How To Enter The Canadian Market: A Legal Road Map

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INTRODUCTION

Canada is geographically the world’s second largest country. According to Statistics Canada, in January 2009, there were approximately 33,500,000 people living in Canada. The United States is smaller in area, but the Canadian population is slightly more than 1/10 of the population of the U.S.

75% of Canadians live less than 100 miles from the U.S. Canada border. As a result, Canada and the United States share many economic imperatives and cultural influences. The economic and material aspirations and realizations of the Canadian and U.S. populations are strikingly similar.

From an historical perspective, however, Canada remains significantly different than the United States. Canada today is a highly multicultural society that generally respects and enshrines cultural heritage rather than encouraging the population to form a homogeneous melting pot. Colonized by the British and French, Canada remains a bilingual country; English and French are the two official languages. About 25% of the population is French speaking, with the greatest concentration in the province of Quebec.

Canada remains an attractive location for the establishment or expansion of business in North America. Canadian workers are highly skilled and well educated with the lowest turnover and absenteeism rates in North America. In 2008, Canada ranked #3 on the United Nations Human Development Index.

According to a KPMG study published in March, 2006, Canada has the lowest average business costs among G7 countries. The costs of running a business in Canada for a period of 10 years was estimated to be 5.5% lower in Canada than a comparable business in the United States.

2009 is proving to be a challenging year for the world economy. Canada has measured up rather well in moderating the effects of a global recession. No Canadian banks have failed. Although credit markets have tightened, Canada’s banking system has been seen as a model of appropriate regulatory oversight.

The Canadian economy is also heavily influenced by the state of the U.S. economy. Canada is the world’s largest exporter to and importer from the United States. Canadian exports to the United States represent 25% of Canada’s gross national product and 75% of its total exports. Corporations controlled by Americans produce 40% of all Canadian manufacturing output.

Except in certain industry specific situations where cultural values are at risk, Canada is receptive to foreign investment. Despite its relatively small population, Canada is one of the largest trading nations in the world. Although historically Canada was an exporter of raw materials and an importer of manufactured goods, shipments from Canada are now balanced between raw materials and finished goods.

This paper is intended to provide a general overview of particular matters of interest to businesses considering entry into the Canadian market. Where appropriate, descriptions of both
federal and Ontario laws are provided. However, this paper should not be considered an exhaustive review, and particular businesses may be subject to industry specific legislation and other legal requirements that are not dealt with in this paper. Accordingly, before undertaking any business transaction involving entry into Canada, it is prudent to seek the advice of counsel.

**LEGISLATIVE JURISDICTION**

Canada’s Constitution creates mutually exclusive jurisdictions for federal and provincial legislation. For example, Canada’s intellectual property, bankruptcy, and criminal laws are solely within the purview of the federal government. Provincial legislative authority is granted for the regulation of trade and commerce, education and health within the province. However, the jurisdictional distinctions are often blurry, and the subject matter of federal and provincial legislation sometimes overlaps.

Bankruptcy is governed by the *Bankruptcy and Insolvency Act* (Canada). However, receiverships often are governed by private contractual relationships which are interpreted in accordance with provincial law. Corporations may be incorporated either federally or provincially. Similarly, both levels of government assess personal income taxes. The regulation of broadcast, pharmaceutical and most transportation industries is within the federal purview; however, virtually all professions are governed by provincial statutes.

Property and civil rights are matters within the purview of provincial governments. Accordingly, businesses may find themselves regulated by securities laws and environmental legislation from several jurisdictions. Although much of the law is consistent in the various provinces, it is necessary to review statutes in each province in which an enterprise carries on business.

All jurisdictions in Canada other than Quebec operate under common law principles. Accordingly, unless ousted by legislation, the law governing business relationships is derived from the decisions of the judiciary. Quebec is a civil law jurisdiction with a civil code based on the Napoleonic code. The Quebec judiciary’s function is generally confined to the interpretation and application of the civil code to determine the rights of parties.

**FORM OF BUSINESS ORGANIZATIONS IN CANADA**

The first issue facing foreigners setting up business in Canada is the type of entity which should be used to operate the business. Among the most commonly used are:

- corporations
- unlimited liability corporations (ULCs)
- branch of foreign corporation
- sole proprietorships
general partnerships
limited liability partnerships (LLPs)
limited partnerships
cotenancies and joint ventures
agency, distribution and franchise arrangements

The choice of form of business organization is dependent upon a number of factors. The nature of the business and taxation issues which may revolve around the desirability to consolidate income for tax purposes are two important criteria. Availability of incentive or assistance programs may also impact the decision. Foreign investors should obtain professional legal and accounting advice to determine the most advantageous method of carrying on business.

Canadian Corporations

Most businesses in Canada are carried on by corporations with share capital.

A corporation is a distinct, legal entity from its owners, the shareholders, who exercise ultimate control over the management of the corporation through the election of directors. The directors have a duty to act honestly, in good faith and in the best interests of the corporation. Corporations have a perpetual existence and are afforded all the rights to own property and the rights to carry on business as are enjoyed by a natural person.

There are several advantages to utilizing a corporate form of organization, including:

- **Limited Liability** – The exposure of the shareholders of a corporation is limited to the amount of their equity investment. The liabilities of the corporation are distinct from the shareholders.

- **Flexibility and Investment** – A corporation offers investors access to a wider variety of capital and financing opportunities than most other forms of organization. Since a corporation is a flexible form of organization for business, various classes of shares and debt instruments may be utilized to provide different levels of shareholder and lender participation which reflect the degree of risk inherent in the investment.

- **Transfer of Control** – Control of a corporation can be easily transferred through the transfer of issued and outstanding shares.

Private vs. Public Corporations

Canadian corporations can either be private corporations or public corporations. Private corporations are generally those which:

- have fewer than 50 shareholders;
- have restrictions on the right to transfer shares (generally the consent of a majority of the directors or shareholders); and
expressly prohibit any invitation to the public to subscribe for securities.

Articles of incorporation often contain restrictions to ensure that the corporation is a private corporation. Such restrictions exempt the corporation from additional regulatory and securities law rules that apply to public corporations in areas such as proxy solicitation, takeover bids, insider trading, filing of financial statements and public disclosure.

**Federal vs. Provincial Incorporation**

Corporations may be incorporated and organized under either the federal *Canada Business Corporations Act* (the “CBCA”) or the equivalent legislation of each of the provinces and territories. Incorporation and organization under the CBCA does not automatically give rise to a right to carry on business in each province. A federal corporation must register in each province in which it proposes to carry on business. Similarly, a provincial corporation may carry on business in another province, provided an extra-provincial licence is obtained. For certain highly regulated business undertakings such as insurance companies, banks and trust companies, specific statutes set incorporation, organization and operational standards.

When consulted by a foreign company wishing to carry on business in Canada through a Canadian subsidiary, a lawyer will compare the features of the CBCA and the provincial statute of the province in which the head office of the subsidiary will be located in order to determine the preferred corporate statute under which to incorporate and organize. Although the statutes are substantially similar, there are slight differences in the areas of public disclosure of financial statements and residency requirements for directors, which may affect the choice of incorporating jurisdictions.

Under the provincial corporate statute in Ontario, the *Business Corporations Act* (Ontario) (the “OBCA”) and the CBCA, at least 25% of the directors must be resident Canadians, unless there are fewer than four directors, in which case at least one director must be a resident Canadian. In certain circumstances under the CBCA, the residency requirements are reduced for holding corporations.

There are other factors which decide whether or not the federal jurisdiction or the provincial jurisdiction should be utilized for incorporation. For example, certain financing incentives provided by one level of government may dictate incorporation within that jurisdiction. There is also a perception that certain businesses that supply goods or services to a particular province should strongly identify with that province, making it advisable to incorporate within that jurisdiction. Finally, some political considerations and peculiarities (such as the inability to export a corporation incorporated under provincial legislation in Quebec) may make it prudent to utilize a federal corporation for any business that does or has aspirations of doing business outside the province of Quebec.
Incorporation Procedures

A corporation is formed by filing certain prescribed documents with the appropriate authorities under the CBCA or the equivalent provincial legislation. Incorporation is automatic once the required documents are filed and fees paid. The cost of establishing a Canadian corporation is relatively inexpensive. Fees payable to the Government upon registration vary between $325 (under the OBCA) to $500 (under the CBCA). Registration fees and legal fees will also be payable, and vary depending upon the complexity of the corporation’s structure. The incorporation of a routine Canadian corporation can occur electronically immediately after receipt of appropriate authorization from the incorporator. The corporation comes into existence on the date of issue of a certificate of incorporation by the regulators.

The name of the corporation is strictly regulated in all jurisdictions in order to avoid names that are too general or misleading. There is a screening process and it is possible to pre-clear a name prior to application for incorporation. Corporate names may also have separate English and French versions. In such cases, the versions may be used interchangeably. If a corporation wishes to do business with the government of Quebec, it is necessary to adopt a French version of its corporate name.

Shares and Shareholders

Shares in a corporation represent a portion of corporate capital and entitle the holder to a proportional right to corporate assets on dissolution. There is no minimum or maximum amount of shares that a corporation is allowed to issue, unless otherwise specified in the incorporating documents. “One shareholder” companies are also permissible in Canadian law. Canadian corporate law provides great flexibility in developing the appropriate capital structure for a corporation. The articles of incorporation specify the permitted classes of shares and their key terms. Shares may be voting, non-voting or they may have disproportionate voting rights. The incorporating documents may also attach various conditions to the payment of dividends and will stipulate rights on dissolution of the corporation.

Federal and provincial corporate statutes also provide shareholders with dissent and appraisal rights which may require a corporation to acquire a shareholder’s interest for its fair value if a corporation implements a fundamental change. Corporate legislation also contains statutory oppression remedies which grant courts broad rights to grant equitable remedies where shareholders or creditors have been subject to corporate activity which is unfairly prejudicial or unfairly disregards their respective interests. These remedies are in addition to any remedies flowing from fiduciary duties which have been compromised.

Unanimous Shareholders’ Agreements

The term unanimous shareholders’ agreement (“USA”) is used to refer to a shareholders’ agreement between all of the shareholders of a corporation that restricts, in whole or in part, the
powers of the directors to manage or supervise the management of the business and affairs of a corporation. Where a corporation has few shareholders they will often want to customize their relationship to provide for an arrangement which is different from that contemplated in the OBCA, CBCA or at common law. A USA is to be distinguished from a shareholders' agreement in which the shareholders may agree upon certain or all of the matters described below without restricting the powers of the directors.

USAs can regulate a specific topic or every detail of a corporation's operation. The following are subjects which are commonly covered in USAs:

(i) **Voting** – Shareholders may want to exercise their power to vote on a basis different than the votes determined according to share ownership;

(ii) **Share Transfer** – Shareholders may want to set up mechanisms to restrict share transfers (which are typically subject to a right of first refusal) and the issuance of additional securities;

(iii) **Buy Sell Arrangements** – “Shotgun” buy sell arrangements, rights of first refusal, auction procedures, and the method by which shares are valued are often central issues covered by the USA; and

(iv) **Dispute Resolution** – Shareholders may want to resolve their disputes by such means as arbitration, instead of by means of the relative voting power of different shareholders.

Any shareholder who is party to a USA (as distinguished from a shareholder who is a party to an ordinary shareholders’ agreement) has all the rights, powers and duties as directors and the directors are accordingly released from their duties and liabilities.

**Unlimited Liability Companies (“ULC”)**

At present, Nova Scotia, Alberta and British Columbia are the only provinces which allow for the incorporation of ULCs. A ULC is a hybrid entity that has a separate legal identity, analogous to a corporation. A ULC is similar to a partnership in that shareholders of a ULC are jointly and severally liable for losses which exceed corporate assets.

Recently, US investors have expressed a great deal of interest in ULCs on account of their tax treatment. Though a ULC is treated as a corporation from a Canadian tax standpoint, it may be treated as a partnership from a U.S. perspective. In turn, the ULC structure allows flow through of income, deductions, gains and losses to the U.S. parent company.

The disadvantage of ULCs is the potential liability of shareholders. However, shareholder exposure to liability can be limited by contract or by the interposition of a “buffer” entity, such as a limited partnership or a U.S. limited liability company, generally with assets limited to the shares of the ULC, between the ULC and the U.S. parent company. Nevertheless, ULCs have proven attractive for many U.S. companies engaged in cross border transactions.
There are a number of differences between Alberta, Nova Scotia, and British Columbia ULCs. For instance, the extent of the liability of shareholders of a ULC is dependant on the jurisdiction of incorporation. Unlike Alberta ULCs, where shareholders of the ULC are jointly and severally liable to creditors for any liability, act or default of the ULC during its existence and operation, the shareholders of Nova Scotia and British Columbia ULCs have no direct liability to creditors other than on the dissolution or liquidation of the ULC. Another difference between the provincial regimes is that the Business Corporations Act (Alberta) requires that one quarter of the directors of a ULC be Canadian, as is the case with all Alberta corporations, compared to Nova Scotia and British Columbia where there is no such residency requirement. Further, the costs associated with establishing and maintaining a ULC are more significant in Nova Scotia than in Alberta and British Columbia.

On September 21, 2007, Canada and the United States signed the fifth Protocol to the Canada-United States Income Tax Convention (1980). The fifth Protocol proposes changes to the existing Convention that will affect the taxation of ULCs and likely make ULCs less attractive to U.S. investors in Canada. Particularly, under the fifth Protocol, hybrid entities that are treated as flow-through entities in the United States, such as ULCs, will be denied treaty benefits. The change does not come into effect until the first day of the third calendar year that ends after the fifth Protocol comes into force. The fifth Protocol came into force on December 15, 2008, and the changes will come into effect on January 1, 2010.

**Branch of Foreign Corporation**

Often, foreign investors wish to carry on the Canadian operations as a branch of a foreign corporation or U.S. subsidiary, as opposed to creating a separate Canadian entity. Foreign corporations are generally entitled to carry on business in this manner in most areas of commercial activity, provided that extra-provincial licences are obtained in the jurisdictions in which they carry on business. A foreign corporation which sets up a branch in Ontario must obtain a licence under the Extra-Provincial Corporations Act (Ontario). The decision to use a Canadian branch operation is dependent upon a number of considerations. Incorporation often makes it easier for small and medium sized businesses to deal with Canadian suppliers and customers. It is often assumed that choosing a Canadian corporation demonstrates a commitment to Canadian operations. Such assumption has no foundation in law. If independent financing for the Canadian operation is required, local financing may be easier to obtain through the use of a Canadian owned subsidiary. The failure to create a separate corporate entity will expose the foreign corporation to all liabilities incurred in the Canadian operations.

The tax treatment of branch operations is discussed elsewhere in this paper. Income tax must be paid in Canada on Canadian branch profits. The ability to claim a full foreign tax credit by the parent corporation must be considered to ensure that double taxation is avoided. Accordingly, the taxation of the foreign corporation and the projected income or losses which will be incurred by Canadian operations are important (and usually determinative) factors to be considered.
**Sole Proprietorship**

A sole proprietorship may be established by any single individual. The only legislative requirement for this form of enterprise is usually the obtaining of a business licence or registration of the name of the business under the appropriate provincial statute. The disadvantage of this business structure is that the sole proprietor is personally liable for all the debts and liabilities of the enterprise. The liability extends beyond the investment in the business to the personal resources and assets of the investor. On the other hand, there are tax advantages in operating as a sole proprietorship, since losses may be set off against the sole proprietor’s income from other resources.

**General Partnerships**

A partnership is a relationship that exists between two or more people (individuals, corporations, partnerships or other entities) who carry on a business in common with a view to earning profit. In a general partnership, it can generally be said that:

- each partner is liable for all of the debts and other liabilities of the partnership
- net income will be determined at a partnership level and such net income will be allocated to the partners
- a partner may not be entitled to be a creditor of the partnership (although a party related to the partner is entitled to be a creditor)
- unless a partnership agreement otherwise specifies, all partners must contribute equally to the capital of the partnership and are entitled to share equally in the profits of the partnership; likewise, all losses would be shared equally
- the liability of a partner in connection with partnership liabilities extends to the full extent of the partner’s assets.

Partnerships are governed by the provisions of provincial statutes. Written partnership agreements can override many of the provisions of various statutes, and it is advisable to enter into a partnership agreement in order to avoid certain arbitrary provisions of these statutes. As stated above, in the absence of a written agreement to the contrary, amongst themselves partners may be equally liable for partnership obligations, notwithstanding their unequal capital contributions or profit sharing arrangements.

Under Canadian tax law, partnerships do not pay income taxes. Although net income is calculated at the partnership level, the net income is allocated to the partners, who are obligated to pay tax. A foreign partner allocated income from a Canadian partnership would, therefore, be obligated to pay Canadian income tax on the foreign partner’s share of income.
Limited Liability Partnerships ("LLP")

LLP’s are permitted to be established in Ontario. The LLP allows professionals, such as lawyers and accountants, to practice in the form of limited liability partnerships. In a general partnership, partners are liable for the debts and liabilities arising from the negligent acts of all partners. A partner in a LLP is not relieved from liability for such partner’s own negligent or wrongful act or omission (or for the negligent wrongful act or omission of a person under such partner’s direct supervision). Under certain circumstances, a partner may also be liable for a negligent or wrongful act or omission or another partner or an indirectly supervised employee. LLPs are the same as general partnerships in other respects including the process in which they are formed, governed and taxed. In addition, in LLPs, the partnership assets continue to be at risk for the negligence of the partners and employees. Currently, the only other jurisdiction in Canada which allow for the formation of LLPs is Alberta.

Limited Partnerships

A limited partnership is a type of partnership which restricts the exposure of passive individual partners for the liabilities of the partnership. Limited partnerships are creatures of provincial statutes. These statutes contain subtle differences with respect to the exposure of individuals to liability in excess of the capital invested in the partnership by such individuals. These differences are dependent on the province in which a limited partnership is organized.

A limited partnership consists of one or more general partners (who are exposed to unlimited liability) and one or more limited partners. Under Ontario legislation, a limited partner is liable as a general partner in the event such limited partner takes part in the control of the business. In other words, in some circumstances, the limited partner will have unlimited liability. In some provinces, the extent to which a limited partner is exposed to liability is limited to the result of the acts such limited partner performs in the management and operation of the business of the limited partnership.

A limited partnership does not come into existence until it is registered under the laws of the province in which it is established. Typically, registration requires filing forms which provide specific information about the identity of the general partner. These forms may or may not require the identities of the limited partners and the limited partnership agreement itself may have to be filed in an office where it may be scrutinized by the public.

Limited partnerships are useful vehicles where there is a desire to flow through income and expenses and yet limit the liability of the individual participants in a particular venture. However, its suitability requires that the investment of the limited partner/investor be passive in nature.
Co Tenancies and Joint Ventures

Real estate investments are often held in the names of co tenancies or joint ventures. A co tenancy is not a tax paying entity, nor is it a relationship such as a partnership which is treated like an entity for the purposes of calculating net income. Accordingly, there is some flexibility available in the preparation of financial statements for co tenancies. Each co tenant or joint venturer may determine the amount of depreciation expense, which will be utilized by it in the calculation of income for tax purposes.

A joint venture is a form of business organization that is based on a contract, where each of the parties to the contract agrees to contribute property and/or skills towards a stated common purpose. It is not recognized as a distinct and separate entity, and as a result, it cannot sue or be sued. The joint venture agreement will delineate the respective rights and liabilities of the joint venturers, including their right to bind other parties. The most important goal in drafting a joint venture or co tenancy arrangement is to avoid having the structure characterized, at law, as a partnership, because of the duties imposed on partners. The existence of a partnership is a question of fact. Every effort must be expended to ensure the joint venture or co tenancy structure will survive the scrutiny of a third party who may seek to impose full liability on each party as if it was a partner in a general partnership.

Agency, Distribution and Franchise Arrangements

In some cases, the decision to expand into Canada may be realized without actually having the foreign business entity carry on business in Canada. The granting of a franchise or the entering into of a distribution contract or agency agreement in Canada does not, in and of itself, constitute carrying on business in Canada. Accordingly, it is often appropriate for a foreign entity to consider the use of a Canadian agent, distributor or master franchise, or to expand its business operations into Canada.

In each case, the relationship should be governed by contract to avoid ambiguity. Generally speaking, if an agency relationship exists, the agent will have the right to bind its principal to contractual commitments. A distributor does not have such rights and, like a franchise, is generally considered to be an independent contractor.

The ownership and protection of intellectual property rights and exclusivity rights are often given insufficient emphasis when establishing an initial relationship with a Canadian entity. Such diffidence can create significant problems when the relationship between the parties change. In addition, termination rights must be considered. In the absence of a written contract, a Canadian agent or distributor will be entitled to reasonable notice before the termination of the agent or distributor. If insufficient notice of termination is given, a court may award damages in lieu of notice.

With the exception of Ontario, Alberta, Prince Edward Island and New Brunswick, most Canadian jurisdictions do not have franchise disclosure legislation. Ontario’s Arthur Wishart Act
(Franchise Disclosure), 2000 imposes a “fair dealing” obligation on each party to a franchise agreement and requires the franchisor to provide the prospective franchisee with a disclosure document setting out all material facts of the business, including financial statements. Franchisees are permitted to form dealer associations, a practice generally prohibited by standard Canadian franchise agreements. In addition, a franchisor is not able to contract out of the legislation. The franchise disclosure legislation in Ontario applies generally to franchise agreements entered into after July 1, 2000, although the requirement to deal fairly and the right to associate applies to franchise agreements entered into prior to this date. The franchise disclosure legislation in Alberta, Prince Edward Island and New Brunswick is similar to that in Ontario.

**Income Trusts**

An income trust is an investment trust that buys and holds income-producing assets. The trust distributes the operating income to the investors, called unitholders. Prior to the federal government’s 2006 decision to tax income trusts, income trusts were an extremely attractive form of business organization since they enjoyed favourable tax treatment in comparison to corporations. Income trusts acted as flow-through entities, since the operating entity’s tax could be reduced to nil and the unitholders were taxed. In 2006, the federal government proposed legislation pursuant to which income trusts – now termed “special investment flow-through entities” (SIFTS)—would be taxed in a similar fashion to corporations and their shareholders. All income trusts that began trading after October 31, 2006 are now subject to the new taxation policy. Income trusts that were existing on October 31, 2006 will not be subject to the new taxation policy until 2011.

**DIRECTORS’ LIABILITIES**

Under the OBCA and the CBCA, and under common law, directors and officers of a corporation are required to act honestly and in good faith with a view to the best interests of the corporation. They must exercise their powers with the due care, diligence and skill that a reasonably prudent person would exercise in similar circumstances. They must also comply with governing statutes, regulations, incorporating documents and any unanimous shareholders’ agreement.

Apart from statutory liability, in most circumstances directors are shielded from personal liability by the “corporate veil”. However, in certain circumstances, the courts will look beyond the corporate veil, in order to hold directors personally liable for their wrongdoings, particularly where the corporation is used as a vehicle for fraud. Courts have also held directors personally liable for tortious conduct, equitable breaches, and the violation of statutory duties. Generally speaking, a director will only be held personally liable in tort where the degree of personal involvement in the wrongdoing makes the act his or her own. The Ontario courts have identified the following four grounds on which personal liability will almost always be extended to the principals of a corporation: (1) fraud; (2) deceit; (3) dishonesty; and (4) want of authority.
As a general rule, statutes imposing liability on directors operate in one or both of two ways:

1. A statute may make directors personally liable to make payments the corporation has failed to make;
2. A statute may create offences for which directors can be found liable and therefore subject to penalty or imprisonment, or for which the corporation can be found liable, with the directors who participated in the corporate decisions also made liable by virtue of their participation. In many of the cases, directors will be held jointly and severally liable with the corporation such that the directors can be left responsible for payment of the entire sum.

Liability may attach to directors personally where negligence, negligent or fraudulent misrepresentation, inducing breach of contract, or breach of trust are involved, where the director benefited personally or was personally involved. Under the Employment Standards Act (Ontario), directors are jointly and severally liable for employee wages, not exceeding six months, which have become payable while they were directors. Under the OBCA, directors are also responsible for not more than 12 months of vacation pay which accrued while they were directors. Under several statutes, including the Income Tax Act (Canada), Corporations Tax Act (Ontario), Excise Tax Act (Federal) – Goods and Services Tax, Retail Sales Tax Act (Ontario), etc., directors may be held personally liable for any amount which the corporation has failed to deduct, withhold or remit for or its employees pursuant to the tax statutes or for having directed, authorized, assented to, acquiesced in, or participated in, the commission of an offence under the various acts.

Under statute and at common law a director is said to have a fiduciary duty to the corporation which requires that he or she deal honestly with the corporation and maintain the confidence of the corporation’s business information. A director may only exercise his or her powers in the capacity and for the purposes for which they were intended. He or she must avoid conflicts of interest and so may not profit or benefit to the detriment of the corporation by taking advantage of opportunities or benefits which belong to the corporation. This principle applies whether the director has learned about such opportunities by virtue of his position as director or otherwise. A director must also disclose any interests which may be adverse to or in conflict with his or her obligations and responsibilities as a director to the corporation.

Note that directors may not escape liability for breach of fiduciary duty or other obligations by claiming that they did not agree with a decision or were not present at the meeting where the decisions was made. Under the CBCA, a director is generally deemed to have consented to any resolution passed or action taken at a meeting unless the director takes the specific steps to record dissent, as outlined in the statute.

**Securities Law**

The undertaking of a distribution under a prospectus gives rise to significant legal responsibilities for the issuer and its directors and officers and can, in certain circumstances, result in direct and
personal liability of the directors and officers. Securities legislation of all of the Canadian provinces contain important provisions relating to the responsibilities of directors and officers in connection with a distribution of securities.

The standard required by the Securities Act (Ontario) (in the following paragraphs, referred to as the “Act”) with respect to reporting requirement of companies traded publicly in the Province of Ontario is that a prospectus offering securities must contain “full, true and plain disclosure of all material facts relating to the securities” offered by the prospectus and that a prospectus not contain an untrue statement of a material fact or omit a material fact. The term “material fact” is defined in the Act to mean a fact that significantly affects, or would reasonably be expected to have a significant effect on, the market price or value of the securities being offered.

The Act was recently amended to provide rigorous standards of responsibility and liability for purchasers of securities, taken in large part from United States law. In summary, the Act provides that where a prospectus contains a “misrepresentation”, each purchaser is deemed to have relied on the misrepresentation, if it was a misrepresentation at the time of purchase, and has a remedy against the corporation either in damages or for rescission, and a remedy against the directors, and any officers who signed the certificate, in damages (s.130). Note that there are also similar provisions imposing liability for a misrepresentation in a takeover bid circular (s.131).

Under securities legislation, a “material change”, which is an event that triggers a public disclosure obligation, is defined to include a change in the business, operations, or capital of an issuer that would reasonably be expected to have a significant effect on the market price or value of its securities. This definition requires officers and directors to make a business judgement, either alone or based on information or advice from capital markets professionals. In Kerr v. Danier Leather,1 a 2007 decision of the Supreme Court of Canada, the Court held that a change in intra quarterly results did not necessarily signal a material change for the purposes of amending a prospectus after a receipt has been obtained. The court further held that disclosure is a matter of legal obligation rather than a matter of business judgement; directors must comply with statutory disclosure requirements. Given the higher stakes involved under the new regime, the decision about when to disclose major corporate events has been made more difficult. Consequently, issuers may decide to disclose negotiations of significant transactions at an earlier stage in an attempt to err on the side of caution.

In order to provide protection from liability, issuers may decide to file a confidential material change report. However, in such a case, potential defendants in a lawsuit must be prepared to defend the reasonableness of the decision to make a confidential filing.

Furthermore, directors are considered to be insiders of a public company. In order to protect the integrity of the marketplace and ensure that the secondary markets are based on the principle of equal access to material information, various rules are imposed on insiders. A director who purchases or sells a security of the corporation with knowledge of confidential information that, if generally known, might reasonably be expected to alter the value of the security in a material

1Fn 2007 SCC 44
way is liable, under s.76(1) of the Act and s. 131(4) of the CBCA, to the person to whom he or she sells the security or from whom he or she has purchased the security for any damages suffered by him or her unless:

1. the director reasonably believed that the information had been generally disclosed;
2. the information was or ought reasonably be known by the seller or purchaser; or
3. the purchase or sale took place in the prescribed circumstances.

A director is also liable to the corporation for any benefit or advantage received or receivable as a result of such a trade unless it can be established that he or she reasonably believed that the information had been generally disclosed.

Also, under s.76(2) of the Act and s. 131(6) of the CBCA, a director of a corporation who discloses information about the corporation that is not generally known and that, if generally known, might reasonably be expected to alter the value of the security in a material way, is liable for damages incurred by he or she who sells the security to or purchases the security from the individual in receipt of such information, unless the director can establish:

1. the director reasonably believed that the information had been generally disclosed;
2. the information was or ought reasonably be known by he or she who has suffered damages;
3. that the disclosure of the information was necessary in the course of the director’s business (subject to certain limitations).

In such cases, the director is also liable to the corporation as described in the case of insider trading. As above, a reasonable belief in the general disclosure of the information as well as the necessity of the disclosure in the ordinary course of business constitute exceptions to this general principle.

Under the Act, a director could found guilty of either insider trading or tipping may also be fined up to the greater of $5,000,000 and three times any profit made and/or imprisoned for up to five years less a day. Environmental protection statutes also impose liability upon directors. Case law appears to require positive steps to be undertaken by directors to seek out, monitor, and resolve environmental issues in order to avoid statutory liability. These issues are discussed elsewhere in this paper.

**FOREIGN INVESTMENT AND ANTI COMPETITION LEGISLATION**

**The Investment Canada Act**

Historically, barriers to the entry of foreign business existed in Canada. It is now generally accepted that foreign investment is welcome and encouraged in Canada. The *Foreign Investment Review Act* (Canada) has been repealed and replaced with the *Investment Canada Act* (the “ICA”).
The thrust of the ICA is to monitor the level of foreign investment in Canada.

Most investments require mere notification to the Canadian government, along with the filing of simple forms under the ICA. Such transactions may be subject to review, but are not automatically reviewable. The forms require identification of the parties and the business, the value of the business assets, and an indication of the number of employees to be employed in the Canadian business.

Reviewable transactions are limited to those which exceed certain threshold values or are related to certain specified industries, such as publishing and broadcasting. The notification or review provisions of the ICA are triggered by the establishment of a new business in Canada or the acquisition of control of an existing established Canadian business. Virtually all new businesses, other than those businesses which relate to Canada's cultural heritage or national identity (book publishing, broadcasting and film production), require notification only.

Acquisition of control of a Canadian business is defined in the ICA as the purchase of one third or more of the voting shares of a corporation carrying on a business in Canada. In such cases, the direct purchase of control of an active Canadian business by foreign interests is subject to review under the ICA if the Canadian business has assets whose book value exceeds $5,000,000. Pursuant to the North America Free Trade Agreement (“NAFTA”), in the event the investor is American or Mexican, the threshold is significantly higher. Since January 1995, the increased threshold has been extended to investors who are persons or entities from countries that are members of the World Trade Organization (“WTO”). The NAFTA and WTO threshold is based on $150,000,000 in 1992 constant dollars (i.e. adjusted to the equivalent of $150,000,000 1992 Canadian dollars). The threshold is adjusted annually based on the following formula:

**CURRENT NOMINAL GROSS DOMESTIC PRODUCT AT MARKET PRICES PREVIOUS YEAR NOMINAL GROSS DOMESTIC PRODUCT AT MARKET PRICES**

In 2009, based on the above formula, the threshold is $312 million (Cdn). When the new provisions contemplated by Bill C-10, the Budget Implementation Act, 2009, come into force, the review threshold for WTO investors will initially be $600 million (Cdn) based on “enterprise value” rather than book value of assets. For foreign investors other than NAFTA and WTO investors, the threshold for reviewable acquisitions is $5 million, except where an indirect acquisition of an established business in Canada occurs. For example, if the takeover of a foreign company occurs and such company has a Canadian subsidiary carrying on business in Canada, such acquisition would be considered an indirect acquisition. The threshold for review of indirect acquisitions is $50 million for non NAFTA or non WTO investors, provided that the Canadian business assets do not represent more than 50% of the assets involved in the international transaction. Indirect acquisitions by NAFTA and WTO investors are not reviewable no matter what the size of the Canadian business.
Where a review is required, Investment Canada is required to determine whether or not the proposed investment is likely to result in a “net benefit” to Canada using criteria which includes the following:

- the amount of employment for Canadians
- the effect on resource processing and the utilization of parts, components and services produced in Canada
- the effect on exports from Canada
- the effect on competition within the industry
- the degree and significance of participation by Canadians in the Canadian business
- the effect of the investment on technological development, product innovation and product variety in Canada
- the impact on Canada’s ability to compete in global markets

Pursuant to the ICA, Industry Canada is required to conduct a review and notify the investor whether or not the Minister of Industry is satisfied that the investment meets the test of net benefit to Canada. A reviewable transaction may not be completed until the Minister is so satisfied or the time period is deemed to have expired under the ICA. Where the applicant is advised within the appropriate time periods that the Minister is not satisfied that the investment is likely to be of net benefit to Canada, the applicant has the right to make representations and submit undertakings to the Minister. The scope of undertakings is very broad and may include matters guaranteeing the level of investment or employment in Canada.

It is of interest to note that the first rejection by the Minister of a reviewable transaction in relation to a non-“cultural business” since the inception of the ICA in 1985 occurred in 2008. The Minister of Industry made a decision to block U.S.-based Alliant Techsystems Inc.’s proposed acquisition of the information systems and geospatial services business of MacDonald, Dettwiler and Associates Ltd., a Canadian business. The review involved national security related concerns.

Businesses should also be aware that the ICA now incorporates a basis for reviewing investments on the grounds of national security, with retroactive effect as of February 6, 2009.

**The Competition Act**

The *Competition Act* (the “CA”) is Canada’s antitrust legislation. Mergers, agreements between competitors, trade and marketing practices and monopolies are all subject to the provisions of the CA. The Director of Investigation and Research is designated under the CA as the Commissioner of Competition. The CA is divided into three principal areas: criminal offences, civil offences and merger regulation.

On March 12, 2009, Bill C-10, the Budget *Implementation Act*, 2009, which proposed significant changes to the ICA and the CA, received Royal Assent. Most of the amendments to the CA in Bill C-10 as described below are now in force, with some coming into force at a later date.
**Criminal Offences**

Recent amendments to the CA create new *per se* offences for agreements between competitors to fix prices, allocate markets or customers, or fix output or supply, unless a successful ancillary restraints defence or a regulated conduct defence can be established.

If a party is convicted of any of these offences, the court can order a fine, imprisonment or both. For example, if a person is convicted of a conspiracy offence, the offender is liable to imprisonment for a period of up to 14 years and/or a fine of $25 million. As well, any person who has suffered loss or damage as a result of any such offence may recover damages in a private civil action.

**Civil Offences**

The CA also regulates non criminal conduct in attempt to avoid misleading advertising and deceptive marketing practices. The non criminal conduct is divided into two categories, reviewable offences and reviewable trade practices. These offences are more fully discussed under the Marketing and Labeling Legislation section.

The available civil remedies include cease and desist orders, orders requiring the placement of corrective notices and for civil monetary penalties of up to $200,000.

**Merger Regulation**

Recently, the CA has been amended to introduce an entirely new procedure to Canada, akin to the U.S. second request procedure. If the Competition Bureau has concerns with respect to a proposed merger, it can make a demand for documents of the merging parties. The period during which the Bureau can review the merger and the parties cannot close a transaction is halted until the parties fulfill the production requirement.

Regulations to fully implement the amendments to the CA have not yet been published in the Canada Gazette. Pending that process, parties filing merger notifications may continue to use the existing short form reflecting information required under the current Notifiable Transactions Regulations. The Competition Bureau will continue to accept long-form notifications that parties wish to file. Either form of notification will trigger a 30-day waiting period.

A merger is defined broadly under the CA and includes the acquisition of control over, or of a significant interest in, the whole or part of a business. The CA subjects all mergers, whether they are pre notifiable or not, to review by the Commissioner unless an advance ruling certificate has been issued. Advance ruling certificates are only issued when there are insufficient grounds to challenge the merger. If it is found that a merger is likely to prevent or lessen competition substantially, it may be challenged.

The CA requires compulsory notification for certain types of transactions. Pre notification under the CA is required where:
(a) the parties to the transaction, together with their affiliates, have assets in Canada or annual gross revenues from sales in, from or into Canada which exceed $400 million; and

(b)(i) where the proposed transaction involves an acquisition of assets of an operating business in Canada, the aggregate value of assets to be acquired or the annual gross revenues from sales in or from Canada exceed $70 million;

(ii) where the proposed transaction involves the acquisition of voting shares of a corporation carrying on a business in Canada, and the aggregate value of the assets of the issuer or the annual gross revenues from sales in Canada exceed $70 million and the acquirer would own more than 20% of the voting shares in the case of a public corporation (unless the acquirer already owns 20%, in which case the acquisition must result in the acquirer holding in excess of 50% of the voting shares) or 35% of the voting shares in the case of a private corporation (unless the acquirer already owns 35%, in which case the acquisition must result in the acquirer holding in excess of 50% of the voting shares);

(iii) where the proposed transaction involves a corporate amalgamation and the aggregate value of the assets in Canada of the continuing corporation or the annual gross revenues from sales in or from Canada exceed $70 million;

(iv) where the proposed transaction involves establishing a combination, the transaction will be subject to pre notification if the combination has assets in Canada or sales in or from Canada exceeding $70 million; or

(v) where the proposed transaction involves the acquisition of an interest in an existing combination, the transaction will be subject to pre notification if the combination has assets in Canada or sales in or from Canada exceeding $70 million and the acquirer would be entitled to receive more than 35% of its profits or more than 35% of its assets on dissolution (unless the acquirer’s entitlement to profits or interest on dissolution already exceeds 35%, in which case the acquisition must result in the acquirer’s entitlement to profits or interest on dissolution exceeding 50%).

Pre notification is effected by submitting to the Commissioner either a short form or long form information filing on a prescribed form, together with a fee of $50,000. After the notice is filed, mandatory waiting periods are imposed in order to give the Commissioner time to investigate the transaction. Failure to comply with the pre merger requirement or to abide by the waiting periods subject parties and their directors and officers to possible criminal sanctions.

For many transactions, the Commissioner will issue a “no action letter” stating that there are no grounds to challenge the proposed transaction. Notwithstanding the delivery of a no action letter, the Director may challenge the merger for up to three years following closing in the event that new facts come to his attention.
Anti Dumping

In order to discourage the importation of goods at prices below the price at which such goods would be sold in the exporter’s home market, Canada has anti dumping legislation which imposes duties to prevent unfair competition with domestic Canadian goods. Similar duties may be payable when imported goods are subsidized in their country of manufacture. For a more detailed discussion, see the Customs and Excise Taxes section of this paper.

Bankruptcy and Insolvency

Bankruptcy and insolvency are governed by federal legislation, namely the *Bankruptcy and Insolvency Act* (“BIA”). Under the BIA, bankruptcies may be either voluntary or involuntary. An involuntary bankruptcy may be commenced by any creditor who is owed at least $1,000 when an application is filed with the court on behalf of all the creditors for a bankruptcy order. The court will grant such an order if it is persuaded that an “act of bankruptcy”, such as failure to satisfy financial obligations generally when they come due, has occurred within six months of the proceeding. A voluntary bankruptcy may be commenced by a debtor by filing an assignment in bankruptcy with the Office of the Superintendent in Bankruptcy Canada, an agency of Industry Canada whose mandate is to ensure that bankruptcies and insolvencies in Canada are conducted in a fair and orderly manner. The BIA also provides for an insolvent debtor seeking to avoid bankruptcy to make a proposal in bankruptcy for obtaining a temporary stay against all of its secured and unsecured creditors and a mechanism to obtain approvals for the compromise of debt and reorganization. The BIA also provides for increased level of protection for the wages of employees of bankrupt companies, a re ordering of priorities among creditors and confers upon an unpaid supplier the right to take those goods back from a bankrupt company where the supplier has not been paid for 30 days following bankruptcy.

Restructuring of an insolvent business may also be facilitated under the *Companies’ Creditors Arrangement Act* (“CCAA”). The CCAA provides greater flexibility than the BIA and is often the preferred regime where the insolvent debtor is large and the reorganization is complex. In fact, restructurings under the CCAA are restricted to insolvent companies whose liabilities exceed $5,000,000. Under the CCAA a debtor commences its restructuring by bringing an application to the court seeking an order protecting it from its creditors.

In December 2007, amendments to both BIA and the CCAA received Royal Assent.

Under both statutes, in most cases, reorganization plans require the approval by a ‘double majority’ of the unsecured creditors of each class of creditors, meaning a majority in number and two-thirds majority in value.
SECURITIES REGULATION

In Canada, the securities industry is provincially regulated. Each province in Canada has its own set of laws, regulations and policies governing the industry. Although Canada does not have a national regulator analogous to the Securities and Exchange Commission in the United States, the various provincial authorities cooperate to ensure a consistent regulatory framework across the country.

The objectives of securities regulation in Canada is to foster fair and efficient capital markets and to promote public confidence in the industry. These objectives are accomplished by requiring the registration of those who trade, sell, underwrite or advise investors with respect to securities and by having mandatory disclosure rules which ensure the general public is adequately informed as to companies whose securities are publicly traded. Disclosure to the public is achieved by requiring the distribution of a prospectus whenever a company, Canadian or foreign, offers shares to the public (“Reporting Issuers”).

A “security” is broadly defined in securities legislation as, among other things, any document constituting evidence of title to or interest in the capital, assets, property, profits, earnings or royalties of a person or company. Different types of agreements and instruments involving monetary consideration are included in the definition of “security,” including bonds, debentures, notes, stocks, certificates of interests, transferable shares and any option, subscription or other interest in or to a security.

Prospectus

Before a Reporting Issuer is entitled to make a distribution of securities to the public, they must first file a preliminary and a final prospectus and receive a receipt for same. These prospectuses set out detailed material facts relating to the securities of the Reporting Issuer and must be reviewed by provincial security regulators in each province and territory where the securities are to be sold. There are a number of exemptions which may permit securities to be issued without a prospectus. The underlying policy of these exemptions is that they will operate only in situations where the investors are sophisticated or close enough to the Reporting Issuer such that protection afforded by the regulatory system is not required.

Continuous Disclosure

A Reporting Issuer is obligated to disclose on a continuous basis detailed information about itself, including audited and unaudited financial statements, proxy solicitation materials and management discussions and analysis of operating results. Whenever a material change occurs in the affairs of a Reporting Issuer, a press release and a report, within 10 days thereafter, must be issued and filed with the regulatory authorities disclosing the nature and substance of the change. As a result, the public is constantly updated and adequately informed on the status of the company at all times.
A Reporting Issuer is required to file an annual information form (AIF) as well as an annual management proxy statement. There are also obligations on insiders, such as directors, officer and major shareholders of a Reporting Issuer to report their shareholdings. The use of undisclosed material information by insiders to trade in public companies is forbidden.

**Stock Exchange Regulation**

Each of the exchanges have their own requirements and regulations for companies who wish to list their securities for trading. In addition to the various stock exchanges, there is an active over the counter market (OTC) among brokers in securities not listed on any stock exchange.

In 1999 Canada’s exchanges underwent a major realignment in order to specialize and concentrate in certain markets and to better compete with international exchanges. As a result, the Toronto Stock Exchange (TSE) became the sole senior equities exchange; the Montreal Exchange became the derivatives exchange (which include options and futures contracts), and the former Alberta and Vancouver Exchanges merged to become the Canadian Venture Exchange (CDNX) and assumed control of junior equities.

In 2000, the TSE became the first stock exchange in North America to continue operations as a for-profit corporation. As a result, of this change, the TSE was renamed to the “TSX.” The Montreal Stock Exchange demutualized next in 2000. In May 2001, the TSX acquired full ownership of the CDNX and brought all of Canada’s equity trading under the umbrella of one organization for the first time. In April 2002, the CDNX was renamed the TSX Venture Exchange (TSXV) and is now part of the TSX Group. In May 2002, management of the Toronto Stock Exchange 300 Composite Index was taken over by Standard and Poor’s and was subsequently renamed the S&P/TSX Composite Index.

The TSX Group trades approximately 95% of the total value of shares trading in Canada, many of which are often inter-listed on U.S. and European markets. The Montreal Exchange is part of the Global Alliance, which includes Paris Matin and the Chicago Mercantile Exchange. The TSXV provides emerging companies with access to capital while offering investors a regulated environment for higher risk investments.

Each exchange has its own requirements and regulations for companies who wish to list their securities for trading. In addition to various stock exchanges, there is an active over the counter market (OTC) among brokers in securities not listed on any stock exchange.

**Multi Jurisdictional Disclosure System**

A multi jurisdictional disclosure system (MJDS) is in place among the Ontario Securities Commission, the Quebec Securities Commission and the U.S. Securities and Exchange Commission. Under this system, eligible issuers are only required to make a single disclosure filing as opposed to two filings in any cross border securities issue. As a result, Canadian and U.S.
markets are becoming highly integrated allowing more and more U.S. companies to seamlessly access the Canadian market.

The MJDS is a joint initiative between the Canadian Securities Administrators (CSA) and the Securities and Exchange Commission (SEC) in the U.S. to reduce duplicative regulation in cross-border offerings, issuer bids, takeover bids, business combinations and continuous disclosure and filings.

The purpose of the MJDS is intended to remove unnecessary barriers to certain offerings of securities of U.S. issuers in Canada, to facilitate take-over and issuer bids and business combinations involving securities of certain U.S. issuers and to facilitate compliance by U.S. issuers with proxy and continuous disclosure requirements, all while ensuring that Canadian investors are properly protected.

If an offering is being made by a U.S. issuer both in Canada and in the U.S. it is customary for the SEC to carry out the regulatory review of MJDS disclosure documents. If an offering is being made in both Canada or the U.S. or solely in Canada, the Canadian securities regulatory authorities will carry out the regulatory review of the MJDS filed materials to check with specific disclosure and filing requirements. This reciprocal disclosure system also provides for uniform compliance with requirements as to insider reporting, proxy solicitation and related matters.

SALES AND TRANSFER TAXES

Goods and Services Tax

Canada has a 5% value added tax imposed on goods and services called the Goods and Services Tax (“GST”). The GST is applied to each transaction in the production and distribution chain, including services and including the importation of most goods and services into Canada. Financial services such as loan interest and an extremely limited number of goods such as most grocery items are exempt from GST. With respect to imported goods, GST is based on duty paid value (which includes customs duty). Goods exported from Canada are not subject to GST. Most financial services, including insurance premiums and bank interest, are also exempt from GST. Virtually all other persons, including corporations, who carry on business in Canada having revenues greater than $30,000 per year must register to collect GST.

Importers and domestic businesses who register for GST are entitled to input credits equal to the full amount of the GST paid by them on all business purchases. Accordingly, the tax and input tax credit system removes the tax from business inputs and effectively reduces the tax on each business entity to the value added by such entity.

Non residents who solicit orders in Canada or offer for sale certain goods such as books or periodicals for delivery in Canada are required to register for and collect GST. Certain non residents who are not carrying on business in Canada may register to collect and remit GST if
they regularly solicit orders for the supply of goods in Canada. Registration would be desirable if such supplier wishes to obtain input tax credits for GST paid to Canadian suppliers. A non resident without a permanent establishment may be required to post security in connection with its obligation to collect and remit GST. To ensure that direct exporters to Canada do not receive advantageous treatment, imported goods are subject to GST based upon their duty paid value. Imported services and payments to non residents in respect of intellectual property are not subject to GST if wholly used in taxable commercial activities of the purchaser.

**Provincial Sales Tax**

With the exception of the province of Alberta, each province charges a sales tax on tangible personal property and certain services. This tax is levied only at the retail level. Sales taxes in the Canadian provinces generally range between 7% and 10%. Ontario’s sales tax is currently 8%.

Most provinces provide exemptions from retail sales taxes for certain goods, such as basic groceries. As well, exemptions for certain purchases of production machinery are contained in most provinces’ legislation. However, there is a variation from province to province in the services which are subject to taxation. For example, British Columbia extends sales tax to lawyers’ accounts.

A Harmonized Sales Tax (“HST”) system has been implemented in Nova Scotia, New Brunswick and Newfoundland and Labrador, which harmonizes those provinces’ respective retail sales tax systems with the federal Goods and Services Tax. Ontario has announced that it will implement HST in mid-2010.

The HST applies to all goods and services that are currently subject to GST and is administered by the Canada Revenue Agency under the Excise Tax Act (“ETA”). It operates as a single value added tax of 13% on taxable supplies for goods and services made in the participating provinces. Supplies made in the non participating provinces remain subject to GST and provincial retail sales tax under the current rules. Registrants will be entitled to claim input tax credits (“ITS”) for tax payable at either the 5% or the 13% rate. Entitlement is determined under the current GST rules, as well as any HST specific rules. GST registrants will continue to use their GST registration number to collect and remit HST and to claim ITS. The HST is designed to streamline collection and reporting required by merchants. However, many of the provincial exemptions from sales tax will disappear.

**Land Transfer Tax**

Under the City of Toronto Act, 2006, the City of Toronto was granted the power to implement new taxation measures. On October 22, 2007, Toronto City Council approved a new municipal land transfer tax, which took effect on February 1, 2008. The municipal land transfer tax is applied to purchases on all properties in the city of Toronto in addition to the provincial land transfer tax discussed below. For property containing at least one, and not more than two, single
family residences, the rate is 0.5% on the first $55,000 of value, 1% on the next $345,000 of value, and 2% on the balance of the consideration payable for the real property. For all other property in Ontario outside the limits of the City of Toronto, the rate is 0.5% on the first $55,000 of value, 1% on the next $345,000 of value, 1.5% on the next $36 million of value, and 1% on the balance of the consideration payable for the real property.

INCOME AND CAPITAL TAXES

Federal Income Tax

Canada imposes a federal corporate income tax on non residents who carry on business in Canada or sell real property situate in Canada. In general terms, this is restricted to income derived from Canadian business activities and Canadian situate investments. In addition, Canada imposes a federal non resident withholding tax on non residents who do not carry on business in Canada through a permanent establishment yet receive Canadian source dividends, interest and certain other amounts from Canadian payers. In these circumstances, the Canadian payer is required to withhold tax from the gross amount of the dividend, interest, etc. and remit this to the Receiver General for Canada as tax on behalf of the non resident recipient. Subject to rules in the Internal Revenue Code, a U.S. foreign tax credit should be available in respect of Canadian non resident withholding tax or branch tax.

Canada has entered into bilateral tax treaties with many countries. The Canada U.S. Income Tax Convention (1980) as amended by various Protocols (the “Convention”) is an example of a tax treaty which contains certain relieving provisions. In particular, in the absence of a permanent establishment in Canada (as defined in the Convention), a U.S. non resident carrying on business in Canada will not be subject to Canadian federal income tax. A permanent establishment is defined as a fixed place of business through which the business of the non resident is carried on and includes, for example, an office or factory. The Convention also provides for a reduction in withholding tax rates on certain types of Canadian source income distributed to non residents as described below.

A U.S. non resident corporation may carry on business in Canada, indirectly, by incorporating a Canadian subsidiary corporation or directly, by means of a Canadian branch operation. In the case of a Canadian branch operation, in the absence of a “permanent establishment” in Canada as defined in the Convention, federal income tax is not eligible. It should be noted that the definition of “permanent establishment” in the Convention may differ from the definition of the same term as applicable for provincial purposes.

Canadian Subsidiary Corporation

A corporation incorporated in Canada (whether federally or provincially) will be considered to be a resident of Canada for income tax purposes and therefore will be subject to Canadian
income tax on all of its worldwide income under Part I of the *Income Tax Act* (Canada) (the “Act”). The 2009 combined federal Ontario corporate rates of income tax are as follows:

<table>
<thead>
<tr>
<th>TYPE OF INCOME</th>
<th>FEDERAL</th>
<th>ONTARIO</th>
<th>COMBINED</th>
</tr>
</thead>
<tbody>
<tr>
<td>General</td>
<td>19%</td>
<td>14.0%</td>
<td>33%</td>
</tr>
<tr>
<td>Manufacturing and processing</td>
<td>19%</td>
<td>12.0%</td>
<td>31%</td>
</tr>
<tr>
<td>Small business</td>
<td>11%</td>
<td>5.5%</td>
<td>16.5%</td>
</tr>
</tbody>
</table>

In addition, the combined taxation rate on the first $500,000 of small business income may be further lowered to 16.5% if the corporation is a Canadian controlled private corporation (“CCPC”) eligible for a small business deduction. In general, a CCPC is a corporation that is not controlled by a person who is not a non resident in Canada.

If a foreign entity establishes a subsidiary with a Canadian resident and owns no more than 50% of the Canadian subsidiary, tax on the first $500,000 of annual net income may be significantly reduced. Assuming that the Canadian subsidiary shall repatriate profits to its foreign parent, nonresident withholding tax under Part XIII of the Act may apply. Part XIII of the Act imposes withholding tax rate of 25% which is generally reduced by the various tax treaties. Pursuant to the Convention, the reduction depends on the means of repatriation as follows:

- Dividends paid to U.S. parent corporation 5.00%**
- Interest paid to U.S. parent corporation 4.00% ***
- Royalties paid to U.S. parent corporation 10.00%

** Limited to the gross amount of dividends if the beneficial owner is a company that owns 10% or more of the voting stock of the company paying the dividends.

*** Withholding tax has been eliminated under the Act in respect of arm’s length payments of non-participating interest. By virtue of the Convention, the rate of withholding tax on the payment of non-participating interest by Canadian residents to non-arm’s length U.S. lenders is 4.0% in 2009 and will be 0% in 2010 and subsequent years.

If a non resident carries on business in Canada through a permanent establishment and does not incorporate a Canadian subsidiary, tax under Part I of the Act will also be applicable at the rates described above in respect of income from Canadian business operations.

Branch tax is imposed on the after tax profits of the Canadian branch operations which are not, in general terms, reinvested in Canada. The branch tax is intended to be roughly equivalent to the withholding tax which would be payable on dividends which would have been paid by a Canadian subsidiary to its foreign parent. The rate of Canadian branch tax is 25%. Where the withholding on dividend rate is reduced by treaty, the Canadian branch tax rate is normally reduced as well. In any event, as a result of the Convention, this rate has been reduced to 5% for
branches of U.S. corporations. Certain businesses carried on through a Canadian branch are exempt from the branch tax, including banking, communications, and mining. In addition, branch profits that are reinvested in Canadian business assets are generally not subject to the branch tax. The Convention also provides for a one time exemption for the first $500,000 of Canadian net profits. A U.S. foreign tax credit should be available in respect of Canadian income taxes paid for the Canadian branch operation, subject to the rules in the Internal Revenue Code.

To date, Canada has entered into over 85 tax treaties with other countries besides the U.S. The tax treaties usually reduce both the withholding tax rate imposed under the *Income Tax Act* and the branch profits tax rate.

The Federal Minister of Finance delivered the Conservative government’s federal budget on January 27, 2009 (“Budget 2009”), which encompasses an economic stimulus package to encourage growth and the improvement of confidence in the Canadian economy. Among the changes enacted by Budget 2009 are: increase the amount of small business income eligible for the reduced federal tax rate of 11 per cent to $500,000 from the previous limit of $400,000; to provide over $440 million in savings for Canadian industry over the next five years by permanently eliminating tariffs on a range of machinery and equipment to lower costs for Canadian producers in a variety of sectors, such as forestry, energy and food processing; and to increase the maximum eligible loan amount under the Canada Small Business Financing Program for loans made after March 31, 2009, potentially increasing lending under the program by up to $300 million per year.

**Choosing Between a Canadian Subsidiary and Canadian Branch Operation**

There are a number of considerations relevant to this issue. Non income tax considerations such as regulatory compliance or the desirability of segregating Canadian assets and liabilities from U.S. assets and liabilities are relevant. Tax considerations to consider include the following:

(a) the desirability of utilizing any Canadian start up losses against U.S. income;
(b) if a Canadian branch structure is utilized, a Canadian income tax return must be filed and a certain amount of disclosure about the U.S. parent will accordingly be necessary;
(c) if a Canadian branch structure is utilized, the ability to subsequently incorporate the branch on a tax free basis must be considered both from a Canadian and U.S. tax perspective;
(d) if a Canadian branch structure is utilized, one will typically pay the higher of the two tax rates of the two jurisdictions.

**Federal Capital Tax**

In addition to the federal income tax, Canada also imposes a “Financial Institutions Tax”. This is essentially a federal capital tax at the rate of 1.25% on taxable income in excess of $1 Billion.
**Provincial Income and Capital Taxes**

Canadian provinces impose income tax on corporations carrying on business within the province regardless of whether the corporation is a non resident or resident. Many of the provinces, including Ontario have imposed a capital tax on corporations. The table below illustrates the general capital tax rates (2009) levied in each province. The provinces not listed below do not have capital tax legislation. Financial institutions have different capital tax obligations.

<table>
<thead>
<tr>
<th>JURISDICTION</th>
<th>TAX RATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ontario</td>
<td>0.225%</td>
</tr>
<tr>
<td>Quebec</td>
<td>0.24%</td>
</tr>
<tr>
<td>Manitoba</td>
<td>0.20–0.40%</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>0.15–0.30%</td>
</tr>
</tbody>
</table>

The Ontario Capital Tax for manufacturing and production and other resource corporations will be eliminated. For other corporations this tax will be reduced on January 1, 2010 and eliminated on July 1, 2010.

**Employer Health Tax**

All employers in Ontario are subject to the Employer Health Tax. The rate is 1.95% of gross amounts of wages, salaries and other remuneration (“gross remuneration”) paid to employees who either report for work at a permanent establishment in Ontario or are paid from a permanent establishment in Ontario where gross remuneration paid to by the employer exceeds $400,000 per year. The purpose of the Employer Health Tax is to assist in funding the Ontario health care system.

**CUSTOMS AND EXCISE DUTIES**

**Customs Duties**

All goods entering Canada must go through customs inspection at the port of entry, at which time they are valued and duty, if any, is levied. In Canada, customs duties are levied on imported goods under a classification system known as the *Harmonized Commodity Description and Coding System*. This system provides for the classification of goods by their essential or intrinsic character, not according to use.

Canada has a self assessment customs system where importers are responsible for declaring and paying customs duties on imported goods according to the *Customs Act* (Canada) (the “Act”). Importers are required to report any errors made in their declarations of tariff classification,
valuation or origin when they have reason to believe that an error has been made. This obligation lasts for three years following the importation of any goods. The Act imposes severe penalties for non compliance.

Documentation accompanying goods must show origin, nature of the goods, their intended use and their value and/or price. The value of goods is the invoice price for the goods wherever possible. Where the invoice price cannot be used for the value, the Act provides for other methods of valuation to be used.

In Canada, customs valuation is based upon the World Trade Organization’s Customs Valuation Code which has been incorporated into the Act. The transaction value is the primary valuation method in respect of imported goods and is the price actually paid or payable for the goods when sold for export to a purchaser in Canada. If the transaction value is not reliable, the following valuation methods are considered:

(a) transaction value of identical goods;
(b) transaction value of similar goods;
(c) deductive value; and
(d) computed value.

If the valuations are still not satisfactory in the circumstances, the residual basis of appraisal provides for the application of one of the above methods in a flexible manner. The method to be used will be the method that can be most closely applied and the information necessary to apply such method is available in Canada.

The amount of customs duty is determined by reference to the customs tariff which sets out a specific list describing the class of goods and setting out the corresponding rate of duty. The customs duty rate is determined according to the country of origin of the goods and whether the country falls under a most favoured nation type status.

**Free Trade Agreements**

The Canada US Free Trade Agreement came into effect on January 1, 1989 which called for the elimination of tariffs and trade barriers on goods which met “rules of origin” requirements. Trade has boomed since the signing of the FTA and tariffs on products traded between the two countries were completely eliminated by December 31, 1998.

The North American Free Trade Agreement (“NAFTA”), which came into effect on January 1, 1994, improved on the FTA and added Mexico to the free trade zone. Under NAFTA, goods qualifying as North American under rules of origin will be eliminated or phased out over a period of 5, 10 or 15 years. The arrival of the WTO agreement on January 1, 1995 has subsequently built upon the aforementioned agreements. It provides a forum for negotiations among WTO members regarding their multilateral trade relations and is the key international instrument that establishes the rules of international trade on which Canada’s trade laws are based.
Typically, goods manufactured outside of the United States or Canada or goods manufactured in those countries which do not meet the rules of origin tests relating to the materials and other components used during the manufacturing process do not benefit from the Free Trade Agreement duty reductions. The nature of the transformation of the goods during the manufacturing process and the direct importation from the United States thereafter without any subsequent processing or assembly outside the United States will generally permit goods to qualify as goods originating in the United States. However, the rules of origin require transformation into a new tariff classification to qualify for the preferential tariff rates under NAFTA. In certain circumstances, regional value content requirements may be established with respect to a relatively small number of classifications of goods.

**Excise Duties**

The *Excise Act* imposes duties on alcohol, beer, tobacco and related products which are manufactured in Canada and includes extensive control provisions relating to the production and distribution of these products. These duties are not applicable to imported goods which are not further manufactured or processed in Canada. However, imported goods of such categories are subject to a special duty under the customs tariff which is equal to the excise duty.

The *Excise Tax Act* imposes excise taxes on both imported and domestic goods at a unit rate for wine and tobacco products and at a proportionate rate to the value for cigars.

The *Customs Tariff* imposes customs duties equivalent to the excise duties that are applicable to domestically produced goods on alcohol, beer, and tobacco products that are imported.

**Anti Dumping Duties**

Pursuant to the *Special Import Measures Act* (“SIMA”), there are special anti dumping duties for imported goods sold in Canada at prices which are below the prices in the home market. In addition, where goods sold in Canada are subsidized by the exporting country, a countervailing duty may be imposed. These anti dumping and countervailing duties may be imposed as additional charges, over and above the normal customs tariffs. SIMA is designed to provide Canadian producers with relief from unfair import competition.

In order for an anti dumping duty to be levied, two conditions must be met:

(a) the Canadian Border Services Agency (“CBSA”) must have found the imported goods to have been dumped; and

(b) the dumping of the imported goods must have been found by the Canadian International Trade Tribunal (“CITT”) to have caused, be causing or be likely to cause material injury to production in Canada of like goods.

Accordingly, if there are no “like goods” produced in Canada, anti dumping duties cannot be levied.
Dumping occurs when the “normal value” of the imported goods exceeds the “export price”. The “normal value” is generally the price at which the exporter sells the goods in its domestic market under competitive conditions to arm’s length purchasers comparable to the importer. Where there are no comparable purchasers (ie. purchasers who are at the same or substantially the same trade level, and who purchase the same or substantially the same quantities, as the importer), the normal value may be derived by adding the goods cost of production, an amount for administrative, selling and other costs and an amount for profit. It may also be derived by reference to the prices at which the exporter sells the goods to importers in third countries.

Generally, “export price” means the lesser of the exporter’s sale price of the goods and the price for which the importer has purchased or agreed to purchase the goods after deducting (i) all costs, charges and expenses arising from the exportation of the goods; and (ii) import duties and taxes imposed by Canadian law.

If the normal value exceeds the export price, determined as above, the imported goods will be found to have been dumped.

Criteria utilized in determining whether or not there has been material injury to production in Canada of like goods include the following:

- price suppression or erosion of sales by Canadian producers of like goods
- loss of market share by Canadian producers of like goods
- reduced employment of persons in Canadian production facilities
- reduced utilization of Canadian production capacity
- inventory build ups

Generally, an anti dumping inquiry can be commenced by written complaints filed by competitors with the CBSA.

If the CBSA is of the view that there is evidence that imported goods are being dumped and material injury to production in Canada of like goods will occur, an investigation may be initiated. Notice of the investigation will be given to the sellers, the purchasers, the government of the country of export, and any Canadian producers who have complained. If a preliminary determination of dumping occurs, the CBSA has the right to impose a provisional dumping duty equal to the “margin of dumping”.

The “margin of dumping” is the amount by which the normal value of imported goods into Canada exceeds the export price for such goods. The importer is responsible for payment of dumping duties.

A final determination is thereafter made by the CBSA. At the same time, the Canadian International Trade Tribunal (CITT) is required to commence its inquiry and to hold a public hearing to determine whether or not the dumping is causing, or will likely cause in the future, material injury to production in Canada of like goods.
Counter-vailing Duties

In order for a counter-vailing duty to be imposed, SIMA requires that two conditions must exist:
(i) the CBSA must find that the imported goods have been subsidized by a prohibited subsidy; and
(ii) the CITT must find that the imported goods have caused, are causing or are likely to cause
material injury to production in Canada of like goods. The definition of subsidy includes any
financial or other commercial benefit to people engaged in the production, manufacture, growth,
distribution, export or import of the goods in issue as a result of a scheme or program provided or
implemented by the country of export. If subsidization and material injury have been found, the
imported goods will be subject to countervailing duties in the amount of the subsidy.

MARKETING AND LABELING LEGISLATION

Pricing Offences

The March 12, 2009 amendments to the Competition Act (Canada) (the “CA”) replaced the
former criminal price maintenance provision with a new civil enforcement provision, as well as
repealing the criminal pricing provisions relating to price discrimination and predatory pricing.
Consequently, price maintenance, price discrimination and predatory pricing will no longer be
subject to civil damage claims under the CA.

Although price maintenance has been decriminalized the CA still permits the Competition
Tribunal to review and prohibit the practice. The Commissioner of Competition and private
parties with leave of the Tribunal may request that the Competition Tribunal review conduct in
question. Under the new civil regime the person must actually engage in the conduct, whereas
under the previous criminal provision, attempts to influence were actionable. Additionally, the
practice must be determined to have or is likely to have an “adverse effect on competition” in
the market. Upon such findings, the Tribunal has the power to order the party to stop engaging
in the practice or accept the other person as a customer on usual trade terms.

Even though price discrimination and predatory pricing are no longer subject to civil damage claims
under the CA, the Commissioner of the Competition Tribunal is still be able to seek penalties of up
to $10 to $15 million under the CA’s abuse of dominance civil reviewable practice provisions.

Despite the above noted amendments, the CA did not repeal the criminal offence relating to
telemarketing. The CA mandates that anyone engaged in “telemarketing” must provide full,
reasonable and timely disclosure of, among other requirements, the nature of the product or
business being promoted, the purpose of the communication, the price of the product, any
restrictions that may be imposed with respect to the delivery of the product, as well as a prohibition
against “deceptive” telemarketing practices. Any person who contravenes the provisions relating to
telemarketing may be found guilty of an offence and liable to a fine or imprisonment.
**Misleading Advertising**

The CA makes it a criminal offence to make a representation to the public that is false or misleading in any material respect. In addition, representations in the form of statements, warranties or guarantees regarding a product that are not based on adequate or proper testing will also be considered a criminal offence. Finally, making a false or misleading representation regarding the price at which goods will ordinarily be sold is unlawful.

**Packaging and Labeling Laws**

There are a number of laws directed at deceptive marketing practices and improving fairness towards consumers in the marketplace. The following review concentrates on consumer products.

In the event industrial products are exported into Canada, there may be specific rules regarding a particular product.

The *Consumer Packaging and Labeling Act (Canada)* ("CPLA") is designed to protect consumers from misrepresentation in pre-packaged products. Retailers, manufacturers, processors and producers of a “prepackaged product” are required to comply with the CPLA. The CPLA defines “prepackaged products” as any product that is packaged in a container in such a manner that it is ordinarily sold to or used or purchased by a consumer without being re-packaged. Further, the CPLA defines “product” as any product that is or may be the subject of trade and commerce. This includes both food and non food items.

The CPLA requires that certain information appear on the product label, specifically:

(i) the identity and address of the person by or for whom the product was manufactured or produced for resale; and

(ii) the common or generic name of the product or in terms of its function, and

(iii) such information respecting the nature, quality, age, size, material content, composition, geographic origin, performance, use or method of manufacture or production of the prepackaged product as may be prescribed.

The CPLA requires all prepackaged products to have affixed a label declaring the net quantity of the product in the form prescribed by the Act and Regulations. Generally, information is required to be in both English and French, and must express the quantity of the product in metric units. In addition to quantity, the common name of the product and the principal place of business of the person by or for whom the prepackaged product was manufactured must also be disclosed.

Certain products are required by the CPLA to be packaged in standardized containers. Toiletries, perfume, peanut butter, wine, cosmetics, and powdered laundry detergent fit within this class of products. This requirement is intended to prevent consumers from being misled or confused by an undue proliferation of container shapes and sizes.
Hazardous Products Act

The Hazardous Products Act (Canada) (“HPA”) regulates the advertising, labeling, sale and importation into Canada of hazardous products. Schedule I to the HPA lists products which may not be imported or sold in Canada. Examples of such prohibited products are lead pigments in paint and asbestos in textiles.

The HPA also lists certain “restricted” and “controlled” products which may be imported or sold in Canada only if they comply with specified safety standards. Children’s toys, furniture and certain flammable textile products are examples of products within the “restricted” category. “Controlled” products include products which are toxic, flammable and corrosive. Pursuant to the HPA, importation of controlled products may be prohibited unless the supplier or importer provides a material safety data sheet on the product and labels the product as specified in the regulations. This data sheet must contain details on ingredients, risks, injury prevention and treatment procedures. In certain cases, confidential ingredient information may be exempted from disclosure to competitors or the public.

Textile Labeling Act

The Textile Labeling Act (Canada) (“TLA”) is designed to provide consumers with information concerning the fibres contained in fabrics, clothing and other articles made from fabrics and yarns. The TLA defines “consumer textile article” as:

(i) any textile fibre, yarn, or fabric, or
(ii) any product made in whole or in part from a textile fibre, yarn or fabric.

Generally, the TLA requires a disclosure statement contained in a label indicating the name of the textile fibre (as such name is prescribed in the Textile Labeling Regulations), the percentage of that textile fibre contained in the product by weight, the name and address of the person/buyer for whom the article was imported and labelled; and the country of origin of imported articles. It should be noted that the textile fibre article must bear the label at the point of sale and the permanency of such labels depends on the type of article.

In certain cases, consumer textile articles may be imported to Canada without a disclosure label, provided that a sample of the article and certain specified information regarding the article is delivered to a federal government inspector at the port of entry on or before the importation. However, before the imported article may be sold in Canada, the dealer must apply a disclosure label, notify the federal inspector that this has been done, and provide the inspector with a reasonable opportunity to inspect the article.

Regulations pursuant to the TLA exempt a number of articles from labeling requirements. As well, certain other sales are exempt where articles are made in compliance with specifications supplied by the buyer and the articles are not intended for resale.
**Food and Drugs Act**

The *Food and Drugs Act* (Canada) (“FDA”) regulates the advertising, importation and sale of certain foods, cosmetics, drugs and medical devices. Advertising with respect to certain products listed in a schedule to the FDA is prohibited. These prohibitions relate to advertising of certain foods, drugs, cosmetics and medical devices for illnesses such as alcoholism, cancer and heart disease. The definition of food contained in the FDA is broad enough to include chewing gum and ingredients that may be mixed with food for any purpose.

In certain cases, a food may become a drug for the purposes of the FDA. This will occur if medicinal claims are being made in connection therewith. Medicinal claims must be substantiated through scientific study and a pre approval process through the Health Protection Branch of the Department of Health and Welfare.

The FDA also contains stringent standards for the preparation of food and drugs. There are also regulations regarding the labeling, advertising and packaging of foods, drugs, cosmetics and medical devices.

There have been recent debates in Parliament to amend the FDA. Bill C-51, an Act to Amend the FDA (and to make amendments to other acts) was introduced to the House of Commons on April 8, 2008. Bill C-51 is a response to a perceived weakness in the federal health law regime and stems from a reform initiative that has been under consideration for a decade.

**Consumer Protection Legislation**

Most of the jurisdictions in Canada have enacted Consumer Protection Legislation. The increased use of technology and the evolution of the internet in the business world has increased the need for added consumer protection. As such, some jurisdictions in Canada have enacted new Consumer Protection Legislation to provide customers with certain rights.

For example, Ontario’s new Consumer Protection Act, 2002 came into force on July 30, 2005 and gives consumers the right, among other things, to:

(a) refuse to pay for goods or services that they did not request (negative-option billing);
(b) obtain the same protection when buying or leasing services, as when buying or leasing goods;
(c) receive goods or services within 30 days after they are promised in agreements, or get a refund
(d) cancel agreements due to unfair business practices within one year;
(e) receive written contracts for goods or services worth more than $50 to be delivered or paid for in the future;
(f) cancel agreements for fitness, dance clubs or most door-to-door sales worth more than $50 within 10 days of signing the agreement;
(g) full disclosure about the cost of long-term leases and interest on purchases in agreements;

(h) obtain the same protection for online agreements as all other types of agreements;

(i) obtain final cost estimates of no more than 10 per cent of the original agreed estimate for home renovations or moving services; and

(j) cancel timeshare and vacation club agreements, for any reason, within 10 days after receiving a written copy of the agreement.

Failure to comply with the consumer protection legislation can be quite costly as there are maximum fines of up to $50,000 for individuals and $250,000 for corporations. Violating individuals can be sentenced to jail for up to two years less a day.

Natural Health Product Directorate

The Natural Health Product Directorate (“NHPD”) came into effect on January 1, 2004 to regulate products containing vitamins, minerals, herbals and other natural products. Up until this time these products have been sold as food supplements with no claims or drug products with limited or historically based claims.

Natural health products (NHPs) are defined in the Regulations as vitamins and minerals, herbal remedies, homeopathic medicines, traditional medicines such as Traditional Chinese Medicines, probiotics, and other products like amino acids and essential fatty acids.

Under the Regulations, the product must be safe for consideration as an over-the-counter product. Natural health products are available for self care and self selection, and do not require a prescription to be sold. Products requiring a prescription will continue to be regulated under the Food and Drug Regulations.

INTELLECTUAL PROPERTY LEGISLATION

Trade Marks

The Trade-marks Act (Canada) defines a “trade-mark” as “a mark that is used by a person for the purpose of distinguishing or so as to distinguish wares or services manufactured, sold, leased, hired or performed” from the wares and/or services of others. The term also includes a certification mark, a distinguishing guise and/or a proposed trade-mark.

All trademarks, whether registered or unregistered (except in the case of marks for precious metals), have intellectual property rights, as using a mark for a certain length of time can establish ownership through Common Law. However, the rights associated with unregistered trademarks extend only to the geographical locations in which the trademark is made known in Canada.
Registration of a trademark with the Canadian Intellectual Property Office gives the owner the exclusive right to use the mark across Canada in connection with the wares and services for which it was registered, for a period of 15 years.

Registration is evidence of ownership. The onus is on the challenger to dispute a registered trade-mark. Use of an unregistered trade-mark can lead to lengthy, expensive legal actions for passing-off and disputes over who has the right to use it.

It is often appropriate for a foreign corporation to register a trademark even when it is not carrying on business in Canada. If a foreign corporation grants rights to use or sell a product bearing a trademark, it is often prudent to have the trademark registered in Canada as the property of the foreign owner. Licence rights and user agreements then clarify the right of the owner to enforce its trademark exclusivity when the distribution arrangement is terminated.

Generally, a trademark is registerable if the trademark has been used or made known in Canada, has been duly registered in its country of origin (which country must be a member of the Paris Convention on the Protection of Industrial Property), or is actually used in Canada after the allowance of the application but before registration of the trademark. As in other jurisdictions, a trademark is not registerable if it is clearly descriptive or deceptively misdescriptive of the character, quality, or place of origin of the related wares or services or the conditions of or the persons employed in the production of such wares or services. Trademarks are also not registerable if they would cause confusion with a registered trademark.

To maintain trademark rights, renewal fees must be paid every 15 years. The owner must only use the trademark as it is registered and should always use the superscript ‘TM’ symbol to give notice of the trademark to the public. The owner of the trademark must always be in control of how the mark is used. For example, using a trademark as a generic name for a product or service is fatal to the validity of a trademark.

Copyrights

Copyright is a legal right that vests in the authors and creators or literary, dramatic, musical and artistic works, and which protects the expression of original ideas. The Copyright Act (Canada) defines “copyright” as “the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof”. Copyright arises upon the creation (expression) of a particular work and generally subsists for the life of the author/creator, the remainder of the calendar year in which the author dies, and a period of 50 years following the end of that calendar year.

Copyright is automatic in Canada and registration is not required. Registration is no guarantee that a claim of ownership will eventually be recognized as legitimate. Registration is evidence that a work is protected by copyright and that the person who registered the copyright is in fact the
owner. As with trade-marks, the onus is on the challenger to dispute a registered copyright.

A copyright owner can bring an action for infringement against any person who, without the consent of the owner, copies the whole or a substantial part of a copyrighted work, or sells, leases, distributes, exhibits by way of trade or imports for sale or hire into Canada any work that to his/her knowledge infringes copyright or would infringe copyright if it had been made in Canada.

If an infringer was not aware or did not have reasonable grounds for suspecting the subsistence of the copyright, the owner is generally only entitled to an injunction. However, if an infringer had knowledge of, or reasonable grounds for suspecting the subsistence of the copyright, a copyright owner is also entitled to damages, disgorgement of profits, an order for the detention of imported infringing copies, recovery of infringing copies and/or costs.

A copyright owner may elect, at any time before final judgment, to recover, instead of damages and profits referred to above, an award of statutory damages for all infringements involved in the proceedings, with respect to any one work or other subject-matter, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $500 or more than $20,000 as the court considers just. Where a copyright owner makes such an election, if the defendant satisfies the court that he/she was not aware and had no reasonable grounds to believe that he/she had infringed copyright, the court may reduce the amount of the award to less than $500. An election for statutory damages does not affect any right to be awarded exemplary or punitive damages.

Canada is a signatory to the Berne, Universal Copyright and Rome Conventions and a member of the WTO. Pursuant to these conventions, Canada recognizes copyright in works created by nationals of other signatories to the conventions.

Patents

Under the Patent Act (Canada), an inventor or assignee of the inventor who is first to file an application in respect of an invention will be entitled, subject to certain qualifications, to the grant of a patent. This contrasts with the “first to invent” system in the United States. Without a patent, inventions can only be protected as trade secrets, and the moment the invention is published or otherwise available on the market, such protection will no longer be available. Further, public disclosure of an invention bars the grant of a patent (although there is a one year grace period).

To be patentable, an invention must be novel, useful and inventive (“new, workable and ingenious”) and must not have been obvious to a person skilled in the art or science to which the invention relates. “Invention” is defined as any new and useful art, process, machine, manufacture or composition of matter or any new and useful improvement thereof. A patent application is made public 18 months after filing in order to promote the sharing of knowledge.
Patent protection applies in the country that issues the patent and gives the patent holder the exclusive right to make, construct, use and sell the invention. For applications filed before October 1, 1989, the period of protection is 17 years from the date of issue the patent application; for those filed on or after October 1, 1989, the period is 20 years from the date of filing. At the expiration of either the 17 or 20 year period, whichever is applicable, a new application must be filed. Further, to maintain an application made on or after October 1, 1989 or to maintain the rights accorded by a patent issued on the basis of an application filed on or after October 1, 1989 one must pay certain annual manual fees, as prescribed by the Patent Rules.

Canada is a signatory to the Paris Convention on the Protection of Intellectual Property. Patents filed in one member state can be filed in another member state within one year in order to obtain the same application priority filing date.

**Industrial Design**

The Industrial Designs Act (Canada) defines an “industrial design” as “features of shape, configuration, pattern or ornament and any combination of those features that, in a finished article, appeal to and are judged solely by the eye”. In contrast with copyright and trademark protection, industrial designs must be registered to be able to make a legal claim of ownership and to secure legal protection from imitation.

Only the proprietor (most often the creator) of a design may apply for and obtain registration for an industrial design and to be eligible for registration with the Industrial Design Office, the design must be original and the application must be made within one year from the date of first publication in Canada. Further, methods of construction, ideas, materials used in the construction of an article, the function of an article and the colour of an article cannot be registered.

Registration of an industrial design grants the proprietor the exclusive right to make, import for the purpose of trade or business, or sell, rent or offer or expose for sale or rent, any article in respect of which the design is registered and to which the design or a design not differing substantially therefrom has been applied (which includes the right to do, in relation to a kit, anything that would constitute an infringement if done in relation to an article assembled from the kit).

Registration subsists for a period of 10 years (with no option for a renewal) from the date of registration. However, before the expiry of five years and six months from that date, a maintenance fee must be paid or the protection will cease. Once the 10-year term has expired, anyone is free to make, import, rent or sell etc., the industrial design in Canada.

**Integrated Circuit Topographies**

Canada enacted the Integrated Circuit Topography Act in 1993, which protects original integrated circuit topographies. Topographies are the three dimensional configurations of electronic circuits used in microchips and semiconductor chips. They may be protected for 10 years from the filing
of an application for registration or the date of first commercial exploitation, whichever is earlier. However, topographies must be registered within two years of first commercial exploitation to obtain such protection.

**Plant Breeders’ Rights**

The *Plant Breeders’ Rights Act* allows the developer of a new plant to obtain the exclusive right through registration, to sell and produce the seeds of the new plant in Canada for a period of 18 years. Protection is currently available for about 20 species.

**URL Name Rights**

The *Canadian Internet Registration Authority* (the “CIRA”) has controlled and monitored the “.ca” registry since 2000. The “.ca” registry allows anyone with a Canadian presence to register a “.ca” domain name. Entities such as federal or provincial corporations, Canadian citizens, permanent residents and those who have a trademark registered in Canada are among those considered to have a “Canadian presence”. Registration is for a minimum of one year and a maximum of 10 years and there is no limit on the number of domain names one can register.

**INVESTMENT INCENTIVES**

**General**

There are several types of investment incentive programs which are designed to assist investment in new Canadian business initiatives. Various levels of government have direct and indirect assistance program. Assistance program can involve capital grants or loans or may involve job training supplements. Alternatively, a tax credit system has been established which may effectively permit acceleration of deductibility for capital expenses which might otherwise only be amortized over an extended period.

**Program Requirements**

Eligibility for most direct incentive programs is often limited to companies incorporated under federal or provincial laws. Capital grants are generally available only for manufacturing or processing projects. Various provinces have targeted industry segments such as tourism projects for eligibility for an indirect capital grant which gives a rebate to shareholders taking minority positions. Labour sponsored venture funds provide a new source of venture capital in Ontario by providing individual investors with tax credits to encourage investment. A large pool of capital has been raised by this method for investment in Ontario. Some municipalities provide incentives for locating a new enterprise within their boundaries. These are negotiated on an individual basis.
Often government assistance is available only where it is demonstrated that traditional private sector financing cannot be obtained. Accordingly, unless a project is industry specific or designed to be implemented in a geographical area designated as eligible for assistance, an applicant for assistance often walks the fine line of asserting a project’s viability while demonstrating that no financial institution will provide the necessary funds.

**Export Financing and Marketing**

The Export Development Corporation (“EDC”) is a federal crown corporation which has programs to encourage domestic producers of goods and services to expand beyond Canadian borders. Most of EDC’s program relate to guarantees of foreign receivables. However, there are several specialized credit products, which include the financing of foreign receivables. EDC operations are not intended to be grant programs. Accordingly, EDC charges interest and fees similar to other financial institutions. However, many local banks do not like to margin or provide credit for foreign receivables and the EDC’s programs are quite worthwhile.

**Other Programs**

The federal Program for Export Market Development subsidizes export feasibility studies, trade fair sponsorship and other like services to Canadian businesses wishing to expand to markets beyond Canada.

National Research Council of Canada manages the Industrial Research Assistance Program (IRAP), where between $15,000 and $350,000 is paid to cover direct salary costs for eligible companies, as well as up to 50% of the total cost of approved sub contracts and 75% of approved consultants’ fees. Applicant companies must have fewer than 500 employees to be eligible.

The federal Technology Partnerships Canada (TPC) promotes research, development and technology projects with a focus on environmental, aerospace and defence technologies. The program funds between 25% and 30% of the cost of approved projects.

**IMMIGRATION RESTRICTIONS FOR NON CANADIANS**

**Temporary Entry**

To be entitled to work in Canada, a non resident must either become a landed immigrant, or obtain a valid employment authorization, which is commonly referred to as a work permit. To obtain landed immigrant status, all requirements for immigrating into Canada must be satisfied.

The *Immigration Act* (Canada) defines employment as any activity for which a person receives or might reasonably be expected to receive valuable consideration. Therefore, even if a person is paid by a foreign entity, the activity may fall within the definition of employment. Furthermore, if a foreign entity owns or controls a Canadian business, such ownership does not confer upon the
owner the right to staff that Canadian business with citizens of its country of origin.

NAFTA has significantly relaxed the immigration rules for many American and Mexican citizens coming to Canada to work on a temporary basis. (NAFTA does not apply to permanent residents of the United States or Mexico who are not citizens of those countries). It should be noted that these provisions only apply to the following categories of persons entering Canada to work:

- Business Visitors
- Intra Company Transferees
- Professionals
- Trade and Investors

**Business Visitors**

There are a few types of business activities for which certain classes of persons (“Business Visitors”) do not require a work permit for entry into Canada. These persons include:

- individuals coming into Canada to purchase goods for their own country or corporation which carries on business outside of Canada
- individuals entering Canada for the purposes of acquiring training or familiarization with goods or services purchased in Canada
- sales representatives of a foreign business who enter Canada for a period of less than 90 days to sell goods for that business, but who will not be making such sales to members of the public
- permanent employees of a corporation carrying on business outside of Canada who are entering Canada for up to 90 days for the purpose of consulting with other employees or members or inspecting a Canadian branch office or headquarters
- individuals entering Canada as trainees to Canadian parent or subsidiary corporations where the trainees will not be actively engaged in the production of goods or services

Business Visitors are not permitted to engage in hands on work or directly interact with the general public for business purposes. In addition, they are not allowed to receive remuneration from a Canadian source. No management or supervisory functions may be performed.

NAFTA extends the concept of Business Visitor to persons who work in a prescribed occupation or activity. The types of activities listed must be limited in their nature or in that the principal beneficiary must be foreign based. Such persons may qualify for entry without a work permit. For example, if a U.S. lawyer wishes to enter Canada to provide general service functions such as the negotiation of a Canadian contract, he must continue to remain a full time employee of the U.S. entity and receive no salary or direct remuneration in Canada. Documentation should be provided which will satisfy the inquiries of officials at ports of entry and assure them that both the
individual seeking entry, his U.S. employer and, if applicable, the Canadian corporation involved are aware of the limitations on the services which the individual is permitted to perform.

Where work permits are required, an employment authorization approval must be obtained. In such situations, the Canadian employer may have to persuade an official at a local Human Resources Development Canada (“HRDC”) office that there are no Canadians with the necessary training and experience available to fill the job. Initial employment authorization for the job must be issued at a Canadian consulate or embassy outside of Canada or at a port of entry into Canada. Certain exemptions exist for employees of a related business outside of Canada who are transferred on a temporary basis to a Canadian branch to work at a senior executive level. In certain circumstances, a HRDC job clearance will not be required, although a work permit will be necessary. In addition to the employment authorization process, some applicants may have to obtain a visa. All persons listed in Schedule II of the *Immigration Act*, including U.S. nationals and persons lawfully admitted to the U.S. for permanent residence, are visa exempt.

If a work permit is obtained for Canada, the applicant will receive remuneration from a Canadian source. The holder of the work permit will thereby be required to file Canadian tax returns. In addition, all workers having work permits are entitled to receive temporary Canadian social insurance numbers. These social insurance numbers begin with the number 9, indicating that the individual does not have landed immigrant status in Canada.

**Intra Company Transfers**

NAFTA broadened the opportunity for people to enter into Canada pursuant to an intra company transfer. Intra company transfers occur where foreign corporations second individuals to a Canadian parent, subsidiary branch or affiliate. To obtain a work permit, the individual must be a citizen of the United States and have worked for the foreign corporation continuously for one year out of the proceeding three years, before seeking entry into Canada. In addition, the individual must be either a manager or executive, or have specialized knowledge particular to the corporation. Such work permit will be issued for a one to three year period and can be extended from within Canada for up to five years.

In order to obtain an intra company transfer work permit, there are a number of documents which should be prepared for review prior to entry or upon entry into Canada. They include the following:

1. Correspondence from the individual’s employer setting out the applicant’s present position and length of service with the corporation;
2. Correspondence from the foreign employer’s lawyers setting out the legal relationship between the current employer and the potential Canadian employer;
3. Correspondence from the Canadian employer setting out the position and expectations of the transferee;
4. Correspondence from a Canadian lawyer setting out the legal basis for entry under the Immigration Act and any Free Trade Agreement provisions supporting the application;

5. A resume or curriculum vitae of the applicant setting out his or her professional experience for those seeking entry under the “specialized knowledge” category;

6. Proof of U.S. citizenship; and

7. All appropriate fees.

It should be noted that, as with all NAFTA categories, an intra company transfer will not permit permanent entry into Canada. Similarly, the work permit issued to an applicant in an intra company transfer will not permit his or her spouse or any other members of the immediate family to obtain employment in Canada.

**Professionals**

Certain professionals may be eligible to enter Canada for employment after obtaining an offer of employment from a Canadian employer, provided that employment is in the profession in which the professional qualifies. These professions are listed in a schedule to NAFTA. Professionals entering Canada pursuant to this provision would normally obtain a one year work permit, which may be extended for a further year. Extensions can continue to be issued on an annual basis provided the employment is still “temporary” and not a mean of circumventing normal immigration procedures. Such a work permit does not exempt the applicant from having all relevant Canadian qualifications, certifications and licences which are required for practice in any particular Canadian jurisdiction.

**Trade and Investors**

As a general rule, this category receives scrutiny from the immigration authorities and involves applying through a consulate or embassy (rather than simply at the port of entry) to obtain approval. Entry under this category should only be sought after obtaining legal assistance in the completion of the application process, which often involves provision to the immigration authorities of substantial financial statements and other information.

**Permanent Residents**

No quota is set by the Canadian government on the number of immigrants which may be admitted each year from any particular country or region of the world. Anyone can apply to Canada. However, in the case of married applicants, both spouses are required to complete the application for permanent residence. All dependents 19 years of age and over must complete and file a separate application. There are three general admissible classes:
Family Class

Family class involves a sponsorship by a close relative who is at least 18 years old and currently living in Canada as a landed immigrant or citizen. Individuals in the family class must meet basic standards of good health and character. The sponsoring relative must sign an undertaking of support for a period of up to 10 years. The sponsor must also establish that he or she has the financial wherewithal to provide shelter and maintenance for the applicant and his or her accompanying dependents.

Applicants who may qualify to be sponsored under the family class include spouses, fiancés, parents (and each of the foregoing dependent children), grandparents, brothers, sisters, nephews, nieces, orphaned grandchildren and, in special circumstances, children under 13 years of age who the applicant intends to adopt.

Independent/Assisted Relative

In the independent/assisted relative category, a detailed unit system has been established. To be admitted to Canada as a permanent resident, a minimum number of units (70) must be obtained (subject to a limited discretion of a Canadian visa officer). Units can be earned for the following:

- education
- job experience
- prospects for employment
- prearranged jobs
- age
- knowledge of English
- knowledge of French
- personal suitability
- approved sponsorship from a sibling
- type of vocational preparation (based upon job skills and the demand in Canada for such jobs)

Business Immigrants

Business immigrants will come within one of the following three sub categories:
(a) entrepreneurs;
(b) self employed persons; or
(c) investors.

Entrepreneurs who have the intention and ability to establish, purchase or make a substantial investment in a Canadian business which such people will manage on an active and ongoing basis. The Canadian business venture must make a significant contribution to Canadian economy and must result in the creation or maintenance of employment opportunities for one or more Canadian citizens or permanent residents other than the entrepreneur and members of his family. Entrepreneurs must have a net worth of at least $300,000 that was obtained legally.

Self employed immigrants may also be admitted, provided that the business which they intend and are able to establish in Canada is perceived to have the potential to make a significant contribution to the economy or to the cultural or artistic life of Canada. Farmers, sports personalities, and artists may fit within this category.

Investors are defined as people who have a proven track record in business and have accumulated sufficient net worth with which they are prepared to commit their funds to an investor program. This investor program is designed to contribute to the creation or continuation of employment opportunities for Canadian citizens or permanent residents, other than the applicant and his or her dependents. Individuals who have a net worth of $800,000 (Cdn) and make a minimum investment of $400,000 (Cdn) for a 5 year period will qualify for immigration provided that meet certain other basic requirements.

The investment is managed by Citizenship and Immigration Canada (CIC) and is guaranteed by the Canadian provinces that use it to create jobs and help their economies grow.

CIC will return your C$400,000 investment, without interest, about five years and two months after payment.

**EMPLOYMENT LAW**

**Minimum Standards**

Provincial employment legislation contains minimum standards for all labour and employment relations. Contracts with all employees are deemed to contain the minimum standards and contractual terms that prescribe standards or requirements that are less than those provided for in the legislation are deemed null and void. Accordingly, Canada cannot be considered a jurisdiction in which there is employment at will, as the minimum standards mandate either notice of the termination of employment or pay in lieu of notice.

The employment standards legislation varies from province to province. However, the following
is a list of some issues regulated by the various employment standards acts and their regulations, with examples of the standards set out in the Ontario Employment Standards Act ("OESA"):

- minimum wage (subject to certain exceptions, the minimum wage is currently CDN$9.50 per hour for workers 18 years of age or older and $8.90 per hour for part-time workers under the age of 18);
- method of payment of wages and record keeping
- hours of work (subject to certain restrictions and exemptions, the maximum hours of work per week is 48 hours, at 8 hours per day / however, an employer may extend the workday to 13 hours under certain circumstances and employees may agree to work up to 60 hours per week)
- overtime (minimum of 1.5 times the employee’s regular wage rate each hour of work in excess of 44 hours in each week)
- statutory holidays (minimum of eight per year)
- vacation with pay (two weeks’ vacation with vacation pay of at least 4% of the previous year’s wages)
- pay equity (equal pay for men and women performing work of equal value to work typically performed by the opposite gender)
- pregnancy/parental leave (generally, pregnancy leave of 17 weeks followed by a parental leave of 35 weeks with assurance of reinstatement in same job or its equivalent, with 37 week parental leave also available to a parent who did not take pregnancy leave)
- family medical leave (entitled to up to 8 unpaid weeks absence to care for seriously ill family member where there is a significant risk of death)
- emergency leave (entitle to up to 10 unpaid business days absence due to personal or family illness, emergency injury or due to the death of a family member)

**Notice on Termination of Employment**

Under the OESA, the minimum notice period to be given to an employee prior to termination is based upon a number of factors. An employee who has worked for at least three months is entitled to one week’s notice. After one year, the employee will be entitled to two weeks’ notice. After three years, the employee will be entitled to one week’s notice for each year of service up to a maximum of eight weeks. Where more than 50 employees are terminated in any four week period, at least eight weeks’ notice is required, regardless of the length of service. This notice requirement is extended to 12 weeks if more than 200 are so terminated and 16 weeks where more than 500 are so terminated. Employers may terminate an employee without notice, provided is paid the terminated employee the amount she or he would have received had notice been given, and provided that the employer maintain all benefits the employee would have been entitled to during the notice period.
Where 50 or more employees are terminated in any six month period or where an employer, having an annual payroll in of $2.5 million or more, severance pay must be paid, in addition to the provision of notice or a payment in lieu of notice, to terminated employees with five years’ service. The statutory severance pay obligation is equal to one week’s salary for each year of service (up to a maximum of 26 weeks’ severance pay).

Of course, if an employee is terminated for wilful neglect of duties or wilful misconduct, the employer is not obligated to pay these standards. There are also various other exceptions, i.e. fixed term contracts, frustrated contracts, and temporary lay-offs.

The above notice obligations are basic minimums. Termination of employment without cause generally requires significantly longer notice periods than those provided by the legislation. These standards have been established by common law through the litigation process on a case-by-case basis. The courts look at various factors, including the employee’s age, length of service, position, and their chance of finding replacement employment. The judge will consider all of these to determine the appropriate “reasonable notice” period. Further, reasonable notice established by the common law in Canada often greatly exceeds the obligations of U.S. employers to their employees.

The grounds for termination for cause in Canada are also limited in most circumstances.

**Employment Contracts**

In order to avoid the uncertainties that arise in the litigation process, it is highly desirable to have employment contracts with all personnel. In addition to a normal hire letter, such contracts should specifically address issues which arise upon the termination of employment, including termination pay, non-competition and/or non-solicitation covenants. Without a specified term contained in a contract, an employer will be deemed to have hired the employee for an indefinite term. Similarly, if a written contract for a specified term is not formally renewed and the employee continues to work for the employer, the employment will likely be considered to be a relationship of indefinite term.

**Successor Employers**

According to some provincial statutes, where a Canadian business is acquired and continued as substantially the same business, the purchaser may have various obligations towards the vendor’s employees (if they remain employed after the acquisition). For example, the purchaser may inherit the vendor’s obligations under an existing collective agreement with a certified bargaining agent (see below for further detail). Additionally, tenure with the predecessor corporation will be considered for the purposes of determining termination pay required by the employment standards legislation and for determining the amount of reasonable notice which must be given on termination of employment. Thus, a detailed understanding of the nature and relationship of the employees to a business being sold must be considered so that the ongoing obligations can be quantified and factored into the negotiations on the purchase.
Occupational Health and Safety

The *Occupational Health and Safety Act* (“OHSA”) provides for a comprehensive set of rules which impose duties on employers in matters relating to the health and safety of workers. Employers must provide, and employees must use proper and effective protective equipment and machinery. Further, employees have the right to refuse to do unsafe work.

Employees must report all defects, deficiencies, injuries and illnesses arising in the employee’s course of employment to their employers and employers must report all injuries and illnesses arising in the employee’s course of employment to the Workplace Safety and Insurance Board. Employers make financial contributions to an insurance fund (out of which the Board may pay administrative expenses and make disability and injury awards to employees) based on the claims history of the employer’s industry and the individual employer. Subject to very few exceptions, workers are only entitled to the benefits fixed by the OHSA and cannot sue their employers for damages arising out of a work related injury or disease.

Human Rights

In addition to the above, Canadian workplaces are regulated by provincial and federal human rights codes (Ontario’s *Human Rights Code and the Canadian Human Rights Act*, respectively) which prohibit discrimination on the basis of, among other things, race, colour, citizenship, creed, sex, sexual orientation, age, record of offence, handicap and marital or family status. Government and government-controlled workplaces are also governed by the Canadian Charter of Rights and Freedoms.

Labour Relations

Employees have the right to be members of a trade union under both the Labour Relations Act (Ontario) and the federal Canada Labour Code. A certified union 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 court order or by the consent of the Ontario Labour Relations Board, the purchaser of a business in which there are unionized workers must recognize any collective agreement in effect at the time of the purchase. The legislation also allows for the automatic certification of a bargaining agent, regardless of the level of support among the employees, if an employer intimidates, coerces or threatens an employee during an organizing drive. Collective bargaining agreements (the agreements reached between unions and employers) dictate the relationship between the employer and all members of the bargaining unit and include such issues as work hours, compensation rates, employee benefits and dispute resolution mechanisms. Disputes between employers and unionized employees are dealt with outside the court system through grievance arbitration.
ENVIRONMENTAL LAW

In recent years the Canadian public has become increasingly concerned over the protection of the environment. In response, the federal and provincial governments have enacted environmental legislation which has had a dramatic impact on business and trade. To undertake a business venture in Canada requires information about mandatory requirements, limitations, prohibitions and penalties in relevant environmental laws. The prevention and control of pollution in Canada is primarily a provincial or municipal responsibility. However, national standards have been established for specific industries.

The Kyoto Protocol

Canada has ratified the Kyoto Protocol (the “Protocol”) under the previous government, but the current government does not seem intent on achieving the emission reduction target agreed under the Protocol. Instead, the government unveiled a plan in October, 2006 including a proposed Clean Air Act. This proposed legislation will mean less of an immediate impact on emission standards than if the Protocol was followed. The status of these initiative will be important to consider when entering the Canadian marketplace.

Federal Regulation

The Canadian Environmental Protection Act (“CEPA”) provides the federal government with very broad powers in respect of environmental protection. The CEPA provides for the regulation and control of toxic substances. Companies are also required to notify the federal government before any “new” substances can be manufactured or imported in Canada in order to conduct a toxic assessment. The CEPA prohibits waste disposal or dumping in Canada’s territorial seas without a permit. Air pollution regulations also exist which limit the concentration of asbestos, lead, mercury and vinyl chloride emission.

The Fisheries Act is primarily aimed at regulating the harvesting of the commercial fisheries in Canada’s territorial and inland seas. The Fisheries Act contains a number of anti pollution provisions and regulations have been made which limit waste water or effluent discharges from such important industrial facilities as pulp and paper mills, petroleum refineries and meat and poultry processing plants. If an activity will cause harmful alteration to a fish habitat, or involves the discharge of a “deleterious substance” into waters frequented by fish, an approval must be obtained from the Department of Fisheries and Oceans.

The Transportation of Dangerous Goods Act provides for the classification, packaging, labeling, safe handling and transportation of goods which are considered dangerous and hazardous. Such dangerous goods include explosives, compressed gases, radioactive or corrosive materials and many other substances prescribed in the regulations. The transportation of substances which are “dangerous goods” are governed by provincial and federal regulatory schemes.
Provincial Regulation

The principal enforcement provisions of most provincial environmental regimes are similar to those of Ontario’s Environmental Protection Act (“EPA”) which prohibits the discharge of a contaminant into the natural environment that causes or is likely to cause an adverse effect. Whenever a contaminant is to be discharged into the environment as waste, either in the air, water or land, a certificate of approval must first be obtained from the Ministry of the Environment.

Corporations are caught by a provision which deems any act or omission in the course of employment or in the exercise of power to be an act or omission of the corporation. Directors, employers, employees and even shareholders, may also be personally liable if they either “caused” or “permitted” the circumstances resulting in the discharge. Directors and officers, however, may avoid personal liability if they are able to show that they have taken measures to avoid and to minimize the effects of an accidental discharge. These measures include implementing, operating and reviewing a corporate environmental management system designed to deal with environmental situations.

In an effort to enforce compliance and reduce the damage from a discharge most environmental statutes contain a requirement to immediately report a discharge or spill to the relevant authorities. To achieve compliance with environmental legislation governmental authorities have been given authority to issue a wide variety of orders, including stop orders, control orders and remediation orders. Penalties, including fines and/or imprisonment may also be imposed where the legislation has been violated.

Regulatory orders can be issued against those who cause or permit the pollution or those “responsible for the source of the contaminant”. They can also be issued against persons having charge or control of the substance at the time of its discharge and the person who owns or occupies the land on which a discharged substance is located or was located prior to the discharge.

Under the EPA orders can be issued against former owners, former occupiers and people who were in management and control of the polluting facility. There is no requirement that the person or entity caused or contributed to the pollution of the property or the pollution created by the facility.

The EPA provides guidelines with respect to decommissioning and clean up of sites and provides for the issuance of permits relating to waste disposal and transport. Businesses may prepare risk assessments for negotiation with regulatory authorities regarding the application of the guidelines to contaminated sites for the purpose of obtaining approval for decommissioning or clean up plans.

Environmental law in Canada is in a continuous state of growth and evolution. Businesses are advised to seek counsel to keep up to date on environmental issues and legislation in order to ensure compliance and plan for change.
THE FRENCH LANGUAGE REQUIREMENTS IN THE PROVINCE OF QUEBEC

French is the official language of Quebec. The Charter of the French language (the “Charter”) (more commonly known as Bill 101) guarantees the predominance of the French language in virtually every field of human, government and business activity within that province.

Contracts and Forms

Contracts pre determined by one party and standard form printed contracts must be drawn up in French. Similarly, application forms for employment, order forms, invoices and receipts must also be drawn up in French. These documents may be drawn up in another language as well, at the express wish of the parties.

Labour Relations

Written communications between an employer and employee must be in French and job offers or promotions must be offered in French. Collective agreements and the schedules attached to them must be drafted in French.

Product Labeling

Product Labels and all leaflets, brochures or cards supplied with the product, including such things as directions for use and warranties, must be drafted in French.

Other languages may also be used, provided that no inscription in another language is given greater prominence than that in French.

These rules do not apply to inscriptions relating to products intended for a market outside Quebec.

Catalogues, Brochures, Etc.

In general, catalogues, brochures, folders, commercial directories and any similar publications must be drawn up in French. However, if such documents are made available or distributed to the public by way of mass mail or door to door delivery, they may be in two separate versions (one exclusively in French and the other exclusively in the other language), provided that the French version is no less accessible and of the same quality as the English version.

Signs and Posters

In general, most public signs and posters and commercial advertising may be in both French and another language, provided that the French is “markedly predominant”, as defined by the Regulations. However, there are two situations where commercial advertising must be exclusively in French. Commercial advertising displayed on billboards, signs or posters of 16 square meters or more and visible from any highway (unless it is displayed on the firm’s premises) and commercial advertising on or in any public means of transportation or access thereto must be solely in French.
Firm Names

A French corporate name is required for a company’s incorporation in Quebec; an English name may be used in addition to the French name. Under the Charter, a firm’s name must be in French, but a version in another language may accompany it, so long as the French version appears at least as prominently.

When another language is permitted to be used in public signs and posters and commercial advertising, the use of a firm name in a language other than French is also permitted. When texts and documents are drawn up in a language other than French, the firm name may appear in the other language, without the French version.

Francization of Business

Firms employing 50 or more people in Quebec for a period of six months must register with the Office de la Langue Francaise. The Office will issue a francization certificate if it concludes that the use of French is generalized at all levels of the firm. If the Office considers that the use of French is not so generalized, the firm must adopt a francization program.

ELECTRONIC COMMERCE

Electronic Commerce is continuing to grow at an explosive rate. Canada’s vision is to be number one in the world in the provision and utilization of the information highway, creating substantial economic, social and cultural advantage for all Canadians. Canada has currently adopted a comprehensive electronic commerce policy framework which includes:

1. a cryptography policy;
2. the principle of tax neutrality;
3. Personal Information Protection and Electronic Documents Act;
4. Electronic Commerce Act Ontario’s e-commerce legislation;
5. the adoption of voluntary guidelines for consumer protection; and
6. a comprehensive policy on a Public Key Infrastructure.

The United Nations has a Model Law on Electronic Commerce (“Model Law”) which sets out an international standard for the resolution of legal issues arising out of electronic commerce. This Model Law was adopted in Canada through Uniform Electronic Commerce Act (“UECA”).

The Federal Government implemented the UECA by amending the Canada Evidence Act in Part 3 of the Personal Information Protection and Electronic Documents Act (“PIPEDA”). The PIPEDA adapts existing federal statutes and regulations so that they are compatible with an electronic environment. The PIPEDA addresses the recognition of digital signatures, the validity of electronic contracts and other ancillary electronic commerce issues. As well, the PIPEDA establishes rules to govern the collection, use and disclosure of personal information.
Ontario, Manitoba and Saskatchewan have also enacted UECA based Electronic Commerce Acts, which provide for the legal recognition of electronic information and documents. British Columbia, Quebec, Nova Scotia and the Yukon are currently in the process of adopting similar legislation.

The development of a legal framework that harmonizes state laws and promotes consumer confidence in the digital marketplace is necessary to facilitate global electronic commerce. Canada is continuing to collaborate with international organizations, such as the OECD, the WTO, APEC, UN and G 7, on matters which and encourage and support the broad international growth of, and access to, global electronic commerce and e government, such as the development of UNICTRAL Rules on Electronic Signatures.

**CONCLUSION**

Globalization of the economy in the era of free trade with the U.S. and Mexico and freer trade with other countries has lowered many of the barriers to entering into the Canadian market. However, proximity to the United States and similarities in lifestyle and economic aspirations should not fool the unwary investor. The political framework of Canada is more volatile than the United States, and the social safety net can be significantly more supportive in health, education, welfare and other areas. Accordingly, Canadian legislation and common law provides significant protection for individuals and attempts to preserve cultural heritage groups. For example, individuals’ protection under employment standards legislation is generally more exhaustive than most jurisdictions. The entrenchment of bicultural and multicultural ideals is manifested in laws running the gamut from packaging and labeling to education and the judicial system. Sensitivity to the cultural, administrative and legislative differences will assist an enterprise’s entrance into the Canadian market. The foreign investor must explore the differences and the competitive advantages of Canada. There are signposts and guides readily available for assistance. Do not hesitate to use them to your advantage.

**ACKNOWLEDGMENTS**

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