We are committed to being the Canadian gateway for our clients.

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MESSAGE FROM THE MANAGING PARTNER OF AIRD & BERLIS LLP

I am delighted to be able to communicate with our many clients, sources of referral, friends and others throughout the world in my capacity as Managing Partner of Aird & Berlis LLP. I wish to stress our great appreciation for all of our relationships with all of the readers of this message and to say thank you for your support. As Aird & Berlis LLP gets close to celebrating 100 years of continuous legal practice in Toronto, Canada we remember that it is primarily due to our relationships with the people with whom we do business, together with our continued excellence in Canadian legal skills, which has allowed us to grow and prosper.

We started as a Canadian legal firm focusing on the then primary business of Canada and we have not deviated from our roots – we are still a Canadian law firm focusing on the business of Canada. Canada is a nation focusing primarily on mid-market business and domestically our firm focuses on mid-market businesses. We have many areas of expertise, such as corporate/commercial, corporate finance, commercial litigation, financial services, land use planning, mergers and acquisitions, mines and minerals, real estate and taxation. We also have numerous subspecialties of which we are very proud, such as alternative dispute resolution, employment, energy, environment, gaming, infrastructure, intellectual property, privacy, private equity, technology, and transportation. Members of our firm in all areas of our practice remain ready to be available to provide timely, high quality Canadian legal advice.

While our recognized expertise domestically has continuously expanded, our firm has significantly grown its internationally recognized practice in cross border activities – including taxation and corporate/commercial and corporate finance (mergers and acquisitions and capital markets) practices. We have acted in connection with the Canadian legal aspects of many international large dollar value transactions. In connection with our cross border activities, we also apply our broad experience and expertise in Investment Canada Act (including our Canadian CFIUS equivalent) and Competition Act (Canada) (our HSR equivalent). We have broad experience in many deal structures which we bring to bear when we assist you in the Canadian aspects of international transactions. We work well with you, your clients and all of your clients’ professional advisors to provide seamless advice on the Canadian legal aspects of a transaction.

We are tremendously proud of the earned external recognition of our team members. Our team has earned recognition from Chambers Global, Who’s Who Legal, Legal 500, Martindale-Hubbell Law Directory, Martindale-Hubbell Bar Register of Preeminent Lawyers, the Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada and The Canadian Legal Lexpert Directory, to name just a few. Members of our team have had and many continue to have leadership roles with the International Bar Association, the American Bar Association, the Canadian Bar Association, the Canadian Tax Foundation, the International Fiscal Association (international branch) and the International Fiscal Association (Canadian branch). We have had members of our firm join us from government and we have placed members of our firm with governmental agencies. Also, we have had members of our firm provide their expertise to community and regulatory agencies.

Our commitment to everyone is consistent – we shall deliver high quality Canadian legal services in a timely manner at a reasonable price.

One event of note was a decision of the Supreme Court of Canada in late 2014 wherein a thirty plus year view of Angela Swan, Counsel at Aird & Berlis LLP, was adopted by our Supreme Court and became a principle of the law of Canada. In essence, the decision said that the courts should recognize that the parties to an ongoing commercial contract have a duty to act in good faith towards one another in the performance of that contract. In one of the most important contract law decisions in recent memory, the Supreme Court made liberal reference to Angela’s most recent book (written with Jakub Adamski), Canadian Contract Law (3rd ed.). The Court also cited one of her earlier papers with approval.

Our Doing Business in Canada brochure is intended to provide readers with a brief introduction to the Canadian legal regime (excluding Quebec). We wish to be your gateway to Canada and assist you in your entry into or expansion in Canada. If you have any questions, please do not hesitate to contact me and I shall arrange contact with the appropriate person within our firm on a timely basis.

Toronto, Canada, March 2015

Eldon Bennett, Managing Partner
Introduction

MARCH 2015

AIRD & BERLIS LLP
Barristers and Solicitors
Canada welcomes international participants in its economy and business community. A focus of Aird & Berlis LLP is to represent international clients investing in Canada and to assist domestic clients in their business and financial dealings with international participants. At Aird & Berlis LLP, we have extensive experience and expertise in acting for international and Canadian clients. We are very proud of the international recognition given to various members of our firm by authoritative guides, including: The International Who’s Who of Business Lawyers; Chambers Global; The Legal 500 Canada; Martindale-Hubbell Bar Register of Preeminent Lawyers; Legal Media Group Guides to the World’s Leading Lawyers; International Tax Review – North America Guide; The Canadian Legal Lexpert Directory; The Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada – “40 Repeatedly Recommended Canadian Corporate Mid-Market Lawyers”; The Expert Guide to the Leading US/Canada Cross-border Corporate Lawyers in Canada; and The Best Lawyers in Canada.

We are the Canadian gateway for our international clients. We represent a broad range of business entities and individuals. We act for international entities doing business in Canada and Canadian entities doing business abroad. We are dedicated to providing counsel to our clients with respect to their international business activities with a particular focus on taxation, corporate finance (including mergers and acquisitions), securities, financing and real estate investments. We make your business our business and we are ready to assist your business at any time.

Our dedication to the international business arena has been exemplified by our commitment to our international practice. Our lawyers’ commitment is evidenced by our active participation in various international associations where we learn from our colleagues around the world including: AIJA (International Association of Young Lawyers); American Bankruptcy Institute; American Bar Association; American Intellectual Property Law Association; American Real Estate Society, Association of Commercial Finance Attorneys; Inter-American Bar Association; International Association of Restructuring, Insolvency, and Bankruptcy Practitioners; International Bar Association; International Council of Shopping Centres; International Fiscal Association; International Municipal Lawyers Association; International Project Finance Association; International Swaps and Derivatives Association; International Trademark Association; and International Women’s Forum; among many others.

**DISCLAIMER**

This publication is a general overview of Canadian national and provincial law that has been prepared by Aird & Berlis LLP. It is intended for those planning to start, acquire or invest in a business in Canada, and who require more knowledge about the laws and regulations that affect the conduct of business in Canada and, in particular, the province of Ontario.

This publication is current as of February 2015, or such other date as indicated in the separate chapters.

Please note that the contents of this publication should be regarded as a summary and should not be considered as legal advice to the reader. We therefore recommend that you seek the advice of our lawyers on any specific legal issue.

If you have any questions or comments on the materials, please feel free to contact any member of our firm. For a list of our lawyers and areas of expertise, please visit us at airdberlis.com.
Canada was created in 1867 and currently consists of ten provinces and three territories. Canada is a parliamentary democracy whose form of government is a constitutional monarchy with Queen Elizabeth II as its head of state. The Governor General, to whom The Queen has delegated all of her powers over Canada (except the power to appoint or dismiss the Governor General), is obliged to follow the wishes of Canada’s elected representatives. As The Queen’s representative in Canada, the Governor General’s role is largely ceremonial. Canada’s two official languages are English and French and both have equal status in federal courts, Parliament and in all federal institutions.

GOVERNMENT AND POLITICS

Canada is a federal state in which legislative power is constitutionally divided between the federal government and the provincial governments. A third level of government, municipal or local government, has only the powers granted to it by the applicable provincial government. The federal and the provincial governments have exclusive jurisdiction and legislative powers over specified matters. The federal government also has “residual” jurisdiction over matters not specifically assigned to the provinces. In addition, while Canada’s three territories (Yukon, Northwest Territories and Nunavut) have legislatures and govern themselves on local matters, their constitutional responsibilities are fewer than those of the provinces.

The federal government has control over matters of national interest, such as trade and commerce, transportation and communication, banking, currency, customs and excise, external relations, defence and criminal law. The provincial governments have power over matters of a local nature, such as property and civil rights within the province, municipal institutions, education, health and welfare, and the administration of justice. For more than three decades, Canada has had the Canadian Charter of Rights and Freedoms, which imposes limitations on government powers in order to protect civil liberties.

Canada has a parliamentary government. The legislative power of the federal government is vested in the Parliament of Canada, which consists of the Crown, an upper house, known as the Senate, and a lower house, known as the House of Commons. The members of the House of Commons (known as Members of Parliament, or MPs) are chosen in a general election held on the third Monday of October in the fourth calendar year following the last general election, though there is no prohibition on a general election being called on another date, when, on the advice of the Prime Minister, the Governor General dissolves Parliament. The federal government is headed by the Prime Minister, who is normally the leader of the political party that has the most members in the House of Commons. The members of the Senate are currently appointed by the Governor General on the recommendation of the Prime Minister, and appointments are distributed on a regional basis.

Canada’s provinces have systems of government which parallel that of the federal government in several ways. A premier leads each provincial government by virtue of being the leader of the political party with the most support in the provincial legislature, and forms a cabinet from the elected members of the governing party. As the federal and the provincial governments are elected separately, there may be different political parties in power at each level. There are no provincial bodies equivalent to the Senate.

LEGAL SYSTEM

There are two legal systems in Canada: British-based common law and European-style civil law. Civil law predominately applies in the province of Québec, and common law applies in all other provinces and territories. Both legal systems are subject to the Constitution of Canada.

The Supreme Court of Canada is Canada’s highest court. It is the final court of appeal having jurisdiction to hear appeals from the courts of appeal of each province, as well as from the Federal Court of Appeal, which has jurisdiction over a relatively small range of specialized areas under the jurisdiction of the federal government, such as intellectual property. The Supreme Court of Canada consists of nine judges, three of whom must be from the province of Québec. The judges of the Supreme Court, the Federal Court and certain provincial courts (so-called “Superior Courts”) are appointed by the Governor General on the advice of the Prime Minister and cabinet.

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In selecting the most appropriate vehicle for carrying on business in Canada, foreign entities will often be driven by tax preferences. Other factors that should be considered in determining the form of the business organization include potential liabilities, the method of financing and the nature of a particular business. The most common form of business organization in Canada is a corporation. Foreign entities may also consider conducting business in Canada through a branch office, partnership, limited partnership, franchise and licensing arrangement, joint venture, or by entering into contracts with Canadian distributors and independent agents.

CORPORATIONS

Overview

A foreign entity may choose to carry on business in Canada through a Canadian subsidiary corporation. A corporation with share capital is the form of business enterprise used most frequently to carry on commercial activities. A corporation is a legal entity with a separate legal existence from its shareholders, has perpetual existence and, unless its constating documents provide otherwise, has all the rights, powers and privileges of a natural person. A corporation offers the greatest flexibility in both the structuring of decision-making authority and of investment in the business. Its separate legal existence, however, also means that a corporation is subject to separate reporting, regulatory and filing requirements imposed by various levels of government.

Incorporation as a Federal or Provincial Corporation

In Canada, a corporation may be incorporated under federal law pursuant to the Canada Business Corporations Act or under the corporate statute of any province or territory. The key distinction between the two types of corporations is that a federal corporation may carry on business in any province or territory provided that it complies with the applicable registration and reporting requirements of each province. In contrast, a provincial corporation is required to obtain an extra-provincial licence and register in any other province where it carries on business. Many incorporation statutes have minimum Canadian residency requirements for directors.

Unlimited Liability Companies

Unlimited liability companies are flow-through entities that may appeal to foreign entities for tax purposes, and are available under the incorporate statutes of certain provinces.

OTHER BUSINESS VEHICLES

Branch Office

A non-resident foreign corporation may choose to carry on business in Canada through an unincorporated branch office. A branch operation is not a separate legal entity and, accordingly, exposure to debts, liabilities and obligations of the Canadian operation are important considerations. In addition, the foreign corporation will be subject to federal and provincial laws and must obtain a licence or otherwise register in all provinces in which it carries on business.

Partnerships

A general partnership is a relationship where two or more persons, either individuals or corporations, carry on a business in common with a view to profit. The partnership is not a legal entity separate from the partners. Subject to the provision of any agreement between the partners, each partner is allocated a specified share of the profits and losses of the partnership business and is entitled to take part in the management of the partnership business. A separate income tax return is not required from a partnership, although in many cases an information return is required for tax purposes. The tax consequences of a partnership’s business activities flow through to the individual partners in their respective proportions and are reported upon individually in each partner’s tax return. All partners assume unlimited liability for the debts and obligations of the partnership.

Limited Partnerships

A limited partnership is a partnership with unique characteristics. It is comprised of: (a) one or more general partners who manage the business and assume all liabilities of the limited partnership; and (b) limited partners whose liability is limited to their contribution to the partnership. In Ontario, in order to maintain limited liability status, limited partners are not permitted to take part in the management of the business.

Except in certain circumstances, the flow-through features and tax consequences of a general partnership are the same for a limited partnership. In essence, a limited partnership combines the tax benefits of a partnership with the advantages of limited liability.

Franchising

A foreign entity may expand its business into Canada by means of a franchising arrangement. In a typical franchise arrangement, a franchisor develops a business system, in association with a trademark, and licenses the use of that system to a franchisee. The franchise relationship is governed by a franchise agreement which sets out the
details of the relationship, including the fundamental rights and obligations of the parties and the operating principles of the business system. Foreign entities can choose to set up a separate Canadian entity through which Canadian licenses may be granted, or, in certain circumstances, can grant licences directly from the foreign country to Canadian franchisees.

Certain provinces have specific legislation governing the sale of franchises and impose specific disclosure requirements.

**Joint Ventures**

The term “joint venture” is commonly used to describe a contractual business arrangement between two or more parties that have agreed to combine complementary resources for a particular undertaking or specific business venture without the formality of a new legal entity such as a corporation or limited partnership. A joint venture is not recognized as a separate legal entity and therefore, for tax purposes, income and losses are calculated separately according to the business structure of each party.

*February 2015*
Regulatory requirements imposed by Canadian securities authorities and stock exchanges are generally comparable to U.S. requirements. In Canada, securities regulation is within provincial jurisdiction. Currently, each of the provinces and territories has securities regulatory legislation. Although the securities regulatory regimes are generally similar within Canada, there is currently no national securities law or national securities regulator.

The Canadian uniform securities regulation system has developed “organically” over time on the basis of increased cooperation between provincial and territorial regulators. Currently, such “organic” development is evidenced by coordination among all provincial securities commissions (principally through an umbrella organization known as the Canadian Securities Administrators or CSA) in formulating “national instruments” and “national policies” which have been adopted by each of the provincial and territorial securities regulators. Further, with the adoption of the “principal regulator” or “passport” system by each province and territory of Canada (other than Ontario), many aspects of securities law are effectively regulated by one participating jurisdiction in addition to Ontario. Moreover, the national electronic filing system (SEDAR) (the Canadian equivalent to EDGAR) and the passport system encourages regulators to delegate responsibilities to one another.

Canada has a national registration database (“NRD”) system, which is a web-based system that permits dealers and advisers to file registration forms electronically and to deal with one principal regulator in connection with initial registration, amendments to registration and approval or review of certain sponsored individuals. Non-resident firms are not permitted to use the NRD system due to differing requirements across Canada for non-residents.

**PROSPECTUS REQUIREMENT**

A “security” is broadly defined, similar to the U.S. definition, to be any document evidencing title to or an interest in, among other things, the capital, assets, profits or property of a person or corporation. In addition, a number of different types of agreements and instruments involving monetary consideration are specifically included in the definition of “security” including, among other things, notes, stocks, treasury stock, bonds, debentures, options or privileges on a security.

Provincial and territorial securities laws generally require the filing of a prospectus to qualify any “distribution” of securities, subject to the availability of a prospectus exemption. A distribution of securities includes, among other things, a trade by an issuer in previously unissued securities and a trade in securities from a person that is a “control person” in respect of the issuer. A person (or combination of people acting jointly or in concert) generally presumed to be a “control person” in respect of an issuer if that person (or combination of people acting jointly or in concert) holds more than 20% of the voting rights attached to the securities of the issuer. In addition, securities legislation of the various Canadian jurisdictions deem certain trades in securities that were previously acquired under an exemption from the prospectus requirements, called “first trades”, to be distributions. Securities of an issuer that is a “reporting issuer” under Canadian securities law that were acquired under an exemption from the prospectus requirements are generally freely tradable, depending on the exemption relied upon, after a four-month hold period.

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

**PROSPECTUS DISCLOSURE**

A prospectus must be prepared in accordance with applicable provincial and territorial regulations and must contain “full, true and plain” disclosure of all material facts relating to the securities being offered. In the event that a prospectus contains a misrepresentation, the issuer and each underwriter that signs it may be found liable. An issuer would not be liable if it could prove that the purchaser purchased the securities with knowledge of the misrepresentation. In addition, directors of an issuer and underwriters can also rely on a due diligence defence and not be liable for the misrepresentation.

Upon filing a final prospectus and being receipted therefor, the issuer (assuming it had not already filed a prospectus) will become a “reporting issuer” in each jurisdiction in which a receipt for the prospectus was issued. As a reporting issuer, the issuer is subject to continuous disclosure rules and periodic reporting.

The regulation of trading in the “secondary market” is generally referred to as the “closed system.” In the closed system, every trade that is a “distribution” requires the filing of a prospectus or obtaining a ruling from a securities regulatory authority allowing the trade, unless a prospectus exemption is available. The resale of securities sold pursuant to a prospectus exemption requires reliance on a further exemption or, if this is not available, on a prospectus – unless a set of resale restrictions is met. Those restrictions are that the issuer of securities is a “reporting issuer” for the four months prior to the trade, that the securities carry a prescribed legend, that the person proposing to sell the securities must have held them for a minimum hold period of four months and that no unusual effort is made to prepare the market for the securities being sold. The system is called “closed” because the security never becomes freely tradable unless a prospectus is filed or, if distributed under a prospectus...
exemption, until enough time passes to allow information about the issuer and the security to be disseminated in the marketplace.

EXEMPTIONS FROM THE PROSPECTUS REQUIREMENT

The existing exempt offering regimes in various Canadian jurisdictions have been consolidated in National Instrument 45-106 – Prospectus and Registration Exemptions (commonly known as “NI 45-106”) which is designed to generally harmonize the prospectus and registration exemptions contained in various provincial statutes and instruments.

The most useful existing exemptions for an entity financing a business in Canada are the following exemptions: (a) the “accredited investor” exemption which permits certain qualified investors, including institutional investors and persons or companies that meet income or asset tests, to purchase securities without a prospectus. No minimum amount must be invested and accredited investors are able to re-sell securities in any dollar amount to other accredited investors; (b) the “substantial purchase” exemption permits a person to acquire securities on a prospectus and registration exempt basis where each purchaser invests no less than C$150,000 paid in cash; and (c) the “private issuer” exemption.

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

CONTINUOUS DISCLOSURE REQUIREMENTS AND OBLIGATIONS

There are generally two kinds of reporting requirements required under Canada’s continuous disclosure regime – “periodic” and “timely.” Periodic reporting requires a reporting issuer to disclose material information by filing disclosure documents such as financial statements, annual reports, annual information forms and proxy circulars. Timely reporting provisions, on the other hand, require a reporting issuer to disclose material changes as they occur, through press releases and material change reports. “Insiders” of a reporting issuer (i.e. officers, directors and over 10% shareholders), must also report any trade they might make in a reporting issuer’s securities within five days of the trade in question (the initial insider reports continue to be required to be filed within 10 days of the trade) with monetary penalties that are levied daily, depending on provincial jurisdiction.

National Instrument 51-102 – Continuous Disclosure Obligations (commonly known as “NI 51-102”) was introduced to provide a harmonized set of continuous disclosure requirements for reporting issuers across Canada (other than investment funds) and, generally speaking, sets out the obligations of reporting issuers relating to business acquisitions, annual information forms (“AIFs”), material change reporting, management discussion and analysis (“MD&A”), information circulars, proxies and other disclosure matters. The board of a reporting issuer is required to approve both interim, unless this function is delegated to the audit committee of the board, and annual financial statements prior to their release, and MD&As must include discussions of, and provide a comparative analysis of, all financial transactions, including all off-balance sheet transactions, as well as providing information about critical accounting estimates and facts that are required for a better understanding of the issuer’s affairs.

CORPORATE GOVERNANCE PRACTICES

The Canadian Securities Administrators have adopted a uniform set of corporate governance rules and policies. These rules and policies generally require reporting issuers to disclose their corporate governance practices by way of disclosure in their information circulars or AIFs and to be filed on SEDAR.

Other CSA policies are designed to provide “guidance” on corporate governance practices. This guidance, or best practices, constitutes recommendations relating to board independence, the role of a board in its management of board members, etc.

LIABILITY FOR SECONDARY MARKET DISCLOSURE

Ontario legislation grants certain rights of action to investors who purchase or sell securities from third parties in the market (commonly known as the “secondary market”) as opposed to investors who purchase securities from an issuer (commonly referred to as the “primary market”). This legislation creates an offence for fraud, market manipulation and misleading or untrue statements. It also introduces a regime for statutory civil liability by providing a cause of action in respect of a misrepresentation by or on behalf of a responsible issuer in its disclosure documents, whether oral or written, and a responsible issuer’s failure to make timely disclosure of a material change. This legislation creates a statutory right of action without regard to whether the purchaser or seller relied on any alleged misrepresentation, which is different from the common law cause of action for negligent misrepresentation which requires detrimental reliance.
STOCK EXCHANGES IN CANADA

The Toronto Stock Exchange ("TSX") is Canada’s largest stock exchange. The TSX also oversees and administers the Montréal Exchange (primarily a derivatives exchange) and the TSX Venture Exchange (the "TSXV"), which is a listed exchange for more junior companies.

TAKEOVER BIDS

The regulation of takeover bids in Canada is governed by the applicable provincial and territorial securities statutes in the various provinces and territories in Canada. A takeover bid in Canada is generally defined as an offer to acquire outstanding voting securities or equity securities of an issuer that would bring the “offeror’s securities” to 20% or more of the class in question. In this context, “offeror’s securities” include securities beneficially owned or over which control or direction is exercised by the offeror or persons acting jointly and/or in concert with the offeror. A purchase resulting in a holding of less than 20% of the relevant class of securities will not constitute a take-over bid even if the bidder obtains effective control of the company.

An “early warning” notification system is imposed once 10%, but less than 20%, of the voting or equity securities of a reporting issuer is acquired. In this case, every person (or persons acting jointly and/or in concert) acquiring 10% or more of the voting or equity securities of a reporting issuer is required to issue a press release containing certain prescribed information and to file an “early warning report” in prescribed form within two business days of the acquisition in question. A further press release and early warning report is required whenever an additional 2% of the outstanding securities is acquired by a person holding 10% or more.

A take-over bid must be made in compliance with the substantive and procedural requirements of the regulating statute of the applicable province or territory in the absence of an exemption from the take-over bid requirements. Generally speaking, a take-over bid offer is to be made to all security holders of a given class on identical terms. A formal offer requires preparation of a take-over bid circular satisfying certain statutory disclosure requirements, which circular must be sent to all shareholders of the target. However, it is not necessary to make an offer for all shares and 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 to those tendered to the offer. Conditions, other than financing, may be attached to the bid. For instance, it is common to make a purchase conditional upon obtaining a minimum level of acceptance, frequently two-thirds (the threshold for approval of certain fundamental corporate transactions in most jurisdictions) or 90% (the level which gives the offeror the right to acquire the balance of the shares outstanding).

There are various statutory exemptions from the take-over bid requirements and the provincial and territorial securities statutes provide securities regulatory authorities with discretion to exempt take-over bids from full bid compliance. The most commonly relied upon take-over bid exemptions under the provincial and territorial securities statutes are: (a) purchases and private agreements from not more than five persons where the consideration paid does not exceed 115% of the market price (as defined for the securities at the date of purchase); and (b) acquiring, at market prices, within any period of 12 months not more than 5% of the outstanding securities of a class measured at the commencement of the 12 month period.

In addition to the take-over bid regime, there are two other structures that can be used to acquire 100% of a public company; namely: (a) a plan of arrangement (which is effected under court supervision and requires the approval of two-thirds of those shareholders voting on the question) or (b) an amalgamation squeeze-out (which requires the approval of two-thirds of the votes of the shareholders voting on the question). In both the plan of arrangement and in an amalgamation squeeze-out, the shareholders may, under certain circumstances and within the prescribed time, affect “dissent” rights and demand that you pay fair value if they have a concern that the amount to be paid is not fair value.

In addition, the CSA has promulgated rules regarding related party transactions, insider bids and going private transactions. The essence of these rules is that if there is such a transaction (which is based on the economic result and not on the form) then the process must be oversee by an independent committee of the board of directors, there must be a valuation done by an independent valuator and there must be a vote of the approval of the “majority of the minority shareholders.”

CAPITAL POOL COMPANIES

The Capital Pool Company program is a unique two-stage listing process offered by the TSXV which brings together experienced participants in public capital markets with entrepreneurs seeking funding and a public listing. In stage one of the process, a new shell company (known as a “Capital Pool Company”) is listed on the TSXV by way of an initial public offering (the “CPC IPO”).

A financing, through an agent who is registered under applicable securities laws, must be completed in conjunction with the CPC IPO. The gross proceeds to the Capital Pool Company from the CPC IPO must be equal to or greater than C$200,000, and the gross proceeds of the CPC IPO plus all subsequent private placements prior to the Qualifying Transaction (as hereafter defined), must not exceed C$5 million.
In stage two (the “Qualifying Transaction”), the Capital Pool Company identifies a suitable asset or business (the “Target”). In order to be accepted by the TSXV, the proposed company resulting from the Qualifying Transaction (also known as the Resulting Issuer) must be able to meet the initial listing requirements set out in the TSXV’s policies. If the acquired business can meet the minimum listing requirements of the TSX, it can be directly listed on the TSX at the closing of the Qualifying Transaction.

In many cases, taking a business or asset public in Canada through the Capital Pool Company program can be a more cost- and time-efficient alternative than a listing through a traditional initial public offering.

*February 2015*
In Canada, taxes are levied at the federal, provincial and municipal levels of government. At the federal level, the government generates most of its revenue by way of income taxes and excise taxes imposed on the distribution and consumption of goods and services in Canada. The provinces and territories also impose income taxes and sales taxes, whereas municipalities generally levy taxes on real property. There are no stamp duties levied by any government in Canada.

The rates of income taxation to which a taxpayer will be subject will vary according to a number of factors, including: (a) the character of the income; (b) the nature of the business activity; (c) the jurisdiction in which that activity is carried on; and (d) the identity of the taxpayer in question.

TYPES OF INCOME

Under the Income Tax Act (Canada) (“ITA”), the residence of a person and the source of income are the key factors in determining liability for income tax. Non-resident persons are liable for Canadian income tax only in respect of income earned in Canada. The ITA imposes income tax on a non-resident who is employed in Canada, carries on business in Canada or disposes of certain types of Canadian property. Income resulting from the disposition of capital property gives rise to a capital gain, currently only one-half of which is taxable at the taxpayer’s rate of taxation as otherwise determined.

INDIVIDUALS

Individuals are liable for tax under the ITA on their worldwide income if they are resident in Canada. The tests for determining residency are not easily applied. Generally speaking, an individual’s residency status arises from his or her “connection” with Canada, generally whether such individual is ordinarily resident in Canada. An individual may also be deemed to be resident in Canada where the person sojourns (which generally means to visit or temporarily stay) in Canada for 183 days or more in a calendar year.

In Canada, individuals pay tax at graduated rates based on their income levels. Ontario now imposes a surtax equal to approximately 2% on individuals with taxable income in excess of C$220,000 for 2015. Accordingly, the top marginal rate of tax in Ontario for 2014 is 49.53%.

Because of tax credits, the top marginal rate of tax on dividends received by an individual resident in Ontario from a taxable Canadian corporation is 40.13% for non-eligible dividends while the top marginal rate of tax for eligible dividends is 33.82%. The effective top marginal tax rate on capital gains realized by an individual resident in Ontario is 24.77%. The top marginal rates vary between provinces and territories.

CORPORATIONS

Under the ITA, the taxation of a corporation varies depending on the jurisdiction of incorporation, the type of corporation, the type of income and the activities carried on by the corporation. As discussed in the context of individuals above, a corporation resident in Canada is liable for tax in Canada on its worldwide income. Credit for Canadian taxes is generally available with regard to foreign taxes paid with regard to foreign source income. A corporation is deemed to be resident in Canada if it is incorporated in Canada. A corporation will also be resident in Canada if its “central management and control” are in Canada.

In general, a corporation’s income for purposes of the ITA is its income computed in accordance with generally accepted accounting principles, as modified by specific rules in the ITA. For instance, corporate income for tax purposes is not computed on a consolidated basis. Also, the ITA provides rules in respect of depreciation (referred to as capital cost allowance) which may differ from depreciation for accounting purposes. In addition, the ITA provides deductions and credits in respect of scientific research carried on in Canada. Various rules restrict the deductibility of certain expenses, particularly in non-arm’s-length situations.

The combined federal and provincial corporate income tax rates vary from a high of 31% in Nova Scotia and Prince Edward Island to a low of 25% in Alberta. Ontario currently maintains a rate of 26.5%. These tax rates are reduced under the ITA for small businesses that are Canadian-controlled private corporations (“CCPCs”) and for corporations that carry on manufacturing or processing activities. A CCPC is a private corporation that is a Canadian corporation, other than a corporation controlled directly or indirectly by a non-resident, by one or more public corporations or by a combination of non-residents and public corporations. Depending on the facts, a corporation which is 50% owned by Canadians and 50% owned by non-residents may qualify as a CCPC and therefore be subject to a reduced rate of tax. A CCPC is generally subject to a reduced rate of tax on the first C$500,000 of business income it earns each year. In Ontario, the combined federal and provincial corporate income tax rate for a CCPC on such income is 15.5%. If certain income and capital tests are exceeded, the benefits of this low rate of tax may be lost. Where a non-CCPC earns income eligible for the manufacturing and processing deduction, the combined federal and provincial tax rate on such income in Ontario is 25%.

Ontario also has a corporate minimum tax (“CMT”), which will apply to all large corporations in Ontario with either gross revenues of at least C$100 million or total assets of at least C$50 million. Subject to certain adjustments, the CMT rate is 2.7%.
PARTNERSHIPS

For Canadian income tax purposes, a partnership acts as a flow-through entity. Unlike a trust, a partnership is not a taxable entity. While not a separate legal entity per se, the ITA requires that a partnership calculate its income or loss from each source as if it were a separate person resident in Canada before flowing through the income (or loss) from each source through to the individual partners in their respective proportions. Such income (or loss) retains its character in the hands of each partner and is then reported individually in each partner’s tax return with such income being taxed at each partner’s respective tax rate.

TRUSTS

Generally speaking, the scheme of the ITA allows a trust having only Canadian resident beneficiaries to determine whether the income of the trust will be taxed in the hands of the trust or flowed through to its beneficiaries to be taxed in their hands.

Income that is received by a trust and paid or payable to beneficiaries in the year is included in the income of the beneficiary and deductible by the trust. Losses of a trust may not be flowed through to the beneficiaries. On the other hand, income that is received by the trust and not paid or payable to the beneficiaries is taxed in the trust as if the trust were an individual. However, inter vivos trusts are taxed at the top marginal rate and are not entitled to individual tax credits.

Real Estate Investment Trusts (“REITs”) and other forms of business trusts have become much more common in recent years. However, beginning in 2007, a new tax applied to certain publicly-traded business trusts which meet the definition of “specified investment flow-through” (“SIFT”) trusts other than trusts which meet the definition of “real estate investment trust” for purposes of the ITA. Where this tax applies, the trust essentially loses its ability to flow through income to beneficiaries. As a result of the tax on SIFT trusts, most business trusts other than REITs converted to corporations before the end of 2010.

OTHER TAXES

The Canadian tax system also includes federal and provincial sales taxes, payroll taxes and land transfer taxes (addressed in the discussion under Real Estate). Individuals owning personal real property may also be subject to property taxes on the ownership or transfer of such property.

GST/HST AND PROVINCIAL SALES TAXES

Canada imposes a 5% federal goods and services tax (“GST”) on taxable supplies made in Canada. The tax generally applies to supplies of most goods and services made in Canada. Suppliers are liable to collect the tax from recipients of the supplies and remit such tax to the government. In some instances (notably certain imports), the recipient of supplies may have an obligation to self-assess and remit the tax.

Taxpayers may be entitled to an input tax credit if the tax is paid in respect of supplies acquired for use, consumption or supply in the course of commercial activities.

All provinces (other than Alberta) also have a provincial sales tax. Some provinces, such as Manitoba and Saskatchewan, directly impose the tax on certain sales of goods and services. Others, like Ontario and Nova Scotia, have harmonized their provincial sales taxes with the federal GST to create a harmonized sales tax (“HST”). Ontario imposes the HST at 13% on all goods and services that would be subject to the GST (other than a few enumerated exceptions). Quebec has a sales tax which is similar to, but not identical to, the GST.

Persons paying the HST in Ontario are entitled to an input tax credit in respect of tax paid on supplies acquired for use, consumption or supply exclusively in the course of commercial activities. However, Ontario currently imposes a temporary restriction on certain input tax credits (in the form of a recapture of such credits) on specified supplies acquired by large businesses. A large business is generally described as a business whose annual taxable supplies (including zero-rated supplies) in a fiscal year exceed C$10 million. For the purposes of the C$10 million annual limit, the annual taxable sales of GST/HST registered persons associated with a particular business will also be taken into account. The determination is based on the total consideration for taxable supplies made in Canada or made outside Canada through a Canadian permanent establishment. There are four broad categories of supplies that are subject to the temporary restriction for input tax credits. These are specified energy, specified telecommunications services, specified vehicles, and food, beverages and entertainment. However, the restriction does not apply to specified property or service acquired by a large business for the sole purpose of resupply, or specified property acquired by a large business for the sole purpose of becoming a component part of tangible personal property supplied by that business.

Non-residents of Canada that register for GST/HST purposes but do not have a permanent establishment in Canada are required to provide a security deposit equal to 50% of the net tax remittable or refundable to the non-resident for the immediately preceding 12-month period. For the first year after registration, the non-resident is required to estimate its net tax for security purposes. Thereafter, the security will be 50% of the net tax remittable or refundable in the previous fiscal year. The maximum amount of security required is C$1 million while the minimum amount is C$5,000. A non-resident may have security in the form of cash, certified cheque or money order and certain types of bonds. However,
no security need be provided if the annual taxable supply of a non-resident does not exceed C$100,000 and the annual net tax (whether remittable or refundable) is less than C$3,000.

**PAYROLL TAXES**

Payroll taxes include employer and employee contributions towards the Canada Pension Plan and Employment Insurance and, in Ontario, the Employer Health Tax.

Canada Pension Plan contributions are required when an employee is at least 18 years of age but younger than 70, is in pensionable employment during the year, and does not receive a Canada Pension Plan or Quebec Pension Plan retirement or disability pension.

Canada Pension Plan contributions are deducted from most types of remuneration payable, including salaries, wages, bonuses and commissions. An employer is required to deduct contributions from the amounts and benefits paid and provided to employees. The same amount must also be contributed by the employer as its share of the Canada Pension Plan contributions. The maximum employee contribution for 2015 is C$2,479.95.

An employer must deduct employment insurance premiums from an employee’s insurable earnings if the employee is in insurable employment during the year. Insurable employment includes most employment in Canada under a contract of service. There is no age limit for deducting employment insurance premiums. An employer is required to pay 1.4 times the amount of an employee’s premium as its contribution towards employment insurance. The maximum annual employee premium for 2015 is C$930.60. The maximum annual employer premium per employee for 2015 is C$1,302.84.

Ontario levies Employer Health Tax on employers who have annual total remuneration exceeding an enumerated amount and the remuneration is paid to employees or former employees who report for work at a permanent establishment of the employer in Ontario or do not report for work at a permanent establishment of the employer, but are paid from or through a permanent establishment of the employer in Ontario.

Beginning in 2014, the first C$450,000 of annual remuneration is exempt from tax for this purpose if the employer is a private sector employer. The exemption is eliminated for private sector employers with annual Ontario payrolls over C$5 million. Remuneration includes all payments, benefits and allowances required to be included under sections 5-7 of the Income Tax Act (Canada) (“ITA”) in the income of the employee from an office or employment, or would be required to be included if the employee were a resident of Canada. Payments of salaries and wages would be considered remuneration for this purpose.

The rate of tax is as follows (based on the amount of the taxable total Ontario remuneration):

- < C$200,000 – 0.98%
- Between C$200,000 - C$400,000 – rates range from 1.101% to 1.829%, depending on the exact amount
- > C$400,000 – 1.95%

**CAPITAL TAXES**

There is no capital tax under the ITA nor does any province impose a tax on the capital of a taxpayer other than a financial institution

A flat capital tax of 1.25% is levied on a financial institution’s taxable capital employed in Canada in excess of its capital deduction for the year. The amount of the capital deduction is C$1 billion. A financial institution can also offset its capital tax payable by its federal income tax payable for that fiscal year.

**STAMP DUTIES**

Canada does not impose stamp duties.

*February 2015*
Canadian Income Tax Considerations for Non-Residents Making Investments in Canada

MARCH 2015

AIRD & BERLIS LLP
Barristers and Solicitors
In acquiring a business in Canada, a determination must be made as to whether it is preferable to purchase the assets of the business or the shares of a Canadian corporation which owns the assets. From a purchaser’s point of view, it is often advantageous to purchase the assets of the business so that the cost base of the assets, for tax purposes, will be equal to the purchase price of the assets. In a situation where shares of an existing Canadian corporation are acquired, the cost base of the assets generally remains at the historical tax cost of such assets to the corporation whose shares are acquired.

Due to differing tax concerns for Canadian sellers and foreign buyers, a purchase and sale may be structured to accommodate potentially conflicting interests. Canadian individual sellers may wish to take advantage of their Canadian private corporations. The amount of the capital gains exemption will be indexed to the rate of inflation beginning in 2015. A Canadian seller may also prefer to sell shares if there would be significant recaptured capital cost allowance on an asset sale. A non-resident seller of shares of a Canadian private corporation may insist on a share sale in order to take advantage of a treaty exemption for capital gains. Alternatively, non-resident purchasers may wish to get a “step-up” in their basis of the assets held by a business, benefit from a “double-dip” regarding the deduction of financing costs and retain the opportunity to apply Canadian losses or profits against their profits or losses from other operations.

A foreign purchaser’s tax goals normally include the following: minimize Canadian taxation of operating profits; minimize Canadian withholding taxes when funds are repatriated; defer foreign taxation on Canadian profits; maximize the utilization of foreign tax credits when Canadian income is taken into account for the foreign purposes; and in the case of a U.S. purchaser, amortize the goodwill for U.S. tax purposes over 15 years on a straight-line basis or reduce Canadian earnings and profits for U.S. tax purposes by goodwill amortization.

**CANADIAN BRANCH OR CANADIAN SUBSIDIARY**

Where a non-resident purchaser has made a decision to purchase the assets of a Canadian business through a corporation, the purchaser will have to determine whether to acquire the assets using a branch to carry on the business or, alternatively, a corporation formed in Canada. The same determination will have to be made by any non-resident who seeks to open or establish a new business in Canada. Any apparent advantage of conducting business through a branch as opposed to a subsidiary is largely lost once the business is profitable.

Most treaties to which Canada is a signatory include a provision which states that the income earned by a branch of a foreign corporation is only taxable in Canada if that business is carried on through a “permanent establishment.” Permanent establishment is broadly defined in most treaties to which Canada is a signatory to include a fixed place of business through which the business of a resident of a contracting state is wholly or partly carried on, including a place of management, a branch, an office, a factory, a workshop, a mine, an oil or gas well, and a quarry or other place of extraction of natural resources. However, the carrying on of business by a non-resident through an independent contractor does not necessarily mean a permanent establishment exists.

A Canadian subsidiary is subject to income tax under Part I of the ITA on its worldwide income. To the extent that the Canadian subsidiary repatriates its profits by paying dividends to its parent, Part XIII of the ITA provides that those dividends will be subject to withholding tax at the rate of 25%. However, this rate may be reduced by treaty.

A branch of a non-resident corporation is subject to Canadian tax as if the branch were a corporation incorporated in Canada. However, in contrast to a subsidiary, a branch is only taxable on its income from business carried on in Canada.

One advantage of utilizing a branch operation in Canada is that, while the losses of a Canadian subsidiary are generally not available for deduction in the jurisdiction of the parent corporation, the losses of a Canadian branch operation may, subject to the tax laws of the jurisdiction of the parent corporation, be applied against the income of the parent corporation. The advantage provided by a branch operation in this context can only be realized where the parent has sufficient income against which it can offset the losses of the Canadian branch.

In addition to Part I tax, a branch of a non-resident corporation will generally be subject to branch tax under Part XIV of the ITA. Generally speaking, branch tax is levied on the amount of accumulated taxable income in excess of taxes paid or payable as well as an investment allowance. An investment allowance provides the opportunity to defer branch tax to the extent that profits of the branch are reinvested in Canadian business assets and other qualifying assets. The purpose of the branch tax is to equate the Canadian tax position of non-residents who carry on business in Canada through a branch operation with that of non-residents who do so through a Canadian subsidiary. As such, the usual rate of branch tax is 25%. However, similar to withholding tax, many tax treaties to which Canada is a signatory provide that the applicable rate will be reduced to the same rate as the withholding tax rate applicable to dividends under the particular treaty. Moreover, the ITA provides that if a non-resident corporation is resident in a country with which Canada has a treaty and on the last day of the year the treaty applies to that corporation, and if the treaty does not address the rate of branch tax, the rate of branch tax will be reduced to the rate which would be
applicable to a dividend paid to a corporation resident in that
country which owned all the shares of a Canadian subsidiary
corporation.

UNLIMITED LIABILITY COMPANIES

The laws of Nova Scotia, Alberta and British Columbia provide
for the creation of unlimited liability companies. In the United
States, we understand that certain rules permit certain
entities, including unlimited liability companies, to be treated
as partnerships or disregarded entities for U.S. tax purposes
rather than corporations. The use of a flow-through vehicle
may be attractive for U.S. investors.

The shareholders of an unlimited liability company can attempt
to restrict their liability by having the corporation contract
with third parties to limit their recourse to corporate assets.
The shareholders agreement and the articles of an unlimited
liability company could be structured to avoid centralized
management. We understand that it may be possible to
have the unlimited liability company not be characterized as
an association for U.S. purposes. It therefore may offer the
benefits of the U.S. limited liability corporation for a cross-
border transaction.

It is our understanding that the United States regards
unlimited liability companies as a partnership (if there is
more than one shareholder) or disregarded entity (where
there is one shareholder) for U.S. tax purposes. For Canadian
purposes, an unlimited liability company is regarded as
a Canadian corporation and taxed in Canada as such.
Distributions are treated as dividends and are subject to
Canadian withholding tax. However, from a U.S. perspective,
we understand that an unlimited liability company has the
advantage of being treated as branch operation. Accordingly,
we understand that losses of the unlimited liability company
may be applied against U.S. profits. We understand that
any dividends paid by an unlimited liability company will
be disregarded for U.S. purposes and any interest paid by
the unlimited liability company to the U.S. parent would be
ignored for U.S. purposes.

In addition, the subsequent sale of an unlimited liability
company (as is the case with a regular business corporation)
may be exempt from tax under Article XIII of the Canada-U.S.
Income Tax Convention ("Canada-U.S. Treaty") provided that
the assets of the unlimited liability company are not primarily
Canadian real estate. Use of an unlimited liability company,
as opposed to a branch, would obviate the necessity of the
U.S. corporation filing a Canadian tax return in respect of
all of its operations. Instead, for Canadian purposes, the
unlimited liability company would be regarded as a Canadian
corporation and would file a Canadian tax return in respect of
its operations.

The Fifth Protocol to the Canada-U.S. Treaty may have an
impact on the use of unlimited liability companies. Under the
anti-hybrid rule in Article IV(7)(b) of the Canada-U.S. Treaty,
amounts paid by a unlimited liability company to a U.S.
resident are not entitled to the reduced rates of withholding
tax available under the Canada-U.S. Treaty. For example,
dividends paid by an unlimited liability company to a U.S.
residen person who would otherwise be entitled to 5% rate
of withholding are subject to a 25% rate. However, there may
be tax planning strategies to ameliorate the effect of the anti-
hybrid rules depending on the circumstances.

CAPITALIZING THE NON-RESIDENT OWNED
CANADIAN BUSINESS

In determining the appropriate structure for a non-resident
purchaser of a Canadian business, it is important to
consider how the acquisition is to be financed. Issues such
as the deductibility of interest, the possible application
of withholding tax on interest payments and the ability to
repatriate capital should be considered. Subject to the thin
capitalization rules of the ITA, the ITA generally permits
the deduction of reasonable interest paid in the year, or payable
in respect of that year, under a legal obligation to pay interest
on borrowed money used for the purpose of earning income
or an amount payable for property acquired for the purpose
of earning income, including shares or the assets of a business.

THIN CAPITALIZATION

If a Canadian corporation is formed to acquire shares or
assets from an existing Canadian corporation, the Canadian
thin capitalization rules should be considered in determining
the appropriate mix of debt and equity in the Canadian
corporation (and partnerships of which the Canadian
corporation is a partner). The ITA denies a deduction for
interest paid by a corporation resident in Canada to the
extent that the aggregate amount of debt owed to specified
non-resident shareholders exceeds the equity contributed by
specified non-resident shareholders by a ratio of greater than
1.5:1. For the purpose of determining a corporation’s debt-
to-equity ratio, debt obligations of a partnership of which a
corporation is a partner may be allocated to the corporation
based on the corporation’s proportionate share of the
partnership’s total income or loss for the partnership’s fiscal
period.

Interest on debt that exceeds the permitted ratio will be a
recharacterized as a dividend for non-resident withholding
tax purposes. Because interest payments (that are at arm’s
length and do not involve a “participating interest”) are
generally exempt from withholding tax under the Canada-U.S.
Treaty, the previous rule resulted in no withholding tax on
disallowed interest paid to a U.S. entity.
The disallowed interest will be treated as a dividend for withholding tax purposes and subject to withholding at appropriate rates.

A specified non-resident shareholder is defined in the ITA as a non-resident shareholder who, either alone or together with non-arm’s-length persons, owns shares carrying 25% or more of the voting power or representing 25% or more of the fair market value of the issued and outstanding shares. This test is measured on a fully diluted basis with respect to the non-resident shareholder.

The deduction will be denied for that proportion of otherwise deductible interest equal to the amount determined by the following formula:

\[
\frac{A - B}{A}
\]

Where:

A: is the average of all amounts each of which is, for a calendar month that ends in the year, the greatest total amount at any time in the month of the corporation’s outstanding debts to specified non-residents, and

B: is 1.5 times the equity amount of the corporation or trust for the year.

The equity amount for a corporation resident in Canada is the aggregate of: (i) the retained earnings of the corporation at the beginning of the year (except to the extent those earnings include the retained earnings of any other corporation); (ii) the average of all amounts, each of which is the corporation’s contributed surplus at the beginning of a calendar month that ends in the year, to the extent that it was contributed by a specified non-resident shareholder of the corporation; and (iii) the average of all amounts, each of which is the corporation’s paid-up capital at the beginning of a calendar month that ends in the year (excluding the paid-up capital with regard to shares of any class of the capital stock of the corporation owned by a person other than a specified non-resident shareholder of the corporation).

The reference to paid-up capital at the beginning of a month can be problematic when a new acquisition occurs mid-month and is financed, in part, with an interest-bearing loan by a significant shareholder. As there would be no credit for the paid-up capital until the following month, the interest expense may be denied for the initial month.

It also should be noted that the Canadian thin capitalization rules do not apply to an interest-free loan made by a non-resident to a Canadian corporation, as the effect of the rule is to deny the interest deduction on the excess amount owing to a specified non-resident. If the Canadian corporation is required to capitalize interest under the ITA (for example, interest incurred during a construction period), the thin capitalization rules will not apply to the capitalized interest.

Recent amendments greatly extend the application of the thin capitalization rules by the expansion of the back-to-back loan rules. In very general terms, these back-to-back loan rules provide that where a non-resident who deals not at arm’s length with a Canadian borrower provides property in support of a loan made by a third party to a Canadian borrower that is a corporation or trust, the loan may be, in some circumstances, considered to be made by the non-resident to the Canadian borrower for purposes of the thin capitalization rules. In addition, interest paid by the Canadian borrower to the lender may instead be deemed to be paid to such non-resident for purposes of the withholding tax rules in Part XIII of the ITA. The rules may apply to cross-collateralized loans and notional cash pooling arrangements.

Due to recent amendments, the thin capitalization rules also apply to trusts resident in Canada, non-resident trusts and corporations that carry on business in Canada as a branch, and partnerships in which the aforementioned entities are members.

**CANADIAN ACQUISITION CORPORATION**

In most cases, non-resident purchasers should interpose a Canadian corporation to acquire the shares of an existing Canadian corporation. This structure may have several advantages, including the ability to benefit from an increase in the Canadian tax cost of the non-depreciable capital property (such as shares of subsidiary corporations or land) of the Canadian operating corporation if it is subsequently wound-up into the Canadian holding corporation, and the ability to create an increase in paid-up capital that may subsequently be repatriated on a tax-free basis.

Generally, paid-up capital represents the amount that is paid to a corporation for the issuance of treasury shares. If a shareholder of a Canadian corporation sells those shares to a non-resident purchaser, the non-resident purchaser will not be able to increase the paid-up capital of the shares of the corporation, although the non-resident’s adjusted cost base (tax cost) will be equal to the purchase price. The “step-up” in tax cost of the shares for Canadian purposes is of no value to a non-resident shareholder if the disposition of the shares would not be taxable under Canadian domestic law or under a treaty. However, if the non-resident subscribes for shares of a Canadian holding corporation that in turn purchases the shares of a Canadian operating corporation from a Canadian shareholder, the paid-up capital of the non-resident’s shares in the Canadian holding corporation will be equal to the amount invested for shares. Dividends could be paid by the Canadian operating corporation to the Canadian holding
corporation free of tax under Parts I and IV of the ITA, and the dividends then could be distributed by the Canadian holding corporation as a return of capital to the non-resident up to the amount of the paid-up capital without the imposition of Canadian withholding tax.

Similarly, if the Canadian operating corporation is subsequently amalgamated with or wound-up into the Canadian holding corporation, the operating corporation’s after-tax profits can be distributed to the non-resident shareholder as a reduction of the paid-up capital. Also, if the Canadian holding corporation and operating corporation are amalgamated, the interest on funds borrowed by the holding corporation to purchase the shares would be deductible against the operating profits of the business. This potential to increase the paid-up capital and to take advantage of either the “bump” available on the amalgamation or wind-up of a wholly-owned subsidiary or the ability to pay dividends free of tax between related Canadian corporations generally makes the use of a Canadian holding corporation attractive.

STRUCTURING FOR THE EVENTUAL DISPOSITION OF A CANADIAN BUSINESS ENTITY

Canada taxes the disposition of “taxable Canadian property” (“TCP”) by non-residents. Until recently, the definition of TCP included the shares of all private Canadian corporations, interests in most Canadian resident trusts (other than interests in mutual fund trusts) and many partnerships. A section 116 clearance certificate must be obtained from the Minister of National Revenue in connection with the disposition of TCP (other than excluded property). Unfortunately, the process to obtain a section 116 certificate is slow and it can be expensive and time consuming. The requirement to obtain a section 116 certificate is particularly problematic for foreign funds investing in Canada, especially where the fund has other funds as an investor. As a result, many foreign funds have invested into Canada through blocker corporations resident in treaty-friendly jurisdictions such as Luxembourg or the Netherlands (through Dutch co-ops). If a person acquires TCP (other than excluded property) from a non-resident without obtaining a section 116 certificate from the vendor, the purchaser is generally required to withhold and remit 25% of the gross purchase price (or 50% in the case of certain TCP).

Fortunately, the definition of TCP has been substantially narrowed. Now, a share of a private corporation, an interest in a partnership or trust is TCP only where at any time in the 60-month period prior to the date of disposition, more than 50% of the fair market value of the shares, partnership interest or trust interest, is derived directly or indirectly from one or any combination of: (a) real or immovable property situated in Canada; (b) Canadian resource properties; (c) timber resource properties, and (d) options in respect of, or interests in, or civil law rights in, property described in (a)–(c), whether or not the property exists. If the shares of a corporation are listed on a designated stock exchange or a trust is a mutual fund trust, the shares or units are TCP only if the above test is met and at any time in the 60-month period prior to the date of disposition, the non-resident person, alone or together with non-arm’s length persons, owned 25% or more of the issued shares of any class, or 25% or more of the issued units of the mutual fund trust, as the case may be.

This narrowing of the definition of TCP has made foreign investment into Canada much more attractive. However, the TCP definition will still apply to investments in Canadian real property and the shares of many Canadian resource companies, particularly private companies. In such cases, it may still be desirable to hold such investments through a blocker corporation resident in a jurisdiction which has a treaty with Canada which contains an appropriate capital gains exemption.

ENTITIES OWNING REAL ESTATE

If a Canadian corporation to be acquired by a non-resident Canadian owns real estate as well as an operating business, consideration should be given as to whether a non-resident purchaser should acquire the Canadian real estate in a separate corporation. This may attract land transfer tax depending on the province in which the property is located. However, if the real estate is in the operating company and has significant value, then on the disposition of shares of the Canadian subsidiary, the value of the real estate may result in the shares being TCP and the disposition being subject to Canadian tax, unless there is relief from Canadian tax under a capital gains exemption under an applicable tax treaty. Some treaties exclude from the definition of real property, property from which the business of the corporation is carried on. Depending on the provisions of the relevant treaty, separating the Canadian corporation’s assets into separate Canadian corporations for the business and the real estate may preserve the ability of the non-resident to benefit from the capital gains exemption under the relevant treaty should the shares of the Canadian corporation operating the business subsequently be sold.

ACQUISITION OF CONTROL

An acquisition of control of a corporation creates certain tax consequences to the Canadian target, including a deemed year end. Under this provision, the corporation’s year end is deemed to end immediately before the acquisition of control. A deemed year end gives rise to the requirement to file the corporation’s federal and provincial or territorial tax returns (within six months from the date of the deemed year end) and may accelerate the payment of taxes due.

Where a Canadian corporation is a CCPC, it will be deemed to have a year end immediately prior to ceasing to be a CCPC. A non-resident is deemed to own any shares that it has a
right (including a contingent right) to acquire. As a result, a corporation will often lose its status as a CCPC as soon as an agreement of purchase and sale to acquire all the shares of the corporation is signed. This may trigger a year end, followed by another year end on the actual closing of the share purchase.

There are a number of other tax consequences arising from an acquisition of control. For example, a deemed year end shortens the period for non-capital loss carry-forwards and carry-backs. The general rule is that non-capital losses may be carried back three years and forward 20-years. Following the acquisition of control, non-capital losses (business losses) are generally only deductible if the corporation continues to carry on the same business in which the losses arose, or a similar business, throughout the taxation year with a reasonable expectation of profit. Net capital losses incurred prior to the acquisition of control expire and are not deductible in any period subsequent to the acquisition of control. However, an election may be made under the ITA in the taxation year ending immediately prior to the acquisition of control to deem the corporation to have disposed of capital properties for an amount up to the fair market value thereof (thereby creating capital gains in the pre-acquisition of control year, upping the capital losses and increasing the adjusted cost base of such non-depreciable capital properties).

If eligible capital properties are actually disposed of, an election can be made pursuant to the ITA. This provision allows a taxpayer to elect capital gains treatment on the disposition of certain eligible capital property whose cost is identifiable (therefore, this election only applies to eligible capital property which had been acquired by the taxpayer and does not apply to eligible capital property internally developed by the taxpayer). The election is available with respect to the recognition of capital gains, not capital losses or for goodwill or other property for which the original cost is not determinable. Therefore, in order to use any unused losses, the target should consider triggering a disposition of the eligible capital property, elect under the ITA to treat the gain as a capital gain and then apply any unused losses against this gain.

DOUBLE-DIP STRATEGIES

It may be possible to structure the purchase of a Canadian business by a non-resident using a “double-dip” strategy. Canada accepts that if a transaction is correctly structured, interest expense incurred to acquire a Canadian operating business will be deductible in computing the income of such business. The anti-hybrid rules in the Fifth Protocol to the Canada-U.S. Treaty may impact the ability to create an effective double-dip structure depending on the particular circumstances.

INCREASING THE TAX COST OF CANADIAN ASSETS

When a controlling interest is acquired in a Canadian corporation, any net capital losses carried forward will be lost. An election may be made under paragraph 111(4)(e) of the ITA in the taxation year which is deemed to end immediately prior to the acquisition of control for the Canadian corporation to increase the tax basis of any capital properties owned by the subsidiary Canadian corporation up to the lesser of their fair market value and the greater of the adjusted cost base of the property and the amount designated by the corporation in respect of the property to the extent of any net capital loss carry-forwards.

When a wholly-owned Canadian subsidiary is amalgamated or wound-up into its parent, and both the subsidiary and its parent are taxable Canadian corporations, it is possible to increase the tax basis of non-depreciable capital property owned by the subsidiary, in general terms, to the extent that the adjusted cost basis of the shares of the Canadian subsidiary exceeds the net tax value of its underlying assets. The step-up in the basis of any asset is limited to the fair market value of such asset.

Subsection 88(1) of the ITA provides rules for the winding-up of a taxable Canadian corporation into its parent if not less than 90% of the issued shares of each class of capital stock of the subsidiary are held by a parent which is also a taxable Canadian corporation. In general, a tax-free rollover is available with respect to the assets distributed on the winding-up. If a parent receives capital property other than depreciable property, it may increase its basis in the capital property over the basis that the subsidiary had in the property. This “bump” in basis will occur if the adjusted cost base (tax cost) of the shares of the subsidiary immediately before it is wound-up exceeds the aggregate of the net tax value of the subsidiary property and the amount of any dividends paid by the subsidiary to the parent. Subsection 87(11) of the ITA provides for an identical “bump” on a vertical amalgamation between a parent and a subsidiary. Both the parent and subsidiary must be governed by the same corporate statute for an amalgamation. The “bump” in basis on an amalgamation is only available if the parent owns all of the shares of the subsidiary (compared to the 90% requirement on a winding-up).

If the Canadian target corporation owns non-depreciable capital property, such as land or shares of other Canadian or non-resident corporations, it may be possible to wind-up the Canadian target corporation and to increase the tax basis of its non-depreciable capital property to the extent of the positive difference between the purchase price of the shares and the tax basis of the assets, provided that the tax basis of the assets may not exceed fair market value. This increase in basis is only available with respect to non-depreciable capital property that was owned by the subsidiary at the time the
parent last acquired control of the subsidiary. Moreover, the availability of the “bump” is restricted if, as part of the series of transactions, any property, or property substituted for such property, that is distributed to the parent on the winding-up, is acquired by certain persons (which, in general terms, includes persons who own more than 10% of the issued shares of any class but who are not related to the corporation).

If a U.S. purchaser formed a new Canadian corporation to purchase the shares of the existing Canadian holding corporation from the Canadian sellers, it would be possible to subsequently wind-up the existing Canadian holding corporation and to increase the Canadian tax basis of the shares of the U.S. subsidiary. The U.S. subsidiary could then be transferred directly to the U.S. purchaser and trigger less, if any, tax in Canada. One method of accomplishing the distribution without attracting Canadian withholding tax would be to reduce the paid-up capital of the shares of the new Canadian holding corporation by an amount equal to the fair market value of the shares of the U.S. subsidiary, or if the Canadian holding corporation was funded by a combination of shares and debt, to reduce the principal amount of the debt by an amount equal to the fair market value of the shares of the U.S. subsidiary. The removal of the U.S. subsidiary from below the Canadian subsidiary would have the added advantage of enabling the U.S. parent to report the operations of the U.S. operating corporation on a consolidated basis, since the 80% U.S. holding test would be met.

We understand that while the pre-acquisition amalgamation or winding-up of the Canadian target into its parent is one way to get a step-up for U.S. purposes, the more common way is to structure the acquisition as a “qualified stock purchase,” entitling the purchaser to make a section 338(g) election under the U.S. Internal Revenue Code. We understand that the section 338(g) election results in a stepped-up basis in the Canadian target’s assets, but only for U.S. purposes. We understand that an election is usually available under section 338(g) if the buyer (e.g. a Canadian holding corporation) acquires at least 80% of the shares of the target corporation by way of purchase.

HYBRID SALES

A hybrid share and asset purchase may be advantageous where the Canadian sellers wish to use their C$800,000 capital gains exemption and the major asset of the target corporation is goodwill. It is not possible to step-up the cost basis of eligible capital property (goodwill) on an amalgamation or wind-up of the target with the Canadian holding corporation. Instead, the target corporation may, as a first step, sell the goodwill to a new Canadian corporation (“Newco”), formed by the purchaser. The target corporation will pay a tax of approximately 13.25% (assuming target is taxable in Ontario) on the goodwill proceeds (assuming the target corporation did not previously purchase goodwill and, therefore, has no cost in the goodwill) and the after-tax balance of the funds can be paid as a dividend by the target corporation to the selling shareholders. One-half of the gain on the sale of the goodwill will be a tax-free capital dividend to Canadian resident shareholders. Sellers owning more than 10% of the issued shares of the target corporation may transfer their shares, having a value in excess of their unused capital gains exemption, on a tax-deferred basis to a new holding corporation. An election would be filed under subsection 85(1) of the ITA. The target corporation may then purchase for cancellation the shares owned by the new holding corporation(s) generally triggering a deemed dividend equal to the difference between the proceeds and paid-up capital of the shares purchased for cancellation1. Subject to the potential application of subsection 55(2) of the ITA, the inter-corporate dividends will not be taxable and further Canadian tax will be deferred by the sellers until funds are distributed by the holding corporation. Newco benefits from the plan as it can depreciate for Canadian tax purposes 75% of the cost of the goodwill purchased at the rate of 7% per annum on a declining balance basis. Newco would subsequently purchase the remaining shares of the target corporation from the sellers thus enabling the sellers to utilize their capital gains exemption.

If the target owns depreciable property with the result that an asset sale would give rise to significant recaptured depreciation, taxable as ordinary income, the target corporation may transfer the assets to a new subsidiary (the “subsidiary”) on a tax-deferred basis (provided the debt to be assumed on the asset sale does not exceed the aggregate tax cost of the transferred assets). The purchaser may then use Newco, which would form a subsidiary (“Holdco”), to purchase the target. On the amalgamation or wind-up of Holdco with Newco, the tax cost of the shares of the subsidiary may be increased to reflect the fair market value of the previously transferred assets. This would enable the merged corporation to have a high tax cost in the shares of the subsidiary, but not the assets of the subsidiary.

USE OF EXCHANGEABLE SHARES

In some sales of businesses, Canadian sellers are required to take back shares in the foreign corporation as all or part of the sale price. The problem that this creates is that there is no tax deferral available in Canada for an exchange of shares of a Canadian corporation for shares of a foreign corporation. Under the current law, a Canadian seller in such a situation is taxable in Canada on the full capital gain based on the

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1 All or a portion of the deemed dividend may be converted to a capital gain to the extent that one of the results of the transactions or series of transactions was to effect a significant reduction in the portion of the capital gain that would have been realized on a sale of any share of the capital stock of the corporation and that can reasonably be attributable to anything other than safe income (generally the corporation’s taxed retained earnings), see subsection 55(2) of the ITA.
fair market value of the shares of the foreign corporation received as consideration. This may create a cash flow problem as there are no cash proceeds available to discharge the resulting tax liability. In many situations, exchangeable shares have been used to avoid this problem. A tax-deferred transfer in limited circumstances is being considered by the Department of Finance. In December 2005, it was announced that draft legislation would soon be released. However, it is anticipated that the proposed share-for-share exchange provisions will only assist minority shareholders. The need for exchangeable shares will likely continue for all other Canadian shareholders.

In addition, the Canadian shareholder may be faced with double withholding tax if he, she or it owns shares of a foreign corporation that in turn owns shares of a Canadian corporation. The Canadian corporation would be subject to Canadian withholding tax on the distribution of dividends to the foreign corporation and the foreign corporation may be subject to foreign withholding tax on the distribution of dividends to the Canadian shareholders.

If the shares of the foreign corporation subsequently decline in value, the Canadian shareholder may be faced with a capital loss. If that loss is incurred more than three years after the date of the share sale, the loss may not be carried back to offset any capital gain that arose on the original share exchange.

Generally speaking, in an exchangeable share transaction, the foreign purchaser forms a subsidiary (“Newco”) in Canada which acquires the shares of the Canadian target in exchange for shares of another Canadian corporation (the exchangeable shares) which are economically equivalent to the shares of the foreign purchaser. The Canadian shareholders will benefit from a rollover under subsection 85(1) or section 85.1 of the ITA, in the case of a transfer of shares of the target to Newco, or section 86 of the ITA, in the case of a reorganization of the capital of the target corporation, permitting the Canadian holders to defer tax until the disposition of the exchangeable shares. The transaction may be structured to enable the Canadian vendors to claim their Canadian capital gains exemptions, if available.

The Newco exchangeable shares would have a dividend entitlement that would match the dividends that would be paid on the common shares of the foreign corporation. The Newco exchangeable shares also would be redeemable and retractable for a predetermined number (usually one for one) of shares of the foreign corporation. The Canadian shareholders could sell a portion of their shares to Newco for cash. The Canadian shareholders may wish to ensure that they have voting rights in the foreign corporation. The Canadian shareholders may also wish, at a minimum, to have a “put” of the shares of Newco to the foreign corporation if Newco subsequently becomes insolvent.

Newco will ultimately purchase the exchangeable shares in exchange for shares of the foreign corporation. The transaction would be structured to increase the paid-up capital of the holding corporation to reflect the purchase price, thus facilitating the future repatriation of the purchase price free of Canadian withholding tax. The Canadian shareholder would typically trigger the exchange of the exchangeable shares only when the shareholder wishes to dispose of the shares of the foreign corporation. Although the exchange of the exchangeable shares for shares of the foreign corporation will be taxable in Canada, there is a matching of the Canadian gain with the receipt of the sale proceeds. The foreign investment entity rules may require a market-to-market method of reporting the exchangeable shares. That would be problematic if more than 50% of the carrying value of the foreign corporation’s property consists of investment assets (generally passive assets), because it would undermine the tax deferral to the Canadian holder.

These transactions must be carefully structured to ensure that the Canadian shareholders benefit from a rollover and are not deemed to receive any non-share consideration that could give rise to a Canadian tax liability and are not deemed to receive any taxable benefit. In addition, from the perspective of the Canadian corporation, it may be important that the transaction be structured to avoid Part VI.1 and IV.1 tax. If the shares are taxable preferred shares or short-term preferred shares, Part VI.1 of the ITA imposes a tax on the payer in respect of certain dividends paid on the shares and Part IV.1 imposes a tax on the corporate recipient of dividends in certain circumstances. If the exchangeable shares are taxable preferred shares or short-term preferred shares (which they would likely be if they are retractable by the holder at any time pursuant to the share provisions), this tax is avoided by enabling a corporation other than the corporation which issued the exchangeable shares to purchase the exchangeable shares once the Canadian seller has requested a redemption, but before the redemption is completed (the redemption, if completed, may trigger the Part IV.1 tax and the Part VI.1 tax).

**INTEREST PAYMENTS**

There is no Canadian withholding tax on interest paid by a resident of Canada to an arm’s-length lender provided that the interest is not participating debt interest. Canadian withholding tax of 25% (unless reduced by a treaty) will apply to interest paid by a Canadian borrower: (i) to a non-resident lender with which the Canadian borrower does not deal at arm’s-length, or (ii) on “participating debt interest.” Participating debt interest is generally interest all or any portion of which is contingent or dependent on the use of or production from property in Canada or is computed by reference to revenue, profit, cash flow, commodity price or any other similar criteria or by reference to dividends paid or payable to shareholders of any class of shares of the capital
stock of the corporation. The interest on certain convertible debt may be considered to be participating debt interest.

Under the Fifth Protocol to the Canada-U.S. Treaty, withholding tax on interest paid to a related person who is a “qualifying person” for purposes of the Canada-U.S. Treaty is now 0%. Canada does not currently have any other treaties with a 0% rate of withholding tax on interest. Most of Canada’s other treaties reduce the rate of withholding tax on interest to 10%.

No Canadian withholding tax arises on the repayment of capital even if the Canadian corporation has earnings and profits or is thinly capitalized.

**DISTRIBUTION BY WAY OF DIVIDENDS**

If a non-resident investor has invested directly in a Canadian corporation and this corporation pays dividends to the non-resident investor, those dividends would be subject to Canadian withholding tax at 25% unless the rate is reduced under an applicable tax treaty.\(^2\)\(^3\)

**DISTRIBUTION BY WAY OF ROYALTIES**

Where a resident of Canada pays or credits, or is deemed to pay or credit an amount, to a non-resident person, on account, or in lieu of payment of, or in satisfaction of a rent, royalty or similar payment, the non-resident is subject to withholding tax of 25% on the gross amount of the payment, unless reduced by treaty. Many of Canada’s treaties reduce the rate of withholding tax on royalties. For example, pursuant to Article XII of the Canada-U.S. Treaty, the rate of withholding tax on royalties is limited to 10% of the gross amount of the royalty. For purposes of the Canada-U.S. Treaty, the term “royalty” means payments of any kind received as consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work, any patent, trade-mark, design or model, plan, secret formula or process, or for the use of tangible personal property or for information concerning industrial, commercial or scientific experience.

Many of Canada’s treaties provide an exemption from Canadian withholding tax on certain types of royalties. Paragraph 3 of Article XII of the Canada-U.S. Treaty also provides for the exemption of withholding tax in respect of the following types of royalty payments: (a) copyright royalties and other like payments in respect of the production or reproduction of any literary, dramatic, musical or artistic work (other than payments in respect of motion pictures and works on film, videotape or other means of reproduction for use in connection with television); (b) payments for the use of, or the right to use, computer software; (c) payments for the use of, or the right to use, any patent or any information concerning industrial, commercial or scientific experience (but not including any such information provided in connection with a rental or franchise agreement); and (d) payments with respect to broadcasting as may be agreed for the purposes of this paragraph in an exchange of notes between Canada and the United States.

**MANAGEMENT FEES**

The payment of reasonable management fees by the Canadian corporation gives rise to a deduction in Canada but is subject to withholding tax at a rate of 25% (unless modified by treaty or unless the management fees constitute a reimbursement for specific expenses). However, to the extent that the non-resident resides in a jurisdiction with which Canada has a tax treaty, management fees generally escape Canadian withholding tax on the basis that they constitute business income if the entity providing the management services does not maintain a permanent establishment in Canada.

If the services are rendered by a non-resident in Canada, GST may have to be charged. In addition, Regulation 105 of the ITA imposes a separate withholding tax of 15% in respect of all fees paid to a non-resident for services rendered in Canada. The non-resident may apply for a waiver from this 15% tax (which may be difficult to obtain) or claim a refund of the tax by filing a Canadian tax return and taking the position that the non-resident does not have a permanent establishment in Canada.

**SCIENTIFIC RESEARCH AND EXPERIMENTAL DEVELOPMENT (“SR&ED”) TAX INCENTIVE PROGRAM**

The ITA contains a series of generous tax incentives in support of SR&ED in Canada. These tax incentives are provided through a system of tax deductions and credits to taxpayers that incur qualifying SR&ED expenditures, and engage in SR&ED activities in Canada. Taxpayers that are CCPCs are afforded additional benefits under the SR&ED regime. Tax credits range from 20% to 35% of an entity’s qualifying SR&ED expenses, and may be refundable if the taxpayer is a CCPC. Other than capital expenditures, taxpayers may generally deduct the full amount of any qualifying expenditures, including overhead expenditures, in the year in which they were incurred. Conversely, the deduction of these qualifying expenditures may also be deferred. Almost all of the provinces in Canada provide similar tax incentives for SR&ED activities.

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2. If the Canadian payer is an unlimited liability company and the recipient is a U.S. person, the anti-hybrid rules in the Fifth Protocol to the Canada-U.S. Treaty may increase the rate of withholding to 25%.

3. Under the Canada-U.S. Treaty, the rate is reduced to 15% or to 5% if the beneficial owner of the dividends is a corporation which controls, directly or indirectly, at least 10% of the voting power of the Canadian corporation. Most of Canada’s treaties have similar provisions.
There are no restrictions on the ownership of intellectual property that are funded by the SR&ED tax incentives. Hence, it would be possible for a non-resident corporation to set up a Canadian subsidiary to carry out its SR&ED activities in Canada on its behalf so as to take advantage of the SR&ED tax incentives. With proper agreements between the non-resident and its Canadian subsidiary, ownership of any resulting intellectual property from the activities of the Canadian subsidiary may vest in the non-resident corporation. Such an arrangement is particularly useful if the non-resident parent resides in a lower tax jurisdiction.

**TRANSFER PRICING AND NON-ARM’S LENGTH TRANSACTIONS**

Canada’s transfer pricing regime closely follows the transfer pricing guidelines set out by the Organization for Economic Co-operation and Development. Under the ITA, transactions between a Canadian taxpayer and a related non-resident must be carried out on terms and prices that would have prevailed had the Canadian taxpayer and non-resident been acting at arm’s length. This “arm’s-length principle” is meant to prevent taxpayers from engaging in improper tax planning by manipulating prices for transactions between related members of a corporate group with the goal of shifting profits from high tax rate jurisdictions to low tax rate jurisdictions. The “arm’s-length principle” applies to all non-arm’s-length inter-company transactions involving tangible and intangible property, and services. Generally, under Canada’s transfer pricing regime, profits from transactions between non-arm’s length entities are allocated based on the respective entity’s functions, assets, and risks. The entity that has the greater functions, assets, and risks is expected to earn a larger share of the profit.

The ITA allows Canada Revenue Agency ("CRA") to adjust the terms, conditions and prices of transactions between a Canadian taxpayer and a non-arm’s-length non-resident that it concludes are inconsistent with the “arm’s-length principle.” CRA may further levy a 10% penalty on any resulting net transfer pricing adjustment. In addition to increasing the Canadian taxpayer’s taxable income, the transfer pricing adjustment may also result in a “secondary adjustment” particularly in situations where the non-arm’s length non-resident is a shareholder of the Canadian taxpayer. This “secondary adjustment” pertains to the benefit accruing to the non-arm’s-length non-resident from the inappropriate transfer prices. If CRA determines that the non-arm’s-length transfer prices resulted in a benefit to the non-resident shareholder of the Canadian taxpayer, the ITA would treat this benefit as a deemed dividend, subject to applicable withholding taxes, from the Canadian taxpayer to the non-resident shareholder.

Any Canadian taxpayer that engages in transactions with a non-arm’s length entity is obligated to create and retain certain documentation that generally sets out the rationale for the prices used in the non-arm’s-length transactions. The failure to provide this documentation when requested by CRA may result in significant penalties should there be a subsequent transfer pricing adjustment.

**INCOME TAX FILING AND RECORD KEEPING OBLIGATIONS**

Every non-resident corporation that carries on a business in Canada, either directly or through a partnership, is required to file a Canadian income tax return within six months of the corporation’s fiscal year end. The filing obligation remains even if the non-resident corporation does not have any profits or is exempt from Canadian tax pursuant to a tax treaty. Corporations are not allowed to file consolidated returns. Therefore, each corporate entity in a corporate group is required to file a separate return.

Any non-resident that disposes of taxable Canadian property or has a capital gain is required to file an income tax return. However, if a capital gain is sheltered by an applicable tax treaty or the non-resident obtained a section 116 clearance certificate for each disposition of taxable Canadian property, the non-resident is not required to file an income tax return.

Non-residents carrying on a business in Canada must also maintain books and records in Canada or otherwise make these books and records available to CRA for audit purposes.

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REGULATION OF FOREIGN INVESTMENT

The Investment Canada Act is federal legislation that provides a framework to review investments by non-Canadians to ensure “net benefit” to Canada. Most investments by non-Canadians require only that the Director of Investments (an officer appointed under the Investment Canada Act) be notified of the investment while other, usually larger or culturally sensitive, investments by non-Canadians require an application, followed by a review by the Director and approval by the Industry Minister. Investments in culturally sensitive business activities are reviewed and approved by the Canadian Heritage Minister.

Notification Procedure

All establishments of new businesses in Canada, with the exception of “culturally sensitive” businesses, and all non-reviewable acquisitions by non-Canadians of Canadian businesses are generally subject to a notification procedure only. Currently, the form of notice requires information concerning the non-Canadian, the nature of the investment, a description of the Canadian business and certain details concerning the size of the Canadian business. The notice is filed with the Director of Investments who issues a receipt if the notice is complete. The receipt indicates that the establishment, or acquisition, of the business is not reviewable under Part IV of the Investment Canada Act.

Proposed amendments to the Investment Canada Regulations were tabled in 2009, with revised draft regulations published in June 2012 (the “Proposed Regulations”). The Proposed Regulations are not yet law. When implemented, more specific detailed information relating to the investor, including details relating to its officers, directors and sources of financing for the proposed investment will be required.

Review Thresholds: WTO Transactions

By reason of the Agreement Establishing the World Trade Organization (“WTO”) between Canada and certain other countries (there are currently 160 WTO members), the review threshold for direct acquisitions by non-Canadians who are WTO investors or for direct acquisitions of Canadian businesses controlled by WTO investors is based on the value of the assets (essentially book value) of the target business and continues to be adjusted annually based on the Canadian nominal gross domestic product (for 2015, this amount is C$369 million for non-cultural businesses). However, amendments to the Investment Canada Act have been passed that would change the value of the assets test from book value to “enterprise value” (as defined in and upon enactment of the Proposed Regulations) and incrementally increasing the WTO threshold to C$600 million, C$800 million and C$1 billion over a number of years. That said, in connection with investments made by so-called state-owned enterprises (“SOEs”) as described below, amendments passed to the Investment Canada Act in June 2013 (the “June 2013 Amendments”) provide that the increase in review threshold to be effected by the Proposed Regulations will not apply to proposed investments being made by SOEs. Rather, the current threshold (as so adjusted annually) will continue to apply to such investments.

Indirect acquisitions of control of non-cultural Canadian businesses by non-Canadians (i.e., by acquiring control of a non-Canadian parent of a Canadian subsidiary) are not subject to review for WTO investors (or for non-Canadian WTO sellers). These increased thresholds for direct acquisitions by WTO investors and the absence of review of indirect acquisitions do not apply, however, to Canadian businesses that carry on certain “culturally sensitive” businesses, including any activities comprising book publishing, film, video and music production and distribution and broadcasting programming and distribution.

Review Thresholds: Non-WTO Transactions

For the few non-WTO transactions, direct acquisitions of shares of Canadian corporations carrying on Canadian businesses or acquisitions of the assets of such corporations are reviewable where the value of the assets of the subject corporation is C$5 million or greater. Indirect acquisitions of control of a Canadian business are also reviewable, but the asset value thresholds for review are higher (C$50 million) unless the value of the assets of the Canadian business is C$5 million or greater and represents more than 50% of the book value involved in the international transaction.

Cultural Heritage or National Identity

Investment proposals that might ordinarily be only notifiable can be ordered for review where the business is related to Canadian cultural heritage or national identity. Currently, these “culturally sensitive” businesses include the publication, distribution and sale or exhibition of books, magazines, periodicals, newspapers, films, videos and music.

State-Owned Enterprises

In 2007, the Canadian government released guidelines on what additional considerations the Industry Minister would take into account when reviewing proposed investments by SOEs. In late 2012, and in response to two investments made by SOEs in Canadian energy assets, including the Canadian oil sands, new guidelines (the “2012 SOE policy”) were published amplifying the scope of the elements the government will consider important in determining the extent to which an investor is an SOE. The 2012 SOE Policy sets out additional factors that the Industry Minister will take into account when assessing proposed investments by SOEs (see below). In addition, as part of the June 2013 Amendments, a
definition of an SOE was enacted to include “an entity that is controlled or influenced, directly or indirectly, by a government or agency” of a foreign state. As well, the Industry Minister has been given the power to determine that an otherwise Canadian-controlled entity is in fact not a Canadian-controlled entity if the Minister is “satisfied that the entity is controlled in fact by one or more” SOEs.

Factors

Where a proposed investment is reviewable, the Industry Minister (or the Canadian Heritage Minister in the case of “culturally sensitive” businesses) will approve the investment where the proposal is considered to be of “net benefit” to Canada. In assessing net benefit, the Minister will consider, with no particular weighting, such factors as the effect of the proposed investment on economic activity in Canada, participation by Canadians in the business, productivity, competition, the compatibility of the investment with national, industrial, economic or cultural policies and the contribution by the business to Canada’s ability to compete in world markets.

As well, the 2012 SOE policy states that SOE investors will have to satisfy the Minister about the investment’s “commercial orientation; freedom from political influence; adherence to Canadian laws...that promote sound corporate governance and transparency; and positive contributions to the productivity and industrial efficiency of the Canadian business”.

National Security

In 2009, amendments were enacted to the Investment Canada Act concerning investments that may be considered injurious to national security. The amendments introduce a process similar to that found in the United States under the Committee on Foreign Investment in the United States (“CFIUS”) review process, pursuant to which CFIUS is authorized to review, investigate and block any transaction or investment that could result in the control of any U.S. businesses or assets by a foreign person that may raise national security concerns, or involve critical infrastructure.

Under the national security provisions of the Investment Canada Act, if the relevant Minister has reasonable grounds to believe that an investment by a non-Canadian “could be injurious to national security”, the Minister may send the non-Canadian a notice under Part IV.1 of the Investment Canada Act (within 45 days of a notification or application for review) indicating that an order for review of the investment may be made. The review of an investment on the grounds of national security may occur whether or not an investment is otherwise subject to review on the basis of net benefit to Canada or otherwise only subject to notification under the Investment Canada Act. Moreover, a national security review can occur even if there is no “acquisition of control” of a Canadian business (i.e., minority investments that do not transfer de facto control). There is no process for investors to request pre-closing approval in order to obtain comfort.

To date, there is neither legislation nor guidelines published on the meaning of “injurious to national security”. Discussions with government officials suggest that very few investment proposals will cause a review under these new sections. There has been one reported case under the Investment Canada Act dealing with national security issues. However, it is known that the Industry Minister has chosen, on at least a few other occasions, to apply the national security provisions to an investment.

There are significant time periods in the event of a national security review under Part IV.1 of the Investment Canada Act (a review can take up to 135 days). Moreover, significant transaction uncertainty arises, particularly in the context of notifiable investments (i.e., those not ordinarily subject to review), in view of the 45-day waiting period under Part IV.1 in which the Minister may notify the non-Canadian investor of a possible national security review. To foreclose any risk of such a review arising after closing for investments that would not otherwise be subject to review, parties will often send the requisite notification to the Director of Investments at least 45 days before closing, thereby achieving certainty that no national security issues will arise.

History

To date, more than 20,000 investment proposals have been filed with the Director of the Investment Review Division of Industry Canada and a number of other proposals with Cultural Sector Investment Review of Canadian Heritage. Most of these investment proposals have been filed by way of the notification procedures, which investments have not been subjected to review. Those proposals requiring the application and review procedure have all eventually been approved or otherwise withdrawn, with the exception of i) some culturally sensitive cases handled by Canadian Heritage; ii) one case handled by Industry Canada under the traditional Part IV net benefit provisions and iii) one case handled under the Part IV.1 national security provisions. Often the applicant has negotiated undertakings with the Director, which undertakings are designed to satisfy the Part IV net benefit to Canada criteria.

MERGER REGULATION

Mergers

The Competition Act (Canada) is a federal statute that gives the Competition Tribunal (a tribunal established pursuant to the Competition Tribunal Act) (the “Tribunal”) upon application by the Commissioner of Competition (the “Commissioner”),
an officer responsible for administering the Competition Act, the power to make certain orders in connection with mergers that prevent or lessen or are likely to prevent or lessen competition substantially in Canada. A "merger" is defined to mean the acquisition or establishment, direct or indirect, by one or more persons (whether Canadian or non-Canadian), whether by purchase of shares or purchase or lease of assets, by amalgamation or combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person.

The Competition Act provides a list of factors for the Tribunal to consider in assessing whether a merger lessens competition substantially, including: competition from imports and by foreign competitors; the solvency of the target business; the availability of product or service substitutes; trade and other barriers to entry; and the competitive effect of other firms in the relevant market.

If the Tribunal finds that a merger or a proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, the Tribunal is permitted to make certain orders, including: the prohibition of a merger before it occurs, the dissolution of a merger after it has occurred and the disposition of assets or shares. Subject to the issuance of an advance ruling certificate (see below), the Commissioner may challenge a merger by applying to the Tribunal for an order within one year following the date upon which the merger is substantially completed, notwithstanding the compliance by parties to a proposed transaction with the transaction notification provisions of the Competition Act.

Transaction Notification

As is the case in the United States under the Hart-Scott-Rodino ("HSR") notification process, the Competition Act provides that the parties to certain large transactions must notify the Commissioner prior to completing a transaction. While the Commissioner may review all mergers irrespective of size, the Competition Act requires notification of a proposed transaction if both of two financial thresholds (the parties' threshold and the transaction threshold) are exceeded.

The parties' threshold is exceeded if the parties to the proposed transaction, together with their affiliates, have combined assets in Canada or gross annual revenues from sales "in, from or into" Canada exceeding C$400 million. The transaction threshold is exceeded where, in respect of the following five forms of transactions:

(a) the acquisition of assets in Canada of an operating business;

(b) certain acquisitions of shares (see below) of the target corporation carrying on an operating business or of corporations carrying on an operating business controlled by that corporation;

(c) amalgamations of two or more corporations if one or more of those corporations carries on an operating business, or controls a corporation that carries on an operating business;

(d) other forms of non-corporate combinations; or

(e) an acquisition of an interest in a combination that carries on an operating business otherwise than through a corporation,

the target (or the entity formed by amalgamation/combination) has assets in Canada or revenues from sales in or from Canada exceeding C$86 million (the relevant transaction threshold for the remainder of 2015) which amount may be changed annually (by regulation) based on Canadian nominal gross domestic product.

With respect to the second form of transaction and acquisitions of voting shares of a corporation (any of the voting shares of which are publicly traded), the Competition Act requires notification where the persons acquiring the shares together with their affiliates would own more than 20% of the voting shares of the corporation, or will acquire more than 50% if, prior to the proposed transaction, such persons owned more than 20%. In the case of voting shares of a corporation (none of the voting shares of which are publicly traded), the Competition Act requires notification where persons acquiring such shares together with their affiliates would, as a result of the proposed transaction, own in the aggregate more than 35% of the voting shares or will acquire more than 50% if, prior to the proposed transaction, such persons owned more than 35%.

Where the above-noted parties' and transaction thresholds are exceeded, the parties to the proposed transaction must notify the Commissioner by supplying information in accordance with the Competition Act and Section 16 of the Notifiable Transaction Regulations before completing the merger. Typically, counsel for the acquiring party will also file a submission concerning the competitive impact of the proposed transaction. While all of the information provided to the Commissioner is treated as confidential under the Competition Act, the Commissioner has taken the position that the confidentiality provisions in the Competition Act permit the Competition Bureau to share the information filed with them and their review with others on the grounds that such exchanges are made for purposes relating to the administration or enforcement of the Competition Act. Also, the Competition Bureau has the power to speak with affected parties and others for the purposes of gathering information as part of their review. In the ordinary course, filing parties are aware of certain of and consent to these activities by the regulatory authorities.
A notification must include all studies, surveys, analyses and reports “prepared or received by an officer or director ... for the purposes of evaluating or analyzing the proposed transaction”. This broad information requirement is similar to that found in Item 4(c) of the HSR notification reporting form which must be submitted under the U.S. pre-merger notification rules. Once the notification form is filed with the Commissioner, the parties must wait 30 days before completing the transaction, unless the Competition Bureau issues a supplementary information request, or SIR, within 30 days of the original filing, in which case the 30-day waiting period will commence once the parties have complied with the SIR. The Bureau has indicated that it “will only issue a SIR when the proposed transaction raises significant competition issues and additional information is required”. In cases where the Commissioner has no concerns about the proposed merger, an advance ruling certificate (see below) or a “no-action letter” may be issued that will allow the parties to proceed with the proposed transaction even if the 30-day waiting period has not expired.

The *Competition Act* imposes criminal sanctions for failure to comply with the notification or waiting requirements. In addition, administrative monetary penalties of up to C$10,000 per day may be assessed for non-compliance. Typically, a transaction will proceed following the expiry of the waiting period, unless the Commissioner applies or threatens to apply to the Tribunal to prevent the proposed transaction from proceeding in cases where the Commissioner believes that substantive competition issues will arise from the proposed transaction.

The *Competition Act* provides limited exemptions to the notification requirements when a transaction otherwise exceeds the two financial thresholds referred to above. For example, transactions between affiliated parties are exempt from the notification requirements.

**Advance Ruling Certificates**

Parties to a proposed merger, whether or not subject to transaction notification, may apply to the Commissioner for an advance ruling certificate (an “ARC”) with respect to such merger. If issued, the ARC certifies that the Commissioner is satisfied that the proposed merger will not prevent or lessen competition substantially. Parties will often apply for an ARC when it is clear that no substantive competition issues will arise in connection with the proposed transaction and will often couple such application with the transaction notice filing.

Receipt of an ARC exempts the parties from the transaction notification requirements which otherwise may apply. Upon issuing an ARC, the Commissioner cannot apply to the Tribunal in respect of the proposed merger solely on the basis of information that is the same or substantially the same as the information on the basis of which the ARC was issued, provided the merger has been substantially completed within one year following the issuance of the ARC.

**CANADA’S ANTI-CORRUPTION LEGISLATION**

**Bribery Offences**

In 1999, Canada ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions through the enactment of the *Corruption of Foreign Public Officials Act* (“CFPOA”). The legislation was largely unenforced, with only one conviction under the CFPOA in the first six years after enactment. Canada has since, however, begun to commit resources to anti-corruption, with the RCMP establishing dedicated enforcement units.

Under the current CFPOA, every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official. Additionally, it is an offence under the CFPOA to keep false books or records for the purpose of bribing a foreign public.

The CFPOA provides exemptions for payments that are not illegal under the domestic law of the foreign country or the payment of certain reasonable expenses incurred in good faith by the foreign public official on their behalf. Amendments to the CFPOA not currently in force will remove a currently available exemption for facilitation payments.
**BANKING**

**Chartered Banks**

Canada’s major banks are world-class organizations ranked first globally for soundness by the World Economic Forum for the past seven years. The private sector financing industry in Canada is dominated by five such banks, all of which are federally regulated. These banks (Royal Bank of Canada, Canadian Imperial Bank of Commerce, Bank of Montreal, The Bank of Nova Scotia, and The Toronto-Dominion Bank) are, by Canadian standards, very large, well-capitalized, and have significant international interests. Canada was a signatory to the Basel Accord and the major banks have all exceeded minimum capital requirements established under the Basel II and are phasing in the requirements of Basel III.

In addition to the five banks noted above, there are approximately twenty-two other domestic banks (collectively referred to as "Schedule I Banks"), notable among which are National Bank of Canada and the Laurentian Bank. There are also approximately twenty-four subsidiaries of large international banks operating in Canada (referred to as "Schedule II Banks"), HSBC Bank Canada being one with significant retail presence. As well, large international banks may also operate in Canada through branches rather than solely through their subsidiary. These branches (referred to as "Schedule III Banks") will consist of either full-service branches, which may engage in consumer and commercial financing and other financial services activities permitted to Schedule I and II Banks (subject to certain exception), or lending branches, which have more limited powers and are more suited to cater to the borrowing needs of principally small and medium-sized businesses, credit card and consumer loan markets and commercial lending.

As in a number of other countries, the four pillars of finance in Canada (banks, securities, insurance and real estate) have largely been dismantled. Canadian banks now have significant ownership stakes in the brokerage industry, the trust industry and the insurance industry.

**Other Financial Institutions and Alternate Forms of Financing**

A large number of “non-bank” lenders also operate in Canada to provide asset-based lending, mezzanine debt, capital asset financing and/or accounts receivable factoring. A number of Schedule I Banks have, in recent years, formed divisions to compete in the rapidly growing asset-based finance market formerly dominated by subsidiaries of U.S. lenders.

Other financial institutions in Canada, such as life insurance companies and pension funds, can also be approached for longer term funding and portfolio financing. As a result of the size of certain life insurance companies in Canada and the dismantling of the four pillars of finance, insurance companies, such as Manulife, Sun Life and Canada Life, are starting to provide more “banking” services to both businesses and consumers.

**Security for Borrowing in Canada**

Lenders will generally require security over some or all of the borrower’s personal property, and sometimes real estate as well. Working capital loans from Canadian banks are typically secured by margined accounts receivable and inventory, and term loans are typically secured by all assets of a borrower. In the absence of (and often in addition to) security, the lender will usually require guarantees from principals or shareholders. In addition, lenders will frequently restrict borrowers from incurring additional debt, paying dividends, encumbering assets, reorganizing their business, providing financial assistance and other such matters in connection with the granting of significant term loans. Intercreditor arrangements may also be required where appropriate.

Personal property security regimes are provincially legislated, with all provinces and territories other than Québec having (largely similar) personal property security acts modeled on Article 9 of the U.S. *Uniform Commercial Code*. These provinces and territories also have separate regimes for real property security. Several provinces (Ontario included) have enacted legislation modeled on Article 8 of the U.S. *Uniform Commercial Code* which govern, among other things, the perfection of security interests in investment property such as securities.

**BANKRUPTCY, INSOLVENCY AND REORGANIZATION**

**Introduction**

In Canada, legislative jurisdiction over matters involving debtors and creditors is shared among the federal government and the provincial/territorial governments. The federal government has jurisdiction over “bankruptcy and insolvency”, while each provincial government has jurisdiction over “property and civil rights in the province”, which includes jurisdiction over real property and personal property security regimes. The federal government has, by statute, given the territorial governments powers similar to those of provincial governments.

There are three common types of insolvency or restructuring proceedings in Canada: (a) bankruptcy; (b) receivership; and (c) reorganization.

The initiation of any one of these proceedings will stay the rights of creditors other than, in certain circumstances, those creditors holding security over personal property or charges against real property. The exceptions are reorganization
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proceedings pursuant to the federal Companies’ Creditors Arrangement Act ("CCAA"), wherein even secured creditors will usually be stayed by the initial filing. International creditors will generally have the same rights as Canadian creditors in all insolvency and restructuring proceedings.

It is not uncommon for insolvency proceedings in Canadian courts to run parallel with proceedings in the United States or other jurisdictions. Canadian courts may recognize a foreign proceeding where there is a “real and substantial connection” with a proceeding before the Canadian court, and/or may request a foreign court to initiate a parallel proceeding if significant assets of the debtor are located in that foreign jurisdiction.

BANKRUPTCY

The Bankruptcy and Insolvency Act ("BIA") governs the bankruptcies of most individuals, estates of deceased individuals, corporations, partnerships and other entities. In addition to bankruptcy, the BIA deals with enforcement of security (and receiverships in particular) and reorganization of insolvent debtors.

There are several ways in which a debtor may become bankrupt, the principal ones being: (a) the making by the debtor of an assignment for the general benefit of his creditors; and (b) the making of a bankruptcy order by the court on the application of one or more creditors. The legal effect is the same – the vesting in a trustee of all the bankrupt’s non-exempt property, but subject to the rights of secured creditors (creditors which hold security interests in the debtor’s personal property and/or charges against its real property).

Bankruptcy Administration

Unpaid suppliers can repossess goods delivered within 30 days prior to the date of the bankruptcy filing, provided the goods are still in the trustee’s possession, identifiable, in their original state and have not been sold or contracted for sale. These rights also apply in a receivership.

Secured creditors will sometimes support or initiate a bankruptcy at the end of a receivership (or CCAA) going-concern sale or liquidation. The bankruptcy will relegate to unsecured status certain statutory liens and deemed trusts which might otherwise supersede the creditor’s security.

Bankruptcy trustees in Canada are considered officers of the Court and are required to treat the interests of all stakeholders fairly and as such interests may appear. Trustees are generally not adversarial to secured creditors.

ENFORCEMENT OF SECURITY/RECEIVERSHIP

Notice of Intention

Secured creditors are generally free to enforce their security without interference by the trustee in bankruptcy. However, the BIA requires that, before enforcing security on all of the inventory, accounts receivable or other property of an insolvent debtor used in relation to the debtor’s business, the secured creditor must first give the debtor a 10-day notice of its intention to do so.

Private Appointment of Receiver

A security agreement will normally contain a provision authorizing the secured creditor to appoint a receiver upon the occurrence of a default in payment by the debtor or other specified events of default. If the agreement does not do so, the secured creditor will have no alternative but to seek a court appointment.

A private receiver will take direction from the secured creditor. A private receiver is not subject to general fiduciary duties to other interested parties, but is subject to certain standards set out in the BIA (to act honestly and in good faith and to deal with the debtor’s property in a commercially reasonable manner).

The BIA also imposes duties on a receiver to deliver to the debtor, certain creditors and the official receiver’s office notice of its appointment, a statement of its intended plan of action, interim reports and a final report and statement of accounts.

Court Appointment of Receiver

The BIA (as well as the statute in each province, other than Québec, governing the rules of the provincial court) authorizes the court to appoint a receiver or receiver and manager where it is “just or convenient to do so”. Even though a secured creditor may have a contractual right to appoint a receiver, it may have no choice but to seek a court appointment (e.g. where the debtor or a third party will not give access to the charged property), or it may wish to do so (e.g. where it wishes to prevent a subsequent challenge that it acted negligently or improvidently in disposing of the debtor’s property, by having the court establish the terms and conditions of sale and oversee the sale process, or where it expects to face intercreditor priority disputes).

A court receiver is an independent officer of the court and is subject to the direction of the court, not of the secured creditor. A court receiver will serve the interests of all creditors and other stakeholders, as such interests may appear, and does not, for example, prefer the interests of unsecured creditors.
**Effect of Appointment of Receiver**

The appointment of a receiver, whether privately or by the court, does not end a corporate debtor’s existence. However, the appointment does normally suspend the powers of the debtor’s management to carry on the debtor’s business or to deal with its property. A receiver will usually be empowered – a private receiver by the security agreement and a court-appointed receiver by the order – to carry on the debtor’s business (and in doing so, to continue the employment of employees, to perform contracts, etc.) and also to dispose of the debtor’s property.

Because the BIA is a federal statute with effect throughout Canada, an order appointing an interim receiver or receiver under the BIA in one province can be enforced in other provinces.

**REORGANIZATION**

Canada has four federal statutes that provide for formal reorganizations (sometimes called restructurings) between insolvent debtors and their creditors. The principal statutes are the BIA (Part III) and the CCAA. The additional statutes are the Farm Debt Mediation Act, which permits insolvent farmers to make arrangements with their creditors, and the Winding-up and Restructuring Act, which is dedicated to insolvencies of: (a) corporations formed by federal parliament (or certain provincial parliaments) and subject to the authority of federal parliament; and (b) most financial institutions, including banks, trust companies and insurance companies. Recently, there has also been some use of the restructuring provisions of the federal corporations statute, the Canada Business Corporations Act, to restructure bond debt of corporate families wherein some, but not all, members are insolvent.

**Proposals Under the Bankruptcy and Insolvency Act**

Under Part III of the BIA, insolvent individuals, corporations, partnerships and other entities may make “proposals” to their creditors. There are separate schemes for consumer proposals and commercial proposals. We focus here on commercial proposals.

A proposal is a written document that sets out the terms on which the debtor proposes to settle or compromise the claims of unsecured creditors. A proposal may, but usually does not, deal with the claims of secured creditors. A proposal will often provide for one or more of the following elements: a percentage reduction of each creditor’s claim; an extension of time for payment of claims; for corporate debtors, a conversion of claims or a portion of them into shares; or a release of claims against directors. A licensed trustee in bankruptcy, named in the proposal, assists the debtor in preparing and, if approved, performing the proposal.

Upon the filing of a proposal through a licensed trustee with the federal regulator, the debtor obtains a number of benefits including: (a) a stay of proceedings by creditors, including certain secured creditors and the federal and provincial/territorial governments; (b) a prohibition against enforcement of “insolvency” clauses in agreements under which the other party might terminate the agreement or accelerate payment of indebtedness; (c) the ability to obtain a super-priority charge for debtor-in-possession (“DIP”) financing; and (d) a right in certain situations to disclaim commercial leases and other contracts. The BIA allows secured creditors stayed in a BIA proposal proceeding to seek to have an interim receiver appointed by the court to protect their interests and collateral.

A proposal must be approved by unsecured creditors and by the court. Non-approval at either stage results in automatic bankruptcy. For creditor approval, all classes of unsecured creditors must accept the proposal by a majority in number and two-thirds in value of the unsecured creditors of each class present at the meeting and voting on the proposal. For court approval, the court must be satisfied that the terms of the proposal are reasonable and calculated to benefit the general body of creditors. Once approved by the unsecured creditors and the court, the proposal is binding on all unsecured creditors and on any secured creditors to whom it was made and who have approved the proposal (by the same requisite majorities).

A debtor may initiate the process by filing a notice of intention to make a proposal, giving it the same benefits in terms of protection from creditors, DIP financing and disclaimer of agreements. The debtor will then have 30 days within which to file a proposal, subject to extension or abridgement by the court. In total, the process, including all court-ordered extensions (of up to 45 days each), cannot take more than six months. Failure to file a proposal within the required time results in automatic bankruptcy. The debtor also is required to file, within 10 days of filing a notice of intention, cash flows showing an ability to bring a viable proposal and failure to do so also results in automatic bankruptcy.

When a proposal has been fully performed, the trustee gives a certificate to that effect to the debtor and the official receiver. Where there is default, which is not remedied by the debtor or waived by the creditors, the creditors or the trustee may apply to the court for an order annulling the proposal. When a proposal is annulled, there is a deemed assignment in bankruptcy by the debtor.

The BIA also allows for an out-of-the-ordinary-course sale of the debtors’ business and assets without shareholder approval, but subject to approval of the court. This may occur where a proposal does not appear possible, or only possible with the proceeds of such sale.
Arrangements Under the Companies’ Creditors Arrangement Act

Under the CCAA, an insolvent corporation may seek the court’s assistance in making a compromise or an arrangement with its creditors, where the total of claims against the corporation or affiliated corporations exceeds C$5 million. The debtor applies to the court, generally on notice to the significant creditors, for an order (called the initial order) that will normally impose a stay of proceedings by creditors (secured and unsecured), and also by the federal and provincial/territorial governments, for up to 30 days, prohibit termination of contracts with the debtor by other parties to those contracts, and appoint a monitor (normally a licensed trustee in bankruptcy) to assist the debtor with its arrangement. The debtor may apply for an extension of the stay period and must satisfy the court that it has acted, and is acting, in good faith and with due diligence.

The initial order will often authorize DIP financing (and create a super-priority charge in respect thereof), allow the debtor to disclaim contracts and leases and permit preferential payments to critical suppliers.

The court will normally, in either the initial order or any subsequent order or orders that it makes, require the debtor to present a plan of arrangement to its creditors to be voted on at a meeting of creditors to be held within a specified period of time after the date of the order. If a majority in number representing two-thirds in value of the creditors or class of creditors present and voting at the meeting accepts the compromise or arrangement, and the court sanctions it, the compromise or arrangement becomes binding on the debtor and on all the creditors or the class of creditors, as the case may be.

A compromise or arrangement under the CCAA may include provision for the compromise of claims against directors, on the same basis as set out above with regard to proposals under the BIA. Recent decisions have also allowed the compromise of claims against third parties, where deemed necessary to the success of the reorganization. A CCAA plan may also involve reorganization or conversion of share capital pursuant to the Canada Business Corporations Act or applicable provincial corporate statute.

The CCAA also allows for an out-of-the-ordinary-course sale of the debtors’ business and assets without shareholder approval, but subject to approval of the court. This might occur where a plan does not appear possible, or possible only with the proceeds of such sale.

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Legal Jurisdiction

Ownership of real property in Canada is governed primarily by provincial and territorial law, although there are also federal laws, such as the Goods and Services Tax ("GST"), income tax, environmental protection legislation and foreign investment legislation that will apply. The laws of the nine “common law” provinces and the territories are substantially similar in their dealings with real property. Québec, which operates under a civil law system, is the exception. Notwithstanding the many differences which exist with respect to the law of real property in Québec, such differences are unlikely to be a major concern from a business perspective.

Ownership

In Canada, investors may obtain interests in real property in a variety of different forms, including full “freehold” ownership, joint venture co-ownership and leasehold interests. In the common law provinces, the two basic forms recognized for co-ownership by more than one individual, partnership or corporation (or any combination thereof) are “joint tenants” and “tenants in common”. Both forms of ownership permit the owners to hold undivided interests in the property as a whole and, unless otherwise agreed among them, the co-owners are each entitled to the possession and use of the property. Some form of condominium legislation exists in most of the provinces. In Ontario, condominiums can be created for residential, commercial or industrial purposes.

Title to Real Property

Real property throughout Canada is conveyed by means of instruments in the forms prescribed by each of the provinces and territories. In Canada there are two systems of land recording. A “registry” or “registration of deeds” system is used in the Maritime provinces, Québec, and some parts of Ontario and Manitoba. Under this system, investigation of documents filed against the property and an understanding of relevant common law (or civil law in Québec) and statutory rules is required to determine the status of title. In the balance of the country, title is recorded under the “land titles” system under which the status of title is determined and guaranteed by the provincial or territorial recording authority.

Québec employs a system of title conveyancing which relies in large part upon notaries, who fulfill a special role in connection with the transfer of real property under the Civil Code of Québec. A notarial form of deed (i.e. a conveyance of land which is in a prescribed form and which is executed before and authenticated by a notary) is prepared by a notary who keeps the original document in his or her records and deposits a certified copy in the relevant land registry office.

Over the past decade, title insurance has become the norm for residential properties throughout Canada and has replaced lawyers’ legal opinions as a means to protect both purchasers and mortgagees with respect to title deficiencies. While not as common, title insurance is also frequently obtained in conjunction with the acquisition and mortgaging of non-residential properties.

Security Interests in Real Property

Most real estate financings are arranged through institutional lenders such as banks, trust companies, pension funds, credit unions and insurance companies. Credit terms will vary between institutions and will be reflective of the nature of the transaction and risks involved. Generally, lenders will not provide financing in excess of 75% of the appraised value of a property. Because many foreign lenders in Canada are subsidiaries of international banks, they frequently participate by way of syndicated loans arranged by a Canadian lending institution.

Lending institutions typically take both primary and collateral security in real property and related assets. Primary security includes: a mortgage or charge; a debenture containing a fixed charge on real property or, in some cases where multiple lenders are involved, a trust deed securing mortgage bonds or debentures and including a specific charge over real property. Collateral security often includes: assignments of leases and rents, assignment of material contracts; general security agreements; and third party guarantees.

Upon default in payment under any such mortgage or instrument, a creditor may sue the debtor and, in most cases, subject to compliance with legal procedural requirements of the particular jurisdiction, may sell or foreclose upon the interests of the debtor and subsequent holders of security interests in real property. As a result of the ability to register any number of security interests against a particular property, statutory rules (which are usually based on the order of registration under the applicable registry or land titles systems) exist to determine priority among lenders.

In Ontario, generally speaking, brokerage licences are required from the Financial Services Commission of Ontario before any individual or corporation can carry on the business of dealing in mortgages, trading in mortgages, mortgage lending or administering mortgages. Failure to obtain such a licence may result in penalties not only to the entity participating in such activities but also potentially to officers and directors of the offending entity. Similar legislation relating to the governance of mortgage brokers is in place in a number of other provinces, including British Columbia, Alberta and Québec.

Land Transfer Taxes

Most provinces and territories (Alberta being the exception) impose land transfer taxes upon the purchasers or long-term
lessees of real property, payable at the time of acquisition. Such taxes may be levied at the provincial/territorial and/or municipal (local) levels, depending upon the province, territories and municipality, and are typically calculated as a percentage of the value of the consideration paid to acquire the property, including land, building and fixtures. In Ontario, for example, a graduated land transfer tax rate is imposed starting at 0.5% and increasing to 1.5%, or 2.0% for residential property. For properties located within the City of Toronto, an additional graduated land transfer tax is payable starting at 0.5% and increasing to 1.0%, or 2.0% for residential property.

There are certain exemptions which may be claimed to avoid, postpone or reduce land transfer tax in appropriate circumstances.

GST and HST

The Goods and Services Tax is a federal value-added tax imposed at the rate of 5% on goods sold or rented and services provided in Canada. As a general rule, the sale or lease of real property is taxable unless there is a specific exempting provision in the legislation. For example, subject to specific qualifications, exemptions exist for: (a) the sale of used residential property (houses, condominiums, apartment buildings); (b) the sale of vacant land by an individual; (c) farmland sold to family members; and (d) residential rent for lease terms greater than one month. The provinces of Ontario, Québec, Nova Scotia, Prince Edward Island, New Brunswick and Newfoundland and Labrador all apply a single tax which combines the provincial sales tax and the GST to create a single harmonized tax ("HST"). On July 1, 2010, British Columbia similarly combined its provincial sales taxes with the GST to create a single sales tax. However, following a referendum in 2011, British Columbia reverted to its previous system of separate provincial sales tax and GST, effective as of April 1, 2013. Accordingly and subject to certain transitional rules, only GST will be payable on the sale or lease of real property in British Columbia (subject to applicable exemptions). In Ontario, the combined HST rate is 13%. The HST generally applies to all purchases and leases of non-residential real property. Sales and leases of real property that were exempt under the GST rules continue to be exempt for the purposes of HST. Sales of new residential real estate in Ontario are subject to the HST, but rebates are available for some of the provincial sales tax portion of the HST.

LAND USE REGULATIONS

General

All land in Canada is subject to some form of regulation respecting its use and development. The scope of such regulation can vary from the simple to the complex and can involve regulation by the federal, provincial/territorial and municipal levels of government, including special purpose bodies. The construction and use of buildings is likewise subject to public regulation in all parts of Canada. With minor exceptions, one or more public permits or licenses must be obtained before constructing, occupying or making changes to the use of commercial and industrial buildings as well as residential properties. Public regulations of land use across Canada are generally put in place following consultation with stakeholders, including property owners, in an orderly and open fashion. The existence and details of the regulations (be they province-wide or area-specific) are publicly available and generally well-known or readily accessible to all whose interests are touched by them, including landowners, project proponents, architects, contractors and the like.

Generally speaking, land use regulation across Canada has elements of flexibility and is subject to review and reconsideration to meet changing needs and objectives. Land use regulation is intended to produce an outcome that protects and balances private and public interests without officious or unfair interference in the use and enjoyment of land. Land use regulations are normally not retroactive. The regulatory frameworks of Canada and the provinces and territories provide appeal or review opportunities for persons who seek exceptions or changes to the regulations applying to their properties or influencing their property interests. The nature and extent of these rights of appeal and review vary from the simple (e.g., a request to a municipal building official to allow a variation in the use of building materials that is a satisfactory substitute for the literal requirements of a building code) to the complex (e.g., a request to change the land use provisions on a large area of agricultural land to permit its development as a new urban community). The latter may involve administrative, political and quasi-judicial tribunal decisions at several government levels, possibly extending over a period of several years. Guidance and advice from professionals such as land use planners, environmental and traffic engineers and/or market research consultants will often be necessary.

Municipal Zoning

All but the most sparsely populated areas of Canada are governed by local municipal governments or planning boards which, in most cases, exercise through zoning and other controls the most influential powers over land use. These powers are exercised in accordance with senior government policy as well as master policy plans (often known as Official Plans) as determined and laid down by the municipal council. These regulations are unique to each municipality, based on local preference and enacted with public notice and citizen input. Zoning regulations typically implement the policies contained in the relevant master policy plan and may often be amended on a general or site-specific basis upon a successful request by a landowner or owner’s agent. Appeal rights exist for applications that are refused by the relevant local board or council.
Subdivision of Land

The division of parcels of land or interests in land or buildings is generally controlled in relation to all lands under provincial and territorial jurisdictions. When land is divided to create separate building lots, to add land to an existing ownership, to create rights such as rights-of-way, easements, or mortgages over parts of land parcels or to divide buildings into separate condominium units, one or more government approvals are almost always required.

Development Agreements

Development agreements between a landowner and a municipality are used to ensure that adequate infrastructure is available or will be made available to accommodate the proposed development without adversely affecting the surrounding area. A development agreement is a generic term that generally means an agreement that is required by a municipality as a pre-condition to development approval that ensures that the landowner fulfills the obligations that the municipality has imposed in granting the approval.

Despite the fact that some provinces do not provide the statutory authority for municipalities to enter into development agreements, the courts have upheld such agreements as necessary to control and direct development. Each province has its own statutory regime which expressly permits municipalities to enter into development agreements or does not expressly provide the legislative authority to enter into such agreements.

Heritage Conservation

Buildings may be subject to prohibitions against modification or demolition as a result of their architectural or historical significance. Such controls may be absolute or temporary. Lands and buildings of cultural heritage interest are often identified and listed on individual inventories that exist at the municipal, regional, provincial and/or national level. The criteria by which cultural heritage properties are identified typically focus on materials, design, historical associations and/or contextual value.

Properties determined to be of significant heritage value or interest may be designated under provincial statute and thereby gain legal protection against future alterations or demolition. Designation is not essential for protection, but is often undertaken to enhance the listed property’s prospect for long-term survival. Permission to alter or demolish a heritage designated property is often at the discretion of the local municipal council or planning board, which often takes direct advice from a local heritage advisory committee. In most jurisdictions, there are limited rights of appeal to a provincially-appointed administrative tribunal should an application be refused.

Significant Natural Areas, Flood Plains

As a general rule, government regulations do not sterilize land by prohibiting all land uses or prohibiting the construction of all buildings. The exceptions to this general rule occur when health and safety risks are significant – for example, in the case of flood plains and erosion prone lands, or when the lands are in an area of scientific or natural interest. In the latter circumstances, regulatory control is often exercised by special purpose bodies such as watershed commissions or conservation authorities established by statute. While development within these highly protected areas may still be possible, additional approvals will be required from the commissions and/or authorities tasked with protecting the area.

Municipal Infrastructure and Development Charges

Municipal governments in all provinces plan for and provide various forms of infrastructure for their residents, such as water and sewers, roads and streets, solid waste collection and disposal, and parks and recreation. Municipal governments in urban contexts also often provide police and fire protection, public transit, tourism bureaus, libraries and economic development services. The primary means by which these services are paid for is taxation on land. However, the provinces of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, and Nova Scotia, as well as the Yukon and Northwest Territories, also impose a formalized system of levies applicable to the development of land.

Development charges are one-time payments, usually collected prior to the issuance of building permits, that local and regional governments may collect from land developers to offset costs related to increased services that are incurred as a direct result of new development. Developers pay development charges for these increases rather than the costs being borne by the existing taxpayers who are not creating the demand for the new infrastructure or services. The demand created by new development also does not always relate to physical works or services that are provided adjacent to the lands being developed. For example, new development may be required to pay a development charge related to increasing the size of arterial roads or water infrastructure elsewhere in the municipality in anticipation of future development.

Local school boards may also impose a similar development charge of their own, termed an “educational development charge” or “EDC.” EDCs may be imposed if a school board will need to acquire a new school site(s) to accommodate students resulting from new growth, although the levy may apply to both residential and non-residential development.
The imposition of a new development charge is typically preceded by a public process, including notice and input from the affected community. There is often an ability to challenge the imposition of a new development charge, either directly with the municipal government or on appeal to the courts or an administrative tribunal. For example, in Ontario, the Ontario Municipal Board hears appeals from enacted development charge by-laws.

*February 2015*
JURISDICTION

In Canada, the federal government has a much smaller role in environmental regulation than does the U.S. federal government. The authority to create laws dealing with the environment is shared between the provincial and federal government. Each province and territory in Canada has its own environmental protection legislation, whose statutes are the primary regulatory tools. In Ontario, the primary environmental statute is the Environmental Protection Act ("OEPA"），first enacted in 1971. Other environmental statutes in Ontario include the Ontario Water Resources Act, Safe Drinking Water Act, 2002 (and the related Clean Water Act, 2006) and the Environmental Assessment Act. Similar types of legislation are found in most provinces.

Provincial responsibility for environmental regulation is not exclusive but shared with the federal government, and to a lesser extent municipal governments. The federal government is responsible for limited interprovincial environmental legislation. For instance, the transportation of dangerous goods that occurs across provincial borders or international borders is governed by federal legislation. The federal government also takes the lead in negotiating international environmental initiatives and treaties (e.g. the Great Lakes Treaty). In addition, the federal government presides over the Canadian Environmental Protection Act ("CEPA") which, despite its name, has limited applicability beyond federal lands, toxic substances and newly proposed air emissions provisions. Municipalities, using localized health impacts as justification, are increasingly entering the environmental domain (e.g. lawn pesticides, sewer discharges, and local emissions) with by-laws that can have a significant impact on facility design, operation and development. For example, in 2008 the City of Toronto passed the Environmental Reporting and Disclosure By-law which imposes reporting requirements for a prescribed list of substances. It is important to appreciate that particular requirements vary from municipality to municipality which may be in addition to federal and provincial requirements in the same area.

Most governments have endorsed “polluter pays” and “get tough on polluters” policies. These policies have resulted in several governments amending their environmental statutes to permit the issuance of administrative penalties, or environmental tickets, for relatively minor events of non-compliance and characterizing events of non-compliance as continuing offences with each day constituting a new offence. However, even these “minor” administrative penalties can result in significant payments and may also serve as an aggravating factor in any subsequent prosecution. Most jurisdictions provide director and officer liability for certain issues of environmental non-compliance with some requiring an actual environmental harm to impose such liability. In addition, government prosecutors have indicated an increased willingness to pursue prosecutions.

Additionally, government ministries or agencies, such as the Ontario Ministry of the Environment, can issue orders to persons who have management or control of property (i.e. officers and directors) to investigate, mitigate and/or remediate. A recent Director’s Order issued under the OEPA has indicated an expanded prospect to attribute no-fault liability personally to directors and officers of bankrupt corporations. Prior to a determination on the merits, the Ministry of the Environment entered into a settlement agreement with the directors who paid approximately C$4.75 million in respect of the order. The extent of liability will be an issue for directors, especially where insolvency of the company is a risk.

The courts also regulate environmental matters at common law. Individuals and businesses operating in Canada may be exposed to civil liability in nuisance, negligence, and trespass, amongst other claims. The potential for class proceedings greatly increases the quantum of damages that may be available.

WATER

Canada has no single over-arching water quality protection statute administered by the federal government akin to the Clean Water Act in the United States. That being said, the federal government is responsible for the Fisheries Act which, although ostensibly directed at the regulation of Canadian fisheries, has been used increasingly in recent years by the federal Department of Fisheries and Oceans to regulate water pollution in Canadian waterways. Aside from the federal Fisheries Act and the Navigation Protection Act, each province and territory has its own water quality statute(s) which it administers through its Ministry of the Environment or Natural Resources. These statutes generally establish water quality standards, water taking/transfer limits, permitting and approval regimes and enforcement measures. The quantum and quality of water takings (ground and surface) and discharges by industry are also regulated with water transfers becoming increasingly controversial.

AIR

The federal government has air emission regulatory tools contained in the CEPA. The federal government passed a number of regulations to limit or reduce air emissions, including new regulations for heavy duty vehicles (including full-size pick-ups, semi-trucks, garbage trucks and buses) and electricity generation from coal. CEPA necessitates the reporting of emissions where the substance is listed in the National Pollutant Release Inventory substance list and the amount of the emission is in excess of the reporting threshold. The National Pollutant Release Inventory is a publicly accessible database that tracks the release, disposal and transfer of pollutants. However, provincial and territorial legislation is generally of more importance to commercial and
industrial emitters in Canada. For large emitters the federal government has reporting obligations while the provinces tend to issue permits and approvals for emissions related to facilities. Ontario has incorporated several of the U.S. Environmental Protection Agency’s air modeling practices into its legislation. Reporting obligations of emissions are increasingly becoming the norm as reporting thresholds are progressively lowered in preparation for emissions trading.

The Canadian federal government has introduced several initiatives to achieve what it termed a “made in Canada” solution to emissions reductions and to provide regulatory authority for a future emissions trading regime. Internationally, the Canadian government announced in December 2011 that it was withdrawing from the Kyoto Protocol. The federal government has repealed the Kyoto Protocol Implementation Act and has done away with the National Roundtable on the Economy and the Environment – an entity established to promote sustainable development.

Several provinces are working with certain U.S. states through the Western Climate Initiative (“WCI”) on emissions trading programs. However, emissions trading is not widespread in Canada, with Alberta being the first province to implement a mandatory trading scheme. In late 2011, Quebec, a WCI Partner, adopted a regulation under its Environmental Quality Act which creates a cap and trade system for greenhouse gas emissions. The requirements under this regulation are being phased in over several years. Other provinces are considering greenhouse gas policies – including cap and trade and taxation. There should be significant opportunities for foreign corporations to take advantage of an underdeveloped Canadian emission trading market should Canada ultimately participate in emerging emissions trading markets.

LAND

Important to cross-border transactions, an entity cannot contract out of its regulatory liability under Canadian law, as easily as may be done in the United States. The U.S. expectation is often that a U.S. corporation that wishes to engage in business with or by a Canadian corporation can, in its agreement with the Canadian entity, insert provisions whereby the U.S. entity limits liability that may result from the Canadian operations or assets. However, Canadian law is such that a party cannot contract out of its regulatory liability for events or actions that occur in Canada. The best that can be done is to negotiate indemnities. Thus, a U.S. corporation that acquires contaminated land in Ontario one day could be subject to statutory orders and penalties to clean-up the property the next day. That being said, environmental legislation across Canada is drafted and interpreted by the courts in accordance with the “polluter-pays” principle. Accordingly, the focus of regulators and the courts should properly be on the entity responsible for the pollution, whether that entity was the immediate previous owner or a more remote owner.

Ontario is one of the provinces to have substantive and directed legislation for the remediation of contaminated lands or brownfields. The OEPA provides certain basic immunity from Ministry of the Environment (“MOE”) orders under the OEPA (the MOE’s primary enforcement tool). These include orders with respect to a once-contaminated property where prescribed remediation has been conducted and proper filings with the MOE have been made by a property owner or entity in control. What is not included in the amendments is any funding mechanism similar to Comprehensive Environmental Response, Compensation, and Liability Act in the United States, meaning that the remediation of brownfields in Canada, including Ontario, remains primarily market-driven. In some instances, municipalities may work with the developer to create incentives for the remediation of brownfields through a community improvement plan and property tax incentives.

TOXIC SUBSTANCES

The CEPA regulates the production, manufacture, use and disposal of toxic substances, excluding pesticides which have a separate combination of federal and provincial regulation. Through this legislation, the Minister of the Environment can require samples and information with respect to a substance. In 2012, CEPA was amended to provide new penalty provisions, including mandatory minimum fines and increasing maximum fines. The federal government continues to review its classification of several substances to ensure that the proper safeguards are in place given the current state of scientific knowledge about the health and environmental impacts of the substance. Provincial legislation, such as the Toxic Reductions Act, 2009, and in some situations municipal requirements, such as in the City of Toronto, may impose similar or more restrictive standards, including the preparation of plans to reduce the use of certain toxic products.

ENDANGERED SPECIES

Regulation exists at both the federal (e.g. Species at Risk Act) and provincial levels (e.g. in Ontario, the Endangered Species Act, 2007). These acts set out permitting, monitoring, reporting, and remediation requirements for activities that affect a listed species or its habitat, with considerable fines for non-compliance. Endangered species legislation can have a significant impact on the timing and costs of infrastructure development.

ENVIRONMENTAL ASSESSMENT

Canada has recognized infrastructure deficits in transportation, energy and water/sewer which necessitate large capital investments over a number of years. Ontario alone is in the process of investing over C$75 billion in electricity generation and transmission projects. Infrastructure projects
usually require the completion of provincial and/or federal environmental assessment processes to ensure any potential impacts are properly mitigated. Where both processes are required there are generally rules and processes to coordinate or harmonize the requirements. A strategic approach to the environmental assessment is used to reduce opposition and NIMBYism (Not In My Back Yard) to ensure the project is completed in a timely manner. Recognizing the potential harm of inordinate delays, the federal government has recently suggested that for certain larger projects, it may explore options to speed up the environmental review process such as providing definite timelines for completion.

The Canadian Environmental Assessment Act, 2012 (“CEAA, 2012”) applies to projects that involve federal lands, government financing and/or are a specific type of project designated under the regulations pursuant to CEAA, 2012. If the project is captured in the regulations, proponents are required to provide a description of their project to the Canadian Environmental Assessment Agency. The federal environmental assessment process was altered to restrict the projects subject to a federal environmental assessment. Where an assessment is required, stipulated timeframes will provide proponents with certainty for getting through the process. The legislation permits the federal government to delegate an environmental assessment to another jurisdiction or substitute the process of another jurisdiction to help avoid duplication of environmental assessments for both federal and provincial governments.

Public and agency consultation is a mandatory requirement of the environmental assessment process. Consultation with First Nations usually forms a significant part of such assessments as treaty and Aboriginal rights are protected by the Canadian Constitution. Several recent court cases have provided further clarification of the consultation obligations which vary depending upon the existence and wording of the treaty or nature of the historic aboriginal claim. The traditional use of impact benefit agreements has in many cases been replaced as governments have encouraged project proponents to align or partner with First Nations as equity partners providing capital loans or grants and other monetary incentives.

WASTE & RECYCLING

The storage, transfer and disposal of hazardous and non-hazardous waste is regulated provincially and, in some circumstances, federally. Development of new waste facilities, such as landfills, can be controversial and subject to significant review and public consultation. Most governments are actively encouraging recycling and mandate industry funded stewardship programs to divert certain waste streams (e.g. paper, cardboard, electronic) from landfills. Failure to register, file and remit payments can lead to fines. Regulation of recycling and waste diversion is expected to increase.

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Canada has a thriving technology sector and a sophisticated legal infrastructure that supports e-commerce, the broadcasting and telecommunications industry, privacy and intellectual property.

TECHNOLOGY

Import/Export Controls

Importing certain technologies into Canada may obligate importers to comply with requirements under the Defense Production Act and Controlled Goods Regulations. The Controlled Goods Directorate, which is governed by the Controlled Goods Regulations, is mandated to protect goods and/or controlled technologies within Canada and to prohibit controlled goods and/or controlled technology from being accessed by unauthorized persons.

Canada’s export control regime is regulated by multiple domestic laws, international agreements and diplomatic obligations. Export permits may be required to not only ship goods outside of Canada, but to provide services associated with designated technologies, discuss designated technologies with certain employees, participate in phone or video conversations about designated technologies, correspond by email, fax or otherwise through cyberspace about designated technologies, and even before leaving Canada’s borders on business trips. Factors such as the nature, characteristics, origin of componentry, uses to be made of the technology, destination and end users of the technology are all relevant to whether an export permit is required.

A key point for U.S. companies working with businesses in Canada is that there are areas of conflict between Canada’s export control laws and U.S. export control laws. For example, Canadian companies may be subject to fines and other penalties should they agree to be bound by U.S. export control laws. In addition, directors and officers may face penalties for complying with any instruction by, or policy of, a U.S. entity, contrary to Canada’s policies relating to the trading between Canada and Cuba.

E-commerce Statutes

Canada’s federal government and the Canadian provinces have adopted electronic commerce statutes that deal with issues arising from conducting business electronically. Ontario’s e-commerce statute is called the Electronic Commerce Act and Canada’s federal act is called the Personal Information Protection and Electronic Documents Act (“PIPEDA”). Canada’s e-commerce statutes typically set out standards to be met to use an enforceable electronic signature and requirements to be met in order for a document that would otherwise have to be in writing, to be satisfied by communicating such document electronically. These e-commerce statutes also set forth how and when an offer and acceptance of a contract distributed electronically may be made.

Insolvency

Canadian bankruptcy and insolvency laws underwent revisions in 2009 to afford greater protection to licensees of technology. One of the key terms set forth in Canadian bankruptcy and insolvency legislation is that such legislation permits insolvent parties to “disclaim” (terminate) a licence agreement; provided however, that a licensee’s right to use the intellectual property cannot be disclaimed.

It is unclear which intellectual property rights enjoyed by licencees are protected from being disclaimed. While one may assume all statutory intellectual property rights would be protected, Canada also enjoys common law intellectual property rights for trade-marks and trade secrets. The legislation provides no guidance as to what the “right to use” (which is afforded protection) means. The legislation does not obligate the licensor to continue to provide maintenance or support should the licensor become insolvent. From a licensor’s perspective, there is little, if any, protection should the licensee become insolvent. There can be serious consequences for the licensor arising from the Canadian courts’ broad right to assign license agreements to third parties in the event of an insolvency.

.ca Domain Names

Internet domain names are verbal representations of a numerical address used to identify and locate websites on the Internet. Each internationally recognized country is entitled to one top level domain, referred to as a country code top level domain, or ccTLD. Canada’s ccTLD is the .ca domain. The .ca domain is currently administered by the Canadian Internet Registration Authority.

Registration in the .ca domain is available only to applicants who can demonstrate Canadian presence requirements, namely Canadian citizens, permanent residents or their legal representatives, corporations incorporated under the laws of Canada or any province or territory of Canada, trusts, partnerships, associations and other individuals and entities that meet certain requirements. Generally, the registration and transfer processes for .ca domain names are not particularly sophisticated or complicated. Dispute resolution processes in the .ca domain were established in 2001.

Applicability of Sale of Goods Legislation

In Canada, certain rights and obligations will follow the acquisition or sale of technology that falls within the scope of provincial sale of goods legislation. Canadian courts tend to treat computer system acquisitions as sales of goods while
transactions involving pure service, maintenance, training or programming are typically viewed as incidental to the sale of goods and therefore not subject to sale of goods legislation. Software supplied solely pursuant to a licence agreement is typically not subject to sale of goods legislation unless some sort of property is transferred to the licensee. If software is provided together with hardware or other goods, the software may be subject to sale of goods legislation.

**Libel Action over the Internet**

Cyber-libel is a statement or image that has been published on the Internet which tends to lower the reputation of a person in the community. It is still unclear in Canadian jurisdictions as to whether email, blogs and the content of websites constitute a broadcast for the purposes of defamation law. If they do, short limitation periods may apply. As information on the Internet is widely disseminated in a short period of time, there is a high probability of significant damages resulting from a cyber-libel.

An issue that has arisen in the context of cyber-libel is the posting of defamatory statements or images to the Internet anonymously. Although it is possible to obtain early mandatory orders or discovery from third parties that allow one to obtain information that may lead to the identity of the cyber-libeller, it is often an expensive exercise. In addition, this information may not prove to be useful since the publisher may have posted the defamatory statement or image from an Internet café or other public resource, which often does not keep records of its users. While the law in jurisdictions within North America vary by province or state, as a result of a recent Supreme Court of Canada decision, the law in Canada is now closer to that generally applicable in the United States. In Canada, those who post statements and images which are false and defamatory may escape liability if they can demonstrate that the material was published responsibly.

In the United States, internet service providers are generally protected from liability in respect to the content of others. In Canada such immunity is less clear.

**Assigning and Sublicensing Technology Licences**

For a software license to be assignable, the Canadian courts look to whether or not the license is "personal" to the parties. If the courts determine that a license is personal, the license may not be assignable or capable of being sublicensed to third parties, barring any language in the license to the contrary.

**Enforceability of Shrink-wrap, Click-wrap and Browse-wrap Licences in Canada**

The key for enforceability of shrink-wrap, click-wrap and browse-wrap agreements is whether or not it can be established that both parties to the contract were aware of the terms of the agreement and agreed to them. Canadian courts have tended to favour the forms of agreements where the terms of such agreement are brought to the attention of the person, with the person having to click “I Accept” prior to being bound to such terms, over those forms of agreement where the person is bound by the terms as a result of simply landing on a website.

**Use of Non-Canadian Form Agreements in Canada**

Foreign technology companies that wish to use their standard commercial precedents to carry on business in Canada should ensure that certain “Canadian-specific” legal issues have been addressed in the form of agreement which is to be used. Some of these issues include the following:

**Sale of Goods Act Conditions:** Canadian practice relating to technology agreements is to ensure that any disclaimer of implied warranties contained in a technology agreement also disclaims the implied conditions imposed by sale of goods legislation.

**Ownership Rights:** Canadian copyright law does not recognize the concept of a “work made for hire”, which is often contained in U.S.-based agreements. In a software scenario, typically, the author of the computer program is the first owner of copyright in the program. If the author is employed for the purpose of creating software, then the employer will generally be the first owner of copyright in the software. The law is similar for inventions and trade secrets. In a situation in which a copyrighted work is being created for a customer by a contractor, the contractor, as author, will be the owner of the work unless the contractor has entered into a written assignment of such copyright in favour of the customer. It is also standard practice in Canada to have such a written assignment accompanied by an express waiver of moral rights in the work.

**Import/Export Law Controls:** Canada has its own export control legislation which must be considered when determining export restrictions which must be adhered to by a Canada-based customer.

**INTELLECTUAL PROPERTY**

With a few exceptions, regulation of patents, trademarks, copyright and industrial designs is within the jurisdiction of the Canadian federal government and is adjudicated most commonly in Canada’s Federal Court. Canada also affords certain protection for trademarks and trade secrets via Canada’s common law or civil law, which is governed by provincial law and provincial superior courts.
Patents

The Patent Act provides a system for the issuance of patents for inventions. It grants to a successful applicant an exclusive right for 20 years from the patent’s filing date to make, use and sell to others the claimed invention in Canada. A patentable invention is any new, useful and non-obvious art, process, machine, manufacture or composition of matter or any new or useful improvement to any of the foregoing. A patentable invention may consist of a method of application of a new principle or a new method of applying an old principle, as well as a new use for an old chemical compound. Some forms of business method patents are obtainable in Canada.

An invention is not patentable in Canada if it has been disclosed by the applicant in any country more than one year prior to the filing date of the application, or if it has been disclosed by anyone not the applicant prior to its filing.

Trademarks

The Trade-marks Act (the “TMA”) provides a system for the registration of trademarks. It grants to a successful applicant an exclusive right for 15 years, subject to renewal, to use the trademark in Canada to distinguish one party’s wares or services from those of others. Renewal fees currently are required every 15 years, although legislation has been passed (although not yet in force) to require registrations every 10 years. A trademark may be composed of words or symbols or a combination of both. A trademark may also consist of a distinctive shape, colour or sound. Applications in Canada may be based on actual use of the trademark in Canada, proposed use of the trademark in Canada or registration of the trademark in a foreign country that is a signatory to the Paris Convention. The new legislation is set to remove the use requirement for filing.

A trademark is registrable if it is not: (a) the name or surname of an individual; (b) clearly descriptive or deceptively misdescriptive of its associated wares or services; (c) the name in any language of its associated wares or services; or (d) likely to be confusing with an already registered trademark.

Trademarks may be licensed. The license should be in writing, and the owner must retain direct or indirect control of the character or quality of the wares or services provided by the licensee under the trademark. Trademarks may be assigned. Any such assignment should be in writing and recorded with the Canadian Intellectual Property Office. If the licensing or assignment arrangements are improper, the trademark may lose its distinctiveness and the owner’s exclusive rights may be lost. Distinctiveness refers to the ability of the trademark to distinguish one party’s goods and services from those of others.

In the absence of registration, a trademark can be protected only in the geographical region in which the owner can establish a reputation or goodwill in association with the trademark and the goods and services offered in association with it, which in practice can vary from a neighborhood to the entire country depending on the circumstances.

Large changes to the TMA have been enacted but are not yet in force. These include the ability to file international registrations (i.e. Madrid applications), the requirement to file wares and services (now known as goods and services) according to the international classification schemes and the removal of a use requirement from the filing of trademarks. The regulations putting these changes into force are not yet implemented, but they likely will be by mid-2016.

Copyright

The Copyright Act provides protection for authors and creators of original literary, dramatic, musical and artistic works, published or unpublished. Copyright protection extends to any work from the moment that it is created and fixed in tangible form, including computer software. There are also protections for associated rights such as performer’s rights and moral rights.

Copyright is the sole right to produce or reproduce the work or any substantial part thereof in any material form in Canada, and it is infringement of copyright for someone other than the owner of copyright to perform an activity that is protected under copyright, without the permission of the owner. It is also an infringement of copyright to provide an Internet-based service (or other digital network service) primarily for the purpose of enabling acts of copyright infringement if an actual infringement of copyright occurs by that same means as a result of the use of that service.

There are some specific activities that would constitute infringement were they not specifically exempt from infringement under the Copyright Act. For example, fair dealing with a work for the purposes of private study, research or criticism, education, parody, satire, review or news reporting does not infringe copyright. Subject to certain conditions, an individual may also use, in a non-commercial context, a publicly-available work for the purpose of creating a new work without constituting infringement. It is also not an infringement of copyright for an individual to transfer legally-obtained works from one format to another for personal use.

For work to be the subject of copyright protection, it must be original. Registration is not required to obtain protection, but is of some assistance to enforce legal rights in a civil action. The author of a work is the first owner of copyright, unless the work was made in the course of employment, in which case the employer is the first owner of copyright unless there was an agreement to the contrary. If the author is
an independent contractor, the author is the first owner of copyright unless there was an agreement to the contrary. The term of protection is generally the life of the author plus 50 years. Copyrights may be licensed, exclusively or otherwise, or assigned.

Independent of any rights of ownership of copyright, an author of a work has moral rights in a work. An author’s moral rights includes an author’s right of paternity (including the right to be associated with his or her work or to be anonymous) and an author’s right of integrity (which provides the author with the right to prevent its distortion, mutilation or modification and its use in association with a product, service, cause or institution if such use would result in prejudice to the honour or reputation of the author). Moral rights may not be assigned, only waived in whole or in part. These moral rights are not available in the United States.

A copyright owner may recover between C$500 and C$20,000 for each work in the event of copyright infringements for commercial purposes, and between C$100 and C$5,000 for all works in the event of copyright infringements for non-commercial purposes. Where a work is controlled by a technological protection measure and such measure is circumvented knowingly and for commercial purposes, the person responsible for such circumvention may be liable on conviction on indictment, to a fine not exceeding C$1 million or to imprisonment for a term not exceeding five years or to both; or, on summary conviction, to a fine not exceeding C$25,000 or to imprisonment for a term not exceeding six months or to both.

**Computer Programs and Copyright**

Computer programs are protected under the Copyright Act as literary works. 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.

**Hardware and Copyright**

Written 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.

**Databases and Copyright**

Some databases that contain original content may be given protection as “compilations” under the Copyright Act, although there is no specific database protection, and most databases likely would not be covered by copyright. To obtain 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 judgment. The exercise of skill and judgment must not be so trivial 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.

**Web Pages and Copyright**

A web page’s look, layout and appearance can be protected by Canadian copyright. Most web pages would be considered original works and/or compilations, and are protected by copyright and trademark laws.

**Technology Elements Not Protected By Canadian Copyright**

Underlying mathematical calculations, algorithms, formulae, ideas, processes, or methods contained in information technology are not protected by Canadian copyright laws, although they may be protected in some cases under patent law. Canadian copyright protects only original expressions of the foregoing.

**Amendments to Canadian Copyright Law**

Many amendments to the Copyright Act regarding treaty implementation provisions and the adoption of a notice-and-notice regime were proclaimed into force as of January, 2015. The current notice-and-notice regime provides that an owner of the copyright in a work or other subject-matter may send a notice of claimed infringement to an online service provider whose subscriber has uploaded the allegedly infringing content, and the online service provider will be required to notify the subscriber of the notice of claimed infringement. The online service provider must then retain records identifying the person to whom the notice was forwarded for at least six months. New exceptions to copyright infringement, including for parody and educational purposes, are now part of Canadian law.

**Industrial Designs**

The Industrial Design Act provides a system for the registration of designs in any original shape, configuration, pattern or ornamentation applied to an article of manufacture made by an industrial process. It grants to a successful applicant the exclusive right to prevent others from making, importing for trade or business, renting, selling or offering for sale or rent any article in respect of which the design is registered (or a design not differing substantially therefrom) in Canada for a period of 10 years from the date of registration subject to the payment of maintenance fees at the fifth year. Amendments have been passed, although not yet in force, that will change
the term of registration to the later of 10 years after the date of registration of the design and the end of 15 years after the filing date of the application. A claim of ownership of a design may only be made if there is a registration of that design under the Industrial Design Act. No claims of ownership may be made without registration. An industrial design is known in the United States as a “design patent”.

For a design to be registrable, it must be original (although the standard will change to a novelty standard once the new amendments are brought into force). Industrial designs are directed to an aesthetic feature that appeals to the eye. Features that are entirely functional may not be the subject of registration. Only the owner of a design may apply for and obtain an industrial design registration. If the design was created by an employee of a company, then the employer is considered to be the owner of an industrial design, barring an agreement to the contrary.

An application for registration must be filed within a year of the first publication or sale of the design in Canada by its author. A design is considered “published” if it has been made public or offered for commercial sale or use anywhere in the world.

Industrial design registrations may be assigned or licensed.

**International Conventions and Treaties**

Canada is a signatory to the North American Free Trade Agreement and is a member of the International Convention for the Protection of Industrial Property which affects patents, trademarks and industrial designs. Canada is a signatory to the Patent Cooperation Treaty which provides a common system for the filing of a patent application in signatory countries. Canada is also a member of the Berne Convention, the Universal Copyright Convention and the World Trade Organization, each of which bear on protection for copyright owners who are citizens of convention countries.

On January 1, 2015, the Combating Counterfeit Products Act came into force and amended the Copyright Act, the Trademarks Act and the Customs Act. The amendments are aimed at giving the Canadian Border Services Agency additional tools for combatting the import and export of counterfeit goods. New civil and criminal remedies have been created to deal with possession and dealing of counterfeit goods. The changes were brought about by Canada’s international obligations under the Madrid Protocol, the Nice Agreement, and the Singapore Treaty.

**COMMUNICATIONS LAW AND DIGITAL MEDIA**

Canadians have long had a deep fascination with communications which stems, in part, from the geographic and physical situation of Canada, a very large country which spans multiple time zones and features extremely difficult and diverse terrain. Most Canadians live on a narrow “people’s belt” along the Canada – U.S. border. This proximity to the United States has a profound influence on Canadians and has given rise to a fixation with concerns related to the preservation of Canada’s unique bilingual and bicultural character. These concerns are, in turn, reflected in some of the unique telecommunications and broadcasting regulatory policies summarized below.

Canada’s communications environment has been in a rapid state of transition, deregulation and increased competition for more than two decades. In Canada, both telecommunications and broadcasting are constitutionally under the legislative authority of the federal government as the courts have expressly found that broadcasting and telecommunications companies are inter-provincial undertakings. The primary legislative requirements for communications regulation are set out in the Telecommunications Act, the Broadcasting Act and the Radiocommunication Act. The government departments and agencies with key responsibility for administering these areas are the Canadian Radio-television and Telecommunications Commission (“CRTC”), which is the regulatory authority in the telecommunications and broadcasting sector; Industry Canada, which is responsible for managing and licensing spectrum to wireless carriers and setting telecommunications policy, including equipment certification guidelines; and Heritage Canada, which is responsible for cultural issues and broadcasting policy.

Four unique aspects of the communications regulatory regime stand out in particular and are at the centre of current policy debates/considerations:

(a) the distinction between content and carriage which is evident in the bifurcated legislative provisions but is increasingly difficult to maintain as technologies and businesses converge;

(b) the foreign ownership restrictions for telecommunications common carriers (entities that own or operate transmission facilities to provide telecommunications services to the public) and for broadcasting companies;

(c) the liberalized regulatory treatment of certain services provided by telecommunications carriers; and

(d) current regulatory exemption for digital media services.

The CRTC has adopted a policy of forbearing from regulating many services provided by telecommunications carriers (e.g. retail wireless rates). Notwithstanding this forbearance, carriers continue to be subject to tariff filing requirements and other ongoing regulatory obligations in areas such as access to support structures and the provision of wholesale Internet access to third parties.
The Canadian communications regulatory and policy environment is constantly evolving. Legislators and regulators are struggling in the face of policy challenges posed by new technologies and new service offerings. The foreign ownership restrictions governing telecommunications carriers (as distinct from broadcasting undertakings) have been the subject of much review and debate, including four separate reports over the past few years. Following several consultation papers and policy review panels, the federal government in 2012 eliminated the foreign ownership rules for investments in Canadian telecommunications carriers whose market share is less than 10% of the total Canadian telecommunications market (as defined by the CRTC).

**PRIVACY LAW IN CANADA AND CANADA’S ANTI-SPAM LEGISLATION**

Canada has a growing array of federal and provincial privacy statutes, in both private and public sectors, as well as growing protection over privacy rights throughout the common law.

Canadian businesses are often subject to multiple pieces of legislation, at the federal and provincial levels, that protect the privacy rights of individuals. For instance, as of January 1, 2004, most Canadians were required to comply with the federal Personal Information Protection and Electronic Documents Act (“PIPEDA”), which regulates the collection, use and disclosure of personal information in the course of “commercial activities”. Legislation substantially similar to PIPEDA exists in various provinces, including British Columbia’s Personal Information Protection Act, Alberta’s Personal Information Protection Act, and Québec’s Act respecting the Protection of Personal Information in the Private Sector.

Various provinces have also enacted statutes legislating the collection, use and disclosure of personal health information, including Ontario’s Personal Health Information Protection Act (“PHIPA”). PHIPA applies to personal health information regardless of whether the information is used in a commercial context or otherwise.

Depending on the nature of an organization’s activities and the use made of personal information, compliance can be as simple as preparing privacy policies or can involve complex processes such as privacy audits, staff training, implementation of security systems, improvements to storage systems, the implementation of other protective measures, including ensuring contractual provisions exist with third parties who may have access to the personal information in the organization’s possession or control.

Privacy issues will likely affect an organization in two ways: First, an organization itself will have to comply with PIPEDA and other privacy legislation with respect to personal information on third parties (such as existing or prospective customers) it collects and controls. Federally regulated organizations will have to also comply with PIPEDA in relation to its employee information. To the extent a provincially regulated organization has employees located in the provinces of British Columbia, Alberta or Quebec, it will need to consider the impact of such provincial privacy laws on employees’ personal information. Secondly, organizations will want to ensure that all third parties to whom they grant access to or use of the personal information have contractual provisions in place governing the third party’s use, disclosure and security around the personal information, as well as certain audit rights to ensure such third party complies with its obligations.

Recently, the Canadian government introduced Bill S-4, an important bill for individuals and businesses. Bill S-4, known by its proposed short title, the Digital Privacy Act, proposes to amend PIPEDA and other legislation by introducing (or re-introducing in some instances) some potentially important changes to PIPEDA, including mandatory federal breach notification. Bill S-4, is still working its way through the parliamentary review process.

**Overview of PIPEDA**

The purpose of PIPEDA is to balance the right of privacy of individuals with the need of businesses to use Personal Information for reasonable purposes in order to operate successfully. “Personal Information” is specifically defined as “information about an identifiable individual”. It does not include the name, title, business address or telephone number of an employee of an organization. It includes such information as race, ethnic origin, colour, age, marital status, religion, education, medical, criminal, employment or financial history, address and telephone number, Social Insurance Number, fingerprints, blood type, tissue or biological sample, and views or personal opinions that are linked to an individual.

PIPEDA now applies to organizations in Canada that collect, use or disclose Personal Information in the course of all commercial activity. “Commercial activities” are defined to mean “any particular transaction, act or conduct or any regular course of conduct that is of a commercial character”.

While some people may believe that the legislation applies only to organizations with a business in Canada, the Federal Court of Canada has held that the federal Privacy Commissioner has a broad right to investigate organizations that collect, use or disclose personal information of Canadians.
What Does an Organization Need to Do?

PIPEDA outlines several key principles to protect personal information. It also requires that personal information be used or disclosed only for purposes for which it was collected. Once an organization collects personal information, it maintains ongoing obligations with respect to its use and safeguarding.

**Be Accountable**: An organization must be responsible for personal information under its control and shall designate an individual or individuals who is/are accountable for the organization’s compliance with the following principles.

**Identify the Purpose**: The purposes for which personal information is collected shall be identified by the organization at or before the time the information is collected.

**Be Accurate**: Personal information shall be accurate, complete and up-to-date as is necessary for the purposes for which it is to be used.

**Be Open**: An organization shall make readily available to individuals specific information about its policies and practices relating to the management of personal information.

**Give Individuals Access**: Upon request, an individual shall be informed of the existence, use and disclosure of his or her personal information and shall be given access to that information. An individual shall be able to challenge the accuracy and completeness of the information and have it amended as appropriate.

**Provide Recourse**: An individual shall be able to address a challenge concerning compliance with the above principles to the designated individual or individuals for the organization’s compliance.

What Are the Risks If an Organization Does Not Comply?

Complaints by individuals are heard by the federal privacy commissioner who has the authority to receive and investigate complaints and to try to resolve these disputes (similarly, complaints in the provinces are heard by the relevant provincial privacy commissioner). The privacy commissioner also has the right to make public any information relating to an organization’s personal information management practices if it is in the public interest to do so. Public disclosure of the details of the complaint can be the most damaging to a business, and is a destructive consequence of misusing personal information. The individual making the complaint can also apply to court for damages.

PIPEDA creates offences for obstructing an investigation or audit; destroying personal information that is the subject of an access request; or disciplining a whistleblower.

An organization that engages in these activities can be fined up to C$10,000 for a summary conviction or C$100,000 for an indictable offence.

Processing of Personal Information in the United States

As indicated above, an organization has an obligation to safeguard the personal information processes and not to disclose it to third parties without consent.

There is a great deal of sensitivity in Canada regarding outsourcing of any data management services outside the country. Many concerns can be dealt with through adequate data protection agreements combined with appropriate notice requirements.

Data Breach Notification in Canada

Arguably, Canada has had breach notification obligations as long as privacy laws existed. An organization is not able to use or disclose personal information for purposes that had not previously been consented to by the individual, without such individual’s notice and consent. However, to clarify and to formalize this, Alberta has mandatory breach notification obligations through its privacy legislation, as does PHIPA. Mandatory breach notification, at the federal level, is being introduced through Bill S-4 as amendments to PIPEDA. There are guidelines on data breach notification that are in effect at the federal level and in some provinces.

Common Law Right to Privacy

The common law tort of invasion of privacy continues to develop throughout Canada and the provinces in various ways. For example, in the last few years, Ontario has begun to recognize a common law tort referred as Intrusion on Seclusion.

Canada’s Anti-Spam Legislation

On July 1, 2014, the majority of Canada’s anti-spam legislation (“CASL”) came into force. (An Act to promote by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act). The legislation requires businesses to comply with its requirements surrounding the sending and disseminating of commercial electronic messages (“CEMs”), including its strict consent and detailed content obligations. This legislation has extremely broad application and includes CEMs sent via email, text, short message service, BlackBerry Messenger and direct social media communications. CEMs are considered to be messages that encourage participation in a commercial activity and include offering, advertising or promoting a product or service.
As of January 15, 2015, further provisions concerning the unsolicited installation of computer programs and software came into force. These provisions prohibit the installation of a computer program to another person’s computing device (such as a smartphone, laptop, or other connected device) in the course of commercial activity without the express consent of the device owner or an authorized user.

The Canadian Radio-television and Telecommunications Commission, the Competition Bureau and the Office of the Privacy Commissioner of Canada jointly enforce Canada’s anti-spam legislation. The legislation is enforced through regulatory measures, including steep administrative monetary penalties. Businesses and those who are subject to the legislation, including directors, officers and agents, that do not comply risk significant financial penalties that can range up to C$1 million per violation for individuals and C$10 million for businesses. CASL will statutorily permit a private right of action for breaching its terms as of July 1, 2017, which will create further financial repercussions for violations of the legislation.

February 2015
Responsibility for labour and employment legislation in Canada is split between the federal and provincial or territorial governments in accordance with the nature of the undertaking in which the employer is engaged. Employees of businesses which fall under federal jurisdiction are subject to federal labour laws. These include such businesses as broadcasting, interprovincial trucking, banks, airlines and railroads. Employees of businesses which are not “federal undertakings” will fall under the applicable provincial or territorial jurisdiction.

The core labour and employment legislation in Canada consists of legislation governing employment standards and, further, a framework for dealing with the establishment of labour rights and relations. The federal government and each province and territory have legislation dealing with these areas. In addition, the federal, provincial and territorial governments each have additional employment-related legislation dealing with human rights and occupational health and safety. Workers’ compensation legislation exists in each province and territory. Many jurisdictions have legislation aimed at pay equity, employment equity and employee privacy.

In every Canadian jurisdiction, the rights of employees on termination of employment are governed in part by statute and in part by common law, except where there is a union representing employees, in which case the terms of the collective agreement apply. The obligations of an employer to provide notice or payment in lieu of notice at common law may be augmented by the terms of any contract entered into between the employer and the employee, which contract must generally be entered into prior to the commencement of employment. However, the employer cannot provide payments or other benefits that are below the minimum thresholds contained in the applicable employment standards legislation.

**EMPLOYMENT STANDARDS LEGISLATION**

Each jurisdiction in Canada has minimum standards by which employers must abide. While an employer and employee may agree to benefits in excess of these minimum requirements, they may not “contract out” of the minimum standards. Areas that are the subject matter of legislation include: (a) minimum wage; (b) hours of work, overtime pay and rest periods; (c) vacation time, vacation pay and holidays; (d) leaves of absence such as bereavement leave, sick leave, compassionate care leave, court leave, family responsibility/emergency leave, reservist leave and education leave; and (e) termination of employment.

**Notice of Termination**

As will be discussed more fully under the headings “common law” and “reasonable notice,” unlike in certain other countries, there is no “at-will” employment in Canada.

When an employer terminates the position of an employee in Canada, the employee is generally entitled to a minimum amount of notice from the employer by statute and, in some provinces, severance pay. Each statute provides for the circumstances that constitute termination, and the length of notice required in those circumstances. Notice may be given in advance of the termination date (working notice), or paid to the employee in a lump sum or as salary continuance while the employee does not attend work (pay in lieu of notice). The requirements vary widely across Canada, but an employer is generally obliged to provide an employee with one to two weeks’ notice per year of service, up to a maximum of eight weeks’ notice. For federally regulated industries, an employee is entitled to two weeks’ notice of termination after three months of service. Statutory notice may be greater where there is a mass or temporary layoff.

In addition to the notice of the termination of an employee’s employment, employees working in Ontario or for federal undertakings may also be entitled to severance pay when their employment is terminated. The provincial severance pay provisions generally provide for payment of a lump sum equivalent of an employee’s wages calculated on their service. Thresholds for payment can include the company’s payroll and the employee’s length of service.

Note that the requirement to provide notice of termination (or pay in lieu of notice) and severance pay (where applicable) is a minimum requirement. Reasonable notice at common law (which generally applies across Canada except for Quebec) and is set out below, addresses the generally greater notice requirement where there is a termination without cause.

**Mass and Temporary Layoff**

Generally, where an employer terminates the employment of 50 or more employees at an establishment within a four week period, a special set of termination rules apply. In Ontario, the notice period for employees in a mass termination is determined by the number of employees affected.

For federally regulated businesses, employers must give the federal government 16 weeks’ notice and set up a joint planning committee to reduce the number and impact of terminations.

Employment legislation varies across provincial and territorial jurisdictions on the permissible length of temporary layoffs. In addition, employees have common law protections against wrongful dismissal, which include notice provisions that may extend beyond those imposed by statute. If an intended temporary layoff is found by a court to be constructive dismissal, the employee may be deemed to have been terminated at the time the layoff commenced.
The estimate of “common law” reasonable notice is more of an art than a science. In estimating the appropriate “reasonable notice period”, Canadian courts will consider the employer’s age, length of service, overall remuneration and position, as well as the existence of any employment agreement and inducement or enticement. The “common law” period of reasonable notice is inclusive of any statutory amounts and is subject to the concept of mitigation, which means any monies earned by the employee during the reasonable notice period can be deducted from any common law damage award.

**Human Rights**

Human rights legislation protects people from discrimination in a number of situations, including employment.

Employees are protected from unfair treatment in Canadian workplaces based on the following grounds: race; religion; age; disability; sex/gender; marital status; and pregnancy/childbirth. Other grounds exist in some provinces, including: ancestry; nationality/citizenship; language; civil status; drug or alcohol dependence; family status; family affiliation; gender identity; gender expression; political beliefs and activity; criminal conviction; social condition and source of income. Employers are prohibited from making employment decisions, including hiring, firing and promoting employees, based on any of the prohibited grounds. In addition, they must not condone or ignore discrimination or harassment in the workplace.

An employer may discriminate on the basis of a prohibited ground only if it relates to a *bona fide* occupational requirement and the employer is otherwise unable to accommodate the individual. If the discrimination relates to a non-prohibited ground, human rights tribunals do not have the jurisdiction to deal with the complaint.

**PAY EQUITY**

Jurisdictions across Canada have different types of pay equity/equal pay legislation, which represent different principles. Each of these laws prohibits disparity between wages for men and women.

**EMPLOYMENT EQUITY**

Employment equity is a concept that addresses the barriers to equal treatment of employees and the process of ensuring such equal treatment. People with disabilities, people of minority backgrounds and others may face discrimination in hiring, promotion and payment of benefits, as well as inadvertent systemic discrimination. Québec and the federal government are currently the only jurisdictions that have employment equity legislation. In Ontario, the *Employment Equity Act* was in force for just over a year in the 1990s. It was repealed and Ontario now promotes workplace diversity through the Equal Opportunity Plan. Most other jurisdictions deal with employment equity through human rights legislation.

**ACCESSIBILITY**

As of January 1, 2012, all employers in Ontario who provide goods or services to members of the public or other third parties, and that have at least one employee in Ontario, must comply with various regulations pursuant to the *Accessibility for Ontarians with Disabilities Act, 2005* (the “AODA”). This legislation was enacted to make the province of Ontario fully accessible to disabled persons by 2025. The AODA requires, amongst other things, that employers establish policies and procedures which ensure that goods or services are provided in a manner that respects the dignity and independence of persons with disabilities and affords them equal opportunity to use or benefit from the goods or services and train its employees with respect to these requirements. Organizations with 20 or more employees are required to file an AODA compliance report.

**OCCUPATIONAL HEALTH AND SAFETY**

Most employers are subject to provincial or territorial occupational health and safety (“OHS”) legislation intended to minimize the risk of workplace accidents and injuries to their employees. In certain jurisdictions, the legislation protects all individuals at or near the workplace.

Provincial and territorial legislation mandates: (a) general health and safety standards; (b) industry-specific obligations; and (c) hazard or substance-specific obligations for provincially regulated employers. The *Canada Labour Code* applies to employees under federal jurisdiction and provides for rights and obligations comparable to those contained in provincial statutes. The Workplace Hazardous Material Information System (“WHMIS”) is a national program implemented by the provinces and requires that hazardous substances be properly labelled, information regarding the substances be made available to workers, and workers receive education and training on storage, handling and use of the substances. Employment contracts cannot be used to avoid OHS legislation, but they can impose health and safety rights and obligations that exceed the standards set out in the legislation.

OHS legislation imposes duties on and grants rights to both employers and employees. An employer’s general duties under the legislation require that they take all reasonable precautions to protect the health and safety of employees, comply with the legislation and ensure their workers comply with the legislation. Employees are under a general duty to take reasonable care to protect their own health and safety and that of their co-workers. An employee’s refusal to work is followed by an investigation. If the work is found to be
dangerous, that danger must be addressed. In 2010, Ontario amended its OHS legislation to require employers to conduct workplace violence assessments and implement policies to address workplace violence and harassment. Many other provinces also have similar legislation.

**WORKERS’ COMPENSATION**

Workers’ compensation legislation creates a provincially or territorially regulated no-fault insurance program that is funded by employers in most industries. Workers’ compensation legislation is intended to facilitate the recovery and return to work of employees who sustain injuries arising out of and in the course of employment or who suffer from an occupational disease. The legislation provides compensation and other benefits to workers and the survivors of deceased workers. Employers in businesses or industries specified in the regulations pay annual premiums based on the risks associated with worker activities in their industry. In some jurisdictions, premiums are adjusted to reflect the employer’s claim history, permitting rebates for employers who have relatively injury-free workplaces or increasing premiums for workplaces that have proven more dangerous than expected.

**LABOUR RELATIONS LEGISLATION**

Each province and territory has legislation that regulates the relationship between employers and employees of provincially regulated industries where a union represents or seeks to represent the business’ employees. The *Canada Labour Code* regulates labour relations for federal works, undertakings or businesses. When a provincially or territorially regulated employer carries on business in multiple jurisdictions, unions must seek certification from the labour board of each province. Each province or territory, and the federal government, has a labour relations board that adjudicates labour relations disputes.

Labour relations legislation has two main purposes: (a) to permit employees to organize without interference from their employers; and (b) to permit collective bargaining between employers and employees represented by bargaining agents. The legislation governs the formation and selection of unions, collective bargaining procedures, the conduct of employees and employers in unionized workplaces, and the adjudication of complaints alleging a violation of the particular legislation.

**Certification of Unions**

Each province and territory has labour relations legislation which governs the establishment of union collective bargaining rights, and the negotiation and administration of collective agreements once such rights have been established. For employers in the federal jurisdiction, the *Canada Labour Code* contains these provisions.

Issues relating to collective bargaining and unfair labour practices are addressed by provincial and federal labour relations legislation. Rules concerning the certification of unions vary (legislation sets out the manner in which unions can establish bargaining rights), as well as the rules surrounding the termination of such rights. Once a union is certified as the representative of a bargaining unit and has given notice to the employer, the employer has a duty to bargain with that union in good faith to reach a collective agreement.

The labour relations legislative framework also deals with employers involved in the construction industry. These vary from province to province, as well as federally, and are often quite different from the normal rules for non-construction employers.

**Strikes and Lockouts**

Before a bargaining unit can strike or its employer can lock them out, certain statutory conditions must be satisfied. In all jurisdictions, a strike or lockout is unlawful while a collective agreement is in effect. In certain jurisdictions a lawful strike or lockout can only begin once attempts at negotiation and conciliation have been exhausted.

The labour relations board in each jurisdiction can make declaratory orders with respect to the legality of a strike or lockout and the order can be filed in court to become enforceable as a judgment. In addition, a court may issue an injunction, prohibiting a strike or lockout or restricting legal picketers where there is illegal conduct which includes the risk of physical injury or property damage.

Employers are prohibited from hiring permanent replacement workers during the course of strike. However, some jurisdictions permit the employer to hire workers while its unionized employees are on strike.

**Picketing**

Picketing is regulated by labour relations statutes, tort law and criminal law in Canada. Lawful picketing includes communication of information; however, intimidation, threats, assaults and blocking of premises is unlawful. It is unlawful for striking workers to picket at the employer’s place of business (i.e., “primary picketing”) as long as there is a legal strike/lockout in effect. However, depending on the nature of the picketing and interference, it may be lawful to picket the premises of third parties who deal with or are affiliated with the employer (i.e. “secondary picketing”) as long as such picketing is for informational purposes.
Impact on Sale of a Business

If all or part of a business is sold, bargaining rights are protected. However, if the nature of the business has changed substantially, the labour relations board may terminate the bargaining rights of the union.

There are also successorship provisions which bind any purchaser of the business to a validly executed collective agreement to which the original employer is bound. The definition of “sale” is very broadly worded for the purposes of determining a successorship.

EMPLOYEE RIGHTS AND OBLIGATIONS UNDER COMMON LAW

All Canadian provinces and territories are common law jurisdictions, with the exception of Québec (where the Civil Code of Québec governs). Common law rights can be characterized as those established by the courts based on jurisprudence or judge-made law, also called the common law. Common law employee rights exist in addition to the rights granted by employment standards legislation, however, any payments made by an employer under the applicable employment standards legislation will be deducted from the common law assessment.

In Canada, certain contractual terms are implicit in a written employment contract (subject to permissible contract provisions to the contrary) or where no written contract of employment exists.

Employee Duties

All employees have at least three duties that are implied terms (unless they are explicit terms) of their employment: (a) duty of good faith and fidelity to their employer; (b) duty to exercise skill and care; and (c) duty to obey.

After employment has terminated, all employees have an implied duty to not remove customer lists and not misuse other confidential information. Non-fiduciary employees are free to compete as soon as employment has terminated, subject to a valid restrictive covenant (discussed below) prohibiting such competition.

Fiduciary employees have more extensive duties than those that apply to all other employees. Generally stated, fiduciary employees are those who have authority to guide the affairs and affect the direction of the employer. In most cases, top management are considered fiduciary employees and, in certain situations, other employees who fulfill a sufficiently critical role and to whom the employer has a particular vulnerability (“key personnel”) may be found to be fiduciaries. A fiduciary’s general duties have been described as requiring loyalty, honesty, good faith with a view to the employer’s best interests and avoidance of conflicts of interest, and a prohibition regarding self-dealing.

Termination of Employment and Reasonable Notice

Whether termination of employment occurs with or without cause will determine the rights and obligations of the employer. Termination with cause follows from an employee’s breach of an express or implied term of the employment contract. Cause is narrowly construed by the courts. If an employer intends to terminate the employment of an employee with cause, the employer is not required to provide the employee with notice of termination. If an employer intends to terminate the employment of an employee without cause, the employer must provide the employee with reasonable notice or pay in lieu thereof.

An employer may not contract out of the statutory minimum notice period (discussed above). However, a contract of employment that includes a term limiting reasonable notice to the period prescribed in employment standards legislation will be valid, provided that the limit is clear and was the subject of consideration (i.e. it was accepted at the time of the original offer of employment). An employee whose employment is terminated without cause is generally entitled to reasonable notice of termination at common law. Although determining a reasonable notice period is not based on a static formula, reasonable notice is calculated based on assumptions about how long it will take the employee to find alternative work of a similar nature. The assumptions are based on a number of factors, including the following: the character of the employment; the employee’s length of service; the age of the employee; and the availability of similar employment having regard to the experience, training and qualifications of the employee and, in some cases, whether there has been inducement/enticement from formerly secure employment.

If an employer has not provided an employee with adequate notice, the employee may commence an action for wrongful dismissal, seeking damages equivalent to what the employee might have earned (which includes a calculation of benefits and perquisites) during the “reasonable notice period”. Also, employers should note that if a former employee can prove that the employer’s conduct in the manner of termination caused him or her mental distress, additional damages may be awarded to the former employee. Reasonable notice periods typically do not exceed 24 months.

Any period of “reasonable notice” determined by a court of competent jurisdiction is subject to the employees’ duty to “mitigate” their damages by seeking alternate or self-employment. Generally, damages at common law for wrongful dismissal will deduct any monies earned by the employee during the common law period of reasonable notice.
Restrictive Covenants

Restrictive covenants are explicit contractual obligations that survive the termination of employment. They typically consist of non-competition or non-solicitation clauses. Restrictive covenants may also include protection of the employer’s intellectual property beyond those protections already afforded to employers by common law and statute.

There is a strong policy inclination in employment law disputes towards ensuring an individual’s ability to make a living doing what he or she knows best and avoiding restraints on trade. Therefore, restrictive covenants are highly scrutinized by Canadian courts. Courts have the discretion to strike out a restrictive covenant that limits the employee’s ability to compete, if it is found to be excessively broad in time, geography or scope of activities prohibited. Non-solicitation covenants, providing they are reasonable and validly executed, are far more defensible.

However, restrictive covenants which constitute consideration arising from a sale or legitimate business arrangement may be more likely to be enforceable.

EMPLOYMENT AND RETIREMENT BENEFITS

Old Age Security and Canada Pension Plan

Old Age Security and Canada Pension Plan (“CPP”) are federally legislated pension programs. CPP is administered as a joint federal-provincial program.

Employment Insurance

The federal Employment Insurance Plan (“EI”) is employer-and/or employee-funded insurance regulated by the federal government which covers employees in every jurisdiction in Canada.

Employers deduct premiums from employees’ insurable earnings and remit these deductions along with the employers’ premiums. Employer premiums are paid at a rate of 1.4 times the amount of the employee’s premiums. Employer contributions are a business expense that can be deducted from the calculation of income.

EI benefits are paid to employees whose employment is terminated without cause or who are on maternal, parental, sick or compassionate care leave, and who satisfy the regulatory requirements, which include a minimum period of employment. No benefits are paid to employees who quit their employment or are terminated with cause. Since January 2011, self-employed individuals have been able to access EI special benefits, notably maternity, parental, sickness and compassionate care benefits.

Regular benefits (i.e. paid to those whose employment has been terminated) last for a maximum of forty-five weeks depending on unemployment rates in the individual’s region and the number of qualified insurable hours accumulated during the prior period of employment. Benefits paid are taxable income for the individual.

Employers can reduce their EI premiums by providing equal or superior benefits to employees through private insurance plans.

Health Plans

The federal Canada Health Act requires that every province and territory in Canada must have a basic health insurance program that covers the costs of medically necessary treatment, including physician costs and hospital stays. Each province and territory then has discretion to offer additional benefits under its health insurance plan.

Wage Earner Protection Program (“WEPP”)

For workers of an employer in bankruptcy or receivership, the WEPP provides compensation if employment has been terminated with unpaid wages, vacation pay, severance pay (if applicable) and termination pay. Such compensation is limited to wages and certain other types of pay which accrued between the date six months prior to a restructuring event and the date of the bankruptcy or the imposition of receivership. If there is no restructuring event, then compensation is provided for wages and certain other types of pay for the six month period preceding the date of the employer’s bankruptcy or receivership. Under the WEPP, the employee will receive no more than the equivalent of four weeks of insurable EI earnings, minus certain prescribed amounts.

February 2015
Infrastructure Opportunities in Canada:
Alternative Financing and Procurement and Public-Private Partnerships

MARCH 2015

AIRD & BERLIS LLP
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Over the last decade, Canada has become one of the leading markets globally for delivering much-needed public infrastructure by way of public-private partnerships (“PPPs” or “P3s”) and alternative finance and procurement (“AFP”), the name given to PPPs in Ontario.

Within Canada, Ontario has been, and based on current project pipelines, will continue to be, the most active jurisdiction in terms of number and value of projects completed and under procurement. Ontario Infrastructure and Lands Corporation, or Infrastructure Ontario (“IO”), is an agency of the Government of Ontario that was created in 2005 to procure and deliver AFP projects. Since then, over 70 projects have been delivered or are in various stages of procurement or development. Seven healthcare projects and four transportation projects are currently in procurement, and 12 healthcare projects and five transportation projects are currently under construction, among others.

British Columbia has also been at the forefront of PPP procurement in Canada. Partnerships BC, which was established in 2002 by the BC provincial government, has overseen the delivery of more than 40 projects (many of which are still in construction or procurement), including hospitals, roads, public transit, water and recreational facilities. The Sea-to-Sky Highway, connecting Vancouver to Whistler and used by many during the 2010 Winter Olympics and Paralympics, was one of the earliest signature PPP projects in Canada. A worker accommodation project and a hospital project are currently in procurement.

While Ontario and British Columbia have been the most active jurisdictions in using a PPP approach, several PPP projects have been procured in other provinces, as well as federally and municipally. The province of Quebec has executed major road, hospital and prison projects using a PPP model. The province of Alberta is also an active PPP participant and has completed a number of PPP roads and schools projects and an expansion of a water and wastewater treatment facility. In addition, the City of Edmonton is currently procuring an LRT system. New Brunswick, Nova Scotia, Manitoba, the Northwest Territories and Nunavut have also been active in the PPP market, with Saint John, New Brunswick having just released a request for proposal for water treatment facilities and the Northwest Territories recently closing the Mackenzie Valley Fibre Link transaction.

After disbanding its P3 Secretariat in 2009, the province of Saskatchewan reinvigorated its PPP program with the establishment of SaskBuilds Corporation, a Treasury Board Crown Corporation, in October 2012. SaskBuilds’ first project, a long-term care facility, reached financial close in 2014. SaskBuilds currently has four major projects in procurement: the Regina Bypass project, two joint-use schools projects (consisting cumulatively of nine schools) and the Saskatchewan Hospital North Battleford project. Saskatoon and Regina, the two largest municipalities in the province, have also recently completed several projects, including a civic operations centre, a stadium and a wastewater treatment plant.

The federal government has established PPP Canada to work with the public and private sectors to support PPPs and to encourage the further development of Canada’s PPP market. The federal government has also created the P3 Canada Fund to support provincial, territorial, municipal, First Nations and other partners in the development of PPP projects. The P3 Canada Fund is contributing funding to major PPP projects across the country, including projects procured by provincial procurement agencies and municipalities. PPP Canada is also involved (along with Public Works and Government Services Canada) in the procurement of the Champlain Bridge Replacement Project, one of the largest Canadian PPP projects to date.

FINANCING TO INFRASTRUCTURE PROJECTS

While the term “public-private partnership” or “PPP” has been used to describe a wide variety of transactions involving public and private participants – including the contracting out of services, the creation of non-share capital corporations (such as NavCan) and the monetization of public assets through concession agreements – the present use of the term “PPP” typically refers to long-term arrangements entered into between public authorities and private sector entities pursuant to detailed contractual arrangements under which the private sector entity is required to design, build, finance and maintain and/or operate public infrastructure for a fixed period. These arrangements are effected through an agreement (typically referred to as a “project agreement” or “concession agreement”) entered into between the public authority and the private sector entity which sets out the respective obligations and responsibilities of each party and allocates risks between them. In Canada, a wide range of PPP structures have been used, including traditional Design-Build, Build-Finance (which many consider to be outside the spectrum of PPPs), Design-Build-Finance, DBFO (Design-Build-Finance-Operate) and DBFM or DBFOM (Design-Build-Finance-Maintain or Design-Build-Finance-Operate-Maintain), based on the U.K. Private Finance Initiative model, providing for a long-term concession and including significant financing and risk assumption by the private sector. In the Canadian context, PPPs are not thought to include privatizations of public assets, as in the case of full or substantial divestiture of assets by the public sector.

PPPs are often used as an alternative means of procuring and financing infrastructure where there is insufficient public sector capital to meet immediate infrastructure investment needs. PPPs allow the public sector to access new sources of financing and achieve the benefits that private sector skills and management can bring, thereby creating efficiencies and value-for-money.
The fundamental principle underlying all PPPs is that risk should be allocated to the party best able to manage that risk. The risks typically allocated to the private sector include design, timely construction, operation and/or maintenance (where those are part of the project agreement) and financing. Milestones for project delivery, a fixed price contract and specified service standards are key components of the risk allocated to the private sector. The principal risks that are retained by the public sector, or shared with the private sector, will depend on the project type and the jurisdiction, but will typically include certain changes in law, insurance costs, uninsurable events, certain supervening events outside the control of the concession company (such as force majeure and catastrophic climate events, public sector strikes, protest actions and the like) and risks related to pre-existing but undiscoverable environmental conditions. Risks relating to adequacy of design, construction, maintenance and life cycle repairs typically reside with the private sector.

In Canada (as in the United Kingdom), PPPs typically are structured using a project finance approach under which a special purpose vehicle (“SPV”) is established for the sole purpose of delivering a project and its related services. The SPV will enter into the project agreement with the public sector authority and will then “drop down” most of the design, construction and operational risks to subcontractors. The SPV will enter into financing arrangements with private sector debt providers, the debt coming from one or more of several sources (e.g. domestic and international banks, pension funds, insurance companies or bond investors) on a limited recourse basis. The lenders’ principal recourse will be to the payment stream available to the SPV under the project agreement over the term of the concession. Canadian PPP projects are usually highly leveraged (with approximately 90% of the project costs being financed by way of senior debt, while the SPV’s owners will typically contribute about 10% of the project costs by way of equity).

While PPPs were initially implemented in the face of considerable criticism (particularly from labour unions concerned about possible public sector job losses), as new roads, hospitals, schools and other public infrastructure are commissioned and built using a PPP model, the criticism has become much more muted. The PPP approach has become increasingly popular in Canada as many governments face significant budgetary deficits and conclude that P3s provide an innovative means of addressing Canada’s significant infrastructure deficit without imperiling public finances.

February 2015
The exploration, development, transmission and sale of energy is the backbone of the Canadian economy. Reserves of crude oil found in western Canada are among the largest in the world and Canada is one of the leading producers of both oil and natural gas. The world’s longest crude oil and liquids pipeline system is operated by a Canadian company. Another Canadian company owns one of the most extensive natural gas transmission networks in the world. A significant portion of Canada’s energy, primarily oil, natural gas and electricity, is exported to the United States. Shale discoveries in the United States and eastern Canada will continue to have an impact on natural gas in Canada and will require investment to accommodate the changing transportation patterns.

The provinces of British Columbia, Quebec, Manitoba, Newfoundland and Ontario have abundant sources of hydroelectric power, and Canada is a world-leading producer of hydropower. The largest nuclear power generating facility in North America is located in Ontario. The province of Saskatchewan is home to some of the largest known high-grade uranium deposits, making it the world’s largest uranium producer. Coal is also mined and used primarily in the western provinces and for export.

Canadians have been recognized as among the largest per capita users of energy in the world. Several Canadian provinces have taken steps to reduce the level of energy consumption both on the part of large industrial users and individual consumers. Laws and government support programs that support investment in infrastructure, additional generation, conservation and improved efficiency have the ability to transform the way new and existing Canadian companies meet their own and the Canadian market’s energy needs over the coming decades and represent significant investment opportunities.

National Management and Regulation

The Canadian energy sector is governed by both federal and provincial or territorial laws. At the federal level, the National Energy Board regulates matters that transcend provincial boundaries and provides advice to the Government of Canada on national energy issues. It has been given a mandate to study and keep under review a broad range of energy-related matters under federal jurisdiction, including the production, transmission, distribution and sale of energy, and sources of energy, both in and outside Canada.

Within the scope of its jurisdiction over extra-provincial energy matters, the National Energy Board’s role extends to construction and operation of facilities, tolls and tariffs and approval of transactions. Thus, the National Energy Board regulates the construction and operation of interprovincial and international pipelines, international electricity transmission lines and designated interprovincial electricity transmission lines; it deals with traffic, tolls and tariffs for the pipelines within its jurisdiction; and it grants approval for the export and import of oil and natural gas and the export of electricity.

Provincial Regulation

In addition, most provinces have established a regulatory body to deal with activities such as the distribution of electricity and natural gas. In Ontario, for example, this body is the Ontario Energy Board. In the natural gas field, the Ontario Energy Board does not regulate the price of the commodity purchased by consumers, but it licenses marketers who sell gas to small volume consumers. It also approves rates charged by utilities for the distribution of gas and exercises powers in relation to the construction of gas distribution facilities, the creation and operation of gas storage areas, the sale or amalgamation of gas distribution utilities and the approval of franchise agreements between distribution utilities and municipalities.

On the electricity side, the Ontario Energy Board sets transmission and distribution rates and approves the budget and fees for the Independent Electricity System Operator (“IESO”). The Ontario Energy Board also licenses electricity market participants; sets the rate for standard supply service by electricity distributors that supply the commodity directly to customers; approves the construction of certain transmission facilities; and approves certain business arrangements within the regulated part of the electricity industry. Given the turbulent economic times, regulators are more than ever focused on the economic and customer rate impact of the decisions being made on rates, tariffs and new infrastructure.

Energy Generation

While the generation, transmission and distribution of electricity generally fall under the jurisdiction of the provinces of Canada, nuclear energy is accorded a special treatment. Nuclear energy is seen to be a matter of national interest, as is Canada’s effective participation in the international control of nuclear energy. The government of Canada has established the Canadian Nuclear Safety Commission which regulates the development, production and use of nuclear energy, as well as the use of nuclear substances and certain prescribed equipment and information. Ontario has forecasted nuclear will continue to form a significant source of electricity for the coming decades. The future of specific nuclear facilities and the long-term management of nuclear waste will be the subject of debate for years to come. However, the existing sites may have their life extended through refurbishment and the installation of new units.

The generation of renewable energy, particularly the wind, solar, hydro and biomass/biogas industries, has very quickly become a multi-billion dollar business in Canada, and especially in Ontario. Most provinces have embarked on programs to develop and procure renewable energy from
independent power producers. Coal and natural gas will continue to play a role in power generation as the dispatch capability makes these fuels especially adept at providing the necessary response to peaks in demand.

**Transmission and Distribution**

Canada has an extensive pipeline system to deliver natural gas from British Columbia, Alberta and Saskatchewan to eastern Canada and the U.S. The distribution and transmission of natural gas is regulated but open to private sector ownership. Investment will continue to be required to expand the system’s capacity and flexibility. Natural gas and electricity will be impacted by proposed changes to the oil pipeline system. Further, the development and evolution of the natural gas market and infrastructure system will be also impacted by the development of shale gas in the northeast of the United States, the changing needs of the oil sands and access to export markets and liquefied natural gas.

New pipelines are proposed that would connect Alberta to the Pacific Coast thereby opening up new markets in places such as China. In addition to reviewing large project applications, the National Energy Board is consistently researching and refining Canadian government policies on oil and gas exploration in the Arctic and both in regards to on and offshore drilling. Several other pipeline projects, oil and natural gas, are currently in development.

A significant portion of the electricity generated in Canada is transmitted from the province of origin to neighbouring provinces and to the United States. The ownership of the electricity grid is a combination of public and private sector ownership with provincial regulators regulating the rate of return. Ontario has recently embarked on a process to permit competitive development of transmission infrastructure which has garnered interest from several international transmission companies. Several jurisdictions have embarked on multibillion-dollar initiatives to improve the transmission system to meet the needs of the new economy through system expansion and the transition to a smart grid.

**Conservation Initiatives**

Energy conservation has also been given prominence as a key objective of both the federal and provincial governments. At the federal level, Natural Resources Canada continues to operate the Office of Energy Efficiency (“OEE”), which is the starting point for businesses and individuals to collect information on government grants, rebates and incentive programs for research and development into new technologies and energy efficiency upgrades. For businesses, the OEE offers incentives as varied as grants for the retrofitting of factories to rebates on the purchase of fuel-efficient fleets. Provincial programs may also exist to encourage energy efficiency upgrades.

In provinces like Ontario, a wide range of opportunities have been opened up through the promotion of conservation and reduced energy consumption. In addition to energy generating opportunities summarized above, businesses also have opportunities to enter into conservation and demand reduction contracts with provincial authorities, whereby businesses get paid for curtailing their peak energy use when done in response to requests from the IESO, which manages the real-time electricity supply in the province. Further, businesses that invest in more energy efficient equipment and processing may also qualify for support.

Finally, based on the supportive environment created by the feed-in tariff and conservation regimes, Canada is also emerging as a ‘smart grid’ technology leader. Referring to the efficiencies gained when electricity is managed and tracked by technology from the point of generation all the way to end-use, both existing and new Canadian businesses are emerging as global players in the energy management field.
Dispute Resolution

MARCH 2015

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CANADA’S COURT SYSTEM

The purpose of Canada’s court system is to assist people in resolving their disputes in a just and equitable manner. In fulfilling this mandate, the courts interpret, and apply laws and address issues that impact upon all facets of Canadian society. With the exception of the province of Québec, which administers a predominantly civil law system, the provinces and territories of Canada have a legal system similar to those utilized in the United States and Great Britain, and administer the common law.

Canada’s court system is organized in a four-tier system. At the bottom of the hierarchy are the provincial and territorial courts. These courts hear cases involving either federal or provincial/territorial laws and deal with a wide array of matters including, but not limited to, criminal offences, family law matters (except divorce) and provincial/territorial regulatory offences.

Provincial and territorial court judgments are appealed to the provincial/territorial superior courts. Superior courts have “inherent jurisdiction”. As such, superior courts are able to hear cases pertaining to any area that is not specifically limited to another level of court. Within the purview of the superior courts, the courts deal with some of the most serious criminal offences as well as divorce cases and cases involving large sums of money. Appeals from decisions of the superior courts and provincial/territorial courts are heard by an appellate division or a court of appeal for the applicable province or territory. Constitutional questions raised in appeals involving individuals, governments or governmental agencies are also heard by the court of appeal.

Running parallel to this system is the Federal Court system. Both the Federal Court and Federal Court of Appeal are similar to the superior courts except that they also have jurisdiction over civil law. An important distinction between the federal courts and the superior courts of the provinces and territories is that while the former can only deal with matters specified in federal statutes, the latter have jurisdiction in all matters except those specifically excluded by statute. The Federal Court has jurisdiction over interprovincial and federal-provincial disputes, intellectual property proceedings, citizenship appeals, Competition Act cases and cases involving Crown corporations or departments of the Government of Canada. Importantly, only the federal courts have jurisdiction to review decisions, orders and other administrative actions of federal boards, commissions and tribunals.

At the apex of the court structure sits the Supreme Court of Canada. The Supreme Court hears appeals from all other Canadian courts. It has jurisdiction over disputes in all areas of the law, including administrative law, civil law, constitutional law and criminal law.

THE INDEPENDENCE OF THE COURTS

Judicial independence is a cornerstone of the Canadian judicial system. It is for this reason that Canadian courts are kept separate from the legislature and the executive. This also means that any government action may be reviewed by the courts for compliance with the Constitution of Canada and the Canadian Charter of Rights and Freedoms.

Three means are used to ensure judicial independence, namely: security of tenure, financial security and administrative independence. In terms of tenure, once appointed, a judge is permitted to serve on the bench until a specified age of retirement and can only be removed if an independent investigation demonstrates good reason. Financial security requires that judges be paid adequately and in a manner that does not leave them in a position of dependence or susceptible to pressure. Canadian governments are also prohibited from altering judges’ salaries or benefits without first consulting with an independent commission. Administrative independence means that interference with the way in which courts manage the litigation process and exercise their judicial functions is prohibited.

CLASS ACTION PROCEEDINGS

Legislation permitting class proceedings can now be found in all of the Canadian provinces and territories (except Prince Edward Island), as well as the Federal Court of Canada.

Unlike ordinary proceedings, a class action proceeding is commenced on behalf of a “class” of persons. This necessitates that a person/persons who is/are representative of the potential class assume the role of plaintiff and represent the interests of that class. A critical first step in commencing the action is having the action judicially approved or “certified” as a class proceeding. Among other things, a certification order will name the representative plaintiff or plaintiffs, define the “class” and approve a “workable plan”. Once the proceeding has been certified, the action will proceed in similar fashion to a traditional lawsuit, complete with documentary and oral discovery, pre-trial procedures, and the exchange of expert reports. If the proceeding is not certified, it continues as a regular action for one plaintiff only. In most Canadian provinces and territories, class actions are case-managed by one judge. However, in all of the provinces but Québec, a new trial judge is assigned once the matter reaches the trial stage.

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4 As Nunavut does not have a territorial court, both territorial and superior court matters are heard by the Nunavut Court of Justice, which is a superior court.
ALTERNATIVE DISPUTE RESOLUTION

Alternative Dispute Resolution ("ADR") is a field of law that has grown exponentially over the last 30 years. ADR refers to methods of settling disputes between would-be litigants using means other than court-based traditional litigation. ADR includes a variety of techniques, including negotiation, conciliation, mediation and arbitration. Interest in ADR continues to grow. The most common reasons cited by both lawyers and their clients for choosing ADR processes include: the faster resolution of disputes; the guarantee of privacy and confidentiality; the avoidance of adverse publicity; the reduction of legal costs; the ability to choose an adjudicator or mediator; the possibility of mutually advantageous resolutions/solutions; and the promise that relationships will remain intact.

Two of the most significant ADR techniques are arbitration and mediation. In arbitration, the parties refer their dispute to a neutral third party whom they have selected for judgment. The result is a binding and enforceable ruling. Parties may choose arbitration as a dispute resolution mechanism by specifying so in their contract, or they may jointly elect to submit to arbitration after a dispute arises. In addition, various provincial and territorial statutes either expressly or impliedly provide for arbitration. Examples of these statutes include: the Expropriations Act, Insurance Act, Hospital Labour Disputes Arbitration Act and the Municipal Arbitrations Act. With the exception of criminal law matters and matters governed by special statutes, any matter that is properly the subject of litigation may be dealt with by arbitration.

Mediation is an informal process wherein a neutral third party assists the parties to a dispute to reach their own mutually agreed upon solution. A striking difference between mediation and other forms of dispute resolution processes, such as litigation or arbitration, is that in mediation the mediator has no authority to impose a solution. The mediator’s role is simply to ensure communication and facilitate fruitful negotiations. Importantly, mediations are not binding. Parties often enter into mediation on the basis that if an agreement is not reached, they may resume the litigation process.

While in some cases mediation is voluntary, in other situations it is mandatory. In Ontario, for instance, the Rules of Civil Procedure require that mandatory mediation be used in all case-managed actions, with minor exceptions, within 90 days after the first defence has been filed, unless a court orders otherwise. The goal of mandatory mediation is to help the parties resolve their disputes outside of court early in the litigation process, thus saving them both time and money. The purpose of case-management is to decrease the expense and delay in the administration of law suits by giving the courts a greater supervisory role over the progress of cases. Currently, case management applies in Ottawa, Windsor and Toronto. Mediation is still popular in areas of Ontario where case management does not apply.

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Commercial Arbitrations

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Canada, as is the case with other advanced jurisdictions, is experiencing significant growth in the use of arbitrations to resolve commercial disputes.

Although Toronto, in particular, is blessed with the Commercial List of the Ontario Superior Court, an expeditious court facility, many corporations, both domestic and foreign, have found that arbitration has additional advantages, including procedural flexibility, access to expert arbitrators and excellent arbitration facilities.

Toronto has become a significant centre not only for domestic arbitrations, of which there are many, but also for international arbitrations, a growing number of which corporations are choosing to conduct in Canada.

There are several reasons for this choice. Canada has an excellent reputation for high quality legal services and fair adjudications. Canadian commercial counsel, both in Toronto and elsewhere, are very capable. Canadian courts, and the legal system in Canada generally, are known for the fairness of their rulings. Expenses incurred are often much less than what is paid for comparable proceedings in other international centres such as London, New York, Hong Kong and Singapore.

Last, but not least, Canada has available to those who choose it as their arbitration venue a large number of excellent arbitrators, both in the ranks of retired judges and seasoned legal counsel.

Arbitrations can offer a number of advantages: speedy determination of disputes; finality, without costly appeals; and the opportunity for the successful party to obtain full indemnification for costs.

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