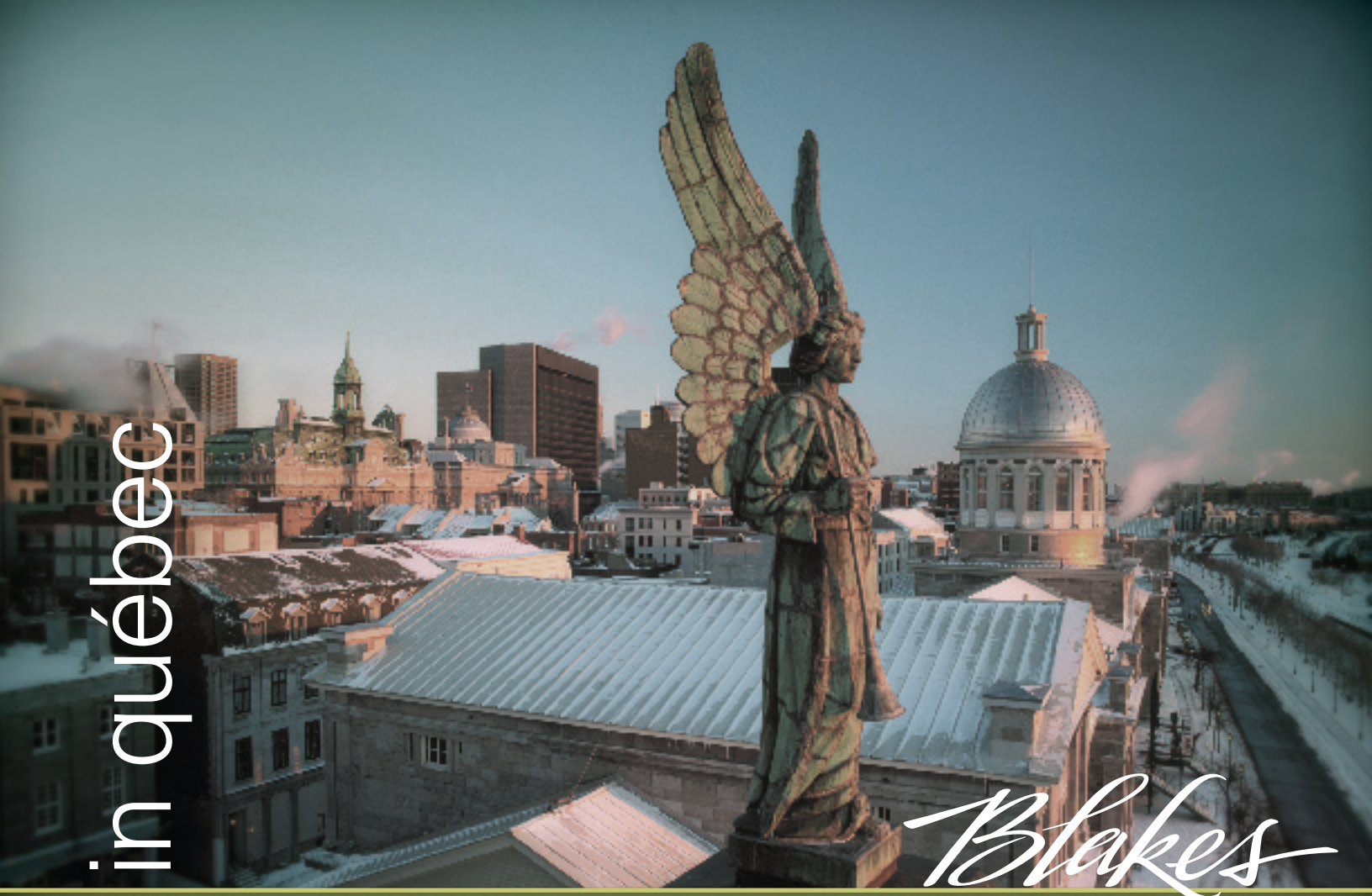

doing business in québec

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BLAKES GUIDE TO DOING BUSINESS IN QUEBEC

Doing Business in Quebec 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 Quebec*, please contact our Montréal Office Managing Partner, Norm Saibil, by telephone at 514-982-4001, by fax at 514-982-4099 or by e-mail at norm.saibil@blakes.com.

Blake, Cassels & Graydon LLP produces regular reports and special publications on Quebec legal developments. For further information about these reports and publications, please contact Carri Eliesen, Manager, Client Relations & Marketing, in our Montréal office by telephone at 514-982-4028, by fax at 514-982-4099 or by e-mail at carri.eliesen@blakes.com.

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BLAKES GUIDE TO DOING BUSINESS IN QUEBEC

I. INTRODUCTION

This Guide provides non-Canadians with an introduction to the laws and regulations that affect the conduct of business in the province of Quebec. 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 the *Charter of the French Language* making French the official language of Quebec. Quebec also collects its own income taxes and has shared jurisdiction with the federal government over immigration to Quebec.

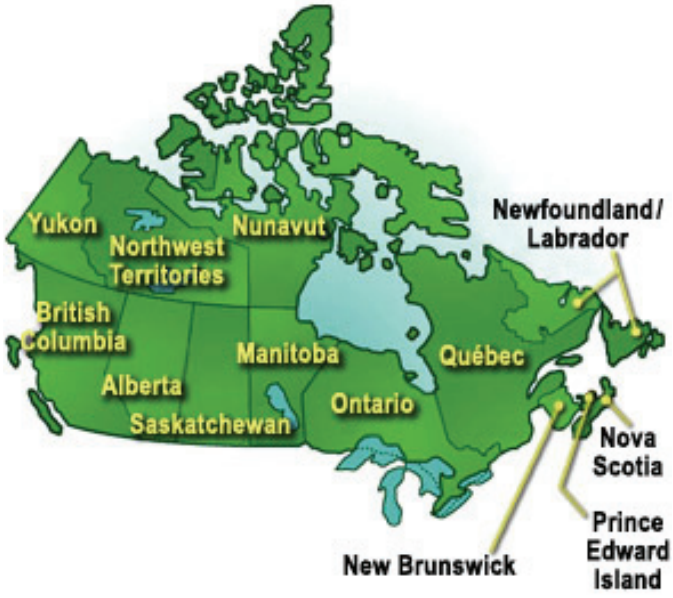
This publication focuses on the laws of the province of Quebec as well as the federal laws of Canada applicable in Quebec. For a discussion on the laws of other Canadian provinces, please consult Blakes *Doing Business in Canada*.

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 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 October 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. Quebec, the focus of this guide, is one of Canada's major provinces, with a population of approximately 7.5 million. Home to some of the globe's most innovative and largest businesses, Canada – and Quebec in particular – has a highly skilled workforce and is a world leader in a variety of sectors. In Quebec, these include aerospace, information technology and telecommunications, life sciences, 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.

2.1 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.

2.2 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.

2.3 QUEBEC AND OTHER PROVINCIAL GOVERNMENTS

Similar to the U.S. system of states, each Canadian province, including Quebec, has its own elected Premier (similar to a U.S. governor), provincial Cabinet of Ministers, a Legislative Assembly (known in Quebec as the National Assembly), 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 Quebec and other 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.

In Quebec, these elected officials are Members of the National Assembly (MNAs). 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	Quebec City
Saskatchewan	Regina
Canada's 3 Territories	**Capital**
Northwest Territories	Yellowknife
Nunavut	Iqaluit
Yukon	Whitehorse

2.4 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. To ensure that appropriate recognition is given to Quebec's civil law system, federal law requires that at least three

of the nine judges on the Supreme Court de Quebec jurists. 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.

2.5 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 towards 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, such as Blakes, 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 extra-territorial laws and blocking legislation.

Whether done directly or through the intermediary of a professional, certain activities may require registration under, and compliance with, the *Lobbying Transparency and Ethics Act* (Quebec) or its federal counterpart.

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 Quebec law will assist the investor in determining the most suitable arrangement for conducting business in the province of Quebec. Quebec law generally governs the forms of business organization although companies may also be incorporated federally under the laws of Canada or under the laws of another province.

3.1 COMPANIES

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

The government of Quebec published a working paper in December 2007 proposing to significantly reform and modernize Quebec's corporate legislation as contained in the *Companies Act* (Quebec), which was last updated in 1981. The government proposes to improve investor or shareholder protection mechanisms and other governance rules, and generally bring Quebec law more in line with the laws of other jurisdictions, including by allowing continuance of Quebec companies to the legislation of another jurisdiction. A bill amending the *Companies Act* (Quebec) has not yet been tabled in the National Assembly, however it is possible that this may occur in the near future. Note that this chapter describes the requirements and features of the *Companies Act* as currently existing.

3.1.1 WHAT TYPES OF COMPANIES ARE AVAILABLE IN QUEBEC?

3.1.1.1 WILL THE QUEBEC SUBSIDIARY BE A PRIVATE OR PUBLIC COMPANY?

Quebec legislation governing companies distinguishes between non-offering companies (now known as private issuers and formerly known as closed companies) and public offering companies. The number of shareholders of a private issuer is limited to 50 (excluding certain classes of individuals such as employees), the constating documents or security holder agreements provide for restrictions on the transfer of the issuer's securities and distributions of such securities are permitted only to a limited category of persons. Public companies are not subject to 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 issuers often participate actively in the management of the company, they do not require the same statutory protections that are essential for shareholders of public companies. Many rules that apply to public companies with respect to directors, insider trading, proxy solicitation, filing and certification of financial statements, appointment of auditors, take-over bids and public disclosure do not apply to private issuers.

3.1.1.2 SHOULD THE SUBSIDIARY BE INCORPORATED FEDERALLY OR UNDER QUEBEC LAW?

Companies wishing to carry on business in Quebec and elsewhere may prefer to incorporate under federal law. This permits the company to carry on business in every province in Canada without being licensed by the provinces, although registration may still be required. Also, federally incorporated companies may be more widely recognized and accepted outside of Canada, though there is no legal basis for this perception.

Whether incorporated federally or under Quebec law, the company must file a declaration under *An Act respecting the legal publicity of sole proprietorships, partnerships and legal persons* (Quebec).

When a company incorporates under Quebec law, it must complete its registration by filing an initial declaration in Quebec 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 residency 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 company in British Columbia, Alberta or Nova Scotia to achieve certain U.S. tax objectives. However, 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").

Currently, there exists an important distinction between companies incorporated under the *Canada Business Corporations Act* and the *Companies Act* (Quebec) with respect to shareholder remedies. In both instances, shareholders have substantial rights with respect to fundamental changes affecting the company, however, in Quebec, they do not have dissent or appraisal rights. In addition, unlike its federal counterpart, the *Companies Act* (Quebec) does not have a broad oppression remedy.

3.1.1.3 WHAT ARE THE SPECIFIC PROCEDURES AND COSTS FOR INCORPORATION? HOW LONG DOES THE PROCESS TAKE?

A company is formed in the province of Quebec by filing certain prescribed documents with the Quebec Enterprise Registrar (Enterprise Registrar) under the *Companies Act* (Quebec).

Under the *Companies Act* (Quebec), the company's articles of incorporation are of considerable importance. They set out the name of the company, the judicial district in the province of Quebec where the head office of the company shall be situated, the company's share capital, any restrictions on share transfers, the number of directors and any limits imposed on the business to be undertaken. Following incorporation, directors and shareholders may pass by-laws that govern the conduct of the company's internal affairs. The company is given the capacity and rights of a natural person and it is not necessary to specify the objects for which the company is incorporated.

The *Charter of the French Language* (Quebec) requires that a company carrying on business in Quebec operate under a French name. For additional information on the *Charter of the French Language* see Section 4.5, "French Language Requirements in the province of Quebec".

The name of the company is strictly regulated so as to avoid names that are too general or misleading. It is possible to pre-clear a corporate name through a screening process prior to application for

incorporation. If the name is approved, the time in which the Enterprise Registrar may reserve a name is 90 days. If a corporate name is not selected prior to incorporation, then the company will be assigned a number to be used as its corporate name. The process of incorporating as a numbered company is carried out more rapidly than incorporating under a name since name searches and approvals can be time-consuming.

A company may be identified under a name other than its corporate name (commonly referred to as a business name). It should be noted that the Enterprise Registrar does not verify whether the business name is identical to, or confusing with, a name used by another person, partnership or group in Quebec. Therefore, it is important for companies to verify and confirm that a business name is not identical to or confusing with another registered name.

Once the required documents are filed and fees paid, incorporation is automatic. The company comes into existence on the date indicated in the certificate of incorporation by the Enterprise Registrar.

The cost of establishing a Quebec company is relatively modest. The government fee ranges between approximately C$400 and C$600 depending on whether the filing is made on-line and the level of service requested. In addition, legal fees will be payable, which vary depending upon the complexity of the company's structure.

The incorporation of a Quebec company can be accomplished very quickly and a routine incorporation could easily be completed within a week.

3.1.2 THE SUPERVISION AND MANAGEMENT OF A COMPANY

3.1.2.1 WHO IS RESPONSIBLE FOR THE COMPANY?

Directors and officers have a duty to act with honesty, loyalty and in the best interests of the company. They must exercise their powers with prudence and diligence and must comply with the governing statutes, regulations, incorporating documents, and any unanimous shareholders' agreement. 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 company may purchase and maintain insurance for the benefit of directors and officers for certain liabilities incurred in such capacity.

Officers conduct the day-to-day management of the company. The senior operating officer would generally be described as "president", with the chief financial officer often being "vice-president, finance" or "treasurer". There is also normally a secretary. One person may hold two or more offices.

Under Quebec and federal corporate legislation, directors may generally meet anywhere and on such notice as is provided in the documents which govern the company. Provision is 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. Under the federal statute but not under Quebec law, 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 holding a meeting.

A Quebec company acts through its board of directors and officers. The directors are elected by the shareholders, for a term not exceeding two years and, subject to any "unanimous shareholders' agreement", manage the business and affairs of the company. 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 for a director to hold any shares in the company 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 companies. Under the *Companies Act* (Quebec), a private company must have at least one director and a public company at least three.

3.1.2.2 ARE THERE RESIDENCY REQUIREMENTS FOR DIRECTORS OR OFFICERS?

The *Companies Act* (Quebec) does not impose a residency requirement for directors or officers.

Under federal law, the Canadian director residency requirement for companies in most sectors is 25%, except where there are fewer than four directors, in which case at least one must be a resident Canadian. Permanent residents of Canada who are not Canadian citizens may qualify as "resident Canadians", either absolutely or only for a specified period of time. There are no residency requirements for officers, either federally or under the *Companies Act* (Quebec). However, separate residency requirements may arise under Quebec legislation that imposes a licensing or registration requirement.

To the extent applicable, a foreign parent company will generally deal with the residency 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 company. Both federal and Quebec law provide for such agreements, under which the powers of the directors to manage the company'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.

3.1.3 HOW MAY A COMPANY BE CAPITALIZED?

3.1.3.1 SHARES

A share represents a portion of corporate capital and entitles the holder to a proportional right to corporate assets on dissolution. For newly incorporated Quebec companies as well as federal companies, shares must be fully paid before they can be issued (calls on shares are permitted for certain pre-existing Quebec companies). Under the *Companies Act* (Quebec), a company may issue shares with par value or shares without par value, or both. Under federal law, a company is prohibited from issuing shares having a par value. There is no minimum or maximum amount of share capital that a company is allowed to issue, unless otherwise specified in its incorporating documents. "One shareholder" companies are permissible under both systems.

Quebec and federal corporate law provide great flexibility in developing the appropriate capital structure for a company. 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 company. Absent specific provision in the articles, shareholders do not have any pre-emptive rights in respect of future share offerings.

Redemption or purchase of shares by a company and payment of dividends are subject to statutory solvency tests. Financial assistance by the company in favour of shareholders and other insiders is also currently regulated in Quebec, but not federally.

3.1.3.2 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 company against third parties in the case of unauthorized borrowing by directors. Companies also have the power to grant security interests (in Quebec, called "hypothecs") over their property and to give guarantees.

3.1.4 WHAT ARE THE BASIC PROCEDURES GOVERNING SHAREHOLDER PARTICIPATION?

Shareholder meetings are usually held annually in a place stipulated in the incorporation document or in the by-laws of the company. 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). The *Companies Act* (Quebec) requires meetings to be held within the judicial district where the head office is situated. Under certain circumstances, the documents that govern the company may provide otherwise. Shareholders may act by way of written resolution rather than at a meeting.

Where a company 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. Shareholders may vote personally or by proxy.

3.2 COMPANIES AND PARTNERSHIPS IN QUEBEC

A company is free to enter into partnerships in Quebec. The relationship of the partners is established by contract and is subject to applicable Quebec law. In Quebec, partnerships are governed by the *Civil Code of Québec*. A partnership is a contract by which the parties, in a spirit of co-operation, agree to carry on an activity, to contribute thereto by combining property knowledge or activities, and to share any resulting pecuniary profits. A partnership may take one of three forms: a "general partnership", a "limited partnership" or an "undeclared 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. This means that if the partnership runs into difficulty, all partners can be sued for more than just their investment. A general partnership must file a declaration of registration under *An Act respecting the legal publicity of sole proprietorships, partnerships and legal persons* (Quebec). The declaration must include the names and domiciles of the partners, the number of employees whose workplace is in Quebec, and the object pursued by the partnership.

In a limited partnership, there is a separation between the partners who manage the business ("general partners") and those who contribute only capital (in Quebec referred to as "special partners", but otherwise known as "limited partners"). A limited partnership must have at least one general partner, who is liable for the debts of the partnership where the partnership property is insufficient. Limited partners are liable only to the extent of their capital contribution provided they do not participate in the management of the business. A limited partnership must file a declaration of registration under *An Act respecting the legal publicity of sole proprietorships, partnerships and legal persons* (Quebec). The declaration must include the names and domiciles of the partners, distinguishing the general partners from the limited partners and specifying the partner who furnishes the greatest contribution, the number of employees whose workplace is in Quebec, and the object pursued by the partnership.

A general or limited partnership that fails to make declarations in the manner prescribed by *An Act respecting the legal publicity of sole proprietorships, partnerships and legal persons* (Quebec) is deemed to be an undeclared partnership, subject to the rights of third persons in good faith. An undeclared partnership allows partners to contract in their own name and independently assume unlimited liability for their respective obligations to third parties. This means that if the partnership runs into difficulty, only the partner that contracts with the third party can be sued.

A partnership would generally be entered into by a foreign company, directly or through a subsidiary, only if it wished to establish a joint venture arrangement with another person or company. 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 generally not taxable entities for Canadian and Quebec 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.

3.3 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, although they are not uncommon in certain industries such as construction and natural resources.

In order 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 company, 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.

3.4 ALTERNATIVE METHODS OF CARRYING ON BUSINESS

3.4.1 BRANCH OFFICE

Organizations with foreign ownership may conduct business in Quebec 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 Quebec operations is not limited as it would be if the Quebec operations were conducted by a separate company (other than a British Columbia, Alberta or Nova Scotia unlimited liability company) of which the foreign business was the shareholder.

3.4.2 AGENTS AND DISTRIBUTORS

As an initial step, a foreign enterprise may wish to offer its products or services in Quebec by means of an independent agent (in Quebec, called a "mandatary") or distributor. An agent would usually 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 is established by contract. The *Civil Code of Québec* provides that the agent may not be terminated without a serious reason or at an inopportune moment, failing which the principal is liable for damages. A distributor may be terminated by the client unilaterally, however the latter will be responsible for the value of work performed and damages suffered by the distributor. Unlike certain other Canadian provinces, Quebec does not have franchise legislation within which such agency or distribution arrangements might otherwise fall.

3.4.3 LICENSING

See Section IX, "Intellectual Property".

3.5 GENERAL REGISTRATION REQUIREMENT

As discussed in relation to companies (whether federal or provincial) and partnerships, those intending to carry on business in Quebec should be aware of the general requirement to register such business (in Quebec, known as an "enterprise"), regardless of its juridical form, under *An Act respecting the legal publicity of sole proprietorships, partnerships and legal persons* (Quebec). The declaration pertaining to such registration provides basic information accessible to the public on the entity's business names, management, principal owners and places in which it carries on business in Quebec, and such information must be updated annually.

The *Charter of the French Language* (Quebec) in turn requires such enterprises to adopt a French business name for the purposes of the province of Quebec. Generally speaking, the French version of the enterprise's name must be used in carrying on business in Quebec, however, exceptions apply to allow the English version of the name in particular instances, particularly when the language of an underlying document is permitted to be in English. For additional information on the *Charter of the French Language*, see Section 4.5, "French Language Requirements in the Province of Quebec".

IV. TRADE AND INVESTMENT REGULATION

4.1 COMPETITION LAW

The *Competition Act* is Canada's antitrust legislation. It is legislation of general application. The Act largely 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, who serves at the pleasure of the Cabinet, but is otherwise independent. The Act may be conveniently divided into three principal areas: criminal offences, civilly reviewable conduct and merger regulation.

4.1.1 CRIMINAL OFFENCES

4.1.1.1 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), and 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.

4.1.1.2 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 criminal provisions of the Act. At any time during her investigation, the Commissioner can refer the matter to the Director of Public Prosecutions (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.

4.1.1.3 RECENT ENFORCEMENT ACTION

Consistent with a global trend amongst 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 that have also been fined and jail terms have been imposed for a period as long as one year.

4.1.2 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 of 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 "record of proceedings" in proceedings that resulted in either (i) the conviction for an offence under Part VI of the Act or (ii) 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.

4.1.3 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 restriction, 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.

4.1.4 MERGER REGULATION

4.1.4.1 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 4.1.4.3 and to the enforcement procedures set out in paragraph 4.1.4.4 (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 transaction 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 share-holding/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.

4.1.4.2 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 4.1.4.3).

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 GST and, in some provinces, 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.

4.1.4.3 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 includes 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.

4.1.4.4 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 also 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.

4.1.4.5 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*.

4.2 GENERAL RULES ON FOREIGN INVESTMENTS

4.2.1 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 of 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 on 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.

4.2.2 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.

4.2.3 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, 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.

4.2.4 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 maybe, on a 12 to 18 month basis for up to three to five years in the ordinary course to confirm the investor's performance.

4.2.5 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.

4.2.6 ARE THERE OTHER STATUTES THAT REGULATE FOREIGN INVESTMENTS IN PARTICULAR SECTORS?

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

4.2.7 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*.

4.3 INTERNATIONAL TRADE AGREEMENTS

4.3.1 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.

4.3.2 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.

4.3.3 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 of 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.

4.3.4 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 whom Canada enjoys trade agreements continues to expand through ongoing negotiations.

4.3.4.1 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:

4.3.4.1.1 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.

4.3.4.1.2 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.

4.3.4.1.3 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.

4.3.4.1.4 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.

4.3.4.1.5 AGREEMENT ON SANITARY AND PHYTO-SANITARY MEASURERS (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.

4.3.4.1.6 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 under-utilized agreement has the potential to be a powerful tool for improving market access for products spanning all industries.

4.3.4.1.7 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.

4.3.4.1.8 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.

4.3.4.1.9 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.

4.3.4.1.10 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.

4.3.4.2 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.

4.3.4.2.1 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.

4.3.4.2.2 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 services 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."

4.3.4.3 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.

4.3.4.4 FOREIGN INVESTMENT PROTECTION AGREEMENTS (FIPAS)

A Foreign Investment Promotion and Protection Agreement (FIPA) 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 highly 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.

4.3.4.5 AGREEMENT ON INTERNAL TRADE (AIT)

Although not an international agreement, the Agreement on Internal Trade (AIT) 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.

4.3.4.6 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.

4.3.5 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.

4.3.5.1 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.

4.3.5.2 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 the 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.

4.3.5.3 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.

4.3.5.4 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.

4.3.5.5 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 Administrative Monetary Penalty System (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 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.

4.3.5.6 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."

4.3.6 DOMESTIC TRADE REMEDY ACTIONS

4.3.6.1 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 finding by a NAFTA *ad hoc* panel of trade law experts.

4.3.6.2 SAFEGUARD AND MARKET DISRUPTIONS 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.

4.3.7 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 property of the procurement process relating to contracts covered by NAFTA, the AIT or the AGP.

4.3.8 EXPORT/IMPORT CONTROLS AND RELATED MEASURES

4.3.8.1 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 and import of all products to and from 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 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.

4.3.8.2 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.

4.3.9 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$2,000,000 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.

4.3.10 *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.

4.4 PRODUCT STANDARDS, LABELLING AND ADVERTISING

4.4.1 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 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 Québec*. 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.

4.4.2 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 Canadian *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 French Language Charter 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, as further described in Section 4.5.

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 4.3.5.6.

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

4.4.3 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.

4.4.4 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.

4.4.5 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.

4.4.6 ADVERTISING REGULATIONS AND ENFORCEMENT

4.4.6.1 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 general rules of civil liability and trade-marks routes.

4.4.6.2 QUEBEC LAW

Quebec legislation, particularly consumer protection legislation, also impacts advertising. For example, the *Consumer Protection Act* (Quebec) renders it a "prohibited practice" to make false or misleading consumer representations by affirmation, behaviour or omission, including with respect to performance characteristics, accessories, uses, ingredients, benefits or quantities that the products do not have. Advertising to children under 13 years of age, unless compliant with regulations, is also prohibited. Businesses that use prohibited business practices face exemplary or punitive damages. Other remedies include rescission and reduction of the consumer's obligation.

With respect to promotional contests, which are called publicity contests in Quebec, the *Act respecting lotteries, publicity contests and amusement machines* (Quebec) and the *Rules respecting publicity contests* adopted thereunder state that the person carrying on a publicity contest in Quebec must notify the *Régie des alcools, des courses et des jeux* (the Quebec Lottery Board) that the contest is being held no less than 30 days before it is launched. The text of the rules of the publicity contest must be filed with the Quebec Lottery Board 10 days before the date on which it is publicized. In certain specific situations, security must be posted and the payment of duties may be required. Strict requirements, such as providing in the contest rules that litigation respecting the contest may be submitted to the Quebec Lottery Board, must also be met.

4.5 FRENCH LANGUAGE REQUIREMENTS IN THE PROVINCE OF QUEBEC

The *Charter of the French Language* (Quebec) (French Language Charter) makes French the official language of Quebec, confers on every person the right to be communicated with in French and imposes obligations on companies carrying on business in Quebec. Thus, business names used in Quebec must be French, subject to exceptions allowing that a portion of the business name be in English. Laws and regulations are drafted in French and English, and legal proceedings may be taken or defended in French or English. The French Language Charter also deals with the use of French in public areas, in social and public services and in professional corporations as well as in labour relations and in day-to-day business. Companies that reach the 50-employee threshold in Quebec are also subject to francization requirements (see Section 4.5.6 below). Although Quebec government bodies will use French in dealing with Quebec residents and businesses, and local contracts will often be drafted in French, dealings with foreign investors and companies can take place in another language, particularly English as the prevalent language of international business. As well, most government services may be provided in English to English-speaking residents upon request. The following highlights some important aspects of the French Language Charter.

4.5.1 COMPANY NAMES

In order to incorporate a company in Quebec, the French Language Charter requires that the company use a French version of its corporate name. The selection of a French corporate name must respect certain basic rules set out in the French Language Charter.

Generally, companies may use an English version of the corporate name provided that the French version appears at least as prominently. When displayed on public signs, posters and commercial advertising, the use of the English version of the corporate name is permitted as long as the French version is "markedly predominant", which essentially means that the French words must have a greater visual impact. In the English version of a document, the English version of the corporate name may appear alone without any reference to its French version.

4.5.2 COMMERCIAL DOCUMENTATION AND ADVERTISING

The French Language Charter grants Quebec consumers the right to be informed and served in French by enterprises carrying on business in Quebec. More specifically, the French Language Charter also requires businesses to have their products and services available in French, and to use French in commercial documentation (which includes product labels, directions for use, warranty certificates, catalogues, brochures, folders, commercial directories, advertising documentation, employment forms, order forms, invoices, receipts and releases).

Companies may also use commercial documentation drafted in both French and in English (or one or more other languages) as long as the French version is displayed as prominently as every other language. The English version of a recognized trade-mark may be used in the French version of commercial documentation and advertising, provided that no French version of such trade-mark is registered.

Certain situations permit the use of English documents. For example, the English version of a standard form contract and related documents may be used if this is specifically requested by the consumer, customer or supplier. This presupposes that there is a French language version of such documents which is available in the first place. There is no language requirement attached to negotiated contracts between businesses, i.e., the choice of language is that of the parties.

4.5.3 COMMUNICATION TOOLS

Employees should have the necessary communication tools available to them in French. For example, guides and manuals should be available in the French language. Computer software must also be in French. However, while the French version of software (where available) must be installed, employees may also choose to have the English version installed.

4.5.4 WEBSITE INFORMATION

Information relating to products available in Quebec found on the website of a company having a place of business in Quebec is subject to the French Language Charter. Therefore, such information must be in French although it may appear in English so long as French is given equal prominence.

4.5.5 LANGUAGE AT WORK AND LABOUR RELATIONS

The French Language Charter grants workers the right to carry on their activities in French. Every employer is required to deliver written communications to staff in French. Also, application forms for employment, offers of employment, promotion offers and any other form of communication between a company and its employees must be drawn up and published in French.

Offers of employment published in an English language daily newspaper must also be published simultaneously in a French language daily newspaper, with at least equivalent display for companies subject to certain francization requirements (see Section 4.5.6 below).

Collective agreements and their schedules must be drafted in the French language. Arbitration awards made following a grievance or a dispute in relation to the negotiation, renewal or review of the collective agreement must be translated into French or English at the expense of the parties, if either one of the parties requests such translation.

Employers are prohibited from dismissing, laying off, demoting or transferring an employee solely because he or she is exclusively French-speaking or has insufficient knowledge of a language other than French. Employers are also prohibited from making the knowledge of a language other than French a condition for employment or to hold an office, unless it is required to perform the duties of such employment or office.

4.5.6 FRANCIZATION OF BUSINESS

A company that employs 50 employees or more in the province of Quebec for a period of six months must register with a regulatory agency known as “Office québécois de la langue française” (Office). Registration with the Office is the first step in the “francization process” which ends with the Office issuing a francization certificate. Once a francization certificate is issued, a company is required to ensure that the use of French remains generalized at all levels and to submit to the Office a report on the

progression of the use of French every three years. A refundable tax credit is available for eligible employers. See Section 6.6.6.12.

A company that employs 100 or more employees will be required to form a francization committee composed of six or more persons. The francization committee has various obligations to fulfil during the "francization process" and once the francization certificate is issued it must ensure that the use of French remains generalised within the company.

Generally, companies having less than 50 employees would not be subject to any of the francization rules, including registration with the Office, but such companies must nonetheless comply with the general requirements of the French Language Charter as highlighted above.

4.6 PRODUCT LIABILITY - QUEBEC LAW

As with most jurisdictions in Canada, a distinction must be made between general sales or supply contracts, and consumer contracts. The latter include any sales contract entered into between a merchant and a natural person, except for a natural person who obtains goods or services for the purposes of his or her business. Consumer contracts in Quebec benefit both from the general protection offered to all sales contracts and the more specific protection offered by consumer protection legislation.

4.6.1 HOW BROAD IS THE POTENTIAL FOR LIABILITY IN A CONTRACTUAL CLAIM?

Sales contracts are subject to legal warranties of ownership and of quality of the product sold. The parties may diminish the effects of these legal warranties or exclude them altogether by contract but the seller cannot exempt itself from its personal fault, nor may it exclude or limit the warranties unless it has disclosed any defects of which it is aware or of which it cannot have been unaware. In this regard, the manufacturer and the professional seller of a product are presumed to be aware, or in any event, cannot plead that they were unaware, of latent defects.

With respect to consumer contracts, there are additional warranties of durability and fitness for the purposes for which products of that kind are ordinarily used. The merchant cannot diminish the effects of these warranties, though the merchant can always offer a more advantageous warranty to the consumer.

4.6.2 HOW BROAD IS THE POTENTIAL FOR EXTRA-CONTRACTUAL LIABILITY?

In the case of a latent defect or a safety defect in the product, a cause of action lies against the manufacturer, anyone who distributes the product under its name or as its own and any supplier, including wholesalers and importers. Furthermore, the defect is presumed to have existed at the time of sale if the product is sold by a professional seller and the product malfunctions or deteriorates prematurely in comparison with identical products or products of the same type.

A special liability regime applies to products with safety defects, defined as products that do not afford the safety which a person is normally entitled to expect, including by reason of the design or manufacture of the product, poor preservation or presentation of the product, lack of sufficient instructions as to the risks and dangers it involves, or as to the safety precautions to take. Where a safety defect is alleged, the injured person need only show the existence of a safety defect, the damages suffered, and the causal link

between the two in order for all the persons referred to in the previous paragraph to be liable. There are three defences that can be raised in safety defect cases, the burden of proof of which is on the defendants:

1. The existence of a superior force;

2. That the victim knew or could have known of the safety defect, or could have foreseen the injury; and

3. That according to the state of knowledge at the time the product was manufactured, distributed or supplied, depending on the defendant, the existence of the defect could not have been known, and the defendant was not neglectful of its duty to provide information when it became aware of the defect.

The court may apportion liability according to the degree of fault among the various persons held liable for the injury to the plaintiff, although the plaintiff may recover all of his/her damages from any defendant who has been found even partly liable, subject to that defendant seeking contribution from its co-defendants pursuant to the apportionment of the court.

4.6.3 WHAT IS THE EXTENT OF A PERSON'S LIABILITY?

In the case of sales contracts, other than consumer contracts, if the seller or manufacturer was unaware of the latent defect and could not reasonably have discovered it, he is only bound to restore the price of the product. If the seller was aware or could not have been unaware of the latent defect, he is bound to restore not only the price, but all damages suffered by the buyer. In the case of consumer contracts, the extent of liability is greater and the consumer may ask for the cancellation of a contract, compensatory damages and punitive damages.

In the case of safety defects, the plaintiff may recover compensatory damages for all bodily, moral (i.e., pain and suffering) and material losses caused by the safety defect. General damages for pain and suffering are presently capped at about C$310,000 per person. The recovery of damages is limited to losses reasonably foreseeable to the parties and not considered "remote".

4.6.4 OTHER LITIGATION RISK: CLASS ACTIONS, JURIES AND PUNITIVE DAMAGES

Historically, Canadians have been less litigious than Americans, and damage awards have been much lower. Quebec does not permit jury trials in civil law cases. Punitive damages are available in certain limited circumstances, though awards are very rare in product liability cases and are, generally, fairly modest when made. Class action legislation in Quebec and other 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 and refunds have been certified despite vigorous opposition from defendants.

See also Section XV, "Dispute Resolution".

V. ACQUIRING A CANADIAN BUSINESS

5.1 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 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.

5.2 SHARE ACQUISITIONS

5.2.1 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 Section 5.2.4 below. In the case of large acquisitions, pre-clearance under the Canadian competition laws is required (see Section 4.1.4). Apart from this, the principal authorization which might be required is approval under the *Investment Canada Act* (ICA). This is discussed in Section 4.2.

5.2.2 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* (Canada) and the *Taxation Act* (Quebec)) and any other shares not listed on a prescribed stock exchange are "taxable Canadian property" and "taxable Quebec property" for purposes of the capital gains tax rules and their sale can give rise to Canadian and Quebec 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 and taxable Quebec property, the *Income Tax Act* (Canada) and the *Taxation Act* (Quebec) require 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 for the purposes of the *Income Tax Act* (Canada). If the vendor is a non-resident, it must generally provide the purchaser with certificates issued by the Canadian and Quebec tax authorities, which will be granted when appropriate arrangements are made to ensure payment of any tax liability. If the certificates are not provided, the purchaser must generally withhold and remit to the Canadian and Quebec tax authorities 25% and 12%, respectively, 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" and "taxable Quebec property" in certain circumstances; however, it is not necessary to obtain a certificate with respect to the sale of such shares. Please note that the *Taxation Act* (Quebec) provides for certain certificate exemptions where the non-resident vendor is an individual.

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.

5.2.3 CAN ONE FREELY DISMISS THE 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 and provided such entitlements are in compliance with legal requirements 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 notice could range between one month and 12 to 18 months or more, under normal circumstances.

See also Section VII, "Employment and Labour Law", which discusses employees' rights in general.

5.2.4 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 "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.

5.2.4.1 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).

5.2.4.2 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 "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 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.

5.2.4.3 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. For companies incorporated under the *Companies Act* (Quebec), the level of shareholder approval required is currently set at 75%. 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 any applicable 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.

5.2.5 WHAT RIGHTS OF COMPULSORY ACQUISITION OF THE MINORITY ARE AVAILABLE AFTER A SUCCESSFUL TAKE-OVER BID?

An offeror which 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, 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 (being so-called second step squeeze-out transactions). 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.

5.3 ASSET ACQUISITIONS

5.3.1 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 4.2, 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 that might apply to an acquisition of assets are discussed in Section 4.1.4.

In addition to the statutory approvals, consents of landlords, equipment owners, creditors and shareholders may be necessary. Under federal Canadian corporate law, but not currently under Quebec corporate law, if a sale involves the disposition of all or substantially all of a corporation's assets, shareholders must approve the transaction by special resolution.

5.3.2 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 (in Quebec known as "immovable property"), land transfer taxes may also be payable.

5.3.2.1 CANADIAN INCOME TAX ISSUES

Capital assets used by a vendor in a Canadian business will generally be "taxable Canadian property" and "taxable Quebec property". As discussed in Section 6.2.2 below, 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, certificates from the Canadian and Quebec tax authorities will in almost all cases 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.

5.3.2.2 SALES TAX

Both Canadian and Quebec governments impose sales taxes, Quebec through the Quebec Sales Tax (QST) and the Canadian government through the Goods and Services Tax (GST), both discussed in Section 6.7.

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.

5.3.3 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 hypothec on immovable property (being a form of security equivalent to a mortgage on real property in common law Canadian provinces) will continue to have priority with respect to the relevant assets as against the purchaser. There are security registration statutes in Canada, including Quebec, 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 immovable property and major items of financed movable 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.

Quebec law no longer contains provisions governing the sale of an enterprise (known as a bulk sale in common law Canadian provinces), although the *Civil Code of Québec* contains basic provisions with respect to the protection of creditors' rights in insolvency situations.

5.4 EMPLOYEE CONSIDERATIONS

The rights of employees in the case of an acquisition depend upon the labour relations laws in the province where the employees are located and the nature of the acquisition.

In the case of a share acquisition or an asset purchase where a significant part of an undertaking's assets are transferred, there is no termination of employment upon the change of control and existing contracts are binding on the successor of the employer.

Where some or all of the employees are unionized, the Quebec *Labour Code* provides that the purchaser of an "undertaking" is placed in the role of employer with regard to the bargaining certificate issued, except under very special circumstances. When all of the undertaking has been purchased, the purchaser will also be bound by the collective agreement(s) in force. 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. There is no statutory definition of "undertaking" under the Quebec *Labour Code*,

however, the courts have developed a definition of the term for purposes of successor employee matters. If only part of the undertaking is transferred, the collective agreement may be deemed to have terminated on the effective date of the transfer. The purchaser would then have to negotiate a new collective agreement with the association of employees.

In addition, Quebec's *Act respecting labour standards* (Labour Standards Act) establishes certain minimum obligations in respect of both union and non-union employees. More beneficial terms of employment, whether express or implied, take precedence over the employment standards legislation. The *Labour Standards Act* stipulates that employees who remain employed by the purchaser in effect carry forward their prior service for the purposes of holiday pay, etc., and for the purpose of establishing entitlement to severance pay and notice of termination in the event of any subsequent termination of employment by the purchaser. Relevant provisions of the *Civil Code of Québec* which provide for the continuation of the employment agreement after a transaction are to the same effect. The *Labour Standards Act* also sets out minimum notice requirements which apply in the event of the termination of employees (which may be extended by the terms of applicable collective agreements and which must be supplemented by the requirement to provide reasonable notice under the *Civil Code of Québec*). In the case of mass terminations, a prior written notice, the duration of which varies depending on the number of employees affected, must be given to the Quebec Ministry of Employment and Social Solidarity, with a copy being provided to any association of employees and the *Commission des normes du travail* (the Quebec employment standards commission).

Failure to provide notice within the prescribed delay may trigger the payment of additional indemnities to the employees. If employees are terminated prior to the transfer of the undertaking, the vendor as terminating employer will be responsible for the termination costs and for providing the required notices. See Section 7.3.1.8.

For federally-regulated businesses, under the *Canada Labour Code*, if an employer discontinues its business permanently or undertakes mass terminations (50 employees of 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

The province of Quebec administers and collects its own personal and corporate income taxes under the Quebec *Taxation Act* (QTA) through the Quebec Minister of Revenue (MRQ), much like the Government of Canada does pursuant to the Canadian *Income Tax Act* (ITA) through the Minister of National Revenue. Although there is a high degree of harmonization between the two laws with respect to the computation of taxable income, the government of Quebec, through the implementation of various fiscal measures, provides Quebec businesses with financial incentives that stimulate the Quebec economy.

The following is a general discussion of taxation under the ITA, with general distinctions made to highlight the taxation regime under the QTA. The reader is cautioned that there may be distinctions to be made in particular circumstances between the two systems which go beyond the scope of this general discussion.

6.1 TYPICAL ORGANIZATIONAL STRUCTURES

A number of forms of organization could theoretically be used by a U.S. or other foreign entity in establishing a Quebec business enterprise. Of these, however, the three most commonly considered are:

1. Sales representatives based in Quebec

2. A Quebec branch of the foreign entity

3. A Quebec subsidiary company.

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 Quebec or Canadian-incorporated subsidiary. In some cases, a British Columbia, Alberta or a 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 foreign tax counsel is essential, particularly if the investor is a U.S. entity that has a special U.S. tax status. The recently released Protocol to amend the Canada-U.S. Tax Convention (the 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 Convention, so it is sometimes not desirable for such an LLC to hold an investment in Quebec or carry on activities in Quebec. 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.

6.1.1 LIMITATION ON BENEFITS OF TREATY

The Protocol to amend the 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.

6.1.2 SALES REPRESENTATIVES BASED IN QUEBEC

6.1.2.1 ARE ENTITIES WITH REPRESENTATIVES EXEMPT FROM TAX IF ACTIVITIES ARE LIMITED?

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

Under the 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 income tax return) may be overridden by the provisions of an applicable Tax Convention entered into between Canada and a foreign country.

In the case of a United States enterprise, Article VII of the Convention provides such relief. Except if the U.S. entity is a "limited liability company" or "LLC" in which case there are special issues with entitlement to benefits under the Convention, Article VII of the Convention 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 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 subject to a withholding tax imposed by the ITA, the rate of which is reduced by the Convention.

Pursuant to the QTA, every non-resident individual of Canada who carries on a business in Quebec and every company who carries on a business in Quebec through an establishment in Quebec, are required to file a Quebec income tax return and are liable for income tax in Quebec on the portion of the taxable income attributable to the business carried on in Quebec. Tax Conventions signed by Canada are also applicable for Quebec tax purposes. Therefore, limitations as described earlier are also applicable under the Quebec regime. The QTA does not however impose withholding tax on dividends, rents, royalties, technical know-how payments or interest.

6.1.2.2 HOW IS A "PERMANENT ESTABLISHMENT" OR "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 normally defined in the applicable Tax Convention. Under the Convention, Article V defines "permanent establishment" as 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 company. 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.

In general terms, the QTA defines "establishment" as a fixed place where a taxpayer carries on a business and specifically includes, *inter alia*, office, branch, mine, oil and gas well, farm, timberland, factory, warehouse and workshop. The MRQ has stated that an establishment is basically "a place which is stable, permanent or of a fairly long duration, which the taxpayer currently or regularly uses in carrying on his business". A business must therefore be connected to the establishment. A place where only administrative functions are carried on, such as bookkeeping or debt collection, does not generally qualify as an establishment unless other factors are present.

The QTA also provides that an establishment exists at the place where a company carries on business through an agent, an employee or a mandatary who has general authority to contract on behalf of the company or who has a stock of the company's merchandise from which orders are filled. The mere fact that a company has business dealings through a commission agent or broker does not in itself mean that the company has an establishment in the place from which such persons operate. Furthermore, an office maintained in Quebec solely for purposes of purchasing merchandise will not in itself result in the company being deemed to have an establishment in Quebec. Also, a company is not deemed to have an establishment in Quebec simply because it has a subsidiary which has an establishment in Quebec. However, where a company already has an establishment in Canada, the mere fact of owning land in Quebec will be considered an establishment.

Despite the similarities between the definition of "permanent establishment" in almost all Tax Conventions and "establishment" under the QTA, these rules should be reviewed prior to the foreign entity commencing its Quebec activities in light of the distinctions between the two definitions. Although the Tax Convention may override the taxation of Canadian source business profits under the ITA and the QTA, the foreign entity may nonetheless have to file applicable Canadian and Quebec income tax returns.

6.1.3 QUEBEC BRANCH

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

6.1.3.1 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 company 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 for U.S. investors 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 may be adversely affected in the future as a result of the most recent Protocol amending the Convention. If a Canadian subsidiary (other than a British Columbia, Alberta or Nova Scotia 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. For both Canadian and Quebec income tax purposes, the losses can only be carried forward within the Canadian company 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.

6.1.3.2 WHAT ARE THE DISADVANTAGES AND HOW WOULD A BRANCH BE TAXED AS BETWEEN THE FOREIGN COUNTRY AND CANADA/QUEBEC?

It is most likely that if a foreign enterprise were to establish a divisional branch in Canada, it would have a "permanent establishment" and an "establishment" within the meaning of the applicable Tax Convention and the QTA respectively, and would be required, pursuant to the ITA, the applicable Tax Convention and the QTA, to pay Canadian and Quebec income tax on taxable income earned in Quebec which is attributable to the branch. Any employees resident in Quebec and, subject to certain exemptions in the applicable Tax Convention, branch employees not resident in Quebec, would be required to pay Canadian and Quebec income tax, and the foreign enterprise would be required to deduct and remit to the Receiver General for Canada and the MRQ amounts from the wages and salaries of such persons.

Despite potential tax savings, our experience has been that there are 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 the Canada Revenue Agency (CRA), the MRQ 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 foreign company's books of account to satisfy itself as to Canadian-source income. The tax compliance obligations of a Quebec branch are sometimes more onerous than for a Quebec subsidiary in other respects. For example, if the branch disposes of capital assets used in the Quebec business, it must obtain tax clearance certificates from the CRA and the MRQ, and if it receives amounts of the type normally subject to non-resident Canadian withholding tax (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 foreign company. Subject to any applicable Tax Convention, the branch tax rate under the ITA is 25%. For example, the rate is reduced under the Convention to 5% for qualifying U.S. residents and may be subject to a lifetime exemption under the Convention for the first C$500,000 of Canadian income. 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. company carried on business in Canada through a subsidiary company 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. The QTA does not provide for a branch tax on foreign companies.

Any applicable Tax Convention shall be reviewed by the foreign investor prior to concluding that it provides for a similar tax treatment as under the Convention.

6.1.3.3 IF A BRANCH TURNS PROFITABLE, HOW CAN IT BECOME A SUBSIDIARY COMPANY?

It would be possible, if a Quebec branch were initially used, to transfer the Quebec business to a subsidiary company 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 company after a significant business has been established may be considerable. A non-resident may transfer immovable property, interests in immovable property and most other assets used in the business of a Quebec branch to a Quebec, Canadian or other Canadian provincial company, as part of the incorporation of the branch, on an income tax deferred basis.

However, the transfer by a foreign entity to any such company of immovable property or interests in immovable property not used in the business of the Quebec branch (such as inventory) 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 reasons to the contrary, it may be advisable to organize the Quebec business through a subsidiary company. We note again that the choice of organizational form depends on individual circumstances and that consultation with foreign and Canadian tax counsel is advised.

6.1.4 QUEBEC SUBSIDIARY COMPANY

If the Quebec business enterprise is carried on through a company incorporated in Quebec (or in Canada or other Canadian provincial jurisdiction, including in British Columbia, Alberta or Nova Scotia in the form of an unlimited liability company), the company 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. Quebec income tax will also apply. Where dividends are paid by the subsidiary company to a qualifying U.S. resident parent company 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 and QTA, which would apply to the new company.

6.2 COMPUTATION OF INCOME

The computation of income from business for Canadian and Quebec 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.

6.2.1 HOW IS DEPRECIABLE PROPERTY AMORTIZED?

6.2.1.1 CAPITAL COST ALLOWANCE

The system in the ITA and QTA 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 the applicable 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.

6.2.1.2 CAN THE COST OF LEASING PROPERTY BE AMORTIZED?

The ITA and QTA impose 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.

6.2.1.3 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 trademarks, licenses 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.

6.2.2 LICENSING FEES, ROYALTIES, DIVIDENDS AND INTEREST

6.2.2.1 TRANSFER PRICING RULES FOR RELATED COMPANIES

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 of Canada with whom the Canadian taxpayer does not deal at arm's length. For example, if a U.S. entity controls a Quebec 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 Quebec company should be allowed as a deduction in computing income.

Canadian and Quebec 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.

6.2.2.2 WHAT ARE THE WITHHOLDING TAX RULES?

The ITA provides for a withholding tax rate of 25%, subject to any applicable Canadian domestic exception or Tax Convention. For example, under the Convention, the Quebec entity must withhold 10% of some "royalties" paid to a qualifying U.S. resident. Moreover, 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. The recent change to the ITA applies without considering where the beneficiary resides. 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.

The QTA does not provide for a withholding tax on licensing fees, royalty, dividend or interest payments. However, services rendered in Quebec by a non-resident of Canada may be subject to a deduction at source under the ITA and the QTA of 15% and 9%, respectively.

The applicable Tax Convention, if any, should be reviewed in order to determine whether the 25% withholding tax rate provided in the ITA is reduced.

6.2.3 WHAT ARE THE LIMITS ON THIN CAPITALIZATION?

A statutory thin capitalization provision (pursuant to both the ITA and QTA) limits the amount of interest-bearing debt which may be owed by a Quebec company to a non-resident creditor who is either a 25% shareholder of the company or does not deal at arm's length with such a shareholder. The limit is set by requiring the Quebec 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 company 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 company representing 25% or more by votes or fair market value of all shares of the company 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 Quebec company). Also excluded from the definition of debt for this purpose are amounts loaned to the Quebec company 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 Quebec company.

6.2.4 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 company.

6.2.5 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 company are extinguished on an acquisition of control of that company.

6.2.6 SHOULD A SINGLE SUBSIDIARY BE USED WHEN THERE ARE SEVERAL LINES OF BUSINESS?

Under the Canadian federal and provincial tax systems, including Quebec, it is not possible under any circumstances for two or more companies to file a consolidated tax return. As a result, the profits of one company 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 Quebec and other applicable provincial income and capital tax.

6.2.7 HOW IS INCOME TAXED AMONG THE DIFFERENT CANADIAN PROVINCES?

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

6.3 RATES OF TAXATION

Corporate income tax is imposed in Canada by both the federal and Quebec governments (and other 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, 18% in 2010, 16.5% in 2011 and 15% in 2012.

Provincial tax rates can vary substantially depending on the province and the type of income earned by the company. In many cases, Canadian provincial income tax liabilities may be substantially reduced by inter-provincial tax planning appropriate to the proposed Canadian operations.

The general rate imposed by the province of Quebec on income is currently 11.4%. Therefore, a company that carries on business in Quebec is currently subject to a combined general tax rate of 30.09% (in other provinces, such rate varies from 29.5% to 35.5%).

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).

It is to be noted that a company 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 company. An exception is made where the company and the non-resident person are dealing at arm's length and the influence is derived solely from a franchise, license, 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 companies.

As described in Section 6.6, Quebec-based companies may be entitled to benefit from various Quebec tax incentives, which are normally in the nature of either tax credits (some of which are refundable) or tax holidays.

6.4 OTHER INCOME TAX CONSIDERATIONS

6.4.1 FOREIGN INCOME TAX CREDITS

A company resident in Quebec 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 (for the purposes of the ITA) and Quebec (for the purposes of the QTA) 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 (under the ITA) and Quebec (under the QTA) tax purposes.

6.4.2 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 for CCPCs. See Section 6.6 for a general description of the various Quebec tax incentives.

6.4.3 HOW ARE DIVIDENDS TREATED?

A company may generally return to a shareholder the shareholder's investment in "paid-up capital" of the company (other than a public company) as a Canadian tax-free receipt. The ITA provides that all other distributions to shareholders of a company 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 Quebec company to its non-resident shareholders are subject to withholding tax under the ITA at a rate of 25%. However, a Tax Convention may reduce such rate. In particular, 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 company's paid-up capital.

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

6.4.4 LOANS TO SHAREHOLDERS

A loan made by a company to any of its shareholders or to persons connected with such shareholders (other than companies 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 Quebec company and a taxable benefit in the hands of the shareholder or connected person (other than a company 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.

6.5 CAPITAL AND PAYROLL TAXES

6.5.1 CAPITAL TAXES – WHAT IS INCLUDED AS CAPITAL? WHAT ARE THE RATES?

The provinces of Quebec, Ontario, Manitoba, Saskatchewan, Nova Scotia and New Brunswick currently levy a corporate capital tax based on a company'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.

A company with an establishment in Quebec will generally be subject to a capital tax under the QTA at a rate of 0.36% (to be reduced to 0.24% effective January 1, 2009) on its taxable capital in excess of up to C$1 million employed in and allocable to such establishment.

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

The federal corporate capital tax was recently eliminated.

6.5.2 PAYROLL TAXES

As an employer in the province of Quebec, deductions at source must be made and remitted to the competent tax authorities on behalf of Quebec employees. These deductions at source made from the remuneration paid to the Quebec employees include income tax withholding, and the employees' contribution under the Canadian Employment Insurance program, the Quebec Pension Plan regime and the Quebec Parental Insurance Plan.

Moreover, as outlined in the table hereunder (applicable for 2008), payroll taxes must also be assumed by the employer. In addition to the Canadian Employment Insurance program, Quebec employers are generally required to make contributions for the benefit of their employees to the Quebec Pension Plan regime, the Quebec Parental Insurance Plan and the *Commission des normes du travail* (the Quebec labour standards board). The province of Quebec also imposes an employer health tax referred to as the Quebec Health Services Fund. Contributions to the *Commission de la santé et sécurité au travail* (the Quebec occupational health and safety board) are also obligatory for most businesses. Quebec employers whose payroll exceeds C$1-million are also required to allot 1% of their payroll to eligible training expenditures under the Manpower Training Fund.

2008 EMPLOYERS' PAYROLL TAXES	
Canadian Employment Insurance	1.95% of insurable salaries (maximum insurable is C$41,100 per employee).
Quebec Pension Plan	4.95% of earnings subject to contribution less a C$3,500 basic exemption (the maximum earnings subject to contribution is C$44,900 per employee).
Quebec Parental Insurance Plan	0.630% of earnings subject to contribution (the maximum earnings subject to contribution is C$60,500 per employee).
Commission des normes du travail	0.08% of payroll (maximum insurable is C$60,500 per employee).
Health Services Fund	A maximum of 4.26% of total payroll for an employer where total payroll is greater than C$5-million. A minimum of 2.7% of total payroll where total payroll is not more than C$1-million.
Occupational Health and Safety	The average contribution rate (which varies based on the type of activity) is 2.14% of the insurable payroll (maximum insurable is C$60,500 per employee).
Training	Employers whose total payroll in Quebec is not less than C$1-million are required to spend 1% of their Quebec payroll on employee training or pay a contribution equal to the difference between 1% of its total payroll and the amount spent on training to the Labour Force Training Fund.

The Quebec government and the Canadian government signed an agreement fixing the terms and conditions for implementing the Quebec parental insurance plan (QPIP). The QPIP replaces maternity and parental benefits provided under the Canadian Employment Insurance program for eligible Quebec residents. Quebec employers and employees are required to contribute to the QPIP, and responsibility for collecting their contributions has been assigned to the MRQ. Canadian Employment Insurance premiums for Quebec employers and employees have been reduced to reflect the fact that Quebec residents no longer receive maternity and parental benefits pursuant to the Canadian Employment Insurance program.

6.6 QUEBEC TAX INCENTIVES

Companies carrying on business in Quebec (or elsewhere in Canada) and subsidiaries and branches of foreign companies may be eligible for various Quebec tax incentives briefly described below. Certain of these tax incentives are, however, only available to Canadian-controlled corporations or to CCPCs. In addition, with respect to the tax incentives which are in the form of Quebec tax credits, the Quebec tax credits can only be claimed on expenditures which have been reduced by any government or non-government assistance received. The assistance given to an enterprise often depends on its size, taking into account all of its affiliates.

To benefit from a particular Quebec tax incentive, an eligible company generally has to file a prescribed form with its income tax return. In certain cases, companies may have to request certificates, visas or attestations of eligibility from the applicable Quebec government organization or department.

6.6.1 SCIENTIFIC RESEARCH AND EXPERIMENTAL DEVELOPMENT (R&D)

Recognizing the importance of R&D as an economic lever, both the Quebec and Canadian governments offer considerable tax incentives to taxpayers who carry out R&D in Quebec and Canada themselves or on behalf of others, or that have R&D conducted on their behalf. The R&D tax incentives take the form of deductions in computing income with respect to eligible R&D expenditures and of tax credits on such eligible R&D expenses, some of which may be refundable at the Canadian level and all of which may be refundable at the Quebec level. In light of the significant financial implications underlying such incentives, proper tax planning is fundamental in order to make the after-tax cost of R&D less expensive.

6.6.1.1 QUEBEC R&D TAX CREDITS

The following expenses are normally eligible for the Quebec R&D tax credits:

- Salaries and wages of employees who worked directly on the project
- One-half of the fees paid to an unrelated subcontractor who performed R&D on behalf of the company
- 80% of the total eligible R&D expenditures incurred in connection with a research contract with a research centre
- Contributions to a research consortium
- Expenditures made in connection with a pre-competitive private partnership R&D.

The basic Quebec tax credit is 17.5% of salary and wages paid for the performance of R&D in Quebec. However, on the first C$3-million of R& D salary and wages, this credit can reach as high as 37.5% for Canadian controlled corporations with less than C$50-million in assets, on an associated basis. For R&D expenditures in the nature of contracts with a research centre, contributions paid to a research consortium and expenditures incurred in connection with a pre-competitive private-partnership R&D, regardless of the size of the company, the Quebec tax credit is a flat 35% of any such R&D expenditures. All the Quebec R&D tax credits are refundable, i.e. a company can receive its tax credit even if it did not pay any income tax.

The basic federal tax credit is 20% of eligible R&D expenditures and is not refundable. Qualifying CCPCs may be entitled to a refundable federal R&D tax credit at a rate of 35% on the first C$2-million of eligible R&D expenditures. Expenditures eligible for the federal R&D tax credit differ from those eligible for the Quebec R&D tax credit.

The Canadian and Quebec tax incentives applicable to R&D performed in the province of Quebec and described above may be summarized as follows:

CANADIAN

Entity	Nature of Eligible Expenditure	Deductibility in computing the income[2]	ITC Rate up to C$2M	Refund Rate	ITC Rate in excess of C$2M	Refund Rate
Qualifying CCPCs[1]	Current	Yes	35%	100%	20%	40%
	Capital	Yes	35%	40%	20%	40%
Other Corp.	Current	Yes	20%	Nil	20%	Nil
	Capital	Yes	20%	Nil	20%	Nil

QUEBEC

Entity	Nature of Eligible Expenditure	Deductibility in computing the income[2]	TC Rate up to C$3M of Wages paid in Quebec	Refund Rate	TC Rate in excess of C$3M of Wages paid in Quebec	Refund Rate
Qualifying CCCs[3]	Current	Yes	37.5%	100%	17.5%	100%
	Capital	Yes				
Other Corp.	Current	Yes	17.5%	100%	17.5%	100%
	Capital	Yes				
Contract Payments to/for R&D Eligible Entities and Projects (subject to 80% limit)	Research Contract		35%	100%		

(1) Qualifying Canadian-controlled private corporations are those that have a taxable income of not more than C$400,000 on an associated basis. Other rules may apply and reduce the C$2-million expenditure limit on which the 35% credit rate and related 100% refund are applicable.

(2) Within the limits provided in the ITA and the QTA.

(3) In particular, to be eligible for the 37.5% rate in respect of the maximum of C$3-million in salary, the qualifying Canadian-controlled company must have less than C$50-million in assets on an associated basis. For assets between C$50-million and C$75-million, the rate is gradually reduced to 17.5%.

6.6.2 TAX HOLIDAY FOR FOREIGN RESEARCHERS AND SPECIALISTS

Foreign individuals who have expertise in certain specialized areas of activity and who settle in Quebec in order to work may be entitled to a Quebec tax holiday. The tax holiday is in the form of an income tax exemption for a maximum of five consecutive years on a portion of the salary received by these individuals. In computing their income for Quebec tax purposes, such individuals may be entitled to deduct in computing their taxable income 100% of their salary for the first and second years, 75% for the third year, 50% for the fourth year and 25% for the fifth year.

The following researchers and specialists, who are not resident in Canada immediately before their employment contract is signed, may be entitled to the tax holiday:

- A researcher specialized in pure or applied sciences who works for a person carrying on a business in Canada and who performs R&D in Quebec
- A specialist either in the field of management or financing of innovation ideas or in the marketing abroad or the transfer of the latest technology, who is working for a person carrying on a business in Canada and performing R&D in Quebec.

6.6.3 TAX CREDIT FOR HIRING EMPLOYEES SPECIALIZING IN FINANCIAL DERIVATIVES

This non-refundable tax credit will allow an eligible corporation that employs, during a fiscal year, an eligible specialized employee, to claim a tax credit equal to 20% of the eligible salary paid to such employee (to a maximum of C$15,000) for such year, for any week or part thereof within the period covered by an eligibility certificate issued by the Quebec government in respect of such eligible specialized employee.

6.6.4 BIOTECHNOLOGY DEVELOPMENT

Enterprises that perform biotechnology innovation activities in a Biotechnology Development Centre (BDC) may be entitled to a 40% tax credit on employee salaries (maximum of C$37,500 per employee) for a maximum period of 10 years or until December 31, 2013. In order to benefit from this tax incentive, an enterprise must locate in one of the four BDCs situated in the following cities in Quebec: Laval, Lévis, Saint-Hyacinthe or Sherbrooke.

6.6.5 DESIGNATED REGIONS AND SITES

Quebec has two distinct Quebec tax incentives to reinforce regional development. These tax incentives, which generally take the form of either a tax holiday or refundable tax credit, may apply to businesses located in certain prescribed regions in Quebec. The two different Quebec tax incentives are:

- The tax holiday for manufacturing enterprises
- The tax credits for job creation.

6.6.6 OTHER TAX MEASURES

Other Quebec specific tax incentives include:

6.6.6.1 ETHANOL PRODUCTION IN THE PROVINCE OF QUEBEC

The QTA contains a refundable tax credit for companies engaged in the production of ethanol in the province of Quebec. The eligible company must have an establishment in the province of Quebec where it produces ethanol. This tax credit is available for an eligible company for no more than 10 years, beginning after April 1, 2006 and ending no later than March 31, 2018.

In very general terms, the tax credit is calculated on a monthly basis pursuant to a mathematical formula based on the monthly production of ethanol expressed in litres and a rate depending on the average monthly price of crude oil. The maximum tax credit will be C$0.185 per litre produced. No tax credit will be available for any months where the average price of crude oil exceeds US$65.

Moreover, the credit is subject to a yearly maximum of 126 million litres of ethanol, and a global maximum of 1.2 billion litres of ethanol. There is also a monetary cap on the tax credit, calculated globally, equivalent to the total nominal capacity of the ethanol plant (without exceeding 1.2 billion litres) multiplied by C$0.152.

6.6.6.2 MAJOR EMPLOYMENT-GENERATING PROJECTS IN THE PROVINCE OF QUEBEC

Eligibility for such refundable tax credit is restricted to companies having an establishment in the province of Quebec and carrying on a business with activities in the information technology sector.

This tax credit will be equal to 25% of eligible salaries incurred beginning January 1, 2005 and disbursed to employees engaged in activities carried out under an eligible contract (without exceeding a credit of C$15,000 per eligible employee per year, to a maximum of 2,000 employees by group of associated corporations). Salaries paid to December 31, 2016 will be eligible for the tax credit. Among other things, the company will have to create more than 150 jobs in a period of 24 months counting from the signature of the eligible contract.

6.6.6.3 ON-THE-JOB TRAINING

A refundable tax credit may be granted to students undergoing a training period with businesses operating in certain regions within Quebec. Moreover, a company may be entitled to claim a refundable tax credit for 30% of the student's salary.

6.6.6.4 MULTIMEDIA PRODUCTIONS

A refundable tax credit of 26.25% to 50% may be granted to companies for eligible multimedia productions. A company may be entitled to claim a credit for each production or for all of its activities when all or substantially all of its activities consist in producing multimedia productions.

Generally, to be eligible, a multimedia production must be produced for commercial use, published on an electronic medium, controlled by software allowing interactivity, and include at least three of the following components: sound, text, static graphics, or animated graphics.

6.6.6.5 TECHNOLOGICAL ADAPTATION SERVICES

A tax credit may be granted to businesses for the collection and processing of strategic information and for collaboration efforts and research and innovation with different partners.

The tax credit is equal to 50% of:

- 80% of the fees for liaison and transfer services provided by a liaison and transfer centre or by a college centre for the transfer of technology
- The expenses for participating in training and information activities related to liaison and transfer services.

Liaison and transfer centres are organizations that bring together a number of university, industry and government members whose mission is to increase the value of enterprises through the transfer of expertise, knowledge, know-how and technologies. The activities of the college centre for the transfer of technology focus on applied research, technical assistance, training, and information monitoring and communication.

6.6.6.6 CULTURAL INDUSTRY

Financial support is provided by the Quebec government to cultural industries through refundable tax credits for labour expenses incurred during the production of cultural property. Tax credits varying from approximately 20% to 48% are granted in respect of:

- Film or TV productions
- Film dubbing
- Sound recordings
- Production of shows
- Book publishing.

The Canadian government also supports this industry through a 25% refundable tax credit for labour costs incurred in connection with Canadian film or video productions and 16% for foreign films and videos that are produced in Canada.

6.6.6.7 INTERNATIONAL FINANCIAL CENTRE

The objective of the International Financial Centres (IFCs) is to promote the implementation, development and retention in the City of Montréal of businesses specializing in international transactions. The tax benefits include a partial exemption for Quebec income tax, capital tax and the employer health services contribution. Moreover, foreign specialists employed by an IFC may be eligible for the same tax holiday as foreign researchers and specialists (described in Section 6.6.2).

6.6.6.8 DESIGN

Tax provisions for design cover two areas and provide a refundable tax credit varying from 15% to 30%. The first area involves industrial or fashion design activities under an external consulting contract. The second area involves salary costs incurred by a company for the designers it employs in the fashion and furnishings sectors.

6.6.6.9 FOREST INDUSTRY SUPPORT

In the 2006 Quebec budget, the Quebec government presented measures to support the forest sector in Quebec, namely:

- An increase to the rate of capital tax credit to 15% respecting eligible investments in this sector, and the period during which such investments can be made will be extended until December 31, 2012. The eligible investments are manufacturing and processing equipment used mainly in the following activities:
    - Sawmill and wood preservation activities

- Activities involved in the making of veneers, plywood and reconstituted wood products, excluding the making of wood structural products
- The activities of pulp, paper and cardboard plants.

- The introduction of a refundable tax credit for the construction or major repair of public access roads. An eligible corporation that incurs eligible expenses regarding the construction or major repair of eligible access roads or bridges, during a fiscal year, may claim a refundable tax credit, for such year, corresponding to 90% of the amount of such eligible expenses incurred after March 23, 2006 and before January 1, 2011.

- An eligible owner of a private wood lot may deduct, in the calculation of such owner's taxable income, an amount not exceeding 80% of such owner's income for the sale of timber relating to the operation of such wood lot for such fiscal year, applicable to fiscal years ended after March 23, 2006 and no later than December 31, 2009.

6.6.6.10 REFUNDABLE INVESTMENT TAX CREDIT FOR MANUFACTURING AND PROCESSING EQUIPMENT

This investment tax credit will allow an eligible corporation that makes an eligible investment to claim a tax credit, for a fiscal year, of up to 40% of the amount of the eligible investment. The investment tax credit rate will depend on where the eligible investment is made and the corporation's paid-up capital.

The tax credit will be fully refundable for corporations whose paid-up capital, which has to be calculated on a consolidated basis, does not exceed C$250-million. For corporations whose paid-up capital is between C$250-million and C$500-million, the refundability will decline linearly. It is important to note that the non-refundable portion of the credit may be carried forward.

6.6.6.11 REFUNDABLE TAX CREDIT FOR THE DEVELOPMENT OF E-BUSINESS

This refundable tax credit will allow an eligible corporation that employs eligible employees to carry out eligible activities, to claim a tax credit equal to 30% of their eligible salaries, to a maximum of C$20,000 per employee, per year. This tax credit may be claimed for salaries incurred until December 31, 2015.

6.6.6.12 REFUNDABLE TAX CREDIT FOR FRANCIZATION IN THE WORKPLACE

This refundable tax credit will allow any eligible employer which provides its eligible employees with eligible training to claim a tax credit of 30% of the training expenditures relating to francization it incurs for its employees.

Eligible training is defined as meaning "a course designed to foster the francization of immigrants in which the eligible employee of the eligible employer is enrolled, given by an eligible trainer under a contract entered into by the employer and the trainer".

6.7 COMMODITY TAX AND CUSTOMS TARIFFS

6.7.1 FEDERAL SALES TAX AND EXCISE TAX AND THE QUEBEC SALES TAX

The Goods and Services Tax (GST) and the Quebec Sales Tax (QST) are both forms of value-added tax which apply to most goods and services at the rate of 5% in the case of GST and 7.5% in the case of QST. Unlike income tax, the GST/QST is a tax on consumption rather than profits.

6.7.1.1 HOW IS THE GST/QST 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/QST as agent for the government, while the purchaser is legally responsible for the payment of the tax. Suppliers deduct from their collections any GST/QST they have paid on their own purchases (called "input tax credits"/"input tax refunds") and remit the difference to the appropriate tax authority. 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 QST. The base upon which the QST is imposed includes any GST applicable on the property or goods in question.

6.7.1.2 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 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.

6.7.1.3 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 zero-rated 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 zero-rated 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.

6.7.1.4 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 used residential property, long-term residential leases, many health and dental services, educational services, domestic financial services and daycare services. Note that domestic financial services may be characterized as zero-rated supplies under the QST regime.

6.7.1.5 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. Rules applicable to non-residents may also apply under the QST regime.

6.7.1.5.1 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" and also acts as importer of record basis 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.

6.7.1.5.2 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 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.

6.7.1.5.3 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.

6.7.1.6 GST/QST 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.

Similarly, all goods brought into Quebec, whether from outside or within Canada, are subject to the QST which must be self-assessed by the importer. However, there is a broad exception in respect of the importation of corporeal property brought into Quebec by a person registered for QST purposes for exclusive consumption or use in the course of the commercial activities of the registered person and in respect of which the registered person would, if he had paid QST on importation of the goods, be entitled to apply for an input tax refund in respect thereof.

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.

6.7.1.7 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 are 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.

6.7.2 OTHER QUEBEC TAXES

Other taxes are imposed under Quebec statutes in connection with the transfer or sale of immovable property, fuel and tobacco. As well, property taxes are imposed on owners and/or occupiers of land and buildings, as are business taxes.

6.7.3 CUSTOMS TARIFFS

All goods imported into Quebec from outside Canada are subject to the provisions of Canada's customs laws, including the provisions of the federal *Customs Act* and the federal *Customs Tariff*. The specific tariffs or customs duties imposed on particular imported goods, are based in part on the specific tariff classification of the goods, as well as their country of origin. Details of Canada's customs laws are set out earlier in this guide, in Section 4.3.

VII. EMPLOYMENT AND LABOUR LAW

Employment and labour law in Quebec and elsewhere in Canada is designed to regulate both conditions of employment and relationships between employers and employees.

While labour relations and employment are generally matters within provincial jurisdiction, the federal government, which has jurisdiction over federal works and undertakings (such as banks, pipelines, telephone systems and television, air transport, inter-provincial trucking and fishing), regulates employment and labour matters that fall within its jurisdiction through the *Canada Labour Code*. Please refer to Blakes *Doing Business in Canada* Guide for a review of the rules applicable to an enterprise that falls within the jurisdiction of the federal government.

Employers doing business in Quebec should be familiar with the following types of employment-related legislation:

- Employment Standards Legislation
- Human Rights Legislation
- Provincial and Federal 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 obligations owed to their employees under 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.

The protection of human rights is also governed by legislation. Quebec and each other Canadian jurisdiction has enacted human rights legislation prohibiting discrimination with respect to employment on a number of specified grounds.

7.1 HOW IS EMPLOYMENT LAW GENERALLY GOVERNED?

As a result of the differences in provincial employment legislation, companies that are subject to provincial jurisdiction and operating in more than one province must ensure that each office maintains employment practices that satisfy local requirements. Some companies approach the issue by preparing policies for general use, retaining the parts of provincial legislation that are most beneficial to employees, so as to ensure consistency throughout the organization. As a practical matter, however, this may be difficult to achieve due to the high costs involved.

Both the federal government and every province have employment standards legislation prescribing the minimum conditions of employment, in regards to such matters as wages, hours of work, holidays and vacation periods, pregnancy and parental leave, notice of termination of employment and equal pay for equal work.

7.2 HOW IS LABOUR LAW GENERALLY GOVERNED?

Labour relations legislation in each province, and under federal jurisdiction, regulates the organization of trade unions and the collective bargaining process. The legislation entrenches the right of employees to organize and to be represented by their chosen bargaining agent, without interference from employers, through a certification process. The collective bargaining process is regulated with a view to providing the mechanism 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 in order 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.

7.3 EMPLOYMENT AND LABOUR LAW IN QUEBEC

In Quebec, *An Act respecting labour standards* (Labour Standards Act) prescribes the minimum terms of employment on such matters as wages, hours of work, holidays and vacation periods, pregnancy and parental leave, notice of termination of employment and equal pay for equal work. The *Civil Code of Québec* also provides for requirements with regard to employment contracts, including notice of termination of employment.

The Quebec *Labour Code* regulates collective bargaining in the private sector in the province of Quebec. The legislation entrenches the right of employees to organize and to be represented by a bargaining agent of their choice, without interference from employers. The collective bargaining process is regulated in order to facilitate the conclusion of a collective agreement between the parties.

Human rights are governed in the province of Quebec by the *Charter of Human Rights and Freedoms* (Quebec), which prohibits discrimination in matters of employment. The *Charter of Human Rights and Freedoms* (Quebec) prevents any person from discriminating in respect of the hiring, apprenticeship, duration of the probationary period, vocational training, promotion, transfer, displacement, laying-off,

suspension, dismissal or conditions of employment of a person, or through the establishment of categories or classes of employment.

The *Act respecting occupational health and safety* (Quebec) and the relevant regulations provide the rules governing safety in the workplace. Work-related injuries and illnesses are compensated by way of a no-fault insurance plan created under the *Act respecting industrial accidents and occupational diseases* (Quebec).

7.3.1 EMPLOYMENT STANDARDS

The Labour Standards Act establishes the minimum obligations owed to employees in respect of numerous employment matters, as they relate to unionized and non-unionized workers. In particular, the legislation addresses with the following issues:

7.3.1.1 MINIMUM WAGES

There are a number of different minimum wages that are set by the Government of Quebec: the general rate as at May 1, 2008 is C$8.50; the rate for employees who usually receive gratuities is C$7.75 as at May 1, 2008. No special salary rate applies to domestics, who are therefore entitled to receive the minimum wage (note, however, that the amounts that may be charged to such employees for their bed and board are set by regulation).

7.3.1.2 HOURS OF WORK

The regular work week consists of 40 hours; however, some categories of workers have longer regular work weeks, according to applicable regulation. Any work performed in excess of the regular work week is considered as overtime and paid at a rate of time and a half. However, the employer may, at the employee's request, substitute the payment of overtime with paid leave equivalent to the overtime worked plus 50%. Subject to a collective agreement or decree, paid leave must be taken within 12 months; otherwise, overtime must be paid. However, if the contract of employment is terminated prior to the employee benefiting from the leave, overtime must be paid at the same time as the last payment of wages.

7.3.1.3 HOLIDAYS AND VACATIONS

The following days are paid statutory holidays in the province of Quebec:

1. 1st January (New Year's Day)
2. Good Friday or Easter Monday, at the option of the employer, or Easter Sunday for employees working in a commercial establishment that is usually open on Sundays but which is closed on Easter Sunday pursuant to *An Act respecting hours and days of admission to commercial establishments* (Quebec)
3. The Monday preceding 25th May (Victoria Day);
4. 24th June (the National Holiday); when it falls on a Sunday, the holiday is Monday, 25th June
5. 1st July or, if this date falls on a Sunday, the 2nd July (Canada Day)
6. The first Monday in September (Labour Day)
7. The second Monday in October (Thanksgiving Day)
8. 25th December (Christmas Day).

In general, for an employee to be entitled to a paid statutory holiday and holiday pay, the employee must not have been absent without authorization or justification on the day either preceding or following one of the statutory holidays.

If the employee must work on a statutory holiday, the employer must pay, in addition to his or her usual wages, an indemnity equal to the average of the employee's daily wages preceding that holiday, excluding overtime, or grant the employee a compensatory holiday. Unless a collective agreement or decree provides otherwise, the compensatory holiday must be taken within three weeks before or after the statutory holiday.

An employee acquires the right to a vacation or annual leave during a "reference year", that is, a period of 12 consecutive months that begins on May 1 of the preceding year and ends on April 30 of the current year (unless an agreement or a decree fixes a different starting date for that period). An employee who, at the end of the reference year, has completed one year of uninterrupted employment with the same employer is entitled to an annual leave of at least two consecutive weeks; an employee who has completed five years of uninterrupted employment at the end of a reference year is entitled to at least three consecutive weeks. An employee is also entitled to an annual leave indemnity equivalent to 4% of the employee's annual salary, if the employee has two weeks of annual leave and 6% if he or she has three weeks of annual leave.

7.3.1.4 PREGNANCY AND PARENTAL LEAVE

The maternity leave without pay in Quebec is not more than 18 consecutive weeks, and it may not begin before the 16th week preceding the expected date of delivery. An employee must give the employer a written notice stating both the date of her maternity leave and the date on which she will return to work, three weeks prior to leaving, unless her health requires her to leave sooner. Upon return, if the employee's regular position no longer exists, the employer must assign her to a comparable employment within the company with a wage equal to, or higher than, what she would have received if she had remained at work at the time that her position was lost.

Quebec also has paternity leave without pay for male employees, of up to five weeks at the birth of the child. Such leave may commence at the birth and must be taken within 52 weeks thereof.

With regard to parental leave, both male and female parents of a new-born child, and persons adopting a child who has not reached the age of compulsory school attendance, are entitled to a parental leave, without pay, of not more than 52 consecutive weeks. This provision is not applicable in circumstances where the employee adopts the child of his or her spouse. Parental leave may not begin before the child is born or, in the case of adoption, before the child is entrusted to the adoption agency or the employee.

Quebec has an income replacement plan called the Quebec Parental Insurance Plan for eligible workers who take maternity, paternity, parental or adoption leave, to which employers contribute. See Section 6.5.2 for further details.

7.3.1.5 PSYCHOLOGICAL HARASSMENT

The Labour Standards Act contains specific provisions with regard to psychological harassment. Vicious behavior that affects an employee's dignity or psychological or physical integrity may constitute psychological harassment. Such conduct is prohibited in the workplace. An employee who believes that he or she was subject to psychological harassment may file a statutory complaint under the Labour Standards Act.

7.3.1.6 LEAVE FOR FAMILY EVENTS

Employees are granted a number of leaves, only some of which are paid by the employer, for events related to the employee's family, namely, maternity leave; paternity leave; parental leave; parental obligations, such as the health, care or education of a minor child; and miscellaneous leaves, such as deaths or funerals, marriages, births or adoptions.

7.3.1.7 ENFORCEMENT

Employment standards legislation is enforced by way of a complaint made to the *Commission des normes du travail*. Officers investigate the complaint and can refer the complaint to the courts or to the *Commission des normes du travail* that will make a ruling either in favour of the complainant or the employer, if the matter cannot be settled.

7.3.1.8 TERMINATION OF EMPLOYMENT

The Labour Standards Act requires that employers provide employees with a minimum period of notice before their employment is to be terminated or if the employee is to be laid off for more than six months. The notice period varies depending on the length of service: one week of notice is required for employees who have completed less than one year of uninterrupted employment with the same employer; two weeks for between one to five years of uninterrupted employment; four weeks for between five to 10 years of uninterrupted employment; and eight weeks for 10 years or more of uninterrupted employment. An employer who does not give sufficient notice must pay the employee a compensatory indemnity which would be equal to the employee's regular wage, excluding overtime, for the period of notice to which the employee was entitled.

The Labour Standards Act also requires that the Quebec Minister of Employment and Social Solidarity be notified in writing in cases of collective dismissals. A collective dismissal occurs when 10 or more employees of the same establishment will be terminated in the course of two consecutive months. The prior notice must be given between eight and 16 weeks before the layoffs, depending on the number of employees affected.

Statutory notice for termination of employment is not required for the following exceptions, but notice under the *Civil Code of Québec* may still be necessary:

- Where an employee has less than three months of uninterrupted employment with the same employer
- Where the contract of employment that expired is for a fixed term or a specific undertaking
- Where an employee has committed a serious fault
- Where the termination of an employee results from *force majeure*.

These statutory requirements constitute minimum standards only. The *Civil Code of Québec* requires that notice of termination be reasonable in time, taking into account the particular circumstances. In order to determine the duration of the reasonable notice, the accrued years of service, position held, and other factors are taken into consideration. As in other Canadian jurisdictions, what constitutes reasonable notice will be driven by the circumstances of each case; however, it is generally accepted that notice periods will not exceed 24 months, and this "upper limit" would apply to senior employees with very long service.

Where employment is terminated without adequate notice, the employee is entitled to payment in lieu of notice and to continuation of benefit coverage during the required notice period.

7.3.1.9 EQUAL PAY FOR EQUAL WORK

Employers must, pay equal wages to their employees who, regardless of their biological sex, perform equivalent services. A difference in wages, however, is justified when there are differences in experience, seniority, years of service, merit, productivity or overtime between employees.

7.3.1.10 PAY EQUITY

The province of Quebec has passed legislation, entitled the *Pay Equity Act*, to "redress differences in compensation due to the systemic gender discrimination suffered by persons who occupy positions in predominantly female job classes". The *Pay Equity Act* applies to all employers whose operations are subject to Quebec labour laws and who employ at least 10 employees.

The extent of the employer's obligations in the *Pay Equity Act* vary with the size of the firm (i.e., 100 or more employees; 50 to 99 employees; or less than 50 employees). Employers who employ more than 100 employees must establish a "pay equity plan" to be applied through the enterprise that will determine the required salary adjustments in order to address the gap in salaries between job classes that are predominantly female and predominantly male.

7.3.2 HUMAN RIGHTS LEGISLATION

7.3.2.1 PROHIBITED GROUNDS OF DISCRIMINATION

The prohibited grounds of discrimination under the Quebec *Charter of Human Rights and Freedoms* (the Quebec Human Rights Charter) include the following: social condition; language; civil status; sexual orientation; family status; political beliefs; disability or the use of any means to palliate such handicap; criminal conviction (to a certain extent); marital status; pregnancy; sex; age; religion; national or ethnic origin; colour; and race. As such, employers in Quebec 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.

In addition, the Quebec Human Rights Charter contains 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.

7.3.2.2 EXCEPTIONS

Some exceptions exist to the 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.

7.3.2.3 ENFORCEMENT

Enforcement of Quebec human rights legislation is essentially a complaint-driven process. The Human Rights Commission 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 the Human Rights Tribunal for adjudication.

The Human Rights Tribunal has 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. The Human Rights Tribunal 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, 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, those persons who infringe the rights provided for by the Quebec Human Rights Charter are guilty of an offence and liable to pay certain fines.

7.3.3 OCCUPATIONAL HEALTH AND SAFETY LEGISLATION

The Quebec *Act respecting occupational health and safety* (the AOHS) creates health and safety obligations for both employers and employees to minimize the risk of workplace accidents. Employers are required to take all reasonable precautions to protect the health and safety of their workers.

Aside from the general obligation to take reasonable precautions to protect employees, the regulations passed under occupational health and safety legislation contain numerous 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.

The AOHS 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, 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. The AOHS provides for the creation of a Joint Health and Safety Committee, which are advisory groups of worker and management representatives.

Employers who employ more than 20 employees are required to create Joint Health and Safety Committees. The AOHS contains specific provisions with respect to the composition and operation of Joint Health and Safety Committees, including their size, composition and the frequency of meetings. Joint Health and Safety Committees are required to meet regularly 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.

7.3.3.1 ENFORCEMENT

Government health and safety officers or inspectors enforce occupational health and safety legislation. These officers or inspectors 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 AOHS, the orders of an officer or inspector may be appealed by the employer to a labour relations board or other adjudicative body.

The AOHS also provides for the prosecution of individuals and corporations for violations of the legislation, resulting in potential fines. Maximum fines vary greatly and can be significant. In addition to these sanctions, the *Criminal Code* has been 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.

7.3.3.2 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. In Quebec, the *Act respecting industrial accidents and occupational diseases* (the AIA) provides 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 created under AIA, 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. In Quebec, the *Commission de la santé et de la sécurité du travail* (the CSST) manages the insurance plan, and the *Commission des lésions professionnelles* (the CLP) adjudicates disputes relating to benefit entitlements and other matters.

All employers with an establishment in Quebec are required to register with the CSST and to pay premiums into the insurance fund. 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 accidents in the workplace, the higher the premium that employer will be required to pay. If an employer has many employees, the AIA provides that its claim history may also impact its premium,

such that a surcharge is applied to the account of an employer with a poor claims history and an employer with a good claims history receives a rebate.

The AIA establishes many additional employer obligations. 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. The AIA requires employers to reinstate 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. This period of time will depend on the number of employees working in a given establishment.

Employers must also comply with various administrative obligations relating to the investigation and adjudication of benefits claims and the payment of insurance premiums.

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

7.3.4 COLLECTIVE BARGAINING

The *Labour Code* (Quebec) regulates collective bargaining within the private sector in the province of Quebec.

7.3.4.1 HOW DO EMPLOYEES BECOME CERTIFIED?

Certification of a collective bargaining unit may be applied for at any time by employees who are not already represented by a certified bargaining unit or contemplated in an application for certification. In its application, the association of employees must petition the *Commission des relations du travail* (the labour relations board) for certification; the petition must be signed by the association's representatives and must indicate the group that it seeks to represent.

Upon receipt of the petition, the *Commission des relations du travail* must send a copy of the petition to the employer. Upon receipt of the petition, the employer has a number of obligations to fulfill: it must, within five days, post the complete list of employees contemplated by the petition, noting the function of each employee; send a copy of this list to the petitioning association; and maintain a copy for the labour relations officer.

The labour relations officer, as a delegate of the *Commission des relations du travail*, must, in order to certify the bargaining unit, ensure the representative character of the bargaining unit and its right to be certified. If the officer ascertains the representativeness of the bargaining unit, he is obliged to certify it in writing and indicate which group of employees constitutes the bargaining unit.

The employer has the right to object to the proposed bargaining unit, setting forth in writing its reasons and proposing what it thinks is a suitable unit. An employer may have an interest both in avoiding fragmented, skill-based units and inappropriately large groupings of employees.

7.3.4.2 WHAT ARE THE RESTRICTIONS UPON MANAGEMENT? WHAT ARE THE REQUIREMENTS?

Labour legislation is designed to separate management from employees for the purposes of collective bargaining. Managerial employees are excluded from participating in collective bargaining. Employees employed in a confidential capacity may also be excluded from the scope of a given bargaining certificate.

While employers have a limited right to express their opinions, they are prohibited from dominating, hindering or financing the formation or activities of any association of employees. Where an employer violates this rule, the *Commission des relations du travail* has a choice of remedies in order to correct the employer's interference with the employees' right of association, including reinstating employees who have been improperly terminated. Employers cannot refuse to employ or discriminate against employees because they are involved in a union. Employers must therefore be extremely careful when responding to an organizing campaign.

Certification confers upon the association of employees the exclusive authority to bargain collectively on behalf of all employees in the bargaining unit. Negotiations between the employer and the certified unit must be carried on diligently and in good faith, and both parties have a duty to make a real and honest effort to reach a collective agreement. In first contract situations, it is possible for one of the parties involved in the negotiation to file an application with the Quebec Minister of Labour requesting the dispute be submitted to arbitration.

7.3.4.3 STRIKES AND LOCKOUTS

Strikes or lockouts are illegal during the life of the collective agreement and may only be undertaken after the expiration of the agreement.

7.3.4.4 PICKETING

Traditionally, there are two forms of picketing: primary picketing is legal and involves picketing at the employer's place of business. Where there are multiple places of business, picketing at other locations is also considered to be primary picketing.

By contrast, secondary picketing can be illegal and involves picketing at third party businesses that deal with the employer. Injunctive relief to restrain picketing might be available from the labour commissioner or the courts, in appropriate circumstances.

In Quebec, picketing is regulated by the criminal law and the general law governing civil liability, and is limited to communicating information. Forms of intimidation, including verbal threats, physical assaults or blocking of premises, are, therefore, illegal.

7.3.4.5 HOW WILL THE PRESENCE OF A BARGAINING UNIT AFFECT THE SALE OF A BUSINESS?

In Quebec, the purchaser of all, or part, of an enterprise is bound by existing bargaining certificates and, if all of the enterprise is sold, by the collective agreements. However, if only part of the enterprise is transferred, the collective agreement in force is deemed to have expired on the day the transfer becomes effective, for the purposes of labour relations between the association of employees and the

new employer. Under very limited circumstances, it is possible that the transfer of some functions within the enterprise will not trigger the transfer of the bargaining certificate. Generally, the *Commission des relations du travail* will not interfere with the bargaining agent after a sale of a business, unless there has been an intermingling of employees and the bargaining unit is, therefore, no longer appropriate, or to settle any difficulties arising out of the transfer of the bargaining certificate.

7.4 EMPLOYEE BENEFITS - ARE THEY PRIVATELY OR PUBLICLY FUNDED?

7.4.1 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 beginning at the 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) provides a 15-week sickness benefit equal to 55% of the employee's average weekly insurable earnings, subject to a fixed maximum.

Most employers contract out of EI sickness benefits by providing equal or superior benefits, thereby reducing their EI premiums.

7.4.2 GOVERNMENT-ADMINISTERED BENEFITS - QUEBEC

The Quebec Pension Plan applies to individuals employed or resident in the province of Quebec. Like the Canada Pension Plan, the Quebec Pension Plan is a compulsory, contributory, earnings-related plan governing employees and providing basic retirement, death and long-term disability benefits. Quebec maintains a hospital and medical insurance plan financed from general provincial revenues and through an employer health tax based on annual payroll. Quebec also has workers' compensation legislation providing non-taxable disability and death benefits for work-related accidents, thereby replacing the employee's need to take legal action against the employer for such claims. Workers' compensation is funded by employer contributions determined through accident history in different industries. The Quebec Parental Insurance Plan also provides income replacement benefits to eligible workers who take maternity, paternity and/or parental leaves pursuant to entitlements granted by labour standards legislation.

7.4.3 PRIVATELY-ADMINISTERED BENEFITS

7.4.3.1 PENSION PLANS

Many employers voluntarily offer private pension plans and, as such, are subject to 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.

7.4.3.2 SUPPLEMENTAL PENSION PLANS

Employers in Quebec 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.

7.4.3.3 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" and make contributions to such plans each year up to certain prescribed limits (which vary depending on whether the individual also participates in a pension plan or deferred profit-sharing plan). 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 payable on current earnings.

The *Income Tax Act* (Canada) also contains provisions permitting an employer to share profits on a tax-sheltered basis with its employees (a "deferred profit-sharing plan"). Deferred profit-sharing plans have become a popular employer-sponsored retirement income mechanism. 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 Quebec 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).

The Quebec income tax regime also provides for equivalent tax incentives.

7.4.3.4 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

8.1 FEDERAL 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 organizations 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 organization such as banks, airlines and telecommunications companies. Provincial privacy legislation will, however, apply to employee information outside those sectors.

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 insofar as the collection, use or disclosure of personal information occurs within a province that has enacted legislation that is substantially similar. *An Act respecting the protection of personal information in the private sector* (Quebec) (Quebec Privacy Act) and the private sector privacy legislation in Alberta and British Columbia have each been designated as substantially similar to PIPEDA.

Nevertheless, given that many organizations operate in more than one province and inter-provincially, businesses are likely to be required to deal with a "patchwork" of provincial and federal 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 of Canadian personal information to the U.S. Much of this attention has centred on the concern that U.S. authorities could use the U.S. *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.

8.2 QUEBEC LAW

Every enterprise supplying goods or services in the province of Quebec must comply with the Quebec Privacy Act if it collects, holds, uses or communicates personal information. The Quebec Privacy Act applies to all private sector organizations with respect to collection, use and disclosure of personal information, which is defined as any information relating to an individual which allows that person to be identified and includes business contact information and employee information. It also applies to private sector collection, use and disclosure of personal health information. Generally speaking, enterprises must comply with certain rules to ensure that individuals maintain control over their own files.

For example, when collecting personal information, private sector enterprises must:

- obtain the information from the person concerned, unless the person or the Quebec Privacy Act authorizes the information to be collected from a third person
- collect only the information required for the stipulated object
- inform the person concerned of the object of the file, the use that will be made of it, the categories of people within the enterprise that will have access to it, where the file will be kept, and inform the person that he or she has the right to access the file containing his or her personal information and to request the rectification of any inaccurate or incomplete information and the deletion of unnecessary or obsolete information.

When holding, using or communicating personal information, private sector enterprises must, among other obligations:

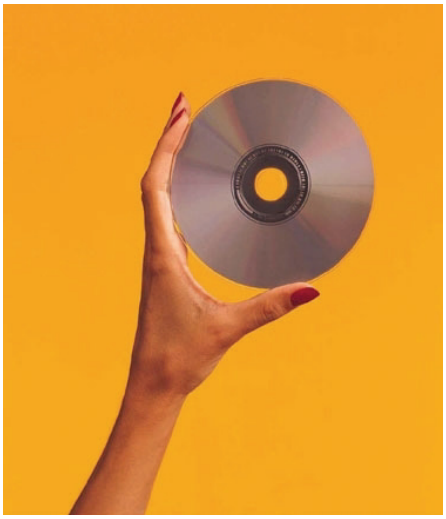
- introduce security measures to ensure that the information remains confidential
- obtain the consent of the person concerned before disclosing personal information to third parties
- ensure that the person's consent to use or communicate the information is validly given.

Exceptionally, an enterprise may communicate personal information from a file without obtaining the consent of the person concerned. For example, such information may be communicated:

- to a person responsible for the prevention, detection or repression of crime
- to a public body that collects such information as part of its function
- to a person who must act urgently to protect the life, health or safety of the person concerned
- to a person who, on certain conditions set out in the Quebec Privacy Act, uses or communicates a nominative list (a list of names, addresses or telephone numbers) for commercial or philanthropic prospecting purposes.

The Quebec Privacy Act also includes special provisions for enterprises lending money and those trading information for credit purposes.

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 of 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 civil law action of unfair competition (similar to the common law action of passing off), personality rights enshrined in the *Civil Code of Québec* and confidential information. Quebec law also governs trade names and contracts related to intellectual property, such as transfers, licences and hypothecs (i.e., security interests).

9.1 FEDERAL LAW

9.1.1 PATENTS

9.1.1.1 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.

9.1.1.2 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 P*atent 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.

9.1.1.3 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 (known as a hypothec in Quebec) may be recorded in the Canadian Intellectual Property Office but the effect of such recordal is not clear. In Quebec, hypothecs may be registered in the Quebec register of personal and movable real rights.

9.1.1.4 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.

9.1.2 TRADE-MARKS

9.1.2.1 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 "Rights and Requirements under Quebec Civil 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.

9.1.2.2 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.

9.1.2.3 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 in the Canadian Intellectual Property Office. 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.

9.1.2.4 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 or hypothec may be filed against a trade-mark of record in the Canadian Intellectual Property Office but the effect of such a filing is unclear. In Quebec, hypothecs may be registered in the Quebec register of personal and movable real rights.

9.1.2.5 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.

9.1.3 COPYRIGHT

9.1.3.1 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.

9.1.3.2 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.

9.1.3.3 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.

9.1.3.4 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 hypothec in the Canadian Intellectual Property Office is not clear. In Quebec, hypothecs may be registered in the Quebec register of personal and movable real rights.

9.1.3.5 HOW MAY A 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 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.

9.1.4 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, "right of anonymity".

As well, the author has "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.

9.1.5 INDUSTRIAL DESIGN

9.1.5.1 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.

9.1.5.2 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.

9.1.5.3 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.

9.1.5.4 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 hypothec in the Canadian Intellectual Property Office is unclear. In Quebec, hypothecs may be registered in the Quebec register of personal and movable real rights.

9.1.6 PERSONALITY RIGHTS

Although personality rights are generally governed by provincial law (see the discussion under "Rights and Requirements under Quebec Civil 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.

9.1.7 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.

9.1.8 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.

9.1.9 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 which is modeled on, but differs in some crucial respects from, the *Uniform Dispute Resolution Policy*.

9.1.10 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.

9.2 RIGHTS AND REQUIREMENTS OF QUEBEC CIVIL LAW

The following aspects of intellectual property law are governed by Quebec civil law.

9.2.1 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 based on unfair competition (similar to the common law passing off action).

To succeed in an action based on unfair competition, 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.

9.2.2 BUSINESS NAMES

An Act respecting the legal publicity of sole proprietorships, partnerships and legal persons (Quebec) requires registration of every person who operates an enterprise in Quebec, whether by means of a sole proprietorship, partnership or legal person (corporation). This statute requires the registration of business names used in Quebec and such names must further comply with the French Language Charter. Please refer to the discussion in Section 3.5 under "Business Entities" as well as in Section 4.5 under "Trade and Investment Regulation".

A proceeding in a court in Quebec taken by a person who has not registered under this legislation may be suspended upon request of an interested party. The court may lift the suspension upon registration taking place.

9.2.3 PERSONALITY RIGHTS

Under the *Civil Code of Québec*, every person has a right to the respect of his reputation and privacy, and no one may invade the privacy of a person without the consent of the person unless authorized by law. The use of a person's name, image, likeliness or voice, among other acts, is considered an invasion of privacy.

9.2.4 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.

9.2.5 LICENSING

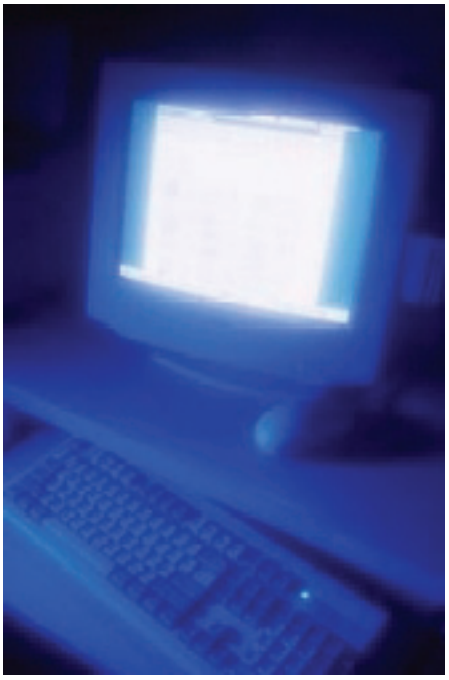
All types of intellectual property may be licensed. The licensing of trade-mark rights must be handled carefully (see Section 9.1.2.4 above). The law of licensing is governed by the law of the contract. No approvals are necessary, although recordal in the Canadian Intellectual Property Office is registration 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 Quebec, as in the rest of 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 Quebec.

10.1 INFORMATION TECHNOLOGY CONTRACTING IN CANADA

10.1.1 WHAT TERMS ARE GENERALLY NEGOTIATED?



In Quebec, 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 Quebec law that may render such clauses unenforceable, and require careful drafting and review by Quebec counsel.

10.1.2 ASSIGNMENTS AND LICENCES

In Quebec, as in the rest of Canada, assignments and licences of intellectual property rights must be in writing and certain assignments and licences should be registered with the Canadian Intellectual Property Office. Note that an author's moral rights, which exist under the federal *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".

10.1.2.1 ARE SOFTWARE LICENCES ASSIGNABLE AND CAPABLE OF BEING SUBLICENSED?

A software licence may be viewed by Quebec (and other 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 commercial acquisition in Quebec.

ARE SHRINK-WRAP AND CLICK-WRAP LICENCES ENFORCEABLE IN CANADA?

Off-the-shelf computer programs that are accompanied by "shrink-wrap" licences and online "browse-wrap" agreements have received mixed enforceability before Quebec (and Canadian) courts due to the requirement in Quebec law (and the law of other Canadian provinces) 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 expressly agreed (for example through a "click-wrap") to the terms or 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.

10.1.3 APPLICABILITY OF *CIVIL CODE OF QUÉBEC*

10.1.3.1 ARE INFORMATION TECHNOLOGY PURCHASES SALES OF GOODS?

If a transaction for the acquisition of information technology falls within the scope of the *Civil Code of Québec*, certain rights and obligations will follow. The acquisition of a computer system will normally be viewed as a contract of sale while transactions involving pure service, maintenance, custom training or programming are generally characterized as contracts of enterprise or contracts of services. Pre-packaged software supplied pursuant to a licence agreement is not specifically regulated as a nominate contract under the *Civil Code of Québec*, although if the software is provided in conjunction with a larger transaction involving the sale of goods (e.g., hardware), the principal contract will be governed by the contract of sale provisions of the *Civil Code of Québec* to the extent such provisions have not been varied by the contract. Note that these transactions may also be regulated under the *Consumer Protection Act* (Quebec).

10.2 INTELLECTUAL PROPERTY RIGHTS IN INFORMATION TECHNOLOGY

10.2.1 COPYRIGHT

10.2.1.1 WHAT INFORMATION TECHNOLOGY IS PROTECTED BY COPYRIGHT?

Copyright is currently a primary source of protection for software programs, user manuals, databases, websites and other similar 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 judgement 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.

10.2.1.2 WHO OWNS THE COPYRIGHT IN INFORMATION TECHNOLOGY?

As discussed in Section IX, "Intellectual Property", the author of a 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".

10.2.1.3 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.

10.2.1.4 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 Section 10.2.2 below.)

10.2.1.5 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 judgement. The exercise of skill and judgement 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.

10.2.1.6 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.

10.2.1.7 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.

10.2.1.8 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.

10.2.2 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.

10.2.3 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 further details.

10.2.4 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 under the *Civil Code of Québec*. For a more detailed discussion on trade-mark law in Canada, see Section IX, "Intellectual Property".

10.2.4.1 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.

10.2.4.2 WHAT RISKS DO METATAGS POSE?

Canadian courts have held that the use of metatags (i.e., tags or key words in a website'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.

10.2.5 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 details on patent law in Canada.

10.2.5.1 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.

10.3 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.

10.4 CRYPTOGRAPHY CONTROLS

10.4.1 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.

10.5 PRIVACY AND DATA PROTECTION

As discussed in Section VIII, "Privacy Law" the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) and Quebec's *An Act respecting the protection of personal information in the private sector* (Quebec Privacy Act) impose conditions on the collection, use and disclosure of personal information by organizations. As a result, websites, online and information technology businesses that obtain, use or disclose personal information must comply with PIPEDA and the Quebec Privacy Act as applicable.

10.6 ELECTRONIC EVIDENCE

10.6.1 IS ELECTRONIC EVIDENCE ADMISSIBLE IN COURT?

In Quebec, electronic evidence is admissible in the courts provided that, in accordance with the *Civil Code of Québec*, such evidence meets the requirements of special legislation styled *An Act to establish a legal framework for information technology* (Quebec). These requirements 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 websites.

10.7 ELECTRONIC CONTRACTING

10.7.1 ARE ELECTRONIC SIGNATURES AND DOCUMENTS VALID IN CANADA?

In Quebec, *An Act to establish a legal framework for information technology* (Quebec) has given statutory recognition to the legal effect of most types of electronic signatures and documents (with certain exceptions) that meet the requirements set out in such statute. One important exception is under Quebec's *Consumer Protection Act*, which in certain cases requires contracts to be in paper form and also requires certain procedures to be followed when contracting with consumers online.

10.8 FRENCH LANGUAGE ISSUES

10.8.1 MUST WEB SITES AND INFORMATION TECHNOLOGY CONTRACTS BE TRANSLATED INTO FRENCH?

The province of Quebec has language laws that may impact electronic contracting and websites, by requiring French versions 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. This is discussed further in Section IV, 4.5.2.

10.8.2 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. See Section 4.5 for further details.

10.9 JURISDICTION AND THE INTERNET

10.9.1 WHERE ARE ELECTRONIC CONTRACTS FORMED?

In Quebec, the issue of where electronic contracts are considered to be formed has not yet conclusively been determined, although certain presumptions are created under special legislation known as *An Act to establish a legal framework for information technology* (Quebec), which thus provides guidance as to when electronic documents are presumed to be received. However, the mere posting of information on a website may not be sufficient to deliver that information to another person.

10.9.2 CAN FOREIGN WEBSITES 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 website or its owner's activity is in Canada, or if the website or business activity targets persons in Canada, it will be subject to the laws of Canada. The fact that the physical location of a website or its server is outside Canada will not immunize the website 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.

10.9.3 CAN PARTIES TO AN ONLINE CONTRACT CHOOSE THE GOVERNING LAW AND FORUM?

In Quebec as in the rest of 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, Canadian courts have found that such clauses cannot be used to oust the jurisdiction of a substantially connected province.

10.10 REGULATION OF THE INTERNET

10.10.1 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 Section 10.9.3, 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.

10.10.2 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 websites and bulletin boards, or in e-mails, news groups 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.

The *Consumer Protection Act* (Quebec) also includes restrictions on advertising and marketing of goods and services to consumers.

For more detail on advertising regulations, see Section 4.4.6 "Advertising regulations and enforcement".

10.10.3 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 the Quebec Privacy Act (discussed in Section VIII, "Privacy Law") 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.

10.11 LIABILITY OF INTERNET SERVICE PROVIDERS (ISPS)

10.11.1 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.

10.11.2 DOES CANADA HAVE ANY LAWS THAT PROTECT ISPS FROM LIABILITY?

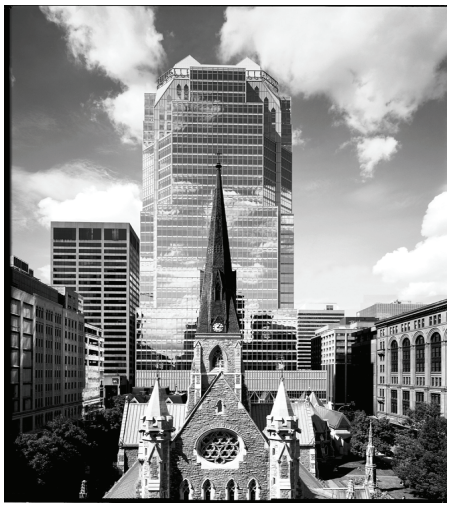
Canada has not passed legislation providing blanket immunity to ISPs from liability, however, courts have generally not held them liable for the infringing activities of their users. In the area of copyright, the Supreme Court of Canada has concluded that ISPs, and other intermediaries, will not face 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 province of Quebec's *An 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 IN QUEBEC

11.1 QUEBEC LAWS OF GENERAL APPLICATION



Generally, Quebec does not impose specific restrictions or prohibitions upon foreign purchasers of real estate (called immovable property in Quebec), although certain taxation, reporting and registration provisions may apply. For example, *An Act respecting the legal publicity of sole proprietorships, partnerships and legal persons* (Quebec) requires natural persons, partnerships or companies constituted outside Quebec to register with the Enterprise Registrar in order to carry on business in Quebec, which, for the purposes of the legislation, includes the possession of real estate in Quebec. Moreover, there may be additional requirements and restrictions under federal legislation such as the *Investment Canada Act* or the *Competition Act* (see Section IV, "Trade and Investment Regulation").

11.2 HOW IS REAL ESTATE HELD AND REGISTERED?

Investors in Quebec real estate may acquire several types of interests in land, including a full ownership interest (the concept of beneficial ownership is foreign to Quebec law), an interest for a specified period (such as under a commercial lease), or a "ground lease" which is known as an emphyteusis, or a partial interest (such as an undivided co-ownership, a divided co-ownership or a right of superficies).

Emphyteusis is an agreement pursuant to which a person obtains the full benefit and enjoyment of an immovable property owned by another person provided it does not endanger its existence and undertakes to make works thereon that durably increase its nature. Emphyteusis must be for a minimum of 10 years and a maximum of 100 years. This device is often used for office towers or box centres.

Undivided ownership is an ownership of the same property, jointly and at the same time, by several persons each of whom is privately vested with an undivided share of the right of ownership. Under divided co-ownership, ownership is divided into fractions belonging to one or several persons.

An example of divided co-ownership would be condominium ownership, under which owners have title to their individual units and a right to use "common elements" of the condominium project (e.g., a swimming pool, landscaping, etc.).

Superficies is a device whereby ownership of the subsoil and the works situated thereon is divided.

Registration of real estate in Quebec is performed by way of registration of deeds at the land register for the registration division where the real estate is located. Deeds may also be registered electronically. In order to be accepted at the land register, the deeds must respect the form requirements prescribed in the *Civil Code of Québec* and its regulations. For example, deeds may be in notarial form or under private signature, in which case a certificate of a notary or lawyer is needed. Some deeds must be in notarial form (i.e., signed before a Quebec notary) or otherwise, they would be of absolute nullity (such as deeds creating a hypothec on Quebec real estate).

11.3 THE AGREEMENT OF PURCHASE AND SALE

11.3.1 IS A WRITTEN CONTRACT REQUIRED? HOW MUCH IS PAID UP-FRONT FOR THE DEPOSIT AND AGENT COMMISSIONS?

Generally, all 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 and execution and registration of the conveyance deed. In certain cases, however, a promise of sale accompanied with delivery and actual possession of the real estate may be equivalent to sale.

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 legal advisors 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 6% of the purchase price for residential transactions.

Most real estate transactions in Quebec 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 sometimes up to 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.

11.3.2 WHAT SERVICES DOES A LAWYER PROVIDE?

Before signing an offer to purchase, a purchaser should obtain legal advice 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 and of security documents). The offer should specify the purchaser's right to search the title and conduct various inspections and investigations and off title searches prior to completing the sale.

11.3.3 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 or re-offer 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. Representations and conditions relating to the environmental history and standing of the property are also important.

Other typical conditions might relate to zoning, the terms of any existing leases, the terms of any hypothecs (security) or other real rights (such as servitudes or easements) to be assumed by the purchaser or the availability of suitable financing for the transaction. Many purchasers require the vendor to produce a current survey (certificate of location) 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 description of the land, whether the land is subject to or benefited by servitudes, that the buildings and other improvements do not encroach onto neighbouring land and that the buildings are "set back" at 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.

11.3.4 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 Quebec generally involves lawyers for the purchaser and vendor exchanging documents and closing funds which are released upon successful registration of title documentation with no adverse entries, such as the transfer/deed of land and any security being granted. Notaries are also commonly used in Quebec. The purchaser pays a land transfer duty, when applicable, and any provincial or federal sales tax payable on the purchase.

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 and pass title to the property.

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.

11.4 RESTRICTIONS ON USE OR SALE — WHAT TYPES OF CONSENT ARE NEEDED?

As with many areas of the world, Quebec regulates the development, use and disposition of real property. For example, the *Cultural Property Act* (Quebec) and the *Act respecting the preservation of agriculture land and agriculture activities* (Quebec) both require authorization in order to sell land that involves a transaction that is subject to those acts.

The *Civil Code of Québec* also has provisions pursuant to which spouses have 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 hypothecation of the property, and should execute both the agreement and the transfer or hypothecation in question.

11.5 PROVINCIAL TRANSFER AND SALES TAXES

In Quebec, a land transfer duty is payable in most cases upon the transfer of ownership of real property interests. This land transfer duty is imposed at graduated rates in accordance with *An Act respecting duties on transfer of immovables* (Quebec) and is generally between 0.5% to 1.5% of the highest of the total consideration for the transfer or its municipal evaluation. In Quebec, with few exceptions, the transfer of the right of ownership on a property, the establishment of emphyteusis, the transfer of the rights of the emphyteusis as well as a contract of lease of a property, provided the period running from the date of transfer to the expiry of the term of the contract of lease, including any extension or renewal mentioned therein, exceeds 40 years, is treated as a transfer for the purposes of *An Act respecting duties on transfer of immovables* (Quebec).

In Quebec, GST and QST are payable by a purchaser of a commercial property, a new residential property or a property that had major renovations, at the time of the transfer, at the rate of 5% and 7.5% respectively. If the purchaser of a commercial property is registered for the purposes of the *Excise Tax Act* (Canada) and *An Act respecting the Quebec Sales Tax*, the vendor will not have to collect and remit the GST and the QST applicable on the sale of the real property and the purchaser will instead be liable for the payment of such taxes (see Section 6.7).

The purchase of real estate is often accompanied by the purchase of certain goods, such as furniture or appliances, to which GST/QST is applicable (see also Section 6.7).

11.6 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 Quebec, in addition to reviewing the terms of the leases, the purchaser should be aware that the *Civil Code of Québec* and certain other legislation dealing specifically with residential tenancies, limit the rights of a landlord to evict existing tenants of residential premises as well as landlord's ability to increase rents.

11.7 JOINT VENTURES

Real estate investors in Quebec 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 upon 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 which 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.

12.1 FEDERAL ENVIRONMENTAL LAW AND REGULATION

12.1.1 *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 or under the jurisdiction of federal agencies, including banks, airlines and broadcasting systems, federal land and aboriginal land. 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.

12.1.1.1 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.

12.1.1.2 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.

12.1.1.3 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 target 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

12.1.1.4 *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 given by 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).

12.1.1.5 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).

12.1.1.6 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.

12.1.1.7 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.

12.1.1.8 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.

12.1.2 *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.

12.1.3 *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.

12.1.4 *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 reason-able 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$1,000,000 and/or two years imprisonment.

12.1.5 *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.

12.1.6 *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.

12.1.7 *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

12.1.8 *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.

12.1.9 *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 provider 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.

12.1.10 *OCEANS ACT*

Under the *Oceans Act*, the Minister of Fisheries and Oceans fulfils a coordinating 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.

12.1.11 *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.

12.1.12 *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.

12.1.13 *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.

12.1.14 *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.

12.1.15 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.

12.2 QUEBEC LAW

12.2.1 *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 Quebec Superior Court for an injunction to prevent or stop a violation from occurring or continuing.

12.2.2 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.

12.2.3 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.

12.2.4 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.

12.2.5 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 website, 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 put a moratorium on class actions suits (noise from snowmobile paths).

12.2.6 *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 analysing, 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 (2) 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.

12.2.7 *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 of 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.

12.2.8 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 the fall of 2008.

The *Petroleum Products Act* (Quebec) 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* (Quebec) 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.

12.2.9 *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 Quebec 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*.

XIII. IMMIGRATION LAW

In the province of Quebec, jurisdiction over immigration is shared with the federal government. Quebec's immigration policy is governed by *An Act respecting immigration to Quebec* (Quebec Immigration Act).

The following discussion highlights key issues and requirements for work permits under the Quebec Immigration Act. For a discussion of the issues and requirements as they pertain to the federal context, please refer to Blakes *Doing Business in Canada* Guide.

13.1 TEMPORARY FOREIGN WORKERS

Quebec companies often wish to hire foreign workers with particular skills. Depending on the particular circumstances, this may be difficult in view of the provincial government's policy which provides that employment opportunities in Quebec belong first to residents of Quebec.

13.1.1 TEMPORARY WORK PERMIT - GENERAL REQUIREMENTS

The Quebec Immigration Act generally prohibits any person, other than a Quebec resident, from working in Quebec without first obtaining a certificate of acceptance for temporary work. A certification of acceptance will generally only be issued when the use of a foreign worker will not adversely affect employment opportunities for Quebecers. The foreign worker will also need to obtain a work permit from the federal authorities.

13.1.2 HOW DOES A COMPANY OBTAIN PERMISSION TO HIRE A FOREIGN WORKER?

Generally, an employer in Quebec who wishes to hire a foreign worker on a temporary basis must first obtain a positive or neutral confirmation or labour market opinion from Service Canada (formerly Human Resources and Skills Development Canada) and the *ministère de l'Immigration et des Communautés culturelles* (MICC) of the job offer in favour of the particular foreign worker. In order to approve the employment offer, HRSDC and MICC must be first 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 and the regional office of MICC 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 and MICC 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 and MICC are increasingly reluctant to confirm job offers in favour of foreign workers except in the clearest of cases.

13.1.3 ARE EMPLOYEES TO BE TRANSFERRED TO QUEBEC EXEMPT FROM SERVICE CANADA CONFIRMATION?

Certain persons may be granted a work permit for Quebec without first obtaining confirmation of the job offer from Service Canada and MICC. 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 of 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.

13.1.4 HAS NAFTA LIBERALIZED THE WORK PERMIT REQUIREMENT?

Under NAFTA, entered into by Canada, the United States and Mexico, 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 and MICC of their job offer from a Canadian employer.

13.1.5 ACCOMPANYING DEPENDANTS

The spouse and dependant children of a work permit holder are entitled to accompany the foreign worker to Quebec but are not permitted to work in Quebec 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 Quebec and may be required to first obtain a study permit from Canada Immigration.

13.2 PERMANENT RESIDENCE

A person wishing to settle permanently in Quebec must file an application for a selection certificate with the MICC. The application will be considered to determine whether the potential immigrant is qualified for admission to settle permanently in Quebec under the existing legislation, regulations and policy. If an applicant is accepted for immigration by Quebec, the applicant must then submit his or her file to the Canadian Embassy or Canadian Visa Office serving his/her country.

In general, a person who wishes to settle permanently in Quebec is considered under these categories:

- Family Class
- Economic Class (includes skilled workers, self-employed persons, entrepreneurs and investors)
- Distressed Persons Class.

13.2.1 FAMILY CLASS

A Canadian Citizen or permanent resident of Canada residing in Quebec, 18 years of age or older, may sponsor certain immediate family members such as spouses, common-law spouses, conjugal partners 16 years of age or older, parents, grandparents and dependent children (generally under the age of 22). Family class application receive the highest processing priority and qualifying applicants are exempt from the usual selection criteria.

13.2.2 ECONOMIC CLASS

Applicants in the independent category for Quebec include skilled workers and business people (investors, entrepreneurs and self-employed) who are expected to have the skills, education, work experience, language ability and other qualities needed to participate in the Quebec labour market. An application for Quebec residence as an independent applicant is generally assessed on selection criteria ("point system") and the applicant must obtain a passing score, and meet certain other requirements of the Quebec Immigration Act and regulations thereunder. Factors such as education and training, work experience, occupational demand, arranged employment, demographic factors (as set by the federal government), age, English and/or French language ability and other specific qualities of the prospective immigrant are assessed within the point system.

Applicants applying for immigration to Quebec as permanent workers must satisfy the prerequisites for one of the three immigration programs for immigrant workers, which includes the Assured Employment Program, the Occupations in Demand Program and the Employability and Occupational Mobility Program.

Applicants applying for immigration to Quebec in the Entrepreneur Program, Investor Program or the Self-Employed Worker Program must also satisfy certain eligibility and prerequisite requirements for one of these programs.

To qualify as an entrepreneur, the immigrant must:

- have, along with his or her spouse, where applicable, lawfully acquired net assets of at least C$300,000

- have at least two years of management experience (planning, supervision and control of human, physical and financial resources) acquired in a lawful and profitable business (agricultural, industrial or commercial)

- *either* submit a business plan to create or acquire a business in Quebec that he or she will manage himself or herself or as management and operations partner on a daily basis *or* acquire in Quebec at least 25% of the capital equity in a business with a value of at least C$100,000, which he or she will manage himself or herself or participate as management and operations partner on a daily basis

- satisfy the following conditions for at least one year in the three years after the entrepreneur becomes a permanent resident:

    - create or acquire a business established in Quebec where the entrepreneur holds at least 25% of the capital equity with a value of at least C$100,000

    - participate in the daily management and operation of the business

    - create the equivalent of at least one full-time equivalent job for a Quebec resident other than the entrepreneur and members of his or her family.

To qualify as an investor, the immigrant must:

- have minimum net assets of C$800,000 acquired through lawful economic activities

- have at least three years of management experience (planning, supervision and control of human, material and financial resources) in a profitable and lawful business (agricultural, industrial or commercial), in government or with an international agency

- undertake to invest a minimum of C$400,000, for five years, by signing an agreement with a financial intermediary: a stockbroker recognized by the *Autorité des marchés financiers* or a trust company. This amount will be invested with *Investissement Québec* or one of its subsidiaries to fund a program to assist small and medium-sized businesses in Quebec.

To qualify as a self-employed worker, the immigrant must:

- come to Quebec to create his or her own job by practicing a profession or trade for his or her own account

- possess lawfully acquired minimum net assets of C$100,000 along with his or her accompanying married or common-law spouse, where applicable

- have at least two years of experience as a self-employed worker in the profession or trade he or she plans to pursue in Quebec.

13.2.3 DISTRESSED PERSONS CLASS

Quebec has a stated commitment to uphold its humanitarian tradition with respect to the displaced and the persecuted. Regulations make provision for refugees and special groups whose admission is to be facilitated on humanitarian grounds.

XIV. RESTRUCTURING AND INSOLVENCY

Commercial insolvency proceedings in Quebec 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.

14.1 KEY INSOLVENCY STATUTES

There are three key insolvency statutes, two of which are federal as a result of the constitutional division of powers:

- The Canadian *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 Canadian *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 minimum debt threshold of only C$1,000.
- The *Civil Code of Québec* (CCQ). The CCQ governs the priorities, rights and obligations of secured or hypothecary creditors, including a secured creditor's right, following a default by the debtor, to enforce on its hypothec and dispose of assets subject to its hypothec (including on a going concern basis).

14.2 REORGANIZATIONS UNDER THE CCAA

14.2.1 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 crises" or is in the "proximity" of insolvency even if it 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.

14.2.2 HOW DOES A COMPANY COMMENCE PROCEEDINGS UNDER THE CCAA?

Proceedings under the CCAA are commenced by an initial application to a court of competent jurisdiction. Unlike the United States, Canada does not have a "Bankruptcy Court" separate from its superior courts. In Quebec, application would be brought before the Commercial Division of the Superior Court of Quebec. In virtually every instance, the application is made by the debtor company itself (creditors may initiate the process but this is very uncommon).

14.2.3 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 if 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.

14.2.4 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.

14.2.5 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.

14.2.6 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.

14.2.7 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.

14.2.8 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 the 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.

14.2.9 CAN THE DEBTOR VOID CERTAIN PRE-FILING TRANSACTIONS?

Unlike Chapter 11, the CCAA does not contain any provisions providing for the avoidance of the 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 14.3.1.6) 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.

14.2.10 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.

14.3 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).

14.3.1 BANKRUPTCY

14.3.1.1 HOW ARE BANKRUPTCY PROCEEDINGS COMMENCED?

The legal process of bankruptcy (generally analogous 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 by the debtor failing to file a proposal in due time; 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.

14.3.1.2 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.

14.3.1.3 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 disposition of any property of the bankrupt.

14.3.1.4 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 form of 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 cannot reach agreement.

14.3.1.5 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.

14.3.1.6 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 far 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.

14.3.1.7 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.

14.3.2 RECEIVERSHIPS

14.3.2.1 INTERIM RECEIVER

In a number of cases, "interim receivers" have been appointed by the court pursuant to the BIA. While the title suggests a temporary role, interim receivers are often given a mandate similar to an ordinary court-appointed receiver, i.e., to proceed to the sale of the debtor's assets. Interim receiver appointments are most commonly applied for in cases where the debtor has assets in several provinces as the court's authority to appoint an interim receiver under the BIA is effective across Canada. At the time of writing, a proposed amendment to the BIA not yet in effect would restrict the use of interim receivers to a more temporary basis.

14.3.2.2 HOW DO CREDITORS ASSERT THEIR CLAIMS IN A RECEIVERSHIP?

When an interim receiver is 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 an interim receiver that has been given power to sell the debtor's assets has realized on same, it will seek distribution of proceeds to creditors in accordance with their entitlements and priority, following court approval. If there are any excess funds, the receiver may seek the court's approval to assign the debtor into bankruptcy and have unsecured claims dealt with through bankruptcy proceedings (described below).

14.3.3 PRIORITIES IN LIQUIDATION

14.3.3.1 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.

14.3.3.2 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.

14.4 GOING CONCERN SALES

14.4.1 CAN INSOLVENT BUSINESSES BE SOLD AS A GOING CONCERN?

Although a going concern sale can be affected by a trustee in bankruptcy, 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.

14.4.2 RECEIVERSHIP SALES PROCESS

To sell a business on a going concern basis, a court-appointed interim receiver will request that the court approve a detailed marketing process for the assets of the company. The requirements 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 common place 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.

14.4.3 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. 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 controls the sales process, is the vendor and is the one requesting approval of a sales process and eventually the sale itself. Generally, the process is supported by the key stakeholders, who have a significant influence over the debtor's sales process. The debtor will also require the support of its monitor if the sales process and sales 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.

14.5 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

15.1 WHAT IS THE CANADIAN COURT SYSTEM LIKE?

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.

15.2 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.

15.3 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. In Quebec, prior to the trial, all parties to civil litigation are required to produce all documents relevant to the facts alleged in the proceedings. This rule differs from the one in Ontario, which requires production of all documents relevant to any matter in the proceedings. Documents are broadly defined and now include such things as e-mails, computer files, tape recordings or videos. The parties are entitled to examine one representative of an opposing party. Unlike the American system, Canada's rules do not provide for automatic rights of discovery of more than one person or of third parties. If a party wishes to examine more than one representative or third parties to an action, it needs leave of the courts to do so. Also, if the claim is less than C$25,000, no examination on discovery is permitted under Quebec law.

Quebec has recently introduced 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.

15.4 COSTS

The Quebec court system generally uses the loser pays principle of costs following litigation, which are established by tariff. The losing party must pay all costs, including the costs of the stenographer and experts, unless the court reduces or compensates them, or orders otherwise. As well, the court may reduce the costs relating to experts' appraisals requested by the parties, particularly if the court is of the opinion that there was no need for the appraisal, the costs are unreasonable or a single expert's appraisal would have been sufficient. The party that is entitled to costs prepares a bill thereof in accordance with the tariffs in force, and has it served upon the party who owes the costs with a notice of at least five days of the date when it will be presented for taxation before a court clerk. Also, in the case where a claim amounts to more than C$100,000 an additional fee of one per cent on the amount exceeding C$100,000 is payable under the tariff.

Contingency fees are permitted in Quebec subject to compliance with the *Bar Act* (Quebec) and professional conduct rules.

15.5 CLASS ACTIONS

A number of Canadian provinces and the Federal Court now have legislation or rules expressly permitting class actions. In addition, the Supreme Court of Canada has opened the door to class actions throughout the country, even where there is no express legislation. In a class action, a person or persons who are representative of the potential group take on the role of plaintiff, representing the interests of the group. It is also possible but rare for a representative defendant to defend the action on behalf of a group of defendants. Early in the litigation, the action must be certified or authorized by the Court as a class proceeding, otherwise, it will proceed as a regular action. Class actions are managed by one judge in most provinces. In Quebec, the case management judge will generally also be the trial judge if the action proceeds through to trial.

Plaintiff's counsel in Canada are increasingly bringing class actions in a number of areas, particularly product liability, *Competition Act* (anti-trust) and *Securities Act* matters, mass torts and consumer disputes. To date, very few class actions have proceeded through to trial and judgement. 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.

15.6 ALTERNATIVE DISPUTE RESOLUTION

Because of the expense and time consuming nature of litigation, there is a trend in Canada towards 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.

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.

OFFICE LOCATIONS

MONTRÉAL
600 de Maisonneuve Boulevard West
Suite 2200
Montréal, Quebec H3A 3J2

Telephone: 514-982-4000
Facsimile: 514-982-4099
E-mail: montreal@blakes.com

OTTAWA
45 O'Connor Street
Suite 2000, World Exchange Plaza
Ottawa, Ontario K1P 1A4

Telephone: 613-788-2200
Facsimile: 613-788-2247
E-mail: ottawa@blakes.com

TORONTO
199 Bay Street
Suite 2800, Commerce Court West
Toronto, Ontario M5L 1A9

Telephone: 416-863-2400
Facsimile: 416-863-2653
E-mail: toronto@blakes.com

CALGARY
855 - 2nd Street S.W.
Suite 3500, Bankers Hall East Tower
Calgary, Alberta T2P 4J8

Telephone: 403-260-9600
Facsimile: 403-260-9700
E-mail: calgary@blakes.com

VANCOUVER
595 Burrard Street, P.O. Box 49314
Suite 2600, Three Bentall Centre
Vancouver, British Columbia V7X 1L3

Telephone: 604-631-3300
Facsimile: 604-631-3309
E-mail: vancouver@blakes.com

NEW YORK
Blake, Cassels & Graydon (U.S.) LLP
126 East 56th Street, Suite 801, Tower 56
New York, NY 10022-3613

Telephone: 212-893-8200
Facsimile: 212-829-9500
E-mail: newyork@blakes.com

CHICAGO
Blake, Cassels & Graydon (U.S.) LLP
181 West Madison Street, Suite 3610
Chicago, Illinois 60602–4645

Telephone: 312-739-3610
Facsimile: 312-739-3611
E-mail: chicago@blakes.com

LONDON
23 College Hill, 5th Floor
London, England EC4R 2RP

Telephone: +44-20-7429-3550
Facsimile: +44-20-7429-3560
E-mail: london@blakes.com

BEIJING
7 Dong Sanhuan Zhonglu
Suite 901, Office Tower A, Beijing Fortune Plaza
Chaoyang District, Beijing 100020
People's Republic of China

Telephone: +86-10-6530-9010
Facsimile: +86-10-6530-9008
E-mail: beijing@blakes.com

www.blakes.com

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