Provincial Parliament (MPPs). The ruling government is the party that controls the most seats in the legislature. Today, Canada has 10 provinces and three territories.

Canada's 10 Provinces	Capital
Alberta	Edmonton
British Columbia	Victoria
Manitoba	Winnipeg
New Brunswick	Fredericton
Newfoundland and Labrador	St. John's
Nova Scotia	Halifax
Ontario	Toronto
Prince Edward Island	Charlottetown
Quebec	Québec City
Saskatchewan	Regina
Canada's Territories	Capital
Northwest Territories	Yellowknife
Nunavut	Iqaluit
Yukon	Whitehorse

4. Canada's Legal System

Canadian courts are considered independent of the government. Elected politicians and bureaucrats cannot influence or dictate how the courts administer and enforce the law. In theory, federal and provincial governments make the laws, and courts interpret and enforce them. Increasingly, however, the line between who makes laws is blurring. In some cases, Canada's courts end up making new laws by virtue of the way legislation is interpreted.

A significant driving force for legislative and judicial change in recent years has been Canada's *Charter of Rights and Freedoms*, which imposes limits on government activity relating to Canadians' fundamental rights and liberties. These include the right to liberty, equality, freedom of religion, freedom of expression, freedom to associate with a group, and to be presumed innocent until proven guilty by an independent and impartial tribunal. The *Charter*, however, does not generally govern interactions between private citizens or businesses.

Canada's legal system is unique from many others in that the *Quebec Act of 1774* created two systems of law — the "civil law" governing those in Quebec and a common law system in all other provinces. The common law system of justice, similar to that in the U.S., relies on the historical record of court interpretations of laws over the years. The civil law system in Quebec uses court decisions to interpret the intentions and allowable authority of law-makers, but also relies on a written *Civil Code* that sets out standards of acceptable behaviour or conduct in private legal relationships.

Canada's court system itself is shaped like a pyramid. At the top, the Supreme Court of Canada is the ultimate court of appeal and has the final word on the interpretation of the law of the country. The Supreme Court of Canada can declare all or part of a law invalid. All lower courts in the land are required to follow its interpretations when dealing with similar matters. Only an Act

of Parliament or a legislature, acting within their respective areas of authority, can change the effect of the top court's interpretation.

Next, are the Courts of Appeal of each province. Decisions of a province's appellate court are binding on the lower courts in that province. In other provinces, some courts will seriously consider decisions of another province's appeal decisions, but there is no requirement to follow them until their own provincial appeal court agrees.

Below each province's appeal courts are trial and specialty courts, where most civil and criminal matters are decided.

5. Doing Business with Canadian Governments

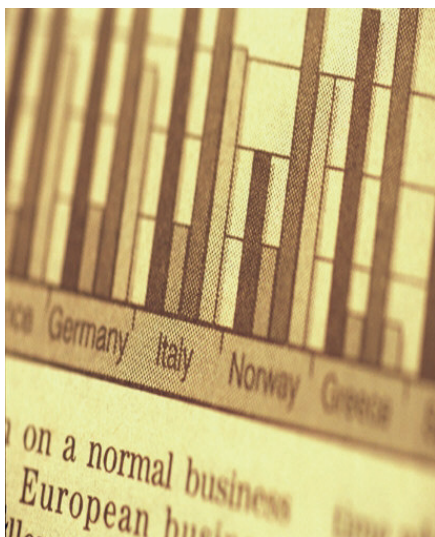
Professionals, such as those at Blakes, can provide valuable advice on issues ranging from government procurement advocacy to government relations in Canada. Unlike the U.S. system, where lobbying activity is directed toward legislators at the voting stages, government policy in Canada is often made at the Cabinet level or in all-party committees.

All levels of government frequently solicit opinions and consult the private sector on legislative and other policy proposals. Professionals can help ensure contact is made with key government decision-makers and that representations are made before appropriate government committees.

This extends to government tribunals and agencies dealing with complex World Trade Organization and free trade rights and obligations, trade litigation, bilateral investment treaties, anti-dumping and countervailing duties, safeguard proceedings, customs regulation, export/import controls, trade sanctions and embargoes, and extraterritorial laws and blocking legislation.

All levels of Canadian government are also actively involved in purchasing from the private sector, as well as developing and managing public-private partnerships and Request for Proposals. In recent years, governments have joined forces with the private sector in energy, health care, public infrastructure, administrative and other projects. Again, representations and proposals to government are often aided by professional advice.

III. BUSINESS ENTITIES



A consideration of the different forms of business enterprises available under federal and provincial law will assist the investor in determining the most suitable arrangement for conducting business. Provincial law generally governs the forms of business organization although corporations may also be incorporated federally under the laws of Canada.

1. Corporations

A corporation with share capital is the most common form of business entity in Canada and enjoys advantages that make it the most practical form of business organization in most instances. Corporations may also be incorporated without share capital, generally for not-for-profit purposes.

1.1 What types of corporations are available in Canada?

1.1.1 Will the Canadian subsidiary be a private or public corporation?

Canadian legislation governing corporations distinguishes between non-offering corporations (commonly referred to as private or closely held corporations) and public offering corporations. Private corporations generally are subject to restrictions on the transfer of their shares, a maximum permitted number of shareholders, excluding certain classes of individuals such as employees and prohibitions against the issue of securities to the public. Public corporations do not have these restrictions and have taken steps under applicable provincial securities laws and stock exchange rules to permit their securities to be offered to, and traded by, the public.

Because shareholders of private corporations often participate actively in the management of the corporation, they do not require the same statutory protections that are essential for shareholders of public corporations. Many rules that apply to public corporations with respect to directors, insider trading, proxy solicitation, filing of financial statements, appointment of auditors, take-over bids and public disclosure do not apply to private corporations. However, all shareholders have substantial rights with respect to fundamental changes affecting the corporation, including, in some cases, dissent and appraisal rights and a very broad oppression remedy.

1.1.2 Should the subsidiary be incorporated federally or provincially?

Corporations wishing to carry on business in more than one province or in foreign countries may prefer to incorporate under federal law. This permits the corporation to carry on business in every province in Canada without being licensed by the provinces, although registration may still be required. Also, federally incorporated corporations may be more

widely recognized and accepted outside Canada, though there is no legal basis for this perception.

When a corporation incorporates in a province, it must register and may be required to obtain an extra-provincial licence in any other province where it carries on business.

There may be additional factors affecting the decision of whether to incorporate federally or provincially. For example, differences in residence requirements for directors may be relevant in some cases. As well, U.S. investors may be interested in the possibility of incorporating an “unlimited liability” corporation or company in British Columbia, Alberta or Nova Scotia to achieve certain U.S. tax objectives. The recently released Protocol to the Canada–U.S. tax treaty contains adverse changes regarding the tax treatment of unlimited liability companies (see Section VI, “Tax”).

1.1.3 What are the specific procedures and costs for incorporation? How long does the process take?

A corporation is formed in Canada by filing certain prescribed documents with the appropriate authorities under the *Canada Business Corporations Act* or the corporations act of one of the Canadian provinces (in Ontario, the *Business Corporations Act*).

The most important document under the *Canada Business Corporations Act* and similar statutes is the “articles of incorporation”, which set out the name of the corporation, its share capital, any restrictions on share transfer, the number of directors and any restrictions on the business to be undertaken. In British Columbia, the “notice of articles” sets out the company’s name, its authorized capital, whether a class of shares has any special rights or restrictions, names and addresses of the company’s directors, and the “articles” govern the conduct of the company’s internal affairs. In most other jurisdictions, matters in the “articles” of a British Columbia corporation are dealt with in by-laws passed by the directors and shareholders following incorporation. Under most statutes, corporations are given the capacity and rights of a natural person and it is not necessary to specify the objects for which the corporation is incorporated.

The name of the corporation is strictly regulated in all jurisdictions so as to avoid names that are too general or misleading. There is a screening process and it is possible to pre-clear a name prior to application for incorporation. In addition, the Quebec Charter of the French Language requires that a corporation carrying on business in Quebec use a French version of its name.

Once the required documents are filed and fees paid, incorporation is automatic. The corporation comes into existence on the date of issue of a certificate of incorporation by the regulators.

The cost of establishing a Canadian corporation is relatively modest in most jurisdictions. For example, the fee in Ontario is C\$360 (or C\$300 if electronically registered), and the fee for federal incorporation is C\$250 (or C\$200 if registered online). In Nova Scotia, however, the fee to incorporate an unlimited liability company is C\$1,000, and the annual fee to register such a company under the *Corporations Registration Act* is C\$2,750. Modest registration fees

may also be payable upon commencing business in various provinces. In addition, legal fees will be payable, which vary depending on the complexity of the corporation's structure.

The incorporation of a Canadian corporation can be accomplished very quickly, and a routine incorporation could easily be completed within a week.

1.2 Supervision and Management of a Corporation

1.2.1 Who is responsible for the corporation?

Directors and officers have a duty to act honestly and in good faith with a view to the best interests of the corporation. They must exercise their powers with due care, diligence and skill, and must comply with the governing statutes, regulations, incorporating documents, and any unanimous shareholder agreements. They are also subject to conflict of interest rules. Where directors and officers neglect their duties, they may be subject to personal liability. They may also be subject to other liabilities, such as with respect to certain unpaid taxes and employee wages. A corporation may purchase and maintain insurance for the benefit of directors and officers for certain liabilities incurred in such capacity.

The corporation's officers conduct the day-to-day management of the corporation. It is rare for a Canadian corporation to have a "managing director", although such role is specifically recognized in some Canadian corporate statutes. The senior operating officer would generally be described as the "president", with the chief financial officer often being the "vice-president, finance" or the "treasurer". There normally also is a secretary. One person may hold two or more offices, and officers need not be resident Canadians. As discussed in Section XIII, Canadian immigration rules must be satisfied in respect of the transfer of non-resident employees to Canada to work for a Canadian subsidiary.

Under most corporate legislation, directors may meet anywhere and on such notice as is provided in the documents which govern the corporation. Provision is usually made for meetings to be held by telephone, either in or outside Canada. There are certain mandatory rules regarding the conduct of business at meetings. Corporate statutes may require that a certain number of Canadian directors be present. Under the federal statute, at least 25% of the directors at a meeting must be resident Canadians or, if there are fewer than four directors, at least one must be a resident Canadian (other than for corporations engaged in certain prescribed business sectors, which require a majority of the directors present to be resident Canadians). Resolutions in writing signed by all directors may generally be used instead of a meeting.

A Canadian corporation acts through its board of directors and officers. The directors are elected by the shareholders, generally for a term of one year and subject, in many provinces, to any "unanimous shareholders agreement", manage the business and affairs of the corporation. Unanimous shareholder agreements are discussed in Section 1.2.2. Directors appoint officers and can delegate some of their powers to the officers. There are a number of general rules governing the qualifications and number of directors, such as a requirement that each director be at least a specified age and not a bankrupt, but (unlike many other countries) there is no requirement that the director hold any shares in the corporation unless the incorporating documents provide otherwise. These rules apply equally to non-resident and resident directors. There are also additional rules that relate only to directors of public

corporations. Under the Ontario statute, a private corporation must have at least one director, and a public corporation at least three.

1.2.2 Are there residency requirements for directors or officers?

The one rule that particularly affects non-residents is a requirement under some Canadian statutes that a majority of the directors of a corporation be resident Canadians. The federal and the Ontario acts have been recently amended to reduce the Canadian residency requirement for corporations in most sectors to 25%, except where there are fewer than four directors, in which case at least one must be a resident Canadian. In Alberta, at least 25% of the directors must be Canadian residents. Permanent residents of Canada who are not Canadian citizens may qualify as “resident Canadians”, either absolutely or only for a specified period. There are no residency requirements for officers. Some jurisdictions (e.g., British Columbia, Quebec, New Brunswick, Nova Scotia and the Yukon) do not impose residency requirements for directors.

A foreign parent corporation will generally deal with the residence requirement of directors in the following way. It may find Canadian individuals to represent it on the board of the subsidiary, either Canadian resident employees or professional advisers (who will generally seek indemnification from the parent for agreeing to act). In some cases, the foreign parent will take the further step of entering into a “unanimous shareholders agreement” with respect to the corporation. Many Canadian corporate statutes (including the federal, Ontario and Alberta statutes) provide for such agreements, under which the powers of the directors to manage the corporation’s business and affairs may be transferred in whole or in part to its shareholders. To the extent that the directors’ powers are restricted, their responsibilities and liabilities are correspondingly reduced and transferred to the shareholders.

1.3 How may a corporation be capitalized?

1.3.1 Shares

A share represents a portion of corporate capital and entitles the holder to a proportional right to corporate assets on dissolution. Shares must be fully paid before they can be issued (although calls on shares are permitted under Quebec law for certain pre-existing companies). Under the federal statute and the corporate statutes of certain provinces, a corporation is prohibited from issuing shares having a par value.

There is no minimum or maximum amount of share capital that a corporation is allowed to issue, unless otherwise specified in its incorporating documents. “One shareholder” companies are permissible under Canadian law.

Canadian corporate law provides great flexibility in developing the appropriate capital structure for a corporation. The articles of incorporation specify the permitted classes of shares and their key terms. Shares may be voting or non-voting, or they may have limited voting or disproportionate voting rights. The incorporating documents may attach various conditions to the payment of dividends and will stipulate rights on dissolution of the corporation. Absent specific provision in the articles, under the Ontario and federal statutes, shareholders do not have any pre-emptive rights in respect of future share offerings.

Redemption or purchase of shares by a corporation and payment of dividends are subject to statutory solvency tests. Financial assistance by the corporation in favour of shareholders and other insiders is also regulated in some provinces but is no longer regulated under the federal or Ontario statutes.

1.3.2 Debt Financing

Corporate capital may also be raised by borrowing. Directors may authorize borrowing unless the incorporating documents or a unanimous shareholders agreement restricts them. Restrictions upon corporate directors, however, will usually not protect the corporation against third parties in the case of unauthorized borrowing by directors. Corporations also have the power to grant security interests over their property and to give guarantees.

1.4 What are the basic procedures governing shareholder participation?

Shareholder meetings are usually held annually in a place determined by the directors or stipulated in the documents that govern the corporation. At the annual meeting the financial statements for the year will be presented to the shareholders and any necessary resolutions passed (such as for the election of directors). Some corporate statutes require meetings to be held in their jurisdiction unless the documents that govern the corporation provide otherwise or the shareholders agree to hold meetings elsewhere. However, shareholders may act by way of written resolution rather than at a meeting. The practice with respect to non-resident wholly owned subsidiaries is for all shareholder matters to be carried out through written resolutions.

Where a corporation has only one class of shares, each share entitles the holder to one vote at all shareholder meetings. Where there is more than one class of shares, the voting rights are set out in the articles of incorporation. Shareholders may vote personally or by proxy.

2. Corporations and Partnerships in Canada

A corporation is free to enter into partnerships in Canada. The relationship of the partners is established by contract and is also subject to applicable provincial laws. Some provinces require that partnerships be registered. A partnership may take one of two forms, a “general partnership” or a “limited partnership”. Subject to the terms of their agreement, all partners in a general partnership are entitled to participate in ownership and management, and each assumes unlimited liability for the partnership’s debts and liabilities. In a limited partnership, there is a separation between the partners who manage the business (“general partners”) and those who contribute only capital (“limited partners”). A limited partnership must have at least one general partner, who will be subject to unlimited liability for the debts of the partnership. Limited partners are liable only to the extent of their capital contribution provided they do not participate in the management of the business.

A partnership would generally be entered into by a foreign corporation, directly or through a subsidiary, only if it wished to establish a joint venture arrangement with another person or corporation. The income or loss of the business will be calculated at the partnership level as if the partnership were a separate person, but the resulting net income or loss will then flow-through to the partners and be taxable in their hands. Partnerships themselves are not taxable entities for

Canadian income tax purposes. Because of its flow-through nature, a partnership might be appropriate if a joint venture business is expected to generate disproportionately large expenses in its early years, as the partnership structure would allow the individual co-venturers to take advantage of the tax write-offs arising from these expenses. In the case of a limited partner, the amount of losses which may be available is limited by the amount which the limited partner is considered to have “at risk” in the partnership.

3. Joint Venture Structuring

Two or more parties may engage in a joint venture or syndicate where they collaborate in a business venture. There is no specific statutory definition or regulatory scheme for joint ventures, at either the provincial or federal level, although they are not uncommon in certain industries such as construction and natural resources.

To help avoid the presumption that a partnership has been formed, the joint venture agreement should declare that a partnership is not intended. The agreement should also set out the scope of the venture and the method of control and decision-making. It should stipulate the rights and obligations of the participants and provide mechanisms for the settlement of disputes. Unlike a corporation, a joint venture is not a distinct legal entity. It cannot sue or be sued. Such rights and liabilities are attached to the entities involved in the joint venture.

4. Alternative Methods of Carrying on Business

4.1 Branch Office

Organizations with foreign ownership may conduct business in Canada through branch offices, so long as the *Investment Canada Act* and provincial registration and licensing requirements are complied with.

A branch office operates as an arm of the foreign business, which may enjoy tax advantages from such an arrangement. (See Section VI, “Tax”.) However, the foreign business’ liability for the debts and obligations incurred in its Canadian operations is not limited as it would be if the Canadian operations were conducted by a separate corporation (other than a British Columbia, Alberta or Nova Scotia unlimited liability corporation or company) of which the foreign business was the shareholder.

4.2 Agents and Distributors

As an initial step, a foreign enterprise may wish to offer its products or services in Canada by means of an independent agent or distributor. An agent usually would be given limited authority to solicit orders for acceptance at the foreign head office, and would not normally take title to the goods or provide services to the customer. A distributor, on the other hand, usually takes title to the goods and offers them for resale, either directly to the customer or through dealers or retailers. In both cases, the foreign enterprise will likely seek to avoid establishing a permanent establishment in Canada for tax purposes. (See Section VI, “Tax”.)

The relationship with an agent or distributor should be established by contract. Although provincial law does not generally prohibit the termination of an agent or distributor, the courts

will require reasonable notice to be given, or damages in place of notice, in the absence of an agreed contractual term for the relationship. The nature of the relationship should be reviewed to determine whether the arrangements are subject to franchise legislation.

4.3 Licensing

See Section IX, "Intellectual Property".

IV. TRADE AND INVESTMENT REGULATION

1. Competition Law

The *Competition Act* is Canada's antitrust legislation. It is legislation of general application. The Act reflects classical economic theory regarding efficient markets and maximization of consumer welfare. It is administered and enforced by the Competition Bureau, a federal investigative body headed by the Commissioner of Competition, Ms. Sheridan Scott. The Act may be conveniently divided into three principal areas: criminal offences, civilly reviewable conduct and merger regulation.

1.1 Criminal Offences

1.1.1 What business practices are subject to criminal liability?

The primary method of enforcing competition offences in Canada has historically been by way of criminal sanction under Part VI of the Act.

The conspiracy provisions prohibit agreements – formal or informal – that prevent, limit or lessen competition unduly. The penalty upon conviction is imprisonment for up to five years and/or a fine not exceeding C\$10 million per offence.

Other criminal provisions focus on a narrower spectrum of activities. These activities may include: illegal trade practices, such as price discrimination (the granting of discounts, rebates or other advantages to one purchaser which are not available to competing purchasers in respect of a sale of articles of like quality and quantity); predatory pricing (selling products at unreasonably low prices with the effect or intention of substantially lessening competition or eliminating a competitor); bid-rigging; pyramid selling schemes; deceptive telemarketing; double ticketing; price maintenance; and misleading advertising.

1.1.2 How are criminal offences prosecuted under the *Competition Act*?

The Commissioner, either on her own initiative or following a complaint from six resident Canadians, can initiate an investigation into a possible violation of the criminal provisions of the Act. At any time during her investigation, the Commissioner can refer the matter to the Director of Public Prosecution (DPP). The DPP is the only person who may initiate criminal proceedings under the Act. The DPP must satisfy a court beyond a reasonable doubt that an offence has been committed to obtain a conviction.

The Act also allows for a private right of action whereby any person who has suffered loss as a result of activity carried on in contravention of the criminal provisions can sue for damages in an amount equal to the loss together with costs. The constitutional validity of this provision has been upheld, and increasing numbers of parties are seeking to enforce this right.

It is important to note that, under the Act, a foreign competition authority that is a party to a mutual legal assistance treaty with Canada may request, subject to ministerial authorization, the assistance of the Commissioner to further its investigation — even where the conduct alleged as anti-competitive did not occur or have any effect in Canada. Evidence obtained by the Commissioner in a Canadian investigation may be provided to a foreign competition authority without the authorization of the party being investigated. The implications of these amendments are that (a) the Commissioner may conduct a search to obtain records located in Canada at the request of a foreign agency (after going through appropriate judicial channels to obtain a warrant) and (b) competitively sensitive information may be provided to foreign competition authorities without the owner's consent.

1.1.3 Recent enforcement action

Consistent with a global trend among competition authorities, the Commissioner has devoted substantial resources to enforcing the criminal conspiracy provisions of the Act, particularly so-called “hard core” cartels involving agreements between competitors to fix prices or allocate markets or customers between themselves. The single largest fine imposed thus far on a corporation is C\$48 million. Executives have also been fined and jail terms have been imposed for a period as long as one year.

1.2 What business practices will attract civil liability? What is the exposure to civil damages?

The Act establishes a private right of action for losses suffered as a result of another party's breach of any of the criminal provisions of Part VI the Act, or failure to comply with an order made pursuant to the Act. Unlike in the United States, this right limits the recoverable damages to losses that can be proven to have resulted from the violation of the Act or the failure to comply with the order in question. In addition to only allowing single damages, the relevant Canadian jurisprudence indicates that parties will not generally be able to recover other types of damages, such as punitive damages.

An unusual aspect of this provision is that it specifically provides that the “record of proceedings” in proceedings that resulted in either (i) the conviction for an offence under Part VI of the Act or (ii) for failure to comply with an order made under the Act, is *prima facie* proof of the alleged conduct in a civil action. Further, any evidence given in the prior proceedings as to the effects of the conduct in question “is evidence thereof” in the civil action.

1.3 What business practices may constitute civilly reviewable conduct and be subject to possible review before the Competition Tribunal?

Certain non-criminal conduct may be subject to investigation by the Competition Bureau and review by the Competition Tribunal. The Tribunal is a specialized body that is comprised of both judicial and lay members. Reviewable practices are not criminal and are not prohibited until made subject to an order of the Tribunal specific to the particular conduct and party. Matters reviewable by the Tribunal include anti-competitive refusals to deal, consignment selling, exclusive dealing, tied selling, market restrictions, abuse of dominant position and certain other “anti-competitive” acts. There is no penalty for past conduct; the Tribunal may, however, order a

person to do or cease doing a particular act in the future, and to otherwise take any other action necessary to fix the competitive harm, if it finds, on the civil standard of the balance of probabilities, that a person has engaged in the reviewable activity. There are criminal penalties for failure to comply with an order once it has been made.

Since 2002, private parties have the right to bring complaints directly to the Tribunal in relation to four areas: exclusive dealing, tied selling, refusal to deal and market restriction. Previously, the Commissioner was the only person who could bring reviewable trade practices before the Tribunal.

1.4 Merger Regulation

1.4.1 Under what circumstances will pre-merger notification be required?

All mergers are subject to the Act, and thus to the substantive review provisions described in paragraph 1.4.3 and to the enforcement procedures set out in paragraph 1.4.4 (mergers fall under the civilly reviewable matters provisions of the Act). Additionally, mergers that satisfy certain prescribed thresholds must be notified to the Competition Bureau, and certain statutory waiting periods must have expired (subject to certain exceptions), before a merger can be completed.

The thresholds applicable to merger transactions are as follows:

- ***Size of parties test:*** the parties to the transaction, together with their affiliates, must have assets in Canada, or gross revenues from sales in, from or into Canada, that exceed C\$400 million, *and*
- ***Size of transaction test:*** in respect of the target, the value of the assets in Canada, or gross revenues from sales in or from Canada from such assets, must exceed C\$50 million. In the case of an acquisition of a corporation or an unincorporated entity, as well as in the case of the formation of an unincorporated entity (e.g., joint venture), the assets and gross revenues are those of the corporation or entity and its affiliates being acquired. The threshold is increased to C\$70 million in the case of an amalgamation.
- ***Shareholding/Interest test:*** In addition to the above two threshold tests, the Act prescribes a shareholding/economic interest test that applies to the acquisition of an interest in a corporation or in an unincorporated entity. Regarding a corporation, in addition to the financial thresholds, there is an additional requirement that the acquirer and its affiliates must be acquiring more than 20% or 35% of the voting shares of a public or private corporation, respectively, or where the acquirer already owns such number of voting shares, where the acquirer acquires more than 50% of the voting shares of the corporation. In the case of an acquisition of an interest in an unincorporated entity, the test is similar to the above, except that the interest is based on the right to more than 35% of the profits or assets on dissolution, and if this level has already been exceeded, then more than 50%.

If all applicable thresholds are exceeded, the parties to the transaction are required to provide the Commissioner with prescribed information relating to the parties and their affiliates. The

obligation to notify is on both parties to a transaction and the statutory waiting period (described below) does not commence until the parties have submitted their respective notifications. However, in the case of a hostile bid, a provision exists to allow the Commissioner to require the target to provide its portion of the notification within a prescribed period. Where this provision applies, the statutory waiting period begins afresh when the bidding party submits its notification. A notification is subject to a filing fee of C\$50,000.

1.4.2 What are the notification procedures?

The notifying parties have the option to submit either a short-form or a long-form notification; the difference between the two notifications being the degree of information required. In the case of a short-form notification, the waiting period is 14 days following the day on which a complete notification was submitted, while in the case of a long-form notification that period is 42 days.

However, where a short-form notification is submitted, the Commissioner can, at any time prior to the expiration of the 14-day waiting period, request that the parties file a long-form notification. In this case, the clock is stopped and the 42-day waiting period begins when the parties submit their complete long-form notification.

Subject to the Commissioner seeking an injunction, the merging parties can complete their merger following the expiration of the statutory waiting period. In many cases, however, the parties will choose to wait until the Commissioner has completed her substantive assessment of the transaction (see paragraph 1.4.3).

In addition to, or in lieu of, filing a notification, the merging parties can request that the Commissioner issue an advance ruling certificate (ARC). An ARC can be issued, at the Commissioner's discretion, where she is satisfied that she does not have sufficient grounds upon which to challenge the merger before the Tribunal. In practice, an ARC is issued only in respect of mergers that do not raise any substantive concerns. The issuance of an ARC has two important benefits.

First, it exempts the parties from having to file a notification (where the Commissioner does not issue an ARC, the parties can apply to have the requirement to file the notification waived so long as substantially the same information was supplied with the ARC request). And second, it bars the Commissioner from later challenging the merger on the same facts upon which the ARC was issued. A filing fee of C\$50,000 (plus Goods and Services Tax (GST) and, in some provinces, Harmonized Sales Tax (HST)) applies to a request for an ARC. Only a single fee applies where both a request for an ARC and a notification have been submitted.

Where the Commissioner is not prepared to issue an ARC, but nevertheless determines that she does not have grounds upon which to initiate proceedings to challenge a proposed transaction, she will typically grant what is commonly referred to as a "no-action letter".

A substantial number of transactions close on the basis of a no-action letter. However, where an ARC has not been granted, the Commissioner retains the jurisdiction to challenge a transaction for up to three years after it has been substantially completed.

The Commissioner has issued guidelines setting out the Bureau's response time for ARC and no-action letter requests, as follows: 14 days where designated as "non-complex"; 10 weeks where designated as "complex"; and five months where designated as "very complex". These review periods are indicative rather than statutory.

1.4.3 What is the substantive test applicable to the review of mergers?

The substantive test applicable to a merger transaction is whether it will, or is likely to, substantially prevent or lessen competition in a relevant market. A market is defined on the basis of product and geographic dimensions. The Act provides that the factors relevant to assessing the competitive impact of a merger include the extent of foreign competition, whether the business being purchased has failed or is likely to fail, the extent to which acceptable substitutes are available, barriers to entry, whether effective competition would remain, whether a vigorous and effective competitor would be removed, the nature of change and innovation in a relevant market, and any other factor relevant to competition.

The Act also provides for an "efficiencies defence" under which a merger that prevents or lessens, or is likely to prevent or lessen, competition substantially in any market in Canada may proceed so long as the efficiency gains resulting from the merger will be greater than, and will offset, the anticipated anti-competitive effect.

1.4.4 What are the consequences if the Commissioner is concerned with a transaction?

If, in the course of reviewing a proposed merger, the Commissioner identifies areas in which she believes the transaction will substantially lessen or prevent competition, she will normally try to negotiate alterations to the transaction which address her concerns. These negotiations can be protracted. Prior to challenging a transaction before the Tribunal, the Commissioner may apply to the Tribunal for an order enjoining the parties from completing the transaction for a period not exceeding 30 days to permit the Commissioner to complete her inquiry. The Commissioner can apply for an extension of the period for an additional 30 days. If the Commissioner makes an application to the Tribunal challenging a proposed transaction, she may also apply for an interim order on such terms as the Tribunal deems appropriate.

Following the end of this period, the Commissioner can challenge the merger. There is precedent for the Competition Bureau permitting the parties to take up shares and enter into a "hold separate" agreement until the Tribunal process has run its course. Following its review, the Tribunal can either allow the merger to proceed or, in the case of a completed merger, it can order a purchaser to dispose of all or some assets or shares or take such other action as is acceptable to the merging parties and the Commissioner.

In practice there have been very few contested proceedings. In most cases where the Commissioner has expressed concerns, the parties have been able to agree upon a set of commitments that are mutually satisfactory to the merging parties and to the Commissioner.

1.5 Are any amendments to the law proposed or expected?

In July 2007, the Government of Canada established the Competition Policy Review Panel to review Canada's competition and foreign investment policies. In June 2008, the Competition Review Panel released its report, entitled *Compete to Win*. The Report sets out various recommendations directed to the government for making Canada more competitive in an increasingly global marketplace.

The Report, among other things, contains recommendations regarding potential amendments to, and the administration of, the *Competition Act*, including the following:

- The merger notification process under the *Competition Act* should be aligned with the merger review process in the United States. The initial review period should be set at 30 days, with a possible extension of a further 30 days following full compliance with a second request from the Commissioner of Competition for further information from the parties.
- The price discrimination, promotional allowances, and predatory pricing provisions of the *Competition Act* should be repealed.
- The existing conspiracy provisions should be repealed and replaced with a *per se* criminal offence to address hardcore cartels and a civil provision to deal with other types of agreements between competitors that have anti-competitive effects.
- The Competition Tribunal should be empowered to order an administrative monetary penalty of up to C\$5 million for violations of the abuse of dominance provisions.
- The Competition Bureau should reinforce its commitment to giving timely decisions, strengthen its economic analysis capabilities, give appropriate weight to the realities of the global marketplace and, where possible, provide "advance rulings" and other less formal advice to parties concerning prospective transactions and other arrangements on a timely basis.

The Report is not binding on the government. As at the preparation of this Chapter, the government has not indicated whether it will accept the Competition Policy Review Panel's recommendations, whether in whole or in part. Nevertheless, the Report is important to the extent that it may indicate future possible reform of the *Competition Act*.

2. General Rules on Foreign Investments

2.1 Are there special rules governing foreign investment?

The *Investment Canada Act* is a federal statute of broad application regulating investments in Canadian businesses by non-Canadians. Except with respect to certain sectors, the Investment Review Branch of Industry Canada (Investment Canada) administers the Act under the direction of the Minister of Industry. Investments by non-Canadians to acquire control over existing Canadian businesses or to establish new ones are either reviewable or notifiable under the Act.

The rules relating to an acquisition of control and whether an investor is a “Canadian” are complex and comprehensive.

A “direct acquisition” for the purpose of the *Investment Canada Act* is the acquisition of a Canadian business by virtue of the acquisition of all or substantially all of its assets or a majority (or, in some cases, one-third or more) of the shares or voting interests of the entity carrying on the business in Canada. Subject to certain exceptions discussed below, a direct acquisition is reviewable where the value of the acquired assets is C\$5 million or more.

An “indirect acquisition” for the purpose of the *Investment Canada Act* is the acquisition of control of a Canadian business by virtue of the acquisition of a non-Canadian parent entity. Subject to certain exceptions discussed below, an indirect acquisition is reviewable where (a) the value of the Canadian assets is less than or equal to 50% of the value of all the assets acquired in the transaction *and* the value of the Canadian assets is C\$50 million or more, or (b) the value of the Canadian assets is greater than 50% of the value of all the assets acquired in the transaction *and* the value of the Canadian assets is C\$5 million or more.

The acquisition of control of an existing Canadian business or the establishment of a new one may also be reviewable, regardless of asset values, if it falls within a prescribed business activity related to Canada’s cultural heritage or national identity. In such case, the federal government, acting through the Cabinet of Ministers of the governing party, has 21 days from the date in which a notification is filed to determine whether it is in the “public interest” to review the investment.

Transactions involving business activities relating to Canada’s cultural heritage or national identity (i.e., publishing, film, video, music and broadcasting) fall under the jurisdiction of the Department of Canadian Heritage.

2.2 How are WTO members treated differently?

The *Investment Canada Act* reflects commitments made by Canada as a member of the World Trade Organization. In the case of a direct acquisition by or from a (non-Canadian) “WTO investor” (that is, an investor controlled by persons who are residents of WTO member countries), the threshold is significantly larger, and is adjusted for inflation each year. The 2008 threshold is C\$295 million. Other than the exception noted below, an indirect acquisition involving a WTO investor (either on the basis that the investor qualifies as a WTO investor or the Canadian business is controlled by a WTO investor that is not a Canadian) is not reviewable by Investment Canada (however, a simple notification must be filed).

Where the Canadian business being acquired is involved, in whole or in part, in certain “sensitive” sectors of the Canadian economy (i.e., cultural businesses, transportation services, financial services and uranium production or ownership of uranium producing properties), WTO investors do not benefit from the higher thresholds nor the exemption for acquisitions of non-Canadian parents.

2.3 If a review is required, what is the process?

Subject to a few narrow exceptions, a reviewable transaction may not be completed unless the investment has been reviewed and the relevant Minister is satisfied that the investment is likely

to be of “net benefit to Canada”. The non-Canadian proposing the investment must make an application to Investment Canada setting out particulars of the proposed transaction. There is then an initial waiting period of up to 45 days; the Minister may unilaterally extend the period for up to 30 days and then only with the consent of the investor (although in effect this can be an indefinite period since, with a few exceptions, the investor cannot acquire the Canadian business until it has received, or is deemed to have received, the Minister’s “net benefit to Canada” decision). If the waiting period is not renewed and the transaction is not expressly rejected, the Minister is deemed to be satisfied that the investment is likely to be of net benefit to Canada. The investor may close a direct acquisition only after the Minister has approved, or is deemed to have approved, the investment. Failure to comply with these rules opens the investor to enforcement proceedings that can result in fines of up to C\$10,000 per day.

Although on its face the regime seems harsh, relatively few investments have proved to be problematic since the legislation was enacted in 1985. The one recent notable exception was the decision by the Minister of Industry, issued on May 8, 2008, to block U.S.-based Alliant Techsystems Inc.’s (“Alliant”) proposed acquisition of the information systems and geospatial services business of MacDonald, Dettwiler and Associates Ltd. (“MDA”), a Canadian business. The decision marked the first time that, in relation to a non-“cultural business”, the Canadian government blocked an acquisition under the *Investment Canada Act*. The facts in that case were unique in that the review involved national security related concerns (albeit that the Minister’s actual reasons for refusing to approve the proposed investment are not public); it remains to be seen whether the decision will have broader implications for future reviews.

The principal practical negative effects of a review are the reality of delay and negotiation. It is often difficult to get the Minister’s approval before the expiration of the initial 45-day period. In addition, the Minister will usually seek undertakings regarding levels of employment, product mandates and the like, as a condition of approval. These undertakings are discussed in more detail below.

As stated above, with respect to business activities involving Canada’s cultural heritage or national identity, the above process is followed; however, in this case, it is the Minister of Canadian Heritage rather than the Minister of Industry who has responsibility (although both Ministers can be involved in the review where only part of the business activities of the Canadian business involve Canada’s cultural heritage or national identity).

Finally, as noted, there are a few limited circumstances where a proposed acquisition can be completed and the application for review filed thereafter. The most common situation where this may be permissible is in respect of an indirect acquisition where the Canadian business is engaged in any of the above described “sensitive” sectors of the Canadian economy. In such case, the application can be filed within 30-days of closing. Otherwise, the review is identical to the process that takes place in the context of a pre-closing review.

2.4 What is required for an investment to be of “net benefit to Canada”?

The *Investment Canada Act* requires the relevant Minister to take these factors into account, where relevant, when determining if an investment is likely to be of “net benefit to Canada”:

- The effect of the investment on the level and nature of economic activity in Canada, including, without limiting the generality of the foregoing, the effect on employment on resource processing, on the utilization of parts, components and services produced in Canada and on exports from Canada
- The degree and significance of participation by Canadians in the Canadian business and in any industry or industries in Canada of which the Canadian business forms a part
- The effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada
- The effect of the investment on competition within any industry or industries in Canada
- The compatibility of the investment with national industrial, economic and cultural policies, taking into consideration industrial, economic and cultural policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the investment
- The contribution of the investment to Canada's ability to compete in world markets.

Typically, during the 45-day period, the investor will negotiate with Investment Canada and/or Canadian Heritage a suitable set of undertakings to be provided in connection with the Minister's approval of the transaction. These undertakings comprise commitments by the investor concerning its operation of the Canadian business following the completion of the transaction. Additionally, the government has issued guidelines that apply to so-called State-owned Enterprises (i.e., enterprises that are owned or controlled directly or indirectly by a foreign government) whereby such Enterprises may be subject to certain additional obligations designed to ensure that their governance is in line with Canadian standards and that the Canadian businesses that they acquire maintain a commercial orientation.

Commitments provided to the Minister by a foreign investor may, among other things, obligate the investor to keep the head office of the Canadian business in Canada, ensure that a majority of senior management of the Canadian business is comprised of Canadians, maintain certain employment levels, make specified capital expenditures and conduct research and development activities based on specified budgets, and make a certain level of charitable contributions, all over a period of usually three years. According to guidelines established by Investment Canada, these undertakings will be reviewed by Investment Canada or Canadian Heritage, as the case may be, on a 12- to 18-month basis for up to three to five years in the ordinary course to confirm the investor's performance.

2.5 Are there any requirements for investments that are not "reviewable"?

If the acquisition of an existing business or the establishment of a new business is not reviewable, the investment will be "notifiable". Notification requires the non-Canadian investor to provide limited information on the identity of the parties to the transaction, the number of employees of the business in question, and the value of its assets. Notification may be given to Investment Canada before or within 30 days after the closing of the transaction.

2.6 Are there other statutes that regulate foreign investments in particular sectors?

In addition to the *Investment Canada Act*, other federal statutes regulate and restrict foreign investment in specialized industries and sectors, such as telecommunications, broadcasting, newspapers, rail and air transportation and financial institutions.

2.7 Are any amendments to the law proposed or expected?

In July 2007, the Government of Canada established the Competition Policy Review Panel to review Canada's competition and foreign investment policies. In June 2008, the Competition Review Panel released its report, entitled *Compete to Win*. The Report sets out various recommendations directed to the government for making Canada more competitive in an increasingly global marketplace.

The Competition Panel Report, among other things, contains recommendations regarding potential amendments to, and the administration of, the *Investment Canada Act*, including the following:

- The general threshold for the review of foreign investments should be increased from C\$295 million to C\$1 billion, with the exception of investments involving cultural businesses.
- The applicable review standard should be changed and the onus in the review process should be reversed. Specifically, investors should no longer be required to demonstrate that their investments are likely to be of "net benefit to Canada". Instead, the responsible Minister should be entitled to block investments only where the Minister determines that such investments would be contrary to Canada's national interest.
- The Competition Review Panel supports the federal government's statements regarding the creation of a new review requirement for transactions that raise "national security" concerns.
- The Minister of Industry and the Minister of Canadian Heritage should increase the use of guidelines and other advisory materials to provide information to the public regarding the review process, the basis for making decisions under the *Investment Canada Act*, and interpretations by Industry Canada and the Department of Canadian Heritage regarding the application of the *Investment Canada Act*.

The Report is not binding on the government. As at the preparation of this Chapter, the government has not indicated whether it will accept the Competition Policy Review Panel's recommendations, whether in whole or in part. Nevertheless, the Report is important to the extent that it may indicate future possible reform of the *Investment Canada Act*.

3. International Trade Agreements

3.1 Trade Agreements as a Constitution for International Business Regulation

The International Trade Agreements to which Canada is party act like a constitution, placing limits on the laws, regulations, procedures, decisions, and actions that all levels of government and their agents may undertake. While these agreements do not automatically invalidate laws that breach their obligations, they all provide sanctions for non-compliance. Canada is a champion of international trade rules and has a good record of complying with them. As a result, these agreements are invaluable tools for challenging government decisions, influencing specific policies and improving market access in Canada and abroad.

3.2 Key Principles of Trade Agreements

The guiding principle of all trade agreements is non-discrimination. This general principle is enforced through a number of specific rules that appear in most trade agreements with varying degrees of force. The underlying rationale is that discriminating between the goods, investments, persons, or services of different countries distorts trade and results in a less efficient utilization of resources and comparative advantages, ultimately to the detriment of all.

The two most prevalent rules are most favoured nation (MFN) and national treatment. MFN treatment prohibits discriminating in the treatment accorded to goods, persons, or companies, as the case may be, of other parties to the agreement. For instance, MFN treatment requires that Canada must give as favourable a duty rate to imports from the European Union as from Brazil. National treatment prohibits giving more favourable treatment to domestic persons, investments, services or goods than is offered to persons, investments, services or goods from other countries. It does not require treating them the same as nationals, so long as the treatment is as favourable.

There are many more rules that address more subtle or specific forms of discriminatory and trade-distorting practices. Some of these are explained in the discussion of specific trade agreements below.

3.3 Using Trade Agreements as Business Tools

Historically, trade agreements focussed on reducing tariffs, which are the most obvious form of trade discrimination in which a country imposes a “tax” only on imported goods. As trade negotiations have succeeded in reducing tariffs other, often more subtle, trade barriers have grown in importance. These non-tariff barriers can include all manner of domestic regulation such as labelling, environmental, and even food safety requirements that directly or indirectly affect the import, export and sale of goods, foreign direct investment, and the ability of companies to move people across borders to provide a service.

Today, these domestic regulations, policies and programs can interfere significantly with business operations. Canada’s trade obligations under the various agreements to which it is a party offer the business community effective tools for responding to these obstacles. Some

agreements, like the NAFTA, provide investors with a direct means of challenging barriers to establishing, acquiring or managing a Canadian company. All the agreements can be effectively used to respond to identified obstacles. This is particularly true in Canada, a strong advocate of multilateral trade rules that seeks to ensure that the development of new laws or the application of current regulations are consistent with international trade law obligations.

International trade agreements are a relatively new business tool. Identifying how trade obligations can be leveraged into the achievement of strategic business objectives is a subtle and specialized skill that can help realize the market opportunities available to those industry players who fully exploit these cutting-edge legal tools.

3.4 Canada's Trade Agreements

Canada is a party to many trade agreements including the World Trade Organization (WTO) Agreements, the North American Free Trade Agreement (NAFTA), the Canada-Israel Free Trade Agreement, the Canada-Chile Free Trade Agreement, the Canada-EFTA Free Trade Agreement, the Canada-Costa Rica Free Trade Agreement, the Canada-Peru Free Trade Agreement and numerous bilateral investment treaties (BITs) with countries around the globe. The list of countries with which Canada enjoys trade agreements continues to expand through ongoing negotiations.

3.4.1 WTO Agreements

Canada is a member of the WTO and has committed to respect the rules of the many Agreements adopted by WTO members, effective January 1, 1995. These agreements cover a wide spectrum of industries and issues and, generally, impose detailed obligations.

The current round of multilateral negotiations, commonly known as the Doha round and aimed at strengthening the rules of the WTO agreements, remains stalled largely as a result of differences between the Member states on measures relating to agricultural products. Nevertheless, the WTO Agreements continue to apply and impose rules governing the laws, regulations and practices of member countries that affect trade in goods or services.

WTO disputes may be litigated only by WTO Member governments and the WTO provides for a detailed dispute resolution process. Complainants are required to first consult with the responding country before requesting the establishment of a three-member WTO panel. That panel establishes a schedule for the filing of documents and presentation of evidence and argument at a hearing. After the release of the panel report, either party may appeal the decision to the WTO Appellate Body. If the complainant succeeds, the responding Member is given a time frame within which to comply with the ruling and make any necessary changes to their laws or programs. If they fail to do so, the WTO can authorize the complaining party to take retaliatory measures. These usually involve the imposition of duties on products imported from the unsuccessful country. Often the duties will be imposed on products entirely unrelated to the subject matter of the dispute.

The WTO Agreements include the following:

3.4.1.1 General Agreement on Tariffs and Trade (GATT)

The grandfather of trade agreements, the GATT came into force in 1947 and imposes disciplines on trade in goods generally. Through successive rounds of negotiations, the GATT has substantially reduced tariffs over the past six decades. The GATT imposes obligations on countries whose regulations impact the treatment of foreign goods including MFN and national treatment, as well as disciplines relating to subsidies, quantitative restrictions (quotas) and anti-dumping duties. The rules in many of these areas have been supplemented by more specific agreements that came into force with the creation of the WTO in 1995.

3.4.1.2 General Agreement on Trade in Services (GATS)

The GATS imposes rules for the regulation of trade in services. Services are regulated according to the classification of the service and the manner in which the service is delivered: provided across borders, consumed across a border, provided in a foreign country through a commercial presence or provided in a foreign country through the presence of natural persons.

Services rules are a new concept compared with rules on goods and this is reflected in the resulting disciplines. While services rules are not as comprehensive as those governing goods, Members are generally obliged to provide MFN treatment to other countries' services providers and are required to grant access to the services market and national treatment in those services sectors that they have listed in a schedule.

3.4.1.3 Agreement on Subsidies and Countervailing Measures (ASCM)

The ASCM expands on the disciplines of the GATT, prohibiting subsidies that are granted on the express or implied condition that the resulting products be exported, while creating a cause of action for other subsidies that cause "adverse effects" to another Member's industry. The prohibition of export subsidies has evolved into one of the WTO's most powerful and frequently litigated disciplines.

3.4.1.4 Agreement on Agriculture

The Agriculture Agreement recognizes the special importance of agricultural products by providing a separate set of rules for this sector. One of the key aims of the Agreement was to transform the multitude of trade barriers in the agricultural sector to tariff barriers, which are far more visible and are more easily liberalized over time than non-tariff barriers. The Agreement also provides special rules for subsidies in the agriculture sector which have significant implications for Canada's regulation of agricultural commodities, such as wheat and dairy products, and access to these markets. Agriculture, including market access and agricultural subsidies, is a key sticking point at the current round of WTO talks.

3.4.1.5 Agreement on Sanitary and Phyto-Sanitary Measures (SPS Agreement)

The SPS Agreement seeks to ensure that laws passed to protect human, animal or plant health are not used as disguised restrictions on trade. They require that such measures be based on sound science and distort trade as little as necessary to achieve their objectives.

3.4.1.6 Agreement on Technical Barriers to Trade (TBT Agreement)

The TBT Agreement is designed to ensure that technical regulations, such as labelling requirements, are applied in a non-discriminatory fashion and are not used as a disguised barrier to trade. This underutilized agreement has the potential to be a powerful tool for improving market access for products spanning all industries.

3.4.1.7 Anti-Dumping Agreement

The WTO permits Members to levy dumping duties on products imported at unfairly low prices if the imports are causing or threatening to cause material injury to the domestic industry. The Anti-Dumping Agreement imposes rules on how a Member conducts anti-dumping investigations, both substantively and procedurally. Both the Canadian International Trade Tribunal and the Canada Border Services Agency are required to act in accordance with this agreement, making it an important tool for regulating Canadian trade remedy regulators.

3.4.1.8 Safeguards Agreement

Safeguards are extraordinary measures a country may use to protect a domestic industry against unanticipated surges in imports, even though the imports are not being unfairly traded. Because safeguards are not used to counter unfair trade practices, the WTO places strict limits on when they may be used.

3.4.1.9 Trade-Related Investment Measures Agreement (TRIMs)

The TRIMs Agreement provides a limited set of rules for laws, regulations and programs relating to investment. The TRIMs sets out an illustrative list of impermissible trade-related investment measures including local content, trade balancing, import-substitution, foreign-exchange and export-limitation requirements. These rules apply only in respect of trade in goods.

3.4.1.10 Agreement on Government Procurement (AGP)

The AGP imposes disciplines on the procurement practices of listed government entities. The AGP imposes obligations on Canadian federal government entities and sets out certain rules to which Canadian bidders can expect to benefit from when bidding on procurements by covered entities of other countries that are parties to the AGP.

3.4.2 NAFTA

The NAFTA is a regional free trade agreement between Canada, the United States and Mexico. The NAFTA has essentially eliminated duties on trade between the three countries. The preferential treatment granted to the other NAFTA parties' goods and services would violate Canada's MFN obligations to other WTO Members but for an exception for this type

of agreement. The NAFTA also imposes similar rules to those found in the WTO Agreements and, in some cases, are more comprehensive. Aside from differences in tariffs, the biggest differences between the WTO and NAFTA agreements are in respect of investment and services rules.

3.4.2.1 *NAFTA Investment Rules*

NAFTA Chapter 11 provides rules relating to the treatment of investments and investors of other NAFTA Parties. These rules are more detailed than those provided for in the WTO's TRIMs Agreement. Most importantly, the NAFTA enables aggrieved foreign NAFTA investors to submit a claim for damages against the country complained of without any approval or involvement of the investor's government.

Claims can only be brought against the government of another NAFTA Party; an investor cannot complain of its own government's actions. Either party may seek judicial review of the arbitration panel's decision.

NAFTA Chapter 11 extends national and MFN treatment to investors and investments of another NAFTA Party so that laws, regulations and government actions cannot discriminate between investors of any of the three countries. Chapter 11 also enables investors to make claims that government measures have effectively expropriated their investment. These claims may recoup the value of the expropriated investment, including lost profits.

To pursue a claim under NAFTA Chapter 11, the investor or company involved typically must be incorporated in one of the NAFTA countries. NAFTA investors may, however, bring claims for damages to their investment. Accordingly, for example, a U.S. investor in a European company operating in a NAFTA country may submit a claim for damages to the investment, i.e., the shares of the company. That damage would typically take the form of a drop in share price or the suppression of anticipated increases in share price. Such an investor could not stand in the shoes of the company itself unless the investor is a controlling shareholder, as the company would not be considered an investment of a NAFTA investor.

3.4.2.2 *NAFTA Services Rules*

Both the NAFTA and the GATS discipline services, but they do so in different ways. Under the NAFTA, U.S. and Mexican service providers must be extended national treatment in all service sectors, except those specifically excluded (under the GATS, national treatment is extended only in those service sectors specifically included). This means that each country must accord to service providers of another NAFTA country treatment no less favourable than it accords to its own service providers. No local presence is required to provide a service cross-border. NAFTA countries must also ensure that licensing and regulations relate principally to competence or ability and do not have the purpose or effect of discriminating against nationals of another NAFTA country. NAFTA countries can maintain existing restrictions on cross-border services where such restrictions have been listed in an annex to the Agreement.

NAFTA also eases restrictions on the entry of "business persons" for the purposes of providing marketing, training, and before and after sales and service for their products and services. For details, see Section XIII, "Immigration Law".

3.4.3 Free Trade Agreements (FTAs)

FTAs generally provide for preferential tariff rates on imported goods and services and enhanced market access to goods and services of the member parties. Such agreements may also provide for protection such as MFN and national treatment. FTAs may go beyond the scope and extent of coverage of the WTO Agreements. Moreover, FTAs may cover areas not addressed by WTO Agreements, such as protection of investments and investors. FTAs generally provide for dispute settlement mechanisms.

Canada has entered into FTAs with a number of countries apart from the U.S. and Mexico (the NAFTA countries), including: Costa Rica, Chile and Israel. In 2008, after a long gap, Canada announced the signing of FTAs with Peru and the European Free Trade Agreement (EFTA) countries (Iceland, Norway, Switzerland and Liechtenstein). In addition, in 2008, Canada announced the conclusion of negotiations for an FTA with each of Colombia and Jordan. The next steps before the FTAs with Colombia and Jordan come into force involve a legal review of the negotiated texts, signature by the parties and ratification by the legislative bodies of the parties. Canada is also in the process of negotiations for FTAs with a number of other countries including Korea, Singapore, Panama, the Dominican Republic and the Caribbean Community countries.

3.4.4 Foreign Investment Protection Agreements (FIPAs)

A Foreign Investment Promotion and Protection Agreement is a bilateral agreement aimed at protecting and promoting foreign investment through legally-binding rights and obligations. FIPAs accomplish their objectives by setting out the respective rights and obligations of the countries that are signatories to the treaty with respect to the treatment of foreign investment.

Typically, there are agreed exceptions to the obligations. FIPAs seek to ensure that foreign investors will not be treated worse than similarly situated domestic investors or other foreign investors; they will not have their investments expropriated without prompt and adequate compensation; and, in any case, they will not be subject to treatment lower than the minimum standard established in customary international law.

As well, in most circumstances, investors should be free to invest capital and repatriate their investments and returns.

Canada began negotiating FIPAs in 1989 to secure investment liberalisation and protection commitments on the basis of a model agreement developed under the auspices of the OECD (Organization for Economic Co-operation and Development). In 2003, Canada updated its FIPA model to reflect and incorporate the results of its experience with the implementation and operation of the investment chapter of the NAFTA. It provides for a high standard of investment protection and incorporates several key principles: treatment that is non-discriminatory and that meets a minimum standard; protection against expropriation without compensation and restraints on the transfer of funds; transparency of measures affecting investment; and dispute settlement procedures. The new model serves as a template for Canada in discussions with investment partners on bilateral investment rules. As a template, the provisions contained therein remain subject to negotiation and further refinement by negotiating parties. Thus, although all FIPAs can be expected to follow this approach, it is unlikely that any two agreements will be identical.

Currently, Canada has FIPAs with 22 countries including Russia, Poland, Venezuela, Argentina, Barbados and Costa Rica, and is in negotiations with a number of countries including China. In June 2007, Canada announced the conclusion of negotiations for FIPAs with India and Jordan.

3.4.5 Agreement on Internal Trade (AIT)

Although not an international agreement, the Agreement on Internal Trade is an agreement among the federal, provincial, and territorial governments designed to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services, and investment within Canada and to establish an open, efficient, and stable domestic market. In this regard, the AIT seeks to reduce extra costs to Canadian businesses by making internal trade more efficient, increasing market access for Canadian companies and facilitating work mobility for tradespeople and professionals. Parties to the AIT operate, in the inter-provincial context, according to the core principles of:

- Non-discrimination (establishing equal treatment for all Canadian persons, goods, services and investments)
- Right of entry and exit (prohibiting measures that restrict the movement of persons, goods, services or investments across provincial or territorial boundaries)
- No obstacles (ensuring provincial/territorial government policies and practices do not create obstacles to trade)
- Legitimate objectives (ensuring provincial/territorial non-trade objectives which may cause some deviation from the above guidelines have a minimal adverse impact on inter-provincial trade)
- Reconciliation (providing the basis for eliminating trade barriers caused by differences in standards and regulations across Canada)
- Transparency (ensuring information is accessible to interested businesses, individuals and governments).

The AIT also features a formal dispute settlement mechanism to deal with complaints.

3.4.6 Trade, Investment and Labour Mobility Agreement (TILMA)

While not an international agreement, the TILMA entered into between the governments of Alberta and British Columbia that came into effect on April 1, 2007 is an agreement designed to remove barriers to trade, investment and labour mobility between the two provinces. The two provinces are also in negotiations and consultations to expand the TILMA to cover financial services, Crown corporations, municipalities, and publicly-funded academic and health entities. In the 2007 Federal Budget, the federal government expressed its interest in examining how TILMAs can be applied to reduce trade barriers across Canada.

The TILMA is seen as a step beyond the AIT and aims to remove barriers across all economic sectors. The TILMA applies to all government measures (e.g., legislation, regulations, standards, policies, procedures, guidelines, etc.) affecting trade, investment and labour mobility. Certain special provisions have been established for some sectors, such as for investment, business subsidiaries, labour mobility, procurement, energy and transportation.

There are also a limited number of sectors that have been excluded from the coverage of the TILMA, such as water, taxation, social policy, and renewable and alternate energy.

3.5 Importing Goods into Canada

The importation of goods into Canada is regulated by the federal government. In this connection, the principal customs laws of Canada are found in the *Customs Tariff* and the *Customs Act*. The *Customs Tariff* imposes tariffs on imported goods, while the *Customs Act* sets out the procedures that importers must follow when importing goods, and specifies how customs duties payable on imported goods are to be calculated and remitted to the relevant governmental authority.

Under NAFTA, barriers to trade in goods between Canada, the U.S. and Mexico have largely been removed. Tariffs between Canada and the United States have generally been eliminated since January 1, 1998. In the case of Mexico, tariffs on most goods were eliminated by January 1, 2003.

In order for goods to be eligible to take advantage of NAFTA, they must satisfy “rules of origin” which require a certain level of North American value-added. These rules are sophisticated and are based on changes in tariff classification and/or regional value content, the latter being calculated by either transaction value or the net cost method. Goods not meeting these requirements will remain subject to Canadian, U.S. or Mexican tariffs. These rules do not depend on the ownership of the business, and thus foreign-owned Canadian companies can take full advantage of the liberalized rules. In the case of services, the provisions of NAFTA are generally open to enterprises of other NAFTA members, even if controlled by non-NAFTA nationals, so long as the enterprise has some substantive business activities (i.e., is not merely a shell).

Following is a more detailed discussion of the steps involved in importing goods and the relevant laws applicable.

3.5.1 Tariff Classification

All goods imported into Canada are subject to the provisions of Canada’s customs laws, including the provisions of the *Customs Act* and the *Customs Tariff*. To determine the rate of duty, if any, applicable on the imported goods, the goods must be classified among the various tariff items set out in the List of Tariff Provisions of the *Customs Tariff*. Canada is a signatory to the *Harmonized Commodity Description and Coding System*, to which the United States is also a party; therefore, tariff classifications up to the sixth digit should be identical between Canada and the United States.

3.5.2 Tariff Treatment

Once the tariff classification of imported goods is determined, the List of Tariff Provisions indicates opposite each tariff classification the various tariff treatments available in respect of the goods, depending on their country of origin. For instance, where no preferential tariff treatment is claimed, the Most Favoured Nation (MFN) tariff treatment applies.

However, as a result of Canada's participation in several bilateral, plurilateral and multilateral trade agreements in recent years, various preferential tariff treatments are available to goods from certain countries. For example, all customs duties on goods originating in the U.S.A. have been eliminated pursuant to NAFTA.

There are similar reductions in Canada's other FTAs. The General Preferential Tariff treatment provides partial duty relief to goods originating in certain developing countries, including China and India. To claim one of the preferential rates of duty, the importer must establish that the goods qualify for the claimed treatment pursuant to the relevant rules of origin and that proper proof of origin is obtained, usually from the exporter.

3.5.3 How are tariffs calculated?

The amount of customs duties payable on any importation is a function of the rate of duty (as determined above) and the valuation of the goods. This is because most of Canada's tariff rates are imposed on an *ad valorem* (or percentage) basis. In Canada, the primary method for customs valuation is the "transaction value" system, under which the value for duty is the price paid for the goods when sold for export to a purchaser in Canada, subject to specified adjustments. A non-resident may qualify as a "purchaser in Canada" where the non-resident imports goods for its own use and not for resale, or for resale if the non-resident has not entered into an agreement to sell the goods prior to its acquisition from the foreign seller. Otherwise, customs value will be based on the sale price charged by the non-resident seller to the customer who is resident, or who has a permanent establishment, in Canada. The transaction value method may not be available in certain other circumstances, such as where the buyer and seller do not deal at arm's length. In that event, other valuation methods will be considered in the following order: (1) transaction value of identical goods; (2) transaction value of similar goods; (3) deductive value; (4) computed value; and (5) residual method.

The transaction value method, if applicable, begins with the sale price charged to the purchaser in Canada. However, the customs value is determined by considering certain statutory additions, as well as permitted deductions. For instance, selling commissions, assists, royalties, and subsequent proceeds must be added to arrive at the customs value of the goods. The value of post-importation services may be deducted from the customs value of the goods.

If the importer's goods originate primarily from suppliers with whom the importer is related and the importer wishes to use the transaction value method of valuation, the importer is frequently requested to demonstrate that the relationship did not influence the transfer price between the importer and the vendor. In such a situation, documentation may be required to establish that the transfer price was acceptable as the transaction value.

3.5.4 How are tariffs assessed?

Canada has a self-assessment customs system. This means that importers and their authorized agents are responsible for declaring and paying customs duties on imported goods. In addition, as a result of recent changes to the *Customs Act*, importers are required to report any errors made in their declarations of tariff classification, valuation or origin when they have "reason to believe" that an error has been made. This obligation lasts for four years following the importation of any goods. The Act imposes severe penalties for non-

compliance with this and other provisions, up to C\$25,000 per occurrence for listed instances for non-compliance.

3.5.5 What penalties are imposed for non-compliance with customs laws?

Where a person has failed to comply with the provisions of the *Customs Act*, the Canada Customs and Revenue Agency is authorized to take several enforcement measures, including seizures, ascertained forfeitures, or the imposition of AMPS.

Seizures and ascertained forfeitures are applied to the more serious offences under the *Customs Act*, such as intentional non-compliance, evasion of customs duties, and smuggling.

Since October 7, 2002, importers are liable for penalties of up to C\$25,000 per contravention in accordance with the customs administrative monetary penalty system (AMPS). Under the AMPS, a Master Penalty Document lists over 230 different contraventions for which importers are liable for penalties ranging from a warning, flat rate amount, or amount based on the value of the goods in question. In addition, the penalties are increased for repeat offenders. The Canada Border Services Agency maintains a “compliance history” for each importer. Each contravention is included on the importer’s compliance history and is purged after one year and in some cases after three years.

3.5.6 Does Canada require “country of origin” markings on imports?

In accordance with regulations made pursuant to the *Customs Tariff*, certain goods to be imported into Canada must be marked with their country of origin. The regulations set out a list of all imported goods that require country of origin marking. If particular goods are not included in the list, no country of origin marking is required. There are two sets of regulations that are applicable depending on the place of shipment of goods intended for importation into Canada. In the case of goods imported from a NAFTA country, the relevant regulations base the determination of origin on the basis of tariff shift rules, which are in turn dependent on the tariff classification of components and the finished product. In the case of goods imported from any country other than a NAFTA country, the country of origin is the country in which the goods were “substantially manufactured”.

3.6 Domestic Trade Remedy Actions

3.6.1 Anti-dumping and Anti-Subsidy Investigations?

The *Special Import Measures Act* (SIMA) contains measures designed to protect businesses in Canada from material injury due to unfair import competition. SIMA’s provisions are based on Canada’s rights and obligations set out in the various WTO agreements.

The SIMA allows Canadian producers to file a complaint against unfairly traded imports and to request relief in the form of anti-dumping or countervailing duties where material injury or retardation results from (1) imports that are “dumped” (i.e., sold at lower prices in Canada than in the exporter’s home market) or (2) imports that are unfairly subsidized by the government of the exporter’s country.

Canada's trade remedy regime establishes a bifurcated process under which the Canada Border Services Agency (CBSA) has jurisdiction over determinations of dumping and subsidization and the Canadian International Trade Tribunal (CITT) enquires into and considers the issue of whether any dumping or subsidization is causing or is likely to cause material injury to the affected Canadian industry.

If the CITT makes a preliminary determination of injury, and the CBSA makes preliminary and final determinations of dumping or subsidization by the CBSA, the CITT goes on to consider whether there is "material injury". If the CITT makes a finding of material injury, an anti-dumping duty (equal to the margin of dumping found by the CBSA) or a countervailing duty (equal to the margin of subsidization found by the CBSA) will be imposed on all importations of the subject goods for a period of five years. During this time, the CBSA may initiate re-investigations to update the margin of dumping or subsidization, as the case may be, and the CITT may review its finding if the circumstances warrant. At the expiry of the five-year period, the CITT may review its finding and may rescind or continue the finding for an additional period of five years (with no limit on the number of continuation orders permissible).

NAFTA permits an alternative to appeals to the Federal Court in connection with appeals from final determinations of dumping and material injury findings. A final determination of the CBSA or CITT is subject to judicial review by the Federal Court of Appeal. Alternatively, under NAFTA, where the dumping/subsidy investigation involves U.S. or Mexican goods, an aggrieved party may choose to request a review of the CBSA or CITT finding by a NAFTA *ad hoc* panel of trade law experts.

3.6.2 Safeguard and Market Disruption Investigations

The SIMA applies only in the case of unfairly traded (i.e., dumped or subsidized) imports that are causing material injury to a Canadian industry. However, the *Canadian International Trade Tribunal Act* and the *Customs Tariff* provide for a trade remedy in the case of fairly traded goods which nevertheless are causing or threatening to cause "serious injury" to a Canadian industry. These are called "safeguard" actions. In such cases, the CITT may hold an inquiry and may make recommendations to the Minister of Finance. The Minister of Finance is authorized, in appropriate cases, to take certain safeguard actions against such imports, including imposing surtaxes or quotas for a limited time.

Until 2013, Canadian manufacturers may also request that the Canadian government impose special market disruption duties against fairly traded imports of Chinese goods that are causing "market disruption". This time-limited remedy was a condition of China's accession to the WTO. "Market disruption" is defined as "a rapid increase in the importation of goods that are like or directly competitive with goods produced by a domestic industry, in absolute terms or relative to the production of those goods by a domestic industry, so as to be a significant cause of material injury, or threat of material injury, to the domestic industry".

These investigations are conducted by the CITT in much the same manner as safeguard investigations.

3.7 Procurement (Government Contracts) Review

The *North American Free Trade Agreement* (NAFTA), the *Agreement on Internal Trade* (AIT) and the *World Trade Organization Agreement on Government Procurement* (AGP) require the signatories to the agreements to provide open access to government procurement for certain goods and services. These agreements also require signatory governments to maintain an independent bid challenge (complaint) authority to receive complaints regarding the federal government procurement process. The *Canadian International Trade Tribunal Act* establishes the Tribunal as the complaint authority for Canada. The Tribunal is an independent administrative tribunal operating within Canada's trade remedies system. It is a quasi-judicial body that reports to Parliament through the Minister of Finance.

Parliament has enacted legislation designed to ensure that the procurements covered by NAFTA, the AIT or the AGP are conducted in an open, fair and transparent manner and, wherever possible, in a way that maximizes competition. While there is considerable overlap in the scope and coverage of procurements covered by these international agreements, several areas have significant differences. The most notable differences between the agreements are the goods and services that they include and the minimum monetary thresholds for goods, services and construction services contracts. These monetary thresholds are subject to periodic review.

The federal government has agreed to provide potential suppliers equal access to federal government procurement for contracts involving certain goods and services bought by approximately 100 government departments, agencies and Crown corporations. Still, on occasion, a potential domestic or foreign supplier may have reason to believe that a contract has been or is about to be awarded improperly or illegally, or that, in some way, it has been wrongfully denied a contract or an opportunity to compete for one. The Tribunal provides an opportunity for redress for potential suppliers, both Canadian and foreign-based, concerned about the propriety of the procurement process relating to contracts covered by NAFTA, the AIT or the AGP.

3.8 Export/Import Controls and Related Measures

3.8.1 Which products are subject to export and import controls?

Primarily for security reasons, Canada, through the *Export Control List*, restricts the export of specified products and also restricts, through the *Area Control List*, the export of all products to specified countries. Canada's export controls are based on several international agreements and arrangements, such as the *Wassenaar Arrangement* and the *Treaty on the Non-proliferation of Nuclear Weapons*. The *Export Control List* is divided into seven groups of items: dual use list, munitions list, nuclear non-proliferation list, nuclear-related dual use list, miscellaneous goods and technology list, missile technology control regime list, and chemical and biological weapons non-proliferation list.

There is also an *Import Control List*. The products on this list are there principally to protect the integrity of Canada's extensive agricultural products supply-management system or to enforce international embargoes on trade in goods made from endangered species.

The lists are enforced by a system which requires permits authorizing export or import, as the case may be.

The *United Nations Act* empowers Canada to make such orders and regulations as are necessary to facilitate Canada's compliance with measures taken by the United Nations Security Council, such as UN embargoes. As well, the *Special Economic Measures Act* (SEMA) empowers Canada to take unilateral action, including embargoes, against a country in specified circumstances. Currently, Canada has imposed economic measures under the SEMA against Burma (Myanmar) and against Zimbabwe.

Other Departments may also control the export of goods, requiring additional permits even where an export permit has already been granted pursuant to the *Export and Import Permits Act* (EIPA). Departments that may also exercise controls over exports include Heritage Canada, Natural Resources Canada, Fisheries and Oceans, Health Canada, the Canadian Wheat Board, Agriculture Canada and Environment Canada. The circumstances that require additional departmental approvals are frequently not intuitive and care must be taken to ensure all export controls have been complied with.

3.8.2 International Traffic in Arms Regulations and the Canadian Exemption

The United States *International Traffic in Arms Regulations* (ITARs) generally regulate the export and licensing of certain defence articles and services from the United States. For exports of defence articles and services to Canada for end-use in Canada, however, the ITARs contain a very limited exemption for a "Canadian-registered person". For a Canadian business to qualify for exemption from the licensing requirements under the ITARs, it must be registered under the Canadian *Defence Production Act*. A list of registered businesses is maintained by the Canadian Controlled Goods Directorate. There is a process to extend this exemption to the employees of a registered business. However, this exemption may not be available to employees of a registered business who are dual citizens of a "proscribed country".

The *Controlled Goods Regulations* made under the *Defence Production Act* set out the process for the registration of Canadian businesses in the *Controlled Goods Program*, described in greater detail in the following section.

3.9 Controlled Goods Program (CGP)

The *Controlled Goods Program* is intended to safeguard potentially sensitive goods and technology and prevent them falling into the wrong hands. The program requires companies dealing with specified civilian or military goods to register with the *Controlled Goods Directorate* (CGD) of Public Works and Government Services, undergo security assessments of individuals and conduct security assessments of others, develop and implement a security plan, control access to the particular goods, report security breaches and maintain extensive records on all such goods for the duration of registration and for five years after registration expires.

The CGP was developed in response to the elimination of the Canadian exemption within the U.S.'s ITARs (discussed above). This exemption permitted Canadian companies and Canadian subsidiaries of U.S. companies to participate in sensitive military contracts. In 1999,

the U.S. government eliminated the exception in response to perceived weaknesses in Canadian security. To assuage these concerns, Canada developed the CGP, a stringent control regime governing both military and civilian products. Although a very limited Canadian ITARs exemption was restored, Canada has maintained the CGP.

Goods subject to the CGP are a subset of goods on Canada's *Export Control List*. These include goods listed in the following parts of the *Export Control List*: Group 2 (the "Munitions" List, with limited exceptions); Group 5 (specifically, item 5504, "strategic goods"); and Group 6 (the Missile Technology Control Regime, all items listed). The scope of these provisions is quite broad and captures many innocuous products that would not ordinarily be associated with military or missile applications. The inclusion of "technology" means that technical information such as documents or e-mails relating to these goods may also be captured. Where a company handles controlled goods or technology and wishes to register, it must:

- Register with the CGD through an application providing certain information (e.g., legal status, share ownership, names of directors and officers, description of the controlled goods at issue, etc.)
- Submit to a security assessment of a Designated Official appointed by the company who in turn must conduct security assessments of all employees with access to the goods or technology
- Develop and implement a security plan within 120 days of registration
- Secure approvals for any visitors who will have access to the goods or technology
- Report any security breaches within 72 hours
- Notify the CGD of any corporate changes
- Prepare and maintain records of all controlled goods and technology received by the registrant, including details of receipt, transfer and disposal for the entire period of their registration under the program and for five years after they cease to be registered.

The Regulations specify that the following factors must be considered in determining whether to register a business: a security assessment; the risk that the applicant poses of transferring the controlled goods to someone not registered or exempt from registration; whether the application contains all the required information; whether any information that the Minister may have requested by authority of the Act has been provided; and whether any information provided is false or misleading.

While the procedures can be very onerous, penalties for non-compliance are severe. Companies that fail to comply can have their registration revoked and they, as well as individuals, may receive fines from C\$25,000 to C\$2 million daily or an imprisonment not exceeding 10 years, or both.

The breadth of the goods involved, coupled with the severity of the potential penalties, make it imperative that companies doing business in Canada ensure that they are not dealing with controlled goods or technology if they have not registered with the CGP.

3.10 Foreign Extraterritorial Measures Act (FEMA) and Doing Business with Cuba

The FEMA is largely an enabling statute to protect Canadian interests against foreign courts and governments wishing to apply their laws extraterritorially in Canada by authorizing the Attorney General to make orders relating to measures of foreign states or foreign tribunals affecting international trade or commerce. The Attorney General has issued such an order with respect to extraterritorial measures of the United States that adversely affect trade or commerce between Canada and Cuba. The order was originally issued in retaliation for certain amendments to the U.S. *Cuban Assets Control Regulations*, and was further amended in retaliation for the enactment of the U.S. *Cuban Liberty and Democratic Solidarity (LIBERTAD) Act*, both of which aim to prohibit the activities of U.S.-controlled entities domiciled outside the U.S. (e.g., Canadian subsidiaries of U.S. companies) with Cuba.

The FEMA Order imposes two main obligations on Canadian corporations. First, the FEMA Order requires Canadian corporations (and their directors and officers) to give notice to the Attorney General of any directive or other communication relating to an extraterritorial measure of the United States in respect of any trade or commerce between Canada and Cuba that the Canadian corporation has received from a person who is in a position to direct or influence the policies of the Canadian corporation in Canada. Second, the FEMA Order prohibits any Canadian corporation from complying with any such measure of the United States or with any directive or other communication relating to such a measure that the Canadian corporation has received from a person who is in a position to direct or influence the policies of the Canadian corporation in Canada.

This means that Canadian companies wishing to carry on business with or in Cuba, whose goods are regulated under the U.S. *Cuban Assets Control Regulations* for example, would be in conflict with U.S. law. On the other hand, if the Canadian company decided not to do business in Cuba because a U.S. extraterritorial measure prohibited such conduct, the company could be in violation of the Canadian FEMA. The conflict of U.S. and Canadian trade sanctions can result in legal liability for both individuals and corporations, not to mention public relations nightmares.

4. Product Standards, Labelling and Advertising

4.1 How are product standards requirements created? Are Canadian product standards in line with international standards?

Canadian legislators and industry bodies are highly influenced by international standards, and Canadian standards frequently reflect both U.S. and European influences.

Requirements that products meet standards take several different forms. Some standards are mandatory legal requirements, others are industry standards developed on a voluntary basis and some are purely market driven as a particular technology becomes the industry standard.

Federal and provincial legislation may both impose mandatory standards for products typically where health or safety issues are regarded as requiring regulation. Standards can be written into

the legislation itself, such as the specification in the Toys Regulations under the *Hazardous Products Act* (Canada) of a small parts cylinder template for testing minimum size for certain toys likely to be used by children under three. Legislation may reference a standard written by an industry organization. Referencing a standard may take several forms, such as a reference to a specific date of issue or edition of a standard, or a reference to a specific standard as amended from time to time.

The Standards Council of Canada (SCC) is the national co-ordinating body for the development of voluntary standards through the National Standards System. The SCC also co-ordinates membership on the Canadian National Committees of both the International Electrotechnical Commission and the International Organization for Standardization.

The standards-developing organizations accredited by the SCC are: the Canadian General Standards Board, the Canadian Standards Association, the Underwriters Laboratories of Canada and the Bureau de normalisation du Quebec. Other bodies are accredited as testing organizations. Industry associations are frequently active in publishing standards of concern to their members.

The concern that standards constitute non-tariff trade barriers has been a major free trade issue. NAFTA includes a chapter on Technical Standards which provides that each party shall use international standards (except where inappropriate or ineffective to fulfil its legitimate objectives) and requires the parties, to the greatest extent practicable, to make their respective standards-related measures compatible.

4.2 What are the sources of labelling requirements? Must or should all labels be bilingual?

Product labelling is regulated at both the federal and provincial levels through statutes of general application and statutes applicable to specific products. The *Consumer Packaging and Labelling Act* (CPLA) is the major federal statute affecting pre-packaged products sold to consumers. The CPLA requires pre-packaged consumer product labels to state the common or generic name of the product, the net quantity and the manufacturer's or distributor's name and address. Detailed rules are set out as to placement, type size, exemptions and special rules for some imported products.

The CPLA, like most federal legislation, requires labelling which is required by the statute to be in both French and English. There are exceptions (most notably that the manufacturer's name and address can be in either English or French). While non-statutory information is not generally required to be bilingual under federal law, most Canadian packaging is nevertheless fully bilingual in practice. There are several reasons for this, including those based on marketing and liability considerations given the large French-speaking population, particularly in the province of Quebec. If products are to be sold in Quebec, they will effectively be required to be fully bilingual because the Quebec *Charter of the French Language* requires that most product labelling and accompanying materials, such as warranties, be in French. Labelling in Quebec can also be in another language or languages, provided the French text has equal prominence as compared to any other language.

Marking of the country of origin is required on certain products listed in regulations issued pursuant to the *Customs Tariff*, as further described in Section IV, 3.5.6.

Many federal statutes, such as the *Food and Drugs Act* and the *Textile Labelling Act*, mandate labelling and language requirements for specific products.

4.3 Food

All food products are regulated under the *Food and Drugs Act* and *Food and Drug Regulations*. In addition to labelling requirements common to other pre-packaged products, foods must also, with a very few exceptions, contain a list of ingredients in French and English. A “best before” date (in a particular Canadian format) is required for foods with a shelf life of less than 90 days. Nutrition labelling, with limited exceptions, is mandatory. Only a few very closely-defined health claims are permitted. Specialized food legislation applies to certain categories of food such as the *Canada Agricultural Products Act*, the *Meat Inspection Act* and the *Fish Inspection Act*. Canadian food legislation regulates claims, sets standards for specific food products and mandates standards of purity and quality.

4.4 Drugs

Drugs are also regulated in Canada under the federal *Food and Drugs Act* and the *Food and Drug Regulations*. Prescription and non-prescription drugs require prior market authorization identified by a Drug Identification Number (DIN) which must appear on the product packaging. In the case of “new drugs” a notice of compliance is also required which is issued following an assessment of the drug’s safety and efficacy. The location of sale of drugs and the professions involved in the prescribing and sale of drugs, such as physicians and pharmacists, are regulated under provincial legislation and frequently by self-regulatory professional organizations.

As of January 1, 2004, a new category of “natural health products” was created under the *Natural Health Products Regulation*. Natural health products require prior market authorization identified by a product registration number (NPN) or, in the case of a homeopathic medicine, by the letters DIN-HM, which must appear on the product packaging.

4.5 Weights and Measures

The *Weights and Measures Act* mandates that the metric system of measurement is the primary system of measurement in Canada. While a metric declaration of measure is required, in most cases it is also possible to have a non-metric declaration in appropriate form.

4.6 Advertising Regulations and Enforcement

4.6.1 Federal Law

Product advertising and marketing claims are regulated by the *Competition Act* (Canada), which has a dual civil and criminal track for advertising matters. The *Competition Act* includes a general prohibition against making any false or misleading representation to the public for the purpose of promoting a business interest. This is a criminal offence if done deliberately or recklessly. If the representation is not made deliberately or recklessly, the *Competition Act* provides for civil sanctions including cease and desist orders, mandatory publication of information notices and administrative monetary penalties. Performance or efficacy claims must be supported by adequate tests conducted before the claim is made. False ordinary price claims are also prohibited and the Competition Bureau has been

particularly active in bringing enforcement actions under that provision. Criminal telemarketing provisions of the *Competition Act* require disclosure of certain information during telemarketing calls and prohibit certain deceptive practices.

The *Competition Act* requires disclosure of key details of promotional contests, such as the number and approximate value of prizes and factors affecting the chances of winning. A deceptive prize notification provision prohibits sending a notice that gives the recipient the general impression a prize has been won and where the recipient is asked or given the option to pay money or incur a cost. The deceptive prize notification offence is not committed if certain disclosure is made, among other requirements. Because of anti-lottery provisions in the *Criminal Code*, most Canadian contests offer consumers a “no purchase” method of entry and require entrants to answer a skill-testing question before being confirmed as a winner. The *Competition Act* provides a civil right of action to those suffering damages as a result of conduct contrary to the criminal advertising requirements of the Act. While there is no similar provision with respect to conduct contrary to civilly-reviewable matters, recourse may be possible by using common law tort and trade-marks routes.

4.6.2 Provincial Law

Provincial legislation, particularly consumer protection and business practices legislation, also impacts advertising. For example, the *Consumer Protection Act, 2002* (Ontario) in force July 30, 2005, renders it an “unfair practice” to make false, misleading or deceptive consumer representations, including with respect to sponsorship, approval, performance characteristics, accessories, uses, ingredients, benefits or quantities that the products do not have, and even goes so far as to create, as an unfair practice, certain “unconscionable” representations. Businesses that make unconscionable consumer representations face exemplary or punitive damages. Other remedies include rescission or having to refund that portion of the purchase price which exceeds the “fair value” of the goods or services in question. Non-residents should pay particular attention to the Ontario *Consumer Protection Act, 2002* as it applies where the consumer is located in Ontario, even if the supplier is not.

Promotional contests run in Quebec must comply with contest legislation in that province, including notice, duty, security and filing requirements.

5. Product Liability – Ontario Law

5.1 How broad is the potential for liability in a contractual claim?

A party to a purchase or supply contract is entitled to sue for damages for breach of the contract if the quality, fitness or performance of the product does not comply with express or implied contractual terms. Implied terms may be found by reference to trade practice or common usage. In addition, provincial sales of goods legislation will generally imply, as part of any agreement for the sale of goods, terms and conditions regarding the fitness and quality of the products sold. Legislation commonly prohibits exclusion of these statutory warranties and conditions from contracts for the sale of products to consumers. In a few provinces, legislation implies statutory warranties in favour of consumers by manufacturers and others in the distribution chain in certain circumstances, even in the absence of contractual privity.

5.2 How broad is the potential for liability in a negligence claim?

Where a purchaser or user of a defective product does not have a contractual relationship with the proposed defendant and statutory warranties are not implied, the purchaser or user will have to prove negligence; that is, failure to exercise reasonable care in the preparation or putting up of the product which results in injury to the foreseeable user or the user's property. Product liability claims under common law can be made for negligently manufacturing a product, negligently designing it or failing to warn foreseeable users of the product of dangers inherent therein. Although negligence must be proven in each case, manufacturers will, as a practical matter, be held strictly liable if a product has a manufacturing defect (i.e., it was built in a way that was not intended by the manufacturer), because the court will assume there was negligence in the manufacturer's production process or by its employees and will not require the consumer to establish which it was.

In addition to product liability claims, a product vendor, manufacturer or distributor who recklessly or carelessly makes false statements regarding its safety or utility may be held liable for any losses arising from reasonable reliance on such statements. To establish liability for such negligent misrepresentation, the court must find that there existed a "special relationship" between the person making the statement and the recipient of the statement, actual or constructive knowledge on the part of the maker that the recipient intended to rely on the accuracy of the statement, and proof that such reliance was reasonable and caused the loss.

All parties in the distribution chain are potentially liable for product liability claims if negligence can be established. Examples would include failure to detect any product defect that they knew or ought to have known existed through reasonable inspection, or failing to provide warnings to potential users of dangers they knew or ought to have known were associated with use of the product.

Under provincial negligence legislation, joint tortfeasors are jointly and severally liable for a plaintiff's loss in most cases. The court may determine the degree of fault or negligence of various persons whose collective "fault" or neglect caused injury to a plaintiff and apportion it among those persons. However, the plaintiff can recover all damages from a person found even partly at fault, and it will then be up to that person to seek contribution from other tortfeasors.

5.3 What is the extent of a person's liability?

A plaintiff's damage recovery may be reduced to reflect any fault or negligence on the plaintiff's part that contributed to the injury or loss. The recovery of damages for negligence, negligent misrepresentation, breach of the duty to warn and breach of contract are limited to losses reasonably foreseeable to the parties and not considered "remote". Damages for personal injury and property damage are intended to be compensatory. General damages for pain and suffering are presently capped at about C\$325,000. Canadian law is unsettled as to the extent to which pure economic loss arising from a product defect may be recovered in a negligence action where such loss does not arise from personal injury or damage to property, other than the product itself, or from a risk of such injury or damage. Economic losses are recoverable in claims respecting breach of contract, negligent misrepresentation and breach of the duty to warn.

5.4 Other Litigation Risk: Class Actions, Juries and Punitive Damages

Historically, Canadians have been less litigious than Americans and damage awards have been much lower. Jury trials are much less common than Judge alone trials. Punitive damages are available in Canada in certain circumstances, though awards have historically been very rare in product liability cases and, in most cases, fairly modest when made. Class action legislation in Canadian provinces has recently begun to change the Canadian litigation landscape, however, resulting in a number of multi-million dollar settlements in the product liability area. The threshold for class certification is generally considered to be lower in Canada than the U.S. and product liability class actions for personal injury damages, medical monitoring costs, refunds and disgorgement of revenues from the sales of the product have been certified despite vigorous opposition from defendants. The latter claims for disgorgement are based on a novel theory of liability called “waiver of tort”, a theory that has not yet been tried in a negligence case.

It remains to be seen whether the availability of class actions will result in more frequent jury trials, larger punitive damage awards or changes in substantive laws. Outside the class action context, there has been some recent support for higher punitive damage awards, though still in very limited circumstances. (Also, see Section XV, “Dispute Resolution”.)

V. ACQUIRING A CANADIAN BUSINESS

1. General Considerations

The threshold question in any acquisition is whether to purchase shares or assets. This will be dictated by a variety of factors, including timing, ease of implementation and tax considerations. A share purchase is generally simpler and quicker to complete than an asset acquisition, as it avoids many of the practical problems associated with the transfer of particular assets and the common requirement to obtain consents of third parties. A share purchase may also have tax advantages from the perspective of the vendor, as it generally permits the vendor to obtain capital gains treatment with respect to any gain on the sale of the shares, thereby reducing overall tax liability.

A sale of assets will generally be less favourable for the vendor, as a result of potential income inclusions in areas such as the recapture of depreciation on the assets being sold. On the other hand, from the perspective of the purchaser, asset acquisitions may have some advantages, particularly where the purchaser wishes to exclude certain parts of the business or its liabilities from the transaction or to step up the tax cost of depreciable assets.

In either case, the purchaser will be concerned about the condition of the underlying business, the title of the vendor to its assets, the status of contracts with third parties and compliance with environmental and other laws. The purchaser will seek to protect itself by conducting a due diligence review of the vendor's business and obtaining appropriate representations, warranties and covenants in the purchase agreement.

2. Share Acquisitions

2.1 What approvals are required for an acquisition of shares of a Canadian company by a non-resident?

The securities rules applicable to a purchase of shares depend on whether the purchase is of a private or a public company, and are discussed under Subsection 2.4 below. In the case of large acquisitions, pre-clearance under the Canadian competition laws is required (see Section IV, 1.4). Apart from this, the principal authorization that might be required is approval under the *Investment Canada Act*. This is discussed in Section IV, 2.

2.2 What are the tax consequences of a share purchase?

There are no stamp duties or similar taxes payable in Canada upon an acquisition of shares. The vendor of the shares may be subject to payment of capital gains tax. Shares in a "private corporation" (as defined in the *Income Tax Act*) and any other shares not listed on a prescribed stock exchange are "taxable Canadian property" for purposes of the capital gains tax rules and their sale can give rise to Canadian tax to a non-resident vendor, unless there is an available treaty exemption. To ensure that non-residents of Canada pay any taxes owing in respect of a sale of taxable Canadian property, the *Income Tax Act* requires the purchaser to undertake a "reasonable inquiry" and satisfy itself as to the vendor's Canadian resident status (normally

through representations in the purchase agreement). As a general rule, if the vendor is a corporation incorporated in Canada after 1965, it will be deemed to be a resident of Canada. If the vendor is a non-resident, it must generally provide the purchaser with a certificate issued by the tax authorities, which will be granted when appropriate arrangements are made to ensure payment of any tax liability. If the certificate is not provided, the purchaser must generally withhold and remit to the tax authorities 25% of the purchase price, whether or not any tax would be payable by the vendor on the sale. Shares that are listed on a prescribed stock exchange can also be “taxable Canadian property” in certain circumstances; however, it is not necessary to obtain a certificate with respect to the sale of such shares.

If a share purchase results in an acquisition of control, there will be certain tax consequences for the target company including restrictions on the availability of accrued tax losses and a deemed taxation year-end.

2.3 Can one freely dismiss directors and officers of the acquired Canadian company?

The sale of a business will not automatically terminate employment contracts. Directors may be removed at any time by resolution of the shareholders, which would enable a non-resident purchaser to replace the board of directors of the acquired company. Officers and employees of the target may also be dismissed, subject to the provisions of Canadian law and any employment contracts or collective agreements. It will typically be a condition of closing that the board and designated officers or employees resign and provide releases.

Unless their employment contracts set out their entitlements upon termination of employment, at common law and under the *Civil Code of Québec*, officers and employees would be entitled to a reasonable period of notice or pay instead of notice. Depending on their length of service, position and age, the required common law notice could range between one month and 24 months or more.

See Section VII, “Employment and Labour Law”, which discusses employees’ rights in general.

2.4 Are there any special rules that apply to the acquisition of shares of public companies?

The acquisition of shares of a public company could trigger the application of the “take-over bid” requirements of Canadian corporate and securities legislation. As noted above, in Canada securities regulation is primarily a matter of provincial jurisdiction. In February 2008, new rules came into force which harmonized the rules governing take-over bids across Canada.

2.4.1 Regulation of Take-over Bids

The threshold for a take-over bid is generally 20% of the issued voting shares or “equity” shares (essentially non-voting common shares) of any class or series of the issuer. A purchase resulting in a holding of less than 20% of the relevant class of shares will not constitute a take-over bid, even if the bidder obtains effective control of the company. Conversely, any purchase beyond the 20% level will be a take-over bid, even if there is no change in control. Disclosure of the acquisition of 10% or more of the voting or equity shares of a company, and

subsequent acquisitions of 2% or more within the 10%-20% range, is required under the “early warning” rules of Canadian securities legislation.

It is not necessary to make an offer for all shares, and the offeror may determine the number of shares for which it wishes to bid. On a partial bid, shares must be taken up pro rata. Conditions may be attached to the bid. It is common to make a purchase conditional upon attaining a minimum level of acceptance, frequently two-thirds (the threshold for approval of certain fundamental corporate transactions in most jurisdictions) or 90% (the level which gives the offeror the right to acquire the balance of the shares outstanding).

Unless an exemption applies, a take-over bid must be made to all shareholders pursuant to a disclosure document (a circular). The circular must set out prescribed information about the offer and the parties, including shareholdings and past dealings by the bidder and related parties in shares of the target. If the target company has Quebec shareholders, which will often be the case, then unless a *de minimis* exemption applies, the circular must also be prepared in the French language for the purposes of mailings to such Quebec holders. The circular must be delivered to the target company and filed with the securities commissions, but is not subject to any pre-clearance review. The offeror is generally free to determine the price at which it chooses to bid and the consideration may be either cash or securities (or a combination of cash and securities). Where the purchase price consists of securities of the offeror, the circular must contain prospectus-level disclosure regarding the offeror’s business and financial results.

The directors of the target company must deliver their own circular to shareholders in response to the bid. There are a number of corporate rules and securities commission policies which affect the ability of the target company to undertake defensive measures in response to a bid. A bid subject to full regulation under provincial legislation must be made in accordance with certain timing and other procedural rules, including a compulsory minimum offer period (35 days).

2.4.2 Exempt Take-over Bids

Exemption from the statutory take-over bid rules is available in certain circumstances. As noted above, purchases of private companies are generally exempt from the take-over rules.

One of the most important exemptions relating to public companies is the “private agreement” exemption. Purchases may be made by way of private agreements with a small number of vendors without complying with the take-over bid rules (which would otherwise require the offer to be made to all shareholders). However, such purchases may only be made in limited circumstances. The rules exempt such purchases *only* if they are made with not more than five persons in the aggregate (including persons located outside of Canada) *and* the purchase price (including brokerage fees and commissions) does not exceed 115% of the average price of the shares during the 20 days preceding the date of the bid.

2.4.3 Arrangements

Friendly acquisitions are often effected in Canada by way of a plan of arrangement. An arrangement is a court-approved transaction governed by corporate legislation and requires shareholder approval (generally 66-2/3%) by the companies involved. The parties enter into

an arrangement agreement setting out the basis for the combination, following which an application is made to the court for approval of the process. The court order will require the calling of shareholders' meetings and specify the approval thresholds and dissent rights. A detailed circular will be sent to shareholders that provides broadly equivalent disclosure to that which would be provided by a take-over bid circular.

Arrangements have a number of advantages. In particular, they can: facilitate dealing with multiple securities (particularly convertible instruments); provide for acquisition of 100% of the target without the need for a follow-up offer or second-stage transaction; and, if securities are to be offered to shareholders of the target, provide an exemption under U.S. securities laws from the requirement to file a registration statement. On the negative side, arrangements tend to be more time-consuming and can be more expensive.

2.5 What rights of compulsory acquisition of the minority are available after a successful take-over bid?

An offeror that acquires substantially all of a class of shares of a company (generally 90% of the shares of the class not held by the offeror and its associates at the time of the bid) may generally buy out the remaining shareholders of the class at the offer price or, if the shareholder objects, at a court-determined "fair value". If an offeror intends to exercise its right of compulsory acquisition, it must state its intent to do so in the circular and follow certain steps within a fixed period (generally 180 days) after the bid.

There are other ways by which a minority can be removed from a company, such as amalgamation, arrangement or consolidation which results in the shareholder losing his participating interest in the business. Securities and corporate laws provide protection for minority shareholders in these circumstances, but if an offeror acquires 66-2/3% of the shares under a bid it will generally be able to eliminate the minority.

3. Asset Acquisitions

3.1 What approvals are required in the case of a purchase of assets of a Canadian business by a non-resident or by its Canadian subsidiary?

The review mechanisms of the *Investment Canada Act*, which are discussed under Section IV, 2, also apply to the purchase of "all or substantially all of the assets used in carrying on a Canadian business". The term "business" includes any undertaking or enterprise capable of generating revenue and carried on in anticipation of profit. A business will be a "Canadian business" if it is carried on in Canada, has a place of business and assets in Canada and one or more individuals in Canada who are employed in connection with the business.

A part of a business capable of being carried on as a separate business will itself be treated as a Canadian business whose acquisition will be subject to the review process. In determining whether a part of the business is severable, the government will look to factors such as whether the business is carried on in separate premises with an identifiable workforce, whether it has its own accounting, management, advertising, selling, purchasing and delivery functions, and

whether it serves a distinct group of customers. Competition laws which might apply to an acquisition of assets are discussed in Section IV, 1.4.

In addition to the statutory approvals, consents of landlords, equipment owners, creditors and shareholders may be necessary. Under most Canadian corporate statutes, if a sale involves the disposition of all or substantially all of a corporation's assets, shareholders must approve the transaction by special resolution.

3.2 What are the tax consequences of an asset purchase?

Two different sets of tax rules must be examined in this context: liability with respect to income tax, and the application of federal and provincial sales taxes. If real property is involved, land transfer taxes may also be payable.

3.2.1 Canadian Income Tax Issues

Capital assets used by a vendor in a Canadian business will generally be "taxable Canadian property". As discussed in Section VI, "Tax", the purchaser should protect itself from possible tax liability by making "reasonable inquiries" to confirm that the vendor is a Canadian resident. For this purpose, an appropriate representation will generally be obtained in the purchase agreement. If the vendor is a non-resident, a certificate from the tax authorities will be required.

The allocation of the purchase price among the various assets being acquired will also have Canadian tax implications, which will vary depending on the cost of the assets for Canadian tax purposes. The allocation is a matter of negotiation between the parties. From the perspective of the vendor, the manner in which the purchase price is allocated among the assets sold will affect the vendor's tax liability on the sale. The allocation may result in the recapture of capital cost allowance claimed in prior years and possibly capital gains, or the realization of income upon the sale of inventory or accounts receivable for which a reserve for doubtful debts has been claimed. The sale of a business will also often generate income due to the transfer of goodwill, and capital gains tax liability may arise in connection with the sale of capital assets. Unless the corporation has accrued losses (or unless the sale generates terminal losses in respect of certain categories of assets), the transaction could result in significant tax exposure for the vendor.

The purchaser will wish to allocate as much of the purchase price as possible to assets such as inventory or depreciable property, to reduce the taxable income that will be generated from the business in future years. As a general matter, the parties should agree that the values attributed to the assets in the purchase agreement represent their fair market value and that they will file their income tax returns in a manner consistent with such allocation, to minimize the risk that the Canadian tax authorities will allocate the purchase price in a manner which may be disadvantageous to the parties.

As tax liability is determined at the corporate level, accumulated tax losses in connection with a business are not available to the purchaser on an asset transaction. However, the purchaser is able to deduct capital cost allowance in respect of the depreciable assets which it purchases, based upon the portion of the total purchase price which is allocated to the particular assets.

3.2.2 Sales Tax

Both federal and provincial governments impose sales taxes, the province at the retail level and the federal government through the Goods and Services Tax discussed in Section VI, 6.1.

In a sale of the assets of a business, an election may be available so that no federal GST or QST will apply to the transaction. The election is available when the subject of the sale is all or substantially all of the assets that are reasonably necessary to operate a business. Where the election applies, the sale of the assets of a business may be made free of GST and QST, the rationale being that the recipient would in any event be able to claim a full input tax credit or refund for the tax otherwise payable.

There are two principal conditions that must be met before the election is available. The assets being sold must constitute a “business or part of a business” that was established, carried on, or acquired by the seller. In addition, the recipient must be acquiring at least 90% of the assets reasonably necessary to carry on the business. An indication of the sale of a qualifying business is the existence of an agreement which deals with issues that are normally found in acquisition arrangements, such as the sale of goodwill and intellectual property, dealings with employees, etc., in addition to the sale of equipment and inventory.

Provincial sales tax exposure (if any) will depend on the province in which the assets are located. For example, the Ontario *Retail Sales Tax Act* imposes tax at the rate of 8% upon taxable transfers of tangible personal property. There is a wide range of exemptions, particularly for transfers of inventory, provided the goods are purchased for resale or further manufacture. If the purchaser is acquiring assets of a business, it may also be liable for the vendor’s accrued sales tax exposure unless clearance certificates are obtained from the retail sales tax authorities indicating that all taxes have been collected and paid to date.

As discussed in Section VI, “Tax”, a Harmonized Sales Tax (HST) has been introduced in Nova Scotia, New Brunswick and Newfoundland. The GST election described in this section will extend to the provincial sales taxes otherwise imposed in the provinces in which HST applies.

3.3 What are the obligations of the purchaser with regard to third parties?

Canadian law provides protection for creditors of a business that might affect an acquisition of assets. To begin with, creditors who have a security interest over real or personal property will continue to have priority with respect to the relevant assets as against the purchaser. There are security registration statutes in Canada and searches can be conducted to determine the existence of such security interests. Unless the purchaser is to acquire the assets subject to existing security interests (which might be the case with respect to real property and major items of financed personal property), the vendor’s obligations should be paid and the security interests discharged at the time of the purchase. Because of time lags in the registration systems, it may be necessary to withhold a portion of the purchase price until confirming searches have been conducted.

In certain provinces, unsecured creditors of the vendor may be protected by bulk sales legislation. The *Bulk Sales Act* (Ontario) is typical and is designed to protect trade creditors where the tangible assets of a business are sold in bulk. A sale of substantially all of the assets of a

Canadian company or a division would be a sale in bulk subject to the Act. The Act provides for a number of specific alternative procedures to ensure that creditors are paid, such as obtaining a list of creditors and paying them off, obtaining consents from the creditors, or obtaining a court order exempting the transaction from the requirements of the legislation.

A court order is unlikely to be forthcoming if the assets to be purchased constitute all or substantially all of the vendor's assets. Unless the *Bulk Sales Act* has been complied with, any creditor can have the sale declared void and the purchaser will be liable to the seller's creditors for the value of any property received. The manner in which this issue is usually dealt with depends on the size of the acquisition and the creditworthiness of the vendor. It is not uncommon for the purchaser to waive compliance with bulk sales legislation, subject to holding a portion of the sale proceeds in escrow or obtaining an indemnity from the vendor.

4. Employee Considerations

The rights of employees in the case of an acquisition depend on the labour relations and employment laws in the province where the employees are located and the nature of the acquisition. The Ontario rules may be taken by way of illustration.

In the case of a share acquisition, there is no termination of employment upon the change of control, and existing contracts remain in place. In the case of an asset purchase, at common law the sale results in a termination of employment with the vendor company, but its obligations will be significantly reduced if the purchaser offers continued employment in the business to the vendor's employees. Statutory requirements affect such a transfer of employees and any terminations that may occur.

Where some or all of the employees are unionized, the *Labour Relations Act, 1995* provides that the purchaser of the "business" acquired is placed in the role of employer for the purposes of the union's bargaining rights and any collective agreement. The effect of this is to require the purchaser to comply with the requirements of the collective agreement, to continue to recognize the bargaining rights of the collective bargaining agent and, in appropriate circumstances, to enter into negotiations with that bargaining agent. A "business" is defined to include a "part or parts thereof" and the transfer of any portion of a business as a going-concern would be caught.

In addition, the *Employment Standards Act, 2000* establishes certain minimum obligations in respect of both union and non-union employees. More beneficial terms of employment, whether express (as, for example, in a collective agreement or a written contract of employment) or implied (as, for example, by the common law of wrongful dismissal), will take precedence over the minimum requirements of the employment standards legislation.

The *Employment Standards Act, 2000* stipulates that employees who remain employed by the purchaser, in effect, carry forward their prior service for any subsequent calculation of the employees' service or length of employment, such as establishing entitlement to severance pay and notice of termination by the purchaser. The Act also sets out minimum notice and severance pay requirements that apply in the event of the termination of employees, including, in the case of mass terminations of 50 employees or more within four weeks or less, an obligation to give notice to the Ministry of Labour. In the case of mass terminations, severance pay obligations apply regardless of the size of the employer's payroll. If employees are terminated prior to the

transfer of the business, the vendor, as terminating employer, will be responsible for the termination costs. See Section VII, 1.1.6.

For federally-regulated businesses, under the *Canada Labour Code*, if an employer discontinues its business permanently or undertakes mass terminations (50 employees or more in four weeks or less), it must give the federal government 16 weeks of prior notice. In most cases, the employer must also establish a “joint planning committee,” which must include employee and trade union representatives. The object of the committee is to develop an adjustment program to: a) eliminate the necessity for termination of employment; or b) minimize the impact of the terminations on affected employees and assist them in obtaining other employment.

VI. TAX

1. Typical Organizational Structures

A number of forms of organization could theoretically be used by a U.S. entity in establishing a Canadian business enterprise.

Of these, however, the three most commonly considered are:

1. Sales representatives based in Canada
2. Canadian branch of the U.S. entity
3. Canadian subsidiary corporation.

While there are some similarities in the basic rules for the computation of income subject to taxation under these possible forms of organization, it is most common for a substantial business undertaking to be organized using a Canadian-incorporated subsidiary.



In some cases, a British Columbia, Alberta or Nova Scotia “unlimited liability company” might be chosen to achieve U.S. tax objectives. The decision will, of course, depend on the circumstances of each case and consultation with both Canadian and U.S. tax counsel is essential, particularly if the U.S. entity has a special U.S. tax status. The recently released Protocol to amend the Canada–U.S. Tax Convention, however, contains new rules that will adversely affect the tax treatment of many structures involving unlimited liability companies.

If the U.S. entity is a “limited liability company” or “LLC” not treated as a corporation for U.S. tax purposes, there have been special problems with entitlement to benefits under the Canada–U.S. Tax Convention, so it is sometimes not desirable for such an LLC to hold an investment in Canada or carry on activities in Canada. The Protocol contains relieving provisions that should allow qualifying U.S. resident members of an LLC to obtain treaty benefits on a “look-through” basis once the Protocol becomes effective.

1.1 Limitation on Benefits of Treaty

The Protocol to amend the Canada–U.S. Tax Convention will introduce new “Limitation on Benefits” rules. To qualify for benefits under the Convention after the Protocol becomes effective, a U.S. entity must be both a resident of the U.S. for purposes of the Convention, and also be a qualifying person or otherwise entitled to the particular benefits under the Limitation on Benefits rules.

1.2 Sales Representatives Based in Canada

1.2.1 Are entities with representatives exempt from tax if activities are limited?

It is possible for a U.S. entity to extend the scope of its business to Canada without becoming subject to Canadian tax on its business profits if the types of activities carried on in Canada are sufficiently limited.

Under the Canadian *Income Tax Act* (ITA) every non-resident person, as defined by the ITA, who carries on a business in Canada is required to file a Canadian tax return and to pay an income tax computed in accordance with the ITA on the taxable income earned in Canada by such non-resident person for the year.

However, the provisions of the ITA relating to the taxation of Canadian source business profits (but not the requirement to file a Canadian return) are overridden, in the case of a United States enterprise qualifying for benefits under the Convention, by Article VII of the Convention, which provides as follows:

“The business profits of a resident of a Contracting State shall be taxable only in that State unless the resident carries on business in the other Contracting State through a permanent establishment situated therein. If the resident carries on, or has carried on, business as aforesaid, the business profits of the resident may be taxed in the other State but only so much of them as is attributable to that permanent establishment.”

The term “business profits” includes income derived from the sale of goods or services but does not include non-business income from real property or transportation, rents, royalties, interest, dividends or gains derived from the sale or exchange of capital assets, as these forms of income are addressed by other Articles of the Convention. Dividends, rents, royalties, technical know-how payments and interest paid to non-residents are currently subject to a withholding tax imposed by the ITA, the rate of which is reduced by the Convention.

1.2.2 How is a “permanent establishment” defined? Does an office or a sales agent create this status? What about a storage facility?

Returning to the taxation of Canadian source business profits, the term “permanent establishment” is defined in Article V of the Convention to mean a “fixed place of business through which the business of a resident of a Contracting State is wholly or partly carried on”.

The Convention goes on to specifically include the following in the definition of permanent establishment: any place of management, a branch, an office, a factory, a workshop and a mine, an oil or gas well, a quarry or any other place of extraction of natural resources or the presence in Canada of any non-independent agent who has the authority to contractually bind the non-resident corporation. The Convention then goes on to specifically exclude the following from the definition of “permanent establishment”:

1. Facilities for the purpose of storage, display or delivery of goods or merchandise belonging to the resident (i.e., the U.S. entity)

2. The maintenance of a stock of goods or merchandise belonging to the resident for the purposes of storage, display or delivery
3. The maintenance of a stock of goods or merchandise belonging to the resident for the purpose of processing by another person
4. A purchase of goods or merchandise, or the collection of information, for the resident
5. Advertising, the supply of information, scientific research or similar activities which have a preparatory or auxiliary character, for the resident.

Therefore, a U.S. entity will not have a permanent establishment in Canada by reason only of having sales representatives in Canada to offer products for sale, provided that these agents (i) do not have the authority to conclude contracts on behalf of the U.S. entity or (ii) are independent and acting in the ordinary course of their business.

If the U.S. entity contemplates establishing a fixed centre for its Canadian operations, care should be taken to ensure that the centre is not a permanent establishment. For example, it could be limited to functioning as a warehouse for the storage of goods awaiting delivery or processing, or as a display area. Any significant presence the U.S. entity will have at a Canadian location needs to be reviewed to determine whether it amounts to a permanent establishment. A building site or construction or installation project is a permanent establishment if, but only if, it lasts more than 12 months. The provision of other types of services in Canada for 183 days or more may result in a permanent establishment after the relevant changes to the definition of a permanent establishment contained in the Protocol become effective. If the U.S. entity has a permanent establishment in Canada, it will be subject to Canadian tax on business profits attributable to the permanent establishment.

While similar rules apply for Canadian provincial income tax purposes, these rules should be reviewed for each province in which the U.S. entity will operate, as there are sometimes significant differences between provincial definitions of “permanent establishment” and the definition in the Convention discussed above.

1.3 Canadian Branch

If it is undesirable for the U.S. entity to restrict its Canadian business in the manner described above to avoid having a permanent establishment in Canada, an alternative would be to establish and operate a Canadian branch out of office premises situate in Canada.

1.3.1 Advantage of a branch operation

One advantage to the use of a branch operation would normally arise when it is anticipated that the branch will incur substantial losses in the first several years of operation. In this case, organization through a branch might enable such losses to be included in the consolidated tax return of the parent corporation and deducted against income from other sources. In general, a branch may be useful where a “flow-through” structure is desirable from the U.S. tax perspective.

An alternative would be to consider incorporation of an entity which might be treated as a branch for U.S. tax purposes, such as a British Columbia, Alberta or Nova Scotia unlimited

liability company. The use of such entities, however, may be adversely affected in the future as a result of the Protocol.

If a Canadian subsidiary (other than an unlimited liability company) is used, we understand that in the usual case such losses may not be consolidated with income from other sources for U.S. tax purposes. In Canada, the losses can only be carried forward within the Canadian corporation for a maximum of 20 taxation years (seven taxation years for losses that arose in taxation years ended on or before March 22, 2004 and 10 taxation years for other losses that arose in taxation years prior to the 2006 taxation year) and used as a deduction in computing taxable income during that time.

1.3.2 What are the disadvantages? How would a branch be taxed as between the U.S. and Canada?

It is clear that if a United States enterprise were to establish a divisional branch in Canada, it would have a “permanent establishment” within the meaning of the Convention, and would be required, pursuant to the ITA, the Convention and Canadian provincial tax legislation, to pay Canadian income tax on taxable income earned in Canada which is attributable to the branch. Any employees resident in Canada and, subject to certain exemptions in the Convention, branch employees not resident in Canada, would be required to pay Canadian income tax, and the United States enterprise would be required to deduct and remit to the Receiver General amounts from the wages and salaries of such persons.

Despite potential tax savings, our experience has been that there are, in some cases, a number of practical difficulties with a branch operation. The most important has been the problem of preparing financial statements for the branch which determine its income earned in Canada in a manner satisfactory to both the Canada Revenue Agency (CRA) and the U.S. Internal Revenue Service.

Particularly difficult is the allocation of head office charges, executive compensation and other common costs. In addition, in a branch situation the CRA may conduct an audit of the U.S. corporation’s books of account to satisfy itself as to Canadian-source income. The tax compliance obligations of a Canadian branch are sometimes more onerous than for a Canadian subsidiary in other respects. For example, if the branch disposes of capital assets used in the Canadian business, it must obtain a tax clearance certificate, and if it receives amounts of the type normally subject to non-resident tax withholding (such as service fees, interest, rentals or royalties), the branch may need to apply for a waiver of withholding.

Finally, Canada imposes a branch tax on the after-tax income of the branch operation of a U.S. corporation, subject to a lifetime exemption, which the U.S. corporation may qualify for under the Convention for the first C\$500,000 of Canadian income. The branch tax rate under the ITA is 25%, but this rate is reduced under the Convention to 5% for qualifying U.S. residents. The branch tax is effectively the equivalent of the 5% non-resident withholding tax which would be applicable under the Convention if the U.S. corporation carried on business in Canada through a subsidiary corporation and had the subsidiary repatriate its retained earnings to the parent by means of a dividend.

While the absolute amount of the branch tax after the exemption may thus be equivalent to the withholding tax which would be paid, there is the disadvantage that branch tax is often

imposed in the year in which the profit is earned, whereas withholding tax is exigible only if, as and when dividends are declared. There are, however, reserve provisions in the ITA which mitigate or eliminate this timing difference.

1.3.3 If a branch turns profitable, how can it become a subsidiary corporation?

It would be possible, if a branch were initially used, to transfer the Canadian business to a subsidiary corporation after it becomes profitable. There are, however, several difficulties in accomplishing this result and, in particular, there may be U.S. tax consequences. In addition, the complexity of a sale of assets, assignment of contracts and transfer of employees to a new corporation after a significant business has been established may be considerable.

A non-resident may transfer real property, interests in real property and most other assets used in the business of a Canadian branch to a Canadian corporation, as part of the incorporation of the branch, on a Canadian income tax deferred basis. However, the transfer by a U.S. entity to a Canadian corporation of real property or interests in real property *not* used in the business of a Canadian branch would have to take place at fair market value, giving rise to a potential recapture of capital cost allowance (i.e., depreciation) and/or capital gain.

In summary, therefore, unless there are important U.S. tax reasons to the contrary, it may be advisable to organize the Canadian business through a subsidiary corporation. We note again that the choice of organizational form depends on individual circumstances and that consultation with U.S. and Canadian tax counsel is advised.

1.4 Canadian Subsidiary Corporation

If the Canadian business enterprise is carried on through a corporation incorporated in Canada (including a British Columbia, Alberta or Nova Scotia unlimited liability company), the corporation will be a “resident” within the meaning of the ITA and will be required to pay Canadian income tax on its world income each taxation year. Canadian provincial income taxes will also apply. Where dividends are paid by the subsidiary corporation to a qualifying U.S. resident parent corporation that owns 10% or more of the voting stock, the Canadian withholding tax rate applicable to the dividends under the Convention is 5%. The following comments address several of the most important provisions of the ITA, which would apply to the new corporation.

2. Computation of Income

The computation of income from business for Canadian tax purposes starts with a computation of the profit from the business. A number of rules must then be applied to adjust the computation of profit to arrive at taxable income. The main provisions in this regard are set out below.

2.1 How is depreciable property amortized?

2.1.1 Capital Cost Allowance

The system in the ITA for amortizing the cost of depreciable property is known as capital cost allowance. All tangible depreciable assets, patent rights and certain intangible property with a limited life must be included in one of the classes prescribed by Regulation. Each class is given a maximum rate, which may or may not be based on the useful life of the assets in the class. The rate for a class is applied to the total capital cost of the assets in that class to calculate the maximum deduction that may be claimed in each year. The actual deduction taken in a year may be any amount that is equal to or less than the maximum deduction available. As the deduction is usually calculated on a diminishing balance basis, the capital cost of a class is reduced by the amount of the actual deduction taken with respect to that class each year. Therefore, unused deductions are effectively carried forward as they do not reduce the capital cost of the class. There are also provisions as to the recapture of capital cost allowance from the disposition of capital assets that have been depreciated for tax purposes below their realizable value.

2.1.2 Can the cost of leasing property be amortized?

The ITA imposes substantial restrictions on capital cost allowance available to lessors of most tangible property. In effect, the lessor is treated for income tax purposes as if the lease payments were blended payments of principal and interest on a loan. The lessee of such property is not entitled to capital cost allowance unless it elects with the lessor to treat the lease as a purchase by the lessee at fair market value financed by a loan from the lessor. If such election is made, the lessee claims full capital cost allowance and a deemed interest deduction calculated by treating the lease payments as blended payments of principal and interest. Otherwise, the lease retains its character for purposes of the tax treatment of the lessee.

2.1.3 How are intangible capital assets amortized?

A similar system to that described above is prescribed in respect of the cost to a taxpayer of intangible capital property not eligible for capital cost allowance such as trade-marks, licences for an unlimited period or goodwill. Only three-quarters of the cost of such assets may be included in the appropriate class and a deduction may be taken in computing income at the rate of 7% per annum on a declining balance basis.

2.2 Licensing Fees, Royalties, Dividends and Interest

2.2.1 Transfer Pricing Rules for Related Corporations

Particular scrutiny is normally given by the CRA to licensing fees, royalties, interest, management charges and other amounts of a like nature paid to non-residents with whom the Canadian taxpayer does not deal at arm's length. For this purpose, if a U.S. entity controls a Canadian company, either by owning a majority of the voting shares or by having sufficient direct or indirect influence to result in control, the two entities will be considered not to deal at arm's length. The first concern of the tax authorities will be to determine whether the

amount paid by the Canadian corporation should be allowed as a deduction in computing income.

Canadian transfer pricing rules require that, for tax purposes, non-arm's length parties conduct their transactions under terms and conditions that would have prevailed if the parties had been dealing at arm's length. The rules also require contemporaneous documentation of such transactions to provide the CRA with the relevant information supporting the transfer prices. The rules provide that taxpayers may be liable to pay penalties where the transfer pricing adjustments under the rules exceed a certain threshold and the taxpayer did not make reasonable efforts (including contemporaneous documentation) to use appropriate transfer prices.

2.2.2 What are the withholding tax rules?

Under the Convention, the Canadian entity must withhold 10% of some "royalties" paid to U.S. residents. The Convention provides exemptions from withholding tax on "royalties" paid to qualifying U.S. residents which are payments for the use of or the right to use (i) computer software or (ii) any patent or any information concerning industrial, commercial or scientific experience (but not including information provided in connection with a rental or franchise agreement).

Reasonable management fees for services rendered outside Canada are not subject to withholding tax as the CRA regards these as business profits of the U.S. entity and therefore not taxable under Article VII of the Convention. The CRA will allow a management fee to include a mark-up over the U.S. entity's costs only in limited circumstances.

Under the Convention, the rate of withholding tax on dividends is 15%, although the lower rate of 5% applies if the shareholder is a qualifying U.S. resident company that owns 10% or more of the voting stock.

Changes to the ITA have eliminated Canadian withholding tax on arm's length (unrelated party) interest payments, other than certain types of participating interest, effective for interest paid on or after January 1, 2008. Payments of or on account of interest to a related U.S. resident are currently subject to a 10% withholding tax under the Convention. Under the Protocol, withholding tax on interest paid by a Canadian resident to a related U.S. resident qualifying for the benefits of the Convention will be gradually reduced and ultimately eliminated. It is not yet known when these changes will become effective. To qualify for the benefits of the Convention, a U.S. resident will, in the future, have to meet the requirements of the new Limitation on Benefits rules in the Protocol.

2.3 What are the limits on thin capitalization?

A statutory thin capitalization provision limits the amount of interest-bearing debt which may be owed by a Canadian corporation to a non-resident creditor who is either a 25% shareholder of the corporation or does not deal at arm's length with such a shareholder. The limit is set by requiring the Canadian company to have a debt-to-equity ratio of not more than 2:1 where debt and equity have particular definitions. In making the necessary calculation, equity includes the paid-up capital of a corporation as well as retained earnings and other surplus accounts.

Debt includes only interest-bearing debt held by non-resident shareholders who, alone or together with affiliates, own shares of the capital stock of the corporation representing 25% or more by votes or fair market value of all shares of the corporation or their affiliates. There are special timing rules regarding when the different debt and equity elements are determined.

Not included as debt are amounts owed to residents of Canada or amounts owed to non-residents who are neither shareholders nor related to shareholders (unless they are part of a “back-to-back” arrangement whereby the non-resident shareholder or related party lends to a third party on the condition that it make an advance to the Canadian corporation). Also excluded from the definition of debt for this purpose are amounts loaned to the Canadian corporation by arm’s length entities where the loans are guaranteed by a shareholder.

The sanction for exceeding the maximum ratio is that interest on the amount of debt in excess of the permitted limit is not allowed as a deduction in computing the income of the Canadian corporation.

2.4 How can operating losses be used?

Operating losses from a particular source can be used by the taxpayer to offset income from other sources. In addition, if an operating loss is realized for a particular year, it may be carried back three fiscal years and carried forward 20 taxation years (seven taxation years for losses that arose in taxation years ended on or before March 22, 2004 and 10 taxation years for other losses that arose in taxation years prior to the 2006 taxation year) as a deduction in computing taxable income of those other years. If the loss is not used within this statutory period, it expires and can no longer be used in computing taxable income. Special rules restrict the availability of these losses following an acquisition of control of the corporation.

2.5 Capital Gains and Losses

One-half of any capital gain realized by a Canadian taxpayer (referred to as a “taxable capital gain”) is included in the taxpayer’s income and is subject to tax at normal rates. One-half of any capital loss may be deducted in computing income, but only against taxable capital gains. Capital losses, which cannot be used as a deduction in the year in which they are incurred, may be carried back three years and carried forward indefinitely, but again such losses may only be deducted against taxable capital gains. Capital losses of a corporation are extinguished on an acquisition of control of that corporation.

2.6 Should a single subsidiary be used when there are several lines of business?

Under the Canadian tax system, it is not possible under any circumstances for two or more corporations to file a consolidated tax return. As a result, the profits of one corporation in a related group cannot be offset by losses in another. It is generally desirable, therefore, unless there are compelling reasons to the contrary, to carry on as many businesses as possible within a single corporate entity. As well, non-residents establishing a corporate group in Canada should consider planning to minimize Canadian provincial income and capital tax.

2.7 How is income taxed among the different provinces?

The taxable income of a corporation with operations in more than one province is allocated for provincial income tax purposes among those provinces in which the corporation has a permanent establishment. The allocation is achieved by means of formulae that are generally based on the salaries and wages paid to employees associated with each permanent establishment and gross revenues attributable to each permanent establishment.

3. Rates of Taxation

Corporate income tax is levied in Canada by both the federal and provincial governments. The effective rate of federal tax is currently 19.5%, after taking into account a reduction in rate that partially offsets the impact of provincial taxation. This rate is scheduled to be reduced to 19% in 2009 and to 18% in 2010.

Provincial tax rates can vary substantially depending on the province and the type of income earned by the corporation. For example, the general rate imposed by the province of Ontario is currently 14%. In many cases, Canadian provincial income tax liabilities may be substantially reduced by inter-provincial tax planning appropriate to the proposed Canadian operations.

Several reductions in federal and provincial rates are possible depending on the circumstances of the particular case. The most substantial of these reductions relates to active business income earned in Canada by a small “Canadian controlled private corporation” (CCPC).

However, a corporation will not be a CCPC if it is “controlled, directly or indirectly, in any manner whatever, by one or more non-resident persons”. The phrase “controlled, directly or indirectly, in any manner whatever” is defined for the purposes of the ITA to include any direct or indirect influence that, if exercised, would result in control in fact of the corporation.

An exception is made where the corporation and the non-resident person are dealing at arm’s length and the influence is derived solely from a franchise, licence, lease, distribution, supply or management agreement or other similar agreement, the main purpose of which is to govern the relationship between the parties. In addition, this preferential tax rate is not available for large private corporations.

Another reduction in the rate of tax occurs if a corporation carries on a manufacturing or processing business, as it may be entitled to provincial tax reductions.

4. Other Income Tax Considerations

4.1 Foreign Income Tax Credits

A corporation resident in Canada is usually entitled to a credit against income tax for income tax paid to the government of another country. The credit is limited to the amount of Canadian tax on foreign income before the credit. The ability to claim foreign tax credits is subject to certain anti-avoidance rules intended, in general terms, to prevent trading in such credits.

If the foreign income tax in question relates to a business carried on in a foreign country, any part of the tax that is not credited in a particular year may be carried forward for credit in the 10 succeeding taxation years (seven taxation years in the case of unused credits for years ended on or before March 22, 2004) and carried back for credit in the three preceding years. No carry forward is permitted with respect to foreign non-business income taxes, such as withholding taxes on dividends, interest or other property income; however, all or part of such taxes may, as an alternative, be taken as a deduction in computing income for Canadian tax purposes.

4.2 Are tax credits available for research and development?

An “investment tax credit” against income tax otherwise payable is provided under the ITA in respect of certain expenditures on qualifying scientific research and experimental development carried out in Canada. An enhanced credit is available to CCPCs.

4.3 How are dividends treated?

A corporation may generally return to a shareholder the shareholder’s investment in “paid-up capital” of the corporation (other than a public corporation) as a Canadian tax-free receipt. The ITA provides that all other distributions to shareholders of a corporation resident in Canada (including share redemptions and liquidating dividends) are treated as dividends to the extent that funds paid out of the company on a reorganization, share reduction or liquidation exceed the paid-up capital of the shares. Such distributions are treated as dividends regardless of the type of surplus or profits from which they are paid and regardless of whether the company has any undistributed income.

Dividends paid by a Canadian corporation to its non-resident shareholders are subject to withholding tax under the ITA. The withholding tax rate under the Convention is 5% for dividends paid to a qualifying U.S. parent. Stock dividends are equivalent to cash dividends and are generally valued at the related increase in the corporation’s paid-up capital.

The ITA contains other rules for dividends paid to Canadian residents that are beyond the scope of this paper. Dividends between affiliated Canadian companies are generally tax-free.

4.4 Loans to Shareholders

A loan made by a corporation to any of its shareholders or to persons connected with such shareholders (other than corporations resident in Canada) which is not repaid by the end of the taxation year following the year in which such loan was made is, with limited exceptions, considered to be income received in the hands of the shareholder.

More stringent rules apply to indebtedness of a non-resident to a Canadian affiliate arising under a “running account” between the two companies. Amounts deemed to be paid to non-resident shareholders as income are subject to non-resident withholding tax as though the amounts were dividends. There is, however, a refund of withholding tax to a non-resident if the debt is subsequently repaid, subject to certain limitations.

A loan which is not included in income as described above may give rise to imputed interest income for the Canadian corporation and a taxable benefit in the hands of the shareholder or

connected person (other than a corporation resident in Canada) if the rate of interest paid on the loan is less than the market rate applicable at the time of the loan.

5. Capital and Payroll Taxes

5.1 Capital Taxes – What is included as capital? What are the rates?

The provinces of Ontario, Quebec, Manitoba, Saskatchewan, Nova Scotia and New Brunswick currently levy a corporate capital tax based on a corporation's taxable capital employed in the province. A number of these provinces have proposed elimination of the capital tax over a period of time. Other provinces impose corporate capital tax only on financial institutions. Therefore, inter-provincial capital tax planning should be explored in the case of a capital-intensive business. The rate of capital tax presently levied by the province of Ontario is generally 0.285%.

Generally, paid-up capital, retained earnings, other surplus and most debt are included in a corporation's taxable capital. Certain deductions are permitted in computing taxable capital, including a deduction for investments in other Canadian corporations. It should be noted that the rules for calculating the capital tax payable by a branch operation may mean that it is subject to greater tax than a Canadian subsidiary. A non-resident corporation with no "permanent establishment" as defined in the relevant provincial capital tax legislation will not be subject to provincial capital tax. Provincial capital taxes (as well as payroll taxes) are fully deductible in computing income.

The federal corporate capital tax was recently eliminated.

5.2 Payroll Taxes

Employers are generally required to make contributions on behalf of their Canadian employees to the Canada or Quebec Pension Plan and to the federal Employment Insurance plan. Certain provinces also impose employer health taxes; for example, in Ontario the current top marginal rate is 1.95% of wages, subject to incentives with respect to new employees. Contributions to provincial Workers' Compensation Boards are also obligatory for most businesses.

6. Commodity Tax and Customs Tariffs

6.1 Federal Sales and Excise Tax

The Goods and Services Tax (GST) is a form of value-added tax that applies to most goods and services at the rate of 5% (reduced from 6% effective January 1, 2008). Unlike income tax, the GST is a tax on consumption rather than profits.

6.1.1 How is the GST collected?

Generally speaking, each registered supplier of taxable goods and services collects the applicable tax from its purchasers at the time of sale. The supplier must collect the GST as agent for the government, while the purchaser is legally responsible for the payment of the tax. Suppliers deduct from their collections any GST they have paid on their own purchases

(called “input tax credits”) and remit the difference to the federal government. If the supplier paid more tax than was collected, the supplier is entitled to a refund of the difference. The result is that the tax is imposed on the value added to the product at each stage of production and distribution and the final consumer ultimately bears the full amount of the tax.

Quebec has harmonized its provincial sales tax base with that of the GST; therefore, most of the discussion that follows applies equally to the Quebec Sales Tax or QST, which is imposed at the rate of 7.5%. New Brunswick, Nova Scotia and Newfoundland also impose a 13% (reduced from 14% effective January 1, 2008) combined federal/provincial GST (called the Harmonized Sales Tax or HST).

6.1.2 Who is exempt from registration requirements?

Generally speaking, most persons who carry on business in Canada must register to collect and remit GST. By way of exception, small suppliers with sales of less than C\$30,000 per year are generally not required to register for GST purposes and cannot claim input tax credits. In determining whether this threshold has been met, sales of associated corporations are included.

Non-residents who in Canada solicit orders or offer for sale prescribed goods (such as books, newspapers or magazines) to be sent to persons in Canada by mail or courier are deemed to carry on business in Canada. Accordingly, they must register to collect and remit GST on their sales.

Non-residents who do not carry on business in Canada, or small suppliers with sales of less than C\$30,000 per year, are permitted to voluntarily register to collect and remit tax if, among other activities, they regularly solicit orders for the supply of goods for delivery in Canada. Non-residents may wish to register in such cases to obtain input tax credits in respect of GST paid on purchases in Canada.

6.1.3 Zero-Rated Supplies

Certain supplies, defined as “zero-rated supplies”, are effectively tax-free supplies and taxed at a zero rate. These supplies include basic groceries, prescription drugs, most medical devices and, generally speaking, goods which are sold for export. Services of an agent on behalf of a non-resident are also tax-free in some cases as are legal and consulting services supplied to assist a non-resident in taking up residence or setting up a business in Canada. Suppliers of tax-free goods and services do not charge tax on their sales, but are entitled to input tax credits for the GST paid on purchases used in supplying taxable and tax-free goods.

6.1.4 Exempt Supplies

The legislation also provides for a class of goods known as “exempt supplies”. No tax is charged on exempt supplies. However, unlike zero-rated supplies, suppliers of exempt goods and services do not receive input tax credits for the GST paid on their purchases to the extent they are used in making the exempt supplies. Examples of exempt supplies include resales of residential property, long-term residential leases, many health and dental services, educational services, domestic financial services and daycare services.

6.1.5 Special Rules for Non-Residents

To encourage non-residents to do business in Canada, the legislation provides relief from the GST in connection with certain transactions.

6.1.5.1 What if goods are imported by the non-resident and delivered in Canada?

A non-resident who sells goods to a Canadian customer on a “delivered” basis and also acts as importer of record will be required to pay GST on the importation of the goods. Where the non-resident is not a GST registrant, the non-resident will not be able to obtain an input tax credit (i.e., refund) of the GST. In effect, the GST legislation would increase the non-resident supplier’s costs and the price to the Canadian customer would include GST.

This is contrary to the intent of the GST legislation. As a result, the Canadian customer is permitted to claim an input tax credit in respect of the GST paid at the border by the non-resident supplier, where the customer obtains proof of payment of the GST from the non-resident. Therefore, its customer will reimburse the non-resident for the GST paid at the border, and the customer will claim the GST input tax credit as if the goods were purchased from a Canadian supplier. This levels the playing field between Canadian customers who deal with non-resident suppliers and those who deal with Canadian suppliers. This is referred to as the “flow-through” mechanism.

6.1.5.2 Will the non-resident have to collect GST from its customer?

A second relieving provision is referred to as the “non-resident override rule”. This rule applies to a supply of personal property or a service in Canada made by a non-resident, and deems it to be made outside Canada and therefore beyond the scope of the GST. This provision applies where the non-resident supplier does not carry on business in Canada and is not registered for GST purposes. The “non-resident override rule” relieves the non-resident from any obligation to register and charge and collect GST on supplies that otherwise would be considered to be made in Canada. However, the Canadian customer may be required to self-assess GST on such supplies, in certain circumstances.

6.1.5.3 What if goods are sold by a non-resident, but sourced from and delivered by a resident third party?

A third relieving provision is referred to as the “drop shipment” rule. In general, this rule applies where a non-resident sells goods to a Canadian customer, sources those goods from a Canadian supplier, and arranges for delivery by the Canadian supplier directly to the Canadian customer. In these circumstances, the Canadian supplier to the non-resident seller must collect GST on the sale to the non-resident, and if the sale is to an individual consumer, the GST will be collected on the non-resident’s re-sale price to the consumer. The drop shipment rule applies to deem the sale by the Canadian supplier to the non-resident re-seller to be made outside Canada and therefore not subject to GST, where the non-resident’s customer provides a “drop shipment certificate” to the Canadian supplier. This places the Canadian customer in the same position as if the goods were purchased directly from a Canadian supplier.

6.1.6 GST on Imports

GST is generally exigible on imported goods based upon their duty paid value. GST is generally not exigible on imported services and intangible property (such as patents and trade marks), provided they are used exclusively in taxable commercial activities of the purchaser. Purchasers must self-assess tax on imported services and intangible property if such services and property are not used exclusively in taxable activities. It should be noted that, although customs duties on U.S.-origin and Mexico-origin goods have been eliminated under NAFTA, GST must still be paid on U.S. or Mexican goods imported into Canada.

6.1.7 Other Federal Excise Taxes

In addition to GST, a limited range of goods is subject to excise duties or taxes at various rates based on the manufacturer's selling price. Examples of items subject to the *Excise Act, 2001* include certain types of alcohol and tobacco. Examples of items subject to the *Excise Tax Act* include certain insurance premiums, air conditioners, certain gasoline and other petroleum products.

6.2 Provincial Sales and Commodity Taxes

6.2.1 When does provincial sales tax apply?

The province of Ontario levies a retail sales tax of 8% on the purchaser of most tangible personal property purchased for consumption or use in Ontario or imported into the province, including most computer software. Certain services are also subject to this tax. Generally, the tax is based on the sale price of the taxable goods or services being sold at the retail level. Most other Canadian provinces also impose sales taxes. It should be noted that Ontario retail sales tax is calculated on the purchase price excluding the federal GST and that the GST is calculated on an amount excluding all provincial sales taxes. Some provinces do, however, include the GST in the tax base when calculating sales taxes.

The Ontario *Retail Sales Tax Act* provides that the vendor of the taxable goods or services is required to act as the agent for the provincial government in collecting the sales tax. However, a non-resident vendor without a physical presence in the province is not required to register for purposes of the tax.

Various goods are exempt from Ontario retail sales tax, including certain foods, drugs and medicines, motor and heating fuels, certain production machinery and equipment, custom computer software, many items used in farming and fishing, and items to be shipped directly out of the province. Also, there is a rebate for tax paid on goods purchased in Ontario and subsequently exported, provided that (i) the purchaser pays tax in another Canadian jurisdiction and (ii) that tax is not refunded.

6.2.2 Which goods are subject to provincial commodity taxes?

The various provinces impose sales or transfer taxes on specific goods such as gasoline, fuel, and tobacco. These taxes are usually imposed as a specific tax (cents per litre or cents per cigarette) rather than on an *ad valorem* (i.e., a percentage) basis. Certain provinces have enacted specific statutes to impose taxes on certain services such as accommodation,

admissions, insurance premiums, gambling, etc. As well, land transfer taxes are imposed on transfers of land, as described in Section XI, "Real Estate". In addition, the provinces also impose property taxes on landowners.

6.3 Customs Tariffs

6.3.1 What are the treaties governing tariffs?

Canada is a member of the World Trade Organization (WTO). In accordance with the WTO, it grants most-favoured-nation tariff status to other WTO members. Goods are classified in Canada's List of Tariff Provisions according to the *Harmonized Commodity Description and Coding System Convention*, which Canada adopted in the late 1980s. For details, see Section IV, 3.

VII. EMPLOYMENT AND LABOUR LAW

Employment and labour law in Canada is designed to regulate both the conditions of employment and the relations between employers and employees. To understand Canadian labour and employment law, it is necessary to know about the constitutional division of power between the federal government of Canada and the governments of Canada's 10 provinces and three territories.

While labour and employment matters are principally within provincial and territorial jurisdiction, the federal government does have jurisdiction over certain industries that are viewed as having a national, international or inter-provincial character, such as banks, air transport, pipelines, telephone systems, television and inter-provincial trucking. All other employers are provincially regulated for the purpose of labour and employment matters. As a result, the vast majority of employers in Canada are required to comply with the employment standards, labour relations and other employment-related legislation of each of the provinces where it has operations.

Regardless of whether a business is provincially or federally regulated, or where in Canada it carries on business, Canadian employers should be familiar with the following types of employment-related legislation:

- Employment Standards Legislation
- Human Rights Legislation
- Federal and Provincial Privacy Legislation
- Occupational Health and Safety Legislation
- Workers' Compensation Legislation
- Labour Relations Legislation

The legislation referred to above is only the start. Regulations made pursuant to this legislation also establish numerous rights and obligations for employers and employees. For example, there are detailed regulations made under both employment standards and occupational health and safety legislation, which give substance to the obligations contained in the statutes. When considering any labour and employment problem, it is important to ensure there are no additional regulatory rights or obligations that may impact on its solution. In addition to the statutory obligations discussed above, employers are also required to satisfy common law obligations owed to their employees in Canada's common law provinces, and to abide by the *Civil Code of Québec*. The most significant of these obligations is to provide employees with reasonable notice of the termination of the employment relationship without cause, which notice is described in greater detail below in Section 2, *Common Law Obligations to Employees*.

1. Statutory Obligations to Employees

An employer's specific statutory and regulatory obligations will generally depend on the law of the province or territory where it has operations. As such, any particular issue or question will have to be answered with reference to the applicable law of that jurisdiction.

1.1 Employment Standards Legislation

Canadian employment standards legislation sets out the minimum terms and conditions of employment in the federal and each provincial and territorial jurisdiction. Employers and employees may not contract out of these minimum obligations, except to provide for terms more favourable than those contained in the legislation. Accordingly, any document or practice that establishes a term of employment that is less favourable than an employment standard has no force or effect.

Generally, employment standards legislation sets out minimum standards relating to matters such as wages, hours of work, overtime pay, public holidays, vacations with pay, various leaves of absences and notice of the termination of employment. You should also be aware that employment standards legislation and regulations include many exceptions to the statutory minimum standards for certain types of employees, such as managers and professionals.

1.1.1 Minimum Wages

The minimum wages that must be paid to employees vary by province and territory, generally ranging from a low of C\$7 per hour to a high of C\$10 per hour. There are also lower minimum wages for certain jobs and types of employees prescribed by the regulations. In addition to setting out minimum wages to be paid to employees, employment standards legislation also includes various provisions regulating how employees are paid and the records that must be provided to employees and retained by employers regarding the employment relationship, including documentation with respect to the payment of wages.

1.1.2 Hours of Work

Except New Brunswick, the employment standards legislation in each jurisdiction provides that an employee's regular hours of work may not exceed certain daily and/or weekly maximums. For example, in British Columbia, Manitoba, Saskatchewan, Northwest Territories, Yukon, Nunavut and the federal jurisdiction, maximum hours of work are eight hours per day and 40 hours per week.

Maximum hours of work in the remaining provinces vary. For example, in Quebec and Newfoundland and Labrador, the applicable employment standards legislation provides for weekly maximum hours of work of 40 hours. Weekly limits in Ontario, Nova Scotia and Prince Edward Island are 48 hours. In Alberta, maximum hours are eight hours per day and 44 hours per week. In many jurisdictions, employees can agree to work more than these maximum hours and may be required to do so to deal with emergency situations. Employment standards legislation also provides employees with entitlements to meal breaks, hours free between shifts and days of rest during each week.

Each employment standards statute includes provisions with respect to the payment of overtime pay (or, in some instances, time off in lieu of overtime pay) after an employee works in excess of a certain number of hours per day and/or week. For example, in Ontario, an employee who works more than 44 hours per week is entitled to time and one half of his or her regular rate for each hour worked in excess of 44, unless he or she is exempted from this entitlement by the applicable regulations.

Generally, employees paid by the hour and by salary are entitled to overtime pay, although certain employees, including managers and certain professionals, are often specifically exempted from this requirement. Further, in many provinces, a written agreement between the employer and employee may provide for the averaging of an employee's hours of work over a period of time for the purpose of calculating his or her entitlement to overtime pay. There are also specific provisions permitting employers to implement work schedules that include "compressed" or four-day workweeks.

1.1.3 Vacations and Holidays

Employment standards legislation provides that employees are entitled to vacation time off work and vacation pay for each year worked. Except Saskatchewan, employees are entitled to two weeks of vacation time for at least the first five years of their employment, with vacation pay of 4% of their annual wages per year. In most provinces, the entitlement to vacation time and pay increases with an employee's length of service, to a maximum of three weeks of vacation time, with vacation pay of 6% of annual wages per year. In Saskatchewan, employees are entitled to three weeks of vacation per year, increasing to four weeks after they have completed 10 years of service. In Ontario, Prince Edward Island and the Yukon, employees are entitled to two weeks of vacation per year, regardless of their length of service.

In addition, employment standards legislation creates various statutory holidays, including New Year's Day, Canada Day, Labour Day and Christmas Day. The number of holidays to which an employee is entitled will depend on the province or territory where he or she works, and ranges from six to 10 holidays per year. Employment standards legislation generally provides that employees must be paid for these statutory holidays and, if an employee performs work on the holiday, he or she is entitled to some type of premium pay for hours worked. In many provinces, the employee is entitled to 1.5 times his or her regular rate for hours worked on the holiday, in addition to the holiday pay provided to employees.

1.1.4 Pregnancy and Parental Leave

Employment standards legislation also provides employees with a variety of protected leaves of absence. These leaves are protected in that an employer may not dismiss or penalize an employee who chooses to exercise his or her right to take leave under the legislation. Generally, employers are also required to continue to make contributions to certain benefit plans during the employee's leave, and the employee must be reinstated to his or her former position at the end of the leave. However, employers are not required to pay employees' wages during the vast majority of the statutory leaves as, in many cases, employees may collect benefits under Canada's federal employment insurance program while they are away from work.

The types of leaves of absences available to employees vary significantly depending on the province or territory where the employee works. However, all Canadian employees are eligible for some type of pregnancy and parental leave, although most provinces require that an employee have worked for an employer for a certain qualifying period before a pregnancy or parental leave may be taken. In most provinces, pregnancy leave can last for 15 to 18 weeks, and parental leave can last for 35 to 37 weeks, depending on whether the employee has also taken pregnancy leave. In Nova Scotia, an employee who has not taken pregnancy leave may take up to 52 weeks of parental leave. Quebec also provides employees with more extensive pregnancy and parental benefits, permitting employees to take 18 weeks of pregnancy leave and 52 weeks of parental leave. Quebec employees are also entitled to up to five days off upon the birth of their child, two days of which must be paid by the employer in certain circumstances.

1.1.5 Emergency Leave

In most Canadian jurisdictions, employment standards legislation also contains some type of unpaid sick leave, emergency leave and/or family responsibility/medical leave which allows employees to take time off to meet child care responsibilities or due to the illness of the employee or certain of his or her family members. These protected leaves vary from a few days to many weeks, and employees generally have an obligation to provide their employers with medical or other information substantiating their absence.

In addition, British Columbia, Saskatchewan, Quebec, New Brunswick, Nova Scotia, Newfoundland and Labrador, Prince Edward Island, Yukon and the federal jurisdiction also provide employees with bereavement leave on the death of certain close family members. These bereavement leaves last from two to five days and, in some instances, wages must be paid by the employer during that time. Ontario also permits employees to take unpaid emergency leave for up to 10 days in the case of a death of a close family member, provided the employer regularly employs 50 or more people.

1.1.6 Termination of Employment

Critical to most employers, employment standards legislation in all Canadian jurisdictions sets out minimum notice obligations upon the termination of an employee's employment. The legislation identifies those situations that constitute a termination of employment, and requires employers to provide written notice or pay in lieu of notice in those circumstances. As a general observation, an employee's entitlement to notice of dismissal increases with his or her length of service.

For example, in Ontario, employees are generally entitled to one week's notice (or, alternatively, one week's pay in lieu of notice) for each completed year of employment, to a maximum of eight weeks. Although employees' entitlement to notice of the termination of their employment varies slightly from province to province, Canadian employment standards legislation establishes a maximum statutory notice requirement of eight weeks or less. Employees in federally-regulated businesses with a minimum of three consecutive months of service at the time of dismissal have a minimum statutory entitlement to two weeks of notice (or pay in lieu thereof).

However, most employment standards statutes also include enhanced notice requirements for employers that effect a mass termination of employment, which is defined in most provinces and territories as the dismissal of 50 or more employees in a span of four weeks or less. Other obligations of a more administrative nature are also created should an employer undergo a mass termination or a discontinuance of its business.

For federally-regulated businesses, under the *Canada Labour Code*, if an employer discontinues its business permanently or undertakes mass terminations (50 employees or more in four weeks or less), it must give the federal government 16 weeks of prior notice. In most cases, the employer must also establish a “joint planning committee,” which must include employee and trade union representatives. The object of the committee is to develop an adjustment program to: a) eliminate the necessity for termination of employment; or b) minimize the impact of the terminations on redundant employees and assist them in obtaining other employment.

In Ontario and the federal jurisdiction, employment standards legislation also requires employers to provide employees with severance payments (in addition to notice or pay in lieu of notice) in certain circumstances. In Ontario, employees who have five or more years of service at the time of their dismissal are entitled to severance pay, if their employer has a payroll in Ontario of C\$2.5 million or more or if the dismissal is part of a discontinuance of a business. Severance payments equal one week’s pay for each completed year of employment and a proportionate amount of one week’s pay for a part year of employment, to a maximum of 26 weeks’ pay.

In the federal jurisdiction, an employee is entitled to statutory severance pay if he or she has completed 12 consecutive months of employment with an employer prior to his or her dismissal. Severance pay is calculated as the greater of two days of wages for each year of employment completed by the employee or five days of wages. The employee is also entitled to a minimum notice of termination or termination pay equal to the greater of two days of wages for each completed year of employment or five days of wages.

Quite aside from the notice and severance pay requirements described above, the employment standards legislation in three Canadian jurisdictions also includes “unjust dismissal” provisions. In general terms, and absent serious misconduct or certain other conditions beyond the employer’s control, these provisions permit certain employees to seek redress from employment standards tribunals or adjudicators following their dismissal. If the administrative decision-maker determines following a hearing that an employee has been unjustly dismissed, the employee may be reinstated to employment and/or receive compensation relating to his or her dismissal.

In the federal jurisdiction, non-unionized employees who have worked for an employer for at least 12 months in a non-management position may make unjust dismissal complaints. In Quebec, employees with two years of service can claim that they have been unjustly dismissed and, in Nova Scotia, employees with at least 10 years of service can do so.

1.1.7 Enforcement

More generally, Canadian employment standards legislation is enforced by way of a complaint made to the applicable federal, provincial or territorial Ministry responsible for the legislation. In most jurisdictions, employment or labour standards officers investigate a complaint and make a ruling either in favour of the complainant or the employer, if the matter cannot be settled. Appeals from these rulings are heard by labour relations boards or other administrative or judicial bodies established in each jurisdiction. In the case of unionized workplaces, bargaining unit members and their representatives generally enforce employment standards legislation by way of grievance arbitration.

1.2 Human Rights Legislation

Each Canadian jurisdiction has enacted human rights legislation that establishes a comprehensive system for the investigation and resolution of issues relating to discrimination. Although these human rights statutes deal with matters beyond the scope of the employment relationship, they also contain a number of provisions that deal with workplace discrimination.

Specifically, human rights legislation provides for an individual's right to equal treatment with respect to employment, and prohibits discrimination in the workplace based on certain "prohibited grounds", which are set out in the legislation. As a general observation, discrimination has been defined to include any distinction, exclusion or preference based on a prohibited ground as defined by the legislation.

1.2.1 Prohibited Grounds of Discrimination

The prohibited grounds of discrimination vary slightly from jurisdiction to jurisdiction, and include the following: place of origin; place of residence; creed; social conditions; social origin; source of income; language; civil status; sexual orientation; family status; political beliefs; ancestry; disability; criminal conviction; marital status; pregnancy; same-sex partnership; sex; age; religion; citizenship; nationality; national or ethnic origin; colour; race; and dependence on drugs or alcohol. As such, employers in Canada must be careful not to make employment decisions with reference to these characteristics. In this respect, employment decisions include a wide variety of matters relating to the employment relationship and the terms and conditions of employment, including hiring, compensation, promotion and dismissal.

Human rights legislation in many provinces and territories also prohibit the distribution of employment applications that express or imply a preference for an individual with certain characteristics. In addition, the human rights statutes of most Canadian provinces and territories contain a prohibition against sexual harassment and/or harassment based on other prohibited grounds. The legislation also seeks to protect employees who make complaints regarding discrimination or harassment by prohibiting reprisals of any kind against those individuals.

1.2.2 Exceptions

Generally, Canadian human rights statutes contain a variety of exceptions to their very broad prohibitions against workplace discrimination. The most used exception is one that permits an employer to discriminate on the basis of disability with respect to employment because the person is incapable of performing or fulfilling the essential duties of his or her position. This exception is narrowly interpreted and is subject to an obligation to reasonably accommodate the individual in performing those essential duties, to the point of undue hardship. Many human rights statutes also provide that affirmative action-style programs designed to relieve hardship or economic advantage or to assist disadvantaged persons or groups to achieve equal opportunity do not constitute discriminatory practices.

1.2.3 Enforcement

Enforcement of Canadian human rights legislation is essentially a complaint-driven process. Most jurisdictions have a human rights commission that will provide advice and assistance to individuals who believe they have been unlawfully discriminated against. If a complaint is filed, the human rights commission will investigate the complaint. If the complaint cannot be settled, the human rights commission may refer the complaint to a human rights tribunal for adjudication.

Generally, human rights tribunals have broad remedial powers, including the power to award damages for loss of employment or wages and/or damages relating to loss of enjoyment or hurt feelings. Human rights tribunals may reinstate an employee to his or her employment or require an employer to take proactive steps to ensure that discrimination does not continue.

For example, in some jurisdictions an employer may be required to institute an anti-discrimination policy, report periodically to the human rights commission and/or make specific changes to its employment systems or practices. Further, most human rights legislation provides that those persons who infringe the rights provided for by the legislation are guilty of an offence and liable to pay certain fines.

1.3 Occupational Health and Safety Legislation

Occupational health and safety legislation creates health and safety obligations for both employers and employees to minimize the risk of workplace accidents. In all jurisdictions, employers are required to take all reasonable precautions to protect the health and safety of their workers. In some provinces, this obligation extends to the protection of the health and safety of all individuals at or near the employer's workplace, whether or not those individuals are employees.

Aside from the general obligation to take reasonable precautions to protect employees, the regulations passed under occupational health and safety legislation contain many and very specific responsibilities that are imposed on employers to ensure that their workplaces are safe for employees. Some of these responsibilities apply to specific industries. Other regulatory responsibilities relate to particular hazards that may exist in the workplace, including the use of toxic substances and hazardous materials or equipment.

Canadian occupational health and safety legislation also provides employees with certain rights designed to promote workplace safety. For example, employees have a right to be informed by their employer about hazards in the workplace and have the right to refuse work that they reasonably believe is dangerous. Although the right to refuse work is subject to very specific procedural requirements in each jurisdiction, employers cannot discipline employees for properly exercising their statutory right to refuse dangerous work.

Employees also have a right to participate in the creation of safe workplaces and the resolution of health and safety problems. Occupational health and safety legislation in all Canadian jurisdictions provides for the creation of some type of Joint Health and Safety Committees, which are advisory groups of worker and management representatives.

Employers who employ more than 20 employees are generally required to create Joint Health and Safety Committees, although in some provinces and territories the committees are only required by order of the responsible Minister. Occupational health and safety statutes contain specific provisions with respect to the composition and operation of Joint Health and Safety Committees, including their size, composition and the frequency of meetings. Generally, Joint Health and Safety Committees are required to meet either monthly or quarterly to discuss health and safety concerns in the workplace, and to make recommendations to the employer for the improvement of the health and safety of workers.

1.3.1 Enforcement

In all Canadian jurisdictions, government health and safety officers or inspectors enforce occupational health and safety legislation. These officers or inspectors typically have broad powers to investigate potential violations of the legislation, and may be called to the workplace by a worker or employer, or may audit the workplace without notice.

An officer or inspector who finds that an employer has failed to comply with occupational health and safety legislation also has broad powers to make orders to rectify that failure. For example, an officer or inspector will typically order that violations be remedied within a certain time frame, and may also make work stoppage orders and/or require the removal of certain hazardous equipment or material from the workplace. Subject to the specific procedural requirements in the applicable legislation, the orders of an officer or inspector may be appealed by the employer to a labour relations board or other adjudicative body.

Canadian occupational health and safety legislation also provides for the quasi-criminal prosecution of individuals and corporations for violations of the legislation, resulting in potential fines and/or imprisonment. Maximum fines vary greatly and can be significant, exceeding C\$1 million in some provinces. In addition to these quasi-criminal sanctions, the *Criminal Code* was recently amended to expand both personal and corporate liability in the context of serious health and safety violations and workplace accidents. As such, employers and their representatives may also be subject to criminal sanctions with respect to a failure to ensure the health and safety of their workplaces.

1.4 Workers' Compensation Legislation

All provinces and territories in Canada operate a no fault insurance plan with respect to injuries and illnesses arising from employment, which is compulsory for most employers. These plans provide workers who become sick or injured at work with compensation for both economic and non-economic losses, in certain circumstances.

To the extent that an employer pays into the insurance fund, an employee can collect benefits for injuries causing temporary or permanent disabilities and make use of any rehabilitation services provided, but cannot sue his or her employer with respect to the injury. Workers' compensation boards in each Canadian province and territory manage the insurance plans, and most provinces and territories have workers' compensation tribunals to adjudicate disputes relating to benefit entitlements and other matters. Employees of federally regulated businesses are generally covered by the plan in the province or territory where they work.

Most employers are required to register with the applicable workers' compensation board and to pay premiums into the insurance fund. In some jurisdictions employers who carry on business in low-risk industries are not required to participate, although they may choose to do so. The contribution an employer is required to make to the insurance fund will depend on the type of activity carried on in the workplace. In general, the greater the risk of accident in the workplace, the higher the premium that employer will be required to pay. In some provinces, workers' compensation legislation provides that an employer's claim history may also impact its premium, such that a surcharge is applied to the account of an employer with a poor claim history and an employer with a good claim history receives a rebate.

Workers' compensation legislation establishes many additional employer obligations. Generally, the legislation requires employers to report any accidents that occur in the workplace within specific time frames. Employers are also required to work with employees to prevent injuries and to help injured employees return to work. In some provinces, workers' compensation legislation requires employers to reinstate certain workers who become able to return to work following a workplace accident to their previous or a comparable position, even if the employee has been absent for a significant period of time.

Employers must also comply with various administrative obligations relating to the investigation and adjudication of benefits claims and the payment of insurance premiums, which may vary significantly in each Canadian province or territory.

Employers and their representatives must comply with all obligations contained in workers' compensation legislation. As with occupational health and safety legislation, workers' compensation legislation provides for the quasi-criminal prosecution of individuals and corporations for violations of the legislation, which may result in significant fines and/or imprisonment.

1.5 Labour Relations Legislation

Labour relations legislation in each province and under the federal jurisdiction regulates trade union organization and collective bargaining. The legislation entrenches the right of employees to organize and to be represented by a bargaining agent, without interference from employers, through a certification process and by prohibiting conduct that interferes with the exercise of that

right. The collective bargaining process is regulated with a view to providing mechanisms for achieving collective agreements. Employers carrying on business in more than one province continue to be subject to provincial regulation (unless their business is subject to federal regulation, as in the case of inter-provincial trucking).

If a provincially regulated employer carries on business in several provinces, a union must seek certification from the labour board of each province in which the employer is located to require the employer to deal with the union in each jurisdiction. Because the *Canada Labour Code* only applies to certain industries and is broadly comparable to provincial legislation, the provisions of that Code will not be specifically reviewed.

Generally, Canadian labour relations legislation governs the conduct of unionized employees and employers, and contains many rights and obligations relating to collective bargaining and industrial disputes. In this respect, it is important to remember that it is the right of every employee in each Canadian jurisdiction to join a trade union, and to participate in any lawful activity of a trade union. Consistent with that right, employers cannot discriminate against an employee because he or she has joined a trade union or is participating in an organizing drive.

1.5.1 Union Certification

Labour relations legislation sets out the process by which a trade union may be certified to represent employees in a specific bargaining unit. Certification is generally approved by provincial and territorial labour relations boards, although the process used varies in each jurisdiction. In some jurisdictions a certification vote is required, whereas in other jurisdictions the trade union need only sign up a certain percentage of the employees to be certified.

Although an employer in almost all provinces has the right to communicate with employees during an organizing drive, labour relations legislation limits such communication to ensure that the employer does not coerce or unduly influence employees. Further, an employer must be careful not to interfere in other ways with a trade union's organizing effort. If a trade union believes that an employer has committed an unfair labour practice during the certification process, it may file a complaint with the applicable labour relations board.

In many jurisdictions, labour relations boards may proceed to certify the trade union if it is determined that due to the employer's inappropriate conduct the true wishes of the employees is not capable of being determined.

1.5.2 Collective Bargaining

Once a trade union is certified, the union becomes the exclusive bargaining agent for employees in its bargaining unit, and the employer has an obligation to bargain in good faith with the union to achieve a collective agreement. During the life of the collective agreement, strikes and lockouts are not permitted and all disputes are resolved through grievance arbitration. Further, labour relations legislation in each Canadian jurisdiction sets out certain procedures that trade unions and employers must follow before they are able to engage in a legal strike or lockout.

Generally, labour relations statutes also include provisions regarding the termination of a union's bargaining rights. As a general observation, an employer cannot encourage employees to initiate an application for termination in any way. In addition, labour relations legislation in each Canadian jurisdiction specifically provides that if all or part of a business is sold, bargaining rights are protected.

1.5.3 Strikes and Lockouts

Strikes or lockouts are illegal during the life of a collective agreement. They can be undertaken only after the expiration of the agreement and after mandatory conciliation has failed to bring about an agreement.

1.5.4 Picketing

Traditionally, there are two forms of picketing. Primary picketing is lawful and involves picketing at the place of business of the struck employer. Where the employer has multiple places of business, picketing at other locations is considered to be primary picketing.

Secondary picketing, on the other hand, involves picketing third parties dealing with struck employers. Injunctive relief to restrain secondary picketing might be available from the courts or labour relations boards in appropriate circumstances.

Picketing is controlled by the criminal law and by the law of torts in addition to labour relations law, and is limited to communicating information. Forms of intimidation, including verbal threats, physical assaults or blocking of premises, are unlawful.

1.5.5 Will the presence of a bargaining unit affect the sale of a business?

Generally, the purchaser of all or part of a business is bound by existing collective agreements and must recognize the certified union. In some cases after a sale, where there has been an intermingling of employees, an application can be made to the Labour Board to determine if the bargaining units are still appropriate.

2. Common Law Obligations to Employees

Over and above the statutory obligations summarized above, employers in Canada are also required to meet common law obligations owed to their employees working in Canada's common law provinces and territories, that is, all jurisdictions other than Quebec. Common law is essentially a "judge-made" body of law consisting of judicial decisions and precedents, instead of statutes or codes created by legislatures.

In the absence of a written contract of employment, certain terms and conditions of employment between an individual and his or her employer are implied by common law. One of the obligations imposed upon employers by the common law is the obligation to provide employees with reasonable notice of termination of employment, or pay in lieu of reasonable notice, in the absence of just cause for dismissal. Given that just cause for dismissal exists in only the most exceptional cases (typically involving serious misconduct on the part of the employee such as

theft or gross insubordination) terminations of employment in Canada are generally effected by providing employees with reasonable notice or pay in lieu of notice.

There is no fixed formula for determining reasonable notice in any given case. There are, however, many factors that have been taken into account by courts of law when determining reasonable notice, including the:

- Age of the employee
- Employee's length of service
- Position held by the employee
- Employee's level of compensation.

In essence, in each case courts attempt to identify the length of notice that will provide the employee with a reasonable opportunity to find alternative work of a similar nature. Generally, notice periods determined by courts have not exceeded 24 months, but the trend is currently toward longer notice periods. Further, any aggravating or "bad faith" behaviour on the part of the employer when dismissing an employee may serve to extend the reasonable notice period.

Reference was made above to written contracts of employment. Written contracts of employment may contain provisions which speak to an employee's entitlement to notice or compensation upon the termination of his or her employment. In general terms, any obligations regarding dismissal described by a valid contract will govern the termination of employment, as long as minimum statutory obligations are met.

On occasion, an onerous provision with respect to dismissal will be relieved against; for example, if the employee had no real opportunity to consider the provision prior to the time that he or she was hired. However, the existence of termination provisions in a written contract of employment does suggest that the parties have turned their minds to that issue prior to the commencement of the employment relationship. As such, in circumstances which involve valid contracts that contain clearly drafted severance clauses, courts are generally willing to give effect to those terms instead of applying the common law principles relating to reasonable notice.

Common law principles are not applicable in the province of Quebec. As a civil law jurisdiction, employers' obligations in Quebec are contained in the *Civil Code of Québec*. The *Civil Code of Québec*, however, does provide that an employee can claim reasonable notice (or compensation in lieu thereof) of the termination of his or her employment, such that a Quebec employee's entitlements upon dismissal are substantially similar to those of employees in the common law provinces.

However, Canadian employers should be aware of the fact that there are unique legislative and other requirements relating to employment in Quebec that are not necessarily present in the common law provinces and territories. For example, Quebec is the only Canadian jurisdiction with legislation that provides a complaint mechanism for employees who allege that they have been psychologically harassed in the workplace.

3. Employee Benefits – Privately or publicly funded?

3.1 Government Administered Benefits – Federal

Canada has many government administered pension, benefit and welfare programs that provide a minimum degree of social security. Old Age Security provides pensions payable from general tax revenues from age 65, subject to residence requirements. The Canada Pension Plan is a compulsory, contributory, earnings-related plan that governs employees and provides basic retirement, survivor benefits, death, and long-term disability benefits. For individuals employed or resident in Quebec, the Quebec Pension Plan is applicable and is essentially identical to the Canada Pension Plan. The federal Employment Insurance Program (EI) pays a 15-week sickness benefit equal to 55% of average weekly insurable earnings in the employee's qualifying weeks to a fixed maximum. Most employers contract out of EI sickness benefits by providing equal or superior benefits, thereby reducing their EI premiums.

3.2 Government Administered Benefits – Provincial

All provinces maintain a hospital and medical insurance plan. In some cases, including in Ontario, it is financed by an employer health tax based upon annual payroll. Provinces also have workers' compensation legislation that provides non-taxable disability and death benefits for accidents that are work-related, and which replace the employee's right to take legal action against the employer in connection with work-related injuries. Workers' compensation is funded by employer contributions determined on an industry-wide basis, depending on accident experience.

3.3 Privately Administered Benefits

3.3.1 Pension Plans

Many employers voluntarily offer private pension plans. They, like employment and labour matters, are governed by federal or provincial legislation depending on the jurisdiction of the undertaking and must be registered in the jurisdiction where the plurality of members are employed. To qualify for preferential tax treatment, pension plans must also comply with federal income tax laws and must be registered under the *Income Tax Act* (Canada).

Pension legislation provides minimum standards applicable to pension plans and specifies rules relating to many aspects of the pension arrangement, including:

- Funding
- Eligibility
- Vesting
- Early, normal and postponed retirement
- Accrual of benefits
- Investing and withdrawing pension fund assets

- Transfers of pension fund assets
- Discontinuance of a pension plan.

Employers with operations in more than one province or jurisdiction may operate one pension plan that provides the modifications required with respect to members employed in each province and jurisdiction.

3.3.2 Supplemental Pension Plans

Employers in Canada may choose to establish a supplemental pension plan for executives and senior level employees which will provide benefits in excess of the legislated limits under the *Income Tax Act* (Canada). Supplemental pension plans often benefit from an exemption from the minimum standards legislation described in the preceding section. However, this should be confirmed when establishing a plan. Assuming that an exemption applies and subject to any relevant employment agreement, benefits provided under a supplemental plan need not be funded. Employers may choose to fund a supplemental pension plan or secure the benefits provided pursuant to the plan using a letter of credit. If this is the case, the supplemental pension plan may be considered a Retirement Compensation Arrangement (RCA) under the *Income Tax Act* (Canada) and subject to a refundable tax regime. There are unique withholding and reporting requirements for the employer when the supplemental pension plan is an RCA.

3.3.3 Other Retirement Savings Arrangements

The *Income Tax Act* (Canada) contains a number of provisions designed to encourage individual savings for retirement. In particular, individuals may establish registered retirement savings plans. Contributions made to a registered retirement savings plan are deductible in computing income, and income earned in the plan is not subject to tax prior to withdrawal. When the accumulated contributions and income are eventually paid out (generally upon retirement), tax is payable on amounts received. Thus, the effect of a registered retirement savings plan is to defer tax on current earnings. The *Income Tax Act* (Canada) also contains provisions that permit an employer to share profits on a tax-sheltered basis with its employees (a “deferred profit-sharing plan”). Deferred profit-sharing plans have become relatively popular employer-sponsored retirement income vehicles. There are many technical rules governing registered retirement savings plans and deferred profit-sharing plans, including the timing and method of withdrawal of contributions, annual contribution limits (which vary depending on whether the individual also participates in a pension plan) and qualified investment restrictions.

Commencing in 2009, individuals residing in Canada can contribute up to C\$5,000 per year to a tax free savings account. Contributions are made with after-tax dollars but individuals are not taxable on any income or capital gains earned in their tax free savings account or withdrawals from the tax free savings account. Contributions made by an individual to their tax free savings account will not reduce the amount the individual is permitted to contribute annually to a pension plan, a registered retirement savings plan and/or a deferred profit-sharing plan under the *Income Tax Act* (Canada).

3.3.4 Employee Benefit Plans

In addition to sponsoring pension plans or other retirement savings plans, employers often offer health and welfare benefits to their employees. Such benefits typically include life insurance, accidental death and dismemberment insurance, long-term disability, short-term disability, extended health care and dental care. Employer-sponsored health and welfare plans supplement the universal health care provided in Canada. Health and welfare plans may be insured or self-insured. There will be different tax implications for employers and employees depending on the types of benefits provided under the health and welfare plan and the structure of the health and welfare plan.

VIII. PRIVACY LAW

Canada has enacted comprehensive federal privacy legislation with application to the private sector. In addition, certain provinces have enacted both comprehensive and sector-specific private sector privacy legislation.

The federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) applies generally to all collection, use or disclosure of personal information by organizations in the course of a commercial activity. “Personal information” is broadly defined in PIPEDA, and includes any “information about an identifiable individual”, whether public or private, with limited exceptions.

All organizations subject to PIPEDA must comply with a range of obligations when collecting, using, disclosing and otherwise handling personal information, summarized in the following 10 principles:

1. **Accountability:** Organizations must appoint an individual (or individuals) to be responsible for the organization’s compliance and to develop and implement personal information policies and procedures. Organizations are accountable for personal information transferred to third party service providers (including affiliated companies) for processing on their behalf, and must use contractual or other means to protect personal information while being handled by those third parties.
2. **Identifying Purposes:** Organizations must identify the purposes for collecting personal information before or at the time of collection.
3. **Consent:** Knowledge and consent of the individual are required for collection, use and disclosure of personal information, with limited statutory exceptions. Consent cannot be made a condition for supplying a product or service unless use of the personal information is required to fill an explicitly specified and “legitimate” purpose. Individuals may withdraw their consent at any time, subject to contractual or statutory limitations.
4. **Limiting Collection:** Organizations are required to limit collection to the amount and type of information necessary for the identified purposes. Information must be collected by “fair and lawful means”, and cannot be collected indiscriminately.
5. **Limiting Use, Disclosure and Retention:** Personal information may not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or pursuant to certain limited statutory exceptions. Personal information is to be retained only as long as necessary for the fulfilment of those purposes.
6. **Accuracy:** Personal information must be accurate, complete and up-to-date as is necessary for the purposes for which it is to be used.
7. **Safeguards:** Organizations must use appropriate security safeguards to protect personal information against loss or theft, and unauthorized access, disclosure, copying, use or

- modification, and must train staff on security and information protection, among other matters.
8. **Openness:** Privacy policies and practices of the organization must be open, understandable and easily available.
 9. **Individual Access:** Organizations must give individuals access to their personal information upon request, subject to certain statutory limits and, in appropriate circumstances, individuals must be given an opportunity to correct their information.
 10. **Challenging Compliance:** Organizations must have a simple and easily accessible complaint procedure.

In addition to the foregoing principles, compliance with PIPEDA is subject to an overriding reasonableness standard whereby organizations may only collect, use and disclose personal information for the purposes that a “reasonable person would consider are appropriate in the circumstances”. This reasonableness requirement applies even if the individual has consented to the collection, use or disclosure of their personal information.

Given the constitutional limits placed on federal legislation, PIPEDA applies only to the employment information of employees of federally-regulated organizations such as banks, airlines and telecommunications companies. Provincial privacy legislation will, however, apply to employee information outside those sectors.

Quebec has had private sector personal information privacy legislation, *an Act respecting the protection of personal information in the private sector* (Quebec Privacy Act), in force since 1994. The Quebec Privacy Act is similar in principle to PIPEDA, but there are important differences in detail. The Quebec Privacy Act applies to all private sector organizations with respect to collection, use and disclosure of personal information (not just with respect to commercial activities) and to employee information. It also applies to private sector collection, use and disclosure of personal health information. Alberta and British Columbia have also enacted comprehensive private sector privacy legislation (in each case, the *Personal Information Protection Act* or PIPA) that applies generally, including to personal information of employees.

In addition, Alberta, Manitoba, Ontario and Saskatchewan have legislation in place specifically governing the collection and use of personal health information.

PIPEDA permits the federal cabinet, by order, to exempt an organization or class of organizations or an activity or class of activities from its application if the collection, use or disclosure of personal information occurs within a province that has enacted legislation that is substantially similar. The Quebec Privacy Act and the PIPA legislation in Alberta and British Columbia have each been designated as substantially similar to PIPEDA. In addition, Ontario health information custodians (e.g., physicians, nurses, hospitals, etc.) have been exempted with respect to personal health information to which Ontario’s health information privacy statute applies. Nevertheless, given that many organizations operate in more than one province and inter-provincially, businesses are still required to deal with a “patchwork” of provincial and federal privacy legislation.

To date, there are no Canadian statutory obligations on private sector organizations that require disclosure of privacy-related data breaches. Federal and provincial privacy commissioners have

published guidelines that suggest disclosure and notification should be made in certain circumstances, and it is likely that mandatory notification requirements will be added to PIPEDA in the next round of amendments to that statute expected in the near future.

Considerable attention has been given in Canada to cross-border transfers and outsourcing of Canadian personal information to the U.S. Much of this attention has centred on the concern that U.S. authorities could use the USA PATRIOT Act to obtain the information of Canadians where that information is located in or accessible from the U.S. While PIPEDA and the related provincial legislation do not prohibit the transfer of personal information outside of Canada, the “Openness” principle has been held to require that notice of such transfers be provided to affected individuals. In addition, the Quebec Privacy Act requires organizations to consider the potential risks involved in transferring personal information outside of Canada.

Somewhat different rules apply to personal information that is collected by federal, provincial or municipal public sector organizations. This information is covered by federal and provincial legislation that limits the use and disclosure of such information to purposes related to a valid public purpose. While generally these public sector privacy statutes apply only to public sector organizations, in British Columbia and Nova Scotia there are restrictions on personal information collected by public sector organizations, which cannot be stored in, or accessed from locations outside of Canada unless the individual consents. These restrictions apply to service providers to public sector organizations. As a result, private sector organizations that provide services to government agencies or other public sector organizations in British Columbia and Nova Scotia will be directly subject to restrictions on foreign storage of, and access to, personal information collected by public sector organizations.

In addition, provinces such as British Columbia, Alberta and Nova Scotia impose penalties for disclosure of personal information pursuant to foreign legal requirements (e.g., court orders, USA PATRIOT Act disclosure notices). Organizations that perform contracted services for federal public bodies should also be aware of federal government contracting guidelines that address privacy risks of contracting with foreign-based or foreign-affiliated service providers.

IX. INTELLECTUAL PROPERTY

Almost all business transactions and new product launches have intellectual property implications. Many products have various aspects that require protection.

For example, a “patent” protects new, useful and inventive functional features of a product or process. “Copyright” protects, among other things, original drawings by which a product is designed and software. An “industrial design” registration protects a novel and original aesthetic design of a functional article. “Trade-mark” protection is available for a distinctive word or design identifying the source of a product.

Any secret formula or process of manufacture of a product or business method that is known exclusively by the business would constitute proprietary “confidential information”. “Personality rights” may be involved if the name or likeness of a person is used to promote a product. “Topography rights” and “plant breeders’ rights” protect the products in certain industries.

With only a few exceptions, federal law governs intellectual property in Canada. Federal statute law regulates patents, trade-marks, copyright and moral rights, industrial designs, topography rights and plant breeders’ rights.

The only provincially regulated aspects of intellectual property are through the common law of passing off, personality rights and confidential information, and the statutes in some provinces governing personality rights. Provincial law also governs trade names and contracts related to intellectual property, such as transfers, licences and security interests.



1. Federal Law

1.1 Patents

1.1.1 What inventions are eligible for a patent?

A patent is granted by the federal government for an invention that satisfies certain criteria pursuant to the *Patent Act*. The patentee may exclude others from making, using or selling an invention protected by a patent.

A patent can only be obtained for certain classes of inventions, namely processes (such as a method for refining oil), machines (devices with moving parts), manufactured articles and compositions of matter (such as chemical compounds like plastics).

To be patentable, an invention must be new, useful and inventive. Utility is determined by whether the invention has a useful purpose and is capable of operation. Inventiveness means that the invention is not obvious to a person having ordinary skill in the art to which the invention relates.

The novelty of an invention is assessed with reference to certain statutory criteria. In the event of competing applications, only the person whose application has the earliest effective filing date may be entitled to a patent. However, only an inventor or a person who derives rights from the inventor is entitled to a patent. An invention made by an employee within the scope of employment is the property of his or her employer.

An invention will not be patentable if it is made available through disclosure by publication, sale or otherwise in any country prior to the filing date of the application, unless the disclosure is made by the inventor or someone who derives knowledge from the inventor and an application is filed within one year of such a disclosure.

1.1.2 How does a person apply for a patent?

Canada is a signatory to the *Paris Convention* and the *General Agreement on Tariffs and Trade* establishing the World Trade Organization. Thus, in determining priority of filing, an applicant can rely on the filing date of its first application for a patent for the same invention in another country which is also a signatory to either of these treaties ("priority date") if the Canadian application is filed within one year of the priority date. Canada is also a signatory to the *North American Free Trade Agreement*, the *Budapest Treaty* and the *Patent Co-operation Treaty* (PCT). An international PCT application may designate Canada, entitling the applicant to enter the national phase in Canada.

An application for a patent must include a description of the invention and claims that clearly define the invention. The description must enable any person skilled in the art to understand the invention and acquire sufficient information to practise the invention after expiry of the patent. The claims must be concise statements of what the invention is and distinguish the patented invention from previously known technology. The claims determine the scope of protection provided by a granted patent.

A patent application is subject to examination by the Canadian Intellectual Property Office prior to grant. Examination must be requested within five years of the filing of an application. Only registered Canadian patent agents – Blakes and many of the individuals within its Intellectual Property Group are patent agents – may represent an applicant for a patent in the Canadian Intellectual Property Office. Applications are published 18 months after the priority date.

1.1.3 May a patent be transferred?

An invention, a patent application and a patent may be voluntarily licensed and transferred. Transfers and exclusive licences must be recorded in the Canadian Intellectual Property Office. After the third anniversary of a patent, an application may be made for a compulsory licence on the ground that the patent rights have been "abused".

A security interest may be recorded in the Canadian Intellectual Property Office but the effect of such recordal is not clear. A security interest may also be recorded under provincial personal property security regimes.

1.1.4 What rights does a patent provide?

A patent based on an application filed after September 30, 1989 is in force from the date of grant to a date 20 years after the date the application is filed in Canada. Patents granted on applications filed prior to October 1, 1989 are in force for the longer of 17 years from the date of grant or 20 years from the Canadian filing date. Annual maintenance fees are required to keep patent applications pending and issued patents in force.

A valid patent protects against the unauthorized manufacture, use or sale in Canada of devices or methods embodying the claimed invention, whether copied or resulting from an independent act of invention. The sale in Canada of products made abroad by a process patented in Canada may also be prevented. There are a number of remedies for patent infringement. These include: (i) temporary and permanent injunctive relief; (ii) either the damages suffered by the patent owner or the profits earned by the infringer; (iii) punitive damages; and (iv) delivery up or destruction of infringing articles.

1.2 Trade-marks

1.2.1 Must a trade-mark be registered to be protected?

A trade-mark is a word, symbol or shape used to distinguish a person's goods or services from those of others. Trade-mark rights can be acquired through use of the mark in Canada in association with goods, services or both, or by registration. Although a trade-mark need not be registered to be protected, registration will usually ensure protection throughout Canada and facilitate enforcement of trade-mark rights.

In the absence of registration, a trade-mark can be protected only in the geographical area in which the owner can establish a reputation or goodwill in association with the mark and the goods and services offered with it. (See the discussion under "Provincial Law" below.) The reservation of a business name or a corporate name, the incorporation of a company or the registration of a domain name will not itself create any trade-mark rights.

1.2.2 What trade-marks may be registered?

A trade-mark is registrable if it is not: (i) primarily merely the name or surname of an individual who is living or has died within the preceding 30 years; (ii) either clearly descriptive or deceptively descriptive in the English or French language of the character or quality of the wares or services in association with which it is used or of the conditions of, or the persons employed in, their production, or of their place of origin; (iii) the name in any language of the wares or services in association with which it is used; (iv) confusing with a registered trade-mark; or (v) a mark of which the adoption is prohibited.

Although otherwise not registrable, some marks may be registrable if they have been so used in Canada as to have become distinctive or, if registered in a foreign country, are not without distinctive character.

1.2.3 How does a person apply to register a trade-mark?

Canada is a signatory to the *Paris Convention* and the *General Agreement on Tariffs and Trade* establishing the World Trade Organization (WTO). Canada is also a member of the *North American Free Trade Agreement*. However, Canada has not adhered to the *Nice Agreement*, the *Trademark Treaty* or the *Madrid Protocol*.

For the purposes of the federal registration system, governed by the *Trade-marks Act*, the first person to “adopt” a trade-mark in Canada is generally considered to be the person entitled to registration in Canada, even if someone else was the first to apply to register the same mark. A trade-mark may be adopted by “use” or “making known” of the trade-mark in Canada or by filing an application for registration of the trade-mark in Canada, and may be registered on one or more of the following bases:

- **Use in Canada by the applicant or a predecessor in title:** “Use” in Canada with goods occurs when a trade-mark is marked on the goods or their packaging or when the mark is otherwise associated with the goods so that a purchaser would have notice of the association when the goods are sold or their possession is transferred in Canada in the normal course of trade. While mere advertising of a mark is not use of the mark in connection with goods, use with services occurs if the mark is used or displayed in Canada in performance of the services, or in advertising of the services if the applicant is capable of performing the services in Canada.
- **A stated intention to use a trade-mark in Canada:** Actual use must occur in Canada before registration is granted.
- **Making the trade-mark known in Canada by the applicant or a predecessor in title:** A mark is “made known” in Canada with goods or services if it is used in a foreign country which is a member of the *Paris Convention* or the WTO and is made well known in Canada to a substantial segment of the relevant population by reason of prescribed types of advertising.
- **Use and registration of the mark in a foreign country that is a member of the *Paris Convention* or the WTO:** The application will not be approved for advertisement until registration is granted in the foreign country.

A person who has filed a trade-mark application in its country of origin, which is a member of the *Paris Convention* or the WTO, may be entitled to treat the filing date of the first foreign application (“priority date”) as an adoption date in Canada if a Canadian application for the same mark is filed within six months of the priority date.

The Canadian Intellectual Property Office will examine the application. Only registered Canadian trade-mark agents (Blakes and many of the individuals in its Intellectual Property Group are trade-mark agents) may represent an applicant to prosecute a trade-mark application. If the mark is found to be registrable, the application is advertised in the *Trade-marks Journal*. Any person may file an opposition to registration, within two months of advertisement.

1.2.4 May a trade-mark be transferred?

A trade-mark, an application for registration or a registration may be assigned, although one must be careful that the distinctiveness of the trade-mark is not thereby impaired.

“Distinctiveness” refers to the ability of a trade-mark to distinguish a person’s goods and services from those of others. The owner of a trade-mark may licence others to use the mark if the owner controls the nature and quality of the licensee’s goods or services associated with the mark pursuant to a licence agreement. An agreement is required even if the parties are related. If notice is given of the trade-mark owner’s name and that the use is a licensed use, control by the owner will be presumed.

A grant of a security interest may be filed against a trade-mark of record in the Canadian Intellectual Property Office but the effect of such a filing is unclear. A security interest may also be recorded under provincial personal property security regimes.

1.2.5 What rights does a trade-mark registration provide?

Registration of a trade-mark is granted for indefinitely renewable periods of 15 years. A registration is subject to expungement if: (i) after the third anniversary of registration the mark has not been used in Canada during the preceding three-year period; (ii) the mark was not validly registered; or (iii) the mark is no longer distinctive of the goods and services of its registered owner.

A valid trade-mark registration gives the owner the exclusive right to use the mark throughout Canada in respect of the goods and services for which it is registered. A person who sells, distributes or advertises goods or services in association with a confusing trade-mark or trade name infringes this right. Confusion is caused if the use of two trade-marks, or a trade-mark and a trade name, in the same area would likely lead to the inference that the goods, services or business associated with such marks or names are manufactured, sold, leased, hired or performed by the same person.

The remedies for trade-mark infringement include: (i) temporary and permanent injunctive relief; (ii) either the damages suffered by the trade-mark owner or the profits earned by the infringer; (iii) punitive damages; (iv) an order prohibiting importation; and (v) delivery up or destruction of offending materials.

1.3 Copyright

1.3.1 What types of works are capable of copyright protection?

Copyright is governed by the *Copyright Act*. Copyright is the sole right to reproduce, publish, publicly perform, telecommunicate to the public and effect other defined activities in respect of literary, dramatic, artistic and musical works. Copyright also includes rights of performers in their performances, and rights in relation to sound recordings and broadcast signals. Only the form of expression of a work is protected. Copyright does not protect an idea, concept or information. Computer programs are protected as literary works, regardless of the medium in which such programs are expressed.

Canada is a signatory to the *Berne Convention*, the *Universal Copyright Convention* and the *Rome Convention*. Canada is also a signatory to the *General Agreement on Tariffs and Trade* establishing the World Trade Organization. Pursuant to those conventions, Canada recognizes copyright in works and other subject matter created by nationals of other signatories to the conventions. Canada is also a member of the World Intellectual Property Organization (WIPO) *Copyright Treaty*, the *WIPO Performances and Phonograms Treaty* and the *North American Free Trade Agreement*.

Copyright protection subsists in any work capable of being so protected from the moment it is created and fixed in a tangible form, provided that certain conditions relating to the publication and residence or domicile of the author in a convention country are satisfied. No registration of copyright is necessary, although registration is helpful as a means of proof of copyright and its ownership in the event of litigation. Marking of copyright on articles with a copyright notice is not necessary in Canada but is a usual practice.

1.3.2 Who owns copyright?

The author of a work is generally the first owner of copyright in the work. If the author is in the employment of another and the work is made in the course of such employment, the employer is the first owner of copyright. If the author is an independent contractor and there is no written transfer of copyright, copyright is owned by the author. Special rules apply for engravings, photographs, portraits, contributions to periodicals, and works prepared or published by or under the direction or control of the federal government. Other special rules apply for performers' performances, sound recordings and communication signals.

1.3.3 What does copyright protect?

Copyright generally lasts for the life of the author of the work plus the period to the end of the calendar year 50 years thereafter. There are different rules for certain works, such as photographs, and performers' performances, sound recordings and broadcast signals.

Copyright includes the right to produce or reproduce a work or any substantial part thereof in any material form whatsoever. Copyright protects original works against the unauthorized reproduction in different media, publication, public performance and telecommunication to the public of protected works, among other activities, and the authorization of such activities. Copyright also protects against certain commercial activities with infringing copies if there is knowledge that the copies infringe.

1.3.4 May copyright be transferred?

Copyright may be assigned and licensed. Any assignment or licence of exclusive rights must be in writing. Assignments and licences should be recorded in the Canadian Intellectual Property Office. The effect of the recordal of a security interest in the Canadian Intellectual Property Office is not clear. A security interest may also be recorded under provincial personal property security regimes.

1.3.5 How may copyright be infringed?

Copyright is infringed by a person who performs any activity with a work protected by copyright without the permission of the author. Such activities include reproduction, publication, public performance and telecommunication to the public.

A person need not be a copier or performer to infringe copyright. Copyright may also be infringed by certain commercial activities in relation to a work which are done with knowledge that the work infringes copyright or would infringe copyright if it had been made within Canada. In some cases, importation of a work may constitute infringement.

For reasons of public policy, a number of activities in relation to copyright works which would otherwise constitute infringement are specifically exempted from infringement. By way of example, any fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary may be exempted from infringement.

Users who are in lawful possession of a computer program may, in certain circumstances, alter and adapt that program to their particular needs, and make back-up copies of it, without infringing copyright.

The drawings used to plan or make a useful three-dimensional object are protectable under copyright, but this protection does not always prohibit the reproduction of the article itself. An article embodying features dictated solely by utilitarian features may, in some circumstances, be reproduced without violating the copyright subsisting in the drawings. A useful article embodying aesthetic features may be reproduced without violating copyright if the copyright owner produces, or authorizes production of, more than 50 articles, unless the design of the article embodying those aesthetic features is registered as an industrial design. (See the discussion of *"Industrial Designs"* below.)

The civil remedies for copyright infringement include: (i) temporary and permanent injunctive relief; (ii) an order prohibiting importation; (iii) both the damages suffered by the copyright owner and the profits earned by the infringer through the sale of infringing copies (subject to a deduction for any overlap); and (iv) punitive damages. Further, all infringing copies of any work in which copyright subsists, and all plates used or intended to be used for the production of such infringing copies, are deemed to be the property of the owner of the copyright. In some cases, statutory damages may be available.

In addition to civil liability for copyright infringement, an infringer may be exposed to criminal liability.

1.3.6 What are moral rights?

Independently of any right of ownership of copyright in any literary, artistic, musical or dramatic work, the author of a work has moral rights. These include the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym, the so-called "right of paternity"; and the right, where reasonable in the circumstances, to remain anonymous, the "right of anonymity".

As well, the author has the "right to the integrity" of the work. An author's right to the integrity of a work is infringed if the work is, to the prejudice of the honour or reputation of

the author, distorted, mutilated or otherwise modified or used in association with a product, service, cause or institution. In the case of a painting, sculpture or engraving, prejudice is deemed to have occurred as a result of any distortion, mutilation or other modification of a work.

Moral rights may not be assigned, but may be waived in whole or in part. A simple assignment of copyright in a work does not constitute a waiver of moral rights.

1.4 Industrial Designs

1.4.1 What industrial designs are registrable?

An industrial design registration under the *Industrial Design Act* protects the aesthetic features of a useful article. Registrable designs are those having an original conception of shape, configuration, pattern or ornamentation. To be registrable, a design must be directed to an aesthetic feature. Entirely functional features may not be the subject of registration. Features of the construction, mode of operation and functioning of an article may be patentable, but cannot be registered as industrial designs.

1.4.2 How does a person apply for registration?

Canada is a signatory to the *Paris Convention*, the *General Agreement on Tariffs and Trade* establishing the World Trade Organization and the *North American Free Trade Agreement*.

An application for registration must be filed within a year of the first publication or sale of the design in Canada. A person who has filed a design application in its country of origin, which is a member of the *Paris Convention* or the World Trade Organization, may be entitled to treat the filing date of the first foreign application ("priority date") as the effective filing date in Canada if a Canadian application for the same design is filed within six months of the priority date.

An industrial design registration must be obtained in the name of the original proprietor. The proprietor of an industrial design is the author or the person for whom the design was authored for valuable consideration, such as an employer. An application is examined by the Canadian Intellectual Property Office.

1.4.3 What does registration provide to a proprietor?

A registration is granted for a period of five years and may be renewed for one additional five-year period.

An industrial design registration entitles the registrant to restrain the manufacture, importation for trade, sale and rental of any article in respect of which the design is registered and to which the design or a design not differing substantially therefrom has been applied.

The remedies for industrial design infringement include: (i) temporary and permanent injunctive relief; (ii) either the damages suffered by the design owner or the profits earned by the infringer; (iii) punitive damages; and (iv) delivery up or destruction of infringing articles.

1.4.4 May an industrial design be transferred?

An industrial design, an application for registration and a registration may be assigned or licensed. Assignments and licences may be recorded in the Canadian Intellectual Property Office. The effect of recordal of a security interest in the Canadian Intellectual Property Office is unclear. A security interest may also be recorded under provincial personal property security regimes.

1.5 Personality Rights

Although personality rights are generally governed by provincial law (see the discussion under “Provincial Law” below), the *Trade-marks Act* provides that no person may adopt in connection with a business, as a trade-mark or otherwise, any mark consisting of, or so nearly resembling as to be likely to be mistaken for any matter that may falsely suggest a connection with (i) any living individual, or (ii) the portrait or signature of an individual who is living or has died within the preceding 30 years.

1.6 Topographies

The *Integrated Circuit Topography Act* permits the protection of original integrated circuit topographies. Topographies are the three-dimensional configurations of electronic circuits used in microchips and semiconductor chips. They may be protected for 10 years from the filing of an application for registration or the date of first commercial exploitation, whichever is earlier. However, to obtain such protection, topographies must be registered within two years of first commercial exploitation.

1.7 Plant Breeders’ Rights

Canada is a member of the Union for the Protection of New Varieties of Plants. New varieties of certain plants may be protected under the *Plant Breeders’ Rights Act*. Protection is currently available for all species, except algae, bacteria and fungi. New species will be brought on stream gradually.

1.8 Domain Names

Canada has its own country code top level domain name registry, **.ca**. To register a **.ca** domain name, an applicant must satisfy one of the 18 criteria in the Canadian Presence Requirements (CPR) which require some nexus with Canada. For example, the CPR may be satisfied if the applicant is a corporation incorporated in Canada or the domain name comprises a trade-mark registered in Canada by the applicant. The **.ca** registry has a domain name dispute resolution policy that is modelled on, but differs in some crucial respects from, the *Uniform Dispute Resolution Policy*.

1.9 Criminal Law

The federal *Criminal Code* provides sanctions against the forgery of trade-marks. Although the theft of tangible materials bearing confidential information is a criminal offence, the theft of information by itself is not a criminal offence.

2. Provincial Law

2.1 Trade-marks/Passing Off

Where someone makes a misrepresentation in the course of trade to prospective customers or ultimate consumers of goods or services which is calculated to injure the business or goodwill of another trader in the sense that it is a reasonably foreseeable consequence, and which causes, or is likely to cause, actual damage to a business or goodwill of the trader by whom the action is brought, such activity may be restrained by an action for passing off at common law. A similar cause of action is available pursuant to the Quebec *Civil Code*.

To succeed in a passing off action, it is not necessary that the plaintiff conduct business in Canada, provided that the plaintiff has a reputation in its trade-mark in association with which the goods or services are offered.

2.2 Business Names

Business names, being the names (other than a corporate name) by which a business is known, are regulated by provincial law. By way of example, the *Business Names Act* of Ontario requires registration by every business operating in Ontario that uses a name other than its corporate name, or in the case of individuals, the names of the owners. Business is defined very broadly to include “every trade, occupation, profession, service or venture carried on with a view to profit”.

A person who has not registered the name of a business cannot maintain a proceeding in a court in Ontario in connection with that business except with leave of the court. The court may grant leave if the person in contravention of the Act satisfies the court that: (i) the failure to register was inadvertent; (ii) there is no evidence that the public has been deceived or misled; and (iii) at the time of the application, the person is no longer in contravention.

2.3 Personality Rights

The provinces of British Columbia, Manitoba, Newfoundland, Quebec and Saskatchewan have legislation dealing with personality rights. At common law, which applies in all Canadian jurisdictions other than Quebec, an individual generally has the right to restrain activities which invade his or her right to privacy or which suggest unauthorized endorsement, sanction or other involvement by him or her. Such involvement may be suggested through the misappropriation of a name, likeness or other recognizable indicia of the personality.

2.4 Confidential Information and Trade Secrets

The possessor of confidential information, which is of commercial or other value, can generally require another party who obtains that information to maintain it in confidence. The existence of this legal right depends on whether there is a contractual or other relationship imposing an obligation of confidentiality. The concept of proprietary information does not apply to information generally known or obtainable. It may apply to information obtained in the course of negotiating a business relationship, such as a joint venture.

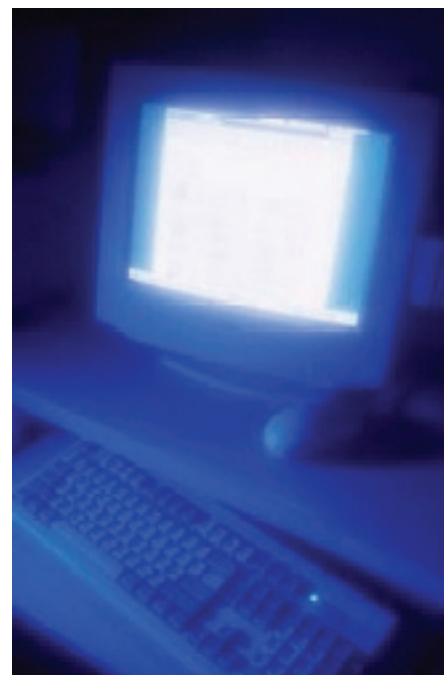
The remedies for the unauthorized use or disclosure of confidential information include: (i) temporary and permanent injunctive relief; (ii) an order prohibiting use or disclosure; (iii) either the damages suffered by the possessor or the profits earned by the violator; and (iv) punitive damages. As well, other benefits gained from the unauthorized use of confidential information may in some circumstances be recoverable by the party from whom the information was obtained.

2.5 Licensing

All types of intellectual property may be licensed. The licensing of trade-mark rights must be handled carefully (see 1.2.4 above). The law of licensing is governed by the law of the contract. No approvals are necessary, although recordal in the Canadian Intellectual Property Office is advisable for some intellectual property rights. Licence agreements are subject to federal competition law and to other laws of general application.

X. INFORMATION TECHNOLOGY

Information technology law in Canada covers a wide range of legal rules and practices, many of which are discussed elsewhere in this Guide, related to activities and transactions involving software, hardware, databases, electronic communications, the Internet and other information technologies. This Section is a summary of some of the key legal issues under Canadian information technology law that one needs to consider when doing business in Canada.



1. Information Technology Contracting in Canada

1.1 What terms are generally negotiated?

In Canada, information technology contracts generally specify each party's obligations (such as delivery, performance, payment and confidentiality obligations) ownership and licence rights (including scope of use), acceptance tests and procedures, source code escrow (if applicable), representations, warranties, indemnities, limitations on liability and disclaimers. Disclaimers and limitation of liability clauses in information technology contracts can help minimize risks. However, it is important to note that there are some peculiarities in Canadian law that may render such clauses unenforceable, and require careful drafting and review by Canadian counsel.

1.2 Assignments and Licences

In Canada, assignments and licences of intellectual property rights must be in writing and should be registered with the Canadian Intellectual Property Office. Note that an author's moral rights, which exist under the *Copyright Act*, cannot be assigned but must be waived. For a more detailed discussion on intellectual property legal issues in Canada, see Section IX, "Intellectual Property".

1.2.1 Are software licences assignable and capable of being sublicensed?

A software licence may be viewed by Canadian courts as "personal" and thus not be assignable or capable of being sublicensed to third parties unless the licence contains the express permission by the licensor to do so. In addition, confidentiality restrictions and limitations on licence scope can also affect the transferability of a licence agreement. This is an important point to keep in mind when doing due diligence in any Canadian commercial acquisition.

1.2.2 Are shrink-wrap, click-wrap and browse-wrap licences enforceable in Canada?

Off-the-shelf computer programs that are accompanied by “shrink-wrap” licences and online “click-wrap” and “browse-wrap” agreements have received mixed enforceability before Canadian courts due to the requirement in Canadian law that both parties must assent to a contract in order for it to be binding on them. Such agreements have been enforced where the purchaser was impressed with the knowledge of the terms at the time of sale. They have also been enforced with proof of established prior business conduct or by the subsequent conduct of the user.

1.3 Applicability of Sale of Goods Legislation

1.3.1 Are information technology purchases sales of goods?

If a transaction for the acquisition of information technology falls within the scope of provincial sale of goods legislation, certain rights and obligations will follow. Canadian courts tend to treat computer system acquisitions as sales of goods while transactions involving pure service, maintenance, custom training or programming are generally characterized as incidental to the sale of goods and therefore not subject to sale of goods legislation. Pre-packaged software supplied pursuant to a licence agreement is not subject to sale of goods legislation as no property in the software is transferred to the licensee. An exception occurs where the software is provided in conjunction with a larger transaction involving the sale of goods (e.g., hardware).

1.4 Consumer Protection

1.4.1 How do consumer protection laws affect Internet business and e-commerce?

For a more detailed discussion on consumer protection laws, see Section IV, “Trade and Investment Regulation”. Note that certain provinces have enacted consumer protection legislation that prescribe various requirements that must be met for Internet sales contracts, such as the disclosure of relevant information and the delivery of a copy of the contract to the consumer. The federal government has also released a code of conduct for businesses engaging in electronic commerce transactions with consumers.

2. Intellectual Property Rights in Information Technology

2.1 Copyright

2.1.1 What information technology is protected by copyright?

Copyright is currently a primary source of protection for software programs, user manuals, databases, Web sites and other information technology works in Canada, provided that they meet the requirements of the federal *Copyright Act*.

To be the subject-matter of copyright, the work must be “original”, meaning that it originated from the author and was not copied (a higher standard of skill and judgment is required for the protection of databases). Further, for a work to garner copyright protection in Canada it must be fixed. Fixation is not always clear, especially with respect to information technology.

2.1.2 Who owns the copyright in information technology?

As discussed in Section IX, “Intellectual Property”, the author of an information technology work is generally considered to be the first owner of the copyright in it. An exception to this rule is where the author is an employee and the work is created in the course of his employment, in the absence of an agreement to the contrary, the first owner of the copyright is the employer not the employee. Canada does not have the U.S. equivalent concept of a “work made for hire”.

2.1.3 Is software a copyright work?

Computer programs are protected under the *Copyright Act* as literary works. Canadian courts have recognized that the writing of a computer program is a creative “art form” and therefore computer programs will typically meet the minimal originality requirement to obtain protection under the *Copyright Act*. Updates or enhancements to software are subject to independent copyright protection. The fact that a computer program is created using well-known programming techniques or contains unoriginal elements may not be a bar to copyrightability if the program as a whole is original.

2.1.4 What elements of hardware are copyrightable?

Computer hardware designs and plans have received copyright protection in Canada. Further, any software code stored on the hardware may be subject to copyright. Computer chips may be subject to integrated circuit topography protection. (See Subsection 2.2 below.)

2.1.5 Can databases receive copyright protection? What criteria must be met?

Under the *Copyright Act*, databases are given protection as “compilations”. The Supreme Court of Canada has ruled that, to receive copyright protection, databases must be independently created by the author, and the selection and arrangement of the components that make up the database must be the product of an author's exercise of skill and judgment. The exercise of skill and judgment must not be so trivial so as to be characterized as a purely mechanical exercise. However, “creativity”, in the sense of novelty or uniqueness, is not required. In addition, the creator of the database only acquires copyright in the database and not in the individual components of the database.

2.1.6 What other Internet elements have received copyright protection in Canada?

Courts in Canada have held that a Web page's look, layout and appearance are protected by copyright, as are musical works stored or created electronically.

2.1.7 What information technology is not protected by copyright?

Canadian copyright law does not protect the underlying mathematical calculations, algorithms, formulae, ideas, processes, or methods contained in information technology, only the expression of the same.

2.1.8 What information technology has not yet been considered by the courts to be protectable?

Canadian courts have yet to determine whether, and to what extent, computer languages, macros and parameter lists, communications protocols, digital type-fonts, and works that result from the use of computer programs are protected by copyright.

2.2 Integrated Circuit Topographies

Integrated circuit topographies (or computer chips) are protectable in Canada by the *Integrated Circuit Topography Act*. See Section IX, “Intellectual Property”, for more detail.

2.3 Trade Secrets

Information technology, including but not limited to a formula, pattern, compilation, program, method, technique, or process, may also be protected under trade secret law where duties of confidence exist either at law or by virtue of an agreement (which must be reasonable to be enforceable). See Section IX, “Intellectual Property”, for more detail.

2.4 Trade-Marks

Trade-marks can be used to protect the goodwill associated with the names, slogans, symbols, and other marks used by businesses in the information technology industry. Trade-mark rights arise under the federal *Trade-marks Act* and at common law. For a more detailed discussion on trade-mark law in Canada, see Section IX, “Intellectual Property”.

2.4.1 How are domain names protected?

Domain names may garner trade-mark rights if they meet the statutory or common law requirements for trade-marks. Trade-mark owners may be able to obtain relief in Canada for cybersquatters under trade-mark law and the Canadian Internet Registration Authority’s alternative dispute resolution process (where the dispute is in respect of a .ca domain name). For generic domain names, the rules promulgated by the Internet Corporation for Assigned Names and Numbers will apply.

2.4.2 What risks do metatags pose?

Canadian courts have held that the use of metatags (i.e., tags or key words in a Web site’s coding that are used by search engines to sort Web pages) that are confusingly similar to another person’s trade-marks may constitute trade-mark infringement.

2.5 Patents

In Canada, to obtain patents on information technology inventions one has to meet the statutory requirements of the federal *Patent Act*. See Section IX, “Intellectual Property”, for more detail on patent law in Canada.

2.5.1 Is software and other information technology patentable in Canada?

Computer programs are not patentable in Canada if they only perform a series of mathematical calculations. Note, however, that the Canadian Intellectual Property Office has issued patents for computer programs under certain circumstances, such as those that include some hardware elements or that focus on the systems, processes, and methods used to achieve a solution to a specific problem, rather than on the algorithms alone.

3. Criminal Law Issues Relating to Information Technology

In Canada, offences under the *Criminal Code* directly dealing with information technology include:

- Theft of computer data
- Defrauding the public of any property, money, or valuable security by deceit, falsehood or other fraudulent means using computers
- Use of a computer in an unauthorized manner or to possess an instrument for that purpose (i.e., hacking)
- Mischief in relation to computer data (i.e., distributing computer viruses)
- Trafficking in unauthorized passwords.

There are several other criminal offences under the *Criminal Code* and the *Copyright Act*, which may indirectly involve information technology.

4. Cryptography Controls

4.1 Are there restrictions on using encryption in Canada?

Other than export controls, and subject to any applicable intellectual property, confidentiality and criminal law issues, businesses and consumers in Canada are free to develop, import and use whatever encryption technology they wish.

5. Privacy and Data Protection

As discussed in Section VIII, “Privacy”, the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) and the provincial private sector privacy legislation in some provinces

impose conditions on the collection, use and disclosure of personal information by organizations in the course of commercial activity.

As a result, Web sites, online and information technology businesses that obtain, use or disclose personal information must comply with PIPEDA and/or the applicable provincial private sector legislation.

6. Electronic Evidence

6.1 Is electronic evidence admissible in court?

In Canada, electronic evidence is admissible in the courts provided that it meets the rules found in the common law and applicable statutes such as the federal and provincial *Evidence Acts* and the *Rules of Civil Procedure*. These rules include: (i) authentication by the party tendering the evidence; (ii) integrity of the system used and the method of record keeping, information storage, and retrieval; (iii) originality; and (iv) reliability.

Canadian courts have admitted electronic evidence where it accurately and fairly represented the information it purported to convey. Finally, Canadian courts have permitted the use of the Internet in court and have admitted the contents of Web sites.

7. Electronic Contracting

7.1 Are electronic signatures and documents valid in Canada?

In Canada, at both the federal and provincial/territorial levels, a series of e-commerce legislation has given statutory recognition to the legal effect of most types of electronic signatures and documents (with some exceptions such as wills, negotiable instruments and land transfers) that meet the requirements set out in the applicable statutes and regulations.

8. French Language Issues

8.1 Must Web sites and information technology contracts be translated into French?

The province of Quebec has language laws that may impact electronic contracting and Web sites, by requiring French translations if the parties or transactions involved have a Quebec connection, such as an office or employees located in Quebec. If certain criteria are met, the parties to a contract may expressly agree to have it written in the English language.

8.2 Must software be translated into French?

Under Quebec's language laws, all computer software sold in Quebec must be available in both English and French, unless no French version exists. In addition, the software must meet the French language packaging and labelling requirements.

9. Jurisdiction and the Internet

9.1 Where are electronic contracts formed?

In Canada, the issue of where electronic contracts are considered to be formed has not yet conclusively been determined and the answer may be different from one province to another. Unlike faxes, which Canadian courts have held to be "instantaneous" in some circumstances and thus formed when and where the offeror receives notice of the acceptance, it is not clear whether electronic communication such as e-mails or contracts formed on a Web site are instantaneous. The Canadian e-commerce legislation (discussed in Section X, 7.1 above) provides some guidance as to when and where electronic documents are presumed to be received. However, the mere posting of information on a Web site may not be sufficient to deliver that information to another person. In addition, the exchange of e-mails discussing a contract or a contractual relationship may not be sufficient to form a contract.

9.2 Can foreign Web sites and Internet transmissions be subject to Canadian laws?

A court can exercise jurisdiction in Canada if there is a "real and substantial connection" between the subject matter of the litigation and the jurisdiction. Generally speaking, the courts have found that the more active a Web site or its owner's activity is in Canada, or if the Web site or business activity targets persons in Canada, it will be subject to the laws of Canada. The fact that the physical location of a Web site or its server is outside Canada will not immunize the Web site owner from legal consequences in Canada.

The Supreme Court of Canada has also applied the "real and substantial connection" test in determining jurisdiction in online copyright matters. The application of the *Copyright Act* depends on whether there is a real and substantial connection between the Internet transmission and Canada. This test turns on the facts of each case and relevant connecting factors include the *situs* of the content provider, host server, intermediaries and end user.

9.3 Can parties to an online contract choose the governing law and forum?

In Canada, the parties to an online contract have, subject to certain exceptions (for example consumer protection), the right to choose the governing law of the contract, the exclusive court in which disputes are to be heard, and to exclude the application of conflict of laws principles. However, the Canadian courts have found that such clauses cannot be used to oust the jurisdiction of a substantially connected province.

10. Regulation of the Internet

10.1 Are Internet activities regulated in Canada?

The Canadian Radio-television and Telecommunications Commission, the body responsible for regulating broadcasting and telecommunications in Canada, has determined that, generally speaking, it will not regulate the Internet in Canada. However, if an Internet business qualifies as

a “telecommunications common carrier” under the *Telecommunications Act*, it may be subject to telecommunications regulation, which would impact its operations, ownership, facilities, rates and services. Note, however, there are no compulsory copyright licences available for retransmission over the Internet. As a result, re-transmitters have to negotiate copyright licences with all rights holders to broadcast works. Further, there are certain obligations that must be met under consumer protection laws, when doing business with consumers on the Internet. (See Subsections 1.4 and 9.3, above.)

Also, many regulatory, licensing, registration and permit requirements are imposed in Canada by stock exchanges, securities commissions, the Office of the Superintendent of Financial Institutions, public health and safety boards, transportation safety commissions, competition boards, industry associations and a variety of other agencies and bodies that regulate different businesses and activities in Canada.

10.2 What rules apply to online advertising?

The same basic rules that govern traditional advertising and marketing practices, including the *Competition Act* and the *Criminal Code* apply to all forms of Internet advertising and marketing, such as deceptive prize notices, representations on Web sites and bulletin boards, or in e-mails, newsgroups and chat rooms. The Competition Bureau has prepared guidelines that address some of the ways in which these traditional rules are applied in the online context, including the use of disclaimers and hyperlinks, and the information that should be provided online when advertising products, services and businesses.

For more detail on advertising regulations, see Section IV, 4, “Trade and Investment Regulation”.

10.3 Is spam illegal in Canada?

The distribution of unsolicited e-mail (spam) over electronic networks is not illegal nor is it regulated in Canada *per se*. However, the *Competition Act* provisions dealing with the advertising of certain products, such as tobacco, or misleading advertising and the *Criminal Code* provisions dealing with fraud, unauthorized access and use of computers and mischief against data, could apply against spammers. As well, an Ontario court decision has referred to the existence of an industry standard duty between users of the Internet, which was referred to as *netiquette*. Also, various industry groups have established member codes and guidelines dealing with the distribution of promotional materials and enforcement. The federal government has created an Anti-Spam Task Force to oversee the implementation of the *Anti-Spam Plan for Canada*, aimed at reducing and controlling spam through a variety of measures.

PIPEDA and similar private sector privacy legislation in some provinces (discussed in Section VIII, “Privacy”) may also affect spammers by imposing obligations on how personal information, which may include e-mail addresses, is collected, used and disclosed in the course of commercial activity.

11. Liability of Internet Service Providers (ISPs)

11.1 What risks of liability do ISPs face?

ISPs, and possibly their directors and officers, may be liable under contract, tort or statute, for various claims arising from the provision of their services.

11.2 Does Canada have any laws that protect ISPs from liability?

Canada has not passed legislation providing blanket immunity to ISPs from liability, however, courts have generally not held them liable for the infringing activities of their users. In the area of copyright, the Supreme Court of Canada has concluded that ISPs, and other intermediaries, will not face liability for copyright infringement if they restrict their activities to providing a conduit for information and do not engage in acts that relate to content. The Supreme Court has also found that caching (the temporary storage of material by the ISP) is also a protected activity.

In June 2008, Bill C-61, amending the *Copyright Act*, received its first reading in the House of Commons. If this bill is enacted, it would exempt ISPs from copyright liability where they were acting as intermediaries, including their activities as mere conduits for information, their caching activities, hosting activities, and information location activities (i.e., search engines). However, ISPs would have a “notice and notice” obligation with respect to the infringing activities carried out by their subscribers, under which the ISPs would be obliged to forward any notification of infringing activities made by a rights holder to the subscriber in question. The bill has not yet been passed.

The province of Quebec’s *Act to Establish a Legal Framework for Information Technology* also establishes a regime for liability and some protection in certain circumstances for ISPs acting as intermediaries on communication networks.

XI. REAL ESTATE

1. Federal Law

The laws relating to the acquisition of real property in any particular province of Canada are, as a rule, those of the province itself. The federal government imposes relatively few regulations or restrictions in the field.

The notable exceptions to that general principle include the review and regulation of foreign investment in Canada, the regulation of bankruptcy and insolvency, the regulation of the activities of certain major lending institutions in Canada, the levying and collection of income taxes (in particular, taxes on capital gains realized by non-resident vendors) and sales taxes (in particular, the Goods and Services Tax in connection with the sale and leasing of real property), the application of federal environmental standards, and the application of federal laws and regulations in the transportation sector such as with railway and airport lands.



2. Provincial Law

2.1 Laws of General Application

Generally speaking, Ontario imposes no restrictions or prohibitions upon foreign investors in land, whether natural or corporate, although certain taxing, reporting and registration provisions may apply. For example, in Ontario the *Extra-Provincial Corporations Act* requires corporations incorporated outside Canada to obtain licences to carry on business in Ontario, which, for the purposes of that Act, includes holding an interest, other than by way of security, in real property situate in Ontario. Quebec has a similar registration requirement.

The *Business Corporations Act* (British Columbia) requires that any company carrying on business in British Columbia be registered under the Act, either as a B.C. company or an extra-provincial company. Under the old *Company Act*, an extra-provincial company that was not registered was not capable of acquiring or holding an interest in land in British Columbia.

As that restriction is not contained in the new *Business Corporations Act*, the land title office requires a foreign entity to provide proof of incorporation and proof of current existence in the form of a certificate of status or affidavit from the appropriate government authority. A statutory declaration stating the entity is exempt from the extra-provincial registration requirements is no longer required. Accordingly, a company that wishes to buy or lease land, or hold a mortgage on land in British Columbia must satisfy these requirements.

Conversely, Alberta does restrict or prohibit certain foreign investments in Alberta land. Pursuant to the *Agricultural and Recreational Land Ownership Act* (Alberta), no ineligible person or foreign controlled corporation may take or acquire an interest in certain controlled land, subject to various exceptions. Generally, controlled land includes all privately owned land outside urban boundaries (usually farmland or rural recreational land). In addition, any corporation that acquires or attempts to register an interest in Alberta land must be registered in Alberta (either as an Alberta corporation or as an extra-provincially registered corporation).

2.2 How is real estate held and registered?

Investors in Ontario real estate may acquire several types of interests in land, including full ownership (a “freehold” interest), an interest for a specified period (a “leasehold” interest) or a partial interest in a freehold or leasehold interest as co-owners under a joint venture. Special legislation permits condominium ownership, under which owners have title to their individual units and a right to use the “common elements” of the condominium project (e.g., a swimming pool, landscaping, etc.). Although condominiums are most usually residential units, their use for commercial or industrial purposes is becoming increasingly more common.

There co-exists in Ontario two systems of land recording, a registry system in which the individual is responsible for the determination of the quality of title based primarily on priority in time of registration, and a land titles system based upon the Torrens System of recording where the quality of the title is determined by the recording authority with indemnities supporting that determination. Properties in the registry system are gradually being converted to the land titles system to facilitate the introduction of electronic production and registration of documents. By 2011, it is expected that all properties in Ontario will have been converted to the system, which will be a fully automated electronic searching and registration regime. Quebec civil law does not generally recognize beneficial interests in land and does not yet have a Torrens System. Both Alberta and British Columbia have a Torrens-based land titles system exclusively.

Investors in Quebec real estate should refer to Blakes *Doing Business in Quebec* guide for a discussion of the civil law system surrounding ownership and registration of such property, known as “immovables” in Quebec.

2.3 The Agreement of Purchase and Sale

2.3.1 Is a written contract required? How much is paid up-front for the deposit and agent commissions?

As oral agreements for the purchase and sale of land are generally unenforceable, most acquisitions of real property begin with an agreement of purchase and sale. Such an agreement is often initiated by the purchaser signing an offer to purchase which, when accepted by the vendor, becomes the agreement of purchase and sale. Although certain legal rights and obligations arise from that agreement, the actual transfer of title (ownership) usually takes place some time later upon the completion or “closing” of the transaction.

It is usual for the purchaser to provide a deposit as “earnest money” which is held in trust by the agent for the vendor or by one of the law firms involved in the transaction pending closing. Generally speaking, the size of the deposit ranges from 1% of the purchase price for a typical commercial transaction to 5% of the purchase price for residential transactions.

Most real estate transactions in Canada involve the services of an agent, generally licensed under provincial legislation. The agent should have expertise as to the market, the availability of properties for sale and prospective purchasers and the terms of sale that may be acceptable to the parties. Agents are usually paid a commission of 5% or 6% (but sometimes a lower percentage) of the purchase price on smaller properties and 10% on recreational properties.

Those percentages are usually reduced on larger properties and commercial properties. The agent is usually hired, and paid, by the vendor (or the landlord in leasing transactions) with the duty to obtain for the vendor (or landlord) the highest price available. The purchaser who wishes the assistance of an agent should retain one by specific contract expressly defining the agent's duties to the purchaser.

2.3.2 What services does a lawyer provide?

Before signing an offer to purchase, a purchaser should obtain legal advice, from a lawyer practising in the province in question, to ensure the offer contains appropriate representations, conditions and other provisions. The purchaser's lawyer will conduct various searches and enquiries to verify that the vendor has good title to the property and that there is no prior lien or other claim by others affecting title. In the acquisition of commercial properties (such as office buildings) the purchaser's counsel may conduct other due diligence investigations (for example, the terms of leases in the building). The offer should specify the purchaser's right to search the title and conduct various inspections and investigations prior to completing the sale.

2.3.3 What are the usual conditions for the purchaser's benefit?

It is usual in commercial transactions for the purchase agreement to contain a "due diligence" condition allowing the purchaser to inspect the property (with or without professional assistance) and permitting termination if the purchaser is not satisfied with the state of the property or the rental income. In exchange, however, the vendor will generally resist giving warranties and representations as to quality of construction, state of repair, or suitability to the purchaser's needs, as such may be matters not within the vendor's knowledge.

From a real estate investor's point of view, other conditions will likely be included in the agreement of purchase and sale relating to the state of the title and, in the case of income properties, the amount of any income (e.g., rental income or royalties) being derived from the property. Of central importance are representations and conditions relating to the environmental history and standing of the property.

Other typical conditions might relate to zoning, the terms of any existing leases, the terms of any mortgage to be assumed by the purchaser or the availability of suitable financing for the transaction. Unless otherwise dealt with in the agreement, the concept of "*caveat emptor*" – let the buyer beware – generally governs.

Many purchasers require the vendor to produce a current survey or real property report prepared by a land surveyor showing the outline of any buildings situated on the property. Such a survey would confirm the identity of the land, whether the land is subject to or benefited by easements, that the buildings and other improvements do not encroach onto

neighbouring land and that the buildings are “set back” the appropriate distances from the boundaries of the property in accordance with zoning requirements. It will also show whether the buildings, fences or other improvements belonging to neighbouring owners encroach on the property to be purchased.

2.3.4 The Closing and Beyond – What remedies are available upon a breach of the agreement?

The closing of a transaction of purchase of real property located in Ontario generally involves lawyers for the purchaser and vendor exchanging documents and closing funds which are released upon successful registration of title documentation, such as the transfer/deed and any security being granted. Notaries may also be used in Quebec and British Columbia. In Ontario and British Columbia, the purchaser normally pays the transfer tax (called the land transfer tax in Ontario, the municipal land transfer tax in the City of Toronto (which is payable in addition to the Ontario land transfer tax in respect of properties situate within the boundaries of the City of Toronto) and the property transfer tax in British Columbia) and any provincial or federal sales tax payable on the purchase. In Alberta, there is no land or property transfer tax or provincial tax payable pursuant to a real estate transaction.

Where the vendor breaches his or her obligations in the agreement of purchase and sale, the purchaser may proceed with the transaction and apply to the court for an order for “specific performance”, compelling the vendor to complete the transaction. Alternatively, the purchaser may terminate the contract, have the deposit returned to him or her and sue the vendor for any damages resulting from the vendor’s breach of contract.

If the purchaser does not perform his obligations under the contract, the vendor may either affirm the contract or seek specific performance and ancillary damages, or terminate the contract and retain the purchaser’s deposit.

2.4 Restrictions on Use or Sale – What types of consent are needed?

As with many areas of the world, all provinces regulate the development, use and disposition of real property. For example, the *Planning Act* of Ontario prohibits, with certain exceptions, the disposition of less than the whole of a parcel of land held by any owner. Therefore, an owner is not entitled to sell or mortgage, or lease for a term of more than 21 years, parts of his or her holdings while retaining abutting property, without first obtaining a consent from a local planning committee. A transfer or mortgage that violates this legislation, even inadvertently, will be void.

Although there is no equivalent legislation in British Columbia to the provisions of the *Planning Act* of Ontario referred to in this section, the *Land Title Act* (British Columbia) does prohibit the leasing of less than an entire legal lot (the lease of less than an entire building is permitted), unless the subdivision requirements of the *Land Title Act* are complied with. As a result, in certain circumstances, a leasehold subdivision plan is required to be approved by the appropriate authority.

In Alberta, the *Municipal Government Act* prohibits the registration of an instrument that may have the effect of subdividing a parcel of land unless the subdivision has been approved by the

appropriate authority. For example, certain long-term leases may constitute a subdivision pursuant to this provision.

Ontario also has in place family law legislation that gives spouses an equal right to possession of the couple's matrimonial home, even though it may be owned by only one of them. Thus the spouse of the owner of the matrimonial home is a necessary party to the transaction, for the purpose of consenting to any sale or mortgage of the property, and must execute both the agreement and the transfer or mortgage in question.

Family law legislation in British Columbia also provides certain protections to a spouse who may have an unregistered interest in land. Accordingly, care must be taken if there is any indication of marital problems between a seller of real estate and his or her spouse.

In Alberta, the *Dower Act* prohibits a married person from disposing of a homestead without consent of the non-title spouse. A disposition includes, among others, a transfer, a mortgage and a lease over three years.

2.5 Provincial and Municipal Transfer Taxes and Provincial Sales Taxes

In Ontario, a land transfer tax is payable in most cases upon the transfer of ownership of real property interests. This land transfer tax is imposed at graduated rates but for most commercial transactions is slightly less than 1.5% of the total consideration for the transfer. For real property situate within the boundaries of the City of Toronto, in addition to the Ontario land transfer tax, a municipal land transfer tax is also payable in most cases upon the transfer of ownership of real property interests. The municipal land transfer tax is also imposed at graduated rates but for most commercial transactions is slightly less than 1.5% of the total consideration for the transfer. The purchase of real estate is often accompanied by the purchase of certain goods, such as furniture, appliances or equipment. In Ontario, retail sales tax is payable by a purchaser, usually at the time of the payment of the land transfer tax, at the rate of 8% of the value of all tangible personal property purchased, unless it qualifies for an exemption from retail sales tax (for example, there is an exemption for some manufacturing equipment). Quebec also levies a graduated land transfer tax and a sales tax. As previously mentioned, these taxes do not apply in Alberta, though there are land registration charges (the fees are C\$35 per transfer, plus C\$1 per C\$5,000 of value).

A property transfer tax is payable in British Columbia upon the registration of a transfer of land. The transfer tax is calculated at 1% of the first C\$200,000 of fair market value and 2% on the value above C\$200,000. As well, there is a provincial sales tax payable on most tangible personal property at a rate of 7%.

2.6 How are leasehold interests regulated?

Long-term ground leasehold interests are more common in the United Kingdom and Europe than in North America. Nevertheless, increasingly, parcels of land in Ontario are held pursuant to long-term ground and building leases as an alternative to freehold ownership in arrangements often structured for tax purposes or to permit differing degrees of participation and liability.

In Ontario, with few exceptions, any lease in excess of 21 years is treated as a conveyance for the purposes of the *Planning Act* and any lease with a term (including renewals) in excess of 50 years will attract land transfer tax and municipal land transfer tax (for leases of land in the City of Toronto) calculated on the market value of the land. Quebec also has analogous provisions. The registration of a lease in British Columbia with a term (including renewals) in excess of 30 years will attract property transfer tax calculated on a formula set out in the *Property Transfer Tax Act*.

2.7 How are landlords regulated?

If a purchaser is interested in acquiring a property that is occupied by residential tenants, a number of additional considerations become relevant. In Ontario, in addition to reviewing the terms of the leases, the purchaser should be aware that the *Tenant Protection Act* and certain other legislation dealing specifically with residential tenancies, limit the rights of a landlord to evict existing tenants of residential premises, limit the landlord's ability to increase rents beyond specified statutory limits, and permit rent reductions in certain cases where substandard levels of landlord maintenance persist. Quebec also has generous residential tenant protection legislation, as does Alberta. In British Columbia, the *Residential Tenancy Act* accords certain protections to residential tenants.

2.8 Joint Ventures

Real estate investors in Canada often enter into joint venture arrangements with other investors. There are many ways in which a joint venture may be organized, including joint venture corporations, partnerships, co-ownerships and sale and leaseback arrangements. Often the selection of the appropriate structure will depend on the tax or other legal ramifications of the proposed joint venture.

XII. ENVIRONMENTAL LAW



As Canadians become ever more vigilant about the state of the environment and insistent that offenders of environmental laws be held accountable, we have witnessed an increasing degree of government regulation intent upon protecting the environment, and there is increasing government activity in this area.

Indeed, the environment has become such an important issue, it is imperative that anyone in a business venture be fully informed on what the relevant environmental laws allow and prohibit, and how to respond to the demands of both governments and the public.

All levels of government across Canada have enacted legislation to regulate the impact of business activities on the environment. Environmental legislation and regulation is not only complex, but all too often exceedingly vague, providing environmental regulators with

considerable discretion in the enforcement of the law.

Consequently, courts have been active in developing new standards and principles for enforcing environmental legislation. In addition, civil environmental lawsuits are now commonplace in Canadian courtrooms involving claims over contaminated land, noxious air emissions and environmental agreements. The result has been a proliferation of environmental rules and standards to such an extent that one needs a “road map” to work through the legal maze.

The environment is not named specifically in the *Canadian Constitution* and consequently neither federal nor provincial governments have exclusive jurisdiction over it. Rather, jurisdiction is based upon other named “heads of power”, such as criminal law, fisheries or natural resources. For many matters falling under the broad label known as the “environment”, both the federal and provincial governments can and do exercise regulatory responsibilities.

This is referred to as “concurrent jurisdiction”, which, in practical terms for business managers, means that both provincial and federal regulations must be complied with. Historically, the provinces have taken the lead with respect to environmental conservation and protection. However, the federal government is increasing its role in this area and some municipalities are also becoming more active, as is evidenced, for example, by their use of by-laws to regulate such matters as the development of contaminated land and the discharge of liquid effluent into municipal sewage systems.

Environmental statutes create offences for non-compliance that can impose substantial penalties, including million-dollar fines and/or imprisonment. Many provide that maximum fines are

doubled for subsequent offences and can be levied for each day an offence continues. Most environmental statutes impose liability on directors, officers, employees or agents of a company where they authorize, permit or acquiesce in the commission of an offence, whether or not the company is prosecuted. Companies and individuals may escape environmental liability on the basis that they took all reasonable steps to prevent the offence from occurring. However, in a growing number of cases, liability may be absolute if a spill or discharge of a contaminant occurs.

Some statutes create administrative penalties, which are fines that can be levied by government regulators as opposed to the courts. There are also some jurisdictions that allow for tickets, similar to motor vehicle infractions, to be issued for non-compliance. Enforcement officers generally have rights to inspect premises, issue stop-work orders, investigate non-compliance and obtain warrants to enter and search property, and seize anything that is believed to be relevant to an alleged offence. A number of jurisdictions also have administrative tribunals to handle appeals of decisions made by such inspectors and other government officials.

1. Federal Environmental Law and Regulation

1.1 *Canadian Environmental Protection Act, 1999 (CEPA)*

CEPA is the principal federal environmental statute and governs a variety of environmental activities falling within federal jurisdiction such as the regulation of toxic substances, cross-border air and water pollution, and waste disposal or “dumping” into the oceans. CEPA also contains specific provisions for the regulation of environmental activities that take place on lands and operations owned by, or under the jurisdiction of, federal agencies, including banks, airlines and broadcasting systems, and aboriginal lands. CEPA establishes a system for evaluating and regulating toxic substances, imposes requirements for pollution prevention planning and emergency plans, and regulates the inter-provincial and international movement of hazardous wastes and recyclable materials. CEPA is administered by Environment Canada. Some of the more important CEPA regulatory provisions are discussed below.

1.1.1 Toxic Substances

CEPA provides the federal government with “cradle to grave” regulatory authority over substances considered toxic. The regime provides for the assessment of “new” substances not included on the Domestic Substances List, a national inventory of chemical and biotechnical substances. The Act requires an importer or manufacturer to notify the federal government of a new substance before manufacture or importation can take place in Canada. Consequently, businesses must build in a sufficient lead-time for the introduction of new chemicals or biotechnology products into the Canadian marketplace. In certain circumstances, manufacturers and importers must also report new activities involving approved new substances so they can be re-evaluated.

All existing substances currently included on the Domestic Substances List are currently being assessed by Environment Canada for bioaccumulation, persistence and inherent toxicity (BPIT). If the government determines that a substance may present a danger to human health or the environment, it may add the substance to the Toxic Substances List, which currently lists over 100 toxic substances or groups of substances. Within two years of a substance being added to the list, Environment Canada is required to take action with respect

to its management. Such actions may include preventive or control measures, such as securing voluntary agreements, requiring pollution prevention plans or issuing restrictive regulations that may provide for the phase-out or outright banning of a substance. Substances that are persistent, bioaccumulative, and result primarily from human activity must be placed on the Virtual Elimination List, and companies will then be required to prepare virtual elimination plans to achieve a release limit set by the Minister of Environment or the Minister of Health. Listed toxic substances include PCBs, CFCs and chlorinated solvents, to name but a few.

1.1.2 National Pollutant Release Inventory

CEPA requires Environment Canada to keep and publish a *National Pollutant Release Inventory* (NPRI). Owners and operators of facilities that manufacture, process or otherwise use one or more of the numerous NPRI-listed substances under certain prescribed conditions are required to report releases or off-site transfers of the substances to Environment Canada.

1.1.3 Air Pollution and Greenhouse Gases

While most air emission regulation is conducted at the provincial level of government, a number of industry-specific air pollution regulations exist under CEPA. They limit the concentration of such emissions as: 1) asbestos emissions from asbestos mines and mills; 2) lead emissions from secondary lead smelters; 3) mercury from chlor-alkali mercury plants; and 4) vinyl chloride from vinyl chloride and polyvinyl chloride plants. The current trend is for Environment Canada to focus on substance-specific regulations, some of which, like CFCs, are considered air pollutants.

While the reduction of greenhouse gases (GG) such as carbon dioxide has been a high priority with the Canadian government, as evidenced by its ratification of the Kyoto Accord in 2002, implementation of a mandatory reduction system is still under development. In October 2006, the current minority government published its *Notice of Intent* to regulate both GG and certain other air emissions. In April 2007, the government released its *Regulatory Framework for Industrial Air Emissions*, also referred to as the *Turning the Corner* plan. The federal plan sets targets for a reduction in GG emissions or emission intensities of 20% below 2006 levels by the year 2020, and 60% to 70% below 2006 levels by 2050.

Draft regulations for implementing these targets under the existing CEPA legislative framework are expected in the fall of 2008 and short-term targets are expected to be in force by 2010. Where provinces have proceeded with their own GG initiatives, the federal government has said it will seek to ensure they are equivalent to the federal targets and, if so, the proposed federal regulations may not apply in such provinces. Regulated industries will likely have a variety of compliance mechanisms available to them for achieving their GG emission reduction obligations, including: contributions to a climate change technology fund; credit for past GG emission reductions and the purchase of domestic and international carbon offsets and credits. However, public support for the current government's approach to controlling greenhouse gases is divided and it remains to be seen when and to what extent it will be able to implement its program.

1.1.4 Movement of Hazardous Waste and Hazardous Recyclable Material

A number of regulations exist under CEPA that regulate the movement of waste and recyclable material in, out and across the country. Waste movement is also regulated by the provincial levels of government within their individual boundaries. The *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* implement Canada's obligations under the Basel Convention and certain other international treaties or agreements aimed at controlling the international movement of such materials. Section 185 of CEPA requires the Minister be notified of any intended international shipment of hazardous wastes or hazardous recyclable materials. An international movement may consist of an export from Canada, an import into Canada, a transit through Canada, or a transit through a country other than Canada.

The notification requirements are set out in the Regulations and include such information as: the nature and quantity of the hazardous waste or hazardous recyclable material involved; the addresses and sites of the exporters, importers, and carriers; the proposed disposal or recycling operations of the hazardous waste or hazardous recyclable material; proof of written contracts between the exporters and importers; and proof of insurance coverage. With this information, Environment Canada is able to determine whether the proposed shipment of hazardous wastes or hazardous recyclable materials complies with regulations for the protection of human health and the environment.

If the notification requirements set out in the Regulations are met, Environment Canada notifies the authorities in the jurisdiction of destination. If any authority (including those in any transit countries) objects to the proposed shipment, the shipment cannot proceed until the objection is lifted. A permit may be granted following a review of the notice and approval from the authorities in the jurisdiction of destination. Various requirements, including prescribed liability insurance, also apply to any shipment.

The *PCB Waste Export Regulations, 1996* allow Canadian owners of PCB waste to export such wastes to the United States for treatment and destruction (excluding landfilling) when these wastes are in concentrations equal to or greater than 50 parts per million. The Regulations require that advance notice of proposed export shipments be given to Environment Canada. If the PCB waste shipment complies with the Regulations for the protection of human health and the environment, and authorities in any countries or provinces through which the waste will transit do not object to the shipment, a permit is sent from Environment Canada to the applicant authorizing the shipment to proceed.

The *Inter-provincial Movement of Hazardous Waste Regulations* maintain a tracking system, based around a prescribed waste manifest, for the movement of hazardous waste and hazardous recyclable material between provinces and territories, which was formerly set out in the *Transportation of Dangerous Goods Regulations* (see below).

1.1.5 Waste Disposal at Sea

CEPA also contains a mechanism for obtaining a permit from Environment Canada to dispose of waste at sea, also known as "dumping". Permits typically govern timing, handling, storing, loading, placement at the disposal site, and monitoring requirements. The

permit assessment phase involves public notice, an application that provides detailed data, a scientific review and payment of fees. Application for such a permit triggers an environmental assessment process (see discussion below under CEAA).

1.1.6 Environmental Emergencies

The *Environmental Emergency Regulations* under CEPA require those who own, or have charge, management or control of listed substances, to submit an environmental emergency plan to Environment Canada.

1.1.7 Enforcement

Maximum penalties under CEPA are generally C\$1 million and/or three years imprisonment although, in the case of intentional or reckless acts which cause environmental disasters or a risk of death or harm to humans, the penalties are an unlimited fine and/or five years imprisonment. A court may also order the offender to pay an additional fine in an amount equal to the monetary benefits accrued to the person as a result of the commission of the offence. The Act gives enforcement officers the authority to issue Environmental Protection Compliance Orders to stop illegal activity or require actions to correct a violation, among various other powers.

1.1.8 Public Participation and Consultation

CEPA provides for a number of public participation measures designed to enhance public access to information, and to encourage reporting and investigation of offences. These include:

- An environmental registry, providing online information on the Act and its regulations, government policies, guidelines, agreements, permits, notices, and inventories as well as identifying opportunities for public consultations and other stakeholder input
- Whistleblower protection for individuals who voluntarily report CEPA offences
- A mechanism through which a member of the public can request an investigation of an alleged offence and, in the event that the Minister fails to conduct an investigation, launch an environmental protection action against the alleged offender in the courts
- Confirmation of the common law right to sue for personal loss as a result of a violation of CEPA.

CEPA also contains provisions for mandatory consultation with provincial, territorial and aboriginal governments on other issues such as toxic substances and environmental emergency regulations.

1.2 Canadian Environmental Assessment Act (CEAA)

The CEAA is designed to ensure that federal government agencies and bodies take environmental concerns into consideration in their decision-making processes. The CEAA is a self-assessment regime whereby environmental assessments must be conducted prior to a project proceeding, where a federal authority is the proponent of the project, federal money is involved, the project involves land in which a federal authority has an interest, or some aspect of the project requires federal approval or authorization. "Project" is defined broadly and includes the proposed construction, operation, modification, decommissioning, abandonment of a physical work and any proposed physical activity in relation to a physical work. CEAA is administered by the Canadian Environment Assessment Agency.

There are four types of assessments under the act: screening, comprehensive study, panel review (public hearing) or mediation. A screening assessment is generally the most basic process and is usually reserved for activities whose environmental effects are well-known. The comprehensive study involves a more in-depth assessment. Where warranted, the government can require further assessment of a project by way of a panel review or mediation.

1.3 Transportation of Dangerous Goods Act, 1992 (TDGA)

The TDGA applies to all facets and modes of inter-provincial and international transportation of dangerous goods in Canada. The objective of the TDGA is to promote public safety and to protect the environment during the transportation of dangerous goods, including hazardous wastes. The TDGA applies to those who transport or import dangerous goods, manufacture, ship, and package dangerous goods for shipment, or manufacture the containment materials for dangerous goods.

The TDGA and the *Transportation of Dangerous Goods Regulations* establish a complex system of product classification, documentation and labelling; placarding and marking of vehicles; hazard management, notification and reporting; and employee training. The TDGA requires Emergency Response Assistance Plans before the offering for transport or importation of prescribed goods. The plans must be approved by the Minister of Transport, or the designated person, and such approval is revocable.

Dangerous goods are specified in the TDG Regulations and arranged into nine classes and 3,000 shipping names. The classes include: explosives, compressed gases, flammable and combustible liquids and solids, oxidizing substances, toxic and infectious substances, radioactive materials, corrosives and numerous miscellaneous products prescribed by regulation. The TDGA also applies to any product, substance or organism that "by its nature" is included within one of the classes. The TDG Regulations have equivalency provisions with respect to such international rules as the *International Maritime Dangerous Goods Code*, the International Civil Aviation Organization Technical Instructions and Title 49 of the U.S. *Code of Federal Regulations*.

Maximum penalties under the TDGA are C\$100,000 or two years imprisonment. In addition, any property that had been seized by a federal inspector in relation to the offence may be forfeited to the government. In the event of an accidental release, orders can be made requiring the removal of dangerous goods to an appropriate place; requiring that certain activities be undertaken to prevent the release or reduce the danger; and requiring that certain persons refrain from doing anything that may impede the prevention or reduction of danger.

1.4 Hazardous Products Act (HPA)

The HPA prohibits or restricts the advertising, sale or importation of hazardous or potentially hazardous products, except as authorized by regulation. The Act also prohibits, in certain circumstances, suppliers from importing and/or selling hazardous “controlled products” that are intended for use in a workplace in Canada. Prohibited, restricted and controlled products are defined in the regulations and are collectively referred to as “hazardous products.”

The Workplace Hazardous Materials Information System is a national program designed to protect workers from exposure to hazardous material that is established in part by the *Controlled Products Regulations* under the HPA. This system is similar to what is known in other jurisdictions as “Worker Right to Know” legislation. In Canada, it consists of both federal and provincial legislation, reflecting the limited constitutional power of the federal government over worker safety and labour relations. In 1987, the federal government took the lead role in developing regulations that require manufacturers and importers to use standard product safety labelling and to provide their customers at the time of sale with standard Materials Safety Data Sheets (MSDS). Provincial occupational health and safety regulations require employees to make these MSDS, along with prescribed training, available to their workers.

The classification of hazardous materials or “controlled products” is similar to that used under the TDGA. Test procedures determine whether a product or material is hazardous and, in some cases, the procedures are extremely complicated and require the exercise of due diligence in obtaining reasonable information on which to base the classification. A significant amount of information must be disclosed on an MSDS, including a listing of hazardous ingredients, chemical toxicological properties and first aid measures.

Maximum penalties under the HPA are C\$1 million and/or two years imprisonment.

1.5 Pest Control Products Act, 2002 (PCPA)

The PCPA prohibits the manufacture, possession, distribution or use of a pest control product that is not registered under the act or in any way that endangers human health or the safety of the environment. Pest control products are registered only if their risks and value are determined to be acceptable by the Minister of Health. A risk assessment includes special consideration of the different sensitivities to pest control products of major identifiable groups such as children and seniors, and an assessment of aggregate exposure and cumulative effects. New information about risks and values must be reported, and a re-evaluation of currently registered products must take place. The public must be consulted before significant registration decisions are made. The public is given access to information provided in relation to registered pest control products.

Maximum penalties under the PCPA are C\$1 million and/or three years imprisonment. A court may also order the offender to pay an additional fine in an amount equal to three times the monetary benefits accrued to the person as a result of the commission of the offence. Enforcement officers can shut down activities and require measures necessary to prevent health or environmental risks.

1.6 Fisheries Act

The primary purpose of the *Fisheries Act* is to protect Canada's fisheries as a natural resource by safeguarding both fish and fish habitat. While much of the Act is aimed at regulating harvesting, it also provides protection for waters "frequented by fish" or areas constituting fish habitat. The Act applies to both coastal and inland waters, and is generally administered by the Department of Fisheries and Oceans (DFO), although the environmental protection parts of the Act are administered by Environment Canada. The Act has frequently been used by Environment Canada to punish those responsible for water polluting activities.

It is an offence for anyone to carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat (HADD). Where an activity will create a HADD, the DFO must approve the project before the work commences. The application process for a HADD approval includes providing the DFO with plans, specifications, studies and details of the proposed procedures, and triggers environmental assessment under CEAA.

It is an offence for anyone to deposit or permit the deposit of any type of deleterious substance in water frequented by fish without a permit or under a regulation. "Deleterious substance" is defined in the Act to include any substance that would degrade or alter or contribute to the degradation or alteration of the quality of water so as to render it deleterious to fish or fish habitat. There are a number of regulations under the Act that limit wastewater or effluent discharges from certain industrial facilities including pulp and paper mills, petroleum refineries and meat and poultry processing plants.

The Act also imposes reporting requirements. For example, if there is a discharge of a deleterious substance into water frequented by fish, or if there is an imminent threat of such a discharge occurring, the persons responsible are obligated to notify the DFO. In addition, those persons must take all reasonable measures to prevent the discharge from occurring, or to mitigate any damage. Maximum penalties under the Act are C\$1 million and/or three years imprisonment. A court may also order the offender to pay an additional fine in an amount equal to the monetary benefits accrued to the person as a result of the commission of the offence.

1.7 Canada Shipping Act

The *Canada Shipping Act*, although not exclusively an environmental statute, contains a number of provisions that deal with environmental issues. In particular, the Act provides for the creation of regulations prohibiting the discharge of specified pollutants from ships. In addition, the Minister of Fisheries and Oceans may take actions to repair, remedy, minimize or prevent pollution damage from a ship, monitor measures taken by any person, direct a person to take measures, or prohibit a person from taking such measures.

The Act gives officers the power to direct any Canadian ship or, in certain circumstances, any other ship to provide information pertaining to the condition of the ship, its equipment, the nature and quantity of its cargo and fuel, and the manner and locations in which the cargo and fuel of the ship are stowed. In addition, officers have the power to board any Canadian ship and inspect the ship for the purposes of determining whether the ship is complying with the Act and its regulations, and to detain a ship where the officer believes that an offence has been committed. The Act requires certain vessels to have arrangements with emergency response organizations. In some cases, oil pollution prevention plans and oil pollution emergency plans

are also required. Maximum penalties under the Act are generally C\$1 million and/or 18 months imprisonment, although in the case of intentional or reckless acts which cause environmental disasters or a risk of death or harm to humans, the penalties are an unlimited fine and/or five years imprisonment.

1.8 *Marine Liability Act*

The *Marine Liability Act* includes provisions to implement international conventions on liability and compensation for oil pollution damage. The Act imposes liability on the owner of a ship for the costs and expenses incurred in respect of measures taken to prevent, repair, remedy or minimize oil pollution damage from the ship, including measures taken in anticipation of a discharge. The owner of the ship may be liable for costs and expenses incurred by the government or any other person in respect of measures she/he was directed to take or prohibited from taking.

1.9 *Navigable Waters Protection Act (NWPA)*

The NWPA prohibits the unauthorized construction or placement of a “work” on, over, under, through or across any navigable water. The Act is administered by Transport Canada. Where a project falls into the definition of “work”, the federal government must approve it before it is undertaken. This approval triggers the CEAA environmental assessment process provided for CEAA. “Work” includes:

- Any bridge, dam, dock, pier, tunnel or pipe and any other works necessary for or connected to construction or placement of the work
- The dumping of fill or excavation of materials from the bed of a navigable water
- Any telegraph, power cable or wire
- Any structure or thing similar in nature to the above that may interfere with navigation.

Where a work is built or placed without an approval, or is not built in accordance with the approval, the Minister of Transport may order the owner of the work to remove or alter the work, or refrain from proceeding with construction. Where an owner fails to comply with an order to remove the work, the Minister may remove and destroy it and dispose of the materials.

The maximum penalty under the NWPA is C\$5,000. In addition, an owner may be liable for the costs of removal and destruction of works. Where the materials are deposited by a vessel, the vessel is liable for the fine and may be detained until it is paid.

1.10 *Oceans Act*

Under the *Oceans Act*, the Minister of Fisheries and Oceans fulfils a co-ordinating and facilitating role among the various governmental agencies concerned with the environmental protection of the oceans. In particular, the Minister is required to:

- Lead and facilitate the development and implementation of a national strategy for the management of Canadian waters

- Lead and facilitate the development and implementation of plans for the integrated management of all activities or measures in or affecting estuaries, coastal waters and marine waters
- Lead and co-ordinate the development and implementation of marine-protected areas (MPAs)
- Make recommendations to the federal Cabinet to make regulations prescribing MPAs and marine environmental quality requirements and standards.

Contravening a regulation made for an MPA or a marine environmental quality requirement is an offence. The maximum penalty under the Act is C\$1 million. A court may also order the offender to pay an additional fine in an amount equal to the monetary benefits accrued to the person as a result of the commission of the offence.

1.11 *Canada National Marine Conservation Areas Act*

The *Canada National Marine Conservation Areas Act* provides the Minister of Canadian Heritage with the authority to establish national marine conservation areas with the objective of protecting and conserving a variety of aquatic environments for the benefit, education and enjoyment of the people of Canada and the world. The legislation also creates a range of regulatory powers relating to the protection of living and non-living marine resources and to ensuring these resources are managed and used in a sustainable manner, with a focus on recreation, tourism, education and research. The maximum penalty under the Act is C\$500,000.

1.12 *Species at Risk Act (SARA)*

SARA is a recent addition to Canada's federal environment laws. It identifies wildlife species considered at risk, categorizing them as threatened, endangered, extirpated or of special concern, and prohibits a number of specific activities related to listed species, including killing or harming the species, as well as the destruction of critical habitat that has been identified in any of the plans required under the Act.

These include recovery strategies and action plans for endangered or threatened species and management plans for species of concern. Plans are currently being developed by Environment Canada in partnership with the provinces, territories, wildlife management boards, First Nations, landowners and others. SARA allows for compensation for losses suffered by any person as a result of any extraordinary impact of the prohibition against the destruction of critical habitat. SARA provides for considerable public involvement, including a public registry and a National Aboriginal Council on Species at Risk that provides input at several levels of the process.

The protections in SARA currently apply throughout Canada to all aquatic species and migratory birds (as listed in the *Migratory Birds Convention Act, 1994*) regardless of whether the species are resident on federal, provincial, public or private land. This means that if a species is listed in SARA and is either an aquatic species or a migratory bird, there is a prohibition against harming it, or its residence, and the penalties for such harm can be substantial. For all other listed species, SARA's protections only apply on federal lands, including National Parks and First Nations Reserves. However, SARA also contains provisions under which it can be extended to protect

other species throughout Canada, if the federal government is of the view that the provinces or territories are not adequately protecting a listed species.

Maximum penalties under SARA are C\$2 million for a corporation and C\$500,000 and/or five years imprisonment for a person. A court may also order the offender to pay an additional fine in an amount equal to the monetary benefits accrued to the person as a result of the commission of the offence.

1.13 *Migratory Birds Convention Act, 1994 (MBCA)*

The MBCA enacts an international agreement between Canada and the U.S. for the protection of migratory birds. Although most of the statute regulates harvesting or hunting, it also contains some environmental protection provisions. The MBCA prohibits the deposit of oil, oil waste or other substances harmful to migratory birds in any waters or areas frequented by migratory birds, except as authorized by regulation. It also prohibits the disturbance of the nests of migratory birds except as authorized by regulation.

Maximum penalties under the MBCA are C\$2 million and/or three years imprisonment. A court may also order the offender to pay an additional fine in an amount equal to the monetary benefits accrued to the person or the loss suffered by another person as a result of the commission of the offence. In addition, there are substantial minimum fines for oil spills involving large vessels.

1.14 *Canada National Parks Act*

The *Canada National Parks Act* provides procedures for the creation of new parks and the enlargement of existing ones, adds several new national parks and park reserves, and includes provisions for the enhancement of protection measures for wildlife and other park resources. The *National Parks Wilderness Area Declaration Regulations* designates wilderness areas in Banff, Jasper, Kootenay and Yoho national parks. The effect of these designations is to restrict activity in the designated area to activities including park administration, public safety, and the carrying out of traditional renewable resources harvesting.

1.15 Criminal Law

The federal *Criminal Code* contains provisions that address corporate liability and provide a basis for criminal charges to be brought against corporations in the event that an activity causes harm to persons or property and negligence or fault can be proven. Three provisions expand criminal responsibility so that it can be attributable to organizations in addition to individuals. First, for negligence offences, criminal intent will be attributable to an organization where one of its representatives (directors, partners, employees, members, agents or contractors) is a party to the offence and its senior officers depart markedly from the standard of care that could reasonably be expected to prevent the commission of the offence.

Second, in respect of offences where fault must be proven, an organization is a party to an offence if one of its senior officers is a party to the offence, or, acting within the scope of their duty, directs other representatives of the organization to commit the offence, or fails to take all reasonable measures to stop the commission of the offence by a representative of the organization. Another provision imposes a legal duty on those who direct how another person does work to take reasonable steps to prevent bodily harm to that person or any other person.

A specific criminal environmental offence is provided for by section 274 of CEPA and section 253 of the *Canada Shipping Act* where, in committing an offence under the Act, the offender intentionally or recklessly causes an environmental disaster or shows wanton or reckless disregard for the lives or safety of other persons and thereby causes death or bodily harm to another person.

2. Provincial Environmental Law and Regulation

This overview discusses the laws as they relate to the environment for four provinces in Canada. These discussions are brief and are designed to alert the reader to the principal laws governing the environment in those provinces. Readers should consult the more detailed overviews of environmental law and regulation in each of these provinces, which are posted to the Blakes Web site at www.blakes.com.

2.1 Alberta

2.1.1 *Environmental Protection and Enhancement Act (EPEA)*

Alberta's EPEA is a comprehensive statute aimed at promoting "the protection, enhancement and wise use of the environment." The EPEA delegates authority to both the Minister of Environment, and directors, inspectors and investigators designated by the Minister to deal with certain matters.

It endeavours to balance these principles:

- The importance of protecting the environment for the well-being of society
- Carrying out Alberta's economic growth in an environmentally responsible manner
- The principle of sustainable development
- Preventing and mitigating the environmental impact of development and of government policies
- The need for government leadership
- The responsibility of all Alberta citizens for environmental protection
- Opportunities for citizens to provide advice on decisions affecting the environment
- Co-operation with governments of other jurisdictions to minimize trans-boundary environmental impacts
- The "polluter pays" principle
- The important role of comprehensive and responsive action in administering this Act.

The EPEA regulates the process for environmental assessments, approvals and registrations. Certain activities are designated by the regulations as requiring an environmental

assessment. For example, an environmental assessment is necessary for the “construction, operation or reclamation of” oil sands mines, oil refineries, certain manufacturing plants, dams over 15 metres high, coal processing plants, and landfills that accept hazardous waste.

The EPEA also grants the government discretion to require other assessments. In deciding whether to require an assessment, the government will consider the size, nature and location of the proposed activity, the complexity of the activity, public concern, similar activities in the same area, and the criteria in regulations.

In addition to assessments, the EPEA regulates the release of specific substances and imposes a reporting obligation on any person who “releases or causes or permits the release of [one of these substances] into the environment”. The EPEA regulates the issuance of reclamation certificates and environmental protection orders (EPOs). The Director may issue an EPO requiring whatever measures the Director deems necessary to deal with the release or potential release of a substance that may cause or has caused an adverse effect.

In addition, the EPEA regulates the use and storage of hazardous substances and pesticides, as well as waste management.

2.1.2 *Climate Change and Emissions Management Act (CCEMA)*

Alberta has developed an emission reduction program. Under the CCEMA, Alberta’s emission reduction system includes emissions trading systems, mandatory reporting and the creation of a fund for implementing new technologies, as well as programs and measures for reducing emissions.

The *Specified Gas Reporting Regulation* sets out the reporting requirements where the release of certain gases are above the level set by the department of Alberta Environment. Contravention of this regulation can result in substantial fines.

The *Specified Gas Emitters Regulation* requires existing facilities that emit more than 100,000 tonnes of CO₂ per year to reduce the intensity of their greenhouse gas emissions by 12% as of July 1, 2007 (based on a 2003-2005 baseline). New facilities are also subject to annual greenhouse gas emissions intensity reductions.

2.1.3 *Water Act (WA)*

The WA supports and promotes the conservation and management of water, while recognizing the need for Alberta’s economic growth and prosperity. Property in and the rights to the diversion and use of all water in Alberta are vested in the provincial Crown. The definition of “water” is broad, including all water on or under the surface of the ground, whether in liquid or solid state.

The WA requires the Director to create a water management plan and water guidelines. The water management plan establishes water management principles for various areas in Alberta, and the guidelines set out how these principles will be implemented. However, the central function of the WA is to establish an approvals, priority and licensing regime. With the exception of deemed licence holders, exempt agricultural uses, and households and riparian owners or occupants, a party must have approval before it commences an activity or a licence before it diverts waters. The WA operates on a FITFIR (first in time, first in right)

principle. Older licence holders, therefore, have priority to the water supply over newer licence holders.

The WA definition of “activity” is expansive. Thus, an approval is needed for any activity that alters flow or water level, that could cause siltation or erosion, that affects aquatic life or that alters the location of water. The WA defines a “diversion” as the impoundment, storage, consumption, taking or removal of water for any purpose. With some exceptions, anyone wishing to commence or continue a diversion of water or operate a work to divert water must apply to the Director for a licence.

2.1.4 *Drainage Districts Act*

The *Drainage Districts Act* establishes a Board of Trustees that may construct, replace, extend, modify, alter, dismantle, or operate and maintain drainage works in a specific drainage district. The Board of Trustees is also empowered to issue orders directing persons to remove anything that is causing or is related to an interference with a drainage work, or to cease and desist from activities that may damage any drainage work. The Board of Trustees is empowered to take whatever action is necessary to carry out its orders. One of the central functions of the Board of Trustees is to establish a general assessment of drainage costs, and to create assessment roles and allocate these costs out to parties in the relevant drainage district. The Act allows parties to dispute these charges, and establishes hearing and appeal processes.

2.1.5 Fish and Wildlife Legislation

The *Fisheries (Alberta) Act* and the *Wildlife Act* pertain mostly to licensing schemes for fishing and hunting, as well as the regulation of the sale of fish or wildlife. However, under the *Wildlife Act*, certain species have been designated as endangered. Thus, where work is to be carried on in areas where there are endangered animals, operators must comply with certain procedures. For example, there are operating guidelines in caribou protection areas in Northern Alberta.

2.1.6 Natural Resources Legislation

The oil, gas and energy industry is heavily regulated in Alberta. Legislation such as the *Oil and Gas Conservation Act*, the *Mines and Minerals Act*, the *Oil Sands Conservation Act*, the *Energy Resources Conservation Act*, the *Coal Conservation Act* and their related regulations are not all strictly environmental. However, under these pieces of legislation, various ministers, boards or other delegated authorities have broad powers to make orders or take other action to protect Alberta’s natural resources. There are also a number of licensing and approvals regimes, many of which take environmental concerns into account. For example, both the Energy Resource Centre Board (ERCB) and the Alberta Utilities Commission (AUC) regulate the energy industry in Alberta. The mandate of the ERCB is to regulate the safe, responsible and efficient development of Alberta’s energy resources. Similarly, the AUC’s mandate is to ensure the delivery of Alberta’s utility services occur in a manner that is fair, responsible and in the public interest. Authorities such as the ERCB and AUC must balance economic development with resource conservation.

The *Forests Act* establishes an annual allowable cut in coniferous and deciduous forests. It prohibits persons from damaging the forest in any way and allows the Minister to construct and maintain forest recreation areas. As well, under the *Forest and Prairie Protection Act* and *Forest Reserve Act*, certain areas of forest can be designated as reserves or forest protection areas.

The *Natural Resources Conservation Board Act* (NRCBA) provides for an impartial process to review projects that will or may affect the natural resources of Alberta to determine whether, in the Board's opinion, the projects are in the public interest. In doing so, the Board must balance the economic effects of a project with its environmental impact.

The NRCBA only applies to projects that are defined as "reviewable projects", including forest industry projects, recreational or tourist projects, mining projects, and water management projects. A "water management" project is defined as a project to construct a dam, reservoir or barrier to store water, or a project to divert water. The NRCBA requires the proponent of any reviewable project to apply to the Board for approval to carry on with the project, regardless of whether the applicant has already received a licence or approval under the *Water Act*.

2.1.7 Restricted Development and Water Conservation Areas Legislation

The *Government Organization Act* establishes ministerial procedures regarding the acquisition of land for environmental protection, the declaration of states of emergency to prevent or stop environmental damage, and the establishment of parts of Alberta as a "Restricted Development Area" or "Water Conservation Area". The Minister can require urgent co-ordinated action. The consequences of refusing to assist range from fines to imprisonment.

The Minister has broad powers and may establish a Restricted Development Area or a Water Conservation Area in the public interest for various reasons, for example, retaining an environment's natural state to propagate plant or animal life, confining activities to a specific area where they could adversely affect a natural resource, protecting a watershed, and controlling or stopping pollution of natural resources.

2.2 British Columbia

2.2.1 Environmental Management Act (EMA)

The EMA is the principal environmental statute in British Columbia. It prohibits the introduction of waste into the environment in such a manner or quantity as to cause pollution, except in accordance with a permit, a regulation or a code of practice established by the government for particular activities. The *Waste Discharge Regulation* prescribes the activities that may operate under a code of practice and those that must have a permit. The EMA also contains provisions that:

- Establish a specific regime for the handling of hazardous wastes
- Establish rules regarding spills and spill reporting

- Provide for pollution abatement and pollution prevention orders
- Provide for orders requiring remediation of contaminated sites
- Provide for municipal waste management programs
- Provide for enforcement procedures and penalties
- Provide for environmental protection orders
- Provide for orders in the event of an environmental emergency.

The *Hazardous Waste Regulation* establishes detailed siting and operational requirements and performance standards for facilities, which include onsite management facilities, that deal with special wastes.

Part 4 of the EMA and the *Contaminated Sites Regulation* establish a detailed regime for the identification, determination and remediation of contaminated sites, and the assessment and allocation of liability for remediation. Remediation orders may require a responsible person to provide information, carry out tests, undertake site investigations, construct or carry out works, and/or carry out remediation. The term “responsible person” is broadly defined and includes current and past owners and operators of a site, plus transporters and producers of contaminants.

The EMA creates a number of offences, including the failure to handle hazardous waste in accordance with the regulations, the failure to comply with a permit, and the failure to report the spill of waste into the environment. Maximum penalties under the EMA are C\$3-million and/or three years imprisonment. The EMA also allows for administrative penalties and tickets.

2.2.2 Action on Climate Change

2008 was a significant period in the development of environmental, energy and natural resources law in B.C. A large amount of new law was introduced specifically aimed at controlling the emissions of greenhouse gases and the regulation of energy, oil and gas, and natural resources.

The *Greenhouse Gas Reduction Targets Act* set a province-wide target of a 33% reduction in the 2007 level of greenhouse gas emissions by 2020 and an 80% reduction by 2050. While the Act set the targets, it does not yet impose requirements on the private sector to achieve the stated goals. Currently, the only specific requirements are on public sector organizations, including Crown corporations, which are required to be carbon neutral by 2010. In this respect, the Act is primarily a form of policy statement to be implemented through further legislative and regulatory initiatives.

The *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act* allows the government to set standards for the amount of renewable fuel that must be contained in B.C.’s transportation fuel blends, reduce the carbon intensity of transportation fuels and meet its commitment to adopt a new low carbon fuel standard similar to California’s. Fuel suppliers are required to carry an average of 5% renewable fuel content by 2010.

The *Greenhouse Gas Reduction (Cap in Trade) Act* allows B.C. to participate in the Western Climate Initiative cap in trade system which is currently under development. The Western Climate Initiative is a partnership which includes seven U.S. states (California, Oregon, Washington, New Mexico, Arizona, Utah, and Montana) and two provinces (British Columbia and Manitoba). The Act establishes a cap and limit on emissions. Operators (a term to be defined by regulation) will be required to retire “compliance units” for a given period. A B.C. compliance unit will be equal to one tonne of carbon dioxide or its equivalent.

The *Greenhouse Gas Reduction (Emissions Standards) Statutes Amendment Act* introduces amendments to the *Environmental Management Act* which require owners or operators of waste management facilities of certain classes to manage greenhouse gases produced from waste handled in their facilities. Operators of coal-based generating facilities will be prevented from introducing emissions of prescribed greenhouse gases from the facility that are attributable to the use of coal for the generation of electricity. Electricity generating facilities are required to have zero emissions. Those facilities that have attributable greenhouse gas emissions must apply emission off-sets in accordance with the regulations to net those emissions to zero.

The *Carbon Tax Act* imposes a tax on the purchase of fuel. Tax rates for the next five years are set out in a schedule to the legislation. According to the B.C. government, the carbon tax is revenue-neutral because it is tied to reductions in personal and business taxes.

The *Greenhouse Gas Reduction (Vehicle Emissions Standards) Act* sets pre-determined greenhouse gas emissions standards on automobile “fleets”. The standards are based on a “fleet-average” approach, permitting manufacturers to keep selling vehicles that exceed the allowed emissions, as long as they stay within the new average standards by selling enough low-emission vehicles for their fleets. The government is empowered to require larger vehicle manufacturers to include a percentage (or set number) of zero emission vehicles in their fleets per year.

The *Utilities Commission Amendment Act* requires public utilities to consider the government’s goal that B.C. be electricity self-sufficient by 2016 and maintain self-sufficiency after that year when planning for the construction or extension of generation facilities and energy purchases. Other provisions dictate that any authority subject to the Act must achieve electricity self-sufficiency by 2016 and maintain it in each calendar year after it is achieved. The Act creates a mechanism for introducing a mandatory reliability standard for B.C.’s bulk electricity system. The B.C. Utilities Commission is empowered to determine whether the rules established by the North American Electricity Reliability Corporation and/or the Western Electricity Coordinating Council in contemplation of being enacted as mandatory reliability standards for planning and operating the North American power system are in the public interest and whether they should be adopted in B.C.

2.2.3 *Integrated Pest Management Act (IPMA)*

The IPMA requires “integrated pest management”, a process that uses a combination of techniques to suppress pests, to be applied to all commercial and industrial pesticide use on all public land, and all private land use by forestry, utilities, transportation and pipelines. The Act does not apply to agricultural use or pesticides used by homeowners. The IPMA prohibits the application of pesticides unless a pest management plan has been prepared (in

accordance with a regulation), the pesticide is applied in accordance with the plan and the regulation, and a pesticide use notice has been sent to the government. Where pesticides are to be used in areas of high concern, approval of the plan must be obtained. The IPMA also regulates the licensing for sales and application of pesticides.

2.2.4 *Transportation of Dangerous Goods Act (TDGA)*

The TDGA regulates the transportation of dangerous goods within British Columbia and gives additional powers to municipalities to regulate the transportation of dangerous goods within their boundaries. Its regulation substantially adopts the rules under the federal TDGA.

2.2.5 *Environmental Assessment Act (EAA)*

The EAA establishes a comprehensive process for the assessment of the environmental effects of major projects in British Columbia. Projects designated in the *Reviewable Projects Regulation* or designated as reviewable by ministerial order must undergo an environmental assessment and cannot proceed without an environmental assessment certificate. It is administered by the B.C. Environmental Assessment Office.

2.2.6 *Natural Resources Legislation*

The *Forest and Range Practices Act* sets the framework for what the B.C. government calls “results-based” forestry on public land. This concept is to set environmental objectives established by government for soils, timber, fish, biodiversity, cultural heritage, forage and associated plant communities, visual quality, water, wildlife, and resource and recreation features. Operators prepare five-year Forest Stewardship Plans designed to achieve the targets or strategies.

The *Private Managed Forest Land Act* creates a mechanism for the regulation of forest practices on private land assessed as managed forest. The legislation creates a governing council that establishes and enforces environmentally sustainable forest practices on private managed forest land in accordance with objectives set by the government in the Act.

One of the key provincial statutes governing oil and gas activities is the *Petroleum and Natural Gas Act*. Although not an exclusively environmental statute, the Act requires proponents to obtain various approvals before undertaking exploration or production work, such as geophysical licences, geophysical exploration project approvals, and permits for the exclusive right to do geological work and geophysical exploration work, and well, test hole, and water source well authorizations. Such approvals are given subject to environmental considerations and licences and project approvals can be suspended or cancelled for failure to comply with the Act or its regulations.

The *Mines Act* applies to all mines during exploration, development, construction, production, closure, reclamation and abandonment activities. Before starting any work in or about a mine, the owner, agent, manager or any other person must hold a permit and have filed a plan outlining the details of the proposed work, a program for the conservation of cultural heritage resources, and for the protection and reclamation of land, watercourses and cultural heritage resources affected by the mine.

2.2.7 Water, Fish and Wildlife Legislation

The *Water Act* establishes licensing or approvals for diversion and use of water, construction of works and alteration or improvements to streams and channels. The *Water Protection Act* prohibits the removal of water from British Columbia or the construction or operation of large scale projects capable of transferring water from one watershed to another without a licence. The *Drinking Water Protection Act* regulates drinking water supply systems, establishing mechanisms for source protection and providing for greater public accountability of water suppliers. The *Fish Protection Act* is designed to protect and restore fish habitat. It prohibits the construction of dams on specified significant rivers, allows for the designation of sensitive streams and establishes rules for new residential, commercial or industrial development. Under the *Riparian Areas Regulation*, an assessment of potential impact to fish habitat must be carried out before development can be approved by a local government.

The *Wildlife Act* regulates the management of wildlife in British Columbia, other than on federal lands. Although much of it relates to hunting, it was amended in 2004 to allow the B.C. Ministry of the Environment to create an endangered species list, and to provide protections for listed species similar to those under the federal SARA. However, these amendments have not yet been brought into force. The *Wildlife Act* also has specific protections for raptors and their habitats.

2.3 Quebec

2.3.1 Environment Quality Act (EQA)

The main environmental statute in Quebec is the EQA. The EQA makes it an offence to deposit or allow the deposit of a contaminant into the environment over and above limits set by decree or by regulation or in a manner that negatively impacts on the environment or human health. Accidental releases must be reported to the Ministry of Sustainable Development, Environment and Parks (MSDEP) immediately. The EQA confers upon all persons the right to the protection of the environment to the extent set forth in the EQA. A person residing in the immediate vicinity of a place where a violation may occur, the Attorney General, and the local municipality may apply to the Superior Court for an injunction to prevent or stop a violation from occurring or continuing.

2.3.1.1 Authorizations

Anyone wishing to undertake an activity that may result in the release of a contaminant into the environment must first obtain a certificate of authorization from the MSDEP. These certificates are transferable, with MSDEP approval. Air emissions control and wastewater treatment are normally regulated by a certificate of authorization issued under the EQA. However, if a facility is located on the island of Montréal, then as regards air emissions and wastewater discharges, the facility is subject to standards set forth in regulations of the Montréal Metropolitan Community. Under the EQA, facilities in certain industrial sectors are subject to the requirement to obtain a “depollution attestation”, a type of comprehensive environmental operating permit that must be renewed every five years. The first two sectors to have been made subject to this requirement are pulp and paper mills, and the mining and primary metals industry. Emissions standards in depollution attestations are tailored to the

facility and its receptor environment. Holders of attestations pay fees for their emissions and must monitor effects of their emissions on the local environment.

Certain types of projects listed in a regulation to the EQA must undergo an environmental assessment before the Quebec government may issue a certificate of authorization. The environmental assessment process always includes a public notification step and may include public hearings before the *Bureau des audiences publiques en environnement* (BAPE – the office of public hearings on the environment). The recommendations of the BAPE must be taken into account by the Quebec government in making its decision and setting permit conditions. The EQA contains a separate environmental and social impact assessment process for the James Bay and Northern Quebec region.

2.3.1.2 Contaminated Sites

The EQA contains a framework for managing contaminated sites. The Act gives MSDEP the power to order clean-up measures, site assessment and site remediation when MSDEP is notified of a spill or otherwise becomes aware that a site poses a hazard to human health or the environment. Under a regulation to the EQA, operators of sites on which listed, potentially-polluting activities have taken place must hire a government-certified expert to carry out a site assessment when they cease to carry on the activity or change the use of the property, and they must notify their neighbours if they become aware of a risk that contaminants in soil or groundwater are migrating offsite. Results of these site assessments must be forwarded to MSDEP and a remedial plan may be required if concentrations of contaminants in the soil or groundwater exceed regulatory criteria. Approval of any plan that involves leaving contaminants onsite in excess of regulatory criteria, based on a risk management approach, requires publishing a notice of contamination on the land registry. The notice may be removed once a government certified expert establishes that concentrations of contaminants onsite no longer exceed regulatory criteria. Defences available to innocent occupants of contaminated land facing an order from the MSDEP to assess or remediate the land are: 1) they honestly did not know about the contamination; 2) they knew about the contamination but they complied with the law and acted reasonably and diligently under the circumstances; and 3) the site was contaminated by a neighbouring property.

2.3.1.3 Waste Management

Quebec has a decentralized framework for siting landfills, with public involvement through regional county municipalities. Regulations have been adopted requiring manufacturers to take back used paint and paint containers, as well as used oil. Regulations are under development extending these obligations to used batteries, consumer electronics, and fluorescent light bulbs. Landfill operators and companies that market printed materials, containers and packaging pay dues that are remitted to municipalities to help finance the cost of curbside recycling programs. A permit is required to process hazardous waste for commercial ends, to incinerate it for energy production, and to store hazardous waste onsite above a certain amount. Permits are also required to transport hazardous waste and to operate hazardous waste disposal sites. The *Transportation of Dangerous Substances Regulation* adopted under the EQA governs the handling and transportation of dangerous substances, including hazardous waste, on Quebec's roads.

2.3.1.4 Enforcement and Remedies

Violation of the EQA can result in fines of up to C\$1 million and prison terms. Convictions can include an order to repair damage done and an additional fine equal to the amount of any financial gain resulting from the commission of the offence. The MSDEP lists recent convictions on its Web site, under Press releases. The MSDEP also maintains an online registry of applications for certificates of authorization and a list of recent authorizations issued under the EQA. Persons subject to an order from the MSDEP or whose certificate of authorization was cancelled or denied may appeal to the Quebec Administrative Tribunal. The Supreme Court of Canada has upheld the authority of the MSDEP to issue a clean-up order in a case where it was a co-defendant, along with the oil company being ordered to do the clean-up, in civil litigation brought by owners of condominiums built on a former industrial site. Citizen groups have applied to courts to obtain the cancellation of certificates of authorization issued to industry. Litigants often invoke the provisions of the *Civil Code of Québec* in environmental disputes. There have been several class action suits, on subjects such as nuisances from municipal landfills, an aquaculture operation that raised phosphorus levels in a lake, dust from a cement company and noise from a snowmobile path. In certain cases, the Quebec government has adopted decrees setting aside environmental provisions (sale of part of Mount Orford Park; absence of an environmental assessment of the Hertel-des Cantons hydro line) or putting a moratorium on class actions suits (noise from snowmobile paths).

2.3.2 Pesticides Act (PA)

The PA has two main objectives: 1) preventing and mitigating harmful effects to the environment and human health caused by pesticides, and 2) rationalizing and reducing the use of pesticides. These objectives are fulfilled by analyzing, assessing and controlling the effects of pesticide use, and by developing and promoting alternatives to pesticide use.

The PA requires pesticide users and vendors to obtain permits and certificates and provides for the establishment of a pesticide classification process. It also grants the Quebec government the power to adopt regulations imposing requirements for pesticide storage, sale and use. The two regulations currently in force under the Act are: 1) the *Regulation respecting permits and certificates for the sale and use of pesticides* and the *Pesticides Management Code*.

The *Pesticides Management Code*, in force since April 3, 2003, initially prohibited the use of certain pesticides on lawns of public, semi-public and municipal properties. In April 2006, the prohibition was extended to private and commercial properties, except golf courses.

2.3.3 Water Resources Preservation Act and Quebec's Water Policy

The *Water Resources Preservation Act* (WRPA) prohibits transfers of surface or ground water outside of Quebec unless the water is (i) used to produce electric power, (ii) intended for human consumption if such water is packaged in Quebec in containers of 20 litres or less, (iii) intended to supply dwellings situated in a bordering zone, or (iv) used to supply and operate vehicles and for the needs of the person or animals being transported in such vehicles.

2.3.4 Natural Resources Legislation

Quebec has several laws regulating natural resources development and conservation.

Since 1991, Quebec has invested C\$20 million in remediating orphaned/abandoned mine sites. Since 1995, under the *Mining Act*, companies must file with the Ministry of Natural Resources (MNR) a reclamation plan and a financial guarantee covering 70% of the cost of reclaiming tailings storage areas. The rehabilitation plan must be filed before the beginning of operations and must be reviewed at least every five years. In 2006, the *Mining Act* was amended to prohibit prospecting on land permanently or temporarily closed to mining.

The *Natural Heritage Conservation Act* allows the MSDEP to designate various types of protected areas in Quebec, sometimes on an emergency basis. The *Act respecting the conservation and development of wildlife* sets out rules for hunting, fishing and trapping on public land, allows the government to adopt wildlife conservation measures, and contains provisions for accommodating the rights of Aboriginal peoples.

The *Forest Act* is intended to promote sustainable forest management. It contains different sets of requirements for public and private forests. Persons carrying on a forest management activity in public forests, other than road maintenance, must hold a forest management permit. The Act also provides for the negotiation of timber supply and forest management agreements, and forest management contracts. An authorization must be obtained from the MSDEP pursuant to the *Tree Protection Act* to destroy or damage a tree, sapling or shrub, or any underwood, anywhere other than in a forest under the management of the MNR. In case of failure to obtain such authorization, punitive damages may be payable.

As part of its renewed focus on forestry, the MNR published a document in June 2008 outlining elements of a new forestry framework that it hopes will be in place by 2013. It includes a triad approach to land use planning, where the forested land base is divided into three types of areas, each with its own level of land use intensity: 1) off limits to resource development (biodiversity conservation); 2) sustainable resource management (multiple use, with a focus on ecosystem-based forest management); and 3) intensive forestry operations (plantation agriculture). Another element is decentralized decision-making by local forest management corporations using results-based management, with MNR taking a step back and concentrating on protecting the public interest, addressing aboriginal issues, road planning, and certain other matters. A further innovation will be selling fibre at market prices, giving existing rights-holders a right of first refusal on market-priced lumber. The document, entitled *L'occupation du territoire forestier québécois et la constitution des sociétés d'aménagement des forêts* (Occupation of the forested landbase and constitution of forest management corporations) is available online at: <http://www.mrnf.gouv.qc.ca/publications/forets/evolution/document-travail-juin08.pdf>. Draft legislation is expected to be sent for committee review in autumn 2008.

The *Petroleum Products Act* is intended to ensure the continuity and security of the petroleum products supply. Regulations under the *Petroleum Products Act* and related statutes set out standards governing the types of permitted petroleum products (oil and gasoline), the use, monitoring and maintenance of petroleum storage tanks and other petroleum equipment, leaks and leak prevention, safety procedures, and government inspections and reporting,

among other matters. The *Building Act* creates a regulatory framework for high risk petroleum products storage equipment, including permit requirements.

The Quebec government has an energy strategy for the period 2006-2015. The document is available online at: <http://www.mrnf.gouv.qc.ca/english/publications/energy/strategy/energy-strategy-2006-2015.pdf>.

2.3.5 Sustainable Development Act (SDA)

In addition to providing a definition of sustainable development, the SDA creates the position of Sustainable Development Commissioner to conduct environmental audits within the office of the Auditor General. The SDA establishes a Green Fund to finance MSDEP initiatives. The fund is financed in part through a levy on fossil fuels. The SDA elevates the right to environmental quality set out in the EQA to the level of an economic and social right under the Quebec *Charter of Human Rights and Freedoms*.

2.4 Ontario

2.4.1 Environmental Protection Act (EPA)

The main source of environmental regulation in Ontario is the EPA. It provides for the control of air, water and land pollution and its basic structure is to prohibit the emission or discharge of a broad range of contaminants that cause or are likely to cause an “adverse effect” to the natural environment. Prohibited adverse effects include: harm or material discomfort to persons; the impairment of the safety of persons; injury or damage to property or to plant or animal life; loss of enjoyment of normal use of property; and interference with the normal conduct of business. Numerous regulations have been made under the Act regulating specific activities or substances. Some of the EPA’s more important provisions and regulations are discussed below.

2.4.1.1 Environmental Approvals

Whenever a contaminant is discharged from a factory stack or wastewater outfall, or when waste is deposited on land, a certificate of approval must first be obtained from the Ontario Ministry of the Environment, which administers the EPA and a companion statute, the *Ontario Water Resources Act*, which regulates both the taking of water for human or industrial use, and the discharge of wastes and storm water directly into a river or lake.

Before a permit or certificate of approval will be issued, the Ministry generally requires detailed plans describing the nature of the discharge source and the manner in which the level or concentration of contaminants in the discharge will be minimized. The Ministry has increasingly required evidence that the owner or operator of the subject facility has identified the best available pollution control technology that is economically feasible. The Ministry will also have regard to concentration limits that have been developed for specified contaminants and is aggressively pushing Ontario industry to continually reduce the levels of contaminants being discharged into the province’s air and water. Major facilities are subject to detailed wastewater discharge requirements, contained in both their approvals and industrial sector regulations.

2.4.1.2 Air Emissions

Air emissions are regulated under the EPA through a combination of the certificate of approval process and specific air contaminant limits determined at “points of impingement”. The principal air emission regulation is *Regulation 419/05*. Among other things, this regulation requires the use of new air emission models, detailed monitoring and reporting, and the phasing in of stricter air emission standards for over 100 different chemical parameters.

Greenhouse gases, such as carbon dioxide (CO₂) and smog gases, such as nitrous oxides (NO_x), are currently receiving some attention from the Ontario government, which has been participating in federal-provincial discussions aimed at developing national air pollution reductions. The Ontario government has recently issued a number of new regulations that have strengthened and updated its air emission controls. In 2005, the province commenced implementation of a five-point action plan to reduce industrial emissions, particularly smog causing emissions of nitrogen oxide (NO_x) and sulphur dioxide (SO₂). NO_x and SO₂ limits and monitoring requirements now govern the electricity generation, base metal, iron and steel and petroleum sectors, among others. It is also considering a greenhouse gas reduction program that would involve a “cap and trade” emission credit system, in the event that it is not satisfied with the federal program under development.

2.4.1.3 Waste Management

Any business which collects, transports, treats or disposes of waste, must have a certificate of approval issued by the Ministry of the Environment. In the case of “liquid industrial and hazardous wastes”, special rules apply. The generators of such waste must register each waste with the Ministry and use prescribed waste manifests in respect of each shipment from the waste generation facility. Hazardous waste must be packaged and labelled in accordance with the federal *Transportation of Dangerous Goods Act* and the generator must confirm the delivery of a waste shipment at the intended receiving facility. If the liquid industrial or hazardous wastes are stored onsite for more than three months, the Ministry must be notified and, in most cases, it will require assurances that the waste will ultimately be removed from the site.

Over the past few years, the Ministry of the Environment has taken steps to encourage the reduction and recycling of waste. Waste materials destined for recycling are exempt from some of the strictures of the legislation, including the requirement for a certificate of approval under the *Environmental Protection Act*. There are also regulations that require industrial and other waste generators to conduct waste audits and meet prescribed waste reduction targets.

In early 2004, the provincial government proclaimed the start of its new “Blue Box” municipal recycling program, which affects all “brand owners and first importers” of products that generate paper, glass, metal or textile packaging waste. The program requires such organizations to register with Waste Diversion Ontario or its delegate, Stewardship Ontario, and implement a waste diversion or recycling program, or pay annual fees. Similar recycling programs have been extended to household hazardous wastes and electronic goods.

2.4.1.4 Spills and Contaminated Sites Clean-up

Where accidental spills or discharges of contaminants occur, the persons in control are obligated under the *Environmental Protection Act* to notify government agencies “forthwith” and to do everything practicable to clean up major “spills” and restore the natural environment. Persons suffering loss or damage from a spill are entitled to compensation. If the government incurs clean-up costs, it is able to recover these costs from the owners and persons in control of the substances spilled. Directors and officers are specifically obligated to exercise “reasonable care” to prevent their corporations from causing or permitting the discharge of contaminants into the environment.

Where land has been contaminated by current or past activities, the Ministry of the Environment is authorized to issue orders requiring remediation. Some orders will require a comprehensive remediation plan, involving expensive studies of the situation prior to the implementation of remediation measures. These orders may be appealed to an environmental tribunal if the terms and conditions are considered unreasonable. Land remediation may also be required as a condition to obtaining land use approvals from municipal authorities who are responsible for land use planning and development activities. The municipal authorities will typically have regard to provincial and national soil and groundwater guidelines.

In November 2001, the Ontario legislature passed the Brownfields Amendments to the EPA and certain related legislation, to encourage the revitalization of contaminated land. Since that time, the government has proclaimed in force most of the amendments that will, among other things, allow lenders, bankruptcy trustees and others to deal with contaminated land without assuming liability for the clean-up of historical environmental conditions. Additional amendments took effect on October 1, 2004, establishing environmental liability protections for landowners who complete a clean-up of a property in accordance with the requirements of the new amendments and Regulation 153/04.

The central part of the clean-up process under the new legislation will be the preparation and filing of a document entitled *Record of Site Condition* (RSC). A RSC is completed by both a property owner and a so-called *qualified person* experienced in environmental site assessment and remediation. Regulations specifically define such persons to ensure that they have minimum qualifications.

2.4.1.5 Enforcement

Ontario aggressively enforces its environmental legislation and the penalties available against those convicted of an offence can be very large. Under the *Environmental Protection Act* and the *Ontario Water Resources Act* maximum fines for corporations are C\$10-million and an individual may be imprisoned for up to five years. Administrative penalties are also available in some cases for less serious offences, although the defences available are very limited. In addition to criminal-like sanctions, the Ministry of the Environment has extensive order-making powers that have been used liberally against corporations and their officers and directors. These orders can require expensive environmental investigations and remedial work extending over a number of years and costing millions of dollars.

2.4.2 *Ontario Water Resources Act*

Where a waste generator wishes to discharge its waste to a local water body, the discharge must be subject to a certificate of approval issued by the Ontario Ministry of Environment pursuant to the *Ontario Water Resources Act*. Without such a licence, if the discharge “may impair the quality of the water,” the person causing or permitting the discharge is guilty of an offence under the Act. Upon conviction for such an offence, the generator/discharger may be fined or imprisoned in accordance with the same penalty structure provided for under the *Environmental Protection Act*.

Under the Act, no person is permitted to establish or operate a facility or works for the collection, transmission, treatment and disposal of commercial and industrial sewage wastes, among other wastes (sewage works), without first obtaining a certificate of approval.

Where one discharges liquid wastes into a municipal sanitary sewer, it is necessary to become familiar with any applicable sewer use by-law. In most areas of the province, municipal sewer by-laws restrict what may be discharged into local sanitary and storm sewers and, in some cases, require pollution prevention plans.

The construction of water wells and the use or taking of any surface or ground water above 50,000 litres a day is also regulated by the Act, which requires such takings to be permitted by the Ministry of the Environment.

2.4.3 *Safe Drinking Water Act*

The *Safe Drinking Water Act* governs municipal drinking water systems and expands on existing policy and practice and introduces new features to protect drinking water in Ontario. The Act's purpose is to protect human health through the control and regulation of drinking-water systems and drinking-water testing. Under the Act, owners and operators must ensure that “end of pipe” water quality meets prescribed standards; that only trained personnel are used to operate a compliant system; that sampling, testing, and monitoring are proficient; and that all reporting obligations regarding any adverse drinking water quality tests results are complied with. The Ministry of Environment must also approve all operational plans from operators of municipal drinking water systems. Part IV of the Act imposes a Quality Management Standard on operators of drinking water systems and an accreditation body is designated for the purpose of administering programs to accredit operating authorities.

2.4.4 *Clean Water Act*

The *Clean Water Act* was enacted in October 2006 and represents the Ontario government's most recent legislation aimed at ensuring clean and safe water for its citizens. The Act establishes conservation authority areas that will be subject to development plans that will protect drinking water sources such as groundwater aquifers and surface watersheds. The water protection plans will be prepared in consultation with various local agencies and, once completed and approved by the Minister of the Environment, they will guide and restrict development activities within the plan areas much like current provincial and municipal development plans.

2.4.5 *Environmental Assessment Act*

Pursuant to the *Environment Assessment Act*, significant public projects proposed by the provincial and municipal governments, and in a few cases, environmentally sensitive private projects, are subject to an assessment of their environmental impacts or effects. The application of the process is subject to the discretion of the Minister of the Environment, who must provide an approval before a project or undertaking may proceed. In some cases, a public project that is caught by the legislation may be exempted by order of the Minister. In other cases, private projects that would normally not be subject to the Act, may be designated by the Minister after having been asked to do so by members of the public. In anticipation of the further privatization of Ontario's electricity generation system, a regulation exists under the Act requiring environmental assessments of prescribed electricity projects.

If a project is required to undergo an environmental assessment, at the very least extensive environmental studies will be required to determine the project's environmental impacts and consider the need for and alternatives to the undertaking. Some public consultation will be required and, in many cases, full public hearings are carried out before an independent tribunal known as the Environmental Review Tribunal. Where other government approvals are required, a consolidated public hearing may be held and the hearing can easily go on for a number of months. In the past, the types of private projects required to undergo an environmental assessment have included major waste management undertakings and new mines. Electrical generation and transmission projects are subject to the Act by a special regulation.

2.4.6 *Liquid Fuels Handling Regulations and Code*

The storage and handling of petroleum products and other liquid fuels, in both above and below ground containers, is regulated under the *Technical Standards and Safety Act*. The *Liquid Fuels Handling Regulations and Code* under the Act stipulate detailed requirements regarding the safe use and distribution of gasoline and most other petroleum products. Underground storage tanks (UST) and other storage systems are subject to detailed safety and environmental protection requirements. When a leak is discovered, the owner of the UST must notify the Fuels Safety Division and Ministry of the Environment, and arrange for the immediate repair or replacement of the leaking systems, the recovery of escaped product and the removal of contaminated soil. The general provisions and the soil and groundwater standards of the EPA will also apply to such fuel spills.

2.4.7 *Natural Resources Legislation*

The *Crown Forest Sustainability Act* is the principal statute governing forestry activities in the province. The Act provides for the administration and regulation of forest management planning, forest resource agreements and licences, information management, reforestation and revenue collection. The Ministry of Natural Resources administers the Act and relies on several manuals to guide various aspects of forest management activities and ensure that provincial forests are managed in a sustainable manner consistent with the long-term objectives set out in forest management plans. After the sustainable supply of wood is determined for a management unit, forest resource disposition occurs based on demand and access is afforded to forest industry companies primarily through socio-economic based

policy instruments including supply agreements and licences for harvesting and processing forest resources.

Mining activities are governed by the *Mining Act*, which provides for the exploration, development and rehabilitation of mines. Before a mine may be opened, the Ministry of Northern Development and Mines must first approve or accept a closure and rehabilitation plan for the mine. Such a plan will require a description of the proposed conditions and uses of the mine site and those that will exist after mine closure. The plan must provide for the rehabilitation of tailings areas and detail all other necessary rehabilitation work. The plans will be subject to negotiation with various government officials, including representatives of the Ministry of the Environment, which will likely be required to issue permits or certificates of approval under their legislation. The Ministry of Northern Development and Mines may also require some form of financial assurance that the closure plan will be carried out at the end of the mine's life.

Similar rehabilitation requirements are provided for under the *Aggregate Resources Act*, which governs the extraction of sand, gravel and other aggregates.

2.4.8 Fish and Wildlife Legislation

Hunting and fishing in Ontario are managed by the Ministry of Natural Resources, principally under the *Fish and Wildlife Conservation Act*. The Act prohibits the hunting of animals without a license issued under the Act and regulates, among other things, the means, time and location of permitted hunting. The Ministry regulates fishing under the authority of this Act and regulations issued under the federal *Fisheries Act – Ontario Fishery Regulations, 2007 (SOR/2007-237)*.

The *Endangered Species Act, 2007* came into force on June 30, 2008, significantly enhancing protection for endangered species in Ontario. Its purpose is to identify species at risk, create measures for their protection, and promote recovery and stewardship of endangered species. Endangered species are identified and designated by the Committee on the Status of Species at Risk in Ontario. Once a species is designated under the Act, it may not be harmed, captured, killed, sold or possessed. In addition, damaging the habitat of an endangered species is prohibited. Enforcement provisions under the legislation include issuing a stop order, fines and imprisonment for offences.

XIII. IMMIGRATION LAW

Except in the province of Quebec, where jurisdiction is shared with the federal government, immigration is a federal jurisdiction and the provinces provide only a consulting role to the federal government.

Canada's immigration policy is governed by the federal *Immigration and Refugee Protection Act*.

The following discussion highlights key issues and requirements for work permits under the Act. For a discussion of these issues and requirements as they pertain to the province of Quebec, please refer to Blakes *Doing Business in Quebec* guide.



1. Temporary Foreign Workers

Canadian companies often wish to hire foreign workers with particular skills. Depending on the particular circumstances, this may be difficult in view of the federal government's policy, which provides that employment opportunities in Canada belong first to Canadian citizens and to permanent residents of Canada.

1.1 Temporary Work Permit - General Requirements

The Act generally prohibits a foreign national (any person other than a Canadian citizen or permanent resident of Canada) from working in Canada without first obtaining a work permit. A work permit will generally only be issued when the use of a foreign worker will not adversely affect employment opportunities for Canadians or permanent residents of Canada.

1.2 How does a company obtain permission to hire a foreign worker?

Generally, an employer in Canada who wishes to hire a foreign worker must first obtain a positive or neutral 'confirmation' or labour market opinion from Service Canada (formerly Human Resources and Skills Development Canada) of the job offer in favour of the particular foreign worker. Before confirming an offer of employment, however, Service Canada must be satisfied that there is no Canadian or permanent resident available to fill the position.

The employer will be required to submit a temporary foreign worker application to Service Canada describing in detail the qualifications required and the duties of the prospective employee or may even be required to advertise the position, either in a local newspaper or across Canada. It must be demonstrated to the satisfaction of Service Canada that the employer is genuinely prepared to give preference to a qualified Canadian or permanent resident.

In periods of economic recession and corresponding high unemployment levels, Service Canada is increasingly reluctant to confirm job offers in favour of foreign workers except in the clearest of cases.

1.3 Are employees to be transferred to Canada exempt from Service Canada confirmation?

Certain persons may be granted a work permit without first obtaining confirmation of the job offer from Service Canada. Included in this exemption from Service Canada confirmation are, among others, “intra-company transferees”. Intra-company transferees are generally defined as executives, managers and “specialized knowledge” workers. This group includes “persons in senior executive and managerial categories carrying a letter from a company carrying on business in Canada, which identifies the holder as an employee of a branch, subsidiary, affiliate or parent of that company located outside Canada and who seeks to enter Canada to work at a senior executive or managerial level for a temporary period at a permanent and continuing establishment of that company in Canada”.

A specialized knowledge worker must demonstrate specialized knowledge of a company’s service or product and its application in international markets or an advanced level of knowledge or expertise in the organization’s processes and procedures. Applicants in the intra-company transferee category (executives, managers and specialized knowledge workers) must have worked abroad for at least one year in the previous three years in a similar position for the company that plans to transfer them to Canada.

1.4 Has NAFTA liberalized the work permit requirement?

Under NAFTA, entered into by Canada, the United States and Mexico, the criteria for intra-company transferees are essentially the same as the general criteria. It should be noted that NAFTA applies only to *citizens* of Canada, the United States or Mexico (i.e., it does not apply to “permanent residents” or “green card holders”).

NAFTA also exempts certain designated “professionals” from the Service Canada confirmation requirements. Included in the list of designated professionals are, among others, accountants, engineers, scientists, scientific technicians/technologists, certain medical professionals, architects, social workers, computer systems analysts, management consultants and hotel managers. These professionals, while still requiring a work permit to work in Canada, may be issued such permit without first having to obtain confirmation from Service Canada of their job offer from a Canadian employer.

1.5 Accompanying Dependants

The spouse and dependant children of a work permit holder are entitled to accompany the foreign worker to Canada but are not permitted to work in Canada without first obtaining a work permit in their own name. Spouses or common-law partners (but not dependant children) of most skilled people coming to Canada as temporary foreign workers are generally able to work in Canada without first obtaining a job offer confirmed by Service Canada. Dependants of a work permit holder are permitted to attend school in Canada and may be required to first obtain a study permit from Canada Immigration.

2. Permanent Residence

A person wishing to become a permanent resident of Canada must file an application at a Canadian Embassy, High Commission or Consulate outside Canada. The application will be considered to determine whether the potential immigrant is qualified for admission to Canada as a permanent resident under the existing legislation, regulations and policy. In general, applications for permanent residence in Canada are considered under these categories:

- Family Class
- Skilled Worker Class
- Business Immigration
- Refugees.

2.1 Family Class Immigration

A Canadian citizen or permanent resident living in Canada, 18 years of age or older, may sponsor certain immediate family members such as spouses, common-law or conjugal partners 16 years of age or older, parents, grandparents and dependant children (generally under the age of 22). Family Class applications receive the highest processing priority and qualifying applicants are exempt from the usual selection criteria.

2.2 Skilled Worker Class Immigration

Applicants in the skilled worker class are expected to have the skills, education, work experience, language ability and other qualities needed to participate in the Canadian labour market. An application for permanent residence as a skilled worker is generally assessed on six selection factors (“point system”) and the applicant must achieve a minimum of 67 points out of 100, and meet certain other requirements of the Act and Regulations. Factors such as education and training, work experience, arranged employment, adaptability, age, English and/or French language ability and other specific qualities of the prospective immigrant are assessed within the point system. Applicants in the skilled worker class must have at least one year of paid full-time work experience (within the past 10 years), the work experience must be in the category of Skill Type 0, or Skill Level A or B as set out in the Canadian National Occupation Classification (NOC).

2.3 Business Class Immigration

Business class immigrants include entrepreneurs, investors and self-employed immigrants. The Government of Canada has established Business Immigration Centres to provide better service. All business immigrants **must** apply at one of nine Business Immigration Centres which are located outside Canada at the Canadian Embassy, Canadian High Commission or Canadian Consulate in Beijing, Berlin, Buffalo, Damascus, Hong Kong, London, Paris, Seoul and Singapore.

1. An “Entrepreneur” must have business experience in managing and controlling a percentage of equity of a qualifying business and meet minimum net worth requirements. An applicant under the entrepreneur program must have the intention and the ability to control a percentage of equity (equal to 33-1/3% or greater) of a qualifying Canadian business. The

entrepreneur must provide active and ongoing management of the qualifying Canadian business and must create at least one new full-time job for a Canadian citizen or permanent resident. The entrepreneur must meet these requirements within three years of becoming a permanent resident.

2. “Investors” must have successfully managed, operated, controlled, directed or owned a financially successful business or commercial undertaking and have legally accumulated through their own efforts a minimum net worth of C\$800,000. All investors, regardless of the province or territory where the capital is invested, are required to make an investment of C\$400,000 for a period of five years with Citizenship and Immigration Canada Headquarters in Ottawa before an immigrant visa is issued. The investment is subsequently allocated to any participating provinces and territories in Canada. These governments use the funds for job creation and economic development. The full amount of the investment (without interest) is repaid to the investor after five years. The return of the investment is fully guaranteed by the participating provinces and territories.

This program is limited to those who intend to live permanently in a province or territory other than Quebec. While Quebec has agreed to standardize its regulations in terms of the required investment amount of C\$400,000 and investor net worth of C\$800,000, investors who intend to live in Quebec must apply under the Quebec Immigrant Investor Program, and must also be selected by Quebec pursuant to a “Certificat de sélection”.

A “self-employed” applicant is “a person who intends and has the ability to establish a business in Canada that will create employment for that person, and will contribute significantly to the economy or the cultural or athletic life of Canada” or that person may purchase and manage a farm in Canada. A self-employed applicant must have relevant experience and the applicant’s management skills, business ability and financial assets and past business record are assessed to determine if the applicant has the ability to establish successfully in Canada.

2.4 Refugees

Canada’s commitment to uphold its humanitarian tradition with respect to the displaced and the persecuted is stated in the objectives of the *Immigration and Refugee Protection Act*. The legislation makes provision for refugees and special groups whose admission is to be facilitated on humanitarian grounds.

XIV. RESTRUCTURING AND INSOLVENCY

Commercial insolvency proceedings in Canada may take a variety of different forms. The assets of a business may be liquidated or sold on a going-concern basis by a trustee in bankruptcy appointed in bankruptcy proceedings, by a receiver of the business appointed privately or by a court, by the exercise of other private remedies of a secured creditor under its security or through some combination of the above.

Alternatively, the insolvent business may be rehabilitated by a restructuring of the corporation and its debts under one or more statutes governing commercial insolvencies.

1. Canada's Insolvency Statutes

Canada has four key insolvency statutes:

- *Companies' Creditors Arrangement Act* (CCAA). The CCAA is the principal statute for the reorganization of a large insolvent corporation that has more than C\$5 million of claims against it. The CCAA is a federal statute with application in every province and territory of Canada and is generally analogous in effect to Chapter 11 of the U.S. *Bankruptcy Code* (U.S. Code), although there are a number of important technical differences. As discussed below, case law has confirmed that the sale of a debtor's business and assets in a CCAA proceeding is also permitted even in the absence of a formal plan of reorganization.
- The *Bankruptcy and Insolvency Act* (BIA). The BIA is also a federal statute that includes provisions to facilitate both the liquidation and reorganization of insolvent debtors. The liquidation provisions, which provide for the appointment of a trustee in bankruptcy over the assets of the insolvent debtor, are generally analogous to Chapter 7 of the U.S. Code, although there are a number of important technical differences. The reorganization provisions under the BIA, known as the "proposal" process, are more commonly used for smaller, less complicated reorganizations than those that take place under the CCAA because there is a minimum debt threshold of only C\$1,000.
- The *Personal Property Security Act* (PPSA). The PPSA governs the priorities, rights and obligations of secured creditors, including a secured creditor's right, following a default by the debtor, to enforce on its security and dispose of assets subject to its security (including on a going-concern basis). Each province of Canada, except Quebec (which has its own unique *Civil Code*, modelled on the French Napoleonic Code) has enacted a version of the PPSA. The PPSA is analogous to, and modelled on, the *Uniform Commercial Code* enacted in each U.S. state.
- Provincial Rules of Court. In all provinces except Quebec, it is also possible to sell an insolvent business, by way of liquidation or going-concern sale, through a court-appointed receiver (which is usually a firm with licensed insolvency professionals and Chartered Accountants). Each province, other than Quebec, has "Rules of Court" similar to Ontario's *Courts of Justice Act*, which allow the court to appoint a receiver and/or receiver and manager



when it is “just or convenient” to do so. The receiver, by way of court order, can be granted the right to take possession of, and sell, the assets subject to the receivership. As discussed below, an “interim receiver” may also be appointed under the BIA, with limited or broad powers depending on the circumstances. Secured creditors may also privately appoint a receiver, without having to make a court application, if the security agreement provides for this remedy.

2. Reorganizations Under the CCAA

2.1 Who qualifies for relief under the CCAA?

To qualify for relief under the CCAA, the debtor must:

- (a) be a Canadian incorporated company or foreign incorporated company with assets in Canada or conducting business in Canada (certain regulated bodies such as banks and insurance companies are not eligible to file under the CCAA or BIA but instead may seek relief from creditors under the *Winding-Up and Restructuring Act*);
- (b) be insolvent on a cash flow or balance sheet test. The Ontario Court of Appeal has held that in determining whether a debtor is insolvent, courts should use a “contextual and purposive approach”. Accordingly, a debtor may be considered insolvent if the debtor faces a “looming liquidity crisis” or is in the “proximity” of insolvency even if it is currently meeting its obligations as they become due; and
- (c) have in excess of C\$5 million in debt or an aggregate in excess of C\$5 million in debt for a filing corporate family.

2.2 How does a company commence proceedings under the CCAA?

Proceedings under the CCAA are commenced by an initial application to the superior court of the relevant province. Unlike the United States, Canada does not have a “Bankruptcy Court” separate from its superior courts. In some jurisdictions like Ontario, however, there are specialized commercial branches of the courts before which these applications may be brought. In virtually every instance, the application is made by the debtor company itself (creditors may initiate the process but this is very uncommon).

2.3 What relief can the court provide?

The initial order granted by the court usually provides for the following key elements:

- (a) A comprehensive stay of proceedings that will apply to both secured and unsecured creditors, and a stay against termination of contracts with the debtor. Unlike Chapter 11, the stay is not automatic; however, the court will typically exercise its discretion to issue an initial stay for up to a permitted 30 days. An application to the court is required for any extensions. There is no statutory limit on the duration or length of extensions.

- (b) The appointment by the court of a monitor to supervise the restructuring on behalf of all creditors and to act as the eyes and ears of the court. The monitor is usually a firm with licensed insolvency professionals and chartered accountants. The monitor's basic duties are set out in the CCAA, but can be expanded by court order. Generally, the debtor's management will remain in control of the debtor throughout the restructuring, however, the monitor will assist management in dealing with the restructuring and other issues that arise. As part of the monitor's supervisory role, it will file periodic reports with the court and creditors, including reports on any proposed disposition of assets. There are no statutorily mandated creditor committees in Canada although they have sometimes been formed on an *ad hoc* basis. There is also no true equivalent in Canada to the U.S. Trustee, which provides government oversight in Chapter 11 cases. However, the monitor fulfils certain of the functions that the U.S. Trustee and creditor committees would fulfil in Chapter 11 cases.
- (c) The authorization of debtor-in-possession or "DIP" financing to the debtor and the granting of super priority charges in favour of the DIP lender, if the court is of the view that additional financing during the restructuring is critical to the continued operations of the business. Canada has not adopted the U.S. concept of "adequate protection", which is intended to protect existing lien holders who have become subject to super-priority charges. Canadian courts also do not need to authorize "replacements liens" because a pre-filing secured creditor's security, if granted over after-acquired property (as it usually would), automatically extends to post-filing assets acquired by the debtor. Pending amendments to the CCAA will codify the court's ability to grant DIP financing and corresponding priority charges. The amendments will require courts to take into account, among other things, whether such financing and charges will materially prejudice any of the debtor's other creditors before granting it.
- (d) The authorization of priority charges, such as an administrative charge to secure payment of the fees and disbursements of the monitor and the monitor's and debtor's legal counsel, and a directors' charge to secure the debtor's indemnity to the directors against post-filing claims. Along with the DIP charge, these priority charges will typically rank ahead of claims of pre-filing secured creditors.
- (e) The authority to repudiate certain contracts and leases where it would be economically advantageous to the debtor and its creditors as a whole to do so. The debtor is not required to elect to accept certain "executory contracts" or real property leases or to reject others, as is the case with Chapter 11 (other than aircraft leases). Generally, the debtor must fulfil its post-filing (i.e., post-petition) obligations under all agreements unless the debtor repudiates the agreement with the court's permission. Counterparties to repudiated agreements can assert a claim for damages on an unsecured basis and will be entitled to share in any distribution of proceeds on a *pro rata* basis along with other unsecured creditors. Pending amendments to the CCAA will codify the debtor's ability to repudiate contracts, on notice to the counterparty. The monitor or the court will be required to approve such repudiation after taking into account whether terminating the contract will cause the debtor's counterparty significant financial hardship. All purported repudiations approved by the monitor will be subject to appeal to the court.

- (f) Authorization and direction to the debtor to file a plan of arrangement or compromise with its creditors.

2.4 What is a plan of arrangement?

Essentially, the plan of arrangement or compromise is a proposal to the debtor's creditors that is designed to allow it to continue to carry on business, although the nature and/or scope of the business might be altered dramatically. Plans can, among other things, provide for a conversion of debt into equity of the restructured debtor or a newly-created corporate entity designed to be a successor to the debtor's business; the creation of a pool of funds to be distributed to the creditors of the debtor; a proposed payment scheme whereby some or all the outstanding debt will be paid over an extended period; or some combination of the three.

Plans may offer different distributions to different classes of creditors (discussed below). However, the plan must treat members within a class equally. This concept, of like creditors being treated alike, is a fundamental tenet of formal restructuring regimes in Canada.

2.5 How does the plan get approved by creditors?

Creditors, who will be required to prove their claims in a "claims bar process" approved by the court, are separated into different classes based on the principle of commonality of interest. Although unsecured creditors will typically be placed in a single class, certain unsecured creditors, such as landlords, may be classified in a separate class. The plan must be passed by a special resolution, supported by a double majority in each class of creditors: 50% plus one of the total number of creditors voting in the class and 66-2/3% of the total value of claims voting in each class. Note that, unlike under Chapter 11 in the U.S., there is no concept of "cram-down" in Canada. Cram-down allows for the passing of a plan of arrangement in certain circumstances, even though the plan has been rejected by a subordinate class of creditors. In Canada, each class of creditors to which the plan is proposed must approve the plan by the requisite majorities.

2.6 What if the plan is not approved by the creditors?

If the plan is not approved by the creditors, the debtor does not automatically become bankrupt (i.e., have a trustee in bankruptcy appointed over its assets). It is possible for the debtor to submit a new or amended plan. In the event the plan is not accepted, however, it is likely that the debtor's significant secured creditors or unsecured creditors will seek to lift the stay to exercise the remedies against the debtor that are otherwise available to them.

2.7 How does the plan get approved by the court?

Once the plan is approved by the creditors, it must then be submitted to the court for approval. This proceeding is known as the sanction or the fairness hearing. The court is not required to sanction a plan even though it has been approved by the creditors. However, creditor approval will be the most significant factor in determining whether the plan is "fair and reasonable", and thus deserving of the court's approval.

2.8 Who is bound by the plan and how is it implemented?

Once the court sanctions the plan, it is binding on all creditors whose claims are compromised by the plan. Although all necessary court approvals might have been obtained, the plan may not become effective until a number of subsequent conditions are met, such as the negotiation of definitive documentation, the completion of exit financing or the obtaining of regulatory approvals. Once all conditions are satisfied, the plan can be implemented. The day on which the plan is implemented is commonly referred to as the “implementation date” and is evidenced by a certificate filed with the court by the monitor, confirming that all conditions to the implementation of the plan have been satisfied. At this point, the debtor officially emerges from the restructuring.

2.9 Can the debtor void certain pre-filing transactions?

Unlike Chapter 11, the CCAA does not contain any provisions providing for the avoidance of pre-filing transactions on the basis that they constitute preferences, fraudulent conveyances or any other inappropriate payments or transfers of assets. However, creditors may be able to seek a remedy through other statutory means.

Pending amendments to the CCAA will add a right to review transactions including preferences and “transfers at under value” (as discussed below in section 3.1.6) in CCAA proceedings. In summary, the amendments will enable creditors in CCAA proceedings to challenge preferential payments or dispositions of property by the debtor for conspicuously less consideration than fair market value.

2.10 What is the difference between CCAA reorganizations and BIA reorganizations?

Insolvent debtors may also seek to restructure their affairs under the BIA. The essential difference between a restructuring under the CCAA and one conducted under the BIA is that a BIA procedure is primarily a statutory process with strict timeframes, rules and guidelines as set out in the BIA. A CCAA proceeding is more discretionary and judicially driven. Although the proposal process under the BIA provides for an automatic statutory stay of proceedings without a court application (including a stay against secured creditors), for debtors that satisfy the minimum C\$5 million debt threshold, the CCAA remains the statute of choice for restructurings of any complexity. Debtor companies and other key stakeholders that may support the restructuring process prefer the flexibility afforded by the CCAA over the more rigid regime of the BIA.

3. Liquidations

The two most common ways to liquidate an insolvent company in Canada are either through a bankruptcy proceeding under the BIA, or by way of an appointment of a receiver or interim receiver. In recent years, the CCAA has also been used as a process for the self-liquidation of a debtor, without a plan being filed and, in most cases, with the support and co-operation of the debtor’s main secured creditor(s).

3.1 Bankruptcy

3.1.1 How is a bankruptcy proceeding commenced?

The legal process of bankruptcy (generally analogous in effect to Chapter 7 of the U.S. Code) can be commenced in one of three ways:

1. Involuntarily, by the filing of a bankruptcy application by one or more of the debtor's creditors; or
2. Voluntarily, by the debtor making an assignment in bankruptcy for the general benefit of its creditors; or
3. On the failure of a proposal by the debtor to its creditors, as a result of the rejection of the proposal by creditors or the court or default under the proposal.

3.1.2 What is the effect of the commencement of the bankruptcy proceeding?

When a corporate debtor becomes bankrupt, the debtor ceases to have legal capacity to dispose of its assets or otherwise deal with its property and a trustee in bankruptcy is appointed over all the debtor's assets (other than property held in trust), although such appointment is subject to the rights of secured creditors. Trustees in bankruptcy are specialized insolvency professionals who in almost all cases are chartered accountants. They are not government officials, but they are licensed and regulated by a government office known as the Office of the Superintendent of Bankruptcy. The debtor itself selects the trustee; however, the selection is subject to confirmation by unsecured creditors at the first creditors' meeting.

3.1.3 What are the trustee's duties?

A trustee is an officer of the court and, accordingly, must represent the interests of creditors impartially. It is the trustee's duty to collect the debtor's property, realize upon it and distribute the proceeds of realization according to a priority scheme set out in the BIA (discussed below). The trustee is required to give notice of the bankruptcy to all known creditors of the bankrupt. The trustee must also convene a first meeting of the creditors of the bankrupt.

At the first meeting of creditors, creditors with proven claims must confirm the trustee's appointment. Proven creditors may also elect "inspectors" from their ranks who will then act in a supervisory role and instruct the trustee. There are certain actions that a trustee cannot engage in without inspector approval, such as the sale or other disposition of any property of the bankrupt.

3.1.4 How does a creditor prove its claim?

Upon the commencement of bankruptcy proceedings, unsecured creditors will be stayed from exercising any remedy against the bankrupt or the bankrupt's property and may not commence or continue any action or proceeding for the recovery of a claim (unless the

creditor is granted special permission by the court). Secured creditors are not subject to this stay of proceedings (discussed below).

A creditor can assert its claim against the debtor by completing a statutorily prescribed proof of claim and submitting it to the trustee in bankruptcy. The proof of claim will be attached to the notice of bankruptcy sent by the trustee to all known creditors. The creditor must submit the completed form before the first meeting of creditors if it wishes to vote on the motion to affirm the appointment of the trustee or vote for and/or act as an inspector in the bankruptcy. Otherwise, the creditor need only submit its proof of claim before the distribution of proceeds by the trustee (creditors will be provided notice before distribution).

A trustee can challenge the quantum of the amount set out in a proof of claim or the entire claim itself. Disputed claims may be resolved through a judicial process if the parties are not able to reach an agreement.

3.1.5 How does bankruptcy affect the rights of secured creditors?

Bankruptcy does not affect the rights of secured creditors to enforce their security. A trustee will obtain an independent opinion of the security to confirm the validity and enforceability of the secured creditor's security as against the trustee and the bankrupt's property. The rights of a trustee in bankruptcy are expressly subject to the rights of secured creditors. To the extent that the amount of a secured creditor's debt exceeds the value of the collateral subject to its security, a secured creditor may participate in the bankruptcy process and file a proof of claim in respect of the unsecured portion of its claim.

3.1.6 Can the trustee void certain pre-bankruptcy transactions?

The trustee is responsible for scrutinizing the actions of the bankrupt before the bankruptcy and for reporting to creditors on transactions that may be attackable as preferences, fraudulent conveyances, reviewable transactions or on other grounds and, where appropriate, commencing proceedings to challenge such transactions. If a challenge is successful, depending on the remedy, the transaction is either voided and property transferred by the debtor before the bankruptcy must be returned to the bankrupt estate or, in the case of a reviewable transaction, the difference in value between the actual consideration given or received by the debtor and the fair market value as determined by the court must be paid to the bankrupt estate. Generally, Canadian trustees are much less aggressive in attacking pre-bankruptcy transactions than their U.S. counterparts and the technical requirements to void such transactions are more onerous than they are in the United States.

Pending amendments to the BIA will introduce the concept of "transfers at undervalue", which are transfers of property made by the bankrupt for little or no consideration within one year of the initial bankruptcy event (the initial bankruptcy event is the earliest of the filing of the following: an assignment, a proposal, a notice of intention to file a proposal, a CCAA filing or the first application for a bankruptcy order against a person), when the bankrupt is insolvent and where the bankrupt intends to defeat or defraud creditors (where the bankrupt disposes of property for little or no consideration to a party that is not at arm's length, the relevant period of review is five years). Upon successfully proving a transfer at

undervalue, the party receiving the property will be liable to pay to the trustee the difference between what it paid for the property (if anything) and the fair market value of that property.

Another pending change provides that for transactions between non-arm's length parties, the intention requirement for preferential payments will be dispensed with.

3.1.7 What rights do unpaid suppliers have?

Suppliers have a qualified right to recover inventory supplied to a bankrupt debtor. Unpaid suppliers can repossess goods delivered 30 days before the issuance of the demand for the return of such goods following a bankruptcy or receivership of the customer (a proposed change not yet in effect at the time of writing is to allow unpaid suppliers the right to repossess goods shipped 30 days before the date of bankruptcy or receivership, rather than having the timeframe tied to the date the demand was issued). The goods must be identifiable, in the same state as on delivery, still in the possession of the trustee or receiver, and not subject to an arms' length sale. In practice, suppliers often find it difficult to satisfy these tracing requirements.

3.2 Receiverships

3.2.1 What is a receiver?

A receiver or receiver and manager, which is typically a firm with licensed insolvency professionals and chartered accountants, may be given the authority to deal with the debtor company's assets, including authority to operate and manage the business in place of the existing management, and to shut down the business if the receiver concludes the continued operations will likely erode the recoveries for creditors or there is insufficient funding to continue operations. The receiver does not become the owner of the debtor company's assets; however, the receiver may have the right (but not the obligation) in the order appointing it to take possession and custody of the assets and to sell them.

3.2.2 How is a receiver appointed?

A receiver may be appointed (i) privately by a secured creditor pursuant to the terms of a security agreement or (ii) by court order.

3.2.2.1 Privately-Appointed Receiver

A secured creditor may have the right to appoint a receiver under its security agreement. The receiver's duties are primarily to the secured creditor which appointed it. It also has a general duty to act honestly, in good faith and in a commercially reasonable manner, including the duty to attempt to maximize recoveries, and to obtain the best price for the debtor's assets in the circumstances.

3.2.2.2 Court-Appointed Receiver

In the case of a court-appointed receiver, the receiver is appointed by a court order, typically on application by a secured creditor under the Rules of Court of the province where the debtor's business is based. Generally, the courts in the common law provinces (i.e., all provinces other than Quebec) have the authority to appoint a receiver when the court is

satisfied that it is “just or convenient” to do so. Court appointments usually occur in more complex cases, especially where there are significant disputes among creditors or between the creditor and the debtor or in cases where it appears likely from the outset that the assistance of the court will be required on an ongoing basis.

A receiver appointed by the court derives its powers from the court order and any specific legislation governing its powers. The receiver is an officer of the court and has duties to all creditors of the debtor. It takes directions and instructions from the court, and not the creditor that first sought its appointment. In most cases, the court order appointing the receiver gives the receiver broad powers similar to those normally granted to a privately-appointed receiver under a security agreement, although certain actions, such as major asset sales, usually require specific court approval.

3.2.2.3 *Interim Receiver*

Another variation that has been used in a number of cases is the appointment of an “interim receiver” by the court, pursuant to the provisions of the BIA, rather than the Rules of Court of any particular province. While the title suggests a temporary role, interim receivers are often given a mandate similar to an ordinary court-appointed receiver, or are appointed as both interim receiver and as receiver.

Interim receiver appointments are most commonly applied for in cases where the debtor has assets in several provinces, since the court’s authority to appoint an interim receiver under the BIA is effective across Canada. A court-appointed receiver appointed under the provincial Rules of Court is only effective in provinces, other than the one in which it is appointed, if the appointment order is recognized by the provincial courts in these other jurisdictions. However, as Quebec is a civil law province, Quebec courts will not recognize provincially-appointed court receivers (a common law concept). Quebec courts will recognize an interim receiver as it is appointed pursuant to the federal BIA. A proposed amendment to the BIA not yet in effect would permit the appointment of a receiver anywhere in Canada including Quebec, and would restrict the use of “interim” receivers to a more temporary basis.

3.2.3 What reporting requirements does a receiver have?

On its appointment, the receiver must provide notice of its appointment to all creditors and, at various stages of administration of the receivership, prepare and distribute interim and final reports concerning the receivership. These reports are filed with the Office of the Superintendent of Bankruptcy and may be made available to all creditors. Court-appointed receivers must also report to the court itself.

3.2.4 How do creditors assert their claims in a receivership?

When an interim receiver is appointed or where a receiver is court-appointed, the court will also typically issue a stay of proceedings restricting creditors from exercising any rights or remedies without first obtaining permission from the court. This stay will be much broader than the statutory stay of proceedings that occurs when a company simply becomes bankrupt and is generally analogous to the comprehensive stay of proceedings found in CCAA proceedings.

Typically, once a receiver has realized on the assets of the debtor, it will seek to distribute proceeds to creditors in accordance with their entitlements and priority, following court approval. If the only recovery is to secured creditors, there may be no need for a claims process. If there are any surplus funds after satisfying all secured claims, the receiver may run a court-sanctioned claims process or seek the court's approval to assign the debtor into bankruptcy and have unsecured claims dealt with through bankruptcy proceedings (described below).

3.3 Priorities in Liquidation

3.3.1 Are there super-priority claims?

Secured creditors rank in priority to unsecured creditors in a liquidation; however, there are certain statutorily prescribed super-priority claims that will rank ahead of secured creditors.

Recent amendments to the BIA establish a priority for certain workers (the priority does not apply to wage claims of officers or directors of the debtor company), to a maximum of C\$2,000 per employee, for unpaid wages (including vacation pay) earned up to six months before the appointment of a receiver or initial bankruptcy event. The priority is secured by a charge over the debtor company's current assets. To the extent that a receiver or trustee pays the aggrieved worker, the secured claim is reduced accordingly.

The *Wage Earner Protection Program Act* establishes a program run by the federal government through which employees entitled to claim a priority for unpaid wages are compensated directly by the government, to a maximum of the greater of C\$3,000 in actual unpaid wages or an amount equal to four times the maximum weekly insurable earnings under the *Employment Insurance Act* (which equals approximately C\$3,000). The government is subrogated to the rights of the unpaid employee for amounts paid under this program, thus receiving a priority claim against the current assets of the debtor company in the amount of the compensation actually paid out, to a maximum amount of C\$2,000 per employee, as set out above.

The same recent amendments to the BIA also provide a priority for unpaid regularly scheduled contributions (i.e., not special contributions or the underfunded liability) to a pension plan by creating a priority charge, equal to the amount owing, over all of the debtor company's assets.

Pending but not yet in force amendments to the CCAA effectively provide the same priorities for unpaid wages and unpaid pension contributions against proceeds realized in a CCAA liquidation and, alternatively, require that any plan of arrangement provide that such priority claims be satisfied.

Before distributions are made to unsecured creditors in an insolvency proceeding, certain statutorily mandated priority claims, such as employee deductions (i.e., income tax withholdings, unemployment insurance premiums and Canada Pension Plan premiums) must also be paid.

In addition to those listed above, there are a number of other federal and provincial statutory liens that have priority over secured creditors outside of bankruptcy, but which are treated as

ordinary unsecured claims following bankruptcy (e.g., liens for unremitted federal and provincial sales tax).

CCAA liquidations and receivership proceedings are often converted into bankruptcy proceedings once the statutory super-priorities and secured creditor claims are satisfied, in part, to affect this reversal of priorities.

3.3.2 What is the priority scheme after the super-priorities and secured creditors are satisfied?

The BIA sets out the following priority scheme for distribution to unsecured creditors:

1. The costs of administration of the bankruptcy;
2. Preferred claims, which include wage claims in excess of the statutory C\$2,000 charge, secured creditors' claims in the amount equal to the difference between what they received and what they would have received but for the operation of the wage and pension super-priorities, and landlords' claims up to the maximum amounts prescribed by statute;
3. Ordinary unsecured claims on a *pro rata* basis.

4. Going-Concern Sales

4.1 Can insolvent businesses be sold as a going-concern?

Although a going-concern sale can be affected by a trustee in bankruptcy or a privately-appointed receiver, a sale of an insolvent business on a going-concern basis will typically be conducted by a court-appointed receiver/interim receiver or through the CCAA process.

4.2 Receivership sales process

To sell a business on a going-concern basis, a court-appointed receiver will request that the court approve a detailed marketing process for the assets of the company. The requirements for and timelines of the marketing process will vary depending on the nature of the business, the value of the assets, the rate at which the assets will depreciate in value through a sales process and the realistic pool of potential purchasers. The court-appointed receiver will select the bidder with the best and highest offer, taking into account conditions of closing, timing of closing, purchaser's ability to close and any potential purchase price adjustments, among other factors. The receiver will then negotiate an agreement of purchase and sale, subject to court approval if required by the appointment order or other orders in the proceeding.

Unless specifically authorized by the court, the agreement of purchase and sale will not be subject to overbids as is the case in the Chapter 11 stalking horse process. However, stalking horse sales have been approved in Canada and are becoming commonplace in situations where a debtor with Canada-U.S. cross-border operations needs to co-ordinate a going-concern sale in both jurisdictions simultaneously.

The receiver, on notice to interested persons, will then request that the court approve the agreement of purchase and sale and vest the assets in the purchaser free and clear of all liens and encumbrances. Liens and encumbrances that exist in the purchased assets will be preserved in the proceeds of sale with the same rank and priority as they had in the purchased assets. Net sale proceeds are typically held by the receiver pending the issuance of a “distribution order” of the court authorizing the receiver to disburse the funds to creditors in accordance with their entitlements. All interested parties are required to receive notice of the motion for the distribution order and disputes between creditors as to allocation of funds are usually addressed at the distribution motion, rather than at the court approval stage.

4.3 CCAA sales process

Sales by the debtor while under CCAA protection have become a preferred method of realization, especially in cases where receivership is not a realistic option due to potential liability concerns. The debtor remains in possession of the assets, but approval and vesting orders are still available to give the purchaser the necessary comfort that it will acquire the purchased assets free and clear of any liens and encumbrances.

The CCAA sales process is similar to the receivership sales process, except the debtor itself controls the sales process, is the vendor, and is the one requesting the court’s approval of a sales process and eventually the sale itself. Generally, the process is supported by the key stakeholders, who have significant influence over the debtor’s sales process. The debtor will also require the support of its monitor if the sales process and sale are to be approved by the court. A recent British Columbia appellate level decision cautioned against the use of the CCAA in a liquidation where there is no contemplation by the debtor to submit a plan of arrangement with creditors.

The proceeds of the sale will typically be held by the monitor. As is the case with sales by court-appointed receivers, the vesting order will provide that creditors will have the same priority against the proceeds that they had against the assets, prior to the sale. Following court approval, the monitor will distribute the proceeds in accordance with those priorities. If there are surplus funds available for unsecured creditors following payment to secured creditors, it is common to bankrupt the debtor and have any surplus proceeds distributed by a trustee in bankruptcy in accordance with the priorities set out in the BIA, discussed above.

5. Cross-Border Insolvencies

Like Chapter 11, the CCAA provides for the co-ordination of cross-border insolvencies. Where appropriate, the Canadian court will recognize the orders of a foreign court in Canada, including a recognition of a foreign stay of proceedings or a foreign court order approving a plan of arrangement. This typically occurs where the principal business of the debtor is in a foreign jurisdiction but the debtor has some assets and/or creditors in Canada and thus needs the Canadian court’s assistance in giving effect to the overall insolvency proceeding. A number of cross-border insolvencies have demonstrated that simultaneous proceedings under Chapter 11 and the CCAA can be harmoniously conducted. Canadian and U.S. courts have been able to co-ordinate the provision of debtor-in-possession financing, stalking horse going concern sales and a host of other relief required by U.S. and Canadian debtors in related cross-border proceedings.

Significant amendments proposed for the CCAA and BIA, not yet in effect at the time of writing, would include adoption of provisions similar to Chapter 15 of the U.S. Code.

XV. DISPUTE RESOLUTION

The Canadian court system is quite similar to the systems of both the United States and Great Britain. There are two parallel court systems in Canada – federal and provincial. Accordingly, in the 10 provinces and three territories of Canada, there are both federal and provincial courts. The province of Quebec is unique from the rest of the country in that it administers civil law, while the courts of the remaining provinces and territories administer the common law.

Unless a matter has been assigned by statute to the Federal Court of Canada, the Provincial Superior Courts have inherent jurisdiction to hear matters. Matters over which the Federal Court of Canada has jurisdiction include those relating to the *Income Tax Act* (Canada) and intellectual property rights. Both the Provincial Superior Courts and the Federal Courts have two levels – a trial division and an appeal court. The Supreme Court of Canada is the final court of appeal for all decisions made by either federal or provincial courts. A more detailed discussion of dispute resolution is contained in Blakes *Litigation and Dispute Resolution Guide*.

1. Independence of the Courts

Canadian courts are completely independent from other branches of government. Accordingly, any government action is subject to review by the courts and, in particular, subject to scrutiny under the *Constitution of Canada* including our *Charter of Rights and Freedoms*. The *Charter of Rights and Freedoms* includes guiding principles for judicial process that include rules of fairness and equality, and protect the rights of accused persons. Canada's courts are open to the public unless there are compelling reasons for a closed hearing.

2. Litigating Through the Courts

For civil disputes, each of the provinces and territories has rules of procedure for the conduct of matters that come before the courts. For example, prior to trial, all parties to civil litigation are required to produce documents that are relevant to the issues in litigation. Documents are broadly defined and now include such things as e-mails, computer files, tape recordings or videos. In most provinces, the primary onus is on each party to produce all relevant documents. However, in Quebec, parties need only produce the documents they rely on at first instance. Following documentary disclosure, the parties are entitled to examine one representative of an opposing party. Unlike the American system, provincial rules often do not provide for automatic rights of discovery of more than one person or of non-parties.

For example, in Ontario, if a party wishes to examine more than one representative of a corporation or witnesses in an action, it needs leave of the courts to do so.

Some provinces have special rules to manage the litigation process. These case management rules provide for greater involvement by the judiciary in the conduct of an action and make things such as timetables mandatory.

3. Costs

The Canadian court system generally uses the loser pays principle of costs following litigation. (In some provinces, this principle is not applied to all aspects of class actions.) Many provinces have a system similar to Ontario whereby there are two scales of costs that can be awarded. The most common scale of costs is called partial indemnity in Ontario, which means the successful party will receive approximately 40-50% of its legal costs from the unsuccessful party. Where one party's behaviour has been particularly egregious, or the plaintiff has effectively used an offer to settle, the court may award a higher scale of costs, called substantial indemnity, which are 1.5 times partial indemnity costs. The costs of experts and other fixed costs like disbursements are generally fully reimbursed. The courts ultimately have the discretion as to whether and how much to award for costs and it is possible for the losing party to be awarded costs against the winning party depending on the circumstances, offers to settle and the successful party's behaviour during the litigation.

Contingency fees are permitted in all provinces subject to local rules and, sometimes, court approval. In some provinces, public funding is available for class actions.

4. Class Actions

Most Canadian provinces and the Federal Court now have legislation or rules expressly permitting class proceedings. In addition, the Supreme Court of Canada has opened the door to class proceedings throughout the country, even where there is no express legislation. In a class proceeding, a person or persons who are representative of the potential class take on the role of plaintiff, representing the interests of the class. It is also possible but rare for a representative defendant to defend the action on behalf of a class of defendants. Early in the litigation, the action must be certified by the court as a class proceeding. Generally, the certification order will identify common issues to be tried together in a common issues trial, and any individual issues will be resolved thereafter by way of separate proceedings to be established by the common issues trial judge. Otherwise, the action will proceed as a regular action. Class actions are case managed by one judge in most provinces. The case management judge, however, will typically not be the trial judge if the action proceeds through to trial, with the exception of Quebec.

Plaintiff's counsel in Canada are increasingly bringing class actions in a number of areas, particularly *Competition Act* (anti-trust), product liability and *Securities Act* matters, mass torts and consumer disputes. To date, very few class proceedings have proceeded through to trial and judgment. The vast majority of cases are either disposed of early through preliminary motions, or settled early in the process or following certification. Class actions have become a concern for commercial businesses in that they are time consuming and expensive to defend and run the risk of substantial settlements or court awards.

5. Alternative Dispute Resolution

Because of the expense and time consuming nature of litigation, there is a trend in Canada toward alternative dispute resolution. Alternative processes to litigation, such as mediation and arbitration, are increasingly being used to resolve both commercial and non-commercial disputes. Most often, such alternative mechanisms are voluntary. However, Ontario has introduced mandatory mediation for certain types of cases, thereby requiring parties to litigation to engage in a mediation session prior to trial, and British Columbia has a procedure whereby one party to litigation can require all to attend a mediation.

In the right case, alternative dispute resolution can be highly effective and much less expensive than traditional litigation. It may also help the parties to achieve a reasonable solution that will enable them to continue their business relationship.

Mediations are presided over by a neutral third party who facilitates a resolution to the dispute. Mediation is not binding and parties enter into it willingly on the understanding that if they do not reach an agreement, they can walk away and continue the litigation process. In contrast, arbitration is a more formal process and is often binding.

Many commercial agreements in Canada now provide for binding arbitration or other forms of alternative dispute resolution as an alternative to the courts for disputes arising out of the agreement. In arbitration, an arbitrator who has expertise in the area of disagreement will hear evidence and legal argument, much like a hearing in court. Arbitration can sometimes (though not always) be less formal and expensive than court proceedings, and can usually be completed more quickly and privately. Prior to entering into an arbitration or mediation, the parties will generally sign an arbitration or mediation agreement that sets out the parameters of the process.

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