CARRYING ON
Business in Canada

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I. INTRODUCTION

This paper is an overview of the laws of both Canada and its provinces with a particular emphasis on those areas that may be of interest or utility to persons intending to open or acquire a business in Canada. It is hoped that these materials may be of particular assistance to non-Canadian business people who may lack familiarity with the Canadian Constitution and the legal system which has evolved thereunder.

THE CONTENTS OF THIS PUBLICATION ARE ONLY INTENDED TO PROVIDE A BRIEF SUMMARY OF A NUMBER OF THE GENERAL COMMERCIAL AND OTHER LAWS THAT APPLY TO BUSINESSES IN CANADA, WITH A SPECIFIC FOCUS ON THE LAWS OF THE PROVINCE OF ONTARIO. AS SUCH, IT SHOULD BE REGARDED AS NOTHING MORE THAN A GENERAL OVERVIEW AND SHOULD NOT BE REGARDED AS LEGAL ADVICE TO THE READER, NOR RELIED UPON WITHOUT CONSULTING LEGAL COUNSEL.

Additional information relating to the establishment, acquisition or carrying on of a business in Canada may be obtained by contacting our office in 2 Queen Street East, Suite 1500 in Toronto, Ontario, Canada.

II. VEHICLES FOR DOING BUSINESS

General

There are several different vehicles that may be utilized in carrying on a business in Canada. Although corporations are the business entities most frequently utilized by investors choosing to carry on business in Canada, sole proprietorships, partnerships, limited partnerships, franchises, joint ventures and business trusts (i.e. trusts holding the legal title to business assets) can also be used to accomplish the objectives of investors. The choice of business vehicle will usually be governed by considerations of applicable tax consequences and exposure to, or insulation from, the contractual and other civil liabilities associated with a business venture. Other factors, however, should also be borne in mind in selecting the appropriate business form, such as ease of administration (including the admission of new principals and the retirement of existing principals) and the particular nature of the business venture in question.

Corporations

A corporation is an entity that has a legal existence independent of its shareholders. It shields the business principals from all but certain of the obligations and liabilities of the business, and is probably the most common form of business organization in Canada. The corporation is taxed as a separate entity and, in some cases, receives favourable tax treatment under Canadian income tax law. It offers the greatest flexibility in the structuring of authority to make and execute business decisions and also in the structuring of investments. The separate legal existence, however, also means that a corporation is subject to separate reporting, regulatory, and filing requirements imposed by various levels of government. In Canada, a corporation may be incorporated in any province under the applicable provincial corporations statute, or under the federal statute, the *Canada Business Corporations Act*. A Canadian corporation may carry on business in any province or territory provided that it complies with that province's or territory's registration and reporting requirements for extra-provincial corporations. There are few additional limitations on the ability of a corporation that has been incorporated in one province to carry on business in all other provinces and territories, but registration and annual fees are usually more onerous for non-federally incorporated entities.

Branches and Subsidiaries

Although most foreign investors in Canada elect to utilize a subsidiary in order to carry on business here, there are others who elect to conduct their business through the use of a branch operation. A

foreign entity may carry on business in Canada directly provided that it is licensed or registered in each province in which it is carrying on business. Although the phrase "carrying on business" is not specifically defined in many cases, it is clear that registration will be required in each province in which the corporation maintains an office or other place of business. The tax considerations in choosing between a branch or subsidiary are discussed in Section IV below.

Sole Proprietorships

As the simplest form of business organization, a sole proprietorship allows the carrying on of a business by an individual who usually owns or leases all of the necessary business assets and exercises total control over business decisions and operations. Sole proprietorships have the advantages of minimal registration and minimal ongoing compliance requirements (registration of any business or trade name is the only requirement in the majority of the provinces). Profits and losses for income tax purposes are realized directly by the sole proprietor, which can be an advantage to this form of business organization since losses can be applied directly against income. However, the sole proprietor has unlimited liability which can only be mitigated by contract or covered off by insurance.

Partnerships (General, Limited and Limited Liability)

A partnership is a business relationship between two or more persons (which may include corporations, other partnerships or other entities) who carry on a business in common with a view to profit. Although technically the partnership is not a separate legal entity, it is conceptually treated as such with each partner being allocated a specified share of the profits and losses of the partnership business. A separate income tax return need not be prepared or filed by a partnership since the tax consequences of the partnership's business activities flow through to the individual partners in their respective shares and are reported individually in each partner's tax return. The sharing of profits and losses, the ownership of the assets used in the partnership business, and the other respective rights and duties of the partners are determined by a partnership agreement, which may be either written or oral. To the extent that such rights and duties are not specified by agreement, they are implied by the applicable provincial partnership legislation.

As far as liability is concerned, a general partnership is identical to the sole proprietorship insofar as each partner in the partnership has unlimited liability to those who have dealings with the partnership.

A limited partnership is a creature of statute that is made up of both general and limited partners. General partners, who take part in the control of the business, have the same powers, rights, responsibilities and liabilities as partners in a general partnership. Limited partners, who do not take part in the control of the business, are only liable to the extent of their capital contribution. Generally, except for special "at risk" rules which can limit deductions in certain cases, the flow-through of tax consequences to the limited partners is essentially the same as for general partnerships. This makes the limited partnership very well-suited for investments which carry potential liabilities.

In certain circumstances, American entities can enjoy the benefits of certain flow-throughs of income and bump-ups in the United States through the use of certain vehicles that are unlimited liability companies formed in certain jurisdictions. We typically work closely with U.S. tax advisors in respect of these matters and would urge you to also consider this form of entity. We would be happy to assist you in respect of organizing and incorporating such a vehicle in Canada. There are other tax advantages which could be enjoyed by U.S. companies, which would also have protection from unlimited liability through the use of U.S. corporations as shareholders of such an unlimited liability vehicle.

In 1998, the Province of Ontario amended its *Partnerships Act* to make provision for the establishment of limited liability partnerships. This form of partnership, known as the "LLP", permits members of certain professions who are not legally permitted to carry on business through a corporation (e.g. lawyers and accountants) to curtail certain liabilities they would otherwise have faced had they carried on business in a general partnership. In a limited liability partnership, unlike a general partnership, a partner is **not** personally liable for the negligent acts of another partner or an employee of the partnership that is supervised by the negligent partner. In all other respects, limited liability partnerships are identical to general partnerships in the manner in which they are formed, regulated and taxed.

Joint Ventures or Syndicates

The terms "joint venture" and "syndicate" do not have any precise legal definition in Canada. However, these terms are usually used to describe a contractual business arrangement between two or more parties that have agreed to pool complementary resources (such as skill or capital) for a particular undertaking or "venture" that might not otherwise be economically feasible for either of them to pursue individually. Historically, the joint venture has thrived in the natural resources business, where independent owners and developers work together to exploit a particular resource. In recent years, however, joint ventures have also become popular for any project where economies of scale or access to know-how require cooperation between parties that normally carry on business activities independently. Care is often taken with a joint venture to ensure that the sharing by the parties relates to either distributions of product or gross returns (i.e. not to profits) and that the enterprise is narrower than would be normal for a partnership. If such care is not taken, the joint venture may constitute a partnership at law, thereby exposing each of the joint venturers to the other's obligations.

Franchises

A franchise is a contractual business relationship under which one party (the franchisee) contracts with another (the franchisor) to sell certain specific proprietary products or services in a defined territory. The franchisee utilizes the intellectual property, business methods and general know-how of the franchisor in exchange for the payment of fees and royalties. All franchises are subject to federal legislation dealing with competition, intellectual property, and foreign investment restrictions as well as other laws of general application to businesses. Those carrying on business in Ontario are also subject to the provisions of the *Arthur Wishart Act* (Franchise Disclosure), which includes provisions imposing an obligation of "fair dealing" on each party to a franchise agreement and requiring franchisors to deliver a prescribed form of disclosure document to all potential franchisees. Other provinces also have franchise legislation.

Business Trusts

The use of trusts in Canada as a business form has historically been on the increase. If properly structured and administered, the business trust generally combines the limited liability of the corporate vehicle with the flow-through of tax benefits to the business principals that make a partnership or joint venture desirable. Recently, trusts have become a popular vehicle in Canada and the United States for structuring asset securitization transactions. As with a joint venture, care must be taken, however, to avoid the trust constituting a partnership at law as it is most desirable to insulate the principals' assets from the liabilities of the business.

III. CORPORATIONS AND CORPORATE GOVERNANCE

Corporations may be incorporated under either federal or provincial law. The federal *Canada Business Corporations Act* as well as similar statutes of Ontario and various other provinces are typical of contemporary corporate law legislation.

The following are some features which are common to the federal, Ontario and many other provincial corporate law statutes:

1. **Incorporation**: A corporation is incorporated by articles of incorporation and, subject to the acceptability of the corporate name, may be incorporated very quickly (sometimes electronically). A corporation has the capacity and, subject to the applicable statute, the rights, powers and privileges of a natural person.

2. **Share Issuance**: A corporation may be authorized to issue an unlimited number of shares of any one or more classes. Shares cannot be issued on a partially paid basis but rather must be fully paid and non-assessable.

3. **Share Attributes**: There is great latitude in designing the attributes of shares of different classes. Shares of a particular class may be made issuable in series with each series having the same basic attributes. Additional attributes, which may differ from series to series, can be determined by the board of directors at the time of issuance.

4. **Directors and Officers**: The directors of a corporation either manage or supervise the management of the business and affairs of the corporation. Directors are elected by the shareholders of the corporation. Only one director is needed unless the corporation offers its securities to the public, in which case it must have more. Certain jurisdictions also have residency requirements, but these have been noticeably relaxed over the years. Lawyers sometimes act as directors for their clients under certain circumstances. Officers of corporations are elected or appointed by the board of directors, usually on an annual basis. Directors and officers of corporations, in discharging their respective duties, are required to act honestly and in good faith with a view to the best interests of the corporation and to exercise the care, diligence and skill that a reasonably prudent person would exercise in such circumstances.

5. **Shareholder Power**: Shareholders of a corporation may unanimously enter into an agreement by which they restrict any or all of the powers of the directors. If this is done, the shareholders adopt all of the rights, powers, duties and liabilities of the directors to the extent the agreement restricts director discretion or powers. The directors are relieved of such duties and liabilities.

6. **Director Meetings**: Meetings of directors may be held by means of telephone.

7. **Director Conflict Disclosure**: Conflict of interest provisions oblige a director or officer of a corporation, who is a party to or has a material interest in a contract with the corporation, to disclose the nature and extent of his or her interest and to abstain from voting under certain circumstances.

8. **Special Shareholder Right**: In various circumstances, an amendment to a corporation's articles of incorporation is proposed that may affect a particular class or series of outstanding shares differently than other classes or series. In such a situation, the holders of the particular class or series of shares may be entitled to vote on the amendment separately as a class or series even though they may not otherwise be entitled to voting rights.

9. **Auditing**: Generally, all corporations that offer their securities to the public are required to appoint an auditor. A corporation incorporated federally that has not distributed its securities to the public is exempted from this obligation, provided its shareholders resolve unanimously not to appoint an auditor. In the case of a similar Ontario corporation, such an exemption is also available.

10. **Continuing the Corporation**: Corporations incorporated under the laws of another jurisdiction may be continued under the corporate laws of Canada, Ontario, or some of the other provinces provided the shareholders authorize such continuance.

11. **Amalgamation**: Corporations governed by the same corporate statute may be amalgamated and thereupon continue as one corporation. Under most modern statutes, an amalgamation can be structured so that shareholders of one or more of the amalgamating corporations receive securities of a corporation other than those of the amalgamated corporation.

12. **Take-Over Bids**: A purchaser under a take-over bid (i.e. a "tender offer") that is accepted by shareholders holding not less than 90% of the voting securities of a corporation (other than voting securities held by the purchaser and related parties prior to the take-over bid) may be entitled to compel the remaining holders of such securities to transfer them to the purchaser. Such a holder is usually entitled to choose to be paid the same price as applied in the take-over bid or the "fair value" as determined by a court.

13. **Remedies for Prejudice**: In circumstances where the affairs of a corporation are carried on, or threatened to be carried on, in a way that is oppressive or unfairly prejudicial to or that disregards the interests of any security holder, creditor, director or officer of the corporation, the aggrieved party may apply to a court for a remedy. The courts in Canada have very broad powers in respect of remedies to such actions.

14. **Mandatory Share Buyout**: If certain fundamental changes are implemented by a corporation, a shareholder who opposes such decision may, by following a prescribed method, require the corporation to purchase his or her shares for their "fair value" as determined by a court.

There are numerous statutes which impose obligations on the directors of a corporation. In many cases (e.g. wages, income and corporation taxes, source deductions from employee salaries), obligations visited upon the directors are obligations of the corporation that it has failed to meet or cannot meet. The failure of a corporation to meet these obligations could result in personal liability for directors.

IV. INCOME AND OTHER TAXES

General

In Canada, taxes are levied at the federal, provincial and municipal levels of government. At the federal level, the government generates most of its revenue by way of income taxes and excise taxes imposed on the distribution and consumption of goods and services throughout Canada (i.e. goods and services tax, or "GST"). Similarly, the provinces also impose income taxes and sales taxes at the retail level, while municipalities generally levy taxes on real property. Stamp duties are not levied by any level of government in Canada.

Rates of income taxation to which a taxpayer is subject vary in accordance with a number of factors, including:

1. the character of the income;
2. the nature of the business activity;
3. the jurisdiction in which that business activity takes place; and
4. the character of the taxpayer in question.

Types of Income and the Significance of Residency

Under the Canadian *Income Tax Act* (the "ITA"), a person's residence and the source of his or her income are central factors in determining liability for income tax. Under the ITA, different tax liability exists for Canadian residents and non-residents. Persons who are residents of Canada are liable for tax on any income earned worldwide, although credit is generally available in respect of foreign taxes paid on foreign source income. Non-resident persons, however, are liable for Canadian income tax only in respect of income earned in Canada. The ITA imposes income tax on a non-resident who is employed in Canada, carries on business in Canada, or disposes of certain types of Canadian property. In addition, withholding taxes are levied on investment income earned by a non-resident, and capital gains from the disposition of capital property may be taxable.

Individuals

Individuals are liable for tax under the ITA on the basis of their residency, although the tests for determining residency are not always easily applied. Generally speaking, where the statutory rules do not apply, an individual's residency status arises from his or her "connection" with Canada. An individual's connection with Canada is determined by a variety of factors, such as family residing in Canada, holding personal property in Canada (furniture, automobiles, etc.), having economic ties to Canada (bank accounts, credit cards, etc.), holding a Canadian passport, and membership in a Canadian union or professional organization. Where an individual meets the tests for residency in two countries, some tax treaties can apply to make a "tie-breaking" determination of an individual's residency for tax purposes.

In Canada, individuals pay tax at graduated rates that are based on their income levels. The effective top marginal rates vary from province to province.

Corporations

Under the ITA the taxation of a corporation is dependent on the jurisdiction of incorporation, the type of corporation, the type of income, and the activities carried on by the corporation. As discussed above, a resident of Canada is liable for tax in Canada on its worldwide income. A corporation is deemed to be resident in Canada if it is incorporated in Canada, carries on business in Canada, or if its "mind, management and control" are situated in Canada.

In general, a corporation's income for purposes of the ITA is its income computed in accordance with generally accepted accounting principles, as modified by specific rules in the ITA. For instance, corporate income for tax purposes is not computed on a consolidated basis. Also, the ITA provides rules in respect of depreciation (referred to as capital cost allowance) which may differ from depreciation for accounting purposes. In addition, the ITA provides generous deductions and credits in respect of scientific research carried on in Canada. Provided specific conditions are met, investment tax credits may also be available in respect of the cost of certain buildings, machinery, and equipment (including transportation and construction equipment) that are to be used in certain areas of Canada. Various rules restrict the deductibility of certain expenses, such as those which are paid to non-arm's length persons.

The combined federal and provincial corporate income tax rates vary. These tax rates are reduced under the ITA for small businesses that are Canadian-controlled private corporations ("CCPCs") and for corporations that carry on manufacturing or processing activities. A CCPC is a Candian private corporation, that is not controlled by non-residents, one or more public corporations, or a combination of non-residents and public corporations. A private corporation that is 50% owned by Canadians and 50% owned by non-residents will generally qualify as a CCPC and therefore be subject to a reduced rate of tax on certain levels of earned business income.

In addition to the above-noted corporate income taxes levied by the federal government and the provinces, there may be capital taxes which apply to a corporation. Certain provinces, including Ontario, levy capital taxes on corporations and have a corporate minimum tax which may apply.

We would be happy to work with you and your tax advisors to aid in various structuring matters and incentives that may help to reduce your tax burden for any entity formed in Canada.

Trusts

Generally speaking, the scheme of the ITA allows a trust to determine whether its income will be taxed in the hands of the trust itself or flowed through to its beneficiaries to be taxed in their hands. Income that is received by a trust and subsequently paid or allocated to beneficiaries in a given year is included in the income of the beneficiary and deductible by the trust. Any income that is received by the trust and is not paid or made payable to the beneficiaries may be taxed in the trust at the highest marginal tax rate. However, losses of a trust may not be flowed through to the beneficiaries.

Partnerships

For Canadian income tax purposes, a partnership acts as a flow-through mechanism. Unlike a trust, a partnership cannot retain income itself and thus be subject to tax. While a partnership is not a separate legal entity per se, the ITA requires calculation of the partnership income as a single entity before flowing the income (or loss) through to the partners to be taxed in their hands. Income (or loss) retains its character in the hands of each partner and is then taxed at each partner's respective rate of taxation. As discussed above, the applicable tax rate may vary depending on the character of the income and the character of the taxpayer.

Careful tax planning is required in order to determine which of the above vehicles to use and, in particular, any benefits that may be realized in using a trust or partnerships in structuring your business.

Non-Residents Acquiring or Carrying on a Business in Canada

When acquiring a business in Canada, a determination must be made as to whether it is preferable to purchase the assets of the business or the shares of the entity owning those assets. From a purchaser's point of view, the advantage of purchasing the assets of the business is that the cost base for tax purposes will be equal to the purchase price of the assets (this also ensures that only certain liabilities are acquired). Where shares of an existing corporation are acquired, the cost base of the assets is generally unchanged, remaining at the historical tax cost.

Canadian Branch or Canadian Subsidiary?

Where a non-resident has made a decision to purchase the assets of a Canadian business, a determination must be made whether to acquire the assets using a branch that will carry on the business, or whether to form a subsidiary corporation or other entity in Canada to acquire the assets and carry on the business. Any non-resident who seeks to open or establish a new business in Canada will also have to make the same determination. Such a choice may even need to be made by a person already carrying on a business in Canada, should that person wish to change the structure of the business. Merely transferring business assets to a newly formed entity may attract tax consequences and careful tax planning is required. This is particularly true in the event that a rollover

transaction is required (such that there is no gain or loss on the transfer), whereby certain agreements and filings with taxing authorities are necessary.

Tax consequences related to the selection of branch or subsidiary will be at the forefront of any decision to invest in Canada. Whether the business will be subject to tax in Canada is a necessary initial consideration in determining whether to use a branch or a subsidiary. Generally speaking, a business will be subject to Canadian tax unless the provisions of the ITA are overridden by the terms of an income tax treaty existing between Canada and the purchaser's country of residence.

An analysis of whether one should carry on business in Canada through a branch or a subsidiary also involves a number of considerations beyond the tax implications. For instance, there may be a marketing advantage to be gained by utilizing a subsidiary as opposed to a branch. Similarly, there may be regulatory requirements that dictate one form over the other. Any analysis, therefore, should not be restricted to a review of the tax consequences of carrying on business in Canada through either a branch or a subsidiary.

We would be happy to assist you with advice on making this branch versus subsidiary determination in establishing your business in Canada.

Capitalizing your Canadian Business

An integral part of the decision to invest in Canada is the determination of the tax costs associated with capitalizing the investment. Where a Canadian operation is financed by Canadian arm's length sources, the interest expense is generally deductible by the business. The effect of this is to reduce the income tax liability of the business. Where a Canadian operation is financed by foreign arm's length sources, the interest expense is also generally deductible by the business. The ITA has recently been amended to provide that interest payments to an arm's length foreign source will generally no longer be subject to withholding tax.

One advantage of operating a business in Canada through a branch is evident in the context of the thin capitalization rules contained in the ITA. This issue arises with respect to financing the Canadian operation with foreign non-arm's length sources (e.g. a foreign parent lends money to its subsidiary). Generally speaking, the thin capitalization rules prohibit the deduction of interest expense on debt owing to a non-resident related party where the indebtedness exceeds two times the subsidiary's equity. However, the thin capitalization rules apply only to corporations that are resident in Canada.

V. REGULATION OF FOREIGN INVESTMENT

General

The *Investment Canada Act* ("ICA") is federal legislation. Its stated purpose is to encourage investments in Canada and to provide for the review of significant investments in Canada by non-Canadians to ensure that those investments are of net benefit to Canada. Some investments by non-Canadians require only that the Director under the ICA be notified of the investment. Other larger, culturally sensitive, or industry sensitive investments by non-Canadians are subject to both review by the Director and approval by either the Industry Minister responsible for the ICA or, in the case of industries relating to Canada's "national identity" or "cultural heritage", by the Minister of Canadian Heritage.

In 2009, a new review process was implemented for investments by non-Canadians that are notifiable or reviewable under the ICA which could be "injurious" to national security. A foreign investment in Canada which, on review, is found to be injurious to national security may be prohibited under the ICA, or require the investor to divert assets.

Procedures under the Investment Canada Act

Notification Procedure

All establishments of new businesses in Canada by non-Canadians (with the exception of "culturally sensitive" businesses) and all acquisitions by non-Canadians of existing Canadian businesses that fall below the monetary thresholds at which review is required are subject only to a notification procedure. The notification process requires filing certain concise information concerning both the investor and the investment within 30 days after the investment is made.

Review Thresholds

The review threshold for either direct acquisitions of the control of a Canadian business by non-Canadian "WTO investors" (as defined in the ICA) or direct acquisitions of Canadian businesses controlled by WTO investors is met when the target business has assets with an "enterprise value" of more than CDN $600 million during 2009. The ICA adjusts the threshold for subsequent years such that by 2014 the threshold value will be CDN $1 billion and thereafter will be adjusted on an annual basis. Except in very limited cases, there is no review of indirect acquisitions (such as the purchase by a non-Canadian of the shares of the non-Canadian parent of a Canadian subsidiary) by WTO investors of control of Canadian businesses or where the Canadian businesses are already controlled by WTO investors.

The thresholds for direct acquisitions and the exemption from review of indirect acquisitions in transactions involving WTO investors do not apply to certain businesses that have been deemed "culturally sensitive" by the Government of Canada. Such "culturally sensitive" businesses include film, video and music production, book publishing, and radio communications. These special sector investments have significantly lower review thresholds. A direct investment in one of them is reviewable where the book value of the assets held by the acquired Canadian business exceeds CDN $5 million. The threshold for an indirect special sector investment is met if the Canadian business has assets with a book value exceeding CDN $50 million.

The WTO investor thresholds reflect the effect of various free trade agreements, including the World Trade Organization agreements, to which Canada is party. If a non-Canadian investor is not a WTO investor, the review thresholds are significantly lower and are similar to those applicable to the special sector investments described above.

If an investment is subject to review, the test to be met to obtain approval is whether the investment is of "net benefit to Canada". Obtaining approval may require negotiating undertakings with the relevant Minister under which the investor makes commitments regarding both the management and operation of the Canadian business.

Exchange Controls

Canada does not have exchange controls. Accordingly, subject to Canadian withholding tax, funds can be removed freely from the country in, for instance, the form of dividends, management fees, royalties or interest. However, Canada has legislation dealing with proceeds of crime, money laundering and terrorism to monitor the flow of certain funds and requires large cash transactions, electronic cross-border transactions and transactions which are "suspicious" to be reported. These requirements continue to evolve.

VI. COMPETITION LAW AND MERGER REGULATION

The Competition Regime

The principal legislation dealing with anti-trust and competition in Canada is the federal *Competition Act* (Canada) ("CAC"). The CAC creates both criminal sanctions and civil reviewable practices regarding a wide range of anti-competitive activities. The Competition Tribunal ("Tribunal"), a quasi-judicial body established under the CAC, is empowered to review and impose monetary penalties practices such as, but not limited to, abuse of dominant position, various pricing abuses (such as resale price maintenance, price discrimination and predatory pricing), market restriction and some misleading advertising matters. The Tribunal also plays a role in merger review, as noted below.

Criminal prosecutions (and criminal sanctions) are provided by the CAC for a range of offences. These offences include hard core cartel agreements between competitors (i.e. price fixing activity), refusal to supply, as well as certain marketing, telemarketing and misleading advertising practices.

Mergers

The CAC also provides for the review of mergers which might have anti-competitive effects. The Tribunal has the power to take certain actions in connection with "mergers" in Canada that substantially prevent or lessen, or are likely to substantially prevent or lessen, competition. A merger can be referred to the Tribunal for review on an application by the Commissioner of Competition ("Commissioner"). A merger under the CAC means the direct or indirect acquisition or establishment, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or part of a business of a competitor, supplier, customer or other person. The definition is sufficiently broad to include almost any type of business acquisition or the establishment of a business, however implemented.

If the Tribunal finds that a merger or a proposed merger has or is likely to have substantial anti-competitive effects, the Tribunal (or the courts) may issue orders to, for example, prohibit the completion of a merger, to dissolve a merger after it has occurred, and to order the disposition of assets, shares or businesses.

The Commissioner is barred from making an application to the Tribunal in respect of a merger when more than one year has passed since it has been substantially completed.

While all mergers are subject to review and may be challenged by the Commissioner before the Tribunal, under the CAC the parties proposing certain large mergers are required to give prenotification of the merger to the Commissioner. This allows the Commissioner to undertake an analysis of the competitive impact of the transaction. Whether or not prenotification is required is based on two factors:

1. size of the merging parties as economic units, and

2. size of the proposed transaction, if the initial party size threshold is reached.

In order to be required to prenotify, the merging parties, together with their affiliates (not just within Canada), must have assets in Canada exceeding CDN $400 million in aggregate value or have gross revenues from sales in, from, or into Canada that exceed CDN $400 million in aggregate value.

Assuming that the “size of the parties” criteria is met, prenotification will then only be required where the aggregate value of the assets in Canada of the acquired business exceed CDN $70 million or the gross revenues from sales in or from Canada generated by those assets exceed CDN $70 million, and, in the case of a share acquisition, if the acquiring party will, after the transaction, hold in excess of certain stipulated percentages of the acquired corporation’s shares. In the case of amalgamations, prenotification is required where the aggregate value of the assets in Canada of the continuing corporation or the gross revenue from sales in or from Canada generated from those assets exceed CDN $70 million.

If prenotification is required, the parties to the transaction must file certain statutorily prescribed information with the Commissioner. The initial review period is 30 days subject to the discretionary right of the Competition Bureau to require the production of additional information which extends the review period to 30 days following full compliance with the request for additional information. The parties are not permitted to close the transaction until 30 days after compliance with the second request..

The CAC also provides for the issuance of a so-called “Advance Ruling Certificate” (“ARC”), where the Commissioner is satisfied that she would not have sufficient grounds on which to apply to the Tribunal with respect to the proposed merger. If an ARC is granted in connection with a proposed merger, then there is no requirement to meet the prenotification obligations under the CAC with respect to that merger.

VII. SECURITIES REGULATION AND STOCK EXCHANGES

Securities Laws

Canada has no equivalent to the United States Securities and Exchange Commission (“SEC”). The ten provinces and three territories of Canada have enacted securities legislation and regulate the Canadian securities industry. While Canadian securities regulation does vary from province to province, considerable cooperation exists among the securities commissions in all provinces and territories through the Canadian Securities Administrators in an effort to harmonize Canadian securities legislation.

Canadian securities regulation falls broadly into two main categories:

1. the regulation of market intermediaries, such as brokers, investment dealers, advisors, and individual salespersons; and
2. the regulation of other market participants, including public companies, mutual funds and other entities whose securities are “publicly” held or whose securities are qualified for distribution to a broadly-based group of investors.

The regulation of the other market participants falls into certain main categories:

1. the qualification of securities for sale through a prospectus that is required to contain “full, true and plain” disclosure of all material facts;
2. distributions of securities under exemptions from prospectus and registration requirements and resale restrictions applicable thereto;
3. continuous disclosure;
4. proxies and proxy solicitations;
5. take-over bids (i.e. “tender offers”), including insider bids and issuer bids; and
6. insider trading and self-dealing.

Generally, each of the provinces and territories of Canada operate under a "closed" system. When securities are distributed under exemptions from prospectus and registration requirements, they may be subject to re-sale restrictions and reporting/filing requirements. Securities laws apply to many things that would be considered to be "securities" including options and rights under typical poison pill/shareholder rights plans. As such, any investor proposing to enter into Canada via a purchase of securities (whether relating to a public or private entity) or establishment of a Canadian business (which may, for instance, issue options to employees or receive or distribute securities (including shares) in relation to an acquisition) should be wary of securities laws and any applicable distribution (including first trade) and re-sale restrictions. Further, each province in Canada has restrictions on "trading" and, typically, any "trade" includes any act in furtherance of a trade (which may include advertising).

We would be happy to work with you and your advisor to aid you in respect of any securities matters.

Stock Exchanges

There are three main stock exchanges in Canada. The senior stock exchange in Canada is the Toronto Stock Exchange ("TSX"). The principal junior stock exchange in Canada is the TSX Venture Exchange. For trading derivatives, the principal stock exchange in Canada is the Montreal Exchange. As of January, 2008, the TSX and Montreal Stock Exchange had proposed to merge.

Each of these exchanges are self-regulated organizations with responsibility to regulate the affairs of their member brokers and listed corporations.

The stock exchanges themselves are also subject to the power and authority of the securities commission in their jurisdiction.

VIII. BANKING AND FINANCE: CONVENTIONAL FINANCING SOURCES

Chartered Banks

Canada's major banks are world-class organizations. The private sector financing industry in Canada is dominated by a small number of such banks, all of which are federally regulated and are well capitalized.

In addition to the major Canadian banks, the shares of which are widely held, there are many large international banks operating in Canada, either through subsidiaries or branches. Banks have historically faced limitations in the business they may do in Canada.

Trust Companies

Many trust companies have been purchased by the larger banks in Canada. Relatively few independently-owned trust companies of size remain.

Other types of Lenders

Other financial institutions in Canada, such as life insurance companies and pension funds, can also be approached for and would consider providing longer term funding.

In addition, there are a number of companies in Canada (such as venture capital companies and asset based lenders) who can assist foreign investors in capitalizing their businesses by providing various forms of equity, debt and mezzanine financing.

IX. GOVERNMENT AND BUSINESSES: GOVERNMENT ASSISTANCE AND BIDDING FOR GOVERNMENT CONTRACTS

Government Assistance to Business

The federal and provincial governments both offer assistance of various kinds to business. Apart from the indirect assistance offered through incentives by way of tax concessions under the *Income Tax Act*, there are other, more direct forms of assistance that may change over time and may depend on the nature of the business, employment opportunities and capital employed.

Bidding for Government Contracts

Government procurement is big business in North America. In Canada, governments, including hospitals, colleges/universities and other publicly funded entities, are the largest purchasers of goods and services in the country. They spend approximately 150 billion dollars each year on goods and services in a wide variety of market sectors, including military, consulting, construction, education, recreation, health, telecommunications, information technology, electronics, equipment, and chemicals, to name but a few.

Although, millions of dollars in government contracts are advertized on the internet each day, suppliers still vastly underutilize government contracting as a market for their goods and services. This is often because they don not have sufficient information and skills to understand and successfully access this market. Many suppliers dismiss the government market because they think they have to be a big company to compete or because they think they are too small to get a contract. Armed with proper knowledge and advice, small and medium sized companies can compete successfully alongside large companies for government contracts.

Unlike commercial purchasers, governments in Canada must comply with domestic and international trade agreements. These agreements require most government procurements to be conducted by public competition and mandate that the procurement process be open, fair and transparent. They also prohibit discrimination on the basis of the supplier's country or province of origin. These requirements benefit suppliers as they seek to ensure all qualified and compliant bidders have an equal opportunity to access the government procurement market.

Canadian suppliers are also entitled to bid, using the Canadian Commercial Corporation, for contracts issued by the US Department of Defence, NASA, the Department of Homeland Security and the U.S. General Services Administration. This market represents approximately $1 billion per year for Canadian suppliers.

Although government contracts are readily accessible and can be lucrative, there are important differences between selling to governments and selling to commercial buyers which must be carefully considered. Suppliers must be sure they understand the terms and conditions which govern the procurement process and any resulting contract before they submit their bid. Also, supplier contact with government officials must be carefully managed as legislation regulating the activity of lobbyists applies to procurement communications with the federal government as well as many provinces and municipalities.

We can help you successfully navigate the government procurement marketplace at all stages of procurement and contract performance, including advising clients on government procurement issues, conducting procurement compliance reviews for both purchasers and suppliers, helping clients manage procurement risks, negotiating government contracts, and achieving effective business solutions for suppliers through dispute resolution, bid protests and litigation.

X. OWNERSHIP AND LEASING OF LAND

Ownership

Legal Jurisdiction

Each province and territory in Canada has established its own laws governing the ownership of real property. The laws of the provinces and the territories are substantially similar. There are, however, some substantive differences in the law applicable to the ownership of real property (an "immovable") under the Civil Code of Quebec although these differences are likely not of much concern from a business perspective.

Co-Ownership

In the nine common law provinces, two basic forms of co-ownership are recognized. Real property may be owned by more than one individual, partnership or corporation (or any combination thereof) as "joint tenants" or as "tenants in common". Both forms of ownership permit the owners to have undivided interests in the whole and, unless otherwise agreed between them, the co-owners are each entitled to the possession and use of the property in common with the others.

Purchase of Real Property

Agreements for the purchase or sale of an interest in land must be in writing and be signed by the parties thereto to be enforceable. There is a well-developed real estate brokerage industry throughout Canada, governed by legislation in each of the provinces. There is no legal requirement that a broker be involved in a real estate transaction, and it is not uncommon for vendors and purchasers to negotiate purchase agreements directly with one another. In larger commercial real estate transactions, the purchase agreement, prior to execution, is normally prepared, or at least reviewed, by the solicitors for the parties.

Nearly all contracts for the purchase and sale of real property in Canada make the purchaser responsible for satisfying itself that the vendor possesses good and marketable title to the property. The property must also be insurable, in compliance with municipal zoning, other governmental land use requirements and environmental protection laws, and it must meet the standards of physical condition imposed by various municipal and other regulatory authorities.

Mortgages

Various forms of instruments can be used to create security in real property for payment of a debt or the discharge of some other obligation. In the common law provinces such instruments are commonly known as mortgages or charges of land. In Quebec such instruments are referred to as hypotheques. Mortgages can be created by a separate instrument, or under a deed of trust or a debenture and can comprise a fixed charge on specified property or a floating charge on all real property owned by a debtor. Each province has passed legislation governing the rights and remedies available to debtors and creditors as well as with respect to mortgages and the interest payments and redemption terms that may be stipulated therein. Upon default in payment under any such mortgage or instrument, a mortgage creditor may sell or foreclose upon the mortgaged property in accordance with the framework set up in the applicable provincial legislation.

Land Transfer Taxes

Most provinces impose land transfer taxes upon the purchasers of real property payable at the time of acquisition. Such taxes may be levied at the provincial or municipal levels, depending upon the province.

XI. TRADE PRACTICES AND PRODUCT REGULATION

Competition and Trade Practices

As has been noted above, the basic legislation in Canada dealing with the regulation of competition and trade practices is contained in the federal *Competition Act* (Canada) (the "CAC"). The CAC governs two categories of acts: those constituting criminal offences that are illegal *per se*, and those constituting reviewable trade practices. The essential difference between a criminal offence and a reviewable trade practice offence is that the latter is dealt with by way of civil proceedings.

In addition to the criminal offences and reviewable trade practices under the CAC, there are several common law actions relevant to the area of competition law (referred to as anti-trust law in the United States). Among these actions are conspiracy to injure and actions arising out of unlawful interference with contractual relations. Most Canadian provinces have also enacted legislation prohibiting unfair trade practices. This legislation is directed principally at defining and prescribing false, misleading or deceptive representations made to the public.

Product Regulation

In addition to competition and trade practices, the labelling, packaging, marketing and/or sale of products are subject to various federal and provincial statutes. At the federal level is legislation specifically governing the production, labelling, packaging, marketing and/or sale of tobacco products, textiles, food, drugs and medical devices.

The *Food and Drugs Act* ("FDA") applies to all food, drugs, cosmetics and medical devices sold in Canada, whether they are manufactured in Canada or are imported. The FDA and its regulations are intended to ensure the safety of and prevent deception in relation to foods, drugs, cosmetics and medical devices by governing their sale and advertisement. All food products that are imported into Canada must comply with Canadian food safety and labelling requirements.

The FDA is administered and enforced by the Canadian Food Inspection Agency (the "CFIA"), which also administers, among others, the *Consumer Packaging and Labelling Act,* the *Canada Agricultural Products Act*, and the *Fish Inspection Act*. These Acts and their regulations are in place to protect consumers from fraud, misrepresentation and to assist them in making informed decisions.

With few exceptions, labels on food products must indicate the product's common name (both in French and English), the net quantity (required depending on the height of the product), the name and address of the producer (in either French or English), a list of ingredients (generally listed in descending order of proportion by weight), a Nutrition Facts table, and a "best before" date (for foods with a durable life of 90 days or less). Other mandatory information may be required depending on the food item. It is expected that in the upcoming year that the federal government will be changing the requirements to label a product as "Made in Canada" or as a "Product of Canada".

One of the main priorities of the Canadian government has always been to ensure that Canadians have access to high quality, safe and reasonably priced drugs. Canada's regulatory requirements with respect to the approval of drugs are also governed by the *FDA* and are monitored rigorously by Health Canada. Only licensed practitioners (doctors and dentists) may legally write prescriptions for drugs and only a registered pharmacist may dispense drugs to a prescription holder. Sale of non-prescription drugs is also regulated by the *FDA*.

There are also federal and provincial statutes dealing with the marking, use and transportation of dangerous or hazardous goods. The *Hazardous Products Act* governs certain products that must meet specific regulations in order to be imported, sold or advertised in Canada. The Act also bans certain other products from import, sale or advertising. In addition, the Act outlines labelling requirements for hazardous products.

Regulation of Sales and Other Transactions

The above federal legislation meshes with a myriad of statutes enacted by various Canadian provinces, each of which applies to businesses and/or transactions occurring within their borders. Some of these are of general application and others are applicable only to certain business sectors or types of businesses. In general, these statutes relate to the sale of goods, consumer protection and cost of credit disclosure.

Each province has enacted legislation governing the sale of goods that incorporate provisions creating implied vendor warranties. Although generally similar, material differences do exist between the legislation enacted by each province and the underlying obligations created by the legislation. Since implied warranties can apply to both consumers and commercial users, it is imperative that businesses selling products in Canada consider incorporating a waiver of implied warranties in any contract to the extent permitted by the applicable provincial laws (for example, such waivers may not be allowed in the case of consumer sales).

In addition, each of the provinces have enacted consumer protection legislation governing consumer sales and transactions. Such legislation also governs the proper disclosure to borrowers of the true cost of consumer credit (sometimes called "truth in lending" legislation). Unlike the federal *Interest Act,* which relates strictly to loans, provincial consumer protection legislation applies to all credit transactions with consumers, including the sale of goods. The topic of consumer protection is further discussed in Section XX below.

XII. LABOUR AND EMPLOYMENT REGULATION

Responsibility for the regulation of labour and employment in Canada is split between the federal and provincial governments in accordance with the nature of the undertaking in which the employer is engaged. Employees of businesses which fall under federal jurisdiction are subject to federal labour laws. These include such businesses as broadcasting, interprovincial trucking, airlines and railroads.

The federal government and each of the provinces have legislation governing employment standards, including minimum wages, hours of work, mandatory vacation, notice requirements for termination of employment, etc. In addition, the federal government and many of the provinces have legislation aimed at the achievement of "equity" and protection of human rights in the workplace.

In addition to the core legislation dealing with employment standards and labour relations, there is legislation applicable in each jurisdiction dealing with such matters as workers compensation for work-related injury and occupational health and safety.

The rights of dismissed employees are governed in part by statute and in part by common law. The common law entitlement of employees who are dismissed without cause is to receive "reasonable notice" of such dismissal or payment in lieu thereof. The liability of an employer to provide such notice or payment in lieu may be limited by the terms of any contract entered into between the employer and the employee at the time of commencement of employment. However, the employer cannot contract out of any statutory minimum obligation. Nevertheless, the most significant obligation is the common law obligation which can, under certain circumstances, amount to a number of months', or even years', worth of salary as damages for pay in lieu of notice. Therefore, in the context of any dismissal or sale transaction, it is imperative that you receive advice regarding your common law obligations and we would be pleased to assist you in respect of same.

In addition to the legislation discussed above, the federal government and each of the provinces have legislation providing for the certification of trade unions as bargaining agents for employees and governing the settlement of labour disputes.

XIII. IMMIGRATION

Business Immigration Program

The business immigration program is intended to promote economic development and employment by attracting to Canada people with venture capital, business acumen and entrepreneurial skills. The program also seeks to develop new commercial opportunities and to improve access to foreign markets.

Currently, there are three types of immigrants under this program: entrepreneurs, investors and the self-employed.

Independent Immigrants

One of the categories for permanent residence is the independent immigrant category.

Education, fluency in English and/or French, and employment related matters are of considerable importance if an applicant is to be successful in being granted permanent residence under this category.

Another category for permanent residence is the various Provincial Nominee Programs ("PN Programs"). Most provinces in Canada have their own PN Program, whereby the province sponsors eligible workers for permanent residency and in many cases provides them with work permits while their permanent resident applications are being processed. The province bases its decision to nominate/sponsor a person on its immigration needs and the applicant's genuine intention to settle in the province.

Visitors and Temporary Employment in Canada

Visitors to Canada may require a visa to come to Canada depending upon their citizenship.

Generally a person who is neither a citizen nor a permanent resident of Canada cannot engage in or continue in employment in Canada without a valid work permit. Work permits can be obtained under the Immigration and Refugee Protection Act Regulations and several treaties such as NAFTA or GATS, or by obtaining a Labour Market Opinion and Confirmation of Employment through Service Canada. Where a work permit application is filed depends on whether the worker is from a visa bearing or visa exempt country (generally the former is completed at a visa post and the latter is completed at a major port of entry in Canada).

Common work permit applications include intra-company transfers of Executives, Managers and Specialized Knowledge Workers, and under NAFTA, certain Professionals. There is also a special program for Information Technology workers and Live-in Caregivers.

Persons who plan to visit Canada temporarily to invest, to look for new business opportunities or to advance existing business relationships may qualify as a Business Visitor to Canada. Business Visitors include those persons who are engaged in international business activities in Canada without directly entering the Canadian labour market, and where the primary source of remuneration and place of business remains outside of Canada. A Business Visitor is not required to obtain a work permit and can stay in Canada for a few days or a few weeks (up to a maximum of 6 months). If the Business Visitor is from a country that requires a visa to visit Canada, he/she will have to also apply for a temporary resident visa.

Canadian Citizenship

To be eligible to apply for Canadian citizenship an immigrant must first be legally admitted to Canada as a permanent resident and must reside in Canada for at least three of the four years immediately before the date of application for citizenship. In addition, the applicant must be able to communicate in either English or French.

We would be happy to assist you with any immigration matter you may have.

XIV. INTELLECTUAL PROPERTY: PATENTS, TRADE-MARKS, COPYRIGHTS, INDUSTRIAL DESIGNS AND TRADE SECRETS

General

Intellectual property is a valuable business asset. In Canada, there are various types of intellectual property protection available, the most common of which are patents, trade-marks, copyrights, industrial designs, and trade secrets. As technology has advanced, protection has also expanded into more specialized areas such as patented medicines, data protection, integrated circuit topographies and plant breeders rights. Depending on the nature of the business, one or a combination of the various intellectual property rights can be used as part of a rational approach to protecting and enforcing a company's assets.

Patents

A patent is a grant of exclusive rights to make, use or sell an invention for a specified period. Under the Canadian *Patent Act*, the term of patent protection begins with the grant of the patent and expires 20 years from the date the application was filed. Patents protect "inventions" which are defined as any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement thereof. Such an invention is only patentable if it possesses the following characteristics:

a. it must be **new** (precisely the same invention must not be previously known anywhere in the world);

b. it must be **useful** (the invention must have a practical application and must work for its intended purpose); and,

c. it must be **unobvious** (the differences between what is already known and what has been "invented", as gauged from the perspective of a person skilled in the art of the invention, must be sufficient enough to warrant protection).

Before doing business in Canada, a search of the Canadian patent database should be conducted to determine if any patents have been granted in Canada that may be infringed by the manufacture, distribution or sale of any products as part of the business to be carried on. It is important to note that a Canadian Patent on a process will be infringed by the importation of and sale in Canada of a product made outside of Canada by the same process. In fact, under Canadian common law, there is an onus on the importing party to establish the product was not produced by the patented process.

Obtaining a Canadian patent does not protect an invention in another country, just as a foreign patent does not protect an invention in Canada. Although patent protection is country specific, the development of international treaties have evolved to allow patent holders to obtain patent rights in various countries in a more streamlined fashion. For example, an applicant may file an international patent application under the Patent Cooperation Treaty (PCT) through the designated Receiving Office for the country in which they are resident or a citizen.

Many countries, like Canada, belong to the Paris Convention for the Protection of Industrial Property, a treaty that allows the applicant to invoke what is called "convention priority." This means that the filing date in one member country will be recognized by all the others provided the applicant files in those countries within a year of first filing.

Conversely, an application can be filed abroad under the Paris Convention, and then in Canada. The Patent Office will recognize the earlier filing date as the convention date if the applicant claims "convention priority" within four months of the Canadian filing date. The Canadian filing date must be within 12 months of the convention date.

To maintain a Canadian patent application or Canadian Patent in good standing, an annual "maintenance" fee is required commencing two years after the Canadian filing date and every year thereafter. It is also the responsibility of the patent holder to monitor any infringing activities of others and take steps, where necessary, to enforce the patent.

Patented Medicines

Before a drug containing a medicine can be sold in Canada, a Notice of Compliance ("NOC") must be obtained from the Minister of Health. An NOC can be obtained through either a New Drug Submission ("NDS"), a Supplemental New Drug Submission ("SNDS") or by an Abbreviated New Drug Submission ("ANDS"). Typically, the party submitting an NDS is the innovator or brand name manufacturer and the party submitting the ANDS is the generic manufacturer. Regulation of drug approval in Canada is governed by the *Food and Drug Regulations* and the *Patented Medicines (Notice of Compliance) Regulations*.

Although subsequent entry drug manufacturers are allowed under the *Patent Act* to use a patented, innovative drug for the purpose of seeking approval to market a competing version of that same drug, the scheme for obtaining drug approval for generic drugs in Canada follows a joint two-fold process:

1. **Approval by Health Canada**, which is an administrative process designed to ensure safety and efficacy of the drug; and,

2. **Patent Status of the equivalent innovative product** that the generic seeks to market, which is a judicial process designed to balance the interests between patent holders and the public.

The *Food and Drug Regulations* provide an 8 year period of data protection for the issuance of the first NOC for an innovative drug and a further 6 month period for data relating to paediatric studies.

This drug patent scheme does not apply to drugs exported from Canada. Thus, a party does not need to seek an NOC where it intends only to export its drug from Canada into another jurisdiction.

Trade-marks

A trade-mark is a word, phrase or slogan, logo or design, or a distinctive shape, which distinguishes your goods or services from those of others. The fundamental principle of trade-mark law in Canada is that the function of a trade-mark is to indicate the source or origin of a trader's goods or services. As such, trade-marks protect the goodwill associated with a trader's product or service.

Trade-mark rights arise in connection with the "use" or "making known" of the trade-mark in Canada in association with goods or services. Registration is not mandatory for trade-mark rights to accrue although registration provides a number of benefits including greater protection and easier, more cost effective enforcement rights. The person who either first uses or makes the mark known or, in the event the mark has not yet been used or made known, the person who first files an application to register the trade-mark in Canada in association with the goods or services has the entitlement to adopt and register the mark in Canada.

In relation to products, "use" means the placement of the trade-mark on the product itself or on the packaging for the product at either the point of sale or when possession is passed to the purchaser of the product. In relation to services, "use" means use of the trade-mark incidental to the provision of the services or use in advertising of the services. While not required in Canada, a trade-mark owner is nonetheless prudent to place notices on all trade-marks used in advertising materials bringing the existence of the trade-mark and the owner's claim thereto to the attention of the public.

The exclusive rights in Canada associated with a trade-mark that is registered under the *Trade-marks Act* are infringed by the use of the same trade-mark, use of a confusingly similar trade-mark or trade

name by others anywhere in Canada, or from use by others of the registered trade-mark in a manner that depreciates the goodwill (or value) in it. While unregistered marks are also protected to prevent confusion, rights are limited to the geographical area in which the mark has been used and in which the owner has acquired a reputation.

Before adopting or using a mark or business name in Canada, regardless of whether it is registered outside of Canada, it is important to ensure that the use of the mark or business name will not infringe the rights associated with any registered trade-marks in Canada or any unregistered rights arising from prior use of the same or a similar mark, trade name or possibly a domain name in Canada.

Trade-marks may be licensed or assigned. If licensed, the owner must retain direct or indirect control over the character and quality of the wares and services provided by the licensee under the trade-mark. It is *highly* advisable that such control rights be evidenced in a written license agreement.

Copyrights

Copyright provides protection for authors and creators of original literary, dramatic, musical and artistic works, whether published or unpublished. Copyright is the exclusive right under the *Copyright Act* given to the author of a work for the duration of the life of the author plus 50 years. The author's rights under copyright include:

a. the sole right to produce or reproduce the work or any substantial part in any material form;

b. to perform the work or any substantial part in public;

c. to produce, reproduce, perform or publish any translation of the work; and

d. in the case of a computer program to lease the use of the computer program.

There are limitations to copyright protection. Copyright cannot be enforced in a design of an useful article reproduced in quantities of more than fifty. Instead, an Industrial Design or Patent must be obtained for protection. Similarly, copyright cannot protect design features of a useful article dictated solely by function.

An author also has moral rights to both the integrity of the work itself and the right to be associated with the work as its author or to be anonymous. If a work is prepared for a business, either by an employee or an independent contractor, it may be important to obtain an assignment of copyright and waiver of the author's moral rights to permit unfettered discretion to use or commercially exploit the work.

Although the *Copyright Act* provides for a registration system, it is not necessary to register a copyright to receive protection under the Act. However, registration can prove useful in terms of enforcing a copyright, since a copyright certificate is viewed by the court as *prima facie* evidence of both existence and ownership of the copyrighted work.

While the copyright in a work prevents others from making use of replicas of the work for commercial purposes (i.e. sale or rental, distribution, and/or importation), there are provisions in the *Copyright Act* relating to fair dealing. For example, it is not an infringement to make a copy of the work for the purpose of research or private study. A review of a work or news reporting may include copyrighted material provided both the following are mentioned: the source of the material and the name of the author, performer, maker or broadcaster. Educational institutions, libraries, archives and museums have privileges regarding fair dealing.

On all copies of the work, there should be a copyright notice (e.g. © Year of Publication, Name of Owner, All Rights Reserved), since such a notice may be required for entitlement to remedies in

damages in some countries, including Canada and the United States. An expanded notice can be used if greater impact is desired.

Copyright may also be assigned or licensed, provided such assignment or license is in writing. However, moral rights may not be assigned or licensed, although they can be waived.

Industrial Designs

Industrial design registrations, or "design patents" as they are called in the United States, protect "applied art": aesthetic features of shape, configuration, pattern or ornament applied to a finished article. This is in contrast to regular "utility patents" (described above), which typically protect structural or functional features of inventions. Industrial design registration provides the owner with the exclusive rights to a design for a limited time, allowing the owner to prevent the making, importing, renting, selling, offering or exposing for sale or rent of any article in respect of which the design is registered.

Registered Industrial Designs in Canada provide exclusivity for ten years from the issue date and must be filed within one year of the first publication or sale. In order to maintain protection for the whole term a renewal fee must be paid after five years to maintain the registration for the second five years.

The article to which the design is applied, or labels or packaging for the article, should be marked with the capital letter "D" in a circle and the name of the proprietor to maintain the right to obtain damages from any infringer.

A registrable or patentable "design" has the following characteristics:

a. it is directed to **proper subject matter***,* namely features of shape, configuration, pattern or ornament applied to a finished article that appeal to and are judged solely by the eye;

b. it is **new meaning** not in use by any other person at the time it was adopted and not identical with or so closely resembling any other design already registered as to be confounded or confused with the prior design

No protection under the *Industrial Design Act* can be obtained on:

a. features that are dictated solely by a utilitarian function of the article; or

b. any method or principle of manufacture or construction; or

c. any design that is contrary to public morality or order.

Industrial designs may be assigned or licensed.

Trade Secrets

A trade secret is any confidential information used in a business that gives a competitive advantage, and that can be kept a secret. Trade secrets can cover a broad range of information including specific product information (such as formulae, patterns, devices, compounds, processes) and business information (such as customer lists, supplier lists, pricing, business plans).

Unlike other forms of intellectual property, there is no registration system for trade secrets and protection can be unlimited in duration provided that confidentiality is maintained. Once the trade secret is disclosed, the protection is lost.

Trade secrets can only be protected through contractual agreements such as confidentiality or licensing agreements, through a legal duty of confidence commonly applied to employees, agents and corporate officers and directors, or through a fiduciary duty.

Remedies

The *Patent Act*, *Trade-marks Act*, *Copyright Act* and *Industrial Design Act* all provide statutory remedies for infringement of intellectual property rights. Remedies include, but are not limited to, injunctions, damages, accounting of profits, delivery up or destruction of the relevant property and seizure.

We would be happy to assist you with advice on any intellectual property related matters.

XV. INTERNATIONAL TREATIES AND CONVENTIONS

The ratification by Canada of the North American Free Trade Agreement and Canada's acceptance of the GATT establish the broad basis for Canada's tariff and customs rules. The existence of reciprocal tax treaties between Canada and many other jurisdictions in the world establish the basis for the taxation in Canada of taxpayers who are subject to more than one set of national tax laws.

Canada has also brought into force legislation to implement many other international treaties. Among the more important for business is the adoption (through the enactment of provincial legislation) of the Convention on Contracts for the International Sale of Goods, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the Model Law on International Commercial Arbitration. These conventions provide a basis for the selection by business in Canada of regimes for international sales and arbitrations that may be familiar to foreign investors or managers. It can be expected that Canadian courts will encourage the use of these conventions to international transactions (i.e. the enforcement of foreign awards) unless their application has been specifically excluded by the parties. In addition, recent changes in Canadian law recognize the international nature of much Canadian business and the need for Canadian courts to co-operate with foreign courts in both facilitating the processes for the resolution of disputes.

XVI. LANGUAGE AND DOING BUSINESS IN THE PROVINCE OF QUEBEC

General

Canada has two official languages: English and French. According to the 2001 Census, English was the first language of 59.1% of all Canadian, with French accounting for another 22.9%. Addressing Canada's French speaking population can at times appear a daunting and costly task for businesses operating in Canada. Failing to do so, however, may result not only in adverse legal implications, but also in denying business access to the population of Quebec, the country's second largest province by population. Furthermore, it may also result in negative publicity. Accordingly, most Canadian businesses seeking to operate on a national level ultimately choose to adapt their operations in this regard.

The *Charter of the French Language* (the "Charter") is a Quebec statute which ensures the predominance of the French language in Quebec. This is accomplished in part by establishing the right of every person living in Quebec to have all firms doing business in the province communicate in French. Also, the predominance of French is achieved by including detailed Charter provisions dealing with the inclusion of French in, among other things, certain types of contracts, firm names, signs and commercial advertising, and the labelling of products, as well as addressing use of the French language in the workplace.

Contracts

All contracts that are pre-determined by one party or that contain printed standard clauses as well as all documents related to such contracts must, according to the Charter, be drawn up in French unless the parties to the contract expressly agree that another language is to be used.

Firm Names

The provisions of the Charter combined with those of Quebec's *Act respecting the Legal Publicity of Sole Proprietorships, Partnerships and Legal Persons* requires that all business entities that carry on business in Quebec, whether a corporation, partnership or otherwise, must have a French name. Generally speaking, a business entity is also permitted to have a name in a language other than French if it so chooses provided that, when that name is used by the entity, the French name appears "**at least as prominently**" as the non-French version.

Signs And Commercial Advertising

As a general rule, all public signs, posters and commercial advertisements must be in the French language. However, the Charter does provide that such signs, posters and advertisements may be in both French and another language provided that the French is "markedly predominant". Notwithstanding the foregoing, the provincial government in Quebec has retained the right to determine, by regulation, the places, cases, conditions or circumstances where public signs, posters and commercial advertising are required to be in French only, where French need not be predominant, or where such signs, posters and advertising may be in another language only.

Labelling Of Products

The Charter contains its own separate and distinct provisions relating to the labelling of products which are produced or sold in Quebec which go beyond the requirements of the federal *Consumer Packaging and Labelling Act* (discussed below in Section XX). Specifically, the Charter provides that every inscription on a product, on its container or its wrapping, or on a document or object supplied with it, inclusive of all directions for use and warranty certificates, must be drafted in French. The Charter does go on to state that a French inscription may be accompanied by a single or multiple translations provided that no inscription in another language is given greater prominence than that set out in French.

Use Of French In The Workplace And The Francization Of Business

All business enterprises carrying on business in Quebec that employ more than 50 people are mandated to use French in the workplace. After a period of 6 months of operation with more than 50 employees, a business must register with the Office de la langue Francaise (the "Office"), which was established to oversee the use of the French language in commerce and business. Registration must be done within a period of another 6 months. If the Office determines that the use of French is generalized at all levels of the business enterprise it will issue a francization certificate, which certifies that the business has met its French language obligations. If, on the other hand, the Office determines that the use of French is not generalized at all levels, it will notify the business enterprise that it must adopt a francization program, which must be submitted to the Office for approval within 6 months following the date on which the notice is received by the business enterprise.

In addition to the above noted requirements, all business enterprises that employ 100 or more persons **must** form a francization committee composed of 6 or more persons whose responsibilities include analyzing the language situation in the enterprise, preparing reports to management that are transmitted to the Office, and, when necessary, devising and supervising the implementation of a francization program for the business enterprise.

Exceptions

The above French language requirements are in many instances subject to additional conditions as well as exclusions, exceptions and qualifications. Accordingly, a careful review of a business' particular circumstances or proposed practices should be undertaken.

XVII. PRIVACY

In Canada, the collection, use, disclosure and retention of “personal information” in the course of commercial activity is subject to the federal *Personal Information Protection and Electronic Documents Act* (“PIPEDA”) or comparable provincial legislation in Alberta, British Columbia and Quebec.

Under these private sector privacy laws, business must notify individuals for what purpose their personal information is collected, used or disclosed at or before the time that information is collected. In PIPEDA, “personal information” means any “information about an identifiable individual”. Consent must be obtained before the collection, use or disclosure of personal information.

Businesses are obligated to comply with the following privacy obligations:

1. **Accountability**: an organization must be responsible for personal information under its control and must implement procedures to protect personal information as well as respond to inquiries and complaints;

2. **Identifying Purposes**: an organization must identify the purposes for which it collects, uses or discloses personal information at or before the time such information is collected;

3. **Consent**: an organization must obtain the consent of each individual to whom the personal information relates for the collection, use or disclosure of such information;

4. **Limiting Collection**: an organization must limit its collection of personal information to that which is necessary for the purposes for which it is collected;

5. **Limiting Use, Disclosure and Retention**: an organization must decline to use or disclose personal information for a purpose other than that for which it was originally collected except with the consent of the individual or as required by law;

6. **Accuracy**: an organization must ensure that all personal information obtained is as accurate, complete and up-to-date as is necessary for the purposes for which it is collected;

7. **Safeguards**: an organization must keep all personal information it holds secure and must apply appropriate security measures based on the sensitivity of such personal information;

8. **Openness**: an organization must be open about its privacy policies and practices regarding its management of personal information;

9. **Individual Access**: an organization must afford individuals the right to access their personal information and to challenge the accuracy and completeness of such information as well as the right to have it amended as appropriate; and

10. **Challenging Completeness**: an organization must designate an individual or individuals who are to be responsible for the organization’s compliance with privacy obligations and whom will be able to address any challenges concerning the organization’s privacy practices.

At present, Canada’s privacy laws applicable to the private sector do not prevent personal information from being transferred out of, or processed out of, the country. However, the issue of international data transfer attracts increasing public and lawmaker scrutiny.

The implementation of Canadian private sector privacy laws has proved challenging for many businesses either operating in Canada or collecting personal information about individuals in Canada. Privacy legislation will be of concern to virtually every business considering operations here. **We would be happy to assist you with advice on compliance with Canadian privacy laws.**

XVIII. CUSTOMS AND OTHER DUTIES

Goods imported into Canada must be reported to the Canada Border Services Agency ("CBSA").

Commercial goods imported into Canada are subject to customs duty, the goods and services tax ("GST"), and depending on the goods or their value, some other charges or taxes may apply, including excise duty and excise tax on luxury items like jewellery or alcohol. These additional taxes or duties are prescribed by the *Special Import Measures Act* ("SIMA"), the *Excise Act*, the *Excise Tax Act*, and other Canadian laws relating to the importing of goods into Canada.

Duties are determined based on the value of the goods as calculated under the *Customs Act*. The various customs duty rates applicable for goods being imported into Canada are set out in the Customs Tariff. Different rates apply depending on the classification of the goods and the country of origin. Goods originating in countries with whom Canada has a free trade agreement are subject to preferential tariff treatment. And in fact, many of the goods from these countries are duty free.

Canada's customs system is self-assessing. That is, importers are responsible for determining the proper tariff classification, declaring and paying customs duties on imported goods.

Anti-Dumping and Countervailing Duties

The SIMA, which is jointly administered by the CBSA and the Canadian International Trade Tribunal (the "CITT"), seeks to protect Canadian industry from injury which may be caused by the dumping and subsidizing of imported goods.

Under SIMA, imported goods that may cause injury to Canadian domestic producers through subsidizing in the originating country may be subject to countervailing duties. Additionally, anti-dumping duties may be imposed on goods that are sold to importers in Canada at a price that is less than the selling price of comparable goods in the originating country or when goods are sold to Canada at unprofitable prices.

XIX. BUSINESS RESTRUCTURING AND INSOLVENCY

While it may seem pessimistic to anticipate having to understand and utilize Canada's bankruptcy and insolvency laws, individuals or entities considering carrying on business in Canada can take comfort in the fact that our insolvency laws are, generally speaking, quite efficient and have proven themselves effective in assisting a number of businesses in distress.

Bankruptcy and insolvency is, by virtue of Canada's constitution, an area which is governed by federal legislation. Although many business reorganizations and workouts are accomplished privately through negotiations between debtors and their various creditors, both debtors and creditors, in some instances, may have recourse to Canada's three main insolvency statutes:

1. *Bankruptcy and Insolvency Act* (the "BIA"): The BIA is Canada's primary piece of bankruptcy and insolvency legislation. The BIA provides the framework for the liquidation of the assets of insolvent companies, partnerships and individuals, their distribution of proceeds to creditors thorough a trustee-in-bankruptcy who is an officer of the court. In addition, the BIA also provides insolvent individuals and companies with the ability to restructure and to

negotiate compromises with their creditors through formal proposals which may prove effective in avoiding liquidation.

2. *Companies Creditors' Arrangement Act* (the "CCAA"): The CCAA is a statute which deals with the reorganization of businesses which have over $5 million Canadian dollars in debt. Similar to Chapter 11 of the United States Bankruptcy Code, the CCAA provides a court-supervised framework which permits insolvent companies to reorganize and restructure their affairs through a plan of compromise or arrangement. The CCAA has been used successfully by a number of very large enterprises in recent years and has proven itself to be a highly important and flexible tool for insolvent businesses.

3. *Winding Up and Restructuring Act* ("WURA"): WURA is a somewhat antiquated piece of legislation which only applies to the liquidation and reorganization of a very limited number of corporations, primarily banks, insurance companies and other financial institutions.

We would be pleased to provide you advice on bankruptcy and insolvency laws relating to individuals or entities.

XX. CONSUMER PROTECTION

Consumer Packaging and Protection

The federal *Consumer Packaging and Labelling Act* (the "CPLA") and the *Consumer Packaging and Labelling Regulations* govern the packaging and labelling requirements of consumer products. The Competition Bureau and Industry Canada are responsible for the administration and enforcement of the Act and its Regulations as it relates to pre-packaged, non-food consumer products. The Act and its Regulations specifically do not apply to items such as drugs, medical devices, and products solely for commercial, industrial, or institutional use, all of which are governed by other legislation.

The CPLA prohibits placing information on a package that is false or misleading to the consumer. Additionally, there are mandatory statements that must be shown on a label including, the product identity (in both French and English), the product net quantity, and the dealer's name and principal place of business. There are also certain goods for which the *Customs Act* mandates the country of origin be clearly marked.

Provincial Consumer Protection Laws

In addition to federal consumer protection laws, each Canadian province has its own consumer protection legislation in place. These laws protect the rights of consumers by setting out rules that govern most consumer transactions. Although the specific rules vary from province to province, the goal of consumer protection laws is to promote a fair and informed marketplace. Some of the rules of consumer protection legislation include that information must be written clearly and prominently and easy to understand, consumers have the right to cancel contracts within prescribed time frames, and complete and accurate information must be provided to consumers regarding the product or service being sold.