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Guide to Doing Business

Canada, Québec

Prepared by Lex Mundi member firm,
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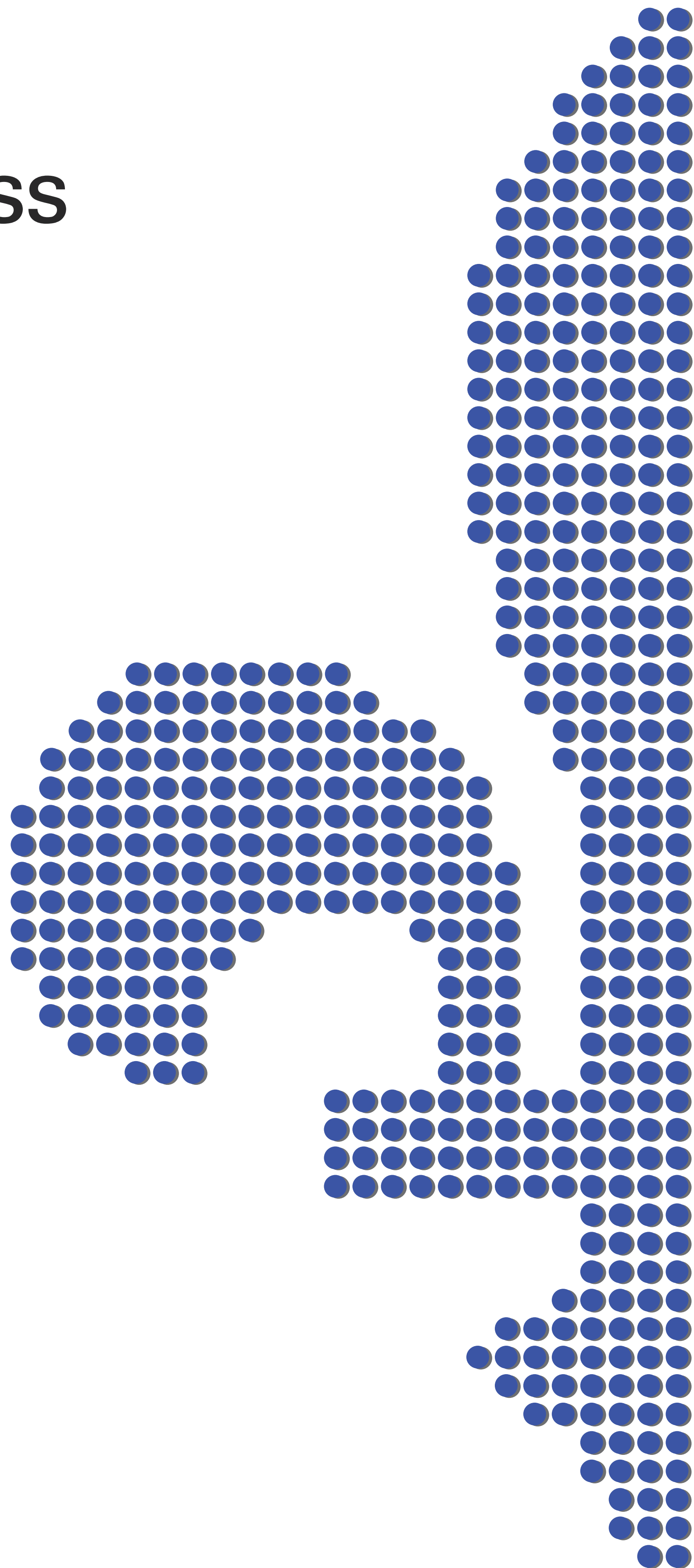
Doing Business in Quebec



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Blakes Guide to Doing Business in Quebec

Doing Business in Quebec is intended as an introductory summary. Specific advice should be sought in connection with particular transactions. If you have any questions with respect to *Doing Business in Quebec*, please contact our Montréal Office Managing Partner, Robert Torralbo, by telephone at 514-982-4014 or by email at robert.torralbo@blakes.com. Blake, Cassels & Graydon LLP produces regular reports and special publications on Quebec legal developments. For further information about these reports and publications, please contact Mathieu Rompré, Director, Business Development & Firm Public Relations, in our Montréal office by telephone at 514-982-5085 or by email at mathieu.rompre@blakes.com.

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Blakes Guide to Doing Business in Quebec

I. Introduction

This Guide provides non-Canadians with an introduction to the laws and regulations that affect the conduct of business in the province of Quebec. Because of Canada's federal structure, the authority to make laws and regulations is divided between the federal and provincial governments by the Canadian Constitution, although in some areas of divided authority, both federal and provincial laws may apply.

For reasons rooted in history, Canada has two legal traditions, the civil law tradition of codified law in the province of Quebec, and the common law tradition of judge-made law in the other provinces of Canada. The province of Quebec, as Canada's only province whose majority population is French speaking, has also adopted the *Charter of the French Language* making French the official language of Quebec. Quebec also collects its own income taxes and has shared jurisdiction with the federal government over immigration to Quebec.

This publication focuses on the laws of the province of Quebec as well as the federal laws of Canada applicable in Quebec. For a discussion on the laws of other Canadian provinces, please consult Blakes *Doing Business in Canada* Guide.

The discussion under each heading in this Guide is intended to provide only general guidance and is not an exhaustive description of all provisions of law with which a business might be required to comply. Particular businesses or industries may also be subject to specific legal requirements not referred to in this Guide. For this reason, the reader should not rely solely upon this Guide in planning any specific transaction or undertaking, but should seek the advice of qualified counsel.

Unless otherwise noted, the law is stated as of July 1, 2017.

II. Government and Legal System

With a population of approximately 36 million people and second only to Russia in area, Canada is a land rich in natural resources and among the world's leading industrialized nations. Quebec, the focus of this Guide, is one of Canada's major provinces, with a population of approximately 8 million. Home to some of the globe's most innovative and largest businesses, Canada — and Quebec in particular — has a highly skilled workforce and is a world leader in a variety of sectors. In Quebec, these include aerospace, information technology and telecommunications, life sciences, energy and natural resources.

While closely aligned in both commerce and culture to its southern neighbour, the United States, Canada has also enjoyed great success in forging strong trade ties with many countries in Asia, Europe, the Middle East, South America and other regions.

1. Brief Canadian History

Canada is a relatively young country that gained independence from Britain in stages over the course of a century. It started on its path as a self-governing nation in 1867, when the British Parliament passed the *British North America Act*. This legislation formed Canada's written constitution until 1982, when Britain formally relinquished its authority over the Canadian Constitution.

As its roots might suggest, Canada is a parliamentary democracy based closely on the British form of government. It has established two levels of government — a federal authority that governs matters of national interest, and the 10 provinces that govern matters of a more local interest. The Canadian Constitution also sets out the specific powers and jurisdictional limits for each level, with the intended result that each should have exclusive domain over certain aspects of government.

For example, the federal government has been allotted authority over the regulation of trade and commerce, banking, patents, copyright and taxation. The provinces have authority over property and civil rights and the administration of justice on a provincial level. As would be expected, there are areas of overlap. Indeed, the division of powers between the federal and provincial governments has been a long-standing source of contention among those who govern Canada.

The evolution of Canada's history has been greatly influenced by three world powers — Britain, France and the U.S. That said, while Canada's two official languages are English and French, the country is decidedly and increasingly multicultural, attracting talented new immigrants from all corners of the world.

1.1 Federal government

Canada's federal government is based in Ottawa, Ontario. Similar to the U.S. federal government, the Parliament of Canada has two legislative bodies through which proposed bills must pass before becoming law — the House of Commons, which has elected representatives, and the Senate, which is comprised of appointees.

The Members of Parliament (MPs) are elected representatives from over 300 "ridings" or regions across Canada who sit in the House of Commons. The federal government itself is headed by a Prime Minister, who is usually the leader of the ruling political party in the House of Commons. The Prime Minister chooses members of the federal Cabinet from the elected Parliamentarians and these "Ministers" are responsible for overseeing individual federal departments.

Canada has four principal political parties — Liberal Party of Canada, Conservative Party of Canada, Bloc Québécois and New Democratic Party of Canada. The political party that controls the most seats in the House forms the ruling government of the day. The Official Opposition is the party that holds the second highest number of seats.

Canada's House of Commons is the only constitutionally authorized body to introduce legislation to raise or spend funds. Once a new law or amendments to existing laws are voted on and approved by the House of Commons, the proposed legislation must then be debated and voted upon by the Senate.

This Upper House of Parliament is made up of up to 105 Senators appointed by the Governor General, on the advice of the Prime Minister. There are currently 98 senators and seven vacancies. Senators, theoretically, provide a check against potential excesses of the governing party. If the Senate approves a law or its amendments, the bill is ready for royal assent. The timing of the royal assent ceremony is chosen by the ruling government and, unless the bill fixes a date on which it is to come into force, it comes into force on the date of royal assent. This time period can be mere days or many months, depending on the political timetable.

1.2 Quebec and other provincial governments

Similar to the U.S. system of states, each Canadian province, including Quebec, has its own elected Premier (similar to a U.S. governor), provincial Cabinet of Ministers, a Legislative Assembly (known in Quebec as the National Assembly), political parties and court system.

Municipalities and their governments are considered "creatures" of the provinces and derive their authority from provincial laws. Canada also has territories, which can be created by the Parliament of Canada under its constitutional authority. While not full-fledged provinces, territorial governments are often delegated powers within the federal domain and have government structures similar to provinces.

Some of the laws that Quebec and other provinces are responsible for include family law, health law, labour standards, education, social services and housing. Similar to Parliament, voters in provinces elect members to sit in the provincial legislature based on ridings.

In Quebec, these elected officials are Members of the National Assembly (MNAs). The ruling government is the party that controls the most seats in the legislature. Today, Canada has 10 provinces and three territories.

Canada's 10 Provinces	Capital
Alberta	Edmonton
British Columbia	Victoria
Manitoba	Winnipeg
New Brunswick	Fredericton
Newfoundland and Labrador	St. John's
Nova Scotia	Halifax
Ontario	Toronto
Prince Edward Island	Charlottetown
Quebec	Québec City
Saskatchewan	Regina
Canada's Territories	**Capital**
Northwest Territories	Yellowknife
Nunavut	Iqaluit
Yukon	Whitehorse

1.3 Canada's legal system

Canadian courts are considered independent of the government. Elected politicians and bureaucrats cannot influence or dictate how the courts administer and enforce the law. In theory, federal and provincial governments make the laws, and courts interpret and enforce them. Increasingly, however, the line between who makes laws is blurring. In some cases, Canada's courts end up making new laws by virtue of the way legislation is interpreted.

A significant driving force for legislative and judicial change in recent years has been Canada's *Charter of Rights and Freedoms* (Charter), which imposes limits on government activity relating to Canadians' fundamental rights and liberties. These include the right to liberty, equality, freedom of religion, freedom of expression, freedom to associate with a group, and to be presumed innocent until proven guilty by an independent and impartial tribunal. The *Charter*, however, does not generally govern interactions between private citizens or businesses.

Canada's legal system is unique from many others in that the *Quebec Act of 1774* created two systems of law — the "civil law" governing those in Quebec and a common law system in all other provinces. The common law system of justice, similar to that in the U.S., relies on the historical record of court interpretations of laws over the years. The civil law system in Quebec uses court decisions to interpret the intentions and allowable authority of law-makers, but also relies on a written *Civil Code* that sets out standards of acceptable behaviour or conduct in private legal relationships.

Canada's court system itself is shaped like a pyramid. At the top, the Supreme Court of Canada is the ultimate court of appeal and has the final word on the interpretation of the law of the country. To ensure that appropriate recognition is given to Quebec's civil law system, federal law requires that at least three of the nine judges on the Supreme Court be Quebec jurists. The Supreme Court of Canada can declare all or part of a law invalid. All lower courts in the land are required to follow its interpretations when dealing with similar matters. Only an act of Parliament or a legislature, acting within their respective areas of authority, can change the effect of the top court's interpretation.

Next, are the courts of appeal of each province. Decisions of a province's appellate court are binding on the lower courts in that province. In other provinces, some courts will seriously consider decisions of another province's appeal decisions, but there is no requirement to follow them until their own provincial appeal court agrees.

Below each province's appeal courts are trial and specialty courts, where most civil and criminal matters are decided.

III. Business Entities and Alternative Methods of Carrying on Business in Canada

A consideration of the different forms of business enterprises available under federal and Quebec law will assist the investor in determining the most suitable arrangement for conducting business in the province of Quebec. Quebec law generally governs the forms of business organization although corporations may also be incorporated federally under the laws of Canada or under the laws of another province.

1. Corporations

A corporation with share capital is the most common form of business entity in Quebec and enjoys advantages that make it the most practical form of business organization in most instances. Corporations may also be incorporated without share capital, generally for not-for-profit purposes. A corporation is a separate legal entity, distinct from its shareholders and management, that can hold property, carry on business and incur contractual and legal obligations.

The Quebec *Business Corporations Act* (QBCA) is a modern and flexible corporate law that is comparable to the *Canada Business Corporations Act* and the corporate statutes of all the other Canadian provinces and territories, and that also has certain additional advantages.

Among the innovations introduced by the QBCA are a simplified set of rules available for corporations with a sole shareholder as well as private corporations in which the shareholders have withdrawn all the powers of the board of directors.

The QBCA also provides flexibility by permitting:

- The electronic transmission of documents to the Enterprise Registrar
- Unpaid shares, fractional shares, uncertificated shares
- The correction, consolidation and cancellation of the corporation's articles
- Short-form amalgamations
- Voluntary dissolution and winding-up
- Reconstitution
- Arrangements
- Reorganizations

Importantly, it is possible for Quebec corporations to be continued out of or merged into other jurisdictions and, conversely, for foreign corporations to be continued into or merged under the QBCA.

1.1 What types of corporations are available in Quebec?

1.1.1 Will the Quebec subsidiary be a private or public corporation?

Quebec legislation governing corporations distinguishes between non-offering corporations (known as private issuers and formerly known as closed companies) and public offering corporations. The number of shareholders of a private issuer is limited to 50 (excluding certain classes of individuals such as employees), the constating documents or securityholder agreements provide for restrictions

on the transfer of the issuer's securities and distributions of such securities are permitted only to a limited category of persons. Public corporations are not subject to these restrictions and have taken steps under applicable provincial securities laws and stock exchange rules to permit their securities to be offered to, and traded by, the public.

Because shareholders of private issuers often participate actively in the management of the corporation, they do not require the same statutory protections that are essential for shareholders of public corporations. Many rules that apply to public corporations with respect to directors, insider trading, proxy solicitation, filing and certification of financial statements, appointment of auditors, take-over bids and public disclosure do not apply to private issuers. However, all shareholders have substantial rights with respect to fundamental changes affecting the corporation, including, in some cases, dissent and appraisal rights and a very broad oppression remedy.

1.1.2 Should the subsidiary be incorporated federally or under Quebec law?

Corporations wishing to carry on business in Quebec and elsewhere may prefer to incorporate under federal law. This permits the corporation to use its corporate name in every province in Canada (with the use of the French form of its name being required in Quebec). Also, federally incorporated corporations may be more widely recognized and accepted outside Canada, though there is no legal basis for this perception. Registration would be required to carry on business in any particular province in Canada.

Whether incorporated federally or under Quebec law, the company must file a declaration under *An Act respecting the legal publicity of enterprises* (Quebec). If not a federal corporation, its corporate name may not be available for use in every other province or territory in Canada, in which case, it would be required to operate under an assumed name in that jurisdiction.

When a corporation incorporates under Quebec law, it must complete its registration by filing an initial declaration in Quebec and may be required to obtain an extra-provincial licence in any other province where it carries on business.

There may be additional factors affecting the decision of whether to incorporate federally or provincially. For example, differences in residency requirements for directors may be relevant in some cases and there is the possibility, under the QBCA, to dispense completely with the requirement of constituting a board of directors. As well, U.S. investors may be interested in the possibility of incorporating an unlimited liability company in British Columbia, Alberta or Nova Scotia to achieve certain U.S. tax objectives. An unlimited liability corporation is treated as a corporation for Canadian tax purposes but may be eligible for flow-through treatment for U.S. tax purposes. The Canada–U.S tax treaty contains some adverse provisions that need to be dealt with in the case of unlimited liability companies. See Section VI, "Tax".

Under the QBCA, shareholders have access to a broad oppression remedy as well as dissent or appraisal rights on par with the *Canada Business Corporations Act*.

1.1.3 What are the specific procedures and costs for incorporation? How long does the process take?

A corporation is formed in the province of Quebec by filing certain prescribed documents with the Quebec Enterprise Registrar (Enterprise Registrar) under the QBCA.

Under the QBCA, the corporation's articles of incorporation are of considerable importance. They set out the name of the corporation, the corporation's share capital any restrictions on share transfers, the number of directors and any limits imposed on the business to be undertaken. Following incorporation, directors and shareholders may pass bylaws that govern the conduct of the

corporation's internal affairs. The corporation is given the capacity and rights of a natural person and it is not necessary to specify the objects for which the corporation is incorporated.

The *Charter of the French Language* (Quebec) requires that a corporation carrying on business in Quebec operate under a French name. See Section IV.4.8, "French Language Requirements in Quebec".

The name of the corporation is strictly regulated to avoid names that are too general or misleading. It is possible to pre-clear a corporate name through a government screening process prior to application for incorporation. If the name is approved, the time in which the Enterprise Registrar may reserve a name is 90 days. If a corporate name is not selected prior to incorporation, then the corporation will be assigned a number to be used as its corporate name. The process of incorporating as a numbered corporation is carried out more rapidly than incorporating under a name since name searches and approvals can be time-consuming.

A corporation may be identified under a name other than its corporate name (commonly referred to as a business name). It should be noted that the Enterprise Registrar does not verify whether the business name is identical to, or confusing with, a name used by another person, partnership or group in Quebec. Therefore, it is important for companies to verify and confirm that a business name is not identical to or confusing with another registered name.

Once the required documents are filed and fees paid, incorporation is automatic. The corporation comes into existence on the date indicated in the certificate of incorporation by the Enterprise Registrar.

The cost of establishing and maintaining a Quebec corporation is relatively modest. Modest registration fees may also be payable upon commencing business in various provinces.

The incorporation of a Quebec corporation can be accomplished very quickly and a routine incorporation could easily be completed within a week.

1.2 Supervision and management of a corporation

1.2.1 Who is responsible for the corporation?

A Quebec corporation acts through its board of directors and officers. The directors are elected by the shareholders, for a term not exceeding two years and, subject to any "unanimous shareholders' agreement", manage the business and affairs of the corporation. Unanimous shareholder agreements are discussed in Section III, 1.2.2 "Residency requirements for directors or officers and unanimous shareholder agreements". There are certain mandatory rules regarding the conduct of business at meetings. Under the federal statute but not under Quebec law, at least 25 per cent of the directors at a meeting must be resident Canadians or, if there are fewer than four directors, at least one must be a resident Canadian (other than for corporations engaged in certain prescribed business sectors, which require a majority of the directors present to be resident Canadians). There are a number of general rules governing the qualifications and number of directors, such as a requirement that each director be at least a specified age and not a bankrupt but, unlike many other jurisdictions, there is no requirement for a director to hold any shares in the company unless the incorporating documents provide otherwise. These rules apply equally to non-resident and resident directors. There are also additional rules that relate only to directors of public companies. Under the QBCA, a private corporation must have at least one director (unless the shareholders determine not to have any board) and a public corporation at least three.

Directors and officers have a duty to act with honesty, loyalty and in the best interests of the corporation. They must exercise their powers with prudence and diligence and must comply with the

governing statutes, regulations, incorporating documents, and any unanimous shareholders' agreement. They are also subject to conflict of interest rules. Where directors and officers neglect their duties, they may be subject to personal liability. They may also be subject to other liabilities, such as with respect to certain unpaid taxes and employee wages. A corporation may purchase and maintain insurance for the benefit of directors and officers for certain liabilities incurred in such capacity.

Directors appoint officers and delegate some of their powers to officers who conduct the day-to-day management of the corporation. The senior operating officer would generally be described as "president", with the chief financial officer often being "vice-president, finance" or "treasurer". There is also normally a secretary. One person may hold two or more offices. Canadian immigration rules must be satisfied in respect of the transfer of non-resident employees to Canada to work for a Canadian subsidiary.

Under Quebec and federal corporate legislation, directors may generally meet anywhere and on such notice as is provided in the documents which govern the company. Provision is made for meetings to be held by telephone, either in or outside Canada. Resolutions in writing signed by all directors may generally be used instead of holding a meeting.

1.2.2 Residency requirements for directors or officers and unanimous shareholder agreements

As discussed in Section III, 1.2.1, "Who is responsible for the corporation?", the QBCA does not impose a residency requirement for directors. Under federal law, the Canadian director residency requirement for companies in most sectors is 25 per cent, except where there are fewer than four directors, in which case at least one must be a resident Canadian. Permanent residents of Canada who are not Canadian citizens may qualify as "resident Canadians", either absolutely or only for a specified period of time. There are no residency requirements for officers, either federally or under the QBCA. However, separate residency requirements may arise under Quebec legislation that imposes a licensing or registration requirement.

A foreign parent corporation will generally deal with the residency requirement of directors in the following way. It may find Canadian individuals to represent it on the board of the subsidiary, either Canadian resident employees or professional advisers (who will generally seek indemnification from the parent for agreeing to act). In some cases, the foreign parent will take the further step of entering into a "unanimous shareholders' agreement" with respect to the corporation. Both federal and Quebec law provide for such agreements, under which the powers of the directors to manage the corporation's business and affairs may be transferred in whole or in part to its shareholders. To the extent that the directors' powers are restricted, their responsibilities and liabilities are correspondingly reduced and transferred to the shareholders. The Quebec law goes further, by expressly allowing the shareholders, when they withdraw all powers from the board of directors, to choose not to establish a board of directors at all.

1.3 How may a corporation be capitalized?

1.3.1 Shares

A share represents a portion of corporate capital and entitles the holder to a proportional right to corporate assets on dissolution. Under the QBCA, but not under federal corporate law, shares may be issued without being fully paid, providing for greater flexibility. As well, under the QBCA, a company may issue shares with par value or shares without par value, or both. Under federal law, a company is prohibited from issuing shares having a par value. There is no minimum or maximum

amount of share capital that a company is allowed to issue, unless otherwise specified in its incorporating documents. "One shareholder" companies are permissible under both systems.

Quebec and federal corporate law provide great flexibility in developing the appropriate capital structure for a company. The articles of incorporation specify the permitted classes of shares and their key terms. Shares may be voting or non-voting, or they may have limited voting or disproportionate voting rights. The incorporating documents may attach various conditions to the payment of dividends and will stipulate rights on dissolution of the company. Absent specific provision in the articles, shareholders do not have any pre-emptive rights in respect of future share offerings.

Redemption or purchase of shares by a company and payment of dividends are subject to statutory solvency tests. Financial assistance by the company in favour of shareholders and other insiders is not regulated under the QBCA or federally.

1.3.2 Debt financing

Corporate capital may also be raised by borrowing. Directors may authorize borrowing unless the incorporating documents or a unanimous shareholders agreement restricts them. Restrictions upon corporate directors, however, will usually not protect the corporation against third parties in the case of unauthorized borrowing by directors. Corporations also have the power to grant security interests (in Quebec, called "hypothecs") over their property and to give guarantees.

1.4 What are the basic procedures governing shareholder participation?

Shareholder meetings are usually held annually in a place stipulated in the incorporation document or in the bylaws of the corporation. At the annual meeting, the financial statements for the year will be presented to the shareholders and any necessary resolutions passed (such as for the election of directors). Meetings may be held outside Quebec if so provided in the articles. Shareholders may act by way of written resolution rather than at a meeting, which is the practice for subsidiaries wholly owned by a non-resident.

Where a corporation has only one class of shares, each share entitles the holder to one vote at all shareholder meetings. Where there is more than one class of shares, the voting rights are set out in the articles. Shareholders may vote personally or by proxy.

2. Corporations and Partnerships in Quebec

A corporation is free to enter into partnerships in Quebec. The relationship of the partners (which may be individuals, corporations, trusts or other partnerships) is established by contract and is subject to applicable Quebec law. In Quebec, partnerships are governed by the *Civil Code of Québec* although the partners are free to choose another governing law of the partnership. In Quebec, a partnership is a contract by which the parties, in a spirit of co-operation, agree to carry on an activity, to contribute thereto by combining property knowledge, or activities, and to share any resulting pecuniary profits. A partnership may take one of four forms: a "general partnership", a "limited partnership", an "undeclared partnership" or, in certain cases, a "limited liability partnership".

Subject to the terms of their agreement, all partners in a general partnership are entitled to participate in ownership and management, and each assumes unlimited liability for the partnership's debts and liabilities. This means that if the partnership runs into difficulty, all partners can be sued for more than just their investment. A general partnership must file a declaration of registration under *An Act respecting the legal publicity of enterprises* (Quebec). The declaration must include the names and domiciles of the partners, the number of employees whose workplace is in Quebec, and the object

pursued by the partnership. To the extent that each partner in a general partnership is itself a limited liability corporation, the liability risk for such partners would be reduced (but not eliminated).

In a limited partnership, there is a separation between the partners who manage the business ("general partners") and those who contribute only capital (in Quebec referred to as "special partners", but otherwise known as "limited partners"). A limited partnership must have at least one general partner, who is liable for the debts of the partnership where the partnership property is insufficient. Limited partners are liable only to the extent of their capital contribution to the partnership provided they do not participate in the management of the business. A limited partnership must file a declaration of registration under *An Act respecting the legal publicity of enterprises* (Quebec). The declaration must include the names and domiciles of the partners, distinguishing the general partners from the limited partners and specifying the partner who furnishes the greatest contribution, the number of employees whose workplace is in Quebec, and the object pursued by the partnership.

A general or limited partnership that fails to make declarations in the manner prescribed by *An Act respecting the legal publicity of enterprises* (Quebec) is deemed to be an undeclared partnership, subject to the rights of third persons in good faith. An undeclared partnership allows partners to contract in their own name and independently assume unlimited liability for their respective obligations to third parties. This means that if the partnership runs into difficulty, only the partner that contracts with the third party can be sued.

In addition, a limited liability partnership is available under specific Quebec legislation for groups of professionals. A limited liability partnership is a general partnership in which the liability of its general partners is limited. This type of partnership provides greater liability protection for partners as only the assets of the partner who worked on, or with, a particular client would be at risk if that client sued the partnerships (and the assets of the other partners would be protected).

A partnership would generally be entered into by a foreign company, directly or through a subsidiary, only if it wished to establish a joint venture arrangement with another person or company. The income or loss of the business will be calculated at the partnership level as if the partnership were a separate person, but the resulting net income or loss will then flow through to the partners and be taxable in their hands. Partnerships themselves are generally not taxable entities for Canadian and Quebec income tax purposes. Because of its flow–through nature, a partnership might be appropriate if a joint venture business is expected to generate disproportionately large expenses in its early years, as the partnership structure would allow the individual co-venturers to take advantage of the tax write-offs arising from these expenses. In the case of a limited partner, the amount of losses which may be available is limited by the amount which the limited partner is considered to have "at risk" in the partnership.

3. Joint Venture Structuring

Two or more parties may engage in a joint venture or syndicate where they collaborate in a business venture. There is no specific statutory definition or regulatory scheme for joint ventures, although they are not uncommon in certain industries such as construction and natural resources. A joint venture generally denotes an association of two or more persons, usually governed by a contract, pursuant to which such persons agree to combine their money, property, knowledge, skills and other resources in furtherance of a desired venture, typically agreeing to share the profits and losses, with each having some degree of control over the venture.

To help avoid the presumption that a partnership has been formed, the joint venture agreement should declare that a partnership is not intended. The agreement should also set out the scope of the venture and the method of control and decision making. It should stipulate the rights and obligations of the participants and provide mechanisms for the settlement of disputes. Unlike a company, a joint

venture is not a distinct legal entity. It cannot sue or be sued. Such rights and liabilities are attached to the entities involved in the joint venture.

4. Alternative Methods of Carrying on Business

4.1 Branch office

Organizations with foreign ownership may conduct business in Quebec through branch offices, so long as the *Investment Canada Act* and provincial registration and licensing requirements are complied with. The foreign corporation must register in all provinces in which it will carry on business.

A branch office operates as an arm of the foreign business, which may enjoy tax advantages from such an arrangement. See Section VI, “Tax”. However, the foreign business’ liability for the debts and obligations incurred in its Quebec operations is not limited as it would be if the Quebec operations were conducted by a separate company (other than a British Columbia, Alberta or Nova Scotia unlimited liability company) of which the foreign business was the shareholder.

4.2 Agents and distributors

As an initial step, a foreign enterprise may wish to offer its products or services in Quebec by means of an independent agent (in Quebec, called a “mandatary”) or distributor. An agent would usually be given limited authority to solicit orders for acceptance at the foreign head office, and would not normally take title to the goods or provide services to the customer. A distributor on the other hand usually takes title to the goods and offers them for resale, either directly to the customer or through dealers or retailers. In both cases, the foreign enterprise will likely seek to avoid establishing a permanent establishment in Canada for tax purposes. See Section VI, “Tax”.

The relationship with an agent or distributor is established by contract. The *Civil Code of Québec* provides that the agent may not be terminated without a serious reason or at an inopportune moment, failing which the principal is liable for damages. A distributor may not be terminated by the client unilaterally, unless provided otherwise in the contract between the distributor and the client. Depending upon the circumstances, the client may be required to provide the distributor with reasonable notice or an indemnity in lieu of such notice, which will vary depending on the length of the existing relationship as well as other factors established by Quebec courts. Unlike certain other Canadian provinces, Quebec does not have franchise legislation within which such agency or distribution arrangements might otherwise fall.

4.3 Licensing

Licensing is a contractual relationship between two parties in which a licensor grants a licensee the right to use trademarks, patents or other intellectual property. While franchising typically involves the licensing of trademarks, know-how and the use of a franchise system, it is distinguished from pure licensing arrangements by the franchisor’s control over the franchisees’ manner of carrying on its business. The licensing relationship does not dictate the licensee’s method of operation but would often establish standards applicable to the licensee’s use of the licensed marks. The relationship is governed predominantly by the general law of contracts but the federal legislation regulating the relevant form of intellectual property would also be relevant.

5. General Registration Requirement

As discussed in relation to corporations (whether federal or provincial) and partnerships, those intending to carry on business in Quebec should be aware of the general requirement to register such

business (in Quebec, known as an “enterprise”), regardless of its juridical form, under *An Act respecting the legal publicity of enterprises* (Quebec). The declaration pertaining to such registration provides basic information accessible to the public on the entity’s business names, management, principal owners and places in which it carries on business in Quebec, and such information must be updated annually.

The *Charter of the French Language* (Quebec) in turn requires such enterprises to adopt a French business name for the purposes of the province of Quebec. Generally speaking, the French version of the enterprise’s name must be used in carrying on business in Quebec, however, exceptions apply to allow the English version of the name in particular instances, particularly when the language of an underlying document is permitted to be in English. See Section IV.4.8, “French Language Requirements in Quebec”.

IV. Trade and Investment Regulation

1. Competition Law

The *Competition Act* (Act) is Canada's antitrust legislation. It is legislation of general application and reflects classical economic theory regarding efficient markets and maximization of consumer welfare. It is administered and enforced by the Competition Bureau (Bureau), a federal investigative body headed by the Commissioner of Competition (Commissioner). The Act may be conveniently divided into two principal areas: criminal offences and civilly reviewable conduct, which includes merger regulation.

1.1 Criminal offences

1.1.1 What business practices are subject to criminal liability?

The main criminal offences in the *Competition Act* relate to conspiracy and bid-rigging.

The conspiracy provisions prohibit competitors (or persons who would be likely to compete) from: conspiring or entering into an agreement or arrangement to fix prices; allocate sales, territories, customers and markets; or fix or control production or supply. Contravention of these provisions constitutes a per se offence (i.e., there is no need to show an effect on competition to secure a conviction). Prior to 2010, proof of an undue limiting, lessening or prevention of competition was required to establish the offence. The penalty upon conviction is imprisonment for up to 14 years and/or a fine not exceeding C$25-million per offence.

The bid-rigging provisions prohibit two or more bidders (in response to a call or request for bids or tender) to agree that one party will refrain from bidding, withdraw a submitted bid, or agree among themselves on bids submitted. The provisions do not apply when the parties clearly inform the party who issued the tender about the joint bidding agreement at or before the time they submit the bid. The penalty upon conviction is imprisonment for up to 14 years and/or a fine at the discretion of the court.

1.1.2 How are criminal offences prosecuted under the *Competition Act*?

The Commissioner, either on his own initiative or following a complaint from six resident Canadians, can initiate an investigation into a possible violation of criminal provisions of the Act. At any time during his investigation, the Commissioner can refer the matter to the Director of Public Prosecutions (DPP). The DPP is the only person who may initiate criminal proceedings for contraventions of the Act. To obtain a conviction, the DPP must satisfy a court beyond a reasonable doubt that an offence has been committed.

It is important to note that, under the Act, a foreign competition authority that is a party to a mutual legal assistance treaty with Canada may request, subject to ministerial authorization, the assistance of the Commissioner to further its investigation — even where the conduct alleged as anti-competitive did not occur in Canada. Evidence obtained by the Commissioner in a Canadian investigation may be provided to a foreign competition authority without the authorization of the party being investigated.

The Act also allows for a private right of action (see Section IV, 1.3, “What business practices will attract civil liability? What is the exposure to civil damages?”).

1.1.3 Recent enforcement action

Consistent with a global trend amongst competition authorities, the Commissioner has devoted substantial resources to enforcing the criminal conspiracy provisions of the Act, particularly so-called "hard core" cartels involving agreements between competitors to fix prices or allocate markets or customers between themselves. The single largest fine imposed thus far on a corporation is C$48-million for conspiracy and C$30-million for bid-rigging. Executives have also been fined and subjected to jail terms.

1.2 What business practices may constitute civilly reviewable conduct and be subject to possible review before the Competition Tribunal?

Certain non-criminal conduct may be subject to investigation by the Bureau and review by the Competition Tribunal (Tribunal). The Tribunal is a specialized body that is comprised of both judicial and lay members. Reviewable practices are not criminal and are not prohibited until made subject to an order of the Tribunal specific to the particular conduct and party. Matters reviewable by the Tribunal include, among other things, non-criminal competitor collaborations, refusals to deal, exclusive dealing, tied selling, market restriction, price maintenance and abuse of dominant position.

If the Tribunal finds, on the civil standard of the balance of probabilities, that a person has engaged in reviewable activity, it may, depending on the activity, order a person to do or cease doing a particular act in the future and to otherwise take any other action necessary to fix the competitive harm. The Tribunal is also empowered to impose administrative monetary penalties of up to C$10-million (and, in the case of repeat offenders, C$15-million) under the abuse of dominance provisions. There are criminal penalties for failure to comply with an order once it has been made.

Private parties have the right to bring complaints directly to the Tribunal in relation to five matters: refusal to deal, exclusive dealing, tied selling, market restriction and price maintenance. At one time, the Commissioner was the only person who could bring reviewable trade practices before the Tribunal.

1.3 What business practices will attract civil liability? What is the exposure to civil damages?

Section 36 of the Act establishes a private right of action for losses suffered as a result of another party's breach of any of the criminal provisions set out in Part VI of the Act (see Section IV, 1.1. "Criminal offences" for a discussion of the main criminal offences under the Act), or failure to comply with an order made pursuant to the Act (such as, by the Tribunal in connection with civilly reviewable conduct). The constitutional validity of this provision has been upheld and increasing numbers of parties are seeking to enforce this right.

Unlike in the U.S., section 36 limits the recoverable damages to losses that can be proven to have resulted from a violation of the Act or the failure to comply with the order in question, plus costs.

Section 36 provides that the "record of proceedings" in proceedings that resulted in either (i) a conviction of a criminal offence under the Act or (ii) a finding of a failure to comply with an order made under the Act, is *prima facie* proof of the alleged conduct in a civil action. Furthermore, any evidence given in the prior proceedings as to the effects of the conduct in question "is evidence thereof" in the civil action.

1.4 Merger regulation

1.4.1 Under what circumstances will pre-merger notification be required?

Mergers fall under the civilly reviewable matters provisions of the Act. All mergers are subject to the Act, and thus to the substantive review provisions described in Section IV, 1.4.3, "What is the substantive test applicable to the review of mergers?" and to the enforcement procedures set out in Section IV, 1.4.4 "What are the consequences if the Commissioner is concerned with a transaction?" Additionally, mergers that satisfy certain prescribed thresholds must be notified to the Bureau, and certain statutory waiting periods must have expired (subject to certain exceptions), before a merger can be completed.

The thresholds applicable to merger transaction are as follows:

- **Size of parties test**: the parties to the transaction, together with their affiliates, must have assets in Canada, or gross revenues from sales in, from or into Canada, that exceed C$400-million.
- **Size of transaction test**: in respect of the target, the value of the assets in Canada, or gross revenues from sales in or from Canada from such assets, must exceed C$88-million (this figure is adjusted annually). In the case of an acquisition of a corporation or an unincorporated entity, as well as in the case of the formation of an unincorporated entity (e.g., joint venture), the assets and gross revenues are those of the corporation or entity and its affiliates being acquired.
- **Shareholding/interest test**: in addition to the above two threshold tests, the Act prescribes a share-holding/economic interest test that applies to the acquisition of an interest in a corporation or in an unincorporated entity. Regarding a corporation, there is an additional requirement that the acquirer and its affiliates must be acquiring more than 20 per cent of the voting shares of a public corporation or more than 35 per cent of the voting shares of a private corporation, or where the acquirer already owns such number of voting shares, it must acquire more than 50 per cent of the voting shares of the corporation. In the case of an unincorporated entity, the test is similar to the above, except that the interest is based on the right to more than 35 per cent of the profits or assets on dissolution, and if this level has already been exceeded, then more than 50 per cent. Additional thresholds apply in the case of amalgamations, which would cover, for example, Delaware mergers.

If all applicable thresholds are exceeded, the parties to the transaction are required to provide the Commissioner with prescribed information relating to the parties and their affiliates. The obligation to notify is on both parties to a transaction and the statutory waiting period (described below) does not commence until the parties have submitted their respective notifications. However, in the case of a hostile bid, a provision exists to allow the Commissioner to require the target to provide its portion of the notification within a prescribed period. Where this provision applies, the statutory waiting period begins when the bidding party submits its notification. A notification is subject to a filing fee of C$50,000.

1.4.2 What are the notification procedures?

The waiting period is 30 days following the day on which complete notifications were submitted to the Bureau.

The parties may close the transaction after the 30-day statutory waiting period has expired unless the Commissioner makes a request for additional information, known as a Supplementary Information Request (SIR). The scope of additional information that may be required is potentially quite broad; any information relevant to the Commissioner's assessment of the transaction can be requested.

Subject to the Commissioner seeking an injunction, the merging parties may complete their merger 30 days after the information required by SIR has been received by the Commissioner. In many cases, however, the parties will choose to wait until the Commissioner has completed his substantive assessment of the transaction (see Section IV, 1.4.3, "What is the substantive test applicable to the review of mergers?").

In addition to, or in lieu of, filing a notification, the merging parties can request that the Commissioner issue an advance ruling certificate (ARC). An ARC can be issued, at the Commissioner's discretion, where he is satisfied that he does not have sufficient grounds upon which to challenge the merger before the Tribunal. In practice, an ARC is issued only in respect of mergers that do not raise any substantive concerns. The issuance of an ARC has two important benefits:

- It exempts the parties from having to file a notification (where the Commissioner does not issue an ARC, the parties can apply to have the requirement to file the notification waived as long as substantially the same information was supplied with the ARC request)
- It bars the Commissioner from later challenging the merger on the same facts upon which the ARC was issued.

A filing fee of C$50,000) applies to a request for an ARC. Only a single fee applies where both a request for an ARC and a notification have been submitted.

Where the Commissioner is not prepared to issue an ARC, but nevertheless determines that he does not have grounds upon which to initiate proceedings to challenge a proposed transaction, he will typically grant what is commonly referred to as a "no-action letter."

A substantial number of transactions close on the basis of a no-action letter. However, where an ARC has not been granted, the Commissioner retains the jurisdiction to challenge a transaction for up to one year after it has been substantially completed.

1.4.3 What is the substantive test applicable to the review of mergers?

The substantive test applicable to a merger transaction is whether it will, or is likely, to prevent or lessen competition substantially in a relevant market. A market is defined on the basis of product and geographic dimensions. The Act provides that the factors relevant to assessing the competitive impact of a merger includes the extent of foreign competition, whether the business being purchased has failed or is likely to fail, the extent to which acceptable substitutes are available, barriers to entry, whether effective competition would remain, whether a vigorous and effective competitor would be removed, the nature of change and innovation in a relevant market, and any other factor relevant to competition.

The Act also provides for an "efficiencies defence" under which a merger that prevents or lessens, or is likely to prevent or lessen, competition substantially in any market in Canada may proceed as long as the efficiency gains resulting from the merger will be greater than, and will offset, the anticipated anti-competitive effects.

1.4.4 What are the consequences if the Commissioner is concerned with a transaction?

If, in the course of reviewing a proposed merger, the Commissioner identifies areas in which he believes the transaction will prevent or lessen competition substantially, he will normally try to negotiate alterations to the transaction which address his concerns. These negotiations can be protracted. Prior to challenging a transaction before the Tribunal, the Commissioner may apply to the Tribunal for an order enjoining the parties from completing the transaction for a period not exceeding 30 days to permit the Commissioner to complete his inquiry. The Commissioner can also apply for an

extension of the period for an additional 30 days. If the Commissioner makes an application to the Tribunal challenging a proposed transaction, he may also apply for an interim order on such terms as the Tribunal deems appropriate.

Following the end of this period, the Commissioner can challenge the merger. There is precedent for the Bureau permitting the parties to take up shares and enter into a "hold separate" agreement until the Tribunal process has run its course. Following its review, the Tribunal can either allow the merger to proceed or, in the case of a completed merger, it can order a purchaser to dispose of all or some assets or shares or take such other action as is acceptable to the merging parties and the Commissioner.

In practice there have been very few contested proceedings. In most cases where the Commissioner has expressed concerns, the parties have been able to agree upon a set of commitments that are mutually satisfactory to the merging parties and to the Commissioner.

2. General Rules on Foreign Investments

2.1 Are there special rules governing foreign investment?

The *Investment Canada Act* is a federal statute of broad application regulating investments in Canadian businesses by non-Canadians. Except with respect to cultural businesses, the Investment Review Division (Investment Canada) administers the *Investment Canada Act* under the direction of the Minister of Innovation, Science and Economic Development Canada.. The Minister of Canadian Heritage is responsible for cultural businesses (i.e., business activities relating to Canada's cultural heritage, such as publishing, film, video, music and broadcasting). In some cases, investments are reviewed by both the Minister of Innovation, Science and Economic Development Canada and the Minister of Canadian Heritage where only part of the business activities of the Canadian business involve Canada's cultural heritage.

Investments by non-Canadians to acquire control over existing Canadian businesses or to establish new ones are either reviewable or notifiable under the *Investment Canada Act*. The rules relating to an acquisition of control and whether an investor is a "Canadian" are complex and comprehensive.

A "direct acquisition" for the purpose of the *Investment Canada Act* is the acquisition of a Canadian business by virtue of the acquisition of all or substantially all of its assets or a majority (or, in some cases, one-third or more) of the voting interests (shares) of the entity carrying on the business in Canada. Subject to certain exceptions discussed below, a direct acquisition is reviewable where the value of the acquired assets is C$5-million or more.

An "indirect acquisition" for the purpose of the *Investment Canada Act* is the acquisition of control of a Canadian business by virtue of the acquisition of a non-Canadian parent entity. Subject to certain exceptions discussed below, an indirect acquisition is reviewable where (a) the value of the Canadian assets is less than or equal to 50 per cent of the value of all of the assets acquired in the transaction *and* the value of the Canadian assets is C$50-million or more, or (b) the value of the Canadian assets is greater than 50 per cent of the value of all the assets acquired in the transaction *and* the value of the Canadian assets is C$5-million or more.

The acquisition of control of an existing Canadian business or the establishment of a new one may also be reviewable, regardless of asset values, if it falls within a prescribed business activity related to Canada's cultural heritage or relates to national security.

Special rules apply with respect to investments made by state-owned enterprises (SOEs):

- The Minister of Innovation, Science and Economic Development Canada has the power to determine that an SOE has acquired “control in fact” of a Canadian business or that a Canadian business is “controlled in fact” by one or more SOEs (notwithstanding the control rules otherwise set out in the statute), with the potential result that certain investments may be subject to a Ministerial review and approval requirement where they otherwise would not have been.
- SOE’s investments in the Canadian oil sands are limited by a federal government policy introduced in December 2012. Specifically, reviewable acquisitions of control (including acquisitions of “control in fact”) of oil sands businesses by SOEs will not receive approval from the Minister of Innovation, Science and Economic Development Canada, except on an “exceptional basis.”

The *Investment Canada Act* defines an SOE broadly as including foreign governments and their agencies and entities that are controlled or influenced, directly or indirectly, by such governments or agencies. It also includes “an individual who is acting under the direction of” or “who is acting under the influence of” such a government or agency. An SOE investor, as with any other investor, will also have to consider the potential application of the national security review regime to the proposed investment.

2.2 How are WTO members treated differently?

The *Investment Canada Act* reflects commitments made by Canada as a member of the World Trade Organization (WTO). In the case of a direct acquisition by or from a (non-Canadian) “WTO investor” (that is, an investor controlled by persons who are residents of WTO member countries) that is not an SOE, the C$5-million threshold for direct investments increases to an “enterprise value” of C$1-billion. This “enterprise value” threshold took effect in April 2015, following expected amendments to the *Investment Canada Act’s* regulations. The threshold is meant to more accurately capture the value of intangible assets of modern, knowledge-based businesses.

The regulations set out the precise manner in which the enterprise value is calculated. In general terms:

- For acquisitions of control of publicly traded entities, the enterprise value of the assets of the Canadian business is equal to the market capitalization of the entity plus liabilities, minus cash and cash equivalents
- For acquisitions of control of private companies and for asset acquisitions, the enterprise value is the purchase price, plus liabilities, minus cash and cash equivalents

The higher threshold applicable to WTO investors does not apply where the Canadian business is considered to be carrying on a “cultural business.”

Where the investor is an SOE WTO investor, the threshold is an asset value based test, which is C$379-million, based on the book value of the assets of the Canadian business.

Additionally, as part of the measures being taken to implement the Comprehensive Economic Trade Agreement (CETA) with the 28 European Union countries, new legislation is expected to take effect that will increase the monetary threshold for investors from those countries, as well as from other countries with trade agreements with Canada, to C$1.5-billion in “enterprise value”. This new threshold will not apply to investments by SOEs or where the Canadian business is considered to be carrying on a “cultural business.”

An indirect acquisition of a Canadian business by a non-SOE WTO investor is not reviewable but only subject to a notification obligation (provided that the Canadian business is not considered to be carrying on a cultural business).

2.3 If a review is required, what is the process?

A reviewable transaction may not be completed unless the investment has been reviewed and the relevant Minister is satisfied that the investment is likely to be of "net benefit to Canada". The non-Canadian proposing the investment must make an application to Investment Canada setting out particulars of the proposed transaction. There is then an initial waiting period of up to 45 days; the Minister may unilaterally extend the period for up to 30 days and then only with the consent of the investor (although in effect this can be an indefinite period since, with a few exceptions, the investor cannot acquire the Canadian business until it has received, or is deemed to have received, the Minister's "net benefit to Canada" decision). If the waiting period is not renewed and the transaction is not expressly rejected, the Minister is deemed to be satisfied that the investment is likely to be of net benefit to Canada. Failure to comply with these rules opens the investor to enforcement proceedings that can result in fines of up to C$10,000 per day.

The principal practical negative effects of a review are the reality of delay and negotiation. It is often difficult to get the Minister's approval before the expiration of the initial 45-day period. In addition, the Minister will usually seek undertakings (see Section IV, 2.4, "What is required for an investment to be of 'net benefit to Canada'?") as a condition of approval.

Special review requirements and timing considerations apply to transactions, whether already implemented or proposed, which potentially raise national security considerations.

The term "national security" is not defined in the *Investment Canada Act*. However, in December 2016, the federal government released guidelines on national security reviews, as part of a new transparency initiative intended to encourage foreign investment by providing investors more information about (a) the types of transactions that may require a national security review; and (b) the factors considered by the government when assessing national security risk. Relevant factors identified in the guidelines include: the effect on Canada's defence capabilities, transfers of sensitive technology or know-how, critical infrastructure, the enablement of foreign surveillance or espionage, the hindering of law enforcement operations, the potential involvement of illicit actors (such as terrorists or organized crime syndicates), the impact on the supply of critical goods and services to Canadians, the supply of goods and services to the federal government, and the impact of an investment on Canada's international interests.

In such a case, the Minister shall, after consultation with the Minister of Public Safety and Emergency Preparedness, inform the non-Canadian investor whether a review of the investment on national security grounds will be required. If the parties are notified that no such review will be ordered, the transaction may proceed.

Where a national security review is required, the parties may be required to provide the Minister with any information considered necessary for the review. The Minister may then either:

- Inform the parties that no further action will be taken, if the Minister is satisfied that the investment would not be injurious to national security (in which case, the transaction may proceed)
- Refer the transaction to the Governor in Council (Federal Cabinet), if the Minister is satisfied that the investment would be injurious to national security or the Minister is not able to make such a determination.

Where the transaction is referred to the Governor in Council, the Governor in Council may take any measures considered advisable to protect national security including blocking the transaction, authorizing the transaction on the basis of written undertakings or other terms and conditions or ordering a divestiture of the Canadian business.

Where a "net benefit to Canada" review is concurrently underway, the minister will have up to an additional 30 days to complete that review once the governor-in-council has cleared the investment on national security grounds.

2.4 What is required for an investment to be of "net benefit to Canada"?

The *Investment Canada Act* requires the relevant Minister to take these factors into account, where relevant, when determining if an investment is likely to be of "net benefit to Canada":

- The effect of the investment on the level and nature of economic activity in Canada, including, without limiting the generality of the foregoing, the effect on employment, on resource processing, on the utilization of parts, components and services produced in Canada and on exports from Canada
- The degree and significance of participation by Canadians in the Canadian business and in any industry or industries in Canada of which the Canadian business forms a part
- The effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada
- The effect of the investment on competition within any industry or industries in Canada
- The compatibility of the investment with national industrial, economic and cultural policies, taking into consideration industrial, economic and cultural policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the investment
- The contribution of the investment to Canada's ability to compete in world markets.

Typically, during the 45-day period, the investor will negotiate with Investment Canada and/or Canadian Heritage a suitable set of undertakings to be provided in connection with the Minister's approval of the transaction. These undertakings comprise commitments by the investor concerning its operation of the Canadian business following the completion of the transaction. With respect to SEOs, the government has issued guidelines whereby such enterprises may be subject to certain additional obligations designed to ensure that their governance is in line with Canadian standards and that the Canadian businesses that they acquire maintain a commercial orientation.

Commitments provided to the Minister by a foreign investor may, among other things, obligate the investor to keep the head office of the Canadian business in Canada, ensure that a majority of senior management of the Canadian business is comprised of Canadians, maintain certain employment levels, make specified capital expenditures and conduct research and development activities based on specified budgets, and make a certain level of charitable contributions, all over a period of usually three years. According to guidelines established by Investment Canada, these undertakings will be reviewed by Investment Canada or Canadian Heritage, as the case maybe, on a 12- to 18-month basis for up to three to five years in the ordinary course to confirm the investor's performance.

2.5 Are there any requirements for investments that are not "reviewable"?

If the acquisition of an existing business or the establishment of a new business is not reviewable, the investment will be "notifiable". Notification requires the non-Canadian investor to provide certain specific information to Investment Canada, including information on the parties to the transaction, the

number of employees of the business in question, and the value of its assets or market capitalization of the investment. Notification may be given before or within 30 days after the closing of the transaction.

2.6 Are there other statutes that regulate foreign investments in particular sectors?

In addition to the *Investment Canada Act*, other federal statutes regulate foreign investment in specialized industries and sectors, such as telecommunications, broadcasting, transportation and financial institutions.

3. International Trade Agreements

3.1 Trade Agreements as a constitution for international business regulation

The International Trade Agreements to which Canada is party act like a constitution, placing limits on the laws, regulations, procedures, decisions and actions that all levels of government and their agents may undertake. While these agreements do not automatically invalidate laws that breach their obligations, they all provide sanctions for non-compliance.

3.2 Key principles of trade agreements

The guiding principle of all trade agreements is non-discrimination. This general principle is enforced through a number of specific rules that appear in most trade agreements with varying degrees of force. The underlying rationale is that discriminating between the goods, investments, persons, or services of different countries distorts trade and results in a less efficient utilization of resources and comparative advantages, ultimately to the detriment of all.

The two most prevalent rules are most favoured nation and national treatment. Most favoured nation treatment prohibits discriminating in the treatment accorded to goods, persons, or companies, as the case may be, of other parties to the agreement. For instance, most favoured nation treatment requires that Canada must give as favourable a duty rate to imports from the European Union (EU) as from Brazil. National treatment prohibits giving more favourable treatment to domestic persons, investments, services or goods than is offered to persons, investments, services or goods from other countries. It does not require treating them the same as nationals, so long as the treatment is as favourable.

There are many more rules that address more subtle or specific forms of discriminatory and trade-distorting practices. Some of these are discussed below.

3.3 Using trade agreements as business tools

Historically, trade agreements focussed on reducing tariffs, which are the most obvious form of trade discrimination in which a country imposes a “tax” only on imported goods. As trade negotiations have succeeded in reducing tariffs, other — often more subtle — trade barriers have grown in importance. These non-tariff barriers can include all manner of domestic regulation such as labelling, environmental, and even food safety requirements that directly or indirectly affect the import, export and sale of goods, foreign direct investment, and the ability of companies to move people across borders to provide a service.

Today these domestic regulations, policies and programs can interfere significantly with business operations. Canada's trade obligations under the various agreements to which it is a party offer the business community effective tools for responding to these obstacles. Some agreements, like the North American Free Trade Agreement (NAFTA), provide investors with a direct means of challenging barriers to establishing, acquiring or managing a Canadian company. All of the agreements can be effectively used to respond to identified obstacles. This is particularly true in Canada, a strong advocate of multilateral trade rules that seeks to ensure that the development of new laws or the application of current regulations are consistent with international trade law obligations.

International trade agreements are a relatively new business tool. Identifying how trade obligations can be leveraged into the achievement of strategic business objectives is a subtle and specialized skill that can help realize the market opportunities available to those industry players who fully exploit these cutting-edge legal tools.

3.4 Canada's trade agreements

Canada is a party to many trade agreements. The list of countries with which Canada enjoys trade agreements continues to expand through ongoing negotiations. We summarize them below.

3.4.1 WTO agreements

Canada is a member of the WTO and has committed to respect the rules of the Agreements adopted by WTO members effective January 1, 1995. The WTO administers the rules governing trade among the organization's 164 members.

The WTO Agreements encompass a structure with six principal parts: the Agreement Establishing the WTO; agreements on trade in goods; the General Agreement on Trade in Services (GATS); the Agreement on Trade-Related Aspects of Intellectual Property Rights; dispute settlement; and reviews of governments' trade policies. These agreements lay down rules that governments must follow in regulating a wide range of business activities including procurement, investment, agriculture and industrial goods trade, and subsidies and antidumping decisions. The WTO's Agreement on Government Procurement is often reviewed when advising clients in procurement matters. A revamped Agreement on Government Procurement (sometimes referred to as the Revised Agreement on Government Procurement) has been in force since April 6, 2014 and is binding on those states, including Canada, that have completed the ratification process.

The current round of multilateral negotiations, commonly known as the Doha round and aimed at strengthening the rules of the WTO agreements, remains stalled largely as a result of differences between the Member states on measures relating to agricultural products. Nevertheless, the WTO Agreements continue to apply and impose rules governing the laws, regulations and practices of member countries that affect trade in goods or services.

The WTO Agreements place limits on actions that WTO member governments and their agents may undertake. If, for example, European, U.S. or Chinese laws, policies or practices adversely affect a business in Canada in contravention of the WTO rules, Canada may use the WTO dispute settlement process to ensure that a WTO member abides by its obligations under the WTO Agreements. While the WTO complaints mechanism is available only to sovereign states (or to a regional grouping of states, such as the EU), private companies confronting WTO unlawful barriers in their activities may request that their governments make use of the system.

3.4.2 NAFTA

NAFTA is a regional free trade agreement between Canada, the U.S. and Mexico. The NAFTA has essentially eliminated duties on trade between the three countries. The preferential treatment granted to the other NAFTA parties' goods and services would violate Canada's most favoured nation treatment obligations to other WTO Members under the WTO Agreements but for an exception for this type of agreement. NAFTA also imposes similar, and in some cases more comprehensive, rules to those found in the WTO Agreements and, in some cases, are more comprehensive. Aside from differences in tariffs, the biggest differences between the WTO and NAFTA agreements are in respect of investment and services rules.

3.4.2.1 NAFTA investment rules

NAFTA Chapter 11 provides rules relating to the treatment of investments and investors of other NAFTA Parties. These rules are more detailed than those provided for in the WTO's Trade-Related Investment Measures Agreement. Most importantly, NAFTA enables aggrieved foreign NAFTA investors to submit a claim for damages against the country complained of without any approval or involvement of the investor's government.

Claims can only be brought against the government of another NAFTA Party; an investor cannot complain of its own government's actions. Either party may seek judicial review of the arbitration panel's decision.

NAFTA Chapter 11 extends national and most favoured nation treatment to investors and investments of another NAFTA Party so that laws, regulations and government actions cannot discriminate between investors of any of the three countries. Chapter 11 also enables investors to make claims that government measures have effectively expropriated their investment. These claims may recoup the value of the expropriated investment, including lost profits.

To pursue a claim under NAFTA Chapter 11, the investor or company involved typically must be incorporated in one of the NAFTA countries. NAFTA investors may, however, bring claims for damages to their investment. Accordingly, for example, a U.S. investor in a European company operating in a NAFTA country may submit a claim for damages to the investment, i.e., the shares of the company. That damage would typically take the form of a drop in share price or the suppression of anticipated increases in share price. Such an investor could not stand in the shoes of the company itself unless the investor is a controlling shareholder, as the company would not be considered an investment of a NAFTA investor.

3.4.2.2 NAFTA services rules

Both NAFTA and the WTO GATS discipline services, but they do so in different ways. Under NAFTA, U.S. and Mexican service providers must be extended national treatment in all service sectors, except those specifically excluded (under the GATS, national treatment is extended only in those services sectors specifically included). This means that each country must accord to service providers of another NAFTA country treatment no less favourable than it accords to its own service providers. No local presence is required to provide a service cross-border. NAFTA countries must also ensure that licensing and regulations relate principally to competence or ability and do not have the purpose or effect of discriminating against nationals of another NAFTA country. NAFTA countries can maintain existing restrictions on cross-border services where such restrictions have been listed in an annex to the Agreement.

NAFTA also eases restrictions on the entry of "business persons" for the purposes of providing marketing, training, and before and after sales and service for their products and services.

3.4.2.3 NAFTA Renegotiation

Following through on statements he had made during his electoral campaign to withdraw from, or renegotiate NAFTA, on May 18, 2017, U.S. President Donald Trump's Trade Representative, Robert Lighthizer, formally gave notice to the U.S. Congress of the Trump administration's plan to renegotiate NAFTA. This formal notification triggers a 90-day consultation period, after which the renegotiations can begin. While at this time it is difficult to predict the changes that may be made to NAFTA, President Trump has expressed his disapproval with the dispute resolution process that is available under Chapter 19 of the agreement, and has indicated that his administration would be interested in seeing changes to the provisions in NAFTA covering, among other things, rules of origin, government procurement and intellectual property.

3.4.3 Canada — U.S. Agreement on Government Procurement

Outside the context of NAFTA, in 2010, Canada and the U.S. entered into an agreement on government procurement which had the effect of liberalizing access to sub-central government procurements in both countries. In addition, the agreement provides for exemptions for Canada from Buy American provisions of the *American Recovery and Reinvestment Act of 2009* in relation to certain programs in exchange for temporary Canadian procurement commitments for certain construction projects not included in the WTO *Agreement on Government Procurement*. Canada and the U.S. also committed to explore the scope of a long-term government procurement agreement to deepen, on a reciprocal basis, procurement commitments beyond those under the WTO and NAFTA.

3.4.4 Free Trade Agreements (FTAs)

FTAs generally provide for preferential tariff rates on imported goods and services and enhanced market access to goods and services of the member parties. Such agreements may also provide for protection such as most favoured nation and national treatment. FTAs may go beyond the scope and extent of coverage of the WTO Agreements. Moreover, FTAs may cover areas not addressed by WTO Agreements, such as protection of investments and investors. FTAs generally provide for dispute settlement mechanisms.

Canada has entered into FTAs with numerous countries apart from the U.S. and Mexico (the NAFTA countries), including: Colombia, Costa Rica, Chile, Honduras, Israel, Jordan, Korea, Panama, Peru, and the European Free Trade Association (EFTA) countries (Iceland, Norway, Switzerland and Liechtenstein). After 14 rounds of negotiations spanning nearly 10 years, Canada concluded the Canada-Korea Free Trade Agreement (CKFTA) . The CKFTA, which came into force on January 1, 2015, is Canada's first free trade deal with an Asia-Pacific country and is considered to be an important gateway to other markets in the region. On July 11, 2016, Canada and Ukraine signed the Canada – Ukraine Free Trade Agreement (CUFTA), which has yet to come into force.

On October 30, 2016, Canada and the EU signed a Comprehensive Economic and Trade Agreement (CETA). The European Parliament approved the CETA on February 15, 2017 concluding the EU ratification procedures. In Canada, the CETA implementing legislation received royal assent on May 16, 2017. As at the time of publication, the CETA is not yet in force. When the CETA comes into force, it will be by way of provisional application as it has been determined by the EU to be a "mixed agreement" requiring ratification of all EU member states before full implementation can be achieved.

Canada is in the process of negotiating FTAs with a number of other countries including: Singapore, Japan, the Dominican Republic, Morocco, the Caribbean Community countries, Guatemala, Nicaragua and El Salvador. Canada and India began the negotiation of a possible comprehensive economic partnership agreement, following the release of a joint study group report concerning key sectors of interest and the possible parameters of a comprehensive trade agreement between the two

countries. Canada and India have since completed nine rounds of negotiations and discussions are ongoing.

In October 2012, Canada joined the Trans-Pacific Partnership (TPP), an agreement designed to promote free trade between Asia and the Americas. The original signatories to the TPP comprised Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam. Negotiations were concluded on the TPP on October 5, 2015, and the agreement was signed on February 4, 2016. TPP member states have two years to ratify the agreement, and the Canadian government has initiated a public consultation process as part of a broader study of the potential impact of the TPP. However, U.S. President Donald Trump issued a Presidential Memorandum on January 23, 2017, withdrawing the U.S. from the TPP, leaving the future of the agreement uncertain.

3.4.5 Foreign Investment Protection Agreements (FIPAs)

A FIPA is a bilateral agreement aimed at protecting and promoting foreign investment through legally binding rights and obligations. FIPAs accomplish their objectives by setting out the respective rights and obligations of the countries that are signatories to the treaty with respect to the treatment of foreign investment.

Typically, there are agreed exceptions to the obligations. FIPAs seek to ensure that foreign investors will not be treated worse than similarly situated domestic investors or other foreign investors; they will not have their investments expropriated without prompt and adequate compensation; and, in any case, they will not be subject to treatment lower than the minimum standard established in customary international law.

As well, in most circumstances, investors should be free to invest capital and repatriate their investments and returns.

Canada began negotiating FIPAs in 1989 to secure investment liberalization and protection commitments on the basis of a model agreement developed under the auspices of the Organization for Economic Co-operation and Development (OECD). In 2003, Canada updated its FIPA model to reflect and incorporate the results of its experience with the implementation and operation of the investment chapter of the NAFTA. It provides for a high standard of investment protection and incorporates several key principles: treatment that is non-discriminatory and that meets a minimum standard; protection against expropriation without compensation and restraints on the transfer of funds; transparency of measures affecting investment; and dispute settlement procedures. The new model serves as a template for Canada in negotiations with investment partners on bilateral investment rules.

Currently, Canada has FIPAs in force with 36 countries including Russia, Poland, Venezuela, Argentina, Barbados, Benin, China, Costa Rica, Jordan, Kuwait and Tanzania, and has concluded negotiations with a number of countries, including Albania, Bahrain, Madagascar, Moldova and Zambia. In June 2007, Canada announced the conclusion of negotiations for a FIPA with India; however, in October 2009, India notified Canada that it had some concerns with the agreed text. Efforts to negotiate a resolution to these issues have been underway since that time. Canada has updated its FIPAs with Latvia, the Czech Republic, Slovakia and Romania and is in the process of updating its FIPAs with Hungary and Poland to bring them into conformity with EU law. Canada has signed FIPAs, which are not yet in force, with Burkina Faso and Nigeria.

3.4.6 Canadian Free Trade Agreement (CFTA)

The CFTA is the successor to the Agreement on Internal Trade (AIT). Although not an international agreement, the AIT is an agreement among the federal, provincial, and territorial governments

designed to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services, and investment within Canada and to establish an open, efficient, and stable domestic market. In this regard, the AIT seeks to reduce extra costs to Canadian businesses by making internal trade more efficient, increasing market access for Canadian companies and facilitating work mobility for tradespeople and professionals.

In June of 2015, the ministers responsible for internal trade from every province and territory agreed to work towards a new internal trade regime, to be completed by March of 2016. This ambitious development arose out of a commitment made during a 2014 meeting of the provincial and territorial premiers at the Council of the Federation to modernize the AIT.

Unfortunately, the ministers failed to meet the March 2016 deadline to deliver a modernized AIT. However, on April 7, 2017, the federal minister of innovation, science and economic development announced that as of July 1, 2017, the AIT would be replaced by a new internal trade agreement: aptly named the Canadian Free Trade Agreement (CFTA).

Unlike the AIT, which covered only those sectors that were specifically listed in the AIT, the CFTA makes use of a so-called “negative list approach”, meaning that the agreement will apply to all sectors, except those that are specifically excluded. Chapter 8 of the CFTA lists the types of measures that are subject to general exception, such as measures concerning: Aboriginal Peoples, national security, taxation, water, social services, tobacco control, language, culture, gambling and betting, collective marketing arrangements for agricultural goods and passenger transportation services.

The CFTA contains provisions calling on each party to the agreement to enter into negotiations intended to reconcile measures that act as barriers to trade, investment or labour mobility within Canada. The agreement also calls on parties to establish a working group on alcoholic beverages in order to identify initiatives to enhance trade in alcoholic beverages within Canada, and requires the parties to enter into negotiations regarding the application of the agreement to the anticipated federal legislation that will legalize non-medical use of cannabis.

Like the AIT before it, the CFTA contains a formal dispute settlement mechanism to deal with complaints. However, the ability of foreign companies to initiate complaints under the CFTA is limited because the CFTA is a domestic free trade agreement. Only companies with a “substantial and direct” connection to a party to the agreement may bring forward a complaint under the CFTA. The CFTA does not trump Canada’s international agreements and does not create any obligations to foreign suppliers.

3.4.7 New West Partnership Trade Agreement (NWPTA)

While it is not an international agreement, NWPTA, formerly known as the Trade, Investment and Labour Mobility Agreement, is an agreement designed to remove barriers to trade, investment and labour mobility between the signatory provinces. Originally signed by Alberta and British Columbia, and effective in 2007, Saskatchewan joined the agreement, effective July 1, 2010. Other provinces and territories of Canada, as well as the federal government, can join the NWPTA upon accepting its terms.

NWPTA applies to all government measures (e.g., legislation, regulations, standards, policies, procedures, guidelines, etc.) affecting trade, investment and labour mobility. Certain special provisions have been established for some sectors, such as for investment, business subsidies, labour mobility, procurement, energy and transportation. There are also a limited number of sectors that have been excluded from the coverage of the NWPTA, such as water, taxation, social policy, and renewable and alternative energy.

NWPTA requires the signatory governments to provide open and non-discriminatory access to procurements in excess of minimum thresholds by various government entities, including departments, ministries, agencies, Crown corporations, municipal governments, school boards and publicly funded academic, health and social service entities.

NWPTA's dispute resolution provisions are available to companies registered under the laws of one of the parties to the agreement. Where a government measure is considered to be inconsistent with both the AIT (now the CFTA) and NWPTA, the NWPTA provides that the dispute resolution process under either agreement may be selected, but once chosen, there is no recourse to the other process in respect of the same issue. The maximum penalty is C$5-million and would only apply to the provincial governments that are parties to the NWPTA.

3.4.8 Trade and Cooperation Agreement between Quebec and Ontario

In 2009, Quebec and Ontario entered into the Trade and Cooperation Agreement with the intention of eliminating and reducing barriers that restrict trade, investment and labour mobility, as well as preventing the creation of further unnecessary barriers. Under the agreement, the two provinces have pledged to cooperate on a number of matters falling under the general categories of economic, regulatory and energy cooperation. The agreement also contains commitments related to labour mobility, financial services, transportation, government procurement, agriculture and food goods, and environmental and sustainable development.

In May of 2015, amendments to the agreement's chapter on government procurement were announced, so as to bring the scope of the chapters into alignment with the government procurement chapter contained in the CETA. The thresholds applied under the revised chapter will be lower than those available under the CFTA or the CETA. The revised government procurement chapter entered into force in two phases: on January 1, 2016, for ministries and agencies, and on September 1, 2016, for all other entities.

3.5 Importing goods into Canada

The importation of goods into Canada is regulated by the federal government. The *Customs Tariff* imposes tariffs on imported goods, while the *Customs Act* sets out the procedures that importers must follow when importing goods, and specifies how customs duties payable on imported goods are to be calculated and remitted to the relevant governmental authority.

Under NAFTA, barriers to trade in goods between Canada, the U.S. and Mexico have largely been removed. Tariffs between Canada and the U.S. have generally been eliminated since January 1, 1998. In the case of Mexico, tariffs on most goods were eliminated by January 1, 2003.

In order for goods to be eligible to take advantage of NAFTA, they must satisfy "rules of origin" which require a certain level of North American value-added. These rules are sophisticated and are based on changes in tariff classification and/or regional value content, the latter being calculated by either transaction value or the net cost method. Goods not meeting these requirements will remain subject to Canadian, U.S. or Mexican tariffs. These rules do not depend on the ownership of the business, and thus foreign-owned Canadian companies can take full advantage of the liberalized rules. In the case of services, NAFTA's provisions are generally open to enterprises of other NAFTA members, even if controlled by non-NAFTA nationals, as long as the enterprise has some substantive business activities (i.e., is not merely a shell).

Following is a more detailed discussion of the steps involved in importing goods and the relevant laws applicable.

3.5.1 Tariff classification

All goods imported into Canada are subject to the provisions of Canada's customs laws, including the provisions of the *Customs Act* and the *Customs Tariff*. To determine the rate of duty, if any, applicable on the imported goods, the goods must be classified among the various tariff items set out in the List of Tariff Provisions of the *Customs Tariff*. Canada is a signatory to the *Harmonized Commodity Description and Coding System*, to which the U.S. is also a party; therefore, tariff classifications up to the sixth digit should be identical between Canada and the U.S.

3.5.2 Tariff treatment

Once the tariff classification of imported goods is determined, the List of Tariff Provisions indicates opposite each tariff classification the various tariff treatments available in respect of the goods, depending on their country of origin. For instance, where no preferential tariff treatment is claimed, the most favoured nation tariff treatment applies.

However, as a result of Canada's participation in several bilateral, plurilateral and multilateral trade agreements in recent years, various preferential tariff treatments are available to goods from certain countries. For example, all customs duties on goods originating in the U.S. have been eliminated pursuant to NAFTA.

In addition to the preferential tariff treatment that Canada affords to imports from countries with which Canada has established an FTA, Canada also affords preferential tariff treatment to imports of goods originating in developing countries, as part of an effort to encourage foreign development in those countries. For instance, the General Preferential Tariff (GPT) treatment provides partial duty relief to goods originating in certain developing countries. In 2017, the GPT treatment is accorded to qualifying imports from 105 countries. Similarly, through the Least Developed Country Tariff (LDCT), Canada grants duty-free access to the Canadian market to goods that originate in certain specified Least Developed Countries. In 2017, the LDCT treatment is accorded to qualifying imports from 49 countries. To claim one of the preferential rates of duty, the importer must establish that the goods qualify for the claimed treatment pursuant to the relevant rules of origin and that proper proof of origin is obtained, usually from the exporter.

3.5.3 How are tariffs calculated?

The amount of customs duties payable on any importation is a function of the rate of duty (as determined above) and the valuation of the goods. This is because most of Canada's tariff rates are imposed on an *ad valorem* (or percentage) basis. In Canada, the primary method for customs valuation is the "transaction value" system, under which the value for duty is the price paid for the goods when sold for export to a purchaser in Canada, subject to specified adjustments. A non-resident may qualify as a "purchaser in Canada" where the non-resident imports goods for its own use and not for resale, or for resale if the non-resident has not entered into an agreement to sell the goods prior to its acquisition from the foreign seller. Otherwise, customs value will be based on the sale price charged by the non-resident seller to the customer who is resident, or who has a permanent establishment, in Canada. The transaction value method may not be available in certain other circumstances, such as where the buyer and seller do not deal at arm's length or where title to the goods passes to the buyer in Canada. In that event, other valuation methods will be considered in the following order: (1) transaction value of identical goods; (2) transaction value of similar goods; (3) deductive value; (4) computed value; and (5) residual method.

The transaction value method, if applicable, begins with the sale price charged to the purchaser in Canada. However, the customs value is determined by considering certain statutory additions, as well as permitted deductions. For instance, selling commissions, assists, royalties, and subsequent

proceeds must be added to arrive at the customs value of the goods. The value of post-importation services may be deducted from the customs value of the goods.

If the importer's goods originate primarily from suppliers with whom the importer is related and the importer wishes to use the transaction value method of valuation, the importer is frequently requested to demonstrate that the relationship did not influence the transfer price between the importer and the vendor. In such a situation, documentation may be required to establish that the transfer price was acceptable as the transaction value.

3.5.4 How are tariffs assessed?

Canada has a self-assessment customs system. Importers and their authorized agents are responsible for declaring and paying customs duties on imported goods. In addition, importers are required to report any errors made in their declarations of tariff classification, valuation or origin when they have "reason to believe" that an error has been made. This obligation lasts for four years following the importation of any goods. The *Customs Act* imposes severe penalties for non-compliance with this and other provisions, up to C$25,000 per occurrence.

3.5.5 What penalties are imposed for non-compliance with customs laws?

Where a person has failed to comply with the provisions of the *Customs Act*, the Canada Border Services Agency (CBSA) is authorized to take several enforcement measures, including seizures, ascertained forfeitures, or the imposition of administrative monetary penalties under the Administrative Monetary Penalty System (AMPS).

Seizures and ascertained forfeitures are applied to the more serious offences under the *Customs Act*, such as intentional non-compliance, evasion of customs duties, and smuggling.

Importers may be liable for penalties of up to C$25,000 per contravention in accordance with the AMPS. The CBSA maintains a "compliance history" for each importer. The retention period for an individual contravention remains on the AMPS system for six years plus the current year. Repeat offenders may be subject to increased penalties.

3.5.6 Country of origin issues

Certain goods listed in regulations made pursuant to the *Customs Tariff* must be marked with their country of origin in order to be imported into Canada. In the case of goods imported from a NAFTA country, the relevant regulations base the determination of origin on the basis of tariff shift rules, which are in turn dependent on the tariff classification of components and the finished product. In the case of goods imported from any country other than a NAFTA country, the country of origin is the country in which the goods were "substantially manufactured."

3.5.7 Which products are subject to import controls?

Almost all goods may be imported into Canada, subject to compliance with certain conditions imposed by the federal and, sometimes, provincial government(s). Goods over which Canada imposes import controls and requires import permits are listed on the *Import Control List*. Other Canadian laws that must be complied with in relation to imports include: labelling laws for goods intended for retail sale; emission control standards for vehicles; health and sanitary conditions for food and agricultural imports; certain goods, for example, electrical appliances, which must be certified by a recognized certification body; and imports of liquor, wine and beer which may require prior authorization from the appropriate provincial liquor commission.

3.6 Domestic trade remedy actions

3.6.1 Antidumping and anti-subsidy investigations

The *Special Import Measures Act* (SIMA) contains measures designed to protect businesses in Canada from material injury due to unfair import competition. SIMA's provisions are based on Canada's rights and obligations set out in the various WTO agreements.

SIMA allows Canadian producers to file a complaint against unfairly traded imports and to request relief in the form of antidumping or countervailing duties where material injury or retardation results from (1) imports that are "dumped" (i.e., sold at lower prices in Canada than in the exporter's home market) or (2) imports that are unfairly subsidized by the government of the exporter's country.

Canada's trade remedy regime establishes a bifurcated process under which the CBSA has jurisdiction over determinations of dumping and subsidization and the CITT enquires into and considers the issue of whether any dumping or subsidization is causing or is likely to cause material injury to the affected Canadian industry.

If the CITT makes a preliminary determination of injury and the CBSA makes preliminary and final determinations of dumping or subsidization, the CITT goes on to consider whether there is "material injury". If the CITT makes a finding of material injury, an antidumping duty (equal to the margin of dumping found by the CBSA) or a countervailing duty (equal to the margin of subsidization found by the CBSA) will be imposed on all importations of the subject goods for a period of five years. During this time, the CBSA may initiate re-investigations to update the margin of dumping or subsidization, as the case may be, and the CITT may review its finding if the circumstances warrant. At the expiry of the five-year period, the CITT may review its finding and may rescind or continue the finding for an additional period of five years (with no limit on the number of continuation orders permissible).

A final determination of the CBSA or CITT is subject to judicial review by the Federal Court of Appeal. Where the dumping/subsidy investigation involves U.S. or Mexican goods, an aggrieved party may choose to request a review of the finding by a NAFTA *ad hoc* panel of trade law experts. A review of final antidumping or countervailing duty determinations with respect to U.S. or Mexican goods must be undertaken by an *ad hoc* NAFTA panel, as NAFTA provides that there is no recourse to judicial review of final determinations.

3.6.2 Safeguard protection

SIMA applies only in the case of unfairly traded (i.e., dumped or subsidized) imports that are causing material injury to a Canadian industry. However, the *Canadian International Trade Tribunal Act* and the *Customs Tariff* provide for a trade remedy in the case of fairly traded goods that nevertheless are causing or threatening to cause "serious injury" to a Canadian industry. These are called "safeguard" actions. In such cases, the CITT may hold an inquiry and may make recommendations to the finance minister. The finance minister is authorized, in appropriate cases, to take certain safeguard actions against such imports, including imposing surtaxes or quotas for a limited time.

3.7 Procurement (government contracts) review

NAFTA, the CFTA and the WTO Revised Agreement on Government Procurement (AGP) require the signatories to the agreements to provide open access to government procurement for certain goods and services. These agreements also require signatory governments to maintain an independent bid challenge (complaint) authority to receive complaints. The CITT is Canada's complaint authority.

Parliament has enacted legislation designed to ensure that the procurements covered by NAFTA, the CFTA or the AGP are conducted in an open, fair and transparent manner and, wherever possible, in a way that maximizes competition. While there is considerable overlap in the scope and coverage of procurements covered by these international agreements, several areas have significant differences. The most notable differences are the goods and services that they include and the minimum monetary thresholds for goods, services and construction services contracts. These monetary thresholds are subject to periodic review.

The federal government has agreed to provide potential suppliers equal access to federal government procurement for contracts involving certain goods and services bought by approximately 100 government departments, agencies and Crown corporations. Still, on occasion, a potential domestic or foreign supplier may have reason to believe that a contract has been or is about to be awarded improperly or illegally, or that, in some way, the potential supplier has been wrongfully denied a contract or an opportunity to compete for one. The CITT provides an opportunity for redress for potential suppliers, both Canadian and foreign-based, concerned about the property of the procurement process relating to contracts covered by NAFTA, the CFTA or the AGP.

As discussed above, the NWPTA requires the governments of Alberta, British Columbia and Saskatchewan to provide open and non-discriminatory access to procurements in excess of minimum thresholds.

3.8 Export controls, economic sanctions and industry-specific trade laws

3.8.1 Which products are subject to export and import controls?

Canada's export controls are based on several international agreements and arrangements, such as the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual Use Goods and Technology and the Treaty on the Non-Proliferation of Nuclear Weapons.

Canada's *Export Control List* identifies specific goods and technology that may only be exported from Canada to specified destinations if an export permit is obtained. The *Export Control List* is divided into seven groups of items: dual-use list, munitions list, nuclear non-proliferation list, nuclear-related dual-use list, miscellaneous goods and technology list, missile technology control regime list, and chemical and biological weapons non-proliferation list. Under the *Export and Import Permits Act* (EIPA), the Minister of Foreign Affairs may issue an export permit to a corporation having its head office in Canada or operating a branch office in Canada.

Some goods and technology on the *Export Control List* may be exempted from the permit requirement if they are being shipped to certain countries, such as the U.S. Goods or technology that have been manufactured in the U.S., imported into Canada, and are proposed for export without any value added in Canada require an export permit. Individual permits are required for the export of these otherwise uncontrolled U.S.-origin goods to Cuba, Iran, North Korea, Syria and countries on Canada's *Export Control List*, and General Export Permit No. 12 applies for all other destinations. The U.S. government may also require the Canadian company to obtain explicit re-export authorization before exporting the items from Canada.

On February 5, 2016, the government announced significant amendments to the economic sanctions it had imposed on Iran. Previously, the Canadian sanctions regulations imposed a ban on all imports and exports to Iran subject to certain exceptions that were primarily limited to humanitarian goods and communications tools. These strict import and export bans have been repealed, although exports of specific goods deemed to be "proliferation sensitive" are still prohibited.

The *Area Control List* restricts the export of all products to specified countries, currently Belarus and North Korea. The export of any goods or technology to countries on the Area Control List requires an export permit. On May 7, 2016, Canada announced that it intended to remove Belarus from the *Area Control List*, but the regulatory amendments required to implement that change have yet to be undertaken.

The *Export Act* restricts the export of certain articles. It allows Canada, in specified situations, to impose export duties on certain logs and pulpwood, ores, petroleum in its crude or partly manufactured state, and intoxicating liquors.

3.8.2 Economic sanctions

The export of certain types of goods and certain activities may also be subject to United Nations (UN) trade sanctions or arms embargoes against particular countries or regions. The *United Nations Act* (UNA) empowers Canada to make such orders and regulations as are necessary to facilitate Canada's compliance with measures taken by the United Nations Security Council. Under UNA, Canada has implemented regulations that adopt UN resolutions prohibiting certain exports, principally arms and related material, to the following countries: the Democratic Republic of the Congo, Iraq, Eritrea, Lebanon, South Sudan, Yemen, Iran, Libya, Somalia, the Central African Republic, the Democratic People's Republic of Korea and Sudan. In some cases, UNA sanctions prohibit dealing with listed persons and entities. Listed persons and entities are normally associated with the subject country's government. Therefore, exports and other transactions should be carefully reviewed so that UNA sanctions are not violated.

The *Special Economic Measures Act* (SEMA) empowers Canada to take unilateral action, including embargoes, against a country in specified circumstances. SEMA gives the Canadian government authority to impose orders or regulations to restrict or prohibit persons in Canada, or Canadians outside Canada, from:

- Dealing in property of a foreign state (or its residents or nationals)
- Exporting, selling or shipping goods to a foreign state
- Transferring technical data to a foreign state
- Importing or acquiring goods from a foreign state
- Providing or acquiring any financial or other services to, or from, a foreign state

Currently, Canada has imposed economic measures under SEMA against the Democratic People's Republic of Korea, Iran, Libya, Russia, South Sudan, Syria, Ukraine and Zimbabwe. Canadian companies are prohibited from making new investments in some, but not all, countries subject to measures under SEMA.

Where UNA or SEMA sanctions apply, it may be possible to obtain a permit allowing an otherwise prohibited transaction. While exports or provision of humanitarian assistance are often allowed, the Canadian government may be willing to issue permits for certain types of non-humanitarian commercial transactions, depending on the government's specific priorities and policies in respect of the particular country subject to sanctions.

3.8.3 Sector-specific trade laws

Canada has certain trade laws that are specific to individual industries. For example, in the forestry industry, there are restrictions on the export of logs and softwood lumber from Canada. Similarly, permits are required for the export of steel. Steel, agricultural goods and textile products are examples of goods that are subject to import controls.

Moreover, numerous Canadian laws may directly or indirectly impose trade controls. Consumer product safety laws and environmental regulations, for example, impact sales of specified types of goods by prohibiting or restricting importation into Canada unless the goods first comply with applicable Canadian standards. In some cases, the manufacture or sale of goods may be subject to Canadian standards even where those goods are intended solely for export.

Other government departments may also control the export of goods, requiring additional permits even where an export permit has already been granted pursuant to the EIPA. Departments that may also exercise controls over exports include Canadian Heritage, Natural Resources Canada, Fisheries and Oceans, Health Canada, the Canadian Wheat Board, Agriculture and Agri-Food Canada, Environment Canada, and the Canadian Food Inspection Agency. The circumstances that require additional departmental approvals are frequently not intuitive and care must be taken to ensure compliance with all export controls.

3.8.4 International Traffic in Arms Regulations and the Canadian exemption

The U.S. *International Traffic in Arms Regulations* (ITARs) generally regulate the export and licensing of certain defence articles and services from the U.S. For exports of defence articles and services to Canada for end-use in Canada, the ITARs contain a very limited exemption for a "Canadian-registered person". For a Canadian business to qualify for exemption from the licensing requirements under the ITARs, it must be registered under the Canadian *Defence Production Act.* A list of registered businesses is maintained by the Canadian Controlled Goods Directorate. There is a process to extend this exemption to the employees of a registered business. However, this exemption may not be available to employees of a registered business who are dual citizens of a listed country if the employee has "substantive contacts" with the listed country. Employers are required to screen dual-citizen employees for such "substantive contacts". When such employees are identified, a risk of technology diversion is presumed and the employer may not give such employee access to the defence articles or information unless the U.S. Directorate of Defence Trade Controls grants a discretionary individual exemption.

The *Controlled Goods Regulations* made under the *Defence Production Act* set out the process for the registration of Canadian businesses in the *Controlled Goods Program*, described in greater detail in the following section.

3.9 Controlled Goods Program

The *Controlled Goods Program* is intended to safeguard potentially sensitive goods and technology and prevent them from falling into the wrong hands. The program requires companies dealing with specified civilian or military goods to register with the *Controlled Goods Directorate*, undergo security assessments, develop and implement a security plan, control access to the particular goods, report security breaches and maintain extensive records on all such goods for the duration of registration and for five years after registration expires.

Goods subject to the *Controlled Goods Program* include a number of goods that are listed on Canada's *Export Control List*, as well as U.S. goods that are "defense articles," or goods produced using "technical data" of U.S. origin, as those terms are defined in the *International Traffic in Arms Regulations*. The specific goods and technology that are subject to the *Controlled Goods Program* are contained in the *Controlled Goods List*, which is included in the schedule to the *Defence Production Act*. The inclusion of "technology" means that technical information such as documents or emails relating to these goods may also be captured. In May of 2014, the *Controlled Goods List* was amended so as to limit domestic controls to goods and technologies with strategic significance, or which have national security implications for Canada.

The regulations specify that in determining whether to register a business, the government must consider, on the basis of a security assessment, the risk that the applicant poses of transferring the controlled goods to someone not registered or exempt from registration.

While the procedures can be very onerous, penalties for non-compliance are severe. Companies that fail to comply can have their registration revoked and they, as well as individuals, may receive fines from C$25,000 to C$2-million or a term of imprisonment not exceeding 10 years, or both.

The breadth of the goods involved, coupled with the severity of the potential penalties, make it imperative that companies doing business in Canada ensure that they are not dealing with controlled goods or technology if they have not registered with the *Controlled Goods Program*.

3.10 Foreign Extraterritorial Measures Act (FEMA) and doing business with Cuba

FEMA is largely an enabling statute to protect Canadian interests against foreign courts and governments wishing to apply their laws extraterritorially in Canada by authorizing the attorney general to make orders relating to measures of foreign states or foreign tribunals affecting international trade or commerce. The attorney general has issued such an order with respect to extraterritorial measures of the U.S. that adversely affect trade or commerce between Canada and Cuba. The order was originally issued in retaliation for certain amendments to the U.S. *Cuban Assets Control Regulations*, and was further amended in retaliation for the enactment of the U.S. *Cuban Liberty and Democratic Solidarity (LIBERTAD) Act*, both of which aim to prohibit the activities of U.S.-controlled entities domiciled outside the U.S. (e.g., Canadian subsidiaries of U.S. companies) with Cuba.

The FEMA order imposes two main obligations on Canadian corporations. First, the FEMA order requires Canadian corporations (and their directors and officers) to give notice to the attorney general of any directive or other communication relating to an extraterritorial measure of the U.S. in respect of any trade or commerce between Canada and Cuba that the Canadian corporation has received from a person who is in a position to direct or influence the policies of the Canadian corporation in Canada. Second, the FEMA order prohibits any Canadian corporation from complying with any such measure of the U. S. or with any directive or other communication relating to such a measure that the Canadian corporation has received from a person who is in a position to direct or influence the policies of the Canadian corporation in Canada.

This means that Canadian companies wishing to carry on business with or in Cuba, whose goods are regulated under the U.S. *Cuban Assets Control Regulations* for example, could be in conflict with U.S. law. On the other hand, if the Canadian company decided not to do business in Cuba because a U.S. extraterritorial measure prohibited such conduct, the company could be in violation of the Canadian FEMA. The conflict of U.S. and Canadian trade sanctions can result in legal liability for both individuals and corporations, not to mention public relations challenges.

In January of 2015, the federal government issued an order pursuant to FEMA in relation to a dispute with the State of Alaska over the construction of a ferry terminal in British Columbia that is leased by Alaska. Alaska had planned to complete the project using only American iron and steel. The FEMA order, issued on January 20, 2015, was intended to prohibit any person in Canada from complying with the Alaskan “Buy America” measures. However, two days after the FEMA order was issued, the State of Alaska cancelled its plans to construct the new terminal.

3.11 Canadian anti-bribery legislation

There are two statutes in Canada that address bribery and corruption, namely the *Corruption of Foreign Public Officials Act* (CFPOA), which criminalizes corruption of foreign public officials, and the Canadian *Criminal Code,* which criminalizes corruption of Canadian public officials and corrupt behaviour in certain transactions among private parties. In both the CFPOA and the *Criminal Code*, all relevant offences are criminal offences.

3.11.1 Criminal Code

The *Criminal Code* contains a number of provisions that regulate conduct in relation to Canadian government officials. In particular, it contains several sections prohibiting the provision of a loan, reward, advantage or benefit of any kind (collectively a "benefit") to a government official by those who do business with the government. The *Criminal Code* is applicable to offences within Canada and offences that occur outside of Canada, provided there is a real and substantial connection between the offence and Canada. In essence, the *Criminal Code* can apply to any offence, provided some part of the formulation, initiation or commission of the offence has taken place within Canada.

Under the *Criminal Code,* "government official" is defined broadly to include provincial and federal employees and officials (including elected officials, ministers, judges, police, military, employees of regulatory bodies, etc.), as well state corporations if they are acting as an agent of the federal or a provincial government. Bribery of municipal officials and employees is also regulated by section 123 of the *Criminal Code.* The definition of "official" has also been applied to Aboriginal Band officials and employees under the *Criminal Code* breach of trust offence, designed to ensure that holders of public office use their offices only for the public good. The secret commissions offence is applicable to all employees and agents, regardless of whether they are in the public or private sector.

Subsection 121(1)(a) of the *Criminal Code* prohibits the offering or giving a benefit to any government official, or any member of his family, as consideration for cooperation, assistance, the exercise of influence or an act or omission in connection with the transaction of business with the government. This provision is targeted at prohibiting overt forms of corruption. Case law from the Supreme Court of Canada has confirmed that this subsection is designed to prevent the provision of benefits in exchange for influence or an advantage in doing business with the government. It is not illegal under this subsection to provide a benefit *per se*, unless the benefit is in exchange for cooperation or assistance.

Subsection 121(1)(b) of the *Criminal Code* is much broader than the other anti-corruption sections of the *Criminal Code,* which require an element of *quid pro quo.* This subsection prohibits the provision of a benefit to government officials with whom you have business dealings, even if there are "no strings attached."

Penalties for violation of the anti-corruption offences in the *Criminal Code* include unlimited fines for corporations, up to five years imprisonment for individuals (including directors and officers that participate in or knowingly assist or encourage the commission of the offence) and forfeiture of any proceeds (not just profits) obtained by the illegal act. Under the recently implemented Public Works and Government Services Canada Integrity Regime (Integrity Regime) and section 750 of the *Criminal Code*, conviction of a section 121 offence will result in debarment or incapacity to contract with the Canadian government indefinitely. Under the same regime, being charged with a section 121 offence may result in an 18-month suspension from contracting with the Canadian government.

3.11.2 CFPOA

Canada is a member of the Organization for Economic Co-operation and Development (OECD) and took part in negotiating the OECD's Convention on Combating Bribery of Foreign Public Officials in

International Business Transactions, which was the impetus for passing the CFPOA. The CFPOA is Canada's equivalent to the United States' *Foreign Corrupt Practices Act*, (FCPA). While similar in many respects, there are some notable differences between the CFPOA and the FCPA, which include the lack of a civil enforcement option under the CFPOA.

The CFPOA forbids transferring or offering to transfer any type of benefit for the purpose of influencing a foreign official to misuse his or her power or influence with the purpose of obtaining or retaining a business advantage. There is also an accounting offence under the CFPOA such that it is an offence to keep secret accounts, falsely record, not record or inadequately identify transactions, enter liabilities with incorrect identification of their object, use false documents, or destroy accounting books and records earlier than permitted by law for the purpose of concealing bribery of a foreign public official.

Amendments in 2013 to the CFPOA deem the actions of Canadian citizens, permanent residents, corporations, societies, firms, or partnerships on a worldwide basis to be acts within Canada for the purpose of the CFPOA. As a result, Canadian citizens and companies are now subject to worldwide regulation by Canadian authorities under the CFPOA, regardless of whether the entirety of the alleged misconduct occurred abroad. For individuals and entities that are not Canadian, the CFPOA may still apply if there is a real and substantial connection between Canada and the alleged misconduct.

A foreign public official is defined in the CFPOA as a person who performs public duties or functions for a foreign state. This definition has broad application and includes a person employed by a board, commission, corporation or other body or authority that is performing a duty or function on behalf of the foreign state, or is established to perform such a duty or function. It also includes employees of wholly or partially state-owned or controlled corporations, and may extend to employees and members of political parties if they perform public duties or functions for a foreign state.

A CFPOA violation can result in imprisonment for up to 14 years. An individual or corporation convicted of a CFPOA offence can also be subject to significant fines. There is no limit to the fines that can be imposed on corporations and the quantum is left to the discretion of the court. In addition, Canadian courts can and have ordered corporate probationary terms, including appointment of a third-party monitor. Under the Integrity Regime noted above, CFPOA convictions result in a maximum 10-year debarment, and being charged with a CFPOA offence may result in an 18-month suspension from contracting with the Canadian government. Any proceeds (not just profits) or property obtained as a result of a CFPOA offence may be ordered to be forfeited to the Crown.

4. Product Standards, Labelling and Advertising

4.1 How are product standards requirements created? Are Canadian product standards in line with international standards?

Canadian legislators and industry bodies are highly influenced by international standards, and so Canadian standards frequently reflect both U.S. and European influences. These standards may take several different forms, from mandatory legal requirements to voluntary industry codes.

Mandatory legal requirements may be imposed under federal and/or provincial legislation, particularly where health or safety issues are involved. These requirements may be written into the legislation itself or may be incorporated into legislation by reference (e.g., legislation may require compliance with the latest issue or edition of a voluntary standard).

The Standards Council of Canada (Council) is the national co-ordinating body for the development of voluntary standards through the National Standards System. The standards-developing organizations

accredited by the Council are the Canadian General Standards Board (CGSB), the Canadian Standards Association (CSA Group), Underwriters Laboratories Inc., the Underwriters Laboratories of Canada (ULC Standards), NSF International, le Bureau de normalisation du Québec, ASTM International and the Air-Conditioning, Heating and Refrigeration Institute (AHRI). The Council also accredits other organizations, including certification bodies, inspection bodies, and testing/calibration laboratories.

The concern that standards constitute non-tariff trade barriers has been a major international and free trade issue. The Council participates in a variety of international harmonization initiatives, including the International Electrotechnical Commission and the World Trade Organization's Committee on Technical Barriers to Trade, established under the WTO Agreement on Technical Barriers to Trade.

4.2 Consumer product safety legislation

Consumer products are regulated in Canada by the *Canada Consumer Product Safety Act* (CCPSA), which applies to all consumer products except those specifically exempted from the Act. The term "consumer product" is defined broadly to include components, parts, accessories and packaging that may be obtained by an individual to be used for non-commercial purposes. The CCPSA does not apply to certain products regulated under other existing legislation, such as food, drugs (including natural health products), medical devices, cosmetics and pest control products. Nevertheless, the legislation still impacts otherwise exempt organizations (e.g., food or non-prescription drug companies) that distribute non-exempted products (e.g., in their packaging or via mail-in offers).

4.2.1 General prohibition

There is a general prohibition in the CCPSA against the manufacture, importation, advertisement or sale of any consumer product that is a "danger to human health or safety" or is subject to a recall or certain other corrective measures. The term "danger to human health or safety" means any existing or potential unreasonable hazard posed by a consumer product during normal or foreseeable use that may reasonably be expected to cause death or an adverse effect on health.

In addition, the CCPSA prohibits any person from manufacturing, importing, advertising or selling a specific consumer product listed in Schedule 2. Regulations published under the CCPSA govern various aspects of certain prescribed products, including manufacturing standards, labelling requirements and prohibited components/substances.

4.2.2 Mandatory record-keeping and reporting

Manufacturers, importers, advertisers, sellers and testers of consumer products must maintain documentation that allows consumer products to be traced through the supply chain. Retailers must keep records of the name and address of the person from whom they obtained the product and all others must keep records of the name and address of the person from whom they obtained the product and to whom they sold it. These documents must be kept for six years at the Canadian place of business of the organization to which the provision applies.

Manufacturers, importers, advertisers and sellers of consumer products must notify the Minister and the person from whom they received a consumer product within two days of an "incident" related to the product. An incident is defined to include:

- An occurrence that resulted or may reasonably have been expected to result in an individual's death or serious adverse health effects
- A defect or characteristic that may reasonably be expected to result in an individual's death or serious adverse health effects

- Incorrect or insufficient labelling or instruction that may reasonably be expected to result in an individual's death or serious adverse health effects
- A recall or other measure initiated by a foreign entity, provincial government, public body or aboriginal government

The manufacturer or importer must provide a written report of the incident within 10 days of the incident.

4.2.3 Minister's powers

The Minister is granted broad powers under the CCPSA in several areas. The Minister has the authority to order manufacturers and importers of consumer products to conduct tests or studies on a product and to compile information to verify compliance with the CCPSA and regulations and to provide the Minister with that information within the time and in the manner the Minister specifies.

If the Minister believes on reasonable grounds that a consumer product is a danger to human health or safety, the Minister may order a manufacturer, importer or seller to recall the product or to implement other specified corrective measures. If a recall or corrective measure order issued by the Minister is not complied with, the Minister may carry out the recall at the expense of the non-compliant manufacturer, importer or seller. A review of the recall, if requested in writing by a manufacturer, importer or seller, must be completed within 30 days (or as extended by the review officer). The order of the Minister remains in effect while the review is ongoing.

The Minister also has broad powers to disclose personal and business information without consent to a person or government that carries out functions relating to the protection of health and safety.

Further, under the CCPSA and its regulations, every person who contravenes an order to take specified measures with respect to a consumer product, such as an order to recall a product, commits a violation under the Act and is liable to pay an administrative monetary penalty.

4.3 What are the sources of labelling requirements? Must or should all labels be bilingual?

Product labelling is regulated at both the federal and provincial levels through statutes of general application and statutes applicable to specific products. The Canadian *Consumer Packaging and Labelling Act* (CPLA) is the major federal statute affecting pre-packaged products sold to consumers. The CPLA and the associated *Consumer Packaging and Labelling Regulations* require pre-packaged consumer product labels to state the common or generic name of the product, the net quantity and the manufacturer's or distributor's name and address. Detailed rules are set out as to placement, type size, exemptions and special rules for some imported products.

The CPLA and associated regulations, like most federal legislation, require mandatory information on labels to be in both English and French. There are exceptions — most notably that the manufacturer's name and address can be in either English or French. While non-mandatory information is not generally required to be presented bilingually under federal law, most Canadian packaging is nevertheless fully bilingual for marketing and liability reasons. Moreover, labelling on products that are to be sold in Quebec is effectively required to be fully bilingual because the Quebec *Charter of the French Language* requires that most product labelling and accompanying materials, such as warranties, be in French. Labelling in Quebec can contain another language or languages, provided the French text has equal or greater prominence as compared to any other language.

Marking of the country of origin is required for certain products listed in regulations issued pursuant to the *Customs Tariff*. See Section IV, 3.5.6, "Country of Origin Issues".

Many federal statutes, such as the *Food and Drugs Act* and the *Textile Labelling Act*, mandate labelling and language requirements for specific products and/or claims.

4.4 Food

All food products are regulated under the *Food and Drugs Act* and *Food and Drug Regulations*. In addition to labelling requirements common to other pre-packaged products, foods must also, with a very few exceptions, contain a list of ingredients in English and French. A "best before" date (in a particular Canadian format) is required for foods with a shelf life of less than 90 days. Nutrition labelling, with limited exceptions, is mandatory. Only a few very closely defined health claims are permitted. Specialized federal legislation such as the *Canada Agricultural Products Act,* the *Meat Inspection Act* and the *Fish Inspection Act* applies to certain categories of food. Canadian food legislation regulates claims, sets standards for specific food products and mandates standards of purity and quality.

On December 14, 2016, amendments to the nutrition labelling, list of ingredients and food colour requirements under the *Food and Drug Regulations* came into force. Some of the notable changes include: revisions to the percentage daily values in the nutrition facts table based on updated science, updating the list of nutrients disclosed in the nutrition facts table, the grouping of sugars-based ingredients in the list of ingredients and changes to the declaration of serving sizes in the nutrition facts table. With the exception of amendments relating to food colours, which are effective immediately, industry has a five-year transition period to meet the new requirements. The Canadian government has also initiated consultations on other labelling initiatives, such as front of package labelling for products that are high in sugar, sodium and fat.

Canada is currently undergoing a modernization of food inspection legislation. The *Safe Food for Canadians Act* (SFCA) received royal assent in 2012, but the majority of the legislation has not yet come into force. The Act, which is intended to align Canadian requirements more closely with trade requirements under the U.S. *Food Safety Modernization Act*, will replace the *Canada Agricultural Products Act*, the *Meat Inspection Act*, the *Fish Inspection Act* and the food-related provisions of the *Consumer Packaging and Labelling Act*. In January 2017, proposed regulations under the SFCA were published for comment and consultation. The government is in the process of reviewing and analyzing feedback and anticipates finalizing the regulations in 2018.

4.5 Drugs

Drugs are also regulated in Canada under the federal *Food and Drugs Act* and the *Food and Drug Regulations*. Prescription and non-prescription drugs require prior market authorization identified by a Drug Identification Number (DIN) which must appear on the product packaging. In the case of "new drugs", a notice of compliance is also required which is issued following an assessment of the drug's safety and efficacy. The location of sale of drugs and the professions involved in the prescribing and sale of drugs, such as physicians and pharmacists, are regulated under provincial legislation and by self-regulatory professional organizations.

"Natural health products" such as vitamins and minerals, herbal remedies, homeopathic medicines and traditional medicines (such as traditional Chinese medicines) are regulated by the *Natural Health Products Regulations*. Natural health products require prior market authorization (product licence) identified by a product registration number (NPN) or, in the case of a homeopathic medicine, by the letters DIN-HM, which must appear on the product packaging. Canadian sites that manufacture, package, label and import these products must have a site licence. These requirements are quite different than in the U.S., where similar types of products are considered "dietary supplements" and are not subject to the same level of regulatory oversight as natural health products.

On November 6, 2014, the government passed amendments to the *Food and Drugs Act* under Bill C-17, the *Protecting Canadians from Unsafe Drugs Act*. Bill C-17 grants the Minister substantial new powers, including the ability to conduct recalls, order modifications to labels/packaging, and require the submission of health and safety data post-approval. In addition, Bill C-17 permits disclosure of confidential business information relating to drugs and medical devices under certain circumstances. Some of the provisions of Bill C-17 will only come into force after related regulations have been developed.

4.6 Weights and measures

The *Weights and Measures Act* mandates that the metric system of measurement is the primary system of measurement in Canada. While a metric declaration of measure is required, in most cases it is also possible to have a non-metric declaration in appropriate form.

4.7 Advertising regulations and enforcement

4.7.1 Federal law

Product advertising and marketing claims are primarily regulated by the *Competition Act* (Canada), which has a dual civil and criminal track for advertising matters. The *Competition Act* includes a general prohibition against making any misleading representation to the public for the purpose of promoting a product or business interest that is false or misleading in a material respect. It is not necessary to establish that any person was actually deceived or misled by the representation. Making a false or misleading representation is a criminal offence if done knowingly or recklessly. In the absence of knowledge or recklessness, the *Competition Act* provides for civil sanctions including cease and desist orders, mandatory publication of information notices and administrative monetary penalties.

Ordinary price or sale claims that do not meet time or volume tests set out in the *Competition Act* are also prohibited. The Competition Bureau has been particularly active in bringing enforcement actions against claims. Performance, efficacy or length of life claims for products must be supported by adequate and proper testing conducted before the claims are made. The *Competition Act* telemarketing provisions require disclosure of certain information during telemarketing calls and render failures to disclose and certain deceptive practices criminal offences.

The *Competition Act* also requires disclosure of key details of promotional contests, such as the number and approximate value of prizes and factors affecting the chances of winning. It is prohibited to send a deceptive notice that gives the recipient the general impression that a prize will be or has been won and that asks or gives the recipient the option to pay money or incur a cost. Because of anti-lottery provisions in the *Criminal Code*, most Canadian contests offer consumers a “no purchase” method of entry and require selected entrants to answer a skill-testing question before being confirmed as winners.

The *Competition Act* provides a civil right of action to those suffering damage as a result of conduct contrary to the criminal provisions of the Act, including the criminal false or misleading advertising provisions. While no similar right of action exists with respect to civilly reviewable conduct, recourse may be sought through common law tort and trade-mark routes.

Monetary penalties for civilly reviewable false or misleading representations can be significant. The maximum civil penalty under the *Competition Act* is C$15-million for a second order against a corporation. Courts may also order advertisers who engage in misleading advertising to disgorge the proceeds to persons to whom the products were sold (excluding retailers, wholesalers and distributors to the extent that they have resold or distributed the products). Courts are given broad

authority to specify terms for the administration of such funds, including how to deal with unclaimed or undistributed funds.

On July 1, 2014, the false or misleading advertising provisions of the *Competition Act* were amended by Canada's new Anti-Spam Legislation. The amendments, which were introduced to give the Competition Bureau greater oversight of online activity, prohibit any representation in an electronic message that is false or misleading in a material respect. In addition, the amendments prohibit any false or misleading representation, regardless of materiality, in the sender description or subject line of an electronic message, or in a "locator" (e.g., metadata or URL). Prohibited representations will constitute criminal offences if performed knowingly or recklessly; in the absence of knowledge or recklessness, the representations will be considered civilly reviewable under the *Competition Act*. See Section XI, "Information Technology".

4.7.2 Quebec law

Quebec legislation, particularly consumer protection legislation, also impacts advertising. For example, the *Consumer Protection Act* (Quebec) renders it a "prohibited practice" to make false or misleading consumer representations by affirmation, behaviour or omission, including with respect to performance characteristics, accessories, uses, ingredients, benefits or quantities that the products do not have. Advertising to children under 13 years of age, unless compliant with regulations, is also prohibited. Businesses that use prohibited business practices face exemplary or punitive damages. Other remedies include rescission and reduction of the consumer's obligation.

With respect to promotional contests, which are called publicity contests in Quebec, the *Act respecting lotteries, publicity contests and amusement machines* (Quebec) and the *Rules respecting publicity contests* adopted thereunder state that the person carrying on a publicity contest in Quebec must notify the *Régie des alcools, des courses et des jeux* (the Quebec Lottery Board) that the contest is being held no less than 30 days before it is launched (the notice period is shortened to five days for contests of C$1,000 or less). The text of the rules of the publicity contest must be filed with the Quebec Lottery Board 10 days before the date on which it is publicized. In certain specific situations, security must be posted and the payment of duties may be required. Strict requirements, such as providing in the contest rules that litigation respecting the contest may be submitted to the Quebec Lottery Board, must also be met.

Moreover, Quebec's *Charter of the French Language* generally requires commercial advertising in Quebec to be displayed in French, although, depending on the location of the advertisement, it may be accompanied by a version in one or more other languages provided that the French version is at least as prominent or, in some situations, markedly predominant. Depending on the circumstances, exceptions may apply. For instance, a "recognized" trade-mark within the meaning of the *Trade-marks Act* may appear exclusively in a language other than French on commercial advertising, posters or public signage unless a French version of that trade-mark is registered. Amendments to the regulations under the *Charter of the French Language* have been enacted to require the use of French words along with the trademark on outdoor signs in certain circumstances. See Section IV, 4.8.2, "Commercial documentation and advertising".

4.8 French language requirements in Quebec

The *Charter of the French Language* (Quebec) (French Language Charter) makes French the official language of Quebec, confers on every person the right to be communicated with in French and imposes obligations on corporations and other entities (referred to as "enterprises") carrying on business in Quebec. Thus, business names used in Quebec must be French, subject to exceptions allowing that a portion of the business name be in English. Laws and regulations are drafted in French and English, and legal proceedings may be taken or defended in French or English. The French Language Charter also deals with the use of French in public areas, in social and public

services and in professional corporations as well as in labour relations and in day-to-day business. Enterprises that reach the 50-employee threshold in Quebec are also subject to francization requirements (see Section IV, 4.8.6, “Business francization”). Although Quebec government bodies will use French in dealing with Quebec residents and businesses, and local contracts will often be drafted in French, dealings with foreign investors and entities can take place in another language, particularly English as the prevalent language of international business. As well, most government services may be provided in English to English-speaking residents upon request. The following highlights some important aspects of the French Language Charter.

4.8.1 Corporate names

In order to incorporate or extra-provincially register a corporation in Quebec, the French Language Charter requires that the corporation use a French version of its corporate name. The selection of a French corporate name must respect certain basic rules set out in the French Language Charter.

Generally, corporations may use an English version of the corporate name provided that the French version appears at least as prominently. When displayed on public signs, posters and commercial advertising, the use of the English version of the corporate name is permitted as long as the French version is “markedly predominant”, which essentially means that the French words must have a greater visual impact. In the English version of a document, the English version of the corporate name may appear alone without any reference to its French version.

4.8.2 Commercial documentation and advertising

The French Language Charter grants Quebec consumers the right to be informed and served in French by enterprises carrying on business in Quebec. More specifically, the French Language Charter also requires businesses to have their products and services available in French, and to use French in commercial documentation (which includes product labels, directions for use, warranty certificates, catalogues, brochures, folders, commercial directories, advertising documentation, employment forms, order forms, invoices, receipts and releases).

Enterprises may also use commercial documentation drafted in both French and in English (or one or more other languages) as long as the French version is displayed as prominently as every other language. The English version of a recognized trade-mark may be used in the French version of commercial documentation and advertising, provided that no French version of such trade-mark is registered. A regulation adopted under the French Language Charter has recently been amended to provide an exception with respect to displays of trade-marks on storefront in signage. The amended regulation provides that a “sufficient presence” of French must be ensured on storefront signage by including a French element with any non-French trade-mark. This French element must be legible together with the non-French trade-mark at all times where such trade-mark is visible. Companies or other entities that display storefront signage that was in place before the amended regulation came into force (i.e. November 24, 2016) have a three-year period (i.e. until November 24, 2019) to replace their signage with signage that complies with this new requirement.

Certain situations permit the use of English documents. For example, the English version of a standard form contract and related documents may be used if this is specifically requested by the consumer, customer or supplier. This presupposes that there is a French language version of such documents which is available in the first place. There is no language requirement attached to negotiated contracts between businesses, i.e., the choice of language is that of the parties.

4.8.3 Communication tools

Employees should have the necessary communication tools available to them in French. For example, guides and manuals should be available in the French language. Computer software must

also be in French. While the French version of software (where available) must be installed, employees may also choose to have the English version installed. However, the Office considers the percentage of use of the French version of computer software by employees to determine whether a company should obtain or maintain its francization certificate.

4.8.4 Website information

Information relating to products available in Quebec found on the website of a company having a place of business in Quebec is subject to the French Language Charter. Therefore, such information must be in French although it may appear in English so long as French is given equal prominence.

4.8.5 Language at work and labour relations

The French Language Charter grants workers the right to carry on their activities in French. Every employer is required to deliver written communications to staff in French. Also, application forms for employment, offers of employment, promotion offers and any other form of communication between a company and its employees must be drawn up and published in French.

Offers of employment published in an English language daily newspaper must also be published simultaneously in a French language daily newspaper, with at least equivalent display for companies subject to certain francization requirements (see Section IV, 4.8.6, “Business francization”).

Collective agreements and their schedules must be drafted in the French language. Arbitration awards made following a grievance or a dispute in relation to the negotiation, renewal or review of the collective agreement must be translated into French or English at the expense of the parties, if either one of the parties requests such translation.

Employers are prohibited from dismissing, laying off, demoting or transferring an employee solely because he or she is exclusively French-speaking or has insufficient knowledge of a language other than French. Employers are also prohibited from making the knowledge of a language other than French a condition for employment or to hold an office, unless it is required to perform the duties of such employment or office.

4.8.6 Business francization

An enterprise that employs 50 employees or more in the province of Quebec for a period of six months must register with a regulatory agency known as the “*Office québécois de la langue française*” (Office). Registration with the Office is the first step in the “francization process” which ends with the Office issuing a francization certificate. Once a francization certificate is issued, an enterprise is required to ensure that the use of French remains generalized at all levels and to submit to the Office a report on the progression of the use of French every three years. A refundable tax credit is available for eligible employers.

An enterprise that employs 100 or more employees will be required to form a francization committee composed of six or more persons. The francization committee has various obligations to fulfil during the “francization process” and once the francization certificate is issued it must ensure that the use of French remains generalised within the enterprise. Generally, enterprises having less than 50 employees would not be subject to any of the francization rules, including registration with the Office, but such enterprises must nonetheless comply with the general requirements of the French Language Charter as highlighted above.

4.8.7 Offences and penalties

In addition to a contravention of a requirement of the French Language Charter constituting an offence, the French Language Charter makes it an offence to distribute or otherwise market non-compliant products, computer software or publications, thereby affecting a multitude of persons within the chain of distribution, including software designers as well as manufacturers, distributors and merchants.

The maximum fine on a first offence for a breach of the French Language Charter for a corporate offender is C$20,000 (C$40,000 for subsequent offences).

The French Language Charter also provides for the possibility that an additional fine may be imposed on the offender equal to the financial gain the offender realized or derived from the offence. Thus, in addition to the maximum fine being payable, disgorgement of the financial gain resulting from the offence may be imposed.

5. Product Liability — Quebec Law

As with most jurisdictions in Canada, a distinction must be made between general sales or supply contracts, and consumer contracts. The latter include any sales contract entered into between a merchant and a natural person, except for a natural person who obtains goods or services for the purposes of his or her business. Consumer contracts in Quebec benefit both from the general protection offered to all sales contracts and the more specific protection offered by consumer protection legislation.

5.1 How broad is the potential for liability in a contractual claim?

Sales contracts are subject to legal warranties of ownership and of quality of the product sold. The parties may diminish the effects of these legal warranties or exclude them altogether by contract but the seller cannot exempt itself from its personal fault, nor may it exclude or limit the warranties unless it has disclosed any defects of which it is aware or of which it cannot have been unaware. In this regard, the manufacturer and the professional seller of a product are presumed to be aware, or in any event, cannot plead that they were unaware, of latent defects.

With respect to consumer contracts, there are additional warranties of durability and fitness for the purposes for which products of that kind are ordinarily used. The merchant cannot diminish the effects of these warranties, though the merchant can always offer a more advantageous warranty to the consumer.

5.2 How broad is the potential for extra-contractual liability?

In the case of a latent defect or a safety defect in the product, a cause of action lies against the manufacturer, anyone who distributes the product under its name or as its own and any supplier, including wholesalers and importers. Furthermore, the defect is presumed to have existed at the time of sale if the product is sold by a professional seller and the product malfunctions or deteriorates prematurely in comparison with identical products or products of the same type.

A special liability regime applies to products with safety defects, defined as products that do not afford the safety which a person is normally entitled to expect, including by reason of the design or manufacture of the product, poor preservation or presentation of the product, lack of sufficient instructions as to the risks and dangers it involves, or as to the safety precautions to take. Where a safety defect is alleged, the injured person need only show the existence of a safety defect, the damages suffered, and the causal link between the two in order for all the persons referred to in the

previous paragraph to be liable. There are three defences that can be raised in safety defect cases, the burden of proof of which is on the defendants:

1. The existence of a superior force
2. That the victim knew or could have known of the safety defect, or could have foreseen the injury
3. That according to the state of knowledge at the time the product was manufactured, distributed or supplied, the existence of the defect could not have been known, and the defendant was not neglectful of its duty to provide information when it became aware of the defect

Provincial consumer protection legislation provides consumers with additional remedies for "false", "misleading" or "deceptive" representations, and is increasingly being relied upon in product liability class actions.

The court may apportion liability according to the degree of fault among the various persons held liable for the injury to the plaintiff, although the plaintiff may recover all of his/her damages from any defendant who has been found even partly liable, subject to that defendant seeking contribution from its co-defendants pursuant to the apportionment of the court.

5.3 What is the extent of a person's liability?

In the case of sales contracts, other than consumer contracts, if the seller or manufacturer was unaware of the latent defect and could not reasonably have discovered it, he is only bound to restore the price of the product. If the seller was aware or could not have been unaware of the latent defect, he is bound to restore not only the price, but all damages suffered by the buyer. In the case of consumer contracts, the extent of liability is greater and the consumer may ask for the cancellation of a contract, compensatory damages and punitive damages.

In the case of safety defects, the plaintiff may recover compensatory damages for all bodily, moral (i.e., pain and suffering) and material losses caused by the safety defect. General damages for pain and suffering are presently capped at about C$360,000 per person. The recovery of damages is limited to losses reasonably foreseeable to the parties and not considered "remote".

5.4 Other litigation risks: class actions, juries and punitive damages

Historically, Canadians, including residents of Quebec, have been less litigious than Americans, and damage awards have been much lower. In Quebec, there are no jury trials in civil cases, and class actions are usually decided by one judge that will hear both the certification hearing and, if certified, the class action on the merits. Punitive damages are available in Quebec if provided for by law, and as contemplated by Article 1621 of the *Civil Code of Quebec.* However such awards in Quebec have historically been rare in product liability cases and, in most cases, fairly modest when made.

In recent years, however, class action legislation in Canadian provinces, including Quebec, has changed the Canadian litigation landscape, resulting in a number of multimillion-dollar settlements in the product liability area. The threshold for class certification is generally considered to be lower in Canada than the U.S. and potentially even lower in Quebec as compared to the other Canadian provinces, since the Courts' role in Quebec is to ensure that the plaintiff has asserted an arguable case, with no requirement for affidavit or expert evidence. Product liability class actions for personal injury damages, medical monitoring costs, refunds and disgorgement of revenues from the sales of the product have been certified despite vigorous opposition from defendants.

To date, relatively few class actions have proceeded to trial in Canada, including Quebec. It remains to be seen whether the availability of class actions will result in larger punitive damage awards or other changes in substantive laws.

V. Acquiring a Canadian Business

1. General Considerations

The threshold question in any acquisition is whether to purchase shares or assets. This will be dictated by a variety of factors, including timing, ease of implementation and tax considerations. A share purchase is generally simpler and quicker to complete than an asset acquisition, as it avoids many of the practical problems associated with the transfer of particular assets and the common requirement to obtain consents of third parties. A share purchase may also have tax advantages from the vendor's perspective, as it generally permits the vendor to obtain capital gains treatment with respect to any gain on the sale of the shares, thereby reducing overall tax liability.

A sale of assets will generally be less favourable for the vendor, as a result of potential income inclusions in areas such as the recapture of depreciation on the assets being sold. On the other hand, from the purchaser's perspective, asset acquisitions may have some advantages, particularly where the purchaser wishes to exclude certain parts of the business or its liabilities from the transaction or step up the tax cost of depreciable assets.

In either case, the purchaser will be concerned about the condition of the underlying business, the title of the vendor to its assets, the status of contracts with third parties and compliance with environmental and other laws. The purchaser will seek to protect itself by conducting a due diligence review of the vendor's business and obtaining appropriate representations, warranties and covenants in the purchase agreement.

2. Share Acquisitions

2.1 What approvals are required for an acquisition of shares of a Canadian company by a non-resident?

The securities rules applicable to a purchase of shares depend on whether the purchase is of a private or a public company (see Section V, 2.4, "Are there any special rules that apply to the acquisition of shares of public companies?"). In the case of large acquisitions, pre-clearance under the Canadian competition laws is required (see Section IV.1.4, "Merger regulation"). Apart from this, the principal authorization which might be required is approval under the *Investment Canada Act* (ICA). See Section IV.2, "General Rules on Foreign Investments".

2.2 What are the tax consequences of a share purchase?

There are no stamp duties or similar taxes payable in Canada upon an acquisition of shares. The vendor's shares may generally be subject to payment of capital gains tax. To ensure that non-residents of Canada pay any taxes owing in respect of a sale of "taxable Canadian property" and "taxable Quebec property" which can include some shares (e.g., if the shares derive their value principally from Canadian real property), the *Income Tax Act* (Canada) and the *Taxation Act* (Quebec) require the purchaser to undertake a "reasonable inquiry" and satisfy itself as to the vendor's "Canadian-resident" status (normally through representations in the purchase agreement). If the vendor is a non-resident, it might need to provide the purchaser with certificates issued by the Canadian and Quebec tax authorities, which will be granted when appropriate arrangements are made to ensure payment of any tax liability. If the required certificates are not provided, the purchaser might need to withhold and remit to the Canadian and Quebec tax authorities 25 per cent and 12.875 per cent , respectively, of the purchase price, whether or not any tax would be payable by the vendor

on the sale. Shares that are listed on a prescribed stock exchange can be “taxable Canadian property” and “taxable Quebec property” in certain circumstances; however, it is not necessary to obtain a certificate with respect to the sale of such shares. Please note that the *Taxation Act* (Quebec) provides for certain certificate exemptions where the non-resident vendor is an individual.

2.3 Can one freely dismiss the directors and officers of the acquired Canadian company?

Directors may be removed at any time by shareholders’ resolution, which would enable a non-resident purchaser to replace the acquired company’s board of directors as the purchaser sees fit, subject to the qualification and Canadian residency requirements for directors, discussed in Section III, 1.2.1, “Who is responsible for the corporation?”

Officers and other employees of the target may be dismissed, subject to the provisions of Canadian law and any employment contracts or collective agreements. Specifically, unless their employment contracts set out their entitlements upon termination of employment and provided such entitlements are in compliance with legal requirements under the *Civil Code of Québec*, employees whose employment is terminated without cause would be entitled to reasonable notice of termination or pay in lieu of notice. Depending on the employee’s length of service, position, compensation, age and availability of similar employment, the required notice of termination (or pay in lieu of notice) could range from one month to 24 months or more.

A typical condition of closing may require the board and designated officers to resign their corporate offices and directorships and provide releases. See Section VII, “Employment and Labour Law”, which discusses employees’ rights in general.

2.4 Are there any special rules that apply to the acquisition of shares of public companies?

The acquisition of shares of a public company could trigger the application of “take-over bid” requirements of Canadian corporate and securities legislation. In Canada, the rules governing take-over bids are now harmonized across all provincial jurisdictions. Negotiated public company acquisitions in Canada are typically commenced by a non-binding letter of intent from the offeror indicating an interest in purchasing the outstanding securities of the target, and a confidentiality and standstill agreement between the parties, followed by the negotiation of a comprehensive support agreement.

2.4.1 Regulation of take-over bids

The threshold for a take-over bid is generally 20 per cent of the issued voting shares or “equity” shares (essentially non-voting common shares) of any class or series of the issuer. This threshold applies regardless of whether the offeror will obtain effective control of the company. Under existing rules, disclosure of the acquisition of 10 per cent or more of the voting or equity shares of a company (or securities convertible into voting or equity securities), and of subsequent acquisitions of two per cent or more within the 10 per cent -20 per cent range, is required under the “early warning” rules of Canadian securities legislation.

The offeror may determine the number of shares for which it wishes to bid. On a partial bid, shares must be taken up *pro rata*. Conditions may be attached to the bid (other than a “financing” condition). It is common to make a purchase conditional upon attaining a minimum level of acceptance, frequently two-thirds (the threshold for approval of certain fundamental corporate transactions in most jurisdictions) or 90 per cent (the level that gives the offeror the right to acquire the balance of the shares outstanding). As a result of recent changes expected to come into effect in 2016, there will be

a minimum tender requirement of 50 per cent of the securities subject to the bid (excluding securities held by the bidder and its joint actors).

Unless an exemption applies, a take-over bid must be made to all shareholders pursuant to a disclosure document (comprising a take-over bid offer and a circular). The circular must set out prescribed information about the offer and the parties, including shareholdings and past dealings by the bidder and related parties in shares of the target. If the target company has Quebec shareholders, which will often be the case, then unless a *de minimis* exemption applies, the circular must also be prepared in the French language for the purposes of mailings to such Quebec holders. The circular must be delivered to the target company and filed with the securities commissions, but is not subject to any pre-clearance review. The offeror is generally free to determine the price at which it chooses to bid and the consideration may be either cash or securities (or a combination of cash and securities).

Where the purchase price consists of securities of the offeror, the circular must contain prospectus-level disclosure regarding the offeror's business and financial results and *pro forma* financial statements assuming completion of the offer. For companies in the resource sector, technical reports on the offeror's properties or oil and gas resources may be required. Issuing securities will make the offeror a "reporting issuer" subjecting the offeror to certain ongoing disclosure requirements.

The target company's directors must deliver their own circular to shareholders in response to the bid. There are a number of corporate rules and securities commission policies that affect the target company's ability to undertake defensive measures in response to a bid, though recent amendments to the law are designed to provide more power to the target board. A bid subject to full regulation under provincial legislation must be made in accordance with certain timing and other procedural rules, including a compulsory minimum offer period. The minimum offer period has historically been 35 days, but new legislation expected to be in force in 2016 will extend that period to 120 days, except in certain circumstances if the target board agrees to reduce the period to 35 days.

2.4.2 Exempt take-over bids

Exemption from the statutory take-over bid rules is available in certain circumstances. As noted above, purchases of private companies are generally exempt from the take-over rules.

One of the most important exemptions relating to public companies is "private agreement" exemption. Purchases may be made by way of private agreements with a small number of vendors without complying with the take-over bid rules (which would otherwise require the offer to be made to all shareholders). However, the rules exempt such purchases *only* if they are made with not more than five persons in the aggregate (including persons located outside Canada) *and* the purchase price (including brokerage fees and commissions) does not exceed 115 per cent of the average closing price of the shares during the 20 days preceding the date of the bid.

2.4.3 Arrangements

Friendly acquisitions of public companies are now generally effected in Canada by way of a plan of arrangement. In particular, Quebec's corporate statute offers flexibility in the use of the arrangement mechanism. An arrangement is a court-approved transaction governed by corporate legislation and requires shareholder approval (generally 66-2/3 per cent) by the companies involved. The parties enter into an arrangement agreement setting out the basis for the combination, following which an application is made to the court for approval of the process. The court order will require the calling of shareholders meetings and specify the approval thresholds and in most cases dissent rights. A detailed circular will be sent to shareholders that provides broadly equivalent disclosure to that which would be provided by a take-over bid circular.

Arrangements have a number of advantages. In particular, they can facilitate dealing with multiple securities (particularly convertible instruments); provide for acquisition of 100 per cent of the target company without the need for a follow-up offer or second-stage transaction; and, if securities are to be offered to the target company's shareholders, provide an exemption under U.S. securities laws from the requirement to file a registration statement. On the negative side, arrangements leave control of the process in the hands of the target company and can provide opportunities for interested parties to intervene in the court proceedings, though this rarely happens in Canada.

2.4.4 Amalgamations

Acquisitions are sometimes effected by "amalgamations". An amalgamation is akin to a merger under U.S. law, however, the amalgamated corporation is considered to be the successor of both amalgamating entities and the amalgamated entity succeeds to the assets and liabilities of the amalgamating entities. Similar to negotiated take-over bids, amalgamations are typically commenced by the execution of a non-binding letter of intent from the offeror indicating an interest in amalgamating with the target company, and a confidentiality and standstill agreement between the parties, followed by the negotiation of a comprehensive amalgamation agreement.

Generally, all securityholders whose legal rights are affected by a proposed amalgamation will be entitled to vote on the transaction. The approval thresholds are usually 66-2/3 per cent of the securities represented by class at the securityholders' meeting. The information to be provided to those entitled to vote on the amalgamation must be sufficient to allow them to form a reasoned judgment as to whether to support or vote against the proposal. Proxy circulars are not subject to regulatory review in Canada. Securityholders have the right to dissent from an amalgamation transaction and to be paid "fair value" for their securities. Subject to regulatory approvals, the amalgamation process typically takes 60 to 90 days. Subject to the availability of financial information and related preparation time, preparation of securityholder meeting documentation may take three to four weeks.

A statutory amalgamation provides certainty in an acquisition transaction that the acquirer will obtain 100 per cent of the shares of the target. However, completion time is often longer than if the transaction were undertaken by a take-over bid. Amalgamations are used less often than arrangements as the time and documentation required is virtually identical but amalgamations do not provide the structuring flexibility afforded by an arrangement or the benefit of a court decision as to the fairness of the transaction.

2.5 What rights of compulsory acquisition of the minority are available after a successful take-over bid?

An offeror which acquires substantially all of a class of shares of a company (generally 90 per cent of the shares of the class not held by the offeror and its associates at the time of the bid) may generally buy out the remaining shareholders of the class at the offer price or, if the shareholder objects, a court-determined "fair value". If an offeror intends to exercise its right of compulsory acquisition, it must state its intent to do so in the circular and follow certain steps within a fixed period (generally 180 days) after the bid.

There are other ways by which a minority can be removed from a company, such as amalgamation, arrangement or consolidation, which results in the shareholder losing his participating interest in the business (being so-called second step squeeze-out transactions). Securities and corporate laws provide protection for minority shareholders in these circumstances, but if an offeror acquires 66-2/3 per cent of the shares under a bid, it will generally be able to eliminate the minority.

3. Asset Acquisitions

3.1 What approvals are required in the case of a purchase of assets of a Canadian business by a non-resident or by its Canadian subsidiary?

The review mechanisms of the *Investment Canada Act*, (see Section IV.2, “General Rules on Foreign Investment”), also apply to the purchase of “all or substantially all of the assets used in carrying on a Canadian business”. See Section IV, 1.4, “Merger regulation”.

In addition to the statutory approvals, consents of landlords, equipment owners, creditors and shareholders may be necessary. Under Quebec corporate law, if the sale of a corporation’s property results in the corporation being unable to retain a significant part of its business activity, shareholders must approve the transaction by special resolution. A requirement for shareholder approval likewise exists under federal Canadian corporate law, if a sale involves the disposition of all or substantially all of a corporation’s assets.

3.2 What are the tax consequences of an asset purchase?

Two different sets of tax rules must be examined in this context: liability with respect to income tax, and the application of federal and provincial sales taxes. If real property is involved (known as “immovable property” in Quebec), land transfer taxes may also be payable.

3.2.1 Canadian income tax issues

Capital assets used by a vendor in a Canadian business will generally be “taxable Canadian property” and “taxable Quebec property”. The purchaser should protect itself from possible tax liability by making “reasonable inquiries” to confirm that the vendor is a Canadian resident. For this purpose, an appropriate representation will generally be obtained in the purchase agreement. If the vendor is a non-resident, certificates from the Canadian and Quebec tax authorities might be required.

The allocation of the purchase price among the various assets being acquired will also have Canadian tax implications. The allocation is a matter of negotiation between the parties and they should agree that they will file their income tax returns in a manner consistent with such allocation, to minimize the risk that the Canadian tax authorities will re-allocate the purchase price in a manner that may be disadvantageous to the parties.

Accumulated tax losses and credits in connection with a business are not available to the purchaser on an asset transaction.

3.2.2 Sales tax

Both Canadian and Quebec governments impose sales taxes, Quebec through the Quebec Sales Tax (QST) and the Canadian government through the Goods and Services Tax (GST)/Harmonized Sales Tax (HST) (see Section VI.7, “Commodity Tax and Customs Tariffs”).

In a sale of the assets of a business, an election may be available so that no GST/HST or QST will apply to the transaction. The election is available when the seller is selling a business or part of a business, and where the subject of the sale is all or substantially all of the assets that are reasonably considered to be necessary to operate a business. Where the election applies, the sale of the assets of a business may be made free of GST/HST and QST, the rationale being that the recipient would in any event be able to claim a full input tax credit or refund for the tax otherwise payable.

There are two principal conditions that must be met before the election is available. The assets being sold must constitute a "business or part of a business" that was established, carried on, or acquired by the seller. In addition, the recipient must be acquiring at least 90 per cent of the assets reasonably necessary to carry on the business. An indication of the sale of a qualifying business is the existence of an agreement that deals with issues normally found in acquisition arrangements, such as the sale of goodwill and intellectual property, dealings with employees, etc., in addition to the sale of equipment and inventory.

3.3 What are the purchaser's obligations regarding third parties?

Canadian law provides protection for creditors of a business that might affect an acquisition of assets. To begin with, creditors who have a hypothec on immovable property (being a form of security equivalent to a mortgage on real property in common law Canadian provinces) will continue to have priority with respect to the relevant assets as against the purchaser. There are security registration statutes in Canada, including Quebec, and searches can be conducted to determine the existence of such security interests. Unless the purchaser is to acquire the assets subject to existing security interests, which might be the case with respect to immovable property and major items of financed movable property, the vendor's obligations should be paid and the security interests discharged at the time of the purchase. Because of time lags in the registration systems, it may be necessary to withhold a portion of the purchase price until confirming searches have been conducted.

Quebec law no longer contains provisions governing the sale of an enterprise (known as a bulk sale in certain common law Canadian provinces), although the *Civil Code of Québec* contains basic provisions with respect to the protection of creditors' rights in insolvency situations.

4. Employee Considerations

Employees' rights in the case of an acquisition depend on the nature of the acquisition and the labour relations laws of the jurisdiction that apply to the employees.

In the case of a share acquisition, unless otherwise provided in an employment contract, there are no changes to the employment relationship as the purchaser essentially becomes the employer for all employment purposes. Accordingly, there is no termination of employment as a result of the purchase of shares, and existing employment contracts remain in place, unless the parties have provided otherwise.

In the case of an asset purchase where a significant part of an undertaking's assets are transferred, the *Civil Code of Québec* provides that there is no termination of employment upon the change of legal structure and existing employment contracts are binding on the successor of the employer.

Where some or all of the employees are unionized, the Quebec *Labour Code* provides that the purchaser of an "undertaking" is placed in the role of employer with regard to the bargaining certificate issued, except under very special circumstances. When all of the undertaking has been purchased, the purchaser will also be bound by the collective agreement(s) in force. The effect of this is to require the purchaser to comply with the requirements of the collective agreement, to continue to recognize the bargaining rights of the collective bargaining agent and, in appropriate circumstances, to enter into negotiations with that bargaining agent. There is no statutory definition of "undertaking" under the Quebec *Labour Code*, however, the courts have developed a definition of the term for purposes of successor employee matters. If only part of the undertaking is transferred, the collective agreement may be deemed to have terminated on the effective date of the transfer. The purchaser would then have to negotiate a new collective agreement with the association of employees.

In addition, Quebec's *Act respecting labour standards* (Labour Standards Act) establishes certain minimum obligations in respect of both union and non-union employees. More beneficial terms of employment, whether express or implied, take precedence over the employment standards legislation. The *Labour Standards Act* stipulates that employees who remain employed by the purchaser in effect carry forward their prior service for the purposes of holiday pay, etc., and for the purpose of establishing entitlement to severance pay and notice of termination in the event of any subsequent termination of employment by the purchaser. Relevant provisions of the *Civil Code of Québec* which provide for the continuation of the employment agreement after a transaction are to the same effect. The *Labour Standards Act* also sets out minimum notice requirements which apply in the event of the termination of employees (which may be extended by the terms of applicable collective agreements and which must be supplemented by the requirement to provide reasonable notice under the *Civil Code of Québec*). In the case of mass terminations, a prior written notice, the duration of which varies depending on the number of employees affected, must be given to the Quebec Ministry of Employment and Social Solidarity, with a copy being provided to any association of employees and the *Commission des normes, de l'équité, de la santé et de la sécurité du travail* (the Quebec employment standards, equity and health and safety commission) (CNESST).

Failure to provide notice within the prescribed delay may trigger the payment of additional indemnities to the employees. If employees are terminated prior to the transfer of the undertaking, the vendor, as terminating employer, will be responsible for the termination costs and for providing the required notices. See Section VII.1.1.8, "Termination of employment".

For federally regulated businesses, under the *Canada Labour Code*, if an employer discontinues its business permanently or undertakes mass terminations (50 employees or more in four weeks or less), it must give the federal government 16 weeks of prior notice. In most cases, the employer must also establish a "joint planning committee", which must include employee and trade union representatives. The object of the committee is to develop an adjustment program to: (a) eliminate the necessity for termination of employment; or (b) minimize the impact of the terminations on affected employees and assist them in obtaining other employment.

VI. Tax

The province of Quebec administers and collects its own personal and corporate income taxes under the Taxation Act (Quebec) (QTA) through the Quebec Revenue Agency (QRA), much like the Government of Canada does pursuant to the Canadian Income Tax Act (ITA) through the Minister of National Revenue. Although there is a high degree of harmonization between the two laws with respect to the computation of taxable income, the government of Quebec, through the implementation of various fiscal measures, provides Quebec businesses with financial incentives that stimulate the Quebec economy.

The following is a general discussion of taxation under the ITA, with general distinctions made to highlight the taxation regime under the QTA. The reader is cautioned that there may be distinctions to be made in particular circumstances between the two systems which go beyond the scope of this general discussion.

1. Typical Organizational Structures

A number of forms of organization could theoretically be used by a U.S. or other foreign entity in establishing a Quebec business enterprise. Of these, however, the three most commonly considered are:

1. Sales representatives based in Quebec
2. A Quebec branch of the foreign entity
3. A Quebec subsidiary company

While there are some similarities in the basic rules for the computation of income subject to taxation under these possible forms of organization, it is most common for a substantial business undertaking to be organized using a Quebec or Canadian-incorporated subsidiary. In some cases, a British Columbia, Alberta or a Nova Scotia “unlimited liability company” might be chosen to achieve U.S. tax objectives. The decision will, of course, depend on the circumstances of each case and consultation with both Canadian and foreign tax counsel is essential, particularly if the investor is a U.S. entity that has a special U.S. tax status. The Canada-U.S. Tax Convention (Convention), however, contains rules that adversely affect the tax treatment of some structures involving unlimited liability companies.

If the U.S. entity is a “limited liability company” or “LLC” not treated as a corporation for U.S. tax purposes, there have been special problems with entitlement to benefits under the Convention, so it is sometimes not desirable for such an LLC to hold an investment in Quebec or carry on activities in Quebec. The Convention now contains relieving provisions that should allow qualifying U.S. resident members of an LLC to obtain treaty benefits on a “look-through” basis in some cases, but there are still issues where an LLC is the shareholder of an unlimited liability company.

1.1 Limitation on benefits of treaty

The Convention includes “Limitation on Benefits” rules. To qualify for benefits under the Convention, a U.S. entity must be both a resident of the U.S. for purposes of the Convention, and also be a qualifying person or otherwise entitled to the particular benefits under the Limitation on Benefits rules.

1.2 Sales representatives based in Quebec

1.2.1 Are entities with representatives exempt from tax if activities are limited?

It is possible for a foreign entity to extend the scope of its business to Quebec without becoming subject to Canadian or Quebec tax on its business profits if the types of activities carried on in Quebec are sufficiently limited.

Under the ITA, every non-resident person, as defined by the ITA, who carries on a business in Canada is required to file a Canadian tax return and to pay an income tax computed in accordance with the ITA on the taxable income earned in Canada by such non-resident person for the year. However, the provisions of the ITA relating to income tax on Canadian source business profits (but not the requirement to file a Canadian income tax return) may be overridden by the provisions of an applicable Tax Convention entered into between Canada and a foreign country.

In the case of a United States enterprise, Article VII of the Convention provides such relief. Except if the U.S. entity is an LLC in which case there are special issues with entitlement to benefits under the Convention, Article VII of the Convention provides as follows:

“The business profits of a resident of a Contracting State shall be taxable only in that State unless the resident carries on business in the other Contracting State through a permanent establishment situated therein. If the resident carries on, or has carried on, business as aforesaid, the business profits of the resident may be taxed in the other State but only so much of them as are attributable to that permanent establishment.”

Pursuant to the QTA, every non-resident individual of Canada who carries on a business in Quebec and every company who carries on a business in Quebec through an establishment in Quebec, is required to file a Quebec income tax return and is liable for income tax in Quebec on the portion of the taxable income attributable to the business carried on in Quebec. Tax Conventions signed by Canada are also applicable for Quebec tax purposes. Therefore, limitations as described earlier are also applicable under the Quebec regime. The QTA does not however impose withholding tax on payments such as dividends, rents, royalties, technical know-how payments or interest to a non-resident of Canada.

1.2.2 How is a “permanent establishment” defined? Does an office or a sales agent create this status? What about a storage facility?

The term “permanent establishment” is normally defined in the applicable Tax Convention. Under the Convention, Article V defines “permanent establishment” as a “fixed place of business through which the business of a resident of a Contracting State is wholly or partly carried on”, and there is also a concept of a deemed permanent establishment that can result from performing services in Canada.

The Convention goes on to specifically include the following in the definition of permanent establishment: any place of management, a branch, an office, a factory, a workshop and a mine, an oil or gas well, a quarry or any other place of extraction of natural resources or the presence in Canada of a non-independent agent who has and habitually exercises the authority to contractually bind the non-resident company. The Convention then goes on to specifically exclude the following from the definition of “permanent establishment”:

1. Facilities for the purpose of storage, display or delivery of goods or merchandise belonging to the resident (i.e., the U.S. entity)

2. The maintenance of a stock of goods or merchandise belonging to the resident for the purpose of storage, display or delivery
3. The maintenance of a stock of goods or merchandise belonging to the resident for the purpose of processing by another person
4. A purchase of goods or merchandise, or the collection of information, for the resident
5. Advertising, the supply of information, scientific research or similar activities which have a preparatory or auxiliary character, for the resident

Therefore, a U.S. entity will not have a permanent establishment in Canada by reason only of having sales representatives in Canada to offer products for sale, provided that these agents (i) do not have the authority to conclude contracts on behalf of the U.S. entity or (ii) are independent and acting in the ordinary course of their business.

If the U.S. entity contemplates establishing a fixed centre for its Canadian operations, care should be taken to ensure that the centre is not a permanent establishment. For example, it could be limited to functioning as a warehouse for the storage of goods awaiting delivery or processing, or as a display area. Any significant presence the U.S. entity will have at a Canadian location needs to be reviewed to determine whether it amounts to a permanent establishment. A building site or construction or installation project is a permanent establishment if, but only if, it lasts more than 12 months. The provision of other types of services in Canada for 183 days or more in any 12-month period may result under the Convention in a permanent establishment. If the U.S. entity has a permanent establishment in Canada, it will be subject to Canadian tax on business profits attributable to the permanent establishment.

In general terms, the QTA defines “establishment” for Quebec provincial domestic purposes as a fixed place where a taxpayer carries on a business and specifically includes, inter alia, office, branch, mine, oil and gas well, farm, timberland, factory, warehouse and workshop. The QRA has stated that an establishment is basically “a place which is stable, permanent or of a fairly long duration, which the taxpayer currently or regularly uses in carrying on his business”. A business must therefore be connected to the establishment. A place where only administrative functions are carried on, such as bookkeeping or debt collection, does not generally qualify as an establishment unless other factors are present.

The QTA also provides that an establishment exists at the place where a company carries on business through an agent, an employee or a mandatary, established in a particular place, who has general authority to contract on behalf of the company or who has a stock of the company’s merchandise from which orders are filled. The QRA has stated that an agent, an employee or a mandatary has general authority to contract for a taxpayer where the agent, employee or mandatary has the authority to bind the taxpayer in most transactions conducted by him and such authority is routinely exercised. The mere fact that a company has business dealings through a commission agent or broker does not in itself mean that the company has an establishment in the place from which such persons operate. Furthermore, an office maintained in Quebec solely for purposes of purchasing merchandise will not in itself result in the company being deemed to have an establishment in Quebec. Also, a company is not deemed to have an establishment in Quebec simply because it has a subsidiary which has an establishment in Quebec. However, where a company already has an establishment in Canada, the mere fact of owning land in Quebec will be considered an establishment.

Despite the similarities between the definition of “permanent establishment” in almost all Tax Conventions and “establishment” under the QTA, these rules should be reviewed prior to the foreign entity commencing its Quebec activities in light of the distinctions between the two definitions. Although the Tax Convention may override the taxation of Canadian source business profits under the ITA and the QTA, the foreign entity may nonetheless have to file applicable Canadian and Quebec income tax returns.

1.3 Quebec branch

If it is undesirable for the foreign entity to restrict its Canadian business in the manner described above to avoid having a permanent establishment in Canada and an establishment in Quebec, an alternative could be to establish and operate a Quebec branch out of office premises situated in Quebec.

1.3.1 Advantage of a branch operation

One advantage to the use of a branch operation would normally arise when it is anticipated that the branch will incur substantial losses in the first several years of operation. In this case, organization through a branch might enable such losses to be included in the consolidated tax return of the U.S. entity or its parent company and deducted against income from other sources. In general, a branch may be useful where a "flow-through" structure is desirable from the U.S. tax perspective.

An alternative for U.S. investors would be to consider incorporation of an entity that might be treated as a branch for U.S. tax purposes, such as a British Columbia, Alberta or Nova Scotia unlimited liability company. The use of such entities may be adversely affected in some cases as a result of "anti-hybrid" rules in the Convention.

If a Canadian subsidiary (other than an unlimited liability company) is used, we understand that in the usual case such losses may not be consolidated with income from other sources for U.S. tax purposes. For both Canadian and Quebec income tax purposes, the losses can be carried forward within the Canadian company for a maximum of 20 taxation years and used as a deduction in computing taxable income during that time.

1.3.2 What are the disadvantages and how would a branch be taxed as between the foreign country and Canada/Quebec?

It is most likely that if a foreign enterprise were to establish a divisional branch in Canada, it would have a "permanent establishment" and an "establishment" within the meaning of the applicable Tax Convention and the QTA respectively, and would be required, pursuant to the ITA, the applicable Tax Convention and the QTA, to pay Canadian and Quebec income tax on taxable income earned in Quebec, which is attributable to the branch. Any employee resident in Quebec and, subject to certain exemptions in the applicable Tax Convention, branch employees not resident in Quebec, would be required to pay Canadian and Quebec income tax, and the foreign enterprise would be required to deduct and remit to the Receiver General for Canada and the QRA amounts from the wages and salaries of such persons.

Despite potential tax savings, our experience has been that there are a number of practical difficulties with a branch operation. The most important has been the problem of preparing financial statements for the branch which determine its income earned in Canada in a manner satisfactory to the Canada Revenue Agency (CRA), the QRA and the U.S. Internal Revenue Service.

Particularly difficult is the allocation of head office charges, executive compensation and other common costs. In addition, in a branch situation the CRA may conduct an audit of the foreign company's books of account to satisfy itself as to Canadian-source income. The tax compliance obligations of a Quebec branch are sometimes more onerous than for a Quebec subsidiary in other respects. For example, if the branch disposes of capital assets used in the Quebec business, it must obtain tax clearance certificates from the CRA and the QRA, and if it receives amounts of the type normally subject to non-resident Canadian withholding tax (such as service fees, rentals or royalties), the branch may need to apply for a waiver of withholding.

Finally, Canada imposes a branch tax on the after-tax income of the branch operation of a foreign company. Subject to an applicable tax convention, the branch tax rate under the ITA is 25 per cent. For example, the rate is reduced under the Convention to five per cent for qualifying U.S. residents and may be subject to a lifetime exemption under the Convention for the first C$500,000 of Canadian income. The branch tax is effectively the equivalent of the five per cent non-resident withholding tax which would be applicable under the Convention if the U.S. company carried on business in Canada through a subsidiary company and the subsidiary repatriated its retained earnings to the parent by means of a dividend.

Any applicable Tax Convention shall be reviewed by the foreign investor prior to concluding that it provides for a similar tax treatment as under the Convention.

1.3.3 If a branch turns profitable, how can it become a subsidiary company?

It would be possible, if a Quebec branch were initially used, to transfer the Quebec business to a subsidiary company after it becomes profitable. There are, however, several difficulties in accomplishing this result and, in particular, there may be U.S. tax consequences. In addition, the complexity of a sale of assets, assignment of contracts and transfer of employees to a new company after a significant business has been established may be considerable. A non-resident may transfer immovable property, interests in immovable property and most other assets used in the business of a Quebec branch to a Quebec, Canadian or other Canadian provincial company, as part of the incorporation of the branch, on an income tax deferred basis.

However, the transfer by a foreign entity to any such company of immovable property or interests in immovable property not used in the business of the Quebec branch (such as inventory) would have to take place at fair market value, giving rise to a potential recapture of capital cost allowance (i.e., depreciation) and/or capital gain.

In summary, therefore, unless there are important reasons to the contrary, it may be advisable to organize the Quebec business through a subsidiary company. We note again that the choice of organizational form depends on individual circumstances and that consultation with foreign and Canadian tax counsel is advised.

1.4 Quebec subsidiary corporation

If the Quebec business enterprise is carried on through a corporation incorporated in Quebec (or in Canada or other Canadian provincial jurisdiction, including in British Columbia, Alberta or Nova Scotia in the form of an unlimited liability company), the company will be a “resident” within the meaning of the ITA and will be required to pay Canadian income tax on its world income each taxation year. Quebec income tax will also apply. Where dividends are paid by the subsidiary company to a qualifying U.S. resident parent company that owns 10 per cent or more of the voting stock, the Canadian withholding tax rate applicable to the dividends under the Convention is five per cent (except in some cases where the subsidiary corporation is an unlimited liability company). The following comments address several of the most important provisions of the ITA and QTA, which would apply to the new company.

2. Income Computation

The computation of income from business for Canadian and Quebec tax purposes starts with a computation of the profit from the business. A number of rules must then be applied to adjust the profit computation to arrive at taxable income. The main provisions in this regard are set out below.

2.1 How is depreciable property amortized?

2.1.1 Capital cost allowance

The system in the ITA and QTA for amortizing the cost of depreciable property is known as capital cost allowance. All tangible and intangible depreciable assets must be included in one of the classes prescribed by the applicable Regulation. Each class is given a maximum rate, which may or may not be based on the useful life of the assets in the class. The rate for a class is applied to the total capital cost of the assets in that class to calculate the maximum deduction that may be claimed in each year. The actual deduction taken in a year may be any amount that is equal to or less than the maximum deduction available. The capital cost of a class is reduced by the amount of the actual deduction taken with respect to that class each year. Therefore, unused deductions are effectively carried forward as they do not reduce the capital cost of the class.

There are also provisions as to the recapture of capital cost allowance from the disposition of capital assets that have been depreciated for tax purposes below their realizable value.

2.2 Licensing fees, royalties, dividends and interest

2.2.1 Transfer pricing rules for related companies

Particular scrutiny is normally given by the Canadian tax authorities to licensing fees, royalties, interest, management charges and other amounts of a like nature paid to non-residents of Canada with whom the Canadian taxpayer does not deal at arm's length. For example, if a U.S. entity controls a Quebec company, either by owning a majority of the voting shares or by having sufficient direct or indirect influence to result in control, the two entities will be considered not to deal at arm's length. The tax authorities' first concern will be to determine whether the amount paid by the Quebec company should be allowed as a deduction in computing income.

Canadian and Quebec transfer pricing rules require that, for tax purposes, non-arm's-length parties conduct their transactions under terms and conditions that would have prevailed if the parties had been dealing at arm's length. The rules also require contemporaneous documentation of such transactions to provide the Canadian tax authorities with the relevant information supporting the transfer prices. The rules provide that taxpayers may be liable to pay penalties where the transfer pricing adjustments under the rules exceed a certain threshold and the taxpayer did not make reasonable efforts (including contemporaneous documentation) to use appropriate transfer prices.

2.2.2 What are the withholding tax rules?

The ITA provides for a withholding tax rate of 25 per cent, subject to any applicable Canadian domestic exception or Tax Convention. For example, under the Convention, the Quebec entity must withhold 10 per cent of some "royalties" paid to a qualifying U.S. resident. Moreover, the Convention provides exemptions from withholding tax on "royalties" paid to qualifying U.S. residents which are payments for the use of or the right to use (i) computer software or (ii) any patent or any information concerning industrial, commercial or scientific experience (but not including information provided in connection with a rental or franchise agreement).

Reasonable management fees for services rendered outside Canada are not subject to withholding tax as the CRA regards these as business profits of the U.S. entity and therefore not taxable under Article VII of the Convention. The CRA will allow a management fee to include a mark-up over the U.S. entity's costs only in limited circumstances.

Under the Convention, the rate of withholding tax on dividends is 15 per cent , although the lower rate of five per cent applies if the shareholder is a qualifying U.S. resident company that owns 10 per cent or more of the voting stock (except in some cases where the payer is an unlimited liability company).

The applicable Tax Convention, if any, should be reviewed in order to determine whether the 25 per cent withholding tax rate provided in the ITA is reduced.

There is no Canadian withholding tax on arm's length (unrelated party) interest payments, other than certain types of participating interest. Withholding tax on interest paid by a Canadian resident to a related U.S. resident qualifying for the benefits of the Convention is eliminated by the Convention (except in some cases where the payer is an unlimited liability company).

The QTA does not provide for a withholding tax on licensing fees, royalty, dividend or interest payments. However, services rendered in Quebec by a non-resident of Canada may be subject to a deduction at source under the ITA and the QTA of 15 per cent and nine per cent, respectively.

2.3 What are the limits on thin capitalization?

A statutory thin capitalization provision (pursuant to both the ITA and QTA) limits the amount of interest-bearing debts that may be owed by a Quebec company to certain non-resident creditors. The limit is set by requiring the Quebec company to have a debt to equity ratio of not more than 1.5:1 where debt and equity have particular definitions. In making the necessary calculation, equity includes the paid-up capital of shares of the Canadian corporation owned by non-resident shareholders described below as well as retained earnings and other surplus accounts.

Debt includes only interest-bearing debt held by non-resident shareholders who, alone or together with affiliates, own shares of the capital stock of the company representing 25 per cent or more by votes or fair market value of all shares of the company or their affiliates. There are special timing rules regarding when the different debt and equity elements are determined.

Not included as debt are amounts owed to residents of Canada or amounts owed to non-residents who are neither shareholders nor related to shareholders (unless they are part of a "back-to-back" arrangement whereby the non-resident shareholder or related party lends to a third party on the condition that it make an advance to the Quebec company). Also excluded from the definition of debt for this purpose are amounts loaned to the Quebec company by arm's-length entities where the loans are guaranteed by a shareholder.

The sanction for exceeding the maximum ratio is that interest on the amount of debt in excess of the permitted limit is not allowed as a deduction in computing the Quebec corporation's income. In addition, the excess interest is treated as a dividend for Canadian withholding tax purposes.

2.4 How can operating losses be used?

Operating losses from a particular source can be used by the taxpayer to offset income from other sources. In addition, if an operating loss is realized for a particular year, it may be carried back three fiscal years and carried forward 20 taxation years as a deduction in computing taxable income of those other years. If the loss is not used within this statutory period, it expires and can no longer be used in computing taxable income. Special rules restrict the availability of these losses following an acquisition of control of the company.

2.5 Capital gains and losses

One-half of any capital gain realized by a Canadian taxpayer (referred to as a "taxable capital gain") is included in the taxpayer's income and is subject to tax at normal rates. One-half of any capital loss may be deducted in computing income, but only against taxable capital gains. Capital losses, to the extent that they cannot be used as a deduction in the year in which they are incurred, may be carried back three years and carried forward indefinitely. Capital losses of a company are extinguished on an acquisition of control of that company.

2.6 Should a single subsidiary be used when there are several lines of business?

Under the Canadian federal and provincial tax systems, including Quebec, it is not possible under any circumstances for two or more companies to file a consolidated tax return. As a result, the profits of one company in a related group cannot be offset by losses in another. It is generally desirable, therefore, unless there are compelling reasons to the contrary, to carry on as many businesses as possible within a single corporate entity. As well, non-residents establishing a corporate group in Canada should consider planning to minimize Quebec and other applicable provincial income tax.

2.7 How is income taxed among the different Canadian provinces?

The taxable income of a company with operations in more than one Canadian province is allocated for provincial income tax purposes among those provinces in which the company has an establishment. The allocation is achieved by means of formulae that are generally based on the salaries and wages paid to employees associated with each establishment and gross revenues attributable to each establishment.

3. Rates of Taxation

Corporate income tax is imposed in Canada by both the federal and Quebec governments (and other provincial governments). The effective rate of federal tax is currently 15 per cent, after taking into account a reduction in rate that partially offsets the impact of provincial taxation.

Provincial tax rates can vary substantially depending on the province and the type of income earned by the company. In many cases, Canadian provincial income tax liabilities may be reduced by inter-provincial tax planning appropriate to the proposed Canadian operations.

The general rate imposed by the province of Quebec on income is currently 11.8 per cent. Therefore, a company that carries on business in Quebec is currently subject to a combined general tax rate of 26.8 per cent (in other provinces, such rate varies from 26 per cent to 31 per cent).

Several reductions in federal and provincial rates are possible depending on the circumstances of the particular case. The most substantial of these reductions relates to active business income earned in Canada by a small "Canadian controlled private corporation" (CCPC).

It is to be noted that a company will not be a CCPC if it is "controlled, directly or indirectly, in any manner whatever, by one or more non-resident persons".

As described in section VI, 6, "Quebec Tax Incentives", Quebec-based companies may be entitled to benefit from various Quebec tax incentives, which are normally in the nature of either tax credits (some of which are refundable) or tax holidays.

4. Other Income Tax Considerations

4.1 Are tax credits available for research and development?

An "investment tax credit" against income tax otherwise payable is provided under the ITA in respect of certain expenditures on qualifying scientific research and experimental development carried out in Canada. An enhanced credit is available for CCPCs. See Section VII, 6, "Quebec Tax Incentives".

4.2 How are distributions treated?

A company may generally return to a shareholder the shareholder's investment in "paid up capital" of the company (other than a public company) as a Canadian tax-free receipt. The ITA provides that all other distributions to shareholders of a company resident in Canada (including share redemptions and liquidating dividends) are treated as dividends to the extent that funds paid out of the company on a reorganization, share reduction or liquidation exceed the paid-up capital of the shares. Such distributions are treated as dividends regardless of the type of surplus or profits from which they are paid and regardless of whether the company has any undistributed income.

Dividends paid by a Quebec company to its non-resident shareholders are subject to withholding tax under the ITA at a rate of 25 per cent. However, a Tax Convention may reduce such rate. In particular, the withholding tax rate under the Convention is five per cent for dividends paid to a qualifying U.S. parent corporation (except in some cases where the payer is an unlimited liability company). Stock dividends are equivalent to cash dividends and are generally valued at the related increase in the company's paid-up capital.

The ITA and the QTA contain other rules for dividends paid to Canadian residents that are beyond the scope of this Guide. Dividends between affiliated Canadian companies are tax-free in some cases (although recent developments have called into question the scope of this treatment).

4.3 Loans to shareholders

A loan made by a company to any of its shareholders or to persons connected with such shareholders (other than companies resident in Canada) that is not repaid by the end of the taxation year following the year in which such loan was made is, with limited exceptions (including a possible election out of the rule), considered to be income received in the hands of the shareholder.

More stringent rules apply to indebtedness of a non-resident to a Canadian affiliate arising under a "running account" between the two companies. Amounts deemed to be paid to non-resident shareholders as income are subject to non-resident withholding tax as though the amounts were dividends. There is, however, a refund of withholding tax to a non-resident if the debt is subsequently repaid, subject to certain limitations.

A loan that is not included in income as described above may give rise to imputed interest income for the Quebec company at prescribed rates and a taxable benefit in the hands of the shareholder or connected person (other than a company resident in Canada) if the rate of interest paid on the loan is less than the market rate applicable at the time of the loan. Some loans that rely on a special exception from the shareholder loan rules will result in imputed interest income for the Quebec company at higher prescribed rates.

5. Payroll Taxes

As an employer in the province of Quebec, deductions at source must be made and remitted to the competent tax authorities on behalf of Quebec employees. These deductions at source made from the remuneration paid to the Quebec employees include income tax withholding and the employees' contribution under the federal Employment Insurance plan, the Quebec Pension Plan and the Quebec Parental Insurance Plan.

Moreover, as outlined in the table hereunder (applicable for 2017), payroll taxes must also be assumed by the employer. In addition to the federal Employment Insurance plan, Quebec employers are generally required to make contributions for the benefit of their employees to the Quebec Pension Plan, the Quebec Parental Insurance Plan (QPIP) and the Commission des normes du travail (the Quebec labour standards board). The province of Quebec also imposes an employer contribution to the Quebec Health services Fund, referred to as the Quebec health tax. Contributions to the CNESST are also obligatory for most businesses. Quebec employers whose payroll exceeds C$2-million are also required to allot one per cent of their payroll to eligible training expenditures under the Workforce Skills Development and Training Fund.

2017 Quebec Employers' Payroll Taxes	
Federal Employment Insurance plan	1.778 per cent of insurable salaries (maximum insurable is C$51,300 per employee).
Quebec Pension Plan	5.4 per cent of earnings subject to contribution less a C$3,500 basic exemption (the maximum insurable earnings is C$55,300 per employee).
Quebec Parental Insurance Plan	0.767 per cent of insurable salaries subject to contribution (the maximum insurable salary subject to contribution is C$72,500 per employee).
Labour Standards	0.07 per cent of payroll (maximum insurable is C$72,500 per employee).
Health Services Fund	A maximum of 4.26 per cent of total payroll for an employer where total worldwide payroll of such employer and its affiliates is greater than C$5-million. A minimum of 2.5 per cent (1.55 per cent for the primary and manufacturing sector) of total payroll where total payroll is not more than C$1-million.
Occupational Health and Safety	The average contribution rate varies based on the type of activity (maximum insurable is C$72,500 per employee).

2017 Quebec Employers' Payroll Taxes	
Training	Employers whose total payroll in Quebec is not less than C$2-million are required to spend one per cent of their Quebec payroll on employee training or pay a contribution equal to the difference between one per cent of its total payroll and the amount spent on training to the Labour Force Training Fund.

The Quebec government and the Canadian government signed an agreement fixing the terms and conditions for implementing the QPIP. The QPIP replaces maternity and parental benefits provided under the federal Employment Insurance plan for eligible Quebec residents. Quebec employers and employees are required to contribute to the QPIP, and responsibility for collecting their contributions has been assigned to the QRA. Federal Employment Insurance premiums for Quebec employers and employees have been reduced to reflect the fact that Quebec residents no longer receive maternity and parental benefits pursuant to the federal Employment Insurance plan.

6. Quebec Tax Incentives

Companies carrying on business in Quebec (or elsewhere in Canada) and subsidiaries and branches of foreign companies may be eligible for various Quebec tax incentives briefly described below. Certain of these tax incentives are, however, only available to Canadian-controlled corporations or to CCPCs. In addition, with respect to the tax incentives which are in the form of Quebec tax credits, such credits can only be claimed on expenditures which have been reduced by any government or non-government assistance received. The assistance given to an enterprise often depends on its size, taking into account all of its affiliates. Generally, the Quebec tax credits cannot be accumulated in respect of an activity. Moreover, all Quebec refundable tax credits have to be included in calculating the income of a taxpayer who receives them.

To benefit from a particular Quebec tax incentive, an eligible company generally has to file a prescribed form with its income tax return. In certain cases, companies may have to request certificates, visas or attestations of eligibility from the applicable Quebec government organization or department.

6.1 Scientific research and experimental development (R&D)

Recognizing the importance of R&D as an economic lever, both the Quebec and Canadian governments offer considerable tax incentives to taxpayers who carry out R&D in Quebec and Canada themselves or on behalf of others, or that have R&D conducted on their behalf. The R&D tax incentives take the form of deductions in computing income with respect to eligible R&D expenditures and of tax credits on such eligible R&D expenses, some of which may be refundable at the Canadian level and all of which may be refundable at the Quebec level. In light of the significant financial implications underlying such incentives, proper tax planning is fundamental in order to make the after-tax cost of R&D less expensive.

The following expenses are normally eligible for the Quebec R&D tax credits:

- Salaries and wages of employees who worked directly on the project
- One-half of the fees paid to an arm's-length subcontractor who performed R&D or work relating to an R&D project on behalf of the company

- 80 per cent of the total eligible R&D expenditures incurred in connection with a research contract with a research centre
- Contributions to a research consortium
- Expenditures made in connection with a pre-competitive private partnership R&D

The basic Quebec tax credit is 14 per cent of salary and wages paid for the performance of R&D in Quebec. However, on the first C$3-million of R& D salary and wages, this credit can reach as high as 30 per cent for Canadian controlled corporations (CCCs) with less than C$50-million in assets, on an associated basis. For assets ranging from C$50-million to C$75-million, the rate is linearly reduced to 14 per cent. Only amounts above the annual exclusion threshold are eligible for Quebec R&D tax credits. The annual exclusion threshold is C$50,000 and increases linearly to C$225,000 when the previous year's assets are between C$50-million and C$75-million. All the Quebec R&D tax credits are refundable, i.e. a company can receive its tax credit even if it did not pay any income tax.

The basic federal tax credit is 15 per cent of eligible R&D expenditures and is not refundable. Qualifying Canadian-controlled private corporations (CCPCs) may be entitled to a refundable federal R&D tax credit at a rate of 35 per cent on the first C$3-million of eligible R&D expenditures. The C$3-million limit applies to current expenditures and must be shared among associated corporations. The C$3-million limit is gradually reduced for CCPCs with taxable capital employed in Canada of between C$10-million and C$50-million or taxable income of between C$500,000 and C$800,000 in the prior year on an associated group basis. Expenditures not eligible for the 35 per cent rate may be eligible for the 15 per cent rate. The unused balance can be carried back three years and carried forward 20 years. Expenditures eligible for the federal R&D tax credit differ from those eligible for the Quebec R&D tax credit.

The Canadian and Quebec tax incentives applicable to R&D performed in the province of Quebec and described above may be summarized as follows:

Canadian						
Entity	**Nature of Eligible Expenditure**	**Deductibility in computing the income**	**ITC Rate up to C$3M**	**Refund Rate**	**ITC Rate in excess of C$3M**	**Refund Rate**
Qualifying CCPCs	Current	Yes	35 per cent	100 per cent	15 per cent	Reduced linearly from 40 per cent to nil
Other Corp.	Current	Yes	15 per cent	Nil	15 per cent	Nil

Quebec						
Entity	**Nature of Eligible Expenditure**	**Deductibility in computing the income**	**TC Rate up to C$3M of Wages paid in Quebec**	**Refund Rate**	**TC Rate in excess of C$3M of Wages paid in Quebec**	**Refund Rate**
Qualifying CCCs	Current	Yes	30 per cent	100 per cent	14 per cent	100 per cent
Other Corp.	Current	Yes	14 per cent	100 per cent	14 per cent	100 per cent

6.2 Tax credit relating to mining, petroleum, gas or other resources

The QTA entitles an eligible corporation to a refundable tax credit relating to mining, petroleum, gas or other resources in respect of certain "Canadian exploration expenses" incurred in Quebec to the extent that such expenses have not been renounced in favour of investors under a flow-through share structure. The rate of the refundable tax credit for resources depends on whether the corporation is an "operating" or a "non-operating corporation" (up to 24 per cent for an "operating corporation" and up to 38.75 per cent for a "non-operating corporation").

The rates of the refundable tax credit for resources available to eligible corporations may be summarized as follows:

Refundable Tax Credit for Resources		
Eligible expenses	**Corporations not operating mineral resources or oil or gas wells**[(1)]	**Other corporations**
Mining	Per cent	Per cent
• In the Near North or Far North	38.75	18.75
• Elsewhere in Quebec	28	12

Oil and gas • In the Near North or Far North • Elsewhere in Quebec	Per cent 31 28	Per cent 15 12
Renewable energy and energy efficiency	28	24
Other natural resources	12	12
[1] These corporations must not be related to any corporation that develops a mineral resource or an oil or gas well.		

6.3 Tax holiday for foreign researchers, university professors and specialists

Foreign individuals who have expertise in certain specialized areas of activity and who settle in Quebec in order to work may be entitled to a Quebec tax holiday. The tax holiday is in the form of an income tax exemption for a maximum of five consecutive years on a portion of the salary received by these individuals. In computing their income for Quebec tax purposes, such individuals may be entitled to deduct in computing their taxable income 100 per cent of their salary for the first and second years, 75 per cent for the third year, 50 per cent for the fourth year and 25 per cent for the fifth year.

The following researchers and specialists, who are not resident in Canada immediately before their employment contract is signed and for whom the Minister of Finance (Quebec) has issued a qualification certificate, may be entitled to the tax holiday:

- A researcher specializing in pure or applied sciences who works for a person carrying on a business in Canada and who performs R&D in Quebec
- A specialist either in the field of management or financing of innovation ideas or in the marketing abroad or the transfer of the latest technology, who is working for a person carrying on a business in Canada and performing R&D in Quebec
- Certain eligible foreign employees specialized in the field of finance employed by a new financial services corporation (see Section VII, 6.6.4 “Fiscal measures to encourage the creation of new financial services corporations”)

6.4 Tax holiday for large businesses

Corporations carrying out, either directly or through a partnership, large investment projects in certain activity sectors and incurring capital expenditures of no less than C$100-million over a maximum of 60 months (save and except expenditures relating to the purchase or use of land and those relating to the acquisition of a business already being operated in Quebec) are eligible for a 15-year Quebec tax holiday. The capital investment threshold may be reduced to C$75-million for projects beginning after February 10, 2015, if 90 per cent or more of total investments related to an eligible region. The value of the tax holiday must not exceed 15 per cent of the total qualifying expenditures. As of March 29,

2017, corporations are allowed to make an election enabling an additional phase to be added to a large investment project, provided certain criteria are met.

The eligible activity sectors of the North American Industry Classification System (NAICS) covered by this tax holiday are:

- Manufacturing (NAICS codes 31-33)
- Data processing, hosting and related services (NAICS code 518)
- Wholesale trade (NAICS code 41)
- Warehousing and storage (NAICS code 4931)

In addition to the income from its eligible activities being completely deductible from the corporation's income for a period of 15 years, the eligible portion of wages paid to the corporation's employees that is attributable to such activities will also be exempt, for the 15-year holiday period, from contribution to the Health Services Fund by the employer.

6.5 Designated regions and sites

Quebec has a tax incentive to reinforce regional development. This tax incentive takes the form of a refundable tax credit for job creation and may apply to businesses located in certain prescribed regions in Quebec.

6.6 Other tax measures

Other Quebec specific tax incentives include:

6.6.1 Ethanol production in Quebec

The QTA contains a refundable tax credit for companies engaged in the production of ethanol in the province of Quebec. The eligible company must have an establishment in the province of Quebec where it produces ethanol. This tax credit is available for an eligible company for no more than 10 years, which could be extended to 12 years in certain cases, beginning after April 1, 2006 and ending no later than March 31, 2018.

In very general terms, the tax credit is calculated on a monthly basis pursuant to a mathematical formula based on the monthly production of ethanol expressed in litres and a rate depending on the average monthly price of crude oil. The maximum tax credit will be C$0.185 per litre produced. No tax credit will be available for any months where the average price of crude oil exceeds US$65.

Moreover, the credit is subject to a monthly ceiling which corresponds to a daily production of 345,205 litres, multiplied by the number of days in such given month.

This tax credit also applies to qualified corporations carrying on a biodiesel fuel production business with respect to biodiesel fuel produced after March 31, 2017, but before April 1, 2018, provided the acquirer takes possession of the fuel before April 1, 2018.

6.6.2 Multimedia productions

A refundable tax credit of 26.25 per cent to 37.5 per cent may be granted to companies for eligible multimedia productions. A company may be entitled to claim a credit for each production or for all of its activities when 75 per cent of its activities consist of producing eligible multimedia productions.

6.6.3 International Financial Centre

The objective of the International Financial Centres (IFCs) is to promote the implementation, development and retention in the City of Montréal of businesses specializing in international transactions. Generally, an eligible corporation may, under certain conditions, claim a tax credit for IFC representing 24 per cent of the eligible salary incurred for an eligible employee, to a maximum of C$16,000 per employee, per year (which represents a maximum annual salary of C$66,667 per employee). This tax credit is generally non-refundable, although a refundable tax credit is available for qualifying back office activities.

6.6.4 Fiscal measures to encourage the creation of new financial services corporations

Subject to the expiry of a five-year qualification period, an eligible corporation whose activities consist of (1) analysis, research, management, advisory and securities trading services or securities distribution, carried out by certain types of securities dealers, or (2) securities advisory or securities management services provided by certain types of securities advisers, may be eligible to a refundable tax credit equal to 24 per cent of the eligible salary paid to certain full-time employees occupying jobs where at least 75 per cent of their duties are attributable to the transactional process specific to the carrying out of these activities (up to a maximum annual credit of C$24,000/employee).

In addition, a second refundable tax credit representing 32 per cent of eligible expenditures, including fees relating to the constitution of the initial file for participation in a stock exchange and fees and dues and expenses incurred by the eligible corporation and paid to certain regulatory bodies is available (up to a maximum annual credit of C$120,000 to be shared between associated corporations). Like the 24 per cent refundable tax credit for salaries, this credit is only available during the five-year qualification period.

In order to benefit from the refundable tax credits of 24 per cent on salaries and 32 per cent on eligible expenditures, a corporation must hold a qualification certificate issued by the Minister of Finance (Quebec) and various annual eligibility certificates covering not only the corporation but each eligible employee, where applicable. Aside from the nature of the corporation’s activities and the absence of any non-arm’s-length relationship between the corporation and its clients, one of the conditions for obtaining the qualification certificate is that the corporation’s net shareholders’ equity for the previous fiscal year must be less than C$15-million, as determined on a consolidated basis.

The Minister of Finance (Quebec) has announced that it will not accept any qualification certificate application after December 31, 2022.

6.6.5 Deduction for innovative manufacturing corporations

Beginning in 2017, Quebec will offer qualified innovative manufacturing corporations a deduction allowing such corporations to reduce their tax rate to four per cent on certain income. The deduction is applicable to income attributable to the value of inventions for which the corporation owns or co-owns a patent that is incorporated into the assets that the company sells or leases. The corporation must carry out at least 50 per cent of its activities for a particular taxation year in Quebec in the manufacturing and processing sector.

In order to benefit from this deduction, the manufacturing company must have a consolidated paid-up capital from the previous year of C$15-million or more. Furthermore, the corporation or a corporation associated with it must have spent a minimum of C$500,000 on qualified R&D expenditures in the five preceding years and must have benefited from a refundable tax credit for R&D in respect of those R&D expenditures.

6.6.6 Refundable investment tax credit for manufacturing and processing equipment

This incentive allows an eligible corporation acquiring qualified property (including property used mainly for the primary processing of certain Canadian or foreign ores) to claim an investment tax credit for a fiscal year, from four per cent up to 24 per cent of the amount of the eligible investment acquired before January 1, 2023. This fiscal measure also extends to certain property used both entirely in Quebec and mainly for primary metal processing (including smelting, refining or hydrometallurgy activities) of certain Canadian or foreign ores, other than ore from a gold or silver mine. The investment tax credit rate depends on (1) the location where the qualified property is used, (2) the eligible corporation's paid-up capital calculated on a consolidated basis and (3) a cumulative ceiling of C$75-million on eligible investments.

The tax credit is fully refundable for corporations whose consolidated paid-up capital does not exceed C$250-million. For corporations whose consolidated paid-up capital is between C$250-million and C$500-million, the percentage of the credit that is refundable will decline linearly. The non-refundable portion of the credit may be carried forward over 20 years and carried back three years.

6.6.7 Tax credit for the development of e-business

This temporary refundable tax credit allows an eligible corporation that employs eligible employees to carry out eligible activities, to claim a refundable tax credit equal to 24 per cent of their eligible salaries, to a maximum of C$20,000 per employee, per year (which represents a maximum annual salary of C$83,333 per employee) and a non-refundable tax credit equal to six per cent of eligible salaries up to a maximum credit of C$5,000 per employee.

Quebec offers other tax credits not mentioned in this document. For further information regarding Quebec tax credits that maybe relevant to your business, we invite you to contact us.

7. Commodity Tax and Customs Tariffs

7.1 Federal sales tax, excise tax and the Quebec sales tax

The federal Goods and Services Tax (GST) and the Quebec Sales Tax (QST) are both forms of value-added tax which apply to most goods and services at the rate of five per cent in the case of GST and 9.975 per cent in the case of QST, which is imposed pursuant to a separate Quebec provincial statute. Unlike income tax, the GST/QST is a tax on consumption rather than profits.

7.1.1 How is the GST/QST collected?

Generally speaking, each registered supplier of taxable goods and services collects the applicable tax from its purchasers at the time of sale. The supplier must collect the GST/QST as agent for the government, while the purchaser is legally responsible for the payment of the tax. Suppliers deduct from their collections any GST/QST they have paid on their own purchases (called "input tax credits" or "input tax refunds") and remit the difference to the appropriate tax authority. If the supplier paid more tax than was collected, the supplier is entitled to a refund of the difference. The result is that the tax is imposed on the value added to the product at each stage of production and distribution and the final consumer ultimately bears the full amount of the tax.

Quebec has largely harmonized its provincial sales tax base with that of the GST; therefore, most of the discussion that follows applies equally to the QST.

7.1.2 Who is exempt from registration requirements?

Generally speaking, most persons who carry on business in Canada must register to collect and remit GST. By way of exception, small suppliers with sales of less than C$30,000 per year are generally not required to register for GST purposes and cannot claim input tax credits. In determining whether this threshold has been met, sales of associated corporations are included.

Non-residents who in Canada solicit orders or offer for sale prescribed goods (such as books, newspapers or magazines) to be sent to persons in Canada by mail or courier are deemed to carry on business in Canada. Accordingly, they must register to collect and remit GST on their sales.

Non-residents who do not carry on business in Canada or small suppliers with sales of less than C$30,000 are permitted to voluntarily register to collect and remit tax if, among other activities, they regularly solicit orders for the supply of goods for delivery in Canada. Non-residents may wish to register in such cases to obtain input tax credits in respect of GST paid on purchases in Canada.

7.1.3 Zero-rated supplies

Certain supplies, defined as "zero-rated supplies" are effectively tax-free supplies and taxed at a zero rate. These supplies include basic groceries, prescription drugs, most medical devices and, generally speaking, goods which are sold for export. Services of an agent on behalf of a non-resident are also zero-rated in some cases as are legal and consulting services supplied to assist a non-resident in taking up residence or setting up a business in Canada. Suppliers of zero-rated goods and services do not charge tax on their sales, but are entitled to input tax credits for the GST paid on purchases used in supplying taxable and tax-free goods.

7.1.4 Exempt supplies

The legislation also provides for a class of goods known as "exempt supplies". No tax is charged on exempt supplies. However, unlike zero-rated supplies, suppliers of exempt goods and services do not receive input tax credits for the GST paid on their purchases to the extent they are used in making the exempt supplies. Examples of exempt supplies include used residential property, long-term residential leases, many health and dental services, educational services, domestic financial services and daycare services.

7.1.5 Special rules for non-residents

To encourage non-residents to do business in Canada, the legislation provides relief from the GST in connection with certain transactions. Rules applicable to non-residents may also apply under the QST regime.

7.1.5.1 What if goods are imported by the non-resident and delivered in Canada?

A non-resident who sells goods to a Canadian customer on a "delivered" and also acts as importer of record basis will be required to pay GST on the importation of the goods. Where the non-resident is not a GST registrant, the non-resident will not be able to obtain an input tax credit (i.e., refund) of the GST. In effect, the GST legislation would increase the non-resident supplier's costs and the price to the Canadian customer would include GST.

This is contrary to the intent of the GST legislation. As a result, the Canadian customer is permitted to claim an input tax credit for the GST paid at the border by the non-resident supplier, where the customer obtains proof of payment of the GST from the non-resident. Therefore, its customer will reimburse the non-resident for the GST paid at the border, and the customer will claim the GST input

tax credit as if the goods were purchased from a Canadian supplier. This levels the playing field between Canadian customers who deal with non-resident suppliers and those who deal with Canadian suppliers. This is referred to as the "flow-through" mechanism.

7.1.5.2 Will the non-resident have to collect GST from its customer?

A second relieving provision is referred to as the "non-resident override rule". This rule applies to a supply of personal property or service in Canada made by a non-resident and deems it to be made outside Canada and therefore beyond the scope of the GST. This provision applies where the non-resident supplier does not carry on business in Canada and is not registered for GST purposes. The "non-resident override rule" relieves the non-resident from any obligation to register and charge and collect GST on supplies that otherwise would be considered to be made in Canada. However, the Canadian customer may be required to self-assess GST on such supplies, in certain circumstances.

7.1.5.3 What if goods are sold by a non-resident, but sourced from and delivered by a resident third party?

A third relieving provision is referred to as the "drop shipment" rule. In general, this rule applies where a non-resident sells goods to a Canadian customer, sources those goods from a Canadian supplier, and arranges for delivery by the Canadian supplier directly to the Canadian customer. In these circumstances, the Canadian supplier to the non-resident seller must collect GST on the sale to the non-resident, and if the sale is to an individual consumer, the GST will be collected on the non-resident's re-sale price to the consumer. The drop-shipment rule applies to deem the sale by the Canadian supplier to the non-resident re-seller to be made outside Canada and therefore not subject to GST, where the non-resident's customer provides a "drop shipment certificate" to the Canadian supplier. This places the Canadian customer in the same position as if the goods were purchased directly from a Canadian supplier.

7.1.5.4 What if the goods are sold by a GST registered non-resident in a sale made outside Canada?

Where the non-resident supplier of goods delivers the goods or makes them available outside Canada, the non-resident should avoid also acting as the importer of record of the goods, as the non-resident will not be permitted to claim an input tax credit for the GST paid at the border. There is an exception to this rule where the supplier and customer in Canada enter into an election to permit the non-resident to claim the credits, however, the non-resident will also be required to charge and collect the GST on the invoice price of the goods sold to the customer.

7.1.6 GST/QST on imports

GST is generally exigible on imported goods based upon their duty paid value. GST is generally not exigible on imported services and intangible property (such as patents and trade-marks), provided they are used exclusively in taxable commercial activities of the purchaser. Purchasers must self-assess tax on imported services and intangible property if such services and property are not used exclusively in taxable activities.

Similarly, all goods brought into Quebec, whether from outside or within Canada, are subject to the QST which must be self-assessed by the importer. However, there is a broad exception in respect of the importation of corporeal property brought into Quebec by a person registered for QST purposes for exclusive consumption or use in the course of the commercial activities of the registered person and in respect of which the registered person would, if he had paid QST on importation of the goods, be entitled to apply for an input tax refund in respect thereof.

It should be noted that although customs duties on U.S.-origin and Mexico-origin goods have been eliminated under NAFTA, GST must still be paid on U.S. or Mexican goods imported into Canada.

7.1.7 Other federal excise taxes

In addition to GST, a limited range of goods is subject to excise duties or taxes at various rates based on the manufacturer's selling price. Examples of items are subject to the Excise Act, 2001 include certain types of alcohol and tobacco. Examples of items subject to the Excise Tax Act include certain insurance premiums, air conditioners for motor vehicles, certain gasoline and other petroleum products.

7.2 Other Quebec taxes

Other taxes or duties are imposed under Quebec statutes in connection with the transfer or sale of immovable property, fuel and tobacco. As well, property taxes are imposed on owners and/or occupiers of land and buildings, as are business taxes.

7.3 Customs tariffs

All goods imported into Quebec from outside Canada are subject to the provisions of Canada's customs laws, including the provisions of the federal Customs Act and the federal Customs Tariff. The specific tariffs or customs duties imposed on particular imported goods, are based in part on the specific tariff classification of the goods, as well as their country of origin. Details of Canada's customs laws are set out earlier in this guide, in Section IV.3 "Trade and Investment Regulation".

VII. Employment and Labour Law

Employment and labour law in Quebec and elsewhere in Canada is designed to regulate both conditions of employment and relationships between employers and employees.

While labour relations and employment are generally matters within provincial jurisdiction, the federal legislature has jurisdiction over certain industries that are viewed as having a national, international or inter-provincial character, such as banks, air transport, pipelines, telephone systems, television and inter-provincial trucking. Other industries are provincially regulated for the purpose of labour and employment matters. As a result, the vast majority of employers in Canada are required to comply with the employment standards, labour relations and other employment-related legislation of each of the provinces in which they have operations. Given that the *Canada Labour Code* only applies to certain industries, the provisions of that code will not be specifically reviewed.

Employers doing business in Quebec should be familiar with the following types of employment-related legislation:

- Employment standards legislation
- Human rights legislation
- Provincial and federal privacy legislation
- Occupational health and safety legislation
- Workers' compensation legislation
- Labour relations legislation
- Pay equity legislation
- Charter of the French Language

The legislation referred to above is only the start. Regulations made pursuant to this legislation also establish numerous rights and obligations for employers and employees. For example, there are detailed regulations made under both employment standards and occupational health and safety legislation, which give substance to the obligations contained in the statutes. When considering any labour and employment problem, it is important to ensure there are no additional regulatory rights or obligations that may impact on its solution.

In addition to the statutory obligations discussed above, employers are also required to satisfy obligations owed to their employees under the *Civil Code of Québec*. The most significant of these obligations is to provide employees with "reasonable notice" of termination of employment without cause, which notice is described in greater detail below.

The protection of human rights is also governed by legislation. Quebec and each other Canadian jurisdiction have enacted human rights legislation prohibiting discrimination with respect to employment on a number of specified grounds.

As well, employees in Quebec have certain rights regarding the use of the French language in the workplace and these rights are set out in the *Charter of the French Language* with corresponding obligations for employers.

1. Statutory Obligations to Employees

1.1 Employment standards

In Quebec, *An Act respecting Labour Standards* (Labour Standards Act) prescribes the minimum terms of employment in respect of such matters as wages, hours of work, holidays and vacation

periods, pregnancy and parental leave, notice of termination of employment and equal pay for equal work. The *Civil Code of Québec* also provides for requirements with regard to employment contracts, restrictive covenants such as non-compete provisions, and other employment related matters.

The Labour Standards Act establishes the minimum obligations owed to employees in respect of numerous employment matters, in respect of both unionized and non-unionized workers. In particular, the legislation addresses the matters discussed hereinafter, among others:

1.1.1 Minimum wages

There are a number of different minimum wages that are set by the Government of Quebec: the general rate as at May 1, 2017 is C$11.25; the rate for employees who usually receive gratuities is C$9.45 as at May 1, 2017. No special salary rate applies to domestics, who are therefore entitled to receive the minimum wage (note, however, that the amounts that may be charged to such employees for their bed and board are set by regulation).

1.1.2 Hours of work

The regular work week consists of 40 hours; however, some categories of workers have longer regular work weeks, according to applicable regulation. Any work performed in excess of the regular work week is considered as overtime and paid at a rate of time and a half. However, the employer may, at the employee's request, substitute the payment of overtime with paid leave equivalent to the overtime worked plus 50 per cent. Subject to a collective agreement or decree, paid leave must be taken within 12 months; otherwise, overtime must be paid. However, if the contract of employment is terminated prior to the employee benefiting from the leave, overtime must be paid at the same time as the last payment of wages.

1.1.3 Holidays and vacations

The following days are paid statutory holidays in the province of Quebec:

1. January 1 (New Year's Day)
2. Good Friday or Easter Monday, at the option of the employer, or Easter Sunday for employees working in a commercial establishment that is usually open on Sundays but which is closed on Easter Sunday pursuant to *An Act respecting Hours and Days of Admission to Commercial Establishments* (Quebec)
3. The Monday preceding May 25 (Victoria Day)
4. June 24 (National Holiday); when it falls on a Sunday, the holiday is Monday, June 25
5. July 1 or, if this date falls on a Sunday, Monday July 2 (Canada Day)
6. The first Monday in September (Labour Day)
7. The second Monday in October (Thanksgiving Day)
8. December 25 (Christmas Day)

In general, for an employee to be entitled to a paid statutory holiday and holiday pay, the employee must not have been absent without authorization or justification on the day either preceding or following the statutory holiday.

If the employee must work on a statutory holiday, the employer must pay, in addition to his or her usual wages, an indemnity equal to the average of the employee's daily wages preceding that holiday, excluding overtime, or grant the employee a compensatory holiday. Unless a collective agreement or decree provides otherwise, the compensatory holiday must be taken within three weeks before or after the statutory holiday.

An employee progressively acquires the right to an annual leave during a “reference year”, that is, a period of 12 consecutive months that begins on May 1 of the preceding year and ends on April 30 of the current year (unless an agreement or a decree fixes a different starting date for that period). An employee who, at the end of the reference year, has completed one year of uninterrupted employment with the same employer is entitled to an annual leave of at least two consecutive weeks; an employee who has completed five years of uninterrupted employment at the end of a reference year is entitled to at least three consecutive weeks. An employee is also entitled to an annual leave indemnity equivalent to four per cent of the employee’s annual salary, if the employee has two weeks of annual leave and six per cent if he or she has three weeks of annual leave.

1.1.4 Pregnancy and parental leave

Maternity leave without pay in Quebec is not more than 18 consecutive weeks, and it may not begin before the 16th week preceding the expected date of delivery. An employee must give the employer a written notice stating both the date of her maternity leave and the date on which she will return to work three weeks prior to leaving, unless her health requires her to leave sooner. Upon return, if the employee’s regular position no longer exists, the employer must assign her to a comparable position within the company with a wage equal to, or higher than, what she would have received if she had remained at work at the time that her position was lost.

Quebec also has paternity leave without pay for male employees, of up to five weeks at the birth of the child. Such leave may commence at the birth and must be taken within 52 weeks thereof.

With regard to parental leave, both male and female parents of a new-born child, and persons adopting a child who has not reached the age of compulsory school attendance, are entitled to a parental leave, without pay, of not more than 52 consecutive weeks. This provision does not apply where the employee adopts the child of his or her spouse, however. Parental leave may not begin before the child is born or, in the case of adoption, before the child is entrusted to the adoption agency or the employee.

Quebec has an income replacement plan called the Quebec Parental Insurance Plan for eligible workers who take maternity, paternity, parental or adoption leave, to which employers contribute. See Section VI.5, “Payroll Taxes”.

1.1.5 Psychological harassment

The Labour Standards Act contains specific provisions regarding to psychological harassment. Behavior that affects an employee’s dignity or psychological or physical integrity may constitute psychological harassment and is prohibited in the workplace. An employee who believes that he or she was subject to psychological harassment may file a statutory complaint under the Labour Standards Act.

1.1.6 Leave for family events

Employees are granted a number of leaves, only some of which are paid by the employer, for events related to the employee’s family, namely: maternity leave; paternity leave; parental leave; parental obligations, such as the health, care or education of a minor child; and miscellaneous leaves, such as in respect of deaths or funerals, marriages, births or adoptions.

1.1.7 Enforcement

Employment standards legislation is enforced by way of a complaint made to the *Commission des normes de l’équité, de la santé et de la sécurité au travail* (CNESST). Officers investigate the

complaint and can refer the complaint to the courts or to the *Tribunal administrative du travail* (TAT) that will make a ruling either in favour of the complainant or the employer, if the matter cannot be settled.

1.1.8 Termination of employment

The Labour Standards Act requires that employers provide employees with a minimum period of notice before employment is to be terminated or if the employee is to be laid off for a period of six months or more. The notice period varies depending on the length of service: one week of notice is required for employees who have completed less than one year of uninterrupted employment with the same employer; two weeks for between one to five years of uninterrupted employment; four weeks for between five to 10 years of uninterrupted employment; and eight weeks for 10 years or more of uninterrupted employment. An employer who does not give sufficient notice must pay the employee a compensatory indemnity which would be equal to the employee's regular wage, excluding overtime, for the period of notice to which the employee was entitled.

The Labour Standards Act also requires that the Quebec Minister of Employment and Social Solidarity be notified in writing in cases of collective dismissals. A collective dismissal occurs when 10 or more employees of the same establishment will be terminated or laid off for a period of six months or more in the course of two consecutive months. The prior notice must be given between eight and 16 weeks before the layoffs, depending on the number of employees affected.

Statutory notice for termination of employment is not required for the following exceptions, but notice under the *Civil Code of Québec* may still be necessary:

- Where an employee has less than three months of uninterrupted employment with the same employer
- Where the contract of employment that expired is for a fixed term or a specific undertaking
- Where an employee has committed a serious fault
- Where the termination of an employee results from *force majeure*

These statutory requirements constitute minimum standards only. The *Civil Code of Québec* requires that notice of termination be reasonable in time, taking into account the employee's particular circumstances. In order to determine the duration of the reasonable notice, the accrued years of service, position held, and other factors are taken into consideration. As in other Canadian jurisdictions, what constitutes reasonable notice will be driven by the circumstances of each case; however, it is generally accepted that notice periods will not exceed 24 months, and this "upper limit" would apply to senior employees with very long service.

Where employment is terminated without adequate notice, the employee is entitled to payment in lieu of notice and to continuation of benefit coverage during the required notice period.

1.1.9 Equal pay for equal work

Employers must pay equal wages to their employees who, regardless of their biological sex, perform equivalent services. A difference in wages, however, is justified when there are differences in experience, seniority, years of service, merit, productivity or overtime between employees.

1.1.10 Pay equity

The province of Quebec has passed legislation, entitled the *Pay Equity Act*, to "redress differences in compensation due to the systemic gender discrimination suffered by persons who occupy positions in predominantly female job classes". The *Pay Equity Act* applies to all employers whose operations are

subject to Quebec labour laws and who employ at least 10 employees. It is important to ensure compliance with the *Pay Equity Act* and an employer should ensure that it is well positioned to demonstrate compliance.

The extent of the employer's obligations in the *Pay Equity Act* varies with the size of the firm (i.e., 100 or more employees; 50 to 99 employees; or less than 50 employees). Generally speaking, employers must undertake a pay equity analysis to be applied within the enterprise that will determine the required salary adjustments in order to address the gap in salaries between job classes that are predominantly female and predominantly male.

In addition, all businesses that report having 10 or more employees with the Quebec Enterprise Registrar (Registraire des entreprises) must also file an Annual Report on Pay Equity (ARPE). The ARPE is an annual report filed online that reports on the business' compliance with its obligations under the *Pay Equity Act*.

1.2 Human rights legislation

1.2.1 Prohibited grounds of discrimination

The prohibited grounds of discrimination under the Quebec *Charter of Human Rights and Freedoms* (Quebec Human Rights Charter) include the following: social condition; language; civil status; sexual orientation; family status; political beliefs; disability or the use of any means to palliate such handicap; criminal conviction (to a certain extent); marital status; pregnancy; sex; age; religion; national or ethnic origin; colour; and race. As such, employers in Quebec must be careful not to make employment decisions with reference to these characteristics. In this respect, employment decisions include a wide variety of matters relating to the employment relationship and the terms and conditions of employment, including hiring, compensation, promotion and dismissal, among others.

In addition, the Quebec Human Rights Charter contains a prohibition against sexual harassment and/or harassment based on other prohibited grounds. The legislation also seeks to protect employees who make complaints regarding discrimination or harassment by prohibiting reprisals of any kind against those individuals.

1.2.2 Exceptions

Some exceptions exist to the prohibitions against workplace discrimination. The most used exception is one that permits an employer to discriminate on the basis of disability with respect to employment because the person is incapable of performing or fulfilling the essential duties of his or her position. This exception is narrowly interpreted and is subject to an obligation to reasonably accommodate the individual in performing those essential duties, to the point of undue hardship.

1.2.3 Enforcement

Enforcement of Quebec human rights legislation is essentially a complaint-driven process. The Human Rights Commission will provide advice and assistance to individuals who believe they have been unlawfully discriminated against. If a complaint is filed, the Human Rights Commission will investigate the complaint. If the complaint cannot be settled, the Human Rights Commission may refer the complaint to the Human Rights Tribunal for adjudication.

The Human Rights Tribunal has broad remedial powers, including the power to award damages for loss of employment or wages and/or damages relating to loss of enjoyment or hurt feelings. The Human Rights Tribunal may reinstate an employee to his or her employment or require an employer to take proactive steps to ensure that discrimination does not continue.

For example, an employer may be required to institute an anti-discrimination policy, report periodically to the Human Rights Commission and/or make specific changes to its employment systems or practices. Further, those persons who infringe the rights provided for by the Quebec Human Rights Charter are guilty of an offence and liable to pay certain fines.

1.3 Occupational health and safety legislation

The Quebec *Act respecting Occupational Health and Safety* (AOHS) creates health and safety obligations for both employers and employees to minimize the risk of workplace accidents. Employers are required to take all reasonable precautions to protect the health and safety of their workers.

Aside from the general obligation to take reasonable precautions to protect employees, the regulations passed under occupational health and safety legislation contain numerous and very specific responsibilities that are imposed on employers to ensure that their workplaces are safe for employees. Some of these responsibilities apply to specific industries. Other regulatory responsibilities relate to particular hazards that may exist in the workplace, including the use of toxic substances and hazardous materials or equipment.

The AOHS also provides employees with certain rights designed to promote workplace safety. For example, employees have a right to be informed by their employer about hazards in the workplace and have the right to refuse work that they reasonably believe is dangerous. Although the right to refuse work is subject to very specific procedural requirements, employers cannot discipline employees for properly exercising their statutory right to refuse dangerous work.

Generally, occupational health and safety legislation requires employers to promptly report, within specific time-frames, any workplace accidents that result in a fatality or critical injury. Additional reporting obligations may apply in most of the provinces depending on whether medical attention was required and/or whether the worker was disables from performing his or her normal duties.

Employees also have a right to participate in the creation of safe workplaces and the resolution of health and safety problems. The AOHS provides for the creation of a Joint Health and Safety Committee, which are advisory groups of worker and management representatives.

Employers who employ more than 20 employees are required to create Joint Health and Safety Committees. The AOHS contains specific provisions with respect to the operation of Joint Health and Safety Committees, including their size, composition and the frequency of meetings. Joint Health and Safety Committees are required to meet regularly to discuss health and safety concerns in the workplace, and to make recommendations to the employer for the improvement of the health and safety of workers.

1.3.1 Enforcement

Government health and safety officers or inspectors enforce occupational health and safety legislation. These officers or inspectors have broad powers to investigate potential violations of the legislation, and may be called to the workplace by a worker or employer, or may audit the workplace without notice.

An officer or inspector who finds that an employer has failed to comply with occupational health and safety legislation also has broad powers to make orders requiring remedial action. For example, an officer or inspector will typically order that violations be remedied within a certain time frame, and may also make work stoppage orders and/or require the removal of certain hazardous equipment or material from the workplace. Subject to the specific procedural requirements in the AOHS, the orders of an officer or inspector may be appealed by the employer to the TAT.

The AOHS also provides for the prosecution of individuals and corporations for violations of the legislation, resulting in potential fines. Maximum fines vary greatly and can be significant. In addition to these sanctions, the *Criminal Code* has been amended to expand both personal and corporate liability in the context of serious health and safety violations and workplace accidents. As such, employers and their representatives may also be subject to criminal sanctions with respect to a failure to ensure the health and safety of their workplaces.

1.4 Workers' compensation legislation

All provinces and territories in Canada operate a no fault insurance plan with respect to injuries and illnesses arising from employment, which is compulsory for most employers. In Quebec, the *Act respecting Industrial Accidents and Occupational Diseases* (AIA) provides workers who become sick or injured at work with a right to compensation for both economic and non-economic losses, in certain circumstances.

If an employer pays into the insurance fund created under the AIA, an employee can collect benefits for workplace injuries causing temporary or permanent disabilities and make use of any rehabilitation services provided, but cannot sue his or her employer with respect to the injury. In Quebec, the CNESST manages the insurance plan, and the TAT adjudicates disputes relating to benefit entitlements and other matters.

All employers with an establishment in Quebec are required to register with the CNESST and to pay premiums into the insurance fund. The contribution an employer is required to make to the insurance fund will depend on the type of activity carried on in the workplace. In general, the greater the risk of accidents in the workplace, the higher the premium that employer will be required to pay. If an employer has many employees, the AIA provides that its claim history may also impact its premium, such that a surcharge is applied to the account of an employer with a poor claims history and an employer with a good claims history receives a rebate.

The AIA establishes many additional employer obligations. The legislation requires employers to report any accidents that occur in the workplace within specific time frames. Employers are also required to work with employees to prevent injuries and to help injured employees return to work. The AIA requires employers to reinstate workers who become able to return to work following a workplace accident to their previous or a comparable position, even if the employee has been absent for a significant period of time. This period of time will depend on the number of employees working in a given establishment.

Employers must also comply with various administrative obligations relating to the investigation and adjudication of benefits claims and the payment of insurance premiums.

Employers and their representatives must comply with all obligations contained in the AIA. As with occupational health and safety legislation, workers' compensation legislation provides for the prosecution of individuals and corporations for violations of the legislation, which may result in significant fines.

1.5 Labour relations legislation

Labour relations legislation is enacted in each province, as well as at the federal level to regulate the organization of trade unions and the collective bargaining process. The legislation entrenches the right of employees to organize and to be represented by their chosen bargaining agent, without interference from employers, through a certification process. The collective bargaining process is regulated with a view to providing the mechanism for achieving collective agreements. Employers carrying on business in more than one province continue to be subject to provincial regulation (unless their business is subject to federal regulation, as in the case of inter-provincial trucking).

If a provincially regulated employer carries on business in several provinces, a union must seek certification from the labour board of each province in which the employer is located in order to require the employer to deal with the union in each jurisdiction. Because the *Canada Labour Code* only applies to certain industries and is broadly comparable to provincial legislation, the provisions of that code will not be specifically reviewed.

The Quebec *Labour Code* regulates collective bargaining in the private sector in the province of Quebec. The collective bargaining process is regulated in order to facilitate the conclusion of a collective agreement between the parties.

1.5.1 How do employees become unionized?

Certification of a collective bargaining unit may be applied for at any time by employees who are not already represented by a certified union or contemplated in an application for certification. In its application, the association of employees must petition the TAT for certification; the petition must be signed by the association's representatives and must indicate the group that it seeks to represent.

Upon receipt of the petition, the TAT must send a copy of the petition to the employer. Upon receipt of the petition, the employer has a number of obligations to fulfill: it must, within one business day, post the complete list of employees contemplated by the petition for five consecutive days, noting the function of each employee; send a copy of this list to the petitioning association; and maintain a copy for the labour relations officer.

The labour relations officer, as a delegate of the TAT, must, in order to certify the bargaining unit, ensure the representative character of the bargaining unit and its right to be certified. If the officer ascertains the representativeness of the bargaining unit, he is obliged to certify it in writing and indicate which group of employees constitutes the bargaining unit.

The employer has the right to object to the proposed bargaining unit, setting forth in writing its reasons and proposing what it thinks is a suitable unit. An employer may have an interest both in avoiding fragmented, skill-based units and inappropriately large groupings of employees.

1.5.2 What are the restrictions upon management? What are the requirements?

Labour relations legislation is designed to separate management from employees for the purposes of collective bargaining. Managerial employees are excluded from collective bargaining units. Employees employed in a confidential capacity may also be excluded from the scope of a given bargaining certificate.

While employers have a limited right to express their opinions, they are prohibited from dominating, hindering or financing the formation or activities of any association of employees. Where an employer violates this rule, the TAT has a choice of remedies in order to correct the employer's interference with the employees' right of association, including reinstating employees who have been improperly terminated. Employers cannot refuse to employ or discriminate against employees because they are involved in a union. Employers must therefore be extremely careful when responding to an organizing campaign.

Certification confers upon the association of employees the exclusive authority to bargain collectively on behalf of all employees in the bargaining unit. Negotiations between the employer and the certified unit must be carried on diligently and in good faith, and both parties have a duty to make a real and honest effort to reach a collective agreement. In first contract situations, it is possible for one of the parties involved in the negotiation to file an application with the Quebec Minister of Employment and Social Solidarity requesting the dispute be submitted to arbitration.

1.5.3 Strikes and lockouts

Strikes or lockouts are illegal during the life of the collective agreement and may only be undertaken after the expiration of the agreement.

1.5.4 Picketing

Traditionally, there are two forms of picketing: primary picketing is legal and involves picketing at the employer's place of business. Where there are multiple places of business, picketing at other locations is also considered to be primary picketing.

By contrast, secondary picketing can be illegal and involves picketing at third-party businesses that deal with the employer. Injunctive relief to restrain picketing might be available from the courts, in appropriate circumstances.

In Quebec, picketing is regulated by criminal law and the general law governing civil liability, and is limited to communicating information. Forms of intimidation, including verbal threats, physical assaults or unreasonable blocking of premises, are, therefore, illegal.

1.5.5 How will the presence of a bargaining unit affect the sale of a business?

In Quebec, the purchaser of all, or part, of an enterprise is bound by existing bargaining certificates and, if all of the enterprise is sold, by the collective agreements. However, if only part of the enterprise is transferred, the collective agreement in force is deemed to have expired on the day the transfer becomes effective, for the purposes of labour relations between the association of employees and the new employer. Under very limited circumstances, it is possible that the transfer of some functions within the enterprise will not trigger the transfer of the bargaining certificate. Generally, the TAT will not interfere with the bargaining unit after a sale of a business, unless there has been an intermingling of employees and the bargaining unit is, therefore, no longer appropriate, or to settle any difficulties arising out of the transfer of the bargaining certificate.

2. Obligations under the *Civil Code of Québec*

Over and above the statutory obligations summarized above, employers in Quebec are also required to provide employees with reasonable notice of the termination of employment when such termination takes place "without cause" (such as for a reduction in the workforce or restructuring).

The *Civil Code of Québec* obliges employers to provide employees with reasonable notice of termination of employment, or payment of an indemnity in lieu of reasonable notice, in the absence of just cause (the term used in Quebec is "a serious reason") for dismissal. Given that having a "serious reason" for dismissal exists in only the most exceptional cases (typically involving serious wilful misconduct on the part of the employee), terminations of employment are generally effected "without cause" by providing employees with reasonable notice or pay in lieu of notice.

There is no fixed formula for determining reasonable notice in any given case, however, the *Civil Code of Québec* stipulates that the "circumstances of the employment" must be taken into consideration which will generally include elements such as the nature of the position, the length of service and the employee's age, for example.

There are other provisions in the *Civil Code of Québec* regulating the employment relationship which should be considered, both during the term of employment and upon termination.

3. Pensions, Benefits and Executive Compensation

3.1 Government-administered benefits — federal

Canada has many government-administered pension, benefit and welfare programs that provide a minimum degree of social security. Old Age Security provides pensions payable from general tax revenues beginning at age 65, subject to residence requirements. The federal government has introduced measures to gradually increase the eligibility age to 67 by 2029. The Canada Pension Plan is a compulsory, contributory, earnings-related plan that applies to employees and self-employed individuals and provides basic retirement, survivor benefits, death and long-term disability benefits. For individuals working or residing in Quebec, the Quebec Pension Plan is applicable and is essentially identical to the Canada Pension Plan. The Federal Employment Insurance Program (EI) provides a 15-week sickness benefit equal to 55 per cent of the employee's average weekly insurable earnings, subject to a fixed maximum.

Most employers contract out of EI sickness benefits by providing equal or superior benefits, thereby reducing their EI premiums.

3.2 Government-administered benefits — Quebec

The Quebec Pension Plan applies to individuals employed or resident in the province of Quebec. Like the Canada Pension Plan, the Quebec Pension Plan is a compulsory, contributory, earnings-related plan governing employees and providing basic retirement, death and long-term disability benefits. Quebec maintains a hospital and medical insurance plan financed from general provincial revenues and through an employer health tax based on annual payroll. As discussed in Section VII.1.4, Quebec also has workers' compensation legislation providing non-taxable disability and death benefits for work-related accidents, thereby replacing the employee's need to take legal action against the employer for such claims. Workers' compensation is funded by employer contributions determined through accident history in different industries. The Quebec Parental Insurance Plan also provides income replacement benefits to eligible workers who take maternity, paternity and/or parental leaves pursuant to entitlements granted by labour standards legislation.

3.3 Privately administered benefits

3.3.1 Registered pension plans

Many employers voluntarily offer private pension plans and, as such, are subject to federal or provincial legislation depending on the jurisdiction of the undertaking. Private pension plans must be registered in the jurisdiction where the plurality of members is employed. To qualify for preferential tax treatment, pension plans must also comply with federal income tax laws and must be registered under the *Income Tax Act* (ITA).

Pension legislation provides minimum standards applicable to pension plans and imposes rules relating to many aspects of the pension arrangement, including:

- Funding
- Eligibility
- Vesting
- Early, normal and postponed retirement
- Accrual of benefits
- Investing and withdrawing pension fund assets
- Transfers of pension fund assets

- Discontinuance of a pension plan

Employers with operations in more than one province or jurisdiction may offer one pension plan that contains terms with respect to members employed in each province and jurisdiction.

3.3.2 Supplemental pension plans and executive compensation

Employers in Quebec may choose to establish a supplemental pension plan (SPP) for employees which will provide benefits in excess of the legislated limits under the ITA. SPPs often benefit from an exemption from the minimum standards legislation or registration requirements described in the preceding section. However, this should be confirmed when establishing a plan. Assuming that an exemption applies and subject to any relevant employment agreements, benefits provided under a supplemental plan need not be funded. Employers may choose to fund an SPP or secure the benefits provided pursuant to the plan using a letter of credit. If this is the case, the SPP may be considered a Retirement Compensation Arrangement (RCA) under the ITA and subject to a refundable tax regime. There are unique withholding and reporting requirements for the employer when the SPP is an RCA.

There are a number of other ways in which employers may compensate executives and other highly paid employees, such as stock options, restricted share units or other types of equity-based compensation plans. Proper plan design, in particular with respect to the ITA requirements and any cross-border tax considerations, will be important when implementing such plans. Generally, such plans benefit from broad exemptions from prospectus and registration requirements under Canadian securities laws.

3.3.3 Other retirement savings arrangements

The ITA contains a number of provisions designed to encourage individual savings for retirement. In particular, individuals may establish registered taxable retirement savings plans (RRSPs). Contributions made to an RRSP are deductible in computing income, and income earned in the plan is not subject to tax prior to withdrawal. When the accumulated contributions and income are eventually paid out (generally upon retirement), tax is payable on amounts received. Thus, the effect of an RRSP is to defer tax on current earnings. The ITA also contains provisions that permit an employer to share profits on a tax-sheltered basis with its employees (a deferred profit-sharing plan). Deferred profit-sharing plans, typically combined with a group RRSP (see below regarding such group plans), have become relatively popular employer-sponsored retirement income vehicles. There are many technical rules governing RRSPs and deferred profit-sharing plans, including the timing and method of withdrawal of account balances, annual contribution limits (which vary depending on whether the individual also participates in a pension plan) and qualified investment restrictions.

Individuals residing in Quebec can also contribute up to C$5,500 per year to a tax-free savings account (TFSA). Contribution limits are established periodically and can thus vary from year to year. Contributions are made with after-tax dollars but individuals are not taxed on any income or capital gains earned in their TFSA or withdrawals from the TFSA. Contributions made by an individual to their TFSA will not reduce the amount the individual is permitted to contribute annually to a pension plan, an RRSP and/or a deferred profit-sharing plan under the ITA.

The Canada Revenue Agency permits the establishment and administration of RRSPs and TFSAs as group arrangements, as long as the group arrangement is sponsored by an employer, an association or other organization and is limited to employees or members of that employer, association or organization.

In 2012, the federal government enacted legislation to permit pooled registered pension plans (PRPPs), which are intended to be large, capital-accumulation plans administered by third-party administrators, such as Canadian banks or insurance companies, allowing for broad-based

participation from multiple employers, individuals (without requiring employer participation), and self-employed workers. The federal legislation permits the establishment of PRPPs applicable to persons subject to federal jurisdiction, such as employees whose employment is regulated by federal law and their employers. Should the provinces wish to allow for PRPPs in their respective jurisdictions, they must enact their own legislation. To date, a number of provinces are well on their way towards enacting similar legislation. Quebec currently has legislation in place for "voluntary retirement savings plans" or "VRSPs". Although the VRSP and PRPP regimes are very similar, the main difference is that affected employers in Quebec with five or more employees and no other retirement savings plan in place may be required to make a VRSP available to employees since December 31, 2016. Employers will be required to deduct and remit employee contributions (unless the employee opts out), but employer contributions are not mandatory.

3.3.4 Employee benefit plans

In addition to sponsoring pension plans or other retirement savings plans, employers often offer health and welfare benefits to their employees. Such benefits typically include life insurance, accidental death and dismemberment insurance, long-term disability, short-term disability, extended health care and dental care. Employer-sponsored health and welfare plans supplement the universal health care provided in Canada which generally does not provide coverage for prescription drugs or dental care outside a hospital setting. Health and welfare plans may be insured or self-insured. There will be different tax implications for employers and employees depending on the types of benefits provided under the health and welfare plan and its structure.

VIII. Privacy Law

1. Federal Law

Canada has comprehensive federal privacy legislation that applies to the private sector. In addition, certain provinces have enacted both comprehensive and sector-specific private-sector privacy legislation.

The federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) applies generally to all collection, use or disclosure of personal information by organizations in the course of a commercial activity. "Personal information" is broadly defined in PIPEDA, and includes any "information about an identifiable individual", whether public or private, with limited exceptions.

All organizations subject to PIPEDA must comply with a range of obligations when collecting, using, disclosing and otherwise handling personal information, summarized in the following 10 principles:

1. **Accountability**: Organizations must appoint an individual (or individuals) to be responsible for the organization's compliance and to develop and implement personal information policies and procedures. Organizations are accountable for personal information transferred to third-party service providers (including affiliated companies) for processing on their behalf, and must use contractual or other means to protect personal information while being handled by those third parties.
2. **Identifying Purposes**: Organizations must identify the purposes for collecting personal information before or at the time of collection.
3. **Consent**: Knowledge and consent of the individual are required for collection, use and disclosure of personal information, with limited statutory exceptions. Consent cannot be made a condition for supplying a product or service unless use of the personal information is required to fill an explicitly specified and "legitimate" purpose. Individuals may withdraw their consent at any time, subject to contractual or statutory limitations.
4. **Limiting Collection**: Organizations are required to limit collection to the amount and type of information necessary for the identified purposes. Information must be collected by "fair and lawful means," and cannot be collected indiscriminately.
5. **Limiting Use, Disclosure and Retention**: Personal information may not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or pursuant to certain limited statutory exceptions. Personal information is to be retained only as long as necessary for the fulfilment of those purposes.
6. **Accuracy**: Personal information must be as accurate, complete and up-to-date as is necessary for the purposes for which it is to be used.
7. **Safeguards**: Organizations must use appropriate security safeguards to protect personal information against loss or theft, and unauthorized access, disclosure, copying, use or modification, and must train staff on security and information protection, among other matters.
8. **Openness**: Privacy policies and practices of the organizations must be open, understandable and easily available.
9. **Individual Access**: Organizations must give individuals access to their personal information upon request, subject to certain statutory limits and, in appropriate circumstances, individuals must be given an opportunity to correct their information.
10. **Challenging Compliance**: Organizations must have a simple and easily accessible complaint procedure.

In addition to the foregoing principles, compliance with PIPEDA is subject to an overriding reasonableness standard whereby organizations may only collect, use and disclose personal information for the purposes that a "reasonable person" would consider are appropriate in the

circumstances. This reasonableness requirement applies even if the individual has consented to the collection, use or disclosure of their personal information.

In the context of personal information about employees of organizations, given the constitutional limits placed on federal legislation, PIPEDA applies only to the employment information of employees of federally regulated organization such as banks, airlines and telecommunications companies. However, in the provinces that have enacted provincial privacy legislation, this legislation applies to employee information outside those sectors.

Quebec's *Act respecting the protection of personal information in the private sector* (Quebec Privacy Act) is similar in principle to PIPEDA, but there are important differences in detail. The Quebec Privacy Act applies to all private-sector organizations with respect to collection, use and disclosure of personal information (not just with respect to commercial activities) and to employee information.

PIPEDA permits the federal Cabinet, by order, to exempt an organization or class of organizations or an activity or class of activities from its application insofar as the collection, use or disclosure of personal information occurs within a province that has enacted legislation that is substantially similar. The Quebec Privacy Act and the private-sector privacy legislation in Alberta and British Columbia have each been designated as substantially similar to PIPEDA. In addition, in Ontario, New Brunswick, Nova Scotia, Yukon Territory and Newfoundland and Labrador, the legislation governing the collection, use and disclosure of personal health information by certain designated entities (e.g., physicians, nurses, hospitals, etc.) has been designated as substantially similar to PIPEDA and therefore these entities are exempt from PIPEDA with respect to the activities covered by the provincial legislation. Given that many organizations operate in more than one province and inter-provincially, businesses are often required to deal with a "patchwork" of provincial and federal privacy legislation.

To date, the Alberta *Personal Information Protection Act* (PIPA) is the only piece of comprehensive private-sector privacy legislation that contains mandatory data breach notification requirements. Proposed amendments to PIPEDA, if enacted, would add a mandatory notification requirement to that statute. Federal and provincial privacy commissioners have published guidelines that suggest disclosure and notification should be made in certain circumstances. Some pieces of provincial health privacy legislation also have mandatory breach notification obligations.

Recent amendments to PIPEDA that are not yet in force will, once enacted, add a mandatory breach notification requirement to that statute. Organizations will be required to notify the Office of the Privacy Commissioner of Canada (OPC) and affected individuals of a breach of security safeguards involving personal information if it is reasonable to believe that the breach creates a real risk of significant harm to an individual. Other organizations and government institutions must also be notified where appropriate to reduce or mitigate harm. Organizations will also be required to keep a record of all breaches, including those that do not meet the threshold for reporting, and to provide the records to the OPC upon request.

Considerable attention has been given in Canada to cross-border transfers of Canadian personal information to the U.S. Much of this attention has centred on the concern that U.S. authorities could use the U.S. PATRIOT Act to obtain the information of Canadians where that information is located in or accessible from the U.S. PIPEDA and the related provincial legislation do not prohibit the transfer of personal information outside Canada. However, PIPEDA's "openness" principle has been held by privacy regulators to require that notice of such transfers be provided to affected individuals.

In addition, the Alberta PIPA requires an organization that uses a service provider outside Canada to collect, use or disclose personal information to notify individuals as to how they can obtain information about the organization's policies and practices with respect to the use of service providers outside

Canada, including the name, position or title of a person who is able to answer questions on behalf of the organization.

The organization is also required to include in its privacy policy or in a separate document, the countries outside Canada in which the collection, use or disclosure of personal information may occur and the purposes for which the service provider outside Canada has been authorized to collect, use or disclose personal information on behalf of the organization.

Under the Quebec Privacy Act, an organization may not communicate personal information outside Quebec, nor entrust anyone outside Quebec with the task of holding, using or communicating such information, unless adequate measures are put in place to ensure that the information will not be used for purposes not relevant to the purposes for which it was collected or communicated to third persons without the consent of the individuals concerned. If the organization considers the personal information being transferred outside Quebec will not receive the protection required, it must refrain from such transfer.

Somewhat different rules apply to personal information that is collected by federal, provincial or municipal public-sector organizations. This information is covered by federal, provincial and municipal legislation that limits the use and disclosure of such information to purposes related to a valid public purpose. The provincial public-sector privacy statutes in British Columbia and Nova Scotia, prohibit storing and accessing personal information from locations outside Canada unless the individual consents or another exemption applies. These restrictions apply to the public sector organizations as well as any service providers to public-sector organizations. As a result, private-sector organizations that provide services to government agencies or other public-sector organizations in British Columbia and Nova Scotia will be directly subject to restrictions on foreign storage of, and access to, personal information collected by public-sector organizations.

In addition, the public sector privacy legislation in British Columbia, Nova Scotia and Alberta impose penalties for disclosure of personal information pursuant to foreign legal requirements (e.g., court orders, USA PATRIOT Act disclosure notices). Organizations that perform contracted services for federal public bodies should also be aware of federal government contracting guidelines that address privacy risks of contracting with foreign-based or foreign-affiliated service providers.

2. Quebec Law

As mentioned above, the Quebec Privacy Act applies to all private-sector organizations with respect to collection, use and disclosure of personal information, which is defined as any information relating to an individual that allows that person to be identified and includes business contact information and employee information. It also applies to private-sector collection, use and disclosure of personal health information. Generally speaking, enterprises must comply with certain rules to ensure that individuals maintain control over their own files.

For example, when collecting personal information, private-sector enterprises must:

- Obtain the information from the person concerned, unless the person or the Quebec Privacy Act authorizes the information to be collected from a third person
- Collect only the information required for the stipulated object
- Inform the person concerned of the object of the file, the use that will be made of it, the categories of people within the enterprise that will have access to it, where the file will be kept, and inform the person that he or she has the right to access the file containing his or her personal information and to request the rectification of any inaccurate or incomplete information and the deletion of unnecessary or obsolete information

When holding, using or communicating personal information, private-sector enterprises must, among other obligations:

- Introduce security measures to ensure that the information remains confidential
- Obtain the consent of the person concerned before disclosing personal information to third parties
- Ensure that the person's consent to use or communicate the information is validly given

Exceptionally, an enterprise may communicate personal information from a file without obtaining the consent of the person concerned. For example, such information may be communicated to:

- A person responsible for the prevention, detection or repression of crime
- A public body that collects such information as part of its function
- A person who must act urgently to protect the life, health or safety of the person concerned
- To a person who, on certain conditions set out in the Quebec Privacy Act, uses or communicates a nominative list (a list of names, geographic or electronic addresses or telephone numbers) for commercial or philanthropic prospecting purposes

The Quebec Privacy Act also includes special provisions for enterprises lending money and those trading information for credit purposes.

IX. Intellectual Property

Almost all business transactions and new product launches have intellectual property implications. Many products have various aspects that require protection.

For example, a "patent" protects new, useful and inventive functional features of a product or process. "Copyright" protects, among other things, original drawings by which a product is designed and software. An "industrial design" registration protects a novel and original aesthetic design of a functional article. "Trade-mark" protection is available for a distinctive word or drawing identifying the source of a product or service.

A secret formula, a product's manufacturing process or business method that is known exclusively by the business would qualify as proprietary "confidential information". "Personality rights" may be involved if the name or likeness of a person is used to promote a product. "Topography rights" and "plant breeders' rights" protect products in specific industries.

With only a few exceptions, federal law governs intellectual property in Canada. Federal statutes regulate patents, trade-marks, copyright and moral rights, industrial designs, topography rights and plant breeders' rights.

The only provincially regulated aspects of intellectual property are through the civil law action of unfair competition (similar to the common law action of passing off), personality rights enshrined in the *Civil Code of Québec* and confidential information. Quebec law also governs trade names and contracts related to intellectual property, such as assignments, licences and hypothecs (i.e., security interests).

1. Federal Law

1.1 Patents

1.1.1 What inventions are eligible for a patent?

A patent is granted by the federal government for an invention that satisfies certain criteria pursuant to the *Patent Act*. The patentee may exclude others from making, using or selling an invention protected by a patent.

A patent may only be obtained for certain classes of inventions, namely processes (such as a method for refining oil), machines (devices with moving parts), manufactured articles and compositions of matter (such as chemical compounds like plastics).

To be patentable, the subject matter claimed in a patent application must be new, useful and inventive. Utility is determined by whether the invention has a useful purpose and is capable of operation. Inventiveness means that the claimed invention is not obvious to a person having ordinary skill in the art to which the invention relates.

The novelty of an invention is assessed with reference to certain statutory criteria. In the event of competing applications, only the person whose application has the earliest effective filing date may be entitled to a patent. However, only an inventor or a person who derives rights from the inventor is entitled to a patent. An invention made by an employee within the scope of employment, in the absence of an agreement to the contrary, is the employer's property.

An invention is not patentable if it is made available through disclosure by publication, sale or otherwise in any country prior to the filing date of the application, unless the disclosure is made by the

inventor or someone who derives knowledge from the inventor and an application is filed within one year of such a disclosure.

1.1.2 How does a person apply for a patent?

Canada is a signatory to the *Paris Convention* and the *General Agreement on Tariffs and Trade* establishing the World Trade Organization (WTO). Thus, in determining priority of filing, an applicant may rely on the filing date of its first application for a patent for the same invention in another country that is also a member of either of these treaties ("priority date") if the Canadian application is filed within one year of the priority date. Canada is also a signatory to the *North American Free Trade Agreement*, the *Budapest Treaty* and the *Patent Co-operation Treaty* (PCT). A PCT application may designate Canada, entitling the applicant to enter the national phase in Canada at a later date.

A patent application is subject to examination by the Canadian Intellectual Property Office (CIPO) prior to grant. Examination must be requested within five years of the filing of an application. Advanced examination is available under some circumstances. An applicant can also take advantage of Patent Prosecution Highway Programs between CIPO and certain other foreign patent offices in order to expedite the issuance of a Canadian patent with claims that substantially correspond with claims that have been found allowable by a foreign patent office.

1.1.3 May a patent be transferred?

Inventions, patent applications and patents may be voluntarily licensed and transferred. Transfers and exclusive licences must be recorded with CIPO. A security interest (known as a hypothec in Quebec) may be recorded with CIPO. In Quebec, hypothecs should also be registered in the Quebec register of personal and movable real rights.

1.1.4 What rights does a patent provide?

A patent is in force from the date it is granted for a maximum of 20 years after the date the application is filed in Canada. Annual maintenance fees are required to keep patent applications pending and issued patents in force.

A valid patent protects against the unauthorized manufacture, use or sale in Canada of devices or methods embodying the claimed invention, whether copied or resulting from an independent act of invention. The sale in Canada of products made abroad by a process patented in Canada may also be prevented. There are a number of remedies for patent infringement. These include:

- Temporary and permanent injunctive relief
- Either the damages suffered by the patent owner or the profits earned by the infringer
- Punitive damages
- Delivery up or destruction of infringing articles

1.1.5 Patent law treaty adoption in Canada

Canada has been a signatory to the Patent Law Treaty (PLT) since 2001, but certain amendments to the *Patent Act* will be required in order to ratify the PLT. The proposed amendments include:

- Changes to the filing date requirements
- Amendments to the abandonment/reinstatement regime, including the introduction of notifications prior to abandonment
- Amendments to certain requirements on representation
- The restoration of priority

- The prevention of the revocation of granted patents on the basis of an administrative defect during the application stage
- Measures to protect third parties

The amendments to the *Patent Act* will come into force on a date that will be established after the relevant amendments to the *Patent Rules* have been prepared and CIPO's IT systems have been updated, both of which are in progress.

1.2 Trade-marks

1.2.1 Must a trade-mark be registered to be protected?

A trade-mark is a word, symbol, sound or shape used to distinguish a person's goods or services from those of others. Recent amendments to Canada's trade-mark legislation will, when they take effect, recognize additional categories of trade-marks such as scents, holograms, tastes and textures. Trade-mark rights may be acquired through use of the mark in Canada in association with goods, services or both, or by registration. Although a trade-mark need not be registered to be protected, registration will usually ensure protection throughout Canada and facilitate enforcement of trade-mark rights.

In the absence of registration, a trade-mark can be protected only in the geographical area in which the owner can establish a reputation or goodwill in association with the mark and the goods and services offered with it. (See Section IX, 2 "Rights and Requirements of Quebec Civil Law" below.) The reservation of a business name or a corporate name, the incorporation of a company or the registration of a domain name will not itself create any trade-mark rights.

1.2.2 What trade-marks may be registered?

A trade-mark is registrable if it is not:

- Primarily merely the name or surname of an individual who is living or has died within the preceding 30 years
- Either clearly descriptive or deceptively descriptive in the English or French language of the character or quality of the goods or services in association with which it is used or of the conditions of, or the persons employed in, their production, or of their place of origin
- The name in any language of the goods or services in association with which it is used
- Confusing with a registered trade-mark
- A mark of which the adoption is prohibited by certain provisions of the *Trade-marks Act*

Although otherwise not registrable, some marks may be registrable if they have been so used in Canada as to have become distinctive or, if registered in a foreign country, are not without distinctive character.

1.2.3 How does a person apply to register a trade-mark?

As noted above, Canada is a signatory to the *Paris Convention* and the *General Agreement on Tariffs and Trade* establishing the World Trade Organization (WTO) and is also a member of the *North American Free Trade Agreement*. Canada announced its intention to adhere to the *Nice Agreement*, the *Singapore Treaty* and the *Madrid Protocol*. CIPO now also permits an applicant to voluntarily designate Nice classes for the goods and services listed in its application for a trade-mark.

For the purposes of the federal registration system, governed by the *Trade-marks Act*, the first person to "adopt" a trade-mark in Canada is generally considered to be the person entitled to the registration of this trade-mark in Canada, even if someone else was the first to file an application for registration of the same mark in Canada. However, in those circumstances, the person who first "adopted" the trade-mark without filing a trade-mark application for such mark will need to be able to prove that it has acquired rights to the mark by its use of same. A trade-mark may be adopted by "using" or "making known" the trade-mark in Canada. A person who has filed a trade-mark application in its country of origin, which is a member of the *Paris Convention* or the WTO, may be entitled to treat the filing date of the first foreign application ("priority date") as an adoption date in Canada if a Canadian application for the same mark is filed within six months of the priority date.

A trade-mark may be registered on one or more of the following bases:

- **Use in Canada by the applicant or a predecessor in title**: "Use" in Canada with goods occurs when a trade-mark is marked on the goods or their packaging or when the mark is otherwise associated with the goods so that a purchaser would have notice of the association when the goods are sold or their possession is transferred in Canada in the normal course of trade. While mere advertising of a mark does not constitute use of the mark in connection with goods, use with services occurs if the mark is used or displayed in Canada in performance of the services or in advertising of the services: if the applicant is capable of performing the services in Canada.
- **A stated intention to use a trade-mark in Canada**: Actual use must occur in Canada before registration is granted on this basis.
- **Making the trade-mark known in Canada by the applicant or a predecessor in title**: A mark is "made known" in Canada with goods or services if it is used in a foreign country that is a member of the Paris Convention or the WTO and is made well known in Canada to a substantial segment of the relevant population by reason of prescribed types of advertising.
- **Use abroad and registration of the mark in the applicant's country of origin that is also a member of the *Paris Convention* or the WTO**: Although the Canadian application can originally be based on an application filed by the applicant in its country of origin, the Canadian application will not be approved for advertisement until registration is granted in the applicant's country of origin.

CIPO examines the application. If the mark is found to be registrable, the application is advertised in the *Trade-marks Journal*. Any person may file an opposition to registration, within two months of advertisement.

Recent amendments to the *Trade-marks Act* will, when they are proclaimed in force, eliminate the requirement to specify a basis of registration in a trade-mark application. It is currently anticipated that these amendments will not be proclaimed in force until 2019 at the earliest.

1.2.4 May a trade-mark be transferred?

A trade-mark, an application for registration or a registration (even an application based on proposed use) may be assigned, although one must be careful that the distinctiveness of the trade-mark is not thereby impaired. "Distinctiveness" refers to the trade-mark's ability to distinguish a person's goods and services from those of others. The owner of a trade-mark may license others to use the mark if the owner controls the nature and quality of the licensee's goods or services associated with the mark pursuant to a licence agreement. It is recommended that any such licence agreement be reduced to writing so as to make it easier, if required, to prove the existence of a licence between the relevant parties. A licence agreement is required even if the parties are related. If notice is given of the trade-mark owner's name and that the use is a licensed use, control by the owner will be presumed.

A grant of a security interest or hypothec may be recorded against a trade-mark of record with CIPO. In Quebec, hypothecs should also be registered in the Quebec register of personal and movable real rights.

1.2.5 What rights does a trade-mark registration provide?

Registration of a trade-mark is granted for indefinitely renewable periods of 15 years. Recent amendments to the *Trade-marks Act*, not yet proclaimed in force, will reduce this period to 10 years. A registration may be subject to expungement if:

- After the third anniversary of registration the mark has not been used in Canada during the preceding three-year period in association with the goods/services covered by the registration
- The mark was not validly registered
- The mark is no longer distinctive of the goods and services of its registered owner

A valid trade-mark registration gives the owner the exclusive right to use the mark throughout Canada in respect of the goods and services for which it is registered. A person who sells, distributes or advertises goods or services in association with a confusing trade-mark or trade name infringes this right. Confusion is caused if the use of two trade-marks, or a trade-mark and a trade name, in the same area would likely lead to the inference that the goods, services or business associated with such marks or names are manufactured, sold, leased, hired or performed by the same person.

The remedies for trade-mark infringement include:

- Temporary and permanent injunctive relief
- Either the damages suffered by the trade-mark owner or the profits earned by the infringer
- Punitive damages
- An order prohibiting importation
- Delivery up or destruction of offending materials

Recent amendments to the *Trade-marks Act* provide additional protection to trade-mark and copyright owners against infringing and counterfeit goods. These amendments give Canadian customs authorities the right — upon their own initiative or on the request of a rights holder — to detain suspected infringing or counterfeit goods. The owner of a Canadian trade-mark or copyright registration is now able to file a request for assistance with the Canada Border Services Agency (CBSA). The CBSA will then be entitled to take such steps as obtaining information regarding allegedly infringing goods and providing the rights owner with a sample of such goods and information regarding the importation of such goods.

1.3 Copyright

1.3.1 What types of works are capable of copyright protection?

Copyright is governed by the *Copyright Act*. Copyright is the sole right to reproduce, publish and perform literary, dramatic, artistic and musical works. Copyright also includes rights of performers in their performances, and rights in relation to sound recordings and broadcast signals. Only the form of expression of a work is protected. Copyright does not protect an idea, concept or information. Computer programs are protected as literary works, regardless of the medium in which such programs are expressed.

Canada is a signatory to the *Berne Convention*, the *Universal Copyright Convention* and the *Rome Convention*. As noted above, Canada is also a signatory to the *General Agreement on Tariffs and Trade* establishing the WTO. Pursuant to those conventions, Canada recognizes copyright in works

and other subject matter created by nationals of other signatories to the conventions. Canada is also a member of the World Intellectual Property Organization (WIPO) *Copyright Treaty,* the WIPO *Performances and Phonograms Treaty* and the *North American Free Trade Agreement*. Canada is also a member of other work or subject matter specific treaties.

Copyright protection subsists in any work capable of being so protected from the moment it is created and fixed in a tangible form, provided that certain conditions relating to the publication and residence or domicile of the author in a convention country are satisfied. No registration of copyright is necessary, although registration in the CIPO is helpful as a means of proof of copyright and its ownership in the event of litigation. Marking of copyright on articles with a copyright notice is not necessary in Canada but is a usual practice.

1.3.2 Who owns copyright?

The work's author is generally the first owner of copyright in the work. If the author is in the employment of another and the work is made in the course of such employment, the employer is the first owner of copyright. If the author is an independent contractor and there is no written transfer of copyright, copyright is owned by the author. Special rules apply to contributions to periodicals and works prepared or published by or under the direction or control of the federal government. Other special rules apply for performers' performances, sound recordings and communication signals.

1.3.3 What does copyright protect?

Copyright generally lasts for the life of the author of the work, the remainder of the calendar year in which the author dies, and for 50 years thereafter. Published sound recordings and performers' performances fixed in sound recordings are, in some circumstances, entitled to up to 70 years of protection, which is measured from the end of the calendar year of first publication. There have also been occasional proposals over the past few years, to extend the term of copyright to 70 years for other works, but such proposals have not yet matured into law.

Copyright includes the right to produce or reproduce a work or any substantial part thereof in any material form whatsoever and to perform a work or any substantial part thereof in public. Copyright protects original works against the unauthorized reproduction in different media, adaptation or conversion to a different form, translation, publication, making available, and telecommunication to the public among other activities, and the authorization of such activities. Copyright also protects against certain commercial activities with infringing copies if there is knowledge that the copies infringe. Copyright law further protects against interference with technological protection measures.

1.3.4 May copyright be transferred?

Copyright may be assigned and licensed. Any assignment or licence of exclusive rights must be in writing. Assignments and licences should be recorded with CIPO. A security interest or hypothec may also be registered with CIPO. In Quebec, hypothecs should also be registered in the Quebec register of personal and movable real rights.

1.3.5 How may a copyright be infringed?

Copyright is infringed by a person who performs any activity exclusive to the copyright owner with a work protected by copyright without the owner's permission.

A person need not be a copier or performer to infringe copyright. Copyright may also be infringed by certain commercial activities in relation to a work which are done with knowledge that the work

infringes copyright or would infringe copyright if it had been made within Canada. In some cases, importation of work may constitute infringement.

For reasons of public policy, a number of activities in relation to copyright works that would otherwise constitute infringement are specifically exempted from infringement by users' rights. By way of example, any fair dealing with any work for the purposes of private study, research, criticism, review, newspaper summary, education, parody or satire may be exempted from infringement.

A user who is in lawful possession of a computer program may, in certain circumstances, alter and adapt that program to its particular needs, and make back-up copies of it, without infringing copyright. There are numerous other user rights, directed to specific institutions and activities. For example, non-commercial user-generated content reproduced for private purposes may, in some circumstances, be exempt from infringement.

The civil remedies for copyright infringement include:

- Temporary and permanent injunctive relief
- An order prohibiting importation
- Both the damages suffered by the copyright owner and the profits earned by the infringer through the sale of infringing copies (subject to a deduction for any overlap)
- Punitive damages. In some cases, statutory damages may be available as an alternative to damages and profits. Further, all infringing copies of any work in which copyright subsists, and all plates used or intended to be used for the production of such infringing copies, are deemed to be the property of the owner of the copyright.

In addition to civil liability for copyright infringement, an infringer may be exposed to criminal liability.

See Section IX, 1.2.5, "What rights does a trade-mark registration provide?" regarding the recent introduction of border measures to protect against works entering the country that infringe upon the rights of the owner of copyright in Canada.

1.3.6 What are moral rights?

Independently of any right of ownership of copyright in any literary, artistic, musical or dramatic work, the author of a work has moral rights in the work and a performer has moral rights in his or her performance. These include the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym ("right of paternity"); and the right, where reasonable in the circumstances, to remain anonymous ("right of anonymity").

As well, the author has a "right to the integrity" of his work. An author's right to integrity of a work is infringed if the work is, to the prejudice of the honour or reputation of the author, distorted, mutilated or otherwise modified or used in association with a product, service, cause or institution. In the case of a painting, sculpture or engraving, prejudice is deemed to have occurred as a result of any distortion, mutilation or other modification of a work.

Moral rights may not be assigned, but they may be waived in whole or in part. A simple assignment of copyright in a work does not constitute a waiver of moral rights.

1.4 Industrial designs

1.4.1 What industrial designs are registrable?

An industrial design registration under the *Industrial Design Act* protects the aesthetic appearance of an article, that is, its features of shape, configuration, pattern or ornamentation or any combination of those features. The feature of colour may also form a part of the design. To be registrable, the design must be new and original. Features of a design that are solely functional in nature are not registrable.

Any article that is manufactured may qualify for industrial design protection. This includes three dimensional objects, such as bottles and handheld devices, and two dimensional objects, such as icons and graphical user interfaces (GUIs).

1.4.2 How does a person apply for registration?

As noted above, Canada is a signatory to the *Paris Convention*, the *General Agreement on Tariffs and Trade* establishing the WTO and the *North American Free Trade Agreement*. Canada has announced its intention to adhere to the *Hague Agreement Concerning the International Registration of Industrial Designs* (Hague Agreement) and has introduced certain amendments to the *Industrial Design Act* (not yet in force) that will allow Canada to comply with the Hague Agreement upon adherence to this treaty.

To obtain registration of a design, an application must be filed, identifying the proprietor's name and including a drawing or photograph of the article to which the design is applied and a description of the design. The applicant of a design registration must also file a declaration that, to the knowledge of the first proprietor of the design, the design was not in use by any other person when it was adopted by the first proprietor.

A design will be refused registration if it is filed more than one year after it is published in Canada or elsewhere. A person who has filed an application for the design in another country that is a member of the *Paris Convention* or the WTO, may be entitled to treat the filing date of the foreign application, the "priority date", as the effective filing date in Canada if a Canadian application for the same design is filed within six months of the priority date.

Once a design application is filed, it is examined to ensure that it meets the requirements of the *Industrial Design Act* and *Industrial Design Regulations*. If the examiner raises any objections, the applicant will be provided with a period of time to file a reply. Once the examiner is satisfied that the design meets the requirements of the *Industrial Design Act* and *Industrial Design Regulations*, the design is registered.

1.4.3 What does registration provide to a proprietor?

An industrial design registration is granted for a term of 10 years from the date of registration. A single maintenance fee must, however, be paid by the fifth anniversary of the registration date to keep the registration in force for the last half of its term.

An industrial design registration entitles the registrant to restrain the manufacture, importation for trade, sale and rental of any article in respect of which the design is registered and to which the design or a design not differing substantially therefrom has been applied.

The remedies for industrial design infringement include:

- Temporary and permanent injunctive relief
- Either the damages suffered by the design owner or the profits earned by the infringer
- Punitive damages
- Delivery up or destruction of infringing articles

1.4.4 May an industrial design be transferred?

A design, whether an industrial design, registration or an application for an industrial design, may be assigned or licensed. Assignments and licences may be recorded in the CIPO. A security interest or hypothec in the design may also be registered in the CIPO. In Quebec, hypothecs should also be registered in the Quebec register of personal and movable real rights.

1.5 Personality rights

Although personality rights are generally governed by provincial law (see the discussion under “Rights and Requirements under Quebec Civil Law” below), the *Trade-marks Act* provides that no person may adopt in connection with a business, as a trade-mark or otherwise, any mark consisting of, or so nearly resembling as to be likely to be mistaken for any matter that may falsely suggest a connection with any living individual or the portrait or signature of an individual who is living or has died within the preceding 30 years.

1.6 Domain names

Canada has its own country code top-level domain name registry, **.ca**. To register a .ca domain name, an applicant must satisfy one of the 18 criteria in the Canadian Presence Requirements (CPR), which require some nexus with Canada. For example, the CPR may be satisfied if the applicant is a corporation incorporated in Canada or if the domain name comprises a trade-mark registered in Canada by the applicant. The .ca registry has a domain name dispute resolution policy which is modeled on, but differs in some respects from, the *Uniform Dispute Resolution Policy*.

1.7 Criminal law

The federal *Criminal Code* provides sanctions against the forgery of trade-marks. Although the theft of tangible materials bearing confidential information is a criminal offence, the theft of information by itself is not a criminal offence.

2. Rights and Requirements of Quebec Civil Law

The following aspects of intellectual property law are governed by Quebec civil law.

2.1 Trade-marks/unfair competition

Where someone makes a misrepresentation in the course of trade to prospective customers or ultimate consumers of goods or services that is calculated to injure the business or goodwill of another trader in the sense that it is a reasonably foreseeable consequence, and which causes, or is likely to cause, actual damage to a business or goodwill of the trader by whom the action is brought, such activity may be restrained by an action based on unfair competition (similar to the common law passing off action).

To succeed in an action based on unfair competition, it is not necessary that the plaintiff conduct business in Canada, provided that the plaintiff has a reputation in its trade-mark in association with which the goods or services are offered.

2.2 Business names

An Act respecting the legal publicity of enterprises (Quebec) requires registration of every person who operates an enterprise in Quebec, whether by means of a sole proprietorship, partnership or legal person (corporation). This statute requires the registration of business names used in Quebec and such names must further comply with the French Language Charter. See Section III.5, “General Registration Requirement” and Section IV.4.8, “French language requirements in Quebec”.

A proceeding in a court in Quebec taken by a person who has not registered under this legislation may be suspended upon request of an interested party. The court may lift the suspension upon registration taking place.

2.3 Personality rights

Under the *Civil Code of Québec*, every person has a right to the respect of his reputation and privacy, and no one may invade the privacy of a person without the consent of the person unless authorized by law. The use of a person’s name, image, likeness or voice, among other acts, is considered an invasion of privacy.

2.4 Confidential information and trade secrets

The possessor of confidential information, which is of commercial or other value, can generally require another party who obtains that information to maintain it in confidence. The existence of this legal right depends on whether there is a contractual or other relationship imposing an obligation of confidentiality.

The remedies for the unauthorized use or disclosure of confidential information include:

- Temporary and permanent injunctive relief
- An order prohibiting use or disclosure
- Either the damages suffered by the possessor or the profits earned by the violator
- Punitive damages

As well, other benefits gained from the unauthorized use of confidential information may in some circumstances be recoverable by the party from whom the information was obtained.

2.5 Licensing

All types of intellectual property may be licensed. The licensing of trade-mark rights must be handled carefully (see Section IX, 1.2.4, “May a trade-mark be transferred?”). The law of licensing is governed by the law of the contract. No approvals are necessary and the recordal of a licence with CIPO is not mandatory, although it is recommended for publicity purposes. Licence agreements are subject to federal competition law and to other laws of general application.

X. Information Technology

Information technology law in Quebec, as in the rest of Canada, covers a wide range of legal rules and practices, many of which are discussed elsewhere in this Guide, related to activities and transactions involving software, hardware, databases, electronic communications, the Internet and other information technologies.

This section is a summary of some of the key legal issues under Canadian information technology law that one needs to consider when doing business in Quebec.

1. Information Technology Contracting in Canada

1.1 What terms are generally negotiated?

In Quebec, information technology contracts generally specify each party's obligations (such as delivery, performance, payment and confidentiality obligations), ownership and licence rights (including scope of use), acceptance tests and procedures, source code escrow (if applicable), representations, warranties, indemnities, limitations on liability and disclaimers. Disclaimers and limitation of liability clauses in information technology contracts can help minimize risks. However, it is important to note that there are some peculiarities in Quebec law that may render such clauses unenforceable, and require careful drafting and review by Quebec counsel.

1.2 Assignments and licences

In Quebec, as in the rest of Canada, assignments and licences of intellectual property rights should be in writing and assignments should be registered with CIPO. Note that an author's moral rights, which exist under the federal *Copyright Act*, cannot be assigned but must be waived. See Section IX, "Intellectual Property".

1.2.1 Are software licences assignable and capable of being sublicensed?

A software licence may be viewed by Quebec (and other Canadian) courts as "personal" and thus not be assignable or capable of being sublicensed to third parties unless the licence contains the express permission by the licensor to do so. In addition, confidentiality restrictions and limitations on licence scope can also affect the transferability of a licence agreement. This is an important point to keep in mind when doing due diligence in any commercial acquisition in Quebec.

1.2.2 Are shrink-wrap, click-wrap and browse-wrap licences enforceable in Canada?

Off-the-shelf computer programs that are accompanied by "shrink-wrap" licences and online "browse-wrap" agreements have received mixed enforceability before Quebec (and Canadian) courts due to the requirement in Quebec law (and the law of other Canadian provinces) that both parties must assent to a contract in order for it to be binding on them. Such agreements have been enforced where the purchaser expressly agreed (for example through a "click-wrap") to the terms or was impressed with the knowledge of the terms at the time of sale. They have also been enforced with proof of established prior business conduct or by the subsequent conduct of the user.

1.3 Applicability of *Civil Code of Québec* and consumer protection legislation

1.3.1 Are information technology purchases sales of goods?

If a transaction for the acquisition of information technology falls within the scope of the *Civil Code of Québec*, certain rights and obligations will follow. The acquisition of a computer system will normally be viewed as a contract of sale while transactions involving pure service, maintenance, custom training or programming are generally characterized as contracts of enterprise or contracts of services. Pre-packaged software supplied pursuant to a licence agreement is not specifically regulated as a nominate contract under the *Civil Code of Québec*, although if the software is provided in conjunction with a larger transaction involving the sale of goods (e.g., hardware), the principal contract will be governed by the contract of sale provisions of the *Civil Code of Québec* to the extent such provisions have not been varied by the contract. Note that these transactions may also be regulated under the *Consumer Protection Act* (Quebec).

1.3.2 Consumer protection

Quebec has enacted consumer protection legislation that prescribes various requirements that must be met for sales of goods and services to consumers, including for Internet sales contracts, such as the disclosure of relevant information and the delivery of a copy of the contract to the consumer. See Section IV, “Trade and Investment Regulation”.

2. Intellectual Property Rights in Information Technology

2.1 Copyright

2.1.1 What information technology is protected by copyright?

Copyright is currently a primary source of protection for software programs, user manuals, databases, websites and other similar information technology works in Canada, provided that they meet the requirements of the federal *Copyright Act*. To be the subject-matter of copyright, the work must be “original”, meaning that it originated from the author and that skill and judgment were used in its creation. Further, for a work to garner copyright protection in Canada it must be fixed. The fixation requirement with respect to information technology is generally easily met.

2.1.2 Who owns the copyright in information technology?

As discussed in Section IX, “Intellectual Property”, the author of a work is generally considered to be the first owner of the copyright in it. An exception to this rule is where the author is an employee and the work is created in the course of employment, in the absence of an agreement to the contrary, the first owner of the copyright is the employer not the employee. A written assignment agreement is considered essential where works are created using non-employee third parties.

2.1.3 Is software a copyright work?

Computer programs are protected under the *Copyright Act* as literary works. Canadian courts have recognized that the writing of a computer program uses sufficient skill and judgment and therefore computer programs will typically meet the minimal originality requirement to obtain protection under the *Copyright Act*. Updates or enhancements to software are subject to independent copyright

protection. The fact that a computer program is created using well-known programming techniques or contains unoriginal elements may not be a bar to copyrightability if the program as a whole is original.

2.1.4 What elements of hardware are copyrightable?

Computer hardware designs and plans have received copyright protection in Canada. Further, any software code stored on the hardware may be subject to copyright. Computer chips may be subject to integrated circuit topography protection. See Section IX, 2.2, “Integrated circuit topographies”.

2.1.5 Can databases receive copyright protection? What criteria must be met?

Under the *Copyright Act*, databases are given protection as “compilations”. The Supreme Court of Canada has ruled that, to receive copyright protection, databases must be independently created by the author, and the selection and arrangement of the components that make up the database must be the product of an author’s exercise of skill and judgement. The exercise of skill and judgement must not be so trivial so as to be characterized as a purely mechanical exercise. However, “creativity”, in the sense of novelty or uniqueness, is not required. In addition, the creator of the database only acquires copyright in the database and not in the individual components of the database.

2.1.6 What other Internet elements have received copyright protection in Canada?

Courts in Canada have held that a web page’s look, layout and appearance are protected by copyright, as are underlying elements that would otherwise qualify for copyright protection, such as text or musical works.

2.1.7 What information technology is not protected by copyright?

Canadian copyright law does not protect the underlying mathematical calculations, algorithms, formulae, ideas, processes, or methods contained in information technology, only the expression of the same.

2.1.8 What information technology has not yet been considered by the courts to be protectable?

Canadian courts have yet to determine whether, and to what extent, computer languages, macros and parameter lists, communications protocols, digital type-fonts, and works that result from the use of computer programs are protected by copyright. Nevertheless, there is no reason to doubt their protectability.

2.2 Integrated circuit topographies

Integrated circuit topographies (or computer chips) are protectable in Canada by the *Integrated Circuit Topography Act*. See Section IX, “Intellectual Property”.

2.3 Trade secrets

Information technology, including but not limited to a formula, pattern, compilation, program, method, technique, or process, may also be protected under trade secret law where duties of confidence exist either at law or by virtue of an agreement (which must be reasonable to be enforceable). See Section IX, “Intellectual Property”.

2.4 Trade-marks

Trade-marks can be used to protect the goodwill associated with the names, slogans, symbols, and other marks used by businesses in the information technology industry. Trade-mark rights arise under the federal *Trade-marks Act*. Significant amendments have been introduced to the *Trade-marks Act* in 2014. A few minor amendments came into force in 2015; however, the most important amendments are expected to come into force in 2018. These amendments include, among other things, the elimination of the requirement that a mark be used in Canada or abroad before registration. See Section IX, "Intellectual Property".

2.4.1 How are domain names protected?

Domain names may garner trade-mark rights if they meet the statutory or common law requirements for trade-marks. Trade-mark owners may be able to obtain relief in Canada for cybersquatters under trade-mark law and the Canadian Internet Registration Authority's alternative dispute resolution process (where the dispute is in respect of a .ca domain name). For generic domain names, the rules promulgated by the Internet Corporation for Assigned Names and Numbers will apply.

2.4.2 What risks do metatags pose?

Canadian courts have held that the use of metatags (i.e., tags or key words in a website's coding that are used by search engines to sort web pages) that are confusingly similar to another person's trade-marks may constitute trade-mark infringement.

As for the use of keyword advertisement, such as Google AdWords, the Québec Superior Court and the British Columbia Court of Appeal have found that bidding on a keyword is not in and of itself an infringement of the *Trade-marks Act*. Such practice is seen as generally legitimate and provides greater choice to consumers, as opposed to creating confusion. However, sponsored links on search pages resulting from keyword advertisements can infringe the *Trade-marks Act* if such links are confusingly similar to another person's trademarks.

2.5 Patents

In Canada, to obtain patents on information technology inventions one has to meet the statutory requirements of the federal *Patent Act*. See Section IX, "Intellectual Property".

2.5.1 Is software and other information technology patentable in Canada?

CIPO routinely issues patents for software-based inventions, particularly methods performed using computer-executable instructions that operate with some hardware elements or that focus on the systems, processes and methods used to achieve a solution to a specific technical problem, rather than on the algorithm per se. Furthermore, the Canadian Federal Court of Appeal ruled that an online method of doing business included patent-eligible subject matter. However, computer programs are not patentable in Canada if they only perform a series of mathematical calculations or if they relate to an abstract idea.

3. Criminal Law Issues Relating to Information Technology

3.1 Offences under the *Criminal Code*

In Canada, offences under the *Criminal Code* directly dealing with information technology include:

- Theft of computer data
- Defrauding the public of any property, money, or valuable security by deceit, falsehood or other fraudulent means using computers
- Use of a computer in an unauthorized manner or to possess an instrument for that purpose (i.e., hacking)
- Mischief in relation to computer data (i.e., distributing computer viruses)
- Trafficking in unauthorized passwords

There are several other criminal offences under the *Criminal Code* and the *Copyright Act*, which may indirectly involve information technology.

3.2 Lawful access

Significant changes were introduced to lawful access legislation in 2015. Lawful access generally refers to the interception of communications and the search and seizure of information carried out by law enforcement agencies pursuant to legal authority, including under the *Criminal Code*. Among other changes, certain *Criminal Code* provisions dealing with the interception of communications were amended by giving law enforcement new powers to collect electronic evidence in the context of an investigation.

In particular, these changes introduced a preservation demand and preservation order that enable law enforcement officials to demand or order third parties who possess or control computer data, including Internet service providers, to preserve computer data for 21 to 90 days. In addition, new production orders for historical transmission data and tracking data were introduced, as well as requirements for real-time transmission data and tracking data, which allow law enforcement officials to retrace an individual's web patterns and to remotely activate existing tracking devices (e.g., in vehicular GPS). It is important to note that in certain cases, the demands, orders or warrants created by these changes are subject to a threshold of "reasonable grounds to suspect" rather than the higher threshold of "reasonable grounds to believe."

4. Cryptography Controls

4.1 Are there restrictions on using encryption in Canada?

Other than export controls, and subject to any applicable intellectual property, confidentiality and criminal law issues, businesses and consumers in Canada are free to develop, import and use whatever encryption technology they wish.

5. Privacy and Data Protection

As discussed in Section VIII, "Privacy Law", the federal Personal Information Protection and Electronic Documents Act (PIPEDA) and Quebec's An Act respecting the protection of personal information in the private sector (Quebec Privacy Act) impose conditions on the collection, use and disclosure of personal information by organizations.

These laws contain requirements for the protection of personal information within the control of an organization, including security measures to prevent unauthorized access, collection, use, disclosure, modification, destruction, and other similar acts. There may also be requirements in the event of a data breach. Businesses that collect, use or disclose personal information must comply with PIPEDA and/or the Quebec Privacy Act.

The federal government also enacted the *Digital Privacy Act* in June 2015, which sets forth obligations on private-sector companies aimed at ensuring that consumers' personal information remains protected online. All provisions of the *Digital Privacy Act* are now in force, except for the provisions that set forth data breach requirements. It is expected that the data breach provisions will come into effect once the federal government passes regulations providing greater clarity and specificity of these requirements under the Act. Consultations by the federal government are currently underway regarding such regulations.

6. Electronic Evidence

6.1 Is electronic evidence admissible in court?

In Quebec, electronic evidence is admissible in the courts provided that, in accordance with the *Civil Code of Québec*, such evidence meets the requirements of special legislation styled *An Act to establish a legal framework for information technology* (Quebec). These requirements include:

- Authentication by the party tendering the evidence
- Integrity of the system used and the method of record-keeping, information storage, and retrieval
- Originality
- Reliability

Canadian courts have admitted electronic evidence where it accurately and fairly represented the information it purported to convey. Finally, Canadian courts have permitted the use of the Internet in court and have admitted the contents of websites.

7. Electronic Contracting

7.1 Are electronic signatures and documents valid in Canada?

In Quebec, *An Act to establish a legal framework for information technology* (Quebec) has given statutory recognition to the legal effect of most types of electronic signatures and documents (with certain exceptions) that meet the requirements set out in such statute. One important exception is under Quebec's *Consumer Protection Act*, which in certain cases requires contracts to be in paper form and also requires certain procedures to be followed and disclosures to be made when contracting with consumers online.

8. French Language Issues

8.1 Must websites and information technology contracts be translated into French?

The province of Quebec has language laws that may impact electronic contracting and websites, by requiring French versions if the parties or transactions involved have a Quebec connection, such as an office or employees located in Quebec. If certain criteria are met, the parties to a contract may

expressly agree to have it written in the English language. See Section IV.4.8.2, “Commercial documentation and advertising”.

8.2 Must software be translated into French?

Under Quebec’s language laws, all computer software sold in Quebec must be available in both English and French, unless no French version exists. In addition, the software must meet the French language packaging and labelling requirements. See Section IV.4.8, “French language requirements in Quebec”.

9. Jurisdiction and the Internet

9.1 Where are electronic contracts formed?

In Quebec, the issue of where electronic contracts are considered to be formed has not yet conclusively been determined, although certain presumptions are created under *An Act to establish a legal framework for information technology* (Quebec), which provide guidance as to when electronic documents are presumed to be received. In addition, under the *Consumer Protection Act* (Quebec), a distance contract (including an online agreement) entered into with a consumer is deemed to be entered into at the address of the consumer.

9.2 Can foreign websites and Internet transmissions be subject to Canadian laws?

A court can exercise jurisdiction in Canada if there is a “real and substantial connection” between the subject matter of the litigation and the jurisdiction. Generally speaking, the courts have found that the more active a website or its owner’s activity is in Canada, or if the website or business activity targets persons in Canada, it will be subject to Canada’s laws. The fact that the physical location of a website or its server is outside Canada will not immunize the website owner from legal consequences in Canada.

Recently, the Supreme Court of Canada upheld an injunction granted on a worldwide basis against a leading search provider, demonstrating that Canadian courts can extend their reach and subject global websites to Canadian laws.

The Supreme Court of Canada has also applied the “real and substantial connection” test in determining jurisdiction in online copyright matters. The application of the *Copyright Act* depends on whether there is a real and substantial connection between the Internet transmission and Canada. This test turns on the facts of each case and relevant connecting factors include the *situs* of the content provider, host server, intermediaries and end user.

9.3 Can parties to an online contract choose the governing law and forum?

In Quebec as in the rest of Canada, the parties to an online contract have, subject to certain exceptions (for example, consumer protection), the right to choose the governing law of the contract, the exclusive court in which disputes are to be heard, and to exclude the application of conflict of laws principles. However, Canadian courts have found that such clauses cannot be used to oust the jurisdiction of a substantially connected province. The Supreme Court of Canada has also recently stated that, irrespective of the validity of a governing law clause, courts may find such a clause

unenforceable for policy reasons; for example, if there is a strong public interest in having a decision heard in Canada or if there is extreme inequality in the bargaining position of parties to a contract.

10. Internet Regulation

10.1 Are Internet activities regulated in Canada?

The Canadian Radio-television and Telecommunications Commission, the body responsible for regulating broadcasting and telecommunications in Canada, has determined that, generally speaking, it will not regulate content transmitted over the Internet in Canada (with the exception of certain commercial electronic messages discussed below). However, if an Internet business qualifies as a "telecommunications common carrier", i.e., by offering voice or data telecommunications services, under the *Telecommunications Act*, it may be subject to telecommunications regulation, which would impact its operations, ownership, facilities, rates and services.

With respect to Internet-based broadcasting, there exists an exemption from the application of the *Broadcasting Act*. Note, however, that there are no compulsory copyright licences available for retransmission of over-the-air broadcasts over the Internet. As a result, re-transmitters have to negotiate copyright licences with all rights holders to broadcast works. Further, there are certain obligations that must be met under consumer protection laws, when doing business with consumers on the Internet. See Section X, 1.3.2 "Consumer protection" and Section X, 9.3, "Can parties to an online contract choose the governing law and forum?".

Also, many regulatory, licensing, registration and permit requirements are imposed in Canada by stock exchanges, securities commissions, the Office of the Superintendent of Financial Institutions, public health and safety boards, transportation safety commissions, competition boards, industry associations and a variety of other agencies and bodies that regulate different businesses and activities in Canada.

10.2 What rules apply to online advertising?

The same basic rules that govern traditional advertising and marketing practices, including the *Competition Act* and the *Criminal Code* apply to all forms of Internet advertising and marketing, such as deceptive prize notices, representations on websites and bulletin boards, or in emails, news groups and chat rooms. The Competition Bureau has prepared guidelines that address some of the ways in which these traditional rules are applied in the online context, including the use of disclaimers and hyperlinks, and the information that should be provided online when advertising products, services and businesses.

The *Consumer Protection Act* (Quebec) also includes restrictions on advertising and marketing of goods and services to consumers.

Canada's Anti-Spam Legislation (CASL) introduces new civil and criminal provisions in the *Competition Act*, which regulate false and misleading representations and deceptive marketing practices in the electronic marketplace. For more details on CASL or for more information on advertising regulations, See Section X, 10.3, "Is spam illegal in Canada?" and Section IV, "Trade and Investment Regulation".

10.3 Is spam illegal in Canada?

Designed as one of the most stringent anti-spam regimes in the world, CASL has a significant impact on the electronic communication practices of companies in Canada and foreign companies sending

commercial electronic messages (CEMs) to recipients in Canada. Most of the provisions of CASL, including those dealing with CEMs, came into force on July 1, 2014, while the provisions dealing with the unsolicited installation of computer software came into force on January 15, 2015. CASL also restricts other activities, including the ability of businesses to alter transmission data in electronic messages.

Subject to certain exceptions set out in the law and its accompanying regulations, CASL prohibits the sending of CEMs to an electronic address unless: (1) the person to whom the message is sent has consented to receiving it; and (2) the message complies with prescribed form and content requirements. Among other requirements, express consent under CASL must be "opt-in", meaning that an explicit and positive consent from an intended recipient of a CEM must be obtained before sending a message. This differs from the common industry practices of using an opt-out or negative option method of obtaining consent for marketing, such as a pre-checked consent box that a consumer has to un-check to signify they do not wish to receive marketing messages.

With respect to the unsolicited installation of computer programs, subject to limited exceptions, CASL prohibits installing, or causing to be installed, a computer program (which may include software updates and upgrades) on another person's computer system including a laptop, smartphone, tablet, gaming console or other connected device in the course of commercial activity, without the express consent of the device owner or an authorized user. As with consent for sending CEMs, consent to the installation of computer programs must be "opt-in" and must be obtained in the prescribed manner. Disclosure requirements will also apply.

The potential penalties for non-compliance under CASL are significant and include administrative monetary penalties of up to C$1-million for individuals and C$10-million for corporations.

CASL also creates a private right of action for persons who have been affected by a contravention of any number of CASL's provisions, including the anti-spam provisions. The provisions of the statute providing for a private right of action were originally scheduled to come into effect on July 1, 2017, but their enactment has now been suspended indefinitely. This suspension is welcome news for industry, which has been very concerned about lawsuits, including class actions, being instituted while industry struggles to understand and comply with the requirements of this legislation.

It should be noted that the *Competition Act* provisions dealing with the advertising of certain products, such as tobacco, or misleading advertising as well as the *Criminal Code* provisions dealing with fraud, authorized access and use of computers and mischief against data, could also apply against spammers. Various industry groups have established member codes and guidelines dealing with the distribution of promotional materials and enforcement.

PIPEDA and the Quebec Privacy Act (see Section VIII, "Privacy Law") may also affect spammers by imposing obligations on how personal information, which may include email addresses, is collected, used and disclosed in the course of commercial activity.

11. Liability of Internet Service Providers (ISPs)

11.1 What risks of liability do ISPs face?

ISPs, and possibly their directors and officers, may be liable under contract, tort or statute, for various claims arising from the provision of their services.

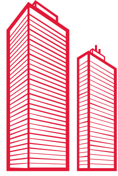
11.2 Does Canada have any laws that protect ISPs from liability?

Canada has not passed specific legislation making ISPs liable for the infringing activities of their users. In the area of copyright, the Supreme Court of Canada has concluded that ISPs, and other intermediaries, will not face liability for copyright infringement if they restrict their activities to providing a conduit for information and do not engage in acts that relate to content. The Supreme Court has also found that caching (the temporary storage of material by the ISP) is also a protected activity.

Canada's *Copyright Modernization Act* codifies the Supreme Court's approach by limiting the liability incurred for "providing services related to the operation of the Internet or another digital network". This limitation covers the activities of ISPs as well as those of persons who provide caching and hosting services. The *Copyright Modernization Act* also implements a "notice-and-notice" regime (which became effective in January 2015), under which ISPs will be required to send notices of potential infringement received from copyright holders to their potentially infringing subscribers.

The province of Quebec's *An Act to Establish a Legal Framework for Information Technology* also establishes a regime for liability and some protection in certain circumstances for ISPs acting as intermediaries on communication networks.

XI. Real Estate in Quebec



1. Quebec Laws of General Application

Generally, Quebec does not impose specific restrictions or prohibitions upon foreign purchasers of real estate (called immovable property in Quebec), although certain taxation, reporting and registration provisions may apply. For example, *An Act respecting the legal publicity of enterprises* (Quebec) requires natural persons, partnerships or companies constituted outside Quebec to register with the Enterprise Registrar in order to carry on business in Quebec, which, for the purposes of the legislation, includes the possession of real estate in Quebec. Also, non-residents shall not, directly or indirectly, make an acquisition of farm land except with the authorization of the *Commission de protection du territoire agricole du Québec*, under the *Act Respecting the Acquisition of Farm Land by Non-residents.*

1.1 How is real estate held and registered?

Investors in Quebec real estate may acquire several types of interests in land, including a full ownership interest (the concept of beneficial ownership is foreign to Quebec law), an interest for a specified period (such as under a commercial lease), or a "ground lease" which is known as an emphyteusis, or a partial interest (such as an undivided co-ownership, a divided co-ownership or a right of superficies).

Emphyteusis is an agreement pursuant to which a person obtains the full benefit and enjoyment of an immovable property owned by another person provided it does not endanger its existence and undertakes to make works thereon that durably increase its nature. Emphyteusis must be for a minimum of 10 years and a maximum of 100 years. This device is often used for office towers or box centres.

Undivided ownership is an ownership of the same property, jointly and at the same time, by several persons each of whom is privately vested with an undivided share of the right of ownership. Under divided co-ownership, ownership is divided into fractions belonging to one or several persons.

An example of divided co-ownership would be condominium ownership, under which owners have title to their individual units and a right to use "common elements" of the condominium project (e.g., a swimming pool, landscaping, etc.).

Superficies is a device whereby ownership of the subsoil and the works situated thereon is divided.

Registration of real estate in Quebec is performed by way of registration of deeds at the land register for the registration division where the real estate is located. Deeds may also be registered electronically. In order to be accepted at the land register, the deeds must respect the form requirements prescribed in the *Civil Code of Québec* and its regulations. For example, deeds may be in notarial form or under private signature, in which case a certificate of a notary or lawyer is needed. Some deeds must be in notarial form (i.e., signed before a Quebec notary) or otherwise, they would be of absolute nullity (such as deeds creating a hypothec on Quebec real estate).

1.2 Purchase and sale agreement

1.2.1 Is a written contract required? How much is paid up-front for the deposit and agent commissions?

Generally, all acquisitions of real property begin with an agreement of purchase and sale. Such an agreement is often initiated by the purchaser signing an offer to purchase which, when accepted by the vendor, becomes the agreement of purchase and sale. Although certain legal rights and obligations arise from that agreement, the actual transfer of title (ownership) usually takes place at a later time upon the completion or "closing" of the transaction and execution and registration of the conveyance deed. In certain cases, however, a promise of sale accompanied with delivery and actual possession of the real estate may be equivalent to sale.

It is usual for the purchaser to provide a deposit as "earnest money" which is held in trust by the agent for the vendor or by one of the legal advisors involved in the transaction pending closing. Generally speaking, the size of the deposit ranges from one to five per cent of the purchase price.

Most real estate transactions in Quebec involve the services of an agent, generally licensed under provincial legislation. The agent should have expertise as to the market, the availability of properties for sale and prospective purchasers and the terms of sale that may be acceptable to the parties. Agents are usually paid a commission of five per cent or six per cent (but sometimes a lower percentage) of the purchase price on smaller properties and sometimes up to 10 per cent on recreational properties. Those percentages are usually reduced on larger properties and commercial properties. The agent is usually hired, and paid, by the vendor (or the landlord in leasing transactions) with the duty to obtain for the vendor (or landlord) the highest price available. The purchaser who wishes the assistance of an agent should retain one by specific contract expressly defining the agent's duties to the purchaser.

1.2.2 What services does a lawyer provide?

Before signing an offer to purchase, a purchaser should obtain legal advice to ensure the offer contains appropriate representations, conditions and other provisions. The purchaser's lawyer will conduct various searches and enquiries to verify that the vendor has good title to the property and that there is no prior lien or other claim by others affecting title. In the acquisition of commercial properties (such as office buildings), the purchaser's counsel may conduct other due diligence investigations (for example, reviewing the terms of leases in the building and of security documents). The offer should specify the purchaser's right to search the title and conduct various inspections and investigations and off title searches prior to completing the sale. In Canada, title insurance companies are not generally involved in the title due diligence process, and this is the responsibility of the purchaser's lawyer.

1.2.3 What are the usual conditions for the purchaser's benefit?

It is usual in commercial transactions for the purchase agreement to contain a "due diligence" condition allowing the purchaser to inspect the property (with or without professional assistance) and permitting termination or re-offer if the purchaser is not satisfied with the state of the property or the rental income. In exchange, however, the vendor will generally resist giving warranties and representations as to quality of construction, state of repair, or suitability to the purchaser's needs, as such may be matters not within the vendor's knowledge and are matters in respect of which the purchaser will be advised to satisfy itself through its due diligence.

From a real estate investor's point of view, other conditions will likely be included in the agreement of purchase and sale relating to the state of the title and, in the case of income properties, the amount of

any income (e.g., rental income or royalties) being derived from the property. Representations and conditions relating to the environmental history and standing of the property are also important.

Other typical conditions might relate to satisfaction with zoning, the terms of any existing leases, the terms of any hypothecs (security) or other real rights (such as servitudes or easements) to be assumed by the purchaser or the availability of suitable financing for the transaction.

Many purchasers require the vendor to produce a current survey (certificate of location) or real property report prepared by a land surveyor showing the footprint of any buildings situated on the property. Such a survey would confirm the description of the land, whether the land is subject to or benefited by servitudes, that the buildings and other improvements do not encroach onto neighbouring land and that the buildings are “set back” at the appropriate distances from the boundaries of the property in accordance with zoning requirements. It will also show whether the buildings, fences or other improvements belonging to neighbouring owners encroach on the property to be purchased. If the vendor does not have a recent survey to deliver to the purchaser, or is not required to have one prepared for the purchaser’s benefit, the purchaser will usually be well advised to arrange for an up-to-date survey as part of its due diligence investigations.

1.2.4 The closing and beyond — what remedies are available upon a breach of the agreement?

The closing of a transaction of purchase of real property located in Quebec generally involves lawyers for the purchaser and vendor exchanging documents and closing funds which are released upon successful registration of title documentation with no adverse entries, such as the transfer/deed of land and any security being granted. Notaries are also commonly used in Quebec. The purchaser pays a land transfer duty, when applicable, and any provincial or federal sales tax payable on the purchase.

Where the vendor breaches his or her obligations in the agreement of purchase and sale, the purchaser may proceed with the transaction and apply to the court for an order for “specific performance”, compelling the vendor to complete the transaction and pass title to the property.

Alternatively, the purchaser may terminate the contract, have the deposit returned to him or her and sue the vendor for any damages resulting from the vendor’s breach of contract.

If the purchaser does not perform his obligations under the contract, the vendor may either affirm the contract or seek specific performance and ancillary damages, or terminate the contract and retain the purchaser’s deposit. The vendor’s rights and remedies in the event of purchaser default may also be limited by the terms of the agreement of purchase and sale.

1.3 Restrictions on use or sale — what types of consent are needed?

As with many areas of the world, Quebec regulates the development, use and disposition of real property. For example, the *Cultural Property Act* (Quebec) and the *Act respecting the preservation of agriculture land and agriculture activities* (Quebec) both require authorization in order to sell land that involves a transaction that is subject to those acts.

The *Civil Code of Québec* also has provisions pursuant to which spouses have an equal right to possession of the couple’s matrimonial home, even though it may be owned by only one of them. Thus, the spouse of the owner of the matrimonial home is a necessary party to the transaction, for the purpose of consenting to any sale or hypothecation of the property, and should execute both the agreement and the transfer or hypothecation in question.

1.4 Quebec transfer and sales taxes

In Quebec, a land transfer duty is payable in most cases upon the transfer of ownership of real property interests. This land transfer duty is imposed at graduated rates in accordance with *An Act respecting duties on transfer of immovables* (Quebec) and is generally between 0.5 per cent to 1.5 per cent (two per cent for real properties located in Montréal) of the highest of the total consideration for the transfer or its municipal evaluation. In Quebec, with few exceptions, the transfer of the right of ownership on a property, the establishment of emphyteusis, the transfer of the rights of the emphyteusis as well as a contract of lease of a property, provided the period running from the date of transfer to the expiry of the term of the contract of lease, including any extension or renewal mentioned therein, exceeds 40 years, is treated as a transfer for the purposes of *An Act respecting duties on transfer of immovables* (Quebec).

In Quebec, GST and QST are payable by a purchaser of a commercial property, a new residential property or a property that had major renovations, at the time of the transfer, at the rate of five per cent and 9.975 per cent respectively. If the purchaser of a commercial property is registered for the purposes of the *Excise Tax Act* (Canada) and *An Act respecting the Quebec Sales Tax*, the vendor will not have to collect and remit the GST and the QST applicable on the sale of the real property and the purchaser will instead be liable for the payment of such taxes. See Section VI.7, "Commodity Taxes and Customs Tariffs".

The purchase of real estate is often accompanied by the purchase of certain goods, such as furniture or appliances, to which GST/QST is applicable. See Section VI.7, "Commodity Taxes and Customs Tariffs".

1.5 How are landlords regulated?

If a purchaser is interested in acquiring a property that is occupied by residential tenants, a number of additional considerations become relevant. In Quebec, in addition to reviewing the terms of the leases, the purchaser should be aware that the *Civil Code of Québec* and certain other legislation dealing specifically with residential tenancies limit the rights of a landlord to evict existing tenants of residential premises as well as the landlord's ability to increase rents.

1.6 Joint ventures

Real estate investors in Quebec often enter into joint venture arrangements with other investors. There are many ways in which a joint venture may be organized, including joint venture corporations, partnerships, co-ownerships and sale and leaseback arrangements. Often the selection of the appropriate structure will depend upon the tax or other legal ramifications of the proposed joint venture.

2. Federal Law

The laws relating to the acquisition of immovable property in the province of Quebec are, as a rule, those of the province itself. The federal government imposes relatively few regulations or restrictions in the field. The notable exceptions to that general principle include:

- The review and regulation of foreign investment in Canada
- The regulation of bankruptcy and insolvency
- The regulation of the activities of certain major lending institutions in Canada

- the levying and collection of income taxes (in particular, taxes on capital gains realized by non-resident vendors) and sales taxes (in particular, the Goods and Services Tax in connection with the sale and leasing of real property)
- The application of federal environmental standards
- The application of federal laws and regulations in the transportation sector such as with railway and airport lands

XII. Infrastructure

1. Overview

The infrastructure market continues to be robust in Canada. In Canada, there are three levels of government: federal; provincial/territorial; and municipal. Each level of government utilizes various affiliated entities for public service delivery in addition to the direct delivery of such services.

The federal government, most of the provinces and many urban municipalities have committed substantial resources to upgrading Canada's infrastructure through both traditional procurement and alternative finance or public-private partnerships (P3).

P3s in the broadest sense have been utilized by the three levels of government and some entities for a wide range of large and medium-sized projects. Large-scale capital projects involving long-term, privately financed concessions have been procured within Quebec as well as a number of other provinces. Large-scale capital projects are the focus of this review.

In Quebec, the Société Québécoise des infrastructures (SQI) advises the government on the implementation and structure of P3 projects. Procuring authorities also include, depending upon the project, provincial ministries, agencies, or quasi-agencies such as health or transportation authorities.

The federal government has established Public-Private Partnerships Canada (P3 Canada) with a mandate to increase and improve the delivery of P3 infrastructure projects throughout Canada. It also manages the P3 Canada Fund established in 2008. In 2015, P3 Canada Fund had direct involvement with five projects with an estimated value of C$2.1 billion. Funding for additional projects will be announced over the course of 2017, but as a general matter, we would expect to continue to see P3 Canada adding value both in the development of large-scale federal infrastructure projects in its capacity as a national procurement advisory body, and in the development of projects at the municipal level, where it will supplement the funds and/or expertise required to implement complex infrastructure projects involving various stakeholder interests. We may also see changes resulting from the government's announcement of its intention to remove the mandatory P3 "screen", an automatic review introduced in 2013 for federally funded projects with capital costs of more than C$100-million to determine whether they are best suited to a P3 procurement model.

Recent key projects receiving P3 Canada investments include the Edmonton Light Rail Transit project, a P3 project where the government is contributing C$400-million in aggregate through both the P3 Canada Fund and the New Building Canada Fund, and the City of Winnipeg's Southwest Rapid Transitway project, which includes an investment from the P3 Canada Fund of C$137.3-million and the New Champlain Bridge Corridor Project in Montréal, which is partly funded by an investment from P3 Canada.

P3 procurement methodology has been adopted in Canada for roads, bridges, rail (including rapid transit), hospital, courthouses, schools, hydroelectric power generation facilities and water/wastewater projects for long-term concessions. A wide range of accommodation and other public facilities have also been built, based upon design-build (DB), design-build-operation (DBO), design-build finance (DBE) and related transaction structures.

The federal government also recently announced details for the Canada Infrastructure Bank (CIB). According to the *Budget Implementation Act, 2017*, the CIB will have access to C$35-billion. As well, the CIB will operate under the mandate to "invest, and seek to attract investment from private sector investors and institutional investors, in infrastructure projects in Canada or partly in Canada that will

generate revenue and that will be in the public interest." The CIB will have broad powers, allowing it to pursue potentially innovative funding solutions for Canadian infrastructure projects.

With several exceptions, P3 transactions have proceeded in Canada without specific enabling legislation although both municipalities and provincial agencies have policy frameworks that direct the appropriation and governance of these projects.

In Quebec, pursuant to the *Municipal Powers Act* (MPA), municipalities can entrust to third parties the operation of certain facilities including parks, exhibition centres and tourist information offices. The MPA provides that a municipality can contract with a third party for the operation of its waterworks, water purification, sewer system, or other water supply works for a term of up to 25 years. The *Act respecting transport infrastructure partnerships* (Quebec) covers a wide range of P3 structures, such as design-build-finance-operate (DBFO) and DB. The *Act respecting contracting by public bodies* (Quebec) standardizes the legal framework applicable to the adjudication and award of contracts that public bodies may enter into with certain private legal persons and entities, including public-private partnership contracts. The *Integrity in Public Contracts Act* (Quebec) contains several measures to more strictly control the public procurement process, including by requiring enterprises wishing to contract with a public body to obtain an authorization from Quebec's financial markets authority.

Typical sources of private debt finance include international banks, Canadian pension funds, Canadian banks, Canadian insurance companies and bonds issued on the Canadian public markets. Typical sources of private equity finance include private equity/infrastructure funds, international contractors, Canadian pension funds, domestic non-bank finance companies, investment funds, subcontractors and other stakeholders in the particular P3 transaction.

The principal risks typically allocated to the private sector include design, construction, operation (where the operation is within the control of the concession company) and financing (where private financing is part of the contract). Milestone payments for project delivery followed by monthly payments for service delivery and deductions for failure to maintain specified service standards are key risk components of the contract.

The principal risks typically retained by the public sector depend in part upon the industry and the jurisdiction. The public sector typically retains risks related to discriminatory or industry-specific changes in law, costs of insurance, uninsurable events and risk related to pre-existing but undiscoverable environmental conditions. *Force majeure* event risk is typically shared between private-sector and public-sector parties.

The manner in which private participants manage P3 risk varies with how the contract is negotiated with the private sector, how the concessionaire entity organizes itself and allocates risks among its equity participants, its construction company and its service providers, and the availability of insurance. In general, the concessionaire entity will seek to manage its risk in three ways: (i) by insurance; (ii) by comprehensive due diligence investigations and inquiries; and (iii) by allocating risks to the subcontractors best able to manage such risks via subcontract agreements. Such agreements usually feature parent company guarantees and the provision of other performance security to the concessionaire entity which then forms part of the debt security package for the private financing.

2. Current State of Canadian P3 Market

The P3 market in Canada is maturing as a number of the early P3 projects have now been successfully completed and are in operation, many projects having been sold to long-term investors in the secondary market. In addition, as projects mature, many are being refinanced for the first time and gainshare mechanics between public authorities and the private sector related to increased efficiencies in financing solutions are being tested.

With the renewed support of the lending community, the Canadian P3 market has continued to show signs of increased levels of activity throughout Canada, particularly at the municipal level.

Initial Canadian P3 deals were financed through long-term bank borrowing, which became scarce to non-existent in late 2008. As the most recent financial crisis continued through 2009, the various Canadian P3 agencies introduced some form of milestone payments during or at the end of the construction period to reduce the level of long-term debt financing required. Although the financial markets have been more stable in recent years, we continue to see milestone payments utilized in most Canadian P3 transactions. Lender exposure to market fluctuations has also been reduced by shortening the period between preferred proponent notification and financial close, and by the use of credit-spread reset mechanisms. In addition, recent transactions have seen the return of Asian and European lenders to the Canadian P3 market.

In terms of market development and growth, transit is the area of strategic focus for the federal government, as well as for several provincial agencies and municipalities. One of the key 2016 announcements was the creation of the federal government's new Public Transit Infrastructure Fund, "to help provinces, territories and municipalities maintain safe, efficient, reliable and accessible transportation networks." Starting in 2016-17, the federal government will invest C$3.4-billion over three years allocated, to municipalities based on their share of ridership, which will be available to fund up to 50 per cent of eligible costs for projects across the country. The federal government has also committed to establish a national Infrastructure Bank to assist municipalities with funding and financing.

It is interesting to note, however, that the funds available through the Public Transit Infrastructure Fund are dwarfed by the publicly stated spending requirements of Canada's major population centres. Accordingly, other sources will be required to fund Canada's transit infrastructure needs, most notably from the provinces. The Ontario Liberal government, for example, has promised to spend C$84 billion on transportation infrastructure projects across Ontario over 10 years. In British Columbia, the Mayors' Council, which includes representatives from each of the municipalities across the Metro Vancouver transit and transportation system, has proposed a 30-year, C$7.5-billion regional transportation vision for investment in roads, rail, bus, SeaBus, cycling and walking infrastructure.

In addition, there has been a diversification of asset classes to include data centres, power generation facilities, high-speed telecommunications lines and others, which provide more opportunities for new domestic and international entrants with depth of specialized experience.

3. Current Market Trends in Quebec

- Despite political opposition to P3s, several major projects have been completed or are under construction in Quebec.
- Total investments in the 2017-2027 Quebec Infrastructure Plan rose to C$91.1-billion, a C$240-million increase compared to the 2016-2026 plan. More than C$200-million of this is meant to be used to improve infrastructure in the healthcare network. Meanwhile, C$150-million is for sports and recreational infrastructure.
- The CHUM Hospital Project was successfully procured and was the single largest bond offering in Canadian P3 projects.
- The Réseau électrique métropolitain project's construction is expected to cost approximately C$6.04-billion. The Government of Quebec has confirmed an investment of C$1.28-billion.

XIII. Environmental Law

All levels of government across Canada have enacted legislation to regulate the impact of business activities on the environment. Environmental legislation and regulation is not only complex, but all too often exceedingly vague, providing environmental regulators with considerable discretion in the enforcement of the law.

Consequently, courts have been active in developing new standards and principles for enforcing environmental legislation. In addition, civil environmental lawsuits are now commonplace in Canadian courtrooms involving claims over chemical spills, contaminated land, noxious air emissions, noise and major industrial projects. The result has been a proliferation of environmental rules and standards to such an extent that one needs a "road map" to work through the legal maze.

The environment is not named specifically in the *Canadian Constitution* and consequently neither federal nor provincial governments have exclusive jurisdiction over it. Rather, jurisdiction is based upon other named "heads of power", such as criminal law, fisheries or natural resources. For many matters falling under the broad label known as the "environment," both the federal and provincial governments can and do exercise regulatory responsibilities.

This is referred to as "concurrent jurisdiction", which, in practical terms for business managers, means that businesses must comply with both provincial and federal regulations. Historically, the provinces have taken the lead with respect to environmental conservation and protection. However, the federal government continues to have a role in this area. In addition, some municipalities are also becoming more active, as is evidenced, for example, by their use of bylaws to regulate such matters as the development of contaminated land, the discharge of liquid effluent into municipal sewage systems and reporting on the emission of chemical substances or application of herbicides or pesticides in the course of business operations.

Environmental statutes create offences for non-compliance that can result in substantial penalties including million-dollar fines and/or imprisonment. Many provide that maximum fines are doubled for subsequent offences and can be levied for each day an offence continues. Most environmental statutes impose liability on directors, officers, employees or agents of a company where they authorize, permit or acquiesce in the commission of an offence, whether or not the company is prosecuted. In some instances directors and officers may be held liable solely by virtue of their role as persons with charge, management or control of a company, Companies and individuals may escape environmental liability on the basis that they took all reasonable steps to prevent the offence from occurring. Companies and individuals may escape environmental liability on the basis that they took all reasonable steps to prevent the offence from occurring.

Some statutes create administrative penalties, which are fines that can be levied by government regulators as opposed to the courts. There are also some jurisdictions which allow for tickets, similar to motor vehicle infractions, to be issued for non-compliance. Enforcement officers generally have rights to inspect premises, issue stop-work orders, investigate non-compliance and obtain warrants to enter and search property, and seize anything that is believed to be relevant to an alleged offence. A number of jurisdictions also have administrative tribunals to handle appeals of decisions made by such inspectors and other government officials.

1. Toxic and Dangerous Substances

The *Canadian Environmental Protection Act* (CEPA) provides the federal government with regulatory authority over substances considered toxic. The regime provides for the assessment of "new" substances not included on the Domestic Substances List, a national inventory of chemical and biotechnical substances. CEPA requires an importer or manufacturer to notify the federal government

of a new substance before manufacture or importation can take place in Canada. Consequently, businesses must build in a sufficient lead-time for the introduction of new chemicals or biotechnology products into the Canadian marketplace. In certain circumstances, manufacturers and importers must also report new activities involving approved new substances so they can be re-evaluated.

If the government determines that a substance may present a danger to human health or the environment, it may add the substance to the Toxic Substances List which currently lists upwards of 125 toxic substances or groups of substances. Within two years of a substance being added to the List, Environment Canada is required to take action with respect to its management. Such actions may include preventive or control measures, such as securing voluntary agreements, requiring pollution prevention plans or issuing restrictive regulations that may provide for the phase-out or outright banning of a substance. Substances that are persistent, bioaccumulative, and result primarily from human activity must be placed on the Virtual Elimination List, and companies will then be required to prepare virtual elimination plans to achieve a release limit set by the Minister of Environment or the Minister of Health. Listed toxic substances include PCBs, CFCs and chlorinated solvents, to name but a few.

The *Pest Control Products Act* (PCPA) prohibits the manufacture, possession, handling, transportation, importation, distribution or use of a pest control product that is not registered under the PCPA or in any way that endangers human health or the safety of the environment. Pest control products are registered only if their risks and value are determined to be acceptable by the Minister of Health. A risk assessment includes special consideration of the different sensitivities to pest control products of major identifiable groups such as children and seniors, and an assessment of aggregate exposure and cumulative effects. New information about risks and values must be reported, and a re-evaluation of currently registered products must take place. The public must be consulted before significant registration decisions are made. The public is given access to information provided in relation to registered pest control products. Maximum penalties under the PCPA are C$1-million and/or three years' imprisonment.

The *Hazardous Products Act* (HPA) prohibits suppliers, in certain circumstances, from importing and/or selling "hazardous products" that are intended for use in a workplace in Canada. The legislation identifies various hazard classes of hazardous products, namely compressed gas, flammable and combustible material, oxidizing material, poisonous and infectious material, corrosive material and dangerously reactive material. Maximum penalties under the HPA are C$5-million and/or two years' imprisonment. If a person knowingly or recklessly contravenes a provision of the HPA, maximum penalties are fines in an amount that is at the discretion of the court and/or five years' imprisonment.

The Workplace Hazardous Materials Information System is a national program designed to protect workers from exposure to hazardous material that is established in part by the *Hazardous Products Regulations* under the HPA. This system is similar to what is known in other jurisdictions as "worker right-to-know" legislation. In Canada, it consists of both federal and provincial legislation, reflecting the limited constitutional power of the federal government over worker safety and labour relations. In 1987, the federal government took the lead role in developing regulations that require manufacturers and importers to use standard product safety labelling and to provide their customers at the time of sale with standard Material Safety Data Sheets (MSDSs). Provincial occupational health and safety regulations require employers to make these MSDSs, along with prescribed training, available to their workers. In 2015, Canada began phasing in the new Globally Harmonized System (GHS) of Classification and Labelling of Chemicals.

The classification of hazardous materials is similar to that used under the *Transportation of Dangerous Goods Act* (TDGA). Test procedures determine whether a product or material is hazardous and, in some cases, the procedures are extremely complicated and require the exercise of due diligence in obtaining reasonable information on which to base the classification. A significant

amount of information must be disclosed on an MSDS, including a listing of hazardous ingredients, chemical toxicological properties and first aid measures.

The TDGA applies to all facets and modes of inter-provincial and international transportation of dangerous goods in Canada. Each of the provinces has parallel intra-provincial requirements. The objective of the TDGA is to promote public safety and to protect the environment during the transportation of dangerous goods, including hazardous wastes. The TDGA applies to those who transport or import dangerous goods; handle, manufacture, ship, and package dangerous goods for shipment; or manufacture the containment materials for dangerous goods.

The TDGA and the *Transportation of Dangerous Goods Regulations* (TDG Regulations) establish a complex system of product classification, documentation and labelling; placarding and marking of vehicles; hazard management, notification and reporting; and employee training. The TDG Regulations also set standards for containers used in road, marine, air and rail transportation. The TDGA requires an Emergency Response Assistance Plan, security training and an implemented security plan before the offering for transport, handling or importation of prescribed goods. An Emergency Response Assistance Plan that is specific to a particular substance, geographic area and mode of transportation must be approved by the Minister of Transport or the designated person, and such approval is revocable. A security plan must include measures to prevent the dangerous goods from being stolen or unlawfully interfered with in the course of importing, offering for transport, handling, or transporting.

Dangerous goods are specified in the TDG Regulations and arranged into nine classes and over3,000 shipping names. The classes include: explosives, compressed gases, flammable and combustible liquids and solids, oxidizing substances, toxic and infectious substances, radioactive materials, corrosives and numerous miscellaneous products prescribed by regulation. The TDGA also applies to any product, substance or organism that "by its nature" is included within one of the classes. The TDG Regulations have equivalency provisions with respect to such international rules as the International Maritime Dangerous Goods Code, the International Civil Aviation Organization Technical Instructions and Title 49 of the U.S. Code of Federal Regulations.

2. Air Pollution and Greenhouse Gases

Most air emission regulation is conducted at the provincial level of government, but a number of industry-specific air pollution regulations exist under CEPA. They limit the concentration of such emissions as:

- Asbestos emissions from asbestos mines and mills
- Lead emissions from secondary lead smelters
- Mercury from chlor-alkali mercury plants
- Vinyl chloride from vinyl chloride and polyvinyl chloride plants

The trend is for Environment Canada to focus on substance-specific regulations, some of which, like CFCs, are considered air pollutants.

New standards for air quality and industrial air emissions are currently in the process of being developed. In May 2008, the federal government agreed to work with provinces, territories and stakeholders to develop a proposal, known as the Comprehensive Air Management System, for air emissions. Subsequently, in October 2010, the Canadian Council of Ministers of the Environment agreed to move forward to finalize a new air quality management system based on the proposal. The new framework, known as the Air Quality Management System (AQMS), is currently in development. In October 2012, all jurisdictions (with the exception of Quebec) agreed to begin implementing the AQMS. The AQMS includes new Canadian Ambient Air Quality Standards (AAQS), which set the bar for outdoor air quality. Standards have been developed for fine particulate matter (PM2.5) ozone and

sulphur dioxide (SO_2) and work has begun to develop standards for nitrogen dioxide (NO_2). It is expected that new air quality standards will continue to be developed over the next decade.

The federal government has also been focusing attention on regulations aimed at reducing greenhouse gas (GHG) emissions such as carbon dioxide. The regulations are part of the federal government's strategy to reach its target of achieving a 30 per cent GHG emission reduction from 2005 levels by 2030. In the fall of 2010, the government released the *Passenger Automobile and Light Truck Greenhouse Gas Emission Regulations*. These Regulations apply to vehicles for 2011 to 2025 model years, and are aligned with mandatory national standards of the U.S. They are expected to reduce emissions per vehicle by 25 per cent from those sold in 2008.

In February 2013, the federal government enacted the *Heavy-duty Vehicle and Engine Greenhouse Gas Emission Regulations*. The regulations establish progressively more stringent emission standards for 2014 to 2018 model year heavy-duty vehicles, such as pick-ups, semi-trucks, garbage trucks, and buses. It is expected that, as a result of these regulations, emissions from 2018 model year heavy-duty vehicles will be reduced by up to 23 per cent.

The federal government also passed the *Renewable Fuel Regulations*, which require an average renewable fuel content of five per cent in gasoline and two per cent for diesel fuel and heating distillate oil. Five provinces (Ontario, Manitoba, Saskatchewan, Alberta and British Columbia) also have similar (or more stringent) renewal fuel mandates.

Further, the government has passed the *Reduction of Carbon Dioxide Emissions from Coal-Fired Generation of Electricity Regulations*. These regulations impose registration, monitoring, and reporting requirements on all coal-fired generation units, as well as establishing emission standards. The implementation of the regulations is phased, whereby certain sections (mostly related to registration and applications for exemption) came into force on January 1, 2013, the bulk of the regulations came into force on January 1, 2015, and regulations applicable to stand-by units will come into force on January 1, 2030.

Energy efficiency standards for energy-consuming goods are an additional legislative instrument used in Canada to reduce GHG emissions. The federal government has jurisdiction to implement energy efficiency standards in the context of international and interprovincial trade. On June 28, 2017, the federal *Energy Efficiency Regulations 2016* came into force, repealing and replacing the original *Energy Efficiency Regulations*. The *Energy Efficiency Regulations 2016* establish more stringent energy efficiency standards for consumer and commercial products in Canada and represent a step towards harmonizing Canada's energy efficiency standards with those of the United States. Provincial governments can also implement energy efficiency standards on products transported intra-provincially and most provinces (with the exception of Saskatchewan, Alberta, Newfoundland and Labrador and Prince Edward Island) have enacted similar standards.

CEPA requires Environment Canada to keep and publish a *National Pollutant Release Inventory* (NPRI). Owners and operators of facilities that manufacture, process or otherwise use one or more of the numerous NPRI-listed substances under certain prescribed conditions are required to report releases or off-site transfers of the substances to Environment Canada. The information is made publicly available to Canadians each year.

In Quebec, the *Clean Air Regulation* sets standards for contaminant emissions to the atmosphere. This regulation applies throughout Quebec, except for the Island of Montreal where the Montreal Metropolitan Community has adopted specific air quality regulations. Quebec has also adopted a cap-and-trade regime for the purpose of managing greenhouse gas emissions. Emitters of GHG above 10,000 MtEq must file a declaration in accordance with the *Regulation respecting mandatory reporting of certain emissions of contaminants into the atmosphere*. Emitters of GHG above 25,000 MtEq and distributors of fuel whose emissions meet that threshold are subject to the cap-and-trade

regime that is regulated under the *Regulation respecting a cap-and-trade system for greenhouse gas emission allowances.* It is useful to note that Quebec forms part of the Western Climate Initiative (carbon market) with California and that Quebec and California's regimes are linked. Ontario intends to enter this joint cap-and-trade program in 2018.

An Act to increase the number of zero-emission motor vehicles in Québec in order to reduce greenhouse gas and other pollutant emissions was adopted in October 2016. Quebec is the first province in Canada to adopt legislation regarding zero-emission vehicles. The Act establishes a system of credits applicable to the sale or lease of motor vehicles in Quebec. Credits may be accumulated by leasing or selling vehicles with a means of propulsion that emits no pollutants, or by purchasing them from another manufacturer. The obligation to accumulate credits under the Act will start applying for the 2018 model year vehicles, and only for vehicle manufacturers that meet a certain threshold established under the Act and its regulations.

3. Land Contamination

Responsibility for past environmental damage can be imposed upon a past, current or purchasing operator or owner of land in a variety of ways.

First, liability — that is, responsibility for cleanup or remediation — for historic environmental damage can be imposed upon a current or past operator or owner by way of statute.

Second, liability for historic environmental damage can be imposed upon a current or purchasing operator or owner by operation of the civil law. For example, a civil lawsuit for environmental damage may be brought by another landowner whose property has been contaminated by the migration of pollutants. Such an action may be based on the civil law principle of extra-contractual liability, including the general fault regime as well as a no-fault regime for nuisance or neighbourhood disturbances. However, there are restrictions placed on these actions by the civil law.

The Quebec *Environment Quality Act* (EQA) contains a framework for managing contaminated sites. The EQA requires a person who permanently ceases an activity that is designated in a regulation or a person who changes the use of property on which a designated activity once occurred to carry out a site assessment in accordance with the Ministry of Sustainable Development, Environment and the Fight against Climate Change (MSDEF) guidelines. In the case of a permanent cessation of activities, the site assessment must be carried out within six months of permanent cessation. If the site assessment indicates that the MSDEF standards are exceeded, there is a requirement to provide the MSDEF with a remediation plan and an execution timetable for approval. The EQA recognizes the possibility of carrying out remediation by way of a risk-management approach. Once the remediation plan is approved by the MSDEF, it must be carried out and completed and a remediation report prepared. All reports prepared as part of this process must be certified by a MSDEF-recognized expert.

In addition, if the site assessment establishes that standards are exceeded, a Notice of Contamination must be registered at the land registry. A Notice of Decontamination can be registered against title once a government-certified expert establishes that concentrations of contaminants onsite no longer exceed regulatory criteria. Where an approved risk-management approach is carried out, a Notice of Land Use Restriction setting out limits on the future use of the property must be registered on title.

The EQA also requires a person to notify their neighbours if they become aware that contaminants resulting from designated activities are present in soil at the property limits or if there is a serious risk that contaminants in groundwater are migrating offsite that might affect the use of water.

The EQA gives the MSDEF the power to order polluters or custodians of property to carry out site assessment and site remediation when the MSDEF is aware that contaminants exceed regulatory limits or where there are no limits set for a contaminant that it is likely to adversely affect the life, health, safety, welfare or comfort of human beings, other living species or the environment. Defences available to innocent custodians of contaminated land facing an order from the MSDEF to assess or remediate the land are: (1) they honestly did not know about the contamination; (2) they knew about the contamination but they complied with the law and acted reasonably and diligently under the circumstances; and (3) the site was contaminated by a neighbouring property caused by a third party.

The obligation to report environmental incidents is contained directly in environmental legislation and varies between Canadian jurisdictions. At the federal level there are also various duty to report requirements. For instance, the *Fisheries Act* requires that notification be given when there has been a deposit of deleterious substances in water frequented by fish or activities that cause serious harm to fish. There are numerous examples of the duty to report in CEPA.

4. Water

The federal *Fisheries Act* protects Canada's fisheries by safeguarding both fish and fish habitat. The Act applies to both coastal and inland waters, and is generally administered by the Department of Fisheries and Oceans (DFO), although the environmental protection parts of the Act are administered by Environment Canada. The Act has frequently been used by Environment Canada to charge those responsible for water-polluting activities.

There are two key prohibitions under the *Fisheries Act*. First, the Act prohibits the deposit of any type of deleterious substance into waters frequented by fish. A "deleterious substance" is defined to include any substance that would degrade or alter, or contribute to the degradation or alteration of, the quality of water frequented by fish so as to render the water deleterious to fish or fish habitat. Second, the Act prohibits carrying out a work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or aboriginal fishery, or to fish that support such a fishery. Serious harm to fish includes the death of fish or any permanent alteration to, or destruction of, fish habitat. DFO may issue authorizations to permit serious harm to fish (and fish habitat). The application process is set out in the *Application for Authorization under Paragraph* 35(2)(b) of the *Fisheries Act Regulations*. Failing to comply with the Act or the conditions set out in an authorization is an offence.

Penalties for offences under the *Fisheries Act* are a minimum of C$100,000 up to a maximum of C$12-million for large corporations. Fines for small corporations are a minimum of C$25,000 up to a maximum of C$8-million. Individuals may be liable for minimum fines of C$5,000 up to a maximum of C$2-million and/or three years' imprisonment.

Subject to certain specific exemptions, Quebec's *Environment Quality Act* provides for the requirement to obtain approval for any withdrawal of water — defined as the taking of surface water or groundwater by any means — in amounts of 75,000 litres or more. Authorizations are generally valid for 10 years and government decisions regarding their issuance and renewal must give priority to public health needs and the environment. No water withdrawn in the St. Lawrence River Basin may be transferred out of the basin. Certain exceptions are provided, including for bottled water. Regulations require payment of fees for water takings in excess of 75m^3 per day: C$0.0025 per cubic metre, except oil and gas extraction and industries where water is incorporated into the final product (such as the bottled water industry), in which case the fee is C$0.07 per cubic metre.

Where one discharges liquid wastes into a municipal sanitary sewer, it is necessary to become familiar with any applicable sewer use bylaw. Municipal sewer bylaws often restrict what may be discharged into local sanitary and storm sewers and, in some cases, require pollution prevention plans.

5. Waste Management

While most waste regulation is regulated at the provincial level, a number of regulations exist federally under CEPA that control the movement of waste and recyclable material in, out and across the country. Waste movement is also regulated by the provincial levels of government within their individual boundaries. The *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* implement Canada's obligations under the Basel Convention and certain other international treaties or agreements aimed at controlling the international movement of such materials. Section 185 of CEPA requires that the Minister be notified of any intended international shipment of hazardous wastes or hazardous recyclable materials. An international movement may consist of an export from Canada, an import into Canada, a transit through Canada, or a transit through a country other than Canada.

The notification requirements are set out in the regulations and include the requirement to provide information such as: the nature and quantity of the hazardous waste or hazardous recyclable material involved; the addresses and sites of the exporters, importers, and carriers; the proposed disposal or recycling operations of the hazardous waste or hazardous recyclable material; proof of written contracts between the exporters and importers; and proof of insurance coverage. With this information, Environment Canada is able to determine whether the proposed shipment of hazardous wastes or hazardous recyclable materials complies with regulations for the protection of human health and the environment.

If the notification requirements set out in the regulations are met, Environment Canada notifies the authorities in the destination country. If any authority (including those in any transit countries) objects to the proposed shipment, the shipment cannot proceed until the objection is lifted. A permit may be granted following a review of the notice and approval from the authorities in the destination country.

The *PCB Waste Export Regulations* allow Canadian owners of PCB waste to export such wastes to the U.S. for treatment and destruction (excluding landfilling) when these wastes are in concentrations equal to or greater than 50 mg per kilogram. The regulations require that advance notice of proposed export shipments be given to Environment Canada. If the PCB waste shipment complies with the regulations, and authorities in any countries or provinces through which the waste will transit do not object to the shipment, a permit is sent from Environment Canada to the applicant authorizing the shipment to proceed.

The *Interprovincial Movement of Hazardous Waste Regulations* maintain a tracking system, based on a prescribed waste manifest, for the movement of hazardous waste and hazardous recyclable material between provinces and territories within Canada.

Quebec has a decentralized framework for siting landfills for disposal of non-hazardous material, with public involvement through regional county municipalities.

Regulations have been adopted in Quebec requiring manufacturers to take back used paint and paint containers, as well as used oil, used batteries, consumer electronics and fluorescent light bulbs. Companies that market printed materials, or products containing containers and packaging are required to pay dues that are remitted to municipalities to finance the cost of curbside recycling programs.

Standards are in place for the use and storage of hazardous waste (known as residual hazardous materials in Quebec). A permit is required to treat or use for energy generation third-party hazardous waste, and to store third-party hazardous waste onsite (a transfer station).

Permits are also required to transport hazardous waste and to operate hazardous waste disposal sites. The *Transportation of Dangerous Substances Regulation* adopted under the EQA governs the

handling and transportation of dangerous substances, including hazardous waste, on Quebec's roads. It tracks the provisions of the federal TDG Regulations.

6. Project Approvals

The *Canadian Environmental Assessment Act, 2012* (CEAA 2012) came into force on July 6, 2012. It replaced the *Canadian Environmental Assessment Act*. The CEAA 2012 is designed to ensure that federal government agencies take environmental concerns into consideration in their decision-making processes. This is accomplished by requiring environmental assessments to be conducted prior to a designated project proceeding. "Designated Projects" are defined broadly to mean one or more physical activities that are carried out in Canada or on federal lands; are designated by regulations; or are linked to the same federal authority as specified in those regulations, as well as the activities incidental to those physical activities.

Each environmental assessment must consider whether designated projects are likely to cause significant adverse environmental effects on components of the environment that are within the legislative authority of the federal government. Assessments will be conducted by the Canadian Environmental Assessment Agency, the Canadian Nuclear Safety Commission (for projects that are regulated under the *Nuclear Safety and Control Act*), and the National Energy Board (for projects that are regulated under the *National Energy Board Act* or the *Canada Oil and Gas Operations Act*). Time limits are set in CEAA 2012 for assessments. Unless otherwise modified, a decision on a standard environmental assessment will generally be required within 365 days from the issuance of the Notice of Commencement. In cases that involve a public review panel, unless otherwise modified, a decision statement from the Minister must be issued not later than 24 months from the date the review panel was established.

The end product of a federal environmental assessment will include a "decision statement" to be issued under CEAA 2012, approving a project and stipulating conditions to mitigate any environmental effects that are directly linked or necessarily incidental to the power exercised by the federal authority. These conditions are binding and enforceable.

CEAA 2012 has resulted in a dramatic reduction in the number of projects being subject to formal environmental assessment at the federal level, which was a key commitment made by the federal government in implementing CEAA 2012.

The *Regulations Designating Physical Activities* under CEAA 2012 were amended in the fall of 2013. The amendments are aimed at ensuring that the regulations capture the major projects that the federal government believes have the greatest potential for significant adverse environmental effects. Of particular note, many large industrial facilities such as those which process heavy oil and oil sands or manufacture pulp and paper, steel and chemicals, as well as certain industrial mineral mines, are no longer automatically subject to the CEAA 2012, while railway yards, offshore exploratory wells, and expansions to oil sands mines remain as designated physical activities.

Quebec has several laws regulating natural resources development and conservation.

The *Quebec Mining Act* requires that a rehabilitation plan be filed before commencing mine operations or significant exploration work. The proponent must provide financial assurance to guarantee the execution of the anticipated rehabilitation work.

The *Petroleum Resources Act*, which lays down a regulatory regime for oil and gas exploration and production in Quebec, was adopted in December 2016. The Act will be in force upon publication of the regulations required to its implementation.

The *Natural Heritage Conservation Act* allows the MSDEF to designate various types of protected areas in Quebec, sometimes on an emergency basis. The *Act respecting the conservation and development of wildlife* sets out rules for hunting, fishing and trapping on public land; allows the government to adopt wildlife conservation measures; and contains provisions for accommodating the rights of Aboriginal Peoples.

Under the provisions of the *Sustainable Forest Development Act*, the Ministère des Forêts, de la Faune et des Parcs (MFFP) is responsible for planning and managing the public forests, and also for carrying out, monitoring and controlling operations in the forests. Authorizations are required for a variety of works and activities in forests.

A timber supply guarantee under the *Sustainable Forest Development Act* entitles its holder to annually purchase a volume of timber from forests in the domain of the state, in one or more specific administrative regions, to supply the wood processing mill for which the guarantee was granted. Authorization to harvest the wood is given in a harvest agreement signed by the MFFP and by all the guarantee holders in the area it covers. The agreement defines the forest operations zones and the activities to be carried out, stipulates any conditions and lists the guarantee holders' other commitments.

The *Regulation respecting standards of forest management* for forests in the domain of the State establishes the standards that all local stakeholders must follow when conducting forest management activities in forests of the public domain. However, as part of the effort to regionalize forest management, some of its provisions may be adjusted at the regional level to reflect local values. These standards ensure that forest lands are protected, forest cover is maintained and reconstituted, and forest management activities are in line with the activities of other users. The Regulation sets the rules for initiating ecosystem management, protecting rivers, streams, forest landscapes, and wildlife habitats, and ensures that the traditional activities of aboriginal communities are respected. On April 1, 2018, this Regulation will be repealed and replaced by the *Regulation respecting the sustainable development of forests in the domain of the State.*

The *Petroleum Products Act* (Quebec) is intended to ensure the continuity and security of the petroleum products supply in Quebec. Regulations under the *Petroleum Products Act* and related statutes set out standards governing the types of permitted petroleum products (oil and gasoline). Regulations adopted under the *Building Act* (Quebec) set standards for the use, monitoring and maintenance of petroleum storage tanks and other petroleum equipment, leaks and leak prevention, safety procedures, and government inspections and reporting, and permitting of high risk petroleum products storage equipment.

7. Environmental Permitting

The licensing or permitting system in Canada differs in each province, with permits granted on a facility-wide basis in some cases and granted in association with particular activities (relating to air, water, soil and so on) in others. These approvals may be accompanied by conditions that may concern certain infrastructure required at a facility, routine testing and reporting, and basic contamination control measures. There are typically mechanisms for appeal, such as a review by a government official, an administrative tribunal or the relevant minister, and possibly to the courts.

The EQA, Quebec's main environmental statute, makes it an offence to discharge or allow the discharge of a contaminant into the environment over and above limits set by regulation that is prohibited by regulation or in a manner that negatively impacts human health, safety, welfare or comfort or that causes damage or impairment to soil, vegetation, wildlife or property. Accidental releases must be reported to the MSDEF immediately.

Anyone who intends to undertake an activity in Quebec that may result in the release of a contaminant into the environment must first obtain a certificate of authorization from the MSDEF. Air emissions control and wastewater treatment equipment are normally covered by a separate authorization issued by the MSDEWP under the EQA. If a facility is located on the Island of Montreal, then in regards to air emissions, the facility is subject to standards set forth in regulations of the Montréal Metropolitan Community (MMC). Moreover, if a facility is located within the territory of the MMC, then with respect to wastewater discharge standards, the facility is subject to standards set forth in the regulations of the MMC.

On March 23, 2018, a new approval regime under the Quebec's EQA will come into force. The new approval regime will make far-reaching changes and seeks to simplify the project authorization scheme.

After this date, subject to a few exceptions, a single type of ministerial authorization will be required for a given project (whereas several types of authorizations may currently be required for a project). In addition, projects will be classified into different categories based on the environmental risks they present: high-risk, moderate, low-risk and negligible-risk activities. Depending on the assigned risk level, some projects will require an environmental impact assessment and review process be followed (discussed below) prior to ministerial authorization, whereas a declaration of compliance will be required for low-risk activities and negligible-risk activities, established pursuant to regulation, will be exempt from an approval requirement. Environmental approvals will also become transferable upon simple notification to the minister, which will be a significant change from the current regime, which requires the minister's consent.

Under the EQA, facilities in certain industrial sectors are subject to the requirement to obtain a "depollution attestation," a type of comprehensive environmental operating permit that must be renewed every five years. The first three sectors to have been made subject to this requirement are pulp and paper mills, and the mining and primary metals industry. Emissions standards in depollution attestations are tailored to the facility and its receiving environment. Holders of attestations pay fees that are based on their emissions and are subject to requirements to monitor the effects of their emissions on the local environment.

Certain types of projects listed in a regulation to the EQA must undergo an environmental impact assessment process before the Quebec government may issue a certificate of authorization. The environmental assessment process always includes the preparation of an environmental impact assessment, a public notification step and may include public hearings before the *Bureau des audiences publiques en environnement* (BAPE, the office of public hearings on the environment). The recommendations of the BAPE must be taken into account by the Quebec government in making its decision to authorize the project and setting permit conditions. The EQA contains a separate environmental and social impact assessment process for the James Bay and Northern Quebec region which requires the involvement of Cree or Inuit representatives in the approval process. Amendments to the EQA that will come into force on March 23, 2018 will allow the Quebec government to, in exceptional circumstances, require that a project that is not listed in a regulation as requiring an environmental impact assessment process comply with environmental impact assessment process if the government is of the view that the project presents major climate change issues, or raises major environmental risks and that public concerns with respect to such risks justify a review.

8. Species Protection

The federal *Species at Risk Act* (SARA) identifies wildlife species considered at risk, categorizing them as threatened, endangered, extirpated or of special concern, and prohibits a number of specific activities related to listed species, including killing or harming the species, as well as the destruction of critical habitat that has been identified in any of the plans required under SARA.

These include recovery strategies and action plans for endangered or threatened species and management plans for species of concern. Plans are developed by Environment Canada in partnership with the provinces, territories, wildlife management boards, First Nations, landowners and others. SARA allows for compensation for losses suffered by any person as a result of any extraordinary impact of the prohibition against the destruction of critical habitat. SARA provides for considerable public involvement, including a public registry and a National Aboriginal Council on Species at Risk that provides input at several levels of the process.

The protections in SARA apply throughout Canada to all aquatic species and migratory birds (as listed in the *Migratory Birds Convention Act*, 1994 or MBCA) regardless of whether the species are resident on federal, provincial, public or private land. This means that if a species is listed in SARA and is either an aquatic species or a migratory bird, there is a prohibition against harming it, or its residence, and the penalties for such harm can be substantial. For all other listed species, SARA's protections only apply on federal lands, including National Parks and First Nations Reserves. However, SARA also contains provisions under which it can be extended to protect other species throughout Canada, if the federal government is of the view that the provinces or territories are not adequately protecting a listed species.

Maximum penalties under SARA for a first-time offence are C$1-million for a corporation (excluding non-profit corporations, which are subject to a maximum fine of C$250,000) and/or five years' imprisonment for an individual. A court may also order the offender to pay an additional fine in an amount equal to the monetary benefits accrued to the person as a result of the commission of the offence.

The MBCA enacts an international agreement between Canada and the U.S. for the protection of migratory birds. Although most of the statute focuses on the regulation of harvesting or hunting, it also contains some environmental protection provisions. The MBCA prohibits the deposit of substances harmful to migratory birds in any waters or areas frequented by migratory birds, except as authorized by regulation. It also prohibits the disturbance of the nests of migratory birds except as authorized by regulation.

9. Enforcement

Individuals and corporations may be held liable for any damage to the environment.

First, such liability may be "regulatory" and enforced under federal or provincial criminal statutes. Upon conviction, an offence, such as the discharge of waste, will be accompanied by fines or jail terms. Some of these fines can be significant and accumulate rapidly upon subsequent offences. Canada relies more heavily on the criminal process for environmental enforcement than do many jurisdictions.

Second, there are also administrative penalties that may be imposed without a full prosecution upon those who run contrary to the dictates of certain environmental legislation. Recent federal legislation, which created the *Environmental Violations Administrative Monetary Penalties Act*, the *Environmental Violations Administrative Monetary Penalties Regulations* and amended various pieces of federal environmental legislation, has updated the fine structure in a wide variety of federal legislation to make the fines more severe. At the provincial level, in addition to fines stemming from a conviction of an offence, various provinces have established administrative "environmental penalties" that can be imposed very shortly after an environmental incident. This does not preclude the laying of charges.

Third, there is also significant potential for civil liability arising at law. This may arise in a variety of circumstances, such as under extra-contractual liability under the *Civil Code of Québec* or in relation to defects in disclosure of environmental problems prior to a transaction. More specifically, the common causes of action under which environmental claims are brought are nuisance (no-fault

liability for neighborhood disturbances), fault (a failure to abide by the rules of conduct applicable in the circumstances and damage caused to a plaintiff) and trespass.

Under CEPA, enforcement officers also have broad powers of investigation. They may issue compliance orders to stop illegal activity or require actions to correct a violation, among other powers. They may also carry out inspections and, in certain circumstances, search and seizure.

The ranges of fines payable for a first offence under CEPA are as follows:

- For individuals, from C$5,000 to C$1-million, and/or a term of imprisonment of up to three years
- For small-revenue corporations, from C$25,000 to C$4-million
- For all other persons and corporations, from C$100,000 to C$6-million

In all cases, the range of fines payable doubles for repeat offenders.

Other federal environmental legislation, and all provincial environmental legislation, impose fines or jail terms for breaches — some quite significant. When imposing penalties, courts are required to consider specified aggravating factors to ensure that penalties reflect the gravity of the offence. CEPA imposes broad liability on officers and directors who "directed or influenced" the corporation's policies or activities in respect of conduct that is the subject matter of the corporation's offence. A public registry is used to maintain details of convictions of corporate offenders.

In addition to the enforcement provisions contained in CEPA, the federal government also has the authority to assess administrative monetary penalties, pursuant to the *Environmental Violations Administrative Monetary Penalties Act*. The stated purpose of this Act is "to establish, as an alternative to the existing penal system and as a supplement to existing enforcement measures, a fair and efficient administrative monetary penalty system" for the enforcement of certain federal environmental protection statutes, including CEPA. The amounts of the administrative penalties that may be assessed in response to a violation of the underlying statute may be up to C$5,000 in the case of an individual or up to C$25,000 in the case of a corporation.

The federal *Criminal Code* contains provisions that address corporate liability and provide a basis for criminal charges to be brought against corporations in the event that an activity causes harm to persons or property and negligence or fault can be proven. Three provisions expand criminal responsibility so that it can be attributable to organizations in addition to individuals. For negligence offences, criminal intent will be attributable to an organization where one of its representatives (directors, partners, employees, members, agents or contractors) is a party to the offence and departs markedly from the standard of care that could reasonably be expected to prevent the commission of the offence. For offences where fault must be proven, an organization is a party to an offence if one of its senior officers is a party to the offence, or, acting within the scope of his or her duty, directs other representatives of the organization to commit the offence, or fails to take all reasonable measures to stop the commission of the offence by a representative of the organization.

XIV. Power Industry and Laws in Quebec

1. Electricity Sector and Regulatory Framework Main Factors

Quebec has a regulated electricity market. Québec's Régie de l'Énergie is the regulatory agency that supervises and regulates the transmission and distribution of electric power in Quebec. Hydro-Québec, a Crown corporation, is responsible for furnishing a guaranteed annual supply of 165 terawatt hours (TWh) of "heritage pool electricity."

1.1 Hydro-Québec

Hydro-Québec is one of the largest electric utilities in North America. Under its incorporating statute, Hydro-Québec is given broad powers to generate, supply and deliver electric power throughout the province. Hydro-Québec is authorized to purchase all of the electric power produced by independent power producers in Quebec. Other private electricity producers may also be called upon to supply the required energy through long-term or short-term contracts.

Hydro-Québec is organized in separate divisions:

- Hydro-Québec Production is responsible for generating power for the Quebec market and sells power on wholesale markets. This division is responsible for furnishing the heritage pool electricity to Hydro-Québec Distribution in order to supply Quebec customers.
- Hydro-Québec TransÉnergie is the transmission system's operator and manages power flows throughout the province.
- Hydro-Québec Distribution is the distributor of electricity to Quebec customers with an almost exclusive right to distribute throughout the province. In order to meet needs beyond the annual heritage pool electricity, which Hydro-Québec production is obligated to supply, Hydro-Québec Distribution buys power on open markets.
- Hydro-Québec Équipement et services partagés and Société d'énergie de la Baie James is responsible for designing and carrying out projects for the construction and refurbishment of generation and transmission facilities.

1.2 Québec's Régie de l'Énergie (Régie)

The Régie is the agency responsible for regulatory supervision of the transmission and distribution of electric power, and electricity rates in Quebec are subject to its approval. The Régie was created by virtue of the *Act Respecting the Régie de l'énergie* (Act) with the powers needed to regulate the electricity and natural gas sectors in order to respond to the requirements of the liberalization of the North American electricity market, including the guarantee of non-discriminatory access to markets. In 2000, the Act was amended to introduce more competition into the electricity market, make the Régie's mode of operation more flexible, broaden its sources of funding and establish the procedure for setting the rates and conditions applicable to the transmission and distribution of electric power.

The Régie fixes and modifies the rates and conditions for the transmission of electricity power by the electricity carrier and the distribution of electricity power by the electricity distributors. In fixing and modifying rates, the Régie favours the use of incentives to improve the carrier's and distributor's efficiency to protect the interests of the consumers. Hence, Hydro-Québec's transmission and distribution activities are subject to the conventional form of regulation based on the cost of service for those activities.

More specifically, the Régie effectively regulates the generation, transmission and distribution segments of the electricity market as follows:

- **Generation**: The heritage pool of 165 TWh is established on the basis of an average cost for heritage electricity supply of C$0.279 per kilowatt hour and since 2014 this cost of heritage pool electricity has been indexed to inflation, except for large-power industrial customers (Rate L). The cost of electric power over and above the heritage pool electricity is determined by way of call for tenders and supply contracts are awarded on the basis of the lowest tendered price and such other factors as the applicable transmission costs. Québec's Régie has procedures in place to govern calls for tenders and contract awards, and has adopted a code of ethics on conducting calls for tenders presented to Hydro-Québec. The Régie also approves the process for purchasing programs for electricity from renewable sources and the Act provides that the provincial government shall determine the initial conditions for defining acquisition of blocks of energy by decree establishing supply rates, which represent the energy portion attributed to a class of consumers.
- **Transmission**: The Régie is responsible for setting the load and point to point rates with incentive mechanisms to improve the efficiency of Hydro-Québec TransÉnergie and to establish rates based on cost of service including a reasonable return. As required under the Act, the rates shall respect territorial uniformity. The Régie also adopts and monitors the application of reliability standards for Hydro-Québec TransÉnergie's network and ensure the non-discriminatory access to the network.
- **Distribution**: The Régie sets distribution rates on a cost of service basis including a reasonable rate of return. The Régie is responsible for setting rates respecting territorial uniformity and it also approves the conditions of Hydro-Québec Distribution supply contracts.

2. Quebec's Energy Supply Mix and Energy Strategy

In 2013, Quebec's electricity generation capacity totalled 43,731 *megawatts* (MW), mainly generated through hydroelectricity (90.2 per cent), but also winds power (5.5 per cent) or biomass-based cogeneration (0.6 per cent). Quebec has an estimated 45,000 MW of untapped hydroelectric power potential with approximately 20,000 MW offering an economic potential. Quebec's exploitable wind power potential amounts to almost eight million MW.

On April 7, 2016, the Québec Energy Strategy 2016-2030 (Strategy) was released, pursuant to which the government's goals and actions in the energy sector for the period from 2016 to 2030 were defined. Pursuant to the Strategy, the government has set the following targets for 2030: (i) improve energy efficiency by 15 per cent, (ii) reduce the consumption of petroleum products by 40 per cent, (iii) eliminate thermal coal usage, (iv) increase renewable energy production by 25 per cent and (v) increase bioenergy production by 50 per cent.

On June 26, 2017, the Government of Québec unveiled the Action Plan 2017-2020 (Action Plan) in order to implement the first steps of the Strategy through public investments totalling C$1.5-billion. Among other things, the Action Plan sets out the construction of a 100 MW solar power station by Hydro-Québec.

On the transmission side, Hydro-Québec's objective is to increase exports to the United States with the contemplated development of projects with New England including the 1,090 MW Northern Pass Transmission project between the Des Cantons substation in Quebec and the Franklin substation in southern New Hampshire.

Additionally, the Plan Nord launched by the Quebec government seeks to develop Quebec's vast territory north of the 49th parallel, which covers 72 per cent of the province or approximately 1.2-million km^2. The initiative seeks an integrated development of transport, mining and energy

infrastructure. The strategy refers to the Plan Nord by providing the development of liquefied natural gas (LNG), natural gas hydrocarbons and wind farm projects in this portion of Quebec.

XV. Restructuring and Insolvency

Commercial restructuring and insolvency proceedings in Quebec and in Canada are not memorialized in any single statute. Canadian and Quebec restructuring and insolvency law refers to the complex matrix of statutory, common law and civil law rules that govern the rights and responsibilities of creditors and debtors in situations where the debtors are in financial distress. These insolvent debtors may become subject to a host of different formal or informal proceedings, with bankruptcy proceedings being only one such form of insolvency proceeding.

Bankruptcy and insolvency are oftentimes thought to be — by laypersons, the media and legal professionals not practising in the area — one and the same thing. An enterprise that ceases operations or cannot meet its obligations is commonly said to have "gone bankrupt". A company that becomes subject to a court-supervised process as a result of some form of financial distress is often referred to as having become subject to "bankruptcy proceedings." Despite their colloquial use as synonymous terms, the distinction between bankruptcy and insolvency in Canada is a critical one.

Bankruptcy is a legal status. Insolvency is a financial condition. An insolvent company is unable to meet its obligations generally as they become due or its liabilities exceed the value of its assets. When a commercial entity becomes bankrupt, on the other hand, it loses the legal capacity to deal with its assets and a trustee in bankruptcy is appointed over those assets with a mandate to, among other things, liquidate the assets and distribute the proceeds of sale to creditors.

In addition to bankruptcy, an insolvent business may be rehabilitated by a restructuring of the corporation and its debts under one or more statutes governing commercial insolvencies. Such "debtor-in-possession" (DIP) proceedings may also result in the sale of some or all of the assets of the insolvent business.

Alternatively, the assets of a business may be liquidated or sold on a going-concern basis in creditor-initiated proceedings. Such proceedings may include the appointment of a receiver of the business (appointed privately or by a court), the exercise of other private remedies of a secured creditor under its security or some combination of the above.

Set out below is a summary of Canadian restructuring and insolvency law which takes into account the unique legal context that exists in Quebec.

1. Key Insolvency Statutes

There are three key insolvency statutes that apply to the Quebec landscape:

- **The *Companies' Creditors Arrangement Act* (CCAA)**. The CCAA is the principal statute for the reorganization of a large insolvent corporation that has more than C$5-million of claims against it or which is part of an affiliated group of companies that has more than C$5-million of claims in the aggregate. As a federal statute, the CCAA has application in every province and territory of Canada (and purports to have worldwide jurisdiction). The CCAA is generally analogous in effect to Chapter 11 of the U.S. *Bankruptcy Code* (U.S. Code), although there are a number of important technical differences. As discussed below, the sale of a debtor's business and assets in a CCAA proceeding is permitted even in the absence of a formal plan of reorganization.
- **The *Bankruptcy and Insolvency Act* (BIA)**. The BIA is also a federal statute that includes provisions to facilitate both the liquidation and reorganization of insolvent debtors. The liquidation provisions, which provide for the appointment of a trustee in bankruptcy over the

assets of the insolvent debtor, are known as "bankruptcy proceedings" and are generally analogous to Chapter 7 of the U.S. Code, although there are a number of important technical differences. The reorganization provisions under the BIA, known as the "proposal" proceedings, are more commonly used for reorganizations that are smaller and less complicated than those that take place under the CCAA because the BIA proposal provisions have more stringent timelines and provide less flexibility than the CCAA. The BIA also provides for the appointment of an interim receiver with national power and authority to protect and preserve assets and a receiver with national power and authority to take possession of, and sell assets of, a debtor where it is "just or convenient" to do so. A receiver appointed over all or substantially all of the assets of an insolvent company must be a licensed trustee in bankruptcy — typically the licensed insolvency professionals in an accounting or financial advisory firm.

- **The *Civil Code of Québec* (CCQ)**. The CCQ governs the priorities, rights and obligations of secured or hypothecary creditors, including a secured creditor's right, following a default by the debtor, to enforce its security or hypothec and dispose of assets subject to its security or hypothec (including on a going-concern basis).

Proceedings under the CCAA and BIA are subject to the oversight of the federal government office known as the Office of the Superintendent of Bankruptcy. The federal government also appoints Official Receivers to carry out statutory duties in each bankruptcy jurisdiction across Canada. The Official Receivers report to the Superintendent of Bankruptcy.

2. Reorganizations Under the CCAA

2.1 Who qualifies for relief under the CCAA?

To qualify for relief under the CCAA, a debtor must:

(a) Be a Canadian incorporated company or foreign incorporated company with assets in Canada or conducting business in Canada (certain regulated bodies such as banks and insurance companies are not eligible to file under the CCAA or BIA but instead may seek relief from creditors under the *Winding-Up and Restructuring Act*). Income trusts (business trusts established for commercial investments) also qualify for relief. Partnerships cannot apply for protection from creditors under the CCAA but, as discussed below, relief has been extended to partnerships in certain circumstances where the corporate partners have filed.

(b) Be insolvent or have committed an "act of bankruptcy" within the meaning set out in the BIA. The CCAA does not contain a definition of insolvency; however, courts have held that reference may be had to the definition of insolvency under the BIA. Accordingly, a company will qualify for relief under the CCAA if it is insolvent on a cash-flow basis (i.e., unable to meet its obligations generally as they become due) or on a balance-sheet test (i.e., has liabilities that exceed the value of assets). Further, the Ontario Superior Court of Justice has held that in determining whether a debtor is insolvent for the purposes of the CCAA, courts may use a "contextual and purposive approach". A debtor may be considered insolvent if the debtor faces a "looming liquidity crisis" or is in the "proximity" of insolvency even if it is currently meeting its obligations as they become due. It is sufficient if the debtor reasonably anticipates that it will become unable to meet its obligations as they come due before the debtor could reasonably be expected to complete a restructuring of its debt.

(c) Have in excess of C$5-million in debt or an aggregate in excess of C$5-million in debt for a filing corporate family.

Partnerships and solvent entities do not qualify as “applicants” under the CCAA, and cannot file plans of arrangement or compromise under the CCAA. Nonetheless, Canadian courts have routinely extended the stay of proceedings and other relief granted to the qualifying insolvent applicants, to related partnerships (where corporate partners themselves have filed) and even solvent entities affiliated with the applicants, where there is a finding that it is appropriate to do so in the circumstances. For example, relief has been extended to partnerships where the business of the partnership is inextricably entwined with the business of the applicants and granting certain relief to the partnership is required for an effective reorganization of the qualifying applicants.

2.2 How does a company commence proceedings under the CCAA?

Unlike Chapter 11, no separate bankruptcy estate is created upon a CCAA filing and the CCAA does not allow a debtor company to make an electronic filing to obtain a skeletal stay of proceedings and then subsequently obtain “first day” relief. Instead, a debtor company must seek the granting of a single omnibus initial order that provides the debtor with a comprehensive stay of proceedings and other relief. Proceedings under the CCAA are commenced by an initial application to a court of competent jurisdiction and not a federal bankruptcy court as in the U.S. In Quebec, the application would be brought before the Commercial Division of the Superior Court of Québec. As in many provinces, there are recognized model orders which establish the accepted framework for an initial order, subject to the appropriate modifications on a case-by-case basis as may be granted by the court. In most instances, the application is made by the debtor company itself (creditors may initiate the process, but this is uncommon). Where the creditor does initiate the proceeding, it is usually with debtor consent.

2.3 Where must the application be brought?

Applications for relief under the CCAA may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the debtor company in Canada is situated, or, if the debtor company has no place of business in Canada, in any province in which any assets of the company are located. Therefore, if a company has a head office or chief place of business in Quebec, the application will be filed in Quebec, in the judicial district in which such office is located. Otherwise an application can be brought in Quebec in a judicial district in which any of the debtor’s assets are located, as long as the debtor does not have any offices elsewhere in Canada.

2.4 What must be included in the initial application?

All CCAA applications must include:

- Weekly cash-flow projections for the weeks to which the initial stay of proceedings will apply
- A report containing certain representations of the debtor regarding the preparation of cash-flow projections
- Copies of all financial statements of the debtor, audited or unaudited, prepared during the year before the application

2.5 What relief can the court provide?

The initial order granted by the court usually provides for the following key elements:

(a) **Stay of Proceedings**. Initial orders typically grant a comprehensive stay of proceedings that will apply to both secured and unsecured creditors, and a stay against terminating contracts with the debtor. The purpose of the stay is to provide for an orderly process by preventing precipitous creditor action and prohibiting any single creditor or group of

creditors from achieving an unfair advantage over other creditors. The stay is designed to maintain the status quo and allow the debtor company sufficient breathing room to seek a solution to its financial difficulties. Stays may also be extended to directors of the debtor in order to encourage those individuals to remain in office and advance the restructuring process.

The stay is subject to certain prescribed limits. For example:

(i) The stay cannot restrict the exercise of remedies under eligible financial contracts such as futures contracts, derivatives and hedging contracts

(ii) The stay cannot prevent public regulatory bodies from taking regulatory action against the debtor, although monetary fines and administrative orders framed in regulatory terms, but which are determined by a court to be monetary claims in substance can be stayed

(iii) There are restrictions on the length of stays for "aircraft objects" — airframes, aircraft engines and helicopters

(iv) No order granting a stay of proceedings can have the effect of prohibiting a person from requiring immediate payment for goods and services delivered after the filling date, or requiring payment for the use of leased property (pursuant to a true lease as opposed to financing lease) or licensed property

(v) Nothing in the stay can have the effect of requiring the further advance of money or credit

(vi) As noted above, partnerships do not qualify to apply under the CCAA, although there is case law that provides that the stay may be extended to partnerships, where the filing corporate partners themselves obtained CCAA protection and the protection is required to facilitate the restructuring

Unlike Chapter 11, the stay of proceedings is not automatic and is a function of the court's discretion; however, the court will typically exercise its discretion to issue an initial stay for up to a maximum of 30 days. An application to the court is required for any extensions. Before an extension can be granted, the court must conclude that circumstances exist that make the extension appropriate and that the debtor is acting with due diligence and in good faith. Other than the initial 30-day stay, there is no statutory limit on the duration or number of extensions.

With respect to aircraft objects, Canada has implemented the Convention on International Interests in Mobile Equipment (known as the Cape Town Convention) and the associated Protocol to the Convention on Matters Specific to Aircraft Equipment (Protocol). Canada adopted "Alternative A" of the Protocol, which is an enhanced version of section 1110 of the U.S. Code. Alternative A contains a 60-day stay limitation for aircraft objects during which period the debtor must cure all defaults and agree to perform all current and future contractual obligations or the aircraft objects must be returned to the secured creditor. Alternative A also requires the aircraft operator to maintain the aircraft objects pursuant to its contract and preserve the value of the aircraft objects as a condition of the continuing stay.

(b) **The Monitor**. As part of the initial order, the court appoints a monitor, a licensed insolvency professional typically from an accounting or financial advisory firm. The monitor's basic duties are set out in the CCAA, but can be expanded by court order. Generally, the monitor plays both a supervisory and an advisory role in the proceeding. In its supervisory role, the monitor oversees the steps taken by the company while in CCAA

proceedings, on behalf of all creditors, as an officer of the court. Further, the monitor will file periodic reports with the court and creditors, including reports setting out the views of the monitor as required by the CCAA in connection with any proposed disposition of assets or in connection with any proposed DIP financing (see Section XV,2.5 (c), "DIP Financing and DIP Charge").

Generally, the debtor's management will remain in control of the company throughout the proceedings, however, in its advisory role, the monitor will assist management in dealing with the restructuring and other issues that arise. In certain cases, such as where the board of directors has resigned or creditors have otherwise lost confidence in management, the monitor's powers can be expanded. By court order, the monitor can be authorized to sell assets, subject to court approval, and direct certain corporate functions. Monitors assuming this role are colloquially referred to as "super monitors". Initial orders may also approve the retention of a Chief Restructuring Officer with an extensive mandate to manage the debtor company, or a more limited mandate to assist management.

Similarly to the rest of Canada, there are no statutorily mandated unsecured creditor committees in Quebec, although such committees have sometimes been formed on an ad hoc basis. There is no equivalent to the U.S. Trustee, which provides government oversight in Chapter 11 cases. However, the monitor fulfils certain of the functions that the U.S. Trustee and unsecured creditor committees would fulfil in Chapter 11 cases. The Superintendent of Bankruptcy has some general oversight powers as well.

(c) **DIP Financing and DIP Charge**. DIP financing refers to the interim financing required by the debtor company to fund its working capital needs, while under CCAA protection. In many cases, the court will authorize DIP financing to the debtor and grant super-priority charges over the assets of the debtor in favour of the DIP lender, if the court is of the view that additional financing is critical to the continued operations of the business during the restructuring. This may be done in the initial order at the time of the first application, or commonly by way of a subsequent order or by amending and restating the initial order. Notice must be given to all pre-filing secured creditors that are likely to be affected by the priority of the DIP charge.

In determining whether to approve DIP financing, the CCAA requires courts to take into account, among other things:

- The expected duration of proceedings
- How the debtor's business and financial affairs are to be managed during the proceedings
- Whether the debtor's management has the confidence of major creditors
- Whether the DIP loan would enhance prospects of a viable plan of arrangement or compromise
- The nature and value of the debtor's property
- Whether any creditor would be "materially prejudiced" as a result of the DIP
- The monitor's report on the cash-flow forecast

The CCAA expressly prohibits the securing of pre-filing obligations with the DIP charge.

At the DIP approval hearing, the debtor company will submit a DIP term sheet or credit agreement for approval, together with projected cash flows and the monitor's report on those cash flows. The monitor will also typically advise the court of its view as to the appropriateness of the DIP, both with respect to quantum and terms.

Canada has not adopted the U.S. concept of "adequate protection", which is intended to protect existing lien holders who have become subject to super-priority charges, although courts may order protective relief to address prejudice to other creditors. Canadian courts also do not need to grant "replacement liens". A pre-filing secured creditor's security, if granted over after-acquired property (as is typically the case), continues to apply and automatically extends to post-filing assets acquired by the debtor, such as inventory and receivables, since as noted above, a CCAA filing does not create a separate legal estate.

(d) **Other Priority Charges Granted in the Initial Order**. Initial orders also routinely authorize priority charges, such as an administration charge to secure payment of the fees and disbursements of the monitor and the monitor's and debtor's legal counsel, and a directors' and officers' charge to secure the debtor's indemnity to the directors and officers against post-filing claims and provide such directors and officers with the protection and assurance necessary to secure their continued involvement throughout the CCAA proceedings. The charge in favour of directors and officers is only available to the extent that these individuals do not have (or if the debtor cannot obtain) adequate insurance at a reasonable cost to cover such liabilities. Along with the DIP charge, these priority charges will typically rank ahead of claims of pre-filing secured creditors, provided that notice is given to any such secured creditors likely to be affected by the priority charges.

(e) **Treatment of Contracts**. The CCAA permits resiliation (the Quebec civil law equivalent of disclaimer) of agreements. The debtor is not required to elect to accept or reject certain "executory contracts" (other than aircraft leases) or real property leases, as is the case under Chapter 11. Further, a standard initial order provides, among other things, that no counterparty to a contract may terminate the contract, alter, fail to renew or cease to perform its obligations under the contract.

Generally, the debtor will fulfil its post-filing payment obligations for the supply of goods or services and the use of property (i.e., rent) under all agreements unless the debtor resiliates the agreement in accordance with the process provided for in the CCAA. If the debtor fails to perform other covenants, which failure to perform would be a basis for the counterparty to terminate the agreement absent the stay, the counterparty may seek to lift the stay in order to exercise its termination rights. Any steps by counterparties to assert damage claims in respect of agreements that are resiliated by the debtor are stayed by the initial order. As with rejected contracts under Chapter 11, counterparties to resiliated agreements can assert a claim for damages on an unsecured basis and will be entitled to share in any distribution on a pro rata basis along with other unsecured creditors.

The monitor's or the court's approval is required to disclaim a contract. All disclaimers approved by the monitor are subject to review by the court if the counterparty objects. In deciding whether to approve a disclaimer, the court will take into account whether the resiliation of the contract would enhance the prospects of a viable plan and whether it would likely cause the debtor's counterparty significant financial hardship

(f) **Treatment of Intellectual Property Licences.** The CCAA provides protections for licensees of intellectual property, analogous to section 365(n) of the U.S. Code. The CCAA also provides a process for the assignment of contracts, with court approval, despite contractual restrictions on assignment. However, a condition of any such forced assignment is that pre-filing monetary defaults are cured.

(g) **Post-filing Supply of Goods**. The initial order typically stays a party to any contract or agreement for the supply of goods or services from terminating the agreement. The initial

order and the terms of the CCAA protect these suppliers by providing that no party is required to continue to supply goods or services on credit, or to otherwise advance money or credit to a debtor. Accordingly, although a supplier cannot terminate its agreement as a result of the CCAA stay of proceedings, the supplier is not required to honour its obligations to supply post-filing unless it is paid for those post-filing obligations or is designated a critical supplier.

Unlike Chapter 11, which provides for an "administrative priority claim" for post-petition suppliers, if the supplier to a CCAA debtor elects to provide goods or services on credit and does not have the benefit of a critical supplier's charge (discussed below), that supplier is afforded no specific priority under the CCAA for its post-filing supply. Accordingly, it is important for post-filing suppliers to ensure that they receive cash on delivery (COD) payments or are otherwise fully protected by a court-ordered charge or some other form of financial assurance as security such as a deposit for payments or a letter of credit issued by a third party.

(h) **Plans of Arrangement or Compromise**. Initial orders in CCAA proceedings typically also authorize the debtor to file a plan of arrangement or compromise with its creditors. See Section XVI, 2.7, "What is a plan of arrangement?".

2.6 Can critical vendors be paid their pre-filing claims?

Where a vendor provides goods or services that are considered critical to the ongoing operation of the debtor, the court may declare the vendor a "critical supplier" and order the vendor to continue to provide goods or services on terms set by the court that are consistent with the existing supply relationship, or that are otherwise considered appropriate by the court. As part of such critical supplier order, the court is required to grant a charge over all or any part of the debtor's property to secure the value of the goods or services supplied under the terms of the order, which charge can be given priority over any secured creditor of the debtor. Any creditors likely to be prejudiced by the court-ordered charge must be given notice of the application to declare a vendor a critical supplier.

Despite these provisions in the CCAA, decisions in Ontario have authorized pre-filing payments to critical suppliers when continued supply could not be guaranteed without such authorized payments.

2.7 What is a plan of arrangement?

Essentially, the plan of arrangement or compromise is a proposal made to the debtor's creditors that is designed to provide creditors with greater value than they would receive in a liquidation under bankruptcy proceedings. The plan is designed to allow the debtor to compromise its obligations and continue to carry on business, although the nature and/or scope of the business might be altered dramatically. Plans can, among other things: provide for a conversion of debt into equity of the restructured debtor — which may require a concurrent plan of arrangement under the applicable federal or provincial business corporations statute (depending on the jurisdiction of the debtor's incorporation) — or a newly created corporate entity designed to be a successor to the debtor's business; the creation of a pool of funds to be distributed to the creditors of the debtor; a proposed payment scheme whereby some or all the outstanding debt will be paid over an extended period; or some combination of the forgoing.

Plans may offer different distributions to different classes of creditors (see Section XV, 2.7.4, "How does the plan get approved by creditors?"). However, the plan must treat all members within a class equally.

2.7.1 Who may file a plan?

Plans may be filed by the debtor, any creditor, a trustee in bankruptcy or liquidator of the debtor. As a matter of practice, plans are almost always filed by a debtor, or filed by a creditor, with the debtor's consent. The CCAA does not provide for an "exclusivity" period in which only the debtor may file a plan, as is the case under the U.S. Code on the basis that even if it obtained requisite creditor approval, the plan was not capable of being sanctioned by the court.

Normally, the filing of a plan is considered to be a procedural step that is routinely granted by courts. However, in one recent Ontario decision, a court refused to allow the debtor applicants to file a plan which contravened prior orders of the court in the same proceedings.

2.7.2 Whose claim may be compromised?

The claims of both secured and unsecured creditors may be compromised in a plan. The CCAA requires Crown — the federal or provincial government — approval of any plan that does not provide for the payment, within six months, of all amounts owed to the Crown in respect of employee source deductions. Plans must provide for the payment of certain pension and wage claims (see Section XV, 4.3, "Priorities in liquidation").

The CCAA also provides that plans can compromise claims against directors, subject to certain limitations. For example, claims that relate to contractual rights of one or more creditors and claims based on allegations of misrepresentations made by directors to creditors or wrongful or oppressive conduct by directors are not subject to compromise.

Courts have also held that CCAA plans can provide for releases in favour of third parties, other than the CCAA debtor itself and its directors and officers, where, among other things, such third-party releases are necessary and essential to the restructuring of the debtor, the claims to be released are rationally related to the purpose of the plan, the plan could not succeed without the releases and the parties that are the beneficiaries of the releases contribute in a tangible and realistic way to the plan. However, there has been judicial caution expressed that third-party releases are the exception, not the rule, and should not be granted as a matter of course. Also, in a number of cases, plans have been sanctioned which contained releases from a broad category of claims, with limited exceptions for claims arising from fraud and wilful misconduct. Releases often purport to bind the applicable creditor as well as its officers, directors, shareholders, affiliates and other parties that may not have received notice of the proceedings. Courts have also expressed some reservation as to the scope of the releases in a plan.

2.7.3 How do creditors prove their claims?

There is no mandatory time-frame in the CCAA in which affected creditors must prove their claims. If it is anticipated that a distribution will be made to unsecured creditors in a plan or following a sale of assets, the debtor will typically seek a claims procedure order which establishes a process to determine creditor claims and a "claims bar date", after which claims will be barred and extinguished forever. There may be a separate bar date for "restructuring claims" arising from the disclaimer, breach or termination of contracts after the filing date. The claims procedure order also establishes a process to resolve disputed claims, typically including the appointment of a claims officer, to address any disputes in an arbitration-style summary process. The monitor typically administers the claims process in consultation with the debtor.

While the U.S. Code provides that interest that is unmatured as of the filing does not form part of either a secured or unsecured claim, under the CCAA, post-filing interest accrues on secured claims but an Ontario decision has cast doubt on whether post-filing interest accrues and forms part of unsecured claims.

2.7.4 How does the plan get approved by creditors?

Creditors are separated into different classes based on the principle of commonality of interest which is analogous to the requirement in the U.S. Code that claims in a particular class be "substantially similar". Although unsecured creditors will typically be placed in a single class, certain unsecured creditors, such as landlords, may be classified in a separate class based on a different set of legal rights and entitlements than that of other unsecured creditors. The plan must be passed by a special resolution, supported by a double majority in each class of creditors: 50 per cent plus one of the total number of creditors voting in the class and 66-2/3 per cent of the total value of claims voting in each class. Note that, unlike under Chapter 11, there is no concept of "cram-down" in Canada. Cram-down allows for the passing of a plan of arrangement in certain circumstances, even though the plan has been rejected by a subordinate class of creditors. In Canada, each class of creditors to which the plan is proposed must approve the plan by the requisite majorities.

2.7.5 What if the plan is not approved by creditors?

If the plan is not approved by the creditors, the debtor does not automatically become bankrupt (i.e., have a trustee in bankruptcy appointed over its assets). It is possible for the debtor or any party in interest to submit a new or amended plan. In the event the plan is not accepted, however, it is likely that the debtor's significant secured or unsecured creditors will move to lift the stay to exercise the remedies against the debtor that are otherwise available to them, which may include seeking to file a bankruptcy application against the debtor or appointing a receiver.

2.7.6 How does the plan get approved by the court?

Once the plan is approved by the creditors, it must then be submitted to the court for approval. This proceeding is known as the sanction or the fairness hearing, and is the equivalent of the confirmation hearing under Chapter 11. The court is not required to sanction a plan even if it has been approved by the creditors. However, creditor approval will be a significant factor in determining whether the plan is "fair and reasonable", and thus deserving of the court's approval.

2.7.7 Who is bound by the plan and how is it implemented?

Once the court sanctions the plan, it is binding on all creditors whose claims are compromised by the plan. Although all necessary court approvals might have been obtained, the plan may not become effective until a number of subsequent conditions are met, such as the negotiation of definitive documentation, the completion of exit financing, the obtaining of regulatory approvals or the expiry of appeal periods. Once all conditions are satisfied, the plan can be implemented. The day on which the plan is implemented is commonly referred to as the "implementation date" and is evidenced by a certificate filed with the court by the monitor, confirming that all conditions to the implementation of the plan have been satisfied.

2.8 Can certain pre-filing transactions with the debtor be voided?

The CCAA contains provisions for the review of certain pre-filing transactions, including preferences and "transfers at undervalue" (see Section XV, 4.1.6, "Can the trustee void certain pre-bankruptcy transactions?"), by incorporating by reference the avoidance concepts from the BIA that were previously only available in bankruptcies (i.e., in Chapter 7-type proceedings) into the CCAA. The monitor in CCAA proceedings (but not the debtor) is empowered to challenge preferential payments or dispositions of property made by the debtor for consideration that was "conspicuously less than fair market value", unless a plan of arrangement provides otherwise.

3. Reorganizations Under the BIA

3.1 What is the difference between CCAA reorganizations and BIA reorganizations?

Insolvent debtors may also seek to restructure their affairs under the BIA's proposal provisions. There are a number of similarities between the BIA's proposal provisions and the CCAA. The key elements of a proposal can be substantially the same as the key elements of a CCAA plan as both proposals and plans provide for the compromise and arrangement of claims against the debtor. The same basic restrictions and limitations that apply to CCAA plans also apply to BIA proposals. Further, DIP financing, DIP charges, the assignment of contracts, the disclaimer of contracts, the granting of other priority charges and the ability to sell assets free and clear of liens and encumbrances are all available in BIA proposal proceedings.

The essential difference between a restructuring under the CCAA and one conducted under the BIA is that a BIA proposal process has more procedural steps set out with strict time-frames, rules and guidelines. A CCAA proceeding is, relative to BIA proposal proceedings, more discretionary and judicially driven. The CCAA remains the statute of choice for restructurings of any complexity for debtors that exceed the minimum C$5-million debt threshold. Debtor companies and other key stakeholders that may support the restructuring process typically prefer the flexibility afforded by the CCAA over the more rigid regime of the BIA. In addition, a BIA proposal must be made to, and approved by, unsecured creditors whereas the CCAA can be used to compromise secured creditor claims, while leaving unsecured claims unaffected.

3.2 Who may make a proposal?

An insolvent person, a bankrupt, a receiver (in relation to an insolvent person), a liquidator of an insolvent person's property or a trustee of the estate of a bankrupt may make a proposal. An insolvent person is a person who is not bankrupt and who is insolvent on a cash-flow or balance-sheet basis. Persons include corporations, partnerships and other legal entities.

3.3 Where can a proposal be filed?

The proposal is filed with a licensed trustee and, in the case of a bankrupt, with the trustee of the estate and copies of the relevant documents must be filed with the official receiver in the locality of the debtor. Locality of the debtor means the principal place (a) where the debtor has carried on business during the year immediately preceding the initial bankruptcy event; (b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event; or (c) in cases not coming within sections (a) or (b) above, where the greater portion of the property of the debtor is situated. The "initial bankruptcy event" is the earliest of the filing of the following: an assignment, a proposal, a notice of intention to file a proposal, a CCAA filing or the first application for a bankruptcy order made against the debtor.

3.4 How are proposal proceedings commenced?

The proposal proceedings may be commenced by filing a proposal or a notice of intention to make a proposal (NOI) with the local office of the Official Receiver. Most debtors commence the proposal process with an NOI, which provides for an automatic stay of proceedings for an initial 30-day period (subject to extensions for additional periods of up to 45 days each, for an aggregate total of up to six months within which time the proposal must be filed, upon a court determining that the debtor is acting in good faith and with due diligence). Once the proposal is filed, the stay continues until the meeting of creditors to vote on the proposal.

The stay applies to both unsecured and secured creditors (unless the secured creditor has delivered a notice of its intention to enforce security pursuant to section 244 of the BIA and the notice period provided for thereunder has expired or been waived by the debtor).

The purpose of the NOI is to allow the debtor a period of stability to negotiate a proposal with its creditors, with the assistance of a proposal trustee which is appointed at the time the NOI is filed. The NOI must also contain a list of creditors with claims of C$250 or more. Once the NOI is filed, the trustee must send a copy of the NOI to every known creditor within five days. Within 10 days, the debtor must prepare a projected cash-flow statement.

3.5 What is the scope of the stay under an NOI?

The stay of proceedings under an NOI stays creditor action against the debtor and provides that no person may terminate an agreement because of the insolvency of the debtor or the filing of the NOI. Landlords cannot terminate leases because of pre-filing rental arrears. Creditors can apply to lift the stay on demonstration of material prejudice or can oppose an extension of the stay if they can demonstrate, among other things, the debtor is not acting in good faith or with due diligence. The stay is also subject to substantially the same limitations as those discussed above in connection with a stay under the CCAA.

3.6 What if the stay extension is not granted?

If a stay extension is not granted, the debtor is deemed to have made an automatic assignment in bankruptcy.

3.7 What is the role of the proposal trustee?

The proposal trustee, selected by the debtor, has a number of statutory duties. These duties include giving notice of the filing of the NOI to all known creditors, filing a projected cash-flow statement accompanied by a report from the trustee on its reasonableness, and calling a meeting of creditors. At the creditors' meeting, the trustee is required to report on the financial situation of the debtor and the cause of its financial difficulties. The trustee must also make the final application to the bankruptcy court for approval of the proposal if it is accepted by creditors.

In addition to its statutory obligations, the trustee plays both a supervisory and advisory role and will assist the debtor in the development of the proposal and its negotiations with creditors and other key stakeholders.

3.8 How do creditors prove their claims?

Pursuant to the terms of the BIA, all creditors must complete a statutory proof of claim form in order to prove their claim. Although there is no predetermined bar date, a creditor is not entitled to vote at a meeting of creditors to approve the proposal, or participate in distributions provided for under the proposal, if they have not submitted a proof of claim by the meeting time or prior to distributions.

3.9 How does the proposal get approved by creditors?

Proposals are voted on at a meeting or meetings of the creditors called for that purpose. The meeting to consider the proposal must be called by the proposal trustee within 21 days of the filing of the proposal and at least 10 days' notice must be given to each of the creditors.

Like a CCAA plan, in order to be binding on creditors, a proposal must be approved by a double majority of creditors (50 per cent plus one in number of creditors, representing 66-2/3 per cent in value of voting claims), in each class of creditors voting on a proposal; however, if the proposal is made to a class of secured creditors and rejected by that class, the proposal may still become effective provided that it is passed by the class or classes of unsecured creditors voting on the proposal. The proposal will not be binding on the dissenting class of secured creditors. These secured creditors would be entitled to enforce their security, if otherwise entitled to do so.

3.10 What if the proposal is not approved by unsecured creditors?

If the proposal is rejected by a class of unsecured creditors voting on the proposal, the debtor is deemed to have made an assignment in bankruptcy on the earliest of: (i) the date the debtor filed the NOI; (ii) the date of the earliest outstanding application for a bankruptcy order; and (iii) the date the debtor filed its proposal.

3.11 How does the proposal get approved by the court?

In addition to creditor approval, the proposal must be approved by the court. Within five days of the acceptance of the proposal by the debtor's creditors, the proposal trustee must apply for a court hearing to have the proposal approved. The proposal trustee must give 15 days' notice to the debtor, the Official Receiver and each creditor who has proven its claim against the debtor. The trustee must file a report regarding the terms of the proposal and the conduct of the debtor at least two days before the date of the hearing.

3.12 What if the proposal is not approved by the court?

If the proposal is not approved by the court, the debtor will be deemed to have made an assignment in bankruptcy on the earliest of: (i) the date the NOI was filed; (ii) the date the earliest application for a bankruptcy order was issued; and (iii) the date the debtor filed its proposal.

3.13 Who is bound by the proposal and how is it implemented?

If the proposal is approved, it is binding on all unsecured creditors and on the classes of secured creditors included in the proposal that voted in favour of the proposal in the requisite majorities. A proposal may be implemented in substantially the same manner in which a CCAA plan is implemented. In instances where unsecured creditors vote in favour of a proposal and certain secured creditors do not vote in favour, a proposal may have technically passed but become frustrated as its terms and implementation thereof required that secured creditors be bound by it.

3.14 What if a debtor defaults under the proposal?

If a debtor defaults under the terms of its proposal, and such default is not waived by inspectors (creditor representatives that may be appointed by creditors in certain cases) or the creditors themselves (if there are no inspectors), the proposal trustee must inform the creditors and the Official Receiver. In these circumstances, a motion may be brought to the court to annul the proposal. If such order is granted, the debtor is automatically bankrupt.

4. Liquidations

The two most common ways to liquidate an insolvent company in Canada are either through a bankruptcy proceeding under the BIA, or by way of an appointment of a receiver. In recent years, the

CCAA has also been used as a process for the self-liquidation of a debtor, without a plan being filed and, in most cases, with the support and co-operation of the debtor's main secured creditor(s).

4.1 Bankruptcy

4.1.1 How is a bankruptcy proceeding commenced?

The legal process of bankruptcy (generally analogous in effect to Chapter 7 of the U.S. Code) can be commenced in one of three ways:

1. Involuntarily, by one or more of the debtor's unsecured creditors filing a bankruptcy application against the debtor in the court having jurisdiction in the judicial district of the locality of the debtor (as defined in Section XV, 3.3, "Where can a proposal be filed?"). To bring a bankruptcy application, a creditor must have in excess of C$1,000 of unsecured debt and allege that the debtor committed an "act of bankruptcy" within six months of the date of the filing of the application. The acts of bankruptcy are enumerated in the BIA, with the most commonly alleged act being that the debtor has ceased to meet its obligations generally as they become due — it is not sufficient that the creditor allege that the debtor has failed to pay the obligations owing to such creditor, only. The debtor has the right to object to the application, in which case, a determination will be made by the court as to whether the bankruptcy order should be issued.
2. Voluntarily, by the debtor making an assignment in bankruptcy for the general benefit of its creditors to the Official Receiver in the locality of the debtor. To make a voluntary assignment, the debtor must be an "insolvent person" (i.e., insolvent on a cash-flow or balance-sheet basis). Companies, partnerships and income trusts are "persons" that may make an assignment if insolvent. To make an assignment a person must reside, carry on business or have property in Canada and have at least C$1,000 of debt.
3. On the failure of a BIA proposal process by the debtor to its creditors, including as a result of the rejection of the proposal by a class of unsecured creditors or by the court, or default under the proposal and subsequent annulment. See Section XV, 3.6, "What if the stay extension is not granted?", Section XV, 3.10, "What if the proposal is not approved by unsecured creditors?", Section XV, 3.12 "What if the proposal is not approved by the court?" and Section XV, 3.14, "What if a debtor defaults under the proposal?".

4.1.2 What is the effect of the commencement of the bankruptcy proceeding?

When a corporate debtor becomes bankrupt, the debtor ceases to have legal capacity to dispose of its assets or otherwise deal with its property, which vests in a trustee in bankruptcy (other than property held in trust which does not form part of the debtor's assets). Such appointment is expressly subject to the rights of secured creditors. Trustees in bankruptcy are licensed insolvency professionals who, in almost all cases, are chartered accountants (unlike the U.S. where trustees are typically lawyers). They are not government officials but they are licensed and regulated by the federal Office of the Superintendent of Bankruptcy. In a voluntary proceeding, the debtor itself selects the trustee, however, the selection is subject to confirmation by unsecured creditors at the first meeting of creditors. In an involuntary proceeding, the applying creditor selects the trustee, also subject to confirmation at the first creditors' meeting. Unsecured creditors are to be provided with notice of the first meeting of creditors promptly after the trustee's appointment.

4.1.3 What are the trustee's duties?

A trustee is an officer of the court and, accordingly, must represent the interests of unsecured creditors impartially. It is the trustee's duty to collect the debtor's property, realize upon it and distribute the proceeds of realization according to a priority scheme set out in the BIA (see

Section XV, 4.3, "Priorities in liquidation"). The trustee is required to give notice of the bankruptcy to all known creditors of the bankrupt. The trustee must also convene a first meeting of the creditors of the bankrupt within 21 days of its appointment, unless extended for a limited period by the Official Receiver or otherwise extended or waived by the court.

At the first meeting of creditors, creditors with proven claims must confirm the trustee's appointment. Proven creditors may also elect "inspectors" from their ranks who will then act in a supervisory role and instruct the trustee. There are certain actions in which a trustee cannot engage without inspector approval, such as carrying on the business of the bankrupt or the sale or other disposition of any property of the bankrupt. A trustee must obtain court approval if it wishes to undertake these actions prior to or in the absence of the appointment of inspectors. At the first meeting, the creditors can vote to dispense with inspectors. If there are no inspectors appointed at the first meeting of creditors, the trustee can exercise all of its power on its own accord, except dispose of assets to a party related to the bankrupt. This action can only be taken with court approval.

4.1.4 How does a creditor prove its claim?

Upon the commencement of bankruptcy proceedings, unsecured creditors are stayed from exercising any remedy against the bankrupt or the bankrupt's property and may not commence or continue any action or proceeding for the recovery of a claim (unless the creditor is granted special permission by the court). Generally, secured creditors are not subject to this stay of proceedings (see Section XV, 4.1.5, "How does bankruptcy affect the rights of secured creditors?").

A creditor can assert its claim against the debtor by completing a statutorily prescribed proof of claim and submitting it to the trustee in bankruptcy. A proof of claim form is attached to the notice of bankruptcy sent by the trustee to all known creditors. The creditor must submit the completed form before the first meeting of creditors if it wishes to vote on the motion to affirm the appointment of the trustee or vote for and/or act as an inspector in the bankruptcy. Otherwise, the creditor need only submit its proof of claim before the distribution of proceeds by the trustee (known creditors will be provided notice before distribution) unless otherwise ordered by the court.

A trustee can disallow the quantum of the amount set out in a proof of claim or the entire claim itself. Disputed claims may be resolved through a judicial process if the parties are not able to reach a consensual resolution.

4.1.5 How does bankruptcy affect the rights of secured creditors?

The rights of a trustee in bankruptcy are expressly subject to the rights of secured creditors. Generally, a bankruptcy does not affect the rights of secured creditors except to the extent necessary to allow the trustee to realize on any value in the collateral subject to the security, above and beyond what is owed to the secured creditor. The BIA provides the trustee with a number of tools in this regard. The trustee can: require the secured creditor to prove its security; cause the secured creditor to value its security; inspect the collateral subject to the security — generally for the purpose of valuing it; and, redeem the collateral subject to the security by paying the secured creditor the amount of the assessed value of the security. On redemption, the collateral subject to the security becomes an asset of the bankruptcy estate. In addition, the court may make an order staying a secured creditor from realizing on its security, but the maximum period of such stay is six months. Such stay orders are not commonly granted. They may, however, be made in situations where the trustee requires some time to value the collateral and determine if it should exercise its right of redemption.

To the extent that the amount of a secured creditor's debt exceeds the value of the collateral subject to its security, a secured creditor may participate in the bankruptcy process and file a proof of claim in respect of the unsecured deficiency portion of its claim.

4.1.6 Can the trustee void certain pre-bankruptcy transactions?

The BIA establishes two types of pre-bankruptcy transactions that are subject to challenge, transfers at undervalue and preferences. A "transfer at undervalue" is a disposition of property or provision of services by the bankrupt for which no consideration was received by the bankrupt or for which the consideration received by the bankrupt was conspicuously less than the fair market value of the consideration given by the debtor. If the parties are dealing at arm's length, the trustee must establish that the transfer at undervalue took place within one year of the initial bankruptcy event, when the bankrupt was insolvent and where the bankrupt intended to defraud, defeat or delay a creditor. When the transferee and the bankrupt are not at arm's length, the relevant period of review is five years prior to the initial bankruptcy event (see Section XV, 3.3, "Where can a proposal be filed?").

If a court determines that a transaction was a transfer at undervalue, the transaction may be voided or the trustee may seek judgment for the difference between the value of consideration received by the bankrupt (if any) and the value of consideration given by the bankrupt.

A preference is a payment made to a pre-filing creditor that meets certain criteria. Where the creditor is dealing at arm's length with the insolvent person, the trustee must establish that the applicable transaction took place within three months prior to the initial bankruptcy event and that the insolvent person had a view to giving that creditor a preference over another creditor. Where the creditor is not dealing at arm's length with the insolvent person, the trustee must establish that the applicable transaction took place within one year prior to the initial bankruptcy event and that the insolvent person had a view to giving that creditor a preference over another creditor. If the transaction had the effect of giving a preference, there is rebuttable presumption that it was made with a view to giving the creditor a preference. If a court determines that a transaction was a preference, such transaction may be voided.

In addition to the recourses provided for by the BIA, trustees and creditors can avail themselves of a "Paulian Action", a mechanism provided for by the CCQ. This remedy allows a creditor that has suffered prejudice as the result of a fraudulent transfer of property by a debtor, including an act by which the debtor renders or seeks to render himself insolvent, to obtain a declaration that such transfer is unenforceable against the creditor. The creditor can institute a Paulian Action only if its claim is liquid and exigible and only within one year from the date on which the creditor learned of the injury from the impugned transfer. If the Paulian Action is brought by a trustee in bankruptcy, the limitation period is one year from the date of appointment of the trustee.

Generally, Canadian trustees are much less aggressive in attacking pre-bankruptcy transactions than their U.S. counterparts and the technical requirements to void such transactions are more onerous in Canada than they are in the U.S. Where the trustee in bankruptcy refuses or neglects to pursue a preference claim or a transfer at undervalue, a creditor may seek a court order authorizing it to bring such an action. If the relief is granted, the creditor proceeds in its own name at its own expense and risk, although notice must be provided to other creditors, who may join the contemplated proceeding. Any benefit derived from a creditor-initiated proceeding belongs exclusively to the creditor(s) who instituted the proceeding and the surplus, if any, must be returned to the bankrupt's estate.

4.1.7 What repossession rights do unpaid suppliers have?

Suppliers have a limited right to recover inventory supplied to a bankrupt debtor or a debtor subject to a receivership. Unpaid suppliers have the right to repossess goods delivered 30 days before the date of bankruptcy or receivership. Written demand for repossession must be sent within 15 days of the purchaser becoming bankrupt or subject to a receivership. The goods must be identifiable, in the same state as on delivery, still in the possession of the purchaser, trustee or receiver, and not subject to a subsequent arm's-length sale. In practice, suppliers often find it difficult to satisfy these tracing requirements.

4.2 Receiverships

4.2.1 What is a receiver?

A receiver, or receiver and manager, may be granted the authority to deal with a debtor company's assets, including authority to operate and manage the debtor's business in place of the existing management, and to shut down the business if the receiver concludes the continued operations will likely erode the recoveries for creditors or there is insufficient funding to continue operations. The receiver does not become the owner of the debtor company's assets; however, the receiver may have the right (but not the obligation) in the instrument appointing it to take possession and custody of the assets and to sell them.

4.2.2 How is a receiver appointed?

A receiver must be appointed by court order. As well, a similar mechanism exists under the *Bank Act* in defined circumstances, which does not require the bank's agent to be court appointed.

(a) **Court-Appointed Receiver, including Interim Receivers**. Courts have the authority to appoint receivers under the BIA, with authority across Canada (the BIA being a federal statute) as opposed to in a particular province (as is the case outside of Quebec, with receivers appointed under provincial *Rules of Court*). Court appointments usually occur in more complex cases, especially where there are disputes among creditors or between the creditor and the debtor or in cases where it appears likely from the outset that the assistance of the court will be required on an ongoing basis. The court appointment of a receiver is typically accompanied by a comprehensive stay of proceedings restraining creditor action against the debtor, the debtor's property and the receiver, and providing a more stable platform for the realization to occur (see Section XV, 4.2.4, "How do creditors assert their claims in a receivership?").

A receiver appointed by the court derives its powers from the court order and the provisions of the BIA governing its powers. The receiver is an officer of the court and has duties to all creditors of the debtor. It takes directions and instructions from the court, not the creditor that first sought its appointment. In most cases, the court order appointing the receiver gives the receiver broad powers similar to those normally granted to a privately appointed receiver under a security agreement, although certain actions, such as major asset sales, usually require specific court approval. The court-appointed receiver is also typically permitted to borrow on a super-priority basis, akin to DIP financing in a CCAA case.

An "interim receiver" may be appointed by the court during the 10-day window after a section 244 notice is issued, with a temporary and restricted mandate. The court may direct an interim receiver to take possession of all or part of the debtor's property, exercise such control over the property and the debtor's business as the court considers advisable, take conservatory measures and summarily dispose of property. Interim receivers, however, are not authorized to borrow funds.

The appointment of the interim receiver expires on the earlier of: (a) the taking of possession by a receiver or a trustee in bankruptcy of the debtor's property, and (b) the expiry of 30 days following the day on which the interim receiver was appointed or any period specified by the court, or in the case where an interim receivership coincides with a proposal, upon court approval of the proposal.

(b) **Taking Possession under the *Bank Act***. The *Bank Act* allows any bank to lend money or make advances to various persons operating in the agricultural, aquacultural, forestry and related sectors, and, in particular, to lend money to manufacturers, on the security of goods, wares and merchandise manufactured or produced by the borrower, procured by the borrower

for use in manufacturing or production or used or produced by the borrower for packing goods, wares or merchandise produced by the borrower (s. 427(1) of the *Bank Act*, esp. para. (b)). A bank which lends pursuant to the foregoing paragraph can, through its officers, employees or agents, take possession of or seize the property covered by the security if, *inter alia*, the borrower is in default of making payments owed to the bank under the loan for which the security was given, the borrower attempts to dispose of the property covered by the security without the bank's consent, or the secured property is seized by a third party. In order for these powers to be enforceable against third parties, the security must be registered.

4.2.3 What reporting requirements does a receiver have?

On its appointment, the receiver must provide notice of its appointment to all known creditors and, at various stages of administration of the receivership, prepare and distribute interim and final reports concerning the receivership. These reports are filed with the Office of the Superintendent of Bankruptcy and may be made available to all creditors. A court-appointed receiver must also report to the court, at such times and intervals as may be required, while carrying out its mandate.

4.2.4 How do creditors assert their claims in a receivership?

Where a receiver is court-appointed, the court will typically issue a stay of proceedings restricting creditors from exercising any rights or remedies without first obtaining permission from the court. This stay is generally analogous to the comprehensive stay of proceedings found in CCAA proceedings and it is much broader than the statutory stay of proceedings when a company becomes bankrupt.

Typically, once a receiver has realized on the assets of the debtor, it will seek to distribute proceeds to creditors in accordance with their entitlements and priority, following court approval. If the only recovery is to secured creditors, there may be no need for a claims process. If there are any surplus funds after satisfying all secured claims, the receiver may run a court-sanctioned claims process or seek the court's approval to assign the debtor into bankruptcy and have unsecured claims dealt with through bankruptcy proceedings (see Section XV.4.1 "Bankruptcy" above).

4.3 Priorities in liquidation

4.3.1 What are the super-priority claims?

Secured creditors rank in priority to unsecured creditors in a liquidation; however, there are certain statutorily prescribed super-priority claims that will rank ahead of secured creditors.

The BIA provides a priority for certain workers (the priority does not apply to officers or directors of the debtor company), up to a maximum of C$2,000 per employee, for unpaid wages (including vacation pay but not including severance and termination pay) earned up to six months before the appointment of a receiver or initial bankruptcy event (see Section XV, 3.3, "Where can a proposal be filed?"). The priority is secured by a charge over the debtor company's current assets, which are essentially inventory and receivables. To the extent that a receiver or trustee pays the worker's claim, the secured claim is reduced accordingly.

The *Wage Earner Protection Program Act* establishes a program run by the federal government through which employees entitled to claim a priority for unpaid wages are compensated directly by the government, to a maximum of the greater of C$3,000 in actual unpaid wages or an amount equal to four times the maximum weekly insurable earnings under the *Employment Insurance Act*, which currently equals approximately C$3,700. The government is subrogated to the rights of the unpaid employee for amounts paid under this program, and receives a priority claim against the current assets of the debtor company in the amount of the compensation actually paid out, to a maximum

amount of C$2,000 per employee. Any balance over such C$2,000 priority claim does not have priority over secured creditors.

The BIA also provides a priority for amounts deducted and not remitted and for unpaid regularly scheduled contributions (i.e., not special contributions or the underfunded liability itself) to a pension plan by creating a priority charge, equal to the amount owing, over all of the debtor company's assets.

Unpaid wages and unpaid pension contributions effectively have the same priority against proceeds realized in a CCAA sale or sale pursuant to the proposal provisions of the BIA, as any proposal or plan of arrangement must provide that such priority claims are satisfied.

Before distributions are made to unsecured creditors in an insolvency proceeding, certain other statutorily mandated priority claims, such as employee deductions (i.e., income tax withholdings, unemployment insurance premiums and Canada Pension Plan premiums) must also be paid.

In addition to those listed above, there are also a number of other federal and provincial statutory liens and deemed trusts that have priority over secured creditors outside of bankruptcy, but which are treated as ordinary unsecured claims following bankruptcy (e.g., liens for unremitted federal and provincial sales tax). CCAA liquidations and receivership proceedings are often converted into bankruptcy proceedings, in part to achieve a reversal of these priorities.

4.3.2 What is the priority scheme after the super-priorities and secured creditors are satisfied?

Once the statutory super-priority claims and secured creditor claims are satisfied, the BIA sets out the priority scheme for distribution to unsecured creditors, primarily as follows:

1. The costs of administration of the bankruptcy
2. A Superintendent of Bankruptcy's levy on all payments made by the trustee to creditors (which is currently five per cent on the first C$1-million of distributions, and a sliding scale on amounts in excess of C$1-million)
3. Preferred claims, which include wage claims in excess of the statutory C$2,000 charge, secured creditors' claims in the amount equal to the difference between what they received and what they would have received but for the operation of the wage and pension super-priorities, and landlords' claims up to the maximum amounts prescribed by statute
4. Ordinary unsecured claims on a pro rata basis

5. Going Concern Sales

5.1 Can an insolvent business be sold as a going-concern?

Although a going-concern sale can be affected by a trustee in bankruptcy, a sale of an insolvent business on a going-concern basis will typically be conducted by a court-appointed receiver or through the CCAA or BIA proposal process.

5.2 What is involved in a receivership sales process?

To sell a business on a going-concern basis, a court-appointed receiver will typically request that the court approve a detailed marketing process for the assets of the company. The requirements for and timelines of the marketing process will vary depending on the nature of the business, the value of the assets, the rate at which the assets will depreciate in value through a sales process, the available operating financing and the realistic pool of potential purchasers. The court-appointed receiver will

select the bidder with the best offer, taking into account value offered, conditions of closing, timing of closing, the purchaser's ability to close and any potential purchase price adjustments, among other factors.

While there is no statutory requirement for a stalking-horse process in Canada, Canadian courts routinely establish a stalking-horse process by court order and stalking-horse sales are commonplace in Canada. However, unless specifically authorized by the court, the agreement of purchase and sale with the winning bidder will not be subject to overbids as is the case in the Chapter 11 stalking-horse process.

The receiver, on notice to interested persons, will then request that the court approve the agreement of purchase and sale and vest the assets in the purchaser free and clear of all liens and encumbrances. Liens and encumbrances that exist in the purchased assets will be preserved in the proceeds of sale with the same rank and priority as they had in the purchased assets. Net sale proceeds are typically held by the receiver pending the issuance of a "distribution order" of the court authorizing the receiver to disburse the funds to creditors in accordance with their entitlements. All interested parties are required to receive notice of the motion for the distribution order and disputes between creditors as to priority and allocation of funds are usually addressed at the distribution motion, rather than at the sale approval stage.

5.3 What is involved in a CCAA sales process?

Like sales conducted pursuant to section 363 of the U.S. Code, sales by the debtor while under CCAA protection have become a preferred method of realization in many cases. Sale approval and vesting orders are available to give the purchaser the necessary comfort that it will acquire the purchased assets free and clear of any liens and encumbrances.

The CCAA sales process is similar to the receivership process, except that the debtor itself controls the process (under the supervision of the monitor), is the vendor, and is the party requesting the court's approval of the process and eventually the sale itself. Generally, the sales process is supported by the key stakeholders including DIP lenders, who have significant influence over the debtor's sales process. The debtor will also require the support of its monitor if the sales process and sale are to be approved by the court. Courts also frequently approve the retainer of a financial adviser or investment bank to conduct the sales process on behalf of the debtor.

The CCAA provides factors that a court is to consider in determining whether to approve a sale outside of the debtor's ordinary course of business. These factors include:

- Whether the sales process was reasonable in the circumstances
- Whether the monitor approved the sales process and the sale, and determined that the sale would be more beneficial to creditors than a sale through a bankruptcy proceeding
- The extent to which creditors were consulted
- The effects of the proposed sale on creditors and other affected stakeholders
- Whether the consideration to be received for the assets is fair and reasonable, taking into account their market value
- If the sale is to a related party, whether good faith efforts were made to sell the assets to unrelated parties and whether the consideration to be received is superior to any other offer that would be received under the sales process

The proceeds of the sale may be held by the monitor. As is the case with sales by court-appointed receivers, a vesting order will provide that creditors will have the same priority against the proceeds that they had against the assets prior to the sale. Following court approval and closing, the court will authorize the distribution of the proceeds to creditors in accordance with their priorities. If there are surplus funds available for unsecured creditors following payment to secured creditors, it is common

to seek leave of the court to bankrupt the debtor and have any surplus proceeds distributed by a trustee in bankruptcy in accordance with the priorities set out in the BIA (see Section XV, 4.3, “Priorities in liquidation”). Beneficiaries of deemed trusts (or their legal representatives), whose priority would be reversed on bankruptcy, should be given notice of any proceeding to bankrupt the debtor company. The debtor company may also elect to file a plan of arrangement or compromise that provides for the distribution of proceeds of sale to unsecured creditors.

5.4 Can a secured creditor credit bid in Canada?

There is no CCAA equivalent to section 363(k) of the U.S. Code, which expressly authorizes a secured creditor to credit bid its debt. However, courts have routinely authorized credit bids in Canada. Unlike in the U.S., there is no case law in Canada addressing a collateral or administrative agent’s contractual right to credit bid on behalf of a syndicate of lenders and bind dissenting lenders. However, it is anticipated that a court would look to the provisions of the agency agreement and security documents to determine the scope of an agent’s security.

6. Cross-Border Insolvencies

Like Chapter 11, the CCAA provides for the co-ordination of cross-border insolvencies. The CCAA and BIA contain comprehensive provisions for the recognition of foreign insolvency proceedings. These provisions, incorporated into both the CCAA and BIA, are based on the UNCITRAL Model Law on Cross-Border Insolvency, similar to Chapter 15 of the U.S. Code. The majority of co-ordinated cross-border proceedings for large commercial insolvencies are conducted under the cross-border provisions of the CCAA rather than the BIA. Accordingly, the CCAA provisions are summarized below.

6.1 What is the purpose of the Model Law?

The purpose of the Model Law, as adopted in the CCAA, is to promote:

- Co-operation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies
- Greater legal certainty for trade and investment
- The fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies
- The protection and maximization of the value of debtor company’s property
- The rescue of financially troubled businesses to protect investment and preserve employment

6.2 Who may commence a recognition proceeding?

A foreign representative may apply to a Canadian court for recognition of a foreign proceeding in respect of which he or she is a foreign representative. Prior to such appointment, a proposed foreign representative may seek an interim order which provides for a stay of proceedings to protect the assets of the debtor company for the period of time between the commencement of a foreign proceeding and the date on which a foreign representative is appointed by the foreign court, after which it may seek full recognition of the foreign proceedings.

6.3 What is a foreign representative?

A foreign representative is a person or body (including one appointed on an interim basis) who is authorized, in a foreign proceeding in respect of a debtor company, to: (a) monitor the debtor

company's business and financial affairs for the purpose of reorganization; or (b) act as a representative in respect of the foreign proceeding.

As a result of the second criteria, a debtor company itself can be a foreign representative, provided it has been duly authorized to act as such. Among other things, a foreign representative is required to inform the Canadian court of any substantial change in the status of the recognized foreign proceeding and any substantial change in the foreign representative's authority to act.

6.4 What is a foreign proceeding?

A foreign proceeding is a judicial or an administrative proceeding, in a jurisdiction outside Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation.

6.5 What evidence needs to be before the court in a recognition proceeding?

In connection with application for recognition, there are certain basic documentary requirements: (a) a certified copy of the instrument that commenced the foreign proceeding — typically a court order; (b) a certified copy of the instrument authorizing the foreign representative to act as foreign representative — typically a court order; and (c) a statement identifying all foreign proceedings in respect of the debtor company that are known to the foreign representative. In the absence of the evidence described above, the court has discretion to accept other evidence satisfactory to it.

6.6 What discretion does the court have in recognizing the foreign proceeding?

If the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and the applicant is a foreign representative in respect of that foreign proceeding, the court shall make an order recognizing the foreign proceeding. There is no discretion in this regard. However, the court does have discretion as to what relief is granted in connection with the recognized proceedings (see Section XV, 6.9, "What obligations does the court have once recognition has been granted"). In addition, the order granting recognition will specify whether the proceeding is a "foreign main proceeding" or a "foreign non-main proceeding".

6.7 What is a foreign main proceeding?

A foreign proceeding will be a "main" proceeding if it is taking place in the jurisdiction that is the centre of the debtor's main interests (COMI). There is a presumption that the debtor company's registered office is its COMI. Provided there are no insolvency proceedings already commenced in Canada with respect to the debtor company, in recognizing a foreign main proceeding the court "shall" make an order, subject to any terms and conditions it considers appropriate, granting a stay of proceedings until otherwise ordered by the court, and restraining the debtor company from selling assets in Canada outside the ordinary course of business. Such recognition orders must be "consistent" with any order that may be made under the CCAA.

6.8 What is a foreign non-main proceeding?

A foreign non-main proceeding is defined in the negative: a foreign non-main proceeding is a foreign proceeding that is not a foreign main proceeding. If the court recognizes the foreign proceeding as a

“non-main” proceeding, the stay is not automatic, but the court may, at its discretion, order a stay if it is necessary for the protection of the debtor’s property or the interests of creditors.

6.9 What obligations does the court have once recognition has been granted?

If an order recognizing a foreign proceeding is made, the court is required to co-operate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

Forms of co-operation include, among other things, the appointment of a person to act at the direction of the court — typically referred to as an “information officer” having similar reporting obligations as a monitor in a CCAA case — and the co-ordination of concurrent proceedings regarding the same debtor company.

6.10 What rules can the court apply?

Nothing in the CCAA prevents the court, on application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of the CCAA.

Also, nothing in the CCAA prevents the court from refusing to do something that would be contrary to public policy. Under Chapter 15 of the U.S. Code, the analogous provision refers to anything that is “manifestly” contrary to public policy. This suggests that the U.S. courts are directed to be even more accommodating than their Canadian counterparts, when called upon to determine what is contrary to public policy.

XVI. Dispute Resolution

1. What is the Canadian Court System Like?

The Canadian court system is quite similar to the systems of both the United States and Great Britain. There are two parallel court systems in Canada — federal and provincial. Accordingly, in Canada's 10 provinces and three territories, there are both federal and provincial courts. The province of Quebec is unique from the rest of the country in that it administers civil law while the courts of the remaining provinces and territories administer the common law.

Unless a matter has been assigned by statute to the Federal Court of Canada, the Provincial Superior Courts have inherent jurisdiction to hear matters. The Federal Court of Canada has jurisdiction over specialized matters, including litigation relating to the *Income Tax Act* (Canada), intellectual property rights and maritime law. Both the Provincial Superior Courts and the Federal Courts have two levels — a trial division and an appeal court. The Supreme Court of Canada is the final court of appeal for all decisions made by either federal or provincial courts. A more detailed discussion of dispute resolution is contained in the Blakes *Litigation and Dispute Resolution in Canada* Guide.

2. Independence of the Courts

While judges are appointed by elected officials, Canadian courts are completely independent from other branches of government. Accordingly, any government action is subject to review by the courts and in particular, subject to scrutiny under the *Constitution of Canada* including the Canadian *Charter of Rights and Freedoms*. The *Charter of Rights and Freedoms* includes guiding principles for judicial process that include rules of fairness and equality, and protections for accused persons. Canada's courts are open to the public unless there are compelling reasons for a closed hearing.

3. Litigating Through the Courts

For civil disputes, each of the provinces and territories has rules of procedure for the conduct of matters that come before the courts. In Quebec, prior to the trial, all parties to civil litigation are required to produce all documents relevant to the facts alleged in the proceedings. This rule differs from the one in Ontario, which requires production of all documents relevant to any matter in the proceedings. Documents are broadly defined and now include such things as emails, computer files, tape recordings or videos. In cases where the claim is more than C$30,000, the parties may hold examinations of a representative of the other party. Although examinations of more than one representative of a party can be permitted, they are rare. Unlike the American system, Canada's rules do not provide for automatic rights of discovery of third parties. If a party wishes to examine more than one representative or third parties to an action, it needs to obtain leave of the courts to do so.

Quebec has special rules to manage the litigation process. These case management rules provide for greater involvement by the judiciary in the conduct of an action and make things such as timetables mandatory.

4. Costs

Under the Quebec court system, the loser generally pays legal costs following litigation, which are established by tariff and are minimal. The losing party must pay all judicial costs, including the costs of the stenographer and experts, unless the court reduces or compensates them, or orders otherwise. As well, the court may reduce the costs relating to experts' reports requested by the parties, particularly if the court is of the opinion that there was no need for the report, the costs are

unreasonable or a single expert's report would have been sufficient. The winning party is generally not entitled to recover solicitor-client fees, except if the Court orders otherwise, in exceptional circumstances. The party that is entitled to costs prepares a bill thereof in accordance with the tariffs in force, and has it served upon the party who owes the costs with a notice of at least five days of the date when it will be presented for taxation before a court clerk.

Contingency fees are permitted in Quebec subject to compliance with the *Bar Act* (Quebec) and professional conduct rules.

5. Class Actions

Class actions involving Quebec residents may be brought before the Superior Court of Québec or the Federal Court of Canada. In addition, the Supreme Court of Canada has opened the door to class actions on behalf of residents of several provinces. In a class action, a person or persons take on the role of representative plaintiff, representing the interests of the group. Early in the litigation, the action must be authorized by the Court as a class proceeding, otherwise, it will proceed as a regular action. Class actions are managed by one judge for all pre-authorization motions. This case management judge will often also be the trial judge if the action proceeds through to trial.

Plaintiffs' counsel in Canada are increasingly bringing class actions in a number of areas, particularly product liability, *Competition Act* (antitrust) and *Securities Act* matters, mass torts, consumer disputes and more recently, digital privacy cases. To date, few class actions have proceeded through to trial and judgement. The vast majority of cases are either disposed of early through preliminary motions or are settled early in the process or following certification. Class actions have become a concern for commercial businesses in that they are time-consuming and expensive to defend and run the risk of substantial settlements or court awards.

6. Alternative Dispute Resolution

Because of the expensive and time-consuming nature of litigation, alternative dispute resolution is firmly established in Canada. Alternative processes to litigation, such as mediation and arbitration, are increasingly being used to resolve both commercial and non-commercial disputes. Most often, such alternative mechanisms are voluntary, but the Code of Civil Procedure requires that the parties consider alternative dispute resolution before bringing judicial proceedings.

In the right case, alternative dispute resolution can be highly effective and much less expensive than traditional litigation. It may also help the parties to achieve a reasonable solution that will enable them to continue their business relationship.

Mediations are presided over by a neutral third party who facilitates a resolution to the dispute. Mediation is not binding and parties enter into it willingly on the understanding that if they do not reach an agreement, they can walk away and continue the litigation process. In contrast, arbitration is a more formal process and is often binding.

Many commercial agreements in Canada now provide for binding arbitration or other forms of alternative dispute resolution as an alternative to the courts for disputes arising out of the agreement. In arbitration, an arbitrator who has expertise in the area of disagreement will hear evidence and legal argument, much like a hearing in court. Arbitration can sometimes (though not always) be less formal and expensive than court proceedings and can usually be completed more quickly and privately. Prior to entering into an arbitration or mediation, the parties will generally sign an arbitration or mediation agreement that sets out the parameters of the process.

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