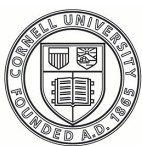
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Doing Business in Canada

Baker & McKenzie

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Doing Business in Canada

Abstract

[Excerpt] Foreign investment in Canada is regulated by the Investment Canada Act (“ICA”), which came into force 30 June 1985. Generally speaking, the ICA monitors the establishment of new businesses and the acquisition of existing Canadian businesses by non-Canadians. Whether an entity is non-Canadian is determined by the nationality of the individual who ultimately beneficially owns or controls the entity. Every non-Canadian who is a citizen or resident of a country that is a member of the World Trade Organization (a “WTO Investor”) is given special status under the ICA for most transactions.

In addition to the ICA, other federal statutes regulate and restrict foreign investment in specialized industries in sectors such as telecommunications, broadcasting and financial industries.

Keywords

Canadal, foregn investment, trade, commerce, business, law, imports, North American Free Trade Agreement, NAFTA

Comments

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Canada

Baker & McKenzie

Doing Business in Canada

2007

Doing Business in Canada

Toronto Office
Baker & McKenzie LLP
BCE Place
181 Bay Street, Suite 2100
P.O. Box 874
Toronto, Ontario, Canada M5J 2T3
Tel: +1 416 863 1221
Fax: +1 416 863 6275
www.bakernet.com

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Table of Contents

1. Constitutional Matters 1

2. Government Regulation of Foreign Investment 3

a) Introduction 3
b) Notifiable Transactions. 3
c) Reviewable Transactions 4

3. Establishment of Business 5

3.1 Canadian Corporate Law 5
a) Canadian Corporations. 5
b) Incorporation Procedure 5
c) Corporate Formalities 6
d) Auditors and Public Disclosure of Financial Information 7
e) Unanimous Shareholders' Agreements 7
f) Unlimited Liability Companies ("ULC") 7
g) Branch Operations 8

3.2 Partnerships 8
a) Introduction 8
b) Formation of the Partnership 8
c) Limited Partnership 9

3.3 Strategic Alliances 10

4. Income Taxation 11

4.1 Introduction 11

4.2 Basis of Taxation 11
a) Residents 11
b) Non-Residents 12

4.3 Rates of Taxation 13
a) Individuals 13
b) Corporations 13
c) Small Business Deduction 13
d) Tax Credit for Manufacturing and Processing Income 14
e) Other Tax Credits 14

4.4 Calculation of Income 15
a) Loss Utilization 15
b) Depreciation and Recapture 15
c) Deductibility of Expenses. 16
d) Interest Deductibility on Loans from Non-Resident Corporations 16
4.5 Income from Foreign Affiliates 17
4.6 Transfer Pricing 18
4.7 Withholding Tax 19
a) Dividends 19
b) Rental income from Real Property 19
c) Royalties 19
d) Interest 20
e) Technical Services Rendered in Canada 20
f) Services Rendered by the Non-Resident in its Own Country 21
g) Management and Administration Fees. 21
4.8 Branch Tax 22
4.9 Capital Tax 22
4.10 Partnerships and Joint Ventures. 23
4.11 Foreign Tax Credits. 24

5. Customs and International Trade 25

5.1 Process of Importation 25
a) Business Number – Importer/Exporter Account Number. 25
b) Customs Brokers 25
c) Tariff Classification of Imported Goods 25
d) Valuation of Imported Goods. 25
e) Tariff Treatment 26
5.2 Import Controls 26
5.3 Export Controls. 27
5.4 The North American Free Trade Agreement. 27

6. Sales Tax 29

6.1 Federal Goods and Services Tax/Harmonized Sales Tax 29

a) General 29
b) Registration Requirements 30
c) Imports 30
d) Exports 31

6.2 Ontario Sales Taxes 31

7. Competition Act 33

7.1 General 33
a) Criminal Offences 33
b) Non-Criminal Offences 33
c) Civil Rights of Action 34

7.2 Mergers 34
7.3 Price-Fixing, Cartels 35
7.4 Bid-Rigging 36
7.5 Price Discrimination and Predatory Pricing 36
7.6 Resale Price Maintenance 36
7.7 Misleading Advertising and Deceptive Marketing Practices 37
7.8 Other Non-Criminal Reviewable Matters 38

8. Advertising and Labelling of Goods for Sale 39

8.1 Introduction 39
8.2 Consumer Packaging and Labelling Act Regulations 39
a) Net Quantity Declaration 39
b) Product Identity Declaration 40
c) Dealer Declaration 40

8.3 Imported Goods Regulations 40
8.4 Product Specific Legislation 41
a) The Food and Drugs Act and Regulations 41
b) Hazardous Products 43
c) Electrical Equipment 43
d) Textiles 44
e) Jewellery 44
f) Environmental Labelling 44

8.5 Standards 45

8.6 Advertising 46
8.7 Contests/Sweepstakes 46
8.8 Quebec Laws 47

9. Protection of Intellectual and Industrial Property Rights 49

9.1 Patents 49
9.2 Trade-marks 50
9.3 .CA Domain Names 51
9.4 Industrial Designs 52
9.5 Copyright 52
9.6 Integrated Circuit Topography Act 53
9.7 Trade Secrets/Confidential Information 54

10. Taking Security In Personal Property 55

11. Bankruptcy and Insolvency 57

11.1 Introduction 57
11.2 Types of Creditors 58
a) Secured Creditors 58
b) Preferred Creditors 60
c) Unsecured Creditors 60

11.3 Bankruptcy/Liquidation 61
a) Procedure 61
b) Stay of Proceedings 62
c) Priority of Claims 62

11.4 Winding Up 63
11.5 Reorganization 63
a) Nature of Reorganization 63
b) Under the BIA 64
c) Under the CCAA 65

11.6 International Insolvency 66
a) Enforcement of Foreign Orders 67
b) Non-Canadian Creditors 68

11.7 Discharge 68

12. Labour and Employment 69

12.1 Introduction 69
12.2 The Minimum Standards Legislation 69
12.3 Common Law Termination Entitlements.................. 71
12.4 Labour Relations Legislation (Trade Unions)........... 72
12.5 Human Rights Legislation 72
12.6 Other Legislation 73

13. Immigration 75

13.1 Work Permits and Labour Market Opinion Requirements 75
13.2 Exemption from Work Permit Requirement 75
13.3 Exemption from Labour Market Opinion 76
- a) Intra-Company Transfers 76
- b) Significant Benefit to Canada 76
- c) North American Free Trade Agreement/Canada-Chile Free Trade Agreement 77
- d) General Agreement on Trade in Services (GATS).......... 77

13.4 Other Requirements.................................... 78
13.5 Extensions of Work Permits 78
13.6 Software Development Workers Pilot Project 78
13.7 Spousal Employment.................................... 79
13.8 Permanent Resident Status 79

14. Real Property 81

14.1 Non-Resident Persons and Corporations.................. 81
14.2 Governing Law 81
14.3 Real Property Interests/Title.......................... 81
14.4 Real Property Interests as Security 82
14.5 Land Use Regulation 82
14.6 Leasing 83
14.7 Land Transfer Tax..................................... 83
14.8 Sales Taxes... 84
14.9 Property Taxes 84

15. Environmental 85

15.1 Environmental Division of Powers 85
15.2 Corporate Environmental Liability 86
15.3 Director and Officer Liability 86
15.4 Enforcement and Compliance 88
15.5 Environmental Audits 89
15.6 Purchasing Contaminated Real Estate 90
15.7 Retroactive Liability of Owners and Occupiers 91
15.8 Leasing a Contaminated Site 91

16. Judicial System and Litigation 93

16.1 Introduction 93
16.2 The Federal Courts 93
- a) The Tax Court of Canada 93
- b) The Federal Court of Canada 94
- c) The Supreme Court of Canada 94

16.3 The Provincial Courts 94
- a) The Court of Appeal for Ontario 94
- b) The Trial Courts in Ontario 95

16.4 The Litigation Process 95
- a) Civil Litigation 95
- b) Criminal Justice 96

16.5 Jurisdiction 97

17. Product Liability 99

17.1 Introduction 99
17.2 The Law of Contract 99
17.3 The Law of Negligence 100
17.4 The Duty to Warn 101
17.5 Strict Liability 101
17.6 Negligent Misstatement 102
17.7 Breach of Statute 102
17.8 Contribution and Indemnity 102

17.9 Damages 103
17.10 Limiting and Excluding Liability. 103
17.11 Avoiding and Minimizing Liability 104
a) Insurance 104
b) Risk Management and Loss Prevention. 104

18. Information Technology 105

18.1 Electronic Commerce 105
18.2 Communications Law 105
18.3 Jurisdiction in Cyberspace 106

19. Privacy 107

1. Constitutional Matters

Canada was created by an act of Parliament in the United Kingdom known as the *British North America Act, 1867*, later renamed the *Constitution Act, 1867*. The *Constitution Act, 1867* united three colonies of British North America and provided for the future admission of all other colonies and territories. Today, Canada is comprised of ten provinces – British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland/Labrador and three territories – Yukon, Northwest Territories, and Nunavut.

Throughout its first 115 years, Canada was not in principle an independent state, as the Parliament of the United Kingdom enjoyed ultimate legislative authority. This changed when the United Kingdom passed the *Canada Act 1982* that ended its imperial authority over Canada. Schedule B of the *Canada Act 1982* contained the *Constitution Act, 1982* ("Act"), which includes the *Charter of Rights and Freedoms*, a constitutional amending formula, and a provision making the Constitution the "supreme law of Canada."

Canada is organized on the principle of "federalism," with governmental powers divided between the federal government and the provinces. The division of legislative power in Canada is set forth in Sections 91 and 92 of the Act. These provisions detail which level of government can legitimately exercise legislative, executive and/or judicial powers with respect to a given matter. The Act confers absolute jurisdiction on either the federal or provincial governments with respect to some matters, while imposing shared jurisdiction with respect to others. This approach has in some areas resulted in the development of complex arrangements designed to facilitate the roles of both government levels.

Section 91 of the Act grants the federal government jurisdiction over "trade and commerce." By virtue of Section 92 of the Act, the provincial governments have jurisdiction over "property and civil rights." These provisions have been interpreted in such a way as to require an "intergovernmental" approach to the regulation of business in Canada.

Canada's legal system is different then many others in that the Québec Act of 1774 created two systems of law: the "civil law" governing those in Québec and a common law system in all other provinces and territories. The common law, which

developed in the U.K., is called judge-made law because it is a system of rules based on "precedent." Whenever a judge makes a decision that is to be legally enforced, this becomes a precedent; a rule that will guide judges in making subsequent decisions in similar cases. The common law cannot be found in any "code" or "legislation," it exists only in past decisions. The civil law system in Québec is based on Roman law: it uses court decisions to interpret the intentions and allowable authority of law-makers, but also relies on a written Civil Code that sets out standards of acceptable behavior or conduct in private legal relationships. Unlike common law courts, courts in a civil law system first look to the Civil Code and then refer to previous decisions for consistency.

2. Government Regulation of Foreign Investment

Notification and Approval Procedures under the *Investment Canada Act*

a) Introduction

Foreign investment in Canada is regulated by the *Investment Canada Act* ("ICA"), which came into force 30 June 1985. Generally speaking, the ICA monitors the establishment of new businesses and the acquisition of existing Canadian businesses by non-Canadians. Whether an entity is non-Canadian is determined by the nationality of the individual who ultimately beneficially owns or controls the entity. Every non-Canadian who is a citizen or resident of a country that is a member of the World Trade Organization (a "WTO Investor") is given special status under the ICA for most transactions.

In addition to the ICA, other federal statutes regulate and restrict foreign investment in specialized industries in sectors such as telecommunications, broadcasting and financial industries.

b) Notifiable Transactions

(i) New Business

A non-Canadian establishing a new business in Canada must file a notification with Investment Canada prior to or within thirty days of the commencement of the business. This filing is unnecessary if the business of the new subsidiary or branch operation is related to a Canadian business already being carried on by the foreign investor.

(ii) Acquisition of Control

A notification must also be filed with respect to each direct acquisition of a Canadian business if the book value of its assets is less than $265 million (this

number is adjusted annually according to the change in Canada's gross domestic product), unless neither the seller nor the buyer of the Canadian business is a WTO Investor.

(iii) Special Cases

The transaction will be reviewable if the book value of the assets is $5 million or more and if the Canadian business relates to Canada's cultural heritage or national identity, involves transportation or financial services or the production of uranium, or if neither the seller nor the buyer is a WTO Investor. Furthermore, if the new business or the business of the target is related to Canada's "cultural heritage or national identity," the Minister of Canadian Heritage may exercise discretion to review it regardless of its size. The applicable regulations define "cultural heritage or national identity" to include the publication and distribution of books, magazines, periodicals, newspapers, films, videos, music recordings and sheet music and radio, television and cable television broadcasting and related activities. The review process for such transactions is conducted by the Department of Canadian Heritage.

c) Reviewable Transactions

Acquisitions which are subject to review generally cannot be completed until approval is received. Direct acquisitions of control of all businesses whose gross assets exceed the thresholds set out above would require approval. Such approval is given upon application if the Minister is satisfied that the acquisition will result in a "net benefit" to Canada. The approval process may require as much as six weeks.

As a condition of approving a reviewable transaction, Investment Canada on behalf of the Minister of Industry (or the Minister of Canadian Heritage, as the case may be) often requires undertakings from the non-Canadian to evidence that the transaction is of net benefit to Canada. Compliance with these undertakings is monitored after closing of the transaction and they will be renegotiated if they have not been substantially performed.

3. Establishment of Business

3.1 Canadian Corporate Law

a) Canadian Corporations

A corporation may be formed under the laws of any province or territory or under federal law. A corporation need not actually carry on its business in its jurisdiction of incorporation. The commentary which follows relates generally to private or closely held non-offering corporations, as opposed to public (offering) corporations and highlights provisions of the *Canada Business Corporations Act* ("CBCA"), which is the federal corporate statute. Other corporate statutes may also be of interest to investors. For example, in contrast to the CBCA, certain provincial corporate statutes do not impose Canadian residency requirements for directors.

b) Incorporation Procedure

Incorporation is achieved by filing Articles of Incorporation. Articles of Incorporation do not require a statement of objects or any monetary limitation on authorized capital. The CBCA confers all the powers of a natural person on a corporation. There are no requirements under the laws of any jurisdiction in Canada for a minimum paid-in capital.

Unless otherwise provided for in its articles, all shares of a federal corporation are fully participating, voting common shares without par value. More complex share provisions may be designed with wide flexibility as to the rights and conditions that may be attached. Shares of federal corporations are not properly issued until they are fully paid for in money, property or past services.

Incorporation may be effected rapidly and inexpensively. Often the most pressing initial matter is to choose a corporate name that is not confusingly similar to that of an existing corporation or trademark.

A corporate name may be in English or any other language as long as only letters from the English alphabet and Arabic numerals are used. A system of incorporation by number may be used to incorporate without a prior name search. Corporate names consisting of a number plus words such as "Canada Ltd." are commonplace. The name may be changed for a nominal fee at a later time. It is not unusual to see corporations operating under their number names with one or more registered "doing business-as" names. The name must include one of the following indicators of limited liability: "Limited," "Ltd.", "Incorporated," "Inc.", "Corporation" or "Corp."

A corporation formed in one province may be required to obtain an extra-provincial licence in any other province or territory where it carries on business. A corporation formed under the CBCA is empowered to carry on business throughout Canada, but is subject to provincial laws of general application, which generally require local registration or filings.

c) Corporate Formalities

The board of directors of a corporation has the power and responsibility to manage the corporation's affairs. Federal corporations may have one or more directors, and may provide in their Articles for a minimum and maximum number of directors, with the precise number to be established from time to time. Corporations governed by the CBCA must have a board of directors composed of at least 25% resident Canadians, and if there are fewer than four directors, at least one must be a resident Canadian. British Columbia, New Brunswick, Nova Scotia, Québec and the Yukon do not impose residency requirements for directors.

There is no Canadian residency requirement for corporate officers, but like directors, officers must be individuals. Most corporations have at least a president and a secretary. The same individual may fill both offices.

The corporate formalities required to operate a Canadian corporation are minimal. All corporate resolutions of shareholders and directors may be passed by unanimous written consent without the necessity of convening formal meetings. This is true even in respect of annual business, which generally includes at least the approval of financial statements, the election of auditors and directors, and the appointment of officers.

Corporate law usually requires a corporation to maintain its original corporate records at its registered head office in its jurisdiction of incorporation in Canada.

d) Auditors and Public Disclosure of Financial Information

Federally-incorporated private corporations may, by resolution, dispense with the appointment of an auditor. In addition, the CBCA does not require these corporations to make public disclosure of financial information.

e) Unanimous Shareholders' Agreements

Although the board of directors has statutory power to manage the corporation, the CBCA, and the corporate statutes of many of the other provinces provide that a "Unanimous Shareholders' Agreement" may be concluded whereby shareholders assume some or all of the powers of the directors to manage the business and affairs of the corporation.

f) Unlimited Liability Companies ("ULC")

The provinces of Nova Scotia and Alberta permit the incorporation of a Unlimited Liability Company ("ULC"). A ULC is treated, for Canadian tax purposes, as an ordinary corporation but may have special US tax status.

There are differences between Nova Scotia ULC and Alberta ULC, for example, Nova Scotia does not impose Canadian residency requirements for directors whereas Alberta requires that a minimum of 25% of the directors of an Alberta ULC must be Canadian residents. On the other hand, the incorporation and annual filing fees in Nova Scotia are much higher, and the corporate law is less familiar.

g) Branch Operations

Branch operations in Canada are a possible alternative to incorporation. A non-Canadian corporation may commence a business in Canada by obtaining an extra-provincial license in each province or territory where it conducts business.

3.2 Partnerships

a) Introduction

Although provincial legislation establishes some mandatory requirements, a partnership may largely be structured to suit a particular business initiative. Persons considering business organization in Canada should thoroughly consider the issue of liability, as a partnership may not provide the limited liability associated with incorporated companies.

The various provincial statutes define "partnership" as a relationship existing between persons carrying on a business in common with a view to generating a profit. A partnership does not necessarily require a formal written agreement between the parties. Canadian courts may imply a partnership where the requisite elements are present.

b) Formation of the Partnership

Under Canadian law, the intent of the parties is critical to the partnership relationship. A partnership may arise in one of two ways. First, the parties may enter into a "partnership agreement" which may be either written or oral. For purposes of certainty in case a dispute arises, it is preferable to define the partnership relationship in a formal written agreement. The agreement should clearly stipulate the objects of the partnership, the partners' responsibilities, the respective share of profits and losses of each partner, as well as a mechanism for dissolution.

Second, a partnership may arise absent any formal written agreement. In this case, the court will examine the substance of the relationship between the parties and determine whether it constitutes a partnership within the language of the applicable provincial legislation. Such a finding may have important consequences with respect to the liability of those persons conducting business by way of this "implied" partnership. The uncertainties associated with this "implied" partnership underline the aforementioned recommendations regarding a formal, written partnership agreement.

Ontario, like other Canadian provinces, has a *Partnerships Act* that regulates Ontario partnerships, whether or not they arise pursuant to a written agreement.

c) Limited Partnership

The common form of a Canadian partnership is the "general partnership." This denotes that all partners are subject to unlimited liability for the obligations of the partnership. However, most Canadian provinces also allow the more restricted form of liability associated with a "limited partnership," wherein a partner's liability may be restricted to the amount of his or her contributed capital. As a general rule, limited partners are not permitted to participate actively in the management of the partnership, although the general partners may be restricted from taking certain action absent the consent of the limited partners. A limited partnership is prohibited unless there are one or more general partners with unlimited liability. The applicable provincial legislation should be examined to determine the requirements and consequences of this structure.

3.3 Strategic Alliances

A joint venture may take the form of any of the corporate vehicles described above: corporation, partnership or limited partnership. It may also be possible to craft a "contractual joint venture" in which the parties define their individual rules in carrying out a particular project. The best structure is usually determined by evaluating the desired business relationship, the need for limited liability and the tax circumstances of the proposed joint venture partners.

4. Income Taxation

4.1 Introduction

Each of the provinces and territories of Canada, as well as the federal government, imposes an income tax. The federal government collects personal income taxes for all provinces except Québec. The provinces of Alberta, Ontario, and Québec administer and collect income tax from provincial corporations, calculated under provincial corporate income tax acts. The taxing statutes of the provinces are, generally, similar to those of the federal *Income Tax Act* (ITA).

4.2 Basis of Taxation

a) Residents

Canadian resident "persons," including individuals, corporations, trusts and estates, are taxed on their income from all sources worldwide.

Canadian courts have held that a "resident" is a person who regularly, normally or customarily lives in Canada. The ITA extends this meaning to include any person who has sojourned in Canada for 183 days of a calendar year. Canadian law considers that, for income tax purposes, a corporation is resident in Canada if its central management and control is exercised in Canada. In addition, a corporation incorporated in Canada (or any of its provinces or territories) after 26 April 1965 is deemed to be a resident of Canada.

Income may be earned from employment, business, property, dispositions of capital property and from other sources. Income from employment includes remuneration paid to an employee and many so-called "fringe benefits" associated with employment. Income from business or property is computed according to generally accepted accounting principles, except to the extent that such rules are specifically modified by the ITA. One-half of any capital gain from the disposition of capital property is included in income for tax purposes and taxed at ordinary rates. Any capital gain realized upon the disposition of a resident individual's principal residence is normally exempt from income tax. A $500,000 exemption from tax is available for capital gains realized upon the sale of shares of a Canadian small business corporation by a resident individual. Also, a tax-free

rollover is available to provide relief from capital gains on the sale of small business shares where the proceeds are re-invested in another small business. The roll-over is available where up to $2 million of proceeds from the sale of such shares are invested in a corporation that, after the investment, has no more than $50 million in assets.

Non-resident individuals proposing to take up residence in Canada should give special attention to the impact of this move on their tax status. Canadian residents are taxable on their worldwide income and on one-half of their worldwide capital gains. On ceasing to be a resident of Canada, an individual who has been resident in Canada for more than 60 months within the previous 10 years will be deemed to have disposed of certain capital property at its fair market value and may realize a capital gain at that time.

b) Non-Residents

Non-residents of Canada are subject to taxation on their income from employment in Canada, on their income from carrying on business in Canada, and on one-half of their gains realized from the disposition of taxable Canadian property, such as real estate or shares in a Canadian private corporation.

The expression “carrying on business” has a very broad meaning under the ITA and includes soliciting orders in Canada through an agent.

Canada has signed tax conventions with a number of countries under which profits earned by non-residents from carrying on business in Canada are not taxed unless they are allocatable to a “permanent establishment” maintained by the non-resident in Canada. The term “permanent establishment” generally refers to a fixed place of business or certain kinds of arrangements with employees or agents in Canada.

4.3 Rates of Taxation

a) Individuals

An individual resident in Canada is subject to tax on worldwide income earned from all sources in a calendar year. However, self-employed individuals, including members of a partnership, need not include business income earned in a fiscal year in their income until the calendar year in which the fiscal year of the business ends.

A foreign tax credit is generally available when taxes have been paid to foreign countries. Federal and provincial income tax is levied at marginal rates on individuals. The maximum rate of tax for an individual, combining the federal and provincial rates, may range from 39% to 49%, depending on the province.

b) Corporations

For 2006, the effective combined federal and provincial tax rates (including federal surtax) range from 34.1% to 38.1%, depending on the province. The tax rate on income from manufacturing activities is lower in some provinces, falling to as low as 24.6%.

The above corporate rates of taxation apply to corporations resident in Canada and also to the Canadian branch operations of foreign corporations carrying on business in Canada.

c) Small Business Deduction

A lower rate of taxation on the first 300,000 of business income may be available to a “Canadian-controlled private corporation” (“CCPC”) A CCPC is a corporation in which Canadians hold at least 50% of the voting interests, and which is not controlled, either directly or indirectly, by a public corporation whose shares are listed on a Canadian stock exchange, or by a non-resident of Canada. Subject to certain qualifications, foreign investors may hold up to 50% of the voting shares of a Canadian corporation without disqualifying it for the reduced rate.

The combined federal and provincial rates on business income of a CCPC up to $300,000 range from 14.6% to 21.6%.

To qualify for the reduced rate, known as the "small business deduction," all or substantially all of the assets of the CCPC must be used in an active business carried on primarily in Canada.

d) Tax Credit for Manufacturing and Processing Income

A corporation which carries on eligible manufacturing or processing activities in Canada may be entitled to a reduction of several percentage points on the rate of taxation on the resulting income in some provinces. The term "manufacturing and processing" is not defined. Certain activities, such as fishing, farming, logging, construction and a number of resource-related activities, are specifically excluded in some provinces. Generally speaking, if a corporation's activities fall within the everyday meaning of the words "manufacturing" or "processing," it will qualify for the reduced rate. The reduced rate will generally not apply to income subject to the "small business deduction."

The current combined federal and provincial tax rates for manufacturing and processing income range from 24.6% to 38.1%, depending on the province.

e) Other Tax Credits

Manufacturers may, in some circumstances, claim a deduction from tax called an "investment tax credit" equal to a percentage of the cost of buildings and equipment to be used in the manufacturing or processing of goods in certain specified regions in Canada. Property for use in offshore activities in the Atlantic Provinces will also qualify for an investment tax credit. In addition, a 20% to 35% credit is available for expenditures on research and development.

The amount of the investment tax credit reduces the cost of assets for capital cost allowance purposes. Investment tax credits are refundable only to small CCPC.

4.4 Calculation of Income

a) Loss Utilization

Losses from business and property that are not utilized in the year the loss is incurred may be carried back three years and forward twenty years. Losses on capital account may be carried back three years and forward indefinitely to offset taxable capital gains. However, in both cases, restrictions apply on a change of control of the corporation.

In defined categories of corporate mergers and dissolutions, losses of a merging or dissolving corporation may be carried forward and deducted by the merged or surviving corporation, as the case may be.

In Canada, each corporation is taxed as a separate entity. Incomes of members of a corporate group are not consolidated. In order to utilize losses realized in one corporation against income earned in a related corporation, it is necessary to merge corporations or transfer income sources between corporations in certain approved situations.

b) Depreciation and Recapture

Taxpayers are entitled to depreciate the cost of assets acquired by them for the purpose of producing income from property or business. In Canada, depreciable assets are categorized by class and a maximum rate of depreciation (called "Capital Cost Allowance") is prescribed in respect of each class. In general, depreciation is calculated on a diminishing balance basis, but for some classes the "straight line" method of depreciation is applied. Taxpayers who do not claim tax depreciation in a year may claim it in a subsequent year. In certain instances, a taxpayer may be entitled to an accelerated rate of depreciation.

When the taxpayer disposes of an asset on which depreciation has been claimed, the taxpayer may be required to "recapture" depreciation previously deducted and include that amount in income.

An "available for use" rule establishes a date when the tax depreciation may commence, usually when the asset becomes available for use by the taxpayer in a business.

A similar deduction is available for most intangible capital expenditures (called "eligible capital expenditures"), such as the purchase of goodwill. Three-quarters of such expenditures may be "depreciated" at a rate of 7% per year on a diminishing balance basis.

c) Deductibility of Expenses

Generally, reasonable expenses of doing business are deductible from revenues for the purpose of calculating the income that is subject to tax according to generally accepted accounting principles. Note, however, that specific rules apply to certain types of expenses. In Ontario, for example, an amount equal to 5/15.5 of management or administration fees, rents, royalties and similar payments (other than for computer software, patents, or industrial know-how), paid to a non-resident person with whom the resident does not deal at arm's length, must be included in computing the resident's income for provincial tax purposes.

In the case of a branch operation, expenses incurred outside Canada on behalf of the Canadian business, including a reasonable proportion of foreign head office administrative expenses, may be deductible in computing the income of the Canadian business.

d) Interest Deductibility on Loans from Non-Resident Corporations

Generally, interest on funds borrowed from a non-resident and used in the business is deductible in computing income. The deduction reduces the corporation's taxable income but the interest payment will be subject to Canadian withholding tax. By "thinly capitalizing" the subsidiary, the non-resident shareholder could significantly increase the amount of money received from its subsidiary by, in effect, taking out the subsidiary's profits in the form of interest payments on loans made to the subsidiary rather than dividends. Therefore, there are some restrictions. Interest on funds borrowed from specified non-resident shareholders (generally, non-residents that own 25% or more of the Canadian corporation) that exceed more than two times the equity of the corporation will not be deductible by the corporation.

The ITA defines equity by reference to the corporation's paid-up capital, contributed surplus and retained earnings. The ITA also contains an anti-avoidance provision which deems a loan made by a related non-resident to an unrelated third party on condition that the third party will lend to the related Canadian corporation, to be a direct loan from the non-resident to the Canadian corporation. In other words, the non-resident corporation cannot enter into so-called "back-to-back" loans in an attempt to avoid the application of the "thin capitalization" rules.

4.5 Income from Foreign Affiliates

Canada imposes tax on foreign accrual property income (FAPI) derived outside Canada by a controlled foreign affiliate (CFA) of a taxpayer resident in Canada. A non-resident corporation is considered to be a CFA of the taxpayer if the taxpayer and not more than four other persons, or a related group of which the taxpayer is a member, control the voting shares of the corporation. The taxpayer must also own more than one percent of any class of shares of the non-resident corporation and the total of the equity percentages of the taxpayer and related persons cannot be less than 10%.

A CFA may earn FAPI, exempt surplus or taxable surplus. In simplified terms, FAPI is the passive investment income of the CFA that is not used in an active business. FAPI is taxed in the Canadian shareholder's hands as it accrues.

Exempt surplus generally consists of active business income carried on in a country with which Canada has concluded a tax treaty, and is not taxable in a Canadian corporate shareholder's hands even when it is repatriated to Canada. Taxable surplus generally consists of active business income earned from a business carried on in a country with which Canada has not concluded a tax treaty. Taxable surplus is taxable in a Canadian corporate shareholder's hands only when it is repatriated to Canada and is eligible for a deduction relating to foreign tax paid. Generally, a Canadian corporate shareholder will realize a taxable capital gain (or an allowable capital loss) when it disposes of the shares of the foreign affiliate.

A corporation resident in Canada will have imputed income for interest on loans made to non-residents to the extent that the interest payable on the loan is less than a reasonable rate. The imputed income applies on loans that are outstanding for more than one year.

4.6 Transfer Pricing

Canadian resident corporations, as well as non-resident corporations carrying on business in Canada, are required to file annual returns detailing transactions with related non-residents. An annual return must be filed if the fair market value of property or services transacted with the related non-resident exceeds $1 million. In addition, the Minister of National Revenue has the authority to request any foreign-based information or documentation that may be viewed as relevant to evaluating whether arm's length prices were used for goods, services, and property transferred between the parties.

Where the terms and conditions of a transaction between a taxpayer and a related non-resident would not have been made between persons dealing at arm's length, the terms and conditions will be adjusted pursuant to the ITA in order to reflect an arm's length transaction. Canada has e ntered into tax treaties that authorize it to adjust the income, loss or tax payable by a person under such circumstances.

In addition, a penalty is imposed pursuant to the ITA, where a taxpayer fails to make reasonable efforts to determine and use arm's length transfer prices. A taxpayer is deemed not to have made reasonable efforts unless the corporation makes or obtains on or before the document due date (in the case of a corporation, the corporation's tax filing date) contemporaneous documentation detailing the transfer pricing. The penalty is equal to 10% of the amount of the total unfavourable transfer pricing adjustments for the year less items for which reasonable efforts were made. No penalty is imposed if the adjustments do not exceed the lesser of 10% of the taxpayer's gross revenue for the year or $5 million. The penalty may be imposed in addition to any increase in tax liability and interest owing on tax payable.

4.7 Withholding Tax

Dividends, rents, royalties (including lump sum payments for the use of property in Canada), interest, management and administration fees and amounts for services rendered in Canada paid by a resident to a non-resident of Canada are all subject to a Canadian non-resident withholding tax. Withholding taxes may be reduced or eliminated if the non-resident is resident in a country with which Canada has concluded a tax treaty.

a) Dividends

Dividends paid by a Canadian resident to a non-resident shareholder are subject to a 25% non-resident withholding tax under the ITA which may be reduced to as little as 5% for dividends paid to shareholders resident in countries with which Canada has entered into tax treaties.

b) Rental income from Real Property

Gross rental income from real property paid or credited by a Canadian resident to a non-resident is subject a 25% withholding tax. However, non-residents may elect to be taxed on their net rent under Part I of the ITA.

c) Royalties

Royalties paid or credited by a Canadian resident to a non-resident are subject to a 25% withholding tax, which is reduced to as little as 10% for royalty payments to persons resident in those countries with which Canada has entered into a tax treaty.

Canada considers payments for the right to use custom software to be royalties and subjects these royalties to withholding tax. However, payments for the right to use pre-packaged or "off the shelf" software are considered to be payments for the acquisition of tangible personal property rather than royalty payments and are not subject to withholding tax.

Canada has announced its willingness to include in its tax treaties an exemption for royalties paid for the use of computer software. Consequently, Canada's treaties with certain countries, such as the United States and the Netherlands, contain such an exemption. Recently concluded or amended treaties may contain such an exemption.

Technology transfers should be scrutinized carefully to ensure that no amount paid by the resident transferee to the non-resident is unnecessarily or inadvertently subjected to Canadian withholding tax.

d) Interest

Interest paid or credited by a Canadian resident to a non-resident is subject to a 25% withholding tax, which is generally reduced to as little as 10% for payments to persons resident in those countries with which Canada has entered into a tax treaty. There are many exemptions in the ITA from Canadian withholding tax on interest. One of the most significant is an exemption for interest paid by a Canadian resident to a non-resident with whom the Canadian resident deals at arm's length on a loan having a term of five years or more.

e) Technical Services Rendered in Canada

The rendering of technical services in Canada by the employees of a non-resident is likely to constitute "carrying on business in Canada" within the meaning of the ITA. While under the ITA the profits of such businesses are taxable in Canada, Canada's income tax treaties with other countries usually provide that such profits are taxable by Canada only if the non-resident maintains a permanent establishment in Canada. Non-residents from treaty countries will wish to avail themselves of treaty protection by taking appropriate precautions to ensure that the activities of their employees or agents in Canada do not create a permanent establishment in Canada.

Although a non-resident individual rendering technical services in Canada may not be liable to Canadian taxation, Canadian residents who pay for such services are required in the first instance to withhold and remit 15% of such payments to the Receiver General of Canada, unless a waiver of this requirement is obtained from the Canada Revenue Agents.

f) Services Rendered by the Non-Resident in its Own Country

It is not uncommon for a non-resident transferor of technology to render services to a Canadian resident transferee in the transferor's own country, for which a separate service charge may be levied. Such services will not constitute carrying on business in Canada, and payments for such services will not be taxed on that basis.

If the services are managerial or administrative in nature, the payments therefor may attract Canadian withholding tax as discussed in the Management and Administration Fees section below. Withholding tax is also levied on payments by a resident of Canada to a non-resident in connection with services of an industrial, commercial or scientific nature without reference to the *situs* of such services, where payment is based in whole or in part on:

(i) the use to be made of the services or the benefit to be derived from same; or

(ii) the production or sales of goods and services; or

(iii) profits;

unless such fees are paid in connection with the sale of property or the negotiation of a contract.

g) Management and Administration Fees

Management and administration fees paid or credited by a Canadian resident to a non-resident are also subject to a non-resident withholding tax. The withholding tax is not dependent on the *situs* of the services but applies whether or not the services are performed for the Canadian resident. Under an exempting provision, a payment for services that include management or administration will not be subject to withholding tax in Canada if either:

(i) the services performed by the non-resident were performed in the course of a business carried on by him that included the performance of such services for a fee and the parties were dealing at arm's length; or

(ii) the payment was made to reimburse the non-resident for reasonable expenses incurred on behalf of the Canadian resident.

Under some tax treaties that Canada has concluded with other countries, management or administration fees are not subject to Canadian withholding tax.

Some provinces, such as Ontario, impose an additional provincial tax on royalties and non-arm's length management and administration fees.

4.8 Branch Tax

The ITA levies an additional 25% tax on a non-resident corporation carrying on business in Canada through a branch. This tax is imposed on after-tax Canadian profits of such corporations that are not reinvested in Canada. The branch tax is in lieu of the withholding tax that would be levied were the corporation resident in Canada and paying dividends to non-resident shareholders. The branch tax is reduced under Canada's tax treaties to the applicable treaty withholding tax rate on dividends. In some treaties, such as that with the United States, there is a cumulative exemption from branch tax on the first $500,000 of branch profits.

4.9 Capital Tax

The most recent federal budget eliminated the federal capital tax as of 1 January 2006.

Ontario Capital Tax

Most of the provinces of Canada also levy a capital tax upon corporations. Ontario levies a capital tax on corporations resident in Canada and also non-resident corporations. The tax is generally payable by a Canadian corporation only if the corporation has a permanent establishment in Ontario. Tax is payable by a non-resident corporation if it has a permanent establishment in Ontario or if it has income from the sale or rental of real property, timber resource property or a timber limit in Ontario.

For most corporations, tax applies at a rate of 0.3% of "taxable capital" or, for non-resident corporations, "taxable capital employed in Canada" to the extent that the taxable capital is allocable to Ontario. Taxable capital is essentially the items that appear on the right hand side of the balance sheet (liabilities, paid up capital, retained earnings and other surplus accounts) with adjustments where booked amounts do not reflect the amounts reported for income tax purposes.

The treatment of financial institutions for Ontario capital tax is slightly different from the treatment of other corporations.

Effective 1 January 2006, the first $10 million in taxable capital of a corporation or group of associated corporations will be exempt from the capital tax. In addition, the amount of taxable capital at which the capital tax will begin to apply will be increased on 1 January, 2007 to $12.5 million. As of 1 January 2008 the deductible will rise to $15 million. Starting on 1 January 2007 the rate of tax will decline, until the capital tax is eliminated completely on 1 January 2012.

4.10 Partnerships and Joint Ventures

Income (or loss) of a business carried on as a partnership will be calculated at the partnership level as if the partnership were a separate person. All applicable deductions from the partnership business must be taken at the partnership level. However, liability for tax on partnership profits flows through to the partners in accordance with their entitlement to the profits or losses of the partnership. For example, depreciation is an expense that must be claimed at the partnership level. This may be disadvantageous if one of the partners does not wish to claim maximum depreciation in the year.

One of the reasons parties contemplating an unincorporated joint venture usually choose to combine their resources on a non-partnership basis is to ensure that deductions for tax purposes are available at the participant level. Since the ITA contains no specific rules regarding computations of the income of such an unincorporated, non-partnership joint venture, each joint venture participant is free to calculate its income and losses from the joint venture separately.

4.11 Foreign Tax Credits

The ITA provides a tax credit where a Canadian resident has paid foreign taxes on business and non-business income earned in a foreign jurisdiction. Generally, therefore, additional Canadian tax will be payable only where the total Canadian tax exceeds the total foreign tax on such income.

5. Customs and International Trade

5.1 Process of Importation

The *Customs Act* governs the administration and enforcement of Canada's customs laws. All goods imported into Canada must be reported to the Canada Border Services Agency ("CBSA") and all applicable duties and taxes must be paid. The amount of customs duty payable will depend upon the tariff classification, the origin and the value of the goods as determined for customs purposes.

a) Business Number – Importer/Exporter Account Number

All Canadian individuals or businesses importing on a commercial basis must obtain a Business Number in order to account for their goods. The CBSA uses this number to identify a business and to process customs accounting documents. Application forms are available from all CBSA offices that clear commercial shipments.

b) Customs Brokers

A customs broker acts as an agent of an importer in dealings with the CBSA. Although any agent, customs brokers included, may undertake most customs work on behalf of importers, only customs brokers who have been licensed by the CBSA are authorized to account for goods and pay duties and taxes on behalf of an importer on a commercial basis.

c) Tariff Classification of Imported Goods

Canada's *Customs Tariff* is based on the international Harmonized Commodity Description and Coding System ("HS"). This classification of goods under the *Customs Tariff* is used to determine the rate of duty that applies, for statistical purposes and to determine if the goods being imported are subject to any prohibitions, quotas, anti-dumping or countervailing duties.

d) Valuation of Imported Goods

To ascertain how much duty and tax to apply to an imported good, importers first need to know the value of the good. The primary method of valuing goods for Canadian customs purposes is the transaction value method. The transaction

value is the price actually paid or payable for the goods when sold for export to Canada to a purchaser in Canada, subject to certain adjustments, provided the vendor and the purchaser are not related, or if they are related, provided that it can be shown that the relationship has not influenced the price. In other words, the value for duty is usually based upon the selling price between the exporter and the importer. Where the transaction value method cannot be used (for example, if there is no sale for export to Canada), the *Customs Act* provides a number of alternative methods of valuation which must be applied in a specified order.

e) Tariff Treatment

Goods imported into Canada from most countries are entitled to Most-Favoured-Nation tariff treatment. There are, however, a number of preferential duty rates available provided the goods in question meet prescribed rules of origin. For example, pursuant to the *North American Free Trade Agreement* ("NAFTA"), goods which are imported into Canada from the United States and Mexico and which meet the NAFTA rules of origin are entitled to enter free of duty. Canada has also implemented free trade agreements with Israel, Costa Rica and Chile. In addition, goods originating in certain "developing" countries, such as South Korea, Singapore and Hong Kong, are entitled to preferential rates of duty under the *General Preferential Tariff* provided certain local content requirements are met.

5.2 Import Controls

The Canadian Government restricts the importation of certain goods, such as dairy, meat and poultry products to promote various domestic policy objectives as well as to implement intergovernmental arrangements or commitments. Goods which are subject to import controls are contained in an Import Control List established under the *Export and Import Permits Act* (Canada) ("EIPA"). Persons who wish to import into Canada goods found on the Import Control List must first obtain an import permit from the Import Controls Division of the Department of Foreign Affairs and International Trade.

5.3 Export Controls

The EIPA not only controls the import of certain goods into Canada, but also controls the export of certain goods and technologies from Canada.

In order to control certain exports from Canada, the EIPA authorizes the federal cabinet to establish an Export Control List ("ECL") and an Area Control List ("ACL"). Goods and technologies listed on the ECL include military goods and technologies, dual-purpose industrial goods and technologies which have both civilian and military applications, nuclear-related goods and technologies and miscellaneous non-strategic goods. Exporters whose goods or technologies are found on the ECL are required to obtain an export permit to export such goods to all destinations with one general exception. It is not necessary to obtain an export permit if the country of final destination is the United States, except for nuclear-related goods and certain miscellaneous items.

The ACL contains a list of countries to which all exports are subject to controls and for which an export permit must be obtained, whether or not the goods are contained on the ECL.

Except in specific circumstances where General Export Permits ("GEPs") are available, exporters must apply to the Export Controls Division of the Department of Foreign Affairs and International Trade for an individual export permit. GEPs authorize the export of certain goods to eligible countries without requiring the exporter to apply for an individual export permit, provided prescribed conditions are met.

5.4 The North American Free Trade Agreement

The NAFTA is a comprehensive free trade agreement consistent with Article XXIV of the GATT 1997. This means essentially that Canada, the United States and Mexico have agreed to eliminate customs duties and other restrictive regulations of commerce on "substantially all the trade" in goods originating between the three countries.

NAFTA came into effect on 1 January 1994 and provides ultimately for the elimination of duties on trade of originating goods between Canada, Mexico and the United States. As of 1 January, 2003 originating goods are not subject to duty when traded between Canada, the United States and Mexico.

Unlike the members of the European Union, which is a customs union, the NAFTA members do not have a common external tariff that applies to goods imported from outside the free trade area. To ensure that goods are not imported into the country within the free trade area with the lowest external tariff and simply transhipped duty free to the others, special rules of origin are required to ensure that only goods produced within the free trade area benefit from free trade treatment. The rules of origin are complex and must be carefully analyzed by corporations doing business in North America who wish to take advantage of the preferential rates of duty under the NAFTA.

6. Sales Tax

6.1 Federal Goods and Services Tax/Harmonized Sales Tax

a) General

A federal value-added tax, known as the Goods and Services Tax ("GST"), applies to most goods and services imported into or sold in Canada. The tax rate of the GST depends upon the province in which the goods or services are sold or imported. In 1997, Newfoundland, New Brunswick, and Nova Scotia ("Participating Provinces") eliminated their general sales tax and harmonized their respective systems with the federal GST. The rate of tax in those provinces is 14% and is referred to as the Harmonized Sales Tax or the HST. In all other provinces, the GST is imposed at a rate of 6%. These other provinces, however, administer their own provincial sales taxes.

As a general rule, the GST/HST is collected throughout the production and distribution chain. Businesses at each level of the chain charge GST/HST on their domestic sales and are able to claim a full refundable credit, known as an "input tax credit", for any GST/HST paid on purchases of goods and services used in the course of doing business. Persons required to collect and remit GST/HST must register with the Canada Revenue Agency and file GST/HST returns at the end of each reporting period, remitting the difference between the GST/HST charged on sales and input tax credits claimed for the period. If the input tax credits exceed the amount of GST/HST charged on sales in any reporting period, the difference is refunded.

The GST/HST base is very broad, covering the vast majority of "supplies" made in Canada. A "supply" is the provision of property or a service in any manner including a sale, transfer, barter, exchange, licence, rental, lease or gift. GST/HST is not payable on a limited number of supplies specifically designated as "zero-rated" supplies (also referred to as "tax-free supplies") and "tax-exempt" supplies. Zero-rated supplies include basic groceries, agricultural and fish products, prescription drugs, and medical devices. Tax-exempt supplies include certain domestic financial services, health care services and educational services. The key difference between zero-rated supplies and tax-exempt supplies is that the vendor

or lessor making zero-rated supplies is entitled to recover the GST/HST it has paid by claiming input tax credits, whereas vendors or lessors making tax-exempt supplies cannot.

b) Registration Requirements

As a general rule, all persons engaged in a "commercial activity" in Canada must register to collect the GST/HST within 30 days of first making a taxable supply in Canada.

Non-residents are required to register only if they carry on business in Canada and make taxable supplies in Canada. It should be noted, however, that a non-resident corporation which has a "permanent establishment" in Canada, as defined for GST/HST purposes, is deemed to be resident in Canada in respect of those activities carried on through that establishment.

c) Imports

The GST is generally payable on the duty-paid value of goods imported into Canada. The duty-paid value is the value for duty determined for customs purposes plus any customs duties and excise duties and taxes. The GST payable on imported goods is collected by the Canada Border Services Agency at the same time customs duties are collected. Persons resident in the Participating Provinces who import non-commercial goods into Canada pay HST calculated at the rate of 14% on the duty paid value of the goods, rather than the GST. Non commercial goods are goods other than those imported for sale or for any commercial, industrial, occupational or institutional use.

GST/HST also applies to services and intangible property (such as intellectual property rights) imported into Canada. GST/HST is not imposed, however, on these supplies when imported by registrants for use in a "commercial activity", as this term is defined for GST/HST purposes. Where the imported service or intangible property is for use other than in a commercial activity (for example, in providing an exempt supply such as domestic financial services), the GST/HST applies on a self-assessment basis.

d) Exports

The GST/HST applies only to supplies of goods and services "made" in Canada. Supplies of goods and services that are made outside Canada are beyond the scope of the GST/HST. Special deeming rules are contained in the legislation for purposes of determining when a supply is made inside or outside of Canada. Furthermore, certain supplies of goods and services that are made in Canada are specifically designated as zero-rated exports and are not subject to GST/HST. Therefore, as a general rule, the GST/HST does not apply to goods and services exported from Canada. Exporters are entitled, however, to claim input tax credits to recover any GST/HST paid on goods and services for use in their commercial activities, thereby completely removing from the exported goods and services any GST/HST component.

6.2 Ontario Sales Taxes

All Canadian provinces have some form of general or limited sales tax. They may include sales taxes, use taxes, value-added taxes, or specific sectoral taxes such as fuel, tobacco, or hotel and accommodation taxes.

The Ontario Retail Sales Tax ("RST") is a form of sales and use tax. It applies to most sales, leases, and licences of tangible personal property, computer software, natural and manufactured gas, and insurance policy premiums. It also applies to certain services including telecommunications, admissions and ticket sales, transient accommodation, commercial parking, warranties, and labour services provided to install, assemble, dismantle, adjust, repair or maintain tangible personal property.

The general rate of RST is 8% and is calculated on the fair value of taxable goods, taxable services and insurance premiums. RST rates of tax of 10% or 12% apply to liquor, beer, wine depending on where these items are sold and the rate of RST is 10% on admissions to places of amusement.

As a sales and use tax, RST applies only to retail sales. It does not apply to transactions at the wholesale level. A number of products and services are also specifically exempt from RST. For example, manufacturing and processing machinery and equipment can generally be acquired exempt from RST. RST will also not usually apply to any tangible personal property acquired for the purpose

of resale or for the purpose of manufacturing or processing the goods into other tangible personal property for resale. Other exemptions exist for a wide variety of products and services.

Anyone carrying on business in Ontario who will be making RST-taxable sales is required to register with the Ontario Ministry of Finance, Retail Sales Tax Branch, as a vendor for RST purposes. Such vendors are required to collect RST from their customers on all sales made in Ontario and to remit the tax collected to the tax authorities. Anyone who does not sell RST-taxable goods or services or who sells such products and services only at the wholesale level is not required to register.

In addition, anyone residing or carrying on business in Ontario who imports taxable goods or services into Ontario for his own use or the use of another at their expense is required to self-assess and remit RST on any goods or services that would be subject to RST if they had been acquired in Ontario.

Ontario also collects, in addition to RST, certain sectoral taxes. These include fuel tax, gasoline tax, and tobacco tax.

7. Competition Act

7.1 General

Canadian "anti-trust" law is contained primarily in the federal *Competition Act* which includes both criminal and non-criminal provisions.

a) Criminal Offences

Criminal offences include conspiracy, bid-rigging, discriminatory and predatory pricing, price maintenance and certain misleading advertising or deceptive marketing practices. Prosecutions are brought before criminal courts where strict rules of evidence apply. Penalties include fines or imprisonment, or both. Individuals as well as companies may be charged. Prohibition orders (court orders forbidding certain activities) and interim injunctions (temporary court orders forbidding certain activities until a hearing is held) may also be obtained from the court upon application by the Commissioner of Competition.

b) Non-Criminal Offences

Non-criminal reviewable matters include mergers, misleading advertising, abuse of dominant position, refusal to deal, consignment selling, exclusive dealing, tied selling, market restriction and delivered pricing. These matters, on reference by the Commissioner of Competition, are reviewed by the Competition Tribunal under non-criminal law standards and may be resolved by the issuance of an order by the Tribunal terminating the restrictive practice and prescribing ameliorative actions.

A private right of civil action is available if there has been a violation of the criminal provisions of the *Competition Act* or a failure to comply with an order of the Tribunal or court. The private party must be able to prove "loss" or damage as a result of the violation. There is a two-year limitation period for filing a private action under the *Competition Act*.

c) Civil Rights of Action

Recently, the Competition Act has been amended to permit private individuals and corporations to bring applications directly to the Competition Tribunal with respect to certain of the non-commerical reviewable matters.

7.2 Mergers

The *Competition Act* contains provisions that relate to the regulation of acquisitions of control over Canadian businesses. Part IX of the *Competition Act* requires pre-notification of an acquisition of more than 20 % of the voting shares of a public corporation that directly or indirectly carries on a business, or more than 35 % of the voting shares of a private corporation that directly or indirectly carries on a business, where the following two thresholds are met:

1. the purchaser and its affiliates and the target corporation and its affiliates (which would include the target corporation's parent and its affiliates) have assets in Canada whose book value exceeds $400 million, or annual revenues from sales in, from or into Canada which exceed $400 million; and
2. the value of the assets in Canada of the target corporation exceeds $50 million or such assets generate annual revenues from sales in or from Canada in excess of such amount.

Similar provisions exist with respect to the acquisition of assets.

If a merger pre-notification is filed, the transaction must not be completed until the mandatory waiting period has expired: fourteen days in the case of a short-form filing, or 42 days in the case of a long-form filing. If a short form is filed, a request may be made by the Competition Bureau within the initial fourteen day period that the long form be filed.

The Merger Enforcement Guidelines outline the evaluative criteria that are used to determine the likelihood that a merger may result in a substantial lessening or prevention of competition. The market share of the merged firm and post-merger industry concentration are only two of many factors considered. While these alone are not definitive, the higher the market share and the greater the concentration will be after a merger, the more likely that the Commissioner will be concerned about the transaction.

The *Competition Act* contemplates a procedure whereby the parties to a proposed transaction may, in lieu of or in addition to filing a merger pre-notification, request an Advance Ruling Certificate (ARC), in which the Commissioner may determine that a proposed merger will not substantially lessen competition. An ARC request is suited to transactions that are unlikely to raise any competition concerns. The Commissioner is obliged to consider such requests as expeditiously as possible. It is difficult to estimate the amount of time it takes to obtain an ARC since much depends upon the extent of the information required by the Commissioner. A filing fee of $50,000 is payable in respect of a merger pre-notification or an ARC request unless both relate to the same transaction, in which case the fee is payable only once.

7.3 Price-Fixing, Cartels

The prohibition of conspiracies that unduly lessen competition has been successfully invoked in a number of prosecutions over the years. Any conspiracy, agreement or arrangement that would, if implemented, lessen competition unduly by, for example, fixing prices or preventing new competitors from entering the market, is a criminal offence. Consideration is given to the conspirators' ability to control the market in question, but lessening competition unduly does not require total control of the market.

Penalties now include a fine of as much as $ 10 million, or up to five years' imprisonment, or both.

7.4 Bid-Rigging

Bid-rigging is an agreement between parties whereby one or more bidders will refrain from submitting bids in response to a call for tenders, or bids are submitted which have been arranged between the parties. If either situation is known to the person calling tenders, no offence occurs under this section. No effect on competition need be proven. Parties engaged in bid-rigging are liable to a fine at the discretion of the court or imprisonment for up to five years, or both.

7.5 Price Discrimination and Predatory Pricing

The *Competition Act* prohibits a supplier from making a practice of granting price concessions to one purchaser which are not available to competing purchasers in respect of a sale of articles of like quality and quantity. There have been relatively few prosecutions under this provision although there have been numerous complaints and investigations. The Competition Bureau issued guidelines setting out its enforcement policy on these provisions.

7.6 Resale Price Maintenance

It is a criminal offence for a person who engages in the business of producing or supplying a product to attempt to influence upwards the price, or attempt to discourage the reduction of the price, at which any other person engaged in the business supplies a product. It is also an offence to refuse to supply a product or to otherwise discriminate against another person engaged in business because of the low pricing policy of that person. Suppliers who suggest retail prices to customers must clearly state that their customers are under no obligation to accept the prices suggested.

The fines levied in price maintenance cases now reach levels of $200,000. It should be noted, however, that the prohibition on resale price maintenance applies only where the parties are not affiliated.

7.7 Misleading Advertising and Deceptive Marketing Practices

New provisions in the *Competition Act* create civil and criminal tracks dealing with misleading advertising and deceptive marketing practices. Misleading advertising remains a criminal offence where a false and misleading representation is knowingly and recklessly made. In the case of less serious deceptive conduct, a new civil regime with a lesser burden of proof has been created. A new criminal offence specifically dealing with deceptive telemarketing practices has also been introduced.

These provisions prohibit representations to the public that are materially false or misleading, performance representations not based on adequate and proper tests, false testimonials and misstatements as to the ordinary price of a product.

Penalties for a criminal offence include fines in the discretion of the court and/or prison terms. In certain circumstances, directors and officers may also be held liable for the offence committed by the corporation.

Penalties for a civil offence include prohibition orders, temporary cease-and-desist orders, correction notices and administrative penalties.

Promotional contests are also subject to certain disclosure requirements under the *Competition Act*. There must be adequate and fair disclosure of the number and approximate value of the prizes, regional allocation of prizes, if any, and of any facts known to the advertiser that affect materially the contestant's chances of winning. Distribution of prizes must not be unduly delayed. A violation of these provisions could result in a fine or imprisonment up to a maximum of five years.

The *Competition Act* contains provisions against double ticketing, pyramid selling, "bait-andswitch" selling (where a product is advertised at a bargain price, and a reasonable supply is not available) and selling above an advertised price.

7.8 Other Non-Criminal Reviewable Matters

These are practices such as exclusive dealing, tied selling, refusal to deal and market restriction, which are not *per se* illegal, but which, depending on the circumstances, may lead to an order prohibiting their continuation. While these matters are not always anti-competitive, they may have anti-competitive consequences in certain circumstances.

8. Advertising and Labelling of Goods for Sale

8.1 Introduction

There is considerable legislation, at both the federal and provincial levels, relating to the advertising and labelling of prepackaged consumer products. The primary federal labelling statute is the *Consumer Packaging and Labelling Act* ("CPLA"). Labelling, advertising and other regulatory requirements are also found in customs and importation laws, in the federal *Competition Act*, as well as in product-specific legislation, such as the *Food and Drugs Act*, the *Canada Agricultural Products Act*, the *Hazardous Products Act*, the *Telecommunications Act* and *Radiocommunication Act*, the *Textile Labelling Act*, and the *Precious Metals Marking Act*. In addition, labelling is impacted by product liability law, which imposes a general duty to warn against reasonably foreseeable harms.

8.2 Consumer Packaging and Labelling Act Regulations

The CPLA and regulations apply, with some exceptions, to all prepackaged products (defined as any product packaged in a container in the manner in which it is ordinarily sold to, used or purchased by a consumer without being repackaged). The label of a prepackaged product must generally contain the following mandatory information:

a) Net Quantity Declaration

The net quantity must be declared on the principal display panel of the product in English and French, in metric units, or by numerical count, depending on the product. It must generally be declared by volume where the product is a liquid or gas and by weight where the product is a solid. The declaration must be accurate within prescribed tolerances.

b) Product Identity Declaration

The identity of the prepackaged product must be shown on the principal display panel in both English and French, using the common or generic name, or the function of the product.

c) Dealer Declaration

The term "dealer" may include a manufacturer, processor or producer, an importer or packer, or a distributor or retailer of a product. The dealer's name and the address of its principal place of business must be shown in English or French, anywhere on the outer surface of the package except the bottom, with some exceptions. The address must be sufficient to allow a postal delivery to be made.

In the case of an imported product, the name and address must be preceded by the words "Imported by" or "Imported for" (and their French equivalent) unless the geographic origin of the product is stated. There are specific regulations for the size of the type in which information required by the CPLA must be shown.

8.3 Imported Goods Regulations

In addition to the CPLA, the marking of many goods imported into Canada is governed by the *Marking of Imported Goods Regulations*, which require specified goods imported into Canada to be marked in English or French to indicate the country of origin. The markings are required to be conspicuous, legible, sufficiently permanent, and capable of being easily seen during ordinary handling of the goods. Different marking rules apply depending on whether goods are imported from NAFTA or non-NAFTA countries.

8.4 Product Specific Legislation

a) The Food and Drugs Act and Regulations

Detailed regulations under the *Food and Drugs Act* (FDA) apply to drugs, natural health products, medical devices, cosmetics and human foods sold or advertised in Canada. The FDA prohibits a person from packaging, labelling, selling or advertising any of these products in a manner that is false, misleading or deceptive, or that is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety. Any product that is not packaged or labelled as required under the FDA is deemed to be misleading or deceptive. The particular requirements that apply to products regulated by the FDA include the following:

(i) Drugs

Products falling within the definition of a drug (generally including any substance manufactured, sold or represented for use in the diagnosis, treatment, mitigation or prevention of a disease, disorder or abnormal physical state, or its symptoms, or for restoring, correcting or modifying organic functions) must be pre-approved by Health Canada through the issuance of a drug identification number ("DIN"). Over the counter drugs such as sunscreens, anti-dandruff shampoo, and medicated skin care products also require a DIN. Drugs are subject to specific packaging, labelling and advertising requirements. Drug establishment licensing and compliance with good manufacturing practices requirements is also required.

(ii) Natural Health Products ("NHP")

Products falling within the definition of a NHP (generally including any drug-like product whose sole medicinal ingredients are natural substances, such as vitamins and minerals, and fungi, algae, plants or plant material, or extracts or isolates thereof) are required to obtain premarket approval from Health Canada in the form of a product licence and be issued a NHP number. As with drugs, specific packaging, labelling and advertising requirements apply. Site licensing and compliance with good manufacturing practices requirements is also required.

(iii) Medical Devices

Medical devices (generally including any article, instrument, or apparatus manufactured, sold or represented for use in purposes similar to those for drugs), may be required to obtain premarket authorization and hold a licence. As with drugs and NHPs, specific packaging, labelling and advertising requirements apply.

(iv) Cosmetics

Cosmetics (generally including any substance manufactured, sold or represented for use in cleansing, improving or altering the complexion, skin, hair or teeth) are subject to packaging and labelling requirements as well as ingredient restrictions and limitations on advertising and labelling claims. Cosmetics must be registered with Health Canada within 10 days of their date of first sale in Canada. Cosmetic labels will be required to carry an ingredient listing beginning in fall 2006.

(v) Foods

Human foods must comply with a wide range of compositional, packaging, advertising and labelling requirements in order to be sold or advertised in Canada. Detailed standards apply to the composition, strength, potency, purity, quality and other properties of certain foods. Food additives are highly regulated, and some types of foods may be sold only in standard container sizes. A variety of information is generally required to appear on the label of prepackaged foods, including a list of ingredients in descending order of proportion by weight in the product, and a best before date for products with a shelf life of less than 90 days.

Most prepackaged foods sold in Canada are also required to carry a Nutrition Facts table ("NFT"), setting forth the nutritional content of foods in accordance with detailed requirements in the FDA. Although the Canadian NFT shares its name with the US nutrition information panel, prepackaged foods sold in Canada are prohibited from displaying the US table, whether alone or in combination with the Canadian NFT.

Detailed requirements also apply to claims made about the nutrient content of a food outside the NFT. Although as a rule health-related claims are prohibited on foods, the FDA permits structure-function claims regarding the biological role of certain nutrients. Claims using the wording prescribed in regulations may also be made about the relationship between a diet featuring certain nutrients and the reduction of risk in relation to certain diseases.

While the FDA is the principal law governing the regulation and labelling of prepackaged foods in Canada, certain types of foods, including processed fruits and vegetables, fresh meats, poultry, fish, dairy products, eggs, honey, and maple products are also subject to regulations established under the Canada Agricultural Products Act or to food-specific statutes. In addition, the province of Quebec has several laws relating to food, including legislation governing dairy product substitutes (for which government pre-approval of labels is required), and mandatory labelling, consignment and payment obligations for the recycling of beer and soft drinks in non-returnable containers.

b) Hazardous Products

The *Hazardous Products Act* regulates packaging and labelling requirements for potentially hazardous consumer products such as bleaches, cleaners, solvents, petroleum distillates and other household products, as well as for certain commercial/industrial products that may be hazardous to users in the workplace. Manufacturing and design standards for consumer products such as cribs, hockey helmets, tents and car seats are also prescribed.

c) Electrical Equipment

Electrical equipment sold in Canada is subject to standards published by the Canadian Standards Association ("CSA"). Although the relevant standards are voluntary, many of them have been adopted by statutory reference as mandatory requirements through provincial electrical safety codes.

Pursuant to telecommunications and radiocommunication laws, telecommunications terminal equipment, wireless devices, and a wide variety of electrical products that emit radio interference are required to conform to standards and marking requirements established by Industry Canada. In some cases, certification or registration is also required.

d) Textiles

A disclosure label must be affixed to most consumer textile articles sold in Canada providing mandatory information relating to fibre content in English and French, as well as the identity of the dealer. Ontario and certain other provinces also have legislation requiring labelling of articles that are upholstered or contain stuffing (i.e., any material used for padding, filling or cushioning that is meant to be enclosed by a covering). A person who inserts and covers stuffing must also be registered under the legislation.

e) Jewellery

Any jewellery comprising precious metals (defined as gold, palladium, platinum and silver and an alloy of any of those metals and any other metal and an alloy thereof) that carries a quality mark is required to be marked in accordance with the *Precious Metals Marking Act* and *Precious Metals Marking Act Regulations*. Also, Health Canada has enacted the *Children's Jewellery Regulations* pursuant to the *Hazardous Products Act*, which restrict the importation, advertisement, or sale of children's jewellery that contains more than 600 mg/kg total lead and more than 90 mg/kg migratable lead.

f) Environmental Labelling

There is currently no requirement under federal law to include statements with respect to recycling or recyclability on products or packaging containers. However, if recycling statements or symbols appear, they must conform to the Canadian Standards Association International (CSAI) National Standard of Canada CAN/CSA ISO 14021-00, "Environmental labels and declarations – Self-declared environmental claims". Pursuant to the Standard, statements such as "Please

Recycle" are permitted only if collection or drop-off facilities are conveniently available to a reasonable proportion of purchasers in a market. The province of Quebec requires consignment/deposit markings for certain beverage products. In addition, some provinces and municipalities impose stewardship obligations for recyclable products and packaging.

8.5 Standards

The Standards Council of Canada ("SCC") coordinates and oversees the National Standards System. The SCC accredits Canadian standards organizations (including the Canadian General Standards Board, CSA, Underwriters' Laboratories of Canada, and the Bureau de normalisation du Québec), and also approves National Standards of Canada.

The SCC maintains a database of standards developed by Canadian standards organizations. International Standardization Organization ("ISO") standards, American National Standards Institute (ANSI) and other US-developed standards are often referenced in the Canadian standards database or incorporated in Canadian standards.

Unless specifically mandated by law or regulation, there is no obligation for a Canadian manufacturer or importer to comply with the voluntary system of Canadian standards. However, where there is a statutory obligation for a product to meet a standard, the product must bear a label issued by the appropriate standards organization.

As a result of standards-related harmonization, certification of compliance with CSA standards can be given by either the CSA or certain other designated standards bodies. Products that are already approved for sale in the US may be permitted for sale in Canada without further inspection. US standards organizations may also be able to certify US products according to Canadian standards, and label them as such for importation into Canada. Products accredited according to European standards may not receive automatic accreditation in Canada; an analysis must generally be undertaken at the individual product level.

8.6 Advertising

The federal *Competition Act* prohibits representations to the public that are false or materially misleading, are not based on adequate and proper tests, contain false testimonials or make misstatements as to the ordinary price of a product. Both civil and criminal penalties can be imposed. The *Competition Act* also contains restrictions against various other sales and marketing practices, including pyramid selling, "bait-and-switch" selling, and selling above an advertised price. Additional requirements are contained in the Ontario *Consumer Protection Act* and other provincial trade practices legislation.

The *Canadian Code of Advertising Standards* and related guidelines administered by Advertising Standards Canada ("ASC"), an industry self-regulatory body, establish extensive advertising standards and guidance, including with respect to comparative advertising, advertising to children and the use of survey data to substantiate advertising claims.

8.7 Contests/Sweepstakes

Product labels and advertising are often used to promote contests and sweepstakes, which are subject to various disclosure requirements under the *Competition Act* as well as restrictions under the federal *Criminal Code*.

The *Competition Act* requires adequate and fair disclosure of, among other information, the number and approximate value of prizes, the regional allocation of prizes, if any, and any facts known to the advertiser that materially affect the chances of winning.

The required information is generally included in a set of legally reviewed contest rules and regulations, which contain numerous other disclosures and legal protections for contest sponsors. Because there is usually insufficient room to include these "full rules" everywhere a contest is publicized, "short rules" can be developed that contain essential information and tell consumers where they may consult the full rules. As contest rules are a contractual document, they may generally not be modified by the contest sponsor after a contest has begun; special steps should be followed if modifications are essential.

Due to restrictions under the *Criminal Code*, no purchase or equivalent may be required to enter a contest or sweepstakes that involves any element of chance. In addition, since games of pure chance are prohibited as illegal lotteries, contests and sweepstakes must contain a skill requirement (usually an arithmetical question). Accordingly, care should always be taken to ensure that entrants have a "no purchase necessary" means of entering a contest, and that promotional materials do not imply that a prize has been won before the prospective winner has satisfied the skill requirement. The *Competition Act* also contains specific provisions restricting the use of deceptive prize notices. The ultimate distribution of prizes must also not be unduly delayed.

The collection of personal information from individuals for purposes of administering a contest, or for other stated purposes, should always be conducted in accordance with a privacy statement providing for implied or express consent appropriate to the information being collected and addressing retention, destruction and any data transfer and disclosure issues.

As noted below, additional requirements apply to contests and sweepstakes that are open to residents of Quebec.

8.8 Quebec Laws

Goods sold in or into the province of Quebec are required to comply with the French language labelling requirements of the *Charter of the French Language* ("Charter"). The Charter requires that all inscriptions on a product, its packaging and any accompanying documents be in French, or if in French and another language, then with the French appearing in at least equal prominence to any other language. Particular rules apply to websites, signage, computer software, and toys and games.

Quebec laws also impose other unique sales and marketing requirements, including restrictions on advertising to children, registration, payment and reporting requirements for contests and sweepstakes, special rules for premium offers, Quebec-specific regulations governing false or misleading representations, and beverage consignment and recycling laws.

9. Protection of Intellectual and Industrial Property Rights

9.1 Patents

Patents are limited monopoly rights created by the Government of Canada, which confer on an inventor the right to exclude others from making, using or selling in Canada, the invention as defined in the patent. Canadian patents issuing from patent applications that are filed after 1 October, 1989, remain in effect from the date of grant until up to 20 years from the application filing date (subject to the timely payment of maintenance fees). No renewals are possible. Under Canadian patent law, patents can protect the process, machine, manufacture or composition of matter, or any improvement thereof, provided that these are new, useful and unobvious. Patents must be registered under the *Patent Act*.

Canada is a party to the *Paris Convention*, which promotes international protection of patents, trade-marks and industrial designs among member countries. Under the *Paris Convention*, a patent application filed in another Convention member country may receive priority consideration if a corresponding application is filed in Canada within one year.

In Canada, the first person to file a patent application has priority. A patent application is not accessible for public inspection until 18 months after the application filing date, or where a Paris Convention priority claim is made, until 18 months after the priority filing date.

The *Patent Act* requires that an exclusive licensee be registered at the Patent Office. While there is no statutory provision governing the failure to register, it is advisable to do so. A patent or patent application may be assigned in whole or in part; it is recommended that any such assignment be recorded in the Patent Office.

A straightforward patent application with no objection from the Patent Office will likely take between two and three years to become registered. In certain circumstances, it may be possible for an applicant to request that the examination process be expedited.

9.2 Trade-marks

Pursuant to the federal *Trade-marks Act*, trade-mark registration may be based on actual use of the mark in Canada, proposed use of the mark in Canada, use and registration of the mark in a foreign country, or making known of the mark in Canada. A trade-mark is deemed to be made known in Canada if it is used in a foreign country and has become well known in Canada by reason of the distribution of wares in Canada, the advertising of wares in printed publications, or by radio or television broadcasting. Under the *Paris Convention*, should one file a trade-mark application in another *Convention* member country, one may file the same application in Canada within six months of the foreign filing date and maintain the priority date of the foreign filing.

A trade-mark is registered after the application clears the Trade-marks Office examination procedure and it is either not opposed, or any opposition to the application is overcome. Registration is valid for a period of 15 years. Renewals for additional 15 year periods may be effected upon payment of a renewal fee. Upon application by an adverse party, a registration may be removed from the Register if it is not in commercial use within three years before the date of the cancellation notice issued by the Registrar. Assuming no difficulties in the Trade-marks Office, and no opposition initiated by third parties, registration will likely occur within 18-24 months from the date the application is filed. An availability search is advisable before filing a trade-mark application.

In Canada, one may license or transfer one's Canadian trade-mark to another party, whether it is registered or unregistered. It is not required that a trade-mark licensee be recorded on the Trade-marks Register as a registered user of the registered trade-mark. Under the more liberal system in place since 1993, the use of a trade-mark by a licensee, whether or not the trade-mark is registered, has the same effect, and is deemed always to have had the same effect, as use by the trade-mark owner on condition that the licence allows the owner to exercise direct or indirect control over the character or quality of the wares or services associated with the mark.

9.3 .CA Domain Names

The .CA domain name regime was substantially changed in 2000, when responsibility was transferred to the Canadian Internet Registration Authority ("CIRA"). .CA domain names must be acquired through a certified CIRA Registrar. Registrations last for 1-10 years. There are Canadian presence requirements to obtaining a .CA domain name. This means, generally speaking, that .CA domain names are available only to Canadian entities (e.g. individuals, partnerships and corporations) that satisfy various Canadian business requirements. Non-Canadian entities may apply for a domain name only if the domain name is registered as a trade-mark or official mark in the Canadian Trade-marks Office. There are no restrictions on the number of .CA domain names a particular entity may own.

Through the CIRA *Domain Name Dispute Resolution Policy*, a dispute resolution process enables the quick and inexpensive resolution of disputes involving .CA domain name registrations. A proceeding is initiated by the submission of a complaint by a complainant with a provider in accordance with the Resolution Rules. The complainant must, at the time of submitting a complaint, satisfy the various requirements for registrants in respect of the domain name that is the subject of the proceeding unless the complaint relates to a trade-mark registered in the Canadian Intellectual Property Office and the complainant is the owner of the trade-mark.

A registrant may submit to a CIRA dispute resolution proceeding if a complainant asserts that:

(a) the registrant's .CA domain name is confusingly similar to a mark in which the complainant had rights prior to the date of registration of the domain name and continues to have such rights;

(b) the registrant has no legitimate interest in the domain name; and

(c) the registrant has registered the domain name in bad faith. Although disputes involving .CA domain names can be determined by this process, disputes may also be resolved in the local courts. A list of certified Registrars and the rules and regulations regarding .CA domain names are available at www.cira.ca.

9.4 Industrial Designs

Industrial design protection is given to any new and original pattern, shape, configuration or ornamentation (or any combination of such features) applied to any article. Only the aesthetic aspect of a design is protectable. The principle of construction or the mere function of the article is not.

An industrial design must be filed within 12 months from the date of its first public disclosure in Canada. Registration is valid for five years from the date of registration, and may be renewed for one further five-year term. There is no further renewal. For a design to be fully protected after registration under the Industrial Design Act, the capital "D" in a circle, together with the name or the usual abbreviation of the name of the proprietor, must appear on all or substantially all the articles to which the registration pertains, or on the article's labels or packaging.

An industrial design may be assigned either in whole or in part. The assignment must be in writing, and can be recorded in the Industrial Design Office upon payment of the prescribed fee.

Under the Paris Convention, should one apply for industrial design protection in another Convention member country, one may, within six months of that foreign filing date, file an application in Canada and be granted the priority date of the foreign application.

A straightforward industrial design application with no objection from the Industrial Design Office will likely become registered in 12 to 18 months from the application date.

9.5 Copyright

In Canada, copyright exists in original musical, dramatic, artistic and literary works, including computer programs, and in records and other means by which sounds are mechanically reproduced. In most cases, copyright subsists for the life of the author, plus 50 years. Copyright arises from creation of a work, and does not depend upon registration pursuant to the *Copyright Act*, although registration creates certain presumptions in favour of the registered owner, and facilitates the collection of damages against infringers.

An application to register copyright in a work may be filed at any time during the term of its existence. If the author of a work is a resident of Canada, or a British subject, or a citizen or subject of a country that is a member of the *Berne Convention* that promotes reciprocal copyright protection, and the author's work is first published in any of these countries, the author is entitled to register his or her copyright in Canada. Further, if the author is a citizen of a non-Berne Convention country with whom Canada has signed an Accord, and his or her work was published in that country, the author is entitled to register his or her copyright in Canada.

A copyright application is likely to proceed to registration within two months of the date of filing. A copy of the work is not required to be filed with the copyright application. Upon registration, a certificate of ownership is issued. This certificate is regarded as *prima facie* evidence that the person registered is the owner of the copyright. Copyright can be assigned, and any interest in the copyright can be licensed. No such assignment or licence is valid, however, unless it is in writing and signed by the owner of the right. An author's moral rights in a copyrighted work can be waived, however, they cannot be assigned.

There are no formal copyright notice requirements in Canada. However, it is advisable for copies to bear a proper copyright notice designation such as the symbol © or the word COPYRIGHT, followed by the name of the owner and the year of first publication. The notice should be marked in such a manner and location as to give reasonable notice of a claim of copyright.

9.6 Integrated Circuit Topography Act

The Integrated Circuit Topography Act (ICTA) protects the topography (i.e. the design) of integrated circuit products. Registration under the ICTA grants the registrant the exclusive right to reproduce, import or commercially exploit all or any substantial part of the topography of the integrated circuit product, and to manufacture, import or commercially exploit an integrated circuit product incorporating all or any substantial part of such topography. This protection lasts to the end of the tenth calendar year either from the date of filing or the date of first commercial exploitation, whichever is the earlier. No renewal is possible. A topography may be registered if it is original, if an application is filed before or within two years of the date on which the

topography is first commercially exploited, and if the topography's creator is a Canadian national or is an individual or legal entity that produces topographies or integrated circuit products in Canada. Under the ICTA, reciprocal protection exists for foreign nationals whose countries afford Canadian nationals substantially equal topography protection.

9.7 Trade Secrets/Confidential Information

As with patents, trade secret protection is available for qualifying processes, machines and formulae. Trade secrets can also protect customer lists and know-how. Unlike patents, which must be registered, trade secrets need not (and, indeed, cannot) be registered. Trade secret protection is automatic and can last forever. However, trade secrets must be kept secret in order to be protected. Once a trade secret becomes publicly known, its owner can no longer restrain its unauthorized use by third parties. Accordingly, trade secret protection is not appropriate if the "secret" may be reverse-engineered. In order to sue for a breach of confidence/unauthorized use of trade secrets, the information in issue must be secret and must have been imparted with an obligation of confidentiality.

10. Taking Security In Personal Property

Every Canadian province and territory has enacted a personal property security regime that governs issues relating to the taking of security in personal property. Other than Quebec's legislation, the relevant statutes within each province are referred to as Personal Property Security Acts, or "PPSAs". Such statutes are similar to and are generally based upon Article 9 of the U.S. Uniform Commercial Code. Quebec, being the only civil law jurisdiction in Canada, has included its similar legislation as part of the Quebec Civil Code. Each of the PPSAs and the Quebec Civil Code provides a comprehensive set of rules to govern the rights of creditors and debtors when personal property is used as collateral to secure payment of a debt or performance of an obligation. These statutes also provide for a province-wide computer-based registry system for the perfection by registration of security interests in personal property such as equipment, inventory, accounts receivable, and intangibles.

The types of transactions to which these personal property security statutes normally apply include loans, chattel mortgages, conditional sales, assignments of book debts or accounts receivable, equipment leases, consignments by way of security, share pledges and assignments of rents.

To ensure priority over other creditors and over a trustee in bankruptcy, a creditor must follow the required steps as set out in the personal property security legislation applicable in the relevant province, including in most cases, the filing of a registration form. Priority among secured creditors is generally determined by the time of filing of the registration form. Also, following certain steps, a supplier of goods (and, except in Quebec, a lender of funds to acquire specific goods) may be entitled to special priority treatment with respect to the goods acquired.

The relevant PPSAs and the Quebec Civil Code each provide a mechanism for establishing (i) priorities among creditors, (ii) rights and obligations of lenders and borrowers; and (iii) various procedures (including enforcement procedures).

In Québec, an instrument called a "hypothec" is used to charge movable (personal) property. A universal hypothec can be used to charge all of the debtor's personal property (as a General Security Agreement is used in the PPSA provinces), or a specific hypothec may be used to charge specific personal property of the debtor.

Canadian chartered banks may also take security over certain assets of their customers (for example, the inventory of a manufacturer), pursuant to the *Bank Act* (Canada). *Bank Act* security can be advantageous because, unlike the PPSAs, Bank Act security is effective across Canada.

If collateral includes rights in intellectual property, aircraft, ships, railway rolling stock, and certain other classes of collateral, separate Canadian federal statutes may apply and govern the perfection or preservation and enforcement of such rights.

11. Bankruptcy and Insolvency

11.1 Introduction

In Canada, the bankruptcy of an individual, partnership, estate or corporation is dealt with under the *Bankruptcy and Insolvency Act* ("BIA"). In simple terms, a trustee is appointed over all the assets of a company or individual. The assets are sold and the proceeds are distributed on an equitable basis.

Where a company or an individual is insolvent but wishes to try and reorganize the debts through a compromise with his creditors, Canadian law provides several mechanisms to allow the debtor the chance to do so. For individuals, the reorganization or compromising of debts may be accomplished under the BIA. Corporations wishing to restructure have more options. An insolvent corporation may resort either to the BIA "proposal" provisions or it may use the *Companies' Creditors Arrangement Act* ("CCAA").

Constitutionally, bankruptcy and insolvency is a federal matter and as a result, the above statutes are federally enacted and apply with equal force across the country. The statutes are administered through the superior courts of the respective provinces.

In 1992, major reforms to the BIA placed increased emphasis on encouraging reorganization rather than bankruptcy. Further reforms to the BIA have been passed by Parliament as Bill C-55 in late 2005, but are not yet in force. No indication has been given as to when these reforms might come into force. The BIA is considered to be creditor-friendly, perhaps more so than corresponding legislation in other countries. The BIA is detailed in the procedures to be followed and the time limits for doing so. As a result it is considered to be less flexible than the CCAA.

The CCAA operates as an alternative reorganization mechanism to those contained in the BIA. It has been referred to as the "Canadian Chapter 11" referring to US Bankruptcy Code Chapter 11 proceedings. Unlike US Code Chapter 11, the CCAA is available to insolvent corporations only and applies only to the reorganization of corporations or corporate groups with claims against it or them of more than $5,000,000.

First introduced during the Depression years of the 1930's, the CCAA was never intended as a statute of general application. It became popular among large corporations with complicated debt structures prior to 1992 because, unlike the pre-1992 BIA, the CCAA addressed both secured and unsecured debt. It remains popular in part because the CCAA allows the court to make virtually any orders that may be necessary in the context of the reorganization effort of the debtor. This includes tailor made orders dealing with the stay of proceedings, the continued obligation to supply the debtor corporation, DIP financing priorities, the determination of classes of creditors, the procedure for voting, and the application of set off rules. While transactional costs of a reorganization under the CCAA may be high, the statute remains in common use by large insolvent companies requiring complicated restructuring due to the statute's high degree of flexibility and a reorganization friendly judicial view.

It must be noted that the incorporation statutes in the various provinces and federally have provisions for liquidation or reorganization. The Ontario Business Corporations Act for example provides for voluntary winding up by the appointment of a liquidator following which an automatic stay of proceedings occurs or an involuntary winding up following court order. The Canada Business Corporations Act contains similar provisions but they do not apply if the company is insolvent. Resort must then be had to the statutes noted above.

11.2 Types of Creditors

a) Secured Creditors

A secured creditor is a person or company holding a mortgage, pledge, charge, lien or privilege over the property of the debtor as security for a debt due or accruing due. The property constituting the collateral can be personal or real property.

Under the provisions of the BIA, the distribution of proceeds in the bankruptcy is subject to the rights of secured creditors. In other words, secured creditors, at least in a straight bankruptcy situation, enjoy a priority over everyone else, though, under Bill C-55, wage earners are entitled to modest protection in priority to secured creditors. They are entitled to take their remedies generally without interference.

Under the reorganization sections of the BIA and under the CCAA, the secured creditors will, subject to further court order, be stayed while the plan of reorganization is being formulated. Failure to file a non possessory security will result in the trustee in bankruptcy taking the collateral free of any security. The unregistered secured creditor then is simply considered an unsecured creditor.

Real property security agreements such as a mortgage are dealt with under the normal land registration statutes.

Depending on the type of security agreement and its wording, secured creditors may enforce their security in a variety of ways, including the repossession or disabling of secured property. Security agreements frequently provide for the appointment of a private receiver (usually an insolvency practitioner with an accounting firm) upon default under the agreement. Alternatively the court may be asked to appoint a receiver over the property in question. In either case, the receiver then has the duty and obligation to collect and realize on the property that is the subject of the appointment. The BIA additionally imposes duties of honesty and good faith on privately appointed receivers and requires the secured creditor and receiver to act in a commercially reasonable manner.

Following default under the security agreement, the BIA further requires the secured creditor to provide the debtor with at least ten days' notice if it intends to enforce security against all or substantially all of the debtor's property. This requirement may be waived by the debtor.

b) Preferred Creditors

The BIA provides a distribution list for the proceeds gathered on the bankruptcy. After funeral expenses, trustees' fees and a government levy, unpaid wages of up to $2000 are to be paid. Next comes alimony and child support, then municipal taxes and landlord arrears of up to three months before and accelerated rent of not more than three months after the date of bankruptcy. In order, these are referred to as "preferred creditors". They are preferred by the BIA over the unsecured creditors of the bankrupt.

Bill C-55 will also implement the Wage Earners' Protection Program ("WEPP"), which will operate to ensure that workers receive unpaid wages. Under the WEPP, workers' claims for unpaid wages within six months prior to a bankruptcy will be paid by the government, which then becomes subrogated to the workers' claims. The government can then assert the workers' claims in the bankruptcy. Elsewhere in Bill C-55, these claims are given a super-priority over even secured creditors, up to a maximum of $2,000.

c) Unsecured Creditors

Unsecured claims are those which do not enjoy any security or preference. They normally will include suppliers, utility arrears, etc.

Following legislative changes in 1992, unsecured creditors have benefited from some increased protection under the BIA. For example, in a bankruptcy or receivership, unpaid suppliers of goods now have the right to reclaim those goods within 30 days of the date of delivery to the debtor in bankruptcy or under receivership. The goods must, however, be in the possession of the trustee or receiver, be identifiable, be in the same condition as they were on delivery, and not have been resold at arm's length. These latter conditions can make it extremely difficult for an unpaid supplier to benefit from this right of revendication.

The time limits are suspended during the formulation of a proposal. However, the "30-day goods" rights become somewhat illusory since during the time given to prepare the proposal, the debtor is entitled to deal with the goods in question in the normal course. The debtor may sell them on or process them to the point where they are no longer identifiable. As a result the revendication rights are lost.

11.3 Bankruptcy/Liquidation

a) Procedure

Under the BIA, bankruptcy may be initiated voluntarily by an insolvent debtor, or involuntarily through court action by a creditor or creditors whose claim exceeds $ 1,000. An Application for a Bankruptcy Order sets out the debt owed by the debtor, the proposed trustee, and the act of bankruptcy that the creditor believes has been committed. The Application must be verified by an affidavit of the creditor. The Application requires at least 10 days notice to be heard (though that can be reduced by the court) and must be personally served. The court on the return of the Application must find one of a list of acts of bankruptcy before a "Bankruptcy Order" is made against the debtor. Usually the typical act of bankruptcy is "generally failing to pay debts when they are due" but it can also include the giving of preferences to other creditors and fraud. The debtor can dispute the Application in which case the court will typically set a date for a trial of the issues and then decide whether an act of bankruptcy has been committed.

On the Bankruptcy Order being made, a trustee in bankruptcy, subject to certain exceptions, becomes the owner of all property of the debtor[1]. The trustee is a private-sector individual (most often an accountant) licensed by the Superintendent of Bankruptcy, a senior administrative official of the federal government. The trustee is charged with the responsibility of gathering the assets and liquidating them with a view to producing a dividend for the creditors in accordance with their prescribed priorities and *pro rata* within each class of creditors.

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1 The web site of the Superintendent of Bankruptcy is http://strategis.ic.gc.ca/sc_mrksv/bankrupt/engdoc/superint.html

The exceptions to this are significant. First, secured creditors are entitled to deal with the collateral of the debtor secured to them regardless of the appointment of a trustee. Second, property of the debtor divisible among the creditors does not include property held in trust for others. Third, property that, as against the bankrupt, is exempt from seizure in the province in which the property is located and within which the bankrupt resides does not become the trustee's. Depending on the province in which the debtor resides, these exemptions can be significant.

The provincial Superior Courts judicially administer the bankruptcy proceedings. There is no separately constituted Bankruptcy Court (though individual superior courts may-and in some cases have-administratively set up a judicial group dealing with insolvency and bankruptcy matters and call it such). As the provincial Superior Court judges are federally appointed and the BIA (and the CCAA and the WURA) are federal, court orders are effective across the country.

b) Stay of Proceedings

Once a receiving order has been made, the BIA imposes an automatic stay of proceedings against all creditors except secured parties exercising their rights to enforce against their security. In limited circumstances, the court may lift the stay and a civil action may proceed. This chiefly happens in situations where there are allegations against the debtor of obtaining property by false pretences, fraudulent misrepresentation, embezzlement, or fraud while acting in a fiduciary capacity.

c) Priority of Claims

Subject to the rights of secured creditors, the proceeds from the realization of the debtor's property are applied in a priority scheme set out in the BIA. As noted above, these include the preferred creditors, the unsecured creditors and finally the shareholders or the debtor.

Most significantly, the trustee is obliged to pay to the government a levy. This is a percentage of the amount collected and available for dividend to all classes of creditors. It is payable immediately after trustees' fees and before any other creditor is paid. It amounts to 5% on the first million dollars, 1.25% on the next million and 0.25% of any amounts above that.

11.4 Winding Up

The *Winding Up and Restructuring Act* is a misnomer. This is a liquidation statute though there is power to compromise claims with agreement during the course of the liquidation. At the point the winding up order is made, the company must cease to carry on business and an official called the "Liquidator" is appointed. The Liquidator however is simply the custodian of the assets. The assets are not transferred to him as would be the case if he were a Trustee in Bankruptcy. The Company still owns its assets.

After a winding up order is made, there is an automatic stay of proceedings subject to leave of the court and on such terms as it may determine. The BIA provides that a petition in bankruptcy will take precedence over a Winding Up proceeding and the latter proceedings will simply stop.

11.5 Reorganization

a) Nature of Reorganization

Under the BIA and the CCAA, commercial reorganization focuses on the preservation of the business enterprise as a whole. Commercial reorganization aims to provide a greater return to creditors than if the assets were liquidated. It recognizes that going concern values may be greater than breakup values. It also preserves jobs.

Under the BIA there are no provisions that either authorize or restrict the ability of a debtor to continue business operations during the reorganization period. Under the CCAA, the initial order by the court may prescribe any number of provisions for the ongoing operation of the business during the reorganization process, depending on the nature of the business and its special circumstances and needs. Quite apart from restrictions on the debtor's business, CCAA orders have been known, for example, to restrain third party businesses that are not even creditors of the insolvent organization from exercising contractual rights that might exist consequent on the insolvency of the debtor. For example, this has occurred in connection with the insolvency of key retail anchor tenants in major shopping centres. Other tenants, who would otherwise be entitled to rely on clauses permitting them to terminate their leases on the key tenant "going dark", have been prevented from doing so.

b) Under the BIA

To commence a reorganization under the BIA, the debtor must make a formal proposal to the creditors or give notice that he/she/it intends to do so. Once a proposal has been made, or notice given, a stay of proceedings is imposed on all creditors, including secured creditors. Under the stay, no agreement may be terminated or amended, no claims for accelerated payment may be made, and no enforcement steps may be taken. Contracts must continue in the usual manner. One exception to this is that lenders are not required to advance further funds.

Once notice of intention to make a proposal has been given, the debtor has 30 days in which to develop a proposal. The stay is in effect during this period. At the court's discretion, the automatic stay may be extended (on notice) for up to a maximum of six months in increments of up to 45 days at a time, but not longer.

The stay of proceedings may be lifted if the debtor is not acting in good faith and with due diligence, or the debtor is not likely to make a viable proposal or one acceptable to the creditors within the period of time to do so, or if the creditors generally would be materially prejudiced were the application to lift the stay be rejected. If no proposal is filed, an automatic bankruptcy occurs, the effective date of which bankruptcy, for the purposes of considering issues of preference and avoidance, is the time that notice was given of intention to make a proposal.

If a proposal is filed, arrangements are made by a trustee to have the creditors consider and vote on the proposal. This normally should happen within 21 days from when the proposal is filed. The creditors may vote to extend the period of time.

In order to succeed, proposals for reorganization require a double majority (two-thirds of the creditors voting in terms of value, and a majority of creditors in number).

Creditors can be divided into classes based on a “commonality of interests” test that is often determined by the nature of the debt, the existence of any security, and the remedies available. Usually the debtor will propose the classes. Unsecured creditors normally vote as a single class. Once creditors have accepted a proposal, the court must approve it. Thereafter, the proposal is binding on the debtor and on all classes of creditors.

There are few specific requirements for a proposal. Claims by tax authorities, however, must be paid in full within six months of acceptance of the proposal, or the court must refuse acceptance. This tends to limit the value of preparing a proposal as most debtors have serious tax problems to address and little means to do so.

c) Under the CCAA

Upon filing under the CCAA, the debtor remains in possession of the insolvent business and continues operations under the protection of a court order. A “Monitor” is appointed to oversee the debtor and to report to the court and the creditors from time to time. The existing auditor of the company may be appointed to this role.

The scope of the stay of proceedings is specified in the court order dealing with the application. The court may also deal with such matters as set-off by purchasers of the debtor’s goods, debtor in-possession (DIP) financing (including super priorities for the DIP financier), costs of creditor committees, and other matters ongoing during the formulation of the plan.

Because CCAA reorganizations are reserved for larger organizations with greater than $5,000,000 debts, the reorganization itself tends to be pursued through a negotiated “arrangement” with the largest creditors and the committees. The creditors themselves may put forward their own plans for reorganization of the company as well.

A reorganization proposal under the CCAA, as under the BIA, requires approval by a majority of creditors in the class and by two-thirds of the creditors in value within that class. Creditor classes are not defined in the CCAA. These classes are usually suggested by the debtor and are often set out in the proposed reorganization plan. Again a "commonality of interest" test is frequently used. The particular classes in which creditors are placed can be a major source of litigation and cost. The debtor for example will not be anxious to have one debtor in a separate class on his own if that debtor is likely to vote against any plan. The creditor however may feel that his interests are so unique that he should be in a class of his own.

As the CCAA tends to deal with more complex insolvencies, the creditors often form committees and bargain with the debtor as to the form of the plan in respect of their interests. Funding for the creditor committees, their size and make-up, the number of expert assistants they can employ, and other matters, can be the subject of a court order.

Once the reorganization plan has been voted on and accepted by the creditors, the court holds a "sanction" hearing at which the plan is considered for approval. Given sizable creditor support, the sanction is usually granted.

11.6 International Insolvency

As business has become more international in nature, complex issues arise for insolvent companies with assets and/or creditors in more than one country. The 1992 amendments to the CCAA and BIA are a move towards increased harmonization of cross-border insolvency proceedings. Bill C-55 aims to make the international insolvency provisions in the BIA and CCAA more consistent with the UNCITRAL Model Law on International Insolvency. As mentioned above, although these reforms have passed Parliament, they are not yet in force, and it is uncertain if and when they will be.

a) Enforcement of Foreign Orders

Generally, a foreign stay of proceedings against creditors does not automatically apply within Canada. Under the current provisions of the BIA and CCAA, on the production of a certified copy of the order appointing the foreign insolvency representative, the Canadian courts will usually grant recognition of that status and may then make orders on various terms and conditions including a stay of proceedings. The foreign representative must seek the stay order in Canada and/or initiate insolvency proceedings in Canada.

A "Foreign Representative" is defined as a person, other than the debtor, holding office under the law of a jurisdiction outside Canada who is assigned similar functions to those of a trustee, liquidator, or receiver. As a result of this, it should be noted that a debtor-in-possession under a US Chapter 11 proceeding will not be considered to be a foreign representative though this will change with Bill C-55. As a result, a more complex approach to the recognition of such orders may be required.

The filing of the foreign bankruptcy, insolvency or reorganization order is, in the absence of proof to the contrary, proof that the debtor is insolvent and proof of the appointment of the foreign representative.

When the foreign order is recognized, a foreign representative gains the right to bring and defend proceedings in Canada, may commence or continue bankruptcy or reorganization proceedings and may be entitled to take possession of corporate records, papers and other property, subject to certain limitations.

In matters of corporate reorganization, Canadian judges and practitioners have shown considerable willingness to cooperate and assist their counterparts in other jurisdictions. In a number of cases, parallel proceedings in Canada and elsewhere have been dealt with by negotiating "cross border insolvency protocols" based on the International Bar Association's model Cross Border Insolvency Concordat. These protocols are aimed at coordinating and harmonizing the equitable disposition of assets in multiple jurisdictions and the conduct of proceedings in the relevant countries in the best interests of all the creditors. These protocols have in some instances gone so far as to allow the judges in each jurisdiction to speak with the other in the absence of counsel, though that is not common.

In *Re Babcock &Wilcox Canada Ltd*,. the US parent of a Canadian subsidiary was in Chapter 11 as a result of numerous asbestos related claims. The Canadian subsidiary asked for a stay though neither it nor the US parent were insolvent. The court found that the CCAA was not as restrictive as the BIA and that in the circumstances, the Canadian subsidiary could ask for a stay.

b) Non-Canadian Creditors

Foreign creditors to a Canadian insolvency are treated no differently from Canadian creditors of the same class, so long as their claims are valid at Canadian law and not contrary to public policy. A creditor need not reside or carry on business in Canada for its claim to be valid. A creditor need not be resident in Canada to commence insolvency proceedings against a debtor in Canada.

11.7 Discharge

Corporations may not be discharged from bankruptcy until 100 % of their debts have been satisfied. Individuals are granted discharges either absolutely or on a conditional basis. Conditional discharges typically require a certain amount of money to be repaid by the debtor at regular intervals over a specified period of time. Discharge has the effect of clearing away debts provable in bankruptcy (save certain debts including those arising out of embezzlement, defalcation and fraud) and affording the debtor a fresh start.

12. Labour and Employment

12.1 Introduction

Non-union employment relationships in Canada's common law provinces (all provinces but Quebec) are governed by the principles of contract law and statute. In the Province of Quebec, provincially regulated employment relationships are governed by Quebec's civil law and the *Labour Standards Act*.. Since, for the most part, employment law is provincially regulated, each Canadian province is governed by its own distinct set of employment statutes. Typically, the legal regulation of a company's employment relationships will therefore depend on the province in which each employee works. Certain industries, however, including nuclear power, aeronautics, banking, and inter-provincial transportation for instance, are regulated at the federal level.

12.2 The Minimum Standards Legislation

Each jurisdiction in Canada (including the Federal jurisdiction) has enacted legislation prescribing certain minimum standards for employment relations within that jurisdiction.

These Employment or Labour Standards statutes operate in conjunction with, but not in replacement of, the law of contract (or the civil law in Quebec). An employer may provide its employees with greater rights than those contained in the jurisdiction's Employment or Labour Standards statute, but they may not offer less than the minimums prescribed by the statute.

A jurisdiction's Employment or Labour Standards statute will typically exempt certain categories of employees from certain specific provisions (e.g., hours of work, minimum wages, overtime pay, public holidays and vacation pay). For example, most provinces have exceptions for managerial employees from the requirement to pay overtime. These exemptions differ, sometime significantly, across Canada's various jurisdictions.

Employment or Labour Standards statutes prescribe minimum requirements for payment of wages, work hours, paid vacation, public holidays, overtime pay and leave entitlements. These statues also provide for an internal mechanism for the

enforcement of the prescribed standards. Non-unionized employees, who feel that they have been denied any of the prescribed employment standards, may pursue their statutory rights at little or no cost to themselves.

The Employment or Labour Standards statutes also include requirements for notice of termination, or pay in lieu of notice. These are minimum requirements only, and, as noted below, the courts have a broad discretion to award damages for wrongful dismissal which will exceed the statutory minimum standards. Generally, statutory notice of termination is calculated on a sliding scale based upon the affected employee's length of service. Additionally, in the case of mass terminations - for example, the termination of 50 or more employees in a rolling four-week period - a number of provinces, including Ontario, prescribe a longer period of notice for all terminated employees, regardless of the length of their service.

Although notice or pay in lieu of notice is not required where the termination is for cause (i.e., if the employee has been guilty of willful misconduct or neglect of duty which has not been condoned by the employer), it is very difficult for an employer to successfully establish that the employee's conduct was such as to preclude them from the statutory minimums.

All employment benefits provided by the employer must be maintained during the applicable notice period.

In addition to statutory notice, in some jurisdictions (i.e., the Federal jurisdiction and Ontario) there are statutory requirements for the payment of severance pay to employees. In Ontario, for example, severance pay is payable in two circumstances, as follows:

(1) when fifty or more employees have their employment terminated by an employer in a period of six months or less, and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or

(2) when one or more employees have their employment terminated by an employer with a "payroll" in Ontario of $2.5 million or more.

In Ontario, should either of these factors be met, the employer must pay severance pay to each employee who has been employed for five or more years. Severance pay is calculated as one week per year of service (including the first five) to a maximum of 26 weeks. In addition, the statute requires that a pro rata calculation be made for partial years of service.

Finally, the Labour or Employment Standards legislation in several jurisdictions provides for a remedy of employee reinstatement in certain specific cases (e.g., Quebec has unjust dismissal provisions which provide that an employee who has more than 2 years of uninterrupted service may seek reinstatement on the grounds that he was not dismissed for good and sufficient cause.).

12.3 Common Law Termination Entitlements

In Canada, in the absence of a written employment contract with an enforceable termination provision, an employee who is terminated without cause is entitled to "reasonable notice", or pay in lieu of such notice, inclusive of the minimum statutory entitlements (discussed above). Courts have used a variety of factors to determine what reasonable notice is. An employee's position, length of service, salary and age are the main factors which a court will take into account. It is also relevant whether or not an employee was induced from prior secure employment. Reasonable notice has been found to be as high as 27 months. Additionally, if a court finds that an employer acted in bad faith, or committed an independent actionable wrong, the amount of damages could be increased. If successful, the affected employee will also be able to recover an amount in respect of his or her legal costs.

Employees, who successfully bring a common law claim for wrongful dismissal, will be entitled to recover pay in lieu of reasonable notice of termination. This is calculated by reference to the reasonable notice period and includes all of the employee's cash compensation (including any commissions, wages, bonuses, pension contributions, as well as the value of every benefit or entitlement that the employee enjoyed as a result of the employment relationship and which the employee would have received had he or she been provided with proper notice, etc.) and the cost of benefit continuation throughout the reasonable notice period.

Specific termination provisions contained in a written contract of employment will govern in place of the common law obligations, as long as the courts do not find the provisions unreasonable. The employee cannot waive his or her statutory rights and any contractual provision purporting to do so will be rendered void.

In the Province of Quebec, which is not a common law province, special considerations on termination of employment apply as a result of the Civil Code.

12.4 Labour Relations Legislation (Trade Unions)

Trade unions represent the concerns of employees vis-à-vis the employer. In Canada, unions are not mandatory. Unions seeking to represent employees must apply to the applicable labour board for certification in accordance with the relevant provisions of the jurisdiction's labour relations statute. Certification, for the most part, is sought and granted on a plant-by-plant basis. There are exceptions to this requirement that are mostly specific to the construction industry that will not be discussed here.

The requirements for collective bargaining and collective agreements are similar in all jurisdictions. All collective agreements must contain a no-strike and no-lockout provision for the life of the agreement. Bargaining during the life of the agreement is rare on any issue. A system of dispute arbitration to settle disagreements arising during the term of the agreement is also mandatory. Disputes regarding unfair labour practices, certification, decertification, etc. are handled by the appropriate labour relations board.

12.5 Human Rights Legislation

Human Rights legislation has been enacted in all Canadian jurisdictions. Human Rights legislation prohibits discrimination in employment on a number of grounds (which vary across jurisdictions) including, but not limited to, the following: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status and disability. Moreover, there is usually a prohibition against harassment in employment. Employees with a discrimination claim will go to the relevant governmental human rights agency for redress.

12.6 Other Legislation

Each jurisdiction has enacted a number of other statutes that govern or influence the employment relationship. Several of these statutes are described below.

Workplace Safety and Insurance/Workers' Compensation legislation typically provides for compensation from an employer and province funded insurance scheme in the event that a worker is injured in the course of their work. Payment into such a scheme is mandatory for the majority of employers. The rate of premiums will vary depending on the nature of the employer's work. New employers should contact the relevant workplace safety and insurance board or workers' compensation authority and inquire about the necessity and process for registration.

Occupational Health and Safety legislation establishes multiple obligations on the part of employers with respect to ensuring a safe workplace. Employers are required to adhere to specific standards, and could face regulatory fines (or even imprisonment) for breaching this legislation. One common obligation is the employer's obligation to take all reasonable precautions to protect the health and safety of its workers. Regulations typically contain many specific responsibilities which are imposed on employers to ensure that their workplaces are safe for employees (e.g., where applicable, regulations concerning toxic substances, hazardous equipment and personal protective gear). Also, some legislation requires employee participation in the process (e.g., employers in Ontario which regularly employ 20 or more workers are responsible for establishing and maintaining a Joint Health and Safety Committee).

Pay Equity legislation exists in many Canadian jurisdictions. It requires that employers abide by the concept of equal pay for work of equal value. Generally, employers must assess the value of work being performed by individuals in different jobs in order to ensure that employees are receiving equal compensation based upon the assessed value of their employment.

Privacy legislation governs the collection, use and disclosure of personal information. In several Canadian jurisdictions (Alberta, British Columbia and Quebec) such legislation governs employee personal information. Employers must comply with the relevant privacy legislation in their jurisdiction. In other Canadian jurisdictions, Privacy legislation does not currently apply to employee information, however it is expected that each respective government will introduce such legislation in the near future.

13. Immigration

13.1 Work Permits and Labour Market Opinion Requirements

Canada's immigration laws generally provides that individuals, other than Canadian citizens or permanent residents of Canada, who intend to engage in employment must first apply for and obtain a "work permit" from the Canadian government. Applications must normally be submitted at a Canadian visa office abroad. There are exceptions that allow some individuals to apply at a Canadian port-of-entry or at an immigration office within Canada.

Typically, the employer must first satisfy an officer of the local Human Resources and Social Development Canada Centre (HRSDC) that the employment of the foreign worker in Canada will not have an adverse impact on labour market conditions for Canadian citizens and permanent residents. This may involve advertising the position and interviewing prospective applicants at considerable cost to the employer. If the officer is satisfied that there will be no adverse impact, the officer will issue a "labour market opinion". Only then may the foreign worker apply for and obtain a work permit.

Immigration regulations provide for several exemptions from this process.

13.2 Exemption from Work Permit Requirement

Some categories of individuals are able to enter Canada without first obtaining a work permit. The most relevant exemptions for business are those applicable to buyers, sellers, intra-company trainers/trainees, and employees of foreign companies entering as business visitors to engage in other business activities (i.e. attend meetings).

United States and Mexican citizens may also rely on the provisions of the North American Free Trade Agreement (NAFTA), which provides for the admission of United States and Mexican citizens under the category of "Business Visitor". Under the Canada-Chile Free Trade Agreement (CCFTA), United States, Mexican and

Chilean citizens may qualify as Business Visitors. In order to qualify under either agreement, an applicant must present proof of citizenship and evidence that entry is being sought to engage in an eligible business activity.

Foreign nationals may also qualify as Business Visitors if they are entering Canada for after-sales service to repair, service or provide familiarization services on commercial or industrial equipment or machinery, including computer software that is sold/leased to a Canadian entity, provided these services are part of the original or extended sales/lease agreement, warranty or service contract. Such workers should have documentation to show that the services being provided are part of the original agreements. Similarly, Mexican and U.S. citizens who qualify for entry under the after-sales service provisions of NAFTA, and Chilean citizens who qualify for entry under the after-sales service provisions of CCFTA, are processed as Business Visitors and will therefore, not require work permits.

13.3 Exemption from Labour Market Opinion

In some cases an applicant may obtain a work permit in the absence of a labour market opinion. The exemptions most applicable to business are:

a) Intra-Company Transfers

Under Canadian immigration regulations, this exemption may apply to senior managers, executives or persons in specialized knowledge positions transferring to Canada to work at a branch, subsidiary or parent of their foreign employer, at a senior managerial, executive or specialized knowledge position for a temporary period.

The Intra-Company Transfer provisions of the NAFTA and the CCFTA may also apply. However, the provisions under those treaties impose citizenship restrictions as well as different maximum periods of authorized stay.

b) Significant Benefit to Canada

Officers may use this exemption in situations not covered by other exemptions, in which there is no doubt that the admission of the foreign worker will result in a significant benefit to Canada. A “significant benefit” may involve creating or maintaining employment, or generating other benefits and opportunities. This category is discretionary and decisions may vary widely from officer to officer.

c) North American Free Trade Agreement/Canada-Chile Free Trade Agreement

(i) Professionals

United States, Mexican, or Chilean citizens seeking temporary entry to engage in business activities in an enumerated profession for a Canadian employer may qualify for an exemption. Application must be made prior to engaging in the profession in Canada. The individual concerned must possess the minimum qualifications listed in the provisions, and have a prior written employment offer from a prospective Canadian employer. Ensuring an individual meets any professional licensing requirements is the responsibility of the prospective employer.

(ii) Traders

A citizen of the United States, Mexico, or Chile who seeks temporary entry to carry on substantial trade in goods or services principally with those countries, and who will be employed in a capacity that is either supervisory, executive or involves essential skills, may qualify for an exemption. The application, however, must be filed at a visa office abroad, not at a port-of-entry.

(iii) Investors

An exemption may apply to citizens of the United States, Mexico, or Chile seeking temporary entry solely to develop and direct the operations of an enterprise of one of those nationalities in which the applicant has made, or is in the process of making, a substantial investment. Employees of an investor may also qualify if they are executives, managers, or are in possession of skills essential to the firm's operations in Canada. Again, this application must be filed at a visa office abroad.

d) General Agreement on Trade in Services (GATS)

The GATS contains immigration provisions which may assist individuals in obtaining employment authorizations to work as professionals or intra-company transferees, or to gain admission as Business Visitors. The provisions, however, only apply to certain countries and specific business sectors listed in the various

appendices of the GATS. Often, the maximum stay under the GATS is much shorter than under the other categories set out above. These provisions should therefore only be used in situations in which none of the other categories apply.

13.4 Other Requirements

In addition to meeting the requirements outlined above, temporary foreign workers, and their accompanying family members, must comply with certain medical and criminal standards. An individual who does not meet these requirements may apply for a "Temporary Resident Permit". Whether such a permit will be issued depends on the severity of the individual's medical problem or criminal record.

13.5 Extensions of Work Permits

Applications for extensions of work permits are submitted by mail to a centralized processing centre. If a labour market opinion was required in order to obtain the original work permit, a new form will be required to support the application for extension. Applicants should also ensure that they file applications to extend their provincial health care coverage.

The maximum duration of stay will depend on the work permit category. For example, individuals granted work permits under either the NAFTA/CCFTA Professional category may seek annual extensions to their work permits, assuming that the assignments in Canada are still temporary. NAFTA intra-company transferees who are executives or senior managers may be eligible to remain as foreign workers in Canada for up to seven years.

13.6 Software Development Workers Pilot Project

In response to the need of employers to fill critical shortages in the software industry, Citizenship and Immigration Canada (CIC) collaborated with HRSDC, Industry Canada and the Software Human Resource Council (SHRC) on the development of the Software Development Workers Program to streamline the entry of those workers whose skills are in high demand in the software industry.

Since May of 1997, foreign workers seeking work permits to fill certain Information Technology jobs found to be in significant shortage across Canada

have been able to have their work permits issued under this program. The Software Development Workers Program provides for seven generic job descriptions prepared by the SHRC and validated on a national basis by labour market economists working for HRSDC. Therefore, if the foreign worker qualifies for a work permit under this program, the Canadian employer does not have to obtain a labour market opinion from the local HRSDC.

13.7 Spousal Employment

Normally, a spouse who accompanies a foreign worker who holds a work permit will be admitted to Canada as an accompanying dependant.

Canada also has a program that allows spouses of certain foreign workers to obtain open spousal work permits without having to first obtain a written job offer from a Canadian employer. If a foreign worker is employed in one of two highly skilled occupational categories described in the National Occupational Classification System and holds a work permit valid for at least six months, his or her spouse may qualify for a spousal work permit. Spouses cannot work in childcare, healthcare or primary/secondary education without first passing immigration medical examinations.

13.8 Permanent Resident Status

If a foreign worker's stay is long-term or permanent, the employee may apply for Canadian permanent resident status. In order to qualify, an individual must obtain a certain number of "points" under Canada's assessment system. (Québec has different selection criteria.) Points are available for such factors as age, education, language skills, work experience, employment in Canada, and adaptability.

Generally, applicants for permanent resident status must submit their applications and supporting documents to a Canadian visa office outside of Canada. They will also be required to undergo medical examinations and security checks.

Once an applicant and his or her family members have obtained Canadian permanent resident status, they generally have the same rights as Canadian citizens. They are generally able to work for any employer, be self-employed, or engage in any course of study without first obtaining the permission of the

Government of Canada. This is an important distinction for employers, as the employee's ability to remain in Canada is no longer dependent on continued employment with the employer named on the work permit.

Permanent residents of Canada must be physically in Canada for at least 730 days in every five-year period in order to retain their immigration status.

However, certain exceptions may apply, thus, allowing longer absences from Canada. For example, a permanent resident who is absent from Canada for more than 1,095 days within any five-year period, may retain his or her permanent resident status if he or she was absent from Canada to accompany a spouse, common-law partner, or parent (if the permanent resident is a child who is under the age of 22), who is a Canadian citizen. Similarly, a permanent resident may retain status if he or she could not meet the residency requirement because he or she was working outside Canada on a full-time basis for a Canadian business or the Canadian government. Another exception applies if the reason for the absence was because the permanent resident was accompanying a Canadian permanent resident spouse, common-law partner, or parent (if the permanent resident is a child who is under the age of 22), who was working outside Canada on a full-time basis for a Canadian business or the Canadian government.

Immigration officers may also consider whether sufficient humanitarian and compassionate grounds exist to justify the retention of permanent resident status in cases where the an individual has not met the residency requirement.

14. Real Property

14.1 Non-Resident Persons and Corporations

In most provinces and for most property interests, there is no restriction upon non-resident persons or corporations owning real property in Canada. Upon the sale of property, however, there may be withholding tax issues to be addressed.

14.2 Governing Law

The laws governing real property law in Canada generally fall within the jurisdiction of the provinces and, with the exception of Quebec, follow the principles of the English common law. An exception to provincial regulation is that certain federal statutes govern real property used for federal facilities.

14.3 Real Property Interests/Title

Real property interests may include fee simple ownership, leasehold interests, the creation of charges and mortgages as security for obligations, easements and rights-of-way, as well as many other interests.

All provinces in Canada maintain public real property registration systems where public notice of virtually every nature dealing with real property may be registered. Failure to register notice of any interest will, in most cases, jeopardize the priority of such unregistered interest as against a registered interest. In many instances, the form and manner to register notice of a real property interest is prescribed by regulation.

Generally, a purchaser or lender will retain a lawyer to carry out various title and off-title searches to determine ownership and the existence and priority of registrations. Title insurance, which protects against certain losses which are suffered due to title related problems, is becoming increasingly popular and may be arranged by the lawyer. Different ownership structures are available, including separating legal and beneficial ownership, and the appropriate structure is often determined based upon tax efficiency.

14.4 Real Property Interests as Security

Real property ownership and leasehold interests may be mortgaged or charged by the owner as security for the repayment of money and the performance of contractual obligations. Priority among several creditors holding security upon the same real property interest is generally governed by the sequence of registration of these security interests in the public registration system, unless changed by agreement among the creditors. Enforcement procedures against solvent debtors or owners are generally regulated by provincial statutes, whereas enforcement procedures against insolvent debtors or owners are largely regulated by federal statutes.

14.5 Land Use Regulation

The regulation of land-use (zoning) is also governed by provincial statute. In most provinces, however, much of the power to formulate and enforce land use policies has been delegated by statute to local municipalities, subject to an appeal process to a provincial body. Virtually all land in those areas of Canada which are organized for municipal purposes is subject to land use regulation. As such, approvals and permits must be obtained for almost any type of development of or improvement to real property.

14.6 Leasing

The prevailing practice among most landlords in Canada is to enter into a binding offer to lease with a tenant and then prepare a full lease, reflecting the business terms of the offer, for execution by the tenant. Such offers to lease are in most instances fully binding contracts and will limit a tenant's ability to negotiate the lease; accordingly, such offers should be reviewed by legal counsel prior to execution or, alternatively, be conditional upon review by legal counsel. Generally, tenants will be required to pay a specified base or minimum rent, often calculated based upon the square footage of the premises, plus the tenant's proportionate share of operating costs and property taxes applicable to the lands and building.

Generally, registration of a notice or caveat of lease is recommended to maintain the priority of a tenant's leasehold interest. In the event the leased premises are subject to a prior mortgage, it is advisable for a tenant to insist that the holder of such mortgage agree not to disturb the tenant's quiet enjoyment of the leased premises if such holder enforces its rights under the mortgage against the landlord.

14.7 Land Transfer Tax

The acquisition of real property gives rise to provincial land transfer tax in most provinces of Canada. Land transfer tax rates vary by province and in certain cases (such as Ontario) are also applicable to the conveyance of unregistered (beneficial) ownership and to long-term leases in excess of 50 years.

14.8 Sales Taxes

Subject to certain exceptions, the federal value-added Goods and Services Tax ("GST") is calculated upon the purchase price of real property; however, a GST-registered purchaser will not be required to pay GST on closing, but rather is required to self assess the applicable GST, against which it may claim input tax credits. The net effect is that no GST is actually paid in most commercial real estate transactions. In certain provinces, "harmonized" provincial sales taxes are also applicable.

14.9 Property Taxes

Property tax is levied at the municipal level and rates, usually calculated upon the value of the property, vary by municipality and by use.

15. Environmental

15.1 Environmental Division of Powers

The Canadian federal government has jurisdiction over many areas of environmental protection through its authority over trade and commerce, fisheries, navigable waters, aboriginal peoples, criminal law and its residual power to legislate for peace, order and good government. Provincial jurisdiction over property and civil rights and local works and undertakings makes the provinces primarily responsible for such matters as solid waste disposal and forestry management.

There is often an overlap, however, between federal and provincial statutory powers. Transportation of dangerous goods, for example, falls within both federal and provincial legislative jurisdiction. Hazardous and hauled liquid industrial wastes transported between provinces are generally considered "dangerous goods" that must be moved in accordance with federal and applicable provincial legislation. Federal regulation applies to all domestic consignments by air, ship, and rail; to all interprovincial and international (including Canada-U.S.) transportation; and to all international transportation by air or ship. Provincial regulation applies to transportation that takes place within a single province.

The central piece of federal legislation regulating the environment is the *Canadian Environmental Protection Act* (CEPA). Liability under the CEPA is focused on matters of national concern, such as the importation of chemicals into Canada, ocean dumping and international air pollution. The original CEPA was enacted in 1988 and a new, revised CEPA, Bill C-32, was passed by the House of Commons on 1 June 1999. The new CEPA is expected to be proclaimed in force by January 2000. Two important aspects of the current CEPA are intergovernmental cooperation and cradle-to-grave regulation of toxic substances. Cradle-tograve regulation of toxic substances is designed to decrease the risk of liability by imposing preventative restrictions on all aspects of the use of toxic substances. The objectives of the new CEPA are the same as the current CEPA, although the new CEPA represents a shift in approach away from "end of pipe" solutions towards pollution prevention and the minimization or "virtual elimination" of contamination and/or the creation of pollutants in the first place.

Other federal statutes that deal with specialized environmental matters include the *Fisheries Act*, the *Canadian Environmental Assessment Act*, the *Arctic Waters Pollution Prevention Act*, the *Canada Shipping Act* and the *Transportation of Dangerous Goods Act*, 1992.

Each Canadian province also has its own environmental legislation. The provinces oversee the day-to-day task of environmental management. The trend in the provinces recently has been towards widening the net of environmental liability and attacking pollution offenders at the source, whether as owners or occupiers of property, owners of contaminants or, increasingly, directors and officers of the polluting corporation.

15.2 Corporate Environmental Liability

Environmental laws in Canada are public welfare statutes. When an offence occurs, and environmental damage must be remedied, the government will look to the deepest pocket - or the easiest pocket to reach – before dipping into the public purse. Corporations have traditionally been seen as the deep pockets on which the brunt of environmental liability should fall. Owners and previous owners of property, occupants and previous occupants, as well as persons who have or had charge, management or control of the source of contamination, may all be within the reach of regulatory authorities.

Corporations in Canada are viewed as "persons" who are subject to the same environmental liability as any other individual. The test for environmental liability in Canada is "control". The test of control is a factual one, based on an assessment of the corporation's position with respect to the activity undertaken that causes pollution. If the corporation can and should control the activity at the point where pollution occurs, then it will be responsible for the pollution. By this test of control, parent companies may be held liable for the environmental offences not only of their agents, but of their subsidiaries as well.

15.3 Director and Officer Liability

Under public pressure to enact more stringent environmental protection laws and to hold alleged polluters accountable, governments in Canada are increasingly imposing express personal liability provisions for directors and officers in environmental statutes. The rationale is that the possibility of personal

prosecution is an effective means of ensuring that those ultimately responsible for overseeing and directing the corporation have a personal stake in the environmental behavior of the corporation and its employees.

Most commonly, statutory provisions create liability for directors and officers who authorize, acquiesce or participate in an environmental offence. A director or officer who actually approves an action that is an offence, even if the action is not carried out personally, can be said to have authorized it. On the other hand, failure to take action, or wilful blindness or negligence, despite awareness of the commission of an offence or of an omission to act, may constitute acquiescence. A director or officer can be said to cause or permit a corporate offence if the director or officer was in a position of influence and control to prevent the commission of the offence but failed to act. How much control will found liability is determined by a factual assessment of proximity to the activity at the point at which pollution occurs.

The defence of due diligence is available to directors and officers for environmental liability. The defence was introduced in the 1978 case *R. v. Sault Ste. Marie*, in which the Supreme Court of Canada created a new category of offences now known as 'strict liability' offences. Essentially, strict liability offences preserve administrative ease of proof, since *mens rea*, or the mental element, is not an ingredient of the offence. An accused may be acquitted, however, if, on the balance of probabilities, all reasonable care or due diligence was exercised to avoid the particular event giving rise to the charges. Since the decision in *Sault Ste. Marie*, the defence of due diligence has been incorporated into both federal and provincial environmental statutes.

The fact that all corporate formalities have been met may help to establish due diligence, but it is not conclusive. However, failure to adhere to corporate formalities increases the likelihood of liability. The due diligence which must be established is that of the director alone, and is determined by whether the director exercised all reasonable care by establishing a proper system to prevent the discharge of the contaminant and taking reasonable steps to ensure the effective operation of the system. Case law suggests that the due diligence requirement becomes more stringent the closer a director is to the impugned activity.

15.4 Enforcement and Compliance

Penalties under environmental legislation in Canada encompass fines into the millions of dollars, and imprisonment.

At the federal level, all regulations under the CEPA fall under the Enforcement and Compliance Policy of the Act. In addition, the CEPA enforcement umbrella covers inspections under certain provisions of the *Fisheries Act*, such as the regulations relating to pulp and paper effluent. There are two enforcement categories under the current CEPA: inspection and investigation. If, during the course of an inspection, it is determined that a provision under the CEPA has not been complied with, the inspector may issue a warning, ticket, direction, Ministerial order or injunction, depending on the severity of the violation. In addition, a civil suit may be brought by the Crown to recover costs in certain circumstances. An investigation involves the gathering of information from a number of sources and may include, where necessary, obtaining a search warrant.

The new CEPA introduces several new enforcement tools. The two most significant tools are Environmental Protection Alternative Measures, known as EPAMs, and Environmental Protection Compliance Orders, referred to as EPCOs. EPAMs are negotiated settlements that allow persons who are in violation of the CEPA to negotiate with the federal government to take corrective action without the need to proceed with a lengthy court case. Certain conditions attached to the use of EPAMs under the new CEPA are significant. For example, an EPAM is only available to persons who accept responsibility for the act or omission that forms the basis of the offence. This does not necessarily mean admitting guilt, but it does mean admitting the facts constituting the offence. Another condition attached to the use of EPAMs involves publication. The EPAM will be accessible to the public as it is to be filed as part of the court record and may be posted on the new CEPA web site. An EPCO will enable a provincial officer to put an immediate stop to illegal or potentially illegal activities or to require action to be taken to correct a violation. The order could be directed to an owner, or a person who has the charge, management or control of a substance or property or to a person who causes or contributes to the contravention of the Act.

Offences under the CEPA are quasi-criminal and carry with them heavy fines and/or imprisonment terms. Penalties for failure to assist inspectors or failure to provide information or conduct certain testing include a fine of up to $200,000

or imprisonment up to six months, or both. Offences for, among other things, the manufacture or importation of a substance in contravention of the CEPA, may be subject to a fine of up to $1 million, or imprisonment for a term not exceeding three years, or both. The most serious offences, relating to fraud and intentional, wanton or reckless conduct causing damage to the environment or death or harm to other persons, incur fines of up to 1 million, or imprisonment for up to five years, or both.

At the provincial level, one of the most common conflicts with environmental legislation occurs when a situation is discovered that may necessitate notification to provincial authorities. The consequences for failure to report can be severe. In Ontario, for instance, generally every person who contravenes the *Environmental Protection Act* is guilty of an offence and can be liable, for each day or part of a day that the offence occurs or continues, to a fine of up to $20,000 on a first conviction and, on each subsequent conviction, to a fine of up to $50,000, imprisonment for a term of up to one year, or both. A corporation that contravenes the *Environmental Protection Act* is generally liable on conviction, for each day or part of a day on which the offence occurs or continues, to a fine of not more than $ 100,000 on a first conviction and not more than $200,000 on each subsequent conviction.

15.5 Environmental Audits

Environmental audits are increasingly commonplace, reflecting increased awareness of environmental concerns and the increased risk of government enforcement actions.

Auditing makes good sense for companies that want to organize their activities in order to minimize the environmental problems that they will face. Audits are also being used to ensure compliance with environmental legislation and as a means of demonstrating corporate due diligence. With the introduction of the ISO 14000 environmental management standards, environmental auditing is likely to become even more common. In addition, audits may be required for lending purposes, in purchase and sale transactions, for landlord/tenant purposes, or simply to identify areas of potential risk. Environmental audits are not, however, mandated by any government legislation or regulation in Canada.

Although there are many benefits associated with the use of environmental audits, a major concern is the confidentiality of the audit report. Current legislation does not help alleviate this concern. For example, the Enforcement and Compliance Policy of Environment Canada states that during routine inspections, environmental audits will not be requested. However, where there is a concern that an offence has been committed, inspectors will look to any environmental audit reports then in existence to aid in the determination of regulatory compliance. One means of protecting the confidentiality of environmental audits has been to rely on solicitor-client privilege, which protects communications made for the purpose of soliciting legal advice, and communications in connection with actual or anticipated litigation.

15.6 Purchasing Contaminated Real Estate

Anyone purchasing or acquiring real estate should be aware of the sources of potential liability, as well as the statutory and common law remedies. Purchasers must be especially aware of the heavy burden of liability that they may face as a result of unwittingly or recklessly acquiring contaminated land. In real estate matters, Canadian law does not provide for an “innocent purchaser” defence. Provinces such as Ontario impose liability for ownership regardless of who bears responsibility for the contamination on the property.

Generally speaking, there is no implied warranty to a purchaser that property will be free from defects or that the land can be used for any particular purpose. Instead, the general principle when buying land in Canada is buyer beware, unless the purchaser has stipulated otherwise in a contract.

When commercial or industrial land is being sold, it is not unusual for the vendor to sell the property “as is, where is”. In such case, the transaction would be conditional on the satisfaction of the purchaser with respect to the condition of the property. Hence, the purchaser is responsible for conducting all necessary due diligence. Typically, a Phase I Environmental Site Audit is conducted by the purchaser. If the Phase I report highlights any environmental concerns, a more intrusive Phase II Environmental Site Audit is usually conducted. A Phase II Audit involves the collection and laboratory analysis of soil and groundwater samples measured against applicable regulatory criteria. In this manner, the purchaser may determine for itself the environmental condition of the property.

An intrusive environmental investigation, however, is merely a snapshot in time and is only as comprehensive as the results from each individual borehole. Untested areas, including those areas between boreholes, may still hold some surprises. Even with a satisfactory Phase II report in hand, therefore, a purchaser could inadvertently acquire toxic real estate.

15.7 Retroactive Liability of Owners and Occupiers

In many cases, environmental problems have been in existence for a number of years, at times pre-dating the environmental laws now in force. Generally, there is a statutory presumption against retroactivity unless the language of the statute states otherwise.

The inclusion of retroactive environmental liability, however, has become increasingly common in Canadian legislation. The *Environmental Protection Act* (EPA) in Ontario, for example, includes past potential environmental offenders within the net of liability. Under the EPA, a *previous owner* of the source of a contaminant, as well as those persons who *were* in occupation of the source of contaminant, may be subject to an administrative order such as a control order. That order requires that the discharge of a contaminant into the natural environment be reduced or stopped. In addition, ancillary steps such as conducting studies and filing reports can be required. Previous owners and occupants may also be subject to a stop order, which is issued when the discharge of a contaminant endangers human health or property. In addition, persons who caused or permitted the discharge of a contaminant into the natural environment could be subject to a clean-up order.

15.8 Leasing a Contaminated Site

A tenant should be aware that it may be responsible for contamination at a site even if it did not cause the contamination. Typically, a tenant leases both the land and buildings at a site. Case law in Ontario suggests that a tenant who has control and management of buildings that are a "continuing source of contaminant" may be required to clean up the contamination. A "continuing source of contaminant" is a term used in the legislation and has been interpreted in the case law to include the ongoing operation of a plant, with its past and present leaks from equipment, pipes, etc. When a tenant leases land, the tenant has occupation of the soil and

may be responsible for its condition even if it results from a prior occupant's conduct. Thus, a current tenant may be liable for contamination that it did not cause simply by being in actual possession of a facility, including the ground upon which it is built. A current tenant would also be held liable for additional contamination that occurs during its tenancy.

16. Judicial System and Litigation

16.1 Introduction

Each province in Canada has established a system of courts for the administration of justice. In addition, certain specialized federal courts exist to deal with income tax, patents, trademarks, and other federal subjects. Since the provinces exercise jurisdiction over "property and civil rights" under the Constitution, most dispute resolution is handled by the provincial court system. One consequence of this has been the development of diverse provincial legal systems across Canada.

While provinces operate the provincial courts, the federal government is responsible for the appointment of most judges. The provinces appoint some provincial court judges, in particular those who deal with specific criminal matters and small civil matters. Once appointed, judges usually remain on the bench until they reach the age of 70 or 75 years, at which time they are obliged to step down.

In part as a response to globalization, the federal and provincial governments have begun to enact corporate and commercial legislation to reflect the international character of the Canadian economy. An example is Canada's uniform acceptance of the UNCITRAL Model Law on International Commercial Arbitration, which has been adopted by all the provinces.

16.2 The Federal Courts

a) The Tax Court of Canada

The Tax Court is a specialized federal court dedicated to hearing appeals brought by taxpayers against assessments levied by the Canada Revenue Agency ("CRA"). Either the taxpayer or the CRA may appeal a decision of the Tax Court to the Federal Court, Trial Division.

b) The Federal Court of Canada

The Federal Court of Canada is comprised of two divisions. The Trial Division has exclusive jurisdiction over select legal matters, including those relating to intellectual property rights, shipping and navigation, and certain matters in which the federal government is a party to the action. The Appeal Division hears appeals from decisions rendered by the Trial Division.

c) The Supreme Court of Canada

Composed of nine judges appointed by the federal government from each region of the country, the Supreme Court of Canada is the final court of appeal in Canada for all matters. Leave to appeal to the Supreme Court is required on most matters.

16.3 The Provincial Courts

Each of Canada's 10 provinces and three territories has developed its own system of provincial and territorial courts. The typical structure involves a trial division and an appellate division. The structure of the Ontario court system is described below. Because subtle differences may exist from province to province, however, reference should be made to the applicable enabling and governing legislation to determine the operation and structure of the court systems in particular provinces.

a) The Court of Appeal for Ontario

Ontario has two levels of appeal courts. The Divisional Court is a branch of the Superior Court of Justice, has limited appellate jurisdiction, and is primarily responsible for the judicial review of the decisions of administrative boards and tribunals exercising statutory powers of decision. The Court of Appeal for Ontario is the superior court of record in Ontario and exercises general appellate jurisdiction from both the trial division and from the Divisional Court.

Hearings before the Court of Appeal take place before at least three appellate court judges. All provinces have a final appellate level and their decisions may be appealed with leave to the Supreme Court of Canada.

b) The Trial Courts in Ontario

The Superior Court of Justice exercises original trial jurisdiction of the Court of Ontario in civil matters. Trials and hearings before the Superior Court of Justice normally take place before a single judge. The Small Claims Court is another branch of the Superior Court of Justice, and provides a comparatively informal forum for the disposition of disputes in which the amount involved is less than $ 10,000.

The Ontario Court of Justice is a second branch of the trial courts in Ontario, and is comprised of those courts dealing with criminal and family matters, as well as matters that are provincial offences. Generally, proceedings in the Ontario Court of Justice are heard and determined by a single judge.

In addition to the foregoing, the province of Ontario has created specialized groups of judges in the City of Toronto and the Regional Municipality of Ottawa-Carleton to deal with particular types of proceedings. These "specialized" groups of judges exist and operate within the Superior Court of Justice. An example of such a court is the Commercial List in the City of Toronto. The Commercial List endeavours to facilitate the expedited and effective disposition of business disputes, major insolvencies, and complex commercial litigation arising in the Toronto area.

16.4 The Litigation Process

a) Civil Litigation

Litigation in all provinces follows three stages: a pleadings stage, a discovery stage and a trial stage. Pleadings set out the substantive elements of the claim or the defence. Discovery involves compliance with extensive pre-trial discovery rules, involving parties to the litigation and documents relevant to the matters at issue. The procedural and substantive laws governing pre-trial discovery in each province and territory are designed to enable each party to the litigation to obtain all documents and detailed evidence relevant to the adverse party's case prior to trial. These rules vary from province to province. Unlike discovery depositions in the United States, provincial civil litigation rules do not usually provide for discovery of more than one representative of each of the parties without leave of the court.

Cases involving less than $50,000, but more than $10,000, are subject to what is known as the 'Simplified Procedure'. Under this streamlined procedure, there are no examinations for discovery and litigants are generally able to have a trial of their matter heard more quickly than in cases where examinations for discovery are conducted. While it is possible for a plaintiff in a lawsuit to voluntarily select the Simplified Procedure for a case involving more than $50,000, defendants can object to that choice and force the matter to be dealt with under the ordinary procedure, which includes examinations for discovery. The Simplified Procedure does not apply to class actions, construction lien actions or family law proceedings.

Following discovery, litigants in Canada proceed to a trial, normally conducted by a judge alone. In certain matters, trials may be heard before a jury, which may be comprised of six or twelve members of the community in which the trial is being heard, depending on the jurisdiction. However, jury trials are far less common in Canada than in the United States.

Between the discovery and trial stages, the courts have various "pre-trial" procedures with the aim of promoting settlements and speeding up the litigation.

b) Criminal Justice

Criminal justice procedure in Canada is governed by the *Criminal Code*. The *Criminal Code* contains both procedural provisions and specific offences. Some statutes impose penalties for the violation of the substantive requirements in the statute, but defer to the procedural provisions of the *Criminal Code*.

The Superior Court and Ontario Court judges deal with criminal trials. The most serious offences are usually dealt with by the Superior Court. A judge alone or judge and jury, at the defendant's election, may hear the most serious offences.

16.5 Jurisdiction

Canadian courts have long recognized the general principle of international law that allows a party commencing a civil action to select the jurisdiction in which the dispute is to be heard. The application of this principle, however, does not always mean that the plaintiff's choice of jurisdiction will be determinative. In order to adjudicate a matter before it, a Canadian court will also require jurisdiction over the party against whom the proceeding has been brought.

In order to establish jurisdiction over a defendant, the court must first satisfy itself that there exists a sufficient connection between the defendant and the territory in which the proceeding has been instituted. This connection may be established where (1) the defendant resides within the territorial jurisdiction of the court; (2) the defendant has been served with the originating process within the court's territorial jurisdiction; and/or (3) the defendant voluntarily submits to the jurisdiction of that court.

Notwithstanding the absence of a "real" connection between the defendant and the proposed court, Canadian courts have "long arm" rules in which such courts may assert jurisdiction on the basis of a connection between the proposed jurisdiction and the subject matter of the dispute. By way of non-exhaustive examples, an Ontario court may assume jurisdiction over a dispute based on (1) the residence of one of the parties to the litigation; (2) where a contract that is the subject matter of the litigation was executed or breached within the Ontario court's jurisdiction; (3) where a tort has allegedly been committed in Ontario; and/or (4) where a company's head office is situated within Ontario or that company carries on business in Ontario.

The parties to litigation in Canada are generally free to select a forum in which disputes arising from their relationship will be adjudicated. However, if the jurisdiction selected by contract has no connection whatsoever to the subject matter of the dispute and one or more of the litigants argue that the jurisdiction is inconvenient, the Court may override a contractual choice of jurisdiction clause. Similarly, Canadian Courts will generally honour a contract in which the parties to a dispute have agreed that any disputes arising from or concerning their

relationship will be governed by the substantive laws of another jurisdiction. Canadian courts can and do hear such disputes, although the parties are required to prove the substantive law of the foreign jurisdiction by presenting testimony from a lawyer who is an expert on the law of the foreign jurisdiction. If no such evidence is presented, the Canadian courts will generally deem the foreign law to be the same as the law of the province in which the case is being heard.

17. Product Liability

17.1 Introduction

Many business enterprises involve the design, manufacture, distribution and sale of products. In the event that these products cause damage, those responsible can be held liable for any resulting damage or loss under Canadian law.

Canadian product liability law may be found in the law of negligence and contract. Under Canadian contract law, manufacturers and others may be liable for damage caused by breach of contractual warranties and conditions. Under Canadian negligence law, anyone that carelessly designs, manufactures or distributes a product may be held responsible for any resulting damage or injury.

As mentioned earlier, the Canadian legal system is comprised of coexisting provincial and territorial regimes, one or more of which may govern a particular product liability claim. Although the standards of liability and the size of damage awards vary provincially, the various regimes have many similarities. Still, those particularly concerned with product liability should consult the laws of the appropriate jurisdiction.

17.2 The Law of Contract

Unlike negligence, liability under contract law does not require proof of fault. It requires only proof that a warranty or condition was broken and that damage ensued. Warranties and conditions are promises made by contract. They typically address things like quality, performance, and durability, and can be express or implied. Breach of contractual warranty is often the remedy of choice pursued in claims resulting from defective or dangerous products. An injured consumer or business can usually only sue for breach of warranty where he or she has a contractual relationship with the party being sued. In most cases, a contract exists between the manufacturer and the seller of the goods.

Express and Implied Warranties

Most manufacturers provide express warranties for things like quality, performance, durability, etc. Manufacturers must ensure their products have any promised

attributes since Canadian law enforces such warranties. Manufacturers and retailers can limit or exclude their exposure for damages for breach of warranty through limitation clauses.

Provincial laws imply some warranties and conditions into most sales contracts, including:

(i) Warranty of fitness for intended purpose

The law implies a term that the product must do what it was intended to do. Also, the court can imply this warranty if the buyer tells the seller about an intended but extraordinary purpose, and the seller suggests that the product is suitable. Sometimes, a seller may want to point out that its products are unsuitable for some collateral but reasonably anticipated purpose.

(ii) Warranty of merchantable quality

The law provides that products must be of merchantable or sellable quality. This means that the product should be in such condition that a buyer, acquainted with all of the facts, would still buy the product at the stipulated price. However, where a buyer has inspected a product before accepting it, there may be no liability for these patent defects that the buyer's inspection should have uncovered. The law also recognizes that a manufacturer or vendor cannot warrant that its goods will be perfect. As such, buyers usually have no legal recourse for minor defects that do not cause appreciable harm.

17.3 The Law of Negligence

The law of negligence provides a remedy to those who are damaged by conduct that falls below societal standards. In product liability law, this means that those responsible for bringing a product to market can be held responsible for damages caused that arise from their negligent actions. To sue in negligence, a claimant must show that (i) the other party owed it a duty of care in connection with the product, (ii) the other party's actions or omissions in connection with that product breached the applicable standard of care, (iii) the other party's breach caused an injury that is not too remote, and (iv) the claimant's own conduct does not create a bar to recovery.

Anyone who might reasonably come into contact with a product can sue in negligence. Also, there is no requirement for a contractual relationship between the injured party and the proposed defendant. Finally, virtually anyone that contributes to the design or manufacture of a product or its components, including those with intermediate care and control, can be held liable for failing to exercise reasonable care. This can include distributors.

17.4 The Duty to Warn

Manufacturers also have a duty to warn of the dangers associated with their products, even when their products are properly designed and manufactured. This duty embraces dangers that the manufacturer knows about and dangers that the manufacturer should know about. One can satisfy this duty by providing warnings that identify the nature of the danger. Most manufacturers fulfill this duty by including proper warnings in their product literature and affixing prominently placed warnings on the product itself. However, a manufacturer must continue to warn even after the product is sold.

17.5 Strict Liability

In some countries, manufacturers are held strictly liable for injuries caused by their defective products. In other words, they are liable for damages caused by their products even in the absence of carelessness. While Canada has not adopted this approach, those doing business in Canada should be aware of related trends. First, if a product is dangerous, the court may hold that the manufacturer owes a higher standard of care. Second, the court might impose liability by presuming negligence where a product causes an injury unless the manufacturer can rebut that presumption. Third, if a manufacturer breaches a statutory standard, the courts may impose liability without proof of negligence or an express contractual undertaking.

17.6 Negligent Misstatement

Manufacturers and distributors can be held liable for false statements they make about their products or services. In other words, where someone makes an assurance regarding a product, the buyer or consumer is entitled to rely upon it. If it is wrong, buyers can recover their associated losses. Canadian courts may impose liability where statements are fraudulently or negligently made or where those statements are held to be a warranty. To avoid liability, the substance of any statements about a product or service must be true.

17.7 Breach of Statute

Some business activities are regulated by statutes that set specific standards. Non-compliance with these standards can be compelling evidence in a product liability case; conversely, compliance with statutory standards can help support a defence.

17.8 Contribution and Indemnity

Where a manufacturer or retailer is alleged to be responsible for damage caused by a defective product, they often look to others to share in any liability. In practice, the injured party will usually sue only the seller and the manufacturer. However, these parties may look to others involved in the manufacturing or distribution process for contribution and/or indemnity (e.g. the manufacturer of sub-components). They can be added to the lawsuit. If more than one party is held responsible, the court can apportion responsibility. However, all of these parties may remain individually liable to the injured plaintiff for all damages. The court will also examine whether an injured party's own conduct contributed in some way to the injury or loss, in which case the defendants' responsibility can be reduced or even eliminated.

17.9 Damages

In a Canadian product liability lawsuit, the court can award damages to compensate the injured party for virtually all losses caused by the defective product. The court essentially tries to put the injured party in the position that he or she would have been in if no damage had been suffered. Usually, the injured party must decide between pursuing a claim in contract or in negligence prior to trial. There are few limits on the damages that a court can award. Generally, any foreseeable damages connected to the wrongdoing can be recovered.

Damages may be assessed under several categories such as pre-trial pecuniary loss, non-pecuniary loss, lost future income, future care, economic loss, family claims, punitive damages, interest, taxes, and legal costs.

17.10 Limiting and Excluding Liability

A limitation period restricts the period of time in which an action can be started. Most Canadian jurisdictions have their own limitation periods. It is very important to confirm the applicable period in a relevant jurisdiction as soon as an injury occurs or a claim is made. Typically, the limitation period begins to run from the date of injury or the date that the injured party was aware of or should have been aware of the claim.

A manufacturer or vendor can state in its contract with the buyer that implied warranties do not apply. However, implied warranties cannot typically be excluded from consumer sales. Most non-consumer sale contracts expressly exclude these warranties by including prominent language to that effect. It is very important to have this language reviewed by legal counsel to ensure that it is sufficient and enforceable.

17.11 Avoiding and Minimizing Liability

a) Insurance

Those carrying on business in Canada should obtain insurance coverage for product liability claims. While product liability insurance is expensive and often carries significant deductibles, it is usually a prudent investment. Any foreign manufacturers selling products in Canada should ensure that their local insurance covers foreign claims. Insurance benefits may also include the legal cost of defending any claims. For this reason, and because the insurer usually bears the major risk, the insurer may insist on the right to choose the legal firm to defend the lawsuit. Insured parties may wish to consider retaining the right exercise some control over the selection of counsel and the conduct of the defence.

b) Risk Management and Loss Prevention

Businesses should have risk-management and loss-prevention programs to prevent and manage product liability claims. These should include a regular review of (a) quality control procedures, (b) packaging/labelling to ensure that appropriate instructions and warnings are included, (c) contracts to ensure that they offer adequate and enforceable protection, and (d) advertising materials. In addition, they should include procedures to allow for customer identification where practicable to facilitate quick communication of information upon discovery of a problem. In the event of a lawsuit, a judge may examine these programs in assessing the reasonableness of the steps taken to avoid and/or manage consumer injuries.

18. Information Technology

18.1 Electronic Commerce

While there is no broad legislation governing electronic commerce in Canada, both the federal and provincial governments have introduced legislation to foster greater certainty in the use of electronic means of communication.

Ontario's Electronic Commerce Act 2000, which came into force in October 2000, addresses issues such as electronic contracts, electronic signatures (including digital signatures), and electronic evidence.

Legal principles relating to electronic commerce also continue to emerge through the application and interpretation of existing law in areas such as securities, contracts, taxation, criminal law (including libel and fraud), payment systems, banking, sale of goods and services, consumer protection, intellectual property, and privacy.

18.2 Communications Law

In Canada, as in most other countries, the Internet and other "new media" have flourished in an environment of little or no direct regulation. A 1999 CRTC Decision confirmed that Internet content would generally not be subject to regulation in Canada under the existing *Telecommunications Act* and *Broadcasting Act*. In particular, telecommunications-analogous new media services provided over the Internet, such as Internet telephony, are generally not subject to regulation. Similarly, broadcasting, as defined in the *Broadcasting Act*, does not encompass new media services that are primarily alphanumeric and text-based, or services that are sufficiently "customizable" by individual users that they do not constitute transmission "to the public". Other Internet services that do constitute broad-casting have been formally exempted from regulation, although it is possible that changes in technology could prompt a revised approach to Internet regulation in the future.

18.3 Jurisdiction in Cyberspace

Jurisdiction generally depends on establishing a nexus between the persons or actions to which a law or regulation applies. In the context of disputes, it requires finding a territorial connection between a court and the dispute in question. The breadth of this discretion is constrained in two ways. First, a "real and substantial connection" is required between the cause of action and the jurisdiction. Second, the jurisdiction in question must not be *forum non conveniens*, i.e. relatively less appropriate to hear a dispute than another jurisdiction.

With respect to the Internet, some courts in Canada have followed a "passive vs. active" test that looks to the predominant type and level of activity taking place on a web site. 'Passive' sites that simply provide information will generally not be subject to laws or courts outside their own jurisdiction. On the other hand, 'active' sites that involve a high level of interaction with users could in theory fall under the authority of courts in any jurisdiction from which the site can be accessed.

Canada has arranged for the reciprocal enforcement of judgements given by provincial courts within its borders, and normally enforces foreign judgments in exchange for the promise of similar treatment. This is unlikely to change in the context of cyberspace.

19. Privacy

Most Canadian companies, and many foreign companies that deal with Canadian individuals or entities, are likely to be subject to or affected by federal or provincial privacy laws in Canada. These privacy laws apply only to the collection use and disclosure of information that can be used to *identify* an individual (Personal Information). Furthermore, such legislation only applies to an *individual's* privacy, and does not extend to the privacy of an organization, such as a corporation.

At the federal level, the Canadian privacy law landscape has changed significantly since 2001 due to the implementation of new federal private sector privacy legislation, the *Personal Information Protection and Electronic Documents Act* (PIPEDA). PIPEDA came into force in three phases:

(a) Effective January 1, 2001, PIPEDA took effect for all private sector organizations that: (i) are subject to Canadian *federal regulation* (e.g., interprovincial transportation, banking, telecommunications and broadcasting companies) and/or (ii) transfer Personal Information *between provinces* or *internationally*, where the information itself is the object of the transaction and payment or "consideration" is provided;

(b) On January 1, 2002, the requirements and foregoing application of PIPEDA extended to personal health information; and

(c) On January 1, 2004, application of PIPEDA also extended to the collection, use or disclosure of Personal Information in the course of "commercial activity" by organizations in any province, *unless* that province has enacted legislation which the federal government has deemed to be "*substantially similar*" to PIPEDA. It should be noted, however, that due to the constitutional division of powers, PIPEDA only applies to businesses in relation to their employees if they are *federally regulated* entities.

Since January 1, 2004, provincial private sector privacy laws in the provinces of British Columbia, Alberta and Quebec have been recognized as being "*substantially similar*" to PIPEDA. Accordingly, this legislation will apply in lieu of PIPEDA in relation to the collection, use or disclosure of personal information by provincially regulated private sector entities in these provinces. Likewise, the *Ontario Personal Health Information Protection Act* has also been deemed substantially similar to PIPEDA, and will apply in the province of Ontario with respect to collection, use and

disclosure of *personal health information* by private sector *healthcare providers* in Ontario. As such, PIPEDA is the privacy law of general application in all provinces besides B.C., Alberta and Quebec; including in Ontario, except with respect to *personal health information* and private sector *healthcare providers*.

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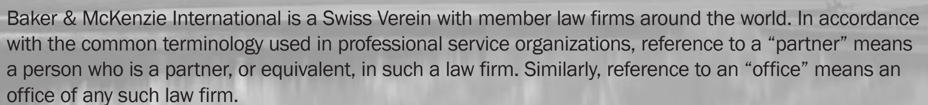
Baker & McKenzie LLP
BCE Place
181 Bay Street, Suite 2100
P.O. Box 874
Toronto, Ontario, Canada M5J 2T3
Tel: +1 416 863 1221
Fax: +1 416 863 6275



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