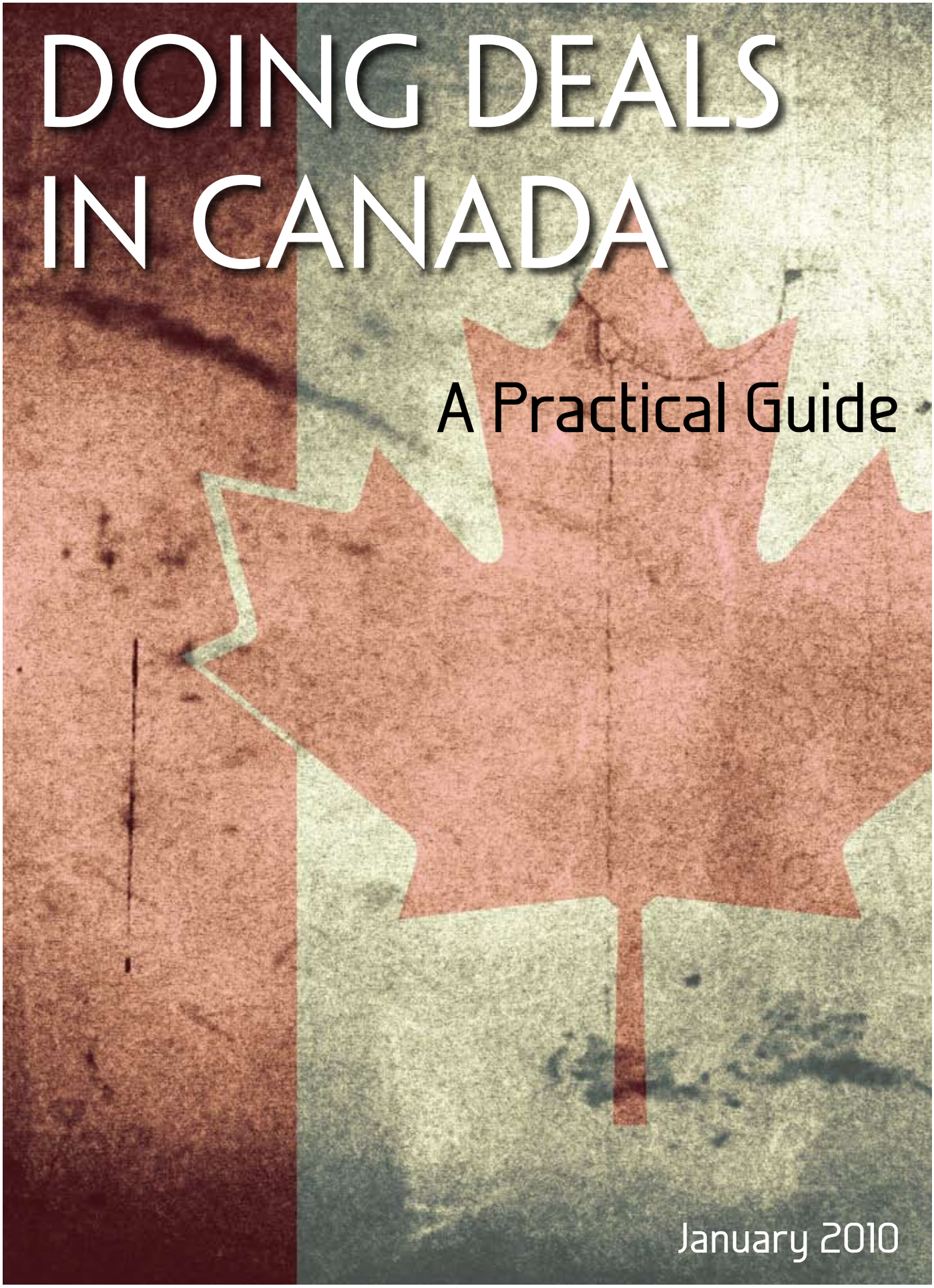
DOING DEALS IN CANADA

A Practical Guide



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1. INTRODUCTION

The progressive liberalization of international trade and investment over the past two decades has generated new opportunities to expand business activities across national borders.

Canada has been at the forefront of this initiative, both globally, through participation in the World Trade Organization, and bilaterally, through its participation in the North American Free Trade Agreement and bilateral free trade agreements with each of Costa Rica, Chile, Israel, South Korea, Columbia, Jordan, Peru and the European Free Trade Association. Details of the bilateral trade agreements that Canada is currently pursuing are summarized on page 13.6. In addition, Canada is a party to 23 bilateral investment treaties, the last of which was signed with Peru.

This overview of the Canadian business environment has been prepared to assist anyone who is considering establishing a business in Canada.

Capitalized terms or acronyms are defined in the glossary at the end of this publication.
All currency is in Canadian dollars, unless otherwise noted.

Although this publication contains detailed analysis of certain legal issues, it is not intended to, and cannot be relied upon, as legal advice. You should consult local counsel and not rely on any statement or conclusion appearing in this document.

Map of Canada

2. ABOUT CANADA

Who Makes the Laws in Canada?

Canada has a parliamentary system of government, in which the political party that elects the greatest number of members to the legislative body (federally, the House of Commons, and provincially, the Legislature) is invited to form the government of the day. The federal Prime Minister and the provincial Premiers (the respective heads of the provincial governments) are elected by members of the political parties they represent. In each case, the cabinet is composed of elected members, and in some cases at the federal level, members of the Senate. This contrasts with the US system, where the individual with the greatest number of supporters in the Electoral College is declared the President and is then entitled to form a government from both elected and non-elected individuals.

As in the US, Canada is a federation with a written constitutionally-based division of powers between the federal government and the provincial governments. Municipal governments derive their authority from the provincial governments.

Canada has two official languages, English and French, and all federal government services are available in both languages.

Federal Jurisdiction

The federal government has authority to make laws in areas of general interest to the country as a whole. For example, the federal government passes laws on income tax, banking, regulation of interprovincial and international trade, bankruptcy and insolvency, intellectual property, immigration, customs duties and crime.

Provincial Jurisdiction

Provincial governments have authority to make laws in many areas, including matters affecting real and personal property rights. For example, provincial governments pass laws relating to corporate securities, secured interests in personal property, the purchase and sale of interests in real estate, consumer protection, the incorporation of provincial companies, sales tax, insurance, the administration of the courts and enforcement of judgments.

Recently, Ontario enacted the *Legislation Act* which established the E-Laws website as an official source of Ontario law. As a result, anyone may access E-Laws (**www.e-laws.gov.on.ca**) and obtain an official version of either a statute or a regulation.

Regulations under all Ontario Acts are effective immediately upon publication on E-Laws. In addition, a regulation is effective against a person (which includes a corporation) before it is published on E-Laws or the Ontario Gazette if such person has actual notice of the regulation. This would seem to prevent such a person from taking steps to avoid or undermine the intended effect of a regulation before it is published in an official reporter. Previously, a regulation was not effective until it was published in the Ontario Gazette. This created the opportunity for mischief.

Finally, the *Legislation Act* only applies to instruments of a "legislative nature." In conformity with its predecessor, the Ontario *Interpretation Act*, the general rules of construction (number, gender, English and French version equality, the meaning of "holiday" and "mentally incompetent," and rules regarding the computation of time) encoded in the *Legislation Act*) apply to the meaning of those terms when used in legislative or regulatory enactments alone. The prescribed meanings do not apply to the same words or concepts when used in private contracts.

Municipal Jurisdiction

Municipal governments have authority to make laws that are local in nature. For example, municipal governments pass laws relating to licensing requirements for conducting business within the municipality and zoning requirements affecting the use of land within the municipality.

Overlapping Jurisdictions

This three-tiered system often creates situations where overlapping levels of government regulation may address a single issue. For example, all three levels of government have enacted, subject to constitutional limitations, legislation, regulations or directives intended to protect the natural environment and to impose responsibility for the cost of cleaning up environmental damage. As well, the federal government and each of the provinces have a Business Corporations Act.

Obviously, it is important to be aware of changes in the laws at each of the federal, provincial and municipal levels.

What is Canada's Legal System?

All provinces except Québec have a legal system based on the English common law tradition. Québec has a civil law legal system based on the Napoleonic Code. In a sense, this gives Canadian lawyers an advantage in that they are likely to be familiar with the underlying concepts of each of the two systems and can help bridge conflicts that arise in international transactions where both civil and common law legal systems play a role.

The Common Law

In Canada, there are many rules affecting the rights of parties conducting business in Canada. These rules derive from the judgments made every day in the courts of Canada. They form part of the law and are separate from statutes, regulations, by-laws and directives (the legislative enactments of governments). Over time, they are generally embodied in the practices observed by everyone, and are referred to as the common law.

The Québec Civil Code

The province of Québec has enacted a Civil Code containing written rules that govern such matters as the law of commerce in the province. Québec courts then interpret the Civil Code on a case-by-case basis.

Evolution of the Legal System

Business in Canada operates through the interplay of a number of components:

Commercial Practice

In contracts and commercial transactions, such things as product innovation and changes in marketing approaches often produce changes in business practice. This has an impact on the form of agreements adopted by contracting parties.

The Common Law

The common law often evolves more slowly than does commercial practice. Courts tend to examine each commercial arrangement in relation to accepted and understood concepts and principles embodied in the existing common law and statutes. Sometimes, however, legal concepts are subject to unforeseen changes caused by unexpected judicial interpretations. This may arise as a result of unusual facts in a particular matter before the court. Because of costs, such decisions often are not appealed to higher courts for review. This can lead to some apparently conflicting decisions, exacerbated by the reluctance of courts to consider and issue rulings based on hypothetical fact situations. The rationale for the foregoing is that the common law is advanced by parties litigating real issues with real consequences. This brings relevance to decisions that might otherwise be absent.

The Charter of Rights and Freedoms

The federal *Constitution Act* was amended in 1982 to incorporate the *Charter of Rights and Freedoms* that imposes limitations on federal and provincial authorities in exercising their powers. No legislative action (including all legislation and regulations) or administrative proceeding (rulings) may be exercised by either Parliament or a provincial Legislature in a manner that would adversely affect the freedom of expression and association of individuals, certain rights of individuals with respect to the enforcement of laws and regulations and the equality of individuals under Canadian law. By far the greatest number of cases reported in Canadian law journals in the last 20 years deal with Charter issues.

Statutes, Regulations, By-laws and Directives

These legislative initiatives may be enacted by any of the three levels of government. Enacted statutes, regulations and directives will remain relatively unchanged over long periods of time. This creates a stable environment for business, but does not prevent the enactment of new laws at the discretion of the government. Apart from the statutes themselves, the manner in which they are enforced obviously has an important effect on those who are subject to the legislation. Generally, there is a great deal of discretion in the hands of public servants, although the courts have exhibited an ever-broadening appetite to review the manner in which legislative enactments are applied, to ensure that the discretion exercised by government officials and administrative bodies is transparent, fair, reasonable and within the intent of the legislative body that granted the discretion. Over the last four years, lobbyist legislation has been enacted by the federal government and the City of Toronto.

How Are Disputes Resolved in Canada's Legal System?

In Canada, there is a comprehensive court system for resolving commercial disputes. The judiciary system is fully independent from all levels of government and is comprised of federal and provincial courts. Judges of the courts in Canada are not elected, but are appointed for life (subject to removal for cause and certain age restrictions) by the government of the day. In addition to the court system, there are specialized independent tribunals which resolve disputes, including employment and municipal matters. In almost all cases, appeals are allowed from final decisions of courts or tribunals. For information regarding class action proceedings in Canada, see the commentary under **Chapter 19: Are Class Actions a Risk for Business in Canada?**

Outside the court system, disputes can be adjudicated through arbitration if the parties have agreed to do so. In arbitrations, the decision-maker is not a judge, but rather an independent person agreed upon by the parties or appointed by a judge. Each province has legislation that governs the arbitration process, if selected by the parties in their contract or otherwise.

British Columbia, Saskatchewan, Ontario, Newfoundland & Labrador and Nunavut have passed legislation adopting the *United Nations Commission on International Trade Law's Model Act* for use by parties to a commercial dispute where the parties to the arbitration have their places of business either in a non-Canadian state or a Canadian province or territory. Each of these provincial Acts will come into effect once the *UN Convention on the Settlement of Investment Disputes* ("ICSID") has been ratified by Canada. Bill C-9 received Royal Assent on March 13, 2008, but the federal government has not, as yet, indicated when it intends to ratify ICSID. It is thought that by becoming a ratified party to ICSID will encourage reciprocal international investment, by both providing additional protections and arbitration options to Canadian investors abroad and to foreign investments in Canada.

Once ICSID is in effect, where a Canadian investor in a foreign state which itself has ratified ICSID has a dispute, the governing contract can provide that disputes will be settled by way of arbitration under ICSID. In such cases, or in disputes with foreign governments under free trade agreements or bilateral trade agreements to which Canada is a party, there is no right of appeal of the ICSID award to the courts. The ICSID arbitration decision will final, apart from appeal to the ICSID Secretary-General in five narrowly described circumstances (such as corruption of a member of the Tribunal, serious departure from procedure or failure to provide reasons). Party states are bound to recognize the award and enforce it as if it were a final judgement of a national court of the state. Three South American countries (Venezuela, Bolivia and Ecuador) have recently withdrawn from ICSID certification as a result of concerns regarding possible disputes which may arise out of the nationalization by each of certain natural resource properties and foreign-controlled businesses.

Finally, parties are, of course, free to select the ICC-International Court of Arbitration in London as the court with jurisdiction to determine disputes; this choice will generally be given effect by courts in Canada.

What Do Canada's Current Economic Indicators Disclose?

In a March 2008 survey, KPMG ranked Canada second only to Mexico as the most cost-efficient place to do business in the countries surveyed. In a second survey of 82 countries conducted by the Economist Intelligence Unit, Canada was ranked fourth in the world in

economic prospects over the next five years. Factors considered included the political and economic environment in the countries, taxes, labour, market potential and trade and investment policies.

Between 1997 and 2008, the Canadian federal government consistently maintained budget surpluses. During 2008 and 2009, the federal government has since incurred significant deficits as a result of its attempts to stimulate economic growth in the face of the current recession triggered by the global banking crisis. The federal government estimates that its fiscal 2009–2010 deficit will be approximately $34 billion. The deficit principally arises from federal government spending on infrastructure projects under the *Economic Recovery Act* (Canada), monies advanced to support the restructuring of the North American automotive industry and employment insurance payments.

The Chrysler and General Motors restructurings in July 2009 involved over US$12.5 billion of new Canadian government financing. Chrysler and General Motors are watershed cross-border restructurings for a host of reasons, including:

- The extent of the close US and Canadian governmental cooperation in the debtor-in-possession ("DIP") and acquisition financing of the restructurings and throughout the course of the US Chapter 11 proceedings and the post-restructuring phases. Of fundamental importance to Canada was ensuring the sustainable viability of the Canadian operations, the maintenance of Canadian production, commitments to research and development in Canada and related capital spending programs, the cultivation of enhanced relationships with Canadian Universities and Colleges and the protection of Canadian suppliers.
- The coordination of the complex Chapter 11 proceedings without the need for parallel proceedings in Canada.
- Co-operation between the Canadian federal government and the Province of Ontario on matters involving the overlap of federal and provincial jurisdictions.
- The speed of the restructurings, which saw both General Motors and Chrysler reorganize and emerge from Chapter 11 in less than 45 days, including the closing of the US Bankruptcy Code section 363 sale transactions for both Chrysler and General Motors, combined with the challenges presented by General Motors and Chrysler's highly-integrated cross-border manufacturing operations and avoiding some of the negative impact of the bankruptcy proceedings on the sale of General Motors and Chrysler products.
- Governmental participation in the equity ownership of both the restructured Chrysler and General Motors.

General Motors has predicted that it will repay its debts to Canada and the US by the end of July, 2010.

The commercial bank prime rate at the end of December 2009 was 2.25%, down by 2.50% since September 2008. The Bank of Canada overnight lending rates charged to commercial banks in September 2009 was 0.5%, down by 2.75% since September 2008 as a result of action taken by the Bank of Canada to stabilize Canadian capital markets and counter the adverse effect of the American subprime residential mortgage crisis and excess lending and borrowing in the commercial real estate and private equity markets.

Inflation in Canada for the 12 months ended on December 31, 2009 was 1.3%.

Canada's unemployment rate at the end of December 2009 was 8.4%, up by nearly 2.5% in the last year. The Ontario manufacturing sector has been hardest hit as a result of the continued uncertainty in, and the decline in demand from, the US consumer markets.

Over 80% of Canadian exports are made to the US. The slowdown in the US economy during the last two years has led to a decline in the rate of growth of the Canadian economy. The trend had been reversed during early 2008 with the surge in commodity prices, including oil, gas, copper, coal and gold. Real Canadian gross domestic product increased by 0.4% during the month of November 2009 following growth in each of September and October. The foregoing marked the end of a nine-month recession in Canada.

Most Canadian manufacturers anticipate continuing declines in shipments. Canadian governments have recently been criticized for their focus on redistribution of wealth among the provinces instead of looking for ways to: (i) reduce interprovincial barriers to trade; (ii) encourage excellence, innovation and wealth creation; and (iii) fund major cities (usually cited as key economic engines for any economy). The latter issue may have been addressed as a result of the federal government's stimulus package which has made billions of dollars in funds available for infrastructure projects throughout Canada.

Significant uncertainty exists as to the effect of the loss of liquidity in several financial capital markets arising out of America's subprime residential mortgage lending problems and excess lending and borrowing in certain capital markets, and the resulting increase in the cost of capital. In Canada, the demand for short-term non-bank asset-based commercial paper collapsed when buyers lost confidence as a result of what they perceived as inadequate financial backing for these securities and buyers then failed to take up the usual volume of commercial paper as it matured in mid-August 2007. The Bank of Canada made significant funds available in the overnight bank market to maintain interest rates at levels prior to that time and to curb the threat of inflation. Under an arrangement referred to as the Montréal Accord, the holders of the defaulted commercial paper agreed to continue to hold the paper and not exercise their remedies. On March 17, 2008, an application was made to the courts in Ontario pursuant to the federal *Companies' Creditors Arrangement Act* (the "CCAA"), and an order was issued which stays all legal proceedings regarding the trusts that issued the asset back commercial paper. The work out plan had to have been approved by 50% of the issuers' creditors plus one. The plan was approved in late April 2008. On January 12, 2009 the Court issued a final order, permitting the restructuring to close. The foregoing, together with the capital market disruptions, will likely result in a significant increase in the cost of capital for Canadian business enterprises. It will be difficult for some domestic enterprises to borrow, given the reluctance by commercial banks to continue certain of their prior lending practices.

The anticipated continued rise of consumer demand in India and China may put pressure on production costs and prices for Canadian business, especially when coupled with the increase in the value of the Canadian dollar in relation to the US dollar.

What is the GST and How Does It Affect Business?

The federal goods and services tax ("GST") is a broad-based value-added tax of 5% imposed on certain goods sold or rented and services provided. The GST is imposed at the point of supply in Canada.

GST is applied, collected and remitted at each transaction level. However, a business is only required to remit to the tax authorities the amount of GST that is in excess of the GST that it has collected (or ought to have collected) over the GST that it has paid on its own purchases and expenses. Accordingly, in most cases, businesses can recover GST paid or payable on goods and services that were acquired in the course of their commercial activities by claiming input tax credits. Businesses that provide exempt supplies are not able to claim any such input tax credits. As a result, the GST does not generally represent an operating cost to a business. Rather, the cost of the GST is paid by the end user of the product or service. The principal cost of the GST for businesses arises from the reporting and compliance requirements.

Subject to certain conditions, the GST does not apply to exported goods. Therefore, it does not impose an additional cost for goods manufactured in Canada and exported.

What Can Business Expect From the Current Governments in Ontario, in Toronto and in Canada?

In October 2007, the Ontario Liberal Party was re-elected for a further four years in a provincial election. Since taking office, because of a current budgetary deficit of $6 billion, the Ontario Liberals eliminated the then existing limit on consumer electricity prices, and cancelled reductions in corporate and personal provincial income taxes. In addition, the government increased the general minimum wage to $9.50 effective March 31, 2009 and a target of $10.25 on March 31, 2010.

In a general election held in Canada in October 2008, a Conservative minority was re-elected. The federal Conservative government, headed by Prime Minister Stephen Harper, has improved relations between Canada and the United States, enhanced government transparency, strengthened law enforcement and reduced the GST from 7% to 5%.

In January 2009, the minority federal government introduced a budget which includes an expansion of the federal government's existing insured mortgage program by $50 billion, the purchase by the government from federally regulated financial institutions of $12 billion in asset-backed commercial paper intended principally to support the automobile leasing market, $13 billion in new funds available through the Business Development Bank of Canada and the Export Development Bank and an increase in individual loan limits under the Canadian Small Business Financing Program from $250,000 to $350,000.

What Was New on January 1, 2010?

- As a result of the Fifth Protocol to the Canada-US Tax Convention (the "Convention") benefits under the Convention are denied in respect of certain hybrid entities. In particular, benefits will be denied in respect of dividends, royalties and interest paid by a Canadian unlimited liability company ("ULC") which is fiscally transparent for US tax purpose. This change is effective as of January 1, 2010 to its US parent (see "ULCs after the Fifth Protocol" on page 3.15 and "Hybrid Entities" on page 4.4).
- To be in a position to provide prior-year comparative figures in 2011 for IFRS purposes, PAEs will have to have appropriate data beginning on January 1, 2010 (see "When Will International Financial Reporting Standards Apply to Canadian Publicly Accountable Enterprises?" on page 3.32).

- As of January 1, 2010, the *Motor Vehicle Dealers Act, 2002* (Ontario) came into force. It is consumer protection legislation for what was prior to 2010, an unregulated industry. The said Act includes a code of ethics which imposes broad disclosure obligations on motor vehicle dealers. The Code includes detailed advertising standards. Consumers have a right, exercisable within 90 days of delivery of the motor vehicle to the consumer, to rescind a purchase agreement where the required disclosure has not been made by the dealer (see "Motor Vehicles" on page 6.15).

How Does "Canada" Rank as a Brand?

In a recent survey by Future Brand, a New York consulting firm, Canada has the second best country brand in the world, behind that of Australia, based on criteria such as natural beauty, beaches, environmentalism and the friendliness of residents, up from 12th place two years ago. Those of the 2,700 surveyed who responded ranked Canada as the easiest to visit with their families and the easiest place to do business.

Vancouver is hosting the winter Olympic Games in February 2010 and Toronto, which has not hosted an international sporting event since 1930, has been selected as the host for the 2015 Pan American Games. With a budget of $1.4 billion, the Pan American Games will result in a significant investment in infrastructure projects throughout the region and an upgrading of existing athletic facilities. The anticipated economic benefit to the region is $2 billion.

Is This a Good Time to Start a Business in Canada?

This remains a good time to start a business in Canada. Canada has a well-educated, highly skilled work force, and is particularly attractive for white-collar, high-technology businesses. Canada also has reasonably priced office accommodation, industrial premises and undeveloped land available. Canada has an abundance of natural resources and extensive telecommunication and transportation infrastructure including highways, railways, sea ports, the St. Lawrence Seaway and the Great Lakes system of canals. Canadian cities are known as being safe and liveable and Canada is fortunate to have an abundant supply of clean, accessible water. Finally, Canadian business practices and legislative developments generally follow those in the US, giving business an advantage in anticipating business and legislative trends in the Canadian market.

3. FORMS OF BUSINESS ORGANIZATION USED IN CANADA

Tax considerations are important in the selection of the form of business organization to be used in Canada. Refer to **Chapter 4: Taxation** of this publication for answers to general questions about income tax, GST, HST and other forms of direct and indirect taxation in Canada. This chapter describes the forms of business organization used in Canada.

Branch Plant Operation

A corporation incorporated outside Canada (a foreign corporation) can establish a business in Canada by registering in the province in which it conducts business as an extra-provincial corporation. There are several considerations to bear in mind. Note that there are two different legal concepts implied by the term "carrying on business." The issue addressed in this chapter is whether or not an entity is carrying on business in a province, requiring that entity to seek and obtain an extra-provincial licence under the applicable Extra-Provincial Corporations Act/Corporations Act or a provincial registration number. The term used from a taxation perspective under the Tax Act is whether or not the entity carries on business in Canada requiring it to file tax returns, and has a permanent establishment under the Convention, requiring it to pay tax on income earned in Canada.

Business Name

Before a province will issue an extra-provincial licence or a provincial registration number, it requires some evidence that the name of the applicant foreign corporation is not so similar to an existing business name used in the province as to be confusing to the public. A search is undertaken on all corporate names used in the province, all business trade styles registered with the provincial government and all trade-marks registered with the federal government. A corporation's use of a name that could be confused with the name of another entity exposes the corporation to a potential civil action, commonly referred to as a passing-off action. In such an action, a court can require the corporation to pay a portion of its profits to the complainant with a similar name and to cease and desist from using the name thereafter.

If the applicant's corporate name is not available for use in the province, the province may still issue the licence or a provincial registration number but prohibit the applicant from carrying on business in the province under that name. It can, however, conduct business under a trade name selected by the applicant and available for use in the province. A separate extra-provincial licence or a provincial registration number is required for each province in which the foreign corporation carries on business. In contrast, Ontario does not require any corporation incorporated anywhere else in Canada to hold an extra-provincial licence or a provincial registration number. Any such corporation can carry on business in Québec or Ontario as of right. A corporation incorporated in either Nova Scotia or New Brunswick may carry on business in the other of the two provinces without registration and a corporation incorporated in either of the provinces of Alberta or British Columbia may arrange for registration in the other province through its home jurisdictions corporate registry. In the province of Québec, any registrant whose name is in a language other than French must include a French version of its name in its registration.

Effect of Failure to Register

The critical determination is whether the foreign corporation will, in fact, be carrying on business in the province. The criteria may differ from province to province. However, for all practical purposes, once a corporation incorporated outside the province in question (a foreign corporation) employs a person who lives in the province in question, or leases or purchases real property and opens a business office, or takes out a telephone number or listing in a local telephone directory, in all likelihood that foreign corporation will be found to be carrying on business in the province.

In Nova Scotia, the *Corporations Registration Act* deems a company to be carrying on business if it is acting through an agent (as opposed to an employee) and explicitly provides that a physical presence is not necessary in the province to be carrying on business. Some of the Canadian provinces, including Ontario, Newfoundland and Labrador, New Brunswick and British Columbia, deem a corporation to be carrying on business in the province in certain circumstances such as solicitation of business in the province, or being named in any advertisement which includes reference to an address in such province. In Newfoundland and Labrador, New Brunswick, Québec and Ontario, a foreign corporation that fails to register where it is carrying on business in the province will not be permitted to maintain an action or any other proceeding in any court or tribunal in such province until the registration is made. Fines up to $20,000 can also be imposed by Ontario. The penalty in Nova Scotia is $50 per day of business carried on without registration and a fine of $50 per day payable by directors and employees of the business who, with notice the business is not registered to do business, transaction business in Nova Scotia. The fine in New Brunswick is up to $2,620 per day, and in Québec is up to $4,000 per day. The penalty in British Columbia is $100 per day that the foreign company continues to carry on business without being registered.

Attorney for Service

A foreign corporation seeking to register in a province as an extra-provincial corporation must designate a person resident in that province to accept service of legal documents. Service on the agent amounts to service of the document in question on the foreign corporation. Often, the foreign corporation will designate an employee at its office in the province as its agent for service. Local legal counsel can also provide this service.

Limited Liability Companies — Uneven Provincial Treatment

Depending on the province in question, it may be easier (or harder) to conduct business in Canada through a Limited Liability Company (a "LLC") than through other forms of business enterprise. Ontario, for example, only requires that a LLC make a business name filing under the *Business Names Act*. No computerized name search, no licence application or review by a public servant, no waiting, and no requirement for a local agent for service. In contrast, Alberta requires a special opinion from counsel in the incorporating jurisdiction, a prescribed form officer's certificate, a computerized name search, a licence application that is subject to review and a resident agent for service. Other provinces treat LLCs as they would any other foreign enterprise applying for extra-provincial registration, that is, the Alberta approach without a requirement for the foreign counsel opinion and certificate.

Foreign Corporations as Limited Partners of an Ontario Limited Partnership or a Foreign Limited Partnership Registered in Ontario as an Extra-Provincial Limited Partnership

As described in more detail under the heading "Limited Partnership" on page 3.23, Ontario's *Corporations Tax Act* deems each foreign corporate limited partner of a partnership as having a permanent establishment in Ontario if such partnership — if it were a corporation would be treated under the laws of Ontario as having a permanent establishment in Ontario — and so may obligate each such corporation to register as an extra-provincial corporation in Ontario, to file returns and to pay tax on income earned by it in Ontario.

In New Brunswick a corporate limited or general partner of a limited partnership is not deemed to be carrying on business in New Brunswick merely by virtue of its status as a partner of a limited partnership.

The advantages of using a branch plant to establish a business in Canada include:

- **Favourable tax treatment** — Losses commonly experienced in start-up branch operations can be written off against profits from the foreign corporation's other operations.
- **Minimal set-up costs** — No new legal entity needs to be created; the only requirement is to obtain an extra-provincial licence, as discussed below.

The disadvantages of using a branch plant to establish a business in Canada include:

- **Transfer pricing risks** — It may be difficult to isolate income earned in Canada. Cross-border transfer pricing may attract the attention of tax authorities in jurisdictions where the foreign corporation carries on business, especially in the location where it has its principal business operations.
- **Financial disclosure** — The foreign corporation is obligated to file its financial statements with its Canadian tax return. Financial statements consolidating more than one corporation are not acceptable for Canadian filing purposes.
- **Compliance with Canadian laws** — The foreign corporation will be subject to Canadian provincial and federal laws. For example, a fine or assessment representing the cost of cleaning up a contaminated work site might be satisfied by seizure of assets held outside Canada if a Canadian judgment is recognized there. One strategy to mitigate this possible exposure is to incorporate a wholly-owned subsidiary in the foreign corporation's home jurisdiction and have it register as an extra-provincial corporation in those provinces in which it carries on business, although doing so might defeat the favourable tax treatment regarding start-up costs described above.
- **Ineligibility for government funding** — Foreign corporations may not qualify for certain Canadian federal and provincial assistance programs.
- **Security for costs** — In court proceedings, a party contrary in interest to the foreign corporation may successfully apply for an order that the foreign corporation post security for costs with the court.
- **Computation of Income** — The determination of income for Canadian tax purposes can be difficult because of uncertainty as to an appropriate allocation of income and expense and the deductibility of allocated expenses.

Sole Proprietorship

Any person may carry on business in Canada under their own names or business styles, subject to compliance with the requirements of the federal *Immigration and Refugee Protection Act* and registration of the business trade styles or names in the provinces in which they propose to conduct business. The considerations relating to "corporate name" described above apply in these circumstances.

Canadian Corporation with Share Capital

There are 13 alternative Canadian statutes (10 provincial, two territorial and one federal) under which a person may incorporate a corporation with share capital in Canada. This contrasts with the US, where it is not possible to incorporate federally. Below is a detailed comparison of the Ontario legislation (the *Business Corporations Act* (the "OBCA")) and the federal legislation (the *Canada Business Corporations Act* (the "CBCA")).

The Requirement for Canadian Resident Directors

Subject to the exceptions described below, resident Canadians must comprise only 25% of the directors for CBCA corporations. A "resident Canadian" is defined as:

- A Canadian citizen ordinarily resident in Canada;
- A Canadian citizen who is not ordinarily resident in Canada but who falls into certain specified classes (e.g., a person who is a full-time employee of a Canadian controlled corporation); *or*
- A landed immigrant ordinarily resident in Canada. A landed immigrant is a person who has successfully sought lawful permission to establish permanent residence in Canada.

In the case of a landed immigrant, to remain qualified as a resident Canadian for the purposes of the CBCA, the landed immigrant must have made application for Canadian citizenship within one year of being entitled to do so. This is not a requirement for directors of an OBCA corporation.

At least 25% of the directors of each of an Ontario (OBCA) corporation, an Alberta (ABCA) corporation or a Saskatchewan (SBCA) corporation must be resident Canadians, provided only that where a corporation has less than four directors, at least one such director must be a resident Canadian. The former OBCA minimum residency requirement for a quorum of a meeting of the board of directors for transacting business has been eliminated.

Where the residency requirement for directors is a concern to you, you can incorporate under the New Brunswick *Business Corporations Act* (the "NBBCA"), which has no director residency requirements. The same applies to corporations incorporated under the Nova Scotia *Companies Act* (the "NS Companies Act"), the Québec *Companies Act* and the British Columbia *Business Corporations Act* (the "BCBCA").

Unanimous Shareholder Agreements

One approach to satisfying residency requirements is for the shareholders of the corporation to enter into a unanimous shareholder agreement (a "USA") under which all, or part, of the directors' duties and responsibilities are assumed by the shareholders. The corporation would then engage a qualified Canadian resident nominee as the sole director of the corporation. Directors (whether or not they are nominee directors) will usually require a written indemnity (including a right to advancement of monies on an as required basis to fund the cost of the nominee to defend any claim or proceeding arising from having acted as a director or office) from the corporation (or its parent company) as well as appropriate directors' and officers' liability ("D&O") insurance coverage. Only a portion of the costs incurred in negotiating and settling a shareholder agreement will be a deductible expense of the corporation for tax purposes.

> Although the use of a USA as outlined above is effective to avoid, for example, the CBCA and OBCA director residency requirements, this procedure exposes the shareholder to all the obligations of a director associated with the director powers assumed by the shareholder. If the shareholder has "deep pockets," the shareholder could find itself subject to claims it might have been protected against, but for having entered into the USA. The foregoing is counterbalanced by: (i) indemnity payments the corporation may have made to directors and officers had they been the subject of claims; and (ii) it is likely that the shareholder would not be entitled to receive payments under D&O insurance policies for insurance payments otherwise available in respect of claims against directors and officers. The CBCA and OBCA give shareholders to a USA the same defences that are available at law to directors to the extent that the USA restricts the powers of the directors to manage or supervise the management of the business and affairs of the corporation. Finally, it may be that by entering into a USA a corporate shareholder would then be subject to the fiduciary duties imposed on directors to act in good faith in the interests of the corporation. Absent a USA, shareholders have no such duty.

A USA may be used to sort out management issues by temporarily suspending the powers of directors and officers.

The use of a USA summarized above applies equally to CBCA and provincial Business Corporation Act corporations. As noted below, it may be an advantage to incorporate federally rather than provincially if it is anticipated that a legal opinion will be required at some point, for example, on a financing or a business purchase and sale transaction.

Incorporation under the CBCA

An applicant must submit a name proposed for use in Canada to a computerized name search service. In addition, the applicant should conduct a name search on the Québec register of companies because the Canada database does not include Québec corporate names. If the public servant reviewing the search concludes that the name is not available because, for example, it is too generic or too similar to an existing corporate name, business trade style or trade-mark used in any of the provinces, then the application will be denied.

If a proposed name is cleared, articles of incorporation are filed, along with specified initial notice forms. The government fee for filing articles of incorporation for a federal corporation is currently $200 for an electronic filing and $250 for a paper filing, plus legal fees and disbursements.

A CBCA corporation may, as of right, register as an extra-provincial corporation in each province where it carries on business and, in all cases other than Ontario and Québec, take out and maintain an extra-provincial licence. No licence is required by either Ontario or Québec for CBCA corporations. For each of the other provinces in Canada, CBCA corporations must go through the name search procedure for each province in which they conduct business and are required to hold extra-provincial licences. Since the CBCA name search includes all names in all provinces (except Québec), a newly incorporated federal company would not likely find its name refused by any province, provided the provincial name search and licence application is done within a relatively short period of time following its incorporation.

The CBCA requires the filing of a notice of each change of directors and a notice of change in the corporation's registered office when they occur.

Incorporation under the OBCA

As in the case of the federal regime, a name search is required. Ontario name searches are conducted on the same database as for a federal incorporation. However, in Ontario, responsibility for ensuring that the proposed name is not confusing with other names rests with the applicant or its agent, and not with a public servant. Unless the name is identical, Ontario will not refuse to issue the requested articles of incorporation on the basis of the name search report. However, the Director under the OBCA has the power, after giving the corporation an opportunity to be heard, to issue a certificate of amendment changing a corporation's name where the name offends a provision of the OBCA.

The fee for filing articles of incorporation for an Ontario corporation is currently $360 plus legal fees and disbursements. In Ontario, articles can only be filed electronically.

An Ontario corporation must apply for an extra-provincial licence in each province in which it carries on business, other than the province of Québec. Ontario and Québec have a reciprocal arrangement under which corporations incorporated under their respective Business Corporations Acts are free to conduct business in the other province without the need for registration. As a result, a corporation qualified to do business in either Ontario or Québec has access to Canada's two largest markets: Toronto and Montréal.

Ontario law requires the electronic filing of an information return for all corporations carrying on business in Ontario, regardless of the legislation under which it is incorporated: (i) annually with the corporation's provincial tax return; and (ii) whenever there is a change in directors or officers or a change in the registered office of the corporation. There is no disclosure of the names of the corporation's shareholders in any publicly filed return, save as set out below under the heading "*Corporations Returns Act*" on page 3.16.

Except for corporations that are reporting issuers (see **Chapter 11: Regulation of Trading in Securities**) and corporations which come within the purview for reporting under the federal *Corporations Returns Act*, there is no obligation to file financial statements as part of any public record.

Effective August 1, 2007, the OBCA was amended to bring its provisions more in line with those of the CBCA. Changes to the OBCA included: the right to create classes of shares with

identical share conditions (this change is intended to avoid the existing common law treatment of different classes of shares with identical attributes as only one class of shares); other changes to facilitate re-organizations of the share capital of OBCA corporations; procedures to be followed by directors in making disclosure of conflicts of interest (directors cannot attend that part of a meeting at which the matter in conflict is discussed — the non-conflicted directors are deemed to constitute a quorum to the extent the conflicted directors would otherwise be required for quorum purposes — the CBCA does not require that directors be excluded from such discussions); as noted above, those persons who assume the management and supervision rights of the directors under the terms of a USA are entitled to defences available to directors under the OBCA; confirmation that OBCA directors only owe a fiduciary duty to the corporation and not to any stakeholders, including shareholders and creditors; implementation of the due diligence defence for directors for statutory claims against them; and extension of director and officer indemnification beyond the corporation itself to entities in respect of which the corporation has management rights.

OBCA corporations may now fund the defence costs incurred by indemnified officers, directors and employees on an ongoing basis prior to a final determination of the proceeding giving rise to indemnity claims, subject to a right to repayment if indemnity is ultimately found to be beyond the obligations of the corporation to the indemnified person or where the person is disentitled to indemnification as a result of the director having been found not to have acted honestly and in good faith with a view to the best interests of the corporation in respect of the matter in question, or, where the matter involves a criminal or administrative action or proceeding that is enforced by a monetary penalty, where the director or officer is found not to have had reasonable grounds for believing that his/her conduct was lawful.

> If your corporation was incorporated under the OBCA prior to June, 2007, you should review and revise your general by-law. A provision of the by-law will authorize indemnification of directors and officers, but it is likely to be more narrowly framed than is now permitted by law. You should also review your D&O insurance coverage and any directors indemnification agreements or employment agreements with any director or officer.

If the corporation in question is incorporated in one province and conducts business in another province, opinions from lawyers entitled to practice in each jurisdiction may be required. If, however, the corporation is a CBCA corporation, that is, it is federally incorporated, a lawyer in any province would be in a position to give most (if not all) of the necessary opinions.

> Each of the Canadian provinces and territories has entered into an agreement with the others (referred to as the Mobility Agreement) to the effect that in certain limited circumstances, a lawyer called in one such jurisdiction may opine to a matter governed by the laws of another jurisdiction where she/he has not been called to the bar. There may be legal issues such as the obligation to register as an extra-territorial corporation or limited partnership where a firm in one province would be in a position to opine as to compliance by a corporation or by a limited partnership for each Canadian jurisdictions, including Québec, without requiring opinions addressed to it from agents in any of the other jurisdictions. For example, this might result in significant cost savings for a corporation or limited partnership where it is making an initial public offering of securities, especially in that four provinces, Saskatchewan, Ontario, New Brunswick and Prince Edward Island, each of which deem a foreign limited partnership to be

conducting business in the province where the foreign limited partnership is effecting a primary distribution of securities to the public in such province.

With the advent of online filing, there is no material difference between incorporating under the CBCA and the OBCA insofar as cost or convenience of filing are concerned. On balance, given the choice between incorporating under the CBCA or the OBCA, our preference would be the CBCA in those cases in which there are only two shareholders. For OBCA corporations with a board consisting of three or fewer directors, if one of the directors refuses to attend meetings, the other board will be prevented from passing required corporate resolutions because of the manner in which the term "quorum" for directors' meeting purposes in these circumstances is defined in the OBCA. CBCA corporations do not face this possible roadblock. If it is anticipated that the corporation will conduct business in more than one province, a CBCA corporation cannot be denied extra-provincial registration; a provincially incorporated corporation could be denied an extra-provincial licence. The name clearance procedures required for incorporation include Canada-wide name conflict searches (apart from Québec), more or less ensuring that the name will be available for registration in any province where registration is required, if done at or shortly following the date of incorporation.

Nova Scotia companies are incorporated through the filing of a memorandum and articles of association. The memorandum of association has similar information to the CBCA articles of incorporation and the articles of association are broadly similar to a first by-law of CBCA corporation. On filing, a certificate of incorporation is then issued together with a certificate of registration to do business.

Incorporation Under the Newfoundland and Labrador *Corporations Act*

As an overarching principle, the Newfoundland and Labrador *Corporations Act* (the "NLCA") generally follows the same model as the CBCA. The NLCA requires that at least 25% of the directors of a corporation shall be resident Canadians. The NLCA also contains illicit loan provisions that are relevant to related parties. The NLCA provides that any loan or other financial assistance from a Newfoundland and Labrador corporation to certain related parties is void unless the corporation passes a solvency test or meets certain exemptions. The provisions relating to extra-provincial registrations can be found in the NLCA and not in a separate act. There is also no business names registry in Newfoundland and Labrador.

Incorporation under the New Brunswick *Business Corporations Act*

A name search is required in New Brunswick, other than for the incorporation of a numbered-name company. The Director of the NBBCA can refuse to register a corporate name, even if the name search does not indicate the existence of an identical match.

The fee for filing articles of incorporates in New Brunswick is $262 (electronically) or $312 (paper), plus legal fees and disbursements.

A NBBCA corporation must apply for an extra-provincial licence in each province in which it carries on business, other than the Provinces of Nova Scotia, Québec and Ontario. New Brunswick law requires the filing of an annual information return for all corporations carrying

on business in New Brunswick. Such corporations are also required to file each time there is a change of directors, or a change in the registered office or address for service.

Incorporation under the Nova Scotia *Business Companies Act*

Unlike the other Canadian provinces, the *Companies Act* (Nova Scotia) is based on English law. As a result, there are some significant differences from the other provinces and Nova Scotia in corporate documentation and terminology, but far fewer differences in legal effect.

A name search is required prior to incorporation as well as approval from the Nova Scotia Registry of Joint Stock Companies. The proposed name must be both distinctive and descriptive and cannot be identical to another name. The Registry staff have the authority to reject a name if it is not sufficiently distinctive and descriptive, even if it is not duplicative.

Rather than Articles of Incorporation and by-laws, Nova Scotia companies have a Memorandum of Association and Articles of Association, which serve substantially the same function.

Significant amendments were made in 2004 that corrected some archaic features of the *Companies Act* (Nova Scotia), including:

- A simplified amalgamation procedure which eliminated the need for court applications for most short-form amalgamations.
- The financial assistance prohibition was eliminated.
- Share capital provisions were amended to bring the *Companies Act* (Nova Scotia) more in line with the CBCA.
- The threshold for fundamental changes was reduced for newly incorporated companies and for existing companies (once a special resolution to that effect is passed) to 66 2/3%, the same percentage as that fixed in the CBCA.
- The ability of shareholders to convert a limited company to a ULC by special resolution was added.

Major Reform to the Québec *Companies Act*

The *Business Corporation Act* (Québec) (the "QBCA"), which was adopted by the Québec National Assembly on December 4, 2009 and should come into force at the beginning of 2011, provides for a substantial reform of the legal framework applicable to legal persons that are currently governed by the *Companies Act* (Québec). The existing Act had not been updated in a significant way since 1981. The QBCA will modernize and streamline the internal functioning of business corporations, for instance, by clarifying the unanimous shareholder agreement mechanism and by simplifying the rules governing the maintenance of share capital. The QBCA is modelled to a large extent on the current provisions of each of the CBCA and the OCBA. However, there will be a number of differences between the QBCA and other Business Corporations Acts which may be of interest for persons wishing to incorporate in Canada. For instance, the QBCA has no residency requirements for directors; it permits the issue of shares by QBCA corporations that are not fully paid-up (they will be subject to calls for payment by the directors of the corporation from time to time); it permits the creation of par value shares in its capital; it eliminates the need to meet a solvency or other test prior to granting financial assistance (broadly defined) to related parties; it provides that a QBCA corporation must

indemnify its directors and officers, and may advance funds for the costs incurred by them in defending themselves against proceedings arising from their positions as directors and officers of the corporation, subject to a repayment obligation in like circumstances to those set out in the OBCA and CBCA.

Incorporation under *The Corporations Act* (Manitoba)

The Corporations Act (Manitoba) (the "MCA") provides shareholders substantially the same rights as are available to shareholders under the CBCA. However, set out below are certain distinguishing factors that may be considered material to shareholders of Manitoba corporations:

Appointment of Directors

Under the CBCA, if the articles of the company so provide, directors may appoint additional directors to hold office until not later than the next annual meeting of shareholders, provided the number of directors so appointed may not exceed one-third of the number of directors elected at the previous annual general meeting of shareholders. There is no such ability to appoint additional directors under the MCA.

Shareholders' Meetings

Under both the CBCA and the MCA, an annual meeting of shareholders must be held within fifteen months after holding the preceding annual meeting. However, under the CBCA, the meeting may not be held later than six months after the end of the company's preceding financial year.

Place of Shareholders' Meetings

Under the MCA, a shareholders' meeting may be held at such place in Manitoba provided for in the by-laws of the company, or in the absence of that provision, at such place within Manitoba as the directors may determine. Unless the articles of the company provide that meetings may be held outside of Manitoba, or all of the shareholders of the company entitled to vote at a meeting agree or are deemed to agree that such meeting may be held at a place outside of Manitoba, all meetings of shareholders of the company are to be conducted in Manitoba. Under the CBCA, a shareholders' meeting may be held at any place in Canada provided in the by-laws or in the absence of such provision, such place in Canada as the directors determine, or at a place outside Canada if such place is specified in the articles of the company or all shareholders entitled to vote at a meeting agree or are deemed to agree that such meeting is to be held at that place.

Solicitation of Proxies

Under the MCA, a person who solicits proxies, other than by or on behalf of management of the company, must send a dissident's proxy circular in prescribed form to each shareholder whose proxy is solicited and to certain other recipients. Under the CBCA, proxies may be solicited other than by or on behalf of management of the company without the sending of a dissident's proxy circular if: (i) proxies are solicited from 15 or fewer shareholders; or (ii) the solicitation is conveyed by public broadcast, speech or publication containing certain of the information that would be required to be included in a dissident's proxy circular. Furthermore, under the CBCA, the definitions of "solicit" and "solicitation" specifically exclude (among others): (i) the sending of a form of proxy in response to an unsolicited request made by or on behalf of a shareholder; (ii) the performance of administrative acts or

professional services on behalf of a person soliciting a proxy; (iii) a solicitation by a person in respect of shares of which the person is the beneficial owner; and (iv) a public announcement by a shareholder of how the shareholder intends to vote and the reasons for that decision. Shareholders will need to determine whether the proxy requirements of the US or Canadian securities laws apply to any such communication.

Class Voting

The CBCA and the MCA have similar provisions entitling shareholders to vote on a proposal separately as a class or series. However, the CBCA includes provisions that obviate the requirement for a class vote in certain circumstances where the amendment to the company's articles constrains the issue, transfer or ownership of shares in order to assist the company to qualify under Canadian or provincial law to receive licences or other benefits by reason of attaining or maintaining a specified level of Canadian ownership or control.

Squeeze-out Transactions

Under the CBCA, a company may not carry out a transaction that would require an amendment to its articles and would result in the interest of a holder of shares of a class of the corporation being terminated without the consent of the holder, and without substituting an interest of equivalent value in shares having equal or greater rights and privileges than the shares of the affected class (a squeeze-out transaction), unless certain additional shareholder approvals specifically provided for in the CBCA for squeeze-out transactions are obtained. The MCA does not have such specific provisions for squeeze-out transactions.

Compelled Acquisitions

Under the CBCA, following a take-over bid accepted by the holders of not less than 90% of the shares of the offeree company to which the take-over bid relates (excluding shares held by the offeror), the remaining shareholders that did not accept the take-over bid can be compelled to sell their shares to the offeror. In the event that the offeror does not compel such remaining shareholders to sell, then such remaining shareholders may require the offeror to acquire their shares. The MCA does not have equivalent provisions.

Registered Office

Under the MCA, a company's registered office must be in the place within Manitoba specified in its articles of incorporation and may be changed to a different location only by a special resolution of the shareholders. Under the CBCA, a company's registered office must be in a place in the province of Canada specified in its articles of incorporation and may be relocated to another province only by special resolution of the shareholders.

Disclosure of Material Interests

The CBCA requires a director or officer to disclose to the company any interest he or she has in an actual or proposed material contract or material transaction with the company. The MCA only requires disclosure of an interest in an actual or proposed material contract with the company. Under the CBCA, a director is prohibited from voting in respect of any such contract unless the contract is regarding remuneration, indemnity or insurance or is with an affiliate. Under the MCA, a director is not precluded from voting in respect of the above kinds of contracts or in respect of arrangements relating to security for money lent or obligations undertaken for the benefit of the company or otherwise in respect of any kind of contract, provided the resolution in the latter category is approved by not less than two-

thirds of votes of all the shareholders of the company to whom notice of the nature and extent of the director's interest in the contract or transaction are declared and disclosed in reasonable detail. Under the CBCA, shareholders have an ability to ratify any contract approved contrary to the applicable provisions by special resolution.

Short Selling

Under the CBCA, insiders of the company are prohibited from selling any securities of the company if the insider does not own or has not fully paid for the security to be sold, nor shall the insider sell a call or buy a put option in respect of a security of the company. The MCA has no such requirement.

Note that this summary is not an exhaustive review of the two statues. Reference should be made to the full text of both statutes and the regulations thereunder for particulars of any differences between them, and shareholders should consult their legal or other professional advisors with regard to the implications of the legislation which may be of importance.

Incorporation under the Alberta *Business Corporations Act*

To incorporate under the Alberta *Business Corporations Act* (the "ABCA"), only one-quarter of the members of a Board of Directors of a corporation must be Canadian residents. The ABCA provides clarity and increased certainty for directors of Alberta corporations as directors' conflict of interest obligations and duties of care are set out in detail in the ABCA.

Incorporation under *The Business Corporations Act* (Saskatchewan)

Many of the material provisions contained within the CBCA have been adopted in and are consistent with the provisions of *The Business Corporations Act* (Saskatchewan) (the "SBCA"). Like the CBCA, the SBCA requires that at least 25% of the directors of a Saskatchewan business corporation are resident Canadians, and if the corporation has less than four directors, at least one director must be a resident Canadian. Although the obligations and rights of shareholders, directors and corporations are largely the same in each of the CBCA and SBCA, the SBCA does contain a few subtle differences. For example, unlike the CBCA (which does not require a corporation to advise its shareholders if the corporation grants financial assistance), the SBCA requires a corporation to advise its shareholders if the corporation grants financial assistance to a shareholder, director, officer or employee of the corporation or an affiliate of the corporation. Provided that the corporation is not a reporting issuer under *The Securities Act, 1988* (Saskatchewan), the SBCA provides that a corporation is required to provide its shareholders with notice of the identity of the person that received the financial assistance, as well as the nature, amount and terms of the financial assistance within 90 days of providing the financial assistance.

The fee for filing Articles of Incorporation in Saskatchewan is $265 (if the incorporation documents are filed by paper) and $215 (if the incorporation documents are filed electronically), which fee is exclusive of legal fees and disbursements.

British Columbia's *Business Corporations Act*

The BCBCA came into force on March 29, 2004. The following is a list of some of the more important changes to British Columbia's corporate law affected by the BCBCA:

- There is no residency requirement for directors.
- Companies may incorporate subsidiaries directly — incorporators do not have to be individuals.
- A company incorporated under the BCBCA does so by filing a notice of articles with the registrar under the BCBCA. The filing fee is $350 and the notice of articles contains only limited information about the company and no copy of the company's articles of incorporation. There is a right to pre-file by up to 10 days for future incorporations. This feature is attractive in that it accommodates an orderly closing in certain complex corporate reorganizations.
- A subsidiary is now permitted to hold shares of its parent, although it cannot vote those shares. In addition, a BCBCA company (apart from a BCULC) may amalgamate with a company incorporated under the legislation of another jurisdiction without requiring the corporation from the other jurisdiction to first continue under the laws of British Columbia. This contrasts with the provisions of the OBCA and may represent a significant advantage for certain corporate re-organizations or in circumstances where shares of a public company parent are to be issued to satisfy an acquisition price payable by its subsidiary for property acquired from a third party.
- The granting of financial assistance (broadly defined) to a related party is specifically authorized by section 195 of the BCBCA — the only formality is a requirement of notice of the granting of financial assistance to be deposited at the company's registered office at or shortly after the giving of such assistance or recorded in the minutes of the directors' meeting at which the granting of financial assistance was approved.
- One drawback is that there is no concept of a unanimous shareholders agreement under the BCBCA.

Unlimited Liability Corporations — Nova Scotia, Alberta and British Columbia

Nature of Unlimited Liability

The shareholders of an Nova Scotia ULC ("NSULC") or a British Columbia ULC ("BCULC") have unlimited liability but it only arises if the NSULC or BCULC respectively is wound-up or liquidated, and its assets are not sufficient to pay the company's debts and liabilities and wind-up expenses. The ABCA provides that the liability of each of the shareholders of a corporation incorporated under this Act as an ULC for any act, liability or default of the ULC is unlimited in extent and joint and several in nature. As a result, the liability of a shareholder of an Alberta ULC ("AULC") may be greater than the liability of a shareholder of a NSULC.

The shareholders of an AULC have liability for an act or default of the AULC which is unlimited in extent and joint and several in nature, but the scope of the liability is much broader than that in respect of NSULCs and BCULCs. The "past shareholders" of an NSULC may also, in certain circumstances, remain liable upon a winding up of the NSULC for liabilities incurred up to one year after ceasing to be a shareholder.

Because of the potential liability of shareholders of a NSULC, an AULC and a BCULC, it is generally important to interpose a sole purpose entity, typically called a "blocker," between the ultimate investor and the ULC which will hold the shares of the ULC. The objective of the blocker is that a creditor of an ULC cannot have recourse to other assets of the ultimate investor to satisfy a claim where there is a deficiency. The legal nature of the particular blocker will have its own Canadian and US tax as well as business considerations.

Residency Requirements of Directors

There are no residency requirements for directors of NSULCs and BCULCs. This is a particularly attractive feature for many US clients who wish to select directors without regard to residency requirements. However, at least one-quarter of the directors of AULCs must be resident Canadians.

The ABCA provides for the following:

- Continuance into Alberta of an extra-provincial ULC as an Alberta ULC;
- Continuance into Alberta of an extra-provincial limited corporation as an Alberta ULC; *and*
- The conversion of an Alberta corporation from a limited corporation to an ULC.

Nature of Hybrid Status in Canada and the US

An entity with hybrid status is an entity that is treated differently for tax purposes in different jurisdictions. For example, an ULC is a hybrid entity in Canada and the US, as discussed below.

Canada

A ULC is characterized as a corporation for purposes of the Tax Act and is subject to all the provisions of the Tax Act applicable to "taxable Canadian corporations." From a Canadian tax perspective, an ULC is a resident of Canada under the Convention and Canada is entitled to tax its income like that of any other Canadian resident.

US

The US check-the-box regulations govern how domestic business entities are treated for US tax purposes. Under such regulations, there are *per se* corporations and eligible entities. A *per se* corporation is automatically treated as a corporation and cannot elect otherwise. In the US, a corporation is a separate entity for tax purposes. In contrast, an eligible entity is not automatically treated as a corporation. Unless an election is made, an eligible corporation will be treated as a transparent, that is, a disregarded entity, (where there is one shareholder) or as a partnership (where there are two or more shareholders).

The check-the-box regulations also dictate how foreign business entities are treated for US tax purposes. Generally, any corporation formed under Canadian federal or provincial law are viewed as a *per se* corporation for US tax purposes. However, the regulations exclude certain business entities, such as NSULCs and any other corporation whose owners have unlimited liability pursuant to federal or provincial law. Therefore, ULCs incorporated or continued in Nova Scotia, Alberta and British Columbia are excluded from *per se* corporations because shareholders have unlimited liability. As a result, a business entity that is not expressly a corporation is considered to be an "eligible entity," and can elect its

classification for US tax purposes. Therefore, for US tax purposes an ULC will be treated as a transparent or disregarded entity (where there is one shareholder) or a partnership (where there are two or more members), unless it elects to be treated as a corporation.

The consequence of the foregoing is that for US tax purposes the income, expenses and Canadian income taxes of the ULC are treated as those of the US shareholder(s). Furthermore, the losses of the ULC can be claimed by the US shareholder(s) subject to the US dual consolidated loss, and other applicable rules.

Advantages and Disadvantages for Non-Residents Using ULCs

There are a number of potential US tax advantages for US residents using Canadian ULCs, such as:

- Transferring losses from Canadian operations to the US parent.
- Stepping-up the cost base of assets of the ULC for tax purposes under US Internal Revenue Code (the "Code") without triggering a taxable event under the Tax Act.
- Claiming the full balance of Canadian corporate tax and withholding tax for foreign tax credit purposes.
- Avoiding the US transfer pricing rules on payments made by the Canadian ULC to its US shareholder.

However the changes to the Convention as a result of the Fifth Protocol should be considered (discussed below under the heading "ULCs after the Fifth Protocol"). Furthermore, there are technical requirements and there may be disadvantages under the governing legislation of the ULCs that should be explored with a lawyer practicing law in the jurisdiction of incorporation of the ULC.

ULCs after the Fifth Protocol

Canadian ULCs have been used extensively by US residents in Canadian equity investment especially acquisitions conducted by way of a public take-over bid. The denial of treaty benefits in paragraph 7 of Article IV of the Fifth Protocol to income derived from a fiscally transparent ULC caught practitioners by surprise, and went well beyond concerns which the government had expressed regarding "double dip" financing. These provisions came into effect on January 1, 2010.

As noted above, uncertainty has been created as a result of the provisions of the Fifth Protocol. Before the Fifth Protocol came into effect, an ULC was transparent or treated as a partnership for US tax purposes with a resulting flow through of profits and losses, but was taxed as a corporation for Canadian tax purposes. The Fifth Protocol denies Treaty benefits to ULCs which will result in a Canadian withholding tax obligation of 25% on certain distributions made by the ULC to the US shareholder(s).

Questions now arise whether it is prudent to use ULCs in new structures and what steps should be considered in regard to ULCs in current structures. Required tax planning will also depend upon whether the ULC in question was used in a double dip tax structure. Depending on the circumstances and subject to other considerations, there are various alternatives available which could be explored with tax advisors, including:

- Transferring ULC shares to another treaty-country holding company (the Canada Revenue Agency ("CRA") recently stated that this would be acceptable from the perspective of the general anti-avoidance rule in certain circumstances);
- Converting the ULC to an ordinary corporation;
- Liquidating the ULC and carrying on a Canadian business as a branch;
- The US member could transfer its membership interest to a Canadian corporation on a tax-deferred basis under the Tax Act that is not fiscally transparent;
- Increasing the paid-up capital on the shares of the ULC that are held by a US shareholder(s) such that the increase would be disregarded for US tax purposes and result in a deemed dividend subject to a reduced rate of Canadian withholding tax (the CRA recently stated that this would be acceptable in certain circumstances);
- Restructuring debt owed to a US parent such that it becomes payable to a US grandparent and subject to a reduced rate of Canadian withholding tax (the CRA recently stated that this would be acceptable in certain circumstances); *or*
- Subject to other tax considerations, adding a member to the ULC so it will be treated as a partnership for US tax purposes (the CRA recently stated that this would be acceptable in certain circumstances in respect of interest such that treaty relief would apply).

2007 Changes to NSULC Taxes

Nova Scotia amended its legislation, effective April 1, 2007, that significantly reduced the costs of NSULCs in an attempt to compete with AULCs and BCULCs.

Pursuant to Nova Scotia's *Financial Measures (2007) Act* (the "Nova Scotia Act"), the $2,000 initial registration tax under the *Corporations Registration Act* has been eliminated, and the $4,000 incorporation or amalgamation tax under the NS Companies Act has been reduced to $1,000. Therefore, as of April 1, 2007, NSULCs pay only $1,000 in incorporation/registration or amalgamation/registration taxes, which represents a significant decrease from the $6,000 in government charges previously payable. In addition, pursuant to the Nova Scotia Act, the annual registration tax has been reduced from $2,750 to $1,000 effective April 1, 2008. Despite the changes introduced by the Nova Scotia Act, NSULCs remain the most heavily taxed of the three ULC alternatives. Alberta ULCs are subject to a $100 corporate filing fee and the costs associated with having a service provider conduct the annual report filing.

As noted above, when compared to NSULC's, however, the cost advantages of setting up a AULC is significant. In addition, the ABCA allows for both short and long form amalgamations without court approval, whereas the Nova Scotia Act only permits long for amalgamations pursuant to an order of a court of competent jurisdiction approving the amalgamation.

BCULCs are subject to a $1,000 filing fee upon incorporation or amalgamation.

Corporations Returns Act

The federal *Corporations Returns Act* imposes an obligation on every corporation carrying on business in Canada to file an annual return within 90 days of the end of the corporation's fiscal year where:

- Its gross revenue from business in Canada for any fiscal period of the corporation exceeds $15 million; *or*
- The book value of the assets of the corporation at the end of the fiscal period in question exceeds $10 million;

or if any of the following conditions apply:

- Equity in the corporation held by a non-resident of Canada exceeds $200,000; *or*
- The corporation has direct or indirect debt obligations to a non-resident of Canada exceeding $200,000 with an original term to maturity of one year or more; *or*
- The corporation has direct or indirect debt obligations of any nature with a book value exceeding $200,000 to an affiliate, shareholder or director of the corporation who is a non-resident of Canada.

> Each corporation that is subject to the *Corporations Returns Act* must complete and file a return within 90 days of its fiscal year-end disclosing the names, addresses and nationality/citizenship of its directors and officers, the corporation's issued share capital, the specific shareholder interest in the corporation of each of its directors and officers, the name, address and shareholdings in the corporation of each other shareholder (or related group of shareholders) holding 10% or more of any class of shares of the corporation, the shares (representing 10% or more of the issued shares in the company in question) owned by the corporation in other corporations doing business in Canada, and the corporation's debt obligations at the end of the period in question. The gross revenue and assets of a corporation subject to the said Act include the gross revenue and assets of all affiliates of the corporation that carry on business in Canada. Obviously, this public record is a source of significant, and otherwise confidential, information about any corporation that is obligated to file, and does so, under the *Corporations Returns Act*.

The filing of a return by a holding company satisfies the filing obligation of each of its subsidiaries.

The *Corporations Returns Act* also requires such corporations to provide information on any transfers of technology to them or any of their subsidiaries by any non-resident of Canada.

The information contained in reports filed under the *Corporations Returns Act* is placed in the public record that may be searched by anyone interested in doing so.

Finally, every corporation obligated to file a return under the *Corporations Returns Act* must also file consolidated financial statements for the fiscal period in question. The financial statements are not made available to the public. These statements need not be audited, although an officer of the corporation is obligated to certify that the return and financial statements are correct and complete to the best of his/her knowledge and belief.

Use of a Corporation to Conduct Business in Canada

There are a number of obvious advantages to using a corporate form of business organization, including:

- **Limited Liability to the Shareholders** — A corporation incorporated in Canada (other than an ULC) isolates the foreign parent corporation from general liabilities of its Canadian subsidiary although lenders may require the guarantee of the parent corporation or its principals.
- **Separate Legal Entity**.
- **Perpetual Existence**.
- **Transfer of Control** — Can be affected by the transfer of issued and outstanding shares.
- **Familiarity** — Ease of dealing with third parties; corporations are well-understood forms of business organization.
- **Simplicity**.
- **Raising Working Capital and Financing May Be Easier** — Can raise working capital by the issue of debt or shares.
- **Low-Cost** — Relative familiarity with this form of business organization throughout the marketplace means that corporate documentation should be less expensive to create than other business forms discussed below.
- **No Minimum Capitalization** — There are no minimum capitalization requirements, although under the Tax Act the thin capitalization rule (recently amended) provides that interest on debt above a 2:1 debt-to-equity ratio is not deductible as an expense.

The disadvantages of using a corporate form of business organization include:

- **Greater Regulatory Requirements** — Business Corporations Act formalities, etc.
- **Preparation of Financial Statements** — Both the federal and provincial regimes have detailed rules relating to the preparation of annual financial statements.
- **Adherence to Financial Solvency Tests** — Business corporations incorporated in Canada must ensure that whenever shares are redeemed or purchased, or dividends are paid, the corporation will still be able to meet its obligations as they fall due and the realizable value of its assets must not be less than the sum of the corporation's third-party obligations and the stated capital (aggregate amount paid for all shares as they were allotted and issued) of each class of its issued shares.

Financial Assistance by a Business Corporation to Related Parties

A BCBCA incorporated corporation is specifically authorized to give financial assistance to a related party by means of a loan, guarantee or otherwise; however, having done so within a reasonable but unspecified period of time, it must give notice disclosing any material financial assistance so given. Under each of the OBCA and CBCA, there are no statutory requirements on corporations relating to related-party financial assistance.

As is the case in the US, the focus of related-party transactions in Ontario and other provinces (where the issue is not directly addressed in the applicable Business Corporations Act) is on the issues of: (i) the adequacy of consideration; (ii) fraud on the minority shareholders giving rise to "oppression" remedies under the applicable *Business Corporations Act*; and (iii) fraudulent preference issues under applicable provincial assignment and preferences legislation which may affect the validity of a related-party transaction.

NBBCA incorporated corporations can opt out of some financial assistance restrictions relating to loans/guarantees to related parties, but cannot opt out of restrictions relating to providing financial assistance for the purchase of its own shares.

What Limitations Apply to Corporate Director and Officer Indemnities?

Ontario recently enacted changes to the provisions of the OBCA dealing with indemnification of current and former directors and officers of OBCA corporations. One of the changes allows OBCA corporations to make advance payments to indemnified directors and officers on account of expenses incurred by them in respect of any civil, criminal, administrative, investigative or other proceeding to which they may be subject that arise out of having acted as a director or officer of the corporation or other certain related entities. The foregoing is in line with the treatment given to officers and directors of CBCA corporations. Proceedings can be costly. Without such advances the director or officer may be subject to severe financial hardship. Some proceedings last for years. Prior to the amendment, OBCA corporations could only indemnify such costs after the fact.

Conditions apply to the right of indemnification. First, the director or officer must have acted honestly and in good faith with a view to the best interests of the corporation in respect of the matter in question. Secondly, where the matter involves a criminal or administrative action or proceeding that is enforced by a monetary penalty, the director or officer must be found to have had reasonable grounds for believing that his/her conduct was lawful. It is an open question as to what happens when the proceeding is settled or the adjudication does not address the foregoing.

Schoon v. Troy Corporation

While the amendments to the OBCA should provide directors and officers of Ontario corporations with some comfort regarding their indemnification and advancement rights, the recent Delaware Chancery Court decision in *Schoon v. Troy Corporation* ("*Schoon v. Troy*") highlights the potential for directors and officers to be stripped of those rights altogether. The case arose in the context of an action by Troy Corporation (the "Troy") against two former directors for damages suffered by Troy as a result of the sale by the former directors of information which Troy alleged was proprietary and confidential. One of the former directors requested that Troy advance monies for legal fees and expenses incurred by him in his defence of the claim by Troy against him on the basis that during his term as a director Troy's by-laws authorized advancement and indemnification rights for both current and former directors. However, following the resignation of the director, but prior to initiating the claim against him, Troy amended its by-laws to disentitle former directors of the right to receive advance payment of legal costs. The amendment did not apply to directors and officers while they remained in office.

The director argued that his right to advancement had vested when he became a director and that it could not be withdrawn without his consent. In deciding in favour of Troy and upholding the amendment, the Court rejected the director's argument and held that a former director's right to advancement does not vest until the commencement of a lawsuit in which the director is named as a party. The court noted that the manner in which Troy's by-laws were drafted: (i) did not create a basis on which to conclude that the granting of the ultimate

indemnity necessarily included a right of advancement; and (ii) did not prevent the unequal treatment of the two class of indemnified persons (i.e., those still engaged by Troy and those who were no longer officers or directors of Troy).

Lessons Learned

What effect will *Schoon v. Troy* have on Canadian corporate law? While notable differences do exist between Delaware and Canadian corporate law, the decisions of the Delaware Chancery Court are influential beyond its jurisdiction. While Canadian courts have not addressed the exact situation encountered in *Schoon v. Troy*, in particular with respect to the vesting of advancement and/or indemnification rights created by corporate by-laws, it is likely that such courts would take strong note of the approach taken by the Delaware Chancery Court. As such, corporations and their board members and officers would be well advised to heed the following lessons from the *Schoon v. Troy* decision:

- Under Canadian law, provisions of a current by-law might not create a vested right to advancement in favour of an indemnified director or officer following his/her resignation or other removal from the board or employment with the corporation. Such vesting of advancement and indemnity rights under the corporation's by-law may not occur until an action is commenced against the affected director or officer and the rights shall be those set out in the by-law at the time of such action.
- Rights arising under the corporate by-law can be changed by the indemnifying corporation without the consent of any indemnified person.

Recommendations

In light of the foregoing, there are three steps that should taken to ensure that corporations and their board members and officers enact the intended indemnification and advancement coverage:

First, the board should review the indemnity provisions of the corporation's current by-law and make the necessary amendments to ensure that: (i) the corporation is authorized to indemnify directors and officers to the full extent permitted by law; (ii) the corporation is authorized to advance litigation costs to directors and officers, and former directors and officers in any proceeding to which they are parties; and (iii) any subsequent amendments to the by-law cannot adversely affect the rights of directors and officers with respect to indemnification and advancement without such directors' and officers' consent. However, as the decision in *Schoon v. Troy* highlights, by-laws can be amended unilaterally by the corporation and hence the foregoing might not be sufficient to provide directors and officers with certainty as to their indemnification and advancement rights.

Secondly, we recommend that each director and officer enter into a written agreement with the corporation under which the corporation agrees: (i) to indemnify the director/officer in question to the full extent permitted by law; and (ii) to advance to the officer/director litigation costs on an "as incurred" basis, subject to the qualification that if it is shown that the director or officer so indemnified did not act honestly and in good faith with a view to the best interests of the corporation in respect of the matter in question or, in appropriate circumstances, did not have reasonable grounds for believing his/her conduct was lawful, then there would be an obligation on the director or officer to repay the advances with interest. Such a written

agreement, unlike a corporate by-law, cannot be amended unilaterally without the consent of the director or officer and as such provides the only certain method for such director or officer to avoid the scenario that unfolded in *Schoon v. Troy.*

Finally, we recommend that the corporation's D&O insurance policy should be carefully reviewed in the context of the permitted indemnities and qualification for coverage. Coverage changes will likely be required. Each director and officer who is so indemnified should be a named insured under the policy. Directors and officers should still require appropriate D&O insurance coverage and where the creditworthiness of the corporation is in question, the indemnity agreement should be credit-enhanced with a creditworthy parent guarantee (or in extreme cases, collateral security).

The foregoing recommendations will need to be properly authorized by the corporation. Generally, whenever a matter comes before the board of directors in which any director has a personal interest, the director in question must refrain from attending the meeting where the matter is considered and, obviously, not vote on the matter. Individual indemnities in favour of a director are an exception to this rule. However, the director in question must still disclose his/her interest in the matter in the minutes of the meeting when the matter is first considered by the directors. Additionally, it might be considered whether shareholder approval to the granting of indemnities should be sought, particularly when the matter affects all of the directors of the corporation and in light of the uncertainties created by *Schoon v. Troy*. Should it be deemed that such shareholder approval is prudent in the circumstances, at the their next meeting the shareholders would approve the following: (i) the amendments, if any, to the general by-law; (ii) the granting of indemnities (as fixed by the board); and (iii) the entering into the indemnities as contracts in which the affected directors and officers have a personal (and therefore, conflicting) interest.

Corporations Without Share Capital

Although of limited practical application, it is possible to incorporate in Canada, either federally or provincially, a corporation without share capital (a not-for-profit corporation) for certain permitted (education, scientific, philanthropic and religious) purposes. Such corporations often qualify as charities and are entitled to operate tax-free, but there are complex rules under the Tax Act governing what entities are permitted to issue charitable receipts for tax purposes. Currently, all assets of this type of corporation must be applied for the purposes specified in the incorporating document. There is no standard form documentation for creating a corporation without share capital. As a result, incorporation and organization of a corporation without share capital may be more expensive. Compliance with the governing legislation is significantly more cumbersome than compliance with Business Corporations Act formalities.

The federal government has recently passed the Canada *Not-For-Profit Corporations Act* and is expected that it will proclaim the Act in force by the end of 2010. Once enacted, the said Act will modernize and dramatically change federal non-share capital corporations.

Ontario has initiated its usual stakeholder consultation process with a view to bringing its 1953 legislation more in line with the concepts and requirements found in other jurisdictions,

including changes relating to the qualification of directors, the removal of directors, meetings, director's and officer's liability and conflict of interest rules.

Partnership

General Partnerships

Partnerships are governed by provincial law. Partnerships are not separate legal persons, that is, they are not legally distinct from their partners under Canadian law. A partnership is a contractual relationship with legislated legal attributes set out in, for example, Ontario's *Partnerships Act*. A general partnership is a form of business organization where parties carry on business with a common view to making a profit. Whether or not a partnership exists is a question of fact and cannot be determined solely by the language of any agreement between the parties that either denies or asserts partnership. Several significant attributes arise if a court determines that the relationship between parties is that of partnership, including:

Fiduciary Obligations

There are fiduciary obligations between partners that result in a significant loss of freedom of action and loss of each partner's right, for example, to keep information from the other members of the partnership. One partner may be in a position to require another partner to account for profits from a competing venture that the latter may have believed were separate and apart from the partnership arrangement.

Agency

Each partner is an agent for the other partners. Even the unauthorized action of one partner may bind other partners to third parties. Authority of partners is, in effect, divided among the partners.

Joint and Several Liability

There is full joint and several liability for all obligations of the partnership as among partners. This exposes all partners to the full obligation incurred by the partnership. The contribution to settlements of claims by partners is a matter for the partners and not one that concerns the partnership's creditors.

Flow-Through Vehicle

A partnership is not recognized as a separate taxable entity for purposes of the Tax Act or for any other purpose in Canada. Subject to the "at risk rules" described on page 3.25, each partner is taxed at the personal level (or corporate level, if the partner is a corporation) for such partner's share of the profits or losses from the partnership.

Qualification to Conduct Business

Each partner individually must qualify as carrying on business in those provinces of Canada in which the partnership carries on business. Significant adverse tax consequences (e.g., loss of tax-deferred rollover rights) flow as a result of a Canadian constituted partnership having one or more foreign (i.e., non-Canadian) members.

Partnership agreements are more expensive to prepare than the constating documents of other business forms of organization because of the detail with which they must be drafted

and the dangers inherent in failing to provide for each of the matters that would otherwise be automatically mandated by the application of provincial partnerships law.

Other Issues

It may be difficult to find and attract additional suitable partners, raising capital may be difficult, there is no perpetual existence, and the transfer of partnership interests may be complex.

Limited Partnerships

This is a separate statutory form of partnership created by filing a form prescribed by a provincial Limited Partnerships Act or related legislation in which one class of partners, the limited partners, has limited liability for the obligations of the partnership, but otherwise have many of the same rights and obligations as the general partners. Only the general partners of the limited partnership have joint and several unlimited liability for the obligations of the partnership. Each limited partnership must have at least one general partner who is responsible for all obligations of the partnership to third parties.

Limited partnerships are often used in financing syndications where there are a number of passive investors who prefer the tax treatment as partners over the tax treatment as shareholders. To retain their status as limited partners, each is prohibited from participating in the management of the partnership's business.

None of the Canadian provincial *Limited Partnership Acts* has "safe harbour" rules similar to those set out in US Uniform Limited Partnerships Acts to guide and protect limited partners. Generally, the Canadian provincial Acts simply prohibit participation by the limited partner in management of the partnership's business while providing no guidelines for what does and does not constitute "management" of the business.

As noted above, generally when limited partners participate in the management of the partnership business, they may be treated as general partners, lose the protection of limited liability and become jointly and severally liable with the limited partnership and its general partners for all the obligations of the partnership. Unique to Manitoba, however, is the treatment of these limited partners who take an active part in the business of the partnership. Limited partners in a Manitoba limited partnership only become liable as a general partner when they take an active part in the business of the partnership *and* the person with whom they are dealing does not know that they are a limited partner. That is, the benefit of limited liability extends to limited partners actively involved in a partnership's business so long as they provide actual notice of their limited partner status. If a limited partner does not provide such notice at the outset of dealing with a person but that person later becomes aware that they are dealing with a limited partner, the liability of a limited partner to such person only extends to liabilities incurred by the partnership between the time that the limited partner first so dealt with the person and the time when the person first acquires actual knowledge that he or she was dealing with a limited partner.

The Manitoba limited partnership regime is commonly considered the most lenient in Canada for this reason. As a result, many limited partnerships used in structuring plans choose a Manitoba constituted limited partnership even if there is no real connection to Manitoba.

However, even where a limited partnership is formed in Manitoba, to the extent it actually conducts its business in another province, the limited partnership statute of such other province may provide that notwithstanding the limited partnership's jurisdiction of formation, the partnership statute of such other province is still applicable. For example, the *Partnership Act* (British Columbia) provides that an extra-provincial limited partnership registered in British Columbia has rights and privileges the same but no greater than, and is subject to the same duties, restrictions, penalties and liabilities as imposed on a limited partnership formed in British Columbia. The Ontario *Limited Partnerships Act* is silent regarding the foregoing. Presumably the more strict "participation in management" test found in the *Partnership Act* (British Columbia) would also apply to such Manitoba limited partnership notwithstanding its jurisdiction of formation.

Subject to the comments regarding corporations tax (where applicable) below affecting corporate limited partners, only the limited partnership itself and its general partner need qualify as carrying on business in those provinces of Canada in which the limited partnership carries on business.

None of the legislation in effect in any of the Canadian provinces and territories (apart from that in force in Saskatchewan) defines what conduct by a foreign limited partnership will constitute carrying on business. Case law has established that each of the following activities within the jurisdiction in question would likely constitute the limited partnership carrying on business: (i) maintaining an office in the jurisdiction; (ii) renting or owning real property in the jurisdiction; (iii) employing a person who resides and, reports to work, in the jurisdiction; (iv) having a local telephone number listed in a telephone directory within the jurisdiction; or (v) entering into binding contracts through employees or agents with power to bind the limited partnership who are present in the jurisdiction.

Limited Liability Partnerships

One particular form of limited partnership is a limited liability partnership (a "LLP"). Most provinces provide that partnerships practicing only specified professions may be registered as LLPs. The British Columbia partnership legislation allows non-professional partnerships to register as limited liability partnerships as well. Generally, subject to certain exemptions, a partner in a LLP is not liable for obligations of the partnership or another partner that arise from the negligence, wrongful act or omission, malpractice or misconduct of another partner or an employee, agent or representative of the partnership. In Manitoba and British Columbia, partnership legislation provides that where a resident of the province is a limited liability partner under a LLP constituted under laws other than those of such provinces, such resident will not have the benefit of limited liability (at least in Manitoba and British Columbia) unless such foreign LLP registers as an extra-provincial limited liability partnership in Manitoba or British Columbia, as the case may be.

Foreign Limited Partnerships

Foreign-constituted limited partnerships in which all the partners are Canadian resident entities may be able to conduct business in Canada, subject to registration as an extra-provincial limited partnership, without attracting taxes in the foreign incorporating jurisdiction provided they conduct no business there. The usual tax-deferral rollover

elections are available to such foreign-constituted limited partnerships as long as all of the partners are resident in Canada for purposes of the Tax Act.

For an Ontario-constituted limited partnership carrying on business in Ontario, the *Corporations Tax Act* deems each corporate limited partner as having a permanent establishment in Ontario, obligating each such corporation not incorporated in Ontario to register in Ontario as an extra-provincial corporation under the *Extra-Provincial Corporations Act*, file tax returns and pay tax on income earned by it through the Ontario limited partnership.

Although an unlikely result, a strict reading of the statutory provisions might obligate foreign corporate limited partners of an Ontario limited partnership where the business activities of the Ontario limited partnership are entirely outside Ontario to file *Corporations Tax Act* returns in Ontario. However, the foregoing is certainly not the general practice in Ontario at this time. In addition, the transfer of a limited partnership interest in a limited partnership that holds real estate in Ontario will trigger the requirement to pay tax under Ontario's *Land Transfer Tax Act* on the value of the land, calculated without deduction for borrowed funds, including loans secured by a mortgage or charge on the land in question, where the limited partner holds more than a 5% profit distribution right.

Special rules under the Tax Act limit partnership losses that a limited partner may claim for tax purposes, including losses arising out of deductions for capital cost allowance (depreciation) on the capital assets of the partnership. These rules are referred to as the "at risk" rules. As in the case of general partnerships, significant adverse tax consequences flow as a result of a Canadian-constituted limited partnership having a foreign (i.e., non-Canadian) member.

> After taking into account the above-noted concerns, Delaware limited partnerships are sometimes used in Canada in light of the relatively antiquated provincial Limited Partnership Acts in Canada and the ease with which one can comply with the Delaware Act. There had been a concern that Delaware limited partnerships would be treated as corporations for Tax Act purposes in Canada, but this concern seems to have been put to rest by the CRA, the federal agency which administers the Tax Act. One downside to using a Delaware limited partnership is that where a legal opinion is required, US counsel will have to be engaged by the client to provide any required opinion as to the due constitution, capacity and authority of the limited partnership with the attendant added cost and inconvenience in doing so.

Co-operatives

It is possible to constitute special corporations known as co-operative associations for certain purposes permitted by federal and provincial law. The property and assets of a co-operative are owned by the members of the co-operative through their membership in the co-operative and not through share capital. A co-operative form of business organization governed by the federal Act is intended to operate on a not-for-profit basis in at least two provinces. The members are intended to benefit generally from the activities conducted by the co-operative. This form of corporation is sometimes used by credit unions and insurance companies, and has been used in farm marketing and residential real estate ownership. Obviously, this form of business entity has limited application and, in each case, is governed by specific enabling legislation.

Alberta Cooperatives

Alberta-based cooperatives must be incorporated and out-of-province cooperatives wanting to do business in Alberta must be registered under the *Cooperatives Act* (the "ACA") There is a $100 filing fee in each case.

The ACA gives cooperatives the ability to issue investment shares as an additional way of raising capital. However, if a cooperative issues investment shares, the ACA limits the number of directors that represent investment shareholders so that the members will remain in control of the board of directors. The ACA prohibits directors, officers or members from profiting by trading investment shares. In addition to outlining the duties and responsibilities of the board of directors of a cooperative, the ACA gives cooperatives the ability to indemnity their directors when the carry out their responsibilities in good faith.

The ACA provides for four specific types of cooperatives: New Generation Cooperatives (generally focus on producing, processing or marketing agricultural products or providing services to agricultural producers); Multi-Stakeholder Cooperatives (formed by a variety of stakeholders such as customers, suppliers or other interested parties to work together towards a common goal); Employment or Worker Cooperatives (usually established by a group of people starting up or buying a business to provide themselves jobs); and Housing Cooperatives. Regardless of the specific type of cooperative, articles of incorporation which outline the rules under which the particular cooperative is to operate must be developed as part of the incorporation process.

Saskatchewan Co-operatives

Any co-operative seeking to do business in Saskatchewan must be incorporated under or extra-provincially registered pursuant to either *The Co-operatives Act, 1996* (Saskatchewan) or *The New Generation Co-Operatives Act* (Saskatchewan).

The Co-operatives Act (Saskatchewan) permits a number of different types of co-operatives to be incorporated including a consumers' co-operative, a community services co-operative, a housing co-operative and an employment co-operative. The rights and restrictions of each type of co-operative as well as the interest on share capital that each co-operative can distribute varies according to the nature of the business undertaken by the co-operative.

The New Generation Co-Operatives Act (Saskatchewan) is a separate Saskatchewan statute that permits the incorporation or extra-provincial registration of a new generation co-operative. A new generation co-operative is a co-operative that is restricted to carrying on one of three specific business: (i) the production, processing or marketing of agricultural products; (ii) the provision of services to persons primarily engaged in an endeavour mentioned in (i); or (iii) any prescribed business under the regulations to *The New Generation Co-Operatives Act*.

The fee for filing Articles of Incorporation under *The Co-operatives Act, 1996* (Saskatchewan) is $250 for a co-operative that will result in financial gain to its members and $50 if the co-operative is being established and will not result in any financial gain to its members. The incorporation fee for a co-operative under *The New Generation Co-Operatives Act* (Saskatchewan) is $250.

Joint Venture with Others

A joint venture is a form of business organization based on a contract. Each of the parties to the joint venture contributes the use of property owned by it for a single, identified, common purpose. There is no statutory basis for this form of business organization. Under a joint venture arrangement, the parties maintain a significant degree of independence in conducting their other business activities.

In practice, the most important goal in drafting a joint venture arrangement is to avoid having the structure characterized, at law, as a partnership, because of the duties imposed on partners (see discussion set out under the heading "General Partnerships" on page 3.22). The existence of a partnership is a question of fact and every effort must be expended in structuring the joint venture arrangement and conducting its business to support the conclusion that the participants are not, in fact, partners.

Business and Income Trusts

Income and business trusts were quite commonplace forms of business enterprises and many of them issued publicly-traded trust units. However, on October 31, 2006 the federal Department of Finance announced that certain publicly listed trusts and partnerships (collectively referred to as specific investment flow throughs or "SIFTs") would be taxed in the same manner as corporations in respect of taxable distributions and unitholders would be treated as having received dividends of such amounts. A grandfathering period was provided under which then existing SIFTs would not be subject to these new tax rules ("SIFT Rules") until 2011, subject to compliance with certain guidelines. There is less than 12 months left to covert a SIFT to a corporate form.

The federal government has enacted rules under the Tax Act allowing the conversion of certain income trusts into corporations on a tax-deferred basis without requiring a joint election by the unit holder and the corporation. As a result of this new tax treatment, it is expected that SIFTs will want to convert into corporations prior to 2011.

Distributorship, Licensing and Franchise Arrangements

Apart from establishing business operations in Canada using any one of the business forms described above, a foreign corporation or investor could enter the Canadian market indirectly through the use of independent sales agent, distribution, licensing or franchising arrangements. On the face of it, these alternatives avoid the obligation to register in each province as an extra-provincial corporation and to meet certain compliance obligations that would ordinarily arise if the foreign corporation entered Canada directly. However, out of an abundance of caution, it is our general practice to advise our foreign franchisor clients to register under the extra-provincial corporations acts of the applicable provinces. Some other aspects of these arrangements that might influence the decision to pursue them include:

Intellectual Property Protection

The investor must comply with intellectual property legislative registration requirements to ensure that foreign trade-marks, designs, patents and copyright are properly protected and do not fall into the public domain.

Withholding Tax

A 25% withholding tax applies to most payments of royalties and management fees. In some cases, depending on the applicable tax treaty with Canada, this rate is reduced to nil for management fees and to 10% for royalties. Effective January 1, 2010 under the Fifth Protocol, the said reduction in withholding tax is now denied in respect of dividends, royalties and interest paid by a Canadian ULC to its US parent.

Anti-Trust — *Competition Act*

There are restraint of trade laws, such as those relating to tied selling and resale price maintenance provided for in the federal *Competition Act* that should be reviewed carefully with respect to any of the arrangements referenced above. See **Chapter 5: Canadian Competition Laws**.

Regulation — Franchises

In 2000, the Ontario government passed the *Arthur Wishart Act (Franchise Disclosure), 2000* (the "Arthur Wishart Act") to regulate certain aspects of the franchise industry in Ontario. Alberta and Prince Edward Island are currently the only other provinces in Canada with franchise disclosure legislation in force.

In June 2007, New Brunswick became the fourth Canadian province to pass franchise legislation. Draft regulations were released for public comment in April 2009, but have not as yet to be proclaimed into law. Nova Scotia still does not have franchise legislation.

The Arthur Wishart Act requires franchisors to give franchisees prospectus-like disclosure of all material facts about the business, operations, capital and control exercised by the franchisor and the subject franchise system. A material fact is one that would have a significant impact on the price or value of the franchise or on the franchisee's decision to purchase the franchise. Of the available exceptions to the disclosure requirement, there are two that are most often relied upon. The first applies where the franchisee in question has an existing franchise location and the new franchise is substantially identical and no material changes have occurred since the existing agreement was signed or renewed. The second applies to "sophisticated investors," defined as persons who will, over the next year following the execution of the franchise agreement, be investing $5 million or more in the franchise operation.

Typical of such legislation elsewhere, there is a 14-day mandatory cooling off period between the time of disclosure and the signing of any agreement related to the franchise. The Arthur Wishart Act imposes a fair dealing obligation on both parties, that is, a duty to act in good faith in accordance with reasonable commercial standards. Franchisees will be permitted to form dealer associations, a practice commonly prohibited by standard pre-Act Canadian franchise agreements.

Regulations under the Arthur Wishart Act were amended in 2005 — the amendments included the following:

- A definition of "franchisor's agent" was added in order to clarify the right of action for damages against agents that is included in the Act. Before, the term was not defined. A "franchisor's agent" is now defined as a sales agent of the franchisor who is engaged by the franchisor's broker and who is directly involved in the granting of a franchise.

- The mandatory disclosure of all costs associated with the franchise was amended to limit the disclosure only to the costs associated with the establishment of the franchise. Previously, the regulation required disclosure of all costs associated with the establishment and operation of the franchise. This is a positive development, and brings Ontario in line with the disclosure regimes in other jurisdictions.
- All franchise location closures that occurred within the three fiscal years immediately preceding the date of the disclosure document must be disclosed. Previously, the regulation required continuous disclosure of all such closures within the previous three calendar years from the date of the disclosure document. This too is a positive development, as it simplifies the task of keeping disclosure documents current.
- The criteria for the exemption from the requirement to provide financial statements in the disclosure document has been expanded to recognize situations where a franchisor meets the criteria because it is controlled by a corporation that meets the prior criteria for the exemption. Certain franchisors who previously did not qualify for the financial statement exemption may now qualify.

Independent Sales Agents

An independent sales agent is usually an "order taker." Distributors usually operate on a purchase for resale basis, although consignment arrangements are possible. Consignments are not commonplace in Canada because of the high degree of control that the consigning party must exercise over the goods in question to prevent the goods from being treated, at law, as goods in which the consignee has a sufficient interest, from a competing creditor's perspective, to usurp the claim of the consignor to its goods. Failure to exercise such control over the goods by the consignor would expose the goods to claims by the secured creditors of the consignee who may be entitled to a security interest in the consigned goods, which takes priority over the ownership rights of the consigning party in such goods. In addition, landlords and mortgagees of premises on which the consigned goods are located may dispute the right of a consignee to enter onto and remove consigned goods where the lease in question prohibits the removal of goods or where the tenant of the premises is in default of its lease obligations.

Regulation — Distribution Arrangements

If you wish to enter the Canadian market through the use of a distributor, care should be taken to structure the arrangement so as to meet certain tests established by case law. If the tests are not met, there is a risk you will be found to be the distributor's "employer" with attendant adverse consequences under the Tax Act (source deductions and remittances) and provincial legislation.

Costs

Costs might be significant; however, standard documentation developed by a foreign business for use in other jurisdictions would likely be acceptable in Canada with some modifications.

Court Proceedings

In any legal proceedings before Ontario courts involving a person who does not have assets in Ontario, the party contrary in interest will be able to obtain a court order staying the action until the non-resident party posts security for costs with the court.

No corporation may bring an action in the Courts of Nova Scotia until it is registered to do business but it may defend an action brought against it.

Do Canadian Provinces Have Securities Transfer Legislation Similar to Article 8 of the Uniform Commercial Code?

Securities regulators have been encouraging the provinces for some time to conform provincial legislation to Canadian securities industry practices and to the laws governing the transfer of shares and other securities in other jurisdictions such as the European Union and the US. Each of the provinces of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, New Brunswick (effective February 1, 2010), and Newfoundland & Labrador has enacted legislation to address the above concern. Neither Nova Scotia nor Prince Edward Island has a STA. In certain cases, for example with respect to limited partnership interests, the issuing limited partnership must designate the interests and certificates issued by it as "securities" within the meaning of the applicable *Securities Transfer Act* (each a "STA") for the STA to apply. It is estimated that the savings in reduced financing costs to Canadian business as a result of this legislative reform will be substantial and permanent and reduce the cost of funds for business.

Share Pledges

Prior to the enactment of the STA on January 1, 2007, the rights of any person with an interest in securities governed by the laws of the province in question were uncertain. Those rights were based on the concept of physical possession of a share certificate in spite of the fact that practically all transactions involving financial assets were based on book entries in the records of securities intermediaries, that is, no actual certificates are issued. In Ontario, for example, legislation previously consisted of one section in the OBCA which categorized the book entry as deemed possession of the security in question by the person in whose favour the book entry was made — a legal fiction if ever there was one.

Meanwhile, securities dealers had to get on with the business at hand and they whistled past the graveyard pretending that provincial law was similar in effect to that of, say, New York or the UK. One hundred years ago, this would have been called "law merchant" — a business practice that was so accepted as to constitute a course of dealing and, in effect, part of the common law that applied in the circumstances in question, absent overriding legislation.

Security Entitlements

In those provinces that have enacted a STA, and complementary amendments to its Business Corporations Act and the *Personal Property Security Act* (the "PPSA"), have brought provincial legislation in line with Article 8 of the US *Uniform Commercial Code*. The STA introduced a number of new concepts. It refers to securities that are represented by certificates ("certificated securities") and securities that are represented by book entries in the records of a

securities intermediary ("uncertificated securities"). For uncertificated securities, the book entries which, when made, create a novel legal concept referred to as "security entitlements" in favour of the person whose name is recorded, as having a claim against the securities intermediary, not a claim against the securities, as such. Parties no longer attempt to trace ownership rights through transfers of allotted and issued shares. Rather, in a book-based (uncertificated) system, claims are generally limited to a single level, that is, as between the two contracting parties under the securities account agreement.

For a third party (including a lender) who claims, for example, a security interest in a security entitlement of a debtor to prevail against competing adverse claims, the party in question must exercise control over that securities entitlement. It can do so by entering into a three-party agreement with the debtor and the securities intermediary under which the secured party is given sufficient control of the securities entitlement to permit the secured party to realize against the securities entitlement and cause the securities intermediary to expunge the debtor's security entitlement and establish a new securities entitlement in favour of, for example, a purchaser, without interference from the debtor. Proceeds from the resulting sale (which results in the elimination of one security entitlement and the creation of a new one) are then available to pay the claims of the secured party.

Securities Intermediary First Lien

Under the STA, an unpaid securities intermediary has a first lien on the securities entitlement (ahead of all others, including secured creditors) without the need to register. This provision permits the securities intermediary to conduct business without having to concern itself generally with adverse claims arising, for example, from PPSA registrations against its clients (security entitlement holders).

The Rights of Protected Purchasers

Under the STA, a purchaser for value without notice of an adverse claim who takes control of a security is referred to as a "protected purchaser." A protected purchaser takes the interest so acquired by it free of any adverse claim (as defined in the STA), including any existing security interest in the security created, and perfected, for example, by registration of a financing statement against the debtor under the PPSA. The rationale for this rule is that it permits the trading in securities without imposing a burden of enquiry on the persons engaged in such trading as long as they act in good faith. The obligation imposed on participants in the system is only that they have acted honestly in fact and adhered to reasonable commercial standards of fair dealing. Trades are settled in real time.

The securities trading system could simply not function if it permitted adverse claims to prevail against *bona fide* purchasers who give value for the interests acquired by them without notice of adverse claim.

Conflict of Law Rules

The STA introduces a common set of conflict of laws rules that create certainty, as well as permitting the parties, in appropriate circumstances, to select the laws of a jurisdiction to determine issues affecting rights in the securities in question. In effect, the laws governing the

transfer of securities are, for all intents and purposes, identical throughout the trading system, and parties adverse in interest are able to determine with reasonable certainty their rights in securities by applying laws they understand. This necessarily reduces the perceived risks inherent in the purchase and sale of securities, and over time, the cost of raising capital and trading securities.

Although the rules are complex, the focus of the STA is to create certainty and to limit adverse claims to the parties directly involved in the transaction. Again, the integrity of the securities trading system is preserved without unfairly affecting the rights of participants.

Financial Assets

The STA applies to "financial assets," a new term that includes securities as well as any other mediums of investment recognized for trading in any area or market, as well as any financial asset agreed to be dealt with as between the securities intermediary and the person for whom the securities account in question is maintained, that is, it contains an "opting-in" right as between contracting parties. The STA consistently facilitates flexibility into the marketplace and, by doing so, creates an opportunity for Canadian business to raise capital through the creation of any number of alternative financial assets.

Limited partnership interests are not included in the definition of "securities." As a result, limited partnership agreements should be amended to specifically opt-in to the applicable STA and a notation to that effect should appear on unit certificates.

When Will International Financial Reporting Standards Apply to Canadian Publicly Accountable Enterprises?

For fiscal periods beginning on or after January 1, 2011, each Canadian publicly accountable enterprise ("PAE") must (and any other enterprise who wishes to opt-in, may) use International Financial Reporting Standards ("IFRS") instead of Canadian generally accepted accounting principles ("GAAP") in preparing their financial statements. PAEs which are cross-listed on the Toronto Stock Exchange and the US Securities and Exchange Commission ("SEC") for trading have the right to opt-out of conversion to IFRS, and may continue to prepare their financial statements in accordance with US GAAP. Other than PAEs and opting-in entities, any other Canadian business enterprise may continue to prepare its financial statements using Canadian generally accepted accounting principles for small and medium enterprises ("SME GAAP") and all Canadian not-for profit entities may continue to use Canadian GAAP in preparing their financial statements. Early adoption of IFRS by PAEs is permitted, but we understand that few have applied to the Ontario Securities Commission ("OSC") for permission to do so, probably because shareholders and analysts are not yet familiar with the resulting form of IFRS-based financial statements.

The following section deals with some of the big-picture transactional concerns arising out of the transition from Canadian GAAP to IFRS for those entities who are obligated to adopt IFRS or elect to do so.

Rationale and Timing

IFRS is not a new concept. Since 1973 most developed countries (other than Canada, the US, China, South Africa, Singapore, New Zealand and Brazil) have mandated the use of IFRS, or a version of it with minor variations, by all business and not-for-profit entities in their jurisdictions in preparing financial statements. IFRS is regulated by the International Accounting Standards Committee and its Board based in the UK. Implementation of IFRS for US publicly accountable enterprises may be slow-tracked by the newly appointed head of the SEC. However, Canadian regulatory authorities (Canadian Accounting Standards Board, the Ontario Securities Commission and the Office of the Superintendent of Financial Institutions (the "OSFI")) remain committed to implementation of IFRS for the reporting period beginning January 1, 2011. The rationale for implementing IFRS is to create a common world standard, and by doing so, to increase transparency in financial reporting matters and, ultimately, to reduce the cost of raising capital. Since chartered banks in Canada have a fiscal year ending on October 31, they will lag other PAEs in making the accounting standards change to IFRS by nine months.

To be in a position to provide prior-year comparative figures in 2011, PAEs will have to have appropriate data beginning on January 1, 2010. There may be circumstances where an enterprise (e.g., one positioning itself for sale) may be required to provide comparable financial information for a period ending prior to that time. Many affected Canadian enterprises may still be behind the curve on this one.

Once implemented, PAEs will not have to reconcile their financial statements to conform to US GAAP for SEC filing purposes provided Canada adopts a pure (that is, an unamended) version of IFRS. Although the issue is not yet settled, it would appear that a pure IFRS approach will be adopted in Canada.

To give effect to IFRS, systemic changes will have to be made throughout the reporting enterprise (e.g., for budgets, forecasts, key performance indicators (KPIs as compensation parameters), financial covenants found in credit agreements and debt instruments and for acquisition analysis). Implementation and planning will involve tax and treasury functions (fx and other hedging programs), the board of directors, investor relations (in dealing with stakeholders and performance analysis), human resources (employee evaluation and compensation programs), IT (new data collection and presentation) and general counsel, all to address the resulting disconnect between the enterprise's new financial reporting standards and existing arrangements, including contractual obligations.

As at the end of the first fiscal quarter following January 1, 2011, each IFRS reporting entity will have to prepare and file unaudited quarterly financial statements with prior-year comparative figures for its fiscal quarter then ended. If an enterprise wishes to make itself an attractive acquisition prospect or securities issuer, or private enterprise borrower which competes with PAEs for funding, up to five years of historical IFRS financial statements may be required. It is a substantial project to generate the required data and restate five years of financial results where your staff has little or no experience with IFRS. In addition, there is a chance that information required to carry out the exercise may not have been collected, recorded and retained.

The Management Disclosure and Analysis filed in April 2009 by PAEs with their December 31, 2008 annual report would have included discussion regarding the PAE's IFRS conversion plan. Subsequent annual reports and Management Disclosures and Analyses must describe the PAE's progress with its plan.

A Brief Comparison of Canadian GAAP and IFRS

The following chart is not intended as a comprehensive list of the differences between Canadian GAAP and IFRS — it is only intended to highlight some of the differences and the resulting business implications arising from the change in financial reporting.

IFRS	Canadian GAAP	Business Issues
Principles-based — records transactions based on a broad review of all possible resulting economic benefits and obligations. This approach results in an increase in the auditor's discretion as to how a matter may be reflected on the books, and in the financial statements, of the enterprise. There is no general requirement that all assets be recorded at fair value. The reporting entity can, in many cases, chose to record the asset at cost First time adopters of IFRS-based financial reporting may chose to use fair value of property, plant and equipment on its opening balance sheet. This may be an important option	Rules-based — series of bright line tests which dictate how a matter must be reflected on enterprise books and financial statements	• Increased shareholder and contract counterparty uncertainty because of the absence of bright line tests • Increase in financial statement and Management Disclosure and Analysis to rationalize the approach taken, and the judgment exercised by management and accepted by the auditors — some estimate that annual reports may initially double in length • Others believe that for exempt private enterprises, once IFRS based financial statements move past the first few years of use, their IFRS-based financial statements will be shorter, and contain less disclosure than presently required under Canadian GAAP • Increased volatility of asset valuations arising out of the ability of the entity to record investment property at fair value rather than cost and an obligation to record impairments in value. This will affect the enterprise's debt to total asset ratio and return on asset ratio (Canadian GAAP would have used historical cost amounts as the basis for the calculation) • Contingent liabilities are given greater weight in IFRS-based financial statements. As a result, in acquisition transactions, the buyer may prefer to purchase assets and not shares
Componentization — those parts of a reporting entity's plant property and equipment which have similar lives are to be grouped for reporting purposes		• New valuation approach
Disclosure and valuation of future obligations (e.g., recurring payment of bonuses, future year promises in labour negotiations)	Disclosure may not be required	• Valuation and analysis required
Off-balance sheet treatment of affiliated conduits — under IFRS it is difficult to exclude	Off-balance sheet treatment is given to transactions with	• Assets and liabilities of conduits will be brought back onto the balance sheet of the reporting entity. As a result, financial ratios could be

IFRS	Canadian GAAP	Business Issues
affiliate transactions where the reporting entity retains benefits from the operations of the conduit and is subject to obligations. IFRS requires a risk/reward analysis to be applied to the reporting entity as it operated prior to the transaction with its affiliate and after completion of the related-party transaction	affiliates	adversely affected by consolidation • "True sale" opinions will no longer be required in securitization arrangements — bright line test gone
The meaning of EBITDA (earnings before interest, taxes, depreciation and amortization) and financial ratios may be different from corresponding terms in Canadian GAAP		• Credit agreement financial covenants may not be in sync with IFRS-based financial reporting — threshold amounts may no longer properly test the financial covenants, resulting in apparent breaches (where there has been no material change in the performance of the business) • One approach to address the issue would be to prepare and provide financial covenant calculations using both Canadian GAAP and IFRS to give comfort to lenders (and other counterparties) that apparent covenant breaches are the result, in part, of the change to IFRS-based financial reporting, and not a change in the performance of the borrower • We strongly recommend that PAEs prepare an appropriate information package for its lenders and other counterparties by June 30, 2010 — if the relationship in question is in jeopardy you will need significant lead time to negotiate with lenders and to develop a strategy to deal with apparent breach of other significant relationships that cannot be terminated in the short term • If a PAE has issued debt in the public markets with financial covenants based on Canadian GAAP, there may be significant adverse implications arising out of the shift to IFRS • Financial covenants in commercial agreements may no longer fit the intent of the parties — again calculations using both approaches may be needed to evidence compliance — we strongly recommend that material contracts be reviewed as early as possible to identify issues to permit PAEs to develop strategies to address any concerns triggered by the transition to IFRS • Where there is a consensus, parties may have to amend existing agreements to introduce new terminology using IFRS concepts and to change threshold amounts • Existing agreements which reference Canadian GAAP should be reviewed and counterparty lenders, landlords and others briefed on reporting based issues • New agreements which reference Canadian GAAP should provide for a future conversion to

IFRS	Canadian GAAP	Business Issues
		IFRS-based financial reporting in the definition of Canadian GAAP • Contract counterparties and taxing authorities may challenge management's application of broader IFRS reporting standards where the counterparty believes that the entity has used the IFRS standard to artificially reduced its financial obligations
Further to the note above regarding the opening balance sheet for IFRS purposes, an entity must record most of the adjustments made to its opening balance sheet assets and liabilities as an adjustment to retained earnings or another equity account		• Certain ratios (debt to equity and return on equity) will be affected by this adjustment
IFRS requires that certain assets not recognized by Canadian GAAP be recorded for IFRS purposes		• If this occurs, it will affect current ratio calculations
IFRS is a work in process — one issue under consideration is the treatment of true and capital leases		• If the change is made to account for capital leases like true leases, then both lease assets and liabilities would be reflected in the financial statements and have an effect on the enterprise's debt-to-asset ratio and its debt-to-equity ratio

4. TAXATION

What Levels Of Government Levy Income Taxes?

The federal and provincial/territorial governments are entitled to levy taxes on income earned in Canada. Income tax is levied on "persons," a term that includes individuals, trusts and corporations. Partnerships are not considered persons for tax purposes. Income (or loss) of a partnership is calculated as if it were a person, and the income (or loss) is then allocated among the partners for tax purposes.

What Is The Meaning Of The Term "Resident" As Used In The Tax Act?

Federal income tax liability is based the concept of residence. However, the Tax Act does not contain an exhaustive definition of this term. Under the common law, an individual is considered to be a resident of Canada if Canada is the place where that person regularly and customarily lives. Other factors in determining residency are intention and the existence of other ties to Canada, including the location of dwellings, personal property, spouses and dependants, as well as social and economic interests. There are also certain rules in the Tax Act which deem a person to be resident in Canada. For example, individuals will be deemed to be residents of Canada for any year they sojourn in Canada for 183 days or more in that calendar year.

A corporation incorporated outside Canada will be considered resident in Canada if its central mind and management are located in Canada. In other words, if the directors of a foreign corporation who control or manage the corporation are residents of Canada and meet in Canada, the central mind and management of the foreign corporation would, as a result, be considered to be in Canada, and the foreign corporation will be a resident of Canada for Canadian income tax purposes. A corporation will be deemed to be resident in Canada if it was incorporated in Canada after April 26, 1965, or, if incorporated before that time, it was resident in Canada or carried on business in Canada at any time after April 26, 1965.

Trusts are generally considered to reside where the trustee (or a majority of the trustees where there are more than one) who manage the trust and control the trust assets reside. Recent case law has held that trusts are resident where the management and control of the trust takes place.

When Would A Non-Resident Of Canada Be Considered To Be "Carrying On Business In Canada" For Purposes of the Tax Act?

The basic scheme of taxation of non-residents in respect of Canadian investments is that they are either subject to "mainstream" tax under Part I of the Tax Act (and branch tax) or withholding tax under Part XIII.

Non-residents of Canada are taxable under Part I of the Tax Act generally in the same manner as a resident under Part I in respect of:

- Income from employment in Canada;
- Income from a business carried on in Canada; *and*
- Taxable capital gains from the disposition of taxable Canadian property.

The determination of whether a non-resident is carrying on business in Canada is based on case law and provisions of the Tax Act.

Persons who are resident in Canada within the meaning of the Tax Act are liable for tax on their worldwide income from any source for the period they are resident in Canada for tax purposes. Note that a person may live outside Canada and still be resident in Canada for tax purposes.

The Tax Act also deems non-residents to have been carrying on business in Canada for tax purposes in the year if they:

- Produced, grew, mined, created, manufactured, fabricated, improved, packed, preserved or constructed anything in Canada in whole or in part, whether or not the person exports that thing without selling it before exportation;
- Solicited orders or offered anything for sale in Canada through an agent or servant, whether the contract or transaction was to be completed inside or outside Canada, or partly in and partly outside Canada; or
- Disposed of certain property including: (i) Canadian resource property (except in certain circumstances); (ii) property (other than depreciable property) that is a timber resource property, an option in respect of timber resource property or an interest in, or for civil law a right in, a timber resource property; or (iii) property (other than capital property) that is real or immovable property situated in Canada, including an option in respect of such property or an interest in, or for civil law a real right in, such property, whether or not the property is in existence.

What Effect Do Tax Treaties Have On Canadian Tax Rules?

The ITA rules are often overridden by tax treaties between Canada and the country in which the non-resident resides. For example, a US resident's business profits from a Canadian source are not subject to income tax in Canada unless the profits are derived from the US resident's "permanent establishment" in Canada, or unless the income is from sources such as rents, royalties, interest or dividends. Non-resident corporations wanting to claim an exemption from Canadian income tax based on a tax treaty exemption must file an information return disclosing their position.

The Convention defines a "permanent establishment" as a fixed place of business, through which the business of the non-resident is wholly or partly carried on such as an office or factory. A permanent establishment also includes someone who habitually concludes contracts in the name of the non-resident. However, operating a business through a Canadian subsidiary will not constitute a permanent establishment for a US parent corporation, because the subsidiary will already be liable for Canadian income tax on its world income. Furthermore, a US resident is not considered to have a permanent establishment in Canada if the resident carries on business in Canada through an independent agent.

The definition of "Taxable Canadian property" under the Tax Act is broad and includes real property situated in Canada, shares of certain corporations, and interests in certain partnerships, trusts and estates. Under the Convention, a resident of the US disposing of taxable Canadian property is generally not subject to Canadian income tax on any gain from the disposition unless: (i) the value of such property is derived from Canadian real estate or

immovable property; or (ii) the property is personal property forming part of the business property of its permanent establishment in Canada.

New Protocol to the Canada-US Income Tax Convention

The following is a summary of certain of the important changes introduced by the Fifth Protocol to the Canada-US Tax Convention (the "Fifth Protocol").

Elimination of Withholding Tax on Interest Payments between Canada and the US

Unrelated Party Interest

The Fifth Protocol provides that, subject to the potential application of the new Limitation on Benefits ("LOB") provision, non-resident withholding tax on interest (other than "participating interest") paid to US resident persons that are not related to the Canadian payer will be eliminated. This provision applied retroactively for unrelated party interest paid or credited on or after January 1, 2008.

The exemption under the Fifth Protocol for interest paid to a non-related person is likely of little practical significance from a Canadian withholding tax perspective because of domestic tax law changes also applicable from January 1, 2008, eliminating withholding tax on most arm's-length interest payments.

Interest earned in Canada that is determined with reference to receipts, sales, income, profits or other cash flow of the debtor or a related person, to any change in the value of any property of the debtor or a related person or to any dividend, partnership distribution or similar payment made by the debtor to a related person is still subject to withholding tax under the Fifth Protocol. If the beneficial owner is a resident of the United States, the gross amount of the interest may be taxed at a withholding rate of 15%.

Related Party Interest

A very important change in the Fifth Protocol is the relief for related party interest which makes the Convention unique among Canada's tax treaties. Under the Fifth Protocol, withholding tax on interest paid by a Canadian resident to a related US resident person (or a person deemed to be related if paragraph 2 of Article IX applied) was reduced to 7% during 2008, then reduced to 4% for 2009, and eliminated altogether for 2010 and all subsequent years.

Thin-Capitalization Rules

It should be noted that the domestic thin-capitalization rules in the Federal *Income Tax Act* (the "Tax Act") which can restrict the deductibility of interest in respect of "outstanding debts to specified non-residents" continue to apply to the Canadian borrower regardless of any withholding tax exemption under the Tax Act or a tax treaty.

Extension of Treaty Benefits to US Members of Limited Liability Companies

Prior to the Fifth Protocol, the Convention did not provide any rules regarding the treatment of hybrid entities, such as LLCs, that are treated as corporations under the laws of one country but are treated as fiscally transparent entities in the other country. Accordingly, CRA

had taken the position that a fiscally transparent LLC was not entitled to benefits under the Convention.

Effective February 1, 2009 for source withholding and for other tax purposes for taxation years commencing after 2008 the Fifth Protocol provides that income earned through an LLC by a person who is a resident of the US for purposes of the Convention is treated by Canada as having been earned directly by that person provided that the treatment of the amount under the tax laws of the US is the same as its treatment would be if that had been derived directly by that person. Accordingly, such persons are, subject to the LOB provision, entitled to benefits under the Convention such as reduced rates of withholding tax.

However, Canadian law does not disregard the existence of the LLC itself. One implication of the foregoing is that the LLC will have to file a Canadian tax return in respect of income and benefits under the Convention. Another implication is that if the income at issue is business profits, it will have to be determined if such income was earned through a permanent establishment in Canada based on the presence and activities of the LLC itself in Canada, not those of the shareholders. If so, the LLC will be subject to tax on any profits attributable to its permanent establishment in Canada.

Hybrid Entities

While treaty benefits are extended to certain LLCs under the Fifth Protocol, there will be a denial of treaty benefits in respect of certain hybrid entities. The new provisions dealing with hybrid entities are quite broad and will affect a wide range of US investment structures. These changes took effect on January 1, 2010.

Treaty benefits will be denied in respect of dividends, royalties and interest paid by a Canadian ULC (disregarded for US tax purposes) to its US parent.

An example of a financing structure that will be adversely affected by the new provision is where US corporations constitute themselves as a Canadian partnership to finance their Canadian corporate operations and check the box in the US so that the partnership is treated as a corporation for US tax purposes. The reduced withholding rate under the treaty will no longer apply to interest paid by the Canadian corporation to the partnership.

Other Provisions of the Fifth Protocol

Additional important changes in the Fifth Protocol:

- Services performed by an enterprise of a treaty country (e.g., the US) in the other treaty country (e.g., Canada) may give rise to a permanent establishment by the enterprise in the other country (Canada). If the rule applies, the services will be taxed on a net basis on profits attributable to the activities carried on in performing those services.
- A revised LOB provision that only grants treaty benefits to a resident of Canada or a resident of the US if certain tests are met (the LOB provision prior to the Fifth Protocol only applied in respect of US treaty benefits).
- Disputes regarding certain key double tax issues, such as transfer pricing, may now be settled through binding arbitration.

- Double taxation on emigrants' gains will be eliminated by providing for a step-up in the tax cost of property in certain cases.
- There will be mutual tax recognition of pension contributions.
- The tax treatment regarding stock options granted to employees while working in one country who exercise or dispose of the options while working in the other country have been clarified.

Which Tax Rates Apply To Individuals?

The calculation of an individual's 2010 federal income tax is based on a four-bracket progressive system. The tax rates are:

- 15% for incomes up to $40,970;
- 22% for incomes between $40,971 and $81,941;
- 26% for incomes between $81,942 and $127,021; *and*
- 29% for incomes over $127,022.

Most provinces also have a progressive tax rate system. For 2010, these provincial tax rates range from 5.06% to 24%. Alberta has a flat rate of 10% tax on all income. Therefore, the top personal marginal tax rate for individuals can be between 39% and 53%. Dividends and capital gains receive favourable tax treatment in Canada. Canada Pension Plan contribution levels are also significantly lower than US Social Security mandatory contributions.

Which Tax Rates Apply To Corporations?

In most cases, corporations that are taxable in Canada pay a flat rate of income tax that amounts to a combined federal and provincial rate of about 28% to 34% on active business income depending on the province. The federal and provincial governments provide some relief for Canadian-controlled private corporations and those corporations involved in manufacturing and processing businesses. In addition, some provinces provide tax benefits for new businesses.

Federal Business Number

Each business entity conducting business in Canada must apply for and obtain a business number from CRA. The business number is used for GST/HST purposes, payroll source deductions, income tax filings and import/export duties and taxes. A business number may only be obtained on line at **www.arc.gc.ca** or by fax.

Which Withholding Taxes Apply?

Withholding tax on most arm's-length interest payments was eliminated under Canadian domestic law effective January 1, 2008. In effect, interest paid by a resident to an arm's length non-resident is not subject to withholding tax provided the interest is not "participating debt interest." As previously discussed under the heading "Elimination of Withholding Tax on Interest Payments between Canada and the US" on page 4.3, withholding tax on interest, with some limitations and exceptions, has also been eliminated under the Fifth Protocol.

Under the Tax Act, payments to US residents of dividends, rent, royalties and certain management fees from Canadian sources are generally subject to a 25% Canadian withholding tax, applied at source by the payor, calculated on the gross amount of the payments.

The applicable withholding rate for dividends under the Convention is reduced to 15%. In addition, under the Convention, only a 5% withholding tax is imposed on the gross amount of dividends paid or credited by a Canadian corporation if the beneficial owner of the dividend is a US corporation which owns at least 10% of the voting stock of the Canadian corporation.

Most royalties are subject to a 10% withholding tax under the Convention, but there is a withholding tax exemption for some copyright royalties, computer software royalties and certain know-how royalties on patents or information concerning industrial, commercial or scientific expertise.

A Canadian corporation can pay arm's length fees to a US affiliate for management and administrative services rendered outside Canada without Canadian withholding tax, provided there is protection of the Convention. Under the Convention, management and administrative fees are included in business profits. If the US affiliate provides management and administrative services for a fee and if the fee is an arm's length amount, the subsidiary can claim it as a deduction for Canadian federal income tax purposes; and the fee will not attract Canadian withholding tax. If the services are rendered in Canada, there are other Canadian tax considerations.

The Canadian company can claim such payments as deductions for tax purposes under the Tax Act. However, due to the rules on transfer pricing, the CRA can adjust the income of a Canadian taxpayer and apply penalties (in certain cases) if that taxpayer and a non-arm's-length non-resident person participate in a transaction:

- In which the terms and conditions differ from those that would have been made between persons dealing at arm's length; or
- That would not have been entered into between persons dealing at arm's length, and the transaction cannot reasonably be considered to have been entered into primarily for bona fide purposes other than to obtain a tax benefit.

See the commentary on Tax Act section 116 certificates under the heading "Section 116 Clearance Certificates" on page 4.9.

What Are Branch Taxes?

In addition to the normal level of corporate income tax applied to business profits, a branch tax of 25% (reduced to 5% under the Convention) is levied on the after-tax business profits of a non-resident foreign corporation carrying on business in Canada through a branch rather than as a Canadian subsidiary corporation (the "Branch Tax"). Certain Canadian branch businesses are exempt from this tax; they include communications, the transportation of people and goods, and the mining of iron ore in Canada.

The Branch Tax compensates for the 25% Canadian withholding tax (reduced to 15% or 5% under the Convention) that would otherwise apply to dividends paid by a Canadian subsidiary to a non-resident, corporate shareholder. However, through an investment allowance system, branch profits reinvested in Canadian business assets are not subject to the Branch Tax.

Furthermore, the Convention provides that the first $500,000 earned by a Canadian branch operation of a US resident company is exempt from Branch Tax. Many US enterprises operate as a branch in Canada if they expect start-up losses in their Canadian operations, because such losses can then be consolidated against profits of the US corporation. The foregoing treatment is not generally afforded to a separately incorporated subsidiary of a US parent corporation.

Most US enterprises operating branches in Canada incorporate a Canadian subsidiary once the operations become profitable and the $500,000 cumulative threshold of earnings has been used. The capital assets of the branch (other than real property) can be transferred on a tax-deferred, rollover basis to the Canadian subsidiary.

What Taxes Apply On The Death Of A US Resident?

On the death of a US resident who owns certain Canadian real estate-related assets, as described earlier, the Tax Act stipulates that capital gains are deemed to have been realized. In respect of Canadian tax, the Convention permits the realization to be deferred in cases where the resident has left the property to a spouse or to a trust set up exclusively for the spouse. The Convention also grants a tax credit for the Canadian tax on capital gains; this credit can be applied against the US estate tax otherwise payable.

What Other Provincial Taxes Are Imposed On Corporations?

Capital Tax

Several provinces, including Ontario, currently impose an annual tax on the paid-up capital of corporations having a permanent establishment in the province, whether the corporation is a resident of the particular province or not. The general rates of provincial capital tax vary between 0.15% and 0.4%, with exemptions or lower rates on capitalizations under threshold amounts. A higher rate is imposed on financial institutions by provinces that levy a capital tax. A number of these provinces have proposed elimination of the capital tax over a certain amount of time. Ontario capital tax will be eliminated on July 1, 2010. The Nova Scotia Large Corporations Tax, which applies to non-financial services firms, is being phased out and is scheduled for elimination July 1, 2012. British Columbia does not impose a capital tax.

Municipal Realty Taxes

Under Ontario's *Municipal Act* and the *Assessment Act*, municipalities in Ontario levy property taxes on the current value or average current value of real property within the municipality. Each municipality sets the rate of property tax in each tax year. A similar approach applies in Nova Scotia.

Most commercial property lease payments in Canada are net and the lease usually stipulates that the tenant is responsible for the property taxes. Some leases also stipulate that the tenant must pay the landlord's capital tax (if any) attributable to the property. If you intend to lease premises in Canada, you should review the lease terms carefully and if you agree to assume all or part of these tax charges, get an estimate for your budgeting purposes. Commercial lease rents are generally subject to HST in those provinces which have the HST.

Payroll Taxes

All employers in Ontario must pay the Employer Health Tax of 1.95% levied on the gross amounts of wages and salaries and other remuneration paid to employees who either report for work at a permanent establishment in Ontario or are paid from or through a permanent establishment in Ontario where gross remuneration paid by the employer to its employees exceeds $400,000 per year. This tax helps to fund the Ontario health care system.

British Columbia does not impose a payroll tax to help fund its health care system. Individuals are separately assessed $580 per family to fund the system. The province imposes a health care premium on its residents. As of January 1, 2010, the monthly premium is $57 for an individual, $102 for a couple and $114 for a family.

Who Is Required To File A Tax Return In Canada?

Individuals resident in Canada for tax purposes are required to file federal income tax returns if they have tax to pay or if they realize a taxable capital gain or dispose of capital property in the taxation year. Corporations resident in Canada for tax purposes are required to file federal income tax returns whether or not they have any income tax to pay in the taxation year.

In general, non-resident corporations are required to file federal income tax returns if they carried on a business in Canada, realized a taxable capital gain or disposed of taxable Canadian property in the taxation year. With effect from January 1, 2009, the requirements to a file a Canadian tax return have been amended to provide that non-resident individuals and corporations are no longer required to file a federal income tax return for a taxation year solely because they have a taxable capital gain in the year or because they disposed of taxable Canadian property in the year, where the gain or disposition is in respect of an "excluded disposition." A disposition will be an excluded disposition under the Tax Act if the taxpayer is non-resident of Canada for tax purposes, no tax is payable under Part I of the Tax Act by the taxpayer for the taxation year, the taxpayer is not liable to pay any amount under the Tax Act for a previous taxation year (other than an amount for which the Minister of Revenue has adequate security), and each taxable Canadian property is either: (i) an excluded property under subsection 116(6); or (ii) a property for which a clearance certificate has been issued under subsection 116(2), (4) or (5.2) of the Tax Act.

In general, individual income tax returns must be filed by April 30 of the year following the particular taxation year. Individuals who carried on a business in the year must file their income tax returns by June 15 of the year following the taxation year. Corporations' income tax returns are due within six months of the corporation's fiscal year end, which might not necessarily be December 31. For corporations, tax is generally payable in periodic instalments throughout the year, and interest charged on deficient payments is not a deductible expense for income tax purposes. Tax returns cannot be filed on a consolidated basis; each corporate taxpayer must file its own tax return with its own financial statements. Some provinces require corporations to file separate provincial income tax returns.

Canadian resident corporations and non-resident corporations that carry on a business in Canada must also file an information return describing certain transactions that they entered

into with non-residents with whom they do not deal at arm's length which is due within six months of the corporation's fiscal year end.

Section 116 Clearance Certificates

In addition, section 116 of the Tax Act requires a non-resident person who disposes of taxable Canadian property other than excluded property, whether or not the gain is exempt from Canadian tax under a tax treaty, to obtain a clearance certificate from the CRA (see below for changes effective for dispositions after 2008). The following comments apply, not only to the sale of interests in real property, but also to the disposition by a non-resident of any other taxable property in Canada, such as an interest in a business in Canada.

In general terms, the non-resident vendor must send a notice to the CRA on a prescribed CRA form regarding the sale before or within 10 days after the disposition. The notice must set out certain prescribed information. Where the capital gain or income arising from the sale is not exempt from tax under a tax treaty, the non-resident vendor will have to pay to the CRA an amount equal to 25% of the estimated capital gain, and the applicable tax in respect of the estimated income to be realized by the vendor, before the CRA will issue a clearance certificate. Where a capital gain or income is exempt from tax under a tax treaty, the CRA will generally issue a clearance certificate to the non-resident and not require the prepayment of tax. However, the CRA may request certain documents from the non-resident to ascertain the applicability of the treaty exemption before issuing the clearance certificate.

Amendments were made to section 116 effective for dispositions after 2008 which were intended to provide some relief from section 116 requirements to non-residents by relieving the potential liability of the purchaser where the following conditions are met:

- The purchaser concludes, after reasonably inquiry, that the vendor is, under a tax treaty between Canada and another country, resident in that other country;
- The property would be "treated-protected property" if the vendor were resident of that country; *and*
- The purchaser complies with new notice requirements.

There is considerable concern that the provision does not provide meaningful protection from liability for failure to withhold to a purchaser because of its risk associated with determining the vendor's treaty-protected status of taxable Canadian property. Despite good intentions on the part of the government, it is doubtful that the current withholding practices will, for arm's length parties, change unless CRA issues practical guidance to purchasers to avoid liability should the property turn out not to be "treaty protected property." In practice, we expect that the purchaser will continue to require the vendor to file for a clearance certificate and to withhold tax consistent with the practice followed prior to 2009.

There are also amendments concerning the requirements for non-residents disposing of taxable Canadian property to file a Canadian tax return effective for dispositions taking place on of after January 1, 2009 (discussed under the heading "Who is Required to File a Tax Return in Canada").

What Provincial Sales Taxes Are Imposed In Canada?

All provinces except Alberta impose a retail sales tax on personal property purchased for consumption rather than resale, and on selected services.

Sample Rates of Retail Sales Tax across Canada

Province	Rate (%)
British Columbia	7
Saskatchewan	5
Manitoba	7
Ontario	8
Québec	7.5
Prince Edward Island	10

The federal government along with the governments of New Brunswick, Nova Scotia and Newfoundland & Labrador have replaced the GST with the HST. Ontario and British Columbia are scheduled to implement the HST on July 1, 2010.

In some provinces, retail sales tax is applied to the cost of goods including the GST, while in other provinces the retail sales tax is calculated on the price of goods excluding the GST.

There are other provincial sales taxes in Ontario and other provinces, such as a tax imposed on gasoline and alcohol.

There are no sales taxes in Alberta.

Harmonized Sales Tax

The federal government along with the provincial governments of New Brunswick, Nova Scotia and Newfoundland & Labrador (the "Participating Provinces") have replaced the GST and their respective provincial retail sales tax with a harmonized sales tax ("HST"). In the Participating Provinces, the HST combines the 5% GST with an 8% provincial tax component, resulting in a 13% HST rate. Effective July 1, 2010, British Columbia will be implementing a 12% HST, and Ontario will be implementing a 13% HST.

Generally, the HST is applied to the same base of goods and services that are taxable under the GST, subject to some exceptions, which vary across the Participating Provinces. The HST is administered by the federal government, which then remits the appropriate amounts owing to the Participating Provinces.

Generally, businesses who supply certain taxable or zero-rated goods and services can recover the GST/HST paid or payable on goods and services that were acquired in the course of their commercial activities by claiming input tax credits. Accordingly, the HST is effectively a tax on the end-users of a product or service.

Québec Sales Tax

In July 1992, Québec implemented the Québec sales tax ("QST"), which replicated the GST regime. However, contrary to the HST, the QST was implemented in its own provincial legislation. Moreover, in Québec, the GST and the QST are administered by the Québec Ministry of Revenue. The QST is calculated at a rate of 7.5% and is applied to the cost of goods including the GST.

In Québec, generally, businesses can recover the GST/QST paid or payable on goods and services that were acquired in the course of their commercial activities by claiming input tax credits under the GST system and an input tax refund under the QST system.

What Are The Incentives To Establish New Businesses In Canada?

In contrast to the US, the tax system in Canada provides no special incentives to new businesses. Through recent tax reform, the federal government has attempted to make the income tax system as neutral as possible, although, it is possible to obtain modest municipal tax relief and other incentives to establish new businesses. See pages 9.11 to 9.15 for a summary of federal and provincial incentive programs available to business.

How Are Certain US Forms Of Business Entity Characterized In Canada?

The characterization for Canadian income tax purposes of certain US entities has been the subject of much doubt over the past few years. The CRA has, however, issued technical interpretations clarifying the status of some entities.

For example, the CRA has provided opinions that US LLCs formed under certain US states will be regarded as corporations for Canadian income tax purposes even though they may be disregarded or treated as partnerships for US income tax purposes.

A Nova Scotia, Alberta or British Columbia unlimited liability company can provide for significant flexibility in cross-border transactions. For income tax purposes, these entities are generally treated as corporations in Canada and as partnerships in the US. However, as previously described, changes to the Tax Convention by the Fifth Protocol has made these business entities less attractive for US residents.

What Other Taxes Are Imposed In Canada?

Each province has a right to impose indirect taxes. The following is a list of some of the indirect taxes that currently apply in Ontario:

- **Ontario Realty Taxes** — Under Ontario's *Municipal Act* and the *Assessment Act*, municipalities in Ontario levy property taxes on the assessed value of real property within the municipality. Properties are assessed on the basis of their current value or average current value. Municipalities have the power to tax different classes of property at different rates. The municipality sets the amount of tax levied on a property in each taxation year, and property taxes levied on comparable properties may vary from one municipality to another

depending on their different revenue requirements. Property taxes, if unpaid, become a charge against the realty.

- **NS Realty Taxes —** The *Municipal Government Act* and *Assessment Act* provide for a system of property taxes in Nova Scotia based on the assessed value of real property within the municipality. Properties are assessed on a fair market value basis by an corporation owned by the municipalities of Nova Scotia. Residential properties may enjoy a cap on the rate of assessment increase based on the Consumer Price Index in certain cases. Resource, Agricultural and Recreational lands (as defined by the *Assessment Act*) enjoy preferred rates of assessment but when the land class changes through development, a change of use tax applies. Municipalities have the power to tax the classes of property at different rates and therefore vary from municipality to another. Property taxes form a priority lien on property when unpaid.
- **Land Transfer Tax —** All of the provinces of Canada impose a land transfer tax in some form. Land transfer tax is usually payable on the conveyance of real property (e.g., land and any building or fixture thereon) based on the value of the real property or consideration paid for the property. Land transfer tax may also be payable upon entering into a long-term lease of real property. In Nova Scotia, the deed transfer tax rate is set by municipal by-law to a maximum of 1.5% of value and paid to the municipality. Generally, the deed transfer tax is payable through the Land Registration Office upon the registration of a deed that conveys ownership. A lease of more than 21 years is subject to deed transfer tax in Nova Scotia. The obligation to pay land transfer tax is imposed on the purchaser, and is paid directly to the relevant provincial authority on the transfer of registered title to the real property. In Ontario, for example, the progressive rate is approximately 0.5% on the first $55,000 of purchase price; 1% on the next $195,000; and 1.5% on proceeds exceeding $250,000. In Ontario, a lease of real property having a term exceeding 50 years (including renewals or extensions) is subject to land transfer tax, and for residential properties, the land transfer tax is 2% of proceeds over $400,000. In British Columbia the rate is 1% on the first $200,000 of value and 2% thereafter. A transfer of a registered long-term lease may also trigger the tax. The tax does not apply to unregistered transfers such as the transfer of a beneficial interest of real property where title is held by a bare trustee. BC imposes other taxes including tax on gasoline and on occupancy of hotel rooms.
- **City of Toronto Land Transfer Tax** — Effective January 1, 2008, the City of Toronto introduced land transfer tax largely identical to that imposed by the Province of Ontario (summarized above). The Toronto land transfer tax is payable on the conveyance of real property (e.g., land and any building or fixture thereon) based on the value of the real property or consideration paid for the property.
- **Payroll Health Tax** — All employers in Ontario must pay the Employer Health Tax of between 0.98% and 1.95%, levied on the gross amounts of wages and salaries and other remuneration (gross remuneration) paid to employees who either report for work at, or are paid from or through, a permanent establishment in Ontario whose gross remuneration exceeds $400,000 per year. Graduated rates apply to employers whose gross remuneration is less than $400,000. The employers' health levy helps to fund the cost of the Ontario health care system.
- **Ontario Health Premium** — In addition, there is an Ontario Health Premium which is imposed on individuals at graduated rates according to income over the minimum threshold

of $20,000. For an individual earning $25,000, the health premium would be $300. This premium rises incrementally to $900 for an individual earning over $200,600.

- **Workplace Safety Insurance Premium** — This provincial tax is levied on employers to build a fund for workers who lose earnings when they are injured in an accident arising out of, or in the course of, their employment. Employers' contributions depend on the hazard rating that the Workplace Safety and Insurance Board assigns to their industries and on their individual industrial safety records. With very few exceptions, workers are only entitled to the benefits fixed by the fund and cannot sue their employers for damages arising out of a work-related injury or disease. In Nova Scotia, employers must pay a assessment to the workers' compensation fund as a tax to fund the insurance system for workers injured through their employment. The rate of assessment depends on the number of employees and the claims history of the employer.

In addition, two important federal social programs are funded through the tax mechanism:

- **Employment Insurance Contributions** — Employees must contribute 1.73% of insurable earnings up to a maximum annual contribution of $731.79. Employers must contribute an average of 1.4 times the employee contributions.
- **Canada Pension Plan Contributions** — Employers must match employee contributions to the plan. Employees contribute a maximum of 4.95% of their pensionable earnings per year up to a maximum annual contribution of $2,118.60. The rate for self-employed persons is 9.9% of pensionable earnings up to a maximum annual contribution of $4,237.20.

What Other Taxes Are Imposed In Québec?

- **Municipal Taxes —** Under Québec's *Act Respecting Municipal Taxation*, municipalities in Québec levy property taxes on the value of real property (building and land) within the municipality. Properties are assessed on the basis of their current value in an open an competitive market. The tax rates vary according to the type of property (i.e., residential, industrial, agricultural).
- **Land Transfer Tax —** Municipalities in Québec collect taxes on the transfer of any immovable property situated within their city limits calculated on the basis of the greater of the price paid and the fair market value of the lands at the time of the transfer. The obligation to pay the transfer duties is imposed on the purchaser and must be paid directly to the municipality. The progressive rate is 0.5% on the first $50,000 of the basis of purchase price/fair market value; 1% on the next $200,000 and 1.5% on the balance in excess of $250,000.
- **Health Services Fund —** All employers in Québec must pay a contribution to the Health Services Fund ("QHSF"). The contribution rate varies between 2.7% to 4.26% depending on the employer's total payroll and the payroll of all associated corporations. The employers' contribution helps to fund the cost of the public health services in Québec. Individuals must also contribute to the QHSF. The contribution rate is based on the individual's total income allowing for certain deductions to a maximum annual payment by an individual of $1,000.
- **Contribution to the financing of the Commission des normes du travail —** Employers in Québec must pay a contribution to the financing of the Commission des normes du travail ("CNT") equal to 0.08% of the total remuneration paid to certain of its employees up to $62,000 per employee.

- **Contribution to the Workforce Skills Development and Recognition Fund** — An employer whose total payroll exceed $1,000,000 is required to allot an amount representing at least 1% of its total payroll to eligible training expenditures. Employers who fail to do so must pay to the Workforce Skills Development and Recognition Fund a contribution equal to the difference between 1% of their total payroll and the amount of their eligible training expenditures.
- **Québec Parental Insurance Plan** — The Québec Parental Insurance Plan provides for the payment of benefits to employees taking a maternity, paternity, adoption or parental leave. The employees must contribute 0.484% of insurable earnings up to a maximum annual contribution of $300.08. Employers must contribute to 0.667% of insurable earnings up to a maximum annual contribution of $419.74.
- **Québec Pension Plan** — In lieu of contributions to the Canadian Pension Plan, employers in Québec must match employee contributions to the Québec Pension Plan. Employees contribute a maximum of 4.95% of their pensionable earnings per year up to a maximum annual contribution of $2,118.60. The rate for self-employed persons is 9.9% of pensionable earnings up to a maximum annual contribution of $4,237.20.

What Other Taxes Are Imposed In New Brunswick?

- **Realty Taxes** — Under New Brunswick's *Real Property Tax Act* and the *Assessment Act*, municipalities in New Brunswick levy property taxes on the assessed value of real property within the municipality. Properties are assessed on the basis of their current value or average current value. Residential properties located in urban centers have significantly increased in value over the last three years. Municipalities have the power to tax different classes of property at different rates. The municipality sets the amount of tax levied on a property in each tax year, and property taxes levied on comparable properties may vary from one municipality to another depending on their different revenue requirements. Property taxes, if unpaid, become a charge against the realty.
- **Land Transfer Tax** — In New Brunswick the rate is ¼ of 1%. In New Brunswick, a lease of real property having a term exceeding 50 years (including renewals or extensions) is subject to land transfer tax.
- **Worksafe New Brunswick** — This provincial tax is levied on employers to build a fund for workers who lose earnings when they are injured in an accident arising out of, or in the course of, their employment. Employers' contributions depend on the hazard rating that Worksafe New Brunswick assigns to their industries and on their individual industrial safety records. With very few exceptions, workers are entitled to only the benefits fixed by the fund and cannot sue their employers for damages arising out of a work-related injury or disease.

5. CANADIAN COMPETITION LAWS

In Canada, all aspects of competition law are governed by the *Competition Act* (the "CA"), which is federal legislation administered by the Competition Bureau (the "Bureau") and headed by the Commissioner of Competition (the "Commissioner"). The stated purpose of the CA is to maintain and encourage competition in Canada. Three aspects of the CA are of principal interest to companies doing business in Canada.

- First, the CA contains a set of comprehensive rules with respect to both substantive and procedural requirements applicable to mergers.
- Second, it establishes a number of criminal offences, which subject companies and individuals involved to substantial monetary penalties, and in some cases, incarceration. In addition, it allows individuals to launch civil damages suits for breaches of the criminal provisions of the CA.
- Third, the CA contains rules related to reviewable practices, which although generally legal, may be prohibited if it is determined that they substantially prevent or lessen competition, or have an "adverse effect" on competition, in a market in Canada. Each of these aspects of the CA is discussed in more detail below.

Recent Amendments to the *Competition Act*

In March 2009, the Federal Government passed Bill C-10, a budget bill containing an economic stimulus package aimed at stemming the effects of recession, which also included a series of significant amendments to both the CA and *Investment Canada Act*.

The most significant changes to the CA (discussed in more detail below) are:

- Introduction of a US-style "second request" merger review process.
- Increase of the "size of transaction" merger notification threshold to $70 million (from $50 million).
- Introduction of a dual criminal/civil track approach for agreements between competitors.
- Elimination of the competitive effects test for criminal conspiracy and replacing it with a *per se* offence.
- Introduction of significant administrative monetary penalties ("AMPs") for violations of the abuse of dominance provisions.
- Decriminalization of the archaic pricing provisions (price discrimination, predatory pricing, price maintenance and promotional allowances).

Mergers

The CA contains pre-merger notification provisions, as well as substantive merger review provisions, which apply independently of each other. Even if a transaction raises no substantive competition issues under the merger review provisions, the parties to a merger that meets the notification thresholds must nevertheless comply with the filing and waiting period requirements of the pre-merger notification provisions, unless the parties apply for and obtain an exemption in the form of an advance ruling certificate ("ARC"), discussed below.

Conversely, a merger that does not meet the notification thresholds may still be subject to review by the Commissioner and an order of the Competition Tribunal (the "Tribunal") if it raises a substantive issue under the merger review provisions of the CA.

What is a "Merger"?

The CA broadly defines "merger" to include any form (e.g., purchase of shares, assets, amalgamation) of direct or indirect acquisition or establishment of "control over or significant interest in" all or part of a business. "Control" is generally defined as ownership of more than 50% of the voting shares of a corporation or interest in a partnership or the ability to elect a majority of the board of directors. A "significant interest" is not defined in the CA, but is viewed by the Bureau as having a sufficient ownership interest to materially influence the economic behaviour of a business (e.g., decisions relating to pricing, purchasing, distribution, marketing, investing).

Generally, the Bureau will not consider ownership of less than 10% of the voting shares to be significant, while acquiring 10% to 50% of the voting shares would likely be open to review. It should be noted that, in the Bureau's view, a significant interest may be acquired by a variety of means, not just acquisitions of voting rights. Consequently, shareholders' agreements and management contracts may be deemed to be acquisitions of a significant interest.

When is a Merger Notifiable?

Parties must notify the Commissioner of a proposed merger if the transaction meets *both* of the following financial thresholds:

Size of Transaction Threshold

For an acquisition of assets of an operating business, this threshold is met when:

- The aggregate value of the Canadian assets being acquired exceeds $70 million; *or*
- The gross annual revenue from sales in or from Canada generated by the assets exceeds $70 million.

For an acquisition of shares, this threshold is met when:

- The aggregate value of the Canadian assets owned by the corporation whose shares are being acquired (or a corporation controlled by that corporation) exceeds $70 million; *or*
- The gross annual revenue from sales in or from Canada of the corporation whose shares are being acquired (or a corporation controlled by that corporation) exceeds $70 million.

The "size of transaction" threshold is indexed annually based on changes to Canada's gross domestic product ("GDP"), subject to a different amount to be prescribed by regulations.

Size of Parties Threshold

For transactions involving either assets or shares, the parties to the transaction, together with their affiliates, must have:

- Combined assets in Canada exceeding $400 million; *or*

- Combined gross annual revenues from sales in, from (export) or into (import) Canada exceeding $400 million.

Asset and revenue values are calculated based on the most recently completed audited financial statements. If a party does not have its financial statements audited, unaudited statements may be used. With respect to asset values, the book value of assets is used and, subject to limited exceptions, the gross value of these assets is used to determine aggregate value.

Additional Threshold for Share Acquisitions

Even if both the "size of transaction" and "size of parties" thresholds are met, an acquisition of shares is notifiable only when:

- A purchaser acquires 20% or more of the voting shares of a *public* company (or 50% or more, if it already owns 20% of shares); *or*
- 35% or more of the voting shares of a *private* company (or 50% or more, if it already owns 35% of shares).

What Is the Notification Procedure?

Parties must supply the Commissioner with prescribed information, which generally relates to the nature of the businesses carried on by the parties and their affiliates, their principal suppliers and customers, along with general financial information, business plans and competitive analysis documents.

The CA exempts from production information that is not reasonably necessary to the Commissioner's assessment of the competitive impact of a transaction. Accordingly, it is often unnecessary to provide all of the information required under the CA.

Once parties submit their filings, they must wait for the expiry of a mandatory 30-day waiting period, which runs from the date that all of the parties' filings are certified by the Bureau as complete. The Commissioner can extend the waiting period by issuing a request for additional information (a Supplementary Information Request or "SIR") during the initial waiting period for cases that raise substantive competition law issues. Requested information must be "relevant" to the Commissioner's competitive assessment of the transaction. However, the CA does not define "relevant information" and does not provide any procedural mechanism for challenging overly broad requests. Consequently, Supplementary Information Requests often involve extensive documentary productions, which may take several months to complete.

The parties may not close the transaction before the initial 30-day waiting period has expired or, where a SIR is issued, until 30 days after compliance with the SIR, unless the Commissioner issues an ARC or waives the waiting period. Failure to comply with the pre-merger notification requirement or to abide by the waiting periods may result in criminal sanctions.

Following the expiry of the applicable waiting period, the parties are free to close the transaction. However, if the Commissioner has not completed her review, the parties typically agree not to close the deal until the Commissioner has completed her investigation. The Bureau has issued service standards that indicate the length of time it will take the Bureau to complete its review of a proposed transaction.

The Bureau has developed three classifications: non-complex (no competitive overlap or very low post-transaction market shares), complex (some competitive overlap) and very complex (many overlaps with significant issues to resolve). Where a transaction is characterized as non-complex, the Bureau will make its best efforts to complete its review within 14 days; for complex transactions, the period is 10 weeks; and for very complex transactions, the period is five months. However, these time periods are guidelines only and it may take the Bureau more or less time to review a particular transaction. In addition, it is not clear whether the service standards have any practical application given the new Supplementary Information Request process introduced by the March 2009 amendments to the CA.

What Are Advance Ruling Certificates and No-Action Letters?

The CA grants the Commissioner the right to challenge a transaction within one year after it has closed (prior to the March 2009 amendments to the CA, the Commissioner had three years post-closing to challenge a transaction). Consequently, the expiry of the waiting period alone does not immunize the transaction from future challenges, unless the parties obtain comfort from the Commissioner that she does not intend to challenge the transaction.

The most iron-clad comfort comes in the form of an ARC. The Commissioner will issue an ARC where she is satisfied that she does not have sufficient grounds on which to apply to the Tribunal. Issuance of an ARC has the effect of exempting the transaction from the notification provisions and barring the Commissioner from applying to the Tribunal under the merger provisions unless there is a material change in circumstances, provided the transaction is substantially completed within one year after the ARC is issued. ARCs tend to be granted only in cases where it is clear that the merger raises no substantial issues.

More commonly, the Commissioner will issue what is known as a no-action letter ("NAL"), which represents the Commissioner's written confirmation that the transaction raises no substantive issues. The NAL preserves the Commissioner's statutory authority to challenge the transaction for one year from closing. However, provided there is no material change in the facts upon which the NAL is based, further action is extremely unlikely, especially given the new one-year challenge period.

What Are the Filing Fees?

There is a mandatory filing fee of $50,000 plus GST or HST for all pre-merger notifications or requests for both ARCs and NALs. The fee is the same regardless of the size or complexity of the transaction. Who pays the fee is a matter of negotiation. The two most common practices are that the fee is paid by the purchaser or split evenly by the parties. On occasion, parties will provide both a pre-merger notification filing and a request for an ARC, in which case there is only one $50,000 fee. Where an ARC is sought, GST must also be paid; however, the parties can often recover the GST.

When is a Merger Subject to Substantive Review?

Regardless of size, a merger is subject to substantive review by the Bureau and challenge before the Tribunal if it is likely to give rise to a substantial prevention or lessening of competition in a relevant market in Canada. Cases before the Tribunal have established that the

relevant question is whether the merger will create, maintain or enhance the ability of the merged entity, unilaterally or in coordination with other firms, to exercise market power. "Market power" is the ability to profitably maintain prices above the competitive level for a significant period of time.

As a general rule, the Commissioner will not challenge a merger on the basis of the unilateral market power of the merged entity if its post-merger market share will be less than 35%. In addition, the Commissioner generally will not challenge a merger on the basis of an increase in scope for interdependent behaviour among competitors in the relevant market if: (i) the aggregate post-merger market share of the four largest firms in the relevant market will be less than 65%; or (ii) the post-merger market share of the merged entity will be less than 10%.

If in the course of reviewing a proposed transaction the Commissioner identifies areas in which she believes the transaction will substantially lessen competition, she will normally try to negotiate alterations to the transaction to 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. Should the Commissioner be unable to complete an inquiry during the initial period because of circumstances beyond her control, the Tribunal may extend this interim order to a date not more than 60 days after the initial order takes effect. If the Commissioner makes an application to the Tribunal challenging a proposed transaction, she may also apply for an interim order on the terms that the Tribunal deems appropriate.

What Are Possible Merger Remedies?

Where, on application by the Commissioner, the Tribunal finds that, on a balance of probabilities, a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially in a relevant market, the Tribunal may issue orders to remedy the situation.

With respect to a proposed merger, the Tribunal may order the parties not to proceed with all or part of the merger. With respect to completed mergers, it may order that the merger be dissolved or that specific assets or shares be divested. Although in theory these powers seem broad, in practice, the Tribunal has never in the past ordered the dissolution of a completed merger or a full divestiture.

In September 2006, the Bureau issued an *Information Bulletin on Merger Remedies in Canada*. This bulletin provides guidance on the general principles applied by the Bureau when it seeks, designs and implements remedies.

In determining whether to make an order, the Tribunal considers a number of factors, such as: 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, remaining effective competition, whether a vigorous and effective competitor would be removed, the nature of change and innovation in a relevant market, as well as any other factors relevant to competition in the affected market(s).

The CA provides for an efficiencies defence which, in theory, permits a merger that prevents or lessens, or is likely to prevent or lessen, competition substantially in any market in Canada, so long as the efficiency gains resulting from the merger exceed the anti-competitive effects of the merger. In practice, merging parties may raise the defence in the ARC submission in the initial assessment phase before the Commissioner and again, if necessary, when the Commissioner has brought an application before the Tribunal challenging the merger.

Criminal Offences

The CA establishes a number of criminal offences, which are investigated at the discretion of the Bureau and may then be prosecuted by the Attorney General for Canada. A breach of the criminal provisions of the CA may lead to significant fines for businesses and fines and/or imprisonment for individuals responsible (including senior management or directors who oversaw the conduct). In addition, breaches of these provisions can serve as the basis for civil suits for damages, which are generally brought by way of class actions.

Conspiracy

Following the March 2009 amendments to the CA, the old conspiracy provisions have been replaced with a dual criminal/civil track approach. Agreements between competitors that are akin to hard-core cartels (e.g., price-fixing arrangements, customer or territorial allocation, agreements not to buy from, or sell to, certain individuals, output restriction) are now *per se* illegal in Canada (subject to a very limited "ancillary agreement" defence). This means that the prosecution does not need to prove that the conduct had any effect on the market (this is similar to section 1 of the *Sherman Act*). The CA defines the term "competitor" very broadly to include actual competitors, as well as firms who, absent the agreement in question, would likely be competitors. The agreements do not have to be written down or formalized in any way. They do, however, have to be the result of communication among the parties, and not the product of independent business decisions.

Anyone found guilty of conspiracy is liable to imprisonment for a term of up to 14 years and/or a fine of up to $25 million.

Legitimate agreements between competitors (e.g., joint ventures, strategic alliances) that may be anticompetitive will be subject to a civil review that incorporates a competitive effects test. These agreements are discussed in more detail in the Reviewable Trade Practices section below.

The new conspiracy provisions do not come into force until March 2010. Until then, parties may apply to the Commissioner for an opinion on the legality of existing or proposed agreements. It is important to note that the existing agreements are not grandfathered and the CA is silent as to how companies can remedy agreements that the Commissioner concludes are illegal under the new regime or how much time they will have to rescind or modify a problematic agreement. In addition, the move to a *per se* conspiracy offence will almost certainly increase the number of private damages actions (generally brought by way of class action) under the conspiracy provisions.

Bid-rigging

Bid-rigging is an agreement or arrangement between one or more non-affiliated entities either not to submit a bid, to withdraw a bid, to submit a separate but coordinated bid or to submit a joint bid. This is not permitted under the CA, unless the person calling for bids is aware of the agreement or arrangement or the parties are affiliates of each other.

Similarly to conspiracy, bid-rigging is a *per se* offence in Canada.

The monetary fines for bid-rigging can be very high. In addition, there is a possibility of imprisonment for up to 14 years (increased from five years under the old CA) for the individuals involved. It is worth noting that the Commissioner has recently increased her enforcement of the bid-rigging provisions.

Misleading Advertising

The CA prohibits materially false or misleading misrepresentations about a product or service, or about another company and its products and services, to the public. A representation is public if it is part of an advertisement in the media (such as newspaper, television, radio or billboards), or is an oral or written representations made to individual customers. A false of misleading representation is subject to action under the CA even when it is made to the public outside of Canada or in a non-public setting.

Whether a representation is materially false or misleading depends on both the literal meaning, as well as the general impression, of the representation made. Generally, the test is whether a representation influenced a person to purchase a product.

Misleading advertising is unique in that it is a hybrid offence, with provisions both in the criminal and reviewable parts of the CA. The Bureau reserves criminal prosecutions for fraud or deliberate breaches of the CA, but deals with most transactions as reviewable matters. The Tribunal can levy significant monetary penalties for civil misleading advertising, to a maximum of $10 million per count for first time offences by corporations and $750,000 per count for first time offences by individuals. For criminal offences, individuals may face up to 14 years imprisonment.

The CA also provides for restitution to the victims of misleading advertising, which may not exceed the total paid by them for the product or service in question. The court or Tribunal may issue an injunction to prevent the disposal of property to ensure that funds are available for restitution.

Reviewable Trade Practices

Certain trade practices, while not illegal, may be prohibited by the Tribunal if they are found to substantially lessen competition or to have an adverse effect on competition in a market in Canada. Unlike criminal provisions, reviewable practices are subject to a civil “balance of probabilities” standard of proof and the only remedy is a prohibition order from the Tribunal. However, although no fines or jail terms are available as remedies, the Tribunal may levy AMPs under the CA’s abuse of dominance provisions (discussed below).

Abuse of Dominant Position

Abuse of dominant position in the CA is a broad provision akin to section 2 of the *Sherman Act* and section 82 of the *EC Treaty*. There are three elements that must be established to make out an abuse of dominance claim.

First, the Commissioner must prove that a firm has market power in one or more relevant markets in Canada. Market power means having some degree of control over prices in a relevant market. Generally, the Tribunal will look at the combination of high market shares (at least 35%, and probably over 50%) in a relevant market combined with barriers to entry into the market (e.g., high sunk entry costs, existing excess capacity, regulatory constraints).

Second, the Commissioner must prove that the dominant firm has engaged in a practice of anti-competitive acts. The CA sets out a non-exhaustive list of examples of anti-competitive acts. Canadian case law has established that, to be anti-competitive, an act must be exclusionary, disciplinary or predatory in purpose or effect. The anti-competitive aspects of a practice are weighed against the efficiency-enhancing business justifications to determine whether the overall character of the practice could be determined to be anti-competitive. In practice, this analysis is similar to a rule of reason analysis under the *Sherman Act*.

Finally, the anti-competitive practice must, or must be likely to, have caused a substantial lessening or prevention of competition in a market in Canada. The test established by the Federal Court of Appeal is a "but for" test: would the market(s) have been more competitive (i.e., lower prices, increased variety) "but for" the anti-competitive practice.

Recent amendments to the CA introduced significant AMPs for abuse of dominance: maximum $10 million for the first offence and maximum $15 million for subsequent offences. In addition, the draft *Updated Enforcement Guidelines on the Abuse of Dominance Provisions* released by the Bureau in January 2009 introduced an extremely open-ended approach to the enforcement of abuse provisions, coupled with a novel extension of the concept of "joint dominance" to uncoordinated parallel conduct. The combination of large AMPs and a broad enforcement approach raises significant compliance concerns for a much broader range of businesses than was previously the case.

Note that, while certain reviewable practices may be challenged by private individuals, only the Commissioner may bring proceedings under the abuse of dominance provisions.

Agreements or Arrangements that Prevent or Lessen Competition Substantially

This is a civil version of the conspiracy provisions discussed above, which applies to legitimate agreements between competitors (e.g., joint venture, strategic alliance). To be in violation of the civil competitor collaboration provision there must be: (i) an agreement; (ii) among two or more "competitors" (note that it is not possible for a company to enter into an anti-competitive agreement with itself, or with any of its affiliates); (iii) which has the effect of substantially lessening or preventing competition in a market. As with the criminal conspiracy provisions, the term "competitors" includes likely competitors. If the agreement is found to substantially prevent or lessen competition, the Tribunal can order the agreement terminated or modified.

In limited circumstances, the parties may be able to defend the agreement or arrangement by relying on efficiency gains generated by the agreement or arrangement.

Price Discrimination, Predatory Pricing and Promotional Allowances

Price discrimination, predatory pricing and promotional allowances used to be subject to the criminal prohibition under the CA. Following the 2009 amendments, the former criminal pricing provisions have been repealed and these activities are now addressed under the abuse of dominance provisions summarized under the heading "Abuse of Dominant Position" on page 5.8.

Price Maintenance

Prior to the 2009 amendments to the CA, price maintenance was *per se* illegal in Canada. The criminal provision has now been repealed and replaced with a new reviewable practice provision. The Tribunal may now issue a prohibition order where it finds that a supplier: (i) has influenced its dealers or distributors to maintain or increase the price at which its products are advertised or sold; or (ii) refused to supply a product to a customer due to the low pricing policy of that customer, if the conduct has an adverse effect on competition in a market. Private actions may also be brought with leave of the Tribunal.

A resale price may be suggested to a dealer; however, it is important to point out that the dealer has no obligation to accept that suggestion, and there can be no consequences to it if the suggestion is not followed. Where a resale price is indicated in a company's promotional material, the material should clearly indicate that a dealer may sell for less. It is important to note, however, that a supplier can refuse to supply someone if there is reason to believe the purchaser is: (i) "loss leadering" the product; (ii) engaging in bait-and-switch selling or misleading advertising with respect to the product; or (iii) is supplying an unacceptable level of service in respect of a product.

Refusal to Deal

Refusal to deal provisions may be triggered when a dealer or distributor is cut off and this substantially affects the dealer's (or distributor's) business.

If a supplier refuses to supply a product to its customer, and: (i) the customer is substantially affected in its business; (ii) the customer cannot obtain adequate supply of the product anywhere in the market on usual trade terms due to insufficient competition among suppliers; (iii) the customer is willing and able to meet the supplier's usual trade terms; and (iv) the refusal is having, or is likely to have, an adverse effect on competition in the market, the Tribunal may issue an order requiring the supplier to supply the product.

Exclusive Dealing and Tied Selling

Exclusive dealing is a practice of requiring a customer, as a condition of supplying a product, to deal only or primarily with the supplier or its nominee or to refrain from dealing in certain products except as supplied by the supplier.

Tied selling is a practice of requiring a customer to purchase another product, as a condition of supplying the customer with the product the customer actually needs.

Both these practices are subject to review by the Tribunal if: (i) the supplier is a major supplier of a product in a market; (ii) the practice is likely to impede entry or expansion of a firm in the market, to impede product introduction or expansion of sales in the market, or to have some other exclusionary effect; and (iii) the practice is likely to lessen competition substantially.

In many cases, the Commissioner will bring exclusive dealing and tied selling proceedings in conjunction with proceedings under the abuse of dominance provisions.

Market Restriction

Market restriction is a practice of supplying a product to a customer on the condition that the customer restrict its sale of that product to a specific market. If a major supplier engages in this practice and the practice is likely to substantially lessen competition, the Tribunal may make a prohibition order or such other order as is necessary to restore or stimulate competition.

Both the Commissioner and private individuals may challenge refusals to deal, exclusive dealing, tied selling and market restrictions. However, now that private parties can apply directly to the Tribunal, the Commissioner will bring applications with respect to these practices only in the most compelling cases.

Civil Actions

The CA allows individuals who have suffered damages as a result of an alleged violation of the criminal provisions in the CA or a breach of a Tribunal's order to launch civil suits. These suits are generally brought by way of a class action. It is expected that with the introduction of the new *per se* criminal conspiracy offence, the number of follow-on class action suits will increase in Canada.

Only actual damages suffered by a person are recoverable in Canada, together with costs, in contrast to the treble damage awards that are possible in the US.

6. FOREIGN INVESTMENT IN CANADA

Investments in Canadian businesses by non-Canadians are regulated by the *Investment Canada Act* (the "ICA"). The ICA contains a set of complex and comprehensive rules designed to ensure that investments by non-Canadians result in a net benefit to Canada. Although on its face the regime may seem harsh, very few investments have proven problematic since the legislation was enacted in 1985.

For most industries, the ICA is administered by the Investment Review Division of Industry Canada under the direction of the Minister of Industry. For cultural businesses or businesses related to Canadian national identity, the ICA is administered by the Department of Canadian Heritage under the direction of the Minister of Canadian Heritage.

In addition, following the March 2009 amendments to the ICA, all transactions are reviewable on the grounds of national security. Also, transactions involving companies operating in certain regulated industries, such as telecommunications, broadcasting, financial services (e.g., chartered banks), transportation and natural resources (e.g., petroleum and forestry) may be subject to a vast array of complex, multi-jurisdictional and, unfortunately, not always consistent regulatory requirements and approvals. Finally, there are guidelines applicable to investments by state-owned enterprises ("SOEs"), defined as being an enterprise owned or controlled (directly or indirectly) by a foreign government.

When Does The ICA Apply?

The ICA applies to acquisitions of control of a Canadian business or establishment of a new Canadian business by a non-Canadian.

A Canadian business is a business carried on in Canada that has:

- A place of business in Canada; *and*
- An individual or individuals in Canada who are employed or self-employed in connection with the business; *and*
- Assets in Canada used in carrying on the business.

A new Canadian business means a business that is not already carried on in Canada by the non-Canadian and that, at the time of its establishment:

- Is unrelated to any other business carried on in Canada by that non-Canadian; *or*
- Is related to another business being carried on in Canada by that non-Canadian but falls within a prescribed specific type of business activity that, in the opinion of the Governor-in-Council (the federal cabinet) is related to Canada's cultural heritage or national identity.

A Canadian is a person who is:

- A citizen;
- A permanent resident within the meaning of the federal *Immigration and Refugee Protection Act* who has been ordinarily resident in Canada for not more than one year after the time at which he/she became eligible to apply for Canadian citizenship;

- A Canadian government, whether federal, provincial or local or any other agency thereof; *or*
- An entity that is Canadian-controlled, as determined under the Canadian status rules of the ICA.

The ICA contains detailed rules and presumptions regarding Canadian status, including:

- Where one Canadian owns, or two or more members of a voting group who are Canadians own, a majority of the voting interests of an entity, it is a Canadian-controlled entity.
- Where one non-Canadian owns, or two or more members of a voting group who are non-Canadians own, a majority of the voting interest of an entity, it is not a Canadian-controlled entity.
- Other rules require an analysis of "control in fact," in addition to an analysis of voting interest in an entity, to determine whether it is Canadian-controlled.

The rules relating to acquisition of control are complex and comprehensive. Some of the primary rules are:

- The acquisition of a majority of voting shares of a corporation is deemed to be acquisition of control.
- The acquisition of less than a majority but one-third or more of the voting shares of a corporation is presumed to be acquisition of control, unless it can be established that the acquirer will not have "control in fact" of the corporation.
- The acquisition of less than one-third of the voting shares of a corporation is deemed not to be an acquisition of control of that corporation, unless it can be established that the acquirer will have "control in fact" of the corporation.

It should be noted that the Minister can bypass the general ICA rules regarding the "Canadian" status of an investor, as well as rules and presumptions regarding "control" and acquisition of control and determine that the investor is not Canadian-controlled or that an entity does not control another entity or that control has or has not been acquired.

Review vs. Notification

Investments to which the ICA applies are subject to either pre-closing review or post-closing notification. Generally, where a direct acquisition of control of a Canadian business is reviewable, it may not be completed before the relevant Minister has approved it.

Whether an investment is reviewable, or subject to a requirement to give notice, depends on a number of circumstances, including whether:

- The purchaser or vendor is a resident of a WTO member country.
- The business being acquired is a cultural business.
- The transaction is a "direct" investment (acquisition of a Canadian company) or an "indirect" investment (acquisition of a non-Canadian parent).

In addition, **all investments**, regardless of size, the parties' residence, the type of business being acquired or the type of transaction are subject to national security review (discussed in the Review on National Security Grounds section below).

Which Investments Are Subject to Review Under the ICA?

Both direct and indirect acquisitions may be subject to review.

A direct acquisition for the purpose of the ICA 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 of the entity carrying on the business in Canada.

- A direct acquisition by a WTO investor (other than one involving a cultural business discussed below) is reviewable where the book value of the acquired Canadian assets exceeds $299 million for 2010 (note that this is lower than the 2009 threshold of $312 million as a result of the fall in Canada's gross domestic product during 2009). This threshold is expected to be replaced at some point this year by a new $600 million "enterprise value" threshold (please see comments below under the heading "New Notification Thresholds").
- A direct acquisition by a non-WTO investor is reviewable where the value of the acquired Canadian assets is $5 million or more.

An indirect acquisition for the purpose of the ICA is the acquisition of control of a Canadian business by virtue of the acquisition of a non-Canadian parent entity.

- Indirect acquisition by WTO investors (other than those involving a cultural business discussed below) are not reviewable.
- Indirect acquisitions by non-WTO investors are reviewable where the value of the Canadian assets is $50 million or more. The $5 million threshold will apply if the asset value of the Canadian business being acquired exceeds 50% of the asset value of the global transaction.

New Notification Thresholds

Upon certain of the March 2009 amendments to the ICA taking effect, the $312 million asset-based threshold for direct acquisitions by WTO investors will be replaced with an "enterprise value" threshold. The new enterprise value threshold will be set initially at $600 million, increasing in steps, first to $800 million in the two years following the adoption of the new threshold and then to $1 billion. The threshold will be indexed annually based on Canada's GDP.

"Enterprise value" has not yet been defined. Regulations implementing the initial $600 million threshold and defining "enterprise value" are expected to come into force some time in 2010.

What is a "Cultural Business"?

The higher WTO threshold for direct investments and the exemption from review for indirect investments discussed above do not apply where the relevant Canadian business is a "cultural business."

A cultural business means a Canadian business that carries on any of the following activities:

- The publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine-readable form, other than the sole activity of printing or typesetting of books, magazines, periodicals or newspapers.
- The production, distribution, sale or exhibition of film or video recordings.

- The production, distribution, sale or exhibition of audio or video music recordings.
- The publication, distribution or sale of music in print or machine-readable form.
- Radio communication in which the transmissions are intended for direct reception by the general public; any radio, television and cable television broadcasting undertakings, and any satellite programming and broadcast network services.

The Department of Canadian Heritage has also issued policies applicable to book and periodical publishing and distribution that are taken into account during the review process.

Note that the ICA does not have a *de minimis* exemption relating to cultural activities. Even if the "cultural business" components of the Canadian business are minimal or incidental to the overall business, the investment is reviewable. Where a Canadian business includes both cultural and non-cultural components, ICA notifications and/or applications for review are filed with both Industry Canada and the Department of Canadian Heritage. Depending on the asset value of the transaction as a whole, each department will process the notice and/or conduct a review in connection with the activities of the enterprise relevant to its jurisdiction.

Which Activities May Be Related to Canada's Cultural Heritage or National Identity?

The acquisition of control of an existing Canadian business or the establishment of a new one may also be reviewable, *regardless of asset value*, if the business carries on the following activities deemed to be related to Canada's cultural heritage or national identity:

- The publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine-readable form.
- The production, distribution, sale or exhibition of film or video products.
- The production, distribution, sale or exhibition of audio or video music recordings.
- The publication, distribution or sale of music in print or machine-readable form.

As described below, these investments fall under the jurisdiction of the Department of Canadian Heritage. They will be reviewable if review is recommended by the Minister of Canadian Heritage, and an Order-in-Council directing an ICA review is issued by the federal cabinet and provided to the investor within 21 days of the investor filing the completed ICA notification with the Department of Canadian Heritage.

What Procedures Govern an ICA Review?

- An application for review must set out particulars of the proposed transaction, including information about the investor, the Canadian business and the investor's plans for the business. Annual reports or financial statements for the three most recent fiscal years must be included.
- The relevant Minister has 45 days to determine whether to allow the investment. The Minister can unilaterally extend the 45-day period by an additional 30 days by sending a notice to the investor prior to the expiration of the initial 45-day period. Further extensions of time must be agreed to by the investor.
- If the investor does not receive approval or notice of extension within the applicable time then the investment is deemed approved. 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 $10,000 per day.

- Where the Minister determines that the investment will not be of "net benefit to Canada," the investor is provided with an opportunity to make additional representations and to submit undertakings (discussed below) that demonstrate the "net benefit" of the investment. A striking recent example where the parties to a transaction subject to ICA review were refused the required consent was the proposed purchase by Alliant Techsystems Inc. of the Information Systems and Geospatial Service Operations division of MacDonald, Dettwiler and Associate Ltd. The key reasons why this transaction was blocked related to issues of national security, as well as concerns regarding the enforceability of undertakings.

What Factors Are Considered in Connection With the "Net Benefit" Test?

The ICA requires the responsible Minister to take certain factors into account, where relevant, when determining if an investment is likely to be of net benefit to Canada. The relative importance and weighting of the factors will vary from business to business, but each of the following factors should be addressed in the submissions that accompany an application for review:

- The effect of the investment on the economic activity in Canada, including employment, use of Canadian products and services, and exports from Canada.
- How many Canadians will be employed, and in what positions, in the acquired or newly formed business or in the relevant industry.
- 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 the relevant industry or industries in Canada.
- The compatibility of the investment with national industrial, economic and cultural policies.
- The contribution of the investment to Canada's ability to compete internationally.

Typically, during the initial 45-day review period, the investor will negotiate with Investment Canada or Canadian Heritage a mutually acceptable set of binding undertakings to be provided in connection with the Minister's approval of the transaction. These undertakings, which must be entered into for a specified period of time (usually three years), comprise commitments by the investor concerning its operation of the Canadian business following the completion of the transaction. Most often these commitments:

- 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 at the Canadian business.
- Make specified capital expenditures and conduct research and development activities based on specified budgets.
- In some cases, make a certain level of charitable contributions.

These undertakings will normally be reviewed by Investment Canada or Canadian Heritage, as the case may be, on a 12- to 18-month basis to confirm the investor's performance.

Review on National Security Grounds

As discussed above, all investments may be reviewed on national security grounds, even if they are not, otherwise, subject to an ICA review.

The applicable test is whether an investment is "injurious to national security." The ICA does not define "national security," nor does it provide a list of relevant factors that the Minister will take into account in conducting the review. This is in contrast to the US, where the relevant law provides a list of the types of transactions that may raise national security concerns. Consequently, the potential scope of the Canadian national security review is extremely broad and causes significant unpredictability to investors.

It should be noted that, in contrast to the general provisions of the ICA, there is no minimum review threshold for a national security review. Consequently, even very small acquisitions are potentially reviewable. Similarly, national security review potentially applies regardless of whether control has been acquired, with the result that even minority or passive investments may be reviewable.

In addition, while under the general ICA rules a "Canadian business" must have all three defining elements: (i) a place of business in Canada; (ii) individuals employed or self-employed in Canada in connection with the business; and (iii) assets in Canada used in the business), the national security review requires a lesser degree of connection to Canada. In particular, all that is required is that the target entity has any of: (i) a place of business in Canada; (ii) individuals employed or self-employed in connection with the business; or (iii) assets in Canada used in the business. Consequently, investments with only tenuous connections to Canada that are not otherwise subject to the ICA review may be subject to review on national security grounds.

The national security review may be triggered pre- or post-closing. If the review is done pre-closing, the transaction may not be completed until the Minister completes the review. An investor may receive notice that the investment will be subject to the national security review or may simply be advised that the review is taking place. Although timeframes for national security review have not yet been established, it is clear that timelines for clearance of reviewable transactions under the ICA will be extended as a result of national security review.

Investments by State-Owned Enterprises

In addition to the standard "net benefit" factors, the Minister of Industry has issued guidelines outlining the additional factors to be considered in the case of investments by SOEs. Specifically, in determining whether an investment by a SOE satisfies the "net benefit" test, the Minister will consider the following additional factors:

- Whether the SOE adheres to Canadian standards of Corporate Governance;
- Whether the SOE adheres to Canadian laws and practices;
- The manner in which the foreign government exercises control over the SOE; *and*

- Whether a Canadian business acquired by a SOE will continue to operate on a commercial basis regarding:
  - Where to export;
  - Where to process;
  - Participating Canadians;
  - Support of innovation and research and development; *and*
  - Making the appropriate level of capital expenditures to maintain the competitiveness of the Canadian business.

In considering whether an investment by a SOE is of "net benefit" to Canada, the Minister has indicated that he will likely require undertakings (in addition to those listed above) with respect to:

- The appointment of Canadian independent directors;
- Incorporation of business in Canada; *and*
- The listing of shares of the acquiring company a Canadian business to be acquired on a Canadian stock exchange.

When is an ICA Notification Required?

Where a non-Canadian acquires control of an existing Canadian business or establishes a new Canadian business and, on its facts, the acquisition is not reviewable, it will still 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 employed in connection with the business in question and the value of its assets. A notification may be submitted to Investment Canada before or within 30 days after the closing of the transaction. Typically, the notification is filed post-closing.

Are There Special Requirements for Non-Resident Investors?

Apart from compliance with the Investment Canada Act, there are a number of activities that require special licences or where control of the business activity is restricted to Canadians. The majority of such licensing is controlled by the provinces. The following is a partial list of special licences required for certain activities and investments or activities where the participation of non-residents is prohibited or restricted.

In Saskatchewan, *The Trust and Loan Corporations Act, 1997 (*Saskatchewan) (the "TLCA") requires, among other matters, loan brokers, trust corporations, financing corporations and loan corporations to be licensed with the superintendent of financial institutions in order to carry on business in Saskatchewan. As a result, a corporation wishing to lend money to a Saskatchewan based borrower should be licensed with the provincial Financial Institutions Division before makes loans in Saskatchewan. The TLCA regulates, among other matters, corporations that deal in or purchase mortgages on real property as wells as corporations that deal in or purchase security interests under *The Personal Property Security Act, 1993* (Saskatchewan). The annual license fees charged by the financial institutions division vary according to the total assets of the corporation.

Canada's Financial Services Sector

In Canada, although the regulatory barriers between types of financial service providers have been relaxed since 1987, some separation remains between the traditional four pillars of Canada's financial sector — banks, insurance companies, trust and loan companies and investment dealers. The federal government has exclusive jurisdiction over banks. Insurance companies and "non-bank" deposit-taking institutions, such as loan companies and trust companies, may be incorporated under federal or provincial legislation. Cooperative credit associations and societies may be formed under other federal or provincial law. Investment dealers and securities market activity are regulated by provincial agencies and self-regulatory organizations empowered under provincial laws.

Canada's federal financial sector legislation is kept relatively current and responsive to industry challenges by sunset provisions in the governing legislation. The federal Department of Finance is the department of the Government of Canada primarily responsible for regulation and supervision of Canada's banks and other federally regulated deposit-taking institutions and insurance companies.

OSFI supervises and regulates Canada's federal financial institutions. OSFI follows a risk-based approach in its supervision and regulation. This approach is apparent in its Supervisory Framework (1999) and its Guide to Intervention for Federally Regulated Deposit-Taking Institutions (1995, updated in 2008). OSFI is a active and significant member of international organizations, such as the Basel Committee on Banking Supervision (at the Bank for International Settlements) and the Financial Stability Forum.

Provincial governments also regulate financial institutions under their jurisdiction. For example, in the province of Ontario, the Ministry of Finance has given the Financial Services Commission of Ontario responsibilities for Ontario's regulated sector, which includes insurance companies, agents and brokers; cooperative corporations; credit unions and caisses populaires; loan and trust corporations registered in Ontario; mortgage brokers; and pension plans.

In the insurance business, Ontario leaves the supervision of the solvency of companies to the regulator of the company's home jurisdiction (such as OSFI, for federally regulated insurers), except for those insurance companies that are incorporated under Ontario's *Insurance Act*. However, Ontario supervises the market conduct of insurance companies operating in Ontario by regulating insurance contracts, business practices, agents, brokers and adjusters.

Since July 1, 2005, in order to be registered to carry on business in Ontario, a loan or trust corporation must be incorporated under the federal *Trust and Loan Companies Act*. British Columbia is considering a similar approach to the regulation of loan and trust companies. Ontario will not allow the registration of any new loan and trust companies in Ontario that are not federally regulated, and loan and trust companies registered in Ontario prior to July 1, 2005 were required to continue under the federal legislation to maintain their Ontario registration.

Lenders taking security on residential mortgages in Nova Scotia must be registered under the *Mortgage Brokers and Lenders Registration Act* (Nova Scotia). This Act requires that the form of mortgage used by a registrant be approved by the regulator appointed under the said Act and requires that all mortgage lenders to have a physical office in Nova Scotia (apart from the offices of a law firm) where the prescribed lending records are kept for examination by the regulator.

Foreign Bank Rules

The Canadian government regulates any Canadian business presence and any Canadian activity of foreign-formed banks and financial institutions under the foreign bank provisions of the federal *Bank Act* (the "Bank Act"). The definition of a foreign bank is broad and will include many non-bank foreign financial service providers and members of financial service conglomerates.

To determine if the foreign bank provisions of the Bank Act apply, it is important to consider the entire corporate ownership structure, and the business activities of members of the corporate group as carried on in all jurisdictions.

A "foreign bank" is an entity formed under the laws of a country other than Canada that:

- Is a bank under the laws of any jurisdiction where it carries on business;
- Carries on a business outside Canada that would be considered, to a significant extent, to be the business of banking if carried on in Canada;
- Provides financial services and describes itself as a "bank" or its business as "banking";
- Lends money and accepts deposits transferable by cheque or other instrument;
- Provides financial services and is affiliated with another foreign bank;
- Controls another foreign bank; *or*
- Provides financial services and controls a Canadian bank.

Although the definition of foreign bank will catch true regulated banks and many near banks, some near banks may not be subject to the foreign bank rules. Whether or not a near bank is subject to the foreign bank rules is determined with regard to its association with another foreign bank (that is regulated as a bank or a deposit-taking institution or describes its financial services business as banking) and the proportion of the corporate group's business that is banking. The following discussion is relevant for those foreign banks that are subject to the foreign bank rules:

- Except as permitted under the Bank Act, a foreign bank shall not:
  - Carry on any business in Canada;
  - Maintain a branch for any purpose;
  - Establish an automated presence or maintain a remote service unit in Canada; *or*
  - Control, or have a substantial investment in, any Canadian entity (a substantial investment is direct or indirect beneficial ownership of, more than 10% of the voting rights or more than 25% of the shareholders' equity).
- With approval, a foreign bank may establish a presence in Canada by different means, for different purposes.
- With approval, a foreign bank may maintain *a representative office* in Canada that is not permitted to carry on business in Canada, but it may in Canada promote the foreign bank's business outside Canada and provide liaison with offices outside Canada.
- If a foreign bank wishes to provide banking services in Canada, it may (with approval) establish a branch in Canada.
- An authorized foreign bank may establish *a full-service branch or a lending branch*. Except for restrictions on deposit taking, branch business powers are similar to those of Canadian

banks. A full-service branch is not permitted to accept retail deposits of less than $150,000, while a lending branch may not accept any retail or wholesale deposits or otherwise borrow money in Canada, subject to limited exceptions. Different capital rules reflect these limitations on branch activity. Direct foreign bank branching allows foreign banks to take advantage of international capitalization, and increases operational flexibility.

- With approval, a foreign bank may establish a Canadian bank as a subsidiary of the foreign bank. Such a bank subsidiary is subject to the same rules as the Canadian banks.
- Also, a foreign bank may seek approval to own a non-bank financial institution such as a loan or trust company, insurance company or securities dealer, and a foreign insurer or securities dealer may seek approval to carry on a securities or insurance business in Canada.

If a foreign bank is subject to the foreign bank entry rules, then it may only invest in Canadian entities as permitted by the Bank Act and subject to applicable approval requirements. As well, the investment rules permit a foreign bank, with limitations, to carry on commercial business activity in Canada. The Bank Act contains rules that exclude the application of the federal ICA for certain investments (the federal financial institutions legislation will apply).

Ownership of a Canadian Financial Institution

Banks

Canadian banks are incorporated under the Bank Act. One goal of the legislation is to stimulate competition. Ownership rules are also intended to facilitate joint ventures and strategic alliances.

The Bank Act recognizes three categories of banks based on size, as measured by the bank's equity, and establishes different sets of ownership rules for each category. Large banks have equity exceeding $8 billion. They must be widely held and no one person may have control. A bank is widely held if there is no person with beneficial ownership of more than 20% of any class of voting shares or 30% of any class of non-voting shares (i.e., no major shareholder).

A medium-sized bank has equity between $2 billion and $8 billion and may have a major shareholder, although at least 35% of its voting rights must attach to shares that are publicly traded and not held by one major shareholder.

There is no public ownership requirement for small banks, which have equity up to $2 billion. The minimum capital required to start a new bank is $5 million.

In all cases, the Minister of Finance must approve a person's ownership of more than 10% of any class of shares and must apply a "fitness test" in the approval process. The investor's character and integrity is the only fitness factor to be considered when seeking Ministerial approval to own more than 10% of a class of shares of a large bank but less than the ownership level of the bank's major shareholder. No one who controls or holds a substantial investment in an entity that engages in a prohibited personal property leasing business (including car leasing) may control or be a major shareholder of a bank.

Demutualized Life Insurance Companies

As with banks, ownership of more than 10% of any class of shares is subject to approval by the Minister of Finance and compliance with a "fitness test." An insurance company is

widely held if no person has beneficial ownership of more than 20% of any class of voting shares or 30% of any class of non-voting shares (i.e., no major shareholder).

Large demutualized life insurance companies, for which the value of surplus and minority interests exceeded $5 billion when they demutualized, are required to be widely held unless, in any specific instance, the Minister decides to free the company from the restriction. Also, no one person may control a large demutualized company. An investor may have close ownership of a demutualized company that was medium-sized at the time of conversion (i.e., the value of surplus and minority interests was between $1 billion and $5 billion), subject to the general public float requirement. If the insurer has equity of $1 billion or more, at least 35% of its voting rights must attach to shares that are publicly traded and not held by a major shareholder. There is no public float requirement for small companies of up to $1 billion.

Other Life Insurance Companies; Property and Casualty Insurers; Trust and Loan Companies

Close ownership of other (stock) life insurance companies, property and casualty insurers and trust and loan companies is permitted, although ownership of more than 10% of any class of shares is subject to approval by the Minister of Finance and a "fitness test" must be met. Such companies are subject to a 35% public float requirement if the company's equity equals or exceeds $1 billion.

Holding Companies

Banks and life insurance companies are permitted to organize under a financial holding company.

Broadcasting and Telecommunications

Broadcasting and telecommunications are two examples of businesses that are subject to Canadian ownership and control regulations. Following the March 2009 amendments to the *Investment Canada Act,* which eliminated the requirement for review of other categories of transactions involving non-Canadians, the Department of Canadian Heritage retains the jurisdiction to conduct "net benefit to Canada" reviews to approve transactions in which non-Canadians acquire control of Canadian "cultural businesses." This category includes businesses that carry on activities including "radio communication in which the transmissions are intended for direct reception by the general public, any radio, television and cable television broadcasting undertakings and any satellite programming and broadcast network services."

Both broadcasting and telecommunications are subject to the authority of the Canadian Radio-television and Telecommunications Commission (the "CRTC"), an independent public authority constituted under the *Canadian Radio-television and Telecommunications Commission Act*. The CRTC is vested with the authority to regulate and supervise all aspects of the Canadian broadcasting system, as well as to regulate telecommunications common carriers and service providers that fall under federal jurisdiction. The CRTC derives its regulatory authority over broadcasting from the *Broadcasting Act*. Its telecommunications regulatory powers are derived from the *Telecommunications Act.*

Broadcasting

The *Broadcasting Act* (s. 3(1)(a)) requires that the "Canadian broadcasting system shall be effectively owned and controlled by Canadians." The *Direction to the CRTC (Ineligibility of Non-Canadians)* (issued by the federal cabinet, the "Direction") imposes specific requirements for Canadian ownership and control of entities that obtain broadcasting licenses. Among other things, the chief executive officer and not less than 80% of the directors of a "qualified corporation" must be Canadian (as defined in the Direction, which generally means a Canadian citizen who is ordinarily resident in Canada) and Canadians must beneficially own and control not less than 80% of the issued and outstanding voting shares of the corporation; alternatively, if the license-holder is a subsidiary, Canadians must beneficially own not less than 66 ⅔% of the votes and the parent company may not exercise control over the programming decisions of the subsidiary.

The Direction was at issue in the CRTC's consideration of CanWest MediaWorks Inc.'s application to acquire Alliance Atlantis Broadcasting Inc., where the non-Canadian Goldman Sachs Capital Partners held a substantial ownership interest. In December, 2007 the CRTC approved that transaction, after determining that Goldman Sachs would not exercise "control in fact" over the entity that would operate the broadcasting services. Although the former Alliance Atlantis specialty channels are not directly involved in the 2009–10 reorganization of CanWest's broadcasting operations under the CCAA, the agreement between CanWest and Goldman Sachs is an important factor in that reorganization.

Telecommunications

Section 16 of the *Telecommunications Act* and the *Canadian Telecommunications Common Carrier Ownership and Control Regulations* impose Canadian ownership and control rules for telecommunications common carriers. Canada has among the most restrictive telecommunications ownership rules in the world and there is continued pressure on Canada to eliminate or lessen those restrictions. In particular, this issue was addressed in the June 2008 report of the Competition Policy Review Panel, *Compete to Win*. In its recent auction of wireless spectrum, Industry Canada set aside spectrum for new entrants, recognizing the need to increased competition amongst wireless telecommunications service providers.

During 2009, the CRTC reviewed the ownership structure of one of those new entrants, Globalive Wireless Management Corp. ("Globalive"). In July, 2009, the CRTC issued a "Canadian ownership and control review policy" which created a flexible framework consisting of four types of ownership reviews and then examined Globalive's structure under a "Type 4" review, which involved an oral, public, multi-party proceeding, on the basis that the ownership was complex or novel and that the determination would hold precedential value for industry players and the general public. In its October, 2009 decision the CRTC concluded that, although Canadians held legal control since the technical requirements of the regulations were met, Globalive was "controlled in fact" by the non-Canadian, Orascom Telecom Holding (Canada) Limited ("Orascom"). Noting that a number of factors were of concern (specifically, Orascom held two thirds of Globalive's equity, was the principal source of its technical expertise and also provided access an established trademark for wireless services), the Commission's decision was based on the fact that, in addition, Orascom provided the vast majority of Globalive's debt financing, and as such had the

ongoing ability to determine its strategic decision-making activities. Accordingly, Globalive was not eligible to operate as a Canadian telecommunications common carrier.

The precedential value of this decision was soon in doubt, however, as the federal cabinet overturned the CRTC decision in December, 2009. The cabinet referenced the telecommunications policy objectives of the *Telecommunications Act* and the fact that the spectrum auction was designed to stimulate new entry and competition in the wireless telecommunications market. (In contrast to the CRTC, Industry Canada had approved Globalive's ownership under the Canadian ownership and control rules of the *Radiocommunication Act*.) The cabinet emphasized that its decision was based on the particular facts of the case and was not intended to amend Canadian ownership and control rules or policies. It disagreed with the CRTC, and concluded that Globalive was not in fact controlled by persons that are not Canadian. As such, it was eligible to operate as a telecommunications common carrier. Globalive launched its wireless service almost immediately thereafter.

As of January, 2010, another new entrant winner in the Industry Canada spectrum auction, Public Mobile Inc., has challenged the cabinet's Globalive decision in the Federal Court, as a way of seeking clarity with respect to the Canadian ownership and control rules for telecom companies. A CRTC proceeding to review the ownership and control of Public Mobile itself is ongoing. In a December, 2009 letter, the CRTC determined that this would be a "Type 2" review resulting in a public decision. Although Public Mobile's ownership structure was complex and could hold precedential value, the evidentiary record in that case would not be improved by third-party submissions and a public hearing.

New Media

As traditional broadcasters and others have increasingly used the Internet as a delivery channel for information and entertainment, the CRTC has considered whether broadcasting delivered via the Internet should be subject to the *Broadcasting Act.* Following a proceeding held in 1998–99, the CRTC issued its New Media Exemption Order, which provides that broadcasting services delivered and accessed over the Internet are exempt from the requirements of the *Broadcasting Act* and its regulations. As such, "new media broadcasters" need not be licensed and are not subject to Canadian ownership and control rules. The New Media Exemption Order was clarified, with respect to the Internet retransmission of broadcasting services, in 2003, and interpreted to include mobile Internet broadcasting undertakings, in 2006. A further Mobile Broadcasting Exemption Order was issued in 2007, which provides that television broadcasting services that are received by way of mobile devices are not subject to the *Broadcasting Act*, whether or not they rely on the Internet.

In June 2009, the CRTC completed its regular review of the various new media exemption orders and decided to maintain the exempt status of new media broadcasting undertakings. However, with respect to the issue of whether the *Broadcasting Act* applies to Internet Service Providers ("ISPs") when they provide their customers with access to broadcasting content, or whether such ISPs should be subject only to the *Telecommunications Act*, the CRTC initiated a reference to the Federal Court of Appeal. The Court issued directions for this proceeding on July 31, 2009 and the hearing is currently scheduled to commence on shortly.

Airlines

Airlines and foreign air carriers are federally regulated. Although a joint "open skies" policy between Canada and the US has been officially on the books for several years, was implemented in March 2007. Canadian and US airlines can now pick up passengers and cargo in each other's country as long as the flight is heading on to a third country. Cabotage, that is, allowing foreign airlines to pick up passengers between cities located in the "host" country, is still not permitted.

The US open skies agreement with each of the European Union members came into effect in April 2008. Canada has announced that it is negotiating similar agreements with the European Union members. Under the US/European Union agreement, airlines are not restricted as to the airport at which they can land. Existing rights of each predecessor airline are preserved when two or more airlines merge.

Canada has had only one national airline since the amalgamation of Air Canada and Canadian Airlines in 1988.

Fishing

Foreign fishing vessels, unless authorized under the federal *Coastal Fisheries Protection Act*, are prohibited from fishing in Canadian coastal waters.

Utilities

Utilities are regulated by provincial crown corporations and governmental ministries.

Liquor and Alcohol

Any person selling liquor in Canada is required to obtain an appropriate provincial licence. Liquor, wine and beer distribution in Ontario is restricted to a provincial crown corporation, the Liquor Control Board of Ontario.

Transport

Firms that ship goods between cities require public commercial vehicle licences. There are special X-class licences for trucks that cross provincial or international borders. Mandatory bill of lading/shipping contract terms are specified in provincial highway traffic legislation, and certain terms are automatically incorporated into all bills of lading and shipping contracts where the carriage is by motor vehicle. Foreign vessels, unless authorized under the federal *Coasting Trade Act*, are prohibited from shipping cargo or passengers by water between two coastal ports in Canada.

Warehousing

Bonded warehousemen require a licence from the Excise Branch of CRA.

Real Estate Agents and Mortgage Brokers

A person wishing to act as a real estate sales agent or broker, a business broker, or a mortgage broker is required to obtain a special provincial qualification and a licence. The Ontario government has enacted the *Mortgage Brokerages, Lenders and Administrators Act, 2006* (the "MBLA Act") providing for new regulations regarding regulated activities, exemptions, licensing, the powers and duties of principal brokers and the standards of practice for brokerages. Previously, the industry had not been heavily regulated. The MBLA Act came into effect July 1, 2008. The MBLA Act creates a brokerage model for the sector under which separate licences are required for each person who is a mortgage brokerage, a mortgage administrator, a mortgage broker and a mortgage agent within the meaning of the Act.

Brokers and agents would be restricted to acting on behalf of one brokerage. Agents would only deal or trade in mortgages under the supervision of a mortgage broker. Each brokerage must appoint a principal broker to perform prescribed duties. The principal broker would act as a compliance officer. There are few exceptions to the registration requirements and penalties for breach of the MBLA Act include fines up to $200,000.

The MBLA Act includes a requirement that for an individual to be registered as a broker or agent under the MBLA, the person must be a resident of Canada.

Currently, the association representing real estate brokers is in discussions with the Commissioner regarding the access restrictions imposed by real estate brokers on multiple listing data collected and maintained under the MBLA. It is anticipated that within 2010 a settlement may result in a change in the manner in which real estate and brokerage services are delivered to the public, and a reduction in certain circumstances in residential purchase and sale transaction costs.

Motor Vehicles

Motor vehicle dealers are licensed provincially. As of January 1, 2010, the Ontario *Motor Vehicle Dealers Act, 2002* (the "MVD Act") came into force. The MVD Act is consumer protection legislation for what will have been prior to 2010 an unregulated industry. The MVD Act includes a code of ethics which imposes broad disclosure obligations on motor vehicle dealers. The Code includes detailed advertising standards. Consumers have a right, exercisable within 90 days of delivery of the motor vehicle to the consumer, to rescind a purchase agreement where the required disclosure has not been made by the dealer.

Collection Agents

Collection agencies operating in Ontario must be incorporated in Canada and certain ownership restrictions apply.

Consumer Reporting Agencies

Consumer reporting agencies must maintain their database computer records at a location in Canada.

Travel Agents

The travel industry is regulated provincially.

7. CANADIAN INTELLECTUAL PROPERTY REGIME

Canada has a comprehensive legislative scheme similar (apart from two notable exceptions described below) to that of the US for the protection of trade-marks, copyright, patents and industrial designs. A brief overview follows.

Trade-marks

The Federal *Trade-marks Act* (the "TMA") was brought into force in 1954 and has remained in substantially the same form since that time although amendments have been made from time to time. The TMA provides for a public registry system which is national in scope, showing for each registered trade-mark the date of registration, the owner of the registration, a summary of the application for registration, a summary of all documents deposited with the application or subsequently filed affecting rights to the trade-mark, particulars of each renewal and particulars of each change of name and address. The purpose of providing this system is to define and protect the rights of registered trade-mark owners. The system facilitates the protection of trade-marks by providing for public notice of rights and granting exclusive rights to owners.

This registration system co-exists with common law trade-mark rights. Common law rights can be acquired through actual use of the common law mark in association with wares or services. As a common law trade-mark becomes known and goodwill is associated with it, the common law trade-mark owner will be able to assert claims against others who use confusing common law trade-marks in the specific region or area that the common law trade-mark owner has built up goodwill. These rights are asserted by bringing an action in the courts for "passing off."

The essence of a protectable trade-mark is its distinctiveness. Generally speaking, in order to have the benefit of protection, a trade-mark must be distinctive in the sense that it distinguishes the wares or services in association with which it is used by its owner from the wares or services of others.

The TMA has been amended from time to time to allow for the licensing of trade-marks. Section 50 provides that for the purposes of the Act, if an entity is licensed by or with the authority of the owner of a trade-mark to use the trade-mark in a country and the owner has, under the licence, direct or indirect control of the character or quality of the wares or services, then the use, advertisement or display of the trade-mark by the licensee has the same effect as if done by the owner.

Under Section 50, use of the licensed mark is deemed to be use by the owner to ensure the distinctiveness of the mark is not affected by the licence. However this deemed use is only for the purpose of the Act; for any other purpose, the trade-mark owner is not deemed to have sold the goods or provided the services.

The TMA does not contain any limitation concerning the form of the applicable licence other than it must be with the authority of the owner of a trade-mark who must have, under the licence, direct or indirect control of the character or quality of the licensed wares or services.

Control by the trade-mark owner of the character or quality of the licensed wares or services is of fundamental importance since a licence without adequate control may result in the invalidity

of the mark. For the purposes of the Act, to the extent that public notice is given of the fact that the use of a trade-mark is a licensed use and of the identity of the owner, it will be presumed, unless the contrary is proven, that the use is licensed by the owner of the trade-mark, and the character or quality of the wares or services is under the control of the owner. The foregoing presumptions are rebuttable.

A trade name or a business style is a name under which an entity conducts business. In Ontario, trade names must be registered under Ontario's *Business Names Act*. While a trade name may be used as a trade-mark or as a component of a trade-mark, there are technical issues relating to whether the requirements of the TMA relating to trade-mark use are being satisfied.

The Québec *Charter of the French Language* generally requires that commerce and business in the province of Québec be conducted in French. In particular, the *Charter of the French Language* provides that firm names, product labelling, publications, contracts, signs, posters and commercial advertising must be written in French. The Regulation Respecting the Language of Commerce and Business pursuant to the *Charter of the French Language*, however, provides an exception that permits the use of a registered or applied for trade-mark in English unless a French version has been registered. The regulation also provides with respect to a business name that "…an expression taken from a language other than in French may appear in a firm name to specify it provided that the expression is used with a generic term in the French language."

Accordingly, a corporation may, in public posting and commercial advertising, use a trade-mark in a language other than French without a French translation of the trade-mark if such trade-mark is recognized under the Act, and a French version of the trade-mark has not been applied for or registered in Canada.

A corporation may also, in its business name, use a trade-mark in a language other than French, without any translation in French, if such trade-mark is recognized under the Act, and no registration of a French version has been applied for or obtained in Canada provided, however, that a French generic term is included in such business name.

A recent trade-mark case of note is a decision in which the Federal Court of Appeal overturned the 50-year practice of the Canadian Trade-marks Office. The Court determined that applications for confusingly similar trade-marks are to be approved by the Trade-marks Office on a "first to file" basis, not on the basis of when the trademark in question was first used by the competing parties. Previously, the right to register a trade-mark depended on use of the trade-mark. Trade-mark owners must monitor advertisements of pending applications with even greater diligence as a person opposing the registration of a trade-mark must be in a position to demonstrate first use of the trade-mark in Canada.

Copyright

Since January 1, 1924, Canada and the US have provided each other copyright protection under their national legislation. Unlike the US, however, Canada has never required that works be registered for them to be protected under the federal *Copyright Act*; works are automatically protected on their creation. The foregoing is the first of the two principal differences between Canadian and American intellectual property laws. This policy is a result of Canada's adherence

to the *Berne Convention for the Protection of Literary and Artistic Works* (Since 1989, the US has also adhered to this convention). The foregoing is the second of the two principal differences between Canadian and American intellectual property laws. As a result, works created in the US, that are in the public domain due to the owner's failure either to register or to renew the copyright when it expired, are often still fully protected in Canada for the term of copyright in Canada without being registered.

Obtaining copyright in Canada does not depend on registration or any other formal act. It is a proprietary right that arises from authorship alone. Copyright subsists in Canada in original literary or artistic works subject to certain requirements relating to the author's citizenship or residency. While copyright may be registered, if desired, the registration is simply a certificate of ownership affording an easy method of proof of authorship and copyright, should this be required.

The requirement of originality means that the work must not be copied and must originate from the author in the sense that it is the result of some degree of skill, judgment, industry, ingenuity or mental effort employed by the author of the work.

Generally the author of a work is the person who actually writes, draws or composes it. In most cases it will be readily apparent who is the "author" of a work but there are some situations that are not clear. In these cases it must be ascertained who has exercised the skill, labour or judgment that has resulted in the expression of the work in material form. The author is the person who expresses the work in an original form.

Where the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of employment by that person, the person by whom the author was employed will be, in the absence of any agreement to the contrary, the owner of the copyright.

Where a person commissions and pays for the execution of a work other than a photograph or engraving, and the work is not performed in the course of employment under a contract of service between the parties, copyright in the work will be owned by the author, not the person who paid for the work, unless there is an assignment of the copyright to such person. The assignment must be in writing and signed by the author.

There are special rules for photographs. The individual who takes a photograph is not necessarily the author or owner of copyright in the photograph. The person who was the owner of the initial negative at the time when the negative was made, or, where there was no negative, the person who was the owner of the initial photograph at the time when the photograph was made, is deemed to be the author of the photograph. However in the case of a photograph ordered by some other person for valuable consideration, in the absence of any agreement to the contrary, the person who ordered and paid for the photograph is the owner of the copyright.

The application of these principles can be shown by considering a typical advertisement. Let us assume an advertising agency is asked to prepare an advertisement containing text extolling the virtues of the product, as well as photographs.

First, assuming that the text is sufficiently original to give rise to copyright, the specific employees of the agency who prepared it will be the author. However, assuming they are acting in the course of their employment, the agency as their employer will own the copyright.

With respect to the photographs, if the company commissioning the advertisement provides them to the agency and otherwise owns the copyright, their reproduction in the advertisement will not affect the ownership of the copyright in the photographs. If the agency hires an independent photographer not employed by them to take pictures, in the absence of any agreement to the contrary, the agency will be the owner of the copyright in the photographs, so long as they pay for them. If employees of the agency took the photographs in the course of their employment, the agency will also be the owner of copyright in the photographs.

If the agency owns the copyright in the advertisement, they have the sole right to reproduce the advertisement, subject to any contractual rights that the company may have concerning ownership of the copyright or the right to exercise the rights associated with the copyright in the future.

Claims for copyright protection and protection under the TMA may co-exist. For example, a trade-mark that contains artistic or design features may also be protected under copyright if it is sufficiently original.

On June 12, 2008, the federal government introduced Bill C-61, an *Act to Amend the Copyright Act*. When Parliament was dissolved for the election called for October 14, 2008, the Bill died on the order paper and will have to be re-introduced if the amendments to the Copyright Act are to proceed.

Patents

Canadian patent laws operate on a "first-to-file" system rather than the "first-to-invent" system used in the US. As a result, patent applications should be filed in Canada as soon as possible and, as a general rule, before the invention is disclosed to a third party. An issued patent may be invalidated if there has been public disclosure more than one year before filing an application for registration. Patents which issue from applications filed before October 1, 1989 ("Old Act Patents") expire 17 years after the date of issue. In contrast, patents which issue from applications filed on or after October 1, 1989 ("New Act Patents") expire 20 years from the application's priority date if the application claims priority from an earlier filed application.

As a result of a ruling against Canada under the World Trade Organization in September 2000, the federal government amended federal Patent Act (the "Patent Act") effective July 2001 to the effect that non-expired patents with terms of Old Act Patents (from the date of filing in Canada) have a period of protection of 20 years in keeping with the requirements of the Agreement on Trade-Related Aspects of Intellectual Property Rights, to which Canada is a party.

Both the US and Canada are signatories to the *Paris Convention on the Protection of Intellectual Property*. To obtain the same application priority filing date patents filed in one member state (for instance, Canada) can be filed in the US within one year of the Canadian application date.

On January 1, 1989, Canada became a member of the *Patent Cooperation Treaty* ("PCT"). As a result, for both initial filings of patent applications and patent searches, prospective patentees in Europe can obtain patent protection in Canada by making a PCT-filed patent application. Europe affords similar rights to Canada. On July 26, 2004, Canada became an International Searching Authority and International Patent Examination Authority under the PCT for Canadian filing PCT international patent applications.

Before 1987, new drugs had restricted protection against copying by generic drug manufacturers in Canada. As a result, generic drugs were priced 50–85% cheaper than brand-name drugs because the generic manufacturer faced neither the cost of development and testing nor the cost of advertising to establish a market. The federal government responded to this situation by legislating a 20-year patent protection period for new pharmaceuticals. Compulsory licensing requirements are delayed for a number of years, in some cases for nearly the full 20-year period of patent protection. Other countries support a 20-year period of protection for new drugs without compulsory licensing.

A Federal Court ruling that higher life forms such as the Harvard Mouse are patentable under the Patent Act was appealed to the Supreme Court of Canada and the Court ruled in 2002 that higher life forms are not patentable in Canada.

In a decision released on May 21, 2004, although Monsanto Canada did not obtain a compensation order from a farmer who collected and used its genetically altered Roundup Ready canola seed, a majority of the Court held that infringement of a patent occurs where a person, for commercial purposes, uses a plant that contains patented genetic material. In effect, you do not need to patent the entire plant or animal; all you need is a patent for a gene or a cell in the plant or animal.

There is no dispute, however, that the method of performing the genetic modification is patentable under Canadian law.

In Canada, maintenance fees must be paid annually on issued patents and on pending patent applications starting the second anniversary of the application's filing date, or the application's priority date. Fees can be paid on a "small entity" or a "large entity" basis. A small entity in Canada is defined as an individual, a company having 50 or fewer employees or a university. The status of an application, as being either a small entity or a large entity application is determined on the date that the application is filed and the application retains that status throughout its life.

Industrial Designs

In Canada, designs are protected under the federal *Industrial Design Act*. An industrial design registration is loosely equivalent to a US design patent. A "design" or "industrial design" means features of shape, configuration, pattern or ornamentation, or any combination of such features, which, in a finished article, appeal to and are judged solely by the eye.

An industrial design registration is valid for a fixed term of 10 years, subject to paying a maintenance fee which is due on the fifth anniversary of the design's registration date. An

industrial design cannot be renewed. An application to register the design must be filed within one year after the first public disclosure of the design.

Trade Secrets

Trade secret rights that do not fall within the protections outlined above must be created by private contract. Also, at common law, certain relationships, such as employment relationships, can carry with them a requirement of confidentiality.

Other Intellectual Property Rights

In the last 17 years, two new intellectual property interests have been created by statute in Canada and form the basis for property rights that are growing in importance. The federal *Integrated Circuitry Topography Act* that came into force in Canada in 1993 allows the owner of the topography a 10-year period during which the owner can collect licence fees for any reproduction of the topography, any manufacture of products using the topography, and any products using the topography that are imported into Canada.

The federal *Plant Breeders' Rights Act* allows the developer of a new plant variety to register it and obtain the exclusive right, for 18 years, to produce and sell in Canada seeds for the new plant variety, plus all propagating material used to produce another new plant variety. The said Act stipulates that the holder of the right must license the plant variety to any person wanting to use it, subject only to the payment of specified royalties. Canada, the US and the UK are members of an international convention recognizing similar rights in each convention country.

8. DOING THE DEAL

To What Extent are Transactional Letters of Intent Enforceable?

In the course of negotiating a proposed business transaction, it is common practice for the parties to set out the agreed upon terms of the transaction in an informal document, such as a letter of intent or memorandum of understanding, pending the preparation of a more formal agreement. The parties may intend for the informal document to be a binding commitment to complete the transaction, or merely a non-binding "agreement to agree." A recent Ontario Court of Appeal decision provides important lessons on the use of these informal documents as means of settling the terms of a business transaction.

What Impact Does the Ontario *Bulk Sales Act* Have on Asset Purchase Transactions?

Ontario remains the only province with bulk sales legislation, the *Bulk Sales Act* (the "BSA"). Any party engaged in a "sale in bulk," that is, one out of the ordinary course of business, of personal property (fixtures, goods and chattels) used by a person in a trade or business located in Ontario must either: (i) obtain a Court order exempting the transaction; or (ii) obtain from the seller a "statement of creditors" in the prescribed form and ensure adequate provisions for the payment of each trade creditor at closing is in place and obtain executed waivers of compliance in the form prescribed by the BSA from each of those trade creditors who is not to be paid in full at closing.

The exemption order may be obtained on an ex parte application before a judge if the judge is satisfied that the sale is advantageous to the seller and will not impair its ability to pay its creditors in full. The judge may impose conditions.

The risk of non-compliance with the BSA is that any trade creditor who is not paid in full at closing may apply to the court for an order declaring the sale of assets void — obviously a remedy to avoid in all circumstances. There is recent case law to the effect that the remedy that is available to any such creditor is an accounting from the seller regarding its use and application of the proceeds from the sale, not an order declaring the transaction void.

The buyer must file in the office of the clerk of the court within five days of closing particulars of the sale, and duplicate originals of the statement of creditors.

It is common practice in purchase and sale transactions where it is evident that the seller will be in a position to satisfy creditors at closing for the buyer to waive compliance with the BSA subject to full indemnification rights against the seller for any losses or other damages arising out of such non-compliance.

It is a commonly held view that the BSA has outlived its use, that creditors have strong protection under bankruptcy, insolvency and assignment and preference legislation and that the BSA should be repealed, but until that happens, the purchase and sale agreement should include appropriate provisions which deal with it.

The Facts

The case of *Wallace v. Allen* concerned two friends and neighbours, Graham Allen and Kim Wallace. Allen was retiring from his business and agreed to sell the business to Wallace, an entrepreneur and investor. The parties negotiated and signed a letter of intent for the sale of the business.

After signing the letter of intent, Wallace and Allen began the process of negotiating a share purchase agreement, and targeted a specific date to sign the purchase agreement and close the transaction. On the agreed upon closing date, Allen attended at his lawyer's office in order to sign the necessary documents and complete the transaction. He was informed by Wallace's lawyer that Wallace, who was in Florida with family at the time (with Allen's knowledge and approval), had not signed the paperwork to close the deal and had not provided his lawyer with funds to close the transaction (although this was an error, as Wallace had indeed deposited funds in his lawyer's trust account for that purpose). At that time, Allen decided not to complete the transaction; he continued to maintain this position notwithstanding Wallace's subsequent requests to close the deal. Wallace sued Allen for damages and an order for specific performance (i.e., an order for the transaction to be completed).

The trial judge dismissed the action, finding that the parties, in entering into the letter of intent, did not intend to form a binding contractual relationship until the final share purchase agreement was signed. Wallace appealed this decision.

The Enforceability of Letters of Intent

In Canada, the question of whether an informal document constitute an enforceable agreement or merely a non-binding agreement to agree consists of two elements:

(i) Are the terms of the informal document sufficiently certain so that the contract is not void for vagueness? Does the document include all of the essential provisions to be incorporated in a formal document, or does the document contemplate the negotiation of additional significant terms of the deal which are not described in the informal document?
(ii) Were the parties to the document bound immediately upon signing the document, with the more formal agreement intended to embody the precise terms of the informal agreement? Was it the intention of the parties for their legal obligations to be deferred until a formal agreement was settled?

Analysis

Ultimately the Court of Appeal found that the facts supported a finding that the parties had entered into a binding agreement when they signed the letter of intent. The Court's analysis was as follows:

- **Was the letter of intent void for vagueness?** The Court noted that the parties entered into the letter of intent after weeks of negotiation, and that the facts suggested that they had acknowledged that all of the terms they considered necessary or essential to the transaction were agreed upon on and set out in the signed letter of intent. The letter of intent could not be regarded as being non-binding because of vagueness or a lack of agreement as to the essential terms.

- **Did the parties intend to be bound by the letter of intent?** The use by the parties of contractual-type language in the letter of intent (such as references to "this agreement" and statements such as "it is agreed" and "upon acceptance") suggested an intention to be bound. Wallace began to work in the business immediately after signing the letter of intent and also began to incorporate his sons into the business with a view to transitioning management. For his part, Allen announced his retirement and the sale of the business, while introducing Wallace as the new owner. This conduct reinforced the Court's opinion that the parties intended to be bound by the letter of intent.

Avoiding a Binding Commitment

Businesspeople often use letters of intent as a framework for discussing the terms of a transaction because it provides some level of assurance that the parties are approaching the negotiation process seriously. However, it can be of equal concern to a party to a letter of intent that it not be bound to proceed with a transaction before having had an opportunity to, for example, finalize due diligence or properly articulate the agreed upon terms in a formal agreement.

When preparing a non-binding letter of intent, consider the following recommendations:

- State explicitly in the letter of intent that it is the parties intention that the letter of intent be non-binding and that binding commitments will only arise upon execution of a definitive agreement
- Include a provision stating that the parties will, following the execution of the letter of intent, negotiate and enter into a definitive agreement which will contain the agreed upon terms in the letter of intent, as well as other customary provisions
- Include a list of conditions upon which the completion of the transaction will depend, if already determined. A good example is a condition in favour of the buyer (if the transaction is a purchase and sale) providing that the completion of the transaction is conditional upon the buyer being satisfied with its due diligence
- Avoid the use of "agreement-type" language. Refer to the informal document as a letter of intent, term sheet, memorandum of understanding, or some other title that is consistent with characterizing the document as "an agreement to agree," which is not binding
- If the letter of intent includes covenants regarding confidentiality of information or non-solicitation of employees, customers or suppliers, provide in the letter of intent that these provisions as intended to survive termination of the letter of intent and be binding on the parties whether or not a definitive agreement is entered into and whether or not the proposed transaction closes.

9. FINANCING CANADIAN OPERATIONS

How Can You Finance Your Canadian Operations?

Commercial Bank Credit Facilities

In Canada, it is possible to finance business operations either by debt or by equity. Conventional finance sources include commercial banks qualified to provide financial services in Canada under the Bank Act. Loans to low risk enterprises are often done on an unsecured basis. More commonly, a commercial bank will take security from the borrower who charges all or part of the property and assets of the business, including accounts receivable, fixed assets and real estate. Currently, the prime lending rate of Canadian commercial banks is 2.25%. Often, banks will enter into loan arrangements based upon short-form commitment letters and the granting of security by way of a general security agreement, without the requirement of a long (and expensive) loan agreement.

Generally, the least-cost source of funding available only through the Canadian banks is by way of bankers' acceptances ("BAs"). A BA is a money-market instrument represented by a short-term note, issued by the borrower, which has been "accepted," that is, guaranteed by the borrower's Canadian chartered bank. As a result, any borrower can borrow money at a small premium over commercial money-market rates, in effect, using the covenant of its banker to lower its cost of funds.

Canadian banks will also lend in currencies other than Canadian dollars and can determine interest rates on borrowings with reference to LIBOR or other reference rates. Advances under credit facilities will often include advances by way of letter of credit or letter of guarantee, depending on the needs of the borrower. As noted earlier, a borrower may require a hedging program to attempt to mitigate the risk of interest rate, or exchange rate, fluctuations. Other lending facilities are available in Canada, including loans from lenders with specialized industry knowledge who are able to make credit advances using higher margin rates on certain equipment and other collateral (asset-based lending) that are larger than would be available from conventional lenders. The credit arrangements are generally more complex and require more timely reporting and may involve lock-box bank accounts under the sole control of the lender into which borrower receipts are deposited on a daily basis. For various reasons, taking effective security on collateral is easier in Canada than it is in the US.

Personal Property Security

Under the Personal Property Security Acts of the common law provinces (each a "PPSA"), it is possible for a debtor to grant a security interest (a charge) to a third party charging any form of personal property (including not only lease financing arrangements, but also true leases of goods with terms that exceed one year) in which the debtor has an interest to secure the debtor's obligations to such secured party under a security agreement (usual circumstance) or to secure the obligations of another person where the debtor, for example, as a party pledging collateral as security does not assume any obligation under such other person's agreement with the secured party. The PPSA is based, in part, on Article 9 of the US *Uniform Commercial Code*. Filings in the public register maintained by each common law province are done by remote electronic access. To register by remote electronic access, the party doing the

registration must have a trust account with the government and specialized computer software. The register can be accessed outside normal business hours and registrations are immediate. This personal property security regime is a highly efficient means of registering security interest in personal property. The PPSA system is well-understood and reliable.

If a security interest is perfected in personal property which subsequently becomes incorporated in a building or other structure, it is possible to maintain the charge against the fixture by making the required filing against the affected lands in the applicable land registry office.

Generally, priorities are determined by order of "perfection" of the security interest. For collateral other than financial assets, perfection is usually achieved by registration of a financing statement in the appropriate PPSA public register. To prevent the potential tyranny of the first secured party to register against a debtor, the PPSA permits a debtor to grant a purchase money security interest (a "PMSI"), such as vendor take-back financing or third party equipment lease financing, in favour of a secured lender who restricts the charge of the PMSI to the goods so financed and traceable proceeds derived from such goods.

Personal Property Security in Québec

Québec is the only province whose security over personal property (referred to in Québec as "movable property") is governed by the *Civil Code of Québec* ("CCQ"). Under the CCQ, the hypothec plays the role of the common law general security agreement and the charge granted under a hypothec is roughly equivalent to a security interest granted under a general security agreement. The CCQ requires that each hypothec: (i) has specific charging language to the effect that the grantor is hypothecating certain property; (ii) specifies the maximum dollar amount secured by it; (iii) if interest is secured by the hypothec, specifies the maximum interest rate; (iv) describes the obligations secured by it; and (v) sufficiently describes the movable property charged by it — while there are no category definitions in the CCQ similar to the Ontario PPSA such as "inventory" and "equipment," these terms are acceptable for CCQ purposes.

To be effective, moveable hypothecs are registered at the Register of Personal and Movable Rights by filing an application for registration, which is much like a financing statement in other Canadian provinces or a UCC-1 in the United States of America. The application for registration may only be made once all parties to the hypothec have executed the document. No pre-registration similar to that permitted under PPSA legislation is permitted. Since it takes some time for registration records to be updated, there is up to a 48-hour gap between when the registration is submitted and when a search report showing all prior registrations is available. Financing closings may require an escrow period to permit the secured party to obtain a clear search certificate evidencing the intended priority of the secured party against the charged movable property. In the alternative, the parties can pre-close the Québec security approximately 48 hours in advance, sign the loan documents and disburse funds immediately following the passing of the 48 hour period, assuming updated searches at that time do not disclose any new adverse registrations.

Note that in Québec, the legal status of the person granting the hypothec is important. Individuals who are not operating as a business enterprise are prohibited from charging all of their moveable property (referred to as their "universality"). In addition, there are special rules

regarding hypothecs granted by general partnerships. If the loan arrangement is syndicated among a number of lenders, then the security must be structured using an agent or *fondé de pouvoir* (Article 2962 of the CCQ), which structure should be more fully discussed with Québec counsel in the context of any particular transaction. One of the requirements of this structure is that the hypothec must be notarized *en minute*, meaning that a Québec notary (i.e., not a notary public) will have to witness signatures of each of the parties to the hypothec and enter a record of the hypothec into his/her minutes. The foregoing may result in an increase transaction fees.

Security in Aircraft Equipment

Canada is signatory to the CTC (as defined below) and has passed, but not yet fully proclaimed, the *International Interests in Mobile Equipment (Aircraft Equipment) Act* (Canada) (the "CTC Act"), which is the federal implementing legislation for the CTC. Provincial implementing legislation has been passed in Ontario, Nova Scotia, Québec, Alberta, Saskatchewan and Newfoundland & Labrador. The federal Government has indicated that it will likely proclaim the federal legislation when sufficient key provinces have implemented their legislation. On September 28, 2005, in order to give Canadian airlines the benefit of the provisions similar to US Chapter 11, subsection 1110 contained in the CTC Act, Canada proclaimed those parts of the CTC Act which have amended the *Bankruptcy and Insolvency Act* (Canada) (the "BIA") and the CCAA and which now have the force of law in Canada. These provisions have not yet been tested in Canadian insolvency proceedings. Canada has indicated that it may proclaim the other provisions of the CTC Act in the near future, which provisions may require that existing transactions be registered in the International Registry (as defined below). Notwithstanding that Canada has not yet ratified the CTC, lessors and lenders of aircraft and engines will be entitled to the benefit of the amendments to the CCAA, the BIA and the *Winding-up and Restructuring Act* (Canada) (the "WRA") contained in Sections 11 to 18 of the CTC Act with respect to airframes and engines in connection with any proposal proceeding under the BIA, bankruptcy under the BIA, proceeding under the CCAA or proceeding under the WRA, commenced by or against a lessee.

In the foregoing paragraph, the *Convention on International Interests in Mobile Equipment* (the "Mobile Equipment Convention") and the *Protocol to the Convention on Matters Specific to Aircraft Equipment* (the "Cape Town Protocol") each as signed in Cape Town, South Africa on November 16, 2001; the *Regulations* (the "Regulations") issued by the Supervisory Authority for the International Registry of Mobile Assets (the "International Registry"); and the *International Registry Procedures* (the "Procedures"), each as in effect on this date in the US. The Mobile Equipment Convention as modified by the Cape Town Protocol, together with the Regulations and the Procedures and all other rules, amendments, supplements and revisions thereto are collectively referred to as the "CTC."

Bank Act Security

Another financing alternative in Canada, set out in sections 426 and 427 of the Bank Act, is that certain borrowers (such as farmers and manufacturers) can create and grant special security in their inventory in favour of Canadian chartered banks. Bank Act security is only available to banks, does not permit remote electronic registrations and it has a number of

arcane provisions. In light of the foregoing, commercial banks will usual require security under the PPSA and, where appropriate, they will also take security under the Bank Act.

Usury Law

Currently, section 347 of the *Criminal Code* (Canada) provides that it is a criminal offence to charge interest in excess of 60% per annum. There is a proposal before Parliament to eliminate any limit for commercial transactions and to fix the limit for consumer transactions at the prime rate of interest plus 35%. For the purpose of section 347, all fees and other charges are included within the definition of "interest," other than, as summarized below, in the case of late payment fees which can reasonably be categorized as recovery of administration expenses arising from the late payment.

This is of particular importance to our US clients where charging administration fees is common practice, or to our clients who bill for their services on a monthly basis and charge an administration fee for late payment. In a recent case, a client of Bell ExpressVu Inc. (a provider of satellite television) was billed on a monthly basis for services in advance. Payment was due 25 days following the date of the invoice. Interest was charged on an unpaid account five days after the payment was due. In addition, an administration fee (the "Fee") was levied in the event that an account remained unpaid for 60 days, (being 35 days after the due date). Should the payment remain outstanding, services were "soft" disconnected on day 75, and at day 105, the services were deactivated and a deactivation fee of $50 was levied.

In this class action, the representative customer argued that the Fee constituted interest and was, therefore, in contravention of Section 347. Bell argued that the Fee constituted a genuine pre-estimate of the costs associated with collection and management of an overdue account. The court at first instance held that the Fee constituted interest and was, therefore, in contravention of Section 347 and accordingly was unenforceable. On appeal, the Ontario Court of Appeal accepted the evidence of Bell regarding its average collection and administrative costs on overdue accounts and the court overturned the class certification. If administrative fees on overdue accounts are charged, the fee must be based on the increased administrative costs incurred by the service-provider.

The federal Interest Act prohibits the charging of interest at a higher rate after default or maturity than before, but only for obligations which are secured by a charge on real property.

Security on Land in Ontario

If a borrower has an interest in real estate, it is able to charge that interest by way of a mortgage or charge in favour of a creditor. Ontario has an electronic land registration system that permits remote registration of transfers, mortgages and documents affecting title to real estate in the province. Although all land in Ontario is not yet under the electronic registration system, all properties in most major urban areas are. Title insurance is available in Ontario and its use is becoming more widespread, especially among commercial lenders in that title insurers will assume the risk of adverse off-title searches. Often it takes several weeks to receive replies from municipalities regarding compliance with applicable zoning by-laws and the payment of taxes. Title insurers will bind themselves by issuing the subject title insurance without waiting for such off-title searches and assume the risk of any loss arising out of non-compliance.

Security on Land in Québec

The equivalent of a mortgage in common law provinces is a Québec hypothec charging immovable property. All hypothecs on immovable property in Québec must be signed by all the parties before a Québec notary in person or by duly authorized power of attorney. Registration in the applicable land registry office of the land registration division in Québec is made by the notary delivering a complete certified copy of the immovable hypothec to the land registrar in question for recording.

Security on Petroleum and Natural Gas Rights in Alberta

In Alberta, the Province (Crown) owns approximately 81% of the mineral rights, including petroleum and natural gas reserves ("PNG"). 10% are owned privately (by individuals and incorporated entities such as corporations and trusts) and the balance are held in National Parks and Indian Reserves of the Government of Canada. The surface and mineral titles are separated for purposes of the land registration system in Alberta. The disposition, exploration for and development of Crown and private mineral rights are regulated through legislation in the Province, the most significant being the *Mines and Minerals Act* (the "AMMA"). PNG rights are disposed of through a petroleum and/or natural gas lease agreement. The interest of the lessee (usually an energy company) under these forms of lease has been categorized by the Courts as a profit à prendre, which is an interest in land that allows the holder of the interest to remove and dispose of the PNG. While in situ (in the ground), PNG is real property and part of the land underneath which it is situate. Once produced from the underlying reserve, PNG becomes personal property. Therefore, a lender who takes PNG rights as collateral for a loan will want their security to constitute a charge (security interest) over real property and personal property. A security interest in personal property is governed by the PPSA, as discussed elsewhere in this Chapter under the heading "Personal Property Security" on page 9.1.

A charge over PNG rights while they are an interest in land is accomplished through a form of mortgage (if a charge over the specific PNG rights is to be obtained) or, as is more commonly the case, through a debenture or other security agreement containing a floating charge on real property owned by the borrower. A charge on PNG rights to the extent they are an interest in land is registered at the Alberta Land Titles Office as a mortgage for privately owned PNG rights and with the Department of Energy under the applicable provisions of the AMMA Crown-owned PNG rights. An energy company who wants to explore for, develop, produce and transport PNG will also need to acquire certain interests in the surface of the lands under which the PNG is situate. This is accomplished through various types of instruments including surface leases, easements and rights of way that are granted by the owner of the surface rights in the lands. Often, a lender will want to take security over these rights in addition to the PNG rights, which would, in most cases, be governed by the Alberta Land Titles Act, pursuant to which these surface rights would be registered and could form the subject of the mortgage security of the lender.

Exempt Distributions in Ontario

Chapter 11: Regulation of Trading in Securities of this book sets out information on the sale of securities in Canada. As discussed in that chapter, Ontario's *Securities Act* (the "OSA") provides for a closed system relating to the distribution of securities in Ontario. Under the

closed system, securities initially issued relying on a distribution exemption can only be resold: (i) in accordance with a further distribution exemption; (ii) following the satisfaction of certain resale requirements; (iii) if discretionary relief from these resale requirements is granted; or (iv) where the securities are qualified by a prospectus.

For an issuer to issue securities to the public without complying with the distribution requirements under the OSA to produce a prospectus and involve a registrant (an individual registered under the OSA such as a dealer), the issuer must rely on one of the exemptions to the distribution requirements provided for in the OSA or under applicable governmental rules. In September 2005, in an effort to harmonize and consolidate the various prospectus and registration exemptions available across the country, Canadian securities regulators enacted National Instrument 45-106 — *Prospectus and Registration Exemptions* ("NI 45-106").

The following summarizes the key elements of NI 45-106, as amended, as it relates to non-investment fund issuers.

Private Issuer Exemption

- The private issuer exemption under NI 45-106 is available to private companies that are closely held.

A private issuer is defined as an issuer:

- That is not a reporting issuer (that is, an issuer that has not made a distribution of securities to the public) and is not an investment fund; *and*
- The securities of which, other than non-convertible debt securities, are: (i) subject to restrictions on transfer that are contained in the issuer's constating documents or securities-holder agreements; (ii) beneficially owned by not more than 50 persons (apart from current and former employees of the issuer and its affiliates); and (iii) has either distributed securities only to specifically identified classes of investors, including directors, officers, control persons, the family members and close business associates thereof, employees and existing securities holders, accredited investors, persons that are not considered the "public."

If an issuer distributes securities to a person who does not fit into one of the specifically identified classes of investors, then it will cease to qualify as a private issuer.

Except for a trade to an accredited investor, no commission or finder's fee may be paid to any director, officer, founder or control person in connection with a trade under this exemption.

Subscription agreements for private issuers should provide that purchasers represent that they fit within one of the identified classes of exempt investors.

The private issuer exemption is subject to some debate regarding the definition of the term "the public." The courts have interpreted the public very broadly in the context of securities trading.

Accredited Investor Exemption

This is the most popular exemption for private placement financings in Canada. Under the accredited investor exemption, a trade of securities of any value can be affected on an exempt basis if the purchaser is an accredited investor who purchases as principal.

Under NI 45-106, issuers are entitled to rely on the accredited investor exemption for distributions in all provinces and territories of Canada.

The accredited investor approach actually creates a laundry list of persons or entities who satisfy the notion of sophistication for specific reasons. The most notable types of accredited investor categories for individuals are based on high net financial assets or net income. The net financial asset test qualifies an individual as an accredited investor if, individually or together with a spouse, their financial assets (i.e., cash or securities) have an aggregate realizable value before taxes, net of any related liabilities, greater than $1 million. However, as an individual's principal residence is excluded from the definition of "financial assets," the number of individuals who would qualify on the high net worth basis is likely to be few. Another category of accredited investor is an individual whose pre-tax annual income is greater than $200,000 in each of the two most recent years, or greater than $300,000 if combined with a spouse's income in each of those years. To fall under this category, the investor (and the spouse, where applicable) must have a reasonable expectation of exceeding the same net income level in the current calendar year. The practice to ascertain that individuals or entities qualify as "accredited investors" is to have them sign a certificate which contains representations as to their accredited investor status.

Post-closing filings with the applicable provincial securities commissions have to be made by the issuer within 10 days of a trade made in reliance on this exemption.

$150,000 Exemption

Pursuant to NI 45-106, the minimum amount required for this exemption is set uniformly across Canada. Securities are permitted to be sold on an exempt basis to any purchaser (accredited or otherwise) if the purchaser, acting as principal, acquires securities with an acquisition cost of not less than $150,000, which is paid in cash at the time of distribution.

This exemption is not available for any distribution to any person that is created or used solely to purchase or hold securities in reliance on this exemption. Investment clubs would be a prime example of an entity created to take advantage of the minimum investment exemption.

Post-closing filings with the applicable provincial securities commissions have to be made by the issuer within 10 days of a trade made in reliance on this exemption.

Offering Memorandum Exemption

Under NI 45-106, the offering memorandum exemption is available in each Canadian province and territory other than Ontario.

In the participating provinces and territories, a distribution by an issuer is exempt from prospectus and registration requirements if the issuer provides the purchaser with an offering

memorandum in prescribed form and the purchaser signs a prescribed Risk Acknowledgement Form. In British Columbia, Yukon Territory, New Brunswick, Nova Scotia, and Newfoundland & Labrador, an issuer can sell any amount of securities to any purchaser under this exemption. In Alberta, Saskatchewan, Manitoba, Northwest Territories, Prince Edward Island, Québec and Nunavut, an issuer cannot issue securities to any individual purchaser with an acquisition cost in excess of $10,000, unless the purchaser is an eligible investor. An eligible investor is defined as, among other things, a person whose: (i) net assets, alone or with a spouse, in the case of an individual, exceeds $400,000; (ii) net income before taxes exceeded $75,000 in each of the two most recent calendar years and who reasonably expects to exceed that level of income in the current calendar year; or (iii) net income before taxes, whether alone or with a spouse, exceeded $125,000 in each of the two most recently completed calendar years and who reasonably expects to exceed that income level in the current calendar year.

NI 45-106 requires that each purchaser must be provided a contractual right to cancel any purchase agreement within two business days after signing the purchase agreement. Further, the issuer must hold in trust all consideration paid by purchasers until a full two business days have passed after the date that purchaser signs the purchase agreement.

If applicable securities law does not provide the purchaser with a statutory right of action in the event of a misrepresentation in an offering memorandum, the offering memorandum must contain a contractual right of action against the issuer for rescission or damages if the offering memorandum contains a misrepresentation.

NI 45-106 does not affect provisions of securities laws that provide for rights of rescission or damages in the event that an offering memorandum contains a misrepresentation, regardless of the form of the offering memorandum.

Post-closing filings with the applicable provincial securities commissions have to be made by the issuer within 10 days of a trade made in reliance on this exemption.

Family, Friends, Business Associates and Founders

Ontario differs from the other jurisdictions in Canada in terms of the scope of the exemptions available to family, friends and business associates.

In Ontario, securities of any value can be sold on an exempt basis to: (i) a founder of the issuer; (ii) an affiliate of a founder of the issuer; (iii) certain relatives of executive officers, directors and founders of the issuer; and (iii) control persons of the issuer.

In each of the other provinces and territories of Canada, securities of any value can be sold on an exempt basis to: (i) directors, executive officers, control persons or founders of the issuer or an affiliate of the issuer; and (ii) certain relatives, close personal friends and close business associates of those individuals listed in (i). However, in Saskatchewan the purchasers of the securities must also sign a Risk Acknowledgment Form.

The Canadian securities regulators have used the concept of a “founder” and not the concept of a “promoter” in NI 45-106. A founder is a person who takes the initiative in founding, organizing or substantially reorganizing the business of the issuer and at the time of the trade is actively involved in the business of the issuer.

Post-closing filings with the applicable provincial securities commissions have to be made by the issuer within 10 days of a trade made in reliance on this exemption.

Employees, Executive Officers, Directors and Consultants

Distributions by an issuer, a control person of an issuer or related entity of an issuer to employees, executive officers, directors or consultants of such issuer or a related entity of the issuer will be exempt from the prospectus and registration requirements, if participation in the trade is voluntary (the "employee, executive officer and director and consultant exemption").

NI 45-106 also establishes limits on the number of securities that may be issued to executive officers, directors, consultants and employees and consultants who are investor relations persons of reporting issuers whose securities are not listed on certain listed trading markets.

Transaction Exemptions

The prospectus and registration requirements do not apply to any distribution conducted in connection with: (i) an amalgamation, merger, reorganization or arrangement under a statutory procedure; or (ii) the dissolution or winding-up of an issuer (the "business combination and reorganization exemption"). Trades may also be completed on an exempt basis in connection with amalgamations, mergers, reorganizations or arrangements that are: (i) described in an information circular that complies with National Instrument 51-102 — *Continuous Disclosure Obligations* or a similar disclosure document that is delivered to each security holder whose approval is required; and (ii) approved by the securityholders.

NI 45-106 exempts any issue of securities pursuant to three-cornered amalgamations, as the business combination and reorganization exemption applies to a distribution made in connection with an amalgamation or merger done under a statutory procedure. Also, according to the companion policy, the business combination and reorganization exemption is available for all distributions of securities that are necessary to complete an exchangeable share transaction, even where such trades occur several months or years after the transaction.

An issuer may also effect a distribution on an exempt basis if it issues securities as consideration to a person for the acquisition, directly or indirectly, of: (i) assets that have a fair value of not less than $150,000 (the "asset acquisition exemption"); or (ii) petroleum, natural gas or mining properties or any interest therein (the "petroleum, natural gas or mining properties exemption"). According to the regulator's companion policy, it is the responsibility of the issuer and its directors to determine the fair market value of the assets to be required and to retain records to demonstrate how that fair market value was determined. With respect to the acquisition of assets that have a fair value in excess of $150,000, it is unclear whether securities may constitute a portion of the purchase price that is less than $150,000.

An issuer may also issue its own securities on an exempt basis to settle a *bona fide* debt (the "securities for debt exemption").

The prospectus and registration requirements will not apply in respect of distributions made in connection with a take-over bid or issuer bid.

Resale

Securities distributed under an exemption may be subject to restrictions on their resale in accordance with National Instrument 45-102 — *Resale of Securities*.

Securities issued pursuant to the following exemptions are generally subject to a four-month hold period prior to resale: the private issuer exemption and the business combination and reorganization exemption.

Securities issued pursuant to the following exemptions are subject to a general four-month hold period prior to resale: the accredited investor exemption, the offering memorandum exemption, the $150,000 exemption, the family, friends and business associates exemption, the asset acquisition exemption and the securities for debt exemption.

Capital Pool Companies

Start-up access to the public markets is available through the capital pool company ("CPC") Program offered by the TSX Venture Exchange (the "Venture Exchange"). The CPC Program enables qualified companies to raise up to $2 million and obtain a listing on the Venture Exchange on a "blind pool" basis, whereby these companies proceed with a mandate to acquire certain eligible businesses or assets, in most cases using shares as the consideration payable to the vendors.

Upon the completion of the acquisition, which is called a "Qualifying Transaction," the acquired business effectively carries on as the Venture Exchange-listed public company. From a market and GAAP perspective, the foregoing is treated as a reverse takeover transaction. One advantage the CPC program offers is that, under the Venture Exchange rules, a CPC does not necessarily require shareholder approval for arm's length Qualifying Transactions, unless otherwise required under the CPC's governing corporate legislation.

Amendments to the CPC Program have removed the prohibition on foreign non-resource Qualifying Transactions. A CPC that is a reporting issuer in Ontario may undertake a foreign non-resource Qualifying Transaction with the additional requirement that it file a prospectus with the Ontario Securities Commission.

The CPC Program represents a modest source of late-stage working capital for start-up businesses in Canada.

Special Purpose Acquisition Corporation ("SPAC")

The Toronto Stock Exchange implemented the SPAC program in 2009, as an alternative vehicle for listing.

SPAC is an investment vehicle allowing public investors to invest in companies and/or industry sectors normally sought by private equity firms. In addition, it can provide an opportunity for individuals unable to buy into hedge or private equity funds the ability to participate in the acquisition of private operating companies traditionally targeted by those funds.

Unlike a traditional initial public offering ("IPO"), the SPAC program enables seasoned directors and officers to form a corporation that contains no commercial operations or assets

other than cash. The SPAC is then listed on Toronto Stock Exchange via an IPO, raising a minimum of $30 million, 90% of the funds raised in the IPO are then placed in escrow, to be used toward a future acquisition.

The SPAC must then seek out an investment opportunity in a business or asset, to be completed within 36 months of the SPAC's listing on Toronto Stock Exchange, and defined as the "qualifying acquisition." Once the SPAC has completed its qualifying acquisition, which must meet Toronto Stock Exchange listing requirements, its shares will continue trading as a regular listing on Toronto Stock Exchange.

SPACs become reporting issuers as a result of their IPO, and thus are fully regulated by the relevant provincial securities commissions as well as Toronto Stock Exchange.

Which Federal Government Programs Provide Financial Assistance to Business in Canada?

Budget constraints at all levels of government in Canada have reduced the number of government-sponsored incentives for business. The following is a list of current federal programs.

- Export Development Canada provides risk insurance for Canadian exporters (political coverage of up to 90% of the exporter's losses, including certain loan losses), loans to foreign purchasers of Canadian capital goods, and guarantees to Canadian banks for export loans.
- The terms and conditions for the Technology Partnerships Canada program expired on December 31, 2006. Therefore, no new outlines under this program will be accepted, and no new projects will be contracted.
- The Business Development Bank of Canada ("BDC") provides high-risk loans to small and medium Canadian businesses. The BDC has entered into arrangements with a number of Canadian commercial banks pursuant to which BDC conducts an in-depth analysis of the borrower and its needs, shares this information and analysis with the borrower's primary commercial bank, and assumes a subordinated lending position to that of the primary bank. In this way, BDC supports small or emerging companies, especially in knowledge-based industries.
- Under the *Canada Small Business Financing Act*, the federal government guarantees repayment of 85% of certain equipment and fixturing loans of up to $500,000 made to small businesses by Canadian chartered banks. Eligible businesses must have annual sales of less than $5 million. Without this there would be significantly fewer restaurants in Canadian cities.
- Human Resources and Skills Development Canada ("HRDC") operates the Job Creation Partnership, in some cases delegating management to other federal departments. Programs include internships with various federal government departments; targeted wage subsidies under which HRDC will contribute to the wages paid to the employee by an employer who hires an unemployed person then receiving federal employment benefits; and work-sharing arrangements where employers reduce the number of hours of work available to a group of employees so as to avoid layoffs. HRDC pays employment insurance benefits to the employees for the hours of work lost as a result of the work-sharing program.[1]

[1] **www1.servicecanada.gc.ca/eng/epb/sid/cia/grants/jcp/desc_jcp.shtml** (last updated November 16, 2009).

- HRDC has entered into agreements with all provinces and territories to define how the benefits and measures are delivered in each region.[2] As a result, in New Brunswick, Québec, Ontario, Manitoba, Saskatchewan, Alberta, the Northwest Territories and Nunavut, programs similar to the Employment Benefits and Support Measures are delivered by the provincial or territorial government[3] pursuant to agreements under Section 63 of the *Employment Insurance Act*.
- The National Research Council of Canada manages a research financing program known as the Industrial Research Assistance Program. To be eligible, the applicant company must have fewer than 500 employees.
- Under the Strategic Aerospace and Defence Initiative, qualifying entities may apply for long-term repayable contributions representing up to 30% of a project's total eligible costs for conducting research and development work with application in the aerospace and defence technology industries.
- Under the federal Scientific Research and Experimental Development Tax Incentive Program (the "SRED"), qualifying companies are entitled to an income tax credit of up to 35% of qualifying research and development expenditures. A recent Organization for Economic Co-operation and Development study comparing 29 countries has categorized this Canadian program as "too generous" because the value of the tax credit is the same regardless of the aggregate amount of funds expended on research and development. Other countries use a graduated approach, increasing the tax credit as aggregate research and development expenditures exceed specified thresholds.
- The industrial research assistance program invests on a cost-shared basis for technical advisory services and financial services for medium-sized enterprises.

In addition to the foregoing programs, under the federal Business Immigration Program (described under the heading "Business Applicants" on page 15.3), preference is given to applicants who can demonstrate they have significant financial means and are willing to make qualified investments in Canada. Although immigration is a matter within federal jurisdiction, the federal government has delegated administration of the program to the provinces.

Which Provincial Programs Provide Financial Assistance to Business?

As previously noted, each province has modest government support programs. However, in Canada there is no equivalent to programs commonly found in certain US states under which municipal taxes and service charges are abated, for example, to encourage new investment in manufacturing facilities in the state. Municipalities are prohibited by law from offering such tax relief and service rebates. The Ontario government does, however, support local businesses enterprises primarily through special provincial tax incentives and tax credits.

These include:

[2] **www1.servicecanada.gc.ca/eng/epb/sid/cia/grants/jcp/desc_jcp.shtml** (last updated November 16, 2009).

[3] **www1.servicecanada.gc.ca/eng/epb/sid/cia/grants/jcp/desc_jcp.shtml** (last updated November 16, 2009).

Ontario Innovation Tax Credit ("OITC")

The OITC is a 10% refundable tax credit for corporations which make expenditures on scientific research and experimental development done in Ontario. The maximum claim is $200,000 per taxation year.

Ontario Business-Research Institute Tax Credit ("OBRITC")

The OBITRC promotes research partnerships between businesses and post-secondary educational institutions. It provides a qualifying corporation with a 20% refundable tax credit for scientific research and experimental development expenditures incurred in Ontario under an "eligible contract with an eligible research institute." The maximum tax credit is $4 million.

New Technology Tax Incentive

To promote technological developments, the Ontario government offers corporations a 100% deduction off of the eligible cost of qualifying intellectual property (i.e., a patent, licence, permit, commercial secret, technology transfer or other knowledge-based property) acquired in the course of an intellectual property transfer having a value of up to $20 million per year.

Co-operative Education Tax Credit

Ontario corporations that hire students enrolled in a recognized Ontario university or college co-operative education program for co-op work placements receive a refundable tax credit valued at 25% to 30% of eligible expenses incurred as a result of the co-op program, up to $3,000 per work placement.

Ontario Current Cost Adjustment

In addition to regular capital cost allowance claims, corporations can claim a special allowance for the cost of new pollution control machinery and equipment, provided the machinery is used in Ontario.

Ontario Industry-Specific Tax Incentives

Industry-specific tax incentives are available for businesses involved in film production, computer animation, digital media, publishing and mineral exploration. In addition to the foregoing, entities can also apply for financial assistance under various Ontario programs:

- **Job Connect**
  Job Connect is an Ontario government program aimed at helping unemployed individuals develop skills, receive training and obtain permanent employment. Employers in the program may qualify for a wage subsidy, up to a maximum of $2 per hour.
- **OATTC**
  Ontario's apprenticeship training tax credit program provides a refundable tax credit to employers who hire and train apprentices in certain skilled trades of up to $5,000 per qualifying apprentice for up to three years.
- **OBPTC**
  Ontario's book publishing tax credit is a refundable tax credit available to Ontario

publishing companies which publish and promote eligible literary works by eligible Canadian authors up to a maximum tax credit of $30,000 per book title.

- **BFTIP**
  Ontario's Brownfields Financial Tax incentive program provides an opportunity for a municipality to access provincial funds, which are subsequently used to provide tax relief for landowners to clean up eligible contaminated properties.
- **OCIF**
  The purpose of Ontario's commercialization investment funds program is to leverage seed capital for spin-off technology companies created by faculty, staff or students. The maximum grant available to one Ontario commercialization investment fund in respect of a particular eligible business and all businesses related to such an eligible business is $225,000.
- **OCASE**
  The Ontario Computer Animation and Special Effects Tax Credit provides a 20% refundable tax credit for eligible labour expenditures incurred by a qualifying corporation with respect to eligible computer animation and special effect activities in film and television productions carried out in Ontario.
- **OFTTC**
  Ontario offers a 35% refundable tax credit on eligible labour expenditures incurred by a qualifying production company for film and video productions. There are other increased credit amounts depending on location.
- **Innovation Demonstration Fund**
  This fund provides contributions of up to $2 million per year for two years by way of non-interest bearing repayable or forgivable loans, royalty agreements and equity participation to help commercialize innovative technologies in Ontario.
- **OITC**
  Ontario offers a 10% refundable tax credit for corporations that make expenditures on eligible scientific research and experimental development carried on in Ontario to a maximum of $200,000 per taxation year.
- **Interactive Digital Media Tax Credit**
  Ontario offers a 40% refundable tax credit claimed by a qualifying corporation for eligible expenditures made for labour, marketing and distribution expenses relating to the creation of interactive digital media products.
- **ONTTI**
  Ontario offers a 100% immediate tax write-off of eligible expenditures for qualifying intellectual properties acquired in the course of an intellectual property transfer. The expenditure amount for a taxation year is $20 million.
- **OCCA**
  Ontario offers a 30% tax write-off (above applicable depreciation allowances) for investments in pollution control equipment.
- **OPSTC**
  Ontario offers a 25% refundable tax credit on qualifying labour expenditures incurred by a qualifying corporation with respect to an eligible film or television production after June 30, 2009. The applicable rate is lower for prior years.
- **Research Employee Stock Option Credit**
  Ontario eliminates personal income tax arising on the exercise or the disposition of eligible

stock options granted by research and development companies to their eligible employees on up to $100,000 of taxable income each year.

- **Nominee Program**
  Ontario's nominee program allows employers (including multinational corporations investing in Ontario) to recruit and retain internationally trained employees in specified job categories.
- **AMIS**
  The Advanced Manufacturing Investment Strategy program provides repayable loans, interest-free for up to five years, to all manufacturers for projects that have either a minimum value of $10 million or will create or retain 50 high-value jobs.

Information on government programs for businesses in the other Canadian provinces can be found at the following websites:

Newfoundland and Labrador Industry Specific Incentives

Business Department: **www.business.gov.nl.ca/**

Like other provinces, Newfoundland and Labrador has government support programs in the form of grants, loans and investment. The Newfoundland government also supports local business through tax credits and incentives, including:

- **Economic Diversification and Growth Enterprise Program ("EDGE")**
  The EDGE program offers a 10 year tax holiday to qualifying companies from provincial corporate income tax and payroll tax, followed by a five year phase-in of these taxes. A 10-year tax holiday from property taxes and/or business tax is also offered by municipalities declaring themselves as EDGE participants. The program also offers the lease of unserviced crown land for a nominal fee and the services of a dedicated government facilitator to new or expanding businesses. To be designated as an EDGE corporation, the applicant must show the potential for a minimum capital investment of $300,000, or incremental sales of $500,000 annually. The applicant must have the potential to create and maintain at least 10 permanent jobs in a business consistent with the principle of sustainable development.
- **Direct Equity Tax Credit**
  To encourage private investment in new or expanding small businesses, the Newfoundland government offers a tax credit to individuals or arm's-length corporations that invest in eligible small business activities. A 35% rate applies outside the North East Avalon and a 20% applies in the North East Avalon.
- **Manufacturing and Processing Tax Credit**
  This credit applies to corporations that carry out manufacturing or processing from a permanent facility in the province.
- **Small Business Tax Credit**
  Small businesses in Newfoundland that qualify for the federal Small Business Deduction are taxed at a reduced rate of 5% on the first $500,000 of active business income.
- **Scientific Research and Experimental Development Tax Credit**
  Eligible expenditures made with respect to scientific research and experimental development qualify for a 15% tax credit.

- **Film and Video Tax Credit**
  Eligible local film projects may qualify for a tax credit of 40% of eligible local labour costs, to a maximum of 25% of total production costs. The maximum tax credit is $3 million.

Nova Scotia Industry Specific Incentives

Access to Business: **www.gov.ns.ca/snsmr/business/**

- **Equity Tax Credit**
  A non-refundable tax credit at 30 per cent of an investment made by an individual in an eligible Nova Scotia small business to a maximum annual investment of $50,000 (maximum annual credit of $15,000).
- **New Small Business Tax Reduction**
  This deduction effectively eliminates the Nova Scotia corporate income tax for the first 3 taxation years of a new small business after incorporation. The corporation must apply each year to the Nova Scotia Minister of Finance for a Nova Scotia Tax Deduction Eligibility Certificate. This credit would not generally be available to foreign corporations locating in Nova Scotia.
- **Labour-sponsored Venture-capital Tax Credit**
  A personal non-refundable tax credit designed to assist small and medium-sized Nova Scotia businesses and co-operatives in obtaining equity financing. Individuals can receive an income tax credit for investing in registered labour-sponsored venture capital corporations in the province.
- **Research and Development Tax Credit**
  A 15% refundable tax credit in addition to the federal SRED tax credit for research undertaken in the Province of Nova Scotia.
- **Nova Scotia Film Industry Tax Credit**
  A refundable tax credit for costs directly related to the production of films in Nova Scotia. As of September 1, 2007 the credit rates were increased and are now the equal to the lesser of: (i) 50% of eligible Nova Scotia labour expenditures; or (ii) 25% of total expenditures. In addition, there is a 10% geographic area bonus on labour expenditures (5% bonus on total expenditures) for films shot outside of the Halifax Regional Municipality. As well, a 5% frequent filming bonus is available to companies who have produced three films in a 24 month period.
- **Digital Media Tax Credit**
  A refundable tax credit for costs directly related to the development of interactive digital media products in Nova Scotia. The rates of this tax credit are the same as of 2008 as the Film Industry Tax Credit.
    - The Canada/Nova Scotia Business Service Centre website provides a list of government programs, services and incentives designed to facilitate business formation in Nova Scotia. The list is not exhaustive and more information can be found at **www.cbsc.org/ns**.
- **Business Development Program**
  The Atlantic Canada Opportunities Agency (“ACOA”)’s Business Development Program (“BDP”) is designed to assist with the financing of your project. Focusing on small and medium enterprises (“SMEs”), the program offers access to unsecured and interest-free contributions. For some types of projects, repayment may be contingent upon the success of the project. Most business sectors are eligible, except retail/wholesale, real estate,

government services, and services of a personal or social nature. Both commercial and non-profit organizations are eligible.

- **Canada Small Business Financing Program ("CSBF")**
  The CSBF Program, under the *Canada Small Business Financing Act*, can assist businesses in obtaining term loans of up to $500,000 to help finance fixed asset needs. The loans are made directly by a qualified lender (chartered banks, caisses populaires, Alberta Treasury Branches and most credit unions). Do not send loan applications to the Canada Small Business Financing Program Directorate. Small businesses must contact the participating lender of their choice.
- **Immigrant Small Business Loan Program**
  The Immigrant Small Business Loan Program can help small businesses obtain financing to help start, expand or acquire an existing small business. It is available to immigrants who have lived in Nova Scotia for less than five years. Funding is available for start-ups, expansion, or acquiring an existing small business.
- **Business Financing Program — Nova Scotia Business Inc. ("NSBI")**
  The purpose of the Business Financing Program is to provide financial assistance for the establishment of new businesses and the expansion of existing operations that represent the potential for net economic benefit to the province. Assistance is primarily by way of loans but other types of assistance may be considered. Manufacturing, processing, high technology, aerospace, pharmaceutical and environmental technology based industries are a focus for assistance, although businesses in other sectors of the economy are also eligible. Not eligible are: charitable clubs and organizations; residential or rental accommodation, except for tourist facilities; lending, financial and insurance businesses; real estate development; retail, wholesale and construction; taverns, lounges, billiard halls and similar establishments.
- **Nova Scotia Business Development Program**
  The Nova Scotia Business Development Program provides businesses in the province with the opportunity to review and assess current practices and develop new approaches. The program's intent is to assist the start-up of new businesses and enhance the economic vitality of existing businesses in the province. To qualify for assistance, applicants must submit a complete application form to the nearest office of Nova Scotia Economic and Rural Development.
- **Seed Capital Program**
  The Seed Capital Program provides loans up to $20,000 to start, expand or improve a small business, as well as up to $2,000 to acquire business skills training. The program is delivered by community-based organizations that also provide training, counseling and referrals to enable entrepreneurs to be successful and accomplish their goals.
- **Small Business Financing/Loan Guarantee Program**
  The Small Business Financing/Loan Guarantee Program can help businesses obtain financing to help establish new business, grow existing business and empower entrepreneurs with the support they need to create employment for themselves and others. Residents of Nova Scotia who wish to start a small business are eligible, as well as companies or co-operatives who intend to grow their business. All types of business are eligible, except residential and commercial real estate, beverage rooms and taverns. Any venture of a questionable ethical or legal nature is ineligible. This program is a joint initiative of the Nova Scotia Co-operative Council, Nova Scotia Department of Economic and Rural Development and Credit Union Central of Nova Scotia, on behalf of Credit Unions of Nova Scotia and is delivered exclusively through credit unions in Nova Scotia.

- **Community Business Development Corporations ("CBDC")**
  These organizations are found in rural areas of Nova Scotia. CBDCs provide technical services and financial assistance in the form of loans, loan guarantees, and equity assistance to a maximum of $150,000 per business. CBDCs are located in Bridgetown, Windsor, Amherst, New Glasgow, Inverness, Sydney Mines, Sydney, Guysborough, Musquodoboit Harbour, Liverpool, Shelburne, Yarmouth, and Digby.
- **Enterprise Cape Breton Corporation ("ECBC")**
  ECBC is the principal federal government organization for economic development in Cape Breton and Mulgrave. ECBC, in partnership with all levels of government, the private sector and other community stakeholders, will use its broad and flexible powers to assist, promote and co-ordinate efforts that foster an environment supportive of the generation of wealth to effect sustainable job creation throughout Cape Breton Island and Mulgrave.

Alberta Industry Specific Incentives

Programs and Services — Business in Alberta:
www.programs.alberta.ca/Business/IndexB.aspx

In Alberta, many provincially funded grants are intended for established businesses that may be looking at expanding their business model in an area that is of specific interest to the Alberta government. Some examples of this type of government funding are in carbon sequestration and clean energy initiatives.

The following is a list of certain of the federal Government grants that apply specifically to Alberta:

- **Agri-Business and Product Development Grant**
  Assisting Alberta agri-food processors or producers to commercialize their products, create healthy or healthier products, or expand their businesses. Targets existing agri-food or agri-based companies.
- **Alberta Energy Research Institute**
  Grant of $50,000 available towards engineering designs, building prototypes, and obtaining patents for an invention that makes a significant impact on the energy industry. Again, this grant is intended for companies already in business.
- **Alberta Film Development Program**
  Grant for up to $5 million for expenses while producing a motion picture in Alberta. This grant is for companies already incorporated and spending more than $25,000 in Alberta.
- **Alberta Foundation for the Arts Grants**
  Grants for artists or organization involved in visual, performing and literary arts or cultural industries. Appears to be inspired by Alberta artists performing at the Vancouver 2010 Cultural Olympiad.
- **Alberta Ingenuity Fund**
  Intended to assist Alberta entrepreneurs in increasing their capacity to use technology, recruit highly qualified personnel and compete globally. This fond appears to be intended for companies already in business.
- **Alberta Technology Innovation Program**
  Financing intended for Alberta agri-processors (companies) to attend approved national and

international technology related trade shows, conferences, seminars and other industry events that promote innovation and growth.

- **Business Opportunity Grant — Small Agri-Businesses**
  Grant for agricultural producers in Alberta to hire an expert to assist in improving their businesses, meet changing consumer demand, among other things. This grant is on a cost-shared basis, typically split 75/25 between the government and the applicant.

The following are examples of grants offered through Alberta Government Loans and Grants Canada and are specifically intended for Albertans:

- **Industrial Associates**
  Up to 40 grants per year are given to assist with research personnel needs by helping to recruit recent graduates to research programs. These grants attempt to increase research expertise, while giving graduates research experience and the opportunity to contribute to the company.
- **Innovations Assistance Program**
  Grants between $5,000 and $50,000 are available to help support inventions that are in their early stages and will contribute to the energy industry. These help inventors create and test new ideas before they are brought into the marketplace.

Finally, **University Technologies International ("UTI")**, **Calgary Technologies Inc. ("CTI")** and **SAIT Polytechnic** have a grant pool of $250,000 for new programs and initiatives that support technology and innovation advancements.

New Brunswick Industry Specific Incentives

Business New Brunswick: **www.gnb.ca/0398/index-e.asp**

Prince Edward Island Industry Specific Incentives

Government Programs for Businesses:
www.gov.pe.ca/infopei/index.php3?number=48736&lang=E

Québec Industry Specific Incentives

Services Québec — Businesses:
www2.gouv.qc.ca/entreprises/portail/Québec/accueil?lang=en

Manitoba Industry Specific Incentives

Entrepreneurship, Training and Trade: **www.gov.mb.ca/ctt/**

Saskatchewan Industry Specific Incentives

Programs and Services — Business and Industry:
www.gov.sk.ca/programs-services/business-industry/

Yukon Territory Industry Specific Incentives

Programs and Services: **www.gov.yk.ca/services/index.html**

British Columbia Industry Specific Incentives

Business and Economic Development Topics:
www.gov.bc.ca/main_index/business_development/index.html

Northwest Territories Industry Specific Incentives

Industry, Tourism & Investment: **www.iti.gov.nt.ca/program-services/**

Nunavut Industry Specific Incentives

Nunavut Business Information: **www.gov.nu.ca/english/business/**

Are There Conflict of Interest or Other Special Requirements when Doing Business with the Federal Government?

There are a number of statutes that govern how businesses deal with the Government of Canada. Legislation includes the *Federal Accountability Act*, the *Conflict of Interest Act*, the *Canada Elections Act*, the *Lobbyists Registration Act* (now the "Lobbying Act"), the *Public Service Employment Act*, the *Access to Information Act*, the *Public Servants Disclosure Protection Act* and the *Financial Administration Act*. Many of the acts listed above are only partly in force pending settlement of regulations, etc.

The *Federal Accountability Act* prohibits all corporate and union direct or indirect financial contributions of any kind to candidates or political parties at the federal level.

The *Conflict of Interest Act* (the "CIA") applies to public office holders ("POHs") and certain cabinet appointees. POHs include Ministers, parliamentary secretaries and ministerial staff, whether or not paid and whether or not full-time. The CIA creates an independent Commissioner of Conflicts of Interests and Ethics with broad investigatory and enforcement powers. POHs are prohibited from exercising an official power to further the POH's private interests or any other person's private interests. POHs cannot accept gifts from persons other than family and friends unless the gifts are a normal expression of courtesy or protocol. Reporting POHs cannot act as directors of a corporation or other enterprise, hold office in a union or professional organization, act as a paid consultant or be an active member of a partnership. Post-employment prohibitions include providing advice to clients based on non-public information obtained while a POH, acting for a person in respect of which the Crown is a party or taking employment with a person with whom the PHO had direct and significant official dealings within the last 12 months of acting as a PHO.

The Lobbying Act creates an independent Commissioner of Lobbying with broad investigatory and enforcement powers. For instance, the Commissioner has the authority to confirm with designated public office holders ("DPOHs") the accuracy of disclosure provided by registered lobbyists.

The Lobbying Act imposes rules that are more stringent than the previous regulatory regime surrounding lobbyists. For example, lobbyists will no longer be able to work on a contingency fee basis and there are new monthly reporting requirements. In addition, the Lobbying Act prohibits certain DPOH from lobbying the federal government for five years after leaving their posts. Certain corporate executives and directors may be deemed to be lobbyists and be required to register pursuant to the Lobbying Act. Penalties and fines for non-compliance with the Lobbying Act have been increased to up to $50,000 and/or six months imprisonment for summary conviction offences, up to $200,000 and/or two years for indictable offences, and a two-year prohibition on lobbying if convicted of an offence under the Lobbying Act.

Reports under the Lobbying Act include a declaration that the lobbyist is not receiving payment on a contingency basis. Former DPOHs must disclose former offices held and the date they left each position. Monthly returns must list every prescribed contact with a DPOH, the name of the DPOH, the date of the communication and particulars of the subject matter of the communication. Filings will be due within 10 days of each new undertaking and within 15 days of each month end.

Provincial and municipal governments have lobbyist registration legislation in effect, albeit not as stringent as the federal regime summarized above. The City of Toronto amended its lobbyist registration rules set out in the Municipal Code effective February 11, 2008. All communications with City of Toronto public office holders (including non-elected municipal employees), as well as all municipal boards, agencies and commissions falling within the Code's definition of lobbying will require registration. Lawyers are not exempt from registering. Registration must occur before engaging in the lobbying activity.

10. HOW DOES CANADA'S BANKING SYSTEM OPERATE?

Canada has one of the most sophisticated and stable banking systems in the world. Banking services are provided by:

- 21 Canadian-controlled banks (Schedule I banks);
- 23 active foreign bank subsidiaries (Schedule II banks); *and*
- 26 foreign bank branches (Schedule III banks), of which 18 are full-service branches and six are lending branches.

Of the 19 Schedule I banks, six are world-class in terms of their asset value: RBC Financial Group, Canadian Imperial Bank of Commerce, The Bank of Nova Scotia, BMO Financial Group, The Toronto-Dominion Bank and National Bank of Canada. Each provides a full range of banking services through branches located throughout Canada. In some cases, Schedule I banks have made substantial investments in foreign banks operating outside Canada.

The foreign-controlled Schedule II banks (foreign bank subsidiaries) and Schedule III banks (foreign bank branches) tend to provide specialized niche banking services.

Insurance companies, trust companies and loan companies are all permitted to engage in commercial lending activity.

All major credit cards are widely accepted. Debit cards are more widely used in Canada, on a percentage basis, than in any other country.

The Canadian Payments Association operates two national payments systems: the Large Value Transfer System ("LVTS") and the Automated Clearing Settlement System ("ACSS"). The LVTS is used for electronic wire transfers of large value and time critical payments. It provides certainty of final settlement in real time on an item-by-item basis. Cheques and automated payments clear through the ACSS, which settles clearing balances on a net settlement basis by debits and credits to the direct clearer's accounts at the Bank of Canada. Cheque volumes have declined since 1990 and paper items now represent less than 30% of the items settled using ACSS.

The direct clearers process payment items in regional data centres, transfer paper and electronic payment items to other direct clearers for other regions and provide an access port for payments cleared initially through specialized organizations such as the Canadian Depository for Securities, MasterCard, VISA Canada and the International Interbank Payments System.

As a result of: (i) the foregoing; and (ii) the different treatment of account deposits under US and Canadian laws, in contrast to US practice, lock-box arrangements, under which all receipts are paid into a designated account and wire-transferred without deduction or set-off to the payee's lending bank that holds an assignment of receivables security from the payee, are not commonly used in Canada.

Toronto is the financial capital of Canada. Although Canadian equities are traded on four exchanges in Canada, over 75% of trades are done on the Toronto Stock Exchange.

Canadian banks are prohibited by law from acting as trustees. This role is filled by the second pillar of the Canadian financial services industry, trust companies, which are incorporated both provincially and federally. The third and fourth pillars of the industry are the insurance companies and the securities dealers.

Significant changes have been made in the Canadian financial services industry over the last few years, the thrust of which has been to increase competition. As a result, there has been a blurring of lines of authority among the four pillars. For example, most brokerage houses and trust companies are owned by one of the major or chartered banks and chartered banks have begun to acquire insurance companies, although currently banks are not permitted to sell general insurance coverage through their branch network.

All the common law provinces now have personal property security regimes similar to that contained in Article 9 of the US *Uniform Commercial Code*. For provinces other than Québec, registration can be completed online during extended hours. In Ontario, there is no need for signatures or other authorizations from the affected debtor. Québec has a separate province-wide system for registering public notice of security. In addition, corporate borrowers may grant security to Canadian chartered banks against inventory and finished goods under special security provisions of the Bank Act. Provincial statutes govern security in real estate and registrations are made in the county in which the real estate is located. In most counties in Ontario, online registrations are mandatory. (See **Chapter 8: Financing Canadian Operations** for more details.)

What are the Current Rules in Canada Governing Exchange Rate, Interest Rate and Other Hedge Contracts?

The International Swaps and Derivatives Association, Inc. ("ISDA") periodically reviews and revises its standardized industry definition and related documents. The current set of ISDA-sponsored documents includes the:

- 2002 ISDA Master Agreement, updated in early 2003.
- 2002 Energy Agreement Bridge, updated in late 2002.
- 2002 Equity Derivatives Definitions, updated in late 2002.
- 2003 Credit Derivatives Definitions, updated in early 2003.

Commercial borrowers frequently enter into foreign currency swap agreements to hedge the risk of currency fluctuations. Commercial banks will act as counterparties in the swap agreements and manage the risk they assume by doing so through offsetting swap agreements with others. Commodity hedging contracts such as GasEDI contracts are commonly used by business to reduce the risk inherent in fluctuating prices that the purchaser would otherwise face.

Each of the above-referenced ISDA agreements introduced a number of key changes that affect the manner in which swaps and derivative transactions (including those concluded in the energy and commodity sectors) are done. In particular, the 2002 ISDA Master Agreement contains substantial modifications to the usual grace periods that arise, primarily in connection with the failure to satisfy obligations as a result of bankruptcy, and the *force majeure* termination provisions.

As well, it also introduced a new measure for quantifying damages in the event of an early termination and mandates formal set-off rules. These changes have had a significant impact on the way in which derivative transactions are concluded by financial participants and end-users alike.

11. WHAT PROTECTION IS AFFORDED BANKRUPT OR INSOLVENT BUSINESSES IN CANADA?

Insolvency and bankruptcy in Canada are governed primarily by federal legislation. Creditors have had much greater powers in dealing with insolvent businesses in Canada than in the US. The federal BIA provides increased levels of protection for the wages of employees of bankrupt companies, a re-ordering of priorities among creditors, and permits an unpaid supplier to take back goods from a bankrupt if the supplier has not been paid within 30 days following bankruptcy.

The initial cooling-off period for restructuring in Canada is only 30 days, compared to 120 days under comparable US legislation. Under the BIA, a creditor may make a proposal that can affect the rights of both secured and unsecured creditors. Under the former *Bankruptcy Act*, only the rights of unsecured creditors could be affected by a proposal. As well, an insolvent business may be restructured under the federal CCAA, the provisions of which favour the rehabilitation (as opposed to the wind-up) of insolvent businesses. The CCAA is frequently used in complex cross-border insolvency and reorganization situations.

In 2005 and 2007, the Canadian government enacted amendments to Canada's primary insolvency legislation, the BIA and CCAA. While the *Wage Earner Protection Program Act* (Canada) ("WEPPA") and certain changes relating to it in the BIA were proclaimed in force July 2008, the remaining amendments were not as their anticipated impact required further assessment. However, after years of limbo, the remaining amendments came into force on September 18, 2009.

Here are the highlights of the key amendments to the BIA and CCAA. These amendments will be applicable to insolvency proceedings commenced on or after September 18, 2009.

Interim Financing

Now, for the first time in Canada, there will be a statutory basis under both the CCAA and BIA to allow debtors to borrow funds required to restructure and to secure such loans with priority charges on their assets. This type of financing, known as "debtor-in-possession" or "DIP" lending in the US, had become part of the Canadian practice despite the lack of express statutory authority. Nevertheless, the new interim financing provisions are a welcome addition to Canadian restructuring law, as there had been lingering debate as to the extent of the court's jurisdiction to grant priority charges.

Consistent with the practice as it had evolved, the court may now authorize interim financing and give the lender a priority over existing security. However, contrary to at least one controversial case, the charge may not secure pre-existing debts.

On an application for interim financing, the factors the court must consider include not only the anticipated duration of the proceedings, and the debtor's property and management, but also whether the debtor has the confidence of its lenders, and whether any creditor would be materially prejudiced as a result of the security to be granted.

Canadian banks will want to watch developments in this arena closely since, now that the rules are codified, it is expected that the Canadian interim lending marketplace will expand. Even

the Government of Canada, through Export Development Corporation, has formally entered into the interim financing fray by investing $450 million recently in a newly established $1 billion interim lending fund. With these legislative changes, it is clear that interim financing as a legitimate source of financing to distressed companies is here to stay in Canada.

Disclaimer and Assignment of Contracts

Prior to the new amendments, the BIA and CCAA lacked clear mechanics regarding the ability of reorganizing debtors to disclaim, reject or assign contracts. The new changes now provide considerable flexibility for a restructuring debtor to disclaim or to assign contracts.

Both statutes require the approval of the trustee or monitor for the disclaimer or assignment of a contract. If the trustee or monitor provides its approval the debtor will notify the other party to the contract of the intended disclaimer. If the other party wishes to dispute the disclaimer, it must apply to the court within 15 days for an order that the contract should not be disclaimed. Otherwise, the agreement will be deemed disclaimed 30 days after the notice. Any damages arising from the disclaimer will be an unsecured claim in the insolvency proceedings.

If the monitor or proposal trustee does not approve the disclaimer, the debtor must apply to the court for an order authorizing the disclaimer.

The factors to be considered by the court in a disclaimer include the approval of the trustee, the prospects of a viable restructuring, and whether the disclaimer would create a significant financial hardship to the other party to the agreement.

Several types of agreements are excluded from the disclaimer regime. These include the right to use intellectual property given by the debtor, eligible financial contracts, real property leases, collective bargaining agreements, and financing agreements.

The exclusion of agreements relating to the use of intellectual property is of particular interest. If the debtor has granted rights to use its intellectual property (including exclusive use agreements), these rights cannot be disclaimed, provided that the party holding the rights continues to perform its obligations under the agreement.

For the assignment of the debtor's rights under a contract, the court will consider factors such as the ability of the assignee to perform the obligations, and the appropriateness of the assignment of the rights and obligations. The approval of the trustee or monitor is required. The court may not order the assignment unless all monetary defaults are remedied by a date fixed by the court.

The assignment provisions specifically exclude contracts entered into after the date of bankruptcy, eligible financial contracts and collective bargaining agreements. These amendments are designed to give the debtor the ability to eliminate contracts which would prevent a viable restructuring, and assign contracts which add value to the restructuring, and to bring the Canadian legislation closer to practice in other countries.

Collective Bargaining Agreements

There will be no power to disclaim or reject collective agreements in reorganizations. Collective agreements cannot be amended or changed during a CCAA case without the permission of the collective bargaining unit. There is a procedure for reopening a collective agreement, but it is deliberately difficult. The reorganizing business must apply to the court for an order to reopen negotiations.

The court may only issue the order if it is satisfied that:

- A viable plan cannot be made under the terms of the existing collective agreement;
- The company has made good-faith efforts to renegotiate the provisions of the agreement; *and*
- The failure to issue the order will likely result in irreparable damage to the company.

If all of those criteria (including irreparable damage) are met, then the most the court can do is direct a union to negotiate. This does not put unions at much risk. The court may require the company to make available to the bargaining unit whatever business and financial information the court considers relevant to the process. Presumably, the value in this process lies in the ability of the provincial Labour Relations Boards to impose sanctions or conditions on refusals to bargain in good faith. However, these new provisions do not appear to provide much leverage to reorganizing businesses.

Sale of Assets

Express provisions dealing with asset sales during restructurings have been created, which include statutory criteria for court approval of such sales.

Assets may not be sold outside the ordinary course unless the sale is approved by the court on notice to secured creditors who are affected by it. The court must consider, among other things:

- Whether the sale process was reasonable;
- Whether the monitor/trustee approved the sale process;
- Whether the monitor/trustee filed a report giving its opinion that the sale would be more beneficial to creditors than a sale or disposition under a bankruptcy;
- The extent to which the creditors were consulted;
- The effect of the proposed sale or disposition on the creditors and other interested parties; *and*
- Whether the consideration to be received for the assets is reasonable and fair.

In addition, there is now a restriction on sales that is intended to protect employees and pensioners. The court may not approve a sale unless it is satisfied that the company "can and will" make the employee and pension plan payments that are now required for approval of a CCAA plan or BIA proposal. Time will tell whether this requirement will quell the practice of using CCAA proceedings as a means of liquidating company's business as a going concern — commonly referred to as a "liquidating CCAA" — which has been the subject of increasing criticism, particularly from unions and pensioner constituencies. There may also be issues as to how well these provisions deal with sales of assets in small cases or the sale of small assets in large cases.

If a proposed sale is to a related person the court must be persuaded that good faith efforts were made to sell the assets to non-related parties and that the consideration offered is superior to what would be received under any other offer made in the sale process.

National Receivers/Interim Receivers

The amendments to the BIA significantly restrict the role of interim receivers and create a new class of "national" receiver.

Interim receivers may still take possession of the property of the debtor, and exercise such control over the debtor's property and business as the court determines appropriate. However, rather than the broad power to "take such other action" as the court might order, interim receivers will now only be permitted to take conservation measures and summarily dispose of perishable or rapidly depreciable property of the debtor.

The time during which an interim receiver can exercise its powers has been limited to prevent interim receivers from becoming de facto receivers with broad powers of indefinite duration. Where an interim receiver is appointed in connection with a secured creditor's enforcement, the interim receiver's appointment will end when a national receiver or trustee in bankruptcy takes possession of the property; 30 days after the date of its appointment; or on a date fixed by the court, whichever is earlier. In a restructuring, the interim receiver's appointment ends when a national receiver or bankruptcy trustee takes possession of the property; or the debtor's proposal is approved by the court, whichever is earlier.

While the role of the interim receiver has been carved back to ensure that its role is indeed "interim," secured creditors can also now seek the appointment of a "national" receiver, which can exercise its powers across Canada. The court in the debtor's principal place of business can appoint a national receiver to take control of the debtor's property and business. However, consistent with existing rules for provincially-appointed receivers, a national receiver cannot be appointed until ten days after the secured party has given its Notice of Intention to Enforce Security, unless the court considers it appropriate to shorten that time. The court may order that fees and disbursements of the national receiver be subject to a charge over the debtor's assets, but only if satisfied that the secured creditors who would be materially affected have reasonable notice and an opportunity to object.

National receivers will be attractive to creditors because there is no need to seek separate appointments in each province where the debtor has assets. They will also enjoy the usual BIA protection against claims arising out of environmental damage and other circumstances existing before the time of their appointment.

International Insolvencies

Canada has adopted some but not all of the provisions of the UNCITRAL Model Law on Cross-Border Insolvency which was developed in the United Nations Commission on International Trade Law in a Working Group chaired by a member of Canada's Delegation to UNCITRAL. The Model Law has now been adopted in sixteen countries (including the United States (as Chapter 15 of the US *Bankruptcy Code*), the UK, Australia, New Zealand, Mexico, Japan, Korea and Romania, among others).

However Canada chose to adopt its own version of the Model Law which is much shorter. A number of features of the Model Law, such as access by foreign representatives to domestic Canadian proceedings, notification to foreign creditors, and provisions for relief pending the determination of an application for recognition of a foreign proceeding, have not been included in the Canadian amendments. Nevertheless, it is expected that Canadian courts will continue in their long-established tradition of cooperating with foreign administrations.

Subordination of Equity Claims

Claims arising from the ownership, purchase or sale of equity of the debtor are now subordinated to all other claims. A plan that provides for payment of equity claims cannot be approved by the court unless all other claims are to be paid in full. Further, equity claims cannot vote at creditors' meetings without court approval and are not entitled to a dividend until all other claims are satisfied.

Eligible Financial Contracts

The global financial derivatives market continues to evolve at a dizzying pace. Financial derivatives (that is, a financial agreement whose obligations are derived from such underlying assets as currencies, where such agreements are subject to recurring dealings in the derivatives market and the counterparties to such agreement have both termination rights and netting rights) are "eligible financial contracts" (an "EFC") within the meaning of each of the BIA, the CCAA and the WRA and as such, they are not subject to the stay-in-proceedings provision of any order issued under any of the said Act. This means that: (i) the new provisions allowing the disclaimer and assignment of contracts do not apply to EFCs; and (ii) even if one of the parties to the derivative contract EFC is re-structuring under the BIA, CCAA or WRA, the counterparty may exercise the remedies available to it under the agreement.

Critical Suppliers

Under the CCAA, the court now has the ability to declare a supplier to be a "critical supplier" if the court is satisfied that the supplier is critical to the company's continuing operations.

The court may order a critical supplier to continue to supply on terms and conditions that are consistent with its supply relationship or that the court considers appropriate. In doing so, the court must grant the critical supplier security over the debtor's property, and may give security priority over other secured creditors. The application must be made by the debtor, on notice to the secured creditors who are likely to be affected by the security.

Suppliers have often complained of the lack of a "Chapter 11-style" critical supplier designation where suppliers can be paid their pre-filing claims as condition of post-filing supply. While the new CCAA provisions leave open the possibility of the court ordering the payment of pre-filing debts as part of the terms of continued supply, the provisions certainly appear to provide more opportunity for debtors to compel continued supply from unwilling suppliers than for suppliers to obtain court-sanctioned preferential payment on their pre-filing accounts.

Professional Charges

The new amendments codify the current practice of permitting court-ordered charges on a debtor's property to secure payment of professional fees and costs. The court is now expressly permitted to create a lien on the debtor's property to secure payment of the fees and expenses of financial, legal and other experts engaged in the restructuring process. This includes BIA receivers and proposal trustees, as well as, CCAA monitors and their respective advisors.

The amendments also provide for a priority charge to cover the costs of financial, legal or other experts engaged by any "interested person," provided that the court is satisfied that the security or charge is necessary for the "effective participation" of the interested person in the proceedings. It will be interesting to see how broadly the courts interpret and apply this new funding provision, and whether it accelerates the development of unsecured creditors' committees in Canada.

Directors

New provisions give the court the authority to remove or replace directors who are considered to be impeding a debtor's restructuring.

The court may remove any director of a debtor if it is satisfied that the director is "unreasonably impairing," or is likely to unreasonably impair, the possibility of a viable restructuring, or if the director is acting or is likely to act "inappropriately" as a director. The court may replace any director who is removed for those reasons. These provisions will give interested stakeholders a powerful tool in the reorganization process.

The amendments also give the court the authority to provide for a priority charge over the assets of the debtor in favour of any director or officer in order to indemnify them against obligations and liabilities incurred as a result of being a director or officer. The court cannot make such an order if protection is available on commercially reasonable terms by way of insurance. The priority charge will not apply where the liability of the director or officer results from gross negligence or wilful misconduct.

Protection for Employees in Restructuring

WEPPA came into force in 2008 with additions being made in January 2009. Those amendments provided protections to employees whose employers have become bankrupt or have been placed in receivership. It provides for payment of unpaid wages, commissions, vacation pay and bonuses, including severance and termination pay, (generally up to $3,000 per employee).

The existing protections have now been extended to reorganizations. Specifically, BIA proposals and CCAA plans must provide for the payment of claims for unpaid wages, commissions, vacation pay and bonuses, but excluding severance and termination pay, (generally up to $2,000 per employee) and unpaid pension contributions immediately after court approval of a plan unless, in the case of pension contributions, the parties to the pension plan have entered into an agreement that is approved by the applicable pension regulator.

Regulatory Body Stay

It has long been an issue as to whether the stay provisions under the BIA and in Initial Orders made under the CCAA — which restrain creditors and other third parties from enforcing their rights against the insolvent company — can prevent regulators and other governmental bodies from carrying out their duties.

Regulatory bodies are not prohibited from investigating or prosecuting a debtor for breaches of applicable laws. However, stays under the CCAA and BIA will prevent regulatory bodies from enforcing their rights as creditors. In addition, the court may order a stay of proceedings by or before a regulatory body if satisfied that a viable proposal could not be made and that such a stay would not be contrary to the public interest. The effect of these amendments is that insolvent companies will still have to meet their responsibilities under labour, health and safety, securities, environmental, and other laws and will continue to be subject to prosecution for any offences that they have committed.

The term "regulatory body" is quite broad and includes any body that is involved in the enforcement or administration of federal or provincial laws. The definition can also be expanded by regulation to include non-governmental bodies.

Shareholder Approval in Restructurings

The courts have been given the jurisdiction, when approving a BIA proposal or CCAA plan, to amend the debtor's corporate documents to reflect the terms of the plan. These amendments expressly dispense with the other corporate law requirements, such as the need to hold a shareholders' meeting to seek approval for such changes.

The courts have also been given the authority to approve the sale of all or substantially all of a debtor's assets in BIA and CCAA proceedings without the shareholder approval that would be required outside of an insolvency even if the sale is outside of the ordinary course of the debtor's business.

Liability of Trustees, Interim Receivers, Receivers and Monitors

The potential for personal liability of court-appointed officers such as trustees, interim receivers, receivers and monitors has been a significant concern in situations where such officers assume responsibility for carrying on the business of a debtor. A particular area of concern to restructuring professionals is the possibility of successor employer liability. Prior to the decision of the Supreme Court of Canada in TCT Logistics, which held that the Bankruptcy Court had limited authority to protect court-appointed officers from such claims, orders appointing receivers typically contained provisions to insulate the receiver from successor employer liabilities of the debtor existing at the date of appointment.

The new amendments seek to address these concerns by providing that notwithstanding any other federal or provincial legislation, if a trustee, interim receiver, receiver or monitor acting in its official capacity carries on the debtor's business or continues the employment of the debtor's employees, that court-appointed officer will not be exposed to personal liability, including successor employer liability, in respect of the claims of employees, former

employees or a pension plan before appointment or that are calculated by reference to the pre-appointment period.

Monitors

Monitors under the CCAA will be required to be licensed bankruptcy trustees, which codifies existing CCAA practice. The debtor's auditors will no longer be able to act as a CCAA monitor except with leave of the court. This reflects the fact that monitors owe duties not only to the company, but also to the court and to its creditors.

Transfers at Undervalue

The old and sometimes confusing concepts of "settlements" and "reviewable transactions" have been replaced with a new regime of transfers at undervalue ("TUVs"). For the first time, the new attackable transaction rules expressly apply in the CCAA as well as in the BIA.

TUVs are transactions in which no consideration was received by the debtor, or where the consideration received was less than the fair market value given by the debtor.

There are detailed rules for TUVs. Relevant considerations include whether the other party was dealing at arm's length, the timing of the impugned transaction relative to the debtor's insolvency, and whether there was an intention to defraud, defeat or delay creditors. Parties that are related to each other are deemed not to deal at arm's length.

The creation of an avoidance option allows the attacking party to restore the debtor to the position it would have been had the undervalued transaction not taken place. Provincial preference and fraudulent conveyance laws will continue to be applicable in BIA and CCAA cases.

Unpaid Suppliers' Rights

Unpaid suppliers in the BIA have had limited rights to recover goods supplied to an insolvent purchaser who becomes bankrupt.

Under the new amendments, unpaid suppliers have 15 days after the purchaser becomes bankrupt or is placed in receivership to demand repossession of goods supplied within 30 days of the bankruptcy or receivership. This is a much-needed improvement on the previous rule which required suppliers to deliver notice within 30 days of delivery of the goods, regardless of the date of the bankruptcy or receivership.

Income Trusts

It was formerly unclear whether income trusts were subject to the BIA or the CCAA, but they have now been made subject to these Acts. An "income trust" is defined to be a trust with assets in Canada, whose units are listed on a prescribed stock exchange or are held by such a trust. The new provisions of the BIA and CCAA dealing with directors will extend to the trustees of an income trust. Private trusts are not covered by the new provisions and would continue to be liquidated under provincial legislation.

Enhanced Information Flow in CCAA Proceedings

The Government's bankruptcy administration will now for the first time maintain a public registry of CCAA filings.

Several changes have been made to the CCAA to provide greater transparency by increasing information flow through the mechanism of the monitor. These additions include: publishing notices and making publicly available the Initial Order (by way of an Information Pertaining to Initial Order Form) and lists of creditors; filing weekly cash-flow statements; investigating and filing a report on the state of the debtor's business and financial affairs and the causes of its insolvency (by way of a Debtor Company Information Summary Form); and similar reporting obligations of the monitor.

Aircraft

The BIA and the CCAA have each been amended to provide that a stay in respect of aircraft objects (as defined in the CTC Act, see page 9.3), which include most commercial aircraft and aircraft engines, cannot extend for more than 60 days unless, during that period, the airline cures all defaults and agrees to perform all obligations under the existing agreements, unamended (unless otherwise agreed by the lessor/lender).

Provisions enacted by the CTC Act in 2005, which amended the CCAA and BIA, were drafted specifically to avoid some of the technical problems associated with qualifying for US Chapter 11, §1110 protections. Basically, if the lease or loan is to an entity in Canada for aircraft or engines which meet the CTC Act test, the benefits of these provisions will be available. The 2009 amendments simply enact some clean-up revisions to conform treatment under the CCAA to the BIA. Further amendments to these provisions are expected when Canada ratifies the Cape Town Protocol.

In addition, as under the prior law, in the case of operating leases, the airline is still required to pay full rent during the stay period. While the CTC Act provisions do extend to cover aircraft engines, they do not offer similar protection to the financiers of aircraft spare parts.

Highlights of Consumer Amendments to the BIA

The highlights of amendments of provisions relating to consumer debtors include:

- The monetary limit for a consumer proposal has increased from $75,000 to $250,000, excluding debts secured by a principal residence. A consumer proposal is intended to be more expeditious than a conventional proposal.
- A bankrupt who has personal income tax liabilities exceeding $200,000, which comprise over 75% of their unsecured claims, is no longer eligible for an automatic discharge from bankruptcy. An automatic discharge previously came into effect nine months after a first-time bankruptcy, subject to creditors' objections.
- First-time bankrupts are required to contribute "surplus income" for 21 months and second time bankrupts for 36 months. There is a formula to calculate "surplus income" and the required payment approaches 50% of the bankrupt's share of family income.

Cross-Border Insolvency Procedures

To address the special concerns that arise in cross-border insolvencies, the Canadian government expanded the recognition of foreign insolvency proceedings in Canada, including concurrent bankruptcy administrations in more than one jurisdiction. Canada permits foreign insolvency representatives to appear before the Canadian courts in insolvency matters. Canadian courts have endorsed the use of the Cross-Border Concordats in Insolvency Matters modelled on those adopted by the International Bar Association.

12. REGULATION OF TRADING IN SECURITIES

The focus of securities regulation in Canada is disclosure of information on the one hand, and the regulation of market participants on the other.

How are Securities Offered?

The sale of securities in Canada is highly regulated, primarily through provincial and territorial legislation. There is currently no federal securities regulator in Canada, although this has been subject to debate for a number of years. As of October 2009 the federal government had announced its intention to and was pursuing the creation of a national regulator, but there is still a lack of consensus about creating such a single regulator among Canadian provinces. Currently in Ontario, the OSA (Ontario) governs the area and is supplemented by extensive regulations, regulatory rules and policies. There is also a relevant body of national and multilateral instruments, policy statements and other sources of regulation. Generally speaking, securities legislation in all Canadian jurisdictions contains two basic requirements in connection with any sale of securities:

- A comprehensive disclosure document known as a prospectus must be provided to investors in connection with the public offering of securities. This document sets out detailed material disclosure relating to the issuer and the securities being issued and must be reviewed by the issuer's principal regulator and the OSC, if the OSC is not the principal regulator and securities are being sold in Ontario. The prospectus must contain full, true and plain disclosure about the securities and the issuer. The requirement to prepare a prospectus is, however, subject to certain statutory and discretionary exemptions (see below).
- Effective March 17, 2008, the CSA, excluding the OSC, implemented Multilateral Instrument 11-102 Passport System ("MI 11-102") creating a passport system for continuous disclosure, prospectuses, and discretionary exemptions, together with National Instrument 41-101 General Prospectus Requirements which harmonizes prospectus requirements across Canada.
- The passport system replaced the previous Mutual Reliance Review System ("MRRS") for the review of continuous disclosure, prospectus and exemption relief materials (the "Materials"). Under the passport system only the principal regulator reviews and approves Materials on behalf of all of the passport jurisdictions. However, since the OSC did not adopt MI 11-102, an issuer whose principal regulator is not Ontario must file the Materials and receive approval from both the OSC and its principal regulator if securities are being sold in Ontario. Conversely, approvals made by the OSC as principal regulator will be deemed to be granted by the regulators under the passport system.
- MI 11-102 allows a party to clear a prospectus or obtain a discretionary exemption from their principal regulator, and have that clearance or exemption apply automatically in all other passport provinces and territories. However, an issuer will still need to receive approval of application for an exemption filed in Ontario or will have its prospectus subject to review by the OSC, if the OSC is not their principal regulator.
- A registered securities dealer must participate in the sale of securities. In the case of prospectus offerings, the registrant is also responsible for ensuring that the prospectus contains full, true and plain disclosure. The requirement to involve a registrant is subject to statutory and discretionary exemptions similar to exemptions to the prospectus requirement (see below).

In many provinces and territories, securities can be sold without providing a prospectus or using a registered dealer ("Distribution Requirements") through exemptions from these requirements. From an issuer's perspective, reliance on exemptions from Distribution Requirements are generally based upon an assessment of whether the securities can be successfully marketed to a limited number of investors who meet certain criteria that would make them eligible to acquire the securities without the need for a prospectus or the involvement of a dealer versus the ability to market the securities to the public (taking into account the inherent additional costs involved with a prospectus offering).

In many provinces, securities offered pursuant to exemptions from the Distribution Requirements are subject to what is known as the closed system. Again, the objective is to achieve an acceptable level of disclosure for a prospective purchaser. For more information regarding the distribution exemptions that are available, see the commentary under the heading "Exempt Distributions in Ontario" on page 9.5.

The rules regarding the resale of securities sold pursuant to exemptions from National Instrument 45-102 ("NI 45-102") have been adopted by all of the securities commissions in Canada. NI 45-102 provides that unless certain conditions are met, first trades of securities distributed under an exemption are subject to the Distribution Requirements. Depending on the nature of the exemption under which the securities were originally sold, the securities may be subject to a four-month restricted period from the date of distribution during which they cannot be traded without a further exemption. In addition, among other things, the issuer of the securities must be a reporting issuer at the time of the first trade as well as for a four-month period preceding the time of the first trade. Alternatively, depending on the nature of the exemption under which the securities were issued, the securities may be subject to a seasoning period, which requires that the issuer of the securities is a reporting issuer at the time of the first trade as well as for the four-month period preceding the time of the first trade. However, the seasoning period requirements do not require that the holder of the securities have held the securities for four months. It should be noted that the restricted period conditions will generally apply to most sales made pursuant to available prospectus and registration exemptions.

The securities administrators in each province and territory also have discretionary authority to grant relief from certain requirements of the legislation.

What are the Disclosure Requirements?

Disclosure and Corporate Governance Requirements

Commencing in 2004, securities regulatory authorities across Canada introduced several new national and multilateral instruments concerning continuous disclosure and corporate governance that generally harmonize such rules across Canada.

- National Instrument 51-102 sets forth rules regarding continuous disclosure obligations ("NI 51-102").
- National Instrument 52-107 prescribes acceptable accounting principles and audit standards ("NI 52-107").
- National Instrument 52-109 imposes an obligation on issuer executives to certify certain financial disclosure ("NI 52-109").

- National Instrument 52-110 regulated the composition and function of audit committees ("NI 52-110").
- National Instrument 52-108 stipulates certain qualifications for auditors ("NI 52-108").
- National Instrument 71-102 provides exemptions to certain continuous disclosure rules with respect to foreign issuers ("NI 71-102").

(Please see, as well, the commentary above under the heading "Canada's Sarbanes-Oxley" on pages 12.5 to 12.12.)

Continuous Disclosure

NI 51-102 is an example of the importance that securities regulators place on disclosure. Many issuers of securities are required to disclose certain information on an ongoing basis. This requirement is known as "continuous disclosure" and the issuers subject to this requirement are known in most provinces and territories as reporting issuers. The information that an individual issuer is obligated to disclose depends, in part, on the size of the issuer and on whether the issuer is a reporting issuer that: (i) is listed, among other places, on the Toronto Stock Exchange ("TSX") or a US market place (a "Non Venture Issuer"); or (ii) that is listed on another exchange, such as the TSX Venture Exchange, the Canadian National Stock Exchange, other international exchanges or event not listed on any exchange (a "Venture Issuer").

Pursuant to NI 51-102, a reporting issuer is required to make the following continuous disclosure:

- Beginning with the level of disclosure established by the issuer's prospectus (or other similar document), the reporting issuer must continue to make stipulated and regular disclosure, such as filing audited annual and unaudited interim financial statements, management discussion and analysis ("MD&A") of operating results, business acquisition reports (in certain circumstances) and annual meeting and proxy solicitation materials.
- In addition, whenever a material change occurs in the affairs of a reporting issuer, it must issue and file with the regulatory authorities a press release disclosing the nature and substance of the change, as well as a prescribed form of material change report within 10 days of the material change.
- Reporting issuers who are listed on the TSX, and other Non-Venture Issuers, are generally required to produce an annual information form, which is a disclosure document that describes the issuer, its operations, prospects and risks, and which must be updated annually. The foregoing is not a requirement for issuers listed on the TSX Venture Exchange and for other Venture Issuers.

The continuous disclosure instruments require issuers to provide comparative historical financial data in their annual and interim financial statements. The statements must also be accompanied by MD&A of the financial condition of the issuer and its financial results.

In this way, the continuous disclosure system maintains a steady flow of material disclosure about issuers whose securities are bought and sold by the public.

Accounting Principles and Auditing Standards

NI 52-107 buttresses the required forms of public disclosure by setting forth acceptable accounting principles and auditing standards for issuers required to file financial statements or include financial statements in a prospectus or circular. The instrument also discusses requirements regarding currency disclosure and exemptions for SEC and foreign issuers.

In March 2008, Canadian regulators announced that IFRS, and not Canadian GAAP, will apply to Canadian public entities for financial years beginning on or after January 1, 2011. See commentary on page 3.32.

Certification of Financial Statements

Similar to requirements in the US, NI 52-109 requires CEOs and CFOs to certify the issuer's financial disclosure and file such certification in a prescribed form with the issuer's annual and interim financial disclosure.

Audit Committee Standards

NI 52-110 addresses corporate governance concerns regarding the effectiveness of an issuer's audit committee. Subject to limited exceptions, the instrument requires that a reporting issuer's audit committee have at least three members who are independent and financially literate, all of which must also be directors of the reporting issuer. TSX Venture Exchange-listed and other Venture Issuers are subject to different requirements though are nonetheless required to provide annual disclosure with regards to, among other things, their audit committee members' independence, financial literacy, education and experience. The instrument provides extensive guidance so that directors can make these determinations. The instrument sets forth the authority and responsibilities of audit committees and stipulates the prescribed disclosure of the charter, composition and education of the audit committee which must be made in the issuer's annual information form (in the case of TSX issuers) and in the issuer's management information circular (in the case of TSX Venture Exchange issuers and other Venture Issuers). Notably, the instrument also requires the pre-approval by the audit committee of all non-audit services provided by the auditors.

NI 52-108 defines the qualifications required of auditors who prepare auditors' reports on financial statements of reporting issuers. Specifically, such auditors must be a public accounting firm in good standing and subject to the Canadian Public Accountability Board.

Exemptions for US Issuers and other Foreign Issuers

Initiatives between Canadian and US regulators in the area of continuous disclosure are bringing the integration of the disclosure standards for Canadian and US capital markets closer to reality. Currently, a multijurisdictional disclosure system embodied in National Instrument 71-101 — The Multijurisdictional Disclosure System is in place among the Canadian provincial and territorial securities commissions and the SEC. Under this system, in the case of a cross-border securities offering, eligible issuers are generally required to prepare a single disclosure document rather than two disclosure documents, though certain additional limited information may be required to satisfy the requirements of the local jurisdiction.

In addition, pursuant to NI 71-102, certain issuers who are regulated by the SEC are exempt from many of the Canadian continuous disclosure requirements provided they comply with the requirements of US federal securities law regarding such disclosure and file the resulting disclosure documents in Canada. Certain foreign issuers who are not regulated by the SEC but who are subject to foreign disclosure requirements may be exempt from complying with Canadian continuous disclosure requirements if not more than 10% of their equity securities are held by resident Canadians.

Canada's Sarbanes-Oxley

The Canadian securities regulatory authorities have implemented three key instruments significantly in line with United State's Sarbanes-Oxley requirements. These three rules are:

- CEO and CFO must certify the disclosure made in their public company's annual and interim filings (NI 52-109).
- The role and composition of audit committees is regulated (NI 52-110).
- The new Canadian Public Accountability Board has been mandated to oversee auditors of public companies (NI 52-108).

In addition to the foregoing, the Canadian securities regulatory authorities implemented a policy entitled "Corporate Governance Guidelines" and a rule entitled "Disclosure of Corporate Governance Practices" which replaced the former TSX corporate governance requirements.

CEO and CFO Certification of Certain Public Company Filings (National Instrument 52-109)

Originally taken from US regulations, this rule requires that CEOs and CFOs of all Canadian public companies and income trusts other than investment funds to personally certify:

- That to their knowledge, having exercised reasonable due diligence, the issuer's annual or interim filings, as the case may be, do not contain any untrue statement of a material fact or omit to state a fact required to be stated or that is necessary to make a statement not misleading in light of the circumstances under which it was made and that, together with the annual and interim financial statements, they fairly present in all material respects the issuer's financial condition, results of operations and cash flows. Annual and interim filings include an issuer's annual information form, annual and interim financial statements, and annual and interim MD&A.
- In the case of Non-Venture Issuers, there are additional requirements whereby the CEO and CFO must personally certify, among other things that: they have designed such disclosure controls and procedures and such internal control over financial reporting (defined similarly to the SEC definitions) to provide reasonable assurance: (i) material information relating to the issuer is made known to them; and (ii) information required to be disclosed by the issuer under securities legislation is recorded, processed, summarized and reported within the time frames required.
- That they have designed internal controls and financial reporting to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with GAAP.

- That they have evaluated the effectiveness of the issuer's disclosure controls and procedures and have caused the issuer to disclose in the annual MD&A their conclusions about the effectiveness of the disclosure controls and procedures (subject to transitional provisions).
- That they have caused the issuer to disclose in the annual MD&A or interim MD&A, as the case may be, any change in the internal control over financial reporting that occurred and has materially affected, or is reasonably likely to materially affect, the internal control over financial reporting (subject to transitional provisions).

Important to note, Canadian issuers that comply with US federal securities laws and promptly file their US certificates in Canada would generally be exempt from the above certification requirements. Also, certain foreign issuers, certain issuers of exchangeable securities and certain credit support issuers would be exempt from the certification requirements. Exemptions are also granted by securities regulators, however, it is anticipated that exemptions will rarely be given.

The language of the CEO and CFO certification must closely follow the language set out in the rule. An officer providing a false certification could be liable to penalties under securities laws.

Role and Composition of Audit Committees (National Instrument 52-110)

This rule requires that:

- Audit committees have a minimum of three directors.
- Each member of the audit committee is independent.
- Each member of the audit committee is financially literate.

Not only does the rule demand that audit committee members are independent and financially literate, but it also defines what is meant by independent and financially literate. The definition of independent is similar to the US definition and refers to the absence of any direct or indirect material relationship with the issuer. This includes a relationship that could, in the opinion of the board of directors, reasonably interfere with the exercise of a director's independent judgment. It should be noted that the test for independent audit committee members is more stringent than the test for other directors. What constitutes financial literacy is the ability to read and understand financial statements that represent a level of complexity of accounting issues that are generally comparable to the breadth and complexity of the issues that can be raised by the issuer's financial statements. Audit committee members who do not have the required financial literacy at the time of their appointment will be permitted to become financially literate within a reasonable period of time.

Notably, the rule does not require the issuer to disclose whether or not a financial expert is serving on the audit committee. Instead, issuers are required to describe the background of each audit committee member. This description should include the member's education and experience that relate to his or her responsibilities as an audit committee member.

The responsibilities of the audit committee must explicitly relate to the appointment, compensation, retention and oversight of the external auditor. Also, audit committees must deal with the pre-approval of all non-audit services to be provided by the external auditor. In

addition, audit committees must have a written charter and have established procedures to deal with complaints regarding accounting, internal accounting controls or auditing matters and to deal with the confidential, anonymous submission by employees of their concerns regarding any questionable accounting or auditing matters.

There are some exemptions from the rule pertaining to audit committees. For instance, it does not apply to investment funds, issuers of asset-backed commercial paper, some subsidiaries, some foreign issuers, some exchangeable security issuers and some credit support issuers. Also, partial exemptions are granted to issuers that are listed on the TSX Venture Exchange and other Venture Issuers. For instance, issuers that are listed on the TSX Venture Exchange are exempt from the composition requirements and the disclosure requirements, but are required to comply with the remainder of the rule.

Role of the Canadian Public Accountability Board (National Instrument 52-108)

According to this rule, the financial statements of a public company must be audited by a public accounting firm that is a participating audit firm with the Canadian Public Accountability Board ("CPAB"). Further, this accounting firm must follow any restrictions or sanctions imposed by the CPAB as of the date of the auditor's report.

This rule also applies to foreign companies that are reporting issuers in Canada, and requires foreign audit firms to register with the CPAB.

Best Practices

Canadian regulators have taken a guideline approach with respect to best practices in corporate governance. Canadian public companies are required to disclose in their annual information form (or in the case of Venture Issuers, their management information circulars) if they are complying with the recommended best practices or, if they are not, the reason for such non-compliance. This approach recognizes the reality that corporate governance is in a state of evolution and that uniform governance mechanisms may not be suitable for all different kinds of companies.

Best Practices for Effective Corporate Governance (National Policy 58-201)

This policy recommends best practices for all reporting issuers, both corporate and non-corporate. These practices are not mandatory. The practices are largely influenced by the now repealed TSX corporate governance guidelines and listing standards of the New York Stock Exchange.

The practices include:

- Maintaining a majority of independent directors on the board of directors:
  - Independent means that a director has no direct or indirect material relationship with the issuer.
  - Material relationship means a relationship that could, in the view of the issuer's board, reasonably interfere with the exercise of a director's independent judgment with certain individuals being deemed to have a material relationship with the issuer. These individuals are:

- A person who has been an employee or executive officer of the issuer in the previous three years;
- A person whose immediate family member has been an executive officer of the issuer in the previous three years;
- A partners or employee of the auditor or having an immediate family member who is employed by the auditor of the issuer or a person who has been such in the previous three years;
- A person who, or whose immediate family member, is or has been in the previous three years an executive officer of an entity if any of the issuer's current executive officers serves or served at that same time on the entity's compensation committee;
- An individual who received or whose immediate family member receives more than $75,000 per year in direct compensation during any 12 month period in n the previous three years from the issuer.

- In regards to income trusts, independence should occur at the trustee level.
- In regards to limited partnerships, independence should occur at the level of the board of directors of the general partner.

- Holding separate regularly scheduled meetings comprised only of independent directors.
- Appointing an independent director as chair. If this is not appropriate, then an independent director should be appointed as a lead director.
- Setting out a board mandate in writing. This mandate should address the following matters: integrity, strategic planning, managing risk, succession planning, corporate communications, required board approvals, internal controls, management information systems and investor feedback.
- Setting out position descriptions for the chair of the board and the chair of each board committee, directors and the CEO, which should include corporate goals and objectives the CEO is responsible for meeting.
- Providing new directors with orientation.
- Providing all directors with continuing education opportunities.
- Adopting a written code of business conduct and ethics for the directors, officers and employees of the issuer which is enforced by the board. This code of conduct is aimed at deterring wrongdoing and should address some of the following topics: conflicts of interest, reporting illegal or unethical behaviour, and fair dealing with investors, customers, suppliers, competitors and employees.
- Establishing a nominating committee to nominate new directors. This nominating committee should be comprised of independent directors and have a written charter.
- Having the board conduct a review with an eye to considering the size of the board and how appropriate it is, determining what competencies and skills the board should have, determining what competencies and skills each individual member has and keeping this in mind when recruiting new directors.
- Appointing a compensation committee that has a written charter and is composed of independent directors.
- Conducting regular assessments of board effectiveness and individual director effectiveness.

Disclosure of Corporate Governance Policies (*National Instrument 58-101)*

This rule calls for a disclosure requirement regarding corporate governance practices that the issuer has put into place. The rule also requires the issuer to publicly file with the regulators any written code of business conduct and ethics that the issuer follows. Any explicit or implicit waivers from the Code granted by the board to directors or officers would have to be disclosed immediately in a press release. The rule applies to all reporting issuers. However, exemptions will apply to the following: investment funds, issuers of asset-backed securities, designated foreign issuers, SEC foreign issuers, some exchangeable security issuers and some credit support issuers.

Except for Venture Issuers, such as reporting issuers that are listed for trading on the TSX Venture Exchange (who are required to provide similar, but less intensive disclosure in management information circulars), every issuer to whom the rule applies must include in its annual information form specific disclosure regarding:

- The composition of the board, which directors are independent and whether the majority of the board is independent.
- Which directors are also directors of other reporting issuers.
- Whether the independent directors hold meetings in the absence of the non-independent directors and management.
- The attendance record of each director at directors meetings.
- The mandate of the board.
- The chair of each committee and directors.
- The position descriptions for the chair, the chair of each board committee and the CEO.
- Measures adopted respecting the orientation and continuing education of directors.
- The adoption of a code of ethics.
- The composition of the nominating committee and its mandate or other nomination process.
- The composition of the compensation committee and its mandate or other compensation process.
- The assessment process for the performance of the board, of each committee of the board and of each board member.

If the issuer does not follow the recommended best practices with respect to each disclosure item, the issuer would have to explain why the board considers its practice appropriate.

Conduct of the Board and Evaluation of Directors

A board of directors can only be as effective as its members. Director performance is critical to good corporate governance. Directors must be performing effectively at the board level, committee level and individual level. Companies must take the necessary steps to promote effective director and board performance. For instance, companies should impose regular evaluation of the board and of each individual director. Another tool that can be used to promote effectiveness is offering formal orientation for new board directors and continuing education for all board directors.

Evaluation of the Board as a Whole

The recommended best practices provide that boards should implement a process for evaluating the effectiveness of the board as a whole. This task can be done by the nominating or governance committee or under the leadership of a single designated independent director working with or for the committee responsible for the evaluation process. Every issuer must describe how it is complying with these guidelines or, where there is a difference, describe the difference and provide a reason for departure from the guidelines.

Regular board and committee assessment is necessary to improve corporate governance practices. The focal point should be how board or committee performance can be made more effective by establishing and meeting goals that add value. The results of performance assessments should then be reported to the board as a whole and discussed.

In the US, the New York Stock Exchange ("NYSE") Rules provide that a board and its committees are evaluated every year. Foreign private issuers listed on the NYSE who do not perform annual evaluations must disclose any significant differences between their processes and the NYSE Rules.

An assessment process is a great way to improve the governance system of the board of directors. The results of the evaluation can be reviewed and any problems can be identified and steps taken to remedy any deficiencies. An assessment should look at how the board is carrying out its primary functions, particularly in the following areas: (i) responsibilities and mandate; (ii) structure and organization; and (iii) process and information.

Looking at the board responsibilities and mandate, boards should explicitly take responsibility for the stewardship of the company and implement a formal mandate establishing the board's stewardship responsibilities. A board should assume responsibility for implementing a strategic planning process and an annual assessment of the opportunities and risks of the business. Also, the board should identify principal risks and implementation of systems to manage business risks. The board should also establish succession planning and training and monitoring of the chief executive officer and senior management. Another important task for the board is to communicate policies on how the company interacts with various stakeholders and how it complies with continuous and timely disclosure obligations which, under applicable law, arise when there has been a material change in the business, operations or capital of an issuer that would reasonable be expected to have a significant effect on market price, and includes the decision to implement such a change. Where two or more parties are involved in a transaction, there must be a sufficient commitment to implement from all parties to implement the change before there is an obligation to issue a press release. Finally, another important task for the board is to maintain the integrity of internal control and management information systems.

The structure and organization of the board is key to effective functioning of it and when the evaluation is conducted, the board should consider whether the constitution is appropriate, whether the board is truly independent, what procedures are in place for director succession, whether the size is appropriate for the size of the company and if the proper committees are in place to ensure the board functions as smoothly as possible.

A final area of concern when conducting board evaluations is whether the best processes are created for receiving information to enable the board and committees to fulfill their

responsibilities. For instance, the processes and the information itself must allow for the assessment of the organization's activities and management. The information must be in enough detail to make informed decisions and the processes used in gathering information must be effective enough to ensure information is gathered in a timely fashion so that the information is fresh and the recommendations made as a result of the information are effective. The usual methods of assessment include either a written questionnaire that is filled out by each of the directors or discussions between the board chair or lead director and the board.

Evaluation of Individual Directors

It is wise to hold regular evaluations of individual directors. This would help directors understand how they are performing and compare their performance to what is expected of them. Regular evaluation and review allows for directors to compare their performance level with the expectations and make appropriate changes when necessary to correct any shortfalls. Improved individual performance of a director will lead to improved relationships between board members, the board chair, management and employees of the company and the company's shareholders. On the other hand, evaluations will also highlight any deficiencies in board members that cannot be corrected and when a change in board membership is required.

Both written assessments and oral assessments can be used for individual director assessments. In addition, peer reviews or self-assessments are suitable for individual director evaluations. A peer assessment would have each director evaluate the performance of the other directors. A self-assessment would have each director reflect upon and evaluate his or her own performance and contribution. Self-assessments are more favourable than peer evaluations as they are not as stressful and do not detract from the collegiality and co-operation necessary for the efficient functioning of the board as a whole. What seems to work best is a formal evaluation process comprised of a written questionnaire completed by each director and then a follow-up discussion with the board chair, lead director or governance committee chair. The use of a written questionnaire provides all directors with the chance to answer a standardized set of questions candidly and without a director feeling pressured by answering in a one-on-one interview setting with the chair.

In any event, the results should be compiled and interpreted with the results reported to the chair. The board should consider how the results should be disclosed to the full board for review and discussion. For instance, it may be more helpful for the results to be disclosed in an aggregate manner rather than identifying specific board member's evaluation results. The compilation and interpretation of results can be done in-house or the board may choose to hire an outside consultant to perform this task.

Orientation and Continuing Education

It is a good idea for each company to offer an orientation program for new directors and continuing education opportunities for every director. It is important for new directors to understand the role of the board, the role of committees of the board and the role of directors in making the board and company run as efficiently as possible. Also, it is helpful to make new directors aware of the commitment of time and energy that will be expected of them as directors.

A comprehensive orientation program for new directors should include both offering the directors a board manual and literature for the new director to review independently as well as an orientation session with presentations and the opportunity to ask questions and engage in a dialogue about being a director.

Continuing education programs are also important to promote ongoing director education and to ensure that directors are keeping current on laws and regulations applicable to their role. At the same time, continuing education can also serve as an opportunity for directors to review their duties and the board manual. It can be a chance for the directors to provide feedback and suggestions for changes to policies or procedures to enhance efficiency. Continuing education should take place at least once a year. One way to ensure it occurs is to tie it to the annual board evaluation process. This way, the continuing education program for directors can respond to any issues that arise from the evaluation process of the board or individuals and can give the directors the knowledge and information required to remedy any deficiencies.

Governance Beyond Regulations

Governance in Canada is more and more impacted by factors other than regulations and stock exchange rules. Institutional shareholder activism embodied by organizations such as the Canadian Coalition for Good Governance ("CCGG") and Risk Metrics Group ("RMG") play a significant role in Canada in the field of governance. The CCGG publishes every year guidelines with respect to governance and principled executive compensation which go far beyond basic regulatory requirements.

RMG, which is a service organization that provides voting recommendations to its clients (who are institutional investors), is also a dominant player in influencing governance practices and compensation practices of public companies. In addition, Canadian companies' governance practices are significantly influenced by the evaluation criteria of the annual governance survey called Board Games published by The Globe & Mail (Canada's national newspaper). The Board Games survey ranks every year hundreds of public companies based on its evaluation methodology.

These organizations and media are at the forefront of the development and adoption of best practices in governance in Canada. For example, "say-on-pay" voting is voluntary in Canada, but has been given increased attention by market participants as a result of the media and shareholder interest organizations. CCGG has recommended in April 2009 that all boards adopt "say-on-pay" voting and RMG has published guiding principles that it will use for its recommendations to its clients for a "say-on-pay" vote.

What are the Registration Requirements?

After several years of consultation, the Canadian Securities Administrators (the "CSA") have published National Instrument 31-103 Registration Requirements and Exemptions ("NI 31-103"), made consequential amendments to securities legislation and local rules that are intended to harmonize, streamline and simplify dealer and adviser registration categories and requirements across all jurisdictions. The effective date of NI 31-103 was September 28, 2009 (the "Effective Date").

The new registration regime has significant implications for Canadian and non-Canadian market participants, particularly those now doing business in any Canadian jurisdiction on any unregistered or exempt basis.

The significant changes brought about by NI 31-103 are:

- The adoption of a "business" trigger for dealer registration in lieu of the "trade" trigger that existed in all provinces and territories, other than Québec.
- Registration categories and related requirements have been harmonized across all jurisdictions and the number of categories have been reduced significantly, though four new categories of registration have been introduced:
  - "Exempt market dealer," which replaces the category of limited market dealer in Ontario and in Newfoundland and Labrador.
  - "Restricted dealer," a category of dealers engaged in a limited area of dealing activities with restrictions and proficiency requirements tailored to the dealing activities.
  - "Restricted portfolio manager," a category for advisers restricted to advising with respect to specified securities with restrictions and proficiency requirements tailored to the advising activity.
  - "Investment fund manager," which requires all managers of public and private investment funds to be registered regardless of whether they are in the business of dealing or advising.
- The introduction of a registration exemption framework for international dealers and international advisers.
- Exam-based (rather than course-based) proficiency requirements have been prescribed for each category of registration, with certain exceptions.
- Higher minimum capital requirements for registered firms.
- Registered firms will be required to identify each potential and actual conflict of interest and provide prior written disclosure of a conflict of interest to a client while dealing with such conflicts in a fair, equitable and transparent manner.
- Harmonization and narrowing of the exemptions from the dealer and adviser registration requirements across Canada.
- Canadian residency requirements for all registrants in all provinces and territories have been eliminated.

Transitional Rules

Individuals and entities affected by the new rules fit into three categories: (i) parties already registered in categories that will survive under NI 31-103, but that will have certain new rules to follow; (ii) existing unregistered businesses that are seeking registration for the first time; and (iii) registered businesses that are relinquishing registration and becoming subject to new exemptions.

The transitional rules give individuals and entities that are already registered between three months and 24 months after the Effective Date to bring themselves into compliance with the new requirements they must meet. There are transitional rules for entities that have been in active registered or unregistered businesses that seek to be registered under NI 31-103 for the first time in one of the new categories of registration. There are a few transitional rules for

individuals and entities that are in registration categories (e.g., the international dealer registration, the international adviser registration) that will be dropped under the new regime. For example, international advisers have 12 months from the Effective Date to transition to either become registered as a portfolio manager or restricted portfolio manager or to begin relying on the international adviser exemption.

Business Registration Trigger

Prior to NI 31-103, in all provinces and territories, other than Québec, a person or company was required to become registered as a dealer if and when it traded a security unless it could conduct the trade in reliance upon an exemption.

In Québec, a person or company is not required to become registered as a dealer unless and until it becomes engaged in the business of trading in securities. This requirement is comparable to the adviser registration requirement — common to all provinces and territories — that imposes a registration as an adviser on a person or company if it engages in, or holds itself out as engaging in, the business of advising others as to the investing in or the buying or selling of securities.

NI 31-103 adopts the "business" trigger for dealer registration in lieu of the "trade" trigger that existed in all provinces and territories other than Québec. The adoption of a "business" trigger establishes uniform dealer, adviser, underwriter and investment fund manager registration requirements throughout Canada. It also removes from the ambit of securities legislation those persons or companies who are not engaged in the business of trading or advising, acting as an underwriter or acting as an investment fund manager — and thereby facilitates the elimination of a number of dealer registration exemptions that existed to accommodate their exempt trading activity.

According to Companion Policy to NI 31-103 ("NI 31-103CP"), there are two components to any assessment of the application of the "business" trigger. The first component will involve an assessment of whether the particular activity involves dealing in securities or advising in securities. If so, the second component will involve an assessment of the extent to which the activity is being conducted as a business. For non-residents, there will almost certainly be a third component that will involve an assessment of the extent to which the business being conducted by the non-resident is being conducted in Canada.

Categories of Registration and Permitted Activities

Under NI 31-103, the registration categories and related requirements have been harmonized across all jurisdictions and the number of categories of registration has been reduced significantly, although a few new categories of registration have been introduced. The registration categories of dealer and adviser have been maintained and continue to have sub-categories (i.e., investment dealer, mutual fund dealer, etc.). Of note is the addition of the new category of registration for investment fund managers.

A registered firm that continues to be registered following the Effective Date must submit a completed Form 33-109F6 to the regulator on or before September 30, 2010. Form 33-109F6 is new and replaces Form 3.

New Categories of Registration

Exempt Market Dealer

This is a new category of registration for dealers restricted in prospectus-exempt securities and with persons to whom prospectus-exempt distributions can be made. An exempt market dealer may therefore trade a security that is distributed in reliance upon a prospectus exemption whether a prospectus was filed in respect of the distribution or not, and it may also trade a security that, if the trade were a distribution, would be exempt from the prospectus requirement.

In Ontario, and in Newfoundland and Labrador, the exempt market dealer category replaces the limited market dealer ("LMD") category, and LMDs became registered as exempt market dealers on the Effective Date. Exempt market dealers in Ontario and in Newfoundland and Labrador have six months from the Effective Date to comply with new insurance requirements and 12 months to comply with new capital requirements that will be applicable to exempt market dealers.

In all other jurisdictions, a person or company that acts as a dealer in the exempt market on the Effective Date will have 12 months to apply for registration as an exempt market dealer. Firms that had an active business before the Effective Date have 12 months to apply and comply with NI 31-103.

Firms not active before the Effective Date do not get the benefit of any of the transitional rules.

Restricted Dealer

This is a new category of registration for dealers engaged in dealing activities that are limited to a particular sector or type of securities (i.e., real estate securities). The restrictions and requirements applicable to a restricted dealer will be tailored to, and dependent upon, the particular dealing activities.

Restricted Portfolio Manager

This is a new category of registration available to portfolio managers restricted to advising with respect to specified securities, types of securities or specific industries. As with the restricted dealer category, the restrictions and requirements for a restricted portfolio manager will be tailored to the advising activity of the portfolio manager. A restricted portfolio manager will be permitted to provide discretionary management, subject to the terms and conditions of its registration.

Investment Fund Manager

This category introduces a new requirement for all managers of investment funds to be registered as investment fund managers, regardless of whether they are in the business of trading or advising. This includes managers of public mutual funds, public closed-end funds and private or prospectus-exempt pooled funds and hedge funds. Through this new category of registration, the CSA is attempting to address and regulate certain risks particular to fund managers (i.e., calculation of net asset value, financial reporting and conflicts of interest between the manager and investors) through the regulation of the fund managers, in addition to

the current regime of regulating the investment funds. A portfolio manager that manages an investment fund will also be required to be registered as an investment fund manager and meet the conditions of both categories.

The CSA has indicated that it will be publishing a proposal for comment during the next year that will address the circumstances under which an investment fund manager that does not have a Canadian head office will need to register, and in what additional provinces and territories an investment fund manager with a head office in Canada will need to register.

Firms that had an active business before the Effective Date have a 12-month period to register if they apply in their Canadian head office jurisdiction and 24 months if the head office is outside Canada.

NI 31-103 also introduces a few new categories of registration for individuals, including a requirement that all registered firms have a registered Ultimate Designated Person ("UDP") as the person who is in charge of the business (the president or Chief Executive Officer) and a Chief Compliance Officer ("CCO") who is responsible for monitoring daily compliance with policies and procedures. Registered firms have three months from the Effective Date to apply for registration for their UDP and CCO. NI 31-103 introduces a new category of associate advising representative which is a category that already existed in some Canadian jurisdictions, such as Ontario. This category is intended as an apprentice category for individuals looking to obtain the full registration, but who do not yet meet the proficiency requirements.

The following categories of registration have been eliminated: securities issuer, securities adviser, investment counsel, international dealer, international adviser and limited market dealer. Persons who qualified as international dealers (in Ontario and in Newfoundland and Labrador) or international advisers (in Ontario only) are exempt from registration subject to certain conditions, but the types of permitted clients has been narrowed.

Permitted Activities

A registered adviser who deals in securities of in-house pooled funds with advisor fully managed accounts is exempt from the dealer registration requirement.

A registered dealer who provides non-discretionary advice in support of its dealing activities will be exempt from the adviser registration requirement. There is no longer a requirement that the advising be "incidental to" a dealer's primary business. The current exemption for members of Investment Industry Regulatory Organization of Canada ("IIROC") who give discretionary advice to fully managed accounts has been maintained.

Registration Requirements for Individuals

Exam-based (rather than course-based) proficiency requirements have been prescribed for representatives of each category of dealer other than an investment dealer or a mutual fund dealer representative that is a member of IIROC or the Mutual Fund Dealers Association ("MFDA"), and for portfolio managers. Proficiency requirements largely taken from OSC Rule 31-502 Proficiency Requirements for Registrants are also prescribed for CCOs for each of the categories of registrants. Unlike LMD representatives, a person acting as a dealing representative of the new exempt market dealer category must meet one of three proficiency

requirements, similar to representatives of an investment dealer member of IIROC. Representatives and CCOs have 12 months from the Effective Date to satisfy their respective proficiency requirements.

The required experience of an advising representative, if a representative holds a Chartered Financial Analyst ("CFA") charter, has been significantly reduced from five years to 12 months of investment management experience in the 36-month period prior to applying for registration. If a person has the Canadian Investment Manager ("CIM") designation, on the other hand, he or she must have 48 months of investment management experience, at least 12 months of which was in the 36-month period prior to applying for registration. A person may be granted registration as an associate advising representative of a portfolio manager if he or she has completed any part of a requirement for an advising representative, for example, having earned a CFA charter.

Capital and Insurance Requirements

Minimum capital requirements for registered firms under NI 31-103 (IIROC and MFDA impose different requirements for their members) will be $25,000 for advisers, $50,000 for dealers and $100,000 for investment fund managers. A registered firm that, at any time, fails to maintain these minimum capital requirements, must notify the regulator as soon as possible. A financial institution bond calculated based on the number of employees or a percentage of client assets or assets under management subject to $200,000 minimum is prescribed. Solvency requirements are not cumulative — a firm registered in more than one category will have to comply with the highest requirement. Firms have 12 months from the Effective Date to comply with these capital requirements.

Client Relationships

NI 31-103 contains rules pertaining to the relationship between a registered dealer or adviser and its clients. These client relationship rules restate and refine the business conduct requirements that are summarized below and that are currently found in provincial and territorial securities legislation.

Account Opening, Know Your Client ("KYC") and Suitability Requirements

The KYC and suitability requirements are the key due diligence and gate-keeping elements that are intended to assist in protecting the client, the registrant and the integrity of the capital markets. A registrant is always required to comply with KYC requirements and with suitability requirements that are prescribed, unless the registrant is executing a purchase and sale of a security pursuant to instructions received from, among other, another registrant, a Canadian financial institution or a Schedule III bank or where a permitted client waives the suitability requirement in writing (other than in respect of a permitted client's managed account with an adviser). These account opening and KYC requirements do not apply to investment fund managers.

Conflicts

A registrant is required to address conflicts faced in the course of its operations. First, a registrant must address general conflicts of interest; second, it must address particular conflicts associated with referral arrangements; and third, an adviser is subject to self-dealing restrictions of managed accounts.

Identifying Conflicts

A registered firm must identify each potential and actual conflict of interest between it and a client, and provide prior written disclosure of a conflict of interest to a client while dealing with such conflicts in a fair, equitable and transparent manner and exercising responsible business judgment. NI 31-103CP provides examples of such conflicts. Disclosure must be made by a registered firm in respect of securities of a related issuer or of a connected issuer by way of delivery of a disclosure statement in prescribed form.

Referral Arrangements

Referral arrangements are arrangements in which a registrant agrees to pay or receive a fee as a result of a client referral. A registrant will be prohibited from participating in a referral arrangement unless it meets certain requirements, including the prior written disclosure of such arrangements to the client. Firms have six months from the Effective Date to comply with these requirements. The minimum content of any such notice is prescribed. The registrant is also required to take reasonable steps to satisfy itself that the referred person or company has appropriate qualifications to provide the services and, if applicable, is registered to provide those services.

Loans and Margin

A registrant (other than an IIROC member) must not lend money to a client. A registrant must also provide any client that intends to borrow money to finance the purchase of securities with a prescribed form of leverage disclosure.

Complaints Handling

A registered firm is required to document, and to deal fairly and effectively, with every complaint it receives in respect of any of its products or services. It is also required to participate in a related dispute resolution service and to advise clients of the availability of the service. Except for clients in Québec, firms have 24 months from the Effective Date to comply with these requirements.

Relationship Disclosure

Before a registrant can purchase or sell a security for a client, or provide advice to a client, the registrant is required to provide the client with disclosure of information that a reasonable client would consider important regarding the client's relationship with the registrant. Firms have 12 months from the Effective Date to comply with these relationship disclosure rules. This disclosure is not required to take the form of a separate document tailored for this

purpose, but may be provided through separate documents which, in combination, give the client the required information, including:

- A description of the client's account;
- A discussion that identifies which products or services offered by the registered firm will meet the client's investment objectives, and how they will do so;
- A discussion of investment risk factors;
- A description of the conflicts of interest;
- Disclosure of all service fees, charges and other costs associated with the investment;
- A description of the content and frequency of reporting for each account or portfolio of the client;
- Information about how the client can contact the firm;
- Notice that a dispute resolution service is available to mediate any dispute that might arise between the client and the firm regarding a product or service of the firm; *and*
- The information a registered firm is required to collect about the client as part of its KYC obligations.

Fair Allocation

An adviser is required to provide its clients with a statement of policies regarding fair allocation of investment opportunities.

Relationship with Financial Institution

Certain disclosure must be provided to the non-permitted clients of registrants that are conducting securities-related activities in an office or branch of a Canadian financial institution or a Schedule III bank. This is to ensure the clients understand they are dealing with the registrant, not the financial institution.

Client Assets

Generally, a registrant that holds the securities or other property of a client must hold the securities or property separate and apart from its own property and in trust for the client. If the registered firm is holding cash on behalf of the client, the cash must be held in a designated trust account with, among others, a Canadian financial institution or a Schedule III bank. This conduct category also prescribes requirements for client securities that are the subject of a written safe-keeping agreement.

Non-resident firms that hold client assets are subject to restrictions to ensure assets are held appropriately.

Record-keeping

In addition to general record-keeping requirements, NI 31-103 requires registrants to keep their records in a safe and durable form and in a manner that facilitates their prompt delivery to the regulator for a period of seven years following the creation of the records in question.

Account Activity Reporting

Account activity reporting requirements include, without limitation, trade confirmation, statement of account and statement of portfolio delivery requirements. The trade confirmation requirements permit trade confirmations to be sent to either the relevant client or, with the client's consent, any registered adviser acting on behalf of the client. Statements of account and statements of portfolio must be sent to clients by registered dealers and advisers, not less than every three months. A client may instruct an adviser to deliver a statement less frequently.

Compliance

A registered firm is required to permit its UDP and its CCO to gain direct access to the firm's board of directors whenever either of them considers it necessary advisable to do so in the light of his or her responsibilities. The CCO is required to report directly to the board of directors at least once a year respecting the registrant's compliance with securities legislation.

Non-Resident Registrants

Non-resident registrants are required to continue providing their clients with disclosure of the potentially adverse consequences of their non-resident status. They are also required to continue holding clients in accordance with prescribed custodial requirements and to maintain any registration or Self-Regulatory Organization ("SRO") memberships that are required for the business that is being conducted by them in their home jurisdiction.

Dealer Registration Exemptions

NI 31-103 offers far fewer dealer registration exemptions than previous regimes because NI 31-103 is premised upon a business trigger instead of the trade trigger that existed in all provinces and territories other than Québec. Moreover, the introduction of an exempt market dealer registration category, in most jurisdictions, dramatically narrows the exempt market for unregistered market intermediaries. In the western jurisdictions and the three territories, market intermediaries are able to deal in the exempt market without registration in reliance upon certain prospectus exemptions subject to certain conditions (exempt market intermediaries).

The dealer registration exemptions contained in NI 45-106 are repealed and replaced with the following exemptions:

Trades Through a Registered Dealer

This is an exemption to a person if the trade is made through an agent that is a registered dealer or made to a registered dealer that is purchasing as principal.

Adviser — Non-Prospectus Qualified Investment Fund

This is an exemption to a registered adviser or an international adviser for a trade in a security in a non-prospectus qualified investment fund if: (i) the adviser acts as the investment fund's adviser and investment fund manager; and (ii) the trade is to a managed account of a client of the adviser.

Investment Fund Reinvestment

This is a limited exemption to an investment fund manager where: (i) distributions or dividends are used by securityholders to acquire securities of the same class or series of the investment fund; or (ii) a securityholder makes an optional cash payment and acquires securities of an investment fund that trade in a marketplace that are of the same class of series of securities referred to in (i), but securities subscribed with these cash payments in any financial year cannot exceed two per cent of the issued and outstanding securities of the class.

Additional Investment in Investment Funds

This is an exemption to an investment fund and its manager in connection with a distribution of securities to securityholders that have previously acquired securities of the investment fund for an acquisition cost of not less than $150,000 or hold securities having a net asset value of not less than $150,000.

Private Investment Club

This is an exemption for a trade in a security of an investment fund that: (i) has no more than 50 holders and requires contributions from them for funding; (ii) does not distribute its securities to or borrow money from the public; and (iii) pays no fees for investment management or administration advice other than brokerage fees.

Private Investment Fund — Loan and Trust Pools

This is an exemption for a trade in an investment fund co-mingling money of different estates and trusts that is administered solely by the trust company.

Mortgages

This is an exemption to a person dealing in mortgages (other than, in certain jurisdictions, syndicated mortgages) who is licensed or exempt from licensing under mortgage brokerage laws.

Personal Property Security Legislation

This is an exemption to a person dealing in a security (other than to an individual) evidencing indebtedness secured under personal property legislation.

Variable Insurance Contract

This is an exemption to an insurance company dealing in: (i) a contract of group insurance; (ii) a whole life insurance contract providing for a payment at maturity of an amount not less than 75 per cent of the premium paid; (iii) an arrangement for the investment of policy dividends and policy proceeds; and (iv) a variable life annuity.

Schedule III Banks and Cooperative Associations — Evidence of Deposit

This is an exemption to a person dealing in a deposit issued by a Schedule III bank or federal co-op.

Plan Administrators

This is an exemption for dealing in securities of an issuer by a trustee, custodian or administrator acting on behalf of employees, executives, directors and consultants of the issuer pursuant to a plan of the issuer.

Re-Investment Plan

This is an exemption for dealing in securities of an issuer by the issuer or by a trustee, custodian or administrator acting for or on behalf of the issuer if the trades are made pursuant to a plan and dividends or distributions are applied to the purchase of the issuer's securities or a securityholder makes an optional cash payment to purchase the issuer's securities but securities subscribed with these cash payments cannot exceed, in any financial year, two per cent of the issued and outstanding securities of the relevant class or series.

Self-Directed Registered Education Savings Plans ("RESPs")

This is an exemption for a trade in a self-directed RESP to a subscriber: (i) if the trade is made by: (a) a mutual fund dealer representative; (b) a Canadian financial institution; and (c) in Ontario, a financial intermediary; and (ii) the self-directed RESP restricts its investments in securities to securities that the person who trades the RESP is permitted to trade.

Exchange Contracts

This is an exemption for trades by a person in exchange contracts in British Columbia, Alberta, Saskatchewan and New Brunswick: (i) made solely through an agent that is a registered dealer or to a registered dealer purchasing as principal; or (ii) subject to specific conditions, resulting from an unsolicited order placed with an individual who is not a resident of and does not carry on business in the local jurisdiction.

Specified Debt

This is an exemption for a trade in specified government debt such as debt securities of the federal, provincial, territorial or municipal governments and of regulated financial institutions (if not subordinate in payment to deposits).

Small Securityholder Arrangements

This is an exemption for a trade by an issuer or an agent under the odd lot selling and purchase arrangements policy of the Toronto Stock Exchange or TSX Venture Exchange or a similar policy of a designated exchange.

Non-Resident Dealers

See "International Dealer Exemption" below.

Adviser Registration Exemptions

NI 31-103 contains the following exemptions from the adviser registration requirement:

Ancillary Advice by Dealers

This is an exemption to a registered dealer and its representatives for advice in connection with a trade other than a trade for a managed account.

IIROC Members with Discretionary Authority

This is an exemption to a registered dealer that is an IIROC member and its representatives acting as an adviser in compliance with IIROC rules to a managed account.

Advising Generally

This is an exemption to a person that carries on an advisory business either directly or through publications if the advice is not tailored to needs of specific clients and applicable disclosure requirements are addressed.

Non-Resident Advisers

See “International Adviser Exemption” below.

Mobility Exemptions

NI 31-103 sets out limited exemptions that permit a dealer or adviser to continue to service up to ten (and each of its representatives, up to five) individual clients and certain family members of those clients that re-locate to a jurisdiction in which the dealer or adviser is not registered.

International Dealer Exemption

Under NI 31-103, the category of international dealer registration available in Ontario as well as Newfoundland and Labrador is eliminated and replaced with an international dealer exemption from registration. Under the exemption available in all jurisdictions of Canada, a non-resident dealer is only permitted to trade with permitted clients, including:

- Regulated financial institutions.
- Registered dealers and advisers.
- Federal, provincial, territorial and municipal governments and crown corporations.
- Regulated pension funds.
- Accounts fully managed by a registered adviser.
- An investment fund managed by a registered investment fund manager or advised by a registered adviser.
- An individual with at least $5 million in net financial assets.
- A person (other than an individual or investment fund) with net assets of at least $25 million.

Trades with permitted clients will generally be limited to trades involving:

- A debt security during the security's distribution if it is offered primarily in a foreign jurisdiction and if no prospectus is filed in Canada.
- A debt security that is a foreign security other than during the debt security's initial distribution period.
- A foreign security unless the trade is made during the security's distribution under a prospectus filed in Canada.
- If the permitted client is an investment dealer, a foreign security or any security if the investment dealer is acting as principal.

A "foreign security" means a security of an issuer formed under the laws of a foreign jurisdiction or issued by a foreign government.

The international dealer exemption from registration is only available to persons or companies that are registered to carry on the business of dealing in securities in their home (foreign) jurisdiction and engage in the business of a dealer in their home (foreign) jurisdiction. In order to rely on the exemption, the non-resident dealer will have to formally submit to the jurisdiction and appoint an agent for service. Before dealing with any permitted client, the non-resident dealer will also have to notify the client of its non-resident status and of the name and address of its agent for service in the relevant jurisdiction. The non-resident dealer must also provide the securities regulatory authority with an annual notification of its reliance on this exemption.

International Adviser Exemption

Prior to NI 31-103, a non-resident adviser that provided advice to: (i) a resident of Ontario; or (ii) a non-resident investment fund that distributes securities to residents of Ontario was required to have been either registered as an international adviser with the OSC or exempt from registration under OSC Rule 35-502 Non-Resident Adviser.

Under NI 31-103, the category of international adviser registration and many of the exemptions from registration under OSC Rule 35-502 are eliminated and replaced with an international adviser exemption.

Similar to the replacement of the international dealer category of registration with the international dealer exemption from registration, under the international adviser exemption that is now available in all jurisdictions, a non-resident adviser may provide advice to permitted clients without having to become registered as adviser.

The international adviser exemption from registration is only available to persons or companies that are registered to carry on and engage in the business of an adviser in their home (foreign) jurisdiction or operate under an exemption from registration in that jurisdiction. To rely on the exemption, the non-resident adviser must formally submit to the jurisdiction and appoint an agent for service. Before acting as adviser to any permitted client, the non-resident adviser will also have to notify the client of its non-resident status and the name and address of its agent for service in the relevant jurisdiction. The non-resident adviser must also provide the securities regulatory authority with an annual notification of its reliance on this exemption.

The non-resident adviser cannot advise in Canada with respect of securities of Canadian issuers, unless providing advice on securities of a Canadian issuer is incidental to providing advice on securities of a foreign issuer. In addition, not more than 10% of the aggregate consolidated gross revenue of the non-resident adviser and its unregistered affiliates for any financial year may be derived from portfolio management activities of the non-resident adviser and its unregistered affiliates for any financial year may be derived from portfolio management activities of the non-resident adviser and its affiliates in Canada.

Exempt Market Intermediaries

The north and western jurisdictions (British Columbia, Alberta, Manitoba and the three territories) will issue orders exempting a person in the business of dealing in securities using certain prospectus exemptions from registering as an exempt market dealer.

The market intermediary must deal only with persons who are: (i) accredited investors; (ii) family, friends and business associates; (iii) purchasers provided with a prescribed Offering Memorandum; or (iv) purchasers subscribing to a minimum of $150,000 of a security and who rely on the analogous prospectus exemption.

To use any of these exemptions, a person must meet all of the following conditions:

- Not be otherwise registered in any jurisdiction;
- Not provide suitability advice leading to the trade;
- Except in British Columbia, not otherwise provide financial services to the purchaser;
- Not hold or have access to the purchaser's assets;
- Provide prescribed risk disclosure to the purchaser; *and*
- File an information report with the securities regulatory authority.

Registration in Multiple Jurisdictions

National Policy 11-204 Process for Registration in Multiple Jurisdictions ("NP 11-204") sets out the procedures for registering in more than one jurisdiction. Together with the amendments to Multilateral Instrument 11-102 Passport System, NP 11-204 replaces the former National Registration System ("NRS") under National Instrument 31-101 National Registration System with a passport system for firms and individuals seeking registration in passport jurisdictions. Because Ontario is not adopting the passport system, NP 11-204 creates an interface similar to the NRS for firms or individuals in passport jurisdictions seeking registration in Ontario as non-principal jurisdiction.

For the purpose of NP 11-204, the principal regulator for a firm will usually be the regulator in the jurisdiction where the firm has its head office, and for an individual the regulator of the jurisdiction where the individual has his or her working office.

Registration in Passport Jurisdictions — Passport Registration

A firm or individual applying for registration in a non-principal passport jurisdiction in a category (other than restricted dealer) for which the firm or individual is already registered or is concurrently seeking registration in its principal jurisdiction (including Ontario), must do so

through "passport registration." Although Ontario is not a member of the passport system, it can be a principal regulator under the system. If the principal jurisdiction of an applicant is Ontario, it must apply to Ontario as principal regulator and all the other regulators will treat Ontario as a principal regulator under the passport system.

Under the passport registration system, a firm need only submit its registration application to its principal regulator, whereas an individual must file the application through the NRD. The firm or the individual's sponsoring firm deals only with the principal regulator, which reviews the application to register in any other jurisdiction only to ensure that it is complete. Any non-principal regulator does not conduct a review of the registration application of the firm or individual. The applicant is automatically registered in the non-principal jurisdiction in the same category when registered in the principal jurisdiction if the application is complete and, where required for the specific category of registration, if the applicant is an approved member of a SRO.

The applicant under the passport registration must still pay fees in both the principal jurisdiction and in the other passport jurisdictions where it seeks registration.

Registration in Ontario — Interface Registration

Firms or individuals seeking registration in Ontario as non-principal jurisdiction in a category (other than restricted dealer) in which the firm/individual is already registered or is concurrently seeking registration in its principal jurisdiction, must apply through "interface registration." The firm must submit the registration application to both the principal regulator and the OSC; the individual must submit his or her application through NRD. The principal regulator reviews the application and submits to the OSC an interface document containing its proposed determination. Within one business day, the OSC advises the principal regulator whether it opts in or out of the principal regulator's determination. It should be noted that the OSC has the option of opting in and imposing additional terms and conditions to the registration.

In case of an opt-out decision, which must be supported by written reasons, the principal regulator works with the firm or with the individual's sponsoring firm in order to solve the OSC's opt-out issues. In case of failure, the individual or firm must deal directly with the OSC thereafter.

NP 11-204 gives the applicant the right to request an opportunity to be heard before a decision to reject the registration or to grant it with terms and conditions is rendered either by the principal regulator or by the OSC.

Restricted Dealer Registration

The passport registration and interface registration rules do not apply to firms seeking to become registered in the category of restricted dealer. A restricted dealer seeking registration in a non-principal jurisdiction, including Ontario, must apply directly to the regulator of the jurisdiction involved.

Changes to Québec Regulatory Framework

Changes to the *Securities Act* (Québec) ("QSA") and *An Act Respecting the Distribution of Financial Products and Services* (Québec) ("Distribution Act") moves the regulation of mutual fund dealers and scholarship plan dealers to the more flexible regulatory framework of the QSA from the Distribution Act.

However, mutual fund dealers and scholarship plan dealers registered only in Québec will continue to be supervised by the AMF and not be required to become members of the MFDA. Any Québec-registered mutual fund dealer or scholarship plan dealer will be required to maintain prescribed professional insurance and contribute to the Québec-based indemnity fund, the Fonds d'indemnisation des services financiers. Furthermore, their representatives will be required to be members of the Chambre de la sécurité financière.

13. CANADIAN TRADE LAW

Canada's Trade Remedy System

International Obligations

Under the 1994 World Trade Organization Agreement ("WTO Agreement"), Canada has bound its tariffs — that is, regular customs duties — against any increase on imports of goods from any other Party to the WTO Agreement. However, the WTO Agreement also sanctions a "trade remedies" system, whereby Canada (and any other WTO member) is allowed to counteract an influx of unfairly-traded (i.e., dumped or subsidized) goods by special duties notwithstanding these tariff bindings.

The basis for these extraordinary duties is that dumping and subsidizing distorts international trade and causes or threatens to cause "material injury" to domestic production of the same goods. This dates back to the original General Agreement on Tariffs and Trade (the "GATT") of 1947.

Beginning the Process: The Complaint and Investigation Phase

Canada's trade remedy process is a bifurcated one under the governing statute, the *Special Import Measure Act* ("SIMA"). It involves two separate federal government agencies — the Canada Border Services Agency ("CBSA") and the Canadian International Trade Tribunal ("CITT"). The involvement of two different agencies complicates the system and can be confusing to an outsider. However, it follows the requirements laid out in the WTO Agreement and is broadly comparable to the system in other countries, notably the United States.

The process starts with an injured Canadian producer filing a complaint with the CBSA. Once the complaint is verified by the CBSA as having met the required thresholds under SIMA (i.e., it is "properly documented"), the Agency begins an investigation to determine whether or not the goods are actually being dumped or subsidized and, if so, by how much.

While it is up to the CBSA to determine the margins of any dumping and the amount of any subsidy, it is the CITT, acting under the Canadian *International Trade Tribunal Act*, that determines whether such imports have caused or are threatening to cause injury to Canadian producers. Only if the Tribunal makes a positive injury finding can anti-dumping or countervailing duties be applied against the offending imports. Again, this follows the framework of the WTO Agreement and mirrors the system applied in many other countries.

It should be noted that the CBSA's investigations are conducted completely independently of the Tribunal's injury inquiry. However, the two proceedings must be dovetailed in terms of the timing of the steps leading to the CBSA's preliminary and final determinations of dumping or subsidization and injury. This is done under SIMA by setting time limits for the CBSA's preliminary determination of dumping or subsidizing (generally to 90 days) and to the CITT phase following the CBSA's determination within which the CITT's injury decision must be issued (120 days).

Inquiries by the Canadian International Trade Tribunal

The Tribunal's inquiry task under SIMA is spelled out in greater detail under the Special Import Measures Regulations, which set out the factors that the Tribunal is to consider in deciding if dumped or subsidized imports have caused or are threatening to cause material injury to Canadian production. These factors are related to the volume of unfairly traded imports, their effect on the price of domestically produced like goods, and the resulting impact on the domestic industry.

The CITT has quasi-judicial status and is a court of record under Canadian law. Unlike the process in the US, where the International Trade Commission conducts its proceedings almost entirely on the basis of written submissions, the CITT combines written materials with an oral hearing, where witnesses can be called and cross-examined and where arguments are presented by counsel for or against an injury finding.

If, after all of this, the Tribunal finds that dumped or subsidized imports have caused or are threatening to cause material injury to Canadian production, anti-dumping or countervailing duties are then applied to these imports by the CBSA for a five-year period.

Before the expiration of this period, the Tribunal will engage in a "sunset review" to decide if these duties should be allowed to lapse or continued for another five years. The sunset review process involves a consideration by the Tribunal as to whether, if the order were to expire, there would be a continuation or recurrence of material injury resulting from renewed dumping from the named countries.

Information on the dumping and subsidization complaint process and investigation can be found at the website of the CBSA's Trade Programs Directorate at: **www.cbsa-asfc.gc.ca/sima-lmsi/menu-eng.html**. Information on the CITT's procedures and its inquiry processes can be found online at: **www.citt-tcce.gc.ca/index-e.asp**.

Restrictions on Exports and Imports

Export Controls

Canada operates a comprehensive system of export controls under a statute called the *Export and Import Permits Act* ("EIPA"). Export controls apply to all goods and technology listed on the Export Control List ("ECL") promulgated under EIPA. These include items such as military and military-related products, chemical and biological weapons, nuclear-related goods and a range of other sensitive items such as agricultural products, cultural property and endangered species.

Under EIPA, no person can export an item listed on the ECL without an export permit issued by the Minister of Foreign Affairs and International Trade. In some cases, noted below, permits or approvals for certain kinds of exports — nuclear items, for example — require approvals of other Federal government agencies or departments. In some special cases involving the re-export from Canada of goods or technology of US origin, the Department of Foreign Affairs and International Trade ("DFAIT") will require the exporter to obtain US government approval before it issues the required Canadian permit.

As well as controlling exports of listed goods and technology, EIPA prohibits exports to certain listed destinations — generally those States that are considered dangerous or aggressive or that fail to respect international norms of civilized behaviour and respect for the rule of law and human rights. These are listed on the Area Control List ("ACL"), also issued under EIPA and currently cover Myanmar (Burma) and Belarus.

Much of Canada's export control regime, especially with respect to military and strategic goods, had its origin in the Second World War and the ensuing Cold War period. With the terrorist attacks on the World Trade Center, New York, on 11 September 2001 and the unfolding of subsequent events, including the wars in Iraq and Afghanistan and the emergence of anti-western governments in Iran, North Korea and other States, export controls of sensitive goods and technology takes on greater importance.

Because of the criminal penalties for failure to comply with Canadian export permit requirements, companies must be diligent and must ensure at least a basic understanding of how the system operates. Inattention to the details in EIPA and the regulations can result in unnecessary difficulties and have commercial repercussions.

As noted, the administration of EIPA is under the jurisdiction of the Minister of International Trade and DFAIT in Ottawa. Businesses that have export control issues — such as being unsure whether a particular good or technology is a controlled item — should contact the Export Controls Division in the Export and Import Controls Bureau in the Department. The Bureau web-site is found online at: **www.international.gc.ca/controls-controles/about-a_propos/index.aspx.**

Trade and Economic Sanctions

Together with export controls under EIPA, Canada applies trade sanctions against individual countries and terrorist organizations to comply with binding United Nations Security Council resolutions. These United Nations-mandated sanctions are implemented through orders issued under Canada's *United Nations Act*.

Because sanctions differ in content and scope depending on the particular UN Resolution, each must be examined separately to determine that nature of the prohibitions and of the duties imposed on Canadian businesses in complying with those sanctions.

Canada's United Nations-related trade sanctions currently apply to: Al-Qaida and the Taliban; Congo; Côte d'Ivoire; Iran; Iraq; Lebanon; Liberia; North Korea; Terrorist organizations (as listed); Rwanda; Sierra Leon, Somalia, Sudan and Zimbabwe.

While export and import controls described above are under the purview of the Import and Export Controls Bureau of DFAIT, economic sanctions under the *United Nations Act* are administered by the Department's Economic Law Section within the United Nations, Human Rights and Economic Law Division. Details can be found at: **www.international.gc.ca/sanctions/countries_groups-pays_groupes.asp.**

Other Export and Import Restrictions

Other federal enactments come into play in specific cases, preventing or restricting specific kinds of exports and imports. Here are a few specific cases:

Nuclear Goods and Technology

Nuclear goods and technology are listed on the ECL, discussed previously, but are also subject to separate export license requirements of the Canadian Nuclear Safety Commission under the Nuclear Safety and Control Act and the Nuclear Non-Proliferation Import and Export Control Regulations. Thus, together with seeking an export permit from the Department of Foreign Affairs, exporters must make the necessary application and provide the required documentation to the Commission.

For more information on the CNSC and nuclear-related exports, see: **www.cnsc-ccsn.gc.ca/eng/lawsregs/index.cfm**.

Supply Management in Agriculture

While Canada generally operates an open trading regime, there are significant restrictions on imports of dairy products, eggs and poultry as part of the administration of Canada's system of supply management, aimed at supporting agricultural production. No person can import these products at low rates of duty without an import quota allocation. Imports in quantities above these allocations result in extremely large duties, in effect making such imports prohibitive. The administration of the supply-managed quota system comes under the Export and Import Permits Act and the Import Control List ("ICL") made under that Act.

Details on the operation of Canada's quota system for supply managed agricultural products can be found on the Export and Import Controls Bureau of DFAIT at: **www.international.gc.ca/controls-controles.**

Trade in Endangered Species

Under the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), which entered into force internationally in 1975, Canada is required to regulate and prevent trade in those species covered by the Mobile Equipment Convention. These are wild animals and plants that are, or may be, threatened with extinction as a result of international trade. CITES applies to both living and dead specimens, as well as their parts, listed in Appendices to the Convention.

Canada's obligations under CITES are implemented through a permit system under the Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act and the Wild Animal and Plant Trade Regulations. The permit granting authority resides with the Minister of the Environment.

For more information on Canada's regulation of trade in endangered species, see: **www.cites.ec.gc.ca/eng/sct0/index_e.cfm.**

Cultural Property

Exports from Canada of "cultural property" listed on the Cultural Property Export Control List, is prohibited under the *Cultural Property Export and Import Act* without a permit issued by the Minister of Canadian Heritage. The Control List is established by the federal cabinet, on the recommendation of the minister. No person is allowed to export or attempt to export any object included on the list without an export permit issued under the Act.

Canada also prohibits trade of stolen and illicitly-traded cultural property in accordance with the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two protocols. Canadian law makes it an offense for any person to trade in and export or import cultural property covered under the Convention.

For information on controls of Canadian cultural property exports and the operations of the Canadian Cultural Property Export Review Board, see: **www.pch.gc.ca/pgm/bcm-mcp/cebc-cperb/index-eng.cfm**.

Environmentally Harmful Substances

Canada regulates exports of hazardous chemicals and environmentally-harmful substances under the *Canadian Environmental Protection Act, 1999* ("CEPA 1999"). These controls are implemented through three main sets of statutory instruments: (i) the CEPA ECL and the Export Control List Notification Regulations; (ii) the Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations; and (iii) the Export of Substances Under the Rotterdam Convention Regulations.

CEPA 1999 and these regulations are administered by Environment Canada. Details on the application of these measures for control of hazardous wastes and environmentally harmful products can be found at **www.ec.gc.ca/envhome.html**.

The foregoing illustrates that, as with export controls under EIPA, exporting or importing goods from or to Canada that are covered under these different laws without the necessary authorization can result in prosecution and penalties. It is therefore important for companies engaged in international transactions of a variety of sorts to have a basic understanding of the various laws and the interplay amongst them.

Trade with Cuba — a Special Case

While the US government continues to prohibit most kinds of trade with Cuba, there is no such prohibition in Canada. Because of attempts several years ago by US authorities to require Canadian-based subsidiaries of US corporations from complying with the American trade embargo, Canada passed a law called the *Foreign Extraterritorial Measures Act* ("FEMA"). FEMA prohibits any Canadian subsidiary of a US corporation, or any director or officer of that company, from complying with the US trade embargo. Under FEMA, any attempt by a US parent to force its Canadian subsidiary to refuse to export goods and services of Canadian origin to Cuba is an offense and could render the Canadian subsidiary and its officers liable for substantial penalties, including criminal prosecution.

While FEMA applies to ordinary trade with Cuba that does not involve US-origin goods, under bilateral defence co-operation protocols, Canadian authorities still apply US export controls on goods of US origin bound for Cuba. A Canadian company wishing to export US products to Cuba would not be given a Canadian export permit. This avoids Canada being used as a transit country to circumvent US export controls applicable in the United States.

Recently, the US government has announced that it intends to implement measures which will permit Cuban nationals lawfully present in the US and Cuban nationals resident outside the US to make increased monetary payments to Cuban nationals in Cuba.

Canada's Controlled Goods Program

Canada's Controlled Goods Program ("CGP") is a domestic security regime created under the Defence Production Act that regulates access to and use of sensitive military and strategic products, know-how and technology. The details of operation of the CGP is set out under Controlled Goods Regulations ("CGRs") made under Act. The Program covers the same military and strategic and dual-use goods listed on the Export Control List. Thus, there is a close relationship between the CGP and Canada's export control regime.

The CGP is designed to ensure protection of sensitive information and technology in Canada, especially in cases where Canadian companies are jointly involved in US defence procurement projects. The Program is geared to ensuring that Canadian companies and their employees can take advantage of the exemptions for Canada under the US International Traffic In Arms Regulations ("ITARs"), which allow a US company to export sensitive goods and technology to their Canadian counterpart, provided that the Canadian company is registered under the Controlled Goods Program.

Under the CGP, all corporations and other entities and all persons who deal with controlled goods and/or controlled technology are required to register with the Controlled Goods Directorate ("CGD"). Every entity registered under the CGP must also have a Designated Official that is security-cleared and a security plan filed with the CGD.

The DPA makes it an offense for any person that is not registered to knowingly examine, possess or transfer a controlled good to another person. Thus, unless registered under the Program, including having a Designated Official and an approved Security Plan, no corporation or its employees or officers can deal with controlled goods.

Information on the Program and all aspects of registration can be found online at: **www.cgd.gc.ca/cgdweb/text/index_e.htm**.

Canada's Bilateral Trade Agreements Program

In recent years Canada lagged behind other countries, notably the US, that were aggressively signing bilateral pacts with various trading partners. During the period between 1987 with the conclusion of the Canada-US Free Trade Agreement and 2008, Canada concluded only two other bilateral agreements, with Chile (1997) and with Cost Rica (2002). Canada concluded the *North American Free Trade Agreement* with the US and Mexico in 1993, which built on the 1987 FTA with the United States.

However, Canada has recently moved forward in this area and has concluded trade agreements with Colombia (2008), Jordan (2009), Peru (2009) and the European Free Trade Association (2009). Canada is also in the process of negotiating a number of bilateral agreements with a number of other trading partners which are in various stages of maturity, notably with South Korea, Singapore, the Caribbean Community ("CARICOM"), a group of four Central American States and, most recently, with the European Union on a possible Comprehensive Economic and Trade Agreement ("CETA").

The objective of bilateral trade agreements is to provide greater market access for Canadian goods and services. Under the rules of the WTO Agreement, this is done through providing lower tariff rates than would otherwise apply (preferential duty treatment) and other advantages for each others products. Under these agreements, Canadian goods and services are accorded the same treatment as local products (national treatment) and are guaranteed other rights that might not be available to third countries. There are special dispute settlement provisions in these bilateral trade agreements as well.

Details on Canada's existing trade agreements as well as those that Canada is currently negotiating with these other trading partners can be found on the website of the Department of Foreign Affairs and International Trade at: **www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/index.aspx**.

Foreign Investment Protection

In addition to free trade agreements, Canada is a party to 23 bilateral foreign investment protection agreements ("FIPAs"), the last of which was signed with India in 2007, reflecting what may be a renewed interest in securing investment protection for Canadian business abroad.

Canada's FIPA with Peru, which took effect on November 14, 2006, provides a template for Canada's FIPA program. The agreement is based on NAFTA Chapter 11, incorporates binding third-party arbitration over measures of indirect expropriation, something that Latin American countries refused to countenance for many years under the *Calvo Doctrine*, requiring all such disputes to be litigated exclusively before national courts.

In addition, the Canadian FIPA model contains provisions that clarify what kinds of laws or measures are — or are not — deemed to be indirect expropriation. Measures that have an overriding public purpose and are applied in good faith are not expropriations, even if they reduce the value of an investment as a result. These provisions effectively codify decisions contained in a series of NAFTA Chapter 11 arbitration decisions.

FIPAs would give Canadian investors in both countries useful guarantees of non-discrimination, assurances of recognized standards of legal protection, application of transparent laws and procedures, and access to third-party dispute settlement through binding arbitration, the latter being an important safeguard against arbitrary application of local laws.

The new life being breathed into the Canadian FIPA program may be a second-best substitute for failure to get traction on free trade agreements with these countries. Second, as with all bilateral agreements, FIPAs are a product of negotiation and compromise. There is an array of

qualifications, exceptions and reservations in these agreements, the result being that the gains in one area are often countered by other parts of the agreement.

Details of Canada's FIPA program can also be found on the DFAIT website at: **www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/fipa-fastfacts-apie-faitssaillants.aspx?lang=en**.

Settling International Commercial Disputes

After many years of delay, the Canadian Parliament passed legislation in 2008 to implement ICSID. While the legislation has received Royal Assent, due to federal-provincial differences and the failure of all provinces to agree, the federal government has not yet ratified ICSID to bring it into force for Canada.

The advantage of Canada being party to ICSID is that it would allow a Canadian investor to provide in its investment contract that any disputes with foreign States, particularly in matters of expropriation, will be settled by way of binding arbitration using the ICSID arbitration facilities in Washington, D.C. Under the Convention, the arbitration decision is binding and, with very few exceptions, host States are bound to recognize the award and enforce it as if it were a final judgement of a national court.

Apart from ICSID, commercial contracts between a Canadian person and a foreign party can provide for recourse to international commercial arbitration using a variety of mechanisms. Both Federal and provincial laws provide for this. For example, British Columbia, Saskatchewan, Ontario, Newfoundland & Labrador and Nunavut have adopted the model law of the United Nations Commission on International Trade Law ("UNCITRAL") to facilitate international commercial dispute resolution through arbitration.

Parties are, of course, free to select other options, including ICC arbitration in Paris or the International Court of Arbitration in London and their choice of forums and governing law and enforcement of the award will be given effect by courts in the Canada.

Efforts to Reduce Inter-Provincial Trade Barriers in Canada

The Agreement on Internal Trade ("AIT") is a 1995 agreement among the federal government and each of the provinces of Canada intended to reduce trade barriers and permit trade skill certifications to be recognized from province to province. It is generally viewed as being ineffective in achieving those goals.

Effective July 1, 2009, the provinces of British Columbia and Alberta entered into the Trade, Investment and Labour Mobility Agreement (called the "TILMA"). The two provinces agree to reconcile existing standards and regulations which operate to restrict or impair trade, investment or labour mobility. They agree not to directly or indirectly provide business subsidies that advantage one party over the other. Each province agrees to provide open and non-discriminatory access to procurements of their respective governments to persons from the other province.

Any person may institute proceedings before a panel constituted under the 2009 Agreement where the party believes that a measure by one of the provinces is inconsistent with the

TILMA or the Agreement on Internal Trade. The 2009 Agreement provides for a dispute resolution panel with powers to make awards up to $5 million.

The trade certification provisions in the TILMA (permitting certified trades to work in both provinces without re-certification) came into effect on April 1, 2009.

Ontario and Québec have recently indicated a mutual interest in discussing a possible inter-provincial trade agreement which would address, among other things, a long-standing conflict between construction workers in the two provinces regarding trade certification and labour mobility.

The AIT and TILMA attempt to breakdown trade barriers within Canada short of legislation. Many observers feel this is a poor substitute for action by the Federal government, given its authority over Trade and Commerce and Peace Order and Good Government under section 91 of the *Constitution Act 1867*.

Does Canada Have Exchange Controls?

There are no exchange controls in effect in Canada, so there are no restraints on the repatriation of profits from business conducted in Canada by a foreign owner.

14. HAS CANADA ENACTED DOMESTIC LEGISLATION IN FURTHERANCE OF INTERNATIONAL PROTOCOLS AND TREATIES?

How is the International Sale of Goods Treated in Canada?

In Canada, sale of goods legislation is a provincial responsibility. The various provincial *Sale of Goods Acts* impose certain commercial rules into every contract for the sale of goods, such as when title to the goods passes or whether the buyer or seller bears the risk of damage or loss to goods before delivery. These provincial statutes also impute into each sale of goods contract conditions that will apply to the sale in question. They relate to matters such as the seller's title to the goods, the transfer of title to the goods to a *bona fide* purchaser for value free of any existing liens, and a warranty of the goods' fitness for their intended purpose.

Different jurisdictions have different rules relating to the sale of goods. In an attempt to reduce uncertainty, and by extension, the cost of doing business between buyers and sellers in different jurisdictions, the United Nations sponsored a *Convention on Contracts for the International Sale of Goods* (the "Sale of Goods Convention"). Canada and each of the provinces other than Québec ratified the Sale of Goods Convention and it came into force in Canada in May 1992. A number of countries, including the US and Mexico, are parties to the Sale of Goods Convention.

The Convention is important from the perspective of international trade. Unless the application of the Sale of Goods Convention is specifically excluded by the parties to a sale of goods transaction, the Sale of Goods Convention governs any agreement of purchase and sale of goods between Canadian buyers and sellers and their respective foreign counterparts, even if the parties fail to adopt applications of the Sale of Goods Convention to their contract. The Convention establishes a series of rules that are implied as part of each such agreement. The Convention does not radically rewrite the rules as set out, for example, in Ontario's *Sale of Goods Act* or Article 2 of the US *Uniform Commercial Code*. Rather, the Sale of Goods Convention harmonizes the rules to reduce conflict between contracting parties. There is no longer a need to negotiate at length which applicable law will govern. The Convention rules will govern unless the parties "opt out" of the Sale of Goods Convention.

The following is a brief summary of the matters dealt with under the Sale of Goods Convention:

- The obligations of the seller, the obligations of the buyer, remedies for breach, the identity of the party who bears the risk of loss of the goods, and the basis on which damages may be claimed are determined in the Sale of Goods Convention.
- There is no need for the contract to be in writing.
- It is difficult for either party to terminate a contract governed by the Sale of Goods Convention once it is formed. The performing party may rescind the contract only if the non-performing party has committed a fundamental breach of the contract. A breach is fundamental if it deprives the other party of what he/she is entitled to expect under the contract, unless the party in breach did not foresee, or a reasonable person in the same circumstances would not have foreseen, such a result.

- The seller must deliver goods of the quantity, quality and description required by the contract. Goods are deemed not to conform with the contract unless:
  - They are fit for the purpose for which they would ordinarily be used.
  - They are fit for any particular purpose expressly or implicitly made known to the seller when the contract was entered into.
  - They possess the qualities which the seller has held out to the buyer as a sample.
  - They are contained or packaged in a manner usual for such goods, or adequate to preserve or protect them.

The parties to the contract may adopt certain laws of an appropriate jurisdiction to override one or more of the rules set out in the Sale of Goods Convention. In this way the parties can select the arrangement that make the most sense for them in their circumstances.

In Québec, sale of goods legislation is set out in Book Five, Title Two, Chapter 1 of the CCQ. The rules in Book Five are somewhat similar to those under the Sale of Goods Convention. However, where the sale in question is governed by Québec law, Québec counsel should be consulted to determine the differences between the applicable provisions of the Sale of Goods Convention and the CCQ. Note also that under Article 3111 of the CCQ, the parties may choose to have the law of a jurisdiction of their choice to govern their contract (including, for example, the Sale of Goods Convention or, as applicable, the International Chamber of Commerce ("ICC") rules), and this choice of law will likely be upheld by a Québec Court.

What Conduct is Prohibited by the *Corruption of Foreign Public Officials Act*?

Since 1977, the US has had legislation — the federal *Foreign Corrupt Practices Act* (the "FCPA") — designed to punish any US business that bribed foreign officials to gain an advantage over its competitors. The federal *Corruption of Foreign Public Officials Act* (the "CFPOA") only applies to conduct that takes place in Canada or to criminal acts, such as bribery, that take place outside Canada which have a real and substantial connection to activities in Canada. As a result, the CFPOA is generally viewed as having a relatively limited scope of application.

Canada has only had one successfully prosecution under the CFPOA in the last 10 years. However, with the increased focus of the UK and the US, in particular, on money laundering activities, you can anticipate more time and effort being spent by the federal government in CFPOA matters. The rubber hit the road in this area during due diligence for potential purchase and sale transactions where the Canadian target enterprise has business operations outside Canada. Some business practices in many foreign jurisdictions would constitute a violation of both the FCPA and the CFPOA. US authorities have focused on obtaining convictions and imposing fines under the FCPA. As a result, US purchasers are looking for evidence that the target enterprise has done the necessary background and other checks to "know their foreign agents."

CFPOA provides that:

- It is an indictable offence in Canada to obtain or retain an advantage in the course of business, by directly or indirectly giving, offering or agreeing to give or offer a loan, reward,

advantage or benefit to a foreign public official or to a person for the benefit of a foreign public official to influence the official in connection with the performance of the official's duties or functions, or to induce the official to use his/her position to influence any acts or decisions of the foreign state or public international organization for which he/she performs duties or functions. The punishment for such actions is up to five years imprisonment.

- It is an indictable offence in Canada to either possess property or proceeds of any property knowing that all or any part of the property or proceeds were obtained as a result of an offence as summarized above, or deal in any manner with any such property or proceeds with the intent to conceal or convert that property (i.e., money laundering). These actions are punishable on indictment by up to 10 years imprisonment, and on summary conviction by up to six months imprisonment or a fine of up to $50,000, or both.
- Section 183 of the *Criminal Code* brings bribing a foreign public official, possession of property derived from such bribery and laundering proceeds within the definition of the offence of money laundering.
- The Tax Act prohibits anyone who must file a Canadian tax return from claiming a deduction for any outlay made or expense incurred for the purposes of doing anything that is an offence under the CFPOA. This opens the possibility of penalties under the Tax Act where an affected persons deducts such expenses as a business expense.
- There are certain exceptions where the payment in question is a modest one in the circumstances and made to expedite or secure a foreign public official's performance of any routine act, apart from awarding new business or continuing an existing business arrangement.

> In Canada, the *Charter of Rights and Freedoms* provides a due diligence defence to every person, including directors and officers, where breach of the offence includes the possibility of imprisonment. One essential element of this defence is a program and procedures designed to ensure compliance and adherence to the procedures by management. Boards of directors of corporations carrying on business in Canada should implement a CFPOA compliance program similar to those that may already be in place to ensure compliance with the FCPA.

Canada is viewed as not being sufficiently active in investigating and prosecuting economic crime, but it has been reported in the press that the commercial crime division of the RCMP now has two anti-corruption teams in place that are now devoted to enforcement of CFPOA. A November 2009 report published by PriceWaterhouseCoopers ("PWC") discloses that economic crime in Canada is at its highest level in the last six years with 56% of those Canadian enterprises it surveyed reporting that they had been victims of economic crime in the last 12 months, and that in 59% of those cases, the person perpetrating the crime was from outside the organization. PWC reports that actions which would constitute violations of the CFPOA reported by respondents declined slightly over the last 12 months. This may indicate a growing awareness of CFPOA within the Canadian mining, oil and gas industries, especially where an enterprise has one or more directors on its board that are US residents or where the enterprise is a reporting issuer whose shares are traded on a US exchange.

All Canadian enterprises with foreign business operations must have in place appropriate CFPOA compliance guidelines that are enforced with a member of senior management with direct oversight responsibility, and should a possible violation be identified, immediate action is required. Unfortunately, as yet there is no CFPOA voluntary disclosure program in place and

the CFPOA is a criminal law statute and proceedings by the Crown are not subject to a limitation period. All the more reasons for an effective internal compliance program.

What Transactions Come Within the Provisions of the Money Laundering Act?

Canada has legislation intended to deter money laundering in Canada and the financing of terrorist activity.

Canada's *Criminal Code* requires specified types of financial institutions and providers of financial services to determine, on a continuing basis, if they are in possession or control of property of a "listed person," that is, a person named a list maintained by OSFI that includes names listed by the United Nations Security Council and names listed pursuant to the *Criminal Code* and certain regulations under the *United Nations Act*. The *Criminal Code* also makes it an offence for any person or entity in Canada, or Canadian outside Canada, to deal with property of a listed person or a terrorist group, to enter or facilitate any transaction related to such property or to provide any financial service to a listed person or terrorist group.

The federal *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (the "Money Laundering Act") imposes obligations on financial institutions (including life insurance companies, brokers and agents), securities dealers, money services businesses (including foreign exchange dealers), real estate brokers, real estate developers, accountants, casinos, dealers of precious metals, stones and jewellery and British Columbia notaries (called "reporting entities") to keep records and report to the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC"), Canada's financial intelligence unit. Money services businesses are subject to a registration requirement.

The Money Laundering Act is based on the principles set out in the Forty Recommendations of the multinational Financial Action Task Force, of which Canada is a founding member.

Reporting entities are required to report every suspicious transaction or attempted transaction of a customer or client. There is no threshold amount that triggers the reporting requirement. It is an offence to advise the customer or client that a report has been made and to advise the client of the contents of a report. Reporting entities are also required to report large cash transactions (as and when prescribed) and prescribed electronic funds transfers.

Cross-border reporting regulations made under the Money Laundering Act require persons (not just reporting entities) to report the importation or exportation of amounts over $10,000 of currency or monetary instruments in bearer form, whether carried across the border, or imported or exported by mail, courier or by any other means. There is no requirement to report bank drafts or cheques or other negotiable instruments made payable to a named person, unless payable to bearer pursuant to an unrestricted endorsement.

The identity of a client must be ascertained, using the prescribed means, before an account is opened. Client identification and record-keeping requirements include the requirement, in prescribed circumstances, to take reasonable measures to determine if the client is acting on behalf of a third party and to obtain certain information about persons or entities owning or controlling (directly or indirectly) 25%, or more, of the ownership of the entity

Reporting entities must put a compliance regime in place and it must include written policies and procedures to: (i) assess the risk of its business activities being used for money laundering or terrorist financing activities; (ii) identify and monitor high-risk clients or activities; and (iii) mitigate identified risks.

Special requirements apply when a reporting entity determines that it is dealing with a politically exposed foreign person ("PEFP"). PEFPs are foreign (non-Canadian) heads of government, members of legislature, heads of political parties, ambassadors, senior military officers, heads of state-owned companies and members of the judiciary, in each case together with prescribed family members.

There are enhanced rules requiring a Canadian deposit-taking financial institution to obtain information about the counterparty to a correspondent banking relationship and a prohibition on entering into correspondent banking relationships with any shell bank (one that has no physical presence in any country, unless it is controlled by a deposit-taking institution or foreign financial institution that does have a physical presence in Canada).

FINTRAC is empowered to impose administrative monetary penalties for violations of the Money Laundering Act, without having to refer the matter to law enforcement for prosecution. The possible penalties vary with the seriousness of the violation, with the maximum penalty for the most serious violations being $100,000 for an individual and $500,000 for an entity. Offences against the Money Laundering Act may be prosecuted in the courts.

Although the Money Laundering Act is written to apply to the legal profession, lawyers are not currently subject to it by virtue of a continuing injunction. The provisions written for lawyers would not require reporting to FINTRAC. Lawyers are subject to similar client identification and record-keeping requirements pursuant to requirements established by professional governing bodies, and these requirements are based on the provisions of the Money Laundering Act.

Effective February 20, 2009, Canadian real estate developers (defined below) became subject to the Money Laundering Act when a developer sells to the public a new house, a new condominium unit, a new commercial or industrial building, or a new multi-unit residential building. Any person who in any calendar year after 2007 has sold any of the following to the public:

- At least five new houses or condominium units;
- At least one new commercial or industrial building;
- At least one new multi-unit residential building each of which contains five or more residential units; *or*
- At least two new multi-unit residential buildings that together contain five or more residential units.

Real estate developers must establish an internal compliance regime, and in those circumstances described in the Money Laundering Act, real estate developers must prepare and submit to FINTRAC suspicious transaction reports, terrorist property reports and large cash ($10,000 or more) transaction reports. Records must be kept for all funds received by the real estate developer, as well as detailed information regarding each of the developer's clients.

In 2002 the Canadian Payments Association ("CPA") changed its clearing rules to preclude the clearing of cheques of $25 million or more. In effect, certified cheques cannot be used for payments of this amount (unless the cheque is an "on us" payment item involving parties who are customers of the same financial institution). Funds transfers that meet or exceed this threshold may be cleared by CPA members through the Automated Clearing Settlement System or by participating CPA members using the LVTS. Payments made using LVTS are immediately final and irrevocable.

15. ADMISSION TO CANADA

Who Can Apply for Admission to Canada?

The federal *Immigration and Refugee Protection Act* ("IRPA") distinguishes between those who seek to come to Canada temporarily ("temporary residents") such as tourists, international students and temporary foreign workers and those who seek to remain permanently ("permanent residents") also known as "immigrants."

Temporary Entry for Visitors

In order to be "admissible" to Canada, temporary entrants must be without criminal records, in sufficiently good health, and must have sufficient means to support themselves during their stay in Canada and to finance their departure.

Temporary entrants of various nationalities require a formal visa in order to enter Canada. Application for such a Temporary Residence Visa ("TRV") is made at a Canadian immigration office outside Canada ("visa office"). A person applying for a TRV must satisfy a visa officer that he or she seeks to come into the country for a temporary purpose and will abide by the terms of admission. Temporary entrants of specified nationalities are exempted from a formal visa requirement and may travel to Canada without this form of pre-approval.

Temporary entrants who have resided in designated countries for a period that exceeds six consecutive months within the past year, and who wish to remain in Canada for over 180 days, must undergo a medical examination and the results must be reviewed by the Citizenship and Immigration Canada medical office before a TRV be issued or before appearing at a port of entry.

Temporary Entry for Students

A person seeking to engage in a course of studies in Canada for a period that exceeds six months requires a Study Permit which is normally issued by a visa office or, in some cases, at Canadian ports of entry. An application for a Study Permit must be accompanied by proof of enrolment in the course and pre-payment of tuition together with evidence satisfactory to the visa office that the applicant will be financially self-supporting for the entire duration of his/her studies. A person wishing to study in the province of Québec is also generally required to previously apply for a Certificate of Acceptance issued by the Government of Québec.

Temporary Work in Canada

Business Visitors representing foreign employers who typically visit with Canadian clients or to assess future trade or business opportunities do not require Work Permits. Business Visitors may include personnel entering Canada to perform after-sales service, installation or warranty work pursuant to a contract of sale between a foreign vendor and a Canadian purchaser.

The most common way to become eligible for a Work Permit is to be the subject of a positive Labour Market Opinion ("LMO") issued by Service Canada (a.k.a. Human Resources and Skills Development Canada) to a Canadian employer. In order to issue a positive decision, Service Canada requires the potential employer to provide evidence that it has made recruitment efforts focusing on Canadian citizens or permanent residents so as to establish why

the job cannot be filled by a resident of Canada (e.g., because of a lack of qualified local candidates or because of other benefits the foreign candidate brings to the position). In some situations, where broad skills or labour shortages can be established, employers may negotiate with Service Canada for facilitated approvals for specified numbers of foreign workers with specific skills sets. When approving any request for an LMO, Service Canada expects that the employer is offering the position at a prevailing local wage.

When the worker chooses to take up residence in Québec, the LMO must be issued jointly by HRSDC and the Québec Ministère de l'immigration et des communautés culturelles of Québec ("MICC"). In addition, the employee must obtain a Québec Certificate of Acceptance, a process by which the MICC will satisfy itself that the candidate is suitable for the position being offered.

There are categories of Work Permit applications that do *not* require the applicant to be subject to an LMO. These include, but are not limited to:

- Pre-approved skills categories such as designated information technology skills ("Information Technology Workers Programme").
- Intra-company transferees of executives or persons for senior management positions or positions that require specialized knowledge.
- A US or Mexican citizen performing services within a profession listed under the North American Free Trade Agreement ("NAFTA Professional").
- Spouses of skilled foreign workers and spouses of foreign post-secondary students.
- Young adults subject to "Work Abroad" programs offered by the Canadian Government.

Immigration Strategies for the Employer

The past few years have seen a growing trend in Canada to address labour and skill shortages through the use of temporary foreign workers. Programmes have been established by the Canadian Government to facilitate the admission of Construction trades people in Toronto, Information Technology workers across Canada, Oil Sands workers in Northern Alberta and generally a wide variety of high and low skilled workers of many trades throughout Western Canada and beyond. Immigration and labour market officials are open to discussion with industry to review and update their priorities regarding admission of various trades into different sectors of the economy.

A number of temporary foreign workers holding ongoing job offers from local employers are now finding a path to permanent resident status through the Provincial Nominee Programmes (see below).

The availability of foreign skills and labour to Canadian employers now stands in marked contrast to the increasing barriers and bureaucracy to the legal admission of foreign workers into the United States. Employers on either side of the border are making decisions regarding the expansion of their businesses based on the flexibility and growth potential of the Canadian labour market force.

Permanent Entry — Three Categories

There are three categories of eligibility for applicants seeking permanent resident status:

- The Economic class features Skilled Workers and includes Business Applicants.
- The Family Class comprises sponsored spouses and children of permanent residents and citizens of Canada as well as sponsored parents and grandparents.
- Refugees and other humanitarian classes.

Skilled Workers

This category of economic applicants for permanent resident status are measured by a "points system" which considers job skills and experience, knowledge of English and/or French and formal education or training. The point system is designed to identify candidates that will successfully establish themselves in Canada. A skilled worker applicant is not required to have an offer of employment in Canada, but those who do are awarded additional "points."

Business Applicants

Entrepreneurs

Intend and have the ability to:

- Establish, purchase or make a substantial investment in a business or commercial venture in Canada that will contribute significantly to the economy and create or continue employment opportunities in Canada for one or more Canadian citizens or permanent residents, other than the entrepreneur and his/her dependants;
- Intend and have the ability to provide active and ongoing participation in the management of the business or commercial venture;
- Have minimum personal net worth of $300,000; *and*
- Will fulfill a condition to set up a qualifying business within a period of three years.

Investors

Investors are applicants who:

- Have successfully operated, controlled or directed a business or commercial undertaking.
- Have made a minimum "investment" of $400,000 in an approved fund offering a return of principal in five years with no accumulation of interest.
- Have a personal net worth legally accumulated of at least $800,000.

There is no condition imposed on Investors to commence a business in Canada.

Self Employed

This category applies to successful professional athletes and artists (as well as to farm managers) who are in a position to continue their livelihoods in Canada.

Québec Immigration

The Province of Québec operates its own immigration selection and processing system for applicants who intend to reside in this province. Québec has its own selection criteria for skilled workers, entrepreneurs and investors. In addition to determining its own occupational priorities, Québec places a high value on knowledge of French in selecting skilled workers. Applicants are processed and interviewed in Québec immigration offices while federal visa offices are only involved in conducting criminal and medical evaluation before issuing the permanent resident visa.

Provincial Nominee Programmes ("PNPs")

Over the past decade the Federal Government has negotiated agreements with each Province and Territory which allows these jurisdictions to choose a portion of the annual intake of permanent residents according to their own priorities. Applicants selected by a PNP must indicate a clear intention to settle in that Province upon becoming permanent residents. However, once an applicant becomes a permanent resident that person has the same rights as all other Canadian permanent residents and citizens to live and work anywhere in Canada as guaranteed by Canada's *Charter of Rights and Freedoms*. Unless it is determined that the applicant misrepresented his/her intentions at the time he/she entered Canada. A finding to this effect could lead to the loss of permanent resident status.

Most provinces base their selection of "skilled worker" nominees, many of whom are already in their jurisdictions as temporary foreign workers, on applicants with job offers from local employers. Some provinces give preference to those applicants whose occupations are listed as being in high demand within their local labour markets.

Some Provinces offer their own Business Immigration programmes. These may include eligibility criteria for Entrepreneurs that may differ from the federal programme as regards to a candidate's business background, net worth and business creation priorities.

Admissibility

Any person, seeking permanent entry to Canada must be found "admissible" to Canada. Applicants and their accompanying dependants (other than refugees and spouses and children of Canadian sponsors) must pass a medical evaluation that confirms that they are unlikely to become above-average users of health or social services. All adults must also be clear of criminal convictions and must pass security background checks.

Processing Times for Permanent Resident Applications

Timing for processing of permanent residents application varies according to different priorities and visa office locations.

Processing of sponsored spouses can take between nine months and a year and a half in most visa offices.

Federal Economic Immigrant applications can take between 16 months and 72 months to process depending on the individual visa office and the size of its existing backlog. Applicants

are required to file in the Canadian visa office located in (or assigned to) their country of citizenship. However, applicants residing in Canada as international students or foreign workers may file though the Canadian visa office in Buffalo, New York, thus enjoying one of the fastest visa office processing times.

Provincial Nominees are given higher priority than Federal economic applicants and many can be processed in less than a year. They may even be eligible for interim work authorisation after their initial selection by the Province.

At the time of writing the Federal Government has committed to reduce waiting times for permanent resident applicants by instituting "on-time delivery." It is unclear whether this would involve reducing the number of applicants accepted for processing (rather than admission) each year to meet current acceptance targets of over 250,000 immigrants per year and thereby avoid the creation of a backlog of qualified candidates.

The New "Canadian Experience Class"

The Canadian Experience Class, first announced in the 2007 budget, for certain skilled temporary foreign workers and international students with Canadian degrees and/or Canadian employment was implemented by the federal government in September 2008.

This program applies to persons who are, or have been, temporary workers in Canada (two years of continuous work in the last three years) and persons who are recent graduates of post-secondary institutions in Canada with at least one year of temporary work in Canada following graduation. English or French fluency is required. All applications are to be processed through the Canadian visa office in Buffalo, New York. The applications are processed on a "pass-fail" basis, not on a points basis.

The Point System Selection Criteria under the *Immigration and Refugee Protection Act*

Item 1: Education and Training — a maximum of 25 points
These points are awarded for education and formal training in the applicant's intended occupation under Item 3.

Item 2: Experience — a maximum of 21 points
These are awarded for years of experience in the applicant's intended occupation under Item 3.

Item 3: Occupational Factor — a maximum of 10 points
These points are based on the national demand for the intended occupation. The entrepreneur and investor are not assessed on this item.

Item 4: Arranged Employment
10 points are awarded if the applicant has pre-arranged employment in Canada. The self-employed person will be given a bonus of 30 points if, in the opinion of the immigration officer, he will be able to successfully establish himself without assistance. The entrepreneur and investor are not assessed on this item.

Item 5: Demographic Factors — a maximum of 10 points
These are based on consultation with the provincial authorities and such other persons and institutions concerning regional demographic needs, labour market considerations and the ability of the regional infrastructure to accommodate population growth.

Item 6: Age — a maximum of 10 points
- 10 points for 21 years of age or older but less than 50 years of age;
- 8 points, for 20 or 50 years of age;
- 6 points, for 19 or 51 years of age;
- 4 points, for 18 or 52 years of age;
- 2 points, for 17 or 53 years of age; and
- 0 points, for less than 17 years of age or 54 years of age or older

Item 7: Language — a maximum of 24 points
These depend on the applicant's ability to speak, read and write in English and French. An applicant must be proficient in each ability in each language in a range from "fluently" to "well" to receive any points.

Item 8: Personal Suitability — a maximum of 10 points
These are determined at an interview and are based on the immigration officer's assessment of the ability of the applicant and dependants to become successfully established in Canada, taking into account the person's adaptability, motivation, initiative, resourcefulness and other similar qualities.

16. WHAT DOMESTIC EMPLOYMENT LAWS APPLY IN CANADA?

What are the Rights of Employees in the Common Law Provinces?

A number of federal and provincial legislative initiatives affect all employers other than the federal government and businesses that are federally regulated. The following statutory employee rights are currently in effect in Ontario:

- **Minimum Wage Law** — Ontario's *Employment Standards Act* (the "ESA") provides for a minimum wage of $8.20 per hour for workers under the age of 18 who work 28 hours a week or less and $9.50 per hour for those 18 years of age and older. Effective March 31, 2010, the minimum wage under the ESA will increase to $10.25. Minimum wage rates in Nova Scotia for workers with less than three months' experience is $8.10 per hour (increasing to $9.15 by October 1, 2010) and for experienced workers is $8.60 per hour (increasing to $9.65 by October 1, 2010). Subject to certain exceptions, the minimum wage rates in New Brunswick is $8.25. New Brunswick requires that qualifying workers receive a weekly rest period at least 24 hours, to be taken, if possible, on a Sunday.
- **Vacation with Pay** — The ESA fixes minimum vacation pay requirements equal to 4% of the greater of an employee's gross earnings and two weeks wages. Legislation in Nova Scotia provides for two weeks' vacation and 4% vacation pay for workers who have been employed by the same employer for less than eight years. Workers with more than eight years are entitled to three weeks of vacation and 6% vacation pay. New Brunswick has similar requirements.
- **Overtime Pay** — The ESA requires an employer to pay overtime wages (1.5 times the employee's regular wage rate) after an employee has worked 44 hours in a week. Legislation in Nova Scotia *Code* provides for overtime wages at 1.5 times the employee's regular wage rate after the employee has worked 48 hours in one week. New Brunswick has similar requirements which take effect after 44 hours of work in one week.
- **Pay Equity** — The ESA prohibits employers from discriminating between men and women in rates of pay for substantially the same work. In addition, Ontario's *Pay Equity Act* requires private employers with more than 10 employees and all public sector employers to have pay equity, that is, female job classes must receive the same rate of pay as male job classes where the work performed is of equal or comparable value. The said Act applies to all employers in the private sector in Ontario with 10 or more employees, and to all employers in the public sector. Nova Scotia and New Brunswick pay equity laws apply only to the public sector.
- **Holidays** — Generally, in each of the provinces, there are only nine annual, paid, statutory holidays. The Ontario government invariably proclaims the first Monday in August to be the Civic holiday. In addition, the Ontario government has established the third Monday in February as a new holiday called Family Day. It coincides with President's Day in the US.
- **Notice on Termination of Employment** — Under the ESA (and under comparable Newfoundland and Labrador legislation), an employee must receive at least one week's written notice of termination of employment if the employee has completed at least three months of service. As an employee's period of service increases, so does the notice required at termination (up to eight weeks notice after eight years service or more — six weeks notice after 15 years service or more in Newfoundland and Labrador). In addition, employees of

any employer with annual Ontario payroll of $2.5 million or more and who have five years service or more may be entitled to severance pay of up to 26 weeks if their employment is terminated (one week per completed year of service). Employees cannot waive their rights under the ESA. Employees in Nova Scotia are entitled to between one and eight weeks notice depending on their length of service with the employer.

- The period of notice in mass terminations is longer. If during any four-week period, an employer proposes to terminate the employment of 50–199 workers, the notice period for each affected employee is eight weeks. If the number of workers whose employment is to be terminated is 200–499, the notice period for each affected employee is 12 weeks. If the employment of 500 or more workers is to be terminated, the notice period for each affected employee is 16 weeks. There are mass termination provisions in the Newfoundland and Labrador comparable legislation as well.
- The foregoing are minimum statutory notice requirements that may be increased substantially by common law, depending on the circumstances of the case. In employment agreements, employees can waive their common law rights. Ontario does not have a "right to work" regime similar to that in many of the US states. Employment can be terminated only for just cause, or on the giving of the minimum statutory notice as summarized above (which may be far less than the employer's common law obligations, which common law right an employee may enforce through the courts), or on payment of a sum equal to what the wages would have been for the applicable notice period in lieu of such notice.
- Mass terminations also lead to longer notice periods under the Nova Scotia law. If the number of employees terminated is between 10 and 99, eight weeks' notice must be provided. If the number is between 100 and 299 employees are terminated, 12 weeks' notice is required. Finally, if 300 or more employees are terminated, the employer must provide 16 weeks' notice. In addition, under the Nova Scotia *Industry Closing Act*, an employer planning to close down or discontinue business such that 50 or more employees will be affected must provide three months' notice to the Nova Scotia Minister of Industry, Trade and Technology. The employer cannot close or discontinue operations during this three-month period.
- In New Brunswick, the period of notice in mass terminations is longer. If during any four-week period, an employer proposes to terminate the employment of more than 10 workers who represent at least 25% of the workforce, the notice period for each affected employee is six weeks. The foregoing are minimum statutory notice requirements that may be increased substantially by common law, depending on the circumstances of the case. In employment agreements, employees can waive their common law rights. New Brunswick does not have a "right to work" regime similar to that in many of the US states. Employment can be terminated only for just cause, or on the giving of the minimum statutory notice as summarized above (which may be far less than the employer's common law obligations, which common law right an employee may enforce through the courts), or on payment of a sum equal to what the wages would have been for the applicable notice period in lieu of such notice.

- **Human Rights** — Ontario's *Human Rights Code* (the "OHRC"), the Nova Scotia *Human Rights Act*, the New Brunswick *Human Rights Act* and the federal *Bill of Rights* prohibit discrimination on the basis of ancestry, race, ethnic origin, place of origin, citizenship, creed,

colour, religion, sex, sexual orientation, marital status, family status, record of offences, disability and age. Under the Newfoundland and Labrador *Human Rights Code* (the "NLHRC") the prohibited grounds are race, religion, religious creed, political opinion, colour or ethnic, national or social origin, sex, sexual orientation, marital status, family status, physical disability or mental disability and age if that person has reached the age of 19 years. Provincial boards have the power to investigate and award damages for loss of income and distress arising out of a discriminatory practice. Employees who are discriminated against may be entitled to significant damage claims, and even reinstatement. However, the focus of the OHRC is to remedy the discriminatory practice, not to punish the wrongdoer.

- **Parental Leave** — The ESA gives 17 weeks of unpaid pregnancy leave to employees who have 13 weeks of service or more, as well as 35 weeks of unpaid parental leave for both men and women. Under applicable Newfoundland and Labrador and New Brunswick legislation, an employee gets 17 weeks of unpaid pregnancy leave and 35 weeks of unpaid parental leave for both men and women if they have been employed for 20 or more weeks. Nova Scotia has similar provisions with a qualification period of one year's employment. The federal *Employment Insurance Act* provides paid benefits for 52 weeks after a two-week qualification period. Employees have the right to return to their jobs following the leave period.
- **Compassionate Care Benefit** — Employment Insurance eligible workers (600 insurable hours in previous 52 weeks) who must be absent from work to provide support to a family member who is gravely ill with a serious risk of death are entitled to up to six weeks of compassionate care leave. Under applicable NL legislation, an employee employed for at least 30 days is entitled to an unpaid leave of absence of up to eight weeks to provide care or support to a family member of the employee where a legally qualified medical practitioner issues a certificate stating that the family member has a serious medical condition with a significant risk of death within 26 weeks of certain events, and the legislation provides for unpaid sick leave/family responsibility leave, bereavement leave, and leave for reservists. New Brunswick legislation also provides for unpaid leaves of absence for various durations and reasons. An employee is entitled to up to eight weeks compassionate care leave to care for someone in a close family relationship. Further, for employees who have been employed longer than 90 days, they must be granted sick leave up to five days without pay Family responsibility leave of up to three days, court leave, bereavement leave and leave for reservists are also available.
- **Mandatory Retirement** — The Ontario government has enacted the *Ending Mandatory Retirement Statute Law Amendment Act*, which came into force on December 12, 2006. Nova Scotia has similar legislation (*An Act Respecting the Elimination of Mandatory Retirement*). The said Act amends the OHRC to prohibit discrimination in employment based on age. The AHRA prohibits discrimination in employment based on age. Discrimination based on age will be permitted only where it is established that a limitation on the age of a worker is a *bona fide* occupational requirement ("BFOR"). In 2008, the NLHRC was amended prohibiting discrimination on the basis of age if the employee has reached the age of 19, unless the employer can establish that age is a BFOR. Based on what courts have recently held when assessing BFORs in the context of accommodation responsibilities, employers will be hard-pressed to demonstrate that age is a BFOR. In contrast, section 15(1)(c) of the *Canada Human Rights Act* provides that it is not a discriminatory practice if an individual's employment is terminated because the individual has reached the normal age of retirement for employees working in positions similar to the position of that individual. In

a recent decision of the Canadian Human Rights Tribunal, the termination of the employment of overseas pilots at 60 was found not to be a discriminatory practice because 60 is the retirement age for pilots employed by major airlines.

- The government did not make any corresponding amendments to the *Pension Benefits Act*, and under federal legislation, workers may not make contributions or accumulate retirement benefits past the age of 69. In addition, the government left unchanged the provisions of the *Workplace Safety and Insurance Act* ("WSIA"). This means that wage loss benefits terminate at age 65 unless a worker is injured after age 63, in which case those benefits are payable for up to two years.
- This age cut-off is to be contrasted with that of other worker compensation systems. In Alberta, for example, 65 is commonly considered to be normal retirement age and wage loss benefits cease at that age unless "…there is sufficient and satisfactory evidence to show that the worker would have continued to work past that age if the injury had not occurred."
- The question has been asked whether the OHRC, in this respect, complies with the *Canadian Charter of Rights and Freedoms* (the "Charter"). In a 1991 Supreme Court of Canada decision, *Tétreault-Gadoury*, it was decided that the denial of unemployment benefits to those over age 65 violated the equality rights provision of Charter section 15(1) and could not be justified under its saving provision, section 1. There is conflicting case law that might support Ontario's decision to implement a benefits cut-off age.
- In light of the foregoing, employers should re-visit their mandatory retirement policies. Not only will such policies be unenforceable, but employers are likely to face the potential of increased damages when terminating employees over 65 where it is established that age was a factor. Under the OHRC, reinstatement into one's former position with back pay is a potential remedy, as well as general damages for breach of the human right.

- **Occupational Health and Safety** — Ontario's *Occupational Health and Safety Act* and like legislation in the other provinces provide a comprehensive set of rules that imposes duties on employers in matters relating to the health and safety of workers. Employees are obligated to participate in joint health and safety management at their places of employment. Employees must use protective equipment and machinery, and they can refuse to do unsafe work. In 2009, Newfoundland and Labrador made significant amendments to its *Occupational Health and Safety Act*.
- **Workplace Safety and Insurance** (formerly known as "Workers' Compensation") — Virtually all full-time employees and their employers must report to the Workplace Safety and Insurance Board all injuries and illnesses arising in the course of any person's employment. Employers make financial contributions to an insurance fund (out of which the Board makes disability and injury awards to injured employees) based on the history of claims in the employer's industry and the individual employer's claims history. Employees receive various benefits, including payment for loss of earnings and health care benefits. Subject to certain exceptions, injured employees who have recovered from their injuries have the right to return to work, to the same or a similar job, with the employer for whom they were working at the time of injury. The exceptions that would prevent their return to the same or a similar job are that they worked for the employer for less than one year; they failed to return to work within one year of being able to do so; or they are not able to return to work

for two years or more after the date of their injury. Workers are entitled to only the benefits fixed by Ontario's WSIA and, with very few exceptions, cannot sue their employers for damages arising out of a work-related injury or disease. Newfoundland and Labrador have a similar system set out in its *Workplace Health, Safety and Compensation Act*, and Nova Scotia and New Brunswick have similar legislation in effect.

- **Employment Equity** — The federal government enacted voluntary employment equity legislation with mixed success several years ago. The federal legislation applies to, among others, federally regulated businesses with more than 100 employees (e.g., banks).
- **Homeworkers Legislation** — Employees who work from home are covered by the ESA. Nova Scotia has similar legislation. In addition, the ESA confers a 10% premium for such workers over provincial minimum wage rates to compensate for the workers' contribution to overhead.

What are the Rights of Employees in the Province of Québec?

The following statutory employee rights are namely currently in effect in Québec:

- **Minimum Wage Law:** Québec's *Act Respecting Labour Standards* (the "ARLS") and Regulation Respecting Labour Standards ("RRLS") currently provide for a general minimum wage of $9.00 per hour. The minimum wage payable to an employee who receives gratuities or tips is $8.00 per hour.
- **Vacation with Pay:** The ARLS provides that an employee who, at the end of a reference year, is credited with less than one year of uninterrupted service with the same employer during that period, is entitled to an uninterrupted leave for a duration determined at the rate of one working day for each month of uninterrupted service, for a total leave not exceeding two weeks. Similarly, an employee credited with one year of uninterrupted service is entitled to an annual leave of two consecutive weeks, and three consecutive weeks for an employee credited with five years of uninterrupted service with the same employer. The indemnity relating to the annual leave of the employee entitled to an annual leave of two weeks or less is equal to 4% of the gross wages of the employee during the reference year, and 6% for the employee entitled to an annual leave of three weeks.
- **Overtime Pay:** The ARLS requires an employer to pay overtime wages (1.5 times the employee's regular wage rate) after an employee has worked 40 hours in a week.
- **Pay Equity:** The Québec Charter of Human Right and Freedoms ("Quebec Charter") provide that every employer must, without discrimination, grant equal salary or wages to the members of his personnel who perform equivalent work at the same place. In addition, Québec's *Pay Equity Act* has been enacted to redress differences in compensation due to the systemic gender discrimination suffered by persons who occupy positions in predominantly female job classes. The PEA applies to every employer whose enterprise employs ten or more employees.
- **Statutory Holidays:** There are seven annual, paid, statutory holidays prescribed in the ARLS. In addition, Québec's *National Holiday Act* ("NHA") establishes that the 24th of June (St. John the Baptist's Day) is also a statutory public holiday in the province of Québec.
- **Notice on Termination of Employment:** According to the ARLS, an employer must give written notice to an employee before terminating his contract of employment or laying him off for six months or more. The notice shall be of at least: one week if the employee is credited with less than one year of uninterrupted service, two weeks when service is between year and five years, four weeks when seniority is between five years and 10 years and eight

weeks if the employee is credited with 10 years or more of uninterrupted service. The CCQ also provides that an employer must give a reasonable notice of termination, which may be longer than the minimum notice of the ARLS depending on the specific circumstances of employment. The factors to be particularly taken into account with regard to the determination of the length of the notice are namely: the nature of the employment, the special circumstances in which the employment is carried and the duration of the period of work. Employees cannot waive their rights to a reasonable notice under the CCQ. In Québec, employment can be terminated only for good and sufficient cause, or on the giving of the minimum statutory notice as summarized above, or on payment of a sum equal to what the wages would have been for the applicable notice period in lieu of such notice. The period of notice in the case of a collective dismissal is longer. A collective dismissal occurs when 10 employees or more of the same establishment are terminated in the course of two consecutive months. The minimum notice to be given in such case is: eight weeks, where the number of employees affected by the dismissal is at least equal to 10 and less than 100; twelve weeks, where the number of employees affected by the dismissal is at least equal to 100 and less than 300; or sixteen weeks, where the number of employees affected by the dismissal is at least equal to 300. Additionally, under the ARLS, those employees who are credited with more than two years of continuous service can only be terminated for good and sufficient cause. There is a complaint procedure under the ARLS for dismissal made without good and sufficient cause. If found to have merit, the complaint could lead to the reinstatement of the employee in his or her former position. This is not applicable to senior managerial personnel.

- **Human Rights:** Québec's Charter of Human Rights and Freedoms prohibits discrimination on the basis of race, colour, sex, pregnancy, sexual orientation, civil status, age (except as provided by law), religion, political convictions, language, ethnic or national origin, social condition, and handicap or the use of any means to palliate a handicap. Employees who are discriminated against may be entitled to significant damage claims and even reinstatement.
- **Parental Leave:** The ARLS provides that the father and the mother of a newborn child, and a person who adopts a child, are entitled to a parental leave without pay of not more than 52 consecutive weeks. This parental leave entitlement is in addition to maternity leave (18 weeks) and paternity leave (five weeks) entitlement. Québec administers its own provincial Parental Insurance Plan which provides income replacement benefits during the period of leave (maternity, paternity and parental). Employees have the right to return to their jobs following the leave period.
- **Family leave:** The ARLS namely provides that an employee may be absent from work, without pay, for 10 days per year to fulfill obligations relating to the care, health or education of the employee's child or the child of the employee's spouse, or because of the state of health of the employee's spouse, father, mother, brother, sister or one of the employee's grandparents. An employee may also be absent from work for a period of not more than 12 weeks over a period of 12 months where he must stay with his child, spouse, the child of his spouse, his father, his mother, the spouse of his father or mother, his brother, his sister or one of his grandparents because of a serious illness or a serious accident. In addition, if a minor child of an employee has a serious and potentially mortal illness, attested by a medical certificate, the employee is entitled to an extension of the absence.
- **Mandatory Retirement:** According to the ARLS, an employee is entitled to continue to work notwithstanding the fact that he has reached or passed the age or number of years of

service at which he should retire pursuant to a general law, a special Act, a retirement plan, a collective agreement or pursuant to the common practice of an employer. The ARLS forbids an employer to dismiss, suspend or practice discrimination or take reprisals against an employee on the ground that he has reached or passed a certain age or a certain the number of years of service. However, this protection does not prevent an employer from dismissing, suspending or transferring such an employee for good and sufficient cause.

- **Occupational Health and Safety:** The *Act Respecting Occupational Health and Safety Act* ("AROHS") has been enacted in the province of Québec with the objective of eliminating, at the source, the dangers to the health, safety and physical well-being of workers. It provides mechanisms for the participation of workers, workers' associations, employers and employers' associations in the realization of its object. It imposes specific obligations towards workers and employers. Employees must namely use protective equipment and machinery, and can in certain circumstances refuse to do unsafe work.
- **Industrial Accidents and Occupational Diseases:** According to the *Act Respecting Industrial Accidents and Occupational Diseases* ("ARIAOD"), most employees and their employers must register with the Worker's Compensation Board (known as the Commission de la santé et de la sécurité du travail or the "CSST") and report all injuries and illnesses arising in the course of any person's employment. Employers make financial contributions to an insurance fund out of which the CSST provides indemnities to injured employees. Employees receive various benefits, including: health care benefits for the consolidation of an injury, physical, social and vocational rehabilitation, payment of income replacement indemnities, compensation for bodily injury and, as the case may be, death benefits. Subject to certain modalities and exceptions, injured employees who have recovered from their injuries generally have the right to be reinstated in employment to the same or equivalent or suitable position, with the employer for whom they were working at the time of injury. A workers is only entitled to the benefits fixed by Québec's ARIAOD and is not entitled to institute a civil liability action against his employer by reason of his employment injury.

What are the Rights of Employees in the Province of Alberta?

The following statutory employee rights are namely currently in effect in Alberta:

- **Minimum Wage Law:** Alberta's Employment Standards Code (the "AESC") provides for a minimum wage of $8.80 per hour for most workers, with exceptions for various types of salespeople and professionals.
- **Vacation Entitlement:** The AESC fixes minimum annual vacation entitlements of two weeks for each of the first four years of employment, and three weeks for every year thereafter.
- **Vacation with Pay:** The AESC fixes minimum vacation pay requirements equal to 4% of the employee's wages for the year for employees entitled to two weeks vacation or less, and equal to 6% of employee's wages for those entitled to three weeks vacation.
- **Overtime Pay:** The AESC requires an employer to pay overtime wages (1.5 times the employee's regular wage rate) after an employee has worked 44 hours in a week or in excess of eight hours per day, whichever is greater.
- **Pay Equity:** The Alberta *Human Rights Act* (the "AHRA") prohibits employers from discriminating between men and women in rates of pay for substantially the same work.

- **Holidays:** There are only nine annual, paid, statutory holidays prescribed in the AESC. Additionally, the Alberta government invariably proclaims the first Monday in August to be the Civic holiday.
- **Notice on Termination of Employment:** Under the AESC, an employee must receive at least one week's written notice of termination of employment if the employee has completed at least three months of service. As an employee's length of service increases, so does the notice required at termination (up to eight weeks' notice after 10 years service or more). Employees cannot waive their rights under the AESC.

The foregoing are minimum statutory notice requirements that may be increased substantially by common law, depending on the circumstances of the case. In employment agreements, employees can waive their common law rights. Employment can be terminated only for just cause, or on the giving of the minimum statutory notice as summarized above (which may be far less than the employer's common law obligations, which common law right an employee may enforce through the courts), or on payment of a sum equal to what the wages would have been for the applicable notice period in lieu of such notice.

- **Human Rights:** The AHRA and the federal Bill of Rights prohibit discrimination on the basis of ancestry, race, ethnic origin, place of origin, citizenship, creed, colour, religion, sex, sexual orientation, marital status, family status, record of offences, disability and age. Provincial boards have the power to investigate and award damages for loss of income and distress arising out of a discriminatory practice. Employees who are discriminated against may be entitled to significant damage claims, and even reinstatement. However, the focus of the AHRA is to remedy the discriminatory practice, not to punish the wrongdoer.
- **Parental Leave:** The AESC gives 15 weeks of unpaid maternity leave to employees who have 52 weeks of service or more, as well as 37 weeks of unpaid parental leave for both men and women, although the total parental leave taken by both parents cannot exceed 37 weeks. The AESC also provides 37 weeks of parental leave for adoptive parents. This leave can be shared by both parents. The federal *Employment Insurance Act* provides paid benefits for 52 weeks after a two-week qualification period. Employees have the right to return to their jobs following the leave period.
- **Occupational Health Safety:** Alberta's *Occupational Health and Safety Act* provides a comprehensive set of rules that imposes duties on employers in matters relating to the health and safety of workers. Employees must use protective equipment and machinery, and they can refuse to do unsafe work.

The protections summarized above may not apply to in all circumstances and individual situations should be reviewed in the context of applicable limitations and exceptions.

Effect of Employer Bankruptcy

Whether a claimant can successfully claim any of the entitlements summarized above if the employer goes bankrupt varies from entitlement to entitlement.

Employment at Will

The foregoing may contrast with the rights conferred on employees under US law, in that although an employer may terminate an employee's employment at any time, the employer

must provide financial compensation for doing so. In certain cases, a court may order that an employee be re-instated where the employee has been terminated without cause. Canada has no equivalent to the US employment at will concept which permits an employer to end an employee's employment without financial consequence, and permits an employer to change an employee's job description in a manner that would constitute constructive dismissal of the employee. The absence of trial by jury in respect of employee/employer disputes means that settlements and court decisions in Canada regarding employment matters involve modest amounts in contrast with those that can be awarded by US juries.

Is Collective Bargaining Recognized In Canada?

Trade unions, often affiliated with US counterparts, are present in many industries in Canada. Employees have the right to be members of a trade union under both provincial Labour Relations legislation and under the *Canada Labour Code*. The provincial Labour Relations Boards supervise the organization of a trade union in the province. A union that becomes certified has the exclusive right to bargain collectively for all its members and the employer is required by law to bargain with the union in good faith. Unless permitted otherwise by order of a court or by the consent of the Labour Relations Board in question, anyone who purchases a business in which there are unionized workers must honour any collective agreement then in effect as a successor employer. Newfoundland and Labrador have a similar system set out in its *Labour Relations Act*.

Employees in Québec working for an enterprise of provincial jurisdiction have the right to be members of a trade union under the Labour Code. The Commission des relations du travail ("CRT") supervises the organization of a trade union in Québec. A union that becomes certified has the exclusive right to bargain collectively for all its members and the employer is required by law to bargain with the union in good faith. Generally, anyone who purchases a business in which there are unionized workers must honour any certification and collective agreement then in effect as a successor employer.

Does Canada Have Privacy Legislation?

Apart from certain sector-specific privacy laws, the US has not enacted personal information privacy laws. Legislation of this nature is in effect in other jurisdictions, including the Organization for Economic Co-operation and Development Guidelines to the Protection of Privacy and Transborder Flows of Personal Data. In Canada, the right to privacy is a fundamental right entrenched implicitly in the Canadian Charter of Rights and Freedoms and in the Province of Québec, explicitly in its Charter of Human Rights and Freedoms. As summarized below, Canadians have a comprehensive legal framework which governs the collection, holding, use and disclosure of personal information relating to identifiable individuals in both the public and private sectors. In a 2007 survey, Privacy International ranked Canada as second in the world behind Germany in protecting the privacy rights of Canadians. Personal privacy protection remains a concern for Canadians. In a 2004 study, 61% of Canadian businesses linked privacy compliance policies with customer trust and loyalty. As a result, Canadian businesses canvassed in the survey were twice as likely as their US counterparts to assign a senior officer as a privacy officer who reports directly to the chief executive officer of the business.

On January 1, 2001, the federal *Personal Information Protection and Electronic Documents Act* ("PIPEDA") came into effect. Initially, the application of PIPEDA was limited to all private organizations involved in any "federal work, undertaking or business" within the legislative authority of the federal government (e.g., banks, cable, television and telecommunication service providers) and to organizations that transfer personal information across provincial borders "for consideration."

Under PIPEDA, each province had until January 1, 2004 to enact its own private sector personal information protection legislation which was substantially similar to PIPEDA, failing which PIPEDA would apply to all private organizations in each province that failed to pass such legislation. Only the provinces of British Columbia, Alberta and Québec passed such legislation by the end of December 2003. Each of the provincial Acts were confirmed by the federal government as substantially similar to PIPEDA. Personal information protection legislation is now in effect throughout Canada. Although Ontario did not pass an equivalent to PIPEDA, it did enact the *Personal Health Information Protection Act* ("PHIPA") on November 1, 2004. The federal government has declared that PHIPA is substantially similar to PIPEDA and may be relied upon by "health information custodians" in Ontario.

PIPEDA is based on a set of privacy guidelines that were developed by the Canadian Standards Association. The 10 privacy principles are:

- **Accountability**: An organization is responsible for personal information under its control and must designate an individual or individuals who are responsible for the organization's compliance with the 10 principles set out in the legislation.
- **Identifying the purpose:** An organization must identify the purpose for which the information is collected at or before the time the information is collected. If the purpose changes, the organization must identify the change in purpose.
- **Consent**: The individual concerned must give his or her consent to the collection, use or disclosure of personal information, except where to do so would be inappropriate.
- **Limiting collection**: The collection of personal information is strictly limited to the extent it is necessary for the purpose identified by the organization.
- **Limiting use, disclosure and retention:** The use, disclosure and retention of personal information are limited to the purpose for which it was collected, except with the consent of the individual or as required by law. The information should be retained only as long as it is required to fulfill the specified purpose.
- **Accuracy**: Personal information must be accurate, complete and up-to-date as is necessary for the purposes for which it is to be used.
- **Safeguards**: Personal information must be protected by security safeguards appropriate to the sensitivity of the information.
- **Openness**: An organization shall make readily available to individuals specific information about its policies and practices relating to the management of personal information.
- **Individual access**: Upon request, an individual shall be informed of the existence, use and disclosure of their personal information and shall be given access to that information. The individual can challenge the accuracy and completeness of the information and have it amended as appropriate.

- **Challenging compliance**: An individual can challenge the organization's alleged compliance with the above principles and hold the designated individual accountable for the organization's compliance.

Personal information under PIPEDA means any identifiable information about an individual other than such person's "business card" information, that is, the name, title, business address or telephone number of the employee in question. An individual's business email address is considered personal information under PIPEDA.

One of the key requirements of PIPEDA is that the individual's consent is required prior to sharing personal data with the collecting entity's business partners or affiliates or using that data for a previously unidentified purpose.

PIPEDA has no "grandfather" clause for personal data collected prior to 2004, so in order to use personal data collected prior to 2004 companies need to get individuals' consent and provide access for review.

Outside of some sector specific privacy laws, the US does not have comprehensive legislation of this nature in effect. There are similar privacy laws in the EU and it is obvious that the international transmission of personal data throughout the world will and should be regulated.

Québec Privacy Legislation

The Québec *Act Respecting the Protection of Personal Information in the Private Sector* (the "APPIPS") was adopted by the National Assembly on June 15, 1993 and came into effect on January 1, 1994. The APPIPS, which covers all persons carrying on a business in the Province of Québec (including individuals who sell goods and services, partnerships and associations), regulates the collection, holding, use and communication of personal information. The APPIPS also provides for the procedure whereby a person can have access to the file held by a business about him or her and obtain rectification of inaccurate, incomplete or equivocal information that it may contain.

Since January 1, 2001, PIPEDA applies to the commercial activities of a company doing business in Canada, including in the Province of Québec. However, since Québec has its own personal information protection legislation, PIPEDA will only apply in the Province of Québec to the commercial activities of an organization when they involve the collection, use and communication of personal information outside the province (i.e., extra provincial or international) and the commercial activities and employer-employees relations of a federal undertaking (i.e., entities involved in a federally regulated activity such as telecommunications, interprovincial transport, etc.).

The field of application of the APPIPS is the following:

- The collection, use, holding or communication of personal information by a business within the boundaries of the Province of Québec.
- The collection, use, holding or communication of personal information concerning individuals residing in the Province of Québec by a business based outside Québec if:
  (i) originally the personal information has been collected in the Province of Québec; and
  (ii) the company, partnership or association has a business place in the Province of Québec.

In many respects, the Québec legislation goes farther than the federal legislation and is more severe or demanding than the latter. For example, whereas, under PIPEDA, the ways in which consent may be given may vary depending on the circumstances and sensitivity of the information, in the Province of Québec, the requirements of a valid consent to the disclosure and use of personal information are clearly prescribed in section 14 of the APPIPS: consent to the communication or use of personal information must be manifest, free and enlightened, it must be given for specific purposes, and is valid only for the length of time needed to achieve the purposes for which is was requested. Consent given, other than in accordance with these requirements, is without effect.

Essentially, however, PIPEDA and the APPIPS are substantially similar and companies should not have too much difficulty applying the two regimes concurrently by adapting their practices in order to meet the more stringent requirements of the two acts.

Alberta Privacy Legislation

As indicated above, Alberta has its own counterpart legislation in place that has been confirmed by the Federal Government as being substantially similar to PIPEDA.

While PIPEDA is structured around 10 governing principles related to accountability, identifying purposes, consent, limiting collection, limiting use, disclosure and retention, accuracy, safe guards, openness, individual access and challenging compliance, Alberta's *Personal Information Protection Act* ("PIPA") is structured around the requirements of accountability and consent to the collection, use and disclosure of Personal Information. However the requirements of PIPA and PIPEDA are substantially similar.

Personally Identifiable Information

While PIPEDA uses the term "personal information" and PIPA uses the term "personally identifiable information," the terms are similar. For the purposes of PIPA, however, personal information does not included business contact information (an individual's name and position or title, business telephone number, business address, business email, fax number and other business contact information).

Employee Information

Organizations may collect, use and disclose Personal Employee Information (as defined in the PIPA) for reasonable purposes related to managing or recruiting personnel. Personal Employee Information means personal information that is reasonably needed to establish, manage, or end a work, or volunteer work, relationship.

Organizations may collect, use and disclose Personal Employee Information without consent when the individual is an employee (includes an apprentice, volunteer, participant, work experience or co-op student, an individual acting as a contractor to perform a service for an organization or an individual acting as an agent for an organization) or the purpose of collecting the information is to decide whether to hire a potential employee.

The collection, use and disclosure must be reasonable for the purpose and the personal information must be limited to the work or volunteer relationship.

Non-Profit Organizations

PIPA exempts "non-profit organizations" from compliance unless such personal information is being collected, used or disclosed by the non-profit organization in connection with a commercial activity, as defined in PIPA.

Reporting Issuer SEDAR Filings

PIPEDA and its provincial counterparts have a significant effect on a number of key business areas, including the due diligence procedure followed on the purchase and sale of a business, although none of the said Acts contains specific rules regarding business transactions. In a 2005 ruling, the Alberta Information and Privacy Commissioner found that the *Freedom of Information and Protection of Privacy Act* (the "Alberta Act") had been breached where a schedule that was intended to identify the employees of a purchased business by inadvertence included the employees' home addresses and individual social insurance numbers. Complete copies of the agreement were posted on SEDAR. Notwithstanding that the Alberta Act contains a business transaction exception, the Commissioner found that the exception did not relieve the law firms involved in the transaction from liability for this breach of privacy. The Commissioner imposed obligations on the two law firms, including an obligation to appoint a privacy officer at each firm to monitor compliance.

Secondary Marketing

In mid-2005, the Privacy Commissioner of Canada ruled a bank in breach of its PIPEDA obligations when the bank included marketing materials in its monthly mailing without giving its customers an easy and immediate way of opting out of receiving them. The additional materials were found to be "secondary marketing," which was, in this case, determined to be an unauthorized use of personal information.

In Québec, a person carrying on an enterprise may, without the formal consent of the persons concerned, use the names, addresses and telephone numbers of its clients or employees for the purpose of commercial advertising or philanthropic solicitation. However, when an enterprise engages in such practices, it must offer the person concerned the opportunity to opt out, in other words to have his or her name removed from the solicitation list. Subject to the foregoing, it is also possible to provide a list of clients or employees to third parties for marketing or philanthropic purposes.

Outsourcing Services

In April 2007, the Commissioner ruled that Canadian banks participating in the Society for Worldwide Interbank Financial Telecommunications ("SWIFT") were obligated to comply with subpoenas issued by the United States Department of the Treasury on the basis that although SWIFT is subject to PIPEDA, it conducts business in, and is subject to, compliance with US laws. As a result, SWIFT was obligated to disclose the information referenced in the subpoenas served on it. This imposed on the Canadian banks an obligation to review the

provisions of their contracts with SWIFT to ensure that those provisions complied with PIPEDA and that SWIFT had in place policies and procedures that comply with the requirements of PIPEDA. In the context of the agreements between the banks and their customers, there has to be clear disclosure that the information collected by the banks would be disclosed to an entity that is subject to the laws of another country (in this case, the laws of the United States).

Transfer of Personal Information Outside of Canada

While Canada's PIPEDA contains no prohibition against the transfer of personal information outside of Canada, concerns have been raised about potential access to transferred information by government authorities in foreign jurisdictions. To address these concerns, in 2009 the Office of the Privacy Commissioner of Canada issued a set of guidelines entitled "Processing Personal Data Across Borders" to provide advice to organizations that wish to transfer personal information outside of Canada for processing. Included among the Privacy Commissioner's key findings in the guidelines are the following:

- The transferring organization remains accountable for the information that has been transferred outside of Canada;
- The transferring organization is obligated to protect personal information in the hands of contractors; contractual measures are considered to be the primary method of ensuring protection; *and*
- Organizations that do transfer personal information outside of Canada must advise the data subjects that their personal information may be accessed by the courts, law enforcement and national security authorities of the jurisdictions in which the data are located.

Freedom of Information and Protection of Privacy

Ontario has enacted both the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act* which contain provisions intended to protect the personal information regarding individuals collected by provincial and municipal governments.

Like Ontario, the Alberta Act contains provisions intended to protect the personal information of individuals collected by provincial public bodies.

Canada's World Ranking

In a 2007 survey, Privacy International ranked Canada as second in the world behind Germany in protecting the privacy rights of Canadians. Too much should not be read into these results other than that other countries are doing a poor job in protecting the privacy of their citizens.

How Do Canadian Privacy Laws Interact With the US *Patriot Act*?

The US *Patriot Act* empowers US authorities to compel persons subject to it to disclose personal information records in the possession or control of such persons. As noted in the SWIFT case summarized above, where US service providers have possession and control of personal information about Canadian citizens, the Canadian entity providing the personal

information is accountable under Canadian privacy laws unless: (i) the US service provider is obligated to, and does, comply with PIPEDA and the applicable provincial equivalent in dealing with the personal information provided to it; and (ii) the Canadian entity informs the individuals concerned that information about them will be provided to a US service provider who may be compelled under American law to disclose their personal information to US governmental authorities.

One complication arises out of the fact that the use of information disclosed to US authorities is secret. Ontario had enacted the *Business Records Protection Act* (the "BRP Act") in 1990 in response to the US *Foreign Intelligence Surveillance Act*, however, the BRP Act is viewed as ineffective, partly because persons subject to an order issued under the American legislation are prevented by such US law from disclosing the existence of the order or the fact that the records have been disclosed to US authorities.

17. HOW ARE CONSUMERS PROTECTED BY LEGISLATION IN CANADA?

Consumer protection is regulated in Canada primarily at the provincial or territorial level. Each province and territory has one or more statutes regulating consumer transactions (typically defined as being for personal, family or household purposes). Each province and territory has one or more statutes governing various aspects of consumer transactions, which may include some or all of the following:

- Unfair, deceptive or unconscionable practices.
- Unsolicited goods or services.
- Direct sales, future performance and time share contracts.
- Funeral contracts.
- Prepaid purchase cards — gift cards — in some provinces, gift cards in federally regulated areas (e.g., telephone cards) are not subject to provincial gift card regulations which prohibit expiry dates or fees charged against dormant card balances.
- Provision of credit (including through credit cards), including disclosure of costs of credit.
- Credit reporting.
- Debt collection.

Breach of these provisions may result in the consumer transaction being void or unenforceable, in whole or in part, or give rise to compensation orders, fines or imprisonment. Typically, each province and territory has established public offices responsible for receiving, investigating and prosecuting consumer complaints of breach of these provisions.

While there are significant similarities among the statutes of the various jurisdictions, the exact matters covered and the details of the applicable provisions vary between jurisdictions. A more detailed analysis of applicable consumer protection law can be made when the nature of the business being carried on and the jurisdictions in which it will be carried on are known.

Consumer Advertising

Misleading advertising and the regulation of marketing practices form part of the federal *Competition Act*. In addition, each province has legislation that regulates business practices such as false, misleading or deceptive consumer representations. There is also legislation that regulates the use of future performance agreements (previously referred to as executory contracts) to sell goods or services, that is, contracts where either or both parties to the sale undertake future performance, for example, payment for or delivery of, the goods or services. Other key areas of regulation include disclosure of the cost of borrowing (also governed by the federal *Interest Act*), advertising and the use of disclaimer clauses in commercial agreements.

Proposed *Canada Consumer Products Safety* Act

In early 2009, the Government of Canada introduced legislation as part of the Food and Consumer Safety Action Plan, an initiative designed to promote health and safety for Canadians. The regulatory regime created by the *Canada Consumer Product Safety Act* (the "CCPSA"). The Senate (which currently has a majority of Liberal Party members) amended

the Bill passed by Parliament. The Bill will now have to be re-introduced, passed by the Senate without amendment and proclaimed in force. If enacted, the CCPSA will have a significant impact on manufacturers, importers/exporters, advertisers and sellers (at wholesale or retail) of consumer products. The CCPSA, *if enacted*, would impose obligations on all participants in the consumer product supply chain should compel all consumer product manufacturers, importers/exporters, advertisers and sellers to initiate a careful review of each of its consumer products in the context of: (i) whether such product is a "danger to human health or safety" within the meaning of the Act; (ii) whether any statutory recall orders by any domestic or foreign regulatory or governmental body or any province have been issued against the product; (iii) whether any existing labelling or advertising would violate the Act; (iv) what product records and documentation have been retained by it (base retention period is fixed at the usual six years); and (v) what procedures it should initiate to establish the basis for a due diligence defence for it, and for its directors, officers and agents, to the extent such defence is available under the Act. As noted below, penalties for breach of the CCPSA can be severe, and include forfeiture of seized property, fines and/or incarceration.

In response to recent consumer product failures (baby and sports products, in particular) and to the shift of consumer product manufacturing to places outside Canada, the Government of Canada is moving Canada's consumer product safety framework to one that is more far-reaching, regimented and punitive.

The CCPSA will replace Part I of the existing federal *Hazardous Products Act*.

Purpose

The stated purpose of the CCPSA is the enhancement of public health and safety through the modernization of the legislative framework that regulates the manufacture and importation of consumer products, and the advertising, packaging and sale of consumer products in Canada. A consumer product is defined as a product that may reasonably be expected to be obtained by an individual to be used for a non-commercial purpose. A product's components, parts, accessories and packaging are deemed to be part of the consumer product.

The CCPSA seeks to regulate consumer products that represent a danger to human health or safety. For the purposes of the CCPSA, a consumer product will cause danger to human health or safety if it creates an unreasonable hazard as a result of its normal and foreseeable use and which hazard would reasonably be expected to cause the death of an individual exposed to it, cause an injury to such individual or have an adverse effect on the health of that individual. The requirement that a hazard be "unreasonable" is intended to limit the CCPSA from being so broad in its application as to capture consumer products which pose a reasonable risks, such as knives or stovetops.

Prohibitions

The CCPSA contains an outright prohibition of the manufacture, importation, advertising or sale of any consumer product which poses a danger to human health or safety. Also, consumer products may not be packaged, labelled or advertised in a manner that creates an erroneous impression that the product is not a danger to human health or safety.

Certain consumer products are exempted from the Act, typically those products which are covered by other legislation — for example, cosmetics or natural health products (covered under the *Food and Drugs Act*) and ammunition or firearms (covered by the *Criminal Code*). Schedule 2 of the CCPSA expressly prohibits certain specified types of consumer products including certain baby walkers, baby pacifiers, certain products containing listed chemicals or compounds such as PCBs and urea formaldehyde-based foam thermal insulation. One recent example was the voluntary recall on November 10, 2009 by Maclaren USA, Inc. regarding the single and double umbrella strollers sold by it over the last 10 years. Maclaren advised that it had received 15 reports of children placing their finger in the stroller's hinge mechanism, resulting in 12 reports of fingertip amputations in the United States.

Testing and Reporting

The Minister of Health can order a manufacturer or importer of a consumer product to conduct tests on such product and to compile information and documentation necessary for the Minister to determine that the product is in compliance with the Act. Suppliers will also be required to maintain certain documentation relating to the identity of the person from whom the product was obtained and (except for retailers) the person to whom it was sold.

Under section 14 of the Act, manufacturers, importers or sellers of consumer products have duties regarding any incidents involving consumer products of which they become aware. An "incident" includes a recall of a consumer product by a regulatory body, or an occurrence or defect in Canada or elsewhere that resulted or may reasonably have been expected to result in an individual's death, serious injury or other serious adverse effects on their immediate or long-term health. Note the higher standard arising out of the modifier "serious" in contrast to the words used to define the term "danger" above. Where a manufacturer becomes aware of an incident it must provide the Minister with all of the information in its control regarding the incident within two days of becoming aware of the incident. Manufacturers (or importers if the manufacturer is outside Canada) must provide a written report to the Minister setting out certain information relating to the incident, any other consumer product that could have been the subject of a similar incident and proposals for measures it proposes to take with respect to the product within 10 days of becoming aware of the incident, or within such other shorter or longer period as the Minister may specify. The mandated content of the said report and the time periods set out in section 14 would, in many circumstances, appear to impose an impossible compliance burden on consumer product sellers, importers and manufacturers in Canada, and on their directors, officers and agents.

Confidential Information

Business owners may have concerns regarding how the Minister will handle sensitive or confidential information contained in documents or reports provided to the Minister in compliance with the Act. Under section 16 of the Act, the Minister may disclose confidential business information to "a person or government that carries out functions relating to the protection of human health or safety or the environment" — a broadly defined group and set of activities — without the consent of, or notification to, the person to whose business the confidential information relates, provided the recipient of the information enters into an agreement agreeing to keep the information confidential and only use it for the purposes of

carrying out the functions noted above. Under similar conditions, the Minister may disclose personal information to such persons or governments regarding an individual without the individual's consent and without notice to the individual before or after disclosure.

Under section 17 of the Act, where the Minister determines that a consumer product poses a "serious and imminent danger" to health or safety or the environment and disclosure is essential to address the danger, the Minister may disclose confidential information regarding the consumer product without consent from, or prior notification to, the person whose information is disclosed and without obtaining a written confidentiality agreement from the recipient. Although section 17 does not describe the class of person to whom such information may be disclosed, it would appear that it could be disclosed to any person, any group of persons or to the general public, depending on the circumstances. The Minister must notify the person whose confidential information was disclosed on the first business day following disclosure.

Inspection Authority

The CCPSA confers broad discretionary powers upon inspectors appointed by the Minister to administer and enforce the Act. Inspectors may for the purposes of determining compliance (or preventing non-compliance) with the CCPSA "at any reasonable time" enter a place where they have reasonable grounds to believe that a consumer product is being manufactured, imported, packaged stored, advertised, sold, labelled, tested or transported. Other than in respect of a dwelling-house, no search warrant is required. The inspection powers granted by the CCPSA are expansive and include seizure powers and the authority to review and copy information, including information stored on a computer located at the place of inspection. The term "place" specifically includes vehicles, and an inspector has the power to order the owner or operator of a vehicle to stop or move it for the purposes of inspection. An inspector cannot use force to gain entry to a place unless the inspector has a warrant, is accompanied by a peace officer and the warrant authorizes the use of force. In certain circumstances, the Crown has powers of forfeiture for seized property.

In addition to the investigatory powers noted above, an inspector has the authority to issue various orders, including an order requiring the manufacturer, importer or seller to recall a consumer product the inspector has reasonable grounds to believe poses a danger to human health and safety. An inspector may issue an order to stop the manufacture, importation or sale of a consumer product that the inspector has reasonable grounds to believe poses a danger to human health and safety. The effect of the foregoing would be, in certain cases, that an inspector could shut down a manufacturing, importation or distribution business.

If a person subject to an order to recall a consumer product does not comply with the order, the Minister may issue a recall order and manage the recall process at the expense of the non-compliant person. Ministerial orders are interim in nature and cannot exceed an effective term greater than one year. Ministerial orders must be published in the Canada Gazette — inspector orders may be narrower in scope, but they do not have to be so published, and are not subject to any time limit.

The CCPSA grants a limited right to persons affected by a recall order or other measure to have the action taken by an inspector or the Minister considered by a review officer appointed by the Minister. A request for review does not stay the order and the review is limited to

questions of fact or mixed law and fact. Questions of law alone are not subject to review. The order remains in effect unless varied by the review officer.

Offences and Penalties are Treated Differently under the CCPSA

Contravening a provision of the CCPSA (except for certain exempting provisions), and CCPSA regulations or any order made under the CCPSA is an offence which can result in significant sanctions, including fines ranging from up to $250,000 for first offences and up to $5,000,000 for second offences (or a fine at the court's discretion in the case of wilful or reckless contravention) and prison sentences of up to two years. Each day during which the offending activity continues is a separate offence. If the offending party is a corporation the punishment imposed on the corporation can be extended to the directors, officers or agents of the corporation who directed, authorized, assented to or participated in the commission of the offence. A due diligence defence is available for offences under the CCPSA, but not for violations.

The CCPSA also provides for lesser monetary penalties for non-compliance with orders issued by an inspector under either section 30 or section 31, known as "violations." As with offences, directors, officers and agents of a corporation can be liable for violations committed by that corporation. In addition, an employer will be liable for violations committed by an employee acting in the course of their employment. Because the penalties for violations do not include incarceration, a due diligence defence is not available for violations under the CCPSA.

The standard to be met for a conviction of a violation is one of the balance of probabilities, not beyond a reasonable doubt. Beyond a reasonable doubt is the standard which the Crown must meet for conviction of an offence under the Act.

Under section 43 of the Act, the Minister has two years from the time when the Minister became aware of an alleged offence to commence summary conviction proceedings. The limitation period for proceedings by indictment (or serious offences) would be governed by the *Criminal Code*.

As a result, there are three possible approaches that can be taken under the CCPSA, listed in order of severity of the penalty as follows: (i) an inspector may charge a person with a violation (lower fines, no threat of incarceration and no criminal record); (ii) the Minister may charge a person with an offence and proceed by summary conviction (lesser fines and shorter sentences); or (iii) the Minister may charge a person with an offence and proceed by indictment (greater fines and longer sentences).

Powers of Inspectors

On balance, the powers delegated to inspectors under the CCPSA are broadly cast: entry on premises without the need of a warrant, the ability to issue expansive orders that have no limit as to duration, the ability to impose fines (each day of non-compliance is a new violation), limited rights of appeal and those appeals that are permitted are heard by a person appointed under the CCPSA, not before a court law, and no due diligence defence.

What You Should Do

No draft regulations have been published as yet, and as usual, the regulations will frame most of the compliance obligations.

Given the scope of the Act's authority and the onerous obligations it imposes on all parts of the Canadian consumer product supply chain, each consumer product manufacturer, importer, custom broker other agent and seller (at wholesale or retail) should immediately take steps to protect itself by reviewing all consumer products currently in its inventory and by initiating anticipated record-keeping and other procedures. All labels and advertising materials should be inspected and non-compliant inputs destroyed. Each of you should appoint a credible employee to develop appropriate procedures and to monitor employee compliance. Each of you should review your D&O insurance policy to ensure that it provides pay-as-you-go coverage for directors and officers.

Is There Provincial Electronic Commerce Legislation?

Ontario's *Electronic Commerce Act, 2000* (the "ECA") is based on the Uniform Law Conference of Canada's *Uniform Electronic Commerce Act*. It only applies to contracts governed by the laws of Ontario. The ECA is designed to reduce legal uncertainty and remove barriers to electronic contracting, including, for example, Internet contracts. It accomplishes these goals through a series of functional equivalency rules, which allow electronic communications to be used interchangeably with conventional paper-based communications. One of the key aspects of the ECA is that it adopts a facilitating rather than mandatory approach: the ECA creates standards to streamline electronic commerce, but the adoption of those standards is purely voluntary in the sense that it does not require the use, acceptance or provision of documents in electronic form.

The ECA does not apply to wills and codicils, trusts created by wills, codicils or powers of attorney to the extent that they are in respect of an individual's financial affairs or personal care, documents creating or transferring an interest in land which require registration to be effective against third parties, negotiable instruments, and other prescribed documents. The ECA also does not apply to biometric information, that is, information relating to individual biological characteristics and typically used as a means of identification.

The ECA does not affect any law that expressly authorizes or prohibits the use of electronic documents. For example, Ontario's *Land Registration Reform* creates its own system for dealing with the electronic registration of land transfer documents, and is consequently outside the ECA's application. Explicit references to "writing" or "signing" are not considered by the ECA to be express prohibitions on electronic documents or signatures.

The core of the ECA is its functional equivalency rules. These rules establish standards that must be met if an electronic communication is to satisfy the legal requirement of, and be an effective substitute for, a conventional paper-based communication. The fundamental principle behind the functional equivalency rules is that the use of electronic communications instead of conventional paper-based communications does not in itself affect the legal validity or enforceability of those communications. This does not mean that any other applicable laws governing the formation of contracts have been dispensed with by contracting electronically.

Generally, the requirements of functional equivalency vary with the type of communication involved. For example, a legal requirement that a document or information be "in writing" is satisfied by an electronic document where that electronic document is in a form that can be subsequently accessed and used. A legal requirement that a person provide information or a document in writing to another person is also satisfied by an electronic document where the electronic document can be subsequently accessed, used, retained and printed by the recipient.

Under the ECA, any contracts that otherwise meet the requirements of law, but have been entered into electronically, are legally binding. The ECA states that offer, acceptance or any other matter that is material to contract formation or operation can be expressed by means of electronic information or as an electronic document; or an act intended to result in electronic communication such as clicking a mouse, touching an appropriate on-screen icon, or speaking.

The ECA also applies to "anything done in connection with a contract for the carriage of goods" including furnishing the marks, number and quantity or weight of goods, stating the nature or value or goods, issuing a receipt for goods claiming delivery of goods and authorizing the release of goods. In short, the legal requirement that any of the foregoing actions be done in writing is satisfied if the action is done electronically. The ECA creates an exception for documents of title. Where a right is granted or an obligation is to be acquired by a specific individual and, where there is a legal requirement that this be done by the transfer or use of a written document, electronic documents may only be used where they are created by a method that gives a reliable assurance that the right or obligation has become the right or obligation of that individual. The ECA provides that what will be considered a "reliable assurance" is dependent on the specific context of the situation.

The ECA allows electronic signatures as a substitute for the legal requirement that a document be signed if the electronic signature is reliable for identifying the person to whom the signature belongs and if the association between the signature and the document is also reliable. The ECA also establishes rules for when and where electronic documents are deemed to be sent and received. In some cases, actual receipt of the document is not required for a document to be deemed to have been received.

The ECA represents not so much a revolution as a refinement. It is designed to integrate electronic communication and information into Ontario's existing contract law with a minimum amount of disruption. The ECA's fundamental imperative is that documents or information will not be considered invalid simply because they are presented or exist in electronic form. This imperative, which is subject to certain qualifications and exceptions, affects virtually all of the ECA's provisions including the validity of contracts and digital signatures. As noted above, the common law remains relevant for many issues concerning electronic contracts, and there are differences among electronic commerce laws in the various Canadian provinces and among various countries. As a result, disputes based on jurisdictional issues may arise. Finally, there are additional legal requirements arising out of the application of consumer protection legislation to consumer Internet agreements, as summarized under the next heading.

Similar to that of the ECA, the object of the Québec *ECA to Establish a Legal Framework for Information Technology* (the "Québec ECA") is to ensure a legal framework for technology-based documents and to clarify existing rules and regulations to ensure the coherence of legal rules and their application to documentary communications using media based on information

technology, whether electronic, magnetic, optical, wireless or other, or based on a combination of technologies.

The Québec ECA ensures the functional equivalence and legal value of documents, regardless of the medium used, and the interchangeability of media and technologies. For example, as a general rule, the legal value of a document, particularly its capacity to produce legal effects and its admissibility as evidence, is neither increased nor diminished solely because of the medium or technology chosen, whether it is a paper document or a document in any other medium , insofar as, in the case of a technology-based document, it otherwise complies with the legal rules applicable to paper documents.

Under the Act, documents in different media therefore have the same legal value if they contain the same information, if the integrity of each document is ensured and if each document complies with the applicable legal rules. One document may be substituted for another or if a document is lost, the other document may serve to reconstitute it.

In this context, the Québec ECA sets out the rules governing information transfers and the rules concerning the retention, consultation and transmission of documents in a manner that ensures that their integrity are maintained throughout their life cycle. The Act also states the principles underlying the responsibilities of the various service providers acting as intermediaries on communication networks.

The Québec ECA further provides for various ways of confirming the identity of a person communicating by means of a technology-based document, such as an electronic signature, and measures to protect privacy in the context of such communications. Unlike the ECA, the Québec ECA also prescribes the rules for the collection, use, retention and disclosure of biometric data.

It also asserts the necessity of linking a person to a document expressing the will of that person and of linking a document to an association, a partnership or the State, any means allowing them to be identified and, if need be, located, such as certification. It sets the guidelines for the provision of certification and directory services and offers all certification service providers, whether in Québec or elsewhere, the possibility of obtaining accreditation, on the basis of the same assessment criteria, from a person or body determined by the Government.

Finally, to promote the harmonization of technical systems, norms and standards, both at the national and international levels, the Québec ECA provides for the creation of a multidisciplinary committee to foster the compatibility of or interoperability between different media and information technologies. At the time of writing, however, no such committee has yet to be put in place.

Nova Scotia has legislation that is similar to that of the ECA.

What Consumer Protection Legislation Applies in Canada?

Each of the Canadian provinces has consumer protection legislation in place (each a "Consumer Protection Act") which identifies unfair business practices, implies terms into consumer contracts, and prescribes rights and remedies for consumers under consumer agreements, including future performance agreements, time share agreements, Internet

agreements, direct agreements, remote agreements, personal development services agreements, agreements for loan brokering, motor vehicle repairs and personal property (e.g., equipment) leases.

There are differences between provinces, but by way of example, the Ontario Consumer Protection Act:

Unfair Practices, Implied Warranties and Unsolicited Goods

The Ontario Consumer Protection Act addresses remedies arising from supplier/provider misrepresentations regarding: (i) the delivery or performance of goods or services within a specified time; (ii) the purpose of any charge; and (iii) the benefits that are likely to flow to a consumer if the consumer helps a business obtain new or potential customers. The Ontario Consumer Protection Act also provides that it is an unfair practice for a person to use his/her custody or control of a consumer's goods to pressure the consumer into renegotiating the terms of a consumer transaction. Under the Ontario Consumer Protection Act a consumer may exercise his/her remedies for unfair practices (i.e., rescission, or recovery of amounts paid in excess of the value of the goods or services and/or damages) within one year after entering into the agreement.

The Ontario Consumer Protection Act renders void any attempt to negate the implied conditions and warranties under the *Sale of Goods Act* in connection with a consumer sale and implies into each consumer contract a deemed warranty that services supplied under a consumer agreement are of a reasonably acceptable quality. This warranty also cannot be waived or otherwise avoided.

The Ontario Consumer Protection Act prohibits a supplier from charging a consumer an amount that exceeds the estimate by more than 10 per cent.

Under the Ontario Consumer Protection Act, a consumer has no obligations for unsolicited goods or services (i.e., provided without any request by the consumer, which cannot be inferred solely on the basis of payment, inaction or passage of time). Goods or services are deemed unsolicited if there is a material change without the consumer's consent. Consent may be given in any manner, but the supplier has the onus of proving consent was obtained.

The Ontario Consumer Protection Act also renders invalid arbitration clauses in a consumer agreement or a related agreement.

Internet Agreements and Other Specific Consumer Agreements

A remote agreement is a consumer agreement entered into when the consumer and supplier are not present together. Agreements entered into over the phone or by mail would fall within this category. Before entering into a remote agreement, a supplier must disclose prescribed information to the consumer, which includes contact information of the supplier, description of the goods and services, a itemized list of prices, a description of additional charges, the total amount payable by the consumer, terms and methods of payment, any credit terms, date for delivery of goods or completion of services, and a supplier's refund policy.

Before a remote agreement is entered into, the supplier must provide the consumer with an express opportunity to accept or decline the agreement and to correct any errors. A copy of the remote agreement, which must include the information described above, must be

delivered to the consumer by the earlier of: (i) 30 days after the supplier bills the consumer; or (ii) 60 days after the consumer enters into the agreement. The remote agreement may be delivered by email, fax, mail, or any other manner that allows the supplier to prove the consumer has received it.

If the prescribed information is not provided to the consumer prior to entering into the remote agreement, it may be cancelled within seven days of receiving a copy of the agreement. A consumer may also cancel a remote agreement within one year of the date it is entered into if the consumer does not receive a copy of the agreement in accordance with the Ontario Consumer Protection Act.

Direct agreements are negotiated between the supplier and the customer, in person, but not at the supplier's place of business. The Ontario Consumer Protection Act confers a right on consumers to cancel the direct agreement: (i) within one year of entering into the contract if the consumer does not receive a copy of the agreement that complies with the Ontario Consumer Protection Act; and (ii) for any reason within a 10-day cooling off period.

The Ontario Consumer Protection Act contains provisions relating to future performance agreements (previously referred to as future performance agreements) similar to those for direct agreements, save that the right of cancelation arises if delivery or performance under the agreement is delayed by more than 30 days.

An Internet agreement is a consumer agreement formed by text-based Internet communications. For detailed information on the application of the Ontario Consumer Protection Act to Internet agreements, see the heading "How Does Provincial Consumer Protection Legislation Affect Electronic Contracts?" on page 17.12.

The renewal, amendment and extension of future performance agreements, direct agreements, remote agreements and Internet agreements are subject to the following: If the agreement contains a provision for amendment, renewal or extension, it must: (i) indicate what elements are subject to change and how often a supplier may make changes; (ii) give the consumer the alternative of terminating the agreement or retaining the existing agreement unchanged (or both alternatives); and (iii) require that the consumer be given advance notice of any change. Any change takes effect 30 days after the consumer receives notice of it, or a later date specified in the notice. The notice must comply with various prescribed requirements, which include disclosing all proposed changes. Any change cannot retroactively affect rights or obligations of the consumer. If the consumer agreement does not contain a provision regarding amendment, renewal or extension, such changes may only be made if the consumer explicitly, and not merely by implication, agrees to the proposed change. The change is effective on the date specified, but only if the supplier provides an updated version of the agreement to the consumer within 45 days after the consumer has agreed to the change, which updated version must disclose all changes.

Time share agreements must: (i) be in writing; (ii) contain prescribed information, including a consumer's cancellation rights; and (iii) allow for cancellation for any reason within 10 days of receipt by the consumer of a copy of the agreement. These agreements may also be cancelled by the consumer within one year if the consumer is not provided with a copy of the agreement that complies with the Ontario Consumer Protection Act.

The provisions in the Ontario Consumer Protection Act relating to personal development services apply to all services for which payment is required in advance. Professional development services are defined as services for health, fitness, modeling and talent, and matters of a similar nature, as well as facilities used for the instruction of such services. The Ontario Consumer Protection Act applies only if advance payments are required and the services are ***not*** provided by a non-profit, co-operative, private club owned by its members, or any golf club. The Ontario Consumer Protection Act prescribes information that must be included in these agreements, restricts the term of agreements (which includes wording about the consumer's cancellation rights), restricts the term of agreements to one year, limits initiation fees and requires that monthly installment plans be made available. The Ontario Consumer Protection Act also provides for a 10-day cooling off period and a right to cancel the agreement within one year if the consumer does not receive a copy that complies with the Ontario Consumer Protection Act. Payments for services or facilities that are not available at the time of payment must be paid to a trustee.

Gift Card Restrictions

In 2007, the Ontario government introduced regulations governing gift cards. Subject to a number of limited exceptions (charities and regarding a specific good or service), no supplier may enter into a gift card agreement that has an expiry date on the future performance of the agreement.

Application of the Ontario Consumer Protection Act

The Ontario Consumer Protection Act only applies if the consumer is an individual acting for personal, family or household purposes. It does not apply to corporate consumers or any consumer who is acting for business purposes. Subject to limited exceptions, the Ontario Consumer Protection Act applies to all consumer transactions where the consumer or the supplier is located in Ontario.

Internet agreements, remote agreements, future performance agreements and personal development services agreements are only subject to the Ontario Consumer Protection Act if the consumer's total potential payment obligation under the agreement exceeds $50.

Where a consumer agreement meets the criteria of more than one type of agreement under the Ontario Consumer Protection Act, all the applicable provisions must be complied with, except where the application is expressly excluded. The regulations under the Ontario Consumer Protection Act provide some relief to this overlapping application, such that conflict between different requirements is avoided.

The Ontario Consumer Protection Act does not apply to:

- Transactions regulated under the Ontario *Securities Act*.
- Financial services relating to investment products.
- Consumer transactions relating to real property, other than certain time share agreements.
- Prescribed professional services, such as those provided by lawyers, accountants, engineers and architects.

In addition, the supply of accommodations, other than under time share agreements, is exempt from the provisions applicable to Internet agreements, remote agreements and future performance agreements.

How Does Provincial Consumer Protection Legislation Affect Electronic Contracts?

Under Ontario's Consumer Protection Act and similar legislation in Québec, consumers have new rights in respect of Internet agreements. Internet agreements are defined in the said Act as agreements formed by text-based Internet communications for the supply of goods or services for person, family or household purposes (i.e., not for business purposes) that involve a payment in excess of $50. The said legislation sets out the following requirements for these agreements.

Disclosure of Information

Before a consumer enters into an Internet agreement, a supplier must disclose prescribed information to the consumer, which includes contact information of the supplier, a description of the goods and services, an itemized list of prices (and any additional charges and the total amount payable), terms and methods of payment, any credit terms, date for delivery of goods or completion of services, delivery arrangements, and a supplier's refund policy. This is a long list. The information must be "clear, comprehensive and prominent" and be provided in a manner that ensures the consumer has accessed the information and is able to retain and print it.

Express Opportunity to Accept/Decline and Correct Errors

Immediately before an Internet agreement is entered into, the consumer must be provided with an express opportunity to accept or decline the agreement and to correct errors.

Deliver Copy of Agreement

Within 15 days after the date an Internet agreement is entered into, the consumer must be provided with a copy by email, fax, mail or any other manner that allows the supplier to prove the consumer has received it. The agreement must contain the information described under the heading "Disclosure of Information," as well as the consumer's name and date the agreement was entered into.

Cancellation of Agreement

If the prescribed information is not disclosed in advance, or there was no express opportunity to accept/decline the agreement or correct errors, an Internet agreement may be cancelled within seven days after receiving a copy of it. If a copy of the Internet agreement is not provided, the agreement may be cancelled within 30 days after it is entered into.

Amendment, Renewal, Extension

If the Internet agreement does not contain a provision regarding amendment, renewal or extension, such changes may only be made if the consumer explicitly, and not merely by implication, agrees to the proposed change. The change becomes effective on the date

specified, but only if the supplier provides an updated version of the agreement, including the text before and after the change, to the consumer within 45 days after the consumer has agreed to the change.

If the Internet agreement does contain a provision for amendment, renewal or extension, such changes may be made without explicit agreement of the consumer if:

- The amending provision indicates what elements of the agreement are subject to change and how often a supplier may make changes;
- The amending provision gives the consumer, as an alternative to accepting the change, the option of terminating the agreement, retaining the existing agreement unchanged, or both options; *or*
- The agreement requires that the consumer be given advance notice of any changes.

Notice of any change to an Internet agreement effected by notice only (i.e., without the consumer's explicit consent) must be given at least 30 days in advance and cannot retroactively affect the consumer's rights and obligations before the effective date of the change. This notice must disclose all the changes to the agreement and comply with other prescribed requirements.

Alberta does not currently have legislation in place to deal with electronic documents and signatures. Pursuant to Alberta's *Fair Trading Act*, regulations were passed in 2001 which give consumers certain rights in respect of Internet agreements. Those rights are similar to those found under the Ontario and Québec Consumer Protection Legislation described above.

18. WHAT LAWS GOVERN THE ACQUISITION, USE AND DEVELOPMENT OF REAL ESTATE?

What Rules Apply to the Purchase and Sale of Real Property?

In most provinces, a non-resident has the right to purchase, hold and sell real property. Generally, for a corporation to purchase, hold and sell real property in a province other than the one in which the corporation is incorporated, it must apply for and hold a valid extra-provincial registration or licence.

In Alberta, the *Agricultural and Recreational Land Ownership Act* and its regulations restrict the rights of non-Canadian citizens and foreign corporations to acquire any interest in lands in Alberta outside the boundaries of urban municipalities.

Land registration in Alberta is based on the "Torrens system," whereby the Government of Alberta through its Land Titles Office and by virtue of the *Land Titles Act* has custody of all original land titles, documents and plans and has the legal responsibility for the validity and security of all registered land title information. As a result, title insurance is not required by law nor is it normally used in Alberta to close sale or mortgage transactions.

In Saskatchewan, *The Saskatchewan Farm Security Act* (the "SFSA") restricts the ownership of farm land and the holding of an interest in farm land by a "non-resident person" or a "non-Canadian-owned entity." "Farm land" is defined in the SFSA as real property located outside of a city, town, village or hamlet that is capable of being used for farming but does not include minerals or land used in processing or storing minerals. An "interest in farm land" is defined to include a purchase, lease, and option to purchase or lease, but excludes a *bona fide* mortgage interest. Ineligible individuals or entities must apply to the Farm Land Security Board for an exemption to acquire an interest in more than 10 acres of farm land in Saskatchewan.

Land Transfer Taxes

Ontario's *Land Transfer Tax Act* provides that upon a change in the underlying (registered or beneficial) ownership of any real property located in Ontario, the party acquiring the interest must pay land transfer tax. For further information see the relevant section under the heading "What Other Taxes are Imposed in Canada" on page 4.11.

Nova Scotia's deed transfer tax is set at the municipal level and may be imposed on the value of the transaction depending on the applicable municipality.

Unlike in some other provinces, there is no land transfer tax applicable to real estate transactions in Newfoundland and Labrador. However, the Registry of Deeds charges fees for registrations of both deeds and mortgages. While there is a cap of $5,000 for the registration of mortgages, no such cap exists for the registration of deeds. Potential purchasers of property in Newfoundland and Labrador should keep this in mind, as the registration costs for large commercial and/or residential property can be extensive.

In New Brunswick, the *Real Property Transfer Tax Act* levies a rate of one-quarter of one percent (0.25%) on most transfers of real property, with limited exceptions. This rate is applies

to the greater of: (i) the consideration for the transfer; or (ii) the assessed value of the transferred property.

There is no land transfer tax in Alberta, however the Land Titles Office does charge fees for registration of transfers of title and mortgages at the rate of $1 for each $5,000, calculated in the case of transfers on the value of the lands and in the case of mortgages on the lesser of the mortgage amount or the value of the lands.

British Columbia's *Property Transfer Tax Act* provides that upon a change in the registered ownership of any real property located in British Columbia, the party acquiring the interest must pay property transfer tax. The tax also extends to the registration of leases of real property having a term exceeding 30 years. The tax rate is 1% of the first $200,000 of the fair market value of the interest being purchased or leased and 2% on the value exceeding $200,000.

What Rules Apply to the Use and Development of Real Property?

Ontario's *Planning Act* regulates the use and development of land in Ontario. Zoning regulations and subdivision control affect the manner in which property may be developed. Although the Minister of Municipal Affairs and Housing has supervisory powers under the *Planning Act*, many of the functions are delegated to local municipalities. Each local municipality has an official plan that sets out in broad terms the use to which lands within the municipality may be put. Zoning by-laws govern such matters as building coverage and lot-line set-backs as well as permitted uses.

Planning in Nova Scotia is governed by the *Municipal Government Act* and the applicable municipal land control by-laws.

Planning in Newfoundland and Labrador is governed by the *Urban and Rural Planning Act, 2000* and the by-laws applicable thereunder.

Planning in New Brunswick is governed by the *Community Planning Act* and the applicable municipal land control by-laws.

Use, development, zoning and subdivision of lands in Alberta are under the control of the various municipalities pursuant to and subject to the provisions of the Municipal Government Act.

British Columbia's *Local Government Act* is the principal statute regulating the use and development of land in British Columbia. Zoning regulations and subdivision control affect the manner in which property may be developed. Under British Columbia's *Local Government Act* local municipalities adopt an official plan that sets out in broad terms the use to which lands within the municipality may be put. Zoning by-laws govern such matters as building coverage and lot-line set-backs as well as permitted uses.

The ability of an owner to subdivide property is also regulated in British Columbia. Development charges are also imposed by many municipalities on new developments within their jurisdiction. Building codes set specific standards for the construction of buildings, and municipalities require building permits before the commencement of construction. Before commencing the development of any project, it is essential that all required regulatory approvals be obtained.

Pending Land Registration Reform in Newfoundland and Labrador

Newfoundland and Labrador currently operates a registry based system pursuant to the *Registration of Deeds Act*. However, this Act will be repealed in early 2010 and replaced with a new modern act which will reflect the use of modern technology, new search methods and more consumer friendly practices, including online registration. The records maintained in the Registry of Deeds relate to real estate in the Province of Newfoundland and Labrador dating back to the early 1800s. This information can be searched through a manual index system from 1825–1979, and an electronic database from 1980 to present. Access to the electronic database is restricted to registered users.

What Rules Apply to Residential Rental Properties?

In Ontario, the *Tenant Protection Act* governs residential tenancy landlord and tenant obligations. The first rent charged to a new residential tenant by a landlord is not subject to control, although all the increases thereafter, as long as the same tenant is in possession of the property or unit, are subject to rent controls. However, landlords and tenants can negotiate increases above the rent control guideline if the landlord incurs certain capital expenditures or provides additional services. In the absence of a negotiated agreement, a landlord may apply to the Ontario Rental Housing Tribunal for rent increases above the guideline.

In Nova Scotia, the *Residential Tenancies Act* governs these contracts but there are no rent control provisions in Nova Scotia.

In Newfoundland and Labrador, the *Residential Tenancies Act, 1999*, governs residential, tenancy, landlord and tenant obligations.

In New Brunswick, the *Residential Tenancies Act* governs residential tenancy obligations both in respect of landlords and tenants. It sets out rules relating to notice periods, the payment and recovery of damage deposits, lease agreements, and assignments to name a few. It contains certain protections for both landlords and tenants and deems all residential tenancies to comply with the standard form of lease set out in said Act. Contracting out of the standard form of lease is not permitted and any provision of a lease (or any other document) purporting to do so is void.

In Alberta, the *Residential Tenancies Act* requires, in respect of residential tenancies, that at least 365 days lapse between rent increases and non-default terminations may require at least 365 days notice.

In British Columbia, the *Residential Tenancy Ac*t governs residential tenancies in that province. The initial rent charged to a new residential tenant by a landlord is not subject to control, although all the increases thereafter, as long as the same tenant is in possession of the property or unit, are subject to rent controls. However, a landlord may in unusual circumstances apply to the Residential Tenancy Branch for rent increases above the guideline.

What Environmental Standards Apply in Canada?

Legislation concerning the environment is generally within the jurisdiction of the provinces, although the federal government has also legislated in this area, particularly on issues involving matters of national environmental significance, some of which are restricted in

application to federal lands (*Canadian Environmental Protection Act, Canadian Environmental Assessment Act, Fisheries Act, Canada Shipping Act, Navigable Waters Protection Act, Species at Risk Act* and the *Pest Control Products Act*). Responsibility for clean-up costs may be imposed on any person who has, or had in the past, the management or control of the contaminant. Environmental laws have focused on identifiable current practices or accidental events that contaminate the natural environment or property. Ontario environmental laws are no more stringent than those in effect in the United States. Environmental due diligence (Phase 1 and Phase 2 assessments) for both purchasers and lenders is usual practice throughout Canada.

On March 10, 2008, Environment Canada announced refinements to its Regulatory Framework for Industrial Greenhouse Gas Emissions. Those industries governed by the framework (electricity generation, oil and gas, pulp and paper, iron and steel, iron ore pelletizing, smelting and refining, cement, lime, potash, chemicals and fertilizers) will be required to reduce by 2010 greenhouse gas emissions by 18% from 2006 levels. Compliance with thresholds will earn those firms in compliance tradable emission credits which can be sold to regulated firms that fail to meet applicable targets. In addition, Environment Canada has established an Offset System for Greenhouse Gases to encourage construction of projects that achieve quantifiable and verified reductions in greenhouse gases.

In Ontario, the principal legislation is the *Environmental Protection Act*. In 2001, it was amended by the *Brownfields Statute Law Amendment Act,* which established an Environmental Site Registry of contaminated properties. The amendments provided exemptions from liability to secured parties (and receivers appointed by them or trustees in bankruptcy appointed by the courts) who make loans to owners of contaminated properties in respect of such matters as actions taken by them: (i) to investigate the property; (ii) relating to the supply of water, security, insurance and payment of taxes to preserve or protect their interests in the property; (iii) relating to the safety of persons; and (iv) to mitigate impairment to the natural environment. The brownfield amendments have facilitated the redevelopment of many industrial sites throughout the province since it came into force.

Nova Scotia, Newfoundland and Labrador and New Brunswick have similar environmental protection legislation.

In Alberta, the *Environmental Protection and Enhancement Act* deals with many aspects relating to the environment, hazardous materials and waste, contamination, conservation, remediation, reclamation and enforcement. Under certain circumstances, all present and past owners and occupiers of lands may have some responsibility and liability for contamination and resulting damages. Accordingly, appropriate due diligence is recommended in respect of any transaction relating to lands.

In British Columbia, the principal legislation is the *Environmental Management Act* which established an Environmental Site Registry of contaminated properties. The owner of property has certain duties in connection with the discharge of contaminants and hazardous materials into the environment from the property. Liabilities associated with improper waste management practices may be inherited by subsequent owners of property.

A purchaser should assess the environmental risks involved in the property by inspecting the company and public records to ascertain the environmental status of the property. In many cases, a purchaser may carry out an "environmental audit" of the property being purchased, which can include conducting scientific testing and technical analysis of the property. It should be noted that government officials in Canada do not "certify" that a property is free from environmental risk, and a purchaser must undertake its own investigations in this regard.

British Columbia's *Environmental Management Act* provided exemptions from liability to secured parties (and receivers appointed by them or trustees in bankruptcy appointed by the courts) who make loans to owners of contaminated properties in respect of such matters as actions taken by them: (i) to investigate the property; (ii) relating to the supply of water, security, insurance and payment of taxes to preserve or protect their interests in the property; (iii) relating to the safety of persons; and (iv) to mitigate impairment to the natural environment.

Is Retail Shopping on Sundays Permitted?

The right of retailers to remain open for business on Sundays is under provincial jurisdiction, in many cases such provinces have delegated regulation of Sunday shopping to municipalities. Rules vary by province, but generally, only limited retail shopping is permitted in Canada on Sundays. A notable exception is Ontario, which permits province-wide Sunday shopping, but no shopping on provincial holidays such as Christmas, New Year's Day, Thanksgiving or any of the other five annual statutory holidays. Shopping is allowed on Boxing Day, the first business day following Christmas, although employees cannot be compelled to work on that day. New Brunswick has laws similar to the above, but retail shopping is prohibited on Boxing Day.

In Nova Scotia, there is no restriction on Sunday Shopping. Stores are prohibited from opening on Remembrance Day, Good Friday, Canada Day, Labour Day, Christmas Day, Boxing Day, Easter Sunday, and Thanksgiving Day. The first five are required to be days off with pay while the final three may be unpaid time off.

In Newfoundland and Labrador there is no restriction on Sunday Shopping. However, pursuant to the *Shops' Closing Act*, there are certain holidays on which shops are excluded from opening without a special permit to do so or under other limited circumstances set out therein.

In Alberta, retail shopping is permitted on Sundays. The ESA provides for general holiday pay for employees in respect of declared statutory/general holidays.

19. ARE CLASS ACTIONS A RISK FOR BUSINESS IN CANADA?

Yes. Several Canadian provinces have passed legislation to authorize and regulate class actions (often called "class proceedings" in Canada) in a manner similar to US legislation, starting with Québec in 1976, Ontario in 1992 and British Columbia in 1995. In 2001, the Canadian Supreme Court held that, irrespective of whether legislation has been passed, class action should be recognized and implemented by the courts as a procedure available to plaintiffs throughout Canada.

A class action is a procedure whereby one or more plaintiffs who are appropriate representatives of a class of claimants may commence an action on behalf of the larger identifiable class and raise common legal issues that may be determined with respect to the class as a whole, and which is a preferable procedure for the resolution of the claims of the plaintiffs and the class members. Before a class action may proceed, the court must certify it as such.

Although Canadian class action legislation has been explicitly drafted to make the obtaining of court certification easier than in the United States, Canadian courts (with the possible exception of Québec) have interpreted the legislation in a relatively conservative fashion. Notwithstanding this, class actions have been commenced and certified in a range of circumstances, including investor misrepresentation, securities fraud, defective and dangerous products, franchising, and standard form contracts.

There are a number of practical differences between class actions in Canada and those in the US that affect business risk. These are:

- There is no *per se* right to a jury trial in a Canadian class action proceeding , and the few class actions that have proceeded to trial have been determined by a judge without a jury.
- Courts have approved levels of contingent fees for plaintiffs' lawyers which, although much greater than the norm in Canada, are relatively small compared to the fees approved in litigated and settled cases in the US.
- An unsuccessful representative plaintiff in a class action is ordinarily required to pay the court costs and a portion of the fees incurred by the defendant in the case. In a 2007 Supreme Court of Canada decision, the Court confirmed the "loser pays the winner's costs" principle. In a 2008 case, the Ontario Court of Appeal awarded costs on a substantial indemnity basis, that is, in greater amounts than expected, (because fraud had been alleged in the pleadings) against all plaintiffs where the class action claim was dismissed (for some of the plaintiffs, on technical grounds). These two recent rulings are anticipated to have a substantial dampening effect on future class action proceedings before Canadian courts.
- Both compensatory and punitive damage awards tend to be much smaller in Canada than in the US, and more subject to appellate review.

On balance, although class actions have quickly become a significant part of litigation practice in Canada, they have generally been regarded as a manageable cost of doing business. It has been noted that defendants have accepted the foregoing and shifted their efforts away from certification toward an active defence of certified claims, with the effect of increasing financial pressure on class action claimants and their counsel in carrying the claim to trial or settlement.

The Possible Use of Arbitration Clauses to Forestall Class Action Proceedings

Two 2007 Supreme Court of Canada decisions dealt with cases that arose in circumstances where consumers attempted to commence class action proceedings in Québec where the contracts in question, by their terms, purported to bar class action proceedings in favour of private arbitration. In both cases, the Supreme Court held that the matters should be dealt with by arbitration and not by class action proceedings. Ontario and Québec had consumer protection legislation override mandatory arbitration provisions in consumer contracts. The Supreme Court held that legislation of this nature would not be applied to contracts entered into prior to the date on which the consumer protection legislation came into effect.

Since then a case in Ontario and one in British Columbia found ways not to apply the 2007 Supreme Court rationale in certification proceedings, ruling that the mandatory provision in an a consumer contract in place prior to the amendment to consumer protection legislation was just one factor to consider in certification proceedings.

As a result, the law on this issue is unclear, and it is important that consumer product and service providers with agreements that mandate arbitration to settle disputes carefully review the facts relating to any class action proceeding. Some members of the class action proceedings may be excluded from the class of claimants.

20. LIMITATIONS LAW

A limitation period refers to a time limit, prescribed by statute, within which a legal proceeding must be brought. A claim that is not started within the applicable limitation period is vulnerable to a limitations defence, and if such a defence is successful, the defendant will be immune from liability despite the merits of the claim.

The policy behind limitations legislation is that at some point after committing an act which might give rise to a claim, a defendant is entitled to peace of mind that no such claim will be brought. In addition, limitation periods encourage claimants to bring actions in a timely way as the quality and availability of evidence diminishes over time.

Ontario

On January 1, 2004, Ontario's *Limitations Act, 2002* (the "Limitations Act 2002") came into force. The Limitations Act 2002 limits the period of time during which a person may initiate court proceedings in Ontario in respect of a claim against a defendant. For purposes of the Limitations Act 2002, a "claim" is one to remedy an injury, loss or damage from an act or omission.

The Limitations Act 2002 was amended effective October 19, 2006 as summarized under the heading "Contracting Out of the Limitations Act 2002" below.

Finally, the Limitations Act 2002 was amended on October 22, 2008, but having effect retroactively from January 1, 2004 to provide that the two-year (basic) limitation period for demand obligations created from and after January 1, 2004 begins to run on the first day on which there is failure to perform the obligation in question once a demand for performance has been made.

The Ontario Two-Year Basic Limitation Period

The basic limitation period (the time during which an action may be commenced in Ontario) is two years from the earlier of: (i) the day on which the essential elements (act or omission by a known person resulting in damages to the claimant) of the claim are known to the claimant; and (ii) the day on which those elements were discoverable. There is a rebuttable presumption that a claimant discovered all the essential elements of the claim on the day on which the act or omission giving rise to the subject loss or damage occurred (see below). The foregoing represents a codification of the existing common law rules.

There are a number of exceptions to the basic two-year rule. Where the two-year rule applies, it represents a significant reduction from the general six-year limitation period for contract and tort claims in effect in Ontario until December 31, 2003, and it represents an increase in certain other limitation periods. For example, the period during which a claim for unpaid wages may be prosecuted against corporate directors was increased from six months to two years. However, it does mean that a number of limitation periods of varying lengths have been eliminated. Finally, there are circumstances where the running of a limitation period may be suspended by agreement (see below).

The Ontario 15-Year Ultimate Limitation Period

In addition to the basic limitation period, there is an ultimate limitation period of 15 years from the day on which the act or omission takes place, regardless of whether the essential elements of the claim are, or become, known to the claimant or were discoverable during the 15-year period and whether any other limitation period has not run. The only exceptions to this rule are: (i) where at any time after October 19, 2006, the parties to a business agreement become aware of a claim (that is, the claim is "discovered") they may agree to suspend the operation of the ultimate limitation period; and (ii) where the claim in question is for conversion against a bona fide purchaser of personal property, in which case, the ultimate limitation period is fixed at two years from the date of the sale of the personal property to the purchaser.

Certain Claims Subject to No Limitation Periods in Ontario

There are claims that are not subject to any limitation period, for example, a proceeding:

- For a declaration where no consequential relief is sought;
- To enforce an order — in that regard, the order must be one issued by an Ontario court. Orders issued outside of Ontario are treated as simple debt claims, and, as a result, the plaintiff must apply to an Ontario court for an order of that court to recognize the judgment within two years of the foreign court judgment having issued (unless the judgment comes within the provisions of the *Reciprocal Enforcement of Judgments Act* (orders of other Canadian provincial courts), in which case the award holder may have six years to apply (see below);
- To obtain support under the *Family Law Act*;
- To enforce an award under the *Arbitration Act, 1991*;
- By a debtor in possession of collateral to redeem it;
- By a creditor in possession of collateral to realize against it;
- By the Crown to recover fines, taxes, penalties and interest;
- To recover student loans, awards, social assistance recoveries and grants; *and*
- For an environmental claim that has not been discovered.

Certain Existing Ontario Statutory Limitation Periods Unchanged

There is a lengthy list of specific statutory limitation period provisions, referenced in a schedule to the Limitations Act 2002, that have been left unchanged. The list includes provisions under the following Ontario statutes involving court applications:

- *Bulk Sales Act* (six-month limitation period following required public register filings for setting aside sales retained).
- *Construction Lien Act* (45-day limitation period and sheltering concepts retained).
- *Insurance Act* (one-year limitation period retained).
- *Libel and Slander Act* (three-month limitation period retained).
- *Mortgages Act* (a proceeding to recover under a building mortgage still must be commenced within one year of the mortgage's maturity date).
- *Reciprocal Enforcement of Judgments Act* (six-year limitation period following original judgment. Under the Act, a judgment includes an award in proceedings on an arbitration if the award has, in pursuance of the law in force in the province or territory where it was

made, become enforceable in the same manner as a judgment given by a court therein. The foregoing implies that only an award under a Canadian provincial Arbitrations Act is so included in the definition of judgment. The Limitations Act 2002 only references arbitrations made pursuant to the *Ontario Arbitrations Act, 1991*. It does not reference the model arbitrations law recognized in Ontario law by *International Commercial Arbitration Act*. A 2007 Alberta case determined that a foreign arbitral award was nothing more than a simple contract debt, and the basic two year limitation period in the Alberta limitations legislation applied. As a result, caution should be exercised when relying on the six-year period set out in the Ontario *Reciprocal Enforcement of Judgments Act*.)

- The limitation laws of Alberta, and possibly other provinces, provide for a two-year limitation period for both court orders and arbitral awards.
- Remedies for *Organized Crime and Other Unlawful Activities Act, 2001* (15-year limitation period retained).
- OSA (the 90-day rescission period under section 135 and the 180-day/three-year limitation period under section 138 retained).
- *Trustee Act* (action under section 38 still may not be brought after two years from the date of the death of the deceased).
- Judicial Review Procedure Act (proceedings and appeals unaffected).
- *Provincial Offences Act* (proceedings unaffected).
- *Constitution Act, 1982* (aboriginal claims against the Crown continue to be governed by section 35).
- Part 1 of the Limitations Act 2002, was renamed as the *Real Property Limitations Act* (real estate limitation periods in effect as at January 2004 unchanged).

Statutory Notice Periods Unaffected

Do not confuse the two-year basic limitation period during which a claimant can prosecute a claim in the courts with an obligation imposed by statute that a claimant in a specified period of time give a written notice of claim (e.g., to a governmental body or insurer) as a pre-condition to a claim. The Limitations Act 2002 has not changed any notice provisions in any Ontario statutes.

No Exception for Equitable Remedies

Actions for equitable remedies such as detrimental reliance and unjust enrichment are subject to the provisions of the Limitations Act 2002.

Transition Rules

The following are the transition rules from the old regime to the new one:

- Where no proceeding in respect of a claim has been commenced before January 1, 2004 based on acts or omissions that occurred prior to that time, if the prior limitation period has expired, no proceeding may be commenced after January 1, 2004.
- Where the prior limitation period has not expired, and if the Limitations Act 2002 provides for a limitation period for claims of the nature in question and if the claim has not been discovered by the claimant, then the said causal act or omission will be deemed to have occurred on January 1, 2004. If the claim has been discovered by the claimant, then the

former limitation period applies. This latter rule means that many long-term contracts such as insurance policies (and, in particular, disability insurance policies) existing as at December 31, 2003 will continue to be governed by the old rules well past a time when these rules are likely to be widely understood. There are traps for the unwary in any change of the law.

- Where no applicable prior limitation period exists, but the Limitations Act 2002 provides for a limitation period for claims of the nature in question and if the claim has not been discovered by the claimant, then the causal act or omission will be deemed to have occurred on January 1, 2004. If the claim has been discovered by the claimant, then no limitation period applies to the claim.

There are special general and transition rules under the Limitations Act 2002 for claims based on an assault or a sexual assault.

The Meaning of "Discoverable"

A claim is discoverable on the earlier of the day on which:

- The person with the claim first knew each of the following: (i) that the injury, loss or damage had occurred; (ii) that the injury, loss or damage was caused by an act or omission by the person against whom the claim is made; and (iii) that a proceeding would be an appropriate means to seek a remedy. Unless the claimant can prove otherwise, the claimant is presumed to know all of the foregoing on the day on which the act or omission took place; *and*
- A reasonable person with the abilities of the claimant and in the circumstances of the claimant first ought to have known each of the elements of the claim set out above.

Running of Limitation Periods Suspended in Certain Circumstances

The running of the basic limitation period is suspended for minors or incapable persons unless and until a litigation guardian has been appointed for such person. Everyone is presumed to be capable of initiating a proceeding unless the contrary is proven. A claimant may apply to the courts for the appointment of a litigation guardian for a potential defendant and may give a written notice of claim to a potential defendant containing statements regarding each of the elements of the claim. The notice of claim can be considered by a court in determining when the defendant discovered the claim in question.

The running of both the basic and the ultimate limitation periods is suspended where the claimant and the prospective defendant have agreed to engage an independent third party to resolve the claim or assist in its resolution until the earliest of: (i) the date on which the claim is resolved; (ii) the date on which the attempted resolution terminates; and (iii) the date on which one of the parties withdraws from the agreement.

Contracting Out of the Limitations Act 2002

Unless one of the following circumstances apply, any limitation period established by the Limitations Act 2002 applies despite an agreement to vary or exclude it. The exceptions to this general rule are as follows:

- The basic (two-year) limitation period and the ultimate limitation period (15 years) may be varied or excluded by an agreement made prior to January 1, 2004.

- The basic limitation period may be suspended or extended by agreement to that effect which was entered into at any time from and after October 19, 2006.
- The ultimate (15-year) limitation period may be suspended or extended by agreement made at any time from and after October 19, 2006 but only if the relevant claim has been discovered at the time of such agreement.
- For "business agreements" (that is, an agreement made by parties none of whom is a consumer as defined in the Consumer Protection Act), the basic limitation period may be varied or excluded by an agreement made from and after October 19, 2006.
- Finally, for business agreements, the ultimate limitation period may be suspended or extended by agreement made at any time from and after October 19, 2006 but only if the relevant claim has been discovered at the time of such agreement, and it may be may be varied by agreement even if it has been discovered at the time. The term "vary" means to extend, shorten or suspend.

Applying the foregoing to claims under the indemnity provisions of commercial agreements, it is not possible in the business agreement, as first entered into by the parties, to extend or suspend its running past the ultimate limitation period, although the parties are free to extent or suspend its running by a subsequent amending agreement if the claim for indemnity has been discovered within 15 years of entering into the original agreement.

Prior to enactment of the Limitations Act 2002, it had been a common practice in Ontario for litigants to enter into an agreement to suspend the running of the six-year limitation period under the prior Act for extended or indefinite periods (commonly referred to as a "tolling agreement"). Prior to the October 2006 amendment, section 22 of the Limitations Act 2002 this practice was prohibited for the period January 1, 2004 to October 18, 2006. Tolling agreements are now permitted to the extent summarized in the exceptions described above.

Debt Obligations that Are Due on Demand

Hare v. Hare, a December 2006 decision of the Ontario Court of Appeal, the taxpayer loaned a sum of money to her son and secured the loan with a promissory note. Although some interest payments were made under the note, the son did not respond to a demand for payment of the loan and the taxpayer brought an action for recovery.

At trial and on appeal, the defendant claimed the action was barred because it was made after the statutory limitation period had expired. The issue was whether the two-year basic limitation period under the Limitations Act 2002 had started to run at the time the note was issued, or on the demand for payment under the note. If the former, the action was statute-barred; if the latter, the action could proceed.

The Limitations Act 2002 provides that the two-year limitation period begins to run on the discovery of the claim. The Court of Appeal emphasized that the law that a creditor has the right to immediate repayment of a demand loan is well-settled. As the creditor under a demand note has the right to immediate payment, there is nothing to be discovered by the creditor before he or she becomes aware of their claim, which is established immediately on receipt of the demand promissory note. The Court of Appeal, therefore, found that the discovery of the claim occurred at the time the note was issued, as the creditor was in a position to enforce the

note as of that date. The action was, therefore, statute-barred because it was commenced more than two years after discovery of the claim.

In *Zeitler v. Zeitler*, a British Columbia Supreme Court decision in mid-2008, the Court held that the limitation period for a promissory note payable 30 days following demand began to run after the expiry of the 30-day notice, once given. It is thought that this case would likely be applied by an Ontario Court.

As noted above, on October 22, 2008, the Limitations Act 2002 was amended to provide that the two-year (basic) limitation period for demand obligations created on or after January 1, 2004 begins to run on the first day on which there is failure to perform the obligation in question once a demand for performance has been made.

The Limitations Act 2002 was amended on October 22, 2008 to provide that for all demand obligations created on or after January 1, 2004, the act or omission required to trigger the running of a limitation period is the first day on which there is a failure to perform the obligation once a demand for the performance is made. This appears to address the issue of when the limitation period begins to run for all demand obligations created on or after January 1, 2004, but leaves demand promissory notes made prior to 2004 subject to the case law summarized above. It may be that the limitation period for demand promissory notes made prior to January 1, 2004 will commence on the date of delivery of the demand note in question, and not from the date of demand, although the pre-2004 basic limitation period of six years would apply to such demand notes, not two. The basic limitation period applicable to all such pre-2004 demand promissory notes will likely have expired on or before December 31, 2009. Demand promissory notes are commonly used in many commercial arrangements, especially between related parties, and the inadvertent expiration of collection rights under such notes could have grave consequences.

Payments and Acknowledgements

Under the Limitations Act 2002, each payment of interest or principal and a written acknowledgement of the debtor made within the basic limitation period will restart the limitation period under the Limitations Act 2002.

The Running of Time — Discoverability, Postponement and Suspension

Generally speaking, a limitation period begins to run from the time the cause of action arises or accrues. With contract claims, the cause of action typically arises when the breach occurred, whereas with tort claims, there generally has to be damage before the cause of action is said to accrue.

However, there are some significant exceptions to this general rule. In circumstances where a breach or damage is not immediately apparent, the limitation period will not begin to run until the plaintiff has discovered, or ought to have reasonably discovered, the material facts upon which his or her claim is based. This is known as "discoverability." In BC the discoverability principles are outlined in the British Columbia *Limitation Act* ("BCLA").

In addition, in certain circumstances the running of time for a limitation period will be postponed or suspended. For example, as in Ontario, the running of time is postponed for minor who has a claim until a litigation guardian is appointed or the minor reaches the age of majority. A limitation period may be suspended for the period under which a claimant is under a disability.

Each of these circumstances obviously results in a longer time period than that prescribed by the applicable limitation period. In addition, they demonstrate that the actual effective limitation period is different in each case, and will be impossible to properly calculate until all the facts of the claim are known.

Nova Scotia

In Nova Scotia, most limitation periods are set out and governed by the *Limitations of Actions Act* (the "NSLAA"). It provides as follows:

- An action in assault, battery, false imprisonment or slander must be brought within one year after the cause of action arose.
- An action for negligence in the context of medical, dental or hospital services within two years after such services terminated.
- An action for anything relating to the use or operation of a motor vehicle must be brought within three years.
- Actions for penalties, damages or sums of money given to the parties aggrieved by any statute, within two years after the cause of action arose.
- Actions for rent upon an indenture of demise, actions upon a bond or other specialty or actions upon any judgment or recognizance, within twenty years after the cause of action or judgment arose.
- An action for assault or battery based on sexual abuse arises after the victim is aware of the injury and the causal relationship between such injury and the sexual abuse and the victim is then given a reasonable time to bring forward an action.
- All other torts including negligence, within six years after the cause of action arose.
- All other causes of action including actions on a contract or injuries to real or personal property, within six years after such cause of action arose.

Unique to Nova Scotia — courts in Nova Scotia have the discretion to waive the effect of the limitation period expiration so long as the action is commenced within four years after expiration and so long as the courts feel it is equitable to do so having regard to the prejudices each party is likely to suffer. This right is often used in Nova Scotia to relieve a party from the expiration of a limitation period and to allow a cause of action to continue despite such expiration.

Another important consideration when looking at limitation periods is whether the plaintiff or defendant was somehow disabled at the time the cause of action arose. Sections 4 and 5 of the NSLAA provide that if the party was under the age 19 or of unsound mind at the time the cause of action arose, then the limitation period is extended to the time when this person reaches age 19 or becomes of sound mind. The maximum extension period for a plaintiff under Sections 4 and 5 is five years.

Finally, many individual Nova Scotia statutes contain specific limitation periods and these should also be considered when commencing an action or reviewing a limitation period. One important example is section 512 of the *Municipal Government Act* which provides that the limitation period for any action or proceeding against "a municipality or village, the council, a council member, a village commissioner, an officer or employee of a municipality or village or against any person acting under the authority of any of them" is 12 months.

New Brunswick

In New Brunswick, the *Limitations of Actions Act* (the "NBLAA") currently governs both real and personal property matters. It sets out specific limitation periods in respect of bonds, judgments, assault, and fraudulent misrepresentation (among several others) and it, in some cases, sets out the time when the limitation period begins to run. New Brunswick may amend the NBLAA and adopt a limitations law regime similar to the Ontario Limitations Act 2002.

The NBLAA contains a residual "catch all" provision which sets out a limitation period on all causes of action not expressly governed by any other legislation in New Brunswick. Where a limitation period is provided for in another Act, that particular cause of action falls outside the scope of the residual provision in the NBLAA. This residual limitation period is six years after the cause arose. New Brunswick does not have an ultimate limitation period.

The running of the limitation period is suspended in certain circumstances. When a person entitled to bring an action is a minor, mental defective, mental incompetent, or of unsound mind a special limitation period of six years applies, or two years from the date when such person becomes of full age, or of sound mind, whichever is longer. Where a person has a cause of action against a minor or a person mentally incompetent, that person may commence the action within the limitation period, or within two years after the removal of the disability.

Where a cause of action exists against a person who has been absent from the province for the greater part of the last year of the limitation period, the cause of action may be brought within two years after the return of the absent person to the province. Similar extensions of time exist where a judgment has been overturned on appeal, a writ is set aside for a matter of form, or a death occurs.

Payments and written acknowledgments in respect of real or personal property made within the specified limitation period (usually 20 years) will restart the limitation period.

Québec's Limitation Periods

Under Québec civil law, the concept of limitation of actions is called "extinctive prescription" or simply "prescription". Extinctive prescriptions are mainly governed by the sections 2875 to 2909 and 2921 to 2933 of the CCQ.

Extinctive Prescriptions

- Actions to enforce personal rights (contractual and extra-contractual rights or torts rights) are prescribed by three years.
- Actions to enforce movable real rights (rights of repossession of movable (personal) property) are prescribed by three years.

- Actions to enforce immovable real rights (rights of repossession of immovable (real) property) are prescribed by 10 years.
- Actions to enforce judgements are prescribed by 10 years.
- Actions for defamation are prescribed by one year.

The general prescription applicable to actions for which no specific prescription is provided by law is 10 years. However, given the broad application of the above mentioned specific prescriptions, this general prescription period seldom applies.

Subject to the exceptions noted below, in Québec, parties cannot by agreement contract out of any of the prescriptive periods provided by law may be agreed upon.

Running of Prescription

Prescription starts to run on the later of the date when the right of action first arises and the date when damages are first incurred. Prescription for payment under a contract runs from the date when the payment is due, notwithstanding such contract provides for future performance of other obligations.

A prescription period is suspended under Québec law where:

- It is impossible based on the circumstances or in law to perform the contract.
- Remedies by minors or incapable persons with respect to remedies they have against their personal representatives.

A prescription period is interrupted under Québec law, that is, is restarted, where:

- A judicial demand is filed — this applies to including class actions as well as other legal proceedings. Negotiations prior to the filing of a judicial demand do not interrupt prescription.
- A notice of arbitration is served.
- A creditor of a debtor makes an application to the courts to share in a distribution with other creditors.

Prescription may not be waived (for example, by a term of a contract) before a claim arises, but may be waived once a party acquires and becomes aware of a right to make a claim.

Forfeiture Delays

Certain Québec laws which apply to specified circumstances provide for prescription periods that are shorter in duration than those which would otherwise apply. Such periods cannot be suspended or interrupted. For example, a creditor's right to move to set aside a fraudulent conveyance made by a debtor is forfeited on the first anniversary of the later of the date of such fraudulent conveyance and the date on which a trustee is appointed for the property of the fraudulent debtor.

Other Statutory Limitation Periods

Certain Québec laws may provide for both a notice requirement and a shortened prescription period. For example, the *Cities and Towns Act* provides for a specific prescription of six

months for actions against a municipality governed by such act and a forfeiture delay of 15 days notice.

British Columbia

In British Columbia, the BCLA sets out basic limitation periods of two, six and 10 years. The following is a non-exhaustive list of the types of claims covered by these limitation periods:

- **Two year limitation period** — claims based in contract, tort or statutory duty for injury to person or property and any economic loss stemming from such injury; claims for trespass, defamation, false imprisonment, malicious prosecution, and for a tort under the British Columbia *Privacy Act*.
- **Six year limitation period** — claims by secured parties and debtors not in possession of collateral to realize or redeem that collateral; claims for damages for conversion, detention of goods, and for the recovery of goods wrongfully taken or detained.
- 10 year limitation period — claims against trustees in respect of fraud, conversion of trust property, and fraudulent breach of trust; claims against personal representatives for a share of an estate; and claims on a local judgment for the payment of money or return of personal property.

Where a limitation period for a particular type of claim is not specifically provided for in the BCLA or in any other act the limitation period is six years.

British Columbia Ultimate Limitation Period

The underlying policy of the BCLA is preserved by an ultimate limitation period in cases where the basic limitation period is postponed or suspended. The ultimate limitation period begins to run from the date the cause of action arises and runs until the expiry of the ultimate limitation period despite any postponement or suspension of the basic period. The effect of the ultimate limitation period is that a claimant cannot postpone bringing an action indefinitely, which provides defendants with protection from open ended liability.

While the ultimate limitation period is effective despite a postponement, there is one exception to this rule: the time for a minor to bring a claim is postponed until that person reaches the age of majority unless that person has a litigation guardian appointed.

The ultimate limitation period is six years for claims against a hospital, hospital employee, or medical practitioner for negligence or malpractice. In any other case the ultimate limitation period is 30 years.

Claims which are Not Subject by any Limitation Period

There are certain types of actions which are not governed by a limitation period and may therefore be pursued by a claimant at any time. For example, these include:

- Certain claims relating to the possession of land;
- Claims for the enforcement of an injunctions;
- Claims for the enforcement an easements, restrictive covenants or profits à prendre;
- Declarations as to personal status; *or*

- Declarations as to the title of a property.

Other Notable Limitation Periods

As noted, in British Columbia there are other statutes which prescribe limitation periods, several of which are short and therefore worth noting, including:

- **Written notice of damage created by a municipality** — must be provided within two months from the date on which the damage was sustained.
- **An action against a municipality** — must be commenced six months after the cause of action first arose.
- **An action by a creditor in respect of a claim against an estate** — the creditor must give notice of the claim to the executor or administrator of the estate and the action must be commenced within six months after notice is given if the debt is due at the time notice is given; or within six months of the time the debt or a part of it falls due, if no part of it is due at the time of the notice.
- **An action under the *Wills Variation Act*** — must be commenced within six months from the date of issue of probate or the resealing of probate.
- **A complaint under the ESA where the employee has been terminated** — must be filed within six months from the last day of employment.
- **A complaint under the *Human Rights Code*** — must be filed within six months of the alleged contravention.
- **An action by an employee for discrimination in wages** — must be commenced within 12 months from the termination of employment.

21. DISCLAIMER

This publication is intended to provide only a summary of the general commercial laws that apply in Canada. The summary should not be relied on without consulting counsel.

The materials contained in this publication are for general informational purposes only, and should not be taken as legal advice. Readers are urged to consult counsel for advice on specific legal questions or issues.

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22. GLOSSARY: DEFINITIONS USED IN THIS DOCUMENT

Defined Term	Definition	Defined at
ABCA	Alberta *Business Corporations Act*	p. 3.12
ACA	Alberta *Cooperatives Act*	p. 3.26
ACL	Area Control List	p. 13.3
ACOA	Atlantic Canada Opportunities Agency	p. 9.16
ACSS	Automated Clearing Settlement System	p. 10.1
AESC	Alberta's Employment Standards Code	p. 16.7
AHRA	Alberta *Human Rights Act*	p. 16.7
AIT	Agreement on Internal Trade	p. 13.8
Alberta Act	Alberta's *Freedom of Information and Protection of Privacy Act*	p. 16.13
AMMA	*Mines and Minerals Act*	p. 9.5
AMPs	Administrative monetary penalties	p. 5.1
APPIPS	Québec *Act Respecting the Protection of Personal Information in the Private Sector*	p. 16.11
ARC	Advance ruling certificate	p. 5.1
ARIAOD	*Act Respecting Industrial Accidents and Occupational Diseases*	p. 16.7
ARLS	Québec's *Act Respecting Labour Standards*	p. 16.5
AROHS	*Act Respecting Occupational Health and Safety Act*	p. 16.7
Arthur Wishart Act	*Arthur Wishart Act (Franchise Disclosure), 2000*	p. 3.28
Asset acquisition exemption	Exemption from prospectus and registration requirements given to an issuer effecting a trade if it issues securities as consideration for the acquisition of assets that have a fair value of not less than $150,000	p. 9.9
AULC	Alberta ULC	p. 3.13
Bank Act	Federal *Bank Act*	p. 6.9
BAs	Bankers' acceptances	p. 9.1
BCBCA	British Columbia *Business Corporations Act*	p. 3.4
BCLA	British Columbia *Limitation Act*	p. 20.6
BCULC	British Columbia ULC	p. 3.13
BDC	Business Development Bank of Canada	p. 9.11
BDP	Business Development Program	p. 9.16
BFOR	*bona fide* occupational requirement	p. 16.3
BIA	*Bankruptcy and Insolvency Act* (Canada)	p. 9.3

Defined Term	Definition	Defined at
Branch Tax	Branch tax of 25% (reduced to 5% under the Convention) levied on the after-tax business profits of a non-resident foreign corporation carrying on business in Canada through a branch rather than as a Canadian subsidiary corporation	p. 4.6
BRP Act	*Business Records Protection Act*	p. 16.15
BSA	*Bulk Sales Act*	p. 8.1
Bureau	Competition Bureau	p. 5.1
Business combination and reorganization exemption	Dissolution or winding-up of an issuer	p. 9.9
CA	*Competition Act*	p. 5.1
Cape Town Protocol	*Protocol to the Convention on Matters Specific to Aircraft Equipment*	p. 9.3
CARICOM	Caribbean Community	p. 13.7
CBCA	*Canada Business Corporations Act*	p. 3.4
CBDC	Community Business Development Corporations	p. 9.18
CBSA	Canada Border Services Agency	p. 13.1
CCAA	the federal *Companies' Creditors Arrangement Act*	p. 2.6
CCGG	Canadian Coalition for Good Governance	p. 12.12
CCO	Chief Compliance Officer	p. 12.16
CCPSA	*Canada Consumer Product Safety Act*	p. 17.1
CCQ	*Civil Code of Québec*	p. 9.2
CEPA 1999	*Canadian Environmental Protection Act, 1999*	p. 13.5
Certificated securities	Securities that are represented by certificates	p. 3.30
CETA	Comprehensive Economic and Trade Agreement	p. 13.7
CFA	Chartered Financial Analyst	p. 12.17
CFPOA	*Corruption of Foreign Public Officials Act*	p. 14.2
CGD	Controlled Goods Directorate	p. 13.6
CGP	Controlled Goods Program	p. 13.6
CGRs	Controlled Goods Regulations	p. 13.6
Charter	*Canadian Charter of Rights and Freedoms*	p. 16.4
CIA	*Conflict of Interest Act*	p. 9.20
CIM	Canadian Investment Manager	p. 12.17
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora	p. 13.4

Defined Term	Definition	Defined at
CITT	Canadian International Trade Tribunal	p. 13.1
CNT	Commission des normes du travail	p. 4.13
Code	US Internal Revenue Code	p. 3.15
Commissioner	Commissioner of Competition	p. 5.1
Convention	Canada-US Tax Convention	p. 2.7
CPA	Canadian Payments Association	p. 14.6
CPAB	Canadian Public Accountability Board	p. 12.7
CPC	Capital pool company	p. 9.10
CRA	Canada Revenue Agency	p. 3.16
CRT	Commission des relations du travail	p. 16.9
CRTC	Canadian Radio-television and Telecommunications Commission	p. 6.11
CSA	Canadian Securities Administrators	p. 12.12
CSBF	Canada Small Business Financing Program	p. 9.17
CSST	Commission de la santé et de la sécurité du travail	p. 16.7
CTC	Collective reference to the *Convention on International Interests in Mobile Equipment* (the "Mobile Equipment Convention") and the *Protocol to the Convention on Matters Specific to Aircraft Equipment* (the "Cape Town Protocol") each as signed in Cape Town, South Africa on November 16, 2001; the *Regulations* (the "Regulations") issued by the Supervisory Authority for the International Registry of Mobile Assets (the "International Registry"); and the *International Registry Procedures* (the "Procedures"), each as in effect on this date in the US, and the Mobile Equipment Convention as modified by the Cape Town Protocol, together with the Regulations and the Procedures and all other rules, amendments, supplements and revisions thereto	p. 9.3
CTC Act	*International Interests in Mobile Equipment (Aircraft Equipment) Act* (Canada)	p. 9.3
CTI	Calgary Technologies Inc.	p. 9.19
D&O	Directors' and officers' liability	p. 3.5
DFAIT	Department of Foreign Affairs and International Trade	p. 13.2
DIP	Debtor in possession	p. 2.5
Direction	*Direction to the CRTC (Ineligibility of Non-Canadians)* (issued by the federal cabinet)	p. 6.12
Distribution Act	*An Act Respecting the Distribution of Financial Products and Services* (Québec)	p. 12.27
Distribution Requirements	Providing a prospectus or using a registered dealer	p. 12.2

Defined Term	Definition	Defined at
DPOHs	Designated public office holders	p. 9.20
ECA	Ontario's *Electronic Commerce Act, 2000*	p. 17.6
ECBC	Enterprise Cape Breton Corporation	p. 9.18
ECL	Export Control List	p. 13.2
EDGE	Economic Diversification and Growth Enterprise Program	p. 9.15
EFC	Eligible financial contracts	p. 11.5
Effective Date	Effective date of NI 31-103 (September 28, 2009)	p. 12.12
EIPA	*Export and Import Permits Act*	p. 13.2
Employee, executive officer and director and consultant exemption	Exemption from the prospectus and registration requirements, if participation in the trade is voluntary, applied to distributions by an issuer, a control person of an issuer or related entity of an issuer to employees, executive officers, directors or consultants of such issuer or a related entity of the issuer	p. 9.9
ESA	*Employment Standards Act*	p. 16.1
Farm land	Real property located outside of a city, town, village or hamlet that is capable of being used for farming but does not include minerals or land used in processing or storing minerals	p. 18.1
FCPA	*Foreign Corrupt Practices Act*	p. 14.2
FEMA	*Foreign Extraterritorial Measures Act*	p. 13.5
Fifth Protocol	Fifth Protocol to the Canada-US Tax Convention	p. 4.3
Financial assets	Includes securities as well as any other mediums of investment recognized for trading in any area or market, as well as any financial asset agreed to be dealt with as between the securities intermediary and the person for whom the securities account in question is maintained, that is, it contains an "opting-in" right as between contracting parties	p. 3.32
FINTRAC	Financial Transactions and Reports Analysis Centre of Canada	p. 14.4
FIPAs	Foreign investment protection agreements	p. 13.7
Franchisor's agent	A sales agent of the franchisor who is engaged by the franchisor's broker and who is directly involved in the granting of a franchise	p. 3.28
GAAP	Generally accepted accounting principles	p. 3.32
GATT	General Agreement on Tariffs and Trade	p. 13.1
GDP	Gross domestic product	p. 5.2
Globalive	Globalive Wireless Management Corp.	p. 6.12
GST	Federal goods and services tax	p. 2.6

Defined Term	Definition	Defined at
HRDC	Human Resources and Skills Development Canada	p. 9.11
HST	Harmonized sales tax	p. 4.10
ICA	*Investment Canada Act*	p. 6.1
ICC	International Chamber of Commerce	p. 14.2
ICL	Import Control List	p. 13.4
ICSID	*UN Convention on the Settlement of Investment Disputes*	p. 2.4
IFRS	International Financial Reporting Standards	p. 3.32
IIROC	Investment Industry Regulatory Organization of Canada	p. 12.16
Immigrants	Those who seek to remain permanently	p. 15.1
Information Technology Workers Programme	Pre-approved skills categories such as designated information technology skills	p. 15.2
Interest in farm land	Includes a purchase, lease, and option to purchase or lease, but excludes a *bona fide* mortgage interest	p. 18.1
International Registry	International Registry of Mobile Assets	p. 9.3
IPO	Initial public offering	p. 9.10
IRPA	Federal *Immigration and Refugee Protection Act*	p. 15.1
ISDA	International Swaps and Derivatives Association, Inc.	p. 10.2
ISPs	Internet Service Providers	p. 6.13
ITARs	US International Traffic In Arms Regulations	p. 13.6
KYC	Know Your Client	p. 12.17
Limitations Act 2002	Ontario's *Limitations Act, 2002*	p. 20.1
LLC	Limited liability company	p. 3.2
LLP	Limited Liability Partnership	p. 3.24
LMD	Limited market dealer	p. 12.15
LMO	Labour Market Opinion	p. 15.1
LOB	Limitation on Benefits	p. 4.3
Lobbying Act	*Lobbyists Registration Act*	p. 9.20
LVTS	Large Value Transfer System	p. 10.1
Materials	Continuous disclosure, prospectus and exemption relief materials	p. 12.1
MBLA Act	*Mortgage Brokerages, Lenders and Administrators Act, 2006*	p. 6.15
MCA	*The Corporations Act* (Manitoba)	p. 3.10
MD&A	Management discussion and analysis	p. 12.3

Defined Term	Definition	Defined at
MFDA	Mutual Fund Dealers Association	p. 12.16
MI 11-102	Multilateral Instrument 11-102 Passport System	p. 12.1
MICC	the Québec Ministère de l'immigration et des communautés culturelles of Québec	p. 15.2
Mobile Equipment Convention	*Convention on International Interests in Mobile Equipment*	p. 9.3
Money Laundering Act	*Proceeds of Crime (Money Laundering) and Terrorist Financing Act*	p. 14.4
MRRS	Mutual Reliance Review System	p. 12.1
MVD Act	Ontario *Motor Vehicle Dealers Act, 2002*	p. 6.15
NAFTA Professional	A US or Mexican citizen performing services within a profession listed under the North American Free Trade Agreement	p. 15.2
NAL	No-action letter	p. 5.4
NBBCA	New Brunswick *Business Corporations Act*	p. 3.4
NBLAA	New Brunswick *Limitations of Actions Act*	p. 20.8
NHA	*National Holiday Act*	p. 16.5
NI 31-103	National Instrument 31-103	p. 12.12
NI 31-103CP	Companion Policy to NI 31-103	p. 12.14
NI 45-102	National Instrument 45-102	p. 12.2
NI 45-106	National Instrument 45-106 — *Prospectus and Registration Exemptions*	p. 9.6
NI 51-102	National Instrument 51-102	p. 12.2
NI 52-107	National Instrument 52-107.	p. 12.2
NI 52-108	National Instrument 52-108	p. 12.3
NI 52-109	National Instrument 52-109	p. 12.2
NI 52-110	National Instrument 52-110	p. 12.3
NI 71-102	National Instrument 71-102	p. 12.3
NLCA	Newfoundland and Labrador *Corporations Act*	p. 3.8
NLHRC	Newfoundland and Labrador *Human Rights Code*	p. 16.3
Non Venture Issuer	A US market place	p. 12.3
Nova Scotia Act	Nova Scotia's *Financial Measures (2007) Act*	p. 3.16
NP 11-204	National Policy 11-204	p. 12.25
NRS	National Registration System	p. 12.25
NS Companies Act	Nova Scotia *Companies Act*	p. 3.4
NSBI	Business Financing Program — Nova Scotia Business Inc.	p. 9.17

Defined Term	Definition	Defined at
NSLAA	Nova Scotia *Limitations of Actions Act*	p. 20.7
NSULC	Nova Scotia ULC	p. 3.13
NYSE	New York Stock Exchange	p. 12.10
OBCA	*Business Corporations Act*	p. 3.4
OBRITC	Ontario Business-Research Institute Tax Credit	p. 9.13
OHRC	Ontario's *Human Rights Code*	p. 16.2
OITC	Ontario Innovation Tax Credit	p. 9.13
Old Act Patents	Patents which issue from applications filed before October 1, 1989	p. 7.4
Orascom	Orascom Telecom Holding (Canada) Limited	p. 6.12
Order taker	An independent sales agent	p. 3.29
OSA	Ontario's *Securities Act*	p. 9.5
OSC	Ontario Securities Commission	p. 3.32
OSFI	Office of the Superintendent of Financial Institutions	p. 3.33
PAE	Publicly accountable enterprise	p. 3.32
Participating Provinces	Provincial governments of New Brunswick, Nova Scotia and Newfoundland & Labrador	p. 4.10
Patent Act	Federal *Patent Act*	p. 7.4
PCT	*Patent Cooperation Treaty*	p. 7.5
PEFP	Politically exposed foreign person	p. 14.5
Permanent residents	Those who seek to remain permanently	p. 15.1
Petroleum, natural gas or mining properties exemption	Exemption from prospectus and registration requirements given to an issuer effecting a trade if it issues securities as consideration for the acquisition, directly or indirectly, of petroleum, natural gas or mining properties or any interest therein	p. 9.9
PHIPA	*Personal Health Information Protection Act*	p. 16.10
PIPA	*Personal Information Protection Act*	p. 16.12
PIPEDA	*Personal Information Protection and Electronic Documents Act*	p. 16.10
PMSI	Purchase money security interest	p. 9.2
PNG	Petroleum and natural gas reserves	p. 9.5
PNPs	Provincial Nominee Programmes	p. 15.4
POHs	Public office holders	p. 9.20
PPSA	Each of the Personal Property Security Acts of the common law provinces	p. 9.1

Defined Term	Definition	Defined at
Procedures	*International Registry Procedures*	p. 9.3
Protected purchaser	Purchaser for value without notice of an adverse claim who takes control of a security	p. 3.31
PWC	PriceWaterhouseCoopers	p. 14.3
QBCA	*Business Corporation Act* (Québec)	p. 3.9
QHSF	Québec Health Services Fund	p. 4.13
QSA	*Securities Act* (Québec)	p. 12.27
QST	Québec sales tax	p. 4.11
Quebec Charter	The Québec Charter of Human Right and Freedoms	p. 16.5
Québec ECA	Québec *ECA to Establish a Legal Framework for Information Technology*	p. 17.7
Regulations	*Regulations* issued by the Supervisory Authority for the International Registry of Mobile Assets	p. 9.3
Reporting entities	Financial institutions (including life insurance companies, brokers and agents), securities dealers, money services businesses (including foreign exchange dealers), real estate brokers, real estate developers, accountants, casinos, dealers of precious metals, stones and jewellery and British Columbia notaries	p. 14.4
RESPs	Registered Education Savings Plans	p. 12.22
RMG	Risk Metrics Group	p. 12.12
RRLS	Regulation Respecting Labour Standards	p. 16.5
Sale of Goods Convention	*Convention on Contracts for the International Sale of Goods*	p. 14.1
SBCA	*The Business Corporations Act* (Saskatchewan)	p. 3.12
Schoon v. Troy	*Schoon v. Troy Corporation*	p. 3.19
SEC	US Securities and Exchange Commission	p. 3.32
Securities for debt exemption	Exemption from prospectus and registration requirements given to an issuer issuing its own securities to settle a *bona fide* debt	p. 9.9
SFSA	*The Saskatchewan Farm Security Act*	p. 18.1
SIFT Rules	New SIFT tax rules not applying to existing SIFTs	p. 3.27
SIFTs	Specific investment flow throughs	p. 3.27
SIMA	*Special Import Measure Act*	p. 13.1
SIR	Supplementary Information Request	p. 5.3
SME GAAP	Generally accepted accounting principles for small and medium enterprises	p. 3.32
SMEs	Small and medium enterprises	p. 9.16
SOEs	State-owned enterprises	p. 6.1

Defined Term	Definition	Defined at
SPAC	Special Purpose Acquisition Corporation	p. 9.10
SRED	Federal Scientific Research and Experimental Development Tax Incentive Program	p. 9.12
SRO	Self-Regulatory Organization	p. 12.20
STA	*Securities Transfer Act*	p. 3.30
SWIFT	Society for Worldwide Interbank Financial Telecommunications	p. 16.13
Tax Act	Federal *Income Tax Act*	p. 4.3
Temporary residents	Those who seek to come to Canada temporarily, such as tourists, international students and temporary foreign workers	p. 15.1
TILMA	Trade, Investment and Labour Mobility Agreement	p. 13.8
TLCA	*The Trust and Loan Corporations Act, 1997* (Saskatchewan)	p. 6.7
TMA	Federal *Trade-marks Act*	p. 7.1
Tribunal	Competition Tribunal	p. 5.2
TRV	Temporary Residence Visa	p. 15.1
TSX	Toronto Stock Exchange	p. 12.3
TUVs	Transfers at undervalue	p. 11.8
UDP	Ultimate Designated Person	p. 12.16
ULC	Unlimited liability company	p. 2.7
Uncertificated securities	Securities that are represented by book entries in the records of a securities intermediary	p. 3.30
UNCITRAL	United Nations Commission on International Trade Law	p. 13.8
USA	Unanimous shareholder agreement	p. 3.5
UTI	University Technologies International	p. 9.19
Venture Exchange	TSX Venture Exchange	p. 9.10
Venture Issuer	An exchange, such as the TSX Venture Exchange, the Canadian National Stock Exchange, other international exchanges or event not listed on any exchange	p. 12.3
Visa office	Canadian immigration office outside Canada	p. 15.1
WEPPA	*Wage Earner Protection Program Act* (Canada)	p. 11.1
WRA	*Winding-up and Restructuring Act* (Canada)	p. 9.3
WSIA	*Workplace Safety and Insurance Act*	p. 16.4
WTO Agreement	World Trade Organization Agreement	p. 13.1

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