DOING BUSINESS IN CANADA
A PRACTICAL GUIDE

CASSELS BROCK LAWYERS
JUNE 2011
1. INTRODUCTION
   Map of Canada

2. ABOUT CANADA
   Federal Jurisdiction
   Provincial Jurisdiction
   Municipal Jurisdiction
   Overlapping Jurisdictions
   What is Canada’s Legal System?
      The Common Law
      The Québec Civil Code
      Commercial Practice
      The Common Law
      The Charter of Rights and Freedoms
      Statutes, Regulations, By-laws and Directives
   How Are Disputes Resolved in Canada’s Legal System?
   What Do Canada’s Current Economic Indicators Disclose?
   What is the GST and How Does It Affect Business?
   What Can Business Expect From the Current Governments in Ontario and in Canada?
   How Does “Canada” Rank as a Brand?
   Is This a Good Time to Start a Business in Canada?

3. FORMS OF BUSINESS ORGANIZATION USED IN CANADA
   Branch Plant Operation
      Business Name
      Extra-Provincial Licence
      Effect of Failure to Register
      Attorney for Service
      Limited Liability Companies — Uneven Provincial Treatment
      Foreign Corporations as Limited Partners of an Ontario Limited Partnership or a Foreign Limited Partnership Registered in Ontario as an Extra-Provincial Limited Partnership
   Sole Proprietorship
   Canadian Corporation with Share Capital
      The Requirement for Canadian Resident Directors
      Unanimous Shareholder Agreements
      Incorporation Under the CBCA
      Incorporation under the OBCA
      Two-Shareholder Corporations: Avoiding Deadlocks
      Nova Scotia Business Corporations
      Incorporation Under the Newfoundland and Labrador Corporations Act
      Incorporation under The New Brunswick Business Corporations Act
      Incorporation under the Nova Scotia Business Companies Act
      Major 2011 Reform to the Québec Companies Act
      Incorporation under The Corporations Act (Manitoba)
      Incorporation under The Alberta Business Corporations Act
Incorporation under *The Business Corporations Act* (Saskatchewan)

British Columbia’s *Business Corporations Act*

Unlimited Liability Corporations — Nova Scotia, Alberta and British Columbia

Nature of Hybrid Status in Canada and the US

*Corporations Returns Act*

Use of a Corporation to Conduct Business in Canada

Financial Assistance by a Business Corporation to Related Parties

**What Limitations Apply to Corporate Director and Officer Indemnities?**  3.20

*Schoon v. Troy Corporation*

Lessons Learned

Recommendations

**Not-for-profit Corporations**  3.22

Who is Affected?

Sunset Dates

Continuing under the New NFPC Acts

The Purpose of the New NFPC Acts

Capacity of a Natural Person

Directors and Officers

Director and Officer Liability

Appointed Directors

Member Rights

Financial Disclosure

Charities

**Partnership**  3.26

Limited Partnerships

**Co-operatives**  3.30

**Joint Venture with Others**  3.31

**Business and Income Trusts**  3.31

**Distributorship, Licensing and Franchise Arrangements**  3.32

Intellectual Property Protection

Withholding Tax

Anti-Trust — *Competition Act*

Regulation — Franchises

Independent Sales Agents

Regulation — Distribution Arrangements

Costs

Court Proceedings

**Do Canadian Provinces Have Securities Transfer Legislation Similar to Article 8 of the Uniform Commercial Code?**  3.34

Share Pledges

Security Entitlements

Securities Intermediary First Lien

The Rights of Protected Purchasers

Conflict of Law Rules

Financial Assets
When Will International Financial Reporting Standards Apply to Canadian Publicly Accountable Enterprises? 3.37
Rationale and Timing
A Brief Comparison of Canadian GAAP and IFRS
OSC Progress Assessment

4. TAXATION 4.1
How do you Determine Residency for Tax Purposes?
What Constitutes Income from Carrying on Business in Canada?
What Tax Applies to Income from Employment in Canada?
How are Gains from the Disposition of Taxable Canadian Property Taxed in Canada?
How are Dividends from a Corporation Resident in Canada Paid to a Non-Resident Taxed in Canada?
How is Interest Paid to a Non-Resident by a Person Resident in Canada Taxed in Canada?
How Are Management Fees Paid to a Non-Resident by a Person Resident in Canada Taxed in Canada?
How Are Royalties Paid to a Non-Resident by a Person Resident in Canada Taxed in Canada?
What Tax Rates Apply to Income Earned in Canada?
Cross-Border Tax Structuring
Transfer Pricing

Payroll and Other Employment Taxes 4.10
Ontario
British Columbia
Québec

Provincial Taxes 4.11
Municipal Realty and Land Transfer Taxes 4.11
British Columbia
Québec
Nova Scotia

Leasing Property in Canada 4.13
Leasing Property in Canada 4.13
Provincial Sales Taxes 4.14
Sample Rates of Retail Sales Tax across Canada

Harmonized Sales Tax 4.14
HST Place of Supply Rules
Services - General Rules for the Supply of Services
General Rules for the Supply of Intangible Personal Property (“IPP”)

Québec Sales Tax 4.17
What Are The Incentives To Establish New Businesses In Canada? 4.17
Tax Considerations regarding Canadian Mergers and Acquisitions 4.17
Vendor Income Tax Considerations
Purchaser Income Tax Considerations
Non-Resident Purchaser Income Tax Considerations
“Bump” in Tax Cost of Non-Depreciable Capital Property of Target
5. CANADIAN COMPETITION LAWS

Recent Amendments to the Competition Act
Mergers
What is a “Merger”? (5.2)
When is a Merger Notifiable?
Time of Transaction Threshold
Size of Parties Threshold
Additional Threshold for Share Acquisitions
What Is the Notification Procedure?
What Are Advance Ruling Certificates and No-Action Letters?
What Are the Filing Fees?
When is a Merger Subject to Substantive Review?
What Are Possible Merger Remedies?
Criminal Offences
Conspiracy
Bid-rigging
Misleading Advertising
Reviewable Trade Practices
Abuse of Dominant Position
Agreements or Arrangements that Prevent or Lessen Competition Substantially
Price Discrimination, Predatory Pricing and Promotional Allowances
Price Maintenance
Refusal to Deal
Exclusive Dealing and Tied Selling
Market Restriction
Civil Actions
VISA and Mastercard Merchant Charges
Competition Law Implications
Payments Implications

6. FOREIGN INVESTMENT IN CANADA

When Does The ICA Apply?
Review vs. Notification
Which Investments Are Subject to Review Under the ICA?
New Notification Thresholds
What is a “Cultural Business”?
Which Activities May Be Related to Canada’s Cultural Heritage or National Identity?
What Procedures Govern an ICA Review?
What Factors Are Considered in Connection With the “Net Benefit” Test?
Review on National Security Grounds
Investments by State-Owned Enterprises
When is an ICA Notification Required?
Will Investor Undertakings be Enforced? 6.7
Are There Special Requirements for Non-Resident Investors? 6.8

Canada's Financial Services Sector
Foreign Bank Rules
Ownership of a Canadian Financial Institution
Broadcasting and Telecommunications
Airlines
Fishing
Utilities
Liquor and Alcohol
Transport
Warehousing
Payday Lenders
Real Estate Agents and Mortgage Brokers
Settlement Agreement Relating to Access Restrictions Imposed by Real Estate Brokers on Multiple Listing Data Collected and Maintained under the MBLA
Motor Vehicles
Collection Agents
Consumer Reporting Agencies
Travel Agents

7. CANADIAN INTELLECTUAL PROPERTY REGIME 7.1
Trade-marks 7.1
Common Law Rights
Trade-Marks
Distinctiveness
Distinguishing Guise
Prohibited Marks
Prohibited Designations
Acquisition of Rights
Definition of Wares and Services
Registration and Use Abroad
Use or Proposed Use
Priority Filing Date
Official Marks
French Language Considerations
Assignments
Licenses
Opposition Practice
Section 45 Proceedings
Actions for Infringement and Passing Off
Copyright 7.7
Patents 7.9
Industrial Designs 7.10
Trade Secrets 7.10
Domain Names 7.10
Other Intellectual Property Rights 7.12

8. DOING THE DEAL 8.1
The Facts
The Enforceability of Letters of Intent
Analysis
Avoiding a Binding Commitment

What Impact Does the Ontario *Bulk Sales Act* Have on Asset Purchase Transactions? 8.3

9. FINANCING CANADIAN OPERATIONS 9.1
Personal Property Security
Personal Property Security in Québec
Security in Aircraft Equipment
Bank Act Security
Usury Law
Security on Land in Ontario
Security on Land in Québec
Security on Petroleum and Natural Gas Rights in Alberta
Guarantees
Exempt Distributions in Ontario
Private Issuer Exemption
Accredited Investor Exemption
$150,000 Exemption
Offering Memorandum Exemption
Family, Friends, Business Associates and Founders
Employees, Executive Officers, Directors and Consultants
Transaction Exemptions
Resale
Capital Pool Companies
Special Purpose Acquisition Corporation ("SPAC")


Ontario Innovation Tax Credit ("OITC")
Ontario Business-Research Institute Tax Credit ("OBRITC")
Co-operative Education Tax Credit
Ontario Industry-Specific Tax Incentives
Newfoundland and Labrador Industry Specific Incentives
Nova Scotia Industry Specific Incentives
Alberta Industry Specific Incentives
New Brunswick Industry Specific Incentives
Prince Edward Island Industry Specific Incentives
Québec Industry Specific Incentives
Manitoba Industry Specific Incentives
Saskatchewan Industry Specific Incentives
Yukon Territory Industry Specific Incentives
British Columbia Industry Specific Incentives
Northwest Territories Industry Specific Incentives
Nunavut Industry Specific Incentives

Are There Conflict of Interest or Other Special Requirements when Doing Business with the Federal Government?  9.22

10. HOW DOES CANADA’S BANKING SYSTEM OPERATE?  10.1
   Code of Conduct for the Credit and Debit Card Industry
   Task Force Announced to Review Payments Systems
   What are the Current Rules in Canada Governing Exchange Rate, Interest Rate and Other Hedge Contracts?  10.4

11. WHAT PROTECTION IS AFFORDED BANKRUPT OR INSOLVENT BUSINESSES IN CANADA?  11.1
   Interim Financing
   Disclaimer and Assignment of Contracts
   Collective Bargaining Agreements
   Sale of Assets
   National Receivers/Interim Receivers
   International Insolvencies
   Subordination of Equity Claims
   Eligible Financial Contracts
   Critical Suppliers
   Professional Charges
   Directors
   Protection for Employees in Restructuring
   Regulatory Body Stay
   Shareholder Approval in Restructurings
   Liability of Trustees, Interim Receivers, Receivers and Monitors
   Monitors
   Transfers at Undervalue
   Unpaid Suppliers’ Rights
   Income Trusts
   Enhanced Information Flow in CCAA Proceedings
   Aircraft
   Highlights of Consumer Amendments to the BIA
   Cross-Border Insolvency Procedures

12. REGULATION OF TRADING IN SECURITIES  12.1
   How are Securities Offered?  12.1
   What are the Disclosure Requirements?  12.2
      Continuous Disclosure
      Accounting Principles and Auditing Standards
      Certification of Financial Statements
Audit Committee Standards
Exemptions for US Issuers and other Foreign Issuers
Canada's Sarbanes-Oxley
Best Practices
Disclosure of Corporate Governance Policies (National Instrument 58-101)

**Conduct of the Board and Evaluation of Directors**  12.9

- Evaluation of the Board as a Whole
- Evaluation of Individual Directors
- Orientation and Continuing Education

**Governance Beyond Regulations**  12.12

**What are the Registration Requirements?**  12.12

**Transitional Rules**  12.13

**Business Registration Trigger**  12.13

**Categories of Registration and Permitted Activities**  12.14

**New Categories of Registration**  12.14
- Restricted Dealer
- Restricted Portfolio Manager
- Investment Fund Manager

**Permitted Activities**  12.16

- Registration Requirements for Individuals  12.16
- Capital and Insurance Requirements  12.16
- Client Relationships  12.17

**Account Opening, Know Your Client ("KYC") and Suitability Requirements**  12.17

- Conflicts  12.17
- Identifying Conflicts  12.17
- Referral Arrangements  12.17
- Loans and Margin  12.17
- Complaints Handling  12.18
- Relationship Disclosure  12.18
- Fair Allocation  12.18
- Relationship with Financial Institution  12.18
- Client Assets  12.18
- Record-keeping  12.19
- Account Activity Reporting  12.19
- Compliance  12.19

**Non-Resident Registrants**  12.19

**Dealer Registration Exemptions**  12.19
- Trades Through a Registered Dealer
- Adviser — Non-Prospectus Qualified Investment Fund
- Investment Fund Reinvestment
- Additional Investment in Investment Funds
- Private Investment Club
- Private Investment Fund — Loan and Trust Pools
- Mortgages
- Personal Property Security Legislation
- Variable Insurance Contract
Schedule III Banks and Cooperative Associations — Evidence of Deposit
Plan Administrators
Re-Investment Plan
Self-Directed Registered Education Savings Plans ("RESPs")
Exchange Contracts
Specified Debt
Small Securityholder Arrangements
Non-Resident Dealers

**Adviser Registration Exemptions** 12.22
Ancillary Advice by Dealers
IIROC Members with Discretionary Authority
Advising Generally
Non-Resident Advisers

**Mobility Exemptions** 12.22

**International Dealer Exemption** 12.22

**International Adviser Exemption** 12.23

**Exempt Market Intermediaries** 12.24

**Registration in Multiple Jurisdictions** 12.24
- Registration in Passport Jurisdictions — Passport Registration
- Registration in Ontario — Interface Registration
- Restricted Dealer Registration

**Changes to Québec Regulatory Framework** 12.26

**13. CANADIAN TRADE LAW** 13.1
- Beginning the Process: The Complaint and Investigation Phase
- Inquiries by the Canadian International Trade Tribunal

**Restrictions on Exports and Imports** 13.2
- Trade and Economic Sanctions
- United Nations Mandated Actions
- Sanctions Outside the UN
- Asset Freezes – Another Concern
- Export Controls – Evolving
- Compliance
- Other Export and Import Restrictions
- Nuclear Goods and Technology
- Supply Management in Agriculture
- Trade in Endangered Species
- Cultural Property
- Environmentally Harmful Substances
- Trade with Cuba — a Special Case
- Canada’s Controlled Goods Program

**Canada’s Bilateral Trade Agreements Program** 13.8

**Foreign Investment Protection** 13.9

**Settling International Investment Disputes** 13.10

**NAFTA Investment Claims** 13.10
- Obligations to Investors
Arbitration Scorecard
Unsuccessful Canadian Claims
Looking Forward
Buy America – Canada US Deal on Government Procurement 13.12
Efforts to Reduce Inter-Provincial Trade Barriers in Canada 13.14
Does Canada Have Exchange Controls? 13.15

14. HAS CANADA ENACTED DOMESTIC LEGISLATION IN FURTHERANCE OF INTERNATIONAL PROTOCOLS AND TREATIES? 14.1
What Conduct is Prohibited by the Corruption of Foreign Public Officials Act? 14.2
Exceptions
Defences
Facts are the Dominant Consideration
Canada’s Enforcement Reputation
March 2011 OECD Review of Canada’s Enforcement Record
2011 Conviction
Resources and Guides
Caution and Prudence

What Transactions Come Within the Provisions of the Money Laundering Act? 14.6

15. ADMISSION TO CANADA 15.1
Temporary Entry for Visitors 15.1
Temporary Entry for Students 15.1
Temporary Work in Canada 15.1
Immigration Strategies for the Employer 15.3
Permanent Entry — Three Categories 15.3
Skilled Workers 15.3
Business Applicants 15.4
	Immigrant Investors 15.4
Self-Employed 15.4
Québec Immigration 15.4
Provincial Nominee Programmes 15.4
Amissibility 15.5
Processing Times for Permanent Resident Applications 15.5
Canadian Experience Class 15.6
	The Point System Selection Criteria under the Immigration and Refugee Protection Act

16. WHAT DOMESTIC EMPLOYMENT LAWS APPLY IN CANADA? 16.1
What are the Rights of Employees in the Province of Québec? 16.6
What are the Rights of Employees in the Province of Alberta? 16.8
Effect of Employer Bankruptcy 16.9
Employment at Will 16.9
Is Collective Bargaining Recognized In Canada? 16.10
**Does Canada Have Privacy Legislation?**

- Québec Privacy Legislation
- Alberta Privacy Legislation
- Personally Identifiable Information
- Employee Information
- Non-Profit Organizations
- Reporting Issuer SEDAR Filings
- Secondary Marketing
- Outsourcing Services
- Transfer of Personal Information Outside of Canada
- Freedom of Information and Protection of Privacy

**How Do Canadian Privacy Laws Interact With the US Patriot Act?**

**17. HOW ARE CONSUMERS PROTECTED BY LEGISLATION IN CANADA?**

**Consumer Advertising**

**Canada Consumer Products Safety Act**

- Purpose
- Prohibitions
- Testing and Reporting
- Confidential Information
- Inspection Authority
- Offences and Penalties are Treated Differently under the CCPSA
- Powers of Inspectors
- What You Should Do

**Do Ontario and Québec Have Electronic Commerce Legislation?**

**What Other Consumer Protection Legislation Applies in Canada?**

- Unfair Practices, Implied Warranties and Unsolicited Goods
- Internet Agreements and Other Specific Consumer Agreements
- Gift Card Restrictions
- Application of the Ontario Consumer Protection Act

**How Does Provincial Consumer Protection Legislation Affect Electronic Contracts?**

- Disclosure of Information
- Express Opportunity to Accept/Decline and Correct Errors
- Deliver Copy of Agreement
- Cancellation of Agreement
- Amendment, Renewal, Extension

**18. WHAT LAWS GOVERN THE ACQUISITION, USE AND DEVELOPMENT OF REAL ESTATE?**

- Land Transfer Taxes
- What Rules Apply to the Use and Development of Real Property?
- Pending Land Registration Reform in Newfoundland and Labrador
- What Rules Apply to Residential Rental Properties?
- What Environmental Standards Apply in Canada?
19. ARE CLASS ACTIONS A RISK FOR BUSINESS IN CANADA?  19.1
The Possible Use of Arbitration Clauses to Forestall Class Action Proceedings

20. LIMITATIONS LAW  20.1
Ontario  20.1
The Ontario Two-Year Basic Limitation Period
The Ontario 15-Year Ultimate Limitation Period
Certain Claims Subject to No Limitation Periods in Ontario
Certain Existing Ontario Statutory Limitation Periods Unchanged
Dispute Resolution and Enforcement in Ontario of Foreign Judgments, Arbitral Awards
and Mediation Minutes of Settlement
Ontario Statutory Notice Periods Unaffected
No Exception for Equitable Remedies in Ontario
Ontario Transition Rules
The Meaning of “Discoverable” Under Ontario Law
Running of Limitation Periods Suspended in Ontario in Certain Circumstances
Contracting Out of the Ontario Limitations Act, 2002
Debt Obligations that Are Due on Demand Under Ontario Law
Payments and Acknowledgements Under Ontario Law

Nova Scotia  20.9
New Brunswick  20.10
Québec  20.10
Extinctive Prescriptions Under Québec Civil Law
Running of Prescription Under Québec Civil Law
Forefiture Delays Under Québec Civil Law
Other Statutory Québec Limitation Periods

Alberta  20.12
British Columbia  20.12
British Columbia Ultimate Limitation Period
Claims which are Not Subject by any Limitation Period in British Columbia
Other Notable British Columbia Limitation Periods

21. DISCLAIMER  21.1

22. GLOSSARY: DEFINITIONS USED IN THIS DOCUMENT  22.1
1. INTRODUCTION

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

Canada has been at the forefront of this initiative, both globally, through participation in the World Trade Organization, and bilaterally, through its participation in the North American Free Trade Agreement and bilateral free trade agreements with each of Costa Rica, Chile, Israel, South Korea, Columbia, Jordan, Peru and the European Free Trade Association. Details of the bilateral trade agreements that Canada is currently pursuing are summarized on page 13.8. In addition, Canada is a party to 23 bilateral investment treaties, the last of which was signed with Peru.

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

Capitalized terms or acronyms are defined in the glossary at the end of this publication.

All currency is in Canadian dollars, unless otherwise noted.

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

**Who Makes the Laws in Canada?**

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

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

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

**Federal Jurisdiction**

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

**Provincial Jurisdiction**

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

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

Regulations under all Ontario Acts are effective immediately upon publication on E-Laws. In addition, a regulation is effective against a person (which includes a corporation) before it is published on E-Laws or the Ontario Gazette if such person has actual notice of the regulation. This would seem to prevent such a person from taking steps to avoid or undermine the intended effect of a regulation before it is published in an official reporter. Previously, a regulation was not effective until it was published in the Ontario Gazette. This created the opportunity for mischief. For some reason, the Ontario government has, for example, in the case of the Ontario *Personal Property Security Act*, instituted a practice of publishing “Minister Orders” in the Ontario Gazette in lieu of enacting regulations. We hope that this practice will not become commonplace.
Finally, the Legislation Act only applies to instruments of a “legislative nature.” In conformity with its predecessor, the Ontario Interpretation Act, the general rules of construction (number, gender, English and French version equality, the meaning of “holiday” and “mentally incompetent,” and rules regarding the computation of time) encoded in the Legislation Act apply to the meaning of those terms when used in legislative or regulatory enactments alone. The prescribed meanings do not apply to the same words or concepts when used in private contracts.

**Municipal Jurisdiction**

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

**Overlapping Jurisdictions**

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

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

**What is Canada’s Legal System?**

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

**The Common Law**

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

**The Québec Civil Code**

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

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

**Commercial Practice**

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

**The Common Law**

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

**The Charter of Rights and Freedoms**

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

**Statutes, Regulations, By-laws and Directives**

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

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

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

Parties to contracts governed by the laws of Ontario which provide that disputes shall be settled by arbitration pursuant to the Arbitration Act, 1991 (Ontario) (the “AAO”), if the parties wish to be bound by the results of an arbitral award under the AAO and which to limit to the greatest extent possible the ability of either party to appeal the award to the courts, the parties should specifically exclude the application of section 7(2) of the AAO.

Section 7(1) of the AAO provides that if a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding. In addition to certain exceptions which only apply to family law arbitrations, Section 7(2) of the AAO provides that on any such application the court may refuse to stay the proceeding in any of the following cases:

- A party entered into the arbitration agreement while under a legal incapacity;
- The arbitration agreement is invalid;
- The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law;
- The motion was brought with undue delay; and
- The matter is a proper one for default or summary judgment.

Section 3 of the AAO permits parties to arbitration to exclude any provision of the AAO except matters arising under any of the following AAO sections:

- Subsection 5 (4) (“Scott v. Avery” clauses, that is, an agreement requiring or having the effect of requiring that a matter be adjudicated by arbitration before it may be dealt with by a court has the same effect as would have been the case had the parties signed an agreement to arbitrate disputes);
- Section 19 (equality and fairness);
- Section 39 (extension of time limits);
- Section 46 (setting aside award);
- Section 48 (declaration of invalidity of arbitration); and
- Section 50 (enforcement of award).
For the commentary on the settlement of international commercial disputes see page 20.3.

**What Do Canada’s Current Economic Indicators Disclose?**

In its 2010 Competitive Alternatives Guide to International Business Location, KPMG ranked Canada second only to Mexico as the most cost-efficient place to do business in the countries surveyed, that is, first among established industrialized countries. Canada ranked second behind Mexico in total labour costs (wages, salaries and benefits) and third behind the Netherlands and Australia in lowest effective tax rates. In the Economist Intelligence Unit 2010 survey of 82 countries, the most Vienna, Melbourne and Toronto still occupy second, third and fourth positions behind first-ranking Vancouver as the most livable cities in the world. The top ten city list is still dominated by Canadian and Australian cities, which benefit, in particular, from perfect scores for health care and education. Factors considered included the political and economic environment in the countries, taxes, labour, market potential and trade and investment policies.

It has been reported that for the second year in a row, California and Ontario have been named by the FDI Intelligence division of the Financial Times as the top two jurisdictions in North America for foreign direct investment in 2010. California had a 7% increase over 2009 in foreign direct investment projects for a total of 172, and Ontario had a 21% increase over 2009 in foreign direct investment projects for a total of 127. The two jurisdictions ranked first and second in total new capital invested, but Ontario led California with 11,120 new jobs from its 2010 new foreign direct investment projects. For the most attractive North American business cities in which to do business, New York and Toronto ranked 1 and 2 with foreign investors funding 49 new projects in Toronto in 2010.

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

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

- The extent of the close US and Canadian governmental cooperation in the debtor-in-possession (“DIP”) and acquisition financing of the restructurings and throughout the course of the US Chapter 11 proceedings and the post-restructuring phases. Of fundamental importance to Canada was ensuring the sustainable viability of the Canadian operations, the maintenance of Canadian production, commitments to research and development in Canada and related capital spending programs, the cultivation of enhanced relationships with Canadian Universities and Colleges and the protection of Canadian suppliers.
- The coordination of the complex Chapter 11 proceedings without the need for parallel proceedings in Canada.
Co-operation between the Canadian federal government and the Province of Ontario on matters involving the overlap of federal and provincial jurisdictions.

The speed of the restructurings, which saw both General Motors and Chrysler reorganize and emerge from Chapter 11 in less than 45 days, including the closing of the US Bankruptcy Code section 363 sale transactions for both Chrysler and General Motors, combined with the challenges presented by General Motors and Chrysler’s highly-integrated cross-border manufacturing operations and avoiding some of the negative impact of the bankruptcy proceedings on the sale of General Motors and Chrysler products.

Governmental participation in the equity ownership of both the restructured Chrysler and General Motors.

The commercial bank prime rate at the end of June 2011 was 3.0%, up by 0.75% since September 2009. The Bank of Canada overnight lending rates charged to commercial banks in June 2011 was 1.0%, down by 0.50% since September 2009 as a result of action taken by the Bank of Canada to stabilize Canadian capital markets and counter the adverse effect of the American subprime residential mortgage crisis and excess lending and borrowing in the commercial real estate and private equity markets.

Inflation in Canada for the 12 months ended on April 30, 2011 was 3.3%, the largest annual increase since September 2008. This increase is seen to largely be the result of increased energy and food prices. Excluding energy, Canada’s consumer price index only rose 2.4% in the 12 months ended March 31, 2011.

Canada’s unemployment rate at the end of June 2011 was 7.7%, down by nearly 0.5% in the last year. The Ontario manufacturing sector has been hardest hit as a result of the continued uncertainty in, and the decline in demand from, the US consumer markets.

Over 80% of Canadian exports are made to the US. The slowdown in the US economy during the last two years has led to a decline in the rate of growth of the Canadian economy. The trend had been reversed during early 2008 with the surge in commodity prices, including oil, gas, copper, coal and gold. Real Canadian gross domestic product increased by 0.8% during the year ended April 30, 2011. Canada led all industrialized countries in recovering from the recession.

The anticipated continued rise of consumer demand in India and China may put pressure on production costs and prices for Canadian business, especially when coupled with the increase in the value of the Canadian dollar in relation to the US dollar. The exchange rate between Canadian and US dollars in late April, 2011 was 0.95, a 5% change in the last 12 months. The resulting premium in favour of the Canadian dollar has put increased pressure on Canadian manufacturers.

What is the GST and How Does It Affect Business?

The federal goods and services tax (“GST”) is a broad-based value-added tax of 5% imposed on certain goods sold or rented and services provided. The GST is imposed at the point of supply in Canada. The federal government and the provinces of New Brunswick, Nova Scotia, Newfoundland & Labrador, Ontario and British Columbia have replaced the GST with the harmonized sales tax (“HST”) (See commentary on page 4.14).
GST is applied, collected and remitted at each transaction level. However, a business is only required to remit to the tax authorities the amount of GST that is in excess of the GST that it has collected (or ought to have collected) over the GST that it has paid on its own purchases and expenses. Accordingly, in most cases, businesses can recover GST paid or payable on goods and services that were acquired in the course of their commercial activities by claiming input tax credits. Businesses that provide exempt supplies are not able to claim any such input tax credits. As a result, the GST does not generally represent an operating cost to a business. Rather, the cost of the GST is paid by the end user of the product or service. The principal cost of the GST for businesses arises from the reporting and compliance requirements.

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

As part of any business acquisition agreement, purchaser should consider retaining outside consultants who, for no fee other than a portion of recoveries, will conduct audits of GST, provincial sales tax, HST, and such other federal and applicable provincial programs. Recoveries from such efforts should be disclosed and dealt with in an appropriate manner by the terms of the purchase and sale agreement.

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

In October 2007, the Ontario Liberal Party was re-elected for a further four years in a provincial election. Since taking office, because of a current budgetary deficit of $6 billion, the Ontario Liberals eliminated the then existing limit on consumer electricity prices, and cancelled reductions in corporate and personal provincial income taxes. In addition, the government increased the general minimum wage to $10.25 effective March 31, 201. The Ontario Liberals must call a provincial election in October 2011.

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

In the May 2011 federal general election, Canadians elected a Conservative Party majority after two previous consecutive Conservative minority governments. There will not be another federal election in Canada for at least 4 years. Contentious issues to be resolved by the new government include:

- The degree to which Investment Canada will interfere in foreign investment in Canada, given the government’s recent opposition to the BHP Billiton acquisition of Potash Corporation of Saskatchewan and its current review of the proposed merger of The Toronto and London Stock Exchanges.
- The inability to settle a free trade agreement with the EU because of its opposition to current Canadian egg, poultry and dairy farm supply management systems.
- The proposed reduction in barriers to competition in the Canadian telecommunications industry. Permitting greater foreign ownership would likely require changes to the *Telecommunications Act* (Canada).
Achieving a balanced budget in the face of low consumer spending, the large federal service and the high Canadian dollar.

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

How Does “Canada” Rank as a Brand?

In a November 2009 survey by Future Brand, a New York consulting firm, Canada has the second best country brand in the world, behind that of Australia, based on criteria such as natural beauty, beaches, environmentalism and the friendliness of residents, up from 12th place two years earlier. Those of the 2,700 surveyed who responded ranked Canada as the easiest to visit with their families and the easiest place to do business.

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

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

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

**Branch Plant Operation**

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

**Business Name**

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

**Extra-Provincial Licence**

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

**Effect of Failure to Register**

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

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

**Attorney for Service**

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

**Limited Liability Companies — Uneven Provincial Treatment**

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

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

As described in more detail under the heading “Limited Partnership” on page 3.27, Ontario’s *Corporations Tax Act* deems each foreign corporate limited partner of a partnership as having a permanent establishment in Ontario if such partnership — if it were a corporation would be treated under the laws of Ontario as having a permanent establishment in Ontario — and so may obligate each such corporation to register as an extra-provincial corporation in Ontario, to file returns and to pay tax on income earned by it in Ontario.

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

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

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

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

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

**Sole Proprietorship**

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

**Canadian Corporation with Share Capital**

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

**The Requirement for Canadian Resident Directors**

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

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

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

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

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

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

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

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

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

Incorporation Under the CBCA

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

If a proposed name is cleared, articles of incorporation are filed, along with specified initial notice forms. The government fee for filing articles of incorporation for a federal corporation is currently $200 for an electronic filing and $250 for a paper filing, plus legal fees and disbursements.
A CBCA corporation may, as of right, register as an extra-provincial corporation in each province where it carries on business and, in all cases other than Ontario and Québec, take out and maintain an extra-provincial licence. No licence is required by either Ontario or Québec for CBCA corporations. For each of the other provinces in Canada, CBCA corporations must go through the name search procedure for each province in which they conduct business and are required to hold extra-provincial licences. Since the CBCA name search includes all names in all provinces (except Québec), a newly incorporated federal company would not likely find its name refused by any province, provided the provincial name search and licence application is done within a relatively short period of time following its incorporation.

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

### Incorporation under the OBCA

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

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

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

Ontario law requires the electronic filing of an information return for all corporations carrying on business in Ontario, regardless of the legislation under which it is incorporated: (i) annually with the corporation’s provincial tax return; and (ii) whenever there is a change in directors or officers or a change in the registered office of the corporation. There is no disclosure of the names of the corporation’s shareholders in any publicly filed return, save as set out below under the heading “Corporations Returns Act” on page 3.18.

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

Effective August 1, 2007, the OBCA was amended to bring its provisions more in line with those of the CBCA. Changes to the OBCA included: the right to create classes of shares with identical share conditions (this change is intended to avoid the existing common law treatment of different
classes of shares with identical attributes as only one class of shares); other changes to facilitate re-
organizations of the share capital of OBCA corporations; procedures to be followed by directors in
making disclosure of conflicts of interest (directors cannot attend that part of a meeting at which
the matter in conflict is discussed — the non-conflicted directors are deemed to constitute a
quorum to the extent the conflicted directors would otherwise be required for quorum purposes —
the CBCA does not require that directors be excluded from such discussions); as noted above,
those persons who assume the management and supervision rights of the directors under the terms
of a USA are entitled to defences available to directors under the OBCA; confirmation that OBCA
directors only owe a fiduciary duty to the corporation and not to any stakeholders, including
shareholders and creditors; implementation of the due diligence defence for directors for statutory
claims against them; and extension of director and officer indemnification beyond the corporation
itself to entities in respect of which the corporation has management rights.

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

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

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

Each of the Canadian provinces and territories has entered into an agreement with the others
(referred to as the Mobility Agreement) to the effect that in certain limited circumstances, a
lawyer called in one such jurisdiction may opine to a matter governed by the laws of another
jurisdiction where she/he has not been called to the bar. There may be legal issues such as
the obligation to register as an extra-territorial corporation or limited partnership where a
firm in one province would be in a position to opine as to compliance by a corporation or by
a limited partnership for each Canadian jurisdictions, including Québec, without requiring
opinions addressed to it from agents in any of the other jurisdictions. For example, this might
result in significant cost savings for a corporation or limited partnership where it is making
an initial public offering of securities, especially in that four provinces, Saskatchewan,
Ontario, New Brunswick and Prince Edward Island, each of which deem a foreign limited
partnership to be conducting business in the province where the foreign limited partnership is
effecting a primary distribution of securities to the public in such province.
With the advent of online filing, there is no material difference between incorporating under the CBCA and the OBCA insofar as cost and convenience of filing are concerned. On balance, given the choice between incorporating under the CBCA or the OBCA, our preference would be the CBCA in those cases in which there are only two shareholders.

If it is anticipated that the corporation will conduct business in more than one province, a CBCA corporation cannot be denied extra-provincial registration; a provincially incorporated corporation could be denied an extra-provincial licence. The name clearance procedures required for incorporation include Canada-wide name conflict searches (apart from Québec), more or less ensuring that the name will be available for registration in any province where registration is required, if done at or shortly following the date of incorporation.

Two-Shareholder Corporations: Avoiding Deadlocks

The CBCA and OBCA each contain requirements that have important implications for corporations with two voting shareholders holding unequal equity interests in their corporation. Majority shareholders cannot necessarily rely on their superior voting rights to prevent deadlocks.

Each of the CBCA and OBCA sets out rules as to what constitute valid meetings of directors and shareholders. These rules fix the number of directors or shareholders that must be present at a meeting in order for a quorum to be met so that there can be transaction of business at the meeting. In addition, each Act requires that at least 25% of the directors of a corporation must be residents of Canada (or if the board has less than four members, at least one director must be a resident Canadian).

The following analysis assumes that the shareholders have entered into a shareholders’ agreement under which each shareholder is entitled to have one nominee elected to the board of directors. Without a shareholders’ agreement, the majority shareholder would have the votes necessary to elect all the directors.

Directors’ Meetings

Unless the articles or by-laws provide otherwise, under both the CBCA and the OBCA a quorum for a valid meeting of directors is either (a) a majority of the directors or (b) the minimum number of directors fixed by the articles.

In addition, under the CBCA at least 25% of the directors in attendance at the meeting must be resident Canadians (or if the corporation has less than 4 directors, at least one of the directors present at the meeting must be a resident Canadian). The threat of a board deadlock arises where one of the directors fails, or refuses, to attend meetings. It is commonplace to provide in the articles of a CBCA corporation that the minimum number of directors shall be one. Based on the foregoing, on the face of it, if a notice of meeting is properly given, if only one of the directors were to attend, the quorum requirement for the meeting would have been satisfied, as long as the attending director is a resident of Canada. However, there is a common law rule that a person cannot meet with himself. So, the foregoing does not avoid the deadlock for CBCA corporations.

The OBCA also provides that where an OBCA corporation has only two directors, both directors must be present at any meeting of directors to constitute a quorum. There is no requirement that there be at least one resident Canadian director at any meeting.
As a result, for both CBCA and OBCA purposes, if the shareholders agreement provides for a two-person board, either director can create a deadlock by failing to attend meetings.

**Unanimous Shareholders Agreement**

To avoid the adverse consequences that could arise from the directors’ meeting deadlock described above, the shareholders could identify those issues that would otherwise be within the purview of the board and enter into a written USA to provide that such matters will be determined by the shareholders, and not by the directors.

**Signed Resolutions in Lieu of a Resolution Passed at a Duly Constituted Meeting**

Where it is necessary to evidence a decision of the directors or shareholders, in most circumstances, each of the Acts permits the directors or shareholders to pass the required resolution by having all the directors or all the shareholders, as the case may be, sign such resolution.

Under both Acts, directors cannot fetter their discretion, meaning that they cannot agree to take a course of action until the matter in question comes before them for review. Shareholders under a USA are not subject to the same constraint, meaning that shareholders may agree in a USA to provide that the approval by instrument in writing by one or more shareholders holding not less than, for example, a majority of the votes that would be cast at a meeting, and subject to the following commentary, would bind the corporation and the shareholders in regard to the matter in question.

**Circumstances Where the Only Option is a Shareholders Meeting**

However, under both Acts, there are matters that must be approved by special resolution, that is, by the favourable vote of persons holding not less than 2/3 of the votes cast at a meeting of shareholders or consented to in writing by all of the shareholders. If the minority shareholder refuses to sign the special resolution and refuses to attend a duly called meeting of shareholders to consider the special resolution, then for OBCA corporations, even with a USA, a deadlock may arise and the majority shareholder may be without an effective remedy.

**The CBCA Solution**

For meetings of shareholders, the CBCA provides that subject to the corporation’s by-laws, a quorum is present at a meeting of shareholders if the holders of a majority of the shares entitled to vote at the meeting are present in person or represented by proxy, irrespective of the number of persons actually present at the meeting. As a result, unless the by-laws of a CBCA corporation provide to the contrary, the CBCA avoids the threat of a deadlock arising from the failure or refusal by the minority shareholder to attend shareholder meetings.

**The OBCA Defect**

In contrast, the OBCA provides that subject to the corporation’s by-laws, a quorum is present at a meeting of shareholders if the holders of a majority of the shares entitled to vote at the meeting are present in person or represented by proxy, but the OBCA does not include the CBCA phrase, “irrespective of the number of persons actually present at the meeting.” A person cannot meet with himself, and a shareholder cannot be “split” into two by granting a proxy for part of the shares held by the shareholder to another person. As a result, the failure, or refusal, of the minority shareholder of an OBCA corporation to attend a meeting will result in a deadlock, with the majority shareholder being left to apply to the courts for relief.
This result should be viewed as a significant shortcoming of the OBCA, and the CBCA should be the preferred incorporating statute for corporations with only two shareholders, one of whom is a majority shareholder.

Possible Fix
It may be possible for OBCA shareholders to address the deadlock problem in the general by-law of the corporation by providing that a quorum of shareholders is present at a meeting of shareholders if the holders of a majority of the shares entitled to vote at the meeting are present in person or represented by proxy, irrespective of the number of persons actually present at the meeting. Whether this language would be effective to override the common law principle that a person cannot meet with himself is not free from doubt. Using a CBCA corporation would be a better approach.

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

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

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

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

A NBBCA corporation must apply for an extra-provincial licence in each province in which it carries on business, other than the Provinces of Nova Scotia, Québec and Ontario. New Brunswick law requires the filing of an annual information return for all corporations carrying on business in New Brunswick. Such corporations are also required to file each time there is a change of directors, or a change in the registered office or address for service.
Incorporation under the Nova Scotia Business Companies Act

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

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

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

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

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

Major 2011 Reform to the Québec Companies Act

The Business Corporation Act (Québec) (the “QBCA”), which was adopted by the Québec National Assembly on December 4, 2009 is now in force. The QBCA provides for a substantial reform of the legal framework applicable to legal persons that were previously governed by the Companies Act (Québec). The Companies Act had not been updated in a significant way since 1981. The QBCA has modernized and streamlined the internal functioning of business corporations, for instance, by clarifying the unanimous shareholder agreement mechanism and by simplifying the rules governing the maintenance of share capital. The QBCA is modelled to a large extent on the current provisions of each of the CBCA and the OBCA. However, there will be a number of differences between the QBCA and other Business Corporations Acts which may be of interest for persons wishing to incorporate in Canada. The QBCA:

- Has no residency requirement for directors;
- Permits the issue of shares by QBCA corporations that are not fully paid-up (they will be subject to calls for payment by the directors of the corporation from time to time);
- Permits the creation of par value shares in its capital;
- Eliminates the need to meet a solvency or other test prior to granting financial assistance (broadly defined) to related parties and removes directors’ liability for any such financial assistance;
- Confirms that directors of a QBCA owe a duty of care only to the corporation;
• Provides for the issuance of uncertificated securities; and
• Provides significant rights on minority shareholders, including the right to make proposals at meetings, the right to obtain copies of the financial statements of subsidiaries and the right of dissenters to have their shares valued and redeemed where they vote against a fundamental change approved by the required majority of shareholders.

QBCA corporations may indemnify its directors and officers, and may advance funds for the costs incurred by them in defending themselves against proceedings arising from their positions as directors and officers of the corporation, subject to a repayment obligation in like circumstances to those set out in the OBCA and CBCA. It is now possible to export a Québec company for the purposes of amalgamation in another jurisdiction. Most existing Québec companies were automatically continued under the QBCA when it came into force.

Incorporation under The Corporations Act (Manitoba)

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

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

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

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

Solicitation of Proxies
Under the MCA, a person who solicits proxies, other than by or on behalf of management of the company, must send a dissident’s proxy circular in prescribed form to each shareholder whose proxy is solicited and to certain other recipients. Under the CBCA, proxies may be solicited
other than by or on behalf of management of the company without the sending of a dissident’s proxy circular if: (i) proxies are solicited from 15 or fewer shareholders; or (ii) the solicitation is conveyed by public broadcast, speech or publication containing certain of the information that would be required to be included in a dissident’s proxy circular. Furthermore, under the CBCA, the definitions of “solicit” and “solicitation” specifically exclude (among others): (i) the sending of a form of proxy in response to an unsolicited request made by or on behalf of a shareholder; (ii) the performance of administrative acts or professional services on behalf of a person soliciting a proxy; (iii) a solicitation by a person in respect of shares of which the person is the beneficial owner; and (iv) a public announcement by a shareholder of how the shareholder intends to vote and the reasons for that decision. Shareholders will need to determine whether the proxy requirements of the US or Canadian securities laws apply to any such communication.

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

Under the OBCA, where a corporation proposes to pass articles of amendment that vary the rights of a class of shareholders in a manner different from other shares of the same class, the holders of a series of shares of a class are entitled to vote separately as a series even if such shares have no right to vote in other circumstances. In all other circumstances where an OBCA corporation proposes to make a fundamental change in the corporate structure, special class shareholders of such OBCA corporation are not entitled to vote. This limitation the right of such shareholders to vote does not exist under the CBCA or the Business Corporation Acts of the other provinces, and can be viewed as a shortcoming of the OBCA.

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

Compelled Acquisitions
Under the CBCA, following a take-over bid accepted by the holders of not less than 90% of the shares of the offeree company to which the take-over bid relates (excluding shares held by the offeror), the remaining shareholders that did not accept the take-over bid can be compelled to sell their shares to the offeror. In the event that the offeror does not compel such remaining shareholders to sell, then such remaining shareholders may require the offeror to acquire their shares. The MCA does not have equivalent provisions.
Registered Office
Under the MCA, a company’s registered office must be in the place within Manitoba specified in its articles of incorporation and may be changed to a different location only by a special resolution of the shareholders. Under the CBCA, a company’s registered office must be in a place in the province of Canada specified in its articles of incorporation and may be relocated to another province only by special resolution of the shareholders.

Disclosure of Material Interests
The CBCA requires a director or officer to disclose to the company any interest he or she has in an actual or proposed material contract or material transaction with the company. The MCA only requires disclosure of an interest in an actual or proposed material contract with the company. Under the CBCA, a director is prohibited from voting in respect of any such contract unless the contract is regarding remuneration, indemnity or insurance or is with an affiliate. Under the MCA, a director is not precluded from voting in respect of the above kinds of contracts or in respect of arrangements relating to security for money lent or obligations undertaken for the benefit of the company or otherwise in respect of any kind of contract, provided the resolution in the latter category is approved by not less than two-thirds of votes of all the shareholders of the company to whom notice of the nature and extent of the director’s interest in the contract or transaction are declared and disclosed in reasonable detail. Under the CBCA, shareholders have an ability to ratify any contract approved contrary to the applicable provisions by special resolution.

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

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

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

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

**British Columbia's Business Corporations Act**

The following is a list of some of the more important features of the BCBCA:

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

**Unlimited Liability Corporations — Nova Scotia, Alberta and British Columbia**

*Nature of Unlimited Liability*

The shareholders of an Nova Scotia ULC (“NSULC”) or those of a BCULC have unlimited liability but it only arises if the NSULC or BCULC respectively is wound-up or liquidated, and its assets are not sufficient to pay the company’s debts and liabilities and wind-up expenses. The ABCA provides that the liability of each of the shareholders of a corporation incorporated under this Act as a ULC for any act, liability or default of the ULC is unlimited in extent and joint and several in nature. As a result, the liability of a shareholder of an Alberta ULC (“AULC”) may be greater than the liability of a shareholder of a NSULC.
The shareholders of an AULC have liability for an act or default of the AULC which is unlimited in extent and joint and several in nature, but the scope of the liability is much broader than that in respect of NSULCs and BCULCs. The “past shareholders” of an NSULC may also, in certain circumstances, remain liable upon a winding up of the NSULC for liabilities incurred up to one year after ceasing to be a shareholder.

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

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

Special AULC Requirements
- Must use the “ULC” identifier in its name;
- Must provide special disclosure in articles regarding joint and unlimited liability of shareholders; and
- Must insert like disclosure warning on its share certificates.

AULC Advantages
- ABCA is based on modern Business Corporations Act principles — a NSULS is based on an old form of English Companies Act;
- Many corporate steps that a NSULC might take require an order of a court and ratification by of ¾ of its shareholders. For AULCs no court order is required. In addition, approval for fundamental changes is limited to 2/3 of its shareholders and not 75%;
- Cost for incorporating a AULC is $100 with no annual fees — cost of incorporating a NSULS is $2,000 with a $1,000 annual renewal fee;
- ABCA codifies director’s duty of care and conflict of interest obligations providing clarity and certainty to directors, while NSULCs must follow common law requirements re: fiduciary duty and duty of care of directors; and
- A NSULC only provides unlimited liability to its shareholders on liquidation or demise of the NSULC. It may be important for foreign tax or corporate purposes that unlimited liability applies in all circumstances, as it does with an AULC, and not just on winding up. The liability provisions contained in the Alberta Business Corporations Act are intended to result in an AULC being treated under the purposes of the US Internal Revenue Code (the “Code”) as a “disregarded entity or partnership” for US Federal income tax purposes.

The ABCA provides for the following:
- Continuance into Alberta of an extra-provincial ULC as an Alberta ULC;
- Continuance into Alberta of an extra-provincial limited corporation as an Alberta ULC; and
- The conversion of an Alberta corporation from a limited corporation to a ULC.
**BCULCs**

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

---

**Nature of Hybrid Status in Canada and the US**

An entity is considered a hybrid if it is treated differently for tax purposes in different jurisdictions. For example, a ULC is a hybrid entity in Canada and the US, as discussed below.

**Canada**

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

**US**

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

The check-the-box regulations also dictate how foreign business entities are treated for US tax purposes. Generally, any corporation formed under Canadian federal or provincial law are viewed as a *per se* corporation for US tax purposes. However, the regulations exclude certain business entities, such as NSULCs and any other corporation whose owners have unlimited liability pursuant to federal or provincial law. Therefore, ULCs incorporated or continued in Nova Scotia, Alberta and British Columbia are excluded from *per se* corporations because shareholders have unlimited liability. As a result, a business entity that is not expressly a corporation is considered to be an “eligible entity,” and can elect its classification for US tax purposes. Therefore, for US tax purposes a ULC will be treated as a transparent or disregarded entity (where there is one shareholder) or a partnership (where there are two or more members), unless it elects to be treated as a corporation.

**Foreign Tax Credit Planning**

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

**Advantages and Disadvantages for Non-Residents Using ULCs**

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

- The US parent claiming the losses incurred by the ULC.
- Stepping-up the tax cost of assets of the ULC for US tax purposes in the context of a purchase of shares of the ULC without triggering a taxable event under the Tax Act.
Avoiding the US transfer pricing rules in respect of transactions between the ULC and its US shareholder.

However, rules in the Convention limiting the availability of treaty benefits to fiscally transparent entities may adversely impact the use of a ULC. Furthermore, there are technical requirements and there may be disadvantages under the governing legislation of the ULCs that should be explored with a lawyer practicing law in the jurisdiction of incorporation of the ULC.

**Corporations Returns Act**

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

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

or if any of the following conditions apply:

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

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

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

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

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

Use of a Corporation to Conduct Business in Canada

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

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

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

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

Financial Assistance by a Business Corporation to Related Parties

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

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

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

**What Limitations Apply to Corporate Director and Officer Indemnities?**

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

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

**Schoon v. Troy Corporation**

While the amendments to the OBCA should provide directors and officers of Ontario corporations with some comfort regarding their indemnification and advancement rights, the recent Delaware Chancery Court decision in Schoon v. Troy Corporation (“Schoon v. Troy”) highlights the potential for directors and officers to be stripped of those rights altogether. The case arose in the context of an action by Troy Corporation (“Troy”) against two former directors for damages suffered by Troy as a result of the sale by the former directors of information which Troy alleged was proprietary and confidential. One of the former directors requested that Troy advance monies for legal fees and expenses incurred by him in his defence of the claim by Troy against him on the basis that during his term as a director Troy’s by-laws authorized advancement and indemnification rights for both current and former directors. However, following the resignation of the director, but prior to initiating the claim against him, Troy amended its by-laws to disentitle former directors of the right to receive advance payment of legal costs. The amendment did not apply to directors and officers while they remained in office.
The director argued that his right to advancement had vested when he became a director and that it could not be withdrawn without his consent. In deciding in favour of Troy and upholding the amendment, the Court rejected the director’s argument and held that a former director’s right to advancement does not vest until the commencement of a lawsuit in which the director is named as a party. The court noted that the manner in which Troy’s by-laws were drafted: (i) did not create a basis on which to conclude that the granting of the ultimate indemnity necessarily included a right of advancement; and (ii) did not prevent the unequal treatment of the two class of indemnified persons (i.e., those still engaged by Troy and those who were no longer officers or directors of Troy).

Lessons Learned

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

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

Recommendations

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

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

Secondly, we recommend that each director and officer enter into a written agreement with the corporation under which the corporation agrees: (i) to indemnify the director/officer in question to the full extent permitted by law; and (ii) to advance to the officer/director litigation costs on an “as incurred” basis, subject to the qualification that if it is shown that the director or officer so
indemnified did not act honestly and in good faith with a view to the best interests of the corporation in respect of the matter in question or, in appropriate circumstances, did not have reasonable grounds for believing his/her conduct was lawful, then there would be an obligation on the director or officer to repay the advances with interest. Such a written agreement, unlike a corporate by-law, cannot be amended unilaterally without the consent of the director or officer and as such provides the only certain method for such director or officer to avoid the scenario that unfolded in Schoon v. Troy.

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

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

Not-for-profit Corporations

Although of limited practical application, it is possible to incorporate in Canada, either federally or provincially, a corporation without share capital (a not-for-profit corporation or “NFPC”), provided only that if any purpose of the NFPC is “for profit,” the income derived from doing so must be used for the NFPC’s “not for profit” education, scientific, philanthropic, religious, club or other such purpose. NFPCs often qualify as charities and are entitled to operate tax-free, but there are complex rules both under the Tax Act governing what entities are permitted to issue charitable receipts for tax purposes and under provincial legislation, including, in Ontario, the Charities Accounting Act.

The federal and Ontario governments have each passed, but have not proclaimed in force as yet, new laws governing not-for-profit corporations that are game-changers for both existing and new NFPCs. Both the federal and Ontario NFPC Acts (collectively, the “NFPC Acts”) radically change the powers of NFPCs and the corporate governance rules which apply to them. The following commentary contrasts certain provisions between the (as yet, not-in-force) NFPC Acts. Most of the other provinces have older NFPC Acts, although as noted below, there may be advantages to continuing under such legislation where the personal liability of directors is a principal concern.
The NFPC Acts streamline the regulatory regimes that oversee NFPCs. The federal Canada Not-for-profit Corporations Act (the “Canada NFPC Act”) should be proclaimed in force before the end of the summer of 2011. If the present Ontario government is returned to power in the scheduled October 2011 election, the Ontario Not-for-profit Corporations Act, 2010 (the “Ontario NFPC Act”) would likely come into force at some time in 2012. If the Ontario election fails to return the provincial Liberal Party to power, the timing of implementation, and perhaps the provisions, of the Ontario NFPC Act will change.

In any event, all existing NFPCs will, sooner or later, be forced to transition under new legislation. The following commentary assumes that the Canada NFPC Act and the Ontario NFP Act will be brought into force with no substantive amendments.

Who is Affected?

The Canada NFPC Act will govern all existing federal NFPCs, all corporations without share capital incorporated by a special Act of Parliament that “continue” under it, and all new federal NFPCs incorporated on or after the date on which the Canada NFPC Act comes into force.

The Ontario NFPC Act will apply to all existing Ontario NFPCs, all corporations without share capital incorporated by a special Act of Ontario (except for co-operative corporations incorporated under the Ontario Co-operative Corporations Act and insurance corporations incorporated under Part V of the Ontario Corporations Act that “continue” under it), and all new Ontario NFPCs incorporated on or after the date on which the Ontario NFPC Act comes into force.

Sunset Dates

The approach taken under the two Acts is significant. Under the Ontario NFPC Act, on the third anniversary of the date on which the Ontario NFPC Act comes into force, any provision in the letters patent, supplementary letters patent, by-laws or any special resolution of the Ontario NFPC is automatically deemed amended to bring it into conformity. Obviously, the foregoing could create confusion for members of the Ontario NFPC in question, and it is recommended that all Ontario NFPCs restate their constating documents by filing articles of continuance under the Ontario NFPC Act which conform to such Act.

The approach taken under the Canada NFPC Act is more draconian. At some point (generally believed to be three years following the coming into force of the Canada NFPC Act), the Director under such Act will issue a notice to each Canada NFPC that has not applied for, and been issued, articles of continuance or articles of dissolution requiring such notified Canada NFPC to take articles of continuance or articles of dissolution within a specified period. If such Canada NFPC fails to take either step (or fails to continue under not-for-profit legislation of another jurisdiction), then such Canada NFPC will automatically be dissolved without any opportunity for revival.

Continuing under the New NFPC Acts

A corporation can only continue under either of the NFPC Acts if the legislation governing the corporation immediately prior to continuation does not prohibit continuance or export. By way of example, until February 2011, the Québec Companies Act prohibited continuance out of Québec. Continuance or incorporation under either NFPC Act is “as of right” and occurs automatically once
completed articles of continuance or incorporation are executed and filed, and applicable name clearance requirements are complied with.

The Purpose of the New NFPC Acts

The new NFPC Acts are intended to modernize the regulatory framework for NFPCs by aligning it more closely with the regime which currently governs for-profit share capital business corporations. The goals are to improve the operational efficiency of NFPCs, to protect the rights and interests of their members, to augment NFPC accountability and to make NFPC operations more transparent. A comprehensive description of all of the differences imposed by the new legislation is beyond the scope of this note, but the following is a summary of certain of the significant features of, as well as some of the important differences between, the NFPC Acts.

Capacity of a Natural Person

Each continued or newly incorporated NFPC will have the capacity of a natural person, although any for-profit activities must only be used as a source of funds for the not-for-profit purpose of the NFPC. Broader restrictions are imposed on NFPCs which are charities for purposes of the Tax Act.

Directors and Officers

The NFPC Acts introduce rules for directors and officers that are consistent with those presently governing for-profit share capital business corporations, including:

- Unless the by-laws otherwise provide, a director need not be a member of the NFPC
- Resolutions signed by all the directors are permitted in lieu of meetings
- Subject to the by-laws and with the consent of all directors, telephone meetings of directors are permitted; and
- Both NFPC Acts contain provisions relating to the disclosure in writing by directors and officers of the nature and extent of their interest in any material contract or transaction; the provisions are substantially identical to those currently set out in the CBCA and OBCA.

In addition, each NFPC Act sets out an objective standard of care for directors and officers that obligates directors and officers to act honestly and in good faith with a view to the best interests of the NFPC and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. A “due diligence” defence is available to directors and officers for claims against them. A director or officer is deemed to have met his or her obligations under the Act if he/she exercises the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances.

Director and Officer Liability

Both NFPC Acts have updated rules governing the indemnification of directors and officers to make them consistent with those governing for-profit share capital business corporations, although neither NFPC Act has an upper limit on the liability of a (typically unpaid volunteer) NFPC director or officer. Other provinces such as Nova Scotia and Saskatchewan limit NFPC director and officer liability. For example, the Saskatchewan Non-profit Corporations Act, 1995 provides that no director or officer of a NFPC constituted under such Act shall be liable in a civil action or any
loss suffered by any person where the director or officer was acting in good faith at the time of the act or omission giving rise to the loss and the loss did not arise from an act or omission that was fraudulent or criminal misconduct by the director or officer.

One interesting feature of the Canada NFPC Act not present in the Ontario NFPC Act mandates that every director of a Canadian NFPC must verify the lawfulness of the articles and the purpose of the Canada NFPC. The intent of this section is not clear, and its tone is ominous. The requirement that directors personally verify the “lawfulness” of a Canadian NFPC may be similar in effect to the approach that has been taken by the United States under its “honest services” law, which requires that public and corporate officials act in the best interests of their constituents and employers. Some of the convictions registered against Conrad Black in the United States were grounded, in part, on the ruling that his conduct breached his “honest services” duty to Hollinger. Critics of the honest services law suggest that it is too vague and that it invites abuse from regulators who may impose legal sanctions on employees, officers or directors who engage in conduct that, while unappealing or ethically questionable, is not necessarily in breach of their good faith and care obligations to the enterprise. Whether a similar concern for directors will arise under the Canada NFPC Act based on the ambiguity of what constitutes a “lawful purpose” will have to be determined in the fullness of time.

Appointed Directors

Under both NFPC Acts, there are two types of directors: those elected by members and those appointed by such elected directors. NFPC directors have the extraordinary power to appoint one or more additional directors, who shall hold office for a term expiring not later than the close of the next annual meeting of members. In each case, the total number of directors so appointed may not exceed one-third of the number of directors elected at the previous annual meeting of members. There is a key difference between the federal and Ontario Acts with respect to this authority. For the directors of a federal NFPC to have this power, the power must be set out in the articles, but the power appears to be as-of-right in the discretion of the elected directors under the Ontario NFPC Act, unless restricted by the NFPC’s articles. This feature will accommodate NFPCs that wish to include ex officio members to their board of directors and permit NFPCs to act as administrative agents under other legislation where such legislation provides for unelected representation on such agent’s board.

Member Rights

The NFPC Acts enhance member rights by introducing remedies for members that are similar to those conferred on corporate shareholders under the Canada and Ontario Business Corporations Acts, including the right to vote on fundamental changes such as amalgamations, continuance of the NFPC under another jurisdiction, transfers of the NFPC’s assets out of the ordinary course, name changes, changes to membership class conditions and the creation of new membership classes. The list of persons entitled to make an application to the courts for relief for oppressive conduct by a NFPC under the Ontario NFPC Act is a significantly shorter list that that under the Canada NFPC Act, meaning that the number of persons whose interests must be considered by directors of an Ontario NFPC is shorter, and, so, the duties of directors and officers of an Ontario NFPC necessarily less complex. Existing NFPCs and unincorporated associations should bear this
distinction in mind when considering which of the two NFPC Acts it may select for continuance or incorporation. This distinction favours the Ontario NFPC Act.

One significant feature of the Ontario NFPC Act not present in the Canada NFPC Act is the right of each member to vote at a meeting by proxy. The Ontario NFPC Act contains an obligation on the Ontario NFPC to solicit proxies for each member meeting. The preparation of a proxy statement for member meetings may represent a new significant new cost for Ontario NFPCs.

Financial Disclosure

Each of the new NFPC Acts imposes comprehensive financial reporting obligations on NFPCs that have the potential, again, to significantly increase NFPC operating costs. Relief from the requirement to engage an auditor and have audited financial statements prepared on an annual basis is limited. By way of an extreme example, a Canada NFPC that has received more than $10,000 in any financial year from specific sources, including government bodies and public donors (making it a “soliciting corporation”) that has annual gross revenues of more than $50,000 must engage a public accountant to conduct an audit and prepare comparative audited financial statements unless 100% of the members waive such requirement or the Director under the NFPC Act in question grants relief from such audit / review engagement obligation. Similar rules apply to Ontario NFPCs (referred to as “public benefit corporations”), although any Ontario NFPC that is a charity, regardless of the amount it receives in any year from donations, gifts or grants, would be classified as a public benefit corporation and be subject to audit/review engagement requirements unless 80% of the members vote in favour of waiving the requirement or the Ontario NFPC Act Director, on application, grants relief. For many small NFPCs, the resulting audit / review engagement cost will threaten their financial viability. It is possible that persons who would otherwise incorporate a NFPC may choose, for example, to operate as an unincorporated collection of individuals. This strategy, of course, would expose such individuals to personal liability and would have the effect of eliminating all the protections otherwise available to them if they were members of a NFPC.

Charities

No NFPC has the status of a charity without complying with the applicable provisions of the Tax Act. Any NFPC that wishes to issue charitable donation slips for Income Tax Act purposes must seek and obtain from the CR registration as a charitable organization. Existing charities, before they continue under one of the NFPC Acts, might consider submitting their proposed articles of continuance to the Canada Revenue Agency (the “CRA”) to ensure that their charitable registration remains in force following continuance.

Partnership

General Partnerships

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

**Fiduciary Obligations**

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

**Agency**

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

**Joint and Several Liability**

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

**Flow-Through Vehicle**

A partnership is not recognized as a separate taxable entity for purposes of the Tax Act or for any other purpose in Canada. Subject to the “at risk rules” described on page 3.30, each partner is taxed at the personal level (or corporate level, if the partner is a corporation) for such partner’s share of the profits or losses from the partnership.

**Qualification to Conduct Business**

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

Partnership agreements are more expensive to prepare than the constating documents of other business forms of organization because of the detail with which they must be drafted and the dangers inherent in failing to provide for each of the matters that would otherwise be automatically mandated by the application of provincial partnerships law.

**Other Issues**

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

---

**Limited Partnerships**

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

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

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

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

The Manitoba limited partnership regime is commonly considered the most limited partner friendly in Canada for this reason. As a result, many limited partnerships used in structuring plans choose a Manitoba constituted limited partnership even if there is no real connection to Manitoba. However, even where a limited partnership is formed in Manitoba, to the extent it actually conducts its business in another province, the limited partnership statute of such other province may provide that notwithstanding the limited partnership’s jurisdiction of formation, the partnership statute of such other province may provide that notwithstanding the limited partnership’s jurisdiction of formation, the partnership statute of such other province is still applicable. For example, the Partnership Act (British Columbia) provides that an extra-provincial limited partnership registered in British Columbia has rights and privileges the same but no greater than, and is subject to the same duties, restrictions, penalties and liabilities as imposed on a limited partnership formed in British Columbia. As a result, the more strict “participation in management” test found in the Partnership Act (British Columbia) would also apply to such Manitoba limited partnership. The Ontario Limited Partnerships Act is silent regarding the foregoing.

Subject to the comments regarding corporations tax (where applicable) below affecting corporate limited partners, only the limited partnership itself and its general partner need qualify as carrying on business in those provinces of Canada in which the limited partnership carries on business.
None of the legislation in effect in any of the Canadian provinces and territories (apart from that in force in Ontario and Saskatchewan) defines what conduct by a foreign limited partnership will constitute carrying on business. Case law has established that each of the following activities within the jurisdiction in question would likely constitute the limited partnership carrying on business: (i) maintaining an office in the jurisdiction; (ii) renting or owning real property in the jurisdiction; (iii) employing a person who resides and, reports to work, in the jurisdiction; (iv) having a local telephone number listed in a telephone directory within the jurisdiction; or (v) entering into binding contracts through employees or agents with power to bind the limited partnership who are present in the jurisdiction.

**Limited Liability Partnerships**

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

**Foreign Limited Partnerships**

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

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

Although an unlikely result, a strict reading of the statutory provisions might obligate foreign corporate limited partners of an Ontario limited partnership where the business activities of the Ontario limited partnership are entirely outside Ontario to file Corporations Tax Act returns in Ontario. However, the foregoing is certainly not the general practice in Ontario at this time. In addition, the transfer of a limited partnership interest in a limited partnership that holds real estate in Ontario will trigger the requirement to pay tax under Ontario’s Land Transfer Tax Act on the value of the land, calculated without deduction for borrowed funds, including loans secured by a mortgage or charge on the land in question, where the limited partner holds more than a 5% profit distribution right.
Special rules under the Tax Act limit partnership losses that a limited partner may claim for tax purposes, including losses arising out of deductions for capital cost allowance (depreciation) on the capital assets of the partnership. These rules are referred to as the “at risk” rules. As in the case of general partnerships, significant adverse tax consequences flow as a result of a Canadian-constituted limited partnership having a foreign (i.e., non-Canadian) member.

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

**Co-operatives**

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

**Alberta Cooperatives**

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

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

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

_Saskatchewan Co-operatives_

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

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

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

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

_Joint Venture with Others_

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

In practice, the most important goal in drafting a joint venture arrangement is to avoid having the structure characterized, at law, as a partnership, because of the duties imposed on partners (see discussion set out under the heading “General Partnerships” on page 3.26). The existence of a partnership is a question of fact and every effort must be expended in structuring the joint venture arrangement and conducting its business to support the conclusion that the participants are not, in fact, partners.

_Business and Income Trusts_

Income and business trusts were quite commonplace forms of business enterprises and many of them issued publicly-traded trust units. However, on October 31, 2006 the federal Department of Finance announced that certain publicly listed trusts and partnerships (collectively referred to as specific investment flow-through vehicles or “SIFTs”) would be taxed in the same manner as corporations in respect of taxable distributions and unitholders would be treated as having received
dividends of such amounts. The grandfathering period during which existing SIFTs were not be subject to these new tax rules (“SIFT Rules”) ended on January 1, 2011.

Distributorship, Licensing and Franchise Arrangements

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

Intellectual Property Protection

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

Withholding Tax

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

Anti-Trust — Competition Act

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

Regulation — Franchises

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

In June 2007, New Brunswick became the fourth Canadian province to pass franchise legislation which came into effect on February 1, 2011. Nova Scotia still does not have franchise legislation.

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

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

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

- A definition of “franchisor’s agent” was added in order to clarify the right of action for damages against agents that is included in the Act. Before, the term was not defined. A “franchisor’s agent” is now defined as a sales agent of the franchisor who is engaged by the franchisor’s broker and who is directly involved in the granting of a franchise.
- The mandatory disclosure of all costs associated with the franchise was amended to limit the disclosure only to the costs associated with the establishment of the franchise. Previously, the regulation required disclosure of all costs associated with the establishment and operation of the franchise. This is a positive development, and brings Ontario in line with the disclosure regimes in other jurisdictions.
- All franchise location closures that occurred within the three fiscal years immediately preceding the date of the disclosure document must be disclosed. Previously, the regulation required continuous disclosure of all such closures within the previous three calendar years from the date of the disclosure document. This too is a positive development, as it simplifies the task of keeping disclosure documents current.
- The criteria for the exemption from the requirement to provide financial statements in the disclosure document has been expanded to recognize situations where a franchisor meets the criteria because it is controlled by a corporation that meets the prior criteria for the exemption. Certain franchisors who previously did not qualify for the financial statement exemption may now qualify.

Independent Sales Agents

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

Regulation — Distribution Arrangements

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

Costs

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

Court Proceedings

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

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

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

Securities regulators have been encouraging the provinces for some time to conform provincial
legislation to Canadian securities industry practices and to the laws governing the transfer of shares
and other securities in other jurisdictions such as the European Union and the US. Each of the
provinces and Territories has enacted Securities Transfer Act (each a “STA”) other than Nova
Scotia, Prince Edward Island, Nunavut and the Yukon. Only Prince Edward Island has not passed a
STA; the other three have passed, but not proclaimed, such STA in force. As a result, any person
taking a pledge of securities by delivery of a certificate representing the securities should not do so
in any jurisdiction that does not have an STA in force. Delivery of the certificate(s) should be made
in a jurisdiction with a STA in force, and that jurisdiction should be the governing law of the
pledge. In certain cases, for example with respect to limited partnership interests, the issuing
limited partnership must designate the interests and certificates issued by it as “securities” within
the meaning of the applicable STA for the STA to apply. It is estimated that the savings in reduced
financing costs to Canadian business as a result of this legislative reform will be substantial and
permanent and reduce the cost of funds for business.

Share Pledges

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

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

### Security Entitlements

In those provinces that have enacted a STA, and complementary amendments to its Business Corporations Act and PPSA, have brought provincial legislation, for STA purposes, in line with Article 8 of the US Uniform Commercial Code. The STA introduced a number of new concepts. It refers to securities that are represented by certificates (“certificated securities”) and securities that are represented by book entries in the records of a securities intermediary (“uncertificated securities”). For uncertificated securities, the book entries which, when made, create a novel legal concept referred to as “security entitlements” in favour of the person whose name is recorded, as having a claim against the securities intermediary, not a claim against the securities, as such. Parties no longer attempt to trace ownership rights through transfers of allotted and issued shares. Rather, in a book-based (uncertificated) system, claims are generally limited to a single level, that is, as between the two contracting parties under the securities account agreement.

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

The STA does not apply to debt instruments that do not represent an equity interest in the issuer.

One of the principal roles of the STA in secured transactions is to provide a set of rules regarding the perfection of a security interest in a security (an instrument representing an equity interest) granted by one party (referred to as a debtor) in favour of the secured party. Perfection is only one of the three elements required to create a valid charge.
Securities Intermediary First Lien

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

The Rights of Protected Purchasers

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

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

Conflict of Law Rules

The STA introduces a common set of conflict of laws rules that create certainty, as well as permitting the parties, in appropriate circumstances, to select the laws of a jurisdiction to determine issues affecting rights in the securities in question. In effect, the laws governing the transfer of securities are, for all intents and purposes, identical throughout the trading system, and parties adverse in interest are able to determine with reasonable certainty their rights in securities by applying laws they understand. This necessarily reduces the perceived risks inherent in the purchase and sale of securities, and over time, the cost of raising capital and trading securities.

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

Financial Assets

The STA applies to “financial assets,” a new term that includes securities as well as any other mediums of investment recognized for trading in any area or market, as well as any financial asset agreed to be dealt with as between the securities intermediary and the person for whom the securities account in question is maintained, that is, it contains an “opting-in” right as between contracting parties. The STA consistently facilitates flexibility into the marketplace and, by doing so, creates an opportunity for Canadian business to raise capital through the creation of any number of alternative financial assets.
Limited partnership interests are not included in the definition of “securities.” As a result, limited partnership agreements should be amended to specifically opt-in to the applicable STA and a notation to that effect should appear on unit certificates.

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

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

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

**Rationale and Timing**

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

To be in a position to provide prior-year comparative figures in 2011, PAEs will have to have collected appropriate data beginning on January 1, 2010. There may be circumstances where an enterprise (e.g., one positioning itself for sale) may be required to provide comparable financial information for a period ending prior to that time. Many affected Canadian enterprises may still be behind the curve on this one.
Once implemented, PAEs will not have to reconcile their financial statements to conform to US GAAP for SEC filing purposes provided Canada adopts a pure (that is, an unamended) version of IFRS. Although the issue is not yet settled, it would appear that a pure IFRS approach will be adopted in Canada.

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

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

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

A Brief Comparison of Canadian GAAP and IFRS

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

<table>
<thead>
<tr>
<th>IFRS</th>
<th>Canadian GAAP</th>
<th>Business Issues</th>
</tr>
</thead>
<tbody>
<tr>
<td>Principles-based — records transactions based on a broad review of all possible resulting economic benefits and obligations. This approach results in an increase in the auditor’s discretion as to how a matter may be reflected on the books, and in the financial statements, of the enterprise. There is no general requirement that all assets be recorded at fair value. The reporting entity can, in many cases,</td>
<td>Rules-based — series of bright line tests which dictate how a matter must be reflected on enterprise books and financial statements</td>
<td>Increased shareholder and contract counterparty uncertainty because of the absence of bright line tests. Increase in financial statement and Management Disclosure and Analysis to rationalize the approach taken, and the judgment exercised by management and accepted by the auditors — some estimate that annual reports may initially double in length. Others believe that for exempt private enterprises, once IFRS based financial statements move past the first few years of use, their IFRS-based financial statements will be shorter, and contain less disclosure than presently required under Canadian GAAP. Increased volatility of asset valuations arising out of the ability of the entity to record investment property at fair value rather than cost and an obligation to record impairments in value. This will affect the enterprise’s debt to</td>
</tr>
</tbody>
</table>

[Table continued on the next page]
<table>
<thead>
<tr>
<th>IFRS</th>
<th>Canadian GAAP</th>
<th>Business Issues</th>
</tr>
</thead>
<tbody>
<tr>
<td>chose to record the asset at cost</td>
<td>total asset ratio and return on asset ratio (Canadian GAAP would have used historical cost amounts as the basis for the calculation)</td>
<td>Contingent liabilities are given greater weight in IFRS-based financial statements. As a result, in acquisition transactions, the buyer may prefer to purchase assets and not shares</td>
</tr>
<tr>
<td>First time adopters of IFRS-based financial reporting may chose to</td>
<td></td>
<td></td>
</tr>
<tr>
<td>use fair value of property, plant and equipment on its opening</td>
<td></td>
<td></td>
</tr>
<tr>
<td>balance sheet. This may be an important option</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Componentization — those parts of a reporting entity’s plant property</td>
<td>New valuation approach</td>
<td></td>
</tr>
<tr>
<td>and equipment which have similar lives are to be grouped for</td>
<td></td>
<td></td>
</tr>
<tr>
<td>reporting purposes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Disclosure and valuation of future obligations (e.g., recurring</td>
<td>Disclosure may not be required</td>
<td>Valuation and analysis required. In the case of legal claims the test has shifted from the entity likely having to make a payment to the lower threshold of the entity being more likely than not to have to make a payment. The standard has been raised from providing a reasonable estimate of the amount that may have to be paid to a “best” estimate. This change in approach obviously increases the information available to claimants, possibly to the detriment of the entity that is defending the claim, including a loss of privilege,</td>
</tr>
<tr>
<td>payment of bonuses, future year promises in labour negotiations,</td>
<td></td>
<td></td>
</tr>
<tr>
<td>unresolved legal claims)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Off-balance sheet treatment of affiliated conduits — under IFRS it</td>
<td>Off-balance sheet treatment is given to transactions with affiliates</td>
<td>Assets and liabilities of conduits will be brought back onto the balance sheet of the reporting entity. As a result, financial ratios could be adversely affected by consolidation “True sale” opinions will no longer be required in securitization arrangements — bright line test gone</td>
</tr>
<tr>
<td>is difficult to exclude affiliate transactions where the reporting</td>
<td></td>
<td></td>
</tr>
<tr>
<td>entity retains benefits from the operations of the conduit and is</td>
<td></td>
<td></td>
</tr>
<tr>
<td>subject to obligations. IFRS requires a risk/reward analysis to be</td>
<td></td>
<td></td>
</tr>
<tr>
<td>applied to the reporting entity as it operated prior to the</td>
<td></td>
<td></td>
</tr>
<tr>
<td>transaction with its affiliate and after completion of the related-</td>
<td></td>
<td></td>
</tr>
<tr>
<td>party transaction</td>
<td></td>
<td></td>
</tr>
<tr>
<td>The meaning of EBITDA (earnings before interest, taxes, depreciation</td>
<td>Credit agreement financial covenants may not be in sync with IFRS-based</td>
<td></td>
</tr>
<tr>
<td>and amortization) and financial ratios may be different from</td>
<td>financial reporting — threshold amounts may no longer properly test the</td>
<td></td>
</tr>
<tr>
<td>corresponding terms in Canadian GAAP</td>
<td>financial covenants, resulting in apparent breaches (where there has been no</td>
<td></td>
</tr>
<tr>
<td></td>
<td>material change in the performance of the business)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>One approach to address the issue would be to prepare and provide financial</td>
<td></td>
</tr>
<tr>
<td></td>
<td>covenant calculations using both Canadian GAAP and IFRS to give comfort to</td>
<td></td>
</tr>
<tr>
<td></td>
<td>lenders (and other counterparties) that apparent covenant breaches are the</td>
<td></td>
</tr>
<tr>
<td></td>
<td>result, in part, of the change to IFRS-based financial reporting, and not a</td>
<td></td>
</tr>
<tr>
<td></td>
<td>change in the performance of the borrower</td>
<td></td>
</tr>
<tr>
<td></td>
<td>We strongly recommend that PAEs prepare an appropriate information package</td>
<td></td>
</tr>
<tr>
<td></td>
<td>for its lenders and other counterparties by June 30, 2010 — if the</td>
<td></td>
</tr>
<tr>
<td></td>
<td>relationship in question is in jeopardy you will need significant lead time</td>
<td></td>
</tr>
<tr>
<td></td>
<td>to negotiate with lenders and to develop a strategy to deal with apparent</td>
<td></td>
</tr>
<tr>
<td>IFRS</td>
<td>Canadian GAAP</td>
<td>Business Issues</td>
</tr>
<tr>
<td>------</td>
<td>--------------</td>
<td>----------------</td>
</tr>
<tr>
<td></td>
<td></td>
<td>breach of other significant relationships that cannot be terminated in the short term</td>
</tr>
<tr>
<td></td>
<td></td>
<td>If a PAE has issued debt in the public markets with financial covenants based on Canadian GAAP, there may be significant adverse implications arising out of the shift to IFRS</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Financial covenants in commercial agreements may no longer fit the intent of the parties — again calculations using both approaches may be needed to evidence compliance — we strongly recommend that material contracts be reviewed as early as possible to identify issues to permit PAEs to develop strategies to address any concerns triggered by the transition to IFRS</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Where there is a consensus, parties may have to amend existing agreements to introduce new terminology using IFRS concepts and to change threshold amounts</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Existing agreements which reference Canadian GAAP should be reviewed and counterparty lenders, landlords and others briefed on reporting based issues</td>
</tr>
<tr>
<td></td>
<td></td>
<td>New agreements which reference Canadian GAAP should provide for a future conversion to IFRS-based financial reporting in the definition of Canadian GAAP</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Contract counterparties and taxing authorities may challenge management’s application of broader IFRS reporting standards where the counterparty believes that the entity has used the IFRS standard to artificially reduced its financial obligations</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Further to the note above regarding the opening balance sheet for IFRS purposes, an entity must record most of the adjustments made to its opening balance sheet assets and liabilities as an adjustment to retained earnings or another equity account</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Certain ratios (debt to equity and return on equity) will be affected by this adjustment</td>
</tr>
<tr>
<td></td>
<td></td>
<td>If this occurs, it will affect current ratio calculations</td>
</tr>
<tr>
<td></td>
<td></td>
<td>If the change is made to account for capital leases like true leases, then both lease assets and liabilities would be reflected in the financial statements and have an effect on the enterprise’s debt-to-asset ratio and its debt-to-equity ratio</td>
</tr>
</tbody>
</table>

**OSC Progress Assessment**

In early 2010, the OSC recently conducted a review to assess the extent and quality of the IFRS disclosures made by reporting issuers. Of the 106 reporting issuers reviewed, 40% did not provide any IFRS transition disclosure in their MD&As, and of the remaining 60%, the majority provided deficient IFRS disclosure. The OSC’s perspective is that:
• If a reporting issuer does not provide disclosure about an IFRS transition plan, it implies that it has not begun to prepare for IFRS;
• “Boiler-plate” disclosure does not allow an investor to effectively assess the readiness of the issuer to transition to IFRS and the possible impact that IFRS may have on the reporting issuer; and
• Failing to provide quarterly updates on the status of IFRS transition suggests the reporting issuer has not made any progress (alternatively, reporting issuers can confirm that no progress has been made during the quarter).

Future OSC Action: MD&A Re-Filing Requests and Other Regulatory Action
Reporting issuers should be making IFRS transition disclosure on the following six key elements of their company:

• Accounting policies;
• Internal control over financial reporting;
• Disclosure controls and procedures;
• Financial reporting expertise (including training requirements for directors, management and employees);
• Business activities that rely on financial information (risk management, foreign currency, capital requirements, debt covenants, contractual requirements); and
• Information technology and data systems.

Please see OSC Staff Notice 52-718 for examples of adequate disclosure.

The OSC will continue to conduct reviews of select 2009 and 2010 MD&A filings, and the OSC may make re-filing requests and enforce other regulatory action, where reporting issuers have not met their disclosure obligations.
4. **TAXATION**

**How is Income Taxed in Canada?**

Generally, Canada imposes taxes based on a person’s residency. For these purposes, a “person” includes an individual, a corporation or trust. In the case of a partnership, the partnership calculates its income as if it were a person, but the partnership itself does not pay tax on that income. Instead, the income (or loss) of a partnership is allocated among the partners for tax purposes and the partners are subject to tax thereon. Persons who are resident in Canada within the meaning of the Tax Act are liable for tax on their worldwide income. Note that a person may live outside Canada and still be resident in Canada for tax purposes.

Where the person is a non-resident of Canada, the non-resident will be subject to Canadian tax on income or gains from a source in Canada. The amount of Canadian tax payable by the non-resident may be reduced or eliminated pursuant to a tax treaty that Canada has with the non-resident person’s country of residence.

A non-resident will be subject to Canadian tax on income from a Canadian source, subject to the provisions of a tax treaty, including:

- Income from carrying on a business in Canada;
- Income from employment in Canada;
- Gains from the disposition of taxable Canadian property;
- Dividends from a corporation resident in Canada (including deemed dividends);
- Certain types of interest paid by a person resident in Canada;
- Management fees paid by a person resident in Canada; and
- Royalties paid by a person resident in Canada.

**How do you Determine Residency for Tax Purposes?**

As stated above, Canadian tax liability is based on the concept of residence. However, the Tax Act does not contain an exhaustive definition of this term. Under the common law, an individual is considered to be a resident of Canada if Canada is the place where that person regularly and customarily lives. Other factors in determining residency are intention and the existence of other ties to Canada, including the location of dwellings, personal property, spouses and dependants, as well as social and economic interests.

There are also certain rules in the Tax Act which deem a person to be resident in Canada. For example, individuals will be deemed to be residents of Canada for any year they “sojourn” in Canada for 183 days or more in that calendar year. A person is not automatically considered to be sojourning for every day (or part day) that the person is present in Canada. It will depend on the nature of the particular stay in Canada (i.e., days spent working in Canada are not automatically treated as sojourning in Canada).

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

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

It is possible in some circumstances for a person (including a corporation) to be resident in both
Canada and another country. In that situation, the person may be entitled to relief under the “tie
breaker” rules contained in a tax treaty between Canada and the other country.

What Constitutes Income from Carrying on Business in Canada?

*Taxation of Non-Residents*

A non-resident is taxable on their income from carrying on business in Canada, subject to relief
under a tax treaty (discussed below). The determination of whether a non-resident is carrying on
business in Canada is based on the common law and provisions of the Tax Act.

The traditional common law definition of a business is, “anything which occupies the time and
attention and labour of a man for the purpose of profit is business”. The Tax Act defines a
business to include a profession, calling, trade, manufacture or undertaking of any kind
whatever, including an adventure or concern in the nature of trade. A person is generally
considered to be carrying on a business where the person holds themselves out to others as
engaged in the selling of goods or services.

For greater certainty, the Tax Act deems non-residents to be carrying on business in Canada for tax
purposes in the year if they:

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

*Branch Tax*

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

The Branch Tax is intended to compensate for the 25% Canadian withholding tax that would otherwise apply to dividends paid by a Canadian subsidiary to a non-resident, corporate shareholder (see discussion below). However, through an investment allowance system, branch profits reinvested in Canadian business assets are not subject to the Branch Tax.

The Convention reduces the rate of Branch Tax payable by a permanent establishment of a US resident company to 5%. The Convention also provides that the first $500,000 earned by a Canadian branch operation of a US resident company is exempt from Branch Tax. Many US enterprises operate as a branch in Canada if they expect start-up losses in their Canadian operations, because such losses can then be consolidated against profits of the US corporation. The foregoing treatment is not generally afforded to a separately incorporated subsidiary of a US parent corporation.

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

**Withholding Taxes on Amounts Paid to a Non-Resident for Services Performed in Canada**

The Tax Act provides that every person paying to a non-resident person a fee, commission or other amount in respect of services rendered in Canada, of any nature whatever, shall withhold and remit 15 per cent of such payment to the CRA. The withholding applies only to the portion of the payment that relates to services physically performed in Canada. This withholding tax is considered a payment on account of the non-resident’s overall tax liability to Canada.

While a tax treaty may provide a non-resident with relief from Canadian tax on income from a business carried on in Canada, the CRA takes the position that the Treaty does not protect a non-resident from having to pay the 15% withholding tax. A non-resident that is not subject to tax on the Canadian sourced income due to relief under a tax treaty may obtain a refund of any taxes withheld on such income by filing a Canadian tax return.

Alternatively, the non-resident may request a waiver of the withholding taxes from the CRA. There are two types of waivers: treaty based waivers, and income-expense based waivers. A treaty based waiver will be issued if the non-resident does not have a recurring presence in Canada and the services being performed by the non-resident are performed for less than 180 days under the current contract. A treaty based waiver will also be issued where the non-resident has a recurring presence in Canada, but the non-resident’s presence in Canada is less than 240 days during the “period”, and the presence is less than 180 days under the current contract. The “period” means the current year and the three previous years as well as the three following years.

An income-expense waiver allows a non-resident to claim expenses against Canadian sourced income, with the net income being subject to tax at the normal Canadian tax rates (approximately 31%), rather than paying 15% withholding tax on the gross amount of payment received for services rendered in Canada. As a result, an income-expense waiver is only useful if the Canadian tax at the normal rates on the net income is less than the 15% withholding tax on the gross amount of payments. If an income-expense waiver is obtained, the non-resident may file a Canadian
income tax return in order to receive a refund of the taxes paid by claiming treaty relief on the Canadian sourced income.

The province of Québec imposes a withholding tax of 9% for services rendered by a non-resident in Québec. The 9% Québec withholding tax is in addition to the 15% federal withholding tax. Québec only imposes a tax where the non-resident has a permanent establishment in Québec. As a result, if the non-resident pays the 9% withholding tax, the non-resident may obtain a refund of the withholding tax by filing a Québec income tax return and claiming relief on the basis that the non-resident does not have a permanent establishment in Québec.

A waiver may be obtained from Revenue Québec where it is established that the non-resident would not be subject to tax in Québec because the non-resident does not have a permanent establishment in Québec and that the 9% withholding tax would cause undue hardship to the non-resident. Each waiver application is made on the particular facts. It is possible to obtain a waiver of the 9% Québec withholding tax even if a waiver of the federal 15% withholding tax is unavailable.

*Treaty Relief for a Non-Resident Carrying on a Business in Canada*

Canada’s tax treaties generally provide that a non-resident will only be subject to Canadian tax on business profits from a business carried on in Canada where the business is carried on through a “permanent establishment” in Canada. Where the non-resident carries on business in Canada through a “permanent establishment,” only those profits attributable to the permanent establishment are taxable in Canada.

Where the non-resident is a US resident, the Convention defines a “permanent establishment” as a fixed place of business through which the business of the non-resident is wholly or partly carried on such as an office, branch, factory, or workshop, as well as a mine, oil or gas well, quarry or other place of extraction of natural resources. A building site or construction or installation project will be a permanent establishment if it lasts more than 12 months.

Under the Convention, a US resident is not considered to have a permanent establishment in Canada if the resident carries on business in Canada through an independent agent. However, someone in Canada who habitually concludes contracts in the name of the non-resident will constitute a permanent establishment of the non-resident. Operating a business through a Canadian subsidiary will not constitute a permanent establishment for a US parent corporation because the subsidiary will already be liable for Canadian income tax on its worldwide income. However, a US company sending its employees to Canada or hiring employees in Canada for more than 183 days in a 12-month period could constitute a permanent establishment in Canada. US companies should therefore consult with a Canadian tax advisor before sending employees to perform services in Canada or hiring employees to perform services in Canada.

*What Tax Applies to Income from Employment in Canada?*

A non-resident is taxable in Canada under the Tax Act on employment income from duties performed in Canada, subject to relief under a tax treaty. The employment income will be taxed at the graduated tax rates for individuals (see below). An employer, including a non-resident employer, paying salary to a non-resident for employment services performed in Canada is obligated to withhold Canadian withholding taxes on the salary. However, the employer may obtain a waiver of the withholding tax obligation by submitting an application for a waiver to the
CRA. The waiver of withholding taxes will only be granted in specific circumstances. Employers sending non-resident employees to Canada should consult with a tax advisor in advance to determine whether a waiver of the withholding taxes is available.

_Treaty Relief for Income from Employment in Canada_

If the non-resident employee is a US resident, the US resident may be subject to relief from Canadian taxation on the employment income earned in Canada under the Convention. The Convention contains a general exemption that provides that a US resident will not be taxable in Canada if the income from the employment exercised in Canada is less than $10,000 Canadian dollars. The Convention also provides that the US resident will not be subject to tax in Canada, even if the income is greater than $10,000, if the US resident is present in Canada for less than 183 days in the year, and the remuneration is not paid by, or on behalf of, a person who is resident in Canada and is not borne by a permanent establishment in Canada. For the purpose of the Convention, the term “borne by” means allowable as a deduction in computing taxable income.

_How are Gains from the Disposition of Taxable Canadian Property Taxed in Canada?_

A non-resident of Canada will be taxable on any capital gain under the Tax Act from the disposition of taxable Canadian property (other than treaty protected property). Treaty protected property is property any income or gain from the disposition of which by the non-resident would be exempt from tax due to a tax treaty. The definition of taxable Canadian property at any time includes:

- Real property situated in Canada;
- Property used or held by a taxpayer in, eligible capital property in respect of, or property described in an inventory of, a business carried on in Canada (other than property used in carrying on an insurance business or certain ships and aircraft owned by a non-resident);
- A share of the capital stock of a corporation resident in Canada that is not listed on a designated stock exchange, an interest in a partnership or an interest in a trust, if at any particular time during the 60-month period that ends at the time of sale, more than 50% of the fair market value of the share or interest was derived directly or indirectly from one or any combination of:
  - Real or immovable property situated in Canada
  - Canadian resource properties
  - Timber resource properties, and
  - Options in respect of, or interests in, or for civil law rights in, property described in any of the foregoing, whether or not the property exists; and

- A share of the capital stock of a corporation, mutual fund corporation, or unit of a mutual fund listed on a designated stock exchange if at any particular time during the 60-month period that ends at that time:
  - 25% or more of the issued shares of any class of the capital stock of the corporation or units of the mutual fund trust were owned by or belonged to one or any combination of (a) the taxpayer, and (b) persons with whom the taxpayer did not deal at arm’s length, and
  - More than 50% of the fair market value of the share or unit was derived directly or indirectly from one or any combination of real or immovable property situated in Canada, Canadian resource property, timber resource property, or options in respect thereof.
If shares of a public corporation are acquired by a non-resident in exchange for shares that are taxable Canadian property, the shares of the public corporation will be deemed to be taxable Canadian property for a 60-month period following the exchange provided that the shares acquired are subject to a tax-free rollover (that is, sections 85, 85.1 or 87 of the Tax Act).

Section 116 Clearance Certificates on the Disposition of Taxable Canadian Property

Section 116 of the Tax Act requires a non-resident person who disposes of taxable Canadian property, other than excluded property, to obtain a clearance certificate from the CRA. An “excluded property” which is exempt from the section 116 clearance certificate requirements includes property that is taxable Canadian property solely because a provision in the Tax Act deems it to be taxable Canadian property; inventory of a business carried on in Canada; a share of a corporation listed on a recognized stock exchange; a unit of a mutual fund trust; a bond, debenture, bill, note hypothecary claim or similar obligation; or a property the gain from the disposition of which would be exempt from tax because of a tax treaty with Canada (a separate notification may be required for property that is not taxable due to a tax treaty – see below).

In general terms, to obtain a section 116 clearance certificate the non-resident vendor must send a notice reporting the sale to the CRA on a prescribed form within 10 days after the disposition. The notice must set out certain prescribed information. Where the capital gain or income arising from the sale of shares is not exempt from tax under a tax treaty, the non-resident vendor will have to pay to the CRA an amount equal to 25% of the estimated capital gain, and the applicable tax in respect of the estimated income to be realized by the vendor, before the CRA will issue a clearance certificate. Where a capital gain or income is exempt from tax under a tax treaty, the CRA will generally issue a clearance certificate to the non-resident and not require the prepayment of tax. However, the CRA may request certain documents from the non-resident to ascertain the applicability of the treaty exemption before issuing the clearance certificate.

Where the taxable Canadian property disposed of is subject to relief under a tax treaty, the non-resident vendor may not be required to obtain a clearance certificate where the following conditions are met:

- The purchaser concludes, after reasonably inquiry, that the vendor is, under a tax treaty between Canada and another country, resident in that other country;
- The property would be “treaty-protected property” (see discussion above) if the vendor were resident of that country; and
- The purchaser complies with certain notice requirements.

There is concern that the foregoing provisions relating to property that is subject to treaty relief do not provide meaningful protection from liability for failure to withhold to a purchaser because of its risk associated with determining the vendor’s treaty-protected status of taxable Canadian property.

In practice, many purchasers require the vendor to file for a clearance certificate and to withhold tax.

What is the Relief From Canadian Tax Under a Tax Treaty?

A non-resident may be subject to relief from Canadian tax on the gain from the disposition of certain types of property under a tax treaty. The Convention generally provides that gains realized by a US resident from the disposition of property in Canada — other than real property, or personal property of a business — will not be subject to tax in Canada. Special rules apply where the non-resident is a former resident of Canada.
In the Convention, real property situated in Canada includes real property and a usufruct of real property, rights to explore for or exploit mineral deposits, sources and other natural resources and rights to amounts computed by reference to the amount or value of production form such resources. Real property also includes a share of the capital stock of a corporation that is resident in Canada whose share value is derived principally from real property situated in Canada. Real property also includes an interest in a partnership, trust or estate the value of which is derived principally from real property situated in Canada. The term “principally” means more than 50%. The definition of real property may vary between treaties.

The gain from the disposition of personal property (i.e., non-real property) forming part of the business property of a permanent establishment which a resident of the US has, or had, in Canada (within a twelve month period preceding the date of disposition) will also be taxable in Canada.

How are Dividends from a Corporation Resident in Canada Paid to a Non-Resident Taxed in Canada?

The Tax Act provides that an amount that a corporation resident in Canada pays (or is deemed to pay) to a non-resident as a dividend is subject to a 25% withholding tax, subject to relief under a tax treaty.

The Convention reduces, but does not eliminate, the amount of withholding taxes on dividends paid to a US resident. Where the US resident is a corporation which owns at least 10% of the voting stock of the Canadian resident company paying the dividends, the withholding tax rate is 5% of the gross amount of the dividends. For this purpose, a company resident in the US is considered to own the voting stock of an entity that is considered fiscally transparent in the US and that is not a resident of Canada in proportion to the company’s ownership interest in that entity. In any other case (i.e., the US resident is an individual) the withholding tax rate is 15% of the gross amount of the dividends.

How is Interest Paid to a Non-Resident by a Person Resident in Canada Taxed in Canada?

The Tax Act does not impose any withholding tax on interest paid by a Canadian person to a non-resident that is dealing at arm’s length to the Canadian payer, except for interest that is participating debt interest. The term “anticipating debt interest” means interest all or a portion of which is dependent on the use of production from property in Canada, or interest that is computed by reference to revenue, profit, cash flow, commodity price, or by reference to dividends paid or payable to shareholders of any class of share of a corporation. Where the withholding tax applies, the rate of tax is 25% of the interest. The rate of withholding tax may be reduced under a tax treaty.

The Convention provides that there is no withholding tax on interest paid to a US resident from a Canadian payer, even if the parties deal at non-arm’s length, subject to several exceptions. The first exception is where the interest arising in Canada is determined with reference to receipts, sales, income, profits or other cash flow of the debtor or a related person, to any change in the value of any property of the debtor or a related person or to any dividend, partnership distribution or similar payment. Where this exception applies, the rate of withholding tax on such interest will be 15% of the interest.

A second exception is where the beneficial owner of the interest is a US resident and carries on, or has carried on, business in Canada through a permanent establishment in Canada, and the debt-claim in
respect of which the interest is paid is effectively connected with the permanent establishment. In that case, the interest will be treated as business profits and not as interest.

**How Are Management Fees Paid to a Non-Resident by a Person Resident in Canada Taxed in Canada?**

Management and administrative fees or charges paid by a Canadian person to a non-resident are subject to a 25% withholding tax, subject to treaty relief. For these purposes, a management or administration fee or charge does not include an amount paid to a non-resident for services performed by the non-resident where the services were performed in the ordinary course of the business carried on by the non-resident and the non-resident dealt at arm’s length with the Canadian payer. Also, a management or administration fee or charge also does not include a specific expense incurred by the non-resident person for the performance of a service that was for the benefit of the Canadian payer.

Under the Convention, management and administrative fees are included in business profits and are not subject to Canadian withholding tax. If the management services are rendered in Canada, there are other Canadian tax considerations (see above under income from carrying on business in Canada).

**How Are Royalties Paid to a Non-Resident by a Person Resident in Canada Taxed in Canada?**

Royalties paid by a person resident in Canada to a non-resident person are subject to 25% withholding tax under the Tax Act, subject to treaty relief. In this context, royalties include, but are not limited to payment for the use of or for the right to use in Canada any property, invention, trade-name, patent, trade-mark, design or model, plan, secret formula, process or other thing whatever.

The Convention generally provides that most royalties are subject to a 10% withholding tax. However, there is a withholding tax exemption for some copyright royalties, computer software royalties and certain know-how royalties on patents or information concerning industrial, commercial or scientific expertise.

**What Tax Rates Apply to Income Earned in Canada?**

**Individuals**

The calculation of an individual’s 2011 federal income tax is based on a four-bracket progressive system. The tax rates are:

- 22% for incomes between $41,544 and $83,088;
- 26% for incomes between $83,088 and $128,800; and
- 29% for incomes over $128,800.

Most provinces also have a progressive tax rate system. For 2011, these provincial tax rates range from 5.05% to 24%. Alberta has a flat rate of 10% tax on all income. Therefore, the top personal marginal tax rate for individuals can be between 39% and 50%. Dividends and capital gains receive favourable tax treatment in Canada. Canada Pension Plan contribution levels are also significantly lower than US Social Security mandatory contributions.
Corporations

In most cases, corporations that are taxable in Canada pay a flat rate of income tax that amounts to a combined federal and provincial rate of about 25% to 31% on active business income depending on the province. The federal and provincial governments provide some relief for Canadian-controlled private corporations and those corporations involved in manufacturing and processing businesses. In addition, some provinces provide tax benefits for new businesses.

Cross-Border Tax Structuring

Use of an LLC

Income earned through an LLC by a person who is a resident of the US for purposes of the Convention is treated by Canada as having been earned directly by that person provided that the treatment of the amount under the tax laws of the US is the same as its treatment would be if that had been derived directly by that person. Accordingly, such persons may be entitled to benefits under the Convention such as reduced rates of withholding tax (subject to the limitation benefit provisions in the Convention).

The use of LLCs to carry on business in Canada does carry some risks depending on the circumstances. The use of any of an LLC, an “S” Corporation or a partnership is not tax neutral from a Canadian tax perspective. We recommend that a US resident considering using an LLC consult with a Canadian tax advisor to confirm the tax treatment of the LLC under the Convention.

Use of a ULC

Under the Convention, there may be a denial of treaty benefits in respect of certain hybrid entities that are treated as fiscally transparent for tax purposes. The Convention will deny benefits where the US resident is considered under the laws of Canada to have received an amount from an entity resident in Canada, but by reason of the entity being treated as fiscally transparent in the US, the treatment of the amount under the tax laws of the US is not the same as the treatment would be if the entity was not treated as fiscally transparent under the laws of the US. The denial of Convention benefits results in a Canadian withholding tax obligation of 25% on dividends, royalties and interest paid to the US recipient. We recommend that a US resident considering using a ULC consult with a Canadian tax advisor to confirm the tax treatment of the ULC under the Convention.

Transfer Pricing

The Tax Act imposes transfer pricing rules on transactions between a Canadian and a non-resident person that do not deal with each other at arm’s length for the purposes of the Tax Act. Under the transfer pricing rules, the CRA can adjust the income of a Canadian taxpayer and apply penalties (in certain cases) if that taxpayer and a non-arm’s-length non-resident person participate in a transaction:

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

Federal

- **Employment Insurance Contributions** — Employees must contribute 1.78% of insurable earnings up to a maximum annual contribution of $747.36. Employers must contribute an average of 1.4 times the employee contributions.

- **Canada Pension Plan Contributions** — Employees contribute a maximum of 4.95% of their pensionable earnings per year up to a maximum annual contribution of $2,217.60. Employers must match employee contributions to the plan. The rate for self-employed persons is 9.9% of pensionable earnings up to a maximum annual contribution of $4,435.20.

Ontario

- **Payroll Health Tax** — all employers in Ontario must pay the Employer Health Tax of between 0.98% and 1.95%, levied on the gross amounts of wages and salaries and other remuneration (gross remuneration) paid to employees who either report for work at, or are paid from or through, a permanent establishment in Ontario whose gross remuneration exceeds $400,000 per year. Graduated rates apply to employers whose gross remuneration is less than $400,000.

- **Ontario Health Premium** — in addition, there is an Ontario Health Premium which is imposed on individuals at graduated rates according to income over the minimum threshold of $20,000. For an individual earning $25,000, the health premium would be $300. This premium rises incrementally to $900 for an individual earning over $200,600.

- **Workplace Safety Insurance Board** — This provincial premium is levied on employers to build a fund for workers who lose earnings when they are injured in an accident arising out of, or in the course of, their employment. Employers’ contributions depend on the hazard rating that the Workplace Safety and Insurance Board assigns to their industries and on their individual industrial safety records. With very few exceptions, workers are only entitled to the benefits fixed by the fund and cannot sue their employers for damages arising out of a work-related injury or disease.

British Columbia

- **British Columbia Medical Services Plan** — British Columbia does not impose a payroll tax to help fund its health care system. The province imposes a health care premium on its residents. As of January 1, 2011, the monthly premium was $60.50 for an individual, $109 for a couple and $121 for a family.

- **WorkSafeBC** — WorkSafeBC operates the workers compensation regime in British Columbia. Employers pay premiums to WorkSafeBC as a means to provide workplace insurance. The premiums are based on the salary paid to workers and the particular industry. In the event of work-related injuries or diseases, WorkSafeBC works with the affected parties to provide return-to-work rehabilitation, compensation, health care benefits, and a range of other services.

Québec

- **Québec Pension Plan** — In lieu of contributions to the Canadian Pension Plan, employers in Québec must match employee contributions to the Québec Pension Plan. Employees contribute a maximum of 4.95% of their pensionable earnings per year up to a maximum annual
contribution of $2,217.60. The rate for self-employed persons is 9.9% of pensionable earnings up to a maximum annual contribution of $4,435.20.

- **Québec Health Services Fund** — All employers in Québec must pay a contribution to the Health Services Fund (“QHSF”). The contribution rate varies between 2.7% to 4.26% depending on the employer’s total payroll and the payroll of all associated corporations. The employers’ contribution helps to fund the cost of the public health services in Québec. Individuals must also contribute to the QHSF. The contribution rate is based on the individual’s total income allowing for certain deductions to a maximum annual payment by an individual of $1,000.

- **Contribution to the financing of the Commission des normes du travail** — Employers in Québec must pay a contribution to the financing of the Commission des normes du travail (“CNT”) equal to 0.08% of the total remuneration paid to certain of its employees up to $64,000 of remuneration per employee.

- **Contribution to the Workforce Skills Development and Recognition Fund** — an employer whose total payroll exceed $1,000,000 is required to allot an amount representing at least 1% of its total payroll to eligible training expenditures. Employers who fail to do so must pay to the Workforce Skills Development and Recognition Fund a contribution equal to the difference between 1% of their total payroll and the amount of their eligible training expenditures.

- **Québec Parental Insurance Plan** — The Québec Parental Insurance Plan provides for the payment of benefits to employees taking a maternity, paternity, adoption or parental leave. The employees must contribute 0.537% of insurable earnings up to a maximum annual contribution of $343.68. Employers must contribute to 0.752% of insurable earnings up to a maximum annual contribution of $481.28.

## Provincial Taxes

### Capital Tax

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

### Municipal Realty and Land Transfer Taxes

#### Ontario

- **Ontario Land Transfer Taxes** – Land transfer tax is paid on the registration of a conveyance of land in Ontario. The tax rate is 0.5% on the first $55,000 of the value of consideration; 1% on the value of consideration between $55,000 and $250,000; and 1.5% on consideration exceeding $250,000. If the land conveyed contains at least one but not more than two family residences, the tax rate on any consideration greater than $400,000 is 2.5%. A lease of real
property having a term exceeding 50 years (including renewals or extensions) is subject to land transfer tax.

- **Toronto Land Transfer Taxes** – The city of Toronto, Ontario also levies municipal land transfer tax on purchases of all property in the city of Toronto after February 1, 2008. The municipal land transfer tax is in addition to the provincial land transfer tax. The rate of municipal land transfer tax for property (other than property that contains a single family residence) is 0.5% on the first $55,000 of consideration paid for the property; 1% on the value of consideration between $55,000 and $400,000; 1.5% on the value of consideration between $400,000 and $40,000,000; and 1% on consideration greater than $40,000,000. Where the land contains at least one and not more than two single family residences, the tax rate is 0.5% on the first $55,000 of consideration paid for the property; 1% on the value of consideration between $55,000 and $400,000; and 2% of the value of consideration that exceeds $400,000.

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

**British Columbia**

- **British Columbia Land Transfer Taxes** – In British Columbia the rate of land transfer tax is 1% on the first $200,000 of value and 2% thereafter. A transfer of a registered long-term lease may also trigger the tax. The tax does not apply to unregistered transfers such as the transfer of a beneficial interest of real property where title is held by a bare trustee.

- **British Columbia Realty Taxes** – Municipalities in British Columbia levy property taxes on the value of real property within the municipality. Under British Columbia’s Assessment Act and the Assessment Authority Act, the value of real property, including residential and commercial property, is determined each year by BC Assessment, a Crown corporation. The local municipality then imposes a property tax on the property based on the assessed value.

**Québec**

- **Québec Land Transfer Tax** – Municipalities in Québec collect taxes on the transfer of any immovable property situated within their city limits calculated on the basis of the greater of the price paid and the fair market value of the lands at the time of the transfer. The obligation to pay the transfer duties is imposed on the purchaser and must be paid directly to the municipality. The progressive rate is 0.5% on the first $50,000 of the basis of purchase price/fair market value; 1% on the next $200,000 and 1.5% on the balance in excess of $250,000.

- **Québec Realty Taxes** – Under Québec’s Act Respecting Municipal Taxation, municipalities in Québec levy property taxes on the value of real property (building and land) within the municipality. Properties are assessed on the basis of their current value in an open and competitive market. The tax rates vary according to the type of property (i.e., residential, industrial, agricultural).
Nova Scotia

- **Nova Scotia Land Transfer Taxes** - In Nova Scotia, the deed transfer tax rate is set by municipal by-law to a maximum of 1.5% of value and paid to the municipality. Generally, the deed transfer tax is payable through the Land Registration Office upon the registration of a deed that conveys ownership. A lease of more than 21 years is subject to deed transfer tax in Nova Scotia. The obligation to pay land transfer tax is imposed on the purchaser, and is paid directly to the relevant provincial authority on the transfer of registered title to the real property.

- **Nova Scotia Realty Taxes** — The Municipal Government Act and Assessment Act provide for a system of property taxes in Nova Scotia based on the assessed value of real property within the municipality. Properties are assessed on a fair market value basis by a corporation owned by the municipalities of Nova Scotia. Residential properties may enjoy a cap on the rate of assessment increase based on the Consumer Price Index in certain cases. Resource, Agricultural and Recreational lands (as defined by the Assessment Act) enjoy preferred rates of assessment but when the land class changes through development, a change of use tax applies. Municipalities have the power to tax the classes of property at different rates and therefore vary from municipality to another. Property taxes form a priority lien on property when unpaid.

**Leasing Property in Canada**

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

**Leasing Property in Canada**

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

A non-resident corporation is required to file federal income tax return if (a) it carried on a business in Canada, or realized a taxable capital gain (otherwise than from an “excluded disposition”), or disposed of taxable Canadian property in the taxation year (otherwise than in an excluded disposition), or (b) tax is payable by the corporation for the year, or if tax would be, but for a tax treaty, payable by the corporation for the year (otherwise than in respect of a disposition of taxable Canadian property that would not be subject to tax in Canada due to relief under a tax treaty). A non-resident individual is required to file a Canadian tax return where tax is payable by the non-resident, or if the individual has a taxable capital gain (otherwise than from an excluded disposition) or disposes of a taxable Canadian property (otherwise than in an excluded disposition).

A disposition will be an “excluded disposition” if the taxpayer is non-resident of Canada, no tax is payable under Part I of the Tax Act by the taxpayer for the taxation year, the taxpayer is not liable to pay any amount under the Tax Act for a previous taxation year (other than an amount for which
the Minister of Revenue has adequate security), and each taxable Canadian property is either: (i) an “excluded property”; or (ii) a property for which a section 116 clearance certificate has been issued (see below for a discussion of section 116 clearance certificates).

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

Canadian resident corporations and non-resident corporations that carry on a business in Canada must also file an information return describing certain transactions that they entered into with non-residents with whom they do not deal at arm’s length which is due within six months of the corporation’s fiscal year end.

**Provincial Sales Taxes**

Each of the provinces other than Alberta imposes a retail sales tax on personal property purchased for consumption rather than resale, and on selected services.

<table>
<thead>
<tr>
<th>Province</th>
<th>Rate (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>British Columbia</td>
<td>7</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>5</td>
</tr>
<tr>
<td>Manitoba</td>
<td>7</td>
</tr>
<tr>
<td>Ontario</td>
<td>8</td>
</tr>
<tr>
<td>Québec</td>
<td>8.5</td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>10</td>
</tr>
</tbody>
</table>

**Harmonized Sales Tax**

The provinces of British Columbia, Ontario, New Brunswick, Nova Scotia and Newfoundland & Labrador (the “Participating Provinces”) have combined the GST and their respective provincial retail sales tax to form an HST. In the Participating Provinces, the HST combines the 5% GST with a provincial tax component, resulting in combined HST rate. In Ontario, for example, the 5% GST component combined with an 8% provincial sales tax component results in an HST rate of 13%. The HST rate in British Columbia is 12%. Québec has a provincial sales tax that is similar to the provincial component of the HST but is administered separately from the GST (discussed below).

The general rule is that the HST is applied to the same base of goods and services that are taxable under the GST, subject to some exceptions, which vary across the Participating Provinces, including tangible personal property, personal services such as accounting and legal services,
passenger and freight transportation services, leases, intellectual property, contractual rights, all real property sales (apart from residential housing) and all newly constructed or substantially renovated homes. The HST is administered by the federal government, which then remits the appropriate amounts owing to the Participating Provinces.

Generally, businesses who supply certain taxable or zero-rated goods and services can recover the GST/HST paid or payable on goods and services that were acquired in the course of their commercial activities by claiming input tax credits. The HST is effectively a tax on the end-users of a product or service. However, registrants with taxable sales in excess of $10 million per year, and financial institutions, will be temporarily unable to claim the Ontario portion of their input tax credits with respect to energy, telecommunication services, road vehicles weighting less than 3,000 kilograms and good, beverages and entertainment. The availability of input tax credits to these registrants on the foregoing services will be phased in between 2010 and 2018.

**HST Place of Supply Rules**

The place of supply rules (the “POS Rules”) determine whether a supplier has made a supply of goods or services in a “participating province” or in a non-participating province. Under the place of supply rules, where a supplier is deemed to have made a supply of goods or services in a participating province, the supplier is generally required to collect and remit HST (i.e., both provincial and federal components) rather than only the GST.

The POS Rules are particularly important for businesses that supply services or intangible personal property (e.g., patents, trade-marks, intellectual property, licenses, etc.).

Under the POS Rules, when determining where a supply of service or intangible personal property is made, greater emphasis will be placed on the location of the recipient of the supply rather than the location of the supplier. In addition, under the POS Rules, the place of negotiation has been eliminated as a criterion.

**Services - General Rules for the Supply of Services**

**Rule 1**: Where a supplier obtains a Canadian address of a recipient:

- The supply will be regarded as made in the province in which the particular address is situated.

**Rule 2**: Where a supplier does not obtain a Canadian address of a recipient (e.g., the recipient does not reside in Canada) and services are primarily performed in Participating Provinces:

- The supply will be regarded as made in the participating province for which the greatest proportion of service is performed.

**Rule 3**: Where Rule 2 applies and the service is performed equally in two Participating Provinces:

- The supply will be regarded as made in the participating province for which the rate of the provincial component of the HST is the highest at the time the supply is made.

**Rule 4**: Where Rule 3 applies but the provincial component of the HST is the same in two or more participating provinces:
• The supplier will be required to charge that particular rate.

**Rule 5:** Where a supplier does not receive a Canadian address of a recipient and the services are not primarily performed in a participating province:

• The supply will be regarded as made in a non-participating province.

**Exceptions to the Services General Rules**

Under the POS Rules, the general rules will not apply to all services. Specific place of supply rules will apply to each of the following services:

- Personal Services
- Services in Relation to Real Property
- Services in Relation to Tangible Personal Property
- Services Rendered in Connection with Litigation
- Services Supplied on Board Conveyances
- Customs Brokerage Services
- Repairs, Maintenance, Cleaning, Alterations and other Services Relating to Goods
- Services of a Trustee in respect of a Trust Governed by a Registered Retirement Savings Plan, Registered Retired Income Fund or Registered Education Savings Plan
- Premium Rate Telephone Services
- Computer-Related Services and Internet Access
- Air Navigation Services

**General Rules for the Supply of Intangible Personal Property (“IPP”)**

**Rule 1:** If the “Canadian rights,” in respect of IPP, can only be used in a single participating province:

• The supply will be regarded as made in that participating province.

**Rule 2:** If the Canadian rights, in respect of IPP, can be used in more than one participating province:

• The supply will be regarded as made in the province with the greatest proportion of use; or
• If the first paragraph does not apply, the supply will be regarded as made where the address of the recipient is situated; or
• If the first two paragraphs do not apply, the supply will be regarded as made in the participating province with the highest rate of the provincial component of HST.

**Rule 3:** If the Canadian rights, in respect of IPP, can be used only primarily outside the participating provinces:

• The supply will be regarded as made in a non-participating province.

**Rule 4:** If the Canadian rights, in respect of IPP, can be used otherwise than only primarily in participating provinces and otherwise than only primarily in non-participating provinces:

• The supply will be regarded as made where the address of the recipient is situated or, if not applicable, in the province that has the highest rate of the provincial component of the HST.
Exceptions to the IPP General Rules

Under the POS Rules, the general rules will not apply to all IPP. Specific place of supply rules will apply to each of the following IPP:

- IPP that Relates to Real Property
- IPP that Relates to Tangible Personal Property
- IPP that Relates to Services to be Performed

Québec Sales Tax

In July 1992, Québec implemented the Québec sales tax (“QST”), which replicated the GST regime. However, in contrast to the HST, the QST was implemented in its own provincial legislation. Moreover, in Québec, the GST and the QST are administered by the Québec Ministry of Revenue. The QST is calculated at a rate of 8.5% and is applied to the cost of goods including the GST.

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

What Are The Incentives To Establish New Businesses In Canada?

In contrast to the US, the tax system in Canada provides no special incentives to new businesses. Through recent tax reform, the federal government has attempted to make the income tax system as neutral as possible, although, it is possible to obtain modest municipal tax relief and other incentives to establish new businesses. See pages 9.12–9.14 for a summary of federal and provincial incentive programs available to business.

Tax Considerations regarding Canadian Mergers and Acquisitions

The following is a summary of the Canadian tax considerations applicable to mergers and acquisitions.

This summary is intended as an overview of the principal Canadian federal income tax considerations under the Tax Act generally applicable in respect of mergers and acquisitions. This summary is in no way exhaustive and should not be construed as tax advice in respect of any particular transaction. The phrase “mergers and acquisitions” encompasses a very broad range of transactions and will vary depending on a public or private target, tax residency of target, vendors, and purchaser, and share or non-share consideration. Please consult with a tax lawyer at the earliest possible opportunity in respect of your particular transaction. Non-Canadian tax considerations may play a very important part in cross-border transactions with Canadians. This summary will review the general tax considerations from the perspective of each of a vendor of shares, a purchaser of shares and the target.

Vendor Income Tax Considerations

Tax Residence of Vendor

- The tax residency of the vendor is a very important threshold consideration which can affect structuring. If the vendor is a non-resident of Canada, it will have tax considerations
applicable in its home jurisdiction. There are also specific rules under the Tax Act applicable to a non-resident, which are summarized below. Please note that a transaction such as a share-for-share exchange qualifying for tax-free treatment in Canada may not necessarily qualify as a tax-free transaction in the home jurisdiction of the vendor.

**Tax-Free Rollovers**

The Tax Act provides a variety of provisions that facilitate a vendor having a partial or full tax-free rollover in respect of a share-for-share exchange in different circumstances. Each relevant provision has its own requirements. There are also important considerations applicable to a purchaser in respect of these provisions which will be outlined below. The types of tax-free rollovers are summarized below. Generally, a non-resident would not need a tax-free rollover for Canadian tax purposes unless its shares are Taxable Canadian Property and there is no relief under an applicable tax treaty.

Subject to several conditions, there is an automatic and complete rollover for an exchange of shares of a taxable Canadian corporation held as capital property for shares of a Canadian corporation pursuant to section 85.1, unless the shareholder elects to report any portion of the gain (or loss) otherwise determined. There can be no non-share consideration unless there is a proper allocation of the share and non-share consideration to different portions of each target share. A vendor may receive shares of the purchaser for some of the exchanged shares and cash or other consideration for other exchanged shares. In these cases, the automatic rollover in section 85.1 may be utilized for the exchanged shares for which shares of the purchaser were received, as long as the vendor can clearly identify which shares (or fraction of each share) were exchanged for cash or other consideration and which were exchanged for shares of the purchaser. Where the vendor receives shares and cash or other consideration for each exchanged share, section 85.1 may be utilized for the fraction of each exchanged share for which only share consideration was received, provided that the purchaser’s offer clearly indicates that the share consideration will be exchanged for a specified fraction of each share tendered and the non-share consideration will be given for the remaining fraction. In these situations, the cash or other non-share consideration received represents proceeds of disposition of shares or fractions of shares of the target.

An exchange of options or warrants does not qualify for a tax-free rollover under this provision.

There is a complete or partial rollover of shares held as capital property or inventory transferred to a taxable Canadian corporation under subsection 85(1) of the Tax Act in consideration of shares of such corporation. A joint election signed by the vendor and purchaser must be filed specifying an elected amount. The amount elected will determine the proceeds of disposition to the vendor, the cost of the purchaser shares received by the vendor, and the cost of the target shares acquired by the purchaser. There can be non-share consideration, but if the fair market value of the non-share consideration exceeds the tax cost of the target shares, a gain will be triggered equal to the excess. In addition, the elected amount cannot be less than the fair market value of the non-share consideration. An exchange of options for options does not qualify for a tax-free rollover under this provision. There is a complete rollover on the exchange of shares and options of a taxable Canadian corporation held as capital property on a qualifying amalgamation of two or more taxable Canadian corporations pursuant to section 87. The shareholder cannot receive any non-share consideration for the shares and only options in exchange for options. There is a complete rollover on the exchange of units of a publicly-traded trust that is a “SIFT
trust” (e.g., an income trust) for shares of a taxable Canadian corporation pursuant to subsection 85.1(8), provided that the exchange takes place before 2013. The unitholder cannot receive any non-share consideration for the units.

There is a complete rollover for shares and options of a taxable Canadian corporation held as capital property on a qualifying triangular amalgamation of Canadian corporations pursuant to section 87. Subject to several conditions, there is a complete rollover for the exchange of shares of a foreign corporation held as capital property for shares of another foreign corporation pursuant to subsection 85.1(5). There is a complete rollover in respect of the exchange of shares and options of a foreign corporation on a qualifying foreign merger, unless the taxpayer elects otherwise.

There is not a tax rollover in respect of the following transactions:

- The exchange of shares (or options) of a Canadian corporation for shares of a foreign corporation. To address the absence of a rollover in this situation, exchangeable share transactions have developed to provide a tax-deferred transaction under the Tax Act; or
- A triangular merger of two foreign corporations pursuant to which a shareholder receives shares of a Canadian corporation in exchange for shares of a predecessor foreign corporation.

“Safe Income” Dividend

- A Canadian corporate shareholder of a target can reduce its capital gain otherwise to be realized on a sale of shares by its share of the “safe income” (i.e., the tax-retained income of the target during the vendor’s holding period), if any, of the target. This will require the payment of an actual dividend prior to the sale, or creating a deemed dividend for purposes of the Tax Act not exceeding the holder’s share of the safe income. There are various non-cash ways of creating a deemed dividend. In the public company context, where it is generally not possible to pay an actual dividend equal to the safe income attributable to each shareholder, a structure has developed called the “holding company alternative” which can achieve the desired tax effect without an actual payment of a dividend. This requires the full cooperation of the target and must be implemented prior to closing.

Options held by Employees

- The target may have various types of employee bonus, retirement and equity compensation plans, such as an option plan. It is very important to consider existing plans, necessary changes to these plans and the tax consequences to all parties. There are rules that allow for the exchange of employee stock options without triggering employment income.

Purchaser Income Tax Considerations

- The tax considerations applicable to the purchaser will vary depending on a number of variables, some of which are mentioned below. If the target has foreign subsidiaries, there will not only be potential foreign tax considerations applicable to the purchaser, but also the controlled foreign corporation rules in the Tax Act will be applicable on a go-forward basis.

Financing

The financing of the purchaser is a critical consideration if there is a material amount of cash to be paid as purchase price. The most tax efficient manner of financing the acquisition from internal and external resources must be considered at the earliest stage. There is presently no
consolidation for purposes of the Tax Act. Generally, a Canadian acquisition corporation would be the borrower and amalgamate with the Canadian target so the interest expense will offset the income of the target. The amalgamation of two or more taxable Canadian corporations can occur on a tax-free basis. Withholding tax must be considered if there is a non-resident lender.

**Tax-Free Rollovers**

A purchaser will often be required to accommodate a full or partial tax-free rollover where the consideration wholly or partly consists of its shares. The purchaser as client must fully appreciate the tax implications to it of providing a tax-free rollover. It is in this context decisions must be made regarding structuring an automatic share-for-share exchange or a “tainted” section 85.1 exchange, as discussed below. One potential adverse tax consideration applicable to a purchaser in respect of a tax-free transaction for the vendor is that the purchaser will be treated as acquiring the shares of the target at a tax cost which is below fair market value at the time.

The tax cost of the target shares will be very important in circumstances where the purchaser later wishes to dispose of the shares of the target, or possibly “spin out” non-depreciable capital property (e.g., shares) of the target, as discussed below. If the tax cost is less than fair market value by reason of a rollover, the purchaser will subsequently be taxable on the gain inherent in the target shares at the time of acquisition, even though fair market value consideration was paid.

The tax cost will depend on the applicable rollover provision. In an automatic share-for-share exchange rollover under section 85.1, the tax cost to the purchaser of the shares acquired will be the lesser of the “paid-up capital” and fair market value immediately before the exchange. However, if subsection 85(1) elections are filed, the aggregate tax cost will be the aggregate elected amounts, and, if no elections are filed, the aggregate tax cost will be the fair market value of the shares of the purchaser. Therefore, the tax cost of the target shares will generally be lower in an automatic rollover under section 85.1 than where subsection 85(1) elections are filed.

To reduce this potential disadvantage to the purchaser, the purchaser must decide whether to structure the consideration as follows:

- “Taint” the automatic section 85.1 tax-free rollover by including nominal non-share consideration without allocating such consideration to a specific portion of the target share(s) so the automatic rollover does not apply; and
- Provide for a joint election under subsection 85(1) only with taxable Canadian residents and non-residents of Canada who would otherwise be taxable under the Tax Act without any treaty relief.

There is an administrative cost to pursuing this strategy in the public company context where hundreds of subsection 85(1) elections may be required. The client must decide whether the incremental cost of processing these elections is justified having regard to the uncertainty that there will be a future tax benefit of “tainting” the section 85.1 rollover.

**Non-Resident Purchaser Income Tax Considerations**

A non-resident purchaser should first consider whether it is entitled to benefits of a tax treaty with Canada (e.g., reduced rates of withholding tax). In particular, US residents should consider whether they satisfy the requirements in the limitation of benefits provision in the Canada-US Tax
Convention. In certain situations a non-resident purchaser may wish to use a “blocker” corporation in a jurisdiction with both a favourable tax regime and a tax treaty with Canada (e.g., Luxembourg) to make the investment into Canada.

It is very important for the non-resident, regardless of whether a “blocker” is used, to set up a Canadian acquisition corporation to effect the acquisition for many reasons. This will generally provide an opportunity to:

- Offset the interest expense incurred in financing the acquisition against the income of the target (subject to the “thin-capitalization rules”); and
- Repatriate more Canadian funds by a return of paid-up capital free of Canadian withholding tax than would be the case if a non-resident corporation were the purchaser.

Please note that a non-resident corporation as a direct purchaser of a Canadian target will prevent the transaction from qualifying for a tax-free rollover if there is share consideration, and achieving a “bump” as discussed below.

**“Bump” in Tax Cost of Non-Depreciable Capital Property of Target**

A purchaser can be interested in reorganizing the ownership of the shares of the subsidiaries of the target with the objective of distributing the shares to a non-resident shareholder or selling such shares after closing. The resulting income tax liability will depend on the fair market value at the time of the spin-out and the tax cost. In the most favourable circumstances, the “bump” rules will permit a spin-out of the shares without triggering a gain. This “bump” will be particularly important if the target has foreign subsidiaries and the shareholder of the Canadian purchaser resides in a foreign jurisdiction. A Canadian corporation interposed between two non-residents could create tax inefficiency in the future.

The “bump” rules permit a step-up in the tax cost of qualified property up to fair market value at the time of acquisition of control. This requires either an amalgamation of the Canadian target and Canadian purchaser or a winding up of the Canadian target into the Canadian purchaser after all the target shares have been acquired. The tax cost of the shares of the target is a crucial variable in computing the “bump,” and the amount of the “bump” will be reduced to the extent such tax cost is less than fair market value. Therefore, the maximum “bump” up to fair market value at the time of acquisition of control is not possible where the acquisition of the target shares occurs on a tax rollover basis. This is because the tax cost of the shares of the target to the purchaser will be less than fair market value.

The “bump” rules are very complex, and there are a number of anti-avoidance rules that could disqualify a “bump.” The planning must occur well before closing.

**Tax Due Diligence**

It is very important to identify as early as possible who will be responsible for tax due diligence. Generally, in Canada, accounting firms conduct the tax due diligence. Tax lawyers may get involved where there are substantive issues and exposure. Particular regard should be made to tax attributes such as capital cost allowance, resource tax pools, and losses, and the special status of any outstanding shares, such as flow through shares. In some transactions there may be important
post-closing integration and restructuring that will have tax considerations. This is best identified well before closing to identify any potential costs.

Target Income Tax Considerations

- The Tax Act has a comprehensive set of rules that apply where there is an acquisition of control of the corporation. These rules range from tax compliance (e.g., a deemed year end) to more substantive. For example, there are rules which require the recognition of inherent losses for the taxation year ending on the acquisition of control, and restrictions on the carryforward of losses. The target may have status as a “Canadian-controlled private corporation” prior to the sale and lose its status. This could have material monetary implications to the purchaser as there may be the loss of refundable tax credits, and the small business deduction. These implications should be addressed as part of tax due diligence.
5. CANADIAN COMPETITION LAWS

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

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

Recent Amendments to the *Competition Act*

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

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

- Introduction of a US-style “second request” merger review process.
- Increase of the “size of transaction” merger notification threshold to $73 million (from $70 million).
- Introduction of a dual criminal/civil track approach for agreements between competitors.
- Elimination of the competitive effects test for criminal conspiracy and replacing it with a *per se* offence.
- Introduction of significant administrative monetary penalties (“AMPs”) for violations of the abuse of dominance provisions.
- Decriminalization of the archaic pricing provisions (price discrimination, predatory pricing, price maintenance and promotional allowances).

Mergers

The CA contains pre-merger notification provisions, as well as substantive merger review provisions, which apply independently of each other. Even if a transaction raises no substantive competition issues under the merger review provisions, the parties to a merger that meets the notification thresholds must nevertheless comply with the filing and waiting period requirements of the pre-merger notification provisions, unless the parties apply for and obtain an exemption in the form of an advance ruling certificate (“ARC”), discussed below.
Conversely, a merger that does not meet the notification thresholds may still be subject to review by the Commissioner and an order of the Competition Tribunal (the “Tribunal”) if it raises a substantive issue under the merger review provisions of the CA.

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

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

When is a Merger Notifiable? 
Parties must notify the Commissioner of a proposed merger if the transaction meets both of the following financial thresholds:

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

- The aggregate value of the Canadian assets being acquired exceeds $73 million; or
- The gross annual revenue from sales in or from Canada generated by the assets exceeds $73 million, each up from $70 million in 2010.

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

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

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

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

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

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

Additional Threshold for Share Acquisitions

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

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

What Is the Notification Procedure?

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

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

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

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

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

What Are Advance Ruling Certificates and No-Action Letters?

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

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

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

What Are the Filing Fees?

There is a mandatory filing fee of $50,000 plus GST or HST for all pre-merger notifications or requests for NALs. Prior to April 30, 2010, where an ARC is sought, GST had to be paid. CRA has determined that GST does not apply to ARCs. Parties who paid GST for an ARC are eligible for a refund, provided they have not made a claim for an input tax credit. Firms that paid some or the entire fee for an ARC request have two years from the payment of GST to submit a claim for a refund. The fee is the same regardless of the size or complexity of the transaction. Who pays the fee is a matter of negotiation. The two most common practices are that the fee is paid by the purchaser or split evenly by the parties. On occasion, parties will provide both a pre-merger notification filing and a request for an ARC, in which case there is only one $50,000 fee.

When is a Merger Subject to Substantive Review?

Regardless of size, a merger is subject to substantive review by the Bureau and challenge before the Tribunal if it is likely to give rise to a substantial prevention or lessening of competition in a
relevant market in Canada. Cases before the Tribunal have established that the relevant question is whether the merger will create, maintain or enhance the ability of the merged entity, unilaterally or in coordination with other firms, to exercise market power. “Market power” is the ability to profitably maintain prices above the competitive level for a significant period of time.

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

If in the course of reviewing a proposed transaction the Commissioner identifies areas in which she believes the transaction will substantially lessen competition, she will normally try to negotiate alterations to the transaction to address her concerns. These negotiations can be protracted. Prior to challenging a transaction before the Tribunal, the Commissioner may apply to the Tribunal for an order enjoining the parties from completing the transaction for a period not exceeding 30 days to permit the Commissioner to complete her inquiry. Should the Commissioner be unable to complete an inquiry during the initial period because of circumstances beyond her control, the Tribunal may extend this interim order to a date not more than 60 days after the initial order takes effect. If the Commissioner makes an application to the Tribunal challenging a proposed transaction, she may also apply for an interim order on the terms that the Tribunal deems appropriate.

What Are Possible Merger Remedies?

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

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

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

In determining whether to make an order, the Tribunal considers a number of factors, such as: the extent of foreign competition, whether the business being purchased has failed or is likely to fail, the extent to which acceptable substitutes are available, barriers to entry, remaining effective competition, whether a vigorous and effective competitor would be removed, the nature of change and innovation in a relevant market, as well as any other factors relevant to competition in the affected market(s).

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

**Criminal Offences**

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

**Conspiracy**

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

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

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

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

**Bid-rigging**

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

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

Misleading Advertising

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

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

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

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

Reviewable Trade Practices

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

Abuse of Dominant Position

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

First, the Commissioner must prove that a firm has market power in one or more relevant markets in Canada. Market power means having some degree of control over prices in a relevant market. Generally, the Tribunal will look at the combination of high market shares (at least 35%, and probably over 50%) in a relevant market combined with barriers to entry into the market (e.g., high sunk entry costs, existing excess capacity, regulatory constraints).
Second, the Commissioner must prove that the dominant firm has engaged in a practice of anti-competitive acts. The CA sets out a non-exhaustive list of examples of anti-competitive acts. Canadian case law has established that, to be anti-competitive, an act must be exclusionary, disciplinary or predatory in purpose or effect. The anti-competitive aspects of a practice are weighed against the efficiency-enhancing business justifications to determine whether the overall character of the practice could be determined to be anti-competitive. In practice, this analysis is similar to a rule of reason analysis under the *Sherman Act*.

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

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

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

### Agreements or Arrangements that Prevent or Lessen Competition Substantially

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

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

### Price Discrimination, Predatory Pricing and Promotional Allowances

Price discrimination, predatory pricing and promotional allowances used to be subject to the criminal prohibition under the CA. Following the 2009 amendments, the former criminal pricing provisions have been repealed and these activities are now addressed under the abuse of dominance provisions summarized under the heading “Abuse of Dominant Position” on page 5.7.
Price Maintenance

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

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

Refusal to Deal

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

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

Exclusive Dealing and Tied Selling

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

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

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

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

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

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

Civil Actions

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

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

VISA and Mastercard Merchant Charges

In December, 2010, the Commissioner of Competition made an application to the Competition Tribunal challenging VISA and Mastercard rules regarding card acceptance and the fees charged to merchants. Specifically, the application alleges that the rules in question (that it refers to as Merchant Restrictions) prevent merchants from: (a) effectively encouraging customers to use lower-cost forms of payment and discouraging the use of credit cards with higher merchant fees; (b) declining acceptance of certain credit cards, such as those with higher merchant fees (currently, the credit card companies require merchants who accept their brand of credit card to accept all credit cards issued under that brand); and (c) adding a surcharge to a transaction where a customer selects a payment method with a higher merchant fee.

This is the first price maintenance application brought since the civil price maintenance provisions were introduced in 2009. As noted above, previously, price maintenance was a criminal offence.

Competition Law Implications

The application provides further evidence that the Commissioner is willing to aggressively enforce the civil provisions of the CA (this is the third significant contested proceeding that she has brought this year). Moreover, this application once again demonstrates that she is not afraid to bring cases that extend the application of the law beyond the existing jurisprudence.

Typically, price maintenance cases have been brought in the context of traditional supplier-reseller relationships dealing with consumer goods. This application is noteworthy in that, for the first time, it seeks to apply price maintenance to a non-conventional, complex delivery model for credit card services. We expect that the structure and complexity of services will create interesting challenges for the Commissioner in carrying the burden of proof in this case.
Payments Implications

The Commissioner’s application was brought a mere eight months following the Department of Finance’s introduction of the Code of Conduct for the Canadian Credit and Debit Card Industry.

The Code of Conduct was the product of a substantial review of the credit and debit card market by the Senate Banking Committee, the House of Commons and the Department of Finance. It represents the Government’s response to issues faced by Canadian merchants and consumers respecting credit and debit card acceptance and the business concerns raised by payment card networks. Since the introduction of the Code of Conduct, market participants have spent considerable time and money working towards implementation. Indeed, some of its provisions have not even come into force yet.

The Commissioner evidently believes that the Code of Conduct does not in fact address all of the problems facing the market. The application states that the Code of Conduct is inadequate in that: (i) it does not require credit card companies to permit merchants to distinguish between types of credit cards with a single brand (such as that brand’s ‘classic’ cards and ‘premium’ cards); and (ii) it does not require credit card companies to allow surcharges, although it permits discounts for different payment methods – the Bureau’s view is that allowing surcharging is a more effective approach. Interestingly, the Code of Conduct did not require payment card networks to allow merchants to impose surcharges or to differentiate credit cards bearing the same brand in spite of the fact that these measures were specifically addressed by the Senate Banking Committee in its report. Despite the Commissioner’s view regarding the adequacy of the Code of Conduct, the Minister of Finance has publicly supported this application, calling it a “parallel” effort.

Surcharging has been a controversial practice in payments. At a minimum, we would expect that a surcharge regime would require disclosure to a consumer prior to the completion of a transaction (as is the case for INTERAC’s service). We wonder how practical it would be for a merchant to maintain and disclose a surcharge list that attempted to address multiple cards and issuers.

The key issues in dispute include the following:

1. Do the price maintenance provisions require a sale/resale?
2. Are the Merchant Restrictions sufficient to constitute an attempt to influence upward or discourage the reduction of prices?
3. Even if the Merchant Restrictions satisfy the substantive elements of the price maintenance provisions, do they meet the competitive effects test set out on the statute? What is the relevant market which the competitive effects must be evaluated? Do the Market Restrictions cause an adverse lessening or prevention of competition?

Although the Tribunal record is already voluminous, the only certainties at this point is that nothing is clear and that significant time, effort and money will be spent before anything is resolved. Both the Commissioner and the Respondents face considerable challenges in making their cases.
6. FOREIGN INVESTMENT IN CANADA

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

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

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

When Does The ICA Apply?

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

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

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

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

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

A Canadian is a person who is:

- A citizen;
- A permanent resident within the meaning of the federal Immigration and Refugee Protection Act who has been ordinarily resident in Canada for not more than one year after the time at which he/she became eligible to apply for Canadian citizenship;
A Canadian government, whether federal, provincial or local or any other agency thereof; or
An entity that is Canadian-controlled, as determined under the Canadian status rules of the ICA.

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

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

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

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

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

**Review vs. Notification**

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

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

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

In addition, all investments, regardless of size, the parties’ residence, the type of business being acquired or the type of transaction are subject to national security review (discussed in the Review on National Security Grounds section below).
Which Investments Are Subject to Review Under the ICA?

Both direct and indirect acquisitions may be subject to review.

A direct acquisition for the purpose of the ICA is the acquisition of a Canadian business by virtue of the acquisition of all or substantially all of its assets or a majority (or, in some cases, one-third or more) of the shares of the entity carrying on the business in Canada.

- A direct acquisition by a WTO investor (other than one involving a cultural business discussed below) is reviewable where the book value of the acquired Canadian assets exceeds $312 million for 2011. This threshold is expected to be replaced at some point in the future by a new $600 million “enterprise value” threshold (please see comments below under the heading “New Notification Thresholds”).
- A direct acquisition by a non-WTO investor is reviewable where the value of the acquired Canadian assets is $5 million or more.

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

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

New Notification Thresholds

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

What is a “Cultural Business”?

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

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

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

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

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

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

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

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

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

**What Procedures Govern an ICA Review?**

- An application for review must set out particulars of the proposed transaction, including information about the investor, the Canadian business and the investor’s plans for the business. Annual reports or financial statements for the three most recent fiscal years must be included.
- The relevant Minister has 45 days to determine whether to allow the investment. The Minister can unilaterally extend the 45-day period by an additional 30 days by sending a notice to the investor prior to the expiration of the initial 45-day period. Further extensions of time must be agreed to by the investor.
- If the investor does not receive approval or notice of extension within the applicable time then the investment is deemed approved. The investor may close a direct acquisition only after the Minister has approved, or is deemed to have approved, the investment. Failure to comply with these rules opens the investor to enforcement proceedings that can result in fines of up to $10,000 per day.
Where the Minister determines that the investment will not be of “net benefit to Canada,” the investor is provided with an opportunity to make additional representations and to submit undertakings (discussed below) that demonstrate the “net benefit” of the investment. A striking recent example where the parties to a transaction subject to ICA review were refused the required consent was the proposed purchase by Alliant Techsystems Inc. of the Information Systems and Geospatial Service Operations division of MacDonald, Dettwiler and Associate Ltd. The key reasons why this transaction was blocked related to issues of national security, as well as concerns regarding the enforceability of undertakings.

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

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

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

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

- Obligate the investor to keep the head office of the Canadian business in Canada.
- Ensure that a majority of senior management of the Canadian business is comprised of Canadians.
- Maintain certain employment levels at the Canadian business.
- Make specified capital expenditures and conduct research and development activities based on specified budgets.
- In some cases, make a certain level of charitable contributions.

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

Review on National Security Grounds

As discussed above, all investments may be reviewed on national security grounds, even if they are not, otherwise, subject to an ICA review.
The applicable test is whether an investment is “injurious to national security.” The ICA does not define “national security,” nor does it provide a list of relevant factors that the Minister will take into account in conducting the review. This is in contrast to the US, where the relevant law provides a list of the types of transactions that may raise national security concerns. Consequently, the potential scope of the Canadian national security review is extremely broad and causes significant unpredictability to investors.

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

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

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

**Investments by State-Owned Enterprises**

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

- Whether the SOE adheres to Canadian standards of Corporate Governance;
- Whether the SOE adheres to Canadian laws and practices;
- The manner in which the foreign government exercises control over the SOE; and
- Whether a Canadian business acquired by a SOE will continue to operate on a commercial basis regarding:
  - Where to export;
  - Where to process;
  - Participating Canadians;
  - Support of innovation and research and development; and
  - Making the appropriate level of capital expenditures to maintain the competitiveness of the Canadian business.
In considering whether an investment by a SOE is of “net benefit” to Canada, the Minister has indicated that he will likely require undertakings (in addition to those listed above) with respect to:

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

**When is an ICA Notification Required?**

Where a non-Canadian acquires control of an existing Canadian business or establishes a new Canadian business and, on its facts, the acquisition is not reviewable, it will still be notifiable.

Notification requires the non-Canadian investor to provide limited information on the identity of the parties to the transaction, the number of employees employed in connection with the business in question and the value of its assets. A notification may be submitted to Investment Canada before or within 30 days after the closing of the transaction. Typically, the notification is filed post-closing.

**Will Investor Undertakings be Enforced?**

The first constitutional challenge to the government’s use of the enforcement provisions of the ICA was argued by U.S. Steel argued in June 2010 and the Federal Court rejected U.S. Steel’s case in its entirety and upheld the provisions in question. In July 2010, the Ontario Court of Appeal refused to stay the lower court ruling which permits Canada to seek penalties from U.S. Steel for breach of its undertakings.

U.S. Steel alleged that, because the ICA subjected it to potential financial penalties (up to $10,000 per day of non-compliance) without providing the protections typically afforded to defendants in criminal cases, the statute infringed its rights to a fair hearing under both the Charter of Rights and Bill of Rights.

In upholding the constitutionality of the ICA’s enforcement provisions, the Court held that:

- ICA enforcement proceedings are not “by nature” penal proceedings;
- The potential for penalties of up to $10,000 per day is not unconstitutional; and
- The Federal Court Rules provide adequate procedural protections to protect the right to a fair hearing (i.e., knowing the case to be met).

This case arose in connection with allegations by the government that U.S. Steel breached undertakings given by it to secure approval for its 2007 acquisition of Stelco and the government’s request for compliance (U.S. Steel shifted production from the Canadian Stelco facilities in response to the global economic crisis). The case will now proceed to the analysis of whether U.S. Steel was justified in breaching its undertakings relating to maintaining production and employment levels at Canadian Stelco facilities. If the government’s case is successful, U.S. Steel could face multi-million dollar fines and possibly have to sell its remaining Canadian operations.
This case has several implications for foreign investors who give undertakings to secure ICA approval:

- The Canadian government is willing to aggressively enforce undertakings provided to it by foreign investors;
- Foreign investors must carefully consider the terms and scope of any undertakings provided to the government; and
- It is necessary to consider how ICA undertakings may impact the company’s ability to re-structure its international operations.

**Are There Special Requirements for Non-Resident Investors?**

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

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

**Canada’s Financial Services Sector**

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

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

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

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

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

Effective June 30, 2011, property and casualty insurance companies will no longer be prohibited from ceding more than 75% of their gross premiums in the aggregate, and will no longer be limited to ceding only 25% of their gross premiums to unregistered reinsurers. The purpose of these 75% and 25% ceding restrictions was to limit counterparty risk in the event reinsurance companies would not be able to meet claim obligations. However, these 75% and 25% ceding limits did not reflect industry innovations (multi-layered arrangements and sophisticated financial instruments, such as securitization), lacked in efficiency and flexibility, and no longer fulfilled their prudential purpose.

The effect of these changes will be to:

- Allow OSFI to better address insurers’ risks through the issuance of principles-based guidance and a risk based supervisory framework, in particular Guideline B-3 Sound Reinsurance Practices and Procedures, December 2010;
- Provide clarity to industry on OSFI expectations pertaining to reinsurance arrangements, which will produce more effective and efficient supervisory efforts;
- Provide the industry with greater flexibility to structure operations to be more aligned with global business practices and will facilitate federally regulated companies to be more competitive globally;
- Alleviate the administrative burden for insurance companies; and
- Permit simplified reinsurance transactions and clearer contractual agreements for the industry, which will translate into greater transparency in reinsurance transactions.

OSFI has indicated that once these changes come into effect reinsurance strategies, programs, processes and contracts will be subject to significantly greater scrutiny by OSFI’s supervision arm, which may take enforcement actions if a company does not act in the best interest of policyholders.

Since July 1, 2005, in order to be registered to carry on business in Ontario, a loan or trust corporation must be incorporated under the federal Trust and Loan Companies Act. British Columbia is considering a similar approach to the regulation of loan and trust companies. Ontario will not allow the registration of any new loan and trust companies in Ontario that are not federally regulated, and loan and trust companies registered in Ontario prior to July 1, 2005 were required to continue under the federal legislation to maintain their Ontario registration.
Lenders taking security on residential mortgages in Nova Scotia must be registered under the
*Mortgage Brokers and Lenders Registration Act* (Nova Scotia). This Act requires that the form of
mortgage used by a registrant be approved by the regulator appointed under the said Act and requires
that all mortgage lenders to have a physical office in Nova Scotia (apart from the offices of a law firm)
where the prescribed lending records are kept for examination by the regulator.

**Foreign Bank Rules**

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

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

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

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

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

- Except as permitted under the Bank Act, a foreign bank shall not:
  - Carry on any business in Canada;
  - Maintain a branch for any purpose;
  - Establish an automated presence or maintain a remote service unit in Canada; or
  - Control, or have a substantial investment in, any Canadian entity (a substantial investment is
direct or indirect beneficial ownership of, more than 10% of the voting rights or more than
25% of the shareholders’ equity).

- With approval, a foreign bank may establish a presence in Canada by different means, for
different purposes.
- With approval, a foreign bank may maintain a *representative office* in Canada that is not
  permitted to carry on business in Canada, but it may in Canada promote the foreign bank’s
  business outside Canada and provide liaison with offices outside Canada.
If a foreign bank wishes to provide banking services in Canada, it may (with approval) establish a branch in Canada.

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

With approval, a foreign bank may establish a Canadian bank as a subsidiary of the foreign bank. Such a bank subsidiary is subject to the same rules as the Canadian banks.

Also, a foreign bank may seek approval to own a non-bank financial institution such as a loan or trust company, insurance company or securities dealer, and a foreign insurer or securities dealer may seek approval to carry on a securities or insurance business in Canada.

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

Ownership of a Canadian Financial Institution

Banks

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

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

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

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

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

As with banks, ownership of more than 10% of any class of shares is subject to approval by the Minister of Finance and compliance with a “fitness test.” An insurance company is widely held if no person has beneficial ownership of more than 20% of any class of voting shares or 30% of any class of non-voting shares (i.e., no major shareholder).

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

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

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

Holding Companies

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

Broadcasting and Telecommunications

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

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

The Broadcasting Act (s. 3(1)(a)) requires that the “Canadian broadcasting system shall be effectively owned and controlled by Canadians.” The Direction to the CRTC (Ineligibility of Non-Canadians) (issued by the federal cabinet, the “Direction”) imposes specific requirements for Canadian ownership and control of entities that obtain broadcasting licenses. Among other things, the chief executive officer and not less than 80% of the directors of a “qualified corporation” must be Canadian (as defined in the Direction, which generally means a Canadian citizen who is ordinarily resident in Canada) and Canadians must beneficially own and control not less than 80% of the issued and outstanding voting shares of the corporation; alternatively, if the license-holder is a subsidiary, Canadians must beneficially own not less than 66⅔% of the votes and the parent company may not exercise control over the programming decisions of the subsidiary.

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

Telecommunications

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

During 2009, the CRTC reviewed the ownership structure of one of those new entrants, Globalive Wireless Management Corp. (“Globalive”). In July, 2009, the CRTC issued a “Canadian ownership and control review policy” which created a flexible framework consisting of four types of ownership reviews and then examined Globalive’s structure under a “Type 4” review, which involved an oral, public, multi-party proceeding, on the basis that the ownership was complex or novel and that the determination would hold precedential value for industry players and the general public. In its October, 2009 decision the CRTC concluded that, although Canadians held legal control since the technical requirements of the regulations were met, Globalive was “controlled in fact” by the non-Canadian, Orascom Telecom Holding (Canada) Limited (“Orascom”). Noting that a number of factors were of concern (specifically, Orascom held two thirds of Globalive’s equity, was the principal source of its technical expertise and also provided access an established trademark for wireless services), the Commission’s decision was based on the fact that, in addition, Orascom provided the vast majority of Globalive’s debt financing, and as such had the ongoing ability to determine its strategic decision-making activities. Accordingly, Globalive was not eligible to operate as a Canadian telecommunications common carrier.
The precedential value of this decision was soon in doubt, however, as the federal cabinet overturned the CRTC decision in December, 2009. The cabinet referenced the telecommunications policy objectives of the Telecommunications Act and the fact that the spectrum auction was designed to stimulate new entry and competition in the wireless telecommunications market. In contrast to the CRTC, Industry Canada had approved Globalive’s ownership under the Canadian ownership and control rules of the Radiocommunication Act. The cabinet emphasized that its decision was based on the particular facts of the case and was not intended to amend Canadian ownership and control rules or policies. It disagreed with the CRTC, and concluded that Globalive was not, in fact, controlled by persons that are not Canadian. As such, it was eligible to operate as a telecommunications common carrier. Globalive launched its wireless service almost immediately thereafter.

In January 2010, another new entrant winner in the Industry Canada spectrum auction, Public Mobile Inc., challenged the cabinet’s Globalive decision in the Federal Court, as a way of seeking clarity with respect to the Canadian ownership and control rules for telecom companies. The Federal Court struck down the cabinet decision, supporting the CRTC’s ruling that Globalive was, in fact, controlled by non-Canadians. Globalive and the federal government have appealed the Federal Court decision. In June, the Federal Court of Appeal overturned the Federal Court decision and upheld the cabinet’s decision to allow Globalive to operate in Canada. Public Mobile Inc. has indicated that it will seek leave to appeal the matter to the Supreme Court of Canada. It appears that the federal government will not loosen ownership restrictions in this sector if the Federal Court of Appeal ruling stands.

A CRTC proceeding to review the ownership and control of Public Mobile itself is ongoing. In a December, 2009 letter, the CRTC determined that this would be a “Type 2” review resulting in a public decision. Although Public Mobile’s ownership structure was complex and could hold precedential value, the evidentiary record in that case would not be improved by third-party submissions and a public hearing.

New Media

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

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

**Airlines**

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

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

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

**Fishing**

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

**Utilities**

Utilities are regulated by provincial crown corporations and governmental ministries.

**Liquor and Alcohol**

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

**Transport**

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

**Warehousing**

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

Each of each of Ontario, Alberta and British Columbia has enacted payday loan legislation. Under the Ontario Payday Loans Act, 2008 (the “OPLA”), a “payday loan” is one made in exchange for a post-dated cheque, pre-authorized account debit or like future payment arrangement where any of the borrower, the lender or the loan broker is located in Ontario. A threshold of 10% applies for ownership disclosure and regulation under the OPLA. Under the OPLA, all payday lenders must seek and obtain a licence; where the lender is a corporation, at least one of its directors or officers must be resident in Ontario.

Québec passed the Money-Services Businesses Act (“MSBA”) in December 2010 to combat money laundering. The MSBA will come into force on proclamation. The MSBA will govern each of the following businesses where services are offered in Québec, whether or not the business has a location in the province: currency exchanges, funds transfer, issuers and redeemers of travellers cheques and money orders, cheque cashers or bank drafts and operators of ATMs. There is overlap between the MSBA and the federal Proceeds of Crime (Money Laundering) and Terrorist Financing Act and the subject businesses will have to comply with the reporting and other obligations imposed by both Acts. The MSBA does not apply to banks, co-operatives and other entities governed by legislation specific to them. As a condition of licensing, businesses may be required to post performance security. There will be a six-month transition period following proclamation to permit businesses to apply for a licence under the MSBA (see Usury Law on page 9.4).

Real Estate Agents and Mortgage Brokers

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

Brokers and agents would be restricted to acting on behalf of one brokerage. Agents would only deal or trade in mortgages under the supervision of a mortgage broker. Each brokerage must appoint a principal broker to perform prescribed duties. The principal broker would act as a compliance officer. There are few exceptions to the registration requirements and penalties for breach of the MBLA Act include fines up to $200,000. Exceptions for brokers who are larger financial institutions may be too narrowly cast and there may be some traditional sources of mortgage loans that are neither exempt nor registered.

The MBLA Act includes a requirement that for an individual to be registered as a broker or agent under the MBLA, the person must be a resident of Canada.
Settlement Agreement Relating to Access Restrictions Imposed by Real Estate Brokers on Multiple Listing Data Collected and Maintained under the MBLA

On October 24, 2010, the Canadian Real Estate Association ("CREA") and the Commissioner reached a settlement in the abuse of dominance proceedings pending before the Competition Tribunal. The fact that a settlement was reached seems to confirm the Commissioner’s preference for negotiated settlements — even in cases where contested proceedings have been initiated.

By way of background, the application launched by the Commissioner in February, 2010 alleged that CREA and its members had abused their control of the Multiple Listing Service ("MLS") (the MLS is the pre-eminent Canadian on-line vehicle for posting real estate listings) trademarks in a manner that substantially lessened or prevented competition in the Canadian market for the supply of residential real estate brokerage services. Among the anti-competitive acts alleged by the Commissioner was CREA’s imposition of minimum service requirements that prohibited real estate brokerages from offering alternatives to the traditional full-service model — a prime example being the prohibition on simply listing a seller’s property on the MLS for a flat fee.

The settlement agreement attempts to address the Commissioner’s concerns by prohibiting CREA from enacting rules or otherwise discriminating against members who want to provide sellers with non-traditional real estate services. It also requires CREA to monitor the conduct of its member real estate boards and, if necessary, take steps (including revoking access to the MLS) to ensure that they comply with the settlement.

The consent agreement has a term of ten years. This case illustrates the Commissioner’s concerns regarding the manner in which trade associations regulate the conduct of their members and use their facilities to limit competition between their members in downstream markets. The message to take away from the CREA case is that trade associations must exercise caution in imposing rules that impact the manner in which their members compete. When enacting rules that may impact competition between members, there must be a legitimate business objective at the association level (a potential example would be reasonable advertising guidelines designed to protect consumers). The challenge is that trade associations are often governed by their members, whose primary commercial interest lie in the downstream business. As a result, it is often difficult for the directors of trade associations to distinguish between rules that are necessary or appropriate to advance the goals of the association and those rules that are intended to advance the interests of individual members.

Motor Vehicles

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

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

Travel Agents
The travel industry is regulated provincially.
7. CANADIAN INTELLECTUAL PROPERTY REGIME

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

Trade-marks

The Federal Trade-marks Act (the “TMA”) was brought into force in 1954 and has remained in substantially the same form since that time although amendments have been made from time to time. The TMA provides for a national public registry system that shows proscribed information for each registered trade-mark. The TMA facilities the protection of trade-marks by granting exclusive rights to owners and providing for public notice of those rights. The use of a mark in Canada or in a country that is a member of the Paris Convention or a member of the WTO creates rights under the TMA. A non-Canadian trade-mark owner may file an application for a mark on the basis registration and use in the owner’s “country of origin.” The TMA provides that the term “country of origin” means a country of the union in which the applicant had at the date of the application a real and effective industrial or commercial establishment, was his or her domicile or was a citizen or national of that country.

Priority rights are also available. The priority date for applications based on a mark registered and used abroad is the date of the filing of the application in Canada or, if specific requirements including requirements relating to timely filing are satisfied, the filing date abroad. In Canada, in order to be eligible to obtain a trade-mark registration, the applied-for-mark must comply with the provisions of the TMA relating to registrable trade-marks. The TMA lists a number of matters which may preclude obtaining a registration. The application of these matters can be avoided in part for a mark registered and used abroad.

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

Common Law Rights

The Canadian trade-mark registration system co-exists with common law trade-mark rights. Common law rights are typically acquired through actual use of a common law mark in Canada in association with wares or services. These rights are not directly affected by any international obligations. In the case of a well known mark it may be not necessary for a person to actually use the mark in Canada in order to have goodwill or a reputation that can be protected. As a common law trade-mark becomes known and goodwill is associated with it, the owner of the common mark will be able to assert claims against others who use confusing trade-marks in the specific region or area where the common law trade-mark owner has built up goodwill. This type of claim is referred to as “passing off.”
Trade-Marks

The TMA provides that a trade-mark is: (a) a mark that is used by a person for the purposes of distinguishing or so as to distinguish wares or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others; (b) a certification mark; (c) a distinguishing guise; or (d) a proposed trade-mark. The key feature to the definition of a “trade-mark” is that a trade-mark distinguishes the wares or services of its owner from those of others.

Distinctiveness

“Distinctive” in relation to a trade-mark, means a trade-mark that actually distinguishes the wares or services in association with which it is used by its owner from the wares or services of others or is adapted so as to distinguish them. The definition applies to trade-marks which are used as well as to trade-marks which are proposed to be used. In latter case the mark must be adapted to distinguish the wares or services in issue, because the trade-mark is inherently distinctive. Distinctiveness is the essence and cardinal requirement of a trade-mark. The Registrar of Trade-marks may not directly refuse an application to register a mark on the basis of lack of distinctiveness but an application may be opposed on the ground that the applied-for mark is not distinctive. The registration of trade-mark may be found to be invalid if the trade-mark is not distinctive at the time the proceedings bringing the validity of the registration into question are commenced.

Distinguishing Guise

A “distinguishing guise” means a shaping of the wares or their containers or a mode of wrapping or packaging wares, the appearance of which is used by a person for the purpose of distinguishing wares manufactured, sold, leased, or hired by it from those manufactured, sold, leased, hired or performed by others. A distinguishing guise is registrable only if: (a) it has been used in Canada by the applicant or predecessor in title as to have become distinctive at the date of filing of an application for its registration; and (b) the exclusive use by the applicant of the distinguishing guise in association with the wares or services with which it has been used is not likely to unreasonably limit the development of an art or an industry. No registration of a distinguishing guise interferes with the use of any Unitarian feature embodied in the distinguishing guise. The registration of the distinguishing guise may be limited to a defined area of Canada. The registration of a distinguishing guise may be expunged by the Federal Court on the application of any interested person if the Court concludes that the registration has become likely to unreasonably limit the development of any art or industry in Canada.

Prohibited Marks

The adoption, which includes use and application for registration, of a variety of regal, governmental or public words, crests, symbols, marks or other devices is prohibited. Subsection 9(1) of the TMA provides that no person shall adopt in connection with a business, as a trade-mark or otherwise, any mark consisting of, or so nearly resembling as to be likely to be mistaken for, a prohibited mark.
Prohibited Designations

Section 10 of the TMA states that where a mark has by ordinary and bona fide commercial usage become recognized in Canada as designating the kind, quality, quantity, destination, value, place of origin or date of production of any wares or services, no person shall adopt it as a trademark in association with such wares or services or others of the same general class or use it in a way likely to mislead. In addition, no one may adopt or so use any mark so nearly resembling that mark as to be likely to be mistaken for it. Where a denomination must under the Plant Breeders’ Rights Act (Canada), be used to designate a plant variety, no one may adopt the denomination as a trade-mark in association with that plant variety or another plant variety of the same species or use it in a way likely to mislead. In addition, no one may adopt or use any mark so nearly resembling that denomination as to be likely to be mistaken for it.

Acquisition of Rights

An application for a mark may be filed on the basis of: (a) the use of the trade-mark in Canada; (b) making the trade-mark known in Canada; (c) registration and use in the “country of origin” of the applicant; and (d) proposed use. An application can include multiple grounds as the basis of registration.

Definition of Wares and Services

An application must contain a statement in ordinary commercial terms of the specific wares or services in association with which the trade-mark has been or is proposed to be used. If the wares or services fall into different general categories they should be grouped by category. Canada has not adopted the Arrangement of Nice Concerning the International Classification of Goods and Services which sets out a system for the classification of goods and services. There are no separate fees since there are no applicable “classes” of wares. The Canadian Intellectual Property Office has developed a Wares and Services Manual to serve as a guide for specifying wares and services in trade-mark applications. The manual contains a representative listing of acceptable wares and services, as well as directions for making “insufficiently specific” wares and services acceptable.

Registration and Use Abroad

A non-Canadian trade-mark owner may file an application for a mark on the basis of registration and use in the owner’s “country of origin.” The particulars of the registration and use in the country of origin must be set out in the application. Before such an application will be approved for advertisement a certified copy of the registration must be filed. In order to obtain a registration it is not necessary to show use in Canada of the applied for mark, but any registration may be subject to attack if use does not occur. It is important to be aware the registration in the country of origin must be accompanied by use in that country. While the Registrar does not require proof of use the application may be opposed on the grounds that use did not occur.

The applicant can take advantage of section 14 of the TMA. Compliance with section 14 avoids the requirements set out in section 12 relating to registrability. Section 14 provides that notwithstanding section 12, a trade-mark that the applicant or applicant’s predecessor in title has caused to be duly registered in or for the country of origin of the applicant is registrable if, in Canada: (a) it is not without distinctive character, having regard to all the circumstances of the
case, including the length of time during which it has been used in any country; or (b) it is not contrary to morality or public order or of such a nature as to deceive the public.

Section 14 is only available to an applicant with a country of origin that is a country of the Union and in relation to a trade-mark that the applicant or applicant’s predecessor in title has caused to be duly registered. Section 14 does not apply to trade-marks that have been used but not registered in the country of origin. An applicant who is entitled to claim the benefit of section 14 may do so at any time during the application process but the registration relied upon must exist at least until the Canadian registration is granted.

Use or Proposed Use

In Canada, a trade-mark is deemed to be adopted when a person or his or her predecessor in title commenced to use the trade-mark. An application for a mark may be filed on the basis of use of the trade-mark in Canada. The requirements of the TMA relating to use must be satisfied. If the trade-mark has not previously been used by the applicant or their predecessor in title, the mark is deemed to be adopted on the filing of an application for registration of a trademark in Canada. A “proposed trade-mark” means a mark that is proposed to be used by a person for the purpose of distinguishing or so as to distinguish wares or services manufactured, sold, leased, hired or performed by that person from those manufactured, sold, leased, hired or performed by others. No application may be amended to change the application from one not alleging use of the trade-mark in Canada before the filing of the application to one alleging such use.

Priority Filing Date

If an applicant applies to register the same or substantially the same trade-mark in Canada for use in association with the same kind of wares or services, within six months from the date of first filing in a Country of the Union then the date of filing in that country becomes the effective Canadian filing date.

Official Marks

The term “official mark” describes marks adopted and used by a public authority, in Canada, under paragraph 9(1)(n)(iii) of the TMA, as a mark for wares or services. There are a large number of these marks and many of the marks are of a commercial nature. In certain cases their existence can cause significant problems for which there may be no redress. A request for an official mark may only be filed by a “public authority.” Subsection 9(1) of the TMA provides that no person shall adopt in connection with a business, as a trade-mark or otherwise, any mark consisting of, or so nearly resembling as to be likely to be mistaken for, a mark adopted by a public authority in respect of which the Registrar has given public notice. The public notice of the adoption and use of an official mark does not operate retroactively to prohibit the use of an existing mark. A trade-mark owner can continue to use a trade-mark adopted or registered before the publication of a similar official mark with impunity. However, public notice of the adoption and use of an official mark will preclude the expansion of an existing registration to additional wares or services or the registration of any pending application which was not registered at the time of the publication of the official mark even if previously adopted, used and applied for.
French Language Considerations

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

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

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

Assignments

Subsection 48(1) of the TMA provides that a trade-mark, whether registered or unregistered, is transferable, and deemed always to have been transferable, either in connection with or separately from the goodwill of the business, and in respect of either all or some of the wares or services in association with which it has been used. The subsection applies to both registered and unregistered trade-marks. Once a mark is assigned, the new owner must take the necessary steps to cause the mark to actually distinguish its wares or services from the wares or services of others, including those of the assignor. If the mark does not become distinctive of the new owner, the validity of the registration may be attacked on the ground that it is not distinctive. The function and the purpose of a trade-mark is to indicate the source of the goods, and by definition, it must be and remain distinctive of a single source.

Licenses

Section 50 provides that, for the purposes of the TMA, if an entity is licensed by or with the authority of the owner of a trade-mark to use the trade-mark in a country and the owner has, under the licence, direct or indirect control of the character or quality of the wares or services, then the use, advertisement or display of the trade-mark in that country as or in a trade-mark, trade name or otherwise by that entity has, and is deemed always to have had, the same effect as such a use, advertisement or display of the trade-mark in that country by the owner. The use of the words “in a country” allow an applicant for a trade-mark, based on registration and use abroad to rely on use by a licensee abroad. Even though a related company controls another company by virtue of its share holdings, as in a parent and wholly owned subsidiary relationship, such control is not sufficient to comply with section 50. In cases involving such a relationship there must be evidence of facts from which it can be concluded that a licensing arrangement existed and that the trademark owner had
direct or indirect control of the character or quality of the licensed wares or services provided pursuant to that licensing arrangement. For the purposes of the TMA, to the extent that public notice is given of the fact that the use of a trade-mark is a licensed use and of the identity of the owner, it will be presumed, unless the contrary is proven, that the use is licensed by the owner of the trade-mark and the character or quality of the wares or services is under the control of the owner. This presumption may be rebutted if evidence to the contrary is presented.

### Opposition Practice

An opposition may be based on any of the following grounds:

a) The application does not conform to the requirements of section 30 which specifies what must be contained in an application. This includes grounds such as:
   - The applicant did not describe the wares or services in ordinary commercial terms;
   - The applicant did not use the mark from the date set out in the application;
   - The applicant did not use the mark in its country of origin when the application is based on registration and use abroad;
   - The applicant was not satisfied it was entitled to use the mark;
   - The applicant used the mark prior to filing an application for the mark on the basis of proposed use; and
   - The applicant failed to refer to a predecessor in title who used the mark or a licensee;

b) The trade-mark is not registrable;

c) The applicant is not the person entitled to registration; and

d) The trade-mark is not distinctive.

The owner of a trade-mark registered abroad who cannot satisfy the difficult requirements of showing its mark has been made known in Canada may oppose an application on the basis of non distinctiveness. But in order to succeed with such a ground of opposition it must be shown that at the date of filing the statement of opposition, the mark is known to some extent in Canada and the reputation of the mark in Canada is substantial, significant or sufficiently known so as to negate the distinctiveness of the applied for mark. Both the opponent and the applicant are given an opportunity, in the manner prescribed, to submit evidence by way of affidavit or statutory declaration or certified copies of documents or entries relating to the register.

At any time before notice requiring filing of argument, the Registrar may, on the application of any party and on such terms as may be directed, order the cross examination under oath of any affiant or declarant on their affidavit or declaration. If an affiant or declarant fails to attend for cross examination, the affidavit or declaration shall not be part of the evidence. Where the affiant or declarant resides outside of Canada and the parties are unable to come to an agreement concerning cross-examination in that individual’s country, the individual will be made available for cross-examination in Canada and the party on whose behalf the individual is being cross-examined will bear the cost of all expenses.

### Section 45 Proceedings

The purpose of section 45 of the TMA is to provide a summary procedure for trimming the register of “dead wood”. Frequently proceedings under the section will be instituted by third parties who
are prevented from obtaining a registration for a desired mark by a registration which is perceived not to be in use. Section 45 provides that the Registrar, at any time and at the written request made after three years from the date of the registration of a trade-mark by any person who pays the prescribed fee, shall, unless the Registrar sees good reason to the contrary, give notice to the registered owner of the trade-mark requiring the registered owner to furnish within three months an affidavit or statutory declaration showing with respect to each of the wares or services specified in the registration, whether the trade-mark was in use in Canada at any time during the three year period immediately proceeding the date of the notice and, if not, the date when it was last so in use and the reason for the absence of such use since such date. The Registrar should not attempt to resolve any question other than whether the registration is in use. The procedure under the section is not intended to create or rescind substantive rights.

Actions for Infringement and Passing Off

Both the Federal Court and any court of competent jurisdiction of a province have jurisdiction to hear and determine an action for the infringement of a trade-mark. The rights associated with a registered trade-mark are territorial and a Canadian court does not have jurisdiction concerning infringement that takes place wholly abroad. A claim for passing off is also territorial in nature since it is restricted to the area in which the plaintiff can establish the existence of goodwill. Actions for passing off at common law may only be brought in courts of competent jurisdiction of the provinces. The Federal Court has no statutory jurisdiction to hear an action for passing off unless the claim is interconnected with a claim over which the court has jurisdiction. Actions claiming relief under subsection 7(a) or (b) of the TMA, the statutory codification of passing off, may be brought in the Federal Court or in courts of competent jurisdiction in the provinces. The applicable rules of practice of Canadian Courts provide that if the plaintiff is ordinarily resident outside of Canada the court may order that security for the defendant’s costs be provided. The amount of the security can be significant.

Copyright

Since January 1, 1924, Canada and the US have provided each other copyright protection under their national legislation. Unlike the US, however, Canada has never required that works be registered for them to be protected under the federal Copyright Act; works are automatically protected on their creation. The foregoing is the first of the two principal differences between Canadian and American intellectual property laws. This policy is a result of Canada’s adherence to the Berne Convention for the Protection of Literary and Artistic Works (Since 1989, the US has also adhered to this convention). The foregoing is the second of the two principal differences between Canadian and American intellectual property laws. As a result, works created in the US, that are in the public domain due to the owner’s failure either to register or to renew the copyright when it expired, are often still fully protected in Canada for the term of copyright in Canada without being registered.

Obtaining copyright in Canada does not depend on registration or any other formal act. It is a proprietary right that arises from authorship alone. Copyright subsists in Canada in original literary or artistic works subject to certain requirements relating to the author’s citizenship or residency. While copyright may be registered, if desired, the registration is simply a certificate of ownership affording an easy method of proof of authorship and copyright, should this be required.
The requirement of originality means that the work must not be copied and must originate from the author in the sense that it is the result of some degree of skill, judgment, industry, ingenuity or mental effort employed by the author of the work.

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

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

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

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

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

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

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

If the agency owns the copyright in the advertisement, they have the sole right to reproduce the advertisement, subject to any contractual rights that the company may have concerning ownership of the copyright or the right to exercise the rights associated with the copyright in the future.
Claims for copyright protection and protection under the TMA may co-exist. For example, a trademark that contains artistic or design features may also be protected under copyright if it is sufficiently original.

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

**Patents**

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

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

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

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

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

A Federal Court ruling that higher life forms such as the Harvard Mouse are patentable under the Patent Act was appealed to the Supreme Court of Canada and the Court ruled in 2002 that higher life forms are not patentable in Canada.
In a decision released on May 21, 2004, although Monsanto Canada did not obtain a compensation order from a farmer who collected and used its genetically altered Roundup Ready canola seed, a majority of the Court held that infringement of a patent occurs where a person, for commercial purposes, uses a plant that contains patented genetic material. In effect, you do not need to patent the entire plant or animal; all you need is a patent for a gene or a cell in the plant or animal.

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

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

**Industrial Designs**

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

An industrial design registration is valid for a fixed term of 10 years, subject to paying a maintenance fee which is due on the fifth anniversary of the design’s registration date. An industrial design cannot be renewed. An application to register the design must be filed within one year after the first public disclosure of the design.

**Trade Secrets**

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

**Domain Names**

A domain name is an identification label that identifies protocol resources on the Internet. The Internet Corporation for Assigned Names and Numbers (“ICANN”) manages the top-level development and architecture of the Internet domain name space. It authorizes domain name registrars, through which domain names may be registered and reassigned.

It appears that ICANN’s proposal to make an unlimited number of new top-level domain names (“gTLDs”) available may soon become a reality. A top-level domain name is the part of a domain name to the right of the dot, for example, .com or .org. When ICANN was created in 1998, the gTLD domain space was limited to eight generics. In 2000 and 2004 a limited number of additional gTLDs were introduced to expand the number to 22 gTLDs. In October 2007, the Generic Names Supporting Organization, one of the groups that coordinate global Internet policy at ICANN, developed a policy concerning new gTLDs. Stakeholder groups were engaged in discussions for more than 18 months on the issues relating to implementation.
At its June 2008 meeting ICANN voted unanimously to modify the domain name system to permit an unlimited number of new gTDLs. Under the proposal anyone may apply for and, subject to ICANN approval, administer the new gTLD. Applicants can select a domain name that is most appropriate for their customers or potentially the most marketable. It seems likely that this will result in a multitude of new gTLDs.

ICANN says that the new gTLDs will create more choice for Internet users, empower innovation, stimulate economic activity and generate new business opportunities around the world. Brand owners’ views are more critical since they will be obliged to obtain registrations for defensive purposes and incur expenses relating to monitoring a significantly increased number of potential abuses. In response to brand owners’ concerns ICANN set up an Implementation Recommendation Team (“IRT”) to develop solutions. The IRT issued a report.

On November 12, 2010 ICANN posted a Proposed Final Applicant Guidebook (“DAG4”) which took into account the IRT report as well as the comments of hundreds of interested stakeholders. There was a flurry of objections by brand owners and others over the process and the substance of the new gTLD program. ICANN’s actions were criticized as a drive toward conclusion without meaningful dialogue, without a thorough and reasoned explanation of decisions taken and for failing to adequately resolve key overarching issues. The Government Advisory Committee (“GAC”), which is made up of representatives of more than 100 governments and is intended to give governments from around the world a voice in ICANN’s multi-stakeholder community, made it clear to the ICANN Board that it had concerns and some issues needed resolution before the launch of new gTLDs.

In response, ICANN’s board of directors organized an extended meeting with the GAC in Brussels in February 2011, to resolve the remaining concerns of GAC’s members. At its public meeting in San Francisco on March 13, 2011, ICANN announced a new working timeline for the completion of the process and the launch of the new gTLDs. As things now stand, ICANN’s final decision will be announced at its Singapore meeting in June 2011.

In broad terms, brand owners should now start the process of securing their new gTLD or find a way to deal with third party applications for new gTLDs. Many parties are said to be interested in securing new gTLDs such as .brand, .car, .health and so on. One source has suggested at least 115 proposals would be presented this year. However, the costs are high. The ICANN evaluation fee is US$185,000 which must be paid before the process begins. However, these fees are just the tip of the iceberg and the real costs may be in the millions.

An alternative strategy would be to monitor the actions of third parties as they seek to obtain new gTLDs. ICANN will post all applications considered complete and ready for evaluation as soon as practicable after the close of the application submission period. An objection may be based on any one of four grounds including a “Legal Rights Objection,” asserting that the applied-for gTLD string infringes the existing legal rights of the objector.

Where formal objections are filed and filing fees paid during the objection filing period, a dispute resolution process applies. An independent dispute resolution service provider will initiate and conclude proceedings based on the objections received. In addition, defensive registrations at the second level may also be possible. For example, if the .car gTLD was obtained, it may be possible to secure edsel.car or the like. A brand owner’s rights are protected to a degree since the registry
operator of the new gTLD must implement, at a minimum, either a sunrise period or a trademark claims service during the start-up phases for registration in the gTLD. These mechanisms are to be supported by the establishment of a “Trade-mark Clearinghouse” which is intended to provide a listing of valid trade-marks. The sunrise period allows eligible rights holders an early opportunity to register names in the gTLD.

To the extent that these procedures do not work, a separate dispute resolution known as the Uniform Rapid Suspension (“URS”) system is available to brand owners. The proposal for the URS resulted from the perceived need for a rapid take-down process for egregious and clear-cut infringing domains that would supplement the existing Uniform Domain Name Dispute Resolution Procedure (“UDRP”). Unfortunately the URS only provides for suspension as a remedy and resort must be made to the UDRP to obtain cancellation or transfer of the impugned domain name.

**Other Intellectual Property Rights**

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

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

To What Extent are Transactional Letters of Intent Enforceable?

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

The Facts

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

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

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

The Enforceability of Letters of Intent

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

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

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

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

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

Avoiding a Binding Commitment

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

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

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

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

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

The risk of non-compliance with the BSA is that any trade creditor who is not paid in full at closing may apply to the court for an order declaring the sale of assets void — obviously a remedy to avoid in all circumstances. There is recent case law to the effect that the remedy that is available to any such creditor is an accounting from the seller regarding its use and application of the proceeds from the sale, not an order declaring the transaction void. In a second recent case, where a creditor had a perfected security interest, the court declared a sale in bulk of charged inventory void. So, the BSA is not without teeth in the right circumstances.

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

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

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

How Can You Finance Your Canadian Operations?

Commercial Bank Credit Facilities

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

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

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

Personal Property Security

Under the PPSAs of the common law provinces, it is possible for a debtor to grant a security interest (a charge) to a third party charging any form of personal property (including not only lease financing arrangements, but also true leases of goods with terms that exceed one year) in which the debtor has an interest to secure the debtor’s obligations to such secured party under a security agreement (usual circumstance) or to secure the obligations of another person where the debtor, for example, as a party pledging collateral as security does not assume any obligation under such other person’s agreement with the secured party. The PPSA is based, in part, on Article 9 of the US Uniform Commercial Code. Filings in the public register maintained by each common law province are done by remote electronic access. To register by remote electronic access, the party doing the registration must have a trust account with the government and specialized computer software. The register can be accessed outside normal business hours and registrations are immediate. This
personal property security regime is a highly efficient means of registering security interest in personal property. The PPSA system is well-understood and reliable.

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

Generally, priorities are determined by order of “perfection” of the security interest. For collateral other than financial assets, perfection is usually achieved by registration of a financing statement in the appropriate PPSA public register. However, there are at least 30 other provisions of the PPSA which trump the order of PPSA registration. None of those rules which is designed to prevent the potential tyranny of the first secured party to register against a debtor, the PPSA permits a debtor to grant a purchase money security interest (a “PMSI”), in the nature of vendor take-back financing or third party equipment lease purchase financing, in favour of a secured lender who restricts the charge of the PMSI to the goods so financed and traceable proceeds derived from such goods.

In 1997, Ontario had amended its PPSA to facilitate the enactment of the STA. One of the amendments then made was done so in error and in mid-2010, Ontario amended its PPSA to reinstate the deleted language on a retroactive basis to August 1, 2007. The amendment provided that when a class of collateral is claimed in a registration and words are inserted in the registration to describe the collateral, then the collateral is limited to what is described in those words. This amendment eliminates the requirement to seek and obtain estoppel certificates from secured creditors with competing PPSA registrations against a debtor.

In addition, to bring the Ontario PPSA into conformity with other PPSA jurisdictions:

- All leases of collateral to which the PPSA applies for a term of more than one year are deemed to create security interests for the purpose of the PPSA;
- The period of time to perfect a PMSI in equipment was extended from 10 days after the debtor or its agent obtained possession of the equipment to 15 days;
- The sale-and-lease-back transactions were excluded from the definition of PMSI. This change was made on the basis that the special priority rights which favour PMSIs were intended to provide additional opportunities for debtors to obtain third party financing, and a sale-and-lease-back transaction did not meet this test;
- For purposes of obtaining a PMSI in inventory, the notice requirement was changed to include notice to existing persons with PPSA registrations in either inventory, in accounts or in both collateral categories; and
- A new provision was added to permit a debtor to demand that a secured party who has claimed more collateral in its registration than is covered by the security agreement, amend its registration to one that is restricted to the collateral charged by the security agreement, or, where the registration has no limiting description, that the registration be amended to add one that properly describes the charged collateral.

Personal Property Security in Québec

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

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

Note that in Québec, the legal status of the person granting the hypothec is important. Individuals who are not operating as a business enterprise are prohibited from charging all of their moveable property (referred to as their “universality”). In addition, there are special rules regarding hypothecs granted by general partnerships. If the loan arrangement is syndicated among a number of lenders, then the security must be structured using an agent or fondé de pouvoir (Article 2962 of the CCQ), which structure should be more fully discussed with Québec counsel in the context of any particular transaction. One of the requirements of this structure is that the hypothec must be notarized en minute, meaning that a Québec notary (i.e., not a notary public) will have to witness signatures of each of the parties to the hypothec and enter a record of the hypothec into his/her minutes. The foregoing may result in an increase transaction fees.

Security in Aircraft Equipment

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

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

Bank Act Security
Another financing alternative in Canada, set out in sections 426 and 427 of the Bank Act, is that 
certain borrowers (such as farmers and manufacturers) can create and grant special security in their 
inventory in favour of Canadian chartered banks. Bank Act security is only available to banks, does 
not permit remote electronic registrations and it has a number of arcane provisions. In light of the 
foregoing, commercial banks will usual require security under the PPSA and, where appropriate, 
they will also take security under the Bank Act.

In a 2011 Supreme Court of Canada case, the Court determined that a unperfected security interest 
set out in a security agreement which predated the date on which a bank took Bank Act security 
had priority over properly registered Bank Act security and the basis that there was no priority rule 
in the Bank Act and the common law rule is that a debtor cannot grant an interest in personal 
property not held by it at the time in question. In this case, the debtor had granted an interest in the 
personal property in favour of another person and the debtor could not then grant a like interest in 
such property to the bank, even where the Bank Act security was registered under the Bank Act. 
There is general support in Canada among legal commentators and others for the repeal of the 
security granting sections 426 and 427 of the Bank Act.

Usury Law
Currently, section 347 of the Criminal Code (Canada) provides that it is a criminal offence to 
charge interest in excess of 60% per annum. The federal government has indicated that it intends to 
eliminate any limit for commercial transactions and to fix the limit for consumer transactions at the 
prime rate of interest plus 35%. To address the consumer protection aspect of interest charges, the 
federal government, in effect, is stepping back from regulating payday lenders, and each of 
Ontario, Alberta and British Columbia has enacted payday loan legislation. Maximum cost of 
calculated on the principal amount of the loan to the borrower varies by province: Ontario at $21 
per $100; Alberta is $23 per $100 and British Columbia is $23 per $100.

Under the OPLA, a “payday loan” is one made in exchange for a post-dated cheque, pre-authorized 
account debit or like future payment arrangement where any of the borrower, the lender or the loan
A broker is located in Ontario. A 10% threshold of 10% applies for ownership disclosure and regulation under the OPLA. Under the OPLA, all payday lenders must seek and obtain a licence; where the lender is a corporation, at least one of its directors or officers must be resident in Ontario. No fees may be charged for assisting a borrower in obtaining a payday loan and payments under the loan may only be made to the lender. The advance must be made on the day on which the payday loan agreement is signed. All payday loan agreements must be in writing, contain prescribed information and the borrower must receive a copy. No cost of borrowing charges are payable before the end of the term of the payday loan. The cost of borrowing must be disclosed and all charges (apart from reasonable costs incurred following default) are included in the cost of borrowing. Cost of borrowing limits (currently $21 per $100 borrowed) are prescribed for payday loans for $1,500 or less or where the term of the loan is for 62 days or less. Advertising standards are imposed. Default charges are limited to reasonable costs incurred by the lender. All payday loans are repayable by the borrower without notice or bonus. There are restrictions on a lender extending the term of any payday loan. The lender cannot obligate the borrower as a condition of the loan to transact in respect of any other good or service. Wage assignments as security are prohibited. The Director appointed under the OPLA has powers of inspection, search and seizure, freeze orders, to power to make orders affecting both licensees and others. Fines may become a general lien on the personal property of the person obligated to pay the fine by a filing by the Director under the OPLA registering a financing statement under the Ontario PPSA.

Effective March 1, 2011, the provisions of the OPLA regarding the Ontario Payday Lending Education Fund came into effect. The Fund is to be used to promote the education of persons respecting the rights and obligations of persons and entities under this Act and respecting financial planning.

For the purpose of section 347 of the Criminal Code, all fees and other charges are included within the definition of “interest,” other than, as summarized below, in the case of late payment fees which can reasonably be categorized as recovery of administration expenses arising from the late payment. This is of particular importance to our US clients where charging administration fees is common practice, or to our clients who bill for their services on a monthly basis and charge an administration fee for late payment. In a recent case, a client of Bell ExpressVu Inc. (a provider of satellite television) was billed on a monthly basis for services in advance. Payment was due 25 days following the date of the invoice. Interest was charged on an unpaid account five days after the payment was due. In addition, an administration fee was levied in the event that an account remained unpaid for 60 days, (being 35 days after the due date). Should the payment remain outstanding, services were “soft” disconnected on day 75, and at day 105, the services were deactivated and a deactivation fee of $50 was levied.

In this class action, the representative customer argued that the fee constituted interest and was, therefore, in contravention of Section 347. Bell argued that the fee constituted a genuine pre-estimate of the costs associated with collection and management of an overdue account. The court at first instance held that the fee constituted interest and was, therefore, in contravention of Section 347 and accordingly was unenforceable. On appeal, the Ontario Court of Appeal accepted the evidence of Bell regarding its average collection and administrative costs on overdue accounts and the court overturned the class certification. If administrative fees on overdue accounts are charged, the fee must be based on the increased administrative costs incurred by the service-provider.
The federal *Interest Act* prohibits the charging of interest at a higher rate after default or maturity than before, but only for obligations which are secured by a charge on real property.

**Security on Land in Ontario**

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

**Security on Land in Québec**

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

**Security on Petroleum and Natural Gas Rights in Alberta**

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

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

Guarantees

Each Canadian province has a Statute of Frauds which requires that agreements in the nature of guarantees must be in writing and signed by the guarantor, but only Alberta has the Alberta Guarantees Acknowledgement Act, no written agreement by any person other than a corporation (apart from a bill of exchange, cheque or promissory note, a partnership agreement, a bond given pursuant to a statute, the guarantee given on the sale of an interest in land or chattels) has any effect unless the person entering into the agreement (a) appears before a notary public; (b) acknowledges to the notary public that the person executed the guarantee; and (c) in the presence of the notary public signs a statement in the prescribed form.

Exempt Distributions in Ontario

Chapter 11: Regulation of Trading in Securities of this book sets out information on the sale of securities in Canada. As discussed in that chapter, Ontario’s Securities Act (the “OSA”) provides for a closed system relating to the distribution of securities in Ontario. Under the closed system, securities initially issued relying on a distribution exemption can only be resold: (i) in accordance with a further distribution exemption; (ii) following the satisfaction of certain resale requirements; (iii) if discretionary relief from these resale requirements is granted; or (iv) where the securities are qualified by a prospectus.

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

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

Private Issuer Exemption

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

A private issuer is defined as an issuer:
That is not a reporting issuer (that is, an issuer that has not made a distribution of securities to the public) and is not an investment fund; and

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

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

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

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

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

**Accredited Investor Exemption**

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

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

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

Post-closing filings with the applicable provincial securities commissions have to be made by the issuer within 10 days of a trade made in reliance on this exemption.
$150,000 Exemption

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

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

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

Offering Memorandum Exemption

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

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

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

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

NI 45-106 does not affect provisions of securities laws that provide for rights of rescission or damages in the event that an offering memorandum contains a misrepresentation, regardless of the form of the offering memorandum.
Post-closing filings with the applicable provincial securities commissions have to be made by the issuer within 10 days of a trade made in reliance on this exemption.

**Family, Friends, Business Associates and Founders**

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

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

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

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

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

**Employees, Executive Officers, Directors and Consultants**

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

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

**Transaction Exemptions**

The prospectus and registration requirements do not apply to any distribution conducted in connection with: (i) an amalgamation, merger, reorganization or arrangement under a statutory procedure; or (ii) the dissolution or winding-up of an issuer (the “business combination and reorganization exemption”). Trades may also be completed on an exempt basis in connection with amalgamations, mergers, reorganizations or arrangements that are: (i) described in an information circular that complies with National Instrument 51-102 — Continuous Disclosure Obligations or a similar disclosure document that is delivered to each security holder whose approval is required; and (ii) approved by the securityholders.
NI 45-106 exempts any issue of securities pursuant to three-cornered amalgamations, as the business combination and reorganization exemption applies to a distribution made in connection with an amalgamation or merger done under a statutory procedure. Also, according to the companion policy, the business combination and reorganization exemption is available for all distributions of securities that are necessary to complete an exchangeable share transaction, even where such trades occur several months or years after the transaction.

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

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

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

Resale

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

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

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

Capital Pool Companies

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

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

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

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

**Special Purpose Acquisition Corporation (“SPAC”)**

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

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

Unlike a traditional initial public offering (“IPO”), the SPAC program enables seasoned directors and officers to form a corporation that contains no commercial operations or assets other than cash. The SPAC is then listed on Toronto Stock Exchange via an IPO, raising a minimum of $30 million, 90% of the funds raised in the IPO are then placed in escrow, to be used toward a future acquisition.

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

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

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

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

- Export Development Canada provides risk insurance for Canadian exporters (political coverage of up to 90% of the exporter’s losses, including certain loan losses), loans to foreign purchasers of Canadian capital goods, and guarantees to Canadian banks for export loans.
- The terms and conditions for the Technology Partnerships Canada program expired on December 31, 2006. Therefore, no new outlines under this program will be accepted, and no new projects will be contracted.
- The Business Development Bank of Canada (“BDC”) provides high-risk loans to small and medium Canadian businesses. The BDC has entered into arrangements with a number of Canadian
commercial banks pursuant to which BDC conducts an in-depth analysis of the borrower and its needs, shares this information and analysis with the borrower’s primary commercial bank, and assumes a subordinated lending position to that of the primary bank. In this way, BDC supports small or emerging companies, especially in knowledge-based industries.

- Under the Canada Small Business Financing Act, the federal government guarantees repayment of 90% of certain equipment and fixtures loans of up to $500,000 made to small businesses by Canadian chartered banks. Eligible businesses must have annual sales of less than $5 million. Without this there would be significantly fewer restaurants in Canadian cities.

- Human Resources and Skills Development Canada (“HRDC”) operates the Job Creation Partnership, in some cases delegating management to other federal departments. Programs include internships with various federal government departments; targeted wage subsidies under which HRDC will contribute to the wages paid to the employee by an employer who hires an unemployed person then receiving federal employment benefits; and work-sharing arrangements where employers reduce the number of hours of work available to a group of employees so as to avoid layoffs. HRDC pays employment insurance benefits to the employees for the hours of work lost as a result of the work-sharing program.¹

- HRDC has entered into agreements with all provinces and territories to define how the benefits and measures are delivered in each region.² Programs similar to the Employment Benefits and Support Measures are delivered by the provincial or territorial government³ pursuant to agreements under Section 63 of the Employment Insurance Act.

- The National Research Council of Canada manages a research financing program known as the Industrial Research Assistance Program. To be eligible, the applicant company must have fewer than 500 employees. The industrial research assistance program invests on a cost-shared basis for technical advisory services and financial services for medium-sized enterprises.

- Under the Strategic Aerospace and Defence Initiative, qualifying entities may apply for long-term repayable contributions representing up to 30% of a project’s total eligible costs for conducting research and development work with application in the aerospace and defence technology industries.

- Under the federal Scientific Research and Experimental Development Tax Incentive Program (the “SRED”), qualifying companies are entitled to an income tax credit of up to 35% of qualifying research and development expenditures. A recent Organization for Economic Co-operation and Development study comparing 29 countries has categorized this Canadian program as “too generous” because the value of the tax credit is the same regardless of the aggregate amount of funds expended on research and development. Other countries use a graduated approach, increasing the tax credit as aggregate research and development expenditures exceed specified thresholds.

- Under the International Science and Technology Partnerships Canada (“ISTP Canada”) Collaborative Research and Development Program. Under the Program up to 50% of the eligible Canadian costs for the R&D portion of an approved joint research project. Projects should include:

Industry (small and medium enterprise (“SME”)) participation in both country research
teams (Canadian SME participant is mandatory for Canadian funding)

- Canadian Industry participation from both a technology developer company and an end-user
  company, and
- University or College participation.

Eligible research and development costs are incremental direct costs of personnel, research
consumables, some travel and capital costs if the equipment is essential to the project and has
no other uses. Eligible costs include labour, material and other costs which are directly
attributable to the project. Overhead expenses such as indirect labour, materials and supplies,
and general and administrative expenses are also eligible provided these overhead expenses are
not more than 30% of the eligible costs. Specialized equipment for the project may be eligible
as well. Corporate overhead costs and financial charges that cannot be funded by the program
include support costs associated with land and buildings. In projects involving commercial
entities, at least 30% of the total research and development expenditures for a project must be
in either Canada or in the Partner Country. Where universities/colleges and other private sector
research and development institutes are involved, 100% of their R&D expenditures must be in
either Canada or the Partner Country.4

- Under the ecoENERGY Energy Assessment Funding Incentives Program, Natural Resources
  Canada (“NRCan”) will provide a financial incentive of up to 50% of study costs to a
maximum of $50,000 for Process Integration studies and $30,000 for Computational Fluid
Dynamics studies.5

- Under the Filmmaker Assistance Program (“FAP”), the National Film Board (“NFB”) provides
  assistance to independent filmmakers to complete their films/videos by providing technical
  services and support. Applicants must be Canadian citizens or landed immigrants who are
  working on projects that fall within the NFB’s mandate regarding cultural and social
  objectives, originality and innovation in style and content, and promoting under-represented
  viewpoints. FAP is not a funding (cash) program. Assistance is offered in the form of technical
  services, up to a maximum cash value of $3,000 or $5,000 depending on the region in which
  the applicant resides.6

In addition to the foregoing programs, under the federal Business Immigration Program (described
under the heading “Business Applicants” on page 15.4), preference is given to applicants who can
demonstrate they have significant financial means and are willing to make qualified investments in
Canada. Although immigration is a matter within federal jurisdiction, the federal government has
delegated administration of the program to the provinces.

Which Ontario Provincial Programs Provide Financial Assistance to
Business in Ontario?

As previously noted, each province has modest government support programs. However, in Canada
there is no equivalent to programs commonly found in certain US states under which municipal

4 [www.istpcanada.ca/WhoWeAre/FAQ/index.php](http://www.istpcanada.ca/WhoWeAre/FAQ/index.php)
taxes and service charges are abated, for example, to encourage new investment in manufacturing facilities in the state. Municipalities are prohibited by law from offering such tax relief and service rebates. The Ontario government does, however, support local businesses enterprises primarily through special provincial tax incentives and tax credits.

These include:

**Ontario Innovation Tax Credit ("OITC")**

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

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

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

**Co-operative Education Tax Credit**

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

**Ontario Industry-Specific Tax Incentives**

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

- **Job Connect**
  
  Job Connect is an Ontario government program aimed at helping unemployed individuals develop skills, receive training and obtain permanent employment.

- **ATTC**

  Ontario’s apprenticeship training tax credit program provides a refundable tax credit to employers who hire and train apprentices in certain skilled trades of up to $5,000 per qualifying apprentice for up to three years.

- **OBPTC**

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

- **BFTIP**

  Ontario’s Brownfields Financial Tax incentive program provides an opportunity for a municipality to access provincial funds, which are subsequently used to provide tax relief for landowners to clean up eligible contaminated properties.
• **OCIF**
The purpose of Ontario’s commercialization investment funds program is to leverage seed capital for spin-off technology companies created by faculty, staff or students. The maximum grant available to one Ontario commercialization investment fund in respect of a particular eligible business and all businesses related to such an eligible business is $225,000.

• **OCASE**
The Ontario Computer Animation and Special Effects Tax Credit provides a 20% refundable tax credit for eligible labour expenditures incurred by a qualifying corporation with respect to eligible computer animation and special effect activities in film and television productions carried out in Ontario.

• **OFTTC**
Ontario offers a 35% refundable tax credit on eligible labour expenditures incurred by a qualifying production company for film and video productions. There are other increased credit amounts depending on location.

• **Innovation Demonstration Fund**
This fund provides contributions of up to $4 million per project to be applied against up to 50% of eligible costs for approved eligible projects to help commercialize innovative technologies in Ontario.

• **OITC**
Ontario offers a 10% refundable tax credit for corporations that make expenditures on eligible scientific research and experimental development carried on in Ontario to a maximum of $300,000 per taxation year.

• **Interactive Digital Media Tax Credit**
Ontario offers a 40% refundable tax credit claimed by a qualifying corporation for eligible expenditures made for labour, marketing and distribution expenses relating to the creation of interactive digital media products.

• **OPSTC**
Ontario offers a 25% refundable tax credit on qualifying labour expenditures incurred by a qualifying corporation with respect to an eligible film or television production after June 30, 2009. The applicable rate is lower for prior years.

• **Nominee Program**
Ontario’s nominee program allows employers (including multinational corporations investing in Ontario) to recruit and retain internationally trained employees in specified job categories.

• **Ontario Tax Exemption for Commercialization Program**
The program is intended to encourage the commercialization of intellectual property which has been developed by qualifying Canadian universities or colleges. OTEC applies to corporations established between March 24, 2008 and March 25, 2012 that derive all of its income from eligible commercialization, including the development of prototypes and the marketing and manufacturing of products related to the intellectual property carried out in Ontario by providing a refund of corporate income tax and corporate minimum tax paid for the first ten taxation years.

• **OEFT — Ontario Emerging Technologies Fund**
OEFT is a $250 million fund that will commit a maximum of $50-million per year for five years. Investments will be made alongside qualified co-investors into innovative, high-growth companies conducting business in Ontario in clean technologies, life sciences, advanced health technologies, digital media and information and 9.16nstalment9.169.16ions technologies.
• OSRTC — Ontario Sound Recording Tax Credit

OSRTC is a refundable tax credit available to corporations for 20% of eligible expenses incurred by an eligible sound recording company on an eligible sound recording by an emerging Canadian artist or group. Qualification corporations must be Canadian controlled, have carried on sound recording business in Ontario for at least 12 months, earned at least 50% of its taxable income in Ontario in the previous year, marketed at least one sound recording in the last year and bear the financial risks of its business.

• Export Market Access

The program provides per diem travel and living expense allowances for attendance or participation at international trade shows, up to 50% of eligible costs incurred in developing promotional materials for goods and services focused on international markets and up to 50% of eligible costs for procuring bid/tender documents, bid or performance bonds and product testing for foreign markets.

• EODF — Eastern Ontario Development Fund

OEFT is a $80 million fund, part of which is designated for expansion of existing businesses with at least 10 employees — it funds 15% of eligible project expenses to implement new technologies, equipment and skills training for projects valued at $500,000 or more. The second part of the fund is available to economic development offices, business associations and NGOs for qualified economic development projects budgeted at $100,000 or more.

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

Newfoundland and Labrador Industry Specific Incentives

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

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

• Economic Diversification and Growth Enterprise Program (“EDGE”)

The EDGE program offers a 10 year tax holiday to qualifying companies from provincial corporate income tax and payroll tax, followed by a five year phase-in of these taxes. A 10-year tax holiday from property taxes and/or business tax is also offered by municipalities declaring themselves as EDGE participants. The program also offers the lease of unserviced crown land for a nominal fee and the services of a dedicated government facilitator to new or expanding businesses. To be designated as an EDGE corporation, the applicant must show the potential for a minimum capital investment of $300,000, or incremental sales of $500,000 annually. The applicant must have the potential to create and maintain at least 10 permanent jobs in a business consistent with the principle of sustainable development.

• Direct Equity Tax Credit

To encourage private investment in new or expanding small businesses, the Newfoundland government offers a tax credit to individuals or arm’s-length corporations that invest in eligible small business activities. A 35% rate applies outside the North East Avalon and a 20% applies in the North East Avalon.
• **Manufacturing and Processing Tax Credit**
  This credit applies to corporations that carry out manufacturing or processing from a permanent facility in the province.

• **Small Business Tax Credit**
  Small businesses in Newfoundland that qualify for the federal Small Business Deduction are taxed at a reduced rate of 5% on the first $500,000 of active business income.

• **Scientific Research and Experimental Development Tax Credit**
  Eligible expenditures made with respect to scientific research and experimental development qualify for a 15% tax credit.

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

**Nova Scotia Industry Specific Incentives**


• **Equity Tax Credit**
  A non-refundable tax credit at 30 per cent of an investment made by an individual in an eligible Nova Scotia small business to a maximum annual investment of $50,000 (maximum annual credit of $15,000).

• **New Small Business Tax Reduction**
  This deduction effectively eliminates the Nova Scotia corporate income tax for the first three taxation years of a new small business after incorporation. The corporation must apply each year to the Nova Scotia Minister of Finance for a Nova Scotia Tax Deduction Eligibility Certificate. This credit would not generally be available to foreign corporations locating in Nova Scotia.

• **Labour-sponsored Venture-capital Tax Credit**
  A personal non-refundable tax credit designed to assist small and medium-sized Nova Scotia businesses and co-operatives in obtaining equity financing. Individuals can receive an income tax credit for investing in registered labour-sponsored venture capital corporations in the province.

• **Research and Development Tax Credit**
  A 15% refundable tax credit in addition to the federal SRED tax credit for research undertaken in the Province of Nova Scotia.

• **Nova Scotia Film Industry Tax Credit**
  A refundable tax credit for costs directly related to the production of films in Nova Scotia. As of September 1, 2007 the credit rates were increased and are now the equal to the lesser of: (i) 50% of eligible Nova Scotia labour expenditures; or (ii) 25% of total expenditures. In addition, there is a 10% geographic area bonus on labour expenditures (5% bonus on total expenditures) for films shot outside of the Halifax Regional Municipality. As well, a 5% frequent filming bonus is available to companies who have produced three films in a 24 month period.

• **Digital Media Tax Credit**
  A refundable tax credit for costs directly related to the development of interactive digital media products in Nova Scotia. The rates of this tax credit are the same as of 2008 as the Film Industry Tax Credit.
• The Canada/Nova Scotia Business Service Centre website provides a list of government programs, services and incentives designed to facilitate business formation in Nova Scotia. The list is not exhaustive and more information can be found at www.cbsc.org/ns.

• **Business Development Program**
The Atlantic Canada Opportunities Agency ("ACOA")’s Business Development Program ("BDP") is designed to assist with the financing of your project. Focusing on SMEs, the program offers access to unsecured and interest-free contributions. For some types of projects, repayment may be contingent upon the success of the project. Most business sectors are eligible, except retail/wholesale, real estate, government services, and services of a personal or social nature. Both commercial and non-profit organizations are eligible.

• **Canada Small Business Financing Program ("CSBF")**
The CSBF Program, under the Canada Small Business Financing Act, can assist businesses in obtaining term loans of up to $500,000 to help finance fixed asset needs. The loans are made directly by a qualified lender (chartered banks, caisses populaires, Alberta Treasury Branches and most credit unions). Do not send loan applications to the Canada Small Business Financing Program Directorate. Small businesses must contact the participating lender of their choice.

• **Immigrant Small Business Loan Program**
The Immigrant Small Business Loan Program can help small businesses obtain financing to help start, expand or acquire an existing small business. It is available to immigrants who have lived in Nova Scotia for less than five years. Funding is available for start-ups, expansion, or acquiring an existing small business.

• **Business Financing Program — Nova Scotia Business Inc. ("NSBI")**
The purpose of the Business Financing Program is to provide financial assistance for the establishment of new businesses and the expansion of existing operations that represent the potential for net economic benefit to the province. Assistance is primarily by way of loans but other types of assistance may be considered. Manufacturing, processing, high technology, aerospace, pharmaceutical and environmental technology based industries are a focus for assistance, although businesses in other sectors of the economy are also eligible. Not eligible are: charitable clubs and organizations; residential or rental accommodation, except for tourist facilities; lending, financial and insurance businesses; real estate development; retail, wholesale and construction; taverns, lounges, billiard halls and similar establishments.

• **Nova Scotia Business Development Program**
The Nova Scotia Business Development Program provides businesses in the province with the opportunity to review and assess current practices and develop new approaches. The program’s intent is to assist the start-up of new businesses and enhance the economic viability of existing businesses in the province. To qualify for assistance, applicants must submit a complete application form to the nearest office of Nova Scotia Economic and Rural Development.

• **Seed Capital Program**
The Seed Capital Program provides loans up to $20,000 to start, expand or improve a small business, as well as up to $2,000 to acquire business skills training. The program is delivered by community-based organizations that also provide training, counseling and referrals to enable entrepreneurs to be successful and accomplish their goals.

• **Small Business Financing/Loan Guarantee Program**
The Small Business Financing/Loan Guarantee Program can help businesses obtain financing to help establish new business, grow existing business and empower entrepreneurs with the support they need to create employment for themselves and others. Residents of Nova Scotia
who wish to start a small business are eligible, as well as companies or co-operatives who intend to grow their business. All types of business are eligible, except residential and commercial real estate, beverage rooms and taverns. Any venture of a questionable ethical or legal nature is ineligible. This program is a joint initiative of the Nova Scotia Co-operative Council, Nova Scotia Department of Economic and Rural Development and Credit Union Central of Nova Scotia, on behalf of Credit Unions of Nova Scotia and is delivered exclusively through credit unions in Nova Scotia.

- **Community Business Development Corporations (“CBDC”)**
  These organizations are found in rural areas of Nova Scotia. CBDCs provide technical services and financial assistance in the form of loans, loan guarantees, and equity assistance to a maximum of $150,000 per business. CBDCs are located in Bridgetown, Windsor, Amherst, New Glasgow, Inverness, Sydney Mines, Sydney, Guysborough, Musquodoboit Harbour, Liverpool, Shelburne, Yarmouth, and Digby.

- **Enterprise Cape Breton Corporation (“ECBC”)**
  ECBC is the principal federal government organization for economic development in Cape Breton and Mulgrave. ECBC, in partnership with all levels of government, the private sector and other community stakeholders, will use its broad and flexible powers to assist, promote and co-ordinate efforts that foster an environment supportive of the generation of wealth to effect sustainable job creation throughout Cape Breton Island and Mulgrave.

### Alberta Industry Specific Incentives

Programs and Services — Business in Alberta:

www.programs.alberta.ca/Business/IndexB.aspx?N=772

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

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

- **Agri-Business and Product Development Grant**
  Assisting Alberta agri-food processors or producers to commercialize their products, create healthy or healthier products, or expand their businesses. Targets existing agri-food or agri-based companies.

- **Alberta Energy Research Institute**
  Grant of $50,000 available towards engineering designs, building prototypes, and obtaining patents for an invention that makes a significant impact on the energy industry. Again, this grant is intended for companies already in business.

- **Alberta Film Development Program**
  Grant for up to $5 million for expenses while producing a motion picture in Alberta. This grant is for companies already incorporated and spending more than $25,000 in Alberta.

- **Alberta Foundation for the Arts Grants**
  Grants for artists or organization involved in visual, performing and literary arts or cultural industries. Appears to be inspired by Alberta artists performing at the Vancouver 2010 Cultural Olympiad.
• Alberta Ingenuity Fund
  Intended to assist Alberta entrepreneurs in increasing their capacity to use technology, recruit highly qualified personnel and compete globally. This fund appears to be intended for companies already in business.

• Alberta Technology Innovation Program
  Financing intended for Alberta agri-processors (companies) to attend approved national and international technology related trade shows, conferences, seminars and other industry events that promote innovation and growth.

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

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

• Industrial Associates
  Up to 40 grants per year are given to assist with research personnel needs by helping to recruit recent graduates to research programs. These grants attempt to increase research expertise, while giving graduates research experience and the opportunity to contribute to the company.

• Innovations Assistance Program
  Grants between $5,000 and $50,000 are available to help support inventions that are in their early stages and will contribute to the energy industry. These help inventors create and test new ideas before they are brought into the marketplace.

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

New Brunswick Industry Specific Incentives
Business New Brunswick: www.gnb.ca/0398/index-e.asp

Prince Edward Island Industry Specific Incentives
Government Programs for Businesses:

Québec Industry Specific Incentives
Services Québec — Businesses:
www2.gouv.qc.ca/9.21nstalment9.21/portail/Québec/accueil?lang=en

Manitoba Industry Specific Incentives
Entrepreneurship, Training and Trade: www.gov.mb.ca/ctt/
Saskatchewan Industry Specific Incentives
Programs and Services — Business and Industry:
www.gov.sk.ca/programs-services/business-industry/

Yukon Territory Industry Specific Incentives
Programs and Services: www.gov.yk.ca/services/index.html

British Columbia Industry Specific Incentives
Business and Economic Development Topics:
www.gov.bc.ca/main_index/business_development/index.html

Northwest Territories Industry Specific Incentives
Industry, Tourism & Investment: www.it.gov.nt.ca/program-services/

Nunavut Industry Specific Incentives

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

There are a number of statutes that govern how businesses deal with the Government of Canada. Legislation includes the Federal Accountability Act, the Conflict of Interest Act, the Canada Elections Act, the Lobbyists Registration Act (the “Lobbying Act”), the Public Service Employment Act, the Access to Information Act, the Public Servants Disclosure Protection Act and the Financial Administration Act.

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

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

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

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

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

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

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

Of the 22 Schedule I banks, six are world-class in terms of their asset value: RBC Financial Group, Canadian Imperial Bank of Commerce, The Bank of Nova Scotia, BMO Financial Group, The Toronto-Dominion Bank and National Bank of Canada. Each provides a full range of banking services through branches located throughout Canada. In some cases, Schedule I banks have made substantial investments in foreign banks operating outside Canada.

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

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

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

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

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

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

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

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

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

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

**Code of Conduct for the Credit and Debit Card Industry**

In August 2010, many of the key elements of the new Code of Conduct for the Credit and Debit Card Industry in Canada (Code) took effect. The requirement for payment card networks, card issuers and acquirers to increase transparency and disclosure to merchants is subject to a 9-month transitional period. The Financial Consumer Agency of Canada ("FCAC"), which was established in 2001 to administer consumer provisions in federal financial institutions legislation, is mandated to administer the Code.

The Code applies to credit and debit card networks (referred to as payment card networks) and their participants (which include card issuers and acquirers). Although the Code does not formally define “payment card networks,” the Payment Card Networks Act (“PCBA”) which became law in July, 2010 defines a payment card network as an “an electronic payment system – other than a prescribed payment system – used to accept, transmit or process transactions made by payment cards for money, goods or services and to transfer information and funds among issuers, acquirers, merchants and payment card users.

The purpose of the Code is to promote fair business practices and to help merchants and consumers understand the costs and benefits associated with credit and debit cards. All payment card networks, major debit and credit card issuers and payment processors have adopted the Code. Payment card networks must provide to the FCAC any requested information regarding actions taken by themselves or issuers. The Code:

- Prohibits debit and credit card functions on the same payment card. A “debit” card is not defined in the Code (but is described as providing access to a deposit account), thus allowing some ambiguity as to the classification of certain prepaid cards. The PCNA does not help to resolve the ambiguity when it proposes to define a “payment card” to include prescribed devices that are used to access a credit or debit account, without elaborating on the meaning of
“account”. Also, it is uncertain how the Code will be interpreted with respect to overdraft protection offered on deposit accounts that are accessed by consumers using debit cards as forms of payment;
• Addresses the “honour all cards” rule by allowing merchants to choose to accept credit or debit payments from a network without having to accept both forms of payment from that payment card network;
• Requires 90 days advance notice to merchants by payment card networks of any fee increase or the introduction of any new fee related to any credit or debit card transaction;
• Requires that payment card network rules allow merchants to provide discounts for different methods of payment and differential discounts between different payment card networks; and
• Permits issuers to give premium credit and debit cards only to consumers who apply for them. Additionally, certain thresholds must be met by the consumer prior to the issuance of a premium payment card.

Payment card networks, issuers and acquirers are given nine months to increase transparency and disclosure to merchants, including in merchant-acquirer agreements and in statements provided to merchants. For example, merchant statements will have to include certain prescribed information such as interchange rates and the total amount of fees applicable to each interchange rate. Another element being phased in will give issuers of payment cards one year to re-issue cards already in circulation that (i) carry two brands that are not given equal prominence, or (ii) offer on the same debit card competing domestic applications from different networks (such as competing point-of-sale payment applications).

Task Force Announced to Review Payments Systems

In 2010 the Minister of Finance announced the launch of the Task Force for the Payments System Review. The task force will review the payments system in Canada. Since Canadians are becoming exposed to different forms of payment, the Department of Finance seeks to ensure that the payments system responds to technology and innovation while continuing to protect consumers and operate efficiently.

Among other things, the task force will:
• Identify public policy objectives for the operation and regulation of the Canadian payments system;
• Assess the regulatory and institutional structures best suited to achieving public policy objectives in the operation and regulation of the payments system;
• Assess the competitive landscape for current participants and identifying any potential barriers to entry;
• Assess the degree of innovation in Canada’s payment system and the challenges in bringing innovative products to market; and
• Assess whether consumers and merchants are well served by the Canadian payments system.

The task force has begun work and will shortly begin consultations. It is directed to provide the Minister of Finance with recommendations by the end of 2011.
What are the Current Rules in Canada Governing Exchange Rate, Interest Rate and Other Hedge Contracts?

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


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

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

As well, it also introduced a new measure for quantifying damages in the event of an early termination and mandates formal set-off rules. These changes have had a significant impact on the way in which derivative transactions are concluded by financial participants and end-users alike.
11. WHAT PROTECTION IS AFFORDED BANKRUPT OR INSOLVENT BUSINESSES IN CANADA?

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

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

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

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

**Interim Financing**

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

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

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

Canadian banks will want to watch developments in this arena closely since, now that the rules are codified, it is expected that the Canadian interim lending marketplace will expand. Even the Government of Canada, through Export Development Corporation, has formally entered into the
interim financing fray by investing $450 million recently in a newly established $1 billion interim lending fund. With these legislative changes, it is clear that interim financing as a legitimate source of financing to distressed companies is here to stay in Canada.

Disclaimer and Assignment of Contracts

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

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

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

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

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

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

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

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

Collective Bargaining Agreements

There will be no power to disclaim or reject collective agreements in reorganizations. Collective agreements cannot be amended or changed during a CCAA case without the permission of the collective

Collective Bargaining Agreements
bargaining unit. There is a procedure for reopening a collective agreement, but it is deliberately difficult. The reorganizing business must apply to the court for an order to reopen negotiations.

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

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

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

**Sale of Assets**

Express provisions dealing with asset sales during restructurings have been created, which include statutory criteria for court approval of such sales. Such sale transactions are exempt under the BSA.

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

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

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

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

Of particular note in this context is the recent 2011 Ontario Court of Appeal decision that has adversely affected commercial lending practice in Ontario. In *Re Indalex Limited*, the Court held that pension fund deficiencies are ranked as super-priority obligations, and come ahead of secured creditors and the DIP lenders. As a result, in dealing with both pre-filing credit facilities and DIP
Financing, lenders will need to carefully navigate through the troubled waters created by this case. Secured lenders that provide credit facilities to companies with defined benefit plans are at risk of having the security for such loans subordinated to claims of pension beneficiaries, whether or not their debtor seeks insolvency protection. In addition, those companies that act as their own plan administrators are at risk of being attacked for breach of fiduciary duties to the pension plan.

Indalex Limited (“Indalex”) was a Canadian company with separate pension plans for its executives and salaried employees. Indalex filed for CCAA protection on April 3, 2009 and obtained Court approval to DIP Financing during the CCAA proceeding. Upon approving the DIP Financing, the Court granted a charge in favour of the DIP Financing lender (“DIP Lender”) against all of the assets of Indalex, which was to rank ahead of Indalex’s other creditors. In July 2009 Indalex closed a court-approved sale of its assets and sought approval to distribute the purchase proceeds to the DIP Lender. Both sets of former employees objected to the proposed distribution on the basis that the shortfalls in the pensions were subject to a deemed trust that ranked ahead of the DIP Lender’s claim. In overturning the Superior Court’s decision, the Court of Appeal ordered that the sale proceeds be paid to the pension plans in priority to the DIP Lender’s claim.

The salaried employees’ pension plan (“Salaried Plan”) was in the process of being wound up when the CCAA proceeding was initiated. Indalex was the plan administrator of the Salaried Plan. As at the date of the CCAA filing the Salaried Plan had a funding deficiency of $1,795,600 (“Salaried Deficiency”).

Section 75 of the Pension Benefits Act (“PBA”) requires an employer, where a pension plan is being wound up, to pay into the plan all payments that are due immediately or that have accrued and have not been paid. Section 57(4) of the PBA establishes a deemed trust for, among other things, amounts accrued to the date of the wind up but not yet due under the plan or regulations. The Court of Appeal concluded that the entire Salary Deficiency had accrued at the date of wind up and as such was subject to the deemed trust granted under Section 57(4) of the PBA.

The executive employee pension plan (“Executive Plan,” together with “Salaried Plan,” the “Plans”) was still operative at the time the CCAA was initiated. Indalex was also the plan administrator of the Executive Plan. At the time of the CCAA filing the estimated wind-up deficiency was $3,200,000 (“Executive Deficiency”). The PBA deemed trust provisions apply to deficiencies in plans that are being wound up. As a result, the Court of Appeal was not able to conclude that the PBA deemed trust provision applied to the Executive Deficiency. However, the Court did conclude that Indalex, as plan administrator, owed fiduciary duties to both Plans. The Court held that as Plan Administrator, Indalex did not protect the best interests of the Plan’s beneficiaries and, accordingly, was in breach of its fiduciary obligations as administrator. The Court held that this breach of fiduciary duty gave rise to a constructive trust on the basis that the breach enabled Indalex to obtain property that should have been held in trust for the pension beneficiaries. The Court consequently imposed a constructive trust over Indalex’s property for the amount of both pension deficiencies. As a result of the application of a constructive trust, the Court ordered that the Plans be paid the full amount of their respective deficiencies, ahead of the DIP Lender.

National Receivers/Interim Receivers

The amendments to the BIA significantly restrict the role of interim receivers and create a new class of “national” receiver.
Interim receivers may still take possession of the property of the debtor, and exercise such control over the debtor’s property and business as the court determines appropriate. However, rather than the broad power to “take such other action” as the court might order, interim receivers will now only be permitted to take conservation measures and summarily dispose of perishable or rapidly depreciable property of the debtor.

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

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

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

International Insolvencies

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

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

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

Eligible Financial Contracts

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

Critical Suppliers

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

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

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

Professional Charges

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

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

Directors

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

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

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

Protection for Employees in Restructuring

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

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

Regulatory Body Stay

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

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

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

Shareholder Approval in Restructurings

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

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

Liability of Trustees, Interim Receivers, Receivers and Monitors

The potential for personal liability of court-appointed officers such as trustees, interim receivers, receivers and monitors has been a significant concern in situations where such officers assume responsibility for carrying on the business of a debtor. A particular area of concern to restructuring professionals is the possibility of successor employer liability. Prior to the decision of the Supreme Court of Canada in TCT Logistics, which held that the Bankruptcy Court had limited authority to protect court-appointed officers from such claims, orders appointing receivers typically contained provisions to insulate the receiver from successor employer liabilities of the debtor existing at the date of appointment.

The new amendments seek to address these concerns by providing that notwithstanding any other federal or provincial legislation, if a trustee, interim receiver, receiver or monitor acting in its official capacity carries on the debtor’s business or continues the employment of the debtor’s employees, that court-appointed officer will not be exposed to personal liability, including successor employer liability, in respect of the claims of employees, former employees or a pension plan before appointment or that are calculated by reference to the pre-appointment period.

Monitors

Monitors under the CCAA will be required to be licensed bankruptcy trustees, which codifies existing CCAA practice. The debtor’s auditors will no longer be able to act as a CCAA monitor except with leave of the court. This reflects the fact that monitors owe duties not only to the company, but also to the court and to its creditors.

Transfers at Undervalue

The old and sometimes confusing concepts of “settlements” and “reviewable transactions” have been replaced with a new regime of transfers at undervalue (“TUVs”). For the first time, the new attackable transaction rules expressly apply in the CCAA as well as in the BIA.
TUVs are transactions in which no consideration was received by the debtor, or where the consideration received was less than the fair market value given by the debtor.

There are detailed rules for TUVs. Relevant considerations include whether the other party was dealing at arm’s length, the timing of the impugned transaction relative to the debtor’s insolvency, and whether there was an intention to defraud, defeat or delay creditors. Parties that are related to each other are deemed not to deal at arm’s length.

The creation of an avoidance option allows the attacking party to restore the debtor to the position it would have been had the undervalued transaction not taken place. Provincial preference and fraudulent conveyance laws will continue to be applicable in BIA and CCAA cases.

Unpaid Suppliers’ Rights
Unpaid suppliers in the BIA have had limited rights to recover goods supplied to an insolvent purchaser who becomes bankrupt.

Under the new amendments, unpaid suppliers have 15 days after the purchaser becomes bankrupt or is placed in receivership to demand repossession of goods supplied within 30 days of the bankruptcy or receivership. This is a much-needed improvement on the previous rule which required suppliers to deliver notice within 30 days of delivery of the goods, regardless of the date of the bankruptcy or receivership.

Income Trusts
It was formerly unclear whether income trusts were subject to the BIA or the CCAA, but they have now been made subject to these Acts. An “income trust” is defined to be a trust with assets in Canada, whose units are listed on a prescribed stock exchange or are held by such a trust. The new provisions of the BIA and CCAA dealing with directors will extend to the trustees of an income trust. Private trusts are not covered by the new provisions and would continue to be liquidated under provincial legislation.

Enhanced Information Flow in CCAA Proceedings
The Government’s bankruptcy administration will now for the first time maintain a public registry of CCAA filings.

Several changes have been made to the CCAA to provide greater transparency by increasing information flow through the mechanism of the monitor. These additions include: publishing notices and making publicly available the Initial Order (by way of an Information Pertaining to Initial Order Form) and lists of creditors; filing weekly cash-flow statements; investigating and filing a report on the state of the debtor’s business and financial affairs and the causes of its insolvency (by way of a Debtor Company Information Summary Form); and similar reporting obligations of the monitor.

Aircraft
The BIA and the CCAA have each been amended to provide that a stay in respect of aircraft objects (as defined in the CTC Act, see page 9.3), which include most commercial aircraft and
aircraft engines, cannot extend for more than 60 days unless, during that period, the airline cures all defaults and agrees to perform all obligations under the existing agreements, unamended (unless otherwise agreed by the lessor/lender).

Provisions enacted by the CTC Act in 2005, which amended the CCAA and BIA, were drafted specifically to avoid some of the technical problems associated with qualifying for US Chapter 11, §1110 protections. Basically, if the lease or loan is to an entity in Canada for aircraft or engines which meet the CTC Act test, the benefits of these provisions will be available. The 2009 amendments simply enact some clean-up revisions to conform treatment under the CCAA to the BIA. Further amendments to these provisions are expected when Canada ratifies the Cape Town Protocol.

In addition, as under the prior law, in the case of operating leases, the airline is still required to pay full rent during the stay period. While the CTC Act provisions do extend to cover aircraft engines, they do not offer similar protection to the financiers of aircraft spare parts.

### Highlights of Consumer Amendments to the BIA

The highlights of amendments of provisions relating to consumer debtors include:

- The monetary limit for a consumer proposal has increased from $75,000 to $250,000, excluding debts secured by a principal residence. A consumer proposal is intended to be more expeditious than a conventional proposal;
- A bankrupt who has personal income tax liabilities exceeding $200,000, which comprise over 75% of their unsecured claims, is no longer eligible for an automatic discharge from bankruptcy. An automatic discharge previously came into effect nine months after a first-time bankruptcy, subject to creditors’ objections; and
- First-time bankrupts are required to contribute “surplus income” for 21 months and second time bankrupts for 36 months. There is a formula to calculate “surplus income” and the required payment approaches 50% of the bankrupt’s share of family income.

### Cross-Border Insolvency Procedures

To address the special concerns that arise in cross-border insolvencies, the Canadian government expanded the recognition of foreign insolvency proceedings in Canada, including concurrent bankruptcy administrations in more than one jurisdiction. Canada permits foreign insolvency representatives to appear before the Canadian courts in insolvency matters. Canadian courts have endorsed the use of the Cross-Border Concordats in Insolvency Matters modelled on those adopted by the International Bar Association.
12. REGULATION OF TRADING IN SECURITIES

The focus of securities regulation in Canada is disclosure of information on the one hand, and the regulation of market participants on the other.

How are Securities Offered?

The sale of securities in Canada is highly regulated, primarily through provincial and territorial legislation. There is currently no federal securities regulator in Canada, although this has been subject to debate for a number of years. As of October 2009 the federal government had announced its intention to and was pursuing the creation of a national regulator, but there is still a lack of consensus about creating such a single regulator among Canadian provinces. Currently in Ontario, the OSA (Ontario) governs the area and is supplemented by extensive regulations, regulatory rules and policies. There is also a relevant body of national and multilateral instruments, policy statements and other sources of regulation. Generally speaking, securities legislation in all Canadian jurisdictions contains two basic requirements in connection with any sale of securities:

- A comprehensive disclosure document known as a prospectus must be provided to investors in connection with the public offering of securities. This document sets out detailed material disclosure relating to the issuer and the securities being issued and must be reviewed by the issuer’s principal regulator and the OSC, if the OSC is not the principal regulator and securities are being sold in Ontario. The prospectus must contain full, true and plain disclosure about the securities and the issuer. The requirement to prepare a prospectus is, however, subject to certain statutory and discretionary exemptions (see below).
- Effective March 17, 2008, the CSA, excluding the OSC, implemented Multilateral Instrument 11-102 Passport System ("MI 11-102") creating a passport system for continuous disclosure, prospectuses, and discretionary exemptions, together with National Instrument 41-101 General Prospectus Requirements which harmonizes prospectus requirements across Canada.
- The passport system replaced the previous Mutual Reliance Review System ("MRRS") for the review of continuous disclosure, prospectus and exemption relief materials (the "Materials"). Under the passport system only the principal regulator reviews and approves Materials on behalf of all of the passport jurisdictions. However, since the OSC did not adopt MI 11-102, an issuer whose principal regulator is not Ontario must file the Materials and receive approval from both the OSC and its principal regulator if securities are being sold in Ontario. Conversely, approvals made by the OSC as principal regulator will be deemed to be granted by the regulators under the passport system.
- MI 11-102 allows a party to clear a prospectus or obtain a discretionary exemption from their principal regulator, and have that clearance or exemption apply automatically in all other passport provinces and territories. However, an issuer will still need to receive approval of application for an exemption filed in Ontario or will have its prospectus subject to review by the OSC, if the OSC is not their principal regulator.
- A registered securities dealer must participate in the sale of securities. In the case of prospectus offerings, the registrant is also responsible for ensuring that the prospectus contains full, true and plain disclosure. The requirement to involve a registrant is subject to statutory and discretionary exemptions similar to exemptions to the prospectus requirement (see below).
In many provinces and territories, securities can be sold without providing a prospectus or using a registered dealer (“Distribution Requirements”) through exemptions from these requirements. From an issuer’s perspective, reliance on exemptions from Distribution Requirements are generally based upon an assessment of whether the securities can be successfully marketed to a limited number of investors who meet certain criteria that would make them eligible to acquire the securities without the need for a prospectus or the involvement of a dealer versus the ability to market the securities to the public (taking into account the inherent additional costs involved with a prospectus offering).

In many provinces, securities offered pursuant to exemptions from the Distribution Requirements are subject to what is known as the closed system. Again, the objective is to achieve an acceptable level of disclosure for a prospective purchaser. For more information regarding the distribution exemptions that are available, see the commentary under the heading “Exempt Distributions in Ontario” on page 9.7.

The rules regarding the resale of securities sold pursuant to exemptions from National Instrument 45-102 (“NI 45-102”) have been adopted by all of the securities commissions in Canada. NI 45-102 provides that unless certain conditions are met, first trades of securities distributed under an exemption are subject to the Distribution Requirements. Depending on the nature of the exemption under which the securities were originally sold, the securities may be subject to a four-month restricted period from the date of distribution during which they cannot be traded without a further exemption. In addition, among other things, the issuer of the securities must be a reporting issuer at the time of the first trade as well as for a four-month period preceding the time of the first trade. Alternatively, depending on the nature of the exemption under which the securities were issued, the securities may be subject to a seasoning period, which requires that the issuer of the securities is a reporting issuer at the time of the first trade as well as for the four-month period preceding the time of the first trade. However, the seasoning period requirements do not require that the holder of the securities have held the securities for four months. It should be noted that the restricted period conditions will generally apply to most sales made pursuant to available prospectus and registration exemptions.

The securities administrators in each province and territory also have discretionary authority to grant relief from certain requirements of the legislation.

**What are the Disclosure Requirements?**

**Disclosure and Corporate Governance Requirements**

Commencing in 2004, securities regulatory authorities across Canada introduced several new national and multilateral instruments concerning continuous disclosure and corporate governance that generally harmonize such rules across Canada.

• National Instrument 71-102 provides exemptions to certain continuous disclosure rules with respect to foreign issuers (“NI 71-102”).

(Please see, as well, the commentary above under the heading “Canada’s Sarbanes-Oxley” on pages 12.5 to 12.12.)

Continuous Disclosure

NI 51-102 is an example of the importance that securities regulators place on disclosure. Many issuers of securities are required to disclose certain information on an ongoing basis. This requirement is known as “continuous disclosure” and the issuers subject to this requirement are known in most provinces and territories as reporting issuers. The information that an individual issuer is obligated to disclose depends, in part, on the size of the issuer and on whether the issuer is a reporting issuer that: (i) is listed, among other places, on the Toronto Stock Exchange (“TSX”) or a US market place (a “Non Venture Issuer”); or (ii) that is listed on another exchange, such as the TSX Venture Exchange, the Canadian National Stock Exchange, other international exchanges or event not listed on any exchange (a “Venture Issuer”).

Pursuant to NI 51-102, a reporting issuer is required to make the following continuous disclosure:

• Beginning with the level of disclosure established by the issuer’s prospectus (or other similar document), the reporting issuer must continue to make stipulated and regular disclosure, such as filing audited annual and unaudited interim financial statements, management discussion and analysis (“MD&A”) of operating results, business acquisition reports (in certain circumstances) and annual meeting and proxy solicitation materials.
• In addition, whenever a material change occurs in the affairs of a reporting issuer, it must issue and file with the regulatory authorities a press release disclosing the nature and substance of the change, as well as a prescribed form of material change report within 10 days of the material change.
• Reporting issuers who are listed on the TSX, and other Non-Venture Issuers, are generally required to produce an annual information form, which is a disclosure document that describes the issuer, its operations, prospects and risks, and which must be updated annually. The foregoing is not a requirement for issuers listed on the TSX Venture Exchange and for other Venture Issuers.

The continuous disclosure instruments require issuers to provide comparative historical financial data in their annual and interim financial statements. The statements must also be accompanied by MD&A of the financial condition of the issuer and its financial results.

In this way, the continuous disclosure system maintains a steady flow of material disclosure about issuers whose securities are bought and sold by the public.

Accounting Principles and Auditing Standards

NI 52-107 buttresses the required forms of public disclosure by setting forth acceptable accounting principles and auditing standards for issuers required to file financial statements or include
financial statements in a prospectus or circular. The instrument also discusses requirements regarding currency disclosure and exemptions for SEC and foreign issuers.

In March 2008, Canadian regulators announced that IFRS, and not Canadian GAAP, will apply to Canadian public entities for financial years beginning on or after January 1, 2011. See commentary on page 3.37.

**Certification of Financial Statements**

Similar to requirements in the US, NI 52-109 requires CEOs and CFOs to certify the issuer’s financial disclosure and file such certification in a prescribed form with the issuer’s annual and interim financial disclosure.

**Audit Committee Standards**

NI 52-110 addresses corporate governance concerns regarding the effectiveness of an issuer’s audit committee. Subject to limited exceptions, the instrument requires that a reporting issuer’s audit committee have at least three members who are independent and financially literate, all of which must also be directors of the reporting issuer. TSX Venture Exchange-listed and other Venture Issuers are subject to different requirements though are nonetheless required to provide annual disclosure with regards to, among other things, their audit committee members’ independence, financial literacy, education and experience. The instrument provides extensive guidance so that directors can make these determinations. The instrument sets forth the authority and responsibilities of audit committees and stipulates the prescribed disclosure of the charter, composition and education of the audit committee which must be made in the issuer’s annual information form (in the case of TSX issuers) and in the issuer’s management information circular (in the case of TSX Venture Exchange issuers and other Venture Issuers). Notably, the instrument also requires the pre-approval by the audit committee of all non-audit services provided by the auditors.

NI 52-108 defines the qualifications required of auditors who prepare auditors’ reports on financial statements of reporting issuers. Specifically, such auditors must be a public accounting firm in good standing and subject to the Canadian Public Accountability Board.

**Exemptions for US Issuers and other Foreign Issuers**

Initiatives between Canadian and US regulators in the area of continuous disclosure are bringing the integration of the disclosure standards for Canadian and US capital markets closer to reality. Currently, a multijurisdictional disclosure system embodied in National Instrument 71-101 — The Multijurisdictional Disclosure System is in place among the Canadian provincial and territorial securities commissions and the SEC. Under this system, in the case of a cross-border securities offering, eligible issuers are generally required to prepare a single disclosure document rather than two disclosure documents, though certain additional limited information may be required to satisfy the requirements of the local jurisdiction.

In addition, pursuant to NI 71-102, certain issuers who are regulated by the SEC are exempt from many of the Canadian continuous disclosure requirements provided they comply with the requirements of US federal securities law regarding such disclosure and file the resulting disclosure documents in Canada. Certain foreign issuers who are not regulated by the SEC but who are
subject to foreign disclosure requirements may be exempt from complying with Canadian continuous disclosure requirements if not more than 10% of their equity securities are held by resident Canadians.

Canada’s Sarbanes-Oxley

The Canadian securities regulatory authorities have implemented three key instruments significantly in line with United State’s Sarbanes-Oxley requirements. These three rules are:

- CEO and CFO must certify the disclosure made in their public company’s annual and interim filings (NI 52-109).
- The role and composition of audit committees is regulated (NI 52-110).
- The new Canadian Public Accountability Board has been mandated to oversee auditors of public companies (NI 52-108).

In addition to the foregoing, the Canadian securities regulatory authorities implemented a policy entitled “Corporate Governance Guidelines” and a rule entitled “Disclosure of Corporate Governance Practices” which replaced the former TSX corporate governance requirements.

**CEO and CFO Certification of Certain Public Company Filings**

*(National Instrument 52-109)*

Originally taken from US regulations, this rule requires that CEOs and CFOs of all Canadian public companies and income trusts other than investment funds to personally certify:

- That to their knowledge, having exercised reasonable due diligence, the issuer’s annual or interim filings, as the case may be, do not contain any untrue statement of a material fact or omit to state a fact required to be stated or that is necessary to make a statement not misleading in light of the circumstances under which it was made and that, together with the annual and interim financial statements, they fairly present in all material respects the issuer’s financial condition, results of operations and cash flows. Annual and interim filings include an issuer’s annual information form, annual and interim financial statements, and annual and interim MD&A.
- In the case of Non-Venture Issuers, there are additional requirements whereby the CEO and CFO must personally certify, among other things that: they have designed such disclosure controls and procedures and such internal control over financial reporting (defined similarly to the SEC definitions) to provide reasonable assurance: (i) material information relating to the issuer is made known to them; and (ii) information required to be disclosed by the issuer under securities legislation is recorded, processed, summarized and reported within the time frames required.
- That they have designed internal controls and financial reporting to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with GAAP.
- That they have evaluated the effectiveness of the issuer’s disclosure controls and procedures and have caused the issuer to disclose in the annual MD&A their conclusions about the effectiveness of the disclosure controls and procedures (subject to transitional provisions).
- That they have caused the issuer to disclose in the annual MD&A or interim MD&A, as the case may be, any change in the internal control over financial reporting that occurred and
has materially affected, or is reasonably likely to materially affect, the internal control over financial reporting (subject to transitional provisions).

Important to note, Canadian issuers that comply with US federal securities laws and promptly file their US certificates in Canada would generally be exempt from the above certification requirements. Also, certain foreign issuers, certain issuers of exchangeable securities and certain credit support issuers would be exempt from the certification requirements. Exemptions are also granted by securities regulators, however, it is anticipated that exemptions will rarely be given.

The language of the CEO and CFO certification must closely follow the language set out in the rule. An officer providing a false certification could be liable to penalties under securities laws.

Role and Composition of Audit Committees (National Instrument 52-110)
This rule requires that:

• Audit committees have a minimum of three directors.
• Each member of the audit committee is independent.
• Each member of the audit committee is financially literate.

Not only does the rule demand that audit committee members are independent and financially literate, but it also defines what is meant by independent and financially literate. The definition of independent is similar to the US definition and refers to the absence of any direct or indirect material relationship with the issuer. This includes a relationship that could, in the opinion of the board of directors, reasonably interfere with the exercise of a director’s independent judgment. It should be noted that the test for independent audit committee members is more stringent than the test for other directors. What constitutes financial literacy is the ability to read and understand financial statements that represent a level of complexity of accounting issues that are generally comparable to the breadth and complexity of the issues that can be raised by the issuer’s financial statements. Audit committee members who do not have the required financial literacy at the time of their appointment will be permitted to become financially literate within a reasonable period of time.

Notably, the rule does not require the issuer to disclose whether or not a financial expert is serving on the audit committee. Instead, issuers are required to describe the background of each audit committee member. This description should include the member’s education and experience that relate to his or her responsibilities as an audit committee member.

The responsibilities of the audit committee must explicitly relate to the appointment, compensation, retention and oversight of the external auditor. Also, audit committees must deal with the pre-approval of all non-audit services to be provided by the external auditor. In addition, audit committees must have a written charter and have established procedures to deal with complaints regarding accounting, internal accounting controls or auditing matters and to deal with the confidential, anonymous submission by employees of their concerns regarding any questionable accounting or auditing matters.

There are some exemptions from the rule pertaining to audit committees. For instance, it does not apply to investment funds, issuers of asset-backed commercial paper, some subsidiaries, some foreign issuers, some exchangeable security issuers and some credit support issuers. Also, partial exemptions are granted to issuers that are listed on the TSX Venture Exchange and other
Venture Issuers. For instance, issuers that are listed on the TSX Venture Exchange are exempt from the composition requirements and the disclosure requirements, but are required to comply with the remainder of the rule.

**Role of the Canadian Public Accountability Board (National Instrument 52-108)**

According to this rule, the financial statements of a public company must be audited by a public accounting firm that is a participating audit firm with the Canadian Public Accountability Board (“CPAB”). Further, this accounting firm must follow any restrictions or sanctions imposed by the CPAB as of the date of the auditor’s report.

This rule also applies to foreign companies that are reporting issuers in Canada, and requires foreign audit firms to register with the CPAB.

**Best Practices**

Canadian regulators have taken a guideline approach with respect to best practices in corporate governance. Canadian public companies are required to disclose in their annual information form (or in the case of Venture Issuers, their management information circulars) if they are complying with the recommended best practices or, if they are not, the reason for such non-compliance. This approach recognizes the reality that corporate governance is in a state of evolution and that uniform governance mechanisms may not be suitable for all different kinds of companies.

**Best Practices for Effective Corporate Governance (National Policy 58-201)**

This policy recommends best practices for all reporting issuers, both corporate and non-corporate. These practices are not mandatory. The practices are largely influenced by the now repealed TSX corporate governance guidelines and listing standards of the New York Stock Exchange.

The practices include:

- Maintaining a majority of independent directors on the board of directors:
  - Independent means that a director has no direct or indirect material relationship with the issuer.
  - Material relationship means a relationship that could, in the view of the issuer’s board, reasonably interfere with the exercise of a director’s independent judgment with certain individuals being deemed to have a material relationship with the issuer. These individuals are:
    - A person who has been an employee or executive officer of the issuer in the previous three years;
    - A person whose immediate family member has been an executive officer of the issuer in the previous three years;
    - A partner or employee of the auditor or having an immediate family member who is employed by the auditor of the issuer or a person who has been such in the previous three years;
    - A person who, or whose immediate family member, is or has been in the previous three years an executive officer of an entity if any of the issuer’s current executive officers serves or served at that same time on the entity’s compensation committee; and
    - An individual who received or whose immediate family member receives more than $75,000 per year in direct compensation during any 12 month period in the previous three years from the issuer.
• In regards to income trusts, independence should occur at the trustee level.
• In regards to limited partnerships, independence should occur at the level of the board of directors of the general partner.

• Holding separate regularly scheduled meetings comprised only of independent directors.
• Appointing an independent director as chair. If this is not appropriate, then an independent director should be appointed as a lead director.
• Setting out a board mandate in writing. This mandate should address the following matters: integrity, strategic planning, managing risk, succession planning, corporate communications, required board approvals, internal controls, management information systems and investor feedback.
• Setting out position descriptions for the chair of the board and the chair of each board committee, directors and the CEO, which should include corporate goals and objectives the CEO is responsible for meeting.
• Providing new directors with orientation.
• Providing all directors with continuing education opportunities.
• Adopting a written code of business conduct and ethics for the directors, officers and employees of the issuer which is enforced by the board. This code of conduct is aimed at deterring wrongdoing and should address some of the following topics: conflicts of interest, reporting illegal or unethical conduct, and fair dealing with investors, customers, suppliers, competitors and employees.
• Establishing a nominating committee to nominate new directors. This nominating committee should be comprised of independent directors and have a written charter.
• Having the board conduct a review with an eye to considering the size of the board and how appropriate it is, determining what competencies and skills the board should have, determining what competencies and skills each individual member has and keeping this in mind when recruiting new directors.
• Appointing a compensation committee that has a written charter and is composed of independent directors.
• Conducting regular assessments of board effectiveness and individual director effectiveness.

Disclosure of Corporate Governance Policies (National Instrument 58-101)

This rule calls for a disclosure requirement regarding corporate governance practices that the issuer has put into place. The rule also requires the issuer to publicly file with the regulators any written code of business conduct and ethics that the issuer follows. Any explicit or implicit waivers from the code granted by the board to directors or officers would have to be disclosed immediately in a press release. The rule applies to all reporting issuers. However, exemptions will apply to the following: investment funds, issuers of asset-backed securities, designated foreign issuers, SEC foreign issuers, some exchangeable security issuers and some credit support issuers.

Except for Venture Issuers, such as reporting issuers that are listed for trading on the TSX Venture Exchange (who are required to provide similar, but less intensive disclosure in management information circulars), every issuer to whom the rule applies must include in its annual information form specific disclosure regarding:
• The composition of the board, which directors are independent and whether the majority of the board is independent.
• Which directors are also directors of other reporting issuers.
• Whether the independent directors hold meetings in the absence of the non-independent directors and management.
• The attendance record of each director at directors meetings.
• The mandate of the board.
• The chair of each committee and directors.
• The position descriptions for the chair, the chair of each board committee and the CEO.
• Measures adopted respecting the orientation and continuing education of directors.
• The adoption of a code of ethics.
• The composition of the nominating committee and its mandate or other nomination process.
• The composition of the compensation committee and its mandate or other compensation process.
• The assessment process for the performance of the board, of each committee of the board and of each board member.

If the issuer does not follow the recommended best practices with respect to each disclosure item, the issuer would have to explain why the board considers its practice appropriate.

**Conduct of the Board and Evaluation of Directors**

A board of directors can only be as effective as its members. Director performance is critical to good corporate governance. Directors must be performing effectively at the board level, committee level and individual level. Companies must take the necessary steps to promote effective director and board performance. For instance, companies should impose regular evaluation of the board and of each individual director. Another tool that can be used to promote effectiveness is offering formal orientation for new board directors and continuing education for all board directors.

**Evaluation of the Board as a Whole**

The recommended best practices provide that boards should implement a process for evaluating the effectiveness of the board as a whole. This task can be done by the nominating or governance committee or under the leadership of a single designated independent director working with or for the committee responsible for the evaluation process. Every issuer must describe how it is complying with these guidelines or, where there is a difference, describe the difference and provide a reason for departure from the guidelines.

Regular board and committee assessment is necessary to improve corporate governance practices. The focal point should be how board or committee performance can be made more effective by establishing and meeting goals that add value. The results of performance assessments should then be reported to the board as a whole and discussed.

In the US, the New York Stock Exchange (“NYSE”) Rules provide that a board and its committees are evaluated every year. Foreign private issuers listed on the NYSE who do not perform annual evaluations must disclose any significant differences between their processes and the NYSE Rules.
An assessment process is a great way to improve the governance system of the board of directors. The results of the evaluation can be reviewed and any problems can be identified and steps taken to remedy any deficiencies. An assessment should look at how the board is carrying out its primary functions, particularly in the following areas: (i) responsibilities and mandate; (ii) structure and organization; and (iii) process and information.

Looking at the board responsibilities and mandate, boards should explicitly take responsibility for the stewardship of the company and implement a formal mandate establishing the board’s stewardship responsibilities. A board should assume responsibility for implementing a strategic planning process and an annual assessment of the opportunities and risks of the business. Also, the board should identify principal risks and implementation of systems to manage business risks. The board should also establish succession planning and training and monitoring of the chief executive officer and senior management. Another important task for the board is to communicate policies on how the company interacts with various stakeholders and how it complies with continuous and timely disclosure obligations which, under applicable law, arise when there has been a material change in the business, operations or capital of an issuer that would reasonable be expected to have a significant effect on market price, and includes the decision to implement such a change. Where two or more parties are involved in a transaction, there must be a sufficient commitment to implement from all parties to implement the change before there is an obligation to issue a press release. Finally, another important task for the board is to maintain the integrity of internal control and management information systems.

The structure and organization of the board is key to effective functioning of it and when the evaluation is conducted, the board should consider whether the constitution is appropriate, whether the board is truly independent, what procedures are in place for director succession, whether the size is appropriate for the size of the company and if the proper committees are in place to ensure the board functions as smoothly as possible.

A final area of concern when conducting board evaluations is whether the best processes are created for receiving information to enable the board and committees to fulfill their responsibilities. For instance, the processes and the information itself must allow for the assessment of the organization’s activities and management. The information must be in enough detail to make informed decisions and the processes used in gathering information must be effective enough to ensure information is gathered in a timely fashion so that the information is fresh and the recommendations made as a result of the information are effective. The usual methods of assessment include either a written questionnaire that is filled out by each of the directors or discussions between the board chair or lead director and the board.

Evaluation of Individual Directors

It is wise to hold regular evaluations of individual directors. This would help directors understand how they are performing and compare their performance to what is expected of them. Regular evaluation and review allows for directors to compare their performance level with the expectations and make appropriate changes when necessary to correct any shortfalls. Improved individual performance of a director will lead to improved relationships between board members, the board chair, management and employees of the company and the company’s shareholders. On the other
hand, evaluations will also highlight any deficiencies in board members that cannot be corrected and when a change in board membership is required.

Both written assessments and oral assessments can be used for individual director assessments. In addition, peer reviews or self-assessments are suitable for individual director evaluations. A peer assessment would have each director evaluate the performance of the other directors. A self-assessment would have each director reflect upon and evaluate his or her own performance and contribution. Self-assessments are more favourable than peer evaluations as they are not as stressful and do not detract from the collegiality and co-operation necessary for the efficient functioning of the board as a whole. What seems to work best is a formal evaluation process comprised of a written questionnaire completed by each director and then a follow-up discussion with the board chair, lead director or governance committee chair. The use of a written questionnaire provides all directors with the chance to answer a standardized set of questions candidly and without a director feeling pressured by answering in a one-on-one interview setting with the chair.

In any event, the results should be compiled and interpreted with the results reported to the chair. The board should consider how the results should be disclosed to the full board for review and discussion. For instance, it may be more helpful for the results to be disclosed in an aggregate manner rather than identifying specific board member’s evaluation results. The compilation and interpretation of results can be done in-house or the board may choose to hire an outside consultant to perform this task.

Orientation and Continuing Education

It is a good idea for each company to offer an orientation program for new directors and continuing education opportunities for every director. It is important for new directors to understand the role of the board, the role of committees of the board and the role of directors in making the board and company run as efficiently as possible. Also, it is helpful to make new directors aware of the commitment of time and energy that will be expected of them as directors.

A comprehensive orientation program for new directors should include both offering the directors a board manual and literature for the new director to review independently as well as an orientation session with presentations and the opportunity to ask questions and engage in a dialogue about being a director.

Continuing education programs are also important to promote ongoing director education and to ensure that directors are keeping current on laws and regulations applicable to their role. At the same time, continuing education can also serve as an opportunity for directors to review their duties and the board manual. It can be a chance for the directors to provide feedback and suggestions for changes to policies or procedures to enhance efficiency. Continuing education should take place at least once a year. One way to ensure it occurs is to tie it to the annual board evaluation process. This way, the continuing education program for directors can respond to any issues that arise from the evaluation process of the board or individuals and can give the directors the knowledge and information required to remedy any deficiencies.
Governance Beyond Regulations

Governance in Canada is more and more impacted by factors other than regulations and stock exchange rules. Institutional shareholder activism embodied by organizations such as the Canadian Coalition for Good Governance (“CCGG”) and Risk Metrics Group (“RMG”) play a significant role in Canada in the field of governance. The CCGG publishes every year guidelines with respect to governance and principled executive compensation which go far beyond basic regulatory requirements.

RMG, which is a service organization that provides voting recommendations to its clients (who are institutional investors), is also a dominant player in influencing governance practices and compensation practices of public companies. In addition, Canadian companies’ governance practices are significantly influenced by the evaluation criteria of the annual governance survey called Board Games published by The Globe & Mail (Canada’s national newspaper). The Board Games survey ranks every year hundreds of public companies based on its evaluation methodology.

These organizations and media are at the forefront of the development and adoption of best practices in governance in Canada. For example, “say-on-pay” voting is voluntary in Canada, but has been given increased attention by market participants as a result of the media and shareholder interest organizations. CCGG has recommended in April 2009 that all boards adopt “say-on-pay” voting and RMG has published guiding principles that it will use for its recommendations to its clients for a “say-on-pay” vote.

What are the Registration Requirements?

After several years of consultation, the Canadian Securities Administrators (the “CSA”) have published National Instrument 31-103 Registration Requirements and Exemptions (“NI 31-103”), made consequential amendments to securities legislation and local rules that are intended to harmonize, streamline and simplify dealer and adviser registration categories and requirements across all jurisdictions. The effective date of NI 31-103 was September 28, 2009 (the “Effective Date”).

The new registration regime has significant implications for Canadian and non-Canadian market participants, particularly those now doing business in any Canadian jurisdiction on any unregistered or exempt basis.

The significant changes brought about by NI 31-103 are:

- The adoption of a “business” trigger for dealer registration in lieu of the “trade” trigger that existed in all provinces and territories, other than Québec.
- Registration categories and related requirements have been harmonized across all jurisdictions and the number of categories have been reduced significantly, though four new categories of registration have been introduced:
  - “Exempt market dealer,” which replaces the category of limited market dealer in Ontario and in Newfoundland and Labrador.
  - “Restricted dealer,” a category of dealers engaged in a limited area of dealing activities with restrictions and proficiency requirements tailored to the dealing activities.
  - “Restricted portfolio manager,” a category for advisers restricted to advising with respect to specified securities with restrictions and proficiency requirements tailored to the advising activity.
- “Investment fund manager,” which requires all managers of public and private investment funds to be registered regardless of whether they are in the business of dealing or advising.

- The introduction of a registration exemption framework for international dealers and international advisers.

- Exam-based (rather than course-based) proficiency requirements have been prescribed for each category of registration, with certain exceptions.

- Higher minimum capital requirements for registered firms.

- Registered firms will be required to identify each potential and actual conflict of interest and provide prior written disclosure of a conflict of interest to a client while dealing with such conflicts in a fair, equitable and transparent manner.

- Harmonization and narrowing of the exemptions from the dealer and adviser registration requirements across Canada.

- Canadian residency requirements for all registrants in all provinces and territories have been eliminated.

Transitional Rules

Individuals and entities affected by the new rules fit into three categories: (i) parties already registered in categories that will survive under NI 31-103, but that will have certain new rules to follow; (ii) existing unregistered businesses that are seeking registration for the first time; and (iii) registered businesses that are relinquishing registration and becoming subject to new exemptions.

The transitional rules give individuals and entities that are already registered between three months and 24 months after September 28, 2009 to bring themselves into compliance with the new requirements they must meet. There are transitional rules for entities that have been in active registered or unregistered businesses that seek to be registered under NI 31-103 for the first time in one of the new categories of registration. There are a few transitional rules for individuals and entities that are in registration categories (e.g., the international dealer registration, the international adviser registration) that will be dropped under the new regime. For example, international advisers had until September 28, 2010 to transition to either become registered as a portfolio manager or restricted portfolio manager or to begin relying on the international adviser exemption.

Business Registration Trigger

Prior to NI 31-103, in all provinces and territories, other than Québec, a person or company was required to become registered as a dealer if and when it traded a security unless it could conduct the trade in reliance upon an exemption.

In Québec, a person or company is not required to become registered as a dealer unless and until it becomes engaged in the business of trading in securities. This requirement is comparable to the adviser registration requirement — common to all provinces and territories — that imposes a registration as an adviser on a person or company if it engages in, or holds itself out as engaging in, the business of advising others as to the investing in or the buying or selling of securities.

NI 31-103 adopts the “business” trigger for dealer registration in lieu of the “trade” trigger that existed in all provinces and territories other than Québec. The adoption of a “business” trigger establishes uniform dealer, adviser, underwriter and investment fund manager registration requirements.
throughout Canada. It also removes from the ambit of securities legislation those persons or companies who are not engaged in the business of trading or advising, acting as an underwriter or acting as an investment fund manager — and thereby facilitate the elimination of a number of dealer registration exemptions that existed to accommodate their exempt trading activity.

According to Companion Policy to NI 31-103 (“NI 31-103CP”), there are two components to any assessment of the application of the “business” trigger. The first component will involve an assessment of whether the particular activity involves dealing in securities or advising in securities. If so, the second component will involve an assessment of the extent to which the activity is being conducted as a business. For non-residents, there will almost certainly be a third component that will involve an assessment of the extent to which the business being conducted by the non-resident is being conducted in Canada.

**Categories of Registration and Permitted Activities**

Under NI 31-103, the registration categories and related requirements have been harmonized across all jurisdictions and the number of categories of registration has been reduced significantly, although a few new categories of registration have been introduced. The registration categories of dealer and adviser have been maintained and continue to have sub-categories (i.e., investment dealer, mutual fund dealer, etc.). Of note is the addition of the new category of registration for investment fund managers.

A registered firm that continues to be registered following September 28, 2009 must have installed a completed Form 33-109F6 to the regulator on or before September 30, 2010. Form 33-109F6 is new and it replaced Form 3.

**New Categories of Registration**

**Exempt Market Dealer**

This is a new category of registration for dealers restricted in prospectus-exempt securities and with persons to whom prospectus-exempt distributions can be made. An exempt market dealer may therefore trade a security that is distributed in reliance upon a prospectus exemption whether a prospectus was filed in respect of the distribution or not, and it may also trade a security that, if the trade were a distribution, would be exempt from the prospectus requirement.

In Ontario, and in Newfoundland and Labrador, the exempt market dealer category replaces the limited market dealer (“LMD”) category, and LMDs became registered as exempt market dealers on the Effective Date. Exempt market dealers in Ontario and in Newfoundland and Labrador have six months from the Effective Date to comply with new insurance requirements and 12 months to comply with new capital requirements that will be applicable to exempt market dealers.

In all other jurisdictions, a person or company that acts as a dealer in the exempt market on the Effective Date will have 12 months to apply for registration as an exempt market dealer. Firms that had an active business before the Effective Date have 12 months to apply and comply with NI 31-103.

Firms not active before the Effective Date do not get the benefit of any of the transitional rules.
Restricted Dealer
This is a new category of registration for dealers engaged in dealing activities that are limited to a particular sector or type of securities (i.e., real estate securities). The restrictions and requirements applicable to a restricted dealer will be tailored to, and dependent upon, the particular dealing activities.

Restricted Portfolio Manager
This is a new category of registration available to portfolio managers restricted to advising with respect to specified securities, types of securities or specific industries. As with the restricted dealer category, the restrictions and requirements for a restricted portfolio manager will be tailored to the advising activity of the portfolio manager. A restricted portfolio manager will be permitted to provide discretionary management, subject to the terms and conditions of its registration.

Investment Fund Manager
This category introduces a new requirement for all managers of investment funds to be registered as investment fund managers, regardless of whether they are in the business of trading or advising. This includes managers of public mutual funds, public closed-end funds and private or prospectus-exempt pooled funds and hedge funds. Through this new category of registration, the CSA is attempting to address and regulate certain risks particular to fund managers (i.e., calculation of net asset value, financial reporting and conflicts of interest between the manager and investors) through the regulation of the fund managers, in addition to the current regime of regulating the investment funds. A portfolio manager that manages an investment fund will also be required to be registered as an investment fund manager and meet the conditions of both categories.

The CSA has indicated that it will be publishing a proposal for comment during the next year that will address the circumstances under which an investment fund manager that does not have a Canadian head office will need to register, and in what additional provinces and territories an investment fund manager with a head office in Canada will need to register.

Firms that had an active business before the Effective Date have a 12-month period to register if they apply in their Canadian head office jurisdiction and 24 months if the head office is outside Canada.

NI 31-103 also introduces a few new categories of registration for individuals, including a requirement that all registered firms have a registered Ultimate Designated Person (“UDP”) as the person who is in charge of the business (the president or Chief Executive Officer) and a Chief Compliance Officer (“CCO”) who is responsible for monitoring daily compliance with policies and procedures. Registered firms have three months from the Effective Date to apply for registration for their UDP and CCO. NI 31-103 introduces a new category of associate advising representative which is a category that already existed in some Canadian jurisdictions, such as Ontario. This category is intended as an apprentice category for individuals looking to obtain the full registration, but who do not yet meet the proficiency requirements.

The following categories of registration have been eliminated: securities issuer, securities adviser, investment counsel, international dealer, international adviser and limited market dealer. Persons who qualified as international dealers (in Ontario and in Newfoundland and Labrador) or
international advisers (in Ontario only) are exempt from registration subject to certain conditions, but the types of permitted clients has been narrowed.

Permitted Activities
A registered adviser who deals in securities of in-house pooled funds with advisor fully managed accounts is exempt from the dealer registration requirement.

A registered dealer who provides non-discretionary advice in support of its dealing activities will be exempt from the adviser registration requirement. There is no longer a requirement that the advising be “incidental to” a dealer’s primary business. The current exemption for members of Investment Industry Regulatory Organization of Canada (“IIROC”) who give discretionary advice to fully managed accounts has been maintained.

Registration Requirements for Individuals
Exam-based (rather than course-based) proficiency requirements have been prescribed for representatives of each category of dealer other than an investment dealer or a mutual fund dealer representative that is a member of IIROC or the Mutual Fund Dealers Association (“MFDA”), and for portfolio managers. Proficiency requirements largely taken from OSC Rule 31-502 Proficiency Requirements for Registrants are also prescribed for CCOs for each of the categories of registrants. Unlike LMD representatives, a person acting as a dealing representative of the new exempt market dealer category must meet one of three proficiency requirements, similar to representatives of an investment dealer member of IIROC. Representatives and CCOs have 12 months from the Effective Date to satisfy their respective proficiency requirements.

The required experience of an advising representative, if a representative holds a Chartered Financial Analyst (“CFA”) charter, has been significantly reduced from five years to 12 months of investment management experience in the 36-month period prior to applying for registration. If a person has the Canadian Investment Manager (“CIM”) designation, on the other hand, he or she must have 48 months of investment management experience, at least 12 months of which was in the 36-month period prior to applying for registration. A person may be granted registration as an associate advising representative of a portfolio manager if he or she has completed any part of a requirement for an advising representative, for example, having earned a CFA charter.

Capital and Insurance Requirements
Minimum capital requirements for registered firms under NI 31-103 (IIROC and MFDA impose different requirements for their members) will be $25,000 for advisers, $50,000 for dealers and $100,000 for investment fund managers. A registered firm that, at any time, fails to maintain these minimum capital requirements, must notify the regulator as soon as possible. A financial institution bond calculated based on the number of employees or a percentage of client assets or assets under management subject to $200,000 minimum is prescribed. Solvency requirements are not cumulative — a firm registered in more than one category will have to comply with the highest requirement. Firms have 12 months from the Effective Date to comply with these capital requirements.
Client Relationships
NI 31-103 contains rules pertaining to the relationship between a registered dealer or adviser and its clients. These client relationship rules restate and refine the business conduct requirements that are summarized below and that are currently found in provincial and territorial securities legislation.

Account Opening, Know Your Client (“KYC”) and Suitability Requirements
The KYC and suitability requirements are the key due diligence and gate-keeping elements that are intended to assist in protecting the client, the registrant and the integrity of the capital markets. A registrant is always required to comply with KYC requirements and with suitability requirements that are prescribed, unless the registrant is executing a purchase and sale of a security pursuant to instructions received from, among other, another registrant, a Canadian financial institution or a Schedule III bank or where a permitted client waives the suitability requirement in writing (other than in respect of a permitted client’s managed account with an adviser). These account opening and KYC requirements do not apply to investment fund managers.

Conflicts
A registrant is required to address conflicts faced in the course of its operations. First, a registrant must address general conflicts of interest; second, it must address particular conflicts associated with referral arrangements; and third, an adviser is subject to self-dealing restrictions of managed accounts.

Identifying Conflicts
A registered firm must identify each potential and actual conflict of interest between it and a client, and provide prior written disclosure of a conflict of interest to a client while dealing with such conflicts in a fair, equitable and transparent manner and exercising responsible business judgment. NI 31-103CP provides examples of such conflicts. Disclosure must be made by a registered firm in respect of securities of a related issuer or of a connected issuer by way of delivery of a disclosure statement in prescribed form.

Referral Arrangements
Referral arrangements are arrangements in which a registrant agrees to pay or receive a fee as a result of a client referral. A registrant will be prohibited from participating in a referral arrangement unless it meets certain requirements, including the prior written disclosure of such arrangements to the client. Firms have six months from the Effective Date to comply with these requirements. The minimum content of any such notice is prescribed. The registrant is also required to take reasonable steps to satisfy itself that the referred person or company has appropriate qualifications to provide the services and, if applicable, is registered to provide those services.

Loans and Margin
A registrant (other than an IIROC member) must not lend money to a client. A registrant must also provide any client that intends to borrow money to finance the purchase of securities with a prescribed form of leverage disclosure.
Complaints Handling

A registered firm is required to document, and to deal fairly and effectively, with every complaint it receives in respect of any of its products or services. It is also required to participate in a related dispute resolution service and to advise clients of the availability of the service. Except for clients in Québec, firms have 24 months from the Effective Date to comply with these requirements.

Relationship Disclosure

Before a registrant can purchase or sell a security for a client, or provide advice to a client, the registrant is required to provide the client with disclosure of information that a reasonable client would consider important regarding the client’s relationship with the registrant. Firms have 12 months from the Effective Date to comply with these relationship disclosure rules. This disclosure is not required to take the form of a separate document tailored for this purpose, but may be provided through separate documents which, in combination, give the client the required information, including:

- A description of the client’s account;
- A discussion that identifies which products or services offered by the registered firm will meet the client’s investment objectives, and how they will do so;
- A discussion of investment risk factors;
- A description of the conflicts of interest;
- Disclosure of all service fees, charges and other costs associated with the investment;
- A description of the content and frequency of reporting for each account or portfolio of the client;
- Information about how the client can contact the firm;
- Notice that a dispute resolution service is available to mediate any dispute that might arise between the client and the firm regarding a product or service of the firm; and
- The information a registered firm is required to collect about the client as part of its KYC obligations.

Fair Allocation

An adviser is required to provide its clients with a statement of policies regarding fair allocation of investment opportunities.

Relationship with Financial Institution

Certain disclosure must be provided to the non-permitted clients of registrants that are conducting securities-related activities in an office or branch of a Canadian financial institution or a Schedule III bank. This is to ensure the clients understand they are dealing with the registrant, not the financial institution.

Client Assets

Generally, a registrant that holds the securities or other property of a client must hold the securities or property separate and apart from its own property and in trust for the client. If the registered firm is holding cash on behalf of the client, the cash must be held in a designated trust account with, among
others, a Canadian financial institution or a Schedule III bank. This conduct category also prescribes requirements for client securities that are the subject of a written safe-keeping agreement.

Non-resident firms that hold client assets are subject to restrictions to ensure assets are held appropriately.

Record-keeping
In addition to general record-keeping requirements, NI 31-103 requires registrants to keep their records in a safe and durable form and in a manner that facilitates their prompt delivery to the regulator for a period of seven years following the creation of the records in question.

Account Activity Reporting
Account activity reporting requirements include, without limitation, trade confirmation, statement of account and statement of portfolio delivery requirements. The trade confirmation requirements permit trade confirmations to be sent to either the relevant client or, with the client’s consent, any registered adviser acting on behalf of the client. Statements of account and statements of portfolio must be sent to clients by registered dealers and advisers, not less than every three months. A client may instruct an adviser to deliver a statement less frequently.

Compliance
A registered firm is required to permit its UDP and its CCO to gain direct access to the firm’s board of directors whenever either of them considers it necessary advisable to do so in the light of his or her responsibilities. The CCO is required to report directly to the board of directors at least once a year respecting the registrant’s compliance with securities legislation.

Non-Resident Registrants
Non-resident registrants are required to continue providing their clients with disclosure of the potentially adverse consequences of their non-resident status. They are also required to continue holding clients in accordance with prescribed custodial requirements and to maintain any registration or Self-Regulatory Organization (“SRO”) memberships that are required for the business that is being conducted by them in their home jurisdiction.

Dealer Registration Exemptions
NI 31-103 offers far fewer dealer registration exemptions than previous regimes because NI 31-103 is premised upon a business trigger instead of the trade trigger that existed in all provinces and territories other than Québec. Moreover, the introduction of an exempt market dealer registration category, in most jurisdictions, dramatically narrows the exempt market for unregistered market intermediaries. In the western jurisdictions and the three territories, market intermediaries are able to deal in the exempt market without registration in reliance upon certain prospectus exemptions subject to certain conditions (exempt market intermediaries).

The dealer registration exemptions contained in NI 45-106 are repealed and replaced with the following exemptions:
Trades Through a Registered Dealer
This is an exemption to a person if the trade is made through an agent that is a registered dealer or made to a registered dealer that is purchasing as principal.

Adviser — Non-Prospectus Qualified Investment Fund
This is an exemption to a registered adviser or an international adviser for a trade in a security in a non-prospectus qualified investment fund if: (i) the adviser acts as the investment fund’s adviser and investment fund manager; and (ii) the trade is to a managed account of a client of the adviser.

Investment Fund Reinvestment
This is a limited exemption to an investment fund manager where: (i) distributions or dividends are used by securityholders to acquire securities of the same class or series of the investment fund; or (ii) a securityholder makes an optional cash payment and acquires securities of an investment fund that trade in a marketplace that are of the same class of series of securities referred to in (i), but securities subscribed with these cash payments in any financial year cannot exceed two per cent of the issued and outstanding securities of the class.

Additional Investment in Investment Funds
This is an exemption to an investment fund and its manager in connection with a distribution of securities to securityholders that have previously acquired securities of the investment fund for an acquisition cost of not less than $150,000 or hold securities having a net asset value of not less than $150,000.

Private Investment Club
This is an exemption for a trade in a security of an investment fund that: (i) has no more than 50 holders and requires contributions from them for funding; (ii) does not distribute its securities to or borrow money from the public; and (iii) pays no fees for investment management or administration advice other than brokerage fees.

Private Investment Fund — Loan and Trust Pools
This is an exemption for a trade in an investment fund co-mingling money of different estates and trusts that is administered solely by the trust company.

Mortgages
This is an exemption to a person dealing in mortgages (other than, in certain jurisdictions, syndicated mortgages) who is licensed or exempt from licensing under mortgage brokerage laws.

Personal Property Security Legislation
This is an exemption to a person dealing in a security (other than to an individual) evidencing indebtedness secured under personal property legislation.
Variable Insurance Contract
This is an exemption to an insurance company dealing in: (i) a contract of group insurance; (ii) a whole life insurance contract providing for a payment at maturity of an amount not less than 75 per cent of the premium paid; (iii) an arrangement for the investment of policy dividends and policy proceeds; and (iv) a variable life annuity.

Schedule III Banks and Cooperative Associations — Evidence of Deposit
This is an exemption to a person dealing in a deposit issued by a Schedule III bank or federal co-op.

Plan Administrators
This is an exemption for dealing in securities of an issuer by a trustee, custodian or administrator acting on behalf of employees, executives, directors and consultants of the issuer pursuant to a plan of the issuer.

Re-Investment Plan
This is an exemption for dealing in securities of an issuer by the issuer or by a trustee, custodian or administrator acting for or on behalf of the issuer if the trades are made pursuant to a plan and dividends or distributions are applied to the purchase of the issuer’s securities or a securityholder makes an optional cash payment to purchase the issuer’s securities but securities subscribed with these cash payments cannot exceed, in any financial year, two per cent of the issued and outstanding securities of the relevant class or series.

Self-Directed Registered Education Savings Plans (“RESPs”)
This is an exemption for a trade in a self-directed RESP to a subscriber: (i) if the trade is made by: (a) a mutual fund dealer representative; (b) a Canadian financial institution; and (c) in Ontario, a financial intermediary; and (ii) the self-directed RESP restricts its investments in securities to securities that the person who trades the RESP is permitted to trade.

Exchange Contracts
This is an exemption for trades by a person in exchange contracts in British Columbia, Alberta, Saskatchewan and New Brunswick: (i) made solely through an agent that is a registered dealer or to a registered dealer purchasing as principal; or (ii) subject to specific conditions, resulting from an unsolicited order placed with an individual who is not a resident of and does not carry on business in the local jurisdiction.

Specified Debt
This is an exemption for a trade in specified government debt such as debt securities of the federal, provincial, territorial or municipal governments and of regulated financial institutions (if not subordinate in payment to deposits).
Small Securityholder Arrangements
This is an exemption for a trade by an issuer or an agent under the odd lot selling and purchase arrangements policy of the Toronto Stock Exchange or TSX Venture Exchange or a similar policy of a designated exchange.

Non-Resident Dealers
See “International Dealer Exemption” below.

Adviser Registration Exemptions
NI 31-103 contains the following exemptions from the adviser registration requirement:

Ancillary Advice by Dealers
This is an exemption to a registered dealer and its representatives for advice in connection with a trade other than a trade for a managed account.

IIROC Members with Discretionary Authority
This is an exemption to a registered dealer that is an IIROC member and its representatives acting as an adviser in compliance with IIROC rules to a managed account.

Advising Generally
This is an exemption to a person that carries on an advisory business either directly or through publications if the advice is not tailored to needs of specific clients and applicable disclosure requirements are addressed.

Non-Resident Advisers
See “International Adviser Exemption” below.

Mobility Exemptions
NI 31-103 sets out limited exemptions that permit a dealer or adviser to continue to service up to ten (and each of its representatives, up to five) individual clients and certain family members of those clients that re-locate to a jurisdiction in which the dealer or adviser is not registered.

International Dealer Exemption
Under NI 31-103, the category of international dealer registration available in Ontario as well as Newfoundland and Labrador is eliminated and replaced with an international dealer exemption from registration. Under the exemption available in all jurisdictions of Canada, a non-resident dealer is only permitted to trade with permitted clients, including:

- Regulated financial institutions.
- Registered dealers and advisers.
- Federal, provincial, territorial and municipal governments and crown corporations.
Regulated pension funds.
Accounts fully managed by a registered adviser.
An investment fund managed by a registered investment fund manager or advised by a registered adviser.
An individual with at least $5 million in net financial assets.
A person (other than an individual or investment fund) with net assets of at least $25 million.

Trades with permitted clients will generally be limited to trades involving:

- A debt security during the security’s distribution if it is offered primarily in a foreign jurisdiction and if no prospectus is filed in Canada.
- A debt security that is a foreign security other than during the debt security’s initial distribution period.
- A foreign security unless the trade is made during the security’s distribution under a prospectus filed in Canada.
- If the permitted client is an investment dealer, a foreign security or any security if the investment dealer is acting as principal.

A “foreign security” means a security of an issuer formed under the laws of a foreign jurisdiction or issued by a foreign government.

The international dealer exemption from registration is only available to persons or companies that are registered to carry on the business of dealing in securities in their home (foreign) jurisdiction and engage in the business of a dealer in their home (foreign) jurisdiction. In order to rely on the exemption, the non-resident dealer will have to formally submit to the jurisdiction and appoint an agent for service. Before dealing with any permitted client, the non-resident dealer will also have to notify the client of its non-resident status and of the name and address of its agent for service in the relevant jurisdiction. The non-resident dealer must also provide the securities regulatory authority with an annual notification of its reliance on this exemption.

**International Adviser Exemption**

Prior to NI 31-103, a non-resident adviser that provided advice to: (i) a resident of Ontario; or (ii) a non-resident investment fund that distributes securities to residents of Ontario was required to have been either registered as an international adviser with the OSC or exempt from registration under OSC Rule 35-502 Non-Resident Adviser.

Under NI 31-103, the category of international adviser registration and many of the exemptions from registration under OSC Rule 35-502 are eliminated and replaced with an international adviser exemption.

Similar to the replacement of the international dealer category of registration with the international dealer exemption from registration, under the international adviser exemption that is now available in all jurisdictions, a non-resident adviser may provide advice to permitted clients without having to become registered as adviser.

The international adviser exemption from registration is only available to persons or companies that are registered to carry on and engage in the business of an adviser in their home (foreign) jurisdiction.
jurisdiction or operate under an exemption from registration in that jurisdiction. To rely on the exemption, the non-resident adviser must formally submit to the jurisdiction and appoint an agent for service. Before acting as adviser to any permitted client, the non-resident adviser will also have to notify the client of its non-resident status and the name and address of its agent for service in the relevant jurisdiction. The non-resident adviser must also provide the securities regulatory authority with an annual notification of its reliance on this exemption.

The non-resident adviser cannot advise in Canada with respect of securities of Canadian issuers, unless providing advice on securities of a Canadian issuer is incidental to providing advice on securities of a foreign issuer. In addition, not more than 10% of the aggregate consolidated gross revenue of the non-resident adviser and its unregistered affiliates for any financial year may be derived from portfolio management activities of the non-resident adviser and its unregistered affiliates for any financial year may be derived from portfolio management activities of the non-resident adviser and its affiliates in Canada.

**Exempt Market Intermediaries**

The north and western jurisdictions (British Columbia, Alberta, Manitoba and the three territories) will issue orders exempting a person in the business of dealing in securities using certain prospectus exemptions from registering as an exempt market dealer.

The market intermediary must deal only with persons who are: (i) accredited investors; (ii) family, friends and business associates; (iii) purchasers provided with a prescribed Offering Memorandum; or (iv) purchasers subscribing to a minimum of $150,000 of a security and who rely on the analogous prospectus exemption.

To use any of these exemptions, a person must meet all of the following conditions:

- Not be otherwise registered in any jurisdiction;
- Not provide suitability advice leading to the trade;
- Except in British Columbia, not otherwise provide financial services to the purchaser;
- Not hold or have access to the purchaser’s assets;
- Provide prescribed risk disclosure to the purchaser; and
- File an information report with the securities regulatory authority.

**Registration in Multiple Jurisdictions**

National Policy 11-204 Process for Registration in Multiple Jurisdictions (“NP 11-204”) sets out the procedures for registering in more than one jurisdiction. Together with the amendments to Multilateral Instrument 11-102 Passport System, NP 11-204 replaces the former National Registration System (“NRS”) under National Instrument 31-101 National Registration System with a passport system for firms and individuals seeking registration in passport jurisdictions. Because Ontario is not adopting the passport system, NP 11-204 creates an interface similar to the NRS for firms or individuals in passport jurisdictions seeking registration in Ontario as non-principal jurisdiction.

For the purpose of NP 11-204, the principal regulator for a firm will usually be the regulator in the jurisdiction where the firm has its head office, and for an individual the regulator of the jurisdiction where the individual has his or her working office.
Registration in Passport Jurisdictions — Passport Registration

A firm or individual applying for registration in a non-principal passport jurisdiction in a category (other than restricted dealer) for which the firm or individual is already registered or is concurrently seeking registration in its principal jurisdiction (including Ontario), must do so through “passport registration.” Although Ontario is not a member of the passport system, it can be a principal regulator under the system. If the principal jurisdiction of an applicant is Ontario, it must apply to Ontario as principal regulator and all the other regulators will treat Ontario as a principal regulator under the passport system.

Under the passport registration system, a firm need only submit its registration application to its principal regulator, whereas an individual must file the application through the NRD. The firm or the individual’s sponsoring firm deals only with the principal regulator, which reviews the application to register in any other jurisdiction only to ensure that it is complete. Any non-principal regulator does not conduct a review of the registration application of the firm or individual. The applicant is automatically registered in the non-principal jurisdiction in the same category when registered in the principal jurisdiction if the application is complete and, where required for the specific category of registration, if the applicant is an approved member of a SRO.

The applicant under the passport registration must still pay fees in both the principal jurisdiction and in the other passport jurisdictions where it seeks registration.

Registration in Ontario — Interface Registration

Firms or individuals seeking registration in Ontario as non-principal jurisdiction in a category (other than restricted dealer) in which the firm/individual is already registered or is concurrently seeking registration in its principal jurisdiction, must apply through “interface registration.” The firm must submit the registration application to both the principal regulator and the OSC; the individual must submit his or her application through NRD. The principal regulator reviews the application and submits to the OSC an interface document containing its proposed determination. Within one business day, the OSC advises the principal regulator whether it opts in or out of the principal regulator’s determination. It should be noted that the OSC has the option of opting in and imposing additional terms and conditions to the registration.

In case of an opt-out decision, which must be supported by written reasons, the principal regulator works with the firm or with the individual’s sponsoring firm in order to solve the OSC’s opt-out issues. In case of failure, the individual or firm must deal directly with the OSC thereafter.

NP 11-204 gives the applicant the right to request an opportunity to be heard before a decision to reject the registration or to grant it with terms and conditions is rendered either by the principal regulator or by the OSC.

Restricted Dealer Registration

The passport registration and interface registration rules do not apply to firms seeking to become registered in the category of restricted dealer. A restricted dealer seeking registration in a non-principal jurisdiction, including Ontario, must apply directly to the regulator of the jurisdiction involved.
Changes to Québec Regulatory Framework

Changes to the Securities Act (Québec) (“QSA”) and An Act Respecting the Distribution of Financial Products and Services (Québec) (“Distribution Act”) moves the regulation of mutual fund dealers and scholarship plan dealers to the more flexible regulatory framework of the QSA from the Distribution Act.

However, mutual fund dealers and scholarship plan dealers registered only in Québec will continue to be supervised by the AMF and not be required to become members of the MFDA. Any Québec-registered mutual fund dealer or scholarship plan dealer will be required to maintain prescribed professional insurance and contribute to the Québec-based indemnity fund, the Fonds d’indemnisation des services financiers. Furthermore, their representatives will be required to be members of the Chambre de la sécurité financière.
13. CANADIAN TRADE LAW

Canada’s Trade Remedy System

International Obligations

Under the 1994 World Trade Organization Agreement (“WTO Agreement”), Canada has bound its tariffs — that is, regular customs duties — against any increase on imports of goods from any other Party to the WTO Agreement. However, the WTO Agreement also sanctions a “trade remedies” system, whereby Canada (and any other WTO member) is allowed to counteract an influx of unfairly-traded (i.e., dumped or subsidized) goods by special duties notwithstanding these tariff bindings.

The basis for these extraordinary duties is that dumping and subsidizing distorts international trade and causes or threatens to cause “material injury” to domestic production of the same goods. This dates back to the original General Agreement on Tariffs and Trade (the “GATT”) of 1947.

Beginning the Process: The Complaint and Investigation Phase

Canada’s trade remedy process is a bifurcated one under the governing statute, the Special Import Measure Act (“SIMA”). It involves two separate federal government agencies — the Canada Border Services Agency (“CBSA”) and the Canadian International Trade Tribunal (“CITT”). The involvement of two different agencies complicates the system and can be confusing to an outsider. However, it follows the requirements laid out in the WTO Agreement and is broadly comparable to the system in other countries, notably the United States.

The process starts with an injured Canadian producer filing a complaint with the CBSA. Once the complaint is verified by the CBSA as having met the required thresholds under SIMA (i.e., it is “properly documented”), the Agency begins an investigation to determine whether or not the goods are actually being dumped or subsidized and, if so, by how much.

While it is up to the CBSA to determine the margins of any dumping and the amount of any subsidy, it is the CITT, acting under the Canadian International Trade Tribunal Act, that determines whether such imports have caused or are threatening to cause injury to Canadian producers. Only if the Tribunal makes a positive injury finding can anti-dumping or countervailing duties be applied against the offending imports. Again, this follows the framework of the WTO Agreement and mirrors the system applied in many other countries.

It should be noted that the CBSA’s investigations are conducted completely independently of the Tribunal’s injury inquiry. However, the two proceedings must be dovetailed in terms of the timing of the steps leading to the CBSA’s preliminary and final determinations of dumping or subsidization and injury. This is done under SIMA by setting time limits for the CBSA’s preliminary determination of dumping or subsidizing (generally to 90 days) and to the CITT phase following the CBSA’s determination within which the CITT’s injury decision must be issued (120 days).

Inquiries by the Canadian International Trade Tribunal

The Tribunal’s inquiry task under SIMA is spelled out in greater detail under the Special Import Measures Regulations, which set out the factors that the Tribunal is to consider in deciding if dumped or subsidized imports have caused or are threatening to cause material injury to Canadian
production. These factors are related to the volume of unfairly traded imports, their effect on the price of domestically produced like goods, and the resulting impact on the domestic industry.

The CITT has quasi-judicial status and is a court of record under Canadian law. Unlike the process in the US, where the International Trade Commission conducts its proceedings almost entirely on the basis of written submissions, the CITT combines written materials with an oral hearing, where witnesses can be called and cross-examined and where arguments are presented by counsel for or against an injury finding.

If, after all of this, the Tribunal finds that dumped or subsidized imports have caused or are threatening to cause material injury to Canadian production, anti-dumping or countervailing duties are then applied to these imports by the CBSA for a five-year period.

Before the expiration of this period, the Tribunal will engage in a “sunset review” to decide if these duties should be allowed to lapse or continued for another five years. The sunset review process involves a consideration by the Tribunal as to whether, if the order were to expire, there would be a continuation or recurrence of material injury resulting from renewed dumping from the named countries.

Information on the dumping and subsidization complaint process and investigation can be found at the website of the CBSA’s Trade Programs Directorate at: www.cbsa-asfc.gc.ca/sima-lmsi/menu-eng.html. Information on the CITT’s procedures and its inquiry processes can be found online at: www.citt-tcce.gc.ca/index-e.asp.

Restrictions on Exports and Imports

Export Controls

Canada operates a comprehensive system of export controls under a statute called the Export and Import Permits Act (“EIPA”). Export controls apply to all goods and technology listed on the Export Control List (“ECL”) promulgated under EIPA. These include items such as military and military-related products, chemical and biological weapons, nuclear-related goods and a range of other sensitive items such as agricultural products, cultural property and endangered species.

Under EIPA, no person can export an item listed on the ECL without an export permit issued by the Minister of Foreign Affairs and International Trade. In some cases, noted below, permits or approvals for certain kinds of exports — nuclear items, for example — require approvals of other Federal government agencies or departments. In some special cases involving the re-export from Canada of goods or technology of US origin, the Department of Foreign Affairs and International Trade (“DFAIT”) will require the exporter to obtain US government approval before it issues the required Canadian permit.

As well as controlling exports of listed goods and technology, EIPA prohibits exports to certain listed destinations — generally those States that are considered dangerous or aggressive or that fail to respect international norms of civilized behaviour and respect for the rule of law and human rights. These are listed on the Area Control List (“ACL”), also issued under EIPA and currently cover Myanmar (Burma) and Belarus.

Much of Canada’s export control regime, especially with respect to military and strategic goods, had its origin in the Second World War and the ensuing Cold War period. With the terrorist attacks
on the World Trade Center, New York, on 11 September 2001 and the unfolding of subsequent events, including the wars in Iraq and Afghanistan and the emergence of anti-western governments in Iran, North Korea and other States, export controls of sensitive goods and technology takes on greater importance.

Because of the criminal penalties for failure to comply with Canadian export permit requirements, companies must be diligent and must ensure at least a basic understanding of how the system operates. Inattention to the details in EIPA and the regulations can result in unnecessary difficulties and have commercial repercussions.

As noted, the administration of EIPA is under the jurisdiction of the Minister of International Trade and DFAIT in Ottawa. Businesses that have export control issues — such as being unsure whether a particular good or technology is a controlled item — should contact the Export Controls Division in the Export and Import Controls Bureau in the Department. The Bureau web-site is found online at: www.international.gc.ca/controls-controles/about-a_propos/index.aspx.

Trade and Economic Sanctions

Together with export controls under EIPA, Canada applies trade sanctions against individual countries and terrorist organizations to comply with binding United Nations Security Council resolutions. These United Nations-mandated sanctions are implemented through orders issued under Canada’s United Nations Act.

Because sanctions differ in content and scope depending on the particular UN Resolution, each must be examined separately to determine the nature of the prohibitions and the duties imposed on Canadian businesses in complying with those sanctions.

The volatility in today’s world is demonstrated by many unsettling events in 2011, as Canada, in league with like-minded countries, has imposed an array of new economic sanctions against troubled and violent countries that have shown disregard for basic freedoms and human rights.

Canadian businesses involved in these regions need to be aware of these sanctions. They entail criminal penalties for companies and individuals who infringe them. The sanctions are a moving target and change as events unfold. Because they apply not only in Canada but in many cases to all Canadians outside the country, they create dangerous pitfalls for the unwary.

United Nations Mandated Actions

The federal cabinet imposes sanctions under the United Nations Act to implement binding UN Security Council resolutions. The scope of these vary, depending on the content of the particular UN resolution. At present, Canada has imposed UN-mandated sanctions against Belarus, Côte d’Ivoire, North Korea, Congo, Eritrea, Iran, Iraq, Lebanon, Liberia, Libya, Rwanda, Sierra Leone, Somalia and Sudan. Canada also applies UN sanctions against Al-Qaida and international terrorist organizations.

These United Nations Act sanctions do not always follow the same pattern and their scope and targets can differ. It’s important to look carefully at the wording of each. Some, like the sanctions against Iran and North Korea, are aimed mostly at prohibiting trade in nuclear-related materials. Others, like those against Côte d’Ivoire, Somalia and Sierra Leone, are aimed mostly at preventing arms and munitions trade.
One of the notable features of these UN-mandated sanctions is that they prohibit not only trade in specific types of goods but also dealings with “designated persons,” which tracks persons listed by the UN Security Council from time to time. These listings change continually, placing additional burdens on anyone doing business in or with these countries. It’s important to be aware of these.

Sanctions Outside the UN

Not only does Canada apply sanctions mandated by the UN Security Council — which can be changed, enlarged and modified by the UN — it also applies these in other difficult cases where the situation warrants, whether or not the UN has been involved.

This second grouping of sanctions falls under the Special Economic Measures Act (“SEMA”), which gives the government broad powers to implement sanctions agreed to by other organizations (like NATO, etc.) or to act unilaterally where the federal cabinet on its own determines that “a grave breach of international peace and security has occurred that has resulted or is likely to result in a serious international crisis.” This is totally separate from any UN resolutions.

The federal cabinet has used its authority under SEMA to make regulations prohibiting trade and business dealings with Burma, Zimbabwe and, most recently, with Syria.

While the scope of these SEMA regulations varies, they tend to be quite broad. Special care must be taken in regard to the wording here as well. For example, in the case of Burma, the regulations prohibit any “sale,” “export,” “supply” or “shipment” of “any goods” by anyone in Canada to any person in Burma or to any person, inside or outside of Burma that facilitates any business carried on there. In the case of Syria, in contrast, the regulations prohibit “dealings” in property held by or on behalf of “designated persons”. The words used in each case differ and this difference can be critical.

SEMA gives the federal cabinet virtually unrestricted authority to freeze all dealings in assets of named individuals, to order property of a foreign State seized or sequestered, to prohibit all persons inside or outside of Canada from dealing in property of that State, from shipping or supplying any kind of goods and technical data and from dealing in any manner with that State and its agencies, residents or nationals. In the case of Zimbabwe, the sanctions apply to arms and related material and to direct and indirect dealing in all property (including funds and bank accounts) of persons specifically designated in the regulations.

Again, because sanctions under SEMA are not tied to UN resolutions, they are applied as determined by the federal government in order to respond rapidly to changing foreign situations. This is exemplified by the SEMA sanctions imposed against Syria in response to the recent human rights violations in that country.

Asset Freezes – Another Concern

Closely related to these is a third statute, the Freezing Assets of Corrupt Foreign Officials Act, passed in March 2011 to deal with the situation in countries like Egypt and Tunisia, where there are grounds to believe senior officials have been corrupt and have secretly taken money or property out of the country. These persons are defined somewhat awkwardly as “politically exposed foreign persons.”
The statute permits the federal government to freeze the assets or restrain property of such persons at the request of a foreign government, where the cabinet has determined that there is a condition of turmoil or political uncertainty in that country, and where the making of an order or regulation is in the interest of international relations.

Simultaneous to its enactment, regulations were issued freezing the Canadian-held assets and prohibiting any Canadian person anywhere from dealing with assets of any kind of former government officials in Egypt and Tunisia, including the former presidents of those countries and their extended families.

Export Controls – Evolving

Operating in tandem with these is a totally separate regime of export controls, covering sensitive goods and technologies listed under the Export and Import Permits Act. All items on the Export Control List (such as arms, munitions, nuclear items and all goods of US origin) require an export permit to be exported from Canada. All goods and technology, whether listed or not, require a permit to be exported to any destinations on the Area Control List.

While export controls come under a different legal framework, they are allied to Canada’s system of sanctions. Many of the items covered by specific sets of sanctions – such as nuclear items and armaments – are also covered under the export permit regime.

Items falling under export control change in accordance with international agreements to which Canada belongs, such as the Nuclear Suppliers Group and other organizations. Because the list of controlled items — goods and related technology — constantly evolves and because of penalties where such items are exported without permit authorization, this is another statute of which exporting business and service providers need be cognisant.

Compliance

The foregoing is a very brief description shows that the present international situation is extremely fluid. Canadian law gives wide-ranging authority for the federal government to apply economic and trade sanctions against rogue States and terrorist organizations identified in UN resolutions. As outlined, quite apart from UN and related initiatives, the Canadian government has the unilateral authority to apply sanctions, seize property and freeze assets where the international situation warrants.

Criminal penalties apply where these prohibitions are transgressed. Therefore, it is all the more important for any business engaged in international dealings in troubled areas or in trade in sensitive items to be aware of the general nature of Canada’s sanctions and export control regime. Given the unsettled international situation, Canadian laws change and those changes need to be carefully watched.

While export and import controls described above are under the purview of the Import and Export Controls Bureau of DFAIT, economic sanctions under the United Nations Act are administered by the Department’s Economic Law Section within the United Nations, Human Rights and Economic Law Division. Details can be found at: www.international.gc.ca/sanctions/countries_groups-pays_groupes.asp.
Other Export and Import Restrictions

Other federal enactments come into play in specific cases, preventing or restricting specific kinds of exports and imports. Here are a few specific cases:

**Nuclear Goods and Technology**

Nuclear goods and technology are listed on the ECL, discussed previously, but are also subject to separate export license requirements of the Canadian Nuclear Safety Commission under the Nuclear Safety and Control Act and the Nuclear Non-Proliferation Import and Export Control Regulations. Thus, together with seeking an export permit from the Department of Foreign Affairs, exporters must make the necessary application and provide the required documentation to the Commission.


**Supply Management in Agriculture**

While Canada generally operates an open trading regime, there are significant restrictions on imports of dairy products, eggs and poultry as part of the administration of Canada’s system of supply management, aimed at supporting agricultural production. No person can import these products at low rates of duty without an import quota allocation. Imports in quantities above these allocations result in extremely large duties, in effect making such imports prohibitive. The administration of the supply-managed quota system comes under the Export and Import Permits Act and the Import Control List (“ICL”) made under that Act.

Details on the operation of Canada’s quota system for supply managed agricultural products can be found on the Export and Import Controls Bureau of DFAIT at: [www.international.gc.ca/controls-controles](http://www.international.gc.ca/controls-controles).

**Trade in Endangered Species**

Under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”), which entered into force internationally in 1975, Canada is required to regulate and prevent trade in those species covered by the Mobile Equipment Convention. These are wild animals and plants that are, or may be, threatened with extinction as a result of international trade. CITES applies to both living and dead specimens, as well as their parts, listed in Appendices to the Convention.

Canada’s obligations under CITES are implemented through a permit system under the Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act and the Wild Animal and Plant Trade Regulations. The permit granting authority resides with the Minister of the Environment.

For more information on Canada’s regulation of trade in endangered species, see: [www.cites.ec.gc.ca/eng/sct0/index_e.cfm](http://www.cites.ec.gc.ca/eng/sct0/index_e.cfm).

**Cultural Property**

Exports from Canada of “cultural property” listed on the Cultural Property Export Control List, is prohibited under the *Cultural Property Export and Import Act* without a permit issued by the
Minister of Canadian Heritage. The Control List is established by the federal cabinet, on the recommendation of the minister. No person is allowed to export or attempt to export any object included on the list without an export permit issued under the Act.

Canada also prohibits trade of stolen and illicitly-traded cultural property in accordance with the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two protocols. Canadian law makes it an offense for any person to trade in and export or import cultural property covered under the Convention.

For information on controls of Canadian cultural property exports and the operations of the Canadian Cultural Property Export Review Board, see: www.pch.gc.ca/pgm/bcm-mcp/cebc-cperb/index-eng.cfm.

Environmentally Harmful Substances

Canada regulates exports of hazardous chemicals and environmentally-harmful substances under the Canadian Environmental Protection Act, 1999 (“CEPA 1999”). These controls are implemented through three main sets of statutory instruments: (i) the CEPA ECL and the Export Control List Notification Regulations; (ii) the Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations; and (iii) the Export of Substances Under the Rotterdam Convention Regulations.

CEPA 1999 and these regulations are administered by Environment Canada. Details on the application of these measures for control of hazardous wastes and environmentally harmful products can be found at www.ec.gc.ca/envhome.html.

The foregoing illustrates that, as with export controls under EIPA, exporting or importing goods from or to Canada that are covered under these different laws without the necessary authorization can result in prosecution and penalties. It is therefore important for companies engaged in international transactions of a variety of sorts to have a basic understanding of the various laws and the interplay amongst them.

Trade with Cuba — a Special Case

While the US government continues to prohibit most kinds of trade with Cuba, there is no such prohibition in Canada. Because of attempts several years ago by US authorities to require Canadian-based subsidiaries of US corporations from complying with the American trade embargo, Canada passed a law called the Foreign Extraterritorial Measures Act (“FEMA”). FEMA prohibits any Canadian subsidiary of a US corporation, or any director or officer of that company, from complying with the US trade embargo. Under FEMA, any attempt by a US parent to force its Canadian subsidiary to refuse to export goods and services of Canadian origin to Cuba is an offense and could render the Canadian subsidiary and its officers liable for substantial penalties, including criminal prosecution.

While FEMA applies to ordinary trade with Cuba that does not involve US-origin goods, under bilateral defence co-operation protocols, Canadian authorities still apply US export controls on goods of US origin bound for Cuba. A Canadian company wishing to export US products to Cuba
would not be given a Canadian export permit. This avoids Canada being used as a transit country to circumvent US export controls applicable in the United States.

Recently, the US government has announced that it intends to implement measures which will permit Cuban nationals lawfully present in the US and Cuban nationals resident outside the US to make increased monetary payments to Cuban nationals in Cuba.

---

**Canada’s Controlled Goods Program**

Canada’s Controlled Goods Program (“CGP”) is a domestic security regime created under the Defence Production Act that regulates access to and use of sensitive military and strategic products, know-how and technology. The details of operation of the CGP is set out under Controlled Goods Regulations (“CGRs”) made under Act. The Program covers the same military and strategic and dual-use goods listed on the Export Control List. Thus, there is a close relationship between the CGP and Canada’s export control regime.

The CGP is designed to ensure protection of sensitive information and technology in Canada, especially in cases where Canadian companies are jointly involved in US defence procurement projects. The Program is geared to ensuring that Canadian companies and their employees can take advantage of the exemptions for Canada under the US International Traffic In Arms Regulations (“ITARs”), which allow a US company to export sensitive goods and technology to their Canadian counterpart, provided that the Canadian company is registered under the Controlled Goods Program.

Under the CGP, all corporations and other entities and all persons who deal with controlled goods and/or controlled technology are required to register with the Controlled Goods Directorate (“CGD”). Every entity registered under the CGP must also have a Designated Official that is security-cleared and a security plan filed with the CGD.

The DPA makes it an offense for any person that is not registered to knowingly examine, possess or transfer a controlled good to another person. Thus, unless registered under the Program, including having a Designated Official and an approved Security Plan, no corporation or its employees or officers can deal with controlled goods.

Information on the Program and all aspects of registration can be found online at: [www.cgd.gc.ca/cgdweb/text/index_e.htm](http://www.cgd.gc.ca/cgdweb/text/index_e.htm).

---

**Canada’s Bilateral Trade Agreements Program**

In recent years Canada lagged behind other countries, notably the US, that were aggressively signing bilateral pacts with various trading partners. During the period between 1987 with the conclusion of the Canada-US Free Trade Agreement and 2008, Canada concluded only two other bilateral agreements, with Chile (1997) and with Cost Rica (2002). Canada concluded the North American Free Trade Agreement with the US and Mexico in 1993, which built on the 1987 FTA with the United States.

However, Canada has recently moved forward in this area and has concluded trade agreements with Panama (2010), Colombia (2008), Jordan (2009), Peru (2009) and the European Free Trade Association (2009). Canada is also in the process of negotiating a number of bilateral agreements with a number of other trading partners which are in various stages of maturity, notably with South
Korea, Singapore, the Caribbean Community (“CARICOM”), a group of four Central American States and, most recently, with the European Union on a possible Comprehensive Economic and Trade Agreement (“CETA”).

The objective of bilateral trade agreements is to provide greater market access for Canadian goods and services. Under the rules of the WTO Agreement, this is done through providing lower tariff rates than would otherwise apply (preferential duty treatment) and other advantages for each others products. Under these agreements, Canadian goods and services are accorded the same treatment as local products (national treatment) and are guaranteed other rights that might not be available to third countries. There are special dispute settlement provisions in these bilateral trade agreements as well.

Details on Canada’s existing trade agreements as well as those that Canada is currently negotiating with these other trading partners can be found on the website of the Department of Foreign Affairs and International Trade at: [www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/index.aspx](http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/index.aspx).

**Foreign Investment Protection**

In addition to free trade agreements, Canada is a party to 23 bilateral foreign investment protection agreements (“FIPAs”), the last of which was signed with India in 2007, reflecting what may be a renewed interest in securing investment protection for Canadian business abroad.

Canada’s FIPA with Peru, which took effect on November 14, 2006, provides a template for Canada’s FIPA program. The agreement is based on NAFTA Chapter 11, incorporates binding third-party arbitration over measures of indirect expropriation, something that Latin American countries refused to countenance for many years under the Calvo Doctrine, requiring all such disputes to be litigated exclusively before national courts.

In addition, the Canadian FIPA model contains provisions that clarify what kinds of laws or measures are — or are not — deemed to be indirect expropriation. Measures that have an overriding public purpose and are applied in good faith are not expropriations, even if they reduce the value of an investment as a result. These provisions effectively codify decisions contained in a series of NAFTA Chapter 11 arbitration decisions.

FIPAs would give Canadian investors in both countries useful guarantees of non-discrimination, assurances of recognized standards of legal protection, application of transparent laws and procedures, and access to third-party dispute settlement through binding arbitration, the latter being an important safeguard against arbitrary application of local laws.

The new life being breathed into the Canadian FIPA program may be a second-best substitute for failure to get traction on free trade agreements with these countries. Second, as with all bilateral agreements, FIPAs are a product of negotiation and compromise. There is an array of qualifications, exceptions and reservations in these agreements, the result being that the gains in one area are often countered by other parts of the agreement.

Details of Canada’s FIPA program can also be found on the DFAIT website at: [www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/fipa-fastfacts-apie-faitssai.png](http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/fipa-fastfacts-apie-faitssai.png)?lang=en.
Settling International Investment Disputes

How Are International Investment Disputes Settled Under in Canadian Law?

The federal Settlement of International Investment Disputes Act (“SIIDA”) received Royal Assent on March 13, 2008, but the federal government has not, as yet, indicated when it intends to ratify the United Nations Convention on the Settlement of Investment Disputes (“ICSID”). It is thought that becoming a ratified party to ICSID would encourage reciprocal international investment, by both providing additional protections and arbitration options to Canadian investors abroad and to foreign investments in Canada. SIDDA may be within the jurisdiction of the federal government. However, since part of SIDDA includes reference to dispute arbitration procedures, the federal government has, to date, decided not to proclaim SIDDA, thereby bringing it into effect, while negotiations continue with the provinces. If settlement can be reached, each of the provinces would enact supporting provincial legislation adopting ICSID.

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

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

NAFTA Investment Claims

There are a number of NAFTA investment disputes filed by American investors against Canada. As is generally known, under Chapter 11 of the NAFTA, a private investor from one NAFTA country can bring binding arbitration against the government of another NAFTA country for failing to meet treaty obligations regarding the treatment owed to that investor and its investment. Chapter 11 allows investors from the US (or Mexico) to invoke these rights when Canada — including a Canadian province — is alleged to have infringed NAFTA obligations. Canadian investors, of course, have the same rights in the US and Mexico. If successful, the claimant investor gets monetary compensation for damages suffered.

Obligations to Investors

The NAFTA obligations on governments are, generally speaking, to not discriminate against another country’s investor in favour of local investors, to provide foreign investors with “fair and equitable treatment” and “full protection and security” in accordance with international law norms.
and, in cases of expropriation, to provide expeditious compensation based on the “fair market value” of the expropriated property.

**Arbitration Scorecard**

There has been a total of 58 investment claims filed against the United States, Canada and Mexico since NAFTA’s inception: 17 against the US, 15 against Mexico and, somewhat surprisingly, a total of 26 against Canada, putting Canada out in front in terms of the number of NAFTA claims filed against it. Why this is so is not entirely clear.

These numbers have to be tempered somewhat by the fact that a number of these 58 claims have either been withdrawn or are inactive. So far, relatively few Chapter 11 arbitrations have reached conclusion. Here is the tally:

- **Mexico**: Of the 15 cases initiated against the government, seven have been concluded by final awards, five are currently inactive and three cases remain active.
- **United States**: Of the 17 cases initiated, eight have been concluded (several of which have been amalgamated under the Softwood Lumber banner and are considered as one), seven are inactive or have been withdrawn and two remain active.
- **Canada**: Of the 26 cases initiated against Canada, 13 have been withdrawn or are inactive, one case has been settled, three have been concluded by final arbitration awards and nine remain active, in varying stages of readiness. Of the three cases that resulted in final awards, one claim (by UPS involving the operations of Canada Post) was dismissed by the arbitration panel. To date, only two arbitration awards have been made against Canada.

Of the cases that have been completed, only two resulted in damage awards against Canada, for a total of some $7 million, a pittance when compared with the hundreds of millions originally claimed. Four cases have been thrown out, including a $160 million claim by UPS against the operations of Canada Post and a $100 million claim by the US company Chemtura Corp against Canada’s ban of certain pesticides.

Canada has settled three investment claims, one involving Ethyl Corporation, where the settlement was for $11 million; a second involving AbitibiBowater, where the settlement was $130 million; and a third involving Dow AgroSciences where the settlement was $2 million. It would be wrong to include these settlements in totalling up successful investment claims. The $130 million AbitibiBowater settlement, for example, was for property expropriated by Newfoundland and Labrador. The fact that some amount of compensation was owed was never questioned by either the federal government or the Province.

The scorecard to date, then, is that only some $7 million NAFTA investment awards have been made against Canada by NAFTA tribunals. Three cases were settled but most have been either dismissed or are not being pursued, a far cry from the sky-is-falling type of arguments that were made when the NAFTA was concluded.

**Unsuccessful Canadian Claims**

Canadian investors have not tended to fare well in NAFTA claims over the years, several high-profile arbitrations having been dismissed by panels. Claims that have been lost include:
• *Mondev International v. United States*, 2002 (court decision that a municipal development agency was immune from tort liability);
• *Loewen Corporation v. United States*, 2003 (punitive damages in a civil jury trial);
• *ADF v. United States*, 2003 (Buy America preferences in a state highway construction project);
• *Methanex v. United States*, 2005 (a ban on the use of a gasoline additive by California);
• *International Thunderbird Gaming v. Mexico*, 2005 (regulation and closure of gaming facilities); and
• *Glamis Gold v. United States*, 2009 (regulatory delays and refusal of a mining permit).

**Looking Forward**

Even with Canada coming out way ahead in these investment disputes (as in similar NAFTA awards decisively favouring the US government), there are three cases moving ahead and — while some time away from a formal hearing — should be carefully watched because of the importance of the issues:

• *Clayton/Bilcon v Canada*, where US investors are claiming $188 million in compensation as a result of alleged discrimination in a federal-provincial environmental assessment that resulted in refusal of permission to open a basalt quarry and marine terminal in Nova Scotia;
• *Gallo v Canada*, where a US investor is claiming $355 million as a result of an alleged expropriation through Ontario’s refusal to approve a proposed land-fill site in Northern Ontario; and
• *Mobil Investments and Murphy Oil v Canada*, in which two US companies are claiming $60 million and alleging breach of NAFTA obligations as a result of performance guidelines issued by the Canada-Newfoundland Offshore Petroleum Board.

While each of the claimant/investors has raised sound legal arguments, there is no guaranty they’ll be enough to carry the day. NAFTA arbitration panels have shown themselves to be very demanding.

**Buy America – Canada US Deal on Government Procurement**

Canada added all provinces and territories to the WTO Government Procurement Agreement (the “GPA”). The provinces and territories were not included when Canada signed the GPA in 1994. Similarly, Canada limited its procurement commitments *vis-a-vis* the US when the NAFTA was concluded at about the same time.

The GPA is a “plurilateral” agreement, in WTO parlance. Unlike other parts of the WTO Agreement that are multilateral and comprehensive, the GPA applies only to those procuring entities that are specifically listed by each WTO member in schedules to the agreement and only binds the offering country to other WTO members that provide similar rights. Because provinces and territories were not listed in Canada’s GPA schedule, procurement by these sub-federal entities were not subject to Canada’s GPA obligations. Only Canadian federal procurements are covered and, then, only those departments, agencies and federal Crown corporations that were listed in Canada’s schedule. As a result of Canada’s limitation its GPA coverage, the US excluded Canada — and Canadian suppliers — from access to American sub-federal procurement by the 37 US states that were listed in the US GPA schedule.
In spite of this absence of legal obligation, Canadian suppliers as a practical matter have, in fact, provided goods and services to various US state and local projects over the years. It simply developed as a commercial matter. However, the Buy American conditions of the US stimulus bill changed that, by preventing state and local governments from using iron, steel or manufactured goods from countries such as Canada that did not legally guaranty similar rights to US suppliers.

The February 2010 agreement repairs this omission by including the Canadian provinces and territories in Canada’s WTO-GPA schedule. However, not all provincial or territorial agencies and ministries are included; only those that are specifically listed are covered. For example, Ontario’s list is restrictive. For example, the LCBO and all procurements of all rail, urban transportation and highway construction are excluded. Québec has excluded procurement of cultural and artistic goods and services as well as construction grade steel. There are also overriding exclusions for all sub-federal highway projects, environmental programs as well as for all Crown corporations of the provinces and territories. In effect, Canada has offered up a series of provincial procurements to US bidders that are designed to balance the access that Canadian bidders have to the 37 US state procurement projects open to Canadian bidders under the GPA.

This change only provides US suppliers access to provincial and territorial bidding opportunities; it does not guaranty a right to supply.

As allowed under the GPA, this deal only applies bilaterally to suppliers from the United States. It does not open Canadian sub-federal procurements to bidders from third countries. Because of the nature of the GPA, such third-country access would have to be negotiated. Canada has stated that it would be prepared to negotiate that access. This is important in the context on current trade negotiations with the European Union, which has indicated that this is an important part of their objectives in the talks.

The February 2010 agreement allows Canadian bidders access to US sub-federal procurements funded under the Buy American provisions of the US stimulus package (in the American Recovery and Reinvestment Act or “ARRA”). It does that by opening up seven stimulus programs under the ARRA that applied Buy American restrictions for iron, steel and manufactured goods and excluded Canada. These openings contain important limitations, however, such as pre-existing preferences for US small business set-asides.

As a quid pro quo for access to these sub-central procurements under the US stimulus program, Canada has agreed to allow US bidders access to procurements of “construction services” by provincial and territorial entities specifically listed in the Canadian annex. Any provincial procuring entity not listed is not covered. For example, Ontario has listed a large number of provincial agencies and about 35 municipalities whose construction projects will be open to US bids, but is has excluded procurements by Metrolinx, the Toronto Transit Commission, Hydro One, all cultural, educational and hospital agencies, and other agencies. To determine which projects are open to US bidders it is necessary to consult each provincial list.

Excluded as well are all provincial procurements procurements related to aboriginal programs.

Canada’s granting of US bidders access to provincial, territorial and municipal construction projects under this part of the deal is designed to balance Canadian bidders’ access to those remaining monies not yet committed under the ARRA for US sub-federal projects noted above.
However, only time will tell if the intended balance is realized, by comparing the value of access and the procurement contracts actually awarded to suppliers from each country over the course of the agreement.

This part of the deal ends in September 2011, about the time the stimulus measures in each country run their course. Even though this part is time-limited, the Canada-US WTO-GPA commitments explained above will continue.

Finally, Canada and the US commit to consulting on a long-term Canada-US procurement agreement, which by definition would have to be mutually beneficial and self-balancing and which would extend the scope of the GPA and the NAFTA to a broader range of sub-central procurements on a long-term basis. Those negotiations will take time, however.

None of the above affects Mexico under the NAFTA and although there have been noises to the effect that Mexico has some rights to access under Canada’s offer, that is legally incorrect. Similarly, while some comments have suggested that access to Canada’s sub-federal procurements under the GPA is open to other WTO members, that is not the case. These access rights have to be negotiated on a one-to-one basis, as summarized above.

**Efforts to Reduce Inter-Provincial Trade Barriers in Canada**

The Agreement on Internal Trade (“AIT”) is a 1995 agreement among the federal government and each of the provinces of Canada intended to reduce trade barriers and permit trade skill certifications to be recognized from province to province. It is generally viewed as being ineffective in achieving those goals.

Effective July 1, 2009, the provinces of British Columbia and Alberta entered into the Trade, Investment and Labour Mobility Agreement (called the “TILMA”). The two provinces agree to reconcile existing standards and regulations which operate to restrict or impair trade, investment or labour mobility. They agree not to directly or indirectly provide business subsidies that advantage one party over the other. Each province agrees to provide open and non-discriminatory access to procurements of their respective governments to persons from the other province.

Any person may institute proceedings before a panel constituted under the 2009 Agreement where the party believes that a measure by one of the provinces is inconsistent with the TILMA or the Agreement on Internal Trade. The 2009 Agreement provides for a dispute resolution panel with powers to make awards up to $5 million.

The trade certification provisions in the TILMA (permitting certified trades to work in both provinces without re-certification) came into effect on April 1, 2009.

Ontario and Québec have recently indicated a mutual interest in discussing a possible inter-provincial trade agreement which would address, among other things, a long-standing conflict between construction workers in the two provinces regarding trade certification and labour mobility.

The AIT and TILMA attempt to breakdown trade barriers within Canada short of legislation. Many observers feel this is a poor substitute for action by the Federal government, given its authority over Trade and Commerce and Peace Order and Good Government under section 91 of the Constitution Act 1867.
Does Canada Have Exchange Controls?

There are no exchange controls in effect in Canada, so there are no restraints on the repatriation of profits from business conducted in Canada by a foreign owner.
14. HAS CANADA ENACTED DOMESTIC LEGISLATION IN FURTHERANCE OF INTERNATIONAL PROTOCOLS AND TREATIES?

How is the International Sale of Goods Treated in Canada?

In Canada, sale of goods legislation is a provincial responsibility. The various provincial Sale of Goods Acts impose certain commercial rules into every contract for the sale of goods, such as when title to the goods passes or whether the buyer or seller bears the risk of damage or loss to goods before delivery. These provincial statutes also impute into each sale of goods contract conditions that will apply to the sale in question. They relate to matters such as the seller’s title to the goods, the transfer of title to the goods to a bona fide purchaser for value free of any existing liens, and a warranty of the goods’ fitness for their intended purpose.

Different jurisdictions have different rules relating to the sale of goods. In an attempt to reduce uncertainty, and by extension, the cost of doing business between buyers and sellers in different jurisdictions, the United Nations sponsored a Convention on Contracts for the International Sale of Goods (the “Sale of Goods Convention”). Canada and each of the provinces other than Québec ratified the Sale of Goods Convention and it came into force in Canada in May 1992. A number of countries, including the US and Mexico, are parties to the Sale of Goods Convention.

The Convention is important from the perspective of international trade. Unless the application of the Sale of Goods Convention is specifically excluded by the parties to a sale of goods transaction, the Sale of Goods Convention governs any agreement of purchase and sale of goods between Canadian buyers and sellers and their respective foreign counterparts, even if the parties fail to adopt applications of the Sale of Goods Convention to their contract. The Convention establishes a series of rules that are implied as part of each such agreement. The Convention does not radically rewrite the rules as set out, for example, in Ontario’s Sale of Goods Act or Article 2 of the US Uniform Commercial Code. Rather, the Sale of Goods Convention harmonizes the rules to reduce conflict between contracting parties. There is no longer a need to negotiate at length which applicable law will govern. The Convention rules will govern unless the parties “opt out” of the Sale of Goods Convention.

The following is a brief summary of the matters dealt with under the Sale of Goods Convention:

- The obligations of the seller, the obligations of the buyer, remedies for breach, the identity of the party who bears the risk of loss of the goods, and the basis on which damages may be claimed are determined in the Sale of Goods Convention.
- There is no need for the contract to be in writing.
- It is difficult for either party to terminate a contract governed by the Sale of Goods Convention once it is formed. The performing party may rescind the contract only if the non-performing party has committed a fundamental breach of the contract. A breach is fundamental if it deprives the other party of what he/she is entitled to expect under the contract, unless the party in breach did not foresee, or a reasonable person in the same circumstances would not have foreseen, such a result.
- The seller must deliver goods of the quantity, quality and description required by the contract. Goods are deemed not to conform with the contract unless:
They are fit for the purpose for which they would ordinarily be used.
They are fit for any particular purpose expressly or implicitly made known to the seller when the contract was entered into.
They possess the qualities which the seller has held out to the buyer as a sample.
They are contained or packaged in a manner usual for such goods, or adequate to preserve or protect them.

The parties to the contract may adopt certain laws of an appropriate jurisdiction to override one or more of the rules set out in the Sale of Goods Convention. In this way the parties can select the arrangement that make the most sense for them in their circumstances.

In Québec, sale of goods legislation is set out in Book Five, Title Two, Chapter 1 of the CCQ. The rules in Book Five are somewhat similar to those under the Sale of Goods Convention. However, where the sale in question is governed by Québec law, Québec counsel should be consulted to determine the differences between the applicable provisions of the Sale of Goods Convention and the CCQ. Note also that under Article 3111 of the CCQ, the parties may choose to have the law of a jurisdiction of their choice to govern their contract (including, for example, the Sale of Goods Convention or, as applicable, the International Chamber of Commerce (“ICC”) rules), and this choice of law will likely be upheld by a Québec Court.

What Conduct is Prohibited by the Corruption of Foreign Public Officials Act?

Since 1977, the US has had legislation — the federal Foreign Corrupt Practices Act (the “FCPA”) — designed to punish any US business that bribed foreign officials to gain an advantage over its competitors which came into force in 1999. The federal Corruption of Foreign Public Officials Act (the “CFPOA”) only applies to conduct that takes place in Canada or to criminal acts, such as bribery, that take place outside Canada which have a real and substantial connection to activities in Canada. This territorial jurisdiction rule appears to be a very hard test for Canadian officials to satisfy. Canada is the only country that applies this rule. Other countries have framed their legislation on the basis of conduct by their nationals, wherever such conduct occurs. International business is often conducted through agents and contacts, all of whom are outside Canada. As a result, the CFPOA is generally viewed as a tiger with real teeth.

CFPOA provides that:

- It is an indictable offence in Canada to obtain or retain an advantage in the course of business, by directly or indirectly giving, offering or agreeing to give or offer a loan, reward, advantage or benefit to a foreign public official or to a person for the benefit of a foreign public official to influence the official in connection with the performance of the official’s duties or functions, or to induce the official to use his/her position to influence any acts or decisions of the foreign state or public international organization for which he/she performs duties or functions. Note the reference to a “reward, advantage or benefit” given directly or indirectly to foreign public officials. This phrase covers a wide range of inducements beyond the simple transfer of money. Note also the reference to these payments or benefits being provided “in order to obtain or retain an advantage in the course of business.” Those terms make the application of the law very broad. The punishment for such actions is up to five years imprisonment.
• It is an indictable (i.e., serious) offence in Canada to either possess property or proceeds of any property knowing that all or any part of the property or proceeds were obtained as a result of a CFPOA offence, or deal in any manner with any such property or proceeds with the intent to conceal or convert such property (i.e., money laundering). These actions are punishable on indictment by up to 10 years imprisonment, and on summary conviction by up to six months imprisonment or a fine of up to $50,000, or both.

• Section 183 of the Criminal Code brings bribing a foreign public official, possession of property derived from such bribery and laundering proceeds within the definition of the offence of money laundering in Canada.

• The Tax Act prohibits anyone who must file a Canadian tax return from claiming a deduction for any outlay made or expense incurred for the purposes of doing anything that is an offence under the CFPOA. This opens the possibility of penalties under the Tax Act where an affected persons deducts the foregoing as business expenses in preparing financial records for tax filing purposes.

Exceptions

Not every kind of payment, benefit or gift to a foreign official is prohibited, however. The Act allows what are called “facilitation payments” — small payments done to assist officials in routine functions where the result is predetermined. The Act defines these to include the issuance of a permit, licence or other document; the processing of documents such as visas and work permits; the provision of services “normally offered to the public” such as mail pick-up and delivery, telecommunication services, power and water supply, police protection and the like.

The point to underscore is that the exception for “facilitation payments” is meant to allow payments of a relatively innocuous nature to low or mid-ranking officials. Anything that extends beyond routine matters to higher-order decision-making would potentially be caught by the Act. There are gray areas, of course, where the line between routine and non-routine decisions may not be easy to determine. In those cases, it’s better to err on the side of caution.

Some intergovernmental bodies dealing with corruption issues, notably Transparency International, are opposed to the very idea of these kinds of payments and suggest that companies avoid them altogether (see the discussion of this on Transparency International’s website: www.transparency.org).

Defences

There are also defences to charges under the Act. The first is that the payment or benefit was lawful in the foreign State concerned. This defence is not easy to mount and there are pitfalls here in not confusing custom or practice in the foreign State concerned with the requirement for written laws that justify the payment or benefit.

The second defence to any charge is that the payment was a “reasonable expense” incurred in good faith for “the promotion, demonstration or explanation of the person’s products and services” or for “the execution or performance of a contract between the person and the foreign state” Again, it should not be assumed that this defence will be easy to prove.

Finally, in Canada, the Charter of Rights and Freedoms provides a due diligence defence to every person, including directors and officers, where breach of the offence includes the possibility of imprisonment. One essential element of this defence is a program and procedures designed to
ensure compliance and adherence to the procedures by management. Boards of directors of corporations carrying on business in Canada should implement a CFPOA compliance program similar to those that may already be in place to ensure compliance with the FCPA.

**Facts are the Dominant Consideration**

Whether a payment or benefit falls within any of these exceptions or 14.4 still means will depend on the particular facts. To be on the safe side, it should be assumed that all payments or benefits for travel, hotel, dinner and entertainment or club fees and other expenses aimed at gaining a favourable decision from a person in higher authority would be an offense. Luncheon or dinner invitations as courtesies and mementos or souvenirs may not be prohibited, depending on the facts and the circumstances. Much will depend on whether the foreign official involved is in a position of authority and can make or influence an impending decision of importance to the business affairs of the company.

As noted, when dealing with foreign public officials that are in positions of authority, it’s always best to err on the side of caution and seek advice in any cases that are more than minor benefits and innocuous gifts or entertainments.

**Canada’s Enforcement Reputation**

Canada is viewed as not being sufficiently active in investigating and prosecuting economic crime, but it has been reported in the press that the commercial crime division of the RCMP now has two anti-corruption teams in place that are now devoted to enforcement of CFPOA. A November 2009 report published by PriceWaterhouseCoopers (“PWC”) discloses that economic crime in Canada is at its highest level in the last six years with 56% of those Canadian enterprises it surveyed reporting that they had been victims of economic crime in the last 12 months, and that in 59% of those cases, the person perpetrating the crime was from outside the organization. PWC reports that actions which would constitute violations of the CFPOA reported by respondents declined slightly over the last 12 months. This may indicate a growing awareness of CFPOA within the Canadian mining, oil and gas industries, especially where an enterprise has one or more directors on its board that are US residents or where the enterprise is a reporting issuer whose shares are traded on a US exchange.

All Canadian enterprises with foreign business operations must have in place appropriate CFPOA compliance guidelines that are enforced with a member of senior management with direct oversight responsibility, and should a possible violation be identified, immediate action is required. Unfortunately, as yet there is no CFPOA voluntary disclosure program in place and the CFPOA is a criminal law statute and proceedings by the Crown are not subject to a limitation period. All the more reasons for an effective internal compliance program.

**March 2011 OECD Review of Canada’s Enforcement Record**

In March 2011, the Organisation for Economic Co-operation and Development ("OECD") Working Group on Bribery has just completed a report on Canada’s enforcement of the OECD’s Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Canada has only had one prosecution under the CFPOA since it was enacted more than 12 years ago. It appears that one publicly traded corporation is under investigation and it is said that there are more
than 20 investigations being actively pursued by the RCMP International Anti-Corruption Unit, established in 2008. Funding for prosecutions appears to be an issue.

OECD recommendations include:

- Amend the CFPOA so that it is clear that it applies to bribery related to the conduct of all international business, both profit and not-for-profit;
- Ensure that sanctions applied in practice for CFPOA violations are effective;
- Take such measures as may be necessary to prosecute Canadian nationals for bribery of foreign public officials committed abroad;
- Clarify that police and prosecutors may not consider factors such as the Canada’s national economic interest and its relations with a foreign state, when deciding whether to investigate or prosecute allegations of foreign bribery;
- Amend the Criminal Code to clarify that where the wrongful conduct of an individual engaged by a corporation can result in a conviction against such corporation;
- Amend the Criminal Code to make threatening or retaliating against whistle blowers a criminal offence; and
- Increase reporting requirements for private entities and public officials.

Given the OECD initiative described above and the increased focus of the UK and the US, in particular, on money laundering activities, you can anticipate more time and effort being spent by the federal government in CFPOA matters. The rubber hits the road in this area when a prospective purchaser conducts due diligence in respect of a potential purchase and sale transaction where the Canadian target enterprise has business operations outside Canada. Some business practices in many foreign jurisdictions would constitute a violation of both the FCPA and the CFPOA. US authorities have focused on obtaining convictions and imposing fines under the FCPA to a much greater extent than has Canada. As a result, US purchasers of Canadian enterprises look for compelling evidence that the Canadian target enterprise has done the necessary background and other checks to “know their foreign agents” in previous transactions where the target was the acquiring entity.

2011 Conviction

In June 2011, a Calgary-based oil and gas company, NIKO Resources Ltd., (“NIKO”) pleaded guilty to one count of bribing a Bangladeshi energy minister in 2005. NIKO agreed to pay a $9.5 million fine. The guilty plea follows a six-year probe by the international anti-corruption unit of Canada’s RCMP, during which NIKO, which has a subsidiary in Bangladesh, was charged with violating CFPOA. NIKO admitted to providing Mosharraf Hossain, a former Bangladeshi State Minister for Energy and Mineral Resources, with a vehicle, travel, and accommodation during a trip from Bangladesh to the GO EXPO oil and gas exposition in Calgary. NIKO also paid the costs of a family trip to New York by the minister. The prosecution may be evidence of stronger enforcement by Canadian officials for conduct by Canadians contrary to CFPOA.

Resources and Guides

There are many useful sources of advice and best-practices standards on meeting these anti-bribery and anti-corruption requirements. Together with consulting Transparency International, referred to
above, Canadian businesses should look at the material provided by the OECD (www.oecd.org) and the OECD’s Business and Industry Advisory Committee (“BIAC”) and the latter’s Anti-Bribery Resource Guide (www.biac.org) as well as the Rules of Conduct and Recommendations issued by the International Chamber of Commerce in Paris (www.iccwbo.org). There are other sources of information that can be uncovered doing a simple Google search.

Caution and Prudence

The OECD Convention and the CFPOA have brought about changes in the way Canadian corporations must conduct diligence in foreign business operations. The important point here is that prudence and caution are the watchwords when dealing with foreign public officials in the context of business deals.

What Transactions Come Within the Provisions of the Money Laundering Act?

Canada has legislation intended to deter money laundering in Canada and the financing of terrorist activity. Money laundering includes proceeds from illegal drug trafficking, bribery, fraud, forgery, murder, robbery, dealing in counterfeit money, stock manipulation, tax evasion and copyright infringement.

Canada’s Criminal Code requires specified types of financial institutions and providers of financial services to determine, on a continuing basis, if they are in possession or control of property of a “listed person,” that is, a person named a list maintained by OSFI that includes names listed by the United Nations Security Council and names listed pursuant to the Criminal Code and certain regulations under the United Nations Act. The Criminal Code also makes it an offence for any person or entity in Canada, or Canadian outside Canada, to deal with property of a listed person or a terrorist group, to enter or facilitate any transaction related to such property or to provide any financial service to a listed person or terrorist group.

The federal Proceeds of Crime (Money Laundering) and Terrorist Financing Act (the “Money Laundering Act”) imposes obligations on financial institutions (including life insurance companies, brokers and agents), securities dealers, money services businesses (including foreign exchange dealers), real estate brokers, real estate developers, accountants, casinos, dealers of precious metals, stones and jewellery and British Columbia notaries (called “reporting entities”) to keep records and report to the Financial Transactions and Reports Analysis Centre of Canada (“FINTRAC”), Canada’s financial intelligence unit. Money services businesses are subject to a registration requirement.

The Money Laundering Act is based on the principles set out in the Forty Recommendations of the multinational Financial Action Task Force, of which Canada is a founding member.

Reporting entities are required to report every suspicious transaction or attempted transaction of a customer or client. There is no threshold amount that triggers the reporting requirement. It is an offence to advise the customer or client that a report has been made and to advise the client of the contents of a report. Reporting entities are also required to report large cash transactions (as and when prescribed) and prescribed electronic funds transfers.
Cross-border reporting regulations made under the Money Laundering Act require persons (not just reporting entities) to report the importation or exportation of amounts over $10,000 of currency or monetary instruments in bearer form, whether carried across the border, or imported or exported by mail, courier or by any other means. There is no requirement to report bank drafts or cheques or other negotiable instruments made payable to a named person, unless payable to bearer pursuant to an unrestricted endorsement.

The identity of a client must be ascertained, using the prescribed means, before an account is opened. KYC identification and record-keeping requirements include the requirement, in prescribed circumstances, to take reasonable measures to determine if the client is acting on behalf of a third party and to obtain certain information about persons or entities owning or controlling (directly or indirectly) 25%, or more, of the ownership of the entity.

Reporting entities must put a compliance regime in place and it must include written policies and procedures to: (i) assess the risk of its business activities being used for money laundering or terrorist financing activities; (ii) identify and monitor high-risk clients or activities; and (iii) mitigate identified risks.

Special requirements apply when a reporting entity determines that it is dealing with a politically exposed foreign person (“PEFP”). PEFPs are foreign (non-Canadian) heads of government, members of legislature, heads of political parties, ambassadors, senior military officers, heads of state-owned companies and members of the judiciary, in each case together with prescribed family members.

There are enhanced rules requiring a Canadian deposit-taking financial institution to obtain information about the counterparty to a correspondent banking relationship and a prohibition on entering into correspondent banking relationships with any shell bank (one that has no physical presence in any country, unless it is controlled by a deposit-taking institution or foreign financial institution that does have a physical presence in Canada).

FINTRAC is empowered to impose administrative monetary penalties for violations of the Money Laundering Act, without having to refer the matter to law enforcement for prosecution. The possible penalties vary with the seriousness of the violation, with the maximum penalty for the most serious violations being $100,000 for an individual and $500,000 for an entity. Offences against the Money Laundering Act may be prosecuted in the courts.

Although the Money Laundering Act is written to apply to the legal profession, lawyers are not currently subject to it by virtue of a continuing injunction. The provisions written for lawyers would not require reporting to FINTRAC. Lawyers are subject to similar client identification and record-keeping requirements pursuant to requirements established by professional governing bodies, and these requirements are based on the provisions of the Money Laundering Act.

Effective February 20, 2009, Canadian real estate developers (defined below) became subject to the Money Laundering Act when a developer sells to the public a new house, a new condominium unit, a new commercial or industrial building, or a new multi-unit residential building. Any person who in any calendar year after 2007 has sold any of the following to the public:

- At least five new houses or condominium units;
- At least one new commercial or industrial building;
• At least one new multi-unit residential building each of which contains five or more residential units; or
• At least two new multi-unit residential buildings that together contain five or more residential units.

Real estate developers must establish an internal compliance regime, and in those circumstances described in the Money Laundering Act, real estate developers must prepare and submit to FINTRAC suspicious transaction reports, terrorist property reports and large cash ($10,000 or more) transaction reports. Records must be kept for all funds received by the real estate developer, as well as detailed information regarding each of the developer’s clients.

In 2002 the Canadian Payments Association (“CPA”) changed its clearing rules to preclude the clearing of cheques of $25 million or more. In effect, certified cheques cannot be used for payments of this amount (unless the cheque is an “on us” payment item involving parties who are customers of the same financial institution). Funds transfers that meet or exceed this threshold may be cleared by CPA members through the Automated Clearing Settlement System or by participating CPA members using the LVTS. Payments made using LVTS are immediately final and irrevocable.
15. ADMISSION TO CANADA

Who Can Apply for Admission to Canada?

The federal Immigration and Refugee Protection Act (“IRPA”) distinguishes between those who seek to come to Canada temporarily (“temporary residents”) such as tourists, international students and temporary foreign workers and those who seek to remain permanently (“permanent residents”) also known as “immigrants.”

Temporary Entry for Visitors

In order to be “admissible” to Canada, temporary entrants must be without criminal records, in sufficiently good health, and must have sufficient means to support themselves during their stay in Canada and to finance their departure.

Temporary entrants of various nationalities require a formal visa in order to enter Canada. Application for such a Temporary Residence Visa (“TRV”) is made at a Canadian immigration office outside Canada (“visa office”). A person applying for a TRV must satisfy a visa officer that he or she seeks to come into the country for a temporary purpose and will abide by the terms of admission. Temporary entrants of specified nationalities are exempted from a formal visa requirement and may travel to Canada without this form of pre-approval.

Temporary entrants who have resided in designated countries for a period that exceeds six consecutive months within the past year, and who wish to remain in Canada for over 180 days, must undergo a medical examination and the results must be reviewed by the Citizenship and Immigration Canada medical office before a TRV be issued or before appearing at a port of entry.

Temporary Entry for Students

A person seeking to engage in a course of studies in Canada for a period that exceeds six months requires a Study Permit which is normally issued by a visa office or, in some cases, at Canadian ports of entry. An application for a Study Permit must be accompanied by proof of enrolment in the course and pre-payment of tuition together with evidence satisfactory to the visa office that the applicant will be financially self-supporting for the entire duration of his/her studies. A person wishing to study in the province of Québec is also generally required to previously apply for a Certificate of Acceptance issued by the Government of Québec.

Temporary Work in Canada

Business Visitors representing foreign employers who typically visit with Canadian clients or to assess future trade or business opportunities do not require Work Permits. Business Visitors may include personnel entering Canada to perform after-sales service, installation or warranty work pursuant to a contract of sale between a foreign vendor and a Canadian purchaser.

The most common way to become eligible for a Work Permit is to be the subject of a positive Labour Market Opinion (“LMO”) issued by Service Canada (a.k.a. Human Resources and Skills Development Canada) to a Canadian employer. In order to issue a positive decision, Service Canada requires the potential employer to provide evidence that it has made recruitment efforts focusing on Canadian citizens or permanent residents so as to establish why the job cannot be filled.
by a resident of Canada (e.g., because of a lack of qualified local candidates or because of other benefits the foreign candidate brings to the position). In some situations, where broad skills or labour shortages can be established, employers may negotiate with Service Canada for facilitated approvals for specified numbers of foreign workers with specific skills sets. When approving any request for an LMO, Service Canada expects that the employer is offering the position at a prevailing local wage.

When the worker chooses to take up residence in Québec, the LMO must be issued jointly by HRSDC and the Québec Ministère de l’immigration et des communautés culturelles de Québec (“MICC”). In addition, the employee must obtain a Québec Certificate of Acceptance, a process by which the MICC will satisfy itself that the candidate is suitable for the position being offered.

There are categories of Work Permit applications that do not require the applicant to be subject to an LMO. These include, but are not limited to:

- Pre-approved skills categories such as designated information technology skills (“Information Technology Workers Programme”).
- Intra-company transferees of executives or persons for senior management positions or positions that require specialized knowledge.
- A US or Mexican citizen performing services within a profession listed under the North American Free Trade Agreement (“NAFTA Professional”).
- Spouses of skilled foreign workers and spouses of foreign post-secondary students.
- Young adults subject to “Work Abroad” programs offered by the Canadian Government.

Effective April 1, 2011, new temporary foreign worker program regulations came into effect. Under the new regulations:

- Greater scrutiny of the genuineness of a job offer will be required, including evidence that the employer is actively involved in the business, the job offer is consistent with the needs of the employer, the employer is reasonably able to comply with the offer to the employee and evidence of compliance with laws regulating employment in the province in which the work will be done;
- The employer’s history in employing temporary foreign workers during the previous two years will be assessed to determine whether the employer complied with the terms of past job offers. An employer who has failed to meet past job offer commitments or compensated the affected employees appropriately for their losses, may have his/her/its name posted on the Department’s ineligible employers list and be ineligible to hire temporary foreign workers for a period of two years, even if a subsequent job offer would pass the test of being genuine;
- We understand that all LMOs are subject to review based on the genuineness criteria set out above; all LMOs which formed the basis of Work Permits for an employer on the ineligible employers list terminate; and new LMOs that are issued will be subject to time limits; and
- The maximum allowable cumulative period of time that a foreign worker can work in Canada is now four years. Any such foreign worker is then ineligible for a Canadian temporary work permit for a further period of four years. Exceptions to this rule include certain persons who have applied for permanent residence status (this may be the only practical approach for employers, that is, to encourage temporary foreign workers who may be needed beyond the 4 year period to make this application well before the end of the four year period), persons in
managerial and professional occupational classes and persons employed under NAFTA or another international agreement or under the Seasonal Agricultural Worker Program.

Implications for merger and acquisition transactions include:

- In an asset purchase transaction, the purchaser may have to seek and obtain new LMOs and will have to seek and obtain new Work Permits for temporary foreign workers prior to closing;
- In a share purchase transaction, if the target company has been in violation of past offers of employment, it may be subject to the two year ban on hiring temporary foreign workers — do your due diligence regarding this issue; and
- In either an asset purchase or share purchase transactions if key foreign temporary workers have been working in Canada for more than four years, their Work Permits will not be renewed and the individuals will not be available for hire for four years following the end of their current Work Permits. Try to convince these workers to apply for permanent residence status.

Immigration Strategies for the Employer

The past few years have seen a growing trend in Canada to address labour and skill shortages through the use of temporary foreign workers. Programmes have been established by the Canadian Government to facilitate the admission of Construction trades people in Toronto, Information Technology workers across Canada, Oil Sands workers in Northern Alberta and generally a wide variety of high and low skilled workers of many trades throughout Western Canada and beyond. Immigration and labour market officials are open to discussion with industry to review and update their priorities regarding admission of various trades into different sectors of the economy.

A number of temporary foreign workers holding ongoing job offers from local employers are now finding a path to permanent resident status through the Provincial Nominee Programmes (see below).

The availability of foreign skills and labour to Canadian employers now stands in marked contrast to the increasing barriers and bureaucracy to the legal admission of foreign workers into the United States. Employers on either side of the border are making decisions regarding the expansion of their businesses based on the flexibility and growth potential of the Canadian labour market force.

Permanent Entry — Three Categories

There are three categories of eligibility for applicants seeking permanent resident status:

- The Economic class features Skilled Workers and includes Business Applicants;
- The Family Class comprises sponsored spouses and children of permanent residents and citizens of Canada as well as sponsored parents and grandparents; and
- Refugees and other humanitarian classes.

Skilled Workers

This category of economic applicants for permanent resident status are measured by a “points system” which considers job skills and experience, knowledge of English and/or French and formal education or training. The point system is designed to identify candidates that will successfully establish themselves in Canada. A skilled worker applicant is not required to have an offer of employment in Canada, but those who do are awarded additional “points.”
Business Applicants

Entrepreneurs
Intend and have the ability to:

- Establish, purchase or make a substantial investment in a business or commercial venture in Canada that will contribute significantly to the economy and create or continue employment opportunities in Canada for one or more Canadian citizens or permanent residents, other than the entrepreneur and his/her dependants;
- Intend and have the ability to provide active and ongoing participation in the management of the business or commercial venture;
- Have minimum personal net worth of $300,000;
- Have successfully operated, controlled or directed a business or commercial undertaking for a period of not less than two years; and
- Will fulfill a condition to set up a qualifying business within a period of three years.

Immigrant Investors
As of December 2010, investors are applicants who:

- Have successfully operated, controlled or directed a business or commercial undertaking for a period of not less than two years;
- Have made a minimum “investment” of $800,000 (twice the previous minimum) in an approved fund offering a return of principal in five years with no accumulation of interest; and
- Have a personal net worth legally accumulated of at least $1,600,000 (again, twice the previous minimum).

There is no condition imposed on Investors to commence a business in Canada, although it currently takes between three and four years to process an investor application.

Self-Employed
This category applies to successful professional athletes and artists (as well as to farm managers) who are in a position to continue their livelihoods in Canada.

Québec Immigration
The Province of Québec operates its own immigration selection and processing system for applicants who intend to reside in this province. Québec has its own selection criteria for skilled workers, entrepreneurs and investors. In addition to determining its own occupational priorities, Québec places a high value on knowledge of French in selecting skilled workers. Applicants are processed and interviewed in Québec immigration offices while federal visa offices are only involved in conducting criminal and medical evaluation before issuing the permanent resident visa. Financial thresholds under the Québec program are similar to those under the federal program.

Provincial Nominee Programmes
Over the past decade the Federal Government has negotiated agreements with each Province and Territory which allows these jurisdictions to choose a portion of the annual intake of permanent
residents according to their own priorities. Applicants selected by a provincial nominee program must indicate a clear intention to settle in that Province upon becoming permanent residents. However, once an applicant becomes a permanent resident that person has the same rights as all other Canadian permanent residents and citizens to live and work anywhere in Canada as guaranteed by Canada’s Charter of Rights and Freedoms. Unless it is determined that the applicant misrepresented his/her intentions at the time he/she entered Canada. A finding to this effect could lead to the loss of permanent resident status.

Most provinces base their selection of “skilled worker” nominees, many of whom are already in their jurisdictions as temporary foreign workers, on applicants with job offers from local employers. Some provinces give preference to those applicants whose occupations are listed as being in high demand within their local labour markets.

Some Provinces offer their own Business Immigration programmes. These may include eligibility criteria for Entrepreneurs that may differ from the federal programme as regards to a candidate’s business background, net worth and business creation priorities.

Admissibility
Any person, seeking permanent entry to Canada must be found “admissible” to Canada. Applicants and their accompanying dependants (other than refugees and spouses and children of Canadian sponsors) must pass a medical evaluation that confirms that they are unlikely to become above-average users of health or social services. All adults must also be clear of criminal convictions and must pass security background checks.

Processing Times for Permanent Resident Applications
Timing for processing of permanent residents application varies according to different priorities and visa office locations.

Processing of sponsored spouses can take between nine months and a year and a half in most visa offices.

Federal Economic Immigrant applications can take between 16 months and 72 months to process depending on the individual visa office and the size of its existing backlog. Applicants are required to file in the Canadian visa office located in (or assigned to) their country of citizenship. However, applicants residing in Canada as international students or foreign workers may file though the Canadian visa office in Buffalo, New York, thus enjoying one of the fastest visa office processing times.

Provincial Nominees are given higher priority than Federal economic applicants and many can be processed in less than a year. They may even be eligible for interim work authorisation after their initial selection by the Province.

At the time of writing the Federal Government has committed to reduce waiting times for permanent resident applicants by instituting “on-time delivery.” It is unclear whether this would involve reducing the number of applicants accepted for processing (rather than admission) each year to meet current acceptance targets of over 250,000 immigrants per year and thereby avoid the creation of a backlog of qualified candidates.
Canadian Experience Class

The Canadian Experience Class, first announced in the 2007 budget, for certain skilled temporary foreign workers and international students with Canadian degrees and/or Canadian employment was implemented by the federal government in September 2008.

This program applies to persons who are, or have been, temporary workers in Canada (two years of continuous work in the last three years) and persons who are recent graduates of post-secondary institutions in Canada with at least one year of temporary work in Canada following graduation. English or French fluency is required. All applications are to be processed through the Canadian visa office in Buffalo, New York. The applications are processed on a “pass-fail” basis, not on a points basis.

The Point System Selection Criteria under the *Immigration and Refugee Protection Act*

| Item 1: Education and Training — a maximum of 25 points |
| These points are awarded for education and formal training in the applicant’s intended occupation under Item 3. |

| Item 2: Experience — a maximum of 21 points |
| These are awarded for years of experience in the applicant’s intended occupation under Item 3. |

| Item 3: Occupational Factor — a maximum of 10 points |
| These points are based on the national demand for the intended occupation. The entrepreneur and investor are not assessed on this item. |

| Item 4: Arranged Employment |
| 10 points are awarded if the applicant has pre-arranged employment in Canada. The self-employed person will be given a bonus of 30 points if, in the opinion of the immigration officer, he will be able to successfully establish himself without assistance. The entrepreneur and investor are not assessed on this item. |

| Item 5: Demographic Factors — a maximum of 10 points |
| These are based on consultation with the provincial authorities and such other persons and institutions concerning regional demographic needs, labour market considerations and the ability of the regional infrastructure to accommodate population growth. |

| Item 6: Age — a maximum of 10 points |
| • 10 points for 21 years of age or older but less than 50 years of age; |
| • 8 points, for 20 or 50 years of age; |
| • 6 points, for 19 or 51 years of age; |
| • 4 points, for 18 or 52 years of age; |
| • 2 points, for 17 or 53 years of age; and |
| • 0 points, for less than 17 years of age or 54 years of age or older |

| Item 7: Language — a maximum of 24 points |
| These depend on the applicant’s ability to speak, read and write in English and French. An applicant must be proficient in each ability in each language in a range from “fluently” to “well” to receive any points. |

| Item 8: Personal Suitability — a maximum of 10 points |
| These are determined at an interview and are based on the immigration officer’s assessment of the ability of the applicant and dependants to become successfully established in Canada, taking into account the person’s adaptability, motivation, initiative, resourcefulness and other similar qualities. |
16. WHAT DOMESTIC EMPLOYMENT LAWS APPLY IN CANADA?

What are the Rights of Employees in Ontario?

A number of federal and provincial legislative initiatives affect all employers other than the federal government and businesses that are federally regulated. The following statutory employee rights are currently in effect in Ontario:

- **Minimum Wage Law** — Ontario’s *Employment Standards Act* (the “ESA”) provides for a minimum wage of $10.50 per hour for workers under the age of 18 who work 28 hours a week or less and $10.25 per hour for those 18 years of age and older. Minimum wage rates in Nova Scotia for workers with less than three months’ experience is $9.15 per hour and for experienced workers is $9.05 per hour. Subject to certain exceptions, the minimum wage rates in New Brunswick is $8.25. New Brunswick requires that qualifying workers receive a weekly rest period at least 24 hours, to be taken, if possible, on a Sunday.

- **Vacation with Pay** — The ESA fixes minimum vacation pay requirements equal to 4% of the greater of an employee’s gross earnings and two weeks wages. Legislation in Nova Scotia provides for two weeks’ vacation and 4% vacation pay for workers who have been employed by the same employer for less than eight years. Workers with more than eight years are entitled to three weeks of vacation and 6% vacation pay. New Brunswick has similar requirements.

- **Overtime Pay** — The ESA requires an employer to pay overtime wages (1.5 times the employee’s regular wage rate) after an employee has worked 44 hours in a week. Legislation in Nova Scotia Code provides for overtime wages at 1.5 times the employee’s regular wage rate after the employee has worked 48 hours in one week. New Brunswick has similar requirements which take effect after 44 hours of work in one week.

- **Pay Equity** — The ESA prohibits employers from discriminating between men and women in rates of pay for substantially the same work. In addition, Ontario’s *Pay Equity Act* requires private employers with more than 10 employees and all public sector employers to have pay equity, that is, female job classes must receive the same rate of pay as male job classes where the work performed is of equal or comparable value. The said Act applies to all employers in the private sector in Ontario with 10 or more employees, and to all employers in the public sector. Nova Scotia and New Brunswick pay equity laws apply only to the public sector.

- **Holidays** — Generally, in each of the provinces, there are only nine annual, paid, statutory holidays. The Ontario government invariably proclaims the first Monday in August to be the Civic holiday. In addition, the Ontario government has established the third Monday in February as a new holiday called Family Day. It coincides with President’s Day in the US.

- **Notice on Termination of Employment** — Under the ESA (and under comparable Newfoundland and Labrador legislation), an employee must receive at least one week’s written notice of termination of employment if the employee has completed at least three months of service. As an employee’s period of service increases, so does the notice required at termination (up to eight weeks notice after eight years service or more — six weeks notice after eight years service or more in Newfoundland and Labrador). In addition, employees of any employer with annual Ontario payroll of $2.5 million or more and who have five years service or more may be entitled to severance pay of up to 26 weeks if their employment is terminated (one week per completed year of service). Employees cannot waive their rights
under the ESA. Employees in Nova Scotia are entitled to between one and eight weeks notice depending on their length of service with the employer.

- the period of notice in mass terminations is longer. If during any four-week period, an employer proposes to terminate the employment of 50–199 workers, the notice period for each affected employee is eight weeks. If the number of workers whose employment is to be terminated is 200–499, the notice period for each affected employee is 12 weeks. If the employment of 500 or more workers is to be terminated, the notice period for each affected employee is 16 weeks. There are mass termination provisions in the Newfoundland and Labrador comparable legislation as well

- the foregoing are minimum statutory notice requirements that may be increased substantially by common law, depending on the circumstances of the case. In employment agreements, employees can waive their common law rights. Ontario does not have a “right to work” regime similar to that in many of the US states. Employment can be terminated only for just cause, or on the giving of the minimum statutory notice as summarized above (which may be far less than the employer’s common law obligations, which common law right an employee may enforce through the courts), or on payment of a sum equal to what the wages would have been for the applicable notice period in lieu of such notice

- mass terminations also lead to longer notice periods under the Nova Scotia law. If the number of employees terminated is between 10 and 99, eight weeks’ notice must be provided. If the number is between 100 and 299 employees are terminated, 12 weeks’ notice is required. Finally, if 300 or more employees are terminated, the employer must provide 16 weeks’ notice. In addition, under the Nova Scotia Industry Closing Act, an employer planning to close down or discontinue business such that 50 or more employees will be affected must provide three months’ notice to the Nova Scotia Minister of Industry, Trade and Technology. The employer cannot close or discontinue operations during this three-month period; and

- in New Brunswick, the period of notice in mass terminations is longer. If during any four-week period, an employer proposes to terminate the employment of more than 10 workers who represent at least 25% of the workforce, the notice period for each affected employee is six weeks. The foregoing are minimum statutory notice requirements that may be increased substantially by common law, depending on the circumstances of the case. In employment agreements, employees can waive their common law rights. New Brunswick does not have a “right to work” regime similar to that in many of the US states. Employment can be terminated only for just cause, or on the giving of the minimum statutory notice as summarized above (which may be far less than the employer’s common law obligations, which common law right an employee may enforce through the courts), or on payment of a sum equal to what the wages would have been for the applicable notice period in lieu of such notice.

- **Human Rights** — Ontario’s Human Rights Code (the “OHRC”), the Newfoundland and Labrador Human Rights Code (the “NLHRC”), the Nova Scotia Human Rights Act, the New Brunswick Human Rights Act and the federal Bill of Rights prohibit discrimination on the basis of ancestry, race, ethnic origin, place of origin, citizenship, creed, colour, religion, sex, sexual orientation, marital status, family status, record of offences, disability and age. Under the NLHRC the prohibited grounds are race, religion, religious creed, political opinion, colour or ethnic, national or social origin, sex, sexual orientation, marital status, family status, physical disability or mental disability and age if that person has reached the age of 19 years. Provincial boards have the power to investigate and award damages for loss of income and distress arising out of a discriminatory practice. Employees who are discriminated against may be
entitled to significant damage claims, and even reinstatement. However, the focus of the OHRC is to remedy the discriminatory practice, not to punish the wrongdoer.

- **Parental Leave** — The ESA gives 17 weeks of unpaid pregnancy leave to employees who have 13 weeks of service or more, as well as 35 weeks of unpaid parental leave for both men and women. Under applicable Newfoundland and Labrador and New Brunswick legislation, an employee gets 17 weeks of unpaid pregnancy leave and 35 weeks of unpaid parental leave for both men and women if leave if they have been employed for 20 or more weeks. Nova Scotia has similar provisions with a qualification period of one year’s employment. The federal Employment Insurance Act provides paid benefits for 52 weeks after a two-week qualification period. Employees have the right to return to their jobs following the leave period.

- **Compassionate Care Benefit** — Employment Insurance eligible workers (600 insurable hours in previous 52 weeks) who must be absent from work to provide support to a family member who is gravely ill with a serious risk of death are entitled to up to six weeks of compassionate care leave. Under applicable NL legislation, an employee employed for at least 30 days is entitled to an unpaid leave of absence of up to eight weeks to provide care or support to a family member of the employee where a legally qualified medical practitioner issues a certificate stating that the family member has a serious medical condition with a significant risk of death within 26 weeks of certain events, and the legislation provides for unpaid sick leave/family responsibility leave, bereavement leave, and leave for reservists. New Brunswick legislation also provides for unpaid leaves of absence for various durations and reasons. An employee is entitled to up to eight weeks compassionate care leave to care for someone in a close family relationship. Further, for employees who have been employed longer than 90 days, they must be granted sick leave up to five days without pay. Family responsibility leave of up to three days, court leave, bereavement leave and leave for reservists are also available.

- **Mandatory Retirement** — The Ontario government has enacted the *Ending Mandatory Retirement Statute Law Amendment Act*, which came into force on December 12, 2006. Nova Scotia has similar legislation (*An Act Respecting the Elimination of Mandatory Retirement*). The said Act amends the OHRC to prohibit discrimination in employment based on age. The AHRA prohibits discrimination in employment based on age. Discrimination based on age will be permitted only where it is established that a limitation the age of a worker is a *bona fide* occupational requirement (“BFOR”). In 2008, the NLHRC was amended prohibiting discrimination on the basis of age if the employee has reached the age of 19, unless the employer can establish that age is a BFOR. Based on what courts have recently held when assessing BFORs in the context of accommodation responsibilities, employers will be hard-pressed to demonstrate that age is a BFOR. In contrast, section 15(1)I of the *Canada Human Rights Act* provides that it is not a discriminatory practice if an individual’s employment is terminated because the individual has reached the normal age of retirement for employees working in positions similar to the position of that individual. In a recent decision of the Canadian Human Rights Tribunal, the termination of the employment of overseas pilots at 60 was found not to be a discriminatory practice because 60 is the retirement age for pilots employed by major airlines.

- The government did not make any corresponding amendments to the *Pension Benefits Act*, and under federal legislation, workers may not make contributions or accumulate retirement benefits past the age of 69. In addition, the government left unchanged the provisions of the *Workplace Safety and Insurance Act* (“WSIA”). This means that wage loss benefits
terminate at age 65 unless a worker is injured after age 63, in which case those benefits are payable for up to two years.

• This age cut-off is to be contrasted with that of other worker compensation systems. In Alberta, for example, 65 is commonly considered to be normal retirement age and wage loss benefits cease at that age unless “…there is sufficient and satisfactory evidence to show that the worker would have continued to work past that age if the injury had not occurred.”

• The question has been asked whether the OHRC, in this respect, complies with the Canadian Charter of Rights and Freedoms (the “Charter”). In a 1991 Supreme Court of Canada decision, Tétreault-Gadoury, it was decided that the denial of unemployment benefits to those over age 65 violated the equality rights provision of Charter section 15(1) and could not be justified under its saving provision, section 1. There is conflicting case law that might support Ontario’s decision to implement a benefits cut-off age.

• In light of the foregoing, employers should re-visit their mandatory retirement policies. Not only will such policies be unenforceable, but employers are likely to face the potential of increased damages when terminating employees over 65 where it is established that age was a factor. Under the OHRC, reinstatement into one’s former position with back pay is a potential remedy, as well as general damages for breach of the human right.

• **Occupational Health and Safety** — Ontario’s Occupational Health and Safety Act (“OHSAO”) and like legislation in the other provinces provide a comprehensive set of rules that imposes duties on employers in matters relating to the health and safety of workers. Employees are obligated to participate in joint health and safety management at their places of employment. Employees must use protective equipment and machinery, and they can refuse to do unsafe work. Effective June 15, 2010, Ontario amended the OHSAS to require that Ontario employers with more than 5 employees to conduct a risk assessment and implement workplace violence and workplace harassment policies. Penalties for non-compliance include fines for employers of up to $500,000 and up to $25,000 or up to 12 months in jail for individuals.

• “Workplace violence” is defined as:
  • The exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker;
  • An attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker; or
  • A statement or instalme  that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.

• Workplace violence programs must include:
  • Measures and procedures to control the risks identified in the assessment;
  • Measures and procedures for summoning immediate assistance when workplace violence occurs or is likely to occur;
  • Measures and procedures for workers to report incidents of workplace violence to the employer or supervisor;
  • Set out how the employer will investigate and deal with incidents or complaints of workplace violence; and
  • Include any elements prescribed by regulation from time to time under the OHSAO.
• “Workplace harassment” is defined as engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome.

• Workplace harassment programs must:
  • Include measures and procedures for workers to report incidents of workplace harassment to the employer or supervisor;
  • Set out how the employer will investigate and deal with incidents and complaints of workplace harassment; and
  • Include any elements prescribed by regulation from time to time under the OHSAO.

• Employers must provide each worker with information and instruction that is appropriate for the worker on the contents of the policy and program with respect to workplace harassment.

• After the initial risk assessment, affected employers must re-assess workplace violence and harassment risk at their place of employment at least annually and more frequently as circumstances require. The risks of workplace violence that may arise from the nature of the workplace and the type of work or the conditions of work. The assessment must take into account circumstances that would be common to similar workplaces, those in the employer’s workplace and such other circumstances as may be prescribed by OHSAO regulations.

• If an employer becomes aware, or ought reasonably to be aware, that domestic violence that would likely expose a worker to physical injury may occur in the workplace, the employer is under a positive duty to take every reasonable precaution for the protection of its workers; and

• Existing employer, supervisor and worker duties under OHSAO have been made to apply in circumstances of workplace violence and harassment. In addition, employers have a duty to provide each employee with information and instruction regarding the policies and have a duty to provide information, including personal information to the extent reasonably required by the circumstances in question, related to a risk of workplace violence from a person with a history of violent if the worker can be expected to encounter that person in the course of his or her work; and the risk of workplace violence is likely to expose the worker to physical injury.

• **Workplace Safety and Insurance** (formerly known as “Workers’ Compensation”) —
  Virtually all full-time employees and their employers must report to the Workplace Safety and Insurance Board all injuries and illnesses arising in the course of any person’s employment. Employers make financial contributions to an insurance fund (out of which the Board makes disability and injury awards to injured employees) based on the history of claims in the employer’s industry and the individual employer’s claims history. Employees receive various benefits, including payment for loss of earnings and health care benefits. Subject to certain exceptions, injured employees who have recovered from their injuries have the right to return to work, to the same or a similar job, with the employer for whom they were working at the time of injury. The exceptions that would prevent their return to the same or a similar job are that they worked for the employer for less than one year; they failed to return to work within one year of being able to do so; or they are not able to return to work for two years or more after the date of their injury. Workers are entitled to only the benefits fixed by Ontario’s WSIA and, with very few exceptions, cannot sue their employers for damages arising out of a work-related injury or disease. Newfoundland and Labrador have a similar system set out in its Workplace Health, Safety and Compensation Act, and Nova Scotia and New Brunswick have similar legislation in effect.
• **Employment Equity** — The federal government enacted voluntary employment equity legislation with mixed success several years ago. The federal legislation applies to, among others, federally regulated businesses with more than 100 employees (e.g., banks).

• **Homeworkers Legislation** — Employees who work from home are covered by the ESA. Nova Scotia has similar legislation. In addition, the ESA confers a 10% premium for such workers over provincial minimum wage rates to compensate for the workers’ contribution to overhead.

**What are the Rights of Employees in the Province of Québec?**

The following statutory employee rights are namely currently in effect in Québec:

• **Minimum Wage Law:** Québec’s *Act Respecting Labour Standards* (the “ARLS”) and Regulation Respecting Labour Standards (“RRLS”) currently provide for a general minimum wage of $9.00 per hour. The minimum wage payable to an employee who receives gratuities or tips is $8.00 per hour.

• **Vacation with Pay:** The ARLS provides that an employee who, at the end of a reference year, is credited with less than one year of uninterrupted service with the same employer during that period, is entitled to an uninterrupted leave for a duration determined at the rate of one working day for each month of uninterrupted service, for a total leave not exceeding two weeks. Similarly, an employee credited with one year of uninterrupted service is entitled to an annual leave of two consecutive weeks, and three consecutive weeks for an employee credited with five years of uninterrupted service with the same employer. The indemnity relating to the annual leave of the employee entitled to an annual leave of two weeks or less is equal to 4% of the gross wages of the employee during the reference year, and 6% for the employee entitled to an annual leave of three weeks.

• **Overtime Pay:** The ARLS requires an employer to pay overtime wages (1.5 times the employee’s regular wage rate) after an employee has worked 40 hours in a week.

• **Pay Equity:** The Québec Charter of Human Right and Freedoms (“Québec Charter”) provide that every employer must, without discrimination, grant equal salary or wages to the members of his personnel who perform equivalent work at the same place. In addition, Québec’s *Pay Equity Act* has been enacted to redress differences in compensation due to the systemic gender discrimination suffered by persons who occupy positions in predominantly female job classes. The PEA applies to every employer whose enterprise employs ten or more employees.

• **Statutory Holidays:** There are seven annual, paid, statutory holidays prescribed in the ARLS. In addition, Québec’s *National Holiday Act* ("NHA") establishes that the 24th of June (St. John the Baptist’s Day) is also a statutory public holiday in the province of Québec.

• **Notice on Termination of Employment:** According to the ARLS, an employer must give written notice to an employee before terminating his contract of employment or laying him off for six months or more. The notice shall be of at least: one week if the employee is credited with less than one year of uninterrupted service, two weeks when service is between year and five years, four weeks when seniority is between five years and 10 years and eight weeks if the employee is credited with 10 years or more of uninterrupted service. The CCQ also provides that an employer must give a reasonable notice of termination, which may be longer than the minimum notice of the ARLS depending on the specific circumstances of employment. The factors to be particularly taken into account with regard to the determination of the length of the notice are namely: the nature of the employment, the special circumstances in which the
employment is carried and the duration of the period of work. Employees cannot waive their rights to a reasonable notice under the CCQ. In Québec, employment can be terminated only for good and sufficient cause, or on the giving of the minimum statutory notice as summarized above, or on payment of a sum equal to what the wages would have been for the applicable notice period in lieu of such notice. The period of notice in the case of a collective dismissal is longer. A collective dismissal occurs when 10 employees or more of the same establishment are terminated in the course of two consecutive months. The minimum notice to be given in such case is: eight weeks, where the number of employees affected by the dismissal is at least equal to 10 and less than 100; twelve weeks, where the number of employees affected by the dismissal is at least equal to 100 and less than 300; or sixteen weeks, where the number of employees affected by the dismissal is at least equal to 300. Additionally, under the ARLS, those employees who are credited with more than two years of continuous service can only be terminated for good and sufficient cause. There is a complaint procedure under the ARLS for dismissal made without good and sufficient cause. If found to have merit, the complaint could lead to the reinstatement of the employee in his or her former position. This is not applicable to senior managerial personnel.

- **Human Rights:** Québec’s Charter of Human Rights and Freedoms prohibits discrimination on the basis of race, colour, sex, pregnancy, sexual orientation, civil status, age (except as provided by law), religion, political convictions, language, ethnic or national origin, social condition, and handicap or the use of any means to palliate a handicap. Employees who are discriminated against may be entitled to significant damage claims and even reinstatement.

- **Parental Leave:** The ARLS provides that the father and the mother of a newborn child, and a person who adopts a child, are entitled to a parental leave without pay of not more than 52 consecutive weeks. This parental leave entitlement is in addition to maternity leave (18 weeks) and paternity leave (five weeks) entitlement. Québec administers its own provincial Parental Insurance Plan which provides income replacement benefits during the period of leave (maternity, paternity and parental). Employees have the right to return to their jobs following the leave period.

- **Family leave:** The ARLS namely provides that an employee may be absent from work, without pay, for 10 days per year to fulfill obligations relating to the care, health or education of the employee’s child or the child of the employee’s spouse, or because of the state of health of the employee’s spouse, father, mother, brother, sister or one of the employee’s grandparents. An employee may also be absent from work for a period of not more than 12 weeks over a period of 12 months where he must stay with his child, spouse, the child of his spouse, his father, his mother, the spouse of his father or mother, his brother, his sister or one of his grandparents because of a serious illness or a serious accident. In addition, if a minor child of an employee has a serious and potentially mortal illness, attested by a medical certificate, the employee is entitled to an extension of the absence.

- **Mandatory Retirement:** According to the ARLS, an employee is entitled to continue to work notwithstanding the fact that he has reached or passed the age or number of years of service at which he should retire pursuant to a general law, a special Act, a retirement plan, a collective agreement or pursuant to the common practice of an employer. The ARLS forbids an employer to dismiss, suspend or practice discrimination or take reprisals against an employee on the ground that he has reached or passed a certain age or a certain number of years of service. However, this protection does not prevent an employer from dismissing, suspending or transferring such an employee for good and sufficient cause.
• Occupational Health and Safety: The Act Respecting Occupational Health and Safety Act has been enacted in the province of Québec with the objective of eliminating, at the source, the dangers to the health, safety and physical well-being of workers. It provides mechanisms for the participation of workers, workers’ associations, employers and employers’ associations in the realization of its object. It imposes specific obligations towards workers and employers. Employees must namely use protective equipment and machinery, and can in certain circumstances refuse to do unsafe work.

• Industrial Accidents and Occupational Diseases: According to the Act Respecting Industrial Accidents and Occupational Diseases (“ARIAOD”), most employees and their employers must register with the Worker’s Compensation Board (known as the Commission de la santé et de la sécurité du travail or the “CSST”) and report all injuries and illnesses arising in the course of any person’s employment. Employers make financial contributions to an insurance fund out of which the CSST provides indemnities to injured employees. Employees receive various benefits, including: health care benefits for the consolidation of an injury, physical, social and vocational rehabilitation, payment of income replacement indemnities, compensation for bodily injury and, as the case may be, death benefits. Subject to certain modalities and exceptions, injured employees who have recovered from their injuries generally have the right to be reinstated in employment to the same or equivalent or suitable position, with the employer for whom they were working at the time of injury. A workers is only entitled to the benefits fixed by Québec’s ARIAOD and is not entitled to institute a civil liability action against his employer by reason of his employment injury.

What are the Rights of Employees in the Province of Alberta?

The following statutory employee rights are namely currently in effect in Alberta:

• Minimum Wage Law: Alberta’s Employment Standards Code (the “AESC”) provides for a minimum wage of $8.80 per hour for most workers, with exceptions for various types of salespeople and professionals.

• Vacation Entitlement: The AESC fixes minimum annual vacation entitlements of two weeks for each of the first four years of employment, and three weeks for every year thereafter.

• Vacation with Pay: The AESC fixes minimum vacation pay requirements equal to 4% of the employee’s wages for the year for employees entitled to two weeks vacation or less, and equal to 6% of employee’s wages for those entitled to three weeks vacation.

• Overtime Pay: The AESC requires an employer to pay overtime wages (1.5 times the employee’s regular wage rate) after an employee has worked 44 hours in a week or in excess of eight hours per day, whichever is greater.

• Pay Equity: The Alberta Human Rights Act (the “AHRA”) prohibits employers from discriminating between men and women in rates of pay for substantially the same work.

• Holidays: There are only nine annual, paid, statutory holidays prescribed in the AESC. Additionally, the Alberta government invariably proclaims the first Monday in August to be the Civic holiday.

• Notice on Termination of Employment: Under the AESC, an employee must receive at least one week’s written notice of termination of employment if the employee has completed at least three months of service. As an employee’s length of service increases, so does the notice required at termination (up to eight weeks’ notice after 10 years service or more). Employees cannot waive their rights under the AESC.
The foregoing are minimum statutory notice requirements that may be increased substantially by common law, depending on the circumstances of the case. In employment agreements, employees can waive their common law rights. Employment can be terminated only for just cause, or on the giving of the minimum statutory notice as summarized above (which may be far less than the employer’s common law obligations, which common law right an employee may enforce through the courts), or on payment of a sum equal to what the wages would have been for the applicable notice period in lieu of such notice.

- **Human Rights:** The AHRA and the federal Bill of Rights prohibit discrimination on the basis of ancestry, race, ethnic origin, place of origin, citizenship, creed, colour, religion, sex, sexual orientation, marital status, family status, record of offences, disability and age. Provincial boards have the power to investigate and award damages for loss of income and distress arising out of a discriminatory practice. Employees who are discriminated against may be entitled to significant damage claims, and even reinstatement. However, the focus of the AHRA is to remedy the discriminatory practice, not to punish the wrongdoer.

- **Parental Leave:** The AESC gives 15 weeks of unpaid maternity leave to employees who have 52 weeks of service or more, as well as 37 weeks of unpaid parental leave for both men and women, although the total parental leave taken by both parents cannot exceed 37 weeks. The AESC also provides 37 weeks of parental leave for adoptive parents. This leave can be shared by both parents. The federal Employment Insurance Act provides paid benefits for 52 weeks after a two-week qualification period. Employees have the right to return to their jobs following the leave period.

- **Occupational Health Safety:** Alberta’s Occupational Health and Safety Act provides a comprehensive set of rules that imposes duties on employers in matters relating to the health and safety of workers. Employees must use protective equipment and machinery, and they can refuse to do unsafe work.

The protections summarized above may not apply to in all circumstances and individual situations should be reviewed in the context of applicable limitations and exceptions.

**Effect of Employer Bankruptcy**

Whether a claimant can successfully claim any of the entitlements summarized above if the employer goes bankrupt varies from entitlement to entitlement.

**Employment at Will**

The foregoing may contrast with the rights conferred on employees under US law, in that although an employer may terminate an employee’s employment at any time, the employer must provide financial compensation for doing so. In certain cases, a court may order that an employee be reinstated where the employee has been terminated without cause. Canada has no equivalent to the US employment at will concept which permits an employer to end an employee’s employment without financial consequence, and permits an employer to change an employee’s job description in a manner that would constitute constructive dismissal of the employee. The absence of trial by jury in respect of employee/employer disputes means that settlements and court decisions in Canada regarding employment matters involve modest amounts in contrast with those that can be awarded by US juries.
Is Collective Bargaining Recognized In Canada?

Trade unions, often affiliated with US counterparts, are present in many industries in Canada. Employees have the right to be members of a trade union under both provincial Labour Relations legislation and under the Canada Labour Code. The provincial Labour Relations Boards supervise the organization of a trade union in the province. A union that becomes certified has the exclusive right to bargain collectively for all its members and the employer is required by law to bargain with the union in good faith. Unless permitted otherwise by order of a court or by the consent of the Labour Relations Board in question, anyone who purchases a business in which there are unionized workers must honour any collective agreement then in effect as a successor employer.

Newfoundland and Labrador have a similar system set out in its Labour Relations Act.

Employees in Québec working for an enterprise of provincial jurisdiction have the right to be members of a trade union under the Labour Code. The Commission des relations du travail supervises the organization of a trade union in Québec. A union that becomes certified has the exclusive right to bargain collectively for all its members and the employer is required by law to bargain with the union in good faith. Generally, anyone who purchases a business in which there are unionized workers must honour any certification and collective agreement then in effect as a successor employer.

Does Canada Have Privacy Legislation?

Apart from certain sector-specific privacy laws, the US has not enacted personal information privacy laws. Legislation of this nature is in effect in other jurisdictions, including the Organization for Economic Co-operation and Development Guidelines to the Protection of Privacy and Transborder Flows of Personal Data. In Canada, the right to privacy is a fundamental right entrenched implicitly in the Canadian Charter of Rights and Freedoms and in the Province of Québec, explicitly in its Charter of Human Rights and Freedoms. As summarized below, Canadians have a comprehensive legal framework which governs the collection, holding, use and disclosure of personal information relating to identifiable individuals in both the public and private sectors. In a 2007 survey, Privacy International ranked Canada as second in the world behind Germany in protecting the privacy rights of Canadians. Personal privacy protection remains a concern for Canadians. In a 2004 study, 61% of Canadian businesses linked privacy compliance policies with customer trust and loyalty. As a result, Canadian businesses canvassed in the survey were twice as likely as their US counterparts to assign a senior officer as a privacy officer who reports directly to the chief executive officer of the business.

On January 1, 2001, the federal Personal Information Protection and Electronic Documents Act (“PIPEDA”) came into effect. Initially, the application of PIPEDA was limited to all private organizations involved in any “federal work, undertaking or business” within the legislative authority of the federal government (e.g., banks, cable, television and telecommunication service providers) and to organizations that transfer personal information across provincial borders “for consideration.”

Under PIPEDA, each province had until January 1, 2004 to enact its own private sector personal information protection legislation which was substantially similar to PIPEDA, failing which PIPEDA would apply to all private organizations in each province that failed to pass such legislation. Only the provinces of British Columbia, Alberta and Québec passed such legislation by
the end of December 2003. Each of the provincial Acts were confirmed by the federal government as substantially similar to PIPEDA. Personal information protection legislation is now in effect throughout Canada. Although Ontario did not pass an equivalent to PIPEDA, it did enact the Personal Health Information Protection Act (“PHIPA”) on November 1, 2004. The federal government has declared that PHIPA is substantially similar to PIPEDA and may be relied upon by “health information custodians” in Ontario.

PIPEDA is based on a set of privacy guidelines that were developed by the Canadian Standards Association. The 10 privacy principles are:

- **Accountability**: An organization is responsible for personal information under its control and must designate an individual or individuals who are responsible for the organization’s compliance with the 10 principles set out in the legislation.
- **Identifying the purpose**: An organization must identify the purpose for which the information is collected at or before the time the information is collected. If the purpose changes, the organization must identify the change in purpose.
- **Consent**: The individual concerned must give his or her consent to the collection, use or disclosure of personal information, except where to do so would be inappropriate.
- **Limiting collection**: The collection of personal information is strictly limited to the extent it is necessary for the purpose identified by the organization.
- **Limiting use, disclosure and retention**: The use, disclosure and retention of personal information are limited to the purpose for which it was collected, except with the consent of the individual or as required by law. The information should be retained only as long as it is required to fulfill the specified purpose.
- **Accuracy**: Personal information must be accurate, complete and up-to-date as is necessary for the purposes for which it is to be used.
- **Safeguards**: Personal information must be protected by security safeguards appropriate to the sensitivity of the information.
- **Openness**: An organization shall make readily available to individuals specific information about its policies and practices relating to the management of personal information.
- **Individual access**: Upon request, an individual shall be informed of the existence, use and disclosure of their personal information and shall be given access to that information. The individual can challenge the accuracy and completeness of the information and have it amended as appropriate.
- **Challenging compliance**: An individual can challenge the organization’s alleged compliance with the above principles and hold the designated individual accountable for the organization’s compliance.

Personal information under PIPEDA means any identifiable information about an individual other than such person’s “business card” information, that is, the name, title, business address or telephone number of the employee in question. An individual’s business email address is considered personal information under PIPEDA.

One of the key requirements of PIPEDA is that the individual’s consent is required prior to sharing personal data with the collecting entity’s business partners or affiliates or using that data for a previously unidentified purpose.
PIPEDA has no “grandfather” clause for personal data collected prior to 2004, so in order to use personal data collected prior to 2004 companies need to get individuals’ consent and provide access for review.

Outside of some sector specific privacy laws, the US does not have comprehensive legislation of this nature in effect. There are similar privacy laws in the EU and it is obvious that the international transmission of personal data throughout the world will and should be regulated.

Québec Privacy Legislation

The Québec Act Respecting the Protection of Personal Information in the Private Sector (the “APPIPS”) was adopted by the National Assembly on June 15, 1993 and came into effect on January 1, 1994. The APPIPS, which covers all persons carrying on a business in the Province of Québec (including individuals who sell goods and services, partnerships and associations), regulates the collection, holding, use and communication of personal information. The APPIPS also provides for the procedure whereby a person can have access to the file held by a business about him or her and obtain rectification of inaccurate, incomplete or equivocal information that it may contain.

Since January 1, 2001, PIPEDA applies to the commercial activities of a company doing business in Canada, including in the Province of Québec. However, since Québec has its own personal information protection legislation, PIPEDA will only apply in the Province of Québec to the commercial activities of an organization when they involve the collection, use and communication of personal information outside the province (i.e., extra provincial or international) and the commercial activities and employer-employees relations of a federal undertaking (i.e., entities involved in a federally regulated activity such as telecommunications, interprovincial transport, etc.).

The field of application of the APPIPS is the following:

- The collection, use, holding or communication of personal information by a business within the boundaries of the Province of Québec.
- The collection, use, holding or communication of personal information concerning individuals residing in the Province of Québec by a business based outside Québec if:
  - Originally the personal information has been collected in the Province of Québec; and
  - The company, partnership or association has a business place in the Province of Québec.

In many respects, the Québec legislation goes farther than the federal legislation and is more severe or demanding than the latter. For example, whereas, under PIPEDA, the ways in which consent may be given may vary depending on the circumstances and sensitivity of the information, in the Province of Québec, the requirements of a valid consent to the disclosure and use of personal information are clearly prescribed in section 14 of the APPIPS: consent to the communication or use of personal information must be manifest, free and enlightened, it must be given for specific purposes, and is valid only for the length of time needed to achieve the purposes for which is was requested. Consent given, other than in accordance with these requirements, is without effect.

Essentially, however, PIPEDA and the APPIPS are substantially similar and companies should not have too much difficulty applying the two regimes concurrently by adapting their practices in order to meet the more stringent requirements of the two acts.
Alberta Privacy Legislation

As indicated above, Alberta has its own counterpart legislation in place that has been confirmed by the Federal Government as being substantially similar to PIPEDA.

While PIPEDA is structured around 10 governing principles related to accountability, identifying purposes, consent, limiting collection, limiting use, disclosure and retention, accuracy, safeguards, openness, individual access and challenging compliance, Alberta’s **Personal Information Protection Act** (“PIPA”) is structured around the requirements of accountability and consent to the collection, use and disclosure of Personal Information. However the requirements of PIPA and PIPEDA are substantially similar.

Personally Identifiable Information

While PIPEDA uses the term “personal information” and PIPA uses the term “personally identifiable information,” the terms are similar. For the purposes of PIPA, however, personal information does not include business contact information (an individual’s name and position or title, business telephone number, business address, business email, fax number and other business contact information).

Employee Information

Organizations may collect, use and disclose Personal Employee Information (as defined in the PIPA) for reasonable purposes related to managing or recruiting personnel. Personal Employee Information means personal information that is reasonably needed to establish, manage, or end a work, or volunteer work, relationship.

Organizations may collect, use and disclose Personal Employee Information without consent when the individual is an employee (includes an apprentice, volunteer, participant, work experience or co-op student, an individual acting as a contractor to perform a service for an organization or an individual acting as an agent for an organization) or the purpose of collecting the information is to decide whether to hire a potential employee.

The collection, use and disclosure must be reasonable for the purpose and the personal information must be limited to the work or volunteer relationship.

Non-Profit Organizations

PIPA exempts “non-profit organizations” from compliance unless such personal information is being collected, used or disclosed by the non-profit organization in connection with a commercial activity, as defined in PIPA.

Reporting Issuer SEDAR Filings

PIPEDA and its provincial counterparts have a significant effect on a number of key business areas, including the due diligence procedure followed on the purchase and sale of a business, although none of the said Acts contains specific rules regarding business transactions. In a 2005 ruling, the Alberta Information and Privacy Commissioner found that the **Freedom of Information and Protection of Privacy Act** (the “AFOIPPA”) had been breached where a schedule that was
intended to identify the employees of a purchased business by inadvertence included the employees’ home addresses and individual social insurance numbers. Complete copies of the agreement were posted on SEDAR. Notwithstanding that the AFOIPPA contains a business transaction exception, the Commissioner found that the exception did not relieve the law firms involved in the transaction from liability for this breach of privacy. The Commissioner imposed obligations on the two law firms, including an obligation to appoint a privacy officer at each firm to monitor compliance.

Secondary Marketing

In mid-2005, the Privacy Commissioner of Canada ruled a bank in breach of its PIPEDA obligations when the bank included marketing materials in its monthly mailing without giving its customers an easy and immediate way of opting out of receiving them. The additional materials were found to be “secondary marketing,” which was, in this case, determined to be an unauthorized use of personal information.

In Québec, a person carrying on an enterprise may, without the formal consent of the persons concerned, use the names, addresses and telephone numbers of its clients or employees for the purpose of commercial advertising or philanthropic solicitation. However, when an enterprise engages in such practices, it must offer the person concerned the opportunity to opt out, in other words to have his or her name removed from the solicitation list. Subject to the foregoing, it is also possible to provide a list of clients or employees to third parties for marketing or philanthropic purposes.

Outsourcing Services

In April 2007, the Commissioner ruled that Canadian banks participating in the Society for Worldwide Interbank Financial Telecommunications (“SWIFT”) were obligated to comply with subpoenas issued by the United States Department of the Treasury on the basis that although SWIFT is subject to PIPEDA, it conducts business in, and is subject to, compliance with US laws. As a result, SWIFT was obligated to disclose the information referenced in the subpoenas served on it. This imposed on the Canadian banks an obligation to review the provisions of their contracts with SWIFT to ensure that those provisions complied with PIPEDA and that SWIFT had in place policies and procedures that comply with the requirements of PIPEDA. In the context of the agreements between the banks and their customers, there has to be clear disclosure that the information collected by the banks would be disclosed to an entity that is subject to the laws of another country (in this case, the laws of the United States).

Transfer of Personal Information Outside of Canada

While Canada’s PIPEDA contains no prohibition against the transfer of personal information outside of Canada, concerns have been raised about potential access to transferred information by government authorities in foreign jurisdictions. To address these concerns, in 2009 the Office of the Privacy Commissioner of Canada issued a set of guidelines entitled “Processing Personal Data Across Borders” to provide advice to organizations that wish to transfer personal information outside of Canada for processing. Included among the Privacy Commissioner’s key findings in the guidelines are the following:
The transferring organization remains accountable for the information that has been transferred outside of Canada;
• The transferring organization is obligated to protect personal information in the hands of contractors; contractual measures are considered to be the primary method of ensuring protection; and
• Organizations that do transfer personal information outside of Canada must advise the data subjects that their personal information may be accessed by the courts, law enforcement and national security authorities of the jurisdictions in which the data are located.

**Freedom of Information and Protection of Privacy**

Ontario has enacted both the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act* which contain provisions intended to protect the personal information regarding individuals collected by provincial and municipal governments.

Like Ontario, the AFOIPPA contains provisions intended to protect the personal information of individuals collected by provincial public bodies.

**How Do Canadian Privacy Laws Interact With the US Patriot Act?**

The US *Patriot Act* empowers US authorities to compel persons subject to it to disclose personal information records in the possession or control of such persons. As noted in the SWIFT case summarized above, where US service providers have possession and control of personal information about Canadian citizens, the Canadian entity providing the personal information is accountable under Canadian privacy laws unless: (i) the US service provider is obligated to, and does, comply with PIPEDA and the applicable provincial equivalent in dealing with the personal information provided to it; and (ii) the Canadian entity informs the individuals concerned that information about them will be provided to a US service provider who may be compelled under American law to disclose their personal information to US governmental authorities.

One complication arises out of the fact that the use of information disclosed to US authorities is secret. Ontario had enacted the *Business Records Protection Act* (the “BRP Act”) in 1990 in response to the US *Foreign Intelligence Surveillance Act*, however, the BRP Act is viewed as ineffective, partly because persons subject to an order issued under the American legislation are prevented by such US law from disclosing the existence of the order or the fact that the records have been disclosed to US authorities.
17. HOW ARE CONSUMERS PROTECTED BY LEGISLATION IN CANADA?

Consumer protection is regulated in Canada primarily at the provincial or territorial level. Each province and territory has one or more statutes regulating consumer transactions (typically defined as being for personal, family or household purposes). Each province and territory has one or more statutes governing various aspects of consumer transactions, which may include some or all of the following:

- Unfair, deceptive or unconscionable practices.
- Unsolicited goods or services.
- Direct sales, future performance and time share contracts.
- Funeral contracts.
- Gift card, being a voucher in any form issued by a supplier against payment in full that may be used to purchase goods or services — defined more broadly as prepaid and stored value products. Note that the issuers of gift cards in certain federally regulated activities (e.g., telephone cards and certain bank products) take the position that they are not subject to provincial gift card regulations based on a constitutional law argument.
- Provision of credit (including through credit cards), including disclosure of costs of credit.
- Credit reporting.
- Debt collection.

Breach of these provisions may result in the consumer transaction being void or unenforceable, in whole or in part, or give rise to compensation orders, fines or imprisonment. Typically, each province and territory has established public offices responsible for receiving, investigating and prosecuting consumer complaints of breach of these provisions.

While there are significant similarities among the statutes of the various jurisdictions, the exact matters covered and the details of the applicable provisions vary between jurisdictions. A more detailed analysis of applicable consumer protection law can be made when the nature of the business being carried on and the jurisdictions in which it will be carried on are known.

**Consumer Advertising**

Misleading advertising and the regulation of marketing practices form part of the federal CA. In addition, each province has legislation that regulates business practices such as false, misleading or deceptive consumer representations. There is also legislation that regulates the use of future performance agreements (previously referred to as 17.1stalme contracts) to sell goods or services, that is, contracts where either or both parties to the sale undertake future performance, for example, payment for or delivery of, the goods or services. Other key areas of regulation include disclosure of the cost of borrowing (also governed by the federal *Interest Act*), advertising and the use of disclaimer clauses in commercial agreements.

**Canada Consumer Products Safety Act**

In early 2009, the Government of Canada introduced legislation as part of the Food and Consumer Safety Action Plan, an initiative designed to promote health and safety for Canadians. The regulatory regime that would have been created by Bill C-6, the *Canada Consumer Product Safety*
Act (the “CCPSA”) would have had a significant impact on manufacturers, importers/exporters, advertisers and sellers (at wholesale or retail) of consumer products in Canada. The Senate amended Bill C-6, from the form passed by Parliament, and Bill C-6 died on the order paper when Parliament was perogued in early 2010.

The federal government re-introduced the CCPSA as Bill C-36 with one major change and three small ones. The CCPSA is not as yet law, but when proclaimed in force, the CCPSA would impose obligations on all participants in the consumer product supply chain should compel all consumer product manufacturers, importers/exporters, advertisers and sellers to initiate a careful review of each of its consumer products in the context of: (i) whether such product is a “danger to human health or safety” within the meaning of the Act; (ii) whether any statutory recall orders by any domestic or foreign regulatory or governmental body or any province have been issued against the product; (iii) whether any existing labelling or advertising would violate the Act; (iv) what product records and documentation have been retained by it (base retention period is fixed at the usual six years); and (v) what procedures it should initiate to establish the basis for a due diligence defence for it, and for its directors, officers and agents, to the extent such defence is available under the Act. As noted below, penalties for breach of the CCPSA can be severe, and include forfeiture of seized property, fines and/or incarceration.

The CCPSA was declared in force date on June 20, 2011.

In response to recent consumer product failures (baby and sports products, in particular) and to the shift of consumer product manufacturing to places outside Canada, the Government of Canada is moving Canada’s consumer product safety framework to one that is more far-reaching, regimented and punitive. Expect many low cost second hand retailers to stop carrying children’s toys and clothing and other products given that the testing and certification required to sell such wares is not available or is prohibitively expensive and their inability to meet the obligation imposed on them by the CCPSA to identify the person from whom the product was obtained.

The CCPSA will replace Part I of the existing federal Hazardous Products Act.

**Purpose**

The stated purpose of the CCPSA is the enhancement of public health and safety through the modernization of the legislative framework that regulates the manufacture and importation of consumer products, and the advertising, packaging and sale of consumer products in Canada. A “consumer product” is defined as a product that may reasonably be expected to be obtained by an individual to be used for a non-commercial purpose, including for domestic, recreational and sports purposes. A product’s components, parts, accessories and packaging are deemed to be part of the consumer product.

The CCPSA seeks to regulate consumer products that represent “a danger to human health or safety.” For the purposes of the CCPSA, a consumer product will cause danger to human health or safety if it creates an unreasonable hazard as a result of its normal and foreseeable use, which hazard would reasonably be expected to cause the death of an individual exposed to it, cause an injury to such individual or have an adverse effect on the health of that individual, regardless of the time between exposure to the product and the resulting adverse effect on human health. The requirement that a
hazard be “unreasonable” is intended to limit the CCPSA from being so broad in its application as to capture consumer products which pose a reasonable risks, such as knives or stovetops.

Prohibitions
The CCPSA contains an outright prohibition of the manufacture, importation, advertising or sale of any consumer product which poses a danger to human health or safety. Also, consumer products may not be packaged, labelled or advertised in a manner that creates an erroneous impression that the product is not a danger to human health or safety.

Certain consumer products are exempted from the Act, typically those products which are covered by other legislation — for example, cosmetics or natural health products (covered under the Food and Drugs Act) and ammunition or firearms (covered by the Criminal Code). Schedule 2 of the CCPSA expressly prohibits certain specified types of consumer products including certain baby walkers, baby pacifiers, certain products containing listed chemicals or compounds such as PCBs and urea formaldehyde-based foam thermal insulation.

Testing and Reporting
The Minister of Health can order a manufacturer or importer of a consumer product to conduct tests on such product and to compile information and documentation necessary for the Minister to determine that the product is in compliance with the Act. Suppliers will also be required to maintain certain documentation relating to the identity of the person from whom the product was obtained and (except for retailers) the person to whom it was sold. Retailers must record the place and the period of time from which the product was sold. These reporting obligations will mean that certain products will likely disappear from second hand good stores because these retailers would in most cases not have the ability to collect the required information.

Under section 14 of the CCPSA, manufacturers, importers or sellers of consumer products have duties regarding any incidents involving consumer products of which they become aware. An “incident” includes (a) a recall of a consumer product by a regulatory body; or (b) (i) an occurrence involving a consumer product; (ii) an incorrect or insufficient labelling or instructions; or (iii) a defect in a consumer product in Canada or anywhere else in the world that resulted, or may reasonably have been expected to result (that is, close calls have to be reported), in an individual’s death, serious injury or other serious adverse effects on their immediate or long-term health. Note the higher standard arising out of the modifier “serious” in contrast to the words used to define the term “danger” above.

Where a manufacturer becomes aware of an incident it must provide the Minister of Health with all of the information in its control regarding the incident within two days of becoming aware of the incident. Manufacturers (or importers if the manufacturer is outside Canada) must provide a written report to the Minister setting out certain information relating to the incident, any other consumer product that could have been the subject of a similar incident and proposals for measures it proposes to take with respect to the product within 10 days of becoming aware of the incident, or within such other shorter or longer period as the Minister may specify. The mandated content of the said report and the time periods set out in section 14 would, in many circumstances, appear to impose what amounts to an impossible compliance burden on consumer product sellers, importers and manufacturers in Canada, and on their directors, officers and agents.
Confidential Information

Business owners may have concerns regarding how the Minister will handle sensitive or confidential information contained in documents or reports provided to the Minister in compliance with the Act. Under section 16 of the CCPSA, the Minister may disclose confidential business information to “a person or government that carries out functions relating to the protection of human health or safety or the environment” — a broadly defined group and set of activities — without the consent of, or notification to, the person to whose business the confidential information relates, provided the recipient of the information enters into an agreement agreeing to keep the information confidential and only use it for the purposes of carrying out the functions noted above. Under similar conditions, the Minister may disclose personal information to such persons or governments regarding an individual without the individual’s consent and without notice to the individual before or after disclosure.

Under section 17 of the CCPSA, where the Minister determines that a consumer product poses a “serious and imminent danger” to health or safety or the environment and disclosure is essential to address the danger, the Minister may disclose confidential information regarding the consumer product without consent from, or prior notification to, the person whose information is disclosed and without obtaining a written confidentiality agreement from the recipient. Although section 18 does not describe the class of person to whom such information may be disclosed, it would appear that it could be disclosed to any person, any group of persons or to the general public, depending on the circumstances. The Minister must notify the person whose confidential information was disclosed on the first business day following disclosure.

Inspection Authority

The CCPSA confers broad discretionary powers upon inspectors appointed by the Minister to administer and enforce the Act. Inspectors may for the purposes of determining compliance (or preventing non-compliance) with the CCPSA “at any reasonable time” enter a place where they have reasonable grounds to believe that a consumer product is being manufactured, imported, packaged, stored, advertised, sold, labelled, tested or transported. Other than in respect of a dwelling-house, no search warrant or occupant consent is required; in such circumstances inspectors are permitted to trespass on private property. The inspection powers granted by the CCPSA are expansive and include seizure powers and the authority to review and copy information, including information stored on a computer located at the place of inspection. The term “place” specifically includes vehicles, and an inspector has the power to order the owner or operator of a vehicle to stop or move it for the purposes of inspection. An inspector cannot use force to gain entry to a place unless the inspector has a warrant, is accompanied by a peace officer and the warrant authorizes the use of force. In certain circumstances, the Crown has powers of forfeiture for seized property.

The principal 2010 amendment to the CCPSA introduced by Bill C-36 was to take from inspectors (and give to the Minister) the authority to issue various orders, including an order requiring the manufacturer, importer or seller to recall a consumer product where the Minister has reasonable grounds to believe poses a danger to human health and safety. The Minister (and not inspectors) may issue an order to stop the manufacture, importation or sale of a consumer product that the Minister has reasonable grounds to believe poses a danger to human health and safety. In effect, the
Minister can shut down a manufacturing, importation or distribution business in Canada in the circumstances described above.

If a person subject to an order to recall a consumer product does not comply with the order, the Minister may issue a recall order and manage the recall process at the expense of the non-compliant person. Ministerial orders are interim in nature and cannot exceed an effective term that is greater than one year. Ministerial orders that include any matter that could have been contained in a regulation made under the CCPSA must be published in the Canada Gazette — all orders issued by an inspector and certain orders of the Minister that are narrower in scope and do not meet the “regulation test”, do not have to be so published, and are not subject to any time limit.

The CCPSA grants a limited right to persons affected by a recall order or other measure to have the action taken by the Minister considered by a review officer appointed by the Minister. A request for review does not stay the order and the review is limited to questions of fact or mixed law and fact. Questions of law alone are not subject to review. The order remains in effect unless varied by the review officer.

The Minister may apply to the courts for an injuction to prevent a violation of the CCPSA.

The Minister may issue a short-term interim order regarding any matter that could be the subject matter of a regulation under the CCPSA if the Minister believes that immediate action is needed to deal with a significant danger to human health or safety.

Offences and Penalties are Treated Differently under the CCPSA

Contravening a provision of the CCPSA (except for certain exempting provisions), and CCPSA regulations or any order made under the CCPSA is an offence which can result in significant sanctions, including fines ranging from up to $250,000 for first offences and up to $5,000,000 for second offences (or a fine at the court’s discretion in the case of wilful or reckless contravention) and prison sentences of up to two years. Each day during which the offending activity continues is a separate offence. If the offending party is a corporation the punishment imposed on the corporation can be extended to the directors, officers or agents of the corporation who directed, authorized, assented to or participated in the commission of the offence. A due diligence defence is available for offences under the CCPSA, but not for violations.

The CCPSA also provides for lesser monetary penalties for non-compliance with orders issued by the Minister under either section 31 or section 32, known as “violations.” As with offences, directors, officers and agents of a corporation can be liable for violations committed by that corporation. In addition, an employer will be liable for violations committed by an employee acting in the course of their employment. Because the penalties for violations do not include incarceration, neither a due diligence, nor a mistake of fact, defence is not available for violations under the CCPSA. For violations, it may be possible to establish a defence on the basis of justification or excuse.

The standard to be met for a conviction of a violation is one of the balance of probabilities, not beyond a reasonable doubt. Beyond a reasonable doubt is the standard which the Crown must meet for conviction of an offence under the Act.

Under section 46 of the CCPSA, the Minister has two years from the time when the Minister became aware of an alleged offence to commence summary conviction proceedings. The limitation period for
proceedings by indictment (or serious offences) is governed by the *Criminal Code*. The limitation period for violations is 6 months from the time when the Minister became aware of the acts or omissions forming the basis of the violation. There is no discoverability rule which binds the Minister, that is, the period does not begin to run just because the Minister ought to have known about the acts or omissions forming the basis of the offence or violation. In addition, the injury suffered by the consumer may be latent and not become evident for a long period of time, and, so, extend the period during which a charge may be laid. The foregoing create additional uncertainty to persons who are governed by the CCPSA.

As a result, there are three possible approaches that can be taken under the CCPSA, listed in order of severity of the penalty as follows: (i) an inspector may charge a person with a violation (lower fines, no threat of incarceration and no criminal record); (ii) the Minister may charge a person with an offence and proceed by summary conviction (lesser fines and shorter sentences); or (iii) the Minister may charge a person with an offence and proceed by indictment (greater fines and longer sentences).

### Powers of Inspectors

On balance, the powers delegated to inspectors under the CCPSA are broadly cast: entry on premises without the need of a warrant, the ability to issue certain orders that have no limit as to duration, the ability to impose fines (each day of non-compliance is a new violation), limited rights of appeal and those appeals that are permitted are heard by a person appointed under the CCPSA, not before a court law, and no due diligence defence.

### What You Should Do

Health Canada has advised that no general regulation will be passed prior to the date on which the CCPSA comes into force. Health Canada has passed a number of specific product category regulations which will not come into force until the CCPSA becomes law, and Health Canada has conducted a number of on-line consultation sessions regarding proposed changes to existing regulations under the *Hazardo us Products Act*.

Given the scope of the CCPSA’s authority and the onerous obligations it imposes on all parts of the Canadian consumer product supply chain, each consumer product manufacturer, importer, custom broker other agent and seller (at wholesale or retail) should immediately take steps to protect itself by reviewing all consumer products currently in its inventory and by initiating anticipated record-keeping and other procedures. All labels and advertising materials should be inspected and non-compliant inputs destroyed. Each of you should appoint a credible employee to develop appropriate procedures and to monitor employee compliance. Each of you should review your D&O insurance policy to ensure that it provides pay-as-you-go coverage for directors and officers.

### Do Ontario and Québec Have Electronic Commerce Legislation?

Ontario’s *Electronic Commerce Act, 2000* (the “ECA”) is based on the Uniform Law Conference of Canada’s *Uniform Electronic Commerce Act*. It only applies to contracts governed by the laws of Ontario. The ECA is designed to reduce legal uncertainty and remove barriers to electronic contracting, including, for example, Internet contracts. It accomplishes these goals through a series of functional equivalency rules, which allow electronic communications to be used interchangeably with conventional paper-based communications. One of the key aspects of the ECA is that it adopts
a facilitating rather than mandatory approach: the ECA creates standards to streamline electronic commerce, but the adoption of those standards is purely voluntary in the sense that it does not require the use, acceptance or provision of documents in electronic form.

The ECA does not apply to wills and codicils, trusts created by wills, codicils or powers of attorney to the extent that they are in respect of an individual’s financial affairs or personal care, documents creating or transferring an interest in land which require registration to be effective against third parties, negotiable instruments, and other prescribed documents. The ECA also does not apply to biometric information, that is, information relating to individual biological characteristics and typically used as a means of identification.

The ECA does not affect any law that expressly authorizes or prohibits the use of electronic documents. For example, Ontario’s Land Registration Reform creates its own system for dealing with the electronic registration of land transfer documents, and is consequently outside the ECA’s application. Explicit references to “writing” or “signing” are not considered by the ECA to be express prohibitions on electronic documents or signatures.

The core of the ECA is its functional equivalency rules. These rules establish standards that must be met if an electronic communication is to satisfy the legal requirement of, and be an effective substitute for, a conventional paper-based communication. The fundamental principle behind the functional equivalency rules is that the use of electronic communications instead of conventional paper-based communications does not in itself affect the legal validity or enforceability of those communications. This does not mean that any other applicable laws governing the formation of contracts have been dispensed with by contracting electronically. Generally, the requirements of functional equivalency vary with the type of communication involved. For example, a legal requirement that a document or information be “in writing” is satisfied by an electronic document where that electronic document is in a form that can be subsequently accessed and used. A legal requirement that a person provide information or a document in writing to another person is also satisfied by an electronic document where the electronic document can be subsequently accessed, used, retained and printed by the recipient.

Under the ECA, any contracts that otherwise meet the requirements of law, but have been entered into electronically, are legally binding. The ECA states that offer, acceptance or any other matter that is material to contract formation or operation can be expressed by means of electronic information or as an electronic document; or an act intended to result in electronic communication such as clicking a mouse, touching an appropriate on-screen icon, or speaking.

The ECA also applies to “anything done in connection with a contract for the carriage of goods” including furnishing the marks, number and quantity or weight of goods, stating the nature or value or goods, issuing a receipt for goods claiming delivery of goods and authorizing the release of goods. In short, the legal requirement that any of the foregoing actions be done in writing is satisfied if the action is done electronically. The ECA creates an exception for documents of title. Where a right is granted or an obligation is to be acquired by a specific individual and, where there is a legal requirement that this be done by the transfer or use of a written document, electronic documents may only be used where they are created by a method that gives a reliable assurance that the right or obligation has become the right or obligation of that individual. The ECA provides that what will be considered a “reliable assurance” is dependent on the specific context of the situation.
The ECA allows electronic signatures as a substitute for the legal requirement that a document be signed if the electronic signature is reliable for identifying the person to whom the signature belongs and if the association between the signature and the document is also reliable. The ECA also establishes rules for when and where electronic documents are deemed to be sent and received. In some cases, actual receipt of the document is not required for a document to be deemed to have been received.

The ECA represents not so much a revolution as a refinement. It is designed to integrate electronic communication and information into Ontario’s existing contract law with a minimum amount of disruption. The ECA’s fundamental imperative is that documents or information will not be considered invalid simply because they are presented or exist in electronic form. This imperative, which is subject to certain qualifications and exceptions, affects virtually all of the ECA’s provisions including the validity of contracts and digital signatures. As noted above, the common law remains relevant for many issues concerning electronic contracts, and there are differences among electronic commerce laws in the various Canadian provinces and among various countries. As a result, disputes based on jurisdictional issues may arise. Finally, there are additional legal requirements arising out of the application of consumer protection legislation to consumer Internet agreements, as summarized under the next heading.

Similar to that of the ECA, the object of the Québec ECA to Establish a Legal Framework for Information Technology (the “Québec ECA”) is to ensure a legal framework for technology-based documents and to clarify existing rules and regulations to ensure the coherence of legal rules and their application to documentary communications using media based on information technology, whether electronic, magnetic, optical, wireless or other, or based on a combination of technologies.

The Québec ECA ensures the functional equivalence and legal value of documents, regardless of the medium used, and the interchangeability of media and technologies. For example, as a general rule, the legal value of a document, particularly its capacity to produce legal effects and its admissibility as evidence, is neither increased nor diminished solely because of the medium or technology chosen, whether it is a paper document or a document in any other medium, insofar as, in the case of a technology-based document, it otherwise complies with the legal rules applicable to paper documents.

Under the Act, documents in different media therefore have the same legal value if they contain the same information, if the integrity of each document is ensured and if each document complies with the applicable legal rules. One document may be substituted for another or if a document is lost, the other document may serve to reconstitute it.

In this context, the Québec ECA sets out the rules governing information transfers and the rules concerning the retention, consultation and transmission of documents in a manner that ensures that their integrity are maintained throughout their life cycle. The Act also states the principles underlying the responsibilities of the various service providers acting as intermediaries on communication networks.

The Québec ECA further provides for various ways of confirming the identity of a person communicating by means of a technology-based document, such as an electronic signature, and measures to protect privacy in the context of such communications. Unlike the ECA, the Québec ECA also prescribes the rules for the collection, use, retention and disclosure of biometric data.
It also asserts the necessity of linking a person to a document expressing the will of that person and of linking a document to an association, a partnership or the State, any means allowing them to be identified and, if need be, located, such as certification. It sets the guidelines for the provision of certification and directory services and offers all certification service providers, whether in Québec or elsewhere, the possibility of obtaining accreditation, on the basis of the same assessment criteria, from a person or body determined by the Government.

Finally, to promote the harmonization of technical systems, norms and standards, both at the national and international levels, the Québec ECA provides for the creation of a multidisciplinary committee to foster the compatibility of or interoperability between different media and information technologies. At the time of writing, however, no such committee has yet to be put in place.

Nova Scotia has legislation that is similar to that of the ECA.

**What Other Consumer Protection Legislation Applies in Canada?**

Each of the Canadian provinces has consumer protection legislation in place (each a “Consumer Protection Act”) which identifies unfair business practices, implies terms into consumer contracts and prescribes rights and remedies for consumers under consumer agreements, including future performance agreements, time share agreements, Internet agreements, direct agreements, remote agreements, personal development services agreements, agreements for loan brokering, motor vehicle repairs and personal property (e.g., equipment) leases.

There are differences between provinces, but by way of example, the Ontario Consumer Protection Act:

**Unfair Practices, Implied Warranties and Unsolicited Goods**

The Ontario Consumer Protection Act addresses remedies arising from supplier/provider misrepresentations regarding: (i) the delivery or performance of goods or services within a specified time; (ii) the purpose of any charge; and (iii) the benefits that are likely to flow to a consumer if the consumer helps a business obtain new or potential customers. The Ontario Consumer Protection Act also provides that it is an unfair practice for a person to use his/her custody or control of a consumer’s goods to pressure the consumer into renegotiating the terms of a consumer transaction. Under the Ontario Consumer Protection Act a consumer may exercise his/her remedies for unfair practices (i.e., rescission, or recovery of amounts paid in excess of the value of the goods or services and/or damages) within one year after entering into the agreement.

The Ontario Consumer Protection Act renders void any attempt to negate the implied conditions and warranties under the Sale of Goods Act in connection with a consumer sale and implies into each consumer contract a deemed warranty that services supplied under a consumer agreement are of a reasonably acceptable quality. This warranty also cannot be waived or otherwise avoided.

The Ontario Consumer Protection Act prohibits a supplier from charging a consumer an amount that exceeds the estimate by more than 10 per cent.

Under the Ontario Consumer Protection Act, a consumer has no obligations for unsolicited goods or services (i.e., provided without any request by the consumer, which cannot be inferred solely on the basis of payment, inaction or passage of time). Goods or services are deemed unsolicited if
there is a material change without the consumer’s consent. Consent may be given in any manner, but the supplier has the onus of proving consent was obtained.

The Ontario Consumer Protection Act also renders invalid arbitration clauses in a consumer agreement or a related agreement.

### Internet Agreements and Other Specific Consumer Agreements

A remote agreement is a consumer agreement entered into when the consumer and supplier are not present together. Agreements entered into over the phone or by mail would fall within this category. Before entering into a remote agreement, a supplier must disclose prescribed information to the consumer, which includes contact information of the supplier, description of the goods and services, an itemized list of prices, a description of additional charges, the total amount payable by the consumer, terms and methods of payment, any credit terms, date for delivery of goods or completion of services, and a supplier’s refund policy.

Before a remote agreement is entered into, the supplier must provide the consumer with an express opportunity to accept or decline the agreement and to correct any errors. A copy of the remote agreement, which must include the information described above, must be delivered to the consumer by the earlier of: (i) 30 days after the supplier bills the consumer; or (ii) 60 days after the consumer enters into the agreement. The remote agreement may be delivered by email, fax, mail, or any other manner that allows the supplier to prove the consumer has received it.

If the prescribed information is not provided to the consumer prior to entering into the remote agreement, it may be cancelled within seven days of receiving a copy of the agreement. A consumer may also cancel a remote agreement within one year of the date it is entered into if the consumer does not receive a copy of the agreement in accordance with the Ontario Consumer Protection Act.

Direct agreements are negotiated between the supplier and the customer, in person, but not at the supplier’s place of business. The Ontario Consumer Protection Act confers a right on consumers to cancel the direct agreement: (i) within one year of entering into the contract if the consumer does not receive a copy of the agreement that complies with the Ontario Consumer Protection Act; and (ii) for any reason within a 10-day cooling off period.

The Ontario Consumer Protection Act contains provisions relating to future performance agreements (previously referred to as future performance agreements) similar to those for direct agreements, save that the right of cancelation arises if delivery or performance under the agreement is delayed by more than 30 days.

An Internet agreement is a consumer agreement formed by text-based Internet communications. For detailed information on the application of the Ontario Consumer Protection Act to Internet agreements, see the heading “How Does Provincial Consumer Protection Legislation Affect Electronic Contracts?” on page 17.12.

The renewal, amendment and extension of future performance agreements, direct agreements, remote agreements and Internet agreements are subject to the following: If the agreement contains a provision for amendment, renewal or extension, it must: (i) indicate what elements are subject to change and how often a supplier may make changes; (ii) give the consumer the alternative of terminating the agreement or retaining the existing agreement unchanged (or both alternatives); and...
(iii) require that the consumer be given advance notice of any change. Any change takes effect 30
days after the consumer receives notice of it, or a later date specified in the notice. The notice must
comply with various prescribed requirements, which include disclosing all proposed changes. Any
change cannot retroactively affect rights or obligations of the consumer. If the consumer agreement
does not contain a provision regarding amendment, renewal or extension, such changes may only
be made if the consumer explicitly, and not merely by implication, agrees to the proposed change.
The change is effective on the date specified, but only if the supplier provides an updated version
of the agreement to the consumer within 45 days after the consumer has agreed to the change,
which updated version must disclose all changes.

Time share agreements must: (i) be in writing; (ii) contain prescribed information, including a
consumer’s cancellation rights; and (iii) allow for cancellation for any reason within 10 days of
receipt by the consumer of a copy of the agreement. These agreements may also be cancelled by
the consumer within one year if the consumer is not provided with a copy of the agreement that
complies with the Ontario Consumer Protection Act.

The provisions in the Ontario Consumer Protection Act relating to personal development services
apply to all services for which payment is required in advance. Professional development services
are defined as services for health, fitness, modeling and talent, and matters of a similar nature, as
well as facilities used for the instruction of such services. The Ontario Consumer Protection Act
applies only if advance payments are required and the services are not provided by a non-profit,
co-operative, private club owned by its members, or any golf club. The Ontario Consumer
Protection Act prescribes information that must be included in these agreements, restricts the term
of agreements (which includes wording about the consumer’s cancellation rights), restricts the term
of agreements to one year, limits initiation fees and requires that monthly instalment plans be
made available. The Ontario Consumer Protection Act also provides for a 10-day cooling off period
and a right to cancel the agreement within one year if the consumer does not receive a copy that
complies with the Ontario Consumer Protection Act. Payments for services or facilities that are not
available at the time of payment must be paid to a trustee.

**Gift Card Restrictions**

In 2007, the Ontario government introduced regulations governing gift cards. Subject to a number
of limited exceptions (charities and regarding a specific good or service), no supplier may enter
into a gift card agreement that has an expiry date on the future performance of the agreement and
the agreement must contain required disclosures to the consumer. Ontario legislation applies where
either the supplier or the consumer is located in Ontario at the time of sale.

For open-looped cards (issued by multiple unaffiliated suppliers), the maximum issue fee is $1.50.
Replacement, customization and maintenance fees (revival following failure to use within 16
months up to $2.50 per month’s extension) are permitted. Disclosure of maintenance fees must
appear on both sides of the card. No maintenance fees may be charged for a closed loop card (one
issued by a single supplier).

If the gift card involves third party service providers (banks, payment processors, distributors or
card networks) the agreements between the suppliers and the service provides must include
appropriate indemnities.
Application of the Ontario Consumer Protection Act

The Ontario Consumer Protection Act only applies if the consumer is an individual acting for personal, family or household purposes. It does not apply to corporate consumers or any consumer who is acting for business purposes. Subject to limited exceptions, the Ontario Consumer Protection Act applies to all consumer transactions where the consumer or the supplier is located in Ontario.

Internet agreements, remote agreements, future performance agreements and personal development services agreements are only subject to the Ontario Consumer Protection Act if the consumer’s total potential payment obligation under the agreement exceeds $50.

Where a consumer agreement meets the criteria of more than one type of agreement under the Ontario Consumer Protection Act, all the applicable provisions must be complied with, except where the application is expressly excluded. The regulations under the Ontario Consumer Protection Act provide some relief to this overlapping application, such that conflict between different requirements is avoided.

The Ontario Consumer Protection Act does not apply to:

- Transactions regulated under the Ontario Securities Act.
- Financial services relating to investment products.
- Consumer transactions relating to real property, other than certain time share agreements.
- Prescribed professional services, such as those provided by lawyers, accountants, engineers and architects.

In addition, the supply of accommodations, other than under time share agreements, is exempt from the provisions applicable to Internet agreements, remote agreements and future performance agreements.

How Does Provincial Consumer Protection Legislation Affect Electronic Contracts?

Under Ontario’s Consumer Protection Act and similar legislation in Québec, consumers have new rights in respect of Internet agreements. Internet agreements are defined in the said Act as agreements formed by text-based Internet communications for the supply of goods or services for person, family or household purposes (i.e., not for business purposes) that involve a payment in excess of $50. The said legislation sets out the following requirements for these agreements.

Disclosure of Information

Before a consumer enters into an Internet agreement, a supplier must disclose prescribed information to the consumer, which includes contact information of the supplier, a description of the goods and services, an itemized list of prices (and any additional charges and the total amount payable), terms and methods of payment, any credit terms, date for delivery of goods or completion of services, delivery arrangements, and a supplier’s refund policy. This is a long list. The information must be “clear, comprehensive and prominent” and be provided in a manner that ensures the consumer has accessed the information and is able to retain and print it.
Express Opportunity to Accept/Decline and Correct Errors

Immediately before an Internet agreement is entered into, the consumer must be provided with an express opportunity to accept or decline the agreement and to correct errors.

Deliver Copy of Agreement

Within 15 days after the date an Internet agreement is entered into, the consumer must be provided with a copy by email, fax, mail or any other manner that allows the supplier to prove the consumer has received it. The agreement must contain the information described under the heading “Disclosure of Information,” as well as the consumer’s name and date the agreement was entered into.

Cancellation of Agreement

If the prescribed information is not disclosed in advance, or there was no express opportunity to accept/decline the agreement or correct errors, an Internet agreement may be cancelled within seven days after receiving a copy of it. If a copy of the Internet agreement is not provided, the agreement may be cancelled within 30 days after it is entered into.

Amendment, Renewal, Extension

If the Internet agreement does not contain a provision regarding amendment, renewal or extension, such changes may only be made if the consumer explicitly, and not merely by implication, agrees to the proposed change. The change becomes effective on the date specified, but only if the supplier provides an updated version of the agreement, including the text before and after the change, to the consumer within 45 days after the consumer has agreed to the change.

If the Internet agreement does contain a provision for amendment, renewal or extension, such changes may be made without explicit agreement of the consumer if:

- The amending provision indicates what elements of the agreement are subject to change and how often a supplier may make changes;
- The amending provision gives the consumer, as an alternative to accepting the change, the option of terminating the agreement, retaining the existing agreement unchanged, or both options; or
- The agreement requires that the consumer be given advance notice of any changes.

Notice of any change to an Internet agreement effected by notice only (i.e., without the consumer’s explicit consent) must be given at least 30 days in advance and cannot retroactively affect the consumer’s rights and obligations before the effective date of the change. This notice must disclose all the changes to the agreement and comply with other prescribed requirements.

Alberta does not currently have legislation in place to deal with electronic documents and signatures. Pursuant to Alberta’s Fair Trading Act, regulations were passed in 2001 which give consumers certain rights in respect of Internet agreements. Those rights are similar to those found under the Ontario and Québec Consumer Protection Legislation described above.
18. WHAT LAWS GOVERN THE ACQUISITION, USE AND DEVELOPMENT OF REAL ESTATE?

What Rules Apply to the Purchase and Sale of Real Property?

In most provinces, a non-resident has the right to purchase, hold and sell real property. Generally, for a corporation to purchase, hold and sell real property in a province other than the one in which the corporation is incorporated, it must apply for and hold a valid extra-provincial registration or licence.

In Alberta, the *Agricultural and Recreational Land Ownership Act* and its regulations restrict the rights of non-Canadian citizens and foreign corporations to acquire any interest in lands in Alberta outside the boundaries of urban municipalities.

Land registration in Alberta is based on the “Torrens system,” whereby the Government of Alberta through its Land Titles Office and by virtue of the *Land Titles Act* has custody of all original land titles, documents and plans and has the legal responsibility for the validity and security of all registered land title information. As a result, title insurance is not required by law nor is it normally used in Alberta to close sale or mortgage transactions.

In Saskatchewan, the *Saskatchewan Farm Security Act* (the “SFSA”) restricts the ownership of farm land and the holding of an interest in farm land by a “non-resident person” or a “non-Canadian-owned entity.” “Farm land” is defined in the SFSA as real property located outside of a city, town, village or hamlet that is capable of being used for farming but does not include minerals or land used in processing or storing minerals. An “interest in farm land” is defined to include a purchase, lease, and option to purchase or lease, but excludes a *bona fide* mortgage interest. Ineligible individuals or entities must apply to the Farm Land Security Board for an exemption to acquire an interest in more than 10 acres of farm land in Saskatchewan.

Land Transfer Taxes

Ontario’s *Land Transfer Tax Act* provides that upon a change in the underlying (registered or beneficial) ownership of any real property located in Ontario, the party acquiring the interest must pay land transfer tax. For further information see page 4.11.

Unlike in some other provinces, there is no land transfer tax applicable to real estate transactions in Newfoundland and Labrador. However, the Registry of Deeds charges fees for registrations of both deeds and mortgages. While there is a cap of $5,000 for the registration of mortgages, no such cap exists for the registration of deeds. Potential purchasers of property in Newfoundland and Labrador should keep this in mind, as the registration costs for large commercial and/or residential property can be expensive.

Nova Scotia’s deed transfer tax is set at the municipal level and may be imposed on the value of the transaction depending on the applicable municipality.

In New Brunswick, the *Real Property Transfer Tax Act* levies a rate of one-quarter of one percent (0.25%) on most transfers of real property, with limited exceptions. This rate is applies to the greater of: (i) the consideration for the transfer; or (ii) the assessed value of the transferred property.
There is no land transfer tax in Alberta, however the Land Titles Office does charge fees for registration of transfers of title and mortgages at the rate of $1 for each $5,000, calculated in the case of transfers on the value of the lands and in the case of mortgages on the lesser of the mortgage amount or the value of the lands.

British Columbia’s Property Transfer Tax Act provides that upon a change in the registered ownership of any real property located in British Columbia, the party acquiring the interest must pay property transfer tax. The tax also extends to the registration of leases of real property having a term exceeding 30 years. The tax rate is 1% of the first $200,000 of the fair market value of the interest being purchased or leased and 2% on the value exceeding $200,000.

What Rules Apply to the Use and Development of Real Property?

Ontario’s Planning Act regulates the use and development of land in Ontario. Zoning regulations and subdivision control affect the manner in which property may be developed. Although the Minister of Municipal Affairs and Housing has supervisory powers under the Planning Act, many of the functions are delegated to local municipalities. Each local municipality has an official plan that sets out in broad terms the use to which lands within the municipality may be put. Zoning by-laws govern such matters as building coverage and lot-line set-backs as well as permitted uses.

Planning in Newfoundland and Labrador is governed by the Urban and Rural Planning Act, 2000 and the by-laws applicable thereunder.

Planning in Nova Scotia is governed by the Municipal Government Act and the applicable municipal land control by-laws.

Planning in New Brunswick is governed by the Community Planning Act and the applicable municipal land control by-laws.

Use, development, zoning and subdivision of lands in Alberta are under the control of the various municipalities pursuant to and subject to the provisions of the Municipal Government Act.

British Columbia’s Local Government Act is the principal statute regulating the use and development of land in British Columbia. Zoning regulations and subdivision control affect the manner in which property may be developed. Under British Columbia’s Local Government Act local municipalities adopt an official plan that sets out in broad terms the use to which lands within the municipality may be put. Zoning by-laws govern such matters as building coverage and lot-line set-backs as well as permitted uses.

The ability of an owner to subdivide property is also regulated in British Columbia. Development charges are also imposed by many municipalities on new developments within their jurisdiction. Building codes set specific standards for the construction of buildings, and municipalities require building permits before the commencement of construction. Before commencing the development of any project, it is essential that all required regulatory approvals be obtained.

Pending Land Registration Reform in Newfoundland and Labrador

Newfoundland and Labrador currently operates a registry based system pursuant to the Registration of Deeds Act. However, this Act will be repealed in early 2010 and replaced with a new modern act
which will reflect the use of modern technology, new search methods and more consumer friendly
practices, including online registration. The records maintained in the Registry of Deeds relate to
real estate in the Province of Newfoundland and Labrador dating back to the early 1800s. This
information can be searched through a manual index system from 1825–1979, and an electronic
database from 1980 to present. Access to the electronic database is restricted to registered users.

What Rules Apply to Residential Rental Properties?

In Ontario, the Tenant Protection Act governs residential tenancy landlord and tenant obligations.
The first rent charged to a new residential tenant by a landlord is not subject to control, although all
the increases thereafter, as long as the same tenant is in possession of the property or unit, are
subject to rent controls. However, landlords and tenants can negotiate increases above the rent
control guideline if the landlord incurs certain capital expenditures or provides additional services.
In the absence of a negotiated agreement, a landlord may apply to the Ontario Rental Housing
Tribunal for rent increases above the guideline.

In Nova Scotia, the Residential Tenancies Act governs these contracts but there are no rent control
provisions in Nova Scotia.

In New Brunswick, the Residential Tenancies Act governs residential tenancy obligations both in
respect of landlords and tenants. It sets out rules relating to notice periods, the payment and recovery
of damage deposits, lease agreements, and assignments to name a few. It contains certain protections
for both landlords and tenants and deems all residential tenancies to comply with the standard form of
lease set out in said Act. Contracting out of the standard form of lease is not permitted and any
provision of a lease (or any other document) purporting to do so is void.

In Alberta, the Residential Tenancies Act requires, in respect of residential tenancies, that at least 365
days lapse between rent increases and non-default terminations may require at least 365 days notice.

In British Columbia, the Residential Tenancy Act governs residential tenancies in that province.
The initial rent charged to a new residential tenant by a landlord is not subject to control, although
all the increases thereafter, as long as the same tenant is in possession of the property or unit, are
subject to rent controls. However, a landlord may in unusual circumstances apply to the Residential
Tenancy Branch for rent increases above the guideline.

What Environmental Standards Apply in Canada?

Legislation concerning the environment is generally within the jurisdiction of the provinces,
although the federal government has also legislated in this area, particularly on issues involving
matters of national environmental significance, some of which are restricted in application to
federal lands (Canadian Environmental Protection Act, Canadian Environmental Assessment Act,
Fisheries Act, Canada Shipping Act, Navigable Waters Protection Act, Species at Risk Act and the
Pest Control Products Act). Responsibility for clean-up costs may be imposed on any person who
has, or had in the past, the management or control of the contaminant. Environmental laws have
focused on identifiable current practices or accidental events that contaminate the natural
environment or property. Ontario environmental laws are no more stringent than those in effect in
the United States. Environmental due diligence (Phase 1 and Phase 2 assessments) for both
purchasers and lenders is usual practice throughout Canada.
On March 10, 2008, Environment Canada announced refinements to its Regulatory Framework for Industrial Greenhouse Gas Emissions. Those industries governed by the framework (electricity generation, oil and gas, pulp and paper, iron and steel, iron ore pelletizing, smelting and refining, cement, lime, potash, chemicals and fertilizers) will be required to reduce by 2010 greenhouse gas emissions by 18% from 2006 levels. Compliance with thresholds will earn those firms in compliance tradable emission credits which can be sold to regulated firms that fail to meet applicable targets. In addition, Environment Canada has established an Offset System for Greenhouse Gases to encourage construction of projects that achieve quantifiable and verified reductions in greenhouse gases.

In Ontario, the principal legislation is the *Environmental Protection Act*. In 2001, it was amended by the *Brownfields Statute Law Amendment Act*, which established an Environmental Site Registry of contaminated properties in Ontario (generally, former industrial or commercial lands which are now vacant or underused) (Brownfield Sites). The amendments provided exemptions from liability to secured parties (and receivers appointed by them or trustees in bankruptcy appointed by the courts) who make loans to owners of Brownfield Sites in respect of such matters as actions taken by them: (i) to investigate the property; (ii) relating to the supply of water, security, insurance and payment of taxes to preserve or protect their interests in the property; (iii) relating to the safety of persons; and (iv) to mitigate impairment to the natural environment. The amendment has facilitated the redevelopment of many industrial sites throughout the province since it came into force.

On December 29, 2009, the Ontario Ministry of the Environment released the long awaited amendments to Ontario’s Brownfield Regulation (O.Reg. 153/04); the principal regulation governing the preparation and filing of *Records of Site Condition*. These extensive regulatory amendments (which generally come into force on July 1, 2011) direct how Brownfield Sites can be redeveloped. Highlights of the new amendments include:

- Significant modifications to the requirements for Environmental Site Assessments;
- New soil, ground water and sediment standards;
- Clarification as to who is and who cannot be a “qualified person,” and the introduction of conflict of interest rules for qualified persons;
- A redefinition of the duties to be performed by qualified persons for Environmental Site Assessments;
- A Streamlined Risk Assessment process;
- Modifications to the content and submission process for the Record of Site Condition; and
- A new definition of “owner of property,” to include a beneficial owner of property.

Nova Scotia and New Brunswick have similar environmental protection legislation.

In Alberta, the *Environmental Protection and Enhancement Act* deals with many aspects relating to the environment, hazardous materials and waste, contamination, conservation, remediation, reclamation and enforcement. Under certain circumstances, all present and past owners and occupiers of lands may have some responsibility and liability for contamination and resulting damages. Accordingly, appropriate due diligence is recommended in respect of any transaction relating to lands.
In British Columbia, the principal legislation is the *Environmental Management Act* which established an Environmental Site Registry of contaminated properties. The owner of property has certain duties in connection with the discharge of contaminants and hazardous materials into the environment from the property. Liabilities associated with improper waste management practices may be inherited by subsequent owners of property.

A purchaser should assess the environmental risks involved in the property by inspecting the company and public records to ascertain the environmental status of the property. In many cases, a purchaser may carry out an “environmental audit” of the property being purchased, which can include conducting scientific testing and technical analysis of the property. It should be noted that government officials in Canada do not “certify” that a property is free from environmental risk, and a purchaser must undertake its own investigations in this regard.

British Columbia’s *Environmental Management Act* provided exemptions from liability to secured parties (and receivers appointed by them or trustees in bankruptcy appointed by the courts) who make loans to owners of contaminated properties in respect of such matters as actions taken by them: (i) to investigate the property; (ii) relating to the supply of water, security, insurance and payment of taxes to preserve or protect their interests in the property; (iii) relating to the safety of persons; and (iv) to mitigate impairment to the natural environment.

**Is Retail Shopping on Sundays Permitted?**

The right of retailers to remain open for business on Sundays is under provincial jurisdiction, in many cases such provinces have delegated regulation of Sunday shopping to municipalities. Rules vary by province, but generally, only limited retail shopping is permitted in Canada on Sundays. A notable exception is Ontario, which permits province-wide Sunday shopping, but no shopping on provincial holidays such as Christmas, New Year’s Day, Thanksgiving or any of the other five annual statutory holidays. Shopping is allowed on Boxing Day, the first business day following Christmas, although employees cannot be compelled to work on that day. New Brunswick has laws similar to the above, but retail shopping is prohibited on Boxing Day.

In Nova Scotia, there is no restriction on Sunday Shopping. Stores are prohibited from opening on Remembrance Day, Good Friday, Canada Day, Labour Day, Christmas Day, Boxing Day, Easter Sunday, and Thanksgiving Day. The first five are required to be days off with pay while the final three may be unpaid time off.

In Alberta, retail shopping is permitted on Sundays. The ESA provides for general holiday pay for employees in respect of declared statutory/general holidays.
19. ARE CLASS ACTIONS A RISK FOR BUSINESS IN CANADA?

Yes. Several Canadian provinces have passed legislation to authorize and regulate class actions (often called “class proceedings” in Canada) in a manner similar to US legislation, starting with Québec in 1976, Ontario in 1992 and British Columbia in 1995. In 2001, the Canadian Supreme Court held that, irrespective of whether legislation has been passed, class action should be recognized and implemented by the courts as a procedure available to plaintiffs throughout Canada.

A class action is a procedure whereby one or more plaintiffs who are appropriate representatives of a class of claimants may commence an action on behalf of the larger identifiable class and raise common legal issues that may be determined with respect to the class as a whole, and which is a preferable procedure for the resolution of the claims of the plaintiffs and the class members. Before a class action may proceed, the court must certify it as such.

Although Canadian class action legislation has been explicitly drafted to make the obtaining of court certification easier than in the United States, Canadian courts (with the possible exception of Québec) have interpreted the legislation in a relatively conservative fashion. Notwithstanding this, class actions have been commenced and certified in a range of circumstances, including investor misrepresentation, securities fraud, defective and dangerous products, franchising, and standard form contracts.

There are a number of practical differences between class actions in Canada and those in the US that affect business risk. These are:

- There is no per se right to a jury trial in a Canadian class action proceeding, and the few class actions that have proceeded to trial have been determined by a judge without a jury.
- Courts have approved levels of contingent fees for plaintiffs’ lawyers which, although much greater than the norm in Canada, are relatively small compared to the fees approved in litigated and settled cases in the US.
- An unsuccessful representative plaintiff in a class action is ordinarily required to pay the court costs and a portion of the fees incurred by the defendant in the case. In a 2007 Supreme Court of Canada decision, the Court confirmed the “loser pays the winner’s costs” principle. In a 2008 case, the Ontario Court of Appeal awarded costs on a substantial indemnity basis, that is, in greater amounts than expected, (because fraud had been alleged in the pleadings) against all plaintiffs where the class action claim was dismissed (for some of the plaintiffs, on technical grounds). These two recent rulings are anticipated to have a substantial dampening effect on future class action proceedings before Canadian courts.
- Both compensatory and punitive damage awards tend to be much smaller in Canada than in the US, and more subject to appellate review.

On balance, although class actions have quickly become a significant part of litigation practice in Canada, they have generally been regarded as a manageable cost of doing business. It has been noted that defendants have accepted the foregoing and shifted their efforts away from certification toward an active defence of certified claims, with the effect of increasing financial pressure on class action claimants and their counsel in carrying the claim to trial or settlement.
The Possible Use of Arbitration Clauses to Forestall Class Action Proceedings

Two 2007 Supreme Court of Canada decisions dealt with cases that arose in circumstances where consumers attempted to commence class action proceedings in Québec where the contracts in question, by their terms, purported to bar class action proceedings in favour of private arbitration. In both cases, the Supreme Court held that the matters should be dealt with by arbitration and not by class action proceedings. Ontario and Québec had consumer protection legislation override mandatory arbitration provisions in consumer contracts. The Supreme Court held that legislation of this nature would not be applied to contracts entered into prior to the date on which the consumer protection legislation came into effect.

Since then a case in Ontario and one in British Columbia found ways not to apply the 2007 Supreme Court rationale in certification proceedings, ruling that the mandatory provision in an a consumer contract in place prior to the amendment to consumer protection legislation was just one factor to consider in certification proceedings. However, in the Supreme Court of Canada decision in Seidel v. Telus Communications Inc. regarding arbitration clauses and whether they act as a bar to class actions, the plaintiff (Seidel) entered into a standard written cell phone contract with Telus which included a clause which required that disputes be referred to private and confidential mediation and then arbitration (the arbitration clause). It also contained a clause which purported to waive any right to commence or participate in a class action. Seidel complained that Telus had falsely represented to her (and all other consumers) how Telus calculated air time for billing purposes. She sought remedial relief pursuant to the British Columbia Business Practices and Consumer Protection Act (“BPCPA”) for what she contended were deceptive and unconscionable practices on the part of Telus. She sought to have the complaint certified as a class action on her own behalf and on behalf of a wide class of overcharged customers of Telus.

After an initial motion by Telus to stay (or suspend) the class action on the basis that the arbitration clause ought to be enforced (thus requiring Seidel to start an arbitration to address her complaint), the question of whether the case should proceed or not in court eventually found its way to the Supreme Court of Canada. In a narrow 5–4 decision, the majority of the Court held that the right to pursue certain “public interest” remedies provided for under the BPCPA could not be waived by contract, while the right to recover damages under the statute was essentially a private right of action which could be waived. However, since the class action waiver provision could not be severed from the arbitration clause on a whole, it too was void.

In reaching these conclusions, the Supreme Court of Canada made two important points when it comes to arbitration clauses and whether they will bar a plaintiff from proceeding in court by way of class action:

- Where an arbitration clause exists, it will operate to stay a class proceeding with respect to a common law or other statutory claim that does not have the specific “court access enabling sections” in them; and
- Where consumer protection legislation (or other legislation) exists that provides a specific right of access to the court, an arbitration clause will not act as a bar to a class action being certified for claims that emanate out of the specific “court access enabling clause.”
20. LIMITATIONS LAW

A limitation period refers to a time limit, prescribed by statute, within which a legal proceeding must be brought. A claim that is not started within the applicable limitation period is vulnerable to a limitations defence, and if such a defence is successful, the defendant will be immune from liability despite the merits of the claim.

The policy behind limitations legislation is that at some point after committing an act which might give rise to a claim, a defendant is entitled to peace of mind that no such claim will be brought. In addition, limitation periods encourage claimants to bring actions in a timely way as the quality and availability of evidence diminishes over time.

Ontario

On January 1, 2004, Ontario’s Limitations Act, 2002 (the “Limitations Act 2002”) came into force. The Limitations Act 2002 limits the period of time during which a person may initiate court proceedings in Ontario in respect of a claim against a defendant. For purposes of the Limitations Act 2002, a “claim” is one to remedy an injury, loss or damage from an act or omission.

The Limitations Act 2002 was amended effective October 19, 2006 as summarized under the heading “Contracting Out of the Limitations Act 2002” below.

Finally, the Limitations Act 2002 was amended on October 22, 2008, but having effect retroactively from January 1, 2004 to provide that the two-year (basic) limitation period for demand obligations created from and after January 1, 2004 begins to run on the first day on which there is failure to perform the obligation in question once a demand for performance has been made.

The Ontario Two-Year Basic Limitation Period

The basic limitation period (the time during which an action may be commenced in Ontario) is two years from the earlier of: (i) the day on which the essential elements (act or omission by a known person resulting in damages to the claimant) of the claim are known to the claimant; and (ii) the day on which those elements were discoverable. There is a rebuttable presumption that a claimant discovered all the essential elements of the claim on the day on which the act or omission giving rise to the subject loss or damage occurred (see below). The foregoing represents a codification of the existing common law rules.

There are a number of exceptions to the basic two-year rule. Where the two-year rule applies, it represents a significant reduction from the general six-year limitation period for contract and tort claims in effect in Ontario until December 31, 2003, and it represents an increase in certain other limitation periods. For example, the period during which a claim for unpaid wages may be prosecuted against corporate directors was increased from six months to two years. However, it does mean that a number of limitation periods of varying lengths have been eliminated. Finally, there are circumstances where the running of a limitation period may be suspended by agreement (see below).

The Ontario 15-Year Ultimate Limitation Period

In addition to the basic limitation period, there is an ultimate limitation period of 15 years from the day on which the act or omission takes place, regardless of whether the essential elements of the
claim are, or become, known to the claimant or were discoverable during the 15-year period and whether any other limitation period has not run. The only exceptions to this rule are: (i) where at any time after October 19, 2006, the parties to a business agreement become aware of a claim (that is, the claim is “discovered”) they may agree to suspend the operation of the ultimate limitation period; and (ii) where the claim in question is for conversion against a bona fide purchaser of personal property, in which case, the ultimate limitation period is fixed at two years from the date of the sale of the personal property to the purchaser.

Certain Claims Subject to No Limitation Periods in Ontario
There are claims that are not subject to any limitation period, for example, a proceeding:

- For a declaration where no consequential relief is sought;
- To enforce an order — in that regard, the order must be one issued by an Ontario court. Orders issued outside of Ontario are treated as simple debt claims, and, as a result, the plaintiff must apply to an Ontario court for an order of that court to recognize the judgment within two years of the foreign court judgment having issued (unless the judgment comes within the provisions of the Reciprocal Enforcement of Judgments Act (orders of other Canadian provincial courts), in which case the award holder may have six years to apply (see below);
- To obtain support under the Family Law Act;
- To enforce an award under the AAO;
- By a debtor in possession of collateral to redeem it;
- By a creditor in possession of collateral to realize against it;
- By the Crown to recover fines, taxes, penalties and interest;
- To recover student loans, awards, social assistance recoveries and grants; and
- For an environmental claim that has not been discovered.

Certain Existing Ontario Statutory Limitation Periods Unchanged
There is a lengthy list of specific statutory limitation period provisions, referenced in a schedule to the Limitations Act 2002, that have been left unchanged. The list includes provisions under the following Ontario statutes involving court applications:

- Bulk Sales Act (six-month limitation period following required public register filings for setting aside sales retained).
- Construction Lien Act (45-day limitation period and sheltering concepts retained).
- Insurance Act (one-year limitation period retained).
- Libel and Slander Act (three-month limitation period retained).
- Mortgages Act (a proceeding to recover under a building mortgage still must be commenced within one year of the mortgage’s maturity date).
- Reciprocal Enforcement of Judgments Act (the “REJA”) (six-year limitation period following the date of the judgment in question. See commentary under the heading Dispute Resolution and Enforcement in Ontario of Foreign Judgments, Arbityral Awards and Mediation Minutes of Settlement below.
- Remedies for Organized Crime and Other Unlawful Activities Act, 2001 (15-year limitation period retained).
• OSA (the 90-day rescission period under section 135 and the 180-day/three-year limitation period under section 138 retained).

• Trustee Act (action under section 38 still may not be brought after two years from the date of the death of the deceased).

• Judicial Review Procedure Act (proceedings and appeals unaffected).

• Provincial Offences Act (proceedings unaffected).

• Constitution Act, 1982 (aboriginal claims against the Crown continue to be governed by section 35).

• Part 1 of the Limitations Act 2002, was renamed as the Real Property Limitations Act (real estate limitation periods in effect as at January 2004 unchanged).

---

Dispute Resolution and Enforcement in Ontario of Foreign Judgments, Arbitral Awards and Mediation Minutes of Settlement

Arbitration of International Commercial Disputes Between Private Parties Under in Canadian Law

In June 1958 the United Nations adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) under which parties to a private written agreement could, for those things which can be the subject matter of an arbitration, agree to submit any dispute regarding such matters to resolution by arbitration. Canada was the last major industrial nation to ratify the New York Convention with the enactment of the United Nations Foreign Arbitral Awards Convention Act (Canada) which Act came into force in January 1986.

Under the Canadian Constitution, property and civil rights are matters within exclusive provincial jurisdiction. As a result, in conjunction with Canada becoming a signatory to the New York Convention, each of the Canadian provinces first had to enact legislation which enabled private parties in the province to adopt the New York Convention.

Each of the provinces, apart from Québec, has enacted legislation adopting the Model Law on International Commercial Arbitration set out in the June 1985 report of the United Nations Commission on International Trade Law (Arbitration Model). Ontario did so under its International Commercial Arbitration Act. The Québec Civil Code was amended to provide that the Arbitration Model shall be taken into consideration where a matter of extra-provincial or international trade is the subject of an arbitration proceeding.

Arbitration of Domestic Commercial Contract Disputes in Ontario

In an effort to promote uniformity of laws in Canada, the common law provinces, the Arbitration Model has been adopted by, and forms the basis of, the Arbitration Act of each of the Canadian provinces, including Ontario’s Arbitration Act, 1991 (the “OAA”).

Mediation of International Commercial Disputes Between Private Parties Under in Canadian Law

Nova Scotia and Ontario are the first two Canadian provinces to enact laws governing the mediation of international commercial disputes. The Ontario Commercial Mediation Act, 2010 (“OCMA”) came into effect on October 25, 2010. The OCMA is based on the United Nations Model Law on International Commercial Conciliation (200). The OCMA provides that such Model Law and the United Nations Report shall be used in mediation proceedings under the OCMA.
Matters which can be the subject of an OCMA commercial dispute mediation include trade transactions for the supply or exchange of goods or services, distribution agreements, commercial representation or agency, factoring, leasing, construction of works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreements and concessions, joint ventures, other forms of industrial or business co-operation or the carriage of goods or passengers. So, there are a great many of circumstances where the parties to a dispute may avail themselves of OCMA mediation.

Unless the parties to the mediation otherwise agree, all information not already public (or where disclosure of such information is required by law, is required to protect the health and safety of any person or is required to carry out or enforce a settlement agreement relating to the mediation) is confidential and cannot be disclosed, even to persons interested in the outcome of the mediation such as a person who is obligated to indemnify one of the mediating parties for certain losses arising out of the commercial dispute.

Mediation agreements may become shorter in that they really only have to deal with (a) opting out of certain provisions of the OCMA that would otherwise apply; and (b) the usual indemnification and release of claims against the mediator.

Parties who execute and deliver OCMA mediation minutes of settlement are bound by the terms of such minutes.

**Enforcement of Mediation Agreements in Ontario**

A principal benefit arising under the OCMA is that upon the filing of a true copy of minutes of settlement with the Registrar of the Ontario Superior Court of Justice, the minutes of settlement have the same force and effect as a judgment obtained and entered in the Court without any retrial of the dispute on its merits. There is no need to initiate Court proceedings to give the minutes of settlement the force of law in Ontario.

Mediation may be less costly than arbitration or litigation.

**Enforcement of Ontario Arbitral Awards in Ontario**

Under the Ontario Limitations Act, 2002 (the “OLA”), the enforcement of arbitral awards under the OAA is not subject to any limitation period.

**Enforcement of Foreign Arbitral Awards in Ontario**

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards applies to Canadian provinces. Under this Convention, a limitation period is construed as a procedural rule, meaning that each province has the legislative power to fix the period during which a foreign arbitral award can be enforced by court proceedings in that province.

Under the OLA, a six-year limitation period applies to the enforcement in Ontario of a foreign monetary judgment and arbitral award within the meaning of the Ontario Reciprocal Enforcement of Judgments Act (the “OREJA”), that is, (a) an order issued by a foreign court in any civil proceedings under which any sum of money is payable; or (b) an award under foreign arbitration proceedings if such award has in such foreign jurisdiction become enforceable in the same manner as a judgment given by a court in such jurisdiction.
The OREJA only applies to a judgment or an award from those jurisdictions from a reciprocating jurisdiction, that is, one that has enacted legislation similar to, and recognized by, the OREJA. Where a judgment or an arbitral award is made under the laws of an OREJA non-reciprocating jurisdiction, the proceeding to enforce it in Ontario would be treated under Ontario Rules of Procedure as an application for a remedial order. Under the OLA, an application of this nature is subject to the two-year limitation period.

Summary
Based, in part, on the rational set out in a 2010 Supreme Court of Canada judgment, subject to certain exceptions, Ontario limitations law regarding the enforcement of monetary judgments, arbitral awards and mediation minutes of settlement can be summarized as follows:

- No limitation period applies in Ontario to a judgment arising out of an Ontario court proceeding;
- No limitation period applies in Ontario to awards under the OAA;
- A limitation period of six years applies in Ontario to the enforcement of a monetary judgment and an arbitral award issued from an OREJA reciprocating jurisdiction;
- A limitation period of two years applies in Ontario to the enforcement of a monetary judgment and an arbitral award issued from an OREJA non-reciprocating jurisdiction;
- A party who wishes to enforce signed OCMA minutes of settlement in Ontario must apply to the Superior Court of Justice for an order authorizing the registration of the minutes with the Court. Upon order being granted, the minutes have the same force and effect as if they were a judgment obtained from, and entered in, the Superior Court of Justice on the date of the registration, as a result:
  - Such a party has two years from the date on which the mediation minutes are signed to apply to the Ontario Court for an order authorizing registration, failing which the minutes are not enforceable in the Ontario courts;
  - If the minutes are registered, as outlined above, no limitation period applies to their enforcement in Ontario.

The above summary may not apply to other Canadian provinces where limitation periods, and exclusions from the applicable limitations legislation, are different from those set out in the OLA.

Ontario Statutory Notice Periods Unaffected
Do not confuse the two-year basic limitation period during which a claimant can prosecute a claim in the courts with an obligation imposed by statute that a claimant in a specified period of time give a written notice of claim (e.g., to a governmental body or insurer) as a pre-condition to a claim. The Limitations Act 2002 has not changed any notice provisions in any Ontario statutes.

No Exception for Equitable Remedies in Ontario
Actions for equitable remedies such as detrimental reliance and unjust enrichment are subject to the provisions of the Limitations Act 2002.

Ontario Transition Rules
The following are the transition rules from the old regime to the new one:
• Where no proceeding in respect of a claim has been commenced before January 1, 2004 based on acts or omissions that occurred prior to that time, if the prior limitation period has expired, no proceeding may be commenced after January 1, 2004.

• Where the prior limitation period has not expired, and if the Limitations Act 2002 provides for a limitation period for claims of the nature in question and if the claim has not been discovered by the claimant, then the said causal act or omission will be deemed to have occurred on January 1, 2004. If the claim has been discovered by the claimant, then the former limitation period applies. This latter rule means that many long-term contracts such as insurance policies (and, in particular, disability insurance policies) existing as at December 31, 2003 will continue to be governed by the old rules well past a time when these rules are likely to be widely understood. There are traps for the unwary in any change of the law; and

• Where no applicable prior limitation period exists, but the Limitations Act 2002 provides for a limitation period for claims of the nature in question and if the claim has not been discovered by the claimant, then the causal act or omission will be deemed to have occurred on January 1, 2004. If the claim has been discovered by the claimant, then no limitation period applies to the claim.

There are special general and transition rules under the Limitations Act 2002 for claims based on an assault or a sexual assault.

The Meaning of “Discoverable” Under Ontario Law

A claim is discoverable on the earlier of the day on which:

• The person with the claim first knew each of the following: (i) that the injury, loss or damage had occurred; (ii) that the injury, loss or damage was caused by an act or omission by the person against whom the claim is made; and (iii) that a proceeding would be an appropriate means to seek a remedy. Unless the claimant can prove otherwise, the claimant is presumed to know all of the foregoing on the day on which the act or omission took place; and

• A reasonable person with the abilities of the claimant and in the circumstances of the claimant first ought to have known each of the elements of the claim set out above.

Case law under the CA has established that the discoverability rule does not apply. In the case of a price-fixing conspiracy, the courts have found that the entering into the agreement to fix prices starts the running of the two year limitation period, and any person who suffers a loss as a result of the price fixing conspiracy must initiate proceedings prior to the end of such period. The fact that the conspiracy remains unknown to the person suffering damages throughout the period does not change the start date.

The limitation period for violations under the CCPSA is six months from the time when the Minister of Health became aware of the acts or omissions forming the basis of the violation. There is no discoverability rule which binds the Minister, that is, the period does not begin to run just because the Minister ought to have known about the acts or omissions forming the basis of the offence or violation.

Running of Limitation Periods Suspended in Ontario in Certain Circumstances

The running of the basic limitation period is suspended for minors or incapable persons unless and until a litigation guardian has been appointed for such person. Everyone is presumed to be capable of initiating a proceeding unless the contrary is proven. A claimant may apply to the courts for the
appointment of a litigation guardian for a potential defendant and may give a written notice of claim to a potential defendant containing statements regarding each of the elements of the claim. The notice of claim can be considered by a court in determining when the defendant discovered the claim in question.

The running of both the basic and the ultimate limitation periods is suspended where the claimant and the prospective defendant have agreed to engage an independent third party to resolve the claim or assist in its resolution until the earliest of: (i) the date on which the claim is resolved; (ii) the date on which the attempted resolution terminates; and (iii) the date on which one of the parties withdraws from the agreement.

**Contracting Out of the Ontario Limitations Act, 2002**

Unless one of the following circumstances apply, any limitation period established by the Limitations Act 2002 applies despite an agreement to vary or exclude it. The exceptions to this general rule are as follows:

- The basic (two-year) limitation period and the ultimate limitation period (15 years) may be varied or excluded by an agreement made prior to January 1, 2004.
- The basic limitation period may be suspended or extended by agreement to that effect which was entered into at any time from and after October 19, 2006.
- The ultimate (15-year) limitation period may be suspended or extended by agreement made at any time from and after October 19, 2006 but only if the relevant claim has been discovered at the time of such agreement.
- For “business agreements” (that is, an agreement made by parties none of whom is a consumer as defined in the Consumer Protection Act), the basic limitation period may be varied or excluded by an agreement made from and after October 19, 2006.
- Finally, for business agreements, the ultimate limitation period may be suspended or extended by agreement made at any time from and after October 19, 2006 but only if the relevant claim has been discovered at the time of such agreement, and it may be may be varied by agreement even if it has been discovered at the time. The term “vary” means to extend, shorten or suspend.

Applying the foregoing to claims under the indemnity provisions of commercial agreements, it is not possible in the business agreement, as first entered into by the parties, to extend or suspend its running past the ultimate limitation period, although the parties are free to extend or suspend its running by a subsequent amending agreement if the claim for indemnity has been discovered within 15 years of entering into the original agreement.

Prior to enactment of the Limitations Act 2002, it had been a common practice in Ontario for litigants to enter into an agreement to suspend the running of the six-year limitation period under the prior Act for extended or indefinite periods (commonly referred to as a “tolling agreement”). Prior to the October 2006 amendment, section 22 of the Limitations Act 2002 this practice was prohibited for the period January 1, 2004 to October 18, 2006. Tolling agreements are now permitted to the extent summarized in the exceptions described above.
Debt Obligations that Are Due on Demand Under Ontario Law

_Hare v. Hare_, a December 2006 decision of the Ontario Court of Appeal, the taxpayer loaned a sum of money to her son and secured the loan with a promissory note. Although some interest payments were made under the note, the son did not respond to a demand for payment of the loan and the taxpayer brought an action for recovery.

At trial and on appeal, the defendant claimed the action was barred because it was made after the statutory limitation period had expired. The issue was whether the two-year basic limitation period under the Limitations Act 2002 had started to run at the time the note was issued, or on the demand for payment under the note. If the former, the action was statute-barred; if the latter, the action could proceed.

The Limitations Act 2002 provides that the two-year limitation period begins to run on the discovery of the claim. The Court of Appeal emphasized that the law that a creditor has the right to immediate repayment of a demand loan is well-settled. As the creditor under a demand note has the right to immediate payment, there is nothing to be discovered by the creditor before he or she becomes aware of their claim, which is established immediately on receipt of the demand promissory note. The Court of Appeal, therefore, found that the discovery of the claim occurred at the time the note was issued, as the creditor was in a position to enforce the note as of that date. The action was, therefore, statute-barred because it was commenced more than two years after discovery of the claim.

In _Zeitler v. Zeitler_, a British Columbia Supreme Court decision in mid-2008, the Court held that the limitation period for a promissory note payable 30 days following demand began to run after the expiry of the 30-day notice, once given. It is thought that this case would likely be applied by an Ontario Court.

The Limitations Act 2002 was amended on October 22, 2008 to provide that for all demand obligations created on or after January 1, 2004, the act or omission required to trigger the running of a limitation period is the first day on which there is a failure to perform the obligation once a demand for the performance is made. This appears to address the issue of when the limitation period begins to run for all demand obligations created on or after January 1, 2004, but leaves demand promissory notes made prior to 2004 subject to the case law summarized above. It may be that the limitation period for demand promissory notes made prior to January 1, 2004 will commence on the date of delivery of the demand note in question, and not from the date of demand, although the pre-2004 basic limitation period of six years would apply to such demand notes, not two. The basic limitation period applicable to all such pre-2004 demand promissory notes will likely have expired on or before December 31, 2009. Demand promissory notes are commonly used in many commercial arrangements, especially between related parties, and the inadvertent expiration of collection rights under such notes could have grave consequences.

In the context of guarantees which are “payable on demand”, recent case law has established that for guarantees that are payable on demand the limitation period does not begin to run until demand is made by the beneficiary against the guarantor. Notice to the guarantor of enforcement against the principal debtor is not, in itself, a demand for payment under a guarantee. The guarantee remains enforceable, even if collection under the principal debt is statute-barred. It would appear that the only possible bar to recovery under the demand guarantee is the ultimate OLA 15-year...
limitation period which begins to run the moment the guarantee is signed. As long as the beneficiary makes demand against the guarantor prior to the end of the 15-year period following the execution and delivery of the guarantee, the right to make a claim against the guarantor is not statute-barred. It would obviously be prudent for a guarantor to attempt to impose a reasonable period during which the beneficiary must make demand such as two years following the earlier of (a) default by the principal debtor under the guaranteed obligation; and (b) demand by the beneficiary against the principal debtor. Beneficiaries should avoid guarantees which automatically become due upon default by the guarantor.

Payments and Acknowledgements Under Ontario Law

Under the Limitations Act 2002, each payment of interest or principal and a written acknowledgement of the debtor made within the basic limitation period will restart the limitation period under the Limitations Act 2002.

Nova Scotia

In Nova Scotia, most limitation periods are set out and governed by the Limitations of Actions Act (the “NSLAA”). It provides as follows:

- An action in assault, battery, false imprisonment or slander must be brought within one year after the cause of action arose.
- An action for negligence in the context of medical, dental or hospital services within two years after such services terminated.
- An action for anything relating to the use or operation of a motor vehicle must be brought within three years.
- Actions for penalties, damages or sums of money given to the parties aggrieved by any statute, within two years after the cause of action arose.
- Actions for rent upon an indenture of demise, actions upon a bond or other specialty or actions upon any judgment or recognizance, within twenty years after the cause of action or judgment arose.
- An action for assault or battery based on sexual abuse arises after the victim is aware of the injury and the causal relationship between such injury and the sexual abuse and the victim is then given a reasonable time to bring forward an action.
- All other torts including negligence, within six years after the cause of action arose.
- All other causes of action including actions on a contract or injuries to real or personal property, within six years after such cause of action arose.
- Unique to Nova Scotia — courts in Nova Scotia have the discretion to waive the effect of the limitation period expiration so long as the action is commenced within four years after expiration and so long as the courts feel it is equitable to do so having regard to the prejudices each party is likely to suffer. This right is often used in Nova Scotia to relieve a party from the expiration of a limitation period and to allow a cause of action to continue despite such expiration.

Another important consideration when looking at limitation periods is whether the plaintiff or defendant was somehow disabled at the time the cause of action arose. Sections 4 and 5 of the NSLAA provide that if the party was under the age 19 or of unsound mind at the time the cause of action arose, then the limitation period is extended to the time when this person reaches age 19 or
becomes of sound mind. The maximum extension period for a plaintiff under Sections 4 and 5 is five years.

Finally, many individual Nova Scotia statutes contain specific limitation periods and these should also be considered when commencing an action or reviewing a limitation period. One important example is section 512 of the Municipal Government Act which provides that the limitation period for any action or proceeding against “a municipality or village, the council, a council member, a village commissioner, an officer or employee of a municipality or village or against any person acting under the authority of any of them” is 12 months.

**New Brunswick**

In New Brunswick, the Limitations of Actions Act (the “NBLAA”) currently governs both real and personal property matters. It sets out specific limitation periods in respect of bonds, judgments, assault, and fraudulent misrepresentation (among several others) and it, in some cases, sets out the time when the limitation period begins to run. New Brunswick may amend the NBLAA and adopt a limitations law regime similar to the Ontario Limitations Act 2002.

The NBLAA contains a residual “catch all” provision which sets out a limitation period on all causes of action not expressly governed by any other legislation in New Brunswick. Where a limitation period is provided for in another Act, that particular cause of action falls outside the scope of the residual provision in the NBLAA. This residual limitation period is six years after the cause arose. New Brunswick does not have an ultimate limitation period.

The running of the limitation period is suspended in certain circumstances. When a person entitled to bring an action is a minor, mental defective, mental incompetent, or of unsound mind a special limitation period of six years applies, or two years from the date when such person becomes of full age, or of sound mind, whichever is longer. Where a person has a cause of action against a minor or a person mentally incompetent, that person may commence the action within the limitation period, or within two years after the removal of the disability.

Where a cause of action exists against a person who has been absent from the province for the greater part of the last year of the limitation period, the cause of action may be brought within two years after the return of the absent person to the province. Similar extensions of time exist where a judgment has been overturned on appeal, a writ is set aside for a matter of form, or a death occurs.

Payments and written acknowledgments in respect of real or personal property made within the specified limitation period (usually 20 years) will restart the limitation period.

**Québec**

Under Québec civil law, the concept of limitation of actions is called “extinctive prescription” or simply “prescription.” Extinctive prescriptions are mainly governed by the sections 2875 to 2909 and 2921 to 2933 of the CCQ.

**Extinctive Prescriptions Under Québec Civil Law**

- Actions to enforce personal rights (contractual and extra-contractual rights or torts rights) are prescribed by three years.
• Actions to enforce movable real rights (rights of repossession of movable (personal) property) are prescribed by three years.
• Actions to enforce immovable real rights (rights of repossession of immovable (real) property) are prescribed by 10 years.
• Actions to enforce judgements are prescribed by 10 years.
• Actions for defamation are prescribed by one year.
• The general prescription applicable to actions for which no specific prescription is provided by law is 10 years. However, given the broad application of the above mentioned specific prescriptions, this general prescription period seldom applies.
• Subject to the exceptions noted below, in Québec, parties cannot by agreement contract out of any of the prescriptive periods provided by law may be agreed upon.

Running of Prescription Under Québec Civil Law

Prescription starts to run on the later of the date when the right of action first arises and the date when damages are first incurred. Prescription for payment under a contract runs from the date when the payment is due, notwithstanding such contract provides for future performance of other obligations.

A prescription period is suspended under Québec law where:

• It is impossible based on the circumstances or in law to perform the contract.
• Remedies by minors or incapable persons with respect to remedies they have against their personal representatives.
• A prescription period is interrupted under Québec law, that is, is restarted, where:
  • A judicial demand is filed — this applies to including class actions as well as other legal proceedings. Negotiations prior to the filing of a judicial demand do not interrupt prescription.
  • A notice of arbitration is served.
  • A creditor of a debtor makes an application to the courts to share in a distribution with other creditors.
• Prescription may not be waived (for example, by a term of a contract) before a claim arises, but may be waived once a party acquires and becomes aware of a right to make a claim.

Forefiture Delays Under Québec Civil Law

Certain Québec laws which apply to specified circumstances provide for prescription periods that are shorter in duration than those which would otherwise apply. Such periods cannot be suspended or interrupted. For example, a creditor’s right to move to set aside a fraudulent conveyance made by a debtor is forfeited on the first anniversary of the later of the date of such fraudulent conveyance and the date on which a trustee is appointed for the property of the fraudulent debtor.

Other Statutory Québec Limitation Periods

Certain Québec laws may provide for both a notice requirement and a shortened prescription period. For example, the Cities and Towns Act provides for a specific prescription of six months for actions against a municipality governed by such act and a forfeiture delay of 15 days notice.
**Alberta**

Under the Alberta Limitations Act, any agreement between parties to reduce a limitationperiod governed by such Act is void.

**British Columbia**

The British Columbia Limitation Act (the “BCLA”) sets out basic limitationperiods of two, six and 10 years. The following is a non-exhaustive list of the types of claims covered by these limitationperiods:

- **Two year limitation period** — claims based in contract, tort or statutory duty for injury to person or property and any economic loss stemming from such injury; claims for trespass, defamation, false imprisonment, malicious prosecution, and for a tort under the British Columbia Privacy Act.
- **Six year limitation period** — claims by secured parties and debtors not in possession of collateral to realize or redeem that collateral; claims for damages for conversion, detention of goods, and for the recovery of goods wrongfully taken or detained.
- **10 year limitation period** — claims against trustees in respect of fraud, conversion of trust property, and fraudulent breach of trust; claims against personal representatives for a share of an estate; and claims on a local judgment for the payment of money or return of personal property.
- **Where a limitation period for a particular type of claim is not specifically provided for in the BCLA or in any other act the limitation period is six years.**

**British Columbia Ultimate Limitation Period**

The underlying policy of the BCLA is preserved by an ultimate limitationperiod in cases where the basic limitationperiod is postponed or suspended. The ultimate limitationperiod begins to run from the date the cause of action arises and runs until the expiry of the ultimate limitationperiod despite any postponement or suspension of the basic period. The effect of the ultimate limitationperiod is that a claimant cannot postpone bringing an action indefinitely, which provides defendants with protection from open ended liability.

While the ultimate limitationperiod is effective despite a postponement, there is one exception to this rule: the time for a minor to bring a claim is postponed until that person reaches the age of majority unless that person has a litigation guardian appointed.

The ultimate limitationperiod is six years for claims against a hospital, hospital employee, or medical practitioner for negligence or malpractice. In any other case the ultimate limitationperiod is 30 years.

**Claims which are Not Subject by any Limitation Period in British Columbia**

There are certain types of actions which are not governed by a limitationperiod and may therefore be pursued by a claimant at any time. For example, these include:

- Certain claims relating to the possession of land;
- Claims for the enforcement of an injunctions;
• Claims for the enforcement an easements, restrictive covenants or profits à prendre;
• Declarations as to personal status; or
• Declarations as to the title of a property.

Other Notable British Columbia Limitation Periods

As noted, in British Columbia there are other statutes which prescribe limitation periods, several of which are short and therefore worth noting, including:

• Written notice of damage created by a municipality — must be provided within two months from the date on which the damage was sustained.
• An action against a municipality — must be commenced six months after the cause of action first arose.
• An action by a creditor in respect of a claim against an estate — the creditor must give notice of the claim to the executor or administrator of the estate and the action must be commenced within six months after notice is given if the debt is due at the time notice is given; or within six months of the time the debt or a part of it falls due, if no part of it is due at the time of the notice.
• An action under the Wills Variation Act — must be commenced within six months from the date of issue of probate or the resealing of probate.
• A complaint under the ESA where the employee has been terminated — must be filed within six months from the last day of employment.
• A complaint under the Human Rights Code — must be filed within six months of the alleged contravention.
• An action by an employee for discrimination in wages — must be commenced within 12 months from the termination of employment.
21. DISCLAIMER

This publication is intended to provide only a summary of the general commercial laws that apply in Canada. The summary should not be relied on without consulting counsel.

The materials contained in this brochure are for general informational purposes only, and should not be taken as legal advice. Readers are urged to consult counsel for advice on specific legal questions or issues.
### 22. GLOSSARY: DEFINITIONS USED IN THIS DOCUMENT

<table>
<thead>
<tr>
<th>Defined Term</th>
<th>Definition</th>
<th>Defined at</th>
</tr>
</thead>
<tbody>
<tr>
<td>AAO</td>
<td>Arbitration Act, 1991 (Ontario)</td>
<td>p. 2.4</td>
</tr>
<tr>
<td>ABCA</td>
<td>Alberta Business Corporations Act</td>
<td>p. 3.14</td>
</tr>
<tr>
<td>ACA</td>
<td>Alberta Cooperatives Act</td>
<td>p. 3.30</td>
</tr>
<tr>
<td>ACL</td>
<td>Area Control List</td>
<td>p. 13.2</td>
</tr>
<tr>
<td>ACOA</td>
<td>Atlantic Canada Opportunities Agency</td>
<td>p. 9.19</td>
</tr>
<tr>
<td>ACSS</td>
<td>Automated Clearing Settlement System</td>
<td>p. 10.1</td>
</tr>
<tr>
<td>AESC</td>
<td>Alberta’s Employment Standards Code</td>
<td>p. 16.8</td>
</tr>
<tr>
<td>AHRA</td>
<td>Alberta Human Rights Act</td>
<td>p. 16.8</td>
</tr>
<tr>
<td>AIT</td>
<td>Agreement on Internal Trade</td>
<td>p. 13.14</td>
</tr>
<tr>
<td>AFOIPPA</td>
<td>Alberta’s Freedom of Information and Protection of Privacy Act</td>
<td>p. 16.13</td>
</tr>
<tr>
<td>AMMA</td>
<td>Mines and Minerals Act</td>
<td>p. 9.6</td>
</tr>
<tr>
<td>AMPs</td>
<td>Administrative monetary penalties</td>
<td>p. 5.1</td>
</tr>
<tr>
<td>APPIPS</td>
<td>Québec Act Respecting the Protection of Personal Information in the Private Sector</td>
<td>p. 16.12</td>
</tr>
<tr>
<td>ARC</td>
<td>Advance ruling certificate</td>
<td>p. 5.1</td>
</tr>
<tr>
<td>ARIAOD</td>
<td>Act Respecting Industrial Accidents and Occupational Diseases</td>
<td>p. 16.8</td>
</tr>
<tr>
<td>ARLS</td>
<td>Québec’s Act Respecting Labour Standards</td>
<td>p. 16.6</td>
</tr>
<tr>
<td>Arthur Wishart Act</td>
<td>Arthur Wishart Act (Franchise Disclosure), 2000</td>
<td>p. 3.32</td>
</tr>
<tr>
<td>Asset acquisition exemption</td>
<td>Exemption from prospectus and registration requirements given to an issuer effecting a trade if it issues securities as consideration for the acquisition of assets that have a fair value of not less than $150,000</td>
<td>p. 9.11</td>
</tr>
<tr>
<td>AULC</td>
<td>Alberta ULC</td>
<td>p. 3.15</td>
</tr>
<tr>
<td>Bank Act</td>
<td>Federal Bank Act</td>
<td>p. 6.10</td>
</tr>
<tr>
<td>Bas</td>
<td>Bankers’ acceptances</td>
<td>p. 9.1</td>
</tr>
<tr>
<td>BCBCA</td>
<td>British Columbia Business Corporations Act</td>
<td>p. 3.4</td>
</tr>
<tr>
<td>BCLA</td>
<td>British Columbia Limitation Act</td>
<td>p. 20.12</td>
</tr>
<tr>
<td>BCULC</td>
<td>British Columbia ULC</td>
<td>p. 3.15</td>
</tr>
<tr>
<td>BDP</td>
<td>Business Development Program</td>
<td>p. 9.19</td>
</tr>
<tr>
<td>BFOR</td>
<td>bona fide occupational requirement</td>
<td>p. 16.3</td>
</tr>
<tr>
<td>BIA</td>
<td>Bankruptcy and Insolvency Act (Canada)</td>
<td>p. 9.3</td>
</tr>
<tr>
<td><strong>Defined Term</strong></td>
<td><strong>Definition</strong></td>
<td><strong>Defined at</strong></td>
</tr>
<tr>
<td>--------------------------------------</td>
<td>-------------------------------------------------------------------------------</td>
<td>----------------</td>
</tr>
<tr>
<td><strong>Defined Term</strong></td>
<td><strong>Definition</strong></td>
<td><strong>Defined at</strong></td>
</tr>
<tr>
<td>Branch Tax</td>
<td>Branch tax of 25% (reduced to 5% under the Convention) levied on the after-tax business profits of a non-resident foreign corporation carrying on business in Canada through a branch rather than as a Canadian subsidiary corporation</td>
<td>p. 4.2</td>
</tr>
<tr>
<td>BRP Act</td>
<td><em>Business Records Protection Act</em></td>
<td>p. 16.15</td>
</tr>
<tr>
<td>BSA</td>
<td><em>Bulk Sales Act</em></td>
<td>p. 8.3</td>
</tr>
<tr>
<td>Bureau</td>
<td>Competition Bureau</td>
<td>p. 5.1</td>
</tr>
<tr>
<td>Business combination and reorganization exemption</td>
<td>Dissolution or winding-up of an issuer</td>
<td>p. 9.10</td>
</tr>
<tr>
<td>CA</td>
<td><em>Competition Act</em></td>
<td>p. 5.1</td>
</tr>
<tr>
<td>Canada NFPC Act</td>
<td><em>Federal Canada Not-for-profit Corporations Act</em></td>
<td>p. 3.23</td>
</tr>
<tr>
<td>Cape Town Protocol</td>
<td><em>Protocol to the Convention on Matters Specific to Aircraft Equipment</em></td>
<td>p. 9.4</td>
</tr>
<tr>
<td>CARICOM</td>
<td>Caribbean Community</td>
<td>p. 13.9</td>
</tr>
<tr>
<td>CBCA</td>
<td><em>Canada Business Corporations Act</em></td>
<td>p. 3.4</td>
</tr>
<tr>
<td>CBDC</td>
<td>Community Business Development Corporations</td>
<td>p. 9.20</td>
</tr>
<tr>
<td>CBSA</td>
<td>Canada Border Services Agency</td>
<td>p. 13.1</td>
</tr>
<tr>
<td>CCAA</td>
<td>the federal <em>Companies’ Creditors Arrangement Act</em></td>
<td>p. 6.13</td>
</tr>
<tr>
<td>CCGG</td>
<td>Canadian Coalition for Good Governance</td>
<td>p. 12.12</td>
</tr>
<tr>
<td>CCO</td>
<td>Chief Compliance Officer</td>
<td>p. 12.15</td>
</tr>
<tr>
<td>CCPSA</td>
<td><em>Canada Consumer Product Safety Act</em></td>
<td>p. 17.1</td>
</tr>
<tr>
<td>CCQ</td>
<td><em>Civil Code of Québec</em></td>
<td>p. 9.2</td>
</tr>
<tr>
<td>CEPA 1999</td>
<td><em>Canadian Environmental Protection Act, 1999</em></td>
<td>p. 13.7</td>
</tr>
<tr>
<td>Certificated securities</td>
<td>Securities that are represented by certificates</td>
<td>p. 3.35</td>
</tr>
<tr>
<td>CETA</td>
<td>Comprehensive Economic and Trade Agreement</td>
<td>p. 13.9</td>
</tr>
<tr>
<td>CFA</td>
<td>Chartered Financial Analyst</td>
<td>p. 12.16</td>
</tr>
<tr>
<td>CFPOA</td>
<td><em>Corruption of Foreign Public Officials Act</em></td>
<td>p. 14.2</td>
</tr>
<tr>
<td>CGD</td>
<td>Controlled Goods Directorate</td>
<td>p. 13.8</td>
</tr>
<tr>
<td>CGP</td>
<td>Controlled Goods Program</td>
<td>p. 13.8</td>
</tr>
<tr>
<td>CGRs</td>
<td>Controlled Goods Regulations</td>
<td>p. 13.8</td>
</tr>
<tr>
<td>Charter</td>
<td><em>Canadian Charter of Rights and Freedoms</em></td>
<td>p. 16.4</td>
</tr>
<tr>
<td>CIA</td>
<td><em>Conflict of Interest Act</em></td>
<td>p. 9.22</td>
</tr>
<tr>
<td>CIM</td>
<td>Canadian Investment Manager</td>
<td>p. 12.16</td>
</tr>
<tr>
<td>Defined Term</td>
<td>Definition</td>
<td>Defined at</td>
</tr>
<tr>
<td>-------------------</td>
<td>---------------------------------------------------------------------------</td>
<td>------------</td>
</tr>
<tr>
<td>CITT</td>
<td>Canadian International Trade Tribunal</td>
<td>p. 13.1</td>
</tr>
<tr>
<td>CNT</td>
<td>Commission des 22.3orms du travail</td>
<td>p. 4.11</td>
</tr>
<tr>
<td>Code</td>
<td>US Internal Revenue Code</td>
<td>p. 3.16</td>
</tr>
<tr>
<td>Commissioner</td>
<td>Commissioner of Competition</td>
<td>p. 5.1</td>
</tr>
<tr>
<td>Consumer Protection Acts</td>
<td>Consumer protection legislation in place in each of the Canadian provinces</td>
<td>p. 17.9</td>
</tr>
<tr>
<td>Convention</td>
<td>Canada-US Tax Convention</td>
<td>p. 3.1</td>
</tr>
<tr>
<td>CPA</td>
<td>Canadian Payments Association</td>
<td>p. 14.8</td>
</tr>
<tr>
<td>CPAB</td>
<td>Canadian Public Accountability Board</td>
<td>p. 12.7</td>
</tr>
<tr>
<td>CPC</td>
<td>Capital pool company</td>
<td>p. 9.11</td>
</tr>
<tr>
<td>CRA</td>
<td>Canada Revenue Agency</td>
<td>p. 3.26</td>
</tr>
<tr>
<td>CRTC</td>
<td>Canadian Radio-television and Telecommunications Commission</td>
<td>p. 6.12</td>
</tr>
<tr>
<td>CSA</td>
<td>Canadian Securities Administrators</td>
<td>p. 12.12</td>
</tr>
<tr>
<td>CSBF</td>
<td>Canada Small Business Financing Program</td>
<td>p. 9.19</td>
</tr>
<tr>
<td>CSST</td>
<td>Commission de la santé et de la sécurité du travail</td>
<td>p. 16.8</td>
</tr>
<tr>
<td>CTC</td>
<td>Collective reference to the Convention on International Interests in Mobile Equipment (the “Mobile Equipment Convention”) and the Protocol to the Convention on Matters Specific to Aircraft Equipment (the “Cape Town Protocol”) each as signed in Cape Town, South Africa on November 16, 2001; the Regulations (the “Regulations”) issued by the Supervisory Authority for the International Registry of Mobile Assets (the “International Registry”); and the International Registry Procedures (the “Procedures”), each as in effect on this date in the US, and the Mobile Equipment Convention as modified by the Cape Town Protocol, together with the Regulations and the Procedures and all other rules, amendments, supplements and revisions thereto</td>
<td>p. 9.4</td>
</tr>
<tr>
<td>CTC Act</td>
<td>International Interests in Mobile Equipment (Aircraft Equipment) Act (Canada)</td>
<td>p. 9.3</td>
</tr>
<tr>
<td>CTI</td>
<td>Calgary Technologies Inc.</td>
<td>p. 9.21</td>
</tr>
<tr>
<td>D&amp;O</td>
<td>Directors’ and officers’ liability</td>
<td>p. 3.5</td>
</tr>
<tr>
<td>DFAIT</td>
<td>Department of Foreign Affairs and International Trade</td>
<td>p. 13.2</td>
</tr>
<tr>
<td>DIP</td>
<td>Debtor in possession</td>
<td>p. 2.5</td>
</tr>
<tr>
<td>Direction</td>
<td>Direction to the CRTC (Ineligibility of Non-Canadians) (issued by the federal cabinet)</td>
<td>p. 6.13</td>
</tr>
<tr>
<td>Distribution Act</td>
<td>An Act Respecting the Distribution of Financial Products and Services (Québec)</td>
<td>p. 12.26</td>
</tr>
<tr>
<td>Defined Term</td>
<td>Definition</td>
<td>Defined at</td>
</tr>
<tr>
<td>--------------------------------------------------</td>
<td>----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>------------</td>
</tr>
<tr>
<td>Distribution Requirements</td>
<td>Providing a prospectus or using a registered dealer</td>
<td>p. 12.2</td>
</tr>
<tr>
<td>DPOHs</td>
<td>Designated public office holders</td>
<td>p. 9.23</td>
</tr>
<tr>
<td>ECA</td>
<td>Ontario’s <em>Electronic Commerce Act, 2000</em></td>
<td>p. 17.6</td>
</tr>
<tr>
<td>ECBC</td>
<td>Enterprise Cape Breton Corporation</td>
<td>p. 9.20</td>
</tr>
<tr>
<td>ECL</td>
<td>Export Control List</td>
<td>p. 13.2</td>
</tr>
<tr>
<td>EDGE</td>
<td>Economic Diversification and Growth Enterprise Program</td>
<td>p. 9.17</td>
</tr>
<tr>
<td>EFC</td>
<td>Eligible financial contracts</td>
<td>p. 11.6</td>
</tr>
<tr>
<td>Effective Date</td>
<td>Effective date of NI 31-103 (September 28, 2009)</td>
<td>p. 12.12</td>
</tr>
<tr>
<td>EIPA</td>
<td><em>Export and Import Permits Act</em></td>
<td>p. 13.2</td>
</tr>
<tr>
<td>Employee, executive officer and director and consultant exemption</td>
<td>Exemption from the prospectus and registration requirements, if participation in the trade is voluntary, applied to distributions by an issuer, a control person of an issuer or related entity of an issuer to employees, executive officers, directors or consultants of such issuer or a related entity of the issuer</td>
<td>p. 9.10</td>
</tr>
<tr>
<td>ESA</td>
<td><em>Employment Standards Act</em></td>
<td>p. 16.1</td>
</tr>
<tr>
<td>FAP</td>
<td>Filmmaker Assistance Program</td>
<td>p. 9.14</td>
</tr>
<tr>
<td>Farm land</td>
<td>Real property located outside of a city, town, village or hamlet that is capable of being used for farming but does not include minerals or land used in processing or storing minerals</td>
<td>p. 18.1</td>
</tr>
<tr>
<td>FCAC</td>
<td>Financial Consumer Agency of Canada</td>
<td>p. 10.2</td>
</tr>
<tr>
<td>FCPA</td>
<td><em>Foreign Corrupt Practices Act</em></td>
<td>p. 14.2</td>
</tr>
<tr>
<td>FEMA</td>
<td><em>Foreign Extraterritorial Measures Act</em></td>
<td>p. 13.7</td>
</tr>
<tr>
<td>Fifth Protocol</td>
<td>Fifth Protocol to the Canada-US Tax Convention</td>
<td>p. 3.32</td>
</tr>
<tr>
<td>Financial assets</td>
<td>Includes securities as well as any other mediums of investment recognized for trading in any area or market, as well as any financial asset agreed to be dealt with as between the securities intermediary and the person for whom the securities account in question is maintained, that is, it contains an “opting-in” right as between contracting parties</td>
<td>p. 3.36</td>
</tr>
<tr>
<td>FINTRAC</td>
<td>Financial Transactions and Reports Analysis Centre of Canada</td>
<td>p. 14.6</td>
</tr>
<tr>
<td>FIPAs</td>
<td>Foreign investment protection agreements</td>
<td>p. 13.9</td>
</tr>
<tr>
<td>Franchisor’s agent</td>
<td>A sales agent of the franchisor who is engaged by the franchisor’s broker and who is directly involved in the granting of a franchise</td>
<td>p. 3.33</td>
</tr>
<tr>
<td>GAAP</td>
<td>Generally accepted accounting principles</td>
<td>p. 3.37</td>
</tr>
<tr>
<td>GAC</td>
<td>Government Advisory Committee</td>
<td>p. 7.11</td>
</tr>
<tr>
<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
<td>p. 13.1</td>
</tr>
<tr>
<td>GDP</td>
<td>Gross domestic product</td>
<td>p. 5.2</td>
</tr>
<tr>
<td>Defined Term</td>
<td>Definition</td>
<td>Defined at</td>
</tr>
<tr>
<td>-----------------------</td>
<td>---------------------------------------------------------------------------</td>
<td>------------</td>
</tr>
<tr>
<td>Globalive</td>
<td>Globalive Wireless Management Corp.</td>
<td>p. 6.13</td>
</tr>
<tr>
<td>GPA</td>
<td>WTO Government Procurement Agreement</td>
<td>p. 13.12</td>
</tr>
<tr>
<td>GST</td>
<td>Federal goods and services tax</td>
<td>p. 2.6</td>
</tr>
<tr>
<td>gTLD</td>
<td>Top-level domain name</td>
<td>p. 7.10</td>
</tr>
<tr>
<td>HRDC</td>
<td>Human Resources and Skills Development Canada</td>
<td>p. 9.13</td>
</tr>
<tr>
<td>HST</td>
<td>Harmonized sales tax</td>
<td>p. 2.6</td>
</tr>
<tr>
<td>ICA</td>
<td>Investment Canada Act</td>
<td>p. 6.1</td>
</tr>
<tr>
<td>ICANN</td>
<td>Internet Corporation for Assigned Names and Numbers</td>
<td>p. 7.10</td>
</tr>
<tr>
<td>ICC</td>
<td>International Chamber of Commerce</td>
<td>p. 14.2</td>
</tr>
<tr>
<td>ICL</td>
<td>Import Control List</td>
<td>p. 13.6</td>
</tr>
<tr>
<td>ICSID</td>
<td>UN Convention on the Settlement of Investment Disputes</td>
<td>p. 13.10</td>
</tr>
<tr>
<td>IFRS</td>
<td>International Financial Reporting Standards</td>
<td>p. 3.37</td>
</tr>
<tr>
<td>IIROC</td>
<td>Investment Industry Regulatory Organization of Canada</td>
<td>p. 12.16</td>
</tr>
<tr>
<td>Immigrants</td>
<td>Those who seek to remain permanently</td>
<td>p. 15.1</td>
</tr>
<tr>
<td>Information Technology Workers Programme</td>
<td>Pre-approved skills categories such as designated information technology skills</td>
<td>p. 15.2</td>
</tr>
<tr>
<td>Interest in farmland</td>
<td>Includes a purchase, lease, and option to purchase or lease, but excludes a bona fide mortgage interest</td>
<td>p. 18.1</td>
</tr>
<tr>
<td>International Registry</td>
<td>International Registry of Mobile Assets</td>
<td>p. 9.4</td>
</tr>
<tr>
<td>IPO</td>
<td>Initial public offering</td>
<td>p. 9.12</td>
</tr>
<tr>
<td>IPP</td>
<td>Intangible personal property</td>
<td>p. 4.16</td>
</tr>
<tr>
<td>IRPA</td>
<td>Federal Immigration and Refugee Protection Act</td>
<td>p. 15.1</td>
</tr>
<tr>
<td>ISDA</td>
<td>International Swaps and Derivatives Association, Inc.</td>
<td>p. 10.4</td>
</tr>
<tr>
<td>ISPs</td>
<td>Internet Service Providers</td>
<td>p. 6.14</td>
</tr>
<tr>
<td>ISTP Canada</td>
<td>International Science and Technology Partnerships Canada</td>
<td>p. 9.13</td>
</tr>
<tr>
<td>ITARs</td>
<td>US International Traffic In Arms Regulations</td>
<td>p. 13.8</td>
</tr>
<tr>
<td>KYC</td>
<td>Know Your Client</td>
<td>p. 12.17</td>
</tr>
<tr>
<td>Limitations Act 2002</td>
<td>Ontario’s Limitations Act, 2002</td>
<td>p. 20.1</td>
</tr>
<tr>
<td>LLC</td>
<td>Limited liability company</td>
<td>p. 3.2</td>
</tr>
<tr>
<td>LLP</td>
<td>Limited Liability Partnership</td>
<td>p. 3.29</td>
</tr>
<tr>
<td>LMD</td>
<td>Limited market dealer</td>
<td>p. 12.14</td>
</tr>
<tr>
<td>LMO</td>
<td>Labour Market Opinion</td>
<td>p. 15.1</td>
</tr>
<tr>
<td>Defined Term</td>
<td>Definition</td>
<td>Defined at</td>
</tr>
<tr>
<td>--------------------</td>
<td>---------------------------------------------------------------------------</td>
<td>------------</td>
</tr>
<tr>
<td>Lobbying Act</td>
<td>Lobbyists Registration Act</td>
<td>p. 9.22</td>
</tr>
<tr>
<td>LVTS</td>
<td>Large Value Transfer System</td>
<td>p. 10.1</td>
</tr>
<tr>
<td>Materials</td>
<td>Continuous disclosure, prospectus and exemption relief materials</td>
<td>p. 12.1</td>
</tr>
<tr>
<td>MBLA Act</td>
<td>Mortgage Brokerages, Lenders and Administrators Act, 2006</td>
<td>p. 6.16</td>
</tr>
<tr>
<td>MCA</td>
<td>The Corporations Act (Manitoba)</td>
<td>p. 3.12</td>
</tr>
<tr>
<td>MD&amp;A</td>
<td>Management discussion and analysis</td>
<td>p. 12.3</td>
</tr>
<tr>
<td>Merger</td>
<td>Any form (e.g., purchase of shares, assets, amalgamation) of direct or indirect acquisition or establishment of “control over or significant interest in” all or part of a business</td>
<td>p. 5.2</td>
</tr>
<tr>
<td>MFDA</td>
<td>Mutual Fund Dealers Association</td>
<td>p. 12.16</td>
</tr>
<tr>
<td>MI 11-102</td>
<td>Multilateral Instrument 11-102 Passport System</td>
<td>p. 12.1</td>
</tr>
<tr>
<td>MICC</td>
<td>the Québec Ministère de l’immigration et des communautés culturelles de Québec</td>
<td>p. 15.2</td>
</tr>
<tr>
<td>Mobile Equipment Convention</td>
<td>Convention on International Interests in Mobile Equipment</td>
<td>p. 9.4</td>
</tr>
<tr>
<td>Money Laundering Act</td>
<td>Proceeds of Crime (Money Laundering) and Terrorist Financing Act</td>
<td>p. 14.6</td>
</tr>
<tr>
<td>MRRS</td>
<td>Mutual Reliance Review System</td>
<td>p. 12.1</td>
</tr>
<tr>
<td>MSBA</td>
<td>Money-Services Businesses Act</td>
<td>p. 6.16</td>
</tr>
<tr>
<td>MVD Act</td>
<td>Ontario Motor Vehicle Dealers Act, 2002</td>
<td>p. 6.17</td>
</tr>
<tr>
<td>NAFTA Professional</td>
<td>A US or Mexican citizen performing services within a profession listed under the North American Free Trade Agreement</td>
<td>p. 15.2</td>
</tr>
<tr>
<td>NAL</td>
<td>No-action letter</td>
<td>p. 5.4</td>
</tr>
<tr>
<td>NBBCA</td>
<td>New Brunswick Business Corporations Act</td>
<td>p. 3.4</td>
</tr>
<tr>
<td>NBLAA</td>
<td>New Brunswick Limitations of Actions Act</td>
<td>p. 20.10</td>
</tr>
<tr>
<td>NFB</td>
<td>National Film Board</td>
<td>p. 9.14</td>
</tr>
<tr>
<td>NFPC</td>
<td>Not-for-profit corporation</td>
<td>p. 3.22</td>
</tr>
<tr>
<td>NFPC Acts</td>
<td>Federal and Ontario NFPC Acts</td>
<td>p. 3.22</td>
</tr>
<tr>
<td>NHA</td>
<td>National Holiday Act</td>
<td>p. 16.6</td>
</tr>
<tr>
<td>NI 31-103</td>
<td>National Instrument 31-103</td>
<td>p. 12.12</td>
</tr>
<tr>
<td>NI 31-103CP</td>
<td>Companion Policy to NI 31-103</td>
<td>p. 12.14</td>
</tr>
<tr>
<td>NI 45-102</td>
<td>National Instrument 45-102</td>
<td>p. 12.2</td>
</tr>
<tr>
<td>NI 51-102</td>
<td>National Instrument 51-102</td>
<td>p. 12.2</td>
</tr>
<tr>
<td>Defined Term</td>
<td>Definition</td>
<td>Defined at</td>
</tr>
<tr>
<td>----------------------</td>
<td>---------------------------------------------------------------------------</td>
<td>------------</td>
</tr>
<tr>
<td>NI 52-109</td>
<td>National Instrument 52-109</td>
<td>p. 12.2</td>
</tr>
<tr>
<td>NI 52-110</td>
<td>National Instrument 52-110</td>
<td>p. 12.2</td>
</tr>
<tr>
<td>NI 71-102</td>
<td>National Instrument 71-102</td>
<td>p. 12.3</td>
</tr>
<tr>
<td>NLCA</td>
<td>Newfoundland and Labrador Corporations Act</td>
<td>p. 3.10</td>
</tr>
<tr>
<td>NLHRC</td>
<td>Newfoundland and Labrador Human Rights Code</td>
<td>p. 16.2</td>
</tr>
<tr>
<td>Non Venture Issuer</td>
<td>A US market place</td>
<td>p. 12.3</td>
</tr>
<tr>
<td>NP 11-204</td>
<td>National Policy 11-204</td>
<td>p. 12.24</td>
</tr>
<tr>
<td>NRCan</td>
<td>Natural Resources Canada</td>
<td>p. 9.14</td>
</tr>
<tr>
<td>NRS</td>
<td>National Registration System</td>
<td>p. 12.24</td>
</tr>
<tr>
<td>NS Companies Act</td>
<td>Nova Scotia Companies Act</td>
<td>p. 3.4</td>
</tr>
<tr>
<td>NSLAA</td>
<td>Nova Scotia Limitations of Actions Act</td>
<td>p. 20.9</td>
</tr>
<tr>
<td>NSULC</td>
<td>Nova Scotia ULC</td>
<td>p. 3.15</td>
</tr>
<tr>
<td>NYSE</td>
<td>New York Stock Exchange</td>
<td>p. 12.9</td>
</tr>
<tr>
<td>OAA</td>
<td>Ontario's Arbitration Act, 1991</td>
<td>p. 20.3</td>
</tr>
<tr>
<td>OBCA</td>
<td>Business Corporations Act (Ontario)</td>
<td>p. 3.4</td>
</tr>
<tr>
<td>OBRITC</td>
<td>Ontario Business-Research Institute Tax Credit</td>
<td>p. 9.15</td>
</tr>
<tr>
<td>OCMA</td>
<td>Ontario Commercial Mediation Act, 2010</td>
<td>p. 20.3</td>
</tr>
<tr>
<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
<td>p. 14.4</td>
</tr>
<tr>
<td>OHRC</td>
<td>Ontario’s Human Rights Code</td>
<td>p. 16.2</td>
</tr>
<tr>
<td>OHSAO</td>
<td>Ontario’s Occupational Health and Safety Act</td>
<td>p. 16.4</td>
</tr>
<tr>
<td>OITC</td>
<td>Ontario Innovation Tax Credit</td>
<td>p. 9.15</td>
</tr>
<tr>
<td>Old Act Patents</td>
<td>Patents which issue from applications filed before October 1, 1989</td>
<td>p. 7.9</td>
</tr>
<tr>
<td>Ontario NFPC Act</td>
<td>Ontario Not-for-profit Corporations Act, 2010</td>
<td>p. 3.23</td>
</tr>
<tr>
<td>OPLA</td>
<td>Payday Loans Act, 2008 (Ontario)</td>
<td>p. 6.16</td>
</tr>
<tr>
<td>Orascom</td>
<td>Orascom Telecom Holding (Canada) Limited</td>
<td>p. 6.13</td>
</tr>
<tr>
<td>Order taker</td>
<td>An independent sales agent</td>
<td>p. 3.33</td>
</tr>
<tr>
<td>OSA</td>
<td>Securities Act (Ontario)</td>
<td>p. 9.7</td>
</tr>
<tr>
<td>OSC</td>
<td>Ontario Securities Commission</td>
<td>p. 3.37</td>
</tr>
<tr>
<td>Defined Term</td>
<td>Definition</td>
<td>Defined at</td>
</tr>
<tr>
<td>------------------------------</td>
<td>-----------------------------------------------------------------------------</td>
<td>------------</td>
</tr>
<tr>
<td>OSFI</td>
<td>Office of the Superintendent of Financial Institutions</td>
<td>p. 3.37</td>
</tr>
<tr>
<td>PAE</td>
<td>Publicly accountable enterprise</td>
<td>p. 3.37</td>
</tr>
<tr>
<td>Participating Provinces</td>
<td>Provinces of British Columbia, Ontario, New Brunswick, Nova Scotia and Newfoundland &amp; Labrador</td>
<td>p. 4.14</td>
</tr>
<tr>
<td>Payday loan</td>
<td>A loan made in exchange for a post-dated cheque, pre-authorized account debit or like future payment arrangement where any of the borrower, the lender or the loan broker is located in Ontario.</td>
<td>p. 9.4</td>
</tr>
<tr>
<td>PBA</td>
<td><em>Pension Benefits Act</em></td>
<td>p. 11.4</td>
</tr>
<tr>
<td>PCBA</td>
<td><em>Payment Card Networks Act</em></td>
<td>p. 10.2</td>
</tr>
<tr>
<td>PCT</td>
<td><em>Patent Cooperation Treaty</em></td>
<td>p. 7.9</td>
</tr>
<tr>
<td>PEFP</td>
<td>Politically exposed foreign person</td>
<td>p. 14.7</td>
</tr>
<tr>
<td>Permanent residents</td>
<td>Those who seek to remain permanently</td>
<td>p. 15.1</td>
</tr>
<tr>
<td>Petroleum, natural gas or mining properties exemption</td>
<td>Exemption from prospectus and registration requirements given to an issuer effecting a trade if it issues securities as consideration for the acquisition, directly or indirectly, of petroleum, natural gas or mining properties or any interest therein</td>
<td>p. 9.11</td>
</tr>
<tr>
<td>PHIPA</td>
<td><em>Personal Health Information Protection Act</em></td>
<td>p. 16.11</td>
</tr>
<tr>
<td>PIPA</td>
<td><em>Personal Information Protection Act</em></td>
<td>p. 16.13</td>
</tr>
<tr>
<td>PIPEDA</td>
<td><em>Personal Information Protection and Electronic Documents Act</em></td>
<td>p. 16.10</td>
</tr>
<tr>
<td>PMSI</td>
<td>Purchase money security interest</td>
<td>p. 9.2</td>
</tr>
<tr>
<td>PNG</td>
<td>Petroleum and natural gas reserves</td>
<td>p. 9.6</td>
</tr>
<tr>
<td>POHs</td>
<td>Public office holders</td>
<td>p. 9.22</td>
</tr>
<tr>
<td>POS Rules</td>
<td>Place of supply rules</td>
<td>p. 4.15</td>
</tr>
<tr>
<td>Procedures</td>
<td><em>International Registry Procedures</em></td>
<td>p. 9.4</td>
</tr>
<tr>
<td>Protected purchaser</td>
<td>Purchaser for value without notice of an adverse claim who takes control of a security</td>
<td>p. 3.36</td>
</tr>
<tr>
<td>Public benefit corporation</td>
<td>Ontario NFPCs</td>
<td>p. 3.26</td>
</tr>
<tr>
<td>PWC</td>
<td>PriceWaterhouseCoopers</td>
<td>p. 14.4</td>
</tr>
<tr>
<td>QBCA</td>
<td><em>Business Corporation Act</em> (Québec)*</td>
<td>p. 3.11</td>
</tr>
<tr>
<td>QHSF</td>
<td>Québec Health Services Fund</td>
<td>p. 4.11</td>
</tr>
<tr>
<td>Defined Term</td>
<td>Definition</td>
<td>Defined at</td>
</tr>
<tr>
<td>--------------</td>
<td>------------</td>
<td>------------</td>
</tr>
<tr>
<td>QSA</td>
<td>Securities Act (Québec)</td>
<td>p. 12.26</td>
</tr>
<tr>
<td>QST</td>
<td>Québec sales tax</td>
<td>p. 4.17</td>
</tr>
<tr>
<td>Québec Charter</td>
<td>The Québec Charter of Human Right and Freedoms</td>
<td>p. 16.6</td>
</tr>
<tr>
<td>Québec ECA</td>
<td>Québec ECA to Establish a Legal Framework for Information Technology</td>
<td>p. 17.8</td>
</tr>
<tr>
<td>Regulations</td>
<td>Regulations issued by the Supervisory Authority for the International Registry of Mobile Assets</td>
<td>p. 9.4</td>
</tr>
<tr>
<td>REJA</td>
<td>Reciprocal Enforcement of Judgements Act</td>
<td>p. 20.2</td>
</tr>
<tr>
<td>Reporting entities</td>
<td>Financial institutions (including life insurance companies, brokers and agents), securities dealers, money services businesses (including foreign exchange dealers), real estate brokers, real estate developers, accountants, casinos, dealers of precious metals, stones and jewellery and British Columbia notaries</td>
<td>p. 14.6</td>
</tr>
<tr>
<td>RESPs</td>
<td>Registered Education Savings Plans</td>
<td>p. 12.21</td>
</tr>
<tr>
<td>RMG</td>
<td>Risk Metrics Group</td>
<td>p. 12.12</td>
</tr>
<tr>
<td>RRLS</td>
<td>Regulation Respecting Labour Standards</td>
<td>p. 16.6</td>
</tr>
<tr>
<td>SBCA</td>
<td>The Business Corporations Act (Saskatchewan)</td>
<td>p. 3.14</td>
</tr>
<tr>
<td>Schoon v. Troy</td>
<td>Schoon v. Troy Corporation</td>
<td>p. 3.20</td>
</tr>
<tr>
<td>SEC</td>
<td>US Securities and Exchange Commission</td>
<td>p. 3.37</td>
</tr>
<tr>
<td>Securities for debt exemption</td>
<td>Exemption from prospectus and registration requirements given to an issuer issuing its own securities to settle a bona fide debt</td>
<td>p. 9.11</td>
</tr>
<tr>
<td>SEMA</td>
<td>Special Economic Measures Act</td>
<td>p. 13.4</td>
</tr>
<tr>
<td>SFSA</td>
<td>The Saskatchewan Farm Security Act</td>
<td>p. 18.1</td>
</tr>
<tr>
<td>SIFT Rules</td>
<td>New SIFT tax rules not applying to existing SIFTs</td>
<td>p. 3.32</td>
</tr>
<tr>
<td>SIFTs</td>
<td>Specific investment flow throughs</td>
<td>p. 3.31</td>
</tr>
<tr>
<td>SIIDA</td>
<td>Settlement of International Investment Disputes Acts</td>
<td>p. 13.10</td>
</tr>
<tr>
<td>SIMA</td>
<td>Special Import Measure Act</td>
<td>p. 13.1</td>
</tr>
<tr>
<td>SIR</td>
<td>Supplementary Information Request</td>
<td>p. 5.3</td>
</tr>
<tr>
<td>SME GAAP</td>
<td>Generally accepted accounting principles for small and medium enterprises</td>
<td>p. 3.37</td>
</tr>
<tr>
<td>SMEs</td>
<td>Small and medium enterprises</td>
<td>p. 9.14</td>
</tr>
<tr>
<td>SOEs</td>
<td>State-owned enterprises</td>
<td>p. 6.1</td>
</tr>
<tr>
<td>Soliciting corporation</td>
<td>A Canada NFPC that has received more than $10,000 in any financial year from specific sources, including government bodies and public donors</td>
<td>p. 3.26</td>
</tr>
<tr>
<td>SPAC</td>
<td>Special Purpose Acquisition Corporation</td>
<td>p. 9.12</td>
</tr>
<tr>
<td>Defined Term</td>
<td>Definition</td>
<td>Defined at</td>
</tr>
<tr>
<td>--------------</td>
<td>------------</td>
<td>------------</td>
</tr>
<tr>
<td>SRED</td>
<td>Federal Scientific Research and Experimental Development Tax Incentive Program</td>
<td>p. 9.13</td>
</tr>
<tr>
<td>SRO</td>
<td>Self-Regulatory Organization</td>
<td>p. 12.19</td>
</tr>
<tr>
<td>STA</td>
<td>Securities Transfer Act</td>
<td>p. 3.34</td>
</tr>
<tr>
<td>SWIFT</td>
<td>Society for Worldwide Interbank Financial Telecommunications</td>
<td>p. 16.14</td>
</tr>
<tr>
<td>Tax Act</td>
<td>Federal Income Tax Act</td>
<td>p. 3.1</td>
</tr>
<tr>
<td>Temporary residents</td>
<td>Those who seek to come to Canada temporarily, such as tourists, international students and temporary foreign workers</td>
<td>p. 15.1</td>
</tr>
<tr>
<td>TILMA</td>
<td>Trade, Investment and Labour Mobility Agreement</td>
<td>p. 13.14</td>
</tr>
<tr>
<td>TLCA</td>
<td>The Trust and Loan Corporations Act, 1997 (Saskatchewan)</td>
<td>p. 6.8</td>
</tr>
<tr>
<td>TMA</td>
<td>Federal Trade-marks Act</td>
<td>p. 7.1</td>
</tr>
<tr>
<td>Tribunal</td>
<td>Competition Tribunal</td>
<td>p. 5.2</td>
</tr>
<tr>
<td>TRV</td>
<td>Temporary Residence Visa</td>
<td>p. 15.1</td>
</tr>
<tr>
<td>TSX</td>
<td>Toronto Stock Exchange</td>
<td>p. 12.3</td>
</tr>
<tr>
<td>TUVs</td>
<td>Transfers at undervalue</td>
<td>p. 11.8</td>
</tr>
<tr>
<td>UDP</td>
<td>Ultimate Designated Person</td>
<td>p. 12.15</td>
</tr>
<tr>
<td>UDRP</td>
<td>Uniform Domain Name Dispute Resolution Procedure</td>
<td>p. 7.12</td>
</tr>
<tr>
<td>ULC</td>
<td>Unlimited liability company</td>
<td>p. 3.11</td>
</tr>
<tr>
<td>Uncertificated securities</td>
<td>Securities that are represented by book entries in the records of a securities intermediary</td>
<td>p. 3.35</td>
</tr>
<tr>
<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
<td>p. 11.5</td>
</tr>
<tr>
<td>URS</td>
<td>Uniform Rapid Suspension</td>
<td>p. 7.12</td>
</tr>
<tr>
<td>USA</td>
<td>Unanimous shareholder agreement</td>
<td>p. 3.5</td>
</tr>
<tr>
<td>UTI</td>
<td>University Technologies International</td>
<td>p. 9.21</td>
</tr>
<tr>
<td>Venture Exchange</td>
<td>TSX Venture Exchange</td>
<td>p. 9.11</td>
</tr>
<tr>
<td>Venture Issuer</td>
<td>An exchange, such as the TSX Venture Exchange, the Canadian National Stock Exchange, other international exchanges or event not listed on any exchange</td>
<td>p. 12.3</td>
</tr>
<tr>
<td>Visa office</td>
<td>Canadian immigration office outside Canada</td>
<td>p. 15.1</td>
</tr>
<tr>
<td>WEPPA</td>
<td>Wage Earner Protection Program Act (Canada)</td>
<td>p. 11.1</td>
</tr>
<tr>
<td>WRA</td>
<td>Winding-up and Restructuring Act (Canada)</td>
<td>p. 9.4</td>
</tr>
<tr>
<td>WSIA</td>
<td>Workplace Safety and Insurance Act</td>
<td>p. 16.3</td>
</tr>
<tr>
<td>WTO Agreement</td>
<td>World Trade Organization Agreement</td>
<td>p. 13.1</td>
</tr>
</tbody>
</table>