DOING BUSINESS IN CANADA

2nd Edition

DAVIES

DAVIES WARD PHILLIPS & VINEBERG LLP

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About This Guide

If you are considering doing business in Canada, this guide may assist you. It is intended to provide the reader with general legal information about doing business in Canada, based on our firm's extensive experience helping North American and international clients wishing to do business in Canada.

This guide covers the laws of the Canadian provinces of Ontario and Québec and the federal laws of Canada. The guide should not be relied upon as legal advice. We encourage you to consult us directly with specific problems or questions.

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Introduction

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POLITICAL AND CONSTITUTIONAL STRUCTURE

Canada is a parliamentary democracy, with a political system originally modelled on that of Britain. Although Queen Elizabeth II is Canada's official head of state, the governments of Canada are democratically elected. Since Canada is a federal state, legislative and executive jurisdiction is constitutionally divided between the federal government and the ten provincial governments. As each government is separately elected, federal and provincial governments are often from different political parties.

The federal government has exclusive jurisdiction over some matters; others are reserved to the provincial governments. In other areas, however, both levels of government may regulate different aspects of a particular activity. In addition, provincial governments delegate certain powers to local governments. A business may therefore be regulated at three levels - federal, provincial and municipal. It may also be affected by policies and decisions of regulatory and administrative bodies and tribunals.

The federal Parliament has constitutional jurisdiction, for the most part, over issues concerning Canada as a whole, such as international trade, trade between provinces, national defence, citizenship and immigration, criminal law, currency, intellectual property, ports, aeronautics and broadcasting.

The federal Parliament is also responsible for the Yukon Territory, the Nunavut Territory and the Northwest Territories, which have been given some authority to govern themselves on local matters through elected territorial councils. In certain regions, as a result of treaties or agreements, Canada's native peoples exercise limited self-government.

The ten Canadian provinces have authority to make laws concerning such matters as property, contract, natural resources, land use and planning, the administration of justice, education, health care and municipalities. Most general commercial law of concern to businesses is therefore provincial law. However, there is considerable consistency between most of such provincial laws across Canada.

In practice, Canadian federal and provincial governments often co-operate, through cost-sharing programs and delegation of authority, to create consistent national approaches for matters that are under provincial legislative jurisdiction. For example, there are national standards and federal funding for health care. Although provinces have constitutional authority to impose income taxes, all provinces except Québec delegate the collection of income taxes to the federal government, so that income tax rules and procedures are relatively uniform throughout Canada.

Canada's constitution includes a Charter of Rights and Freedoms that guarantees certain rights of individuals as against the state. Provincial and territorial governments also have legislation protecting individual rights and freedoms.

LEGAL STRUCTURE

All the provinces of Canada except Québec are common law jurisdictions, which derive their legal systems from the British common law. Québec is a mixed common law/civil law jurisdiction in which private law matters, such as contract and property, are governed by a Civil Code. Although Québec civil law is historically derived from France, today it is strongly influenced by Canada's North American location and orientation.

Canada tends to look towards the United States rather than Europe for its regulatory models. For example, securities laws in Canada evolve in response to developments in the United States.

Canada's courts of general jurisdiction are provincially administered, but the Supreme Court of Canada acts as a court of final appeal for all of Canada. Although Canada also has a federal court system, its jurisdiction is very limited compared to United States federal courts. It deals primarily with matters arising under Canadian federal statutes and claims against the federal government. Although all judges of provincial superior courts in Canada, as well as federal court and Supreme Court judges, are appointed by the federal government, the independence of the judiciary is well-established and courts are not subjected to political interference or influence. Each province also has lower courts presided over by provincially-appointed judges who hear less important cases.

ECONOMIC SYSTEM

Canada is an affluent, high-tech industrial society with a market-oriented economic system and high living standards. Since World War II, the impressive growth of the manufacturing, mining, and service sectors has transformed the nation from a largely rural economy into one primarily industrial and urban. The 1989 U.S.-Canada Free Trade Agreement ("FTA") and the 1994 North American Free Trade Agreement ("NAFTA") (which includes Mexico) touched off a dramatic increase in trade and economic integration with the United States. Given its great natural resources, skilled labour force, stable political and economic systems, and modern capital plant, Canada enjoys solid economic prospects.

The exchange rate of the Canadian dollar is allowed to float in relation to other currencies. Canada's central bank, the Bank of Canada, sets key interest rates, in practice independently of the federal government.

Canada offers many advantages as a place to do business:

- Canada ranks first in lowest business costs in the G7.

  (KPMG's Competitive Alternatives 2004)

- Canada ranks first in the global business environment rankings forecast for 2004 - 2008.

  (The Economist Intelligence Unit, World Investment Report, September 2004)

- Canada's overall competitiveness rating is third overall and second in the large country rankings.

  (The International Institute of Management Development's World Competitiveness Yearbook 2004)

- In 2004, Canada ranked fifteenth in the world in growth competitiveness, in terms of the factors which contribute to future economic growth.

  (The World Economic Forum's Global Competitiveness Report 2004-2005)

- Canada scores well in the World Bank's report "Doing Business in 2004: Understanding Regulation": it takes only two procedures, three days, and less than the equivalent of one percent of annual income per capita to open a business in Canada. (October 2003)

- Canadian companies are ranked second in corporate governance.

  (Study conducted by GovernanceMetrics International, reviewed by Bloomberg, September 2004)

Importing and Exporting Canadian International Trade Regulation

Importing and Exporting: Canadian International Trade Regulation

Companies that are considering exporting to, or investing in, Canada should become familiar with Canadian trade regulations. In addition to customs and other statutes that are specifically targeted at import and export trade, due diligence with respect to the many Canadian laws and regulations that indirectly impact on import and export trade can minimize the risk of unforeseen setbacks to business planning. Similarly, companies contemplating doing business in Canada would be well-advised to review Canada's international trade agreements to determine whether there are market access or other trade liberalizing provisions that can be exploited to further their strategic objectives.

Knowledge of Canada's trade rules will produce cost savings and enhanced competitiveness for any international or cross-border business venture. This section provides an overview of the Canadian laws and principal international agreements that relate to international trade.

CANADA'S TRADE LAWS

CUSTOMS DUTIES

Canadian customs law is governed by two principal statutes: (i) the Customs Act, which contains provisions dealing with the imposition, collection and enforcement of customs tariffs, including the determination of value for duty; and (ii) the Customs Tariff, which determines the applicable tariff rates and also provides for import duty relief, including duty drawbacks and duty remission programs. The Customs Act and Customs Tariff are administered by the Canada Border Services Agency ("CBSA").

TARIFF CLASSIFICATION AND TARIFF TREATMENT

The rate of customs duty that applies to goods imported into Canada depends on their tariff treatment and tariff classification. Tariff treatment is determined by the origin of the goods and tariff classification is determined primarily as a function of their functionality and content using the harmonized system of tariff classification.

NAFTA origin entitles United States goods, and most Mexican goods, to enter Canada duty-free. Goods of United States and Mexican origin must have a NAFTA certificate of origin in order to benefit from the duty-free status.

The most-favoured nation ("MFN") tariff applies to goods originating in all countries that are members of the World Trade Organization ("WTO"). The general preferential tariff (which is lower than the MFN Tariff) applies to goods originating in certain WTO developing-country members. Canada's international trade agreements set out other preferential rates of duty. In addition, there is a British preferential tariff ("BPT") which is available for imports from certain Commonwealth countries (but excluding Great Britain since it joined the European Union). The BPT can often be more advantageous than the MFN tariff applicable in most cases.

An advance ruling can be sought from the CBSA before goods are imported to determine whether the goods qualify as originating goods for the purposes of one or another class of concessionary tariff treatment, or are entitled to the benefit of preferential tariff treatment under one of Canada's international trade agreements.

VALUATION FOR DUTY

The Customs Act sets out the methodology for determining the value for duty of imported goods. This value forms the basis for the assessment of customs duties at the applicable tariff rate. The methodology is based on and is consistent with the WTO valuation code. Pursuant to the Act, the primary basis for assessing value for duty is the transaction value of the goods in question (i.e., the price actually paid or payable on an arm's-length transaction for goods sold for export to Canada, adjusted in the manner prescribed under the Act). Where the transaction value cannot be used, the Act prescribes alternative methods of valuation.

DISPUTE RESOLUTION REGARDING TARIFF TREATMENT, CLASSIFICATION AND VALUATION

Tariff classification, tariff treatment and valuation are initially determined by the importer. However, re-determinations can be made by the CBSA. The CBSA has four years from the date of accounting to make a re-determination. If a re-determination is made, importers may request that the President of the CBSA review the determination. Such request must be brought within 90 days. Importers have a further right to appeal the President's decision to the Canadian International Trade Tribunal ("CITT") within 90 days. CITT decisions can be appealed to the Federal Court of Appeal on a point of law.

CUSTOMS PENALTIES

The Customs Act provides for civil and criminal penalties for contravention of the Act. Civil penalties include seizure and forfeiture of goods imported unlawfully, or ascertained forfeiture where the seizure of the goods would be impossible or impractical. Ascertained forfeiture involves the assessment of a monetary penalty in an amount up to the value for duty of the goods in question plus the amount of duties owing in respect of the goods. The Act also provides for criminal liability for providing false statements, misdescription of goods, smuggling, failure to properly mark goods and other offences.

The administrative monetary penalty system ("AMPS") is a civil penalty regime intended to promote greater compliance with customs regulation by streamlining enforcement action, which imposes graduated monetary penalties in proportion to the type, frequency and severity of the infraction. The potential financial liability that can arise from the application of AMPS suggests that firms doing a significant volume of cross-border business should review and update existing customs compliance procedures or consider adopting a formal compliance program to mitigate potential exposure.

CUSTOMS DUTY RELIEF

The CBSA has a number of duty relief programs, including drawback, refund and remission programs, which can be used in certain circumstances to reduce or eliminate customs duties. Generally, the drawback program permits the full or partial drawback of duties paid on imported goods that are later exported.

Importers, exporters, processors, owners or producers of goods that were exported from Canada but for which duty was paid on importation may apply for the return of any customs duties, anti-dumping and countervailing duties or excise taxes other than the federal goods and services tax ("GST") if the goods were (a) further processed; (b) displayed or demonstrated in Canada; (c) used for the development or production in Canada of goods for subsequent export; or (d) exported without having been used in Canada for any purpose other than for (a), (b) or (c). A claim for drawback must be filed within four years. GST non-registrants that did not use the imported goods for any purpose and exported the goods within 60 days of their importation may apply for a GST rebate. (GST is discussed below in the "Tax Considerations" section of this guide.)

NAFTA restricts duty drawback and duty deferral (inward processing rules) with respect to goods exported to the United States and Mexico. Goods manufactured or processed in Canada using goods originating in a non-NAFTA country and then exported to a NAFTA country are entitled to a drawback of an amount equal to the lesser of the amount of customs duties paid on the goods imported into Canada or of the amount of customs duties paid when the goods enter the United States or Mexico.

The NAFTA drawback rule does not affect goods originating in NAFTA countries, specifically-named products or goods whose condition at export is as it was upon import. Full drawback of such goods is permitted.

Remission programs relieve an importer or exporter in whole or in part from the requirement to pay duties. Examples of remission programs are those for temporary importation and temporary exportation, samples of negligible value and emergency and investigative drugs.

EXCISE TAX

Excise taxes are imposed under authority of the Excise Tax Act on jewellery, wine, tobacco, certain petroleum products, heavy automobiles and air conditioners designed for automobiles manufactured or imported into Canada.

GOODS AND SERVICES TAX PAYABLE ON IMPORTATION

Further, every person who is liable under the Customs Act to pay duty on imported goods, or who would be liable if the goods were liable to duty, is generally required to pay 7% GST on the goods imported. An import transaction may be structured to permit a GST deferral or exemption. For example, the exporters of processing services program allows manufacturing service companies to import certain goods that will eventually be re-exported, without paying GST. The export distribution centre program allows eligible businesses to import tax-free customers' goods that they bring into Canada for processing.

IMPORT/EXPORT CONTROLS

Canada does not license the overwhelming majority of imports and exports. However, certain goods are subject to import or export permit requirements pursuant to the Export and Import Act ("EIPA"). The goods requiring such permits are listed in the import control list and the export control list issued under the EIPA. In addition, Canada requires permits for exports to countries designated under the area control list under the EIPA. The export of U.S.-origin goods to certain countries which are subject to U.S. export sanctions is also restricted by the EIPA.

Canada also imposes quantitative import restrictions and tariff rate quotas on certain agricultural, textile and apparel goods. Goods subject to quantitative import limitations and tariff rate quotas are listed in the import control list. The issuance of import and export permits under the EIPA is administered by the Export and Import Controls Bureau of International Trade Canada (formerly the Department of Foreign Affairs and International Trade).

The Government of Canada imposed new reporting obligations on exporters in 2004, pursuant to the Reporting of Exported Goods Regulations. Exporters are required to report to CBSA goods destined for export, unless they are expressly exempted pursuant to the regulations. The regulations also impose obligations on carriers and customs service providers with regard to reporting exports.

Other specific legislation may also regulate the import or export of certain goods (e.g., the federal Food and Drugs Act). Businesses contemplating importing goods into Canada should make the necessary inquiries to determine whether the goods they propose to import are subject to specific approval by designated government agencies.

TRADE REMEDIES

ANTI-DUMPING AND COUNTERVAILING DUTY LAWS AND SAFEGUARDS

Canadian anti-dumping and countervailing duty law is governed by the Special Import Measures Act ("SIMA"). In order to obtain import relief under the SIMA, a complainant must establish (i) that the exporters are dumping or subsidizing the goods in question and (ii) that the dumping or subsidizing has caused, or is threatening to cause, material injury to the production of like goods in Canada. The CBSA is responsible for the determination of dumping or subsidization and the CITT is responsible for the determination of material injury.

There are three phases to an anti-dumping or countervailing duty investigation. The first phase begins with the filing of a complaint with the CBSA and an initial investigation by the CBSA to decide whether to initiate an inquiry. If the CBSA initiates an inquiry, it forwards the complaint to the CITT and the two agencies conduct separate preliminary investigations to determine whether or not to issue a preliminary determination of dumping or subsidization and injury, respectively. The preliminary process is ordinarily concluded within 90 days, although the CBSA may extend the preliminary investigation to 135 days. If both agencies issue preliminary determinations, the CBSA assesses provisional anti-dumping or countervailing duties on all imports of the subject goods and the matter goes to the third phase, which includes a further refinement of the CBSA's preliminary conclusions and an evidentiary hearing, including examination and cross-examination of witnesses and argument, before the CITT on the issue of material injury.

Chapter 19 of NAFTA provides for a system of binational panel review of final determinations in anti-dumping and countervailing duty matters as an alternative to judicial review by domestic courts in cases involving imports from another NAFTA country. Given the specialization and expertise of the NAFTA panel, such reviews have now become routine.

Canada also allows the imposition of a surtax on imported goods or a quantitative restriction on the level of imports in order to prevent or remedy serious injury to domestic producers. This is consistent with Canada's obligations under the WTO agreement which permits the application of such safeguard measures for a reviewable period of four years.

GOVERNMENT PROCUREMENT

Canada has agreed to provide to suppliers of other NAFTA and WTO members equal opportunity to compete with domestic suppliers for contracts involving purchases by governments of certain classes of goods and services above specified monetary thresholds. Companies that have bid on a government contract can challenge irregularities in the procurement process by way of a complaint to the CITT alleging a contravention of the procurement rules in Chapter 10 of NAFTA or the WTO agreement on government procurement.

THE CANADA-UNITED STATES BORDER

Since September 11, 2001, the Canadian and United States governments have collaborated to enhance border security while preserving the efficient movement of legitimate exports and imports. An important joint initiative is the free and secure trade program ("FAST"), which is designed to provide a harmonized commercial process for pre-approved importers, carriers, and registered drivers. Shipments for approved companies, transported by approved carriers, are cleared at the border with greater speed and certainty, and at a reduced cost of compliance. FAST was established in order to enable the authorities to concentrate on higher-risk goods and non-screened shipments. FAST is in operation at 12 border crossings (five on the Ontario-United States border, three on the Québec-United States border and one each at border crossings in British Columbia, Manitoba, Saskatchewan and Alberta).

PRODUCT STANDARDS AND PRODUCT MARKING AND LABELLING

There are numerous federal and provincial statutes that impose a requirement to comply with or be certified under specified product standards. In addition, Canadian legislation imposes specific labelling and marking requirements for designated goods as well as bilingual marking requirements.

Exporters, importers and businesses proposing to invest in manufacturing or distribution in Canada should consult all applicable federal and provincial laws and regulations in order to determine whether the goods they will be trading in are subject to specific product standards, marking or labelling requirements.

CANADA'S INTERNATIONAL TRADE AGREEMENTS

THE WORLD TRADE ORGANIZATION

Canada is a member of the WTO and was a founding signatory of the General Agreement on Tariffs and Trade (now a part of the WTO agreements). As such, Canada is formally committed to respecting the liberalizing trade obligations that are entailed by WTO membership, including compliance with various subsidiary agreements involving agricultural trade, textiles and clothing, technical standards, sanitary and phytosanitary standards, anti-dumping and countervailing duties, subsidies, rules of origin, import licensing, and other matters.

Canada generally complies promptly with WTO rulings. At the same time, Canada has often invoked the WTO dispute settlement process to enforce commitments made by its trading partners. For example, Canada has taken a number of WTO challenges against the United States in order to defend the interests of softwood lumber exporters. Most recently, in February 2005, Canada announced that it will challenge the U.S. implementation of anti-dumping and countervailing duties before a WTO compliance panel and file a request for authority to retaliate against the U.S. in an amount exceeding C$4.1 billion. Canada has also invoked the WTO dispute settlement process against Brazilian aircraft subsidies, European Union challenges to Canada's pharmaceutical patent regime and Australian measures on imports of Canadian salmon.

Canada also challenged the United States Continued Dumping and Subsidy Offset Act of 2000 (the "Byrd Amendment"), which allows U.S. companies to receive anti-dumping and countervailing duties collected from foreign competitors. A WTO panel found this law to be illegal under the WTO; however, the United States has failed to comply with the WTO ruling. In November 2004, Canada launched a public consultation process to consider ways, consistent with Canada's WTO rights, to retaliate against the United States.

Canada is an active participant in the current Doha round of multilateral trade negotiations under the auspices of the WTO.

THE NORTH AMERICAN FREE TRADE AGREEMENT

NAFTA allows Canada unprecedented access to the United States and Mexican markets, including duty-free access to the United States for Canadian-origin goods, liberalized rules regarding trade in services and greater access to United States government procurement. NAFTA's dispute settlement procedures help to secure that access to United States and Mexican markets. NAFTA dispute settlement procedures include review by a binational panel of anti-dumping and countervailing duty measures and investor-state arbitration, neither of which is available under the WTO.

Recent investor-state rulings under Chapter 11 of NAFTA suggest that NAFTA's investment rules may be an increasingly important tool to seek relief against government action that detrimentally affects an investment in a NAFTA country.

BILATERAL FREE TRADE AND INVESTMENT AGREEMENTS

Canada has bilateral free trade agreements with Chile, Israel and Costa Rica and is currently negotiating free trade agreements with Singapore and a number of regional associations. Canada has also begun exploratory talks on the feasibility of a free trade agreement with South Korea. Canada's program for advancing bilateral trade relations is particularly important in view of the uncertain status of the current Doha round of WTO negotiations.

Since China formally acceded to the WTO in December 2001, China has made extensive commitments to substantially lower barriers to foreign trade and investment. As a result, trade and investment with China has accelerated. Canada engages with China in formal consultations through regular bilateral discussions concerning economic development, trade and investment.

Canada has also signed foreign investment protection agreements ("FIPAs") with 21 countries and is in the process of negotiating FIPAs with India and China. FIPAs are designed to promote and protect foreign investment through legally binding rights and obligations, including binding investor-state arbitration and damages in the event of violation of the FIPA. It is sometimes possible to structure investments in Canada so that they are held through an entity located in a jurisdiction that has a FIPA with Canada, thus increasing the investor's rights in the event of certain unfair, arbitrary or expropriatory conduct by the government. For these purposes, NAFTA counts as an investment treaty as a result of the investment provisions of Chapter 11 of NAFTA.

Real Estate

Real Estate

Canada occupies an immense geographical area totalling 9,976,000 square kilometres, or 3,851,000 square miles, with varying population densities. With a growing population and extensive land available for commercial, industrial, residential and recreational development, Canada attracts substantial foreign investment in property.

FOREIGN OWNERSHIP

Pursuant to the federal Citizenship Act, a non-resident can acquire, hold and dispose of real property in the same manner and under the same conditions as a Canadian citizen or resident. However, the provinces have the right to restrict the acquisition of land by people who are not citizens or permanent residents, or by corporations and associations controlled by them.

In Ontario, the Aliens' Real Property Act grants non-citizens the same rights as Canadians to hold or dispose of real property. Under the Extra-Provincial Corporations Act, a corporation incorporated in a jurisdiction other than Ontario must obtain an extra-provincial licence to acquire, hold or convey real property in the province, but such licences are easily obtained.

In Québec, pursuant to An Act respecting the acquisition of farm land by non-residents, non-residents cannot acquire farm land unless they receive the authorization of the Commission de protection du territoire agricole du Québec, the authority in charge of preserving agricultural land in Québec. Some other provinces have similar restrictions to preserve agricultural land.

Title insurance policies for both lenders and owners, underwritten by the major United States title insurance companies, and containing standard endorsements and policy exclusions approved of by the American Land Title Association, are readily available for real property in all Canadian provinces and territories.

LAND USE PLANNING

In Ontario, the Planning Act provides the principal means for government to control the development and use of land. Land use planning is the responsibility of the provincial government and is supervised at the provincial level, but significant planning functions have been delegated to the various regional governments and municipalities. Land use is controlled through such instruments as the official plan (a long-range general plan for a region or municipality) and zoning by-laws (which regulate, for each parcel of land in the municipality, the uses permitted and other matters such as required parking and the type, size, height and location of buildings and structures). For a purchaser of land, both the official plan and particular zoning by-laws are crucial. Most municipalities require that site plans be approved before the construction of any new development. Site plans set out the details of a development (including the location of buildings and related facilities, such as landscaping, services, driveways and parking spaces). Most municipalities also require the developer to enter into an agreement ensuring construction and ongoing maintenance in accordance with the site plans.

In Ontario, any subdivision of land requires the consent of the local committee of adjustment or subdivision control committee pursuant to the Planning Act. This requirement also applies to a mortgage or the grant of any other interest in land (such as a lease) for 21 years or more (inclusive of all renewals), where the mortgage or interest is granted over only part of a landholding. The failure to obtain such a consent when otherwise required will result in the failure of the deed, mortgage or lease to create any interest in the real property. Although there are a number of exemptions to the requirement for consent, most contracts for the purchase of real property in Ontario are made subject to any required consent, and the cost and responsibility for obtaining such consents is usually allocated to the vendor. Anyone wishing to subdivide land in Ontario or to subdivide and sell lots must obtain governmental consent and may be required to submit a draft plan of subdivision for approval. Normally, the municipality will require the developer to enter into development agreements with it, whereby the developer agrees to provide sewers, roads and other services for the subdivision, the dedication of certain lands for public use and certain other public benefits.

In Québec, An Act respecting land use planning and development gives to each municipality the responsibility for the administration of a territory for municipal purposes. The regional county municipality adopts a development plan setting out general land development policies for the territory as well as the general policies on land use for different parts of the territory. The plan applies to all municipalities within the regional county municipality. In turn, the council of each municipality has the power to adopt zoning, subdivision and building by-laws for the whole or any part of its territory, but these by-laws must be consistent with the objectives of the development plan. Municipal councils may impose certain conditions for the approval of subdivisions, such as minimum lot areas and dimensions and provisions for rights-of-way.

In the case of metropolitan communities in Québec, the metropolitan community adopts a metropolitan land use and development plan that sets out general policies. This general plan is carried out by the city, which has similar powers to those of a local municipality under An Act respecting land use planning and development.

RESIDENTIAL RENT CONTROLS

The Tenant Protection Act, 1997 introduced "vacancy de-control" in Ontario. This means that, when rental units are vacant, rent control rules do not apply. A landlord and a tenant are free to negotiate a market rent and the services that are included in the rent. Once the tenant has entered into a tenancy agreement, the rent control rules in the Act apply.

The rent control guideline is the percentage that a landlord may increase the rent of the tenant during the tenancy. The guideline is determined by the Minister of Municipal Affairs and Housing for each calendar year (for instance, the guideline for 2004 was 2.9% and the guideline for 2005 is 1.5%).

The Act allows a landlord and tenant to negotiate the rent at the beginning of the tenancy agreement. Once that tenant moves in, the rent will not increase for the next 12 months. When and if the rent does increase, it can only increase in conformity with the rent control guideline for the year in which the increase takes effect.

Some exceptions are: (i) the landlord and the tenant may agree to a higher increase because of improvements or other capital expenditures on the unit; (ii) the landlord may apply to the Ontario Rental Housing Tribunal for an order for an above-guideline increase to cover certain additional costs; or (iii) the tenant may apply to the Tribunal for an order reducing the rent increases to below-guideline under certain circumstances.

The Tribunal deals with all disputes in the residential rental housing sector, including rent control matters.

A system of rent control also exists in Québec under the Civil Code of Québec and An Act respecting the Régie du logement. A residential landlord may raise the rent for a dwelling by any percentage upon the expiry of the lease. However, a tenant who opposes the increase may petition the Régie du logement which determines the rent in accordance with specific criteria established by the regulations and guidelines. The Régie breaks down a landlord's increase in expenses over the previous calendar year into various elements, such as the cost of property taxes and municipal services, insurance, electricity and fuel, maintenance and services, and applicable capital expenditures, in determining whether an increase in rent is justified.

REGULATION OF REAL ESTATE BROKERS

Real estate brokers in Ontario are governed by the Real Estate and Business Brokers Act. The Act is administered by the Real Estate Council of Ontario ("RECO").

The Act requires a person who wishes to trade in real estate as a broker or a salesperson to be registered in that capacity. A salesperson is a person employed, appointed or authorized by a broker to trade in real estate. The Act precludes a person from acting on behalf of a corporation or partnership in connection with a trade unless the person and the corporation or partnership are registered as brokers. "Trade" is broadly defined, and includes a disposition or acquisition of or transaction in real estate.

A registered broker or salesperson must be a Canadian resident or landed immigrant. He or she may not trade in Ontario real estate from an office outside Ontario.

Registration may be refused on the basis of financial instability or past conduct. Registration is subject to any terms consented to by the applicant, imposed by the License Appeal Tribunal or prescribed by the regulations. Registration is a prerequisite to recovering a commission or remuneration in connection with a trade.

Brokers and salespersons must comply not only with the Act and its regulations, but also with the terms and conditions of membership in RECO, including compliance with its code of ethics. RECO handles consumer complaints against its members.

In Québec, real estate brokers are subject to similar rules. In addition, pursuant to the Regulation respecting the application of the Real Estate Brokerage Act and the By-law of the Association des courtiers et agents immobiliers du Québec, a person applying for a broker's or agent's certificate must have at least one establishment in Québec or, in some cases, undertake to work at an establishment in Québec.

REGULATION OF MORTGAGE BROKERS

Mortgage brokers in Ontario are governed by the Mortgage Brokers Act. A mortgage broker is a person who carries on the business of lending money on the security of real estate, whether the money is the person's money or that of another, and includes a person who holds out or advertises as being a mortgage broker or who carries on the business of dealing in mortgages. Excluded from most provisions of the Act are financial institutions subject to regulation under other legislation, such as insurance and trust companies, banks and credit unions, and liquidators and trustees in bankruptcy.

In Québec, persons engaging in brokerage transactions relating to loans secured by immovable hypothecs are governed by An Act respecting the distribution of financial products and services.

Environmental Law

Environmental Law

LEGAL FRAMEWORK

Environmental matters are regulated at the federal, provincial and local levels in Canada. Although provincial governments generally take the lead in regulating environmental matters, the federal government has become more active in recent years in environmental protection. Harmonization of programs and standards has begun in Canada but, in many circumstances, separate federal and provincial requirements still apply. In particular, each province in Canada has its own unique environmental protection regime.

CONTAMINATED PROPERTY

The contamination of soil and groundwater is primarily regulated by the provinces. Although the Supreme Court of Canada recently confirmed the operation of the statutory "polluter pay" principle, purchasers of real property must be aware that they may be held liable for pre-existing contamination on and migrating from newly acquired property and tenants should ensure that leases provide protection from such liability.

For example, in Ontario, the Environmental Protection Act ("EPA") provides for administrative orders to be issued against anyone who owns or has management or control of a contaminated property, whether or not that person or entity caused the contamination. Where the discharge of a contaminant continues after a sale or tenancy, the new owner or tenant may be viewed as having permitted the discharge to take place even if it did not cause the source of contamination. Such owners and tenants may be subject to liability, but there is generally no positive statutory obligation in Ontario to clean up historic contamination.

Recent amendments to the EPA allow for some limited protection from statutory liability. If appropriate investigations and remedial work are conducted and a record of site condition ("RSC") is filed, an owner or tenant is protected from regulatory action with respect to contaminants identified in the RSC (except where contamination migrates from the site or the regulator believes there is a danger to health or safety). Before the end of 2005, RSCs will likely be required where redevelopment into a more sensitive use is planned.

Historically, clean-up liability in Québec was limited to "polluters". However, amendments to the Environment Quality Act ("EQA") in 2003 broadened the scope of potential responsible persons that can be held liable with respect to contaminated sites. As in Ontario, clean-up obligations can now be imposed on the polluter and also on any person that has or had "custody" of a contaminated site (e.g., as owner, tenant or occupant), even if such entity did not cause the contamination. A secured creditor that takes possession of a contaminated site might also be deemed to have "custody" of the site and be liable for its clean-up.

Decontamination in Québec must be undertaken under the monitoring of the Minister of the Environment through the use of rehabilitation plans and implementation schedules, which must be approved by the Minister and may provide for land use restrictions. A description of the works required under the rehabilitation plan and a statement of the land use restrictions, including the resulting charges and obligations, must be registered in the land registry. This registration renders the rehabilitation plan binding on third parties and any subsequent acquirer of the land is bound by the charges and obligations provided for in the rehabilitation plan (including land use restrictions).

While rehabilitation required pursuant to an order by the Minister of the Environment must be conducted in accordance with the EQA procedures, no positive statutory duty to decontaminate a contaminated site currently exists in Québec. However, ceasing to carry on certain specified industrial and commercial activities, or carrying on a different activity on the land, requires conducting and delivering to the Minister a characterization study. If the characterization study reveals any contaminants in excess of permitted amounts, then a rehabilitation plan must be filed with the Minister. Notices must also be given by the person having "custody" of the land to the owners of adjacent lands and to the Minister when contaminants resulting from these industrial and commercial activities are found. Notices of contamination as well as characterization studies must be registered in the land registry. In addition, municipalities are required to maintain a public list of contaminated sites and this information may be accessed by the public.

OPERATING LIABILITY

Generally, Canadian provinces have two principal mechanisms for protection of the environment with respect to commercial and industrial operations, a general prohibition against the discharge of contaminants and a system of permits or certificates required for activities which may impair the environment.

For example, Ontario's EPA prohibits unlawful discharges of contaminants into the environment and requires any parties that cause or permit such discharges to notify the regulators immediately of an unlawful discharge. Those who cause or permit unlawful discharges may face offence liability, environmental penalties and administrative orders. To avoid such liability, all operational discharges (to air, water or land) must be approved by the provincial Ministry of the Environment. Conditions and requirements (including financial assurances) may apply to such approvals and any alterations to discharging equipment (including sewage and water works) must also be approved.

As in Ontario, Québec's EQA imposes a duty not to pollute, to report accidental discharges without delay and to clean up contamination. A certificate of authorization must be obtained before undertaking any construction, industrial activity, use or change of an industrial process if it seems likely that this could result in the release of contaminants in the environment. As in Ontario, the range of regulated contaminants is very broad.

Municipalities have traditionally regulated noise pollution and also regulate discharges to municipal storm and sanitary sewers. Many municipalities have passed by-laws to regulate these matters and substantial fines may apply, particularly with respect to sewer discharges.

DIRECTOR AND OFFICER STATUTORY LIABILITY

Directors and officers of a corporation also have specific statutory obligations under federal and certain provincial environmental laws to take reasonable care to ensure that the corporation complies with such laws. Under the federal Canadian Environmental Protection Act, 1999, directors and officers have a statutory duty to take reasonable care to ensure that the corporation complies with all requirements under that Act. In Ontario, there is a more limited statutory duty requiring directors and officers to take all reasonable care to prevent the corporation from (i) causing an unlawful discharge, (ii) contravening administrative orders and (iii) contravening obligations with respect to approvals, notification of unlawful discharges and hazardous waste management. In Québec, any director or officer who, by means of an order or authorization or through advice or encouragement, leads the corporation to refuse or neglect to comply with the EQA, commits an offence under the EQA.

Directors and officers may also incur operational liability if they are found to have personally permitted a discharge or deposit (including under the federal Fisheries Act and the EQA). Officers are more likely than directors to be subject to such liability, because their on-site management responsibilities may result in sufficient control over the discharge or deposit (as opposed to the general supervisory role of directors).

ENVIRONMENTAL ASSESSMENT

An assessment of environmental impacts may be required before a particular undertaking may be constructed or initiated. The federal Canadian Environmental Assessment Act requires an assessment where (among other things) the project involves federal financing or lands or requires federal permits and approvals. As well, provincial, environmental assessment regimes may apply to certain projects. In both Ontario and Québec, a private sector project may be designated for assessment by regulation and be subject to public hearings.

CLIMATE CHANGE

Finally, as the Canadian government has ratified the Kyoto Protocol, large industrial emitters of greenhouse gases are expected to face emission reduction obligations.

This could lead to capital expenditures to modify operations or purchase emission reduction credits. The Canadian government released its "Project Green" climate change plan in April 2005. In the plan, the government acknowledges that it significantly underestimated the greenhouse gas emissions reductions required to achieve Canada's commitment of 6% below 1990 levels by 2008 to 2012: rather than 240 megatonnes, Canada will have to reduce its emissions by at least 270 megatonnes. Industries with significant emissions (such as mining, manufacturing, oil and gas and thermal electricity) will be expected to collectively reduce emissions by 45 megatonnes annually. These reductions may be achieved by implementing operational measures or purchasing domestic or international reduction credits. The largest portion of reductions (75 to 115 megatonnes annually) is to be achieved through the government's purchase of reduction credits under the Climate Fund. The "Project Green" plan addresses Canada's Kyoto obligations only in general terms and further details are to be provided regarding specific compliance criteria and incentive programs.

Types of Business Organization

Types of Business Organization

CORPORATIONS

GENERAL

A corporation is the most frequently used form of business organization in Canada. A corporation has a legal personality distinct from its shareholders and management. A corporation's existence is potentially perpetual, since it is not affected by the departure or death of any or all of its shareholders or managers.

As a separate legal entity, a corporation has rights, powers, privileges and obligations similar to those of individuals. It can hold property and carry on a business and can incur legal and contractual obligations.

Shareholders are the owners of a corporation, but they usually do not manage its business or enter into transactions on its behalf. By statute, they are protected from liability for obligations or liabilities of the corporation. In Canada (except in Québec), shareholders do not have to be disclosed on the public record. Generally, the authority to manage the corporation rests with the directors, who are elected by the shareholders. However, if the shareholders prefer to retain direct control of the corporation, they can enter into a unanimous shareholder agreement. Such an agreement can effectively transfer responsibility (and liability) for the management of the corporation from the directors to the shareholders. It does not have to be filed on the public record (although a federal corporation must indicate on its annual return if its shareholders have entered into a unanimous shareholder agreement).

A corporation may be either public or private. In a public corporation, shares may be bought and sold by members of the general public. By contrast, the sale or transfer of shares in a private corporation is restricted and usually requires the consent of a majority of the directors or shareholders.

The main advantages of the corporation as a business entity are the limited liability of the shareholders, the possibility of perpetual existence and the flexibility of the corporate form for financing and estate planning purposes. The disadvantages include the costs associated with the incorporation, operation and dissolution of the corporation. Since a corporation is a separate taxpayer, shareholders cannot access directly any tax losses it may generate, and it may be more difficult to use as a tax-efficient vehicle than an unincorporated entity like a partnership.

FEDERAL OR PROVINCIAL INCORPORATION

A business corporation can be incorporated either federally, under the Canada Business Corporations Act ("CBCA"), or in any of the provinces. In Ontario, business corporations are governed by the Business Corporations Act ("OBCA"). In Québec, the relevant statute is the Companies Act ("QCA"). The CBCA, OBCA and QCA prescribe essentially the same requirements, with some exceptions, the most significant of which are discussed below. Under all of these statutes, incorporations can be effected quickly and at reasonable cost.

A federal corporation has the right to carry on business under its corporate name in any province of Canada (although it must use a French form of its name in Québec). In contrast, a corporation incorporated under provincial law cannot do so as of right in another province. Hence, an OBCA or QCA corporation cannot be licensed or registered under its name in another province if a confusingly similar name is already being used there by another corporation. If this is a concern, incorporation under the CBCA may be advantageous, although as a practical matter a CBCA corporation may need to operate under a different name in any province where its corporate name would be confusing. However, it may be easier to obtain a desired corporate name by incorporating provincially. Under the OBCA (unlike the CBCA), proposed corporate names are not subject to pre-clearance for possible confusion with existing names. Incorporators can decide for themselves whether there is any risk of other parties objecting to the names they wish to use.

Both federally and provincially incorporated corporations must fulfill the registration requirements of every province in which they intend to carry on business. Provincial corporations must also obtain extra-provincial licences to carry on business in most other provinces, but Ontario and Québec have only a registration requirement.

Generally, only public corporations, whether federally or provincially incorporated, must file financial statements on the public record.

The CBCA requires at least 25% of the directors to be Canadian residents, unless a corporation has less than four directors, in which case it needs to have at least one Canadian resident. The OBCA requires a majority of the directors to be resident Canadians, unless it has one or two directors, in which case one must be a resident Canadian. The QCA does not require that any directors be Canadian residents. All of the CBCA, OBCA and QCA require, however, that a public corporation have at least three directors.

There are a few other important differences between a CBCA or OBCA corporation and a Québec company. The QCA authorizes the creation of shares with or without par value and provides for the issuance of shares which are not fully paid up, whereas the CBCA and OBCA prohibit par value shares and the issuance of shares which are not fully paid up. The CBCA and OBCA have stricter rules with respect to financial disclosure than the QCA and also grant greater rights and remedies to minority and dissident shareholders than the QCA. However, the QCA also has some limitations, since it does not provide (unlike the other statutes) for directors and shareholders to participate and to vote at meetings by electronic means.

The corporate statutes of most other provinces in Canada are generally similar to the CBCA and OBCA. However, there are differences in detail that may provide additional flexibility to certain investors. For example, certain other provinces do not require that any directors be resident Canadians, or may permit a corporation to hold its own shares, whether directly or through a subsidiary (which is prohibited under the CBCA and OBCA).

OFFICERS AND DIRECTORS

The daily operations of a corporation are normally carried out by its officers. Officers can be non-residents of Canada, provided that they have complied with Canada's immigration laws (see the Temporary Entry and Permanent Residence section of this guide).

Although a majority of the directors of an OBCA corporation must generally be Canadian citizens or permanent residents of Canada, foreign control is still possible, since shareholders (who need not be Canadians) elect the directors and may remove them from office. Moreover, as mentioned, the CBCA, OBCA and QCA, as well as other provincial corporation statutes, permit the shareholders to enter into a unanimous shareholders agreement, which can effectively transfer to the shareholders (or sole shareholder) some or all the powers and duties of the directors (together with the corresponding liabilities of the directors).

Directors and officers must act honestly and in good faith with a view to the best interests of the corporation. They must also exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Directors and officers may incur personal liability if they cause the corporation to contravene applicable laws. Directors also may be liable under statutes such as the Employment Standards Act, 2000 in Ontario, An Act respecting labour standards in Québec and the federal Income Tax Act for employees' unpaid wages and amounts that should have been remitted to taxation authorities, if the corporation becomes bankrupt.

The corporation may purchase insurance to cover the personal liability of the directors and officers, or indemnify them directly for such liability. However, insurance or indemnification will generally only cover those acts which were performed by the directors and officers in good faith. The CBCA permits broader insurance coverage to be maintained, even in respect of acts contrary to directors' and officers' fiduciary duties.

SUBSIDIARY OR BRANCH?

A foreign corporation may carry on business in Canada either through a branch or by setting up a new corporation as a Canadian subsidiary. Tax considerations will be important in making this choice, but the non-tax considerations discussed below may also be relevant.

Most provinces in Canada do not provide for hybrid forms of corporate entity with certain partnership-like characteristics. However, Nova Scotia permits the formation of unlimited liability companies ("ULCs"), the shareholders of which do not have limited liability, but which are otherwise similar to ordinary corporations. Although a ULC is treated as a corporation for Canadian tax purposes, it is eligible for flow-through treatment for U.S. tax purposes. Therefore, ULCs are often used in cross-border transactions. The Province of Alberta is amending its corporate legislation to permit the formation of ULCs.

SUBSIDIARY

If the incorporation of a subsidiary is chosen, the cost of incorporating the corporation and the ongoing expenses of maintaining it must be taken into account. If it is incorporated under the OBCA or CBCA, it must be considered whether appropriate individuals who are resident Canadians are available to serve as directors. Certain corporate records generally must be maintained in Canada. The names and addresses of officers and directors are a matter of public record. However, since the subsidiary is a separate legal entity from its parent, the parent will not generally be liable for obligations incurred by the subsidiary.

BRANCH

An unincorporated branch may be chosen as an alternative to a subsidiary. The foreign corporation must register in all provinces in which it wishes to carry on business. The corporation cannot register if the name of the foreign corporation is the same as or similar to one already in use in that province. In addition, in Québec the foreign corporation must register a French name. Business names used by a branch should also be properly registered and should not be the same as or similar to names used in the province. A foreign corporation which establishes a branch in Ontario must obtain a licence under the Extra-Provincial Corporations Act, although this is generally a routine requirement.

PARTNERSHIPS

Partnership is the relationship between persons carrying on business in common with a view to profit. Partners may be individuals, corporations or other partnerships. In Canada, a partnership is not regarded as a separate legal entity from its partners.

There are two principal types of partnership. In a general partnership, all of the partners can participate in management of the business, but are exposed to unlimited liability for partnership obligations. In a limited partnership, limited partners' liability is limited to their investment in the partnership, but they must remain passive investors and not participate in control of the partnership business. Ontario and Québec also permit professionals to practise through a special type of general partnership known as a limited liability partnership, which provides individual partners with a degree of protection against unlimited liability for the negligent acts of other partners.

In Ontario, the governing statutes are the Partnerships Act and the Limited Partnerships Act, which define the rights and obligations of the partners between themselves and in relation to third parties. Partnership law also includes non-statutory common law and equitable principles.

In Québec, partnerships are governed by the Civil Code of Québec, which similarly sets out the rights and obligations of partners between themselves and towards third persons, as well as conditions for the creation, operation and dissolution of a partnership.

The provisions of these statutes that address the rights and obligations of partners between themselves can generally be altered by agreement between the partners. Because the relationships between the partners can be determined by agreement, great flexibility is possible in providing for such matters as capital contributions or other financing of the partnership, participation in profits and management structure.

Income and losses of a partnership, although computed at the partnership level, are taxed in the hands of the partners. This tax treatment is the primary reason for using a partnership rather than a corporation, since each partner may offset its eligible share of the partnership's business tax losses against income from other sources.

GENERAL PARTNERSHIPS

The main characteristic of a general partnership is the unlimited liability of each partner for the liabilities and obligations incurred by the partnership to third parties. Each partner may bind the others unless there are restrictions in the partnership agreement of which third parties have notice. However, a partner is generally not liable for obligations incurred before it became or after it ceased to be a partner.

The main disadvantages of a general partnership are the unlimited liability of the partners and the ability of each partner to incur partnership obligations that will bind the other partners.

In Ontario, all the partners of a general partnership must register the name of the partnership under the Business Names Act, unless the business is carried on under the names of the partners. In Québec, a general partnership must file a declaration every year under An Act respecting the legal publicity of sole proprietorships, partnerships and legal persons. This declaration must include a French name for the purpose of carrying on business in Québec. In both Ontario and Québec, these registrations require that the partnership business and the names and addresses of the partners be disclosed.

LIMITED PARTNERSHIPS

A limited partnership combines the advantages of limited liability and the ability to flow tax losses through to passive investors (subject to certain restrictions under tax legislation). This form of business structure is often used for public financing and real estate syndication. A limited partnership is made up of one or more general partners, each of whom has the same rights and obligations as a partner in a general partnership, and one or more limited partners, whose powers and liabilities are limited.

The general partner or partners manage the partnership. A limited partner may not take part in the management of the partnership without jeopardizing its limited liability.

The primary advantage of a limited partnership over a general partnership is the limited liability of the limited partners. This enables passive investors to receive returns proportional to the amount of their contribution with minimal personal risk.

To establish a limited partnership in Ontario, a declaration signed by the general partners must be filed under the Limited Partnerships Act. The declaration must be renewed every five years and when the partnership wishes to cease operations a declaration of dissolution must be filed. The names and contributions of the limited partners do not have to be disclosed on the public record.

In Québec, a limited partnership must file a declaration every year under An Act respecting the legal publicity of sole proprietorships, partnerships and legal persons. This declaration must include, among other information, the names and addresses of the general and initial limited partners and must specify the partner who is furnishing the largest contribution.

UNDECLARED PARTNERSHIPS

In Ontario, although a limited partnership cannot be formed except by the filing of a declaration under the Limited Partnerships Act, a general partnership may exist without any registration or filing on the public record. If the relationship satisfies the legal criteria for a general partnership, its members will be liable as general partners for obligations relating to the partnership business and will be bound by any such obligations incurred by any of the partners, even to third parties who are not aware of the existence or identity of the other partners. This reflects the common law principle that an undisclosed principal will be liable in the same manner as a disclosed principal for obligations incurred by its agent.

In Québec, a general or limited partnership which does not file a declaration under An Act respecting the legal publicity of sole proprietorships, partnerships and legal persons is an undeclared partnership. An undeclared partnership may arise from written or verbal agreement or from overt acts indicating an intent to form an undeclared partnership. In the absence of an agreement, the relations of partners to each other in an undeclared partnership are treated by the provisions of the Civil Code of Québec in the same manner as those of general partners.

If a partner of a Québec undeclared partnership contracts in his or her own name with a third party who is unaware of the existence of the undeclared partnership, only that partner incurs liability to the third party (unlike a general partner, who can bind the other partners). If a third party is aware that a partner of an undeclared partnership is acting in a partnership capacity in dealing with the third party, however, the other partners of the undeclared partnership will also be liable to the third party.

JOINT VENTURES

A joint venture is an agreement entered into by two or more parties to pool capital and skills for the purpose of carrying out a specific undertaking. It may or may not involve co-ownership by the venturers of the project assets. Because it is essentially a contractual relationship not specifically regulated by statute, the venturers are free to agree on whatever terms they choose. Since a joint venture is not a recognized entity for tax purposes, income and losses for tax purposes are computed separately by each joint venturer rather than at the joint venture level.

A joint venture may be difficult to distinguish from a partnership and the parties' characterization of their relationship may not be conclusive. The most important legal distinction is that sharing of profits is essential to a partnership, whereas joint venturers generally contribute to expenses and divide revenues of the project, but do not calculate profit at the joint venture level. Equal participation in management of the business is characteristic of a general partnership, but less usual in a joint venture, where one party often operates the project, or management is contracted out.

Joint venturers who do not want their joint venture to be treated as a partnership should enter into a written agreement setting out their respective rights and obligations in detail and exercise care in dealing with third parties. In Québec, joint venturers should also file the proper declaration under An Act respecting the legal publicity of sole proprietorships, partnerships and legal persons to avoid being characterized as a general partnership, in which case each partner would be fully liable for partnership obligations and subject to tax as a partner, rather than as a joint venturer.

TRUSTS

Although it has always been possible to use a trust as a form of business organization, only recently has the income trust become a relatively common form of public offering in Canada. The primary reason for employing a trust rather than a corporate structure is to realize greater tax efficiencies for investors than would be possible by distributing corporate earnings to shareholders by way of dividends. In most cases, the trust is not itself the operating business entity.

A trust is not a separate legal entity. In law, its assets are held by the trustees, who are also liable for obligations incurred in carrying on its activities (although the trustees are entitled to be indemnified out of the trust assets for such liabilities). Unlike shareholders of a corporation, investors in a trust have not had the benefit of statutory limited liability. There has therefore been some concern that in certain circumstances it might be possible for investors to be exposed to liabilities arising from the operations of the trust. Ontario has recently passed legislation clarifying that investors in a publicly-traded trust (that is formed under Ontario law and that files its public disclosure documents under Ontario securities laws) will not incur such liabilities as beneficiaries of the trust.

SOLE PROPRIETORSHIPS

A business owned by one person is called a sole proprietorship. This is the simplest form of business organization. The individual is responsible for all the obligations of the business. Accordingly, his or her personal assets are at risk if these obligations are not met.

There is no legislation dealing specifically with sole proprietorships; however, a sole proprietor may need to comply with federal, provincial and municipal regulations affecting trade and commerce, licensing and registration. For example, in Ontario, a sole proprietor who carries on business or identifies his or her business to the public under a name other than his or her own name must register the name under the Business Names Act. In Québec, every person who uses a name or designation other than his or her own complete name must register a declaration under An Act respecting the legal publicity of sole proprietorships, partnerships and legal persons.

A sole proprietorship may be suitable for a small enterprise because it avoids many of the costs of setting up and running a corporation and the complex regulatory scheme that governs corporations. Non-capital start-up losses of the business are generally deductible against the sole proprietor's income from other sources. The disadvantages of a sole proprietorship are the unlimited liability of the owner and that the business can be transferred only by selling the assets.

CONTRACTUAL ARRANGEMENTS

FRANCHISING

A franchise is an agreement whereby one party, the franchisor, gives another, the franchisee, the right to make use of a trade-mark or trade name within a certain territory.

Franchising involves an ongoing relationship between the parties. The franchisor generally retains some degree of control over the manner in which the franchisee carries on its business, but neither party is the agent of the other. In Québec, franchises are governed only by the general law of contracts.

Ontario and Alberta are the only provinces in Canada that currently have legislation regulating franchises. The Ontario legislation defines "franchise" broadly and may apply to many distribution agreements that might not generally be thought of as franchises. As well as imposing disclosure obligations on franchisors, the Ontario and Alberta legislation imposes a statutory duty of fair dealing in the performance and enforcement of a franchise agreement and precludes a franchise agreement from contracting out of the application of the legislation, or providing for disputes to be litigated or arbitrated in another jurisdiction.

LICENSING

Licensing is a contractual relation between two parties whereby a licensor grants a licensee the right to use a copyright, industrial design, patent, trade-mark, trade name or know-how. The relationship is governed primarily by the general law of contracts, although the federal statutory regime regulating the relevant form of intellectual property may impact to some degree.

CONCLUSION

In deciding on the most appropriate form of business organization, the specific needs of the business must be assessed. Factors which require particular consideration include: the complexity of the organization, the nature of the business, whether a separate legal existence is necessary, transferability of interests, participation in management, extent of liability, financing aspects, and tax implications (both in Canada and in the home jurisdiction of a non-resident investor).

Financing a Business Operation

Financing a Business Operation

Corporations may raise capital in several ways, the most common of which are equity and debt financings.

Debt financing may be provided to the corporation by the shareholders, in addition to capital provided by purchasing shares, or by third parties such as banks and other financial institutions. Canadian chartered banks, Canadian subsidiaries of foreign banks and other financial institutions, such as merchant banks, loan and trust companies and life insurance companies, are all active in providing financing to private and public corporations in Canada. As in most jurisdictions, third-party lenders may require that a certain level of equity investment be maintained by the corporation's shareholders. Lenders may also require personal guarantees from the shareholders of small private corporations.

There are two principal forms of financing available from third-party lenders: operating financing and term financing. Operating financing, as the name suggests, usually finances the ongoing operations of the business, and term financing is usually made available for capital investment or acquisitions. Both operating and term financing generally bear interest at a fluctuating rate linked to market rates of interest and the lenders may allow the borrower to convert from one interest option to another. Term financing may require scheduled repayment over a defined period of time.

Persons providing debt financing to a corporation, whether on an operating basis or on a term loan basis, may require security for their loans. The security on operating financing may be limited to security on inventory and accounts receivable of the borrower, and term financing will usually be secured by capital assets, such as machinery and equipment, or by a charge covering all assets of the borrower. The exact nature of the security taken in each instance will depend upon the financial situation and bargaining power of the borrower and the nature of the assets available to secure the debt.

SECURED FINANCING

Property is categorized in two ways in Canadian law: real estate or immovables (land, buildings and movables which are permanently attached to land), as distinct from personal property or movables (anything not attached to land, including vehicles, equipment, inventory, accounts receivable and other intangibles).

Security may be taken in immovables in Québec through a hypothec, or in real estate in any other province through a mortgage or charge. In each case, the lender can protect its security interest and ensure its priority by registration against the property in question.

Where security is taken on personal property, unless the borrower's operations are localized in one province, the lender may have to effect registrations in a number of jurisdictions across Canada in order to protect its security interest, since personal property security is primarily (although not exclusively) under provincial jurisdiction.

Ontario's Personal Property Security Act ("PPSA") is modelled on Article 9 of the United States Uniform Commercial Code. Most other Canadian provinces have very similar legislation. In Québec, the regime adopted in the Civil Code of Québec for taking security on movables also follows the spirit of the Uniform Commercial Code and common law regimes.

The federal government has authority to legislate over personal property security in limited areas such as shipping, railways and certain security taken by banks. Although the federal intellectual property statutory schemes do not deal comprehensively with the taking of security interests, security agreements can generally be filed against intellectual property with the Canadian Intellectual Property Office ("CIPO"). If a debtor's intellectual property is of significant value, a lender will generally register security against it both provincially and federally.

In Ontario, the PPSA applies to every transaction which in substance creates a security interest including financing leases and conditional transfers of title. To protect its rights against third parties, a secured party must either take possession of the property secured or register a financing statement at a searchable computerized registry. Further registrations are required in certain circumstances, such as a debtor name change or a transfer of collateral and to effect a renewal.

The Civil Code of Québec provides for a single form of consensual security: the hypothec (mortgage). A hypothec is a charge on movable or immovable property (which may include future property) which is granted to guarantee the performance of an obligation (present or future) and subsists so long as the obligation continues to exist. Security interests created by hypothecs are set up against third parties by publication in registries established for that purpose or by delivery of the property secured. Furthermore, publications are required in certain circumstances, such as a debtor name change.

SECURITIES LAW

Regulatory framework

In Canada, securities regulation is within provincial jurisdiction and each of the provinces and territories has securities regulatory legislation. Although there are differences in the degree of regulation between jurisdictions, the regulatory regimes are generally similar. Broadly speaking, Canadian securities regulation is comparable to that of the United States. The securities laws, regulations and rules and the policies of the securities commissions in Ontario and Québec are similar to each other in most respects.

Québec has recently adopted An Act respecting the Autorité des marchés financiers. The agency created by this legislation protects consumers of financial products and enforces rules and regulations in the financial sector.

A "security" is broadly defined in Québec and Ontario securities legislation as any document evidencing title to or an interest in, among other things, the capital, assets, profits, or property of a person or corporation. In addition, a number of different types of agreements and instruments involving monetary consideration are specifically included in the definition of "security", including, among other things, notes, stocks, treasuries, bonds, debentures, certificates of interest, transferable shares and options or privileges on any security. Depending on the circumstances, both equity and debt financing may come within the definition of "security" and may therefore be subject to the relevant provincial securities legislation.

Generally, in each Canadian jurisdiction, a distribution of securities must be qualified by a prospectus that is filed with and cleared by the relevant securities regulatory authority, unless an exemption from this requirement is available. A distribution of securities includes, among other things, a trade by an issuer in previously unissued securities and a trade in securities from a person that is a "control person" in respect of the issuer. A person is presumed to be a "control person" in respect of an issuer if that person holds more than 20% of the voting rights attached to the securities of the issuer. In addition, securities legislation in the various Canadian jurisdictions deems certain trades in securities that were previously acquired under an exemption from the prospectus requirements, called "first trades", to be distributions. Securities of an issuer that is a reporting issuer under Canadian securities laws (that is, an issuer that is subject to periodic reporting requirements) that were acquired under an exemption from the prospectus requirements are generally freely tradable, depending on the exemption relied upon, after a four-month hold period.

Any person or corporation engaged in trading or giving advice regarding securities must be registered under the relevant provincial securities legislation unless an exemption from this requirement is available under applicable securities laws.

The lack of complete consistency in securities regulation across the Canadian jurisdictions can complicate securities offerings that are made in more than one jurisdiction. However, similar exemptions from the registration and prospectus requirements are usually available in each jurisdiction. Further, Canadian securities regulators recently jointly issued a draft rule that substantially harmonizes prospectus and registration exemptions across the country (the "Proposed Rule").

The most useful existing exemptions for a foreign entity financing a business in Canada are the following exemptions:

- The substantial purchase exemption permits a person to acquire securities on a prospectus-exempt basis where each purchaser invests no less than $150,000 (in some provinces this threshold may be lower). This exemption is available in each jurisdiction other than Ontario, but under the Proposed Rule this exemption will also be adopted by Ontario; and
- The accredited investor exemption permits certain qualified investors, including institutional investors and persons or companies that meet income or asset tests to purchase securities without a prospectus. The accredited investor exemption is available in each jurisdiction other than Québec (though on a slightly different basis in Ontario). However, the Québec securities regulatory authority has indicated that it is prepared to grant exemptive relief from the prospectus (and dealer registration) requirements for distributions made to persons qualifying as "accredited investors". Under the Proposed Rule this exemption will also be officially adopted in Québec.

In the case of certain exempt trades, it may be necessary to file a report with and pay a fee to the relevant securities regulator. To use certain prospectus exemptions (though not the substantial purchase exemption or the accredited investor exemption), the issuer is required to deliver a disclosure document to prospective investors. Where a disclosure document is provided to an investor (whether required by the exemption or voluntarily), in certain Canadian jurisdictions, including Ontario, securities legislation grants the investor a right of action for damages or rescission if the disclosure document contains a misrepresentation. In addition, a copy of the offering memorandum generally must be filed with the relevant authorities.

Canadian securities legislation requires continuous disclosure of any material changes in the affairs of reporting issuers and also includes provisions relating to activities such as insider trading and take-over bids.

Several key steps have been taken to grant foreign issuers easier access to the Canadian financial markets. In 1991, a co-operative effort between Canadian provincial securities regulators and the United States Securities and Exchange Commission ("SEC") resulted in a system known as the multi-jurisdictional disclosure system or "MJDS". Under the northbound MJDS, securities may be offered by a United States issuer in Canada primarily in accordance with SEC rules. Rights offerings, take-over and issuer bids, business combinations, offerings of debt and preferred shares that have received an approved rating, and offerings of equity and other securities by certain large issuers are included within the MJDS.

Certain entities organized under Canadian law have a further advantage in that they may access United States capital markets via the southbound MJDS rules. Under the southbound MJDS, securities may be offered by a Canadian issuer in the United States primarily in accordance with Canadian securities rules. An issuer may use the southbound MJDS where the issuer is a "foreign private issuer" incorporated or organized under Canadian law (other than an "investment company" under United States legislation) that has been subject to the continuous disclosure requirements of any provincial securities regulator for 12 calendar months, and the aggregate market value of the equity shares of the issuer is at least US$75 million. The market capitalization requirement is relaxed if the securities being offered are non-convertible investment grade debt or preferred securities. The primary benefit of using southbound MJDS is that the review is conducted by Canadian provincial securities regulators, not the SEC (though the SEC reserves the right to review where they have reason to believe that there is a problem with the filing or the offering). In addition, the applicable regulatory review periods are those prescribed by Canadian securities laws, which tend to be considerably shorter than those under United States securities laws.

In 1993, Canadian provincial securities regulators proposed a system designed to encourage foreign companies to offer shares to the Canadian public. Large "world-class" companies from other major industrial countries in the G-7 (the United States, Britain, Japan, Germany, Italy and France) would be able to offer up to 10% of their shares in Canada, basically in accordance with their own "home country" rules. "World-class" status is not restricted to G-7 based companies. Other issuers would be able to come into Canada by piggybacking on their offerings in G-7 countries. This proposal continues to be in the form of a draft national policy and has not yet been issued as a draft rule, though regulators have granted discretionary relief in situations covered by the draft national policy.

CORPORATE GOVERNANCE

Corporate governance regulation in Canada has traditionally been a matter of corporate law. Basic requirements for board independence, audit committees and shareholder rights are set out in the corporate statutes. In addition, since 1995 Canadian public companies listed on the Toronto Stock Exchange ("TSX") have been required to disclose to their shareholders annually how their corporate governance practices compare to the 14 "best practices" set out in the TSX corporate governance guidelines. Public companies have not been required to comply with these guidelines, simply to disclose whether they comply (and if they do not, what their practices are). This approach left it up to the capital markets to determine whether an issuer's governance practices were appropriate. Investors who felt that an issuer's governance practices were deficient could simply elect not to invest or could use their standing as shareholders to try to influence the company's governance practices.

Partly in response to enhanced governance regulation in the United States (including under Sarbanes-Oxley ("SOX")) and partly in order to impose governance requirements on non-corporate entities, such as income trusts, Canada's securities regulators have introduced a number of new governance regulations over the past several years. These include regulations that mirror those introduced by SOX in two important areas of financial reporting - the mandate and composition of the audit committee and CEO/CFO certification of the financial statements. Some additional regulation in this area is expected. For example, in early 2005, Canadian securities regulators released for comment a requirement for a management report on internal controls, mirroring the SEC requirement.

Canada's securities regulators are not proposing to regulate in most other areas of corporate governance. Instead, the disclosure regime will continue to give investors detailed information about an issuer's governance practices and allow investors to make their own choices. Canadian securities regulators are not proposing to follow SOX, for example, in prohibiting loans to directors and senior officers. Instead, disclosure in information circulars will continue to be required with respect to any loans made or guaranteed by the issuer in favour of its directors or officers. Similarly, Canadian public companies will be encouraged, but not required, to adopt the governance practices imposed on US domestic issuers listed on the NYSE or quoted on Nasdaq. For example, there will be no requirement that a public company have a certain number of directors who are independent (beyond what is required in order to satisfy the audit committee requirements).

NEW CORPORATE GOVERNANCE POLICY

Canadian securities regulators issued National Policy 58-201 ("Governance Policy") in April 2005. When the Governance Policy comes into force (which is expected to be on June 30, 2005), the TSX corporate governance policy and disclosure requirement discussed above will be revoked. The Governance Policy sets out 18 best practices drawn from existing Canadian standards and U.S. regulatory standards (including the SOX and the listing standards of the NYSE and Nasdaq). Issuers will not be required to comply with the standards set out in the Governance Policy, but will be required to disclose information about their governance practices as set out in the associated disclosure rule, National Instrument 58-101. This will impose certain disclosure and filing requirements on reporting issuers with respect to their governance practices.

The Governance Policy recommends best practices in the following areas:

- <u>Board Independence</u> - A majority of the board should be "independent" (as defined in Multilateral Instrument 52-110 for purposes of audit committees). Generally speaking, independence means the absence of any direct or indirect material relationship between the director and the issuer, that is, a relationship which could, in the view of the issuer's board, reasonably interfere with a member's independent judgment. Certain relationships are deemed to be material for this purpose. The Governance Policy recommends regular in camera meetings for the independent directors and the separation of the positions of chair (who should be an independent director) and CEO. If these positions are not separated, an independent lead director should be appointed with appropriate responsibilities.

- Role of the Board Generally - The board should have a written mandate that includes certain specified responsibilities. These responsibilities relate to organizational integrity, strategic planning, risk identification and management, succession planning, communications, internal controls, management information systems and corporate governance.

- Role of the Board in the Issuer's Integrity - The board should play an oversight role with respect to the ethical framework of the organization. The board should satisfy itself as to the integrity of the CEO and other senior officers and that the CEO and other senior officers create a culture of integrity throughout the organization. A code of business conduct and ethics (and any amendments to the code) should be approved by the board.

- Board Effectiveness - There should be a comprehensive orientation program for new directors and ongoing education for all directors as well as regular board, committee and director assessments.

- Nominating Directors - The board should be responsible for nominating candidates for election by the shareholders. Before doing so, it should consider what competencies and skills the board requires as well as the competencies and skills the board as a whole currently possesses. It should consider the recommendations of a nominating committee composed entirely of independent directors. In making its recommendations, the nominating committee should also consider the competencies and skills required and those currently in place, as well as those which any new nominee would bring to the board. The nominating committee should have a written charter which includes certain specified provisions.

- Executive Compensation - The board should establish a compensation committee comprised entirely of independent directors with a written charter and certain specified responsibilities. The compensation committee should be responsible for reviewing executive compensation disclosure before it is publicly disclosed and for making recommendations to the board with respect to CEO compensation (based on established corporate goals and objectives), non-CEO compensation, incentive based compensation plans and equity based compensation plans.

There was a significant consolidation in Canadian equity markets in 2001 when the TSX purchased the Canadian Venture Exchange, which is now known as the TSX Venture Exchange. The TSX specializes in equity securities of senior Canadian issuers, whereas the TSX Venture Exchange serves the junior venture capital market. The TSX Venture Exchange head office remains in Calgary, with branch offices in Montréal, Toronto, Vancouver and Winnipeg. All financial derivatives are traded on the Montréal Exchange. Securities of issuers that do not meet listing requirements are quoted on a web-based trade-reporting system called the Canadian Unlisted Board Inc.

GOVERNMENT ASSISTANCE PROGRAMS

There are many government programs to assist business in Canada, at both the federal and provincial levels. Assistance may take a number of different forms, including cash grants, forgivable loans, guarantees to lenders, cost-sharing, and advisory services. These programs are too numerous to review in this guide, but they usually have fairly rigid requirements and involve extensive documentation. Generally, the applicant must demonstrate that it has the ability and resources to carry out its project and that the project will benefit Canada. Close attention should be paid in each case to the detailed requirements of a particular program.

Competition Law

Competition Law

Like many other countries, Canada has a complex set of competition laws. Among other things, these laws: (i) prohibit cartel behaviour; (ii) prohibit abuses of a dominant position; (iii) regulate mergers and acquisitions; and (iv) otherwise govern the conduct of businesses in their relationships with competitors, customers and suppliers. Canada's competition laws are contained in a single federal statute called the Competition Act ("CA"). In contrast to jurisdictions like the United States, Canada does not have provincial competition laws, although several provinces have fair business practice laws directed primarily towards consumer protection. With the exception of a limited number of activities that are specifically exempted, all business activities in Canada are subject to the CA.

ADMINISTRATION AND ENFORCEMENT OF THE COMPETITION ACT

The CA is administered by the Competition Bureau (the "Bureau"), which is part of the federal Department of Industry. At the head of the Bureau is the Commissioner of Competition (the "Commissioner") who has statutory responsibility for administering and enforcing the CA. Bureau staff routinely investigate complaints from the public concerning competition matters. The CA also permits, and in some cases requires, the Commissioner to commence a formal inquiry. Once an inquiry has been commenced, the Commissioner has a broad range of enforcement powers and may obtain authority from a court to: (i) enter and search premises and seize records, (ii) require the production of records or the provision of written information under oath or affirmation, or (iii) require a person to appear and be examined under oath or affirmation.

Separate from the Bureau is a specialized tribunal (the "Competition Tribunal") composed of judges of the Federal Court (Trial Division) and lay members. It functions as a court of record and has exclusive jurisdiction over cases under the non-criminal provisions in the CA. Appeals may be made to the Federal Court of Appeal on questions of law or mixed fact and law, or, with leave, on questions of fact.

CRIMINAL OFFENCES UNDER THE COMPETITION ACT

CONSPIRACY

The CA contains a number of criminal offences, the most significant of which is the conspiracy offence. It is an offence for anyone to conspire or otherwise agree with any other person (which generally means a competitor) to:

(a) limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product;

(b) prevent, limit or lessen, unduly, the manufacture or production of a product or enhance unreasonably the price thereof;

(c) prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product; or

(d) otherwise restrain or injure competition unduly.

In order for an offence to be committed, there must be an agreement or understanding between two or more parties to prevent, limit, lessen, restrain or injure competition unduly. (It is not necessary for the agreement or understanding to have been carried into effect.) An undue restriction is one which is an "improper, inordinate, excessive or oppressive restriction" on competition. Ultimately, the question of whether an offence has been committed needs to be determined on the basis of an assessment of both market structure and qualitative considerations.

BID-RIGGING

The CA prohibits two or more persons from entering an agreement whereby one will not submit a bid or whereby they will agree on the bids that they will each submit. (However, there is no offence if the person calling for the bids is informed of the agreement at or before the bids are submitted.) Unlike the conspiracy provision, there is no requirement of "undueness" for the bid-rigging offence. Therefore, the market power of the parties to the bid-rigging agreement and the actual effect of the agreement on the bidding process are irrelevant.

PRICE MAINTENANCE

The price maintenance provisions of the CA prohibit a person engaged in the business of supplying a product from attempting, by agreement, threat, promise or any like means, to influence upward, or discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply a product within Canada. Thus, in Canada, it is illegal to require unaffiliated distributors or retailers to sell at a specified resale price. It is also an offence to refuse to supply a product to, or otherwise discriminate against, another person because of that person's low pricing policy. In addition, these provisions can apply to attempts to influence the prices charged by competitors or any other persons.

PRICE DISCRIMINATION

The CA prohibits a supplier from engaging in a practice of discriminating among purchasers who compete with one another, by granting a price concession or other advantage to one purchaser of articles that is not available to competing purchasers of like quality and quantity. Unlike many provisions of the CA, the offence of price discrimination does not require that the practice have any anti-competitive effect. However, there are legitimate grounds (such as volume discounts) on which a supplier can price discriminate.

OTHER CRIMINAL OFFENCES

Other offences under the CA include: discriminatory price allowances, predatory pricing, telemarketing, double ticketing, pyramid selling, conspiracy relating to professional sport, agreements among federal financial institutions with regard to interest, services and loans and misleading advertising. Misleading advertising can be dealt with both under the criminal law or through a non-criminal civil provision. The Commissioner has indicated that in most circumstances the Bureau will pursue misleading advertising through the civil remedy. For the Bureau to pursue criminal charges there will have to be clear and compelling evidence that (i) the accused knowingly or recklessly made a false or misleading representation and (ii) a criminal prosecution would be in the public interest.

PENALTIES

The CA provides for significant fines and, in some cases, imprisonment if there is a contravention of the criminal provisions. For example, conspiracy is punishable by up to five years imprisonment, a fine of up to $10 million, or both. There is no limit on the fine that a court can impose for bid-rigging, and that offence is also punishable by imprisonment for up to five years, in addition to a fine. Individuals in Canada have received jail sentences for conduct contrary to the conspiracy provisions and the trend in Canada is towards more frequent prosecutions of individuals and larger fines for conspiracy and bid-rigging offences.

IMMUNITY FROM PROSECUTION

The Commissioner has also announced an immunity program which may allow corporate entities and/or their executives who are "first in" to report a criminal offence (such as conspiracy or bid-rigging) and who meet the other criteria set out in that program, to receive a recommendation of immunity from prosecution in exchange for cooperation in the prosecution of others.

NON-CRIMINAL REVIEWABLE MATTERS UNDER THE COMPETITION ACT

ABUSE OF DOMINANT POSITION

The Tribunal may make an order requiring, among other things, that a party cease certain conduct or dispose of assets or shares if it finds that:

(a) one or more persons substantially or completely controls a type of business throughout Canada or any part of Canada;

(b) one or more persons has engaged, or is engaging, in a practice of anti-competitive acts; and

(c) the practice has had, is having, or will likely have the effect of preventing or lessening competition substantially.

The Tribunal has held that a supplier may be considered to "control a business" if it has sufficient market power to set prices above competitive levels for a considerable period. In determining whether a supplier has market power, the Tribunal has stated that it will look to indicators such as market share and entry barriers. The Tribunal has also indicated that, if a firm has a very large market share, it will very likely have market power, but considerations such as the number of competitors and their respective market shares, excess capacity in the market, and ease of entry will also be taken into account.

Unfortunately, there is little helpful authority in Canada regarding the determination of when a company will be found to have the degree of market power required to trigger the potential application of these provisions. However, it would be prudent to exercise caution when a firm's market share is above 40-45%, or when the aggregate market share of a small group of firms which arguably might be "jointly dominant" exceeds this threshold.

The CA contains a non-exhaustive definition of "anti-competitive acts" and virtually any act, if carried out for an intentional predatory, exclusionary or disciplinary purpose against a competitor, may constitute an anti-competitive act.

REFUSAL TO DEAL

In addition, the Tribunal may order a person to supply a product to a customer who is substantially affected in his business or precluded from carrying on his business by a refusal to supply if (i) the customer is not able to obtain adequate supplies of the product anywhere in a market on usual trade terms, (ii) the customer cannot obtain adequate supplies because of insufficient competition among suppliers of the product in the market, (iii) the customer is willing and able to meet the usual trade terms of the suppliers of the product, and (iv) the product is in ample supply.

In deciding whether to exercise its discretion to make an order for supply once the four elements described above have been established, the Tribunal has indicated that it considers a number of factors, including whether the respondent has legitimate reasons for discontinuing to supply (e.g., the attainment of distribution savings), the duration of the supply relationship and the manner in which any cut-off of the customer was implemented.

OTHER NON-CRIMINAL REVIEWABLE MATTERS

Other non-criminal reviewable matters under the CA include: exclusive dealing and tied selling; market restriction; and the civil misleading advertising provisions. At present, with the exception of misleading advertising, there are no fines or monetary penalties for conduct that constitutes a reviewable practice.

ACQUIRING OR ESTABLISHING A BUSINESS IN CANADA

The CA also establishes a comprehensive legislative and regulatory framework for reviewing and controlling mergers and acquisitions in Canada. In addition, transactions that meet certain financial size thresholds may be subject to pre-merger notification requirements and corresponding waiting periods.

Any merger (defined to mean the acquisition or establishment, direct or indirect, of control over a significant interest in all or part of a business of a competitor, supplier, customer, or other person) may be challenged under the CA by the Commissioner before the Tribunal. The Commissioner may bring an application before the Tribunal in respect of a proposed transaction or in respect of a completed transaction provided the application is made within three years of closing. The Tribunal may issue an order with respect to all or any part of a proposed transaction, and may dissolve a completed transaction or order divestiture of assets or shares. The Tribunal may also make any other order to which the Commissioner and the parties to the transaction consent.

Before making any order, the Tribunal must determine that the transaction prevents or lessens or is likely to substantially prevent or lessen competition in the relevant market. In making this determination, the Tribunal generally applies economic and legal analyses similar to those employed by United States courts in antitrust matters. Among the factors that the Tribunal may consider are the likelihood of foreign competition, whether the acquired business has failed or is likely to fail, the extent and availability of acceptable substitutes, barriers to entry and innovation in the market. The Tribunal may also consider whether the transaction results in the removal of a vigorous competitor from the market and whether effective competition would remain in the market following the transaction. However, the Tribunal may allow certain anti-competitive transactions where they fit within narrowly defined statutory exceptions.

PRE-MERGER NOTIFICATION

In addition to the substantive review procedure that may apply under the CA, advance notification may be required for certain large transactions. Subject to certain exceptions, if a proposed acquisition of assets or shares, an amalgamation or other combination to establish an operating business in Canada, where one or more of those operate a business in Canada, exceeds certain financial thresholds, the parties to the transaction are required to notify the Commissioner in advance.

They are also precluded from completing the transaction before the expiry of a statutory waiting period. Notification to the Commissioner may be made by "short form" or "long form" (which provides more information about the transaction and the parties). If a long form notification is submitted, the review period is 42 days. If a short form notification is submitted, the review period is 14 days. However, the Commissioner can require a person who has submitted a short form notification to submit a long form notification, beginning a new 42-day review period. Anyone proposing a competitively sensitive transaction that is subject to pre-notification should therefore consider submitting a long form notification in the first instance.

In general, two size thresholds must be met for the pre-notification rules to apply. First, the parties to the transaction, together with their affiliates, must have total assets in Canada or total revenues from sales in, from or into Canada that exceed $400 million. Second, the transaction itself must be of a minimum size. For acquisitions of assets or the formation of an unincorporated business combination, the Canadian assets acquired or contributed or the annual gross revenues from sales in or from Canada from such assets must exceed $50 million ($70 million for a corporate amalgamation). Share transactions are subject to pre-notification where the value of the Canadian assets or gross revenues derived from the corporation whose shares are acquired and all other corporations controlled by that corporation would exceed $50 million ($70 million for a corporate amalgamation). In addition, the transaction must result in the acquiror holding a minimum percentage of voting shares for the pre-notification rules to apply. In the case of public corporations this threshold is 20% (or 50% if more than 20% of the voting shares are already owned) and in the case of private corporations this threshold is 35% (or 50% if more than 35% of the voting shares are already owned).

Foreign Investment

Foreign Investment

The federal Investment Canada Act ("ICA") may also affect the ability of a person to acquire or establish a business in Canada. The purpose of the ICA is to encourage investment in Canada by Canadians and non-Canadians. The Investment Review Division of Industry Canada is responsible for administering the ICA and for promoting and reviewing significant non-cultural investments in Canada by non-Canadians. Investments in cultural businesses are reviewed under the ICA by Heritage Canada. Any non-Canadian who proposes to establish a new business or acquire an existing business in Canada should be aware of the provisions of the ICA.

A Canadian business is "acquired" for the purposes of the ICA by the acquisition of control of the business. The ICA also includes rules for determining which investors are "non-Canadians" and which are "WTO investors", the meaning of "business" and "Canadian business", when a new business has been established and when control of an existing business has been acquired.

REVIEWABLE TRANSACTIONS

In general, any acquisition by a non-Canadian of control of a business carried on in Canada will either be notifiable or reviewable under the ICA. Whether such an acquisition is notifiable or reviewable will depend on the value of the assets of the Canadian business being acquired. The ICA applies even if the business is not currently controlled by Canadians and also applies where a Canadian business is acquired indirectly through the acquisition of a foreign corporation with a Canadian subsidiary.

The following acquisitions of control of a Canadian business by non-Canadians (who are not WTO Investors) are reviewable in advance by Investment Canada, unless the Canadian business is itself controlled by a WTO Investor:

- a direct acquisition of a Canadian business with assets of $5 million or more;
- an indirect acquisition of a Canadian business with assets of $50 million or more; and
- an indirect acquisition of a Canadian business with assets of $5 million or more if the assets of the Canadian business represent more than 50% of all the assets acquired in the international transaction.

Direct control of a Canadian corporation may be acquired by acquiring voting shares of the corporation or all or substantially all of the assets used in carrying on the Canadian business. Indirect control of a Canadian corporation is acquired by purchasing voting shares in a non-Canadian corporation that controls the Canadian corporation or by acquiring voting interests in a non-Canadian non-corporate entity that controls the Canadian corporation.

However, except for investments in certain sensitive industries, the thresholds set out above have been significantly increased or eliminated for WTO investors. A direct acquisition by a WTO investor is reviewable only when the assets exceed $250 million. This amount applies to transactions completed in 2005 and varies annually according to a GDP-based formula. Review of indirect acquisitions by WTO investors has now been completely phased out. A WTO investor would include an entity whose voting interests are ultimately controlled, directly or indirectly, by a member of the WTO such as the United States. The ICA has detailed rules for determining the control of an entity.

For the purposes of determining whether an investor has acquired control of a corporation by acquiring shares, the following general rules apply:

- acquisition of a majority of voting shares is deemed to be acquisition of control;
- acquisition of one-third or more but less than a majority of voting shares is presumed to be the acquisition of control, unless it can be shown that the acquired shares do not give control in fact to the investor; and
- acquisition of less than one-third of the voting shares of a corporation is deemed not to be acquisition of control.

There are other rules that may apply as well.

If an acquisition is reviewable, the investor must file an application for review with Investment Canada or Heritage Canada, in the case of cultural businesses. With limited exceptions, the application must be filed and approval granted before completing the transaction. The Minister of Industry has an initial period of 45 days to determine whether the investment will be of net benefit to Canada and may require a 30-day extension. If the Minister does not send a notice to the applicant within the prescribed period, he or she is deemed to be satisfied that the investment is likely to be of net benefit to Canada.

The factors which the Minister will consider include:

- the effect of the investment on the level and nature of economic activity in Canada;
- the degree of participation by Canadians in the Canadian business in particular and in the relevant industry in Canada in general;
- the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;
- the effect of the investment on competition in the relevant industry or industries in Canada;
- the compatibility of the investment with Canadian industrial, economic

and cultural policies, taking into account the policy objectives of affected provinces; and

- the effect of the investment on Canada's ability to compete in world markets.

If the Minister is not satisfied, he must send a notice to the applicant, advising the applicant of its right to make representations and to submit undertakings. The Minister's final determination will be made in the light of such representations and undertakings.

CULTURAL INDUSTRIES AND OTHER EXCEPTIONS

The higher WTO investor thresholds do not apply to investments in certain sensitive industries. These include investments in undertakings that provide financial or transportation services or engage in uranium mining, or investments that may affect Canada's cultural heritage or national identity ("cultural businesses"). The establishment of a new business or the acquisition of control of a Canadian business that might not otherwise be reviewable under the ICA may be reviewable if any part of the business falls within one of these areas.

Cultural businesses include the following:

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

In addition, there are "anti-avoidance" provisions in the ICA that permit the Minister to deem an entity which carries on or proposes to carry on any of the above-noted cultural activities to be a non-Canadian on the basis that the entity is controlled in fact by one or more non-Canadians. Similarly, the Minister may deem a transaction to be an acquisition of control where one of the entities involved carries on or proposes to carry on any cultural business.

NOTIFICATION

Even if an investment by a non-Canadian is not reviewable, a non-Canadian investor must still file a notice with Investment Canada any time up to 30 days after establishing a new Canadian business or acquiring an existing business in Canada.

Industrial and Intellectual Property

Industrial and Intellectual Property

PATENTS

The process for obtaining a patent in Canada is set out in the federal Patent Act. Such process is generally consistent with patent legislation in other countries which are signatories to the Patent Cooperation Treaty of 1970.

To qualify as patentable, an invention must be novel and useful, and must constitute a creative step in the development of a new product. The invention may be any new and useful art, process, machine, manufacture, composition of matter, or improvement in any of the above categories.

The basic principle of the Patent Act is that a patent is only granted to an original inventor or to his or her legal representatives. Companies that employ inventors therefore should clarify the ownership of inventions in written agreements with those individuals. In addition, a patent is granted on the basis of the first to file, unlike the first to invent rule applied in some other jurisdictions, such as the United States. Because of the importance of the filing date of an application, an applicant should make every effort to file at least the minimum permitted information as early as possible.

There is no requirement in Canada that a product be marked as patented, although it may be prudent to do so, in order to give notice of the patent to third parties. However, it is an offence to mark an article as "patented" if it has not been patented in Canada.

The term of a Canadian patent depends on the filing date. For applications filed before October 1, 1989, the term of the patent is 17 years from the date of the granting of the patent. For applications filed after October 1, 1989, the term of the patent is 20 years from the date of the filing of the application in Canada.

A patent is infringed by any interference with the patentee's exclusive right to make, construct or use the invention or to sell it to others for their use. A patentee may seek an injunction to stop the infringement and may also claim for damages resulting from the infringement.

If a person has a patent (or has filed an application) in another country, in accordance with the terms of any patent treaty or convention to which Canada is a party, it has the same force and effect as if filed in Canada, provided that the application is filed in Canada within 12 months after the date of filing in the other country.

A number of requirements must be met in order for a Canadian patent to be granted.

First, novelty is a condition of patentability in Canada. Therefore, any public disclosure of an invention, in Canada or elsewhere, before the filing date of a Canadian patent application can be a bar to patentability. However, if the disclosure is by the applicant or a person who has been informed by him or her of the invention, the applicant has a 12-month period during which to file an application.

Secondly, a patent will only be granted if the invention can be given tangible form and if it can be sold. For example, it would be impossible to be granted a patent for a scientific principle, an abstract theorem, a medical treatment or a way of doing business.

Thirdly, an invention has to be moral and legal in order for it to be granted a patent.

Special provisions apply to computer software and medicines. While most computer software is covered under copyright protection, a patent may be possible if the software forms an integral part of another patentable invention. Applications for patents of medicines entail their own special regime that includes a number of specific reporting and pricing requirements. First, the issuance of a notice of compliance for a new drug by Health Canada is subject to the protection of patent holders' rights. Second, and as a counterbalance to this prerogative, the Patented Medicine Prices Review Board controls the prices at which patented medicines may be sold in Canada.

TRADE-MARKS

Legal rights to a trade-mark may arise from usage alone, but these rights are limited. An unregistered mark may be protected against use by another person of a confusing mark, but only in respect of use in the same trading area. So although registration of a trade-mark is not mandatory, it is advisable.

An applicant who registers a mark under the federal Trade-marks Act is granted the exclusive right to use the mark throughout Canada (irrespective of the extent of use), the right to prevent the use of a confusing mark and the right to register the mark in countries adhering to the Paris Convention and in WTO countries.

An application for registration must show that the mark is in actual use in Canada, or that the applicant proposes to use the mark in Canada. A foreign applicant may rely on foreign registration and use or, in appropriate circumstances, on the fact that the trade-mark used in the foreign country is becoming well known in Canada. Generally, once a trade-mark application has been examined, approved and advertised without successful opposition, it will be granted and the trade-mark registered. A registration is for a term of 15 years and may be renewed for an indefinite period of time.

Registration may be refused for a number of reasons, such as if the trade-mark is merely the name or surname of an individual, is misleading, is too general, is merely descriptive, or if it is confusing with a registered trade-mark. Some unregistrable trade-marks may become registrable if they acquire a "secondary" meaning; for example, a person's name like "Calvin Klein" may become eligible for a trade-mark if it can be shown that the name has become distinctively indicative of a certain product.

Again, while there are no requirements in Canada that a registered trade-mark be used with a symbol such as "TM", or that goods bearing a registered trade-mark so indicate, such practices may be prudent to give notice to third parties of the trade-mark.

Trade-marks may be licensed to third parties. Use by a licensee without the "control" of the trade-mark owner or without disclosure of the licence may result in the loss of the trade-mark's distinctiveness and the possible expunging of the mark. Use of a licensed trade-mark is required to be subject to the direct or indirect control of the trade-mark owner. A written licence agreement is advisable. To the extent that the existence of the licence is made public, there is a presumption that the use by the licensee of the trade-mark in question will not jeopardize the distinctiveness of the trade-mark.

Trade-marks may also be assigned and it is recommended that assignments of registered trade-marks be filed with the CIPO.

Any unauthorized use of a trade-mark may lead to civil liability and criminal remedies.

COPYRIGHT

The federal Copyright Act grants an exclusive right to the copyright holder of any original literary, dramatic, musical or artistic work to control the copying and other commercial exploitation of that work. The copyright holder has the exclusive right to publish, produce, reproduce, translate, broadcast or adapt the copyright works, to perform or cause them to be performed in public and to authorize all such acts. Generally, copyright in Canada exists for the life of the author and 50 years following the end of the year of his or her death. Other terms apply to particular works, such as photographs, phonograph records, posthumous works, and works authored jointly, where differing criteria are applied to determine the duration of the copyright.

Copyright arises automatically in Canada in respect of any original literary, dramatic, musical or artistic work, including a compilation thereof and in a sound recording, provided that the work created is original and has been fixed on a permanent support. Copyright can be granted if the creator or author of the work is a citizen or subject of, or ordinarily resident in, a country that is a party to the Berne Convention or the Universal Copyright Convention, or a member of the WTO.

The Copyright Act provides a system for the registration of copyright interests and assignments of copyright interests. Registration is not necessary to create copyright in a particular work, but does serve as prima facie evidence of copyright ownership and strengthens the remedies available to a party whose copyright is infringed.

Again, marking of copyright material is not essential in Canada, but it may be prudent and is required in order to obtain copyright protection under certain international treaties.

In most cases, copyright belongs initially to the author of the work. The most prominent exception to this rule is that copyright in works created in the course of employment belong initially to the employer, unless there is an agreement to the contrary. In the case of an independent contractor, it is advisable to stipulate ownership of the copyright in a written agreement.

Anyone using a work without the copyright owner's consent infringes the copyright. In addition, persons who rent, sell, distribute or import infringing works are indirect infringers of copyright under Canadian law. Under the Copyright Act infringers may be subject to civil remedies brought by copyright owners and to criminal penalties.

In addition to the economic rights mentioned above, the Copyright Act gives authors certain moral rights. These include the right of an author or creator to claim authorship of the work and the right of integrity of the work, that is, the right to restrain or sue for damages in respect of any distortion or modification of the work which prejudices the integrity or reputation of the creator. Moral rights exist for the same term of copyright in the work. They belong to the author and may not be assigned, although they may be waived in whole or in part. The assignment of a copyright in a work does not, by that act alone, constitute a waiver of any moral right.

The Copyright Act provides protection for computer programs in both source code and object code. There is also jurisprudence which indicates that there may also be copyright protection to the non-literal aspects of a computer object or source code, for example, in the structure or algorithm of the program.

The copyright reform process initiated by the Canadian government in 2001 is intended to result in other amendments to the Copyright Act to deal with the implications of technological changes. Pursuant to this process, the Copyright Act has been amended to protect performers' copyright in their performances and to deal with copyright issues and compulsory licencing in the context of retransmission. The latter amendment provides that existing distribution systems, such as cable and satellite, may continue to rebroadcast over the air radio and television signals and establishes the power to allow new types of distribution systems, such as the Internet, to retransmit, provided they meet regulatory requirements.

Canada is a party to the World Intellectual Property Organization ("WIPO") Copyright Treaty and the WIPO Performances and Phonograms Treaty. In order to comply with these two WIPO treaties, the Copyright Act will have to be amended by the federal government to address a number of issues including:

- adequate legal protection and remedies against the circumvention of effective technological measures (such as data encryption, signatures, access codes and asymmetric key systems) that are used by authors in connection with the exercise of their rights; and
- adequate and effective remedies against persons who tamper with electronic rights management information (e.g. information which identifies the work, the author of the work, the owner of any right in the work, etc.) without authority or who copy works knowing that electronic

rights management information has been removed or altered without authority.

DOMAIN NAMES

A major reform of the domain names system came into force in 2000 in order to adapt the Canadian system to the growth of the Internet and electronic commerce.

The Canadian Internet Registration Authority ("CIRA") is now responsible for the ".ca" system, which is governed by Canadian law. The ".com" domain name system, which designates commercial activities, is governed and managed by the United States under American law.

This reform established a new requirement for those who wish to register under the ".ca" domain. To register a ".ca" name, both companies and individuals need to meet certain Canadian presence requirements in order to ensure that the ".ca" domain names remain a public resource for Canadians' social and economic development.

The new rules removed the "one domain per organization" rule and introduced a "first-come first-served" system which no longer requires evidence of entitlement to a proposed domain name (i.e., by providing proof that the proposed domain name is a corporate/business name or a trade-mark). Canadian companies and Canadian individuals can now register as many domain names as they wish.

The applicant must conduct a WHO IS search to ensure that the chosen domain name is available. It is also the applicant's responsibility to ensure that it has the right to use the domain name, that the registration or use of the domain name does not violate any third party's intellectual property rights or other rights, does not defame any person and does not contravene any applicable laws. However it is not possible to directly register a domain name. A CIRA-certified registrar, who acts on behalf of the applicant, must register and pay the applicable fees. The registration period is valid for one to ten years and is renewable.

It has to be noted that registration of a ".ca" domain name does not give the registrant any additional rights beyond the mere right to use the name.

The CIRA has a dispute resolution policy that regulates domain name conflicts and has the power to transfer or cancel domain names.

INDUSTRIAL DESIGN

The federal Industrial Design Act provides an exclusive right to exploit original design features. "Industrial design" generally refers to the aesthetic properties of an article, such as a pattern, shape and configuration, as opposed to its function.

In order to be registrable, an article based on a design must be useful, have a fixed appearance and be visible at the time of purchase or during normal use.

Both Canadian and non-Canadian owners of designs can register them with CIPO.

Registration grants an exclusive right to make, sell, rent, license or import for trade or business the design applied to any article for which it is registered for a period of ten years. Once a design has been registered, it may also be eligible for protection under patent, trade-mark or copyright legislation. An industrial design registration protects not only the specific design registered, but also any design not differing from it.

The registration of an industrial design is much less costly than obtaining a patent and can usually be obtained within six to twelve months. However, no registration can be obtained if the application is filed more than twelve months after making the design public or offering it for commercial use. This includes distributing samples of an article bearing the design, selling or exhibiting such articles for sale, publishing the design in advertising or other printed material of any sort, or public use of articles bearing the design.

Most countries have signed the Paris Convention. This international treaty allows the applicant of a design to claim priority in respect of an earlier filed design application. Applications filed in a country where the Paris Convention applies, within six months of the filing date of the original application, are treated as though they were filed on the original filing date.

OTHER FORMS OF PROTECTION

Certain other specialized intellectual property rights are provided for in other federal statutes, including the Plant Breeders' Rights Act and the Integrated Circuit Topography Act.

E-COMMERCE

Canada has taken initiatives to create a legal and regulatory infrastructure that fosters the growth of e-business and Internet activity, including increasing Canada's e-government capabilities, enacting federal and provincial legislation concerning privacy protection and electronic transactions and pursuing a wide range of regulatory policy initiatives.

All of the provinces of Canada and one territory have passed electronic commerce enabling legislation in order to normalize the legal rules applicable to documentary communication, irrespective of the medium used. This legislation usually addresses issues related to electronic document equivalency and reliability, digital signatures and electronic record creation, maintenance and retention. In addition to provincial legislation, the federal government has enacted the Personal Information Protection and Electronic Documents Act ("PIPEDA"), which, among other things, deals with electronic documents and governs the rules applicable to the use of "electronic alternatives… where federal laws contemplate the use of paper to record or communicate information or transactions." PIPEDA also deals with data protection and privacy, as is discussed further below.

As long as the general legal principles of contract formation are adhered to, laws in Canada concerning the creation of contractual obligations are generally media-neutral. However, legal issues may arise whether enforceable contracts can be formed through such on-line contracting methods as "click-wrap" or "browse-wrap" agreements. While a "click-wrap" agreement has been declared enforceable by an Ontario court, it is unclear whether "browse-wrap" agreements will be treated in the same way. A "click-wrap" agreement is an agreement where the terms and conditions are accepted by a party by clicking on an "I Agree" or similar button or icon. On the other hand, a "browse-wrap" agreement is an agreement where the terms and conditions are posted on the web-site and a party is deemed to have accepted these terms and conditions by virtue of having "used" the web-site. Businesses should consult their legal advisors before putting into place such on-line contracting methods so as to ensure that they comply with the requirements of an enforceable contract under Canadian law.

Advertising on the Internet is subject to the provisions of the CA, which impose a dual criminal and civil adjudicative regime (see the "Competition Law" section of this guide). In addition, other statutes, such as the Food and Drugs Act, provincial consumer protection legislation, and, in Québec, the Charter of the French Language, provide specific restrictions on the content and style of an advertisement in relation to certain classes or types of products. For example, under the Charter of the French Language, the advertisements for products available in Québec posted on the website of a company having an address or a physical establishment in Québec must be available in French. However, advertisements for products such as cultural or educational products (i.e., books, CDs, etc.) may be exclusively in a language other than French, provided that the products themselves are in that other language.

Moreover, a publicity contest offered on a web-site to residents of Québec will be required to comply with An Act respecting lotteries, publicity contests and amusement machines. Publicity contests must be pre-registered with an agency of the Québec government and a fee must be paid and security posted in certain circumstances.

DATA PROTECTION AND PRIVACY

Since January 1, 2004, PIPEDA applies to the collection, use and/or disclosure of personal information in the course of any commercial activity within Canada. "Personal information" means information about an identifiable individual, but does not include the name, title or business number of an employee of an organization (commonly referred to as "business card" information). "Commercial activity" means "any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists". Businesses are required to establish an administrative structure to ensure that ten "privacy principles" are implemented: (1) accountability; (2) identification of the purpose for which the information is gathered; (3) consent; (4) limitations on collection; (5) limitations on use, disclosure and retention; (6) accuracy; (7) ensuring appropriate safeguards are in place; (8) openness; (9) individual access; and (10) challenging compliance. These principles were developed in response to the international OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data.

As a result of the enactment of PIPEDA, it is now strongly recommended that businesses implement privacy policies in respect of the collection, use and disclosure of personal information and make these policies available to their customers. In addition, the legislation requires businesses to make the information collected about individuals available to them upon request.

Québec, Alberta and British Columbia have all enacted legislation which is substantially similar to PIPEDA. As such, the provincial legislation enacted in those provinces applies to the collection, use and disclosure of personal information for provincially regulated businesses.

More recently, PIPEDA has been used to combat unsolicited commercial e-mail ("SPAM"). It is estimated that, in 2004, 70% of global e-mail was SPAM. The Privacy Commissioner recently released a decision in which it was decided that a person's workplace e-mail address would be considered "personal information" for the purposes of PIPEDA. In addition to privacy legislation, both the Criminal Code and the CA may be used to punish the senders of SPAM.

Employment Law

Employment Law

Canadian employment legislation applies to employees who work in Canada even if the employer is outside Canada. Most employees are under provincial jurisdiction, but federal legislation governs employees of federally-regulated undertakings such as telecommunications, railways, banking and certain interprovincial enterprises.

MINIMUM STANDARDS

Each province has employment standards legislation setting out minimum entitlements for employees. Similar standards are provided for employees under federal jurisdiction by the Canada Labour Code.

The main areas covered by this legislation include minimum wages, overtime, hours of work, vacation and holidays, pregnancy and/or parental leaves of absence and notice of termination. Employment standards legislation applies to most employees, but most statutes provide specific exemptions from their requirements for certain types of employees (for example, commissioned travelling salespersons).

In general, the standards imposed are relatively consistent across Canada. However, there can be significant differences in detail between jurisdictions, not only in the standards required but also in other matters such as the remedies available to employees. For example, in Ontario an employer can only be ordered to reinstate a terminated employee in limited circumstances (for example, if the employer has improperly terminated an employee because she has taken pregnancy leave), whereas the Canada Labour Code and Québec legislation give employees potentially much broader rights to seek reinstatement.

The legislated minimum standards cannot be contracted out of nor waived by employees. Terms more favourable to employees than the minimum standards can also be agreed upon, either in an individual employment contract or, in the case of unionized employees, a collective agreement. In Canada, agreed terms of employment will typically be more generous to employees, at least in certain respects, than the statutory minimum standards. In addition, non-statutory legal principles may also impose additional obligations on employers, particularly in connection with the termination of employees: see "Termination of Employees" below.

In Ontario and Québec, employment standards legislation provides that where a purchaser of all or part of a business employs any of the former employees, their employment is deemed to be continuous for the purpose of the legislation (e.g., if the purchaser later terminates any of these employees, it must recognize their prior service with the seller in giving notice of termination). The Ontario Employment Standards Act, 2000 also provides for related employers to be treated as a single employer for purposes of the Act. This is meant to prevent employers from splitting their payroll in order, for example, to avoid payment of severance pay, which is payable to employees with more than five years service, if the employer has a payroll of $2.5 million or more, or there is a "mass lay-off" of 50 or more employees.

In Québec, An Act respecting labour standards generally does not apply to senior managerial personnel, which has been interpreted as applying only to a limited group of individuals who participate in the decision-making process with respect to the policies and the strategies of the organization.

The Québec statute provides recourse for employees who are victims of specified prohibited practices, including psychological harassment. A remedy is also available to employees who have more than two years of service and who believe they were dismissed without cause. An employee who is successful in challenging the employer's conduct may request to be reinstated in his or her employment, in addition to being awarded any lost wages.

The Québec statute allows an employee to be absent from work for an extended period of time for reasons related to his or her health or the health of his or her family. For example, an employee can be absent for as much as 104 weeks if his or her child has a serious and potentially fatal illness (rights to leaves of absence under the Ontario statute are much less generous). Moreover, the employer has the obligation, at the end of the leave of absence, to reinstate the employee in his or her former position with the same benefits, including the wages to which the employee would have been entitled had the employee remained at work.

In both Ontario and Québec, additional requirements are imposed in respect of the simultaneous termination of large numbers of employees, which may include the giving of additional notice to employees and providing prescribed information regarding the impact of the termination to provincial authorities.

LABOUR RELATIONS

Canada promotes the principle of collective bargaining between employers and employees. Employees, excluding those in managerial positions, may form bargaining units represented by specific trade unions. Unions are often organized along industry lines, such as the automotive or retail industry.

Once a union has been certified and has given notice to the employer, the employer has a duty to bargain with the union in good faith to reach a collective agreement. A number of statutory conditions must be met before employees can lawfully strike or an employer can lawfully lock them out. Conciliation, arbitration and mediation are tools available to help employers and employees settle disputes. Labour disputes are adjudicated in Ontario by the Ontario Labour Relations Board, in Québec by the Commission des relations du travail and for federally-regulated employees by the Canada Industrial Relations Board. These specialized tribunals also deal with issues relating to the organization of unions and their representation of employees, with a view to preventing unfair labour practices and encouraging good faith bargaining.

While some Canadian jurisdictions limit the use of strikebreakers and require employers to maintain striking workers as employees, the Québec Labour Code prohibits altogether an employer from hiring anyone to replace striking or locked-out employees unless the replacement is a management employee who works in the establishment affected by the strike or lock-out.

EQUALITY

HUMAN RIGHTS

The federal government and all the provincial governments have adopted human rights legislation, which prohibits discrimination in the workplace.

In Ontario, the Human Rights Code provides that, subject to bona fide occupational requirements, an employer must treat people equally without discrimination or harassment on the basis of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status or physical or mental disability. Alcohol or drug dependence has been found to be a disability for the purpose of the Human Rights Code. Therefore, employers in Ontario generally cannot impose mandatory drug testing of all employees. The Ontario Human Rights Commission administers the Code and investigates complaints of discrimination. It has the power to settle complaints or refer them to the Human Rights Tribunal of Ontario, which can make orders where it finds that a complaint is justified, awarding monetary compensation or other restitution to the complainant, or requiring a party in contravention of the Code to comply with it.

The Québec Charter of human rights and freedoms provides that no one may discriminate on prohibited grounds in respect of the hiring, apprenticeship, duration of probationary period, vocational training, promotion, transfer, displacement, laying-off, suspension, dismissal or conditions of employment of a person or in the establishment of categories or classes of employment. The prohibited grounds are race, colour, sex, pregnancy, sexual orientation, civil status, age (except as provided by law), religion, political convictions, language, ethnic or national origin, social condition, handicap, or the use of devices to palliate a handicap. However, the Charter specifies that distinction, exclusion or preference based on the aptitudes or qualifications required for employment, or justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution or an institution devoted exclusively to the well-being of an ethnic group is deemed non-discriminatory. It also provides that every employer must pay equal wages to every employee performing equivalent work at the same place without discrimination on prohibited grounds.

Québec's Commission des droits de la personne et des droits de la jeunesse investigates complaints of discrimination and acts as a conciliator between the parties. If conciliation fails, the matter may go to negotiated settlement or before an arbitrator or, if recourse to such remedies is not agreed to by the parties, to a hearing before the Tribunal des droits de la personne. The Tribunal may impose any remedial measures, including the reinstatement of a worker when such outcome would be fair and expedient under the circumstances.

PAY EQUITY

It is illegal in every province in Canada to pay a woman less for doing the same job as a man.

Ontario and Québec each have adopted, through a Pay Equity Act, the principle of equal pay for work of equal value. Women in "female job classes" who perform jobs of similar value to employees in "male job classes" have the right to salary readjustments.

In Ontario, the Act applies to all private sector employers who employ 10 or more employees and all employers in the public sector. In Québec the Act applies to private and public sector employers with 10 employees or more. However, in the private sector certain provisions of the Ontario Act, requiring an employer to devise a pay equity plan, apply only to employers with 100 or more employees.

EMPLOYMENT EQUITY

The Employment Equity Act applies to federal sector employers only. The legislation is an "affirmative action/hiring quota" system designed to encourage employers to hire and promote women, aboriginal people, the disabled and visible minorities. Certain non-federal sector employers must comply with the Employment Equity Act in order to obtain federal contracts.

EMPLOYMENT INSURANCE

Employers and employees in Canada are required by the Employment Insurance Act to contribute to the employment insurance account administered by the federal government. An employee's premiums are calculated each year. For 2005, the employee premium is 1.95% of insurable earnings up to a maximum of $39,000 (so that the maximum employee premium in 2005 is $760.50). The employer must pay a premium equivalent to 1.4 times the employee's premium. The employer's contributions are deductible for tax purposes as a normal business expense and may be reduced if the employer supplies a salary insurance scheme to its employees.

Unemployment insurance benefits are paid to employees who lose their jobs due to lay-off or termination. Employees on maternity leave, parental leave, or absent due to illness are also covered.

Self-employed persons are ineligible. Also, no benefits are paid to those who quit a job without cause or who are fired for misconduct.

In Québec, when the provisions of the Act respecting parental insurance come into force, a parental insurance plan will grant benefits upon the birth of a child or the adoption of a minor to the parents. Consequently, every employee resident in Québec and every employer will be required to pay a premium.

CANADA PENSION PLAN

The Canada Pension Plan ("CPP") is compulsory. With the exception of employers and employees in Québec, all employers and employees in Canada are required to contribute to this Plan. Québec has a provincial pension scheme ("QPP") which provides benefits comparable to the CPP. The employee's contribution under the CPP or QPP is a percentage of earnings which is matched by the employer's contribution. The employer can deduct contributions under CPP or QPP for tax purposes as a business expense.

CPP provides several possible types of benefits for employees who have made a minimum contribution towards the Plan:

- retirement pensions to contributors who have reached 65 years of age;
- benefits to a surviving spouse and/or surviving dependant child of the contributor; and
- disability benefits to a contributor who is no longer able to secure substantially gainful employment.

Each of the employee's and employer's contributions for 2005 is 4.95% of earnings up to a maximum of $37,600 (so that the maximum contribution payable in 2005 by each of the employee and the employer is $1,861.20). The contribution rates change annually according to a schedule covering the period up to the year 2016. The CPP provides that, every five years, the Minister of Finance and the ministers of the included provinces will review the schedule and determine if it should be modified.

All provinces also have pension benefits standards legislation governing the elements of a private pension plan.

OCCUPATIONAL HEALTH & SAFETY AND WORKERS' COMPENSATION

Each of the provinces has enacted legislation to establish certain standards for occupational health and safety and to compensate employees who are injured in the course of their employment.

In Ontario, employers must meet the safety standards in the Occupational Health and Safety Act, which:

- encourages health and safety programs through mandatory committees of management and worker representatives;
- imposes duties on employers, supervisors, workers, and other persons (e.g. owners) concerning workplace safety;
- provides employees with access to information regarding the presence of hazardous materials at the workplace; and
- permits employees to refuse to work where they have reason to believe that their safety or that of another employee is endangered.

The legislation is enforced internally by workplace health and safety committees and externally by inspectors appointed by the Ontario Ministry of Labour. Directors and officers of a corporation have a duty to take reasonable care to ensure that the corporation complies with the statute.

Ontario employers must register with the Workers' Compensation Board under the Workplace Safety and Insurance Act. The failure to do so within 10 days of becoming an "employer" is an offence. Most workers injured in accidents arising from employment or suffering from an occupational disease may receive compensation from the fund established under this legislation, but cannot sue the employer for damages arising from such injuries.

In Québec, An Act respecting occupational health and safety is intended to eliminate dangers to the health, safety and physical well-being of workers. It grants an employee the right to refuse to perform work if there is reasonable cause to believe that the work would expose him or her to risks to health, safety or physical well-being or expose an unborn or breast-fed child to such risks, in the case of a pregnant or breast-feeding worker. Employees cannot contract out of the statute, although employees may agree with employers upon more favourable working conditions than the minimum standards required by law.

Québec's Act respecting industrial accidents and occupational diseases provides for compensation for injuries arising from employment and may include income replacement, compensation for bodily injuries, treatment, rehabilitation, and death benefits. Compensation is based on a no-fault system. Workers injured by accidents arising from employment or suffering from an industrial disease may receive compensation from the fund established for such purposes; they cannot, however, sue the employer for damages. In certain circumstances, the statute may apply to employers who do not have an establishment in Québec at the time when the accident occurs or the disease is contracted.

Under the Workplace Hazardous Material Information System, employers in all provinces have an obligation to provide information and educational programs to employees who work with hazardous materials.

EMPLOYER HEALTH TAX

The Ontario Health Insurance Plan is partially funded by an employer health tax. Employers who have permanent establishments in Ontario are required to pay the tax at a graduated tax rate ranging from 0.98% to 1.95% per year, depending on the total amount of remuneration paid in the year by the employer to its employees. Eligible employers are exempt from employer health tax on the first $400,000 of Ontario payroll. Self-employed individuals are not required to pay health tax on their self-employment income.

Under An Act respecting the Régie de l'assurance-maladie du Québec, except for a few employers, every employer in Québec must pay to the Minister of Revenue a contribution ranging from 2.7% to 4.26% of the wages paid to its employees in the province to finance the health plan.

TERMINATION OF EMPLOYEES

In the absence of just cause for termination (which is generally construed narrowly by courts and tribunals in Canada), all employees whether unionized or not are entitled to notice of termination. The notice may be by way of "working notice" or pay in lieu of such notice. The amount of notice is, at a minimum, the statutory requirements as set out in the relevant employment standards legislation, or the requirements of the applicable collective agreement, for unionized employees. Because minimum statutory employment standards for notice of termination cannot be contracted out of or waived, terms in an employment agreement that provide for "termination at will", or for notice of less than the statutory minimum, will not be enforceable. Otherwise, a notice period for termination stipulated in an employment agreement will, in most cases, be enforceable. However, Canadian courts are often reluctant to enforce employment agreements that appear to have been imposed on employees by an employer, with little opportunity for employees to negotiate the terms.

If a non-unionized employee is employed for an indefinite term and no specific period of notice of termination has been stipulated in an employment agreement, upon the employee's termination, in addition to the employee's right to the statutory minimum notice or payment in lieu of notice, the employee is entitled to sue in court for damages if the notice of termination has not been "reasonable".

A court's determination of what is "reasonable" will depend on the individual circumstances of the employee, primarily length of service, age, character of employment (i.e., level in the corporate hierarchy), remuneration, availability of similar alternative employment in the geographic locale and whether the employee has been enticed away from previous secure employment. The conduct of the employer at the time of the termination may also be a factor in determining compensation.

"Reasonable" notice of termination, as construed by a court, will usually exceed the minimum statutory requirements. While statutory notice of termination generally will not exceed eight weeks, a court may award a long-service employee notice of 12 months or more.

MANPOWER TRAINING

Québec's Act to foster the development of manpower training requires most employers with a payroll in excess of $1 million to spend an amount representing at least 1% of their total payroll on eligible training expenditures. Employers who do not spend the minimum amount fixed by law are required to pay to the Minister of Revenue the difference between the statutory amount and the amount actually spent.

Temporary Entry and Permanent Residence

Temporary Entry and Permanent Residence

A non-Canadian who wishes to work in Canada has two options: temporary entry or permanent residence. In all provinces except Québec, an applicant must meet only Canadian federal government requirements; in Québec, an applicant must satisfy Québec immigration criteria as well.

The following is intended to outline generally the rules facilitating cross-border movement of business persons in North America under NAFTA, and among WTO member nations under the General Agreement on Trade in Services ("GATS"), as well as some general immigration rules that are of particular relevance to business persons.

TEMPORARY ENTRY

GENERAL

Any company carrying on business in Canada must assist employees who are neither permanent residents of Canada nor Canadian citizens to obtain employment authorizations before they can be lawfully employed in Canada. This is done by obtaining a job offer validation from a Human Resources Development Canada office. An employment authorization, commonly called a work permit, is usually issued for an initial period of six months to one year but may be extended for a period of up to five years following the date of entry.

To obtain a validation of an employment offer, the company must satisfy Canadian authorities that employment opportunities for Canadians will not be adversely affected if it employs the non-resident. This will entail convincing Canadian authorities that the company has attempted to hire Canadians for that position and either no Canadian fulfilled the job requirements or no Canadian responded to the company's advertisement.

An applicant for an employment authorization who is not sent by a company must prove that he or she has already obtained employment in Canada and that no Canadians could be found to fill that position.

Some people need not obtain an employment authorization: for example, diplomats, employees of a corporation who come to a Canadian affiliate for less than 90 days for the purpose of consulting with other employees of the corporation and governmental or business representatives who come to Canada to purchase or sell goods for that business or government for less than 90 days, provided they do not sell directly to the general public.

INTERNATIONAL AGREEMENTS

In recent years, Canada has concluded several international agreements relating to trade and commerce in general.

NAFTA provides a streamlined procedure under which certain North American business persons who are citizens of the United States or Mexico may enter Canada to work temporarily. GATS provides similar rules for more restricted categories of citizens of WTO member nations.

The procedures that have been in place in Canada since 1989 under the FTA were extended to Mexico by the adoption of NAFTA on January 1, 1994 and to Chile through the Canada-Chile Free Trade Agreement on July 5, 1997. The procedures under GATS are similar to NAFTA and therefore only major differences will be noted.

Under NAFTA, there are four categories of business persons who qualify for the streamlined process:

- Business visitors;
- Traders and investors;
- Professionals; and
- Intra-company transferees.

A "business visitor" is a business person who is seeking temporary entry into Canada for one of a series of specific purposes listed in NAFTA and therefore cannot be seeking to join the domestic labour market. Persons who so qualify need not apply for a work permit and may be admitted to Canada at a port of entry.

A "trader" is a business person who seeks temporary entry to carry on substantial trade in goods and services and who will be employed in a supervisory or executive capacity.

An "investor" is a business person who seeks entry to develop and direct operations of a business in which he or she has invested or will invest a substantial amount of capital.

A "professional" is a business person who will engage in one of a number of specifically listed professions (over 60 under NAFTA as opposed to only 6 (or 9) under GATS) while in Canada temporarily. The minimum requirements, generally speaking, are a bachelor's degree, sometimes combined with practical experience. Under GATS, the three-month period for which a professional may be admitted cannot be extended. NAFTA has no such restriction.

An "intra-company transferee" is a person who has been employed by the company or an affiliate or subsidiary for at least one year within the three-year period immediately before the date of application and who is coming to Canada to work temporarily for the same employer or a subsidiary or affiliate in a capacity that is executive, managerial, or involves specialized knowledge. Under GATS, the person must be employed by the company for at least one year immediately preceding the application.

Traders, investors, professionals and intra-company transferees who are United States or Mexican citizens coming into Canada temporarily must obtain work permits. However, they need not comply with the prior approval procedures, petitions, labour certification tests and other similar procedures generally required to obtain a work permit. However, all business persons are still subject to general security and health restrictions.

PERMANENT RESIDENCE

GENERAL

A person who wants to settle permanently in Canada can be admitted under one of three main classes of immigrants: the family class, the refugee class (which will not be discussed) or the economic classes.

Members of the family class include a spouse or fiancé(e), an unmarried child and, in certain circumstances, a parent, grandparent or other close relative. To be admitted under the family class, an applicant must be sponsored by a close family member who is a Canadian citizen or a permanent resident.

Within the economic classes, persons in the "skilled workers" category are assessed based on a point system involving a series of criteria including employment experience, education, proficiency in the official languages of Canada, age, the existence of an arranged employment offer and adaptability.

Certain of the economic classes, called "self-employed immigrants", "entrepreneurs" or "investors", can take advantage of the Business Immigration Program.

THE BUSINESS IMMIGRATION PROGRAM

The Business Immigration Program is a special program designed to facilitate immigration for qualified business persons who intend to invest capital in Canadian business ventures. It applies to three categories of immigrants: "self-employed persons", "entrepreneurs" and "investors".

In general, the Business Immigration Program gives people who want to engage in business in Canada priority in the processing of their applications. Business immigrants may be conditionally or unconditionally admitted into Canada, depending on the circumstances.

The "self-employed persons class" are those with relevant experience who have the intention and ability to become economically established in Canada and who have previous experience as self-employed persons in cultural activities or athletics, who have participated at a world-class level in cultural activities or athletics, or who have experience in farm management.

"Entrepreneurs" are people with the intention and ability to purchase, establish, or make an investment in a business or commercial venture in Canada, and who plan to take an active role in its management. The business must contribute to the Canadian economy and create jobs for Canadians. The entrepreneur is assessed on his or her track record, experience in a specific sector and on his or her financial capacity to undertake a significant enterprise. The entrepreneur must demonstrate management experience and control of a percentage of equity in a "qualifying business". In order to qualify, the applicant's current business must meet certain standards regarding number of full-time jobs, total annual sales, net income and net assets. After the entrepreneur arrives in Canada, his or her status as a permanent resident is conditional upon the establishment of a "qualifying Canadian business". Within thee years of becoming a permanent resident, the entrepreneur must demonstrate that his or her Canadian business meets certain standards in respect of employment of Canadians, total annual sales, net income and net assts. The entrepreneur must demonstrate a minimum net worth of $300,000. This class is intended for people who operate small to medium size businesses in the manufacturing or retail sectors.

"Investors" are people with a proven business record, who have accumulated some wealth and who are prepared to make an investment in Canada, but who do not wish to actively participate in its management. An investor's business experience must entail the management of a "qualifying business" and the control of a percentage of equity in that business. As is the case with entrepreneur applicants, in order to qualify, the investor applicant's business must satisfy certain standards regarding number of full-time jobs, total annual sales, net income and net assets. An investor is required to have a net worth of at least $800,000 and to invest a minimum of $400,000 for at least five years.

QUÉBEC

If an immigrant's destination is Québec, a permanent resident visa will be issued if federal officials are satisfied that the immigrant meets the Canadian health and security criteria and a Québec officer has determined that, if the applicant is an economic immigrant, he or she meets the Québec selection criteria, or, if the applicant is an immigrant in another class, he or she meets the Canadian selection criteria or the joint Québec and Canadian selection criteria.

PROVINCIAL NOMINEE PROGRAMS

The Government of Canada has entered into provincial nominee agreements with Newfoundland and Labrador, Nova Scotia, Prince Edward Island, Nova Scotia, Manitoba, British Columbia, Alberta, Saskatchewan and the Yukon. Such agreements allow the provinces to select immigrants to fulfill specific economic needs, or create and expand employment and business opportunities. The federal government retains the responsibility for issuing immigrant visas to provincial nominees and their accompanying dependants after they have met all federal legislative requirements, including those related to health, criminality and security.

Provincial nominee programs are primarily directed at selecting skilled workers whose qualifications are particularly suited to the needs of a particular provincial economy, although some provinces are also interested in nominated business applicants as well. Applications are made initially to provincial authorities. Each province has its own selection criteria, but in most instances a pre-arranged job offer will be essential. A major advantage of such programs is that they may offer successful applicants expedited visa processing.

Tax Considerations

Tax Considerations

OVERVIEW

INCOME TAX

Income tax is imposed in Canada by the federal government and by the provincial and territorial governments.

Residents of Canada are subject to income tax on their worldwide income, regardless of the country in which the income is earned. Canada does not impose tax on the basis of citizenship.

Non-residents of Canada are subject to Canadian tax on income and gains sourced in Canada, principally:

- income from business carried on in Canada;
- income from office or employment performed in Canada; and
- gains realized on the disposition of "taxable Canadian property".[1]

Non-residents are also subject to Canadian withholding tax at a rate of 25% on most forms of passive income, including interest, dividends, rent and royalties, paid or credited by a resident of Canada to the non-resident.

The Canadian tax liability of a non-resident may be reduced or eliminated pursuant to a tax treaty between Canada and the country in which the non-resident resides. Among other things, these treaties generally reduce the rate of withholding tax to 5%, 10% or 15%, and restrict the taxation of business profits to those allocable to a "permanent establishment" (e.g., a branch) in Canada.

In general, there is little difference from a Canadian income tax perspective between a non-resident entity carrying on business in Canada through a Canadian branch and carrying on business through a wholly-owned Canadian subsidiary corporation.

SALES AND OTHER TAXES

The Canadian federal government levies a value-added tax, referred to as the GST, on most commercial supplies of property or services. The basic GST rate is 7%

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1 Taxable Canadian property includes Canadian real property, assets used in a business carried on in Canada, shares of a private corporation resident in Canada, and certain other share, partnership and trust interests. For a fuller description, see "Jurisdiction to Tax" in the Income Tax section below.

(15% in certain Atlantic provinces that levy their provincial sales tax in conjunction with the GST). Québec levies its own value-added tax, similar to the GST, under separate legislation, with a combined rate of 15.025%. There is an offsetting credit mechanism that effectively eliminates the cost of the tax to most purchasers of taxable goods and services making purchases in the course of their business. Most other provinces also levy a sales tax on sales of tangible personal property and the provision of certain services. These provincial sales taxes are generally not creditable or deductible in computing liability for income tax.

The purchase and sale of shares and other financial instruments and the provision of most financial services are exempt from GST and provincial sales tax. There are no stamp duties applicable to share transactions in Canada.

INCOME TAX

LEGISLATION

The federal government levies income tax under the Income Tax Act (Canada) ("Tax Act"). It covers federal income tax for individuals and other taxpayers, including corporations and trusts, whether resident in Canada or non-resident. (A partnership is a flow-through for Canadian tax purposes and is not itself a taxable entity.) The Tax Act is administered by a government agency, the Canada Revenue Agency ("CRA").

Provincial and territorial governments levy income tax as a percentage of federal income tax payable or at graduated rates on taxable income, which is generally computed in a manner similar to the computation of taxable income under the Tax Act.

For the remainder of this section, except where indicated otherwise, descriptions of taxation provisions refer only to the federal Tax Act.

JURISDICTION TO TAX

The primary basis for taxation is the residence of the taxpayer. Canada does not impose tax on the basis of citizenship.

Canadian residents are generally subject to income tax in Canada on their worldwide income, regardless of source, but subject to relief from foreign tax under an applicable bilateral income tax treaty. Canada has an extensive network of treaties, with approximately 83 treaties currently in force. Appendix I contains a complete list of Canada's tax treaties current to March 31, 2005.

Non-residents of Canada are subject to taxation on Canadian source income, subject to relief by way of rate reduction or, to a limited extent, the elimination of Canadian tax under a tax treaty.

The principal sources of income of non-residents that are subject to tax in Canada are:

- income from business carried on in Canada;
- income from office or employment performed in Canada; and
- gains realized on the disposition of "taxable Canadian property".

Taxable Canadian property includes:

- real property situated in Canada;
- assets used in a business carried on in Canada;
- shares of a private corporation resident in Canada;
- listed shares of a Canadian resident corporation where a 25% ownership threshold (with respect to any class of shares) is exceeded;
- interests in Canadian resident trusts; and
- certain interests in partnerships, non-resident corporations and non-resident trusts deriving more than 50% of their value from taxable Canadian property.

DETERMINATION OF CANADIAN RESIDENCE

The terms "resident of Canada" and "non-resident" are not defined under the Tax Act but instead derive their meaning from case law. However, there are deeming rules in the Tax Act that deem certain persons to be resident in Canada for purposes of the Tax Act.

A corporation incorporated in Canada after April 26, 1965 (or, in certain limited situations, before this date) is deemed to be resident in Canada.

There is no statutory rule that deems a corporation incorporated outside Canada to be resident in Canada; however, such a corporation may, in fact, be treated as resident in Canada for Canadian tax purposes if its central management and control is located in Canada. A corporation may be considered to have its central management and control in Canada if, for example, the corporation's board of directors meets in Canada.

Whether an individual is resident in Canada depends on his or her particular circumstances, such as whether the individual has a home, family, business, employment or other economic and personal connections to Canada. In addition, the Tax Act deems an individual who "sojourns" in Canada for 183 or more days during a year to be resident in Canada throughout that year.

In general, a trust will be resident in Canada for income tax purposes where a majority of its trustees are resident in Canada. Under the Tax Act, certain non-resident trusts will be deemed to be resident in Canada in limited circumstances.

Under proposed legislation, the scope of this deeming rule will be significantly expanded to apply in most circumstances where there is a "resident contributor" or "resident beneficiary" of the trust.

A taxpayer who is considered under Canadian domestic law to be resident in Canada and at the same time resident in another country may be deemed by an applicable tax treaty to be resident in only one country for tax purposes.

DEEMED DISPOSITION ON IMMIGRATION/EMIGRATION

Emigration from Canada by a Canadian resident is a taxable event by virtue of a statutory rule that deems the resident to have disposed of, and to have reacquired immediately thereafter, each property then owned for its fair market value immediately before that time. (There is an exemption for certain categories of assets owned by an individual emigrating from Canada.)

There is a parallel rule applicable to certain types of property of a non-resident who becomes resident in Canada, which deems the property to have been acquired at that time. The effect of the rule is to "step up" the tax cost of the property to the former non-resident, so that on a subsequent disposition of the property, only the portion of the gain, if any, that accrued since the person became resident in Canada will be subject to Canadian tax.

TAX REPORTING

ANNUAL TAX RETURNS

All Canadian resident taxpayers are required to file an annual tax return. Partnerships that carry on business in Canada or that are "Canadian partnerships" (i.e., partnerships all of the members of which are Canadian residents) are generally required to file an annual information return.

Any non-resident of Canada who, in a taxation year, has a taxable capital gain or disposes of taxable Canadian property (even absent a gain) is required to file a Canadian tax return in respect of that year.

A non-resident corporation is required to file a Canadian tax return for any taxation year in which it carries on business in Canada directly or through a partnership. The filing obligation applies regardless of whether the non-resident is entitled under an applicable tax treaty to relief from Canadian taxation. A non-resident individual carrying on business in Canada directly or through a partnership is also required to file a Canadian income tax return but only in respect of a taxation year in which Canadian tax is owing by the non-resident on such business income.

SECTION 116 CERTIFICATES

There is a reporting and tax collection mechanism that applies to dispositions of most kinds of taxable Canadian property by non-residents. A non-resident vendor must notify CRA in writing of such a disposition, providing particulars of the transaction and is entitled to obtain a certificate (commonly referred to as a "Section 116 Certificate") from CRA upon satisfying CRA that no Canadian tax is owing (e.g., because of a tax treaty exemption) or by paying 25% of the gain to CRA on account of the ultimate tax liability or by posting acceptable security in lieu thereof.

In addition, any person, whether a resident or non-resident of Canada, acquiring taxable Canadian property (other than "excluded property"[2]) from a non-resident is liable for tax unless the purchaser withholds and remits to CRA 25% of the purchase price or, where the non-resident vendor provides a Section 116 Certificate, 25% of the amount, if any, by which the purchase price exceeds the limit indicated on the Section 116 Certificate. The rate is increased to 50% for certain types of property, including depreciable property (e.g., machinery and equipment, buildings). If the property is "taxable Québec property" an additional withholding applies (at a rate of 12% (30% where the 50% federal rate applies)) and a separate certificate (equivalent to a Section 116 Certificate) must be obtained from the Québec tax authority. Failure to obtain a satisfactory Section 116 Certificate from the non-resident vendor or, in the alternative, to make the required withholding and remittance, will make the purchaser liable for the amounts that should have been withheld and remitted.

GENERAL RULES

DETERMINATION OF INCOME

In very general terms, income for purposes of the Tax Act means income from business or property, income from office or employment and taxable capital gains.

Income from business or property is generally equivalent to the profit from the business or property calculated in accordance with accepted accounting and commercial practice, adjusted as required by specific rules in the Tax Act.

Income also includes one-half of the capital gain (referred to as the taxable capital gain) realized on a disposition of capital property, subject to reduction by allowable capital losses. The amount of the capital gain generally equals the proceeds of disposition less the sum of the "adjusted cost base" of the property under the Tax Act (roughly the cost of acquisition) and any costs of disposition.

Employment income includes wages, bonuses and taxable employment benefits. Remuneration paid to directors constitutes income from employment. Deductions from employment income are very limited. A key deduction is for gains on employee stock options, resulting in taxation at equivalent to capital gains rates (i.e., one-half taxable) for qualified stock options.

2 Excluded property includes listed shares, units of a mutual fund trust and debt securities. Shares of a private Canadian company are not excluded property and are, therefore, subject to the certificate regime.

Employers are required to make regular "source deductions" for income tax and social security contributions from employees' income and remit the amount to CRA on behalf of the employees. Directors of corporations may be personally liable if a corporate employer fails to make and remit source deductions. Employers may also be subject to federal and provincial payroll taxes, which are levied under separate legislation.

The remainder of this section summarizes some key rules relevant to the computation of income for Canadian tax purposes and the taxation of common business entities.

LOSSES

Canadian rules do not permit formal loss consolidation within a corporate group; however, there are established techniques that have been accepted by CRA for shifting losses within acceptable limits between members of the same corporate group.

Non-capital losses of a taxpayer from business or property can generally be carried back three years or forward ten to reduce taxable income of the taxpayer.

Net capital losses may be carried back three years or forward indefinitely but can only be applied against taxable capital gains.

Various anti-avoidance rules may apply to limit the availability of losses, including those that may be utilized after an acquisition of control of a corporation.

In 2003, new legislation was proposed that would limit the deductibility of losses, including losses arising from interest expense, except where a reasonable expectation of cumulative profit test is satisfied at all relevant times. For these purposes, profit does not include capital gains or losses. The proposed legislation has been subject to widespread criticism as being overbroad and prejudicial to Canadian entrepreneurship. The federal Department of Finance announced in 2005 that it would develop a "more modest" legislative initiative to avoid inadvertent limitations on ordinary commercial expenses.

INTEREST EXPENSE & OTHER FINANCING COSTS

Subject to the proposed loss limitation rules, reasonable interest expense on funds borrowed or property acquired for the purpose of earning income from business or property is deductible on an accrual basis.

Non-interest costs, including commissions and fees, incurred to borrow money or issue debt for an income-earning purpose or to issue treasury shares are generally deductible on a straight-line basis over five years.

Québec has proposed legislation to limit the deductibility of financing costs to the amount of income generated by the investment. If enacted, this rule would only apply to persons subject to tax in Québec.

INCOME FROM SHARES

Taxable dividends received by a Canadian resident corporation from a "taxable Canadian corporation"[3] are generally fully deductible to the recipient corporation (subject to certain anti-avoidance rules), permitting dividends to pass up through a chain of taxable Canadian corporations without taxation. Dividends received by an individual are taxable, subject to the dividend tax credit, which reduces the effective rate of taxation on dividend income and is intended to compensate (partially) for underlying corporate tax paid by the dividend payer.

Dividends received by a Canadian resident corporation from a non-resident corporation are included in income, subject to certain deductions permitted under the Canadian foreign affiliate rules and the foreign tax credit rules. The foreign affiliate rules, in particular, are complex but, in general terms, provide that earnings from an active business carried on by a foreign affiliate in a jurisdiction with which Canada has a tax treaty may be repatriated to Canada free of tax. This regime affords some tax planning opportunities for Canadian-based multinational enterprises.

Conversely, under the foreign affiliate rules, Canadian resident corporations are required to include their share of the "foreign accrual property income" (in essence, investment income and gains) of a controlled foreign affiliate whether or not distributed to the Canadian corporation.

Proposed new legislation relating to "foreign investment entities" ("FIEs") may also give rise to deemed income inclusions for Canadian residents holding participating interests (including share investments) in FIEs.

A shareholder of a Canadian corporation, whether resident in Canada or non-resident, is generally entitled to the return of share capital free from Canadian tax (including Canadian withholding tax). This is an important planning point for non-residents acquiring shares of a Canadian corporation, especially since capital may be returned without first distributing earnings and profits by way of dividend.

DEPRECIATION

Taxpayers are permitted deductions ("capital cost allowance") at prescribed rates in respect of depreciable property used in a business, including many classes of machinery and equipment, buildings and certain intangible property, including purchased goodwill. Land is not eligible for tax depreciation.

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3 A taxable Canadian corporation is any "Canadian corporation" (including any corporation incorporated in Canada) that is not exempt under the Tax Act by reason of special rules applicable in limited circumstances (e.g., Crown corporations, pension corporations).

CAPITAL TAX

The federal government imposes a capital tax equal to 0.175% (in 2005) of "taxable capital employed in Canada" in excess of $50 million (the threshold is shared among associated corporations). Capital tax is levied on Canadian resident corporations and non-resident corporations carrying on business through a permanent establishment in Canada, including a branch. Federal capital tax is proposed to be phased out by 2008.

Some provinces, including Ontario and Québec, also impose their own capital tax on taxable capital employed in the province. Ontario capital tax is proposed to be phased out by 2012.

CORPORATE REORGANIZATIONS

The Tax Act permits many corporate reorganizations to be effected on a "rollover" or tax-deferred basis to shareholders. Some reorganizations, such as share-for-share exchanges, are relatively straightforward from a tax perspective; whereas others, such as spin-offs, have complex statutory and administrative restrictions.

PARTNERSHIPS

Partnerships are common investment vehicles in Canada because they are flow-throughs for tax purposes. Although partnerships are not taxpayers per se under the Tax Act, a partnership is required to compute its income as though it were a taxpayer resident in Canada. Each member of the partnership includes in income the member's allocable share of the income, gain or loss of the partnership. Special rules apply to limited partners that may, in certain circumstances, restrict their ability to claim losses of a limited partnership allocated to them.

TRUSTS

Unlike partnerships, trusts resident in Canada are taxable entities under the Tax Act. However, certain trusts, including personal trusts and mutual fund trusts, may be eligible for an offsetting deduction in respect of amounts distributed to beneficiaries. The effect of such rules is to reduce (or eliminate) tax at the trust level. Such distributions are generally taxable in the hands of the beneficiaries.

A mutual fund trust is a common investment vehicle for publicly-traded investments (often referred to as income funds or income trusts). There are certain limitations on the participation of non-residents in Canadian mutual fund trusts.

As previously noted, the Tax Act may deem non-resident trusts to be resident in Canada in certain circumstances. In addition, proposed foreign investment entity legislation may give rise to a deemed income inclusion for Canadian residents holding interests in a foreign trust that is a foreign investment entity.

GENERAL ANTI-AVOIDANCE RULE

The Tax Act includes a broadly-worded anti-avoidance rule ("GAAR") to prevent "avoidance transactions". The rule supplements specific anti-avoidance rules in the Tax Act. GAAR is not intended to apply to a transaction that is undertaken primarily for bona fide purposes other than to obtain a tax benefit, or that does not result in a misuse of the provisions of the Tax Act or an abuse of the Tax Act read as a whole. If GAAR applies, CRA may re-determine the tax consequences of a transaction or series of transactions resulting in tax liability for one or more participants in the transaction(s).

SPECIAL RULES FOR NON-RESIDENTS

WITHHOLDING TAX

A resident of Canada who makes a payment to a non-resident in respect of most types of passive income (including interest, dividends, rent, and royalties) is generally required to withhold tax equal to 25% of the gross amount of the payment. This rate may be reduced under an applicable tax treaty.

The typical treaty rate for interest is 10%. For dividends, the typical treaty rate is 15%, except where the shareholder is a corporation that beneficially owns 10% or more of the voting shares of the dividend payer, in which case the rate is reduced to 5%. The typical treaty rate on royalties is 10% and may be reduced to 0% on certain royalties.

A partnership any member of which is a non-resident is itself deemed to be a non-resident under the Tax Act. Consequently, a payment by a Canadian resident to a partnership with any non-resident members is subject to full withholding tax; however, administratively, CRA will generally permit the payer to look through the partnership and withhold based on the residence and treaty status of the members of the partnership.

Although withholding tax is imposed on the non-resident recipient, the resident payer is required to deduct the tax and remit it to CRA on behalf of the non-resident, failing which the resident payer becomes liable for the tax.

A non-resident carrying on business through a Canadian branch may be deemed to be a resident of Canada for purposes of the withholding tax rules. The effect of this rule is to make certain payments, for example deductible interest, made by the non-resident to another non-resident subject to Canadian withholding tax.

CANADIAN BRANCH VS. CANADIAN SUBSIDIARY

In general, there is little difference from a Canadian income tax perspective between carrying on business through a Canadian branch of a non-resident entity and carrying on business through a wholly-owned Canadian subsidiary.

A Canadian incorporated subsidiary of a non-resident corporation is a Canadian resident for Canadian income tax purposes and is therefore subject to tax in Canada on its worldwide income. Certain types of payments (including dividends, interest, rent and royalties) made by a subsidiary to its non-resident parent are subject to withholding tax as discussed above.

Similarly, Canadian tax will apply to the profits attributable to an unincorporated branch of a non-resident carrying on business in Canada. The allocation of items of income and expense between head office and the Canadian branch may be unclear and can result in ambiguity in the computation of branch income for purposes of the Tax Act. In addition, the Tax Act imposes a branch profits tax on the profits of the Canadian branch not reinvested in Canada. The branch profits tax is intended to parallel the dividend withholding tax.

HYBRID ENTITIES

Nova Scotia corporate law permits the establishment of unlimited liability companies or "ULCs". These entities are treated like regular Canadian resident corporations for Canadian tax purposes; however, in certain foreign jurisdictions, including the U.S., they may be eligible to be treated as flow-throughs for non-Canadian tax purposes. This dual or "hybrid" tax characterization can be a useful planning feature. Similar provisions have been introduced in Alberta.

U.S. limited liability companies ("LLCs") are treated as corporations for Canadian tax purposes. Under current Canadian rules, U.S. LLCs are not eligible for relief under the Canada-US tax treaty, including a reduction in withholding tax rates, unless the LLC itself is treated as a taxable entity for U.S. tax purposes. The treaty status of U.S. LLCs has been the subject of negotiation by the Canadian and U.S. authorities for a number of years.

CAPITALIZATION OF A CANADIAN CORPORATION

A Canadian corporation may be capitalized with equity or a combination of debt and equity. Generally speaking, the classification of capital as debt or equity from a Canadian tax perspective is driven by its legal form and may not always match the accounting characterization.

As noted above, share capital of a Canadian corporation can generally be returned to shareholders free from Canadian tax, including Canadian withholding tax applicable to non-resident shareholders.

A distribution to a shareholder in excess of the applicable tax paid-up share capital is deemed to be a dividend for purposes of the Tax Act. Deemed dividends to non-resident shareholders are subject to withholding tax in the same manner and at the same rate (including any reduced treaty rate) as regular dividends.

Repayment of principal loaned to a Canadian corporation by a non-resident shareholder is not subject to withholding tax, but tax must be withheld in respect of interest paid or credited on the loan.

Subject to the thin capitalization rule discussed below and the general limitations on interest expense and losses described above, a Canadian subsidiary may deduct interest paid or credited by it to a non-resident in computing its income.

THIN CAPITALIZATION & INTEREST IMPUTATION

The "thin capitalization rule" is intended to prevent a Canadian-incorporated subsidiary from excessively reducing its taxable Canadian profits, and hence its liability for Canadian tax, by maximizing its interest expense to related non-resident creditors. In very general terms, the subsidiary is denied an interest deduction to the extent that a 2:1 debt to equity ratio is exceeded, where the debt is owed to non-residents that hold shares having either 25% or more of the votes or fair market value of the subsidiary's shares. Indebtedness owing to Canadian residents or arm's-length non-resident lenders is not included in the debt computation, subject to anti-avoidance rules applicable to back-to-back loan arrangements. Under current rules, the thin capitalization restrictions only apply to corporate borrowers.

Conversely, where a Canadian resident corporation has a loan outstanding to a non-resident for one year or more and arm's-length interest is not paid, interest income calculated at a prescribed rate on the principal amount outstanding under the loan is imputed by the Tax Act to the Canadian lender.

TRANSFER PRICING RULES

Canada, like many other nations, employs transfer pricing rules to protect its tax base. The rules are designed to ensure that the income of Canadian taxpayers (and their corresponding Canadian tax liability) is not artificially reduced through non arm's-length transactions with related non-residents.

The transfer pricing rules apply to Canadian residents and to non-residents carrying on business in Canada; therefore, these rules are potentially relevant to both Canadian subsidiaries (and parent companies) and Canadian branches. The pricing of goods, and the quantum of management fees, guarantee fees and royalties are common matters for transfer pricing scrutiny.

Where a Canadian taxpayer or a partnership participates in one or more transactions with a non-arm's length non-resident and either (i) the terms of the transactions differ from those that would have been made by arm's-length persons or (ii) the transactions are not bona fide transactions entered into for non-tax purposes and would not have been entered into by arm's-length persons, then the CRA can make adjustments pursuant to the transfer pricing rules in the Tax Act, including imputing income or denying deductions.

In addition, penalties can be levied. Where a taxpayer's transfer pricing adjustments for a year exceed the lesser of $5,000,000 and the taxpayer's gross revenue for the year computed in accordance with the Tax Act, a penalty equal to 10% of the total transfer pricing adjustments applies unless reasonable efforts were made to apply arm's-length terms. For these purposes, a taxpayer will be deemed not to have made reasonable efforts to apply arm's-length terms unless the taxpayer makes or obtains complete records of the transactions establishing the appropriateness of the transactions from a transfer pricing perspective no later than the taxpayer's tax return due date[4] (or in the case of a partnership its annual information return due date). This rule is often referred to as the contemporaneous documentation requirement.

CRA has special audit powers in transfer pricing matters and can require that a taxpayer produce contemporaneous documentation within 90 days of CRA's making a formal request. In recent years, CRA has become more aggressive in its auditing of transfer pricing records.

TAX INCENTIVES AND SPECIAL REGIMES

The federal government and many provincial governments provide tax incentives for certain business activities in the form of tax credits, reduced tax rates and accelerated write-offs of qualifying expenditures. In addition, special tax regimes may apply to certain undertakings, notably the exploration and development of resource and oil and gas properties. The applicable rules and eligibility criteria are complex and beyond the scope of this summary; however, some of the more common tax incentives available federally and in Ontario and Québec are noted below. In addition, the Tax Act provides reduced tax rates and certain other benefits to corporations that meet the definition of "Canadian-controlled private corporation" or "CCPC", essentially a private Canadian corporation that is not controlled directly or indirectly in any way by one or more public corporations or non-residents or any combination of them.

SCIENTIFIC RESEARCH & EXPERIMENTAL DEVELOPMENT ("SR&ED") INCENTIVES

The Tax Act contains incentives for "scientific research and experimental development" ("SR&ED").

"SR&ED" means systematic investigation or search carried out in a field of science or technology that is basic or applied research or experimental development, including work with respect to engineering, design, operations research, mathematical analysis and testing. Some activities are explicitly excluded from SR&ED, including marketing, quality control, social science research, mineral or oil

4 For corporations, the tax return due date is six months after the taxation year end e.g., for a taxation year ending December 31, 2005 the tax return due date would be June 30, 2006.

and gas exploration or production, commercial production and routine data collection.

SR&ED expenses generally include all expenses directly related to research and development, such as salaries and equipment costs. Payments to Canadian resident corporations or other entities, such as universities, for SR&ED conducted in Canada on behalf of the payer can also be included in SR&ED expenditures.

Broadly speaking, SR&ED incentives take the form of deductions for qualifying current and capital expenditures and a 20% investment tax credit that may be applied to reduce income tax owing. Investment tax credits may be carried over and applied in other taxation years subject to limits in the Tax Act. More generous SR&ED incentives are available to qualifying CCPCs.

Provinces may also provide incentives for SR&ED carried on within their jurisdiction.

Québec provides for fully refundable income tax credits of up to 35% with respect to SR&ED undertaken in Québec. Other Québec incentives include a 35% tax credit for eligible expenditures for research carried out by a university or public research centre and a tax holiday (i.e., full or partial exemption from Québec income tax on employment income) for foreign researchers for up to five years.

In Ontario, an additional deduction is permitted for a portion of certain eligible SR&ED expenditures incurred by a corporation in Ontario, whether directly or through a partnership (commonly referred to as the "Super-Deduction").

Ontario also provides incentives to corporate taxpayers with a permanent establishment (e.g., a branch or office) in Ontario in the form of two refundable tax credits: the innovation tax credit ("ITC") and the Ontario business-research institute tax credit ("OBRITC"). The ITC is designed to encourage small corporations to undertake SR&ED and is clawed back as the corporation's paid-up capital or taxable income increases beyond certain thresholds. Corporations with paid-up capital or taxable income equal to or greater than $50 million and $400,000, respectively, are not eligible for any amount of the ITC.

Subject to the ruling requirement noted below, the OBRITC is generally available for expenditures of a corporation, incurred directly or through a partnership, pursuant to a research contract entered into between the corporation and an eligible research institute (e.g., a university, college or non-profit research organization) in respect of eligible SR&ED carried on directly by the research institute in Ontario. To be eligible for the credit, a corporation must receive a ruling from the Ontario government before the expenditures are incurred.

FILM TAX CREDITS

The federal government and many provincial governments, including Ontario and

Québec, offer an array of incentives for film and video production in Canada. Incentives may also be available for films and videos produced outside Canada where the production corporation incurs eligible labour expenditures in Canada or the relevant province.

GOODS AND SERVICES TAX

GENERAL RULES

Canada imposes a 7% GST on the consumption or use in Canada of most tangible or intangible property. A parallel system of input tax credits ("ITCs") is designed to ensure that intermediate users of goods and services receive a credit for the GST they pay, so that only the final consumer or end-user in the chain of supply effectively pays the aggregate GST. GST is imposed under Part IX of the Excise Tax Act ("ETA") and is administered by the CRA.

Every person, whether resident in Canada or non-resident, who in the course of commercial activities makes a supply (defined in the ETA as a "taxable supply") of property or a service in Canada is generally required to register for the GST unless the person's aggregate annual world-wide taxable supplies do not exceed $30,000. Therefore, any non-resident that makes a taxable supply in Canada and has worldwide non-exempt sales of $30,000 or more (including non-Canadian sales) will generally be required to register for the GST. For the purposes of the ETA, "person" is defined broadly to include, among other things, an individual, a corporation, a trust, and a partnership.

EXEMPT SUPPLIES

The supply of certain types of property and services, defined in the ETA as an "exempt supply", is expressly exempted from the GST. The most common types of exempt supplies are:

- supplies of financial services (such as loans or securities transactions, including the sale or issuance of shares, and some related services);
- supplies (including sales and leases) of used residential real estate;
- certain supplies made by Canadian charities or other non-profit entities; and
- supplies of most medical and dental services.

ZERO-RATED SUPPLIES

The supply of certain types of property or services, defined in the ETA as a "zero-rated supply", is treated as a "taxable supply" but with the rate of tax being 0%, i.e., no GST is charged.

The principal categories of zero-rated supplies are:

- supplies of most forms of property or services for export;
- supplies of prescription drugs and basic groceries;
- supplies of certain agricultural products; and
- supplies of most forms of financial services to a non-resident.

INPUT TAX CREDITS

In general terms, a registrant engaged exclusively in making taxable supplies (including zero-rated supplies) is entitled to claim ITCs equal to all GST that the registrant has paid in connection with property or services acquired for consumption, use or supply in its commercial activities. Conversely, a supplier who is engaged exclusively in making exempt supplies is not entitled to claim ITCs. A registrant who makes both exempt and taxable supplies must allocate its GST expense reasonably between the two activities, and is generally permitted to claim ITCs only for the GST expense allocated to the making of taxable supplies.

COLLECTION AND REPORTING

Although the GST is payable by the recipient, a supplier which is (or is required to be) a registrant for GST purposes is liable, in most cases, to collect and remit the GST payable by the recipient to the federal government on a periodic basis. The supplier may net its ITCs against the GST collected and remit only the balance (if any) to the federal government. If the supplier's ITCs exceed the GST collected in any reporting period, the federal government will refund the excess to the supplier.

GST and ITCs are calculated, reported, and paid or refunded on a regular periodic basis. The reporting period of a registrant may be monthly, quarterly or annually, depending upon the registrant's revenues and whether the registrant elects to report on a more frequent basis than is otherwise required.

OTHER COMMODITY TAXES

Businesses involved in bringing goods into Canada, or manufacturing and selling goods in Canada, may also be affected, either directly or indirectly, by certain other taxes and duties imposed in Canada. Most products imported into Canada are subject to two types of commodity taxes in addition to the GST: customs duties and provincial sales tax. Products such as alcohol and tobacco are subject to additional excise duties.

CUSTOMS DUTIES AND EXCISE TAXES

For a brief discussion of customs duties and excise taxes, please refer to the Importing and Exporting: Canadian International Trade Regulation section of this guide.

PROVINCIAL SALES TAX

Every province except Alberta imposes some form of sales tax. In New Brunswick, Nova Scotia and Newfoundland a Harmonized Sales Tax ("HST") is charged at a single rate of 15% instead of GST and provincial sales tax. HST is levied under the ETA and follows the GST rules described above. Québec levies its own version of the GST, which is described below. Ontario, Manitoba, Saskatchewan and British Columbia impose varying forms of a retail sales tax (commonly referred to as provincial sales tax or "PST"). A vendor in the business of selling taxable goods or providing taxable services in any one or more of these provinces is generally required to obtain a vendor's permit from the relevant provincial government(s) and to collect and remit PST on taxable sales within that province.

In Ontario, the current retail sales tax rate is 8%. This rate is applied to the retail sale price of goods and specified services at the time of purchase or import into Ontario and is payable only by the consumer or end-user of the goods or services. Although the retail sales tax is payable by the purchaser, the vendor is required to collect the tax on sales of goods in Ontario and remit it to the provincial tax authorities. Goods purchased for resale (i.e., inventory) are not subject to Ontario PST.

Québec has a goods and services tax system which closely parallels the concepts and provisions of the GST (including the requirement to register and collect tax). The Québec Sales Tax ("QST") applies at the rate of 7.5% to the price of goods and services inclusive of the GST, making the effective rate 8.025% for a combined rate with GST of 15.025% . The Québec tax authority is responsible for the collection and administration of both the GST and the QST in Québec.

PROPERTY TAXES AND FEES

LAND TRANSFERS

Many provinces impose tax on the transfer of real property (including with respect to certain leasehold interests). Ontario transferees of real property are generally liable for land transfer tax at a rate of 1.5% of the consideration paid. Québec also levies a land transfer tax at similar rates. Certain deferrals and exemptions may be available in respect of land transfer tax, particularly in the context of qualifying inter-corporate transfers amongst affiliated corporations. Certain transfers of real property may also be subject to GST (and QST or HST depending on the relevant provincial jurisdiction).

MUNICIPAL PROPERTY TAXES

Real property owners may also be subject to municipal property taxes and levies, generally based upon the assessed value of the property. The tax rates vary from one jurisdiction to another.

Appendix I: Canada's Tax Treaties[5]

TREATIES IN FORCE

Algeria
Argentina
Australia
Austria
Bangladesh
Barbados
Belgium
Brazil
Bulgaria
Cameroon
Chile
China (PRC)*
Croatia
Cyprus
Czech Republic
Denmark
Dominican Republic
Ecuador
Egypt
Estonia
Finland
France
Germany
Guyana
Hungary
Iceland
India
Indonesia
Ireland
Israel
Italy
Ivory Coast
Jamaica
Japan
Jordan
Kazakhstan
Kenya
Korea, Republic of
Kuwait
Kyrgyz Republic
Latvia
Lithuania
Luxembourg
Malaysia
Malta
Mexico
Moldova
Mongolia
Morocco
Netherlands
New Zealand
Nigeria
Norway
Pakistan
Papua New Guinea
Peru
Philippines
Poland
Portugal
Romania
Russian Federation
Senegal
Singapore
Slovak Republic
Slovenia
South Africa
Spain
Sri Lanka
Sweden
Switzerland
Tanzania
Thailand
Trinidad & Tobago
Tunisia
Ukraine
United Arab Emirates
United Kingdom
United States
Uzbekistan
Venezuela
Vietnam
Zambia
Zimbabwe

*Convention does not apply to Hong Kong

TREATIES SIGNED BUT NOT YET IN FORCE

Armenia
Azerbaijan
Gabon
Ireland
Italy
Lebanon
Oman

5 This Appendix is current to March 31, 2005.

Davies

Davies
Ward
Phillips &
Vineberg LLP