GOODMANS

Doing Business in Canada: A Concise Guide

If you are considering doing business in Canada, this guide may help.

Please note that the discussion in this guide is confined to the laws of Ontario and British Columbia and the laws of Canada that apply in those provinces as of May 2001. The guide is very general and should not be relied upon as legal advice. We encourage you to consult us directly with specific problems or questions.

CANADA'S INTERNATIONAL LAW FIRM

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OUR PHILOSOPHY

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INTRODUCTION

Canada is a federal state in which jurisdiction is constitutionally divided between two levels of government, federal and provincial. In some areas, either the federal government or the provincial government may have exclusive jurisdiction. In others, both levels of government may regulate different aspects of a particular activity. In addition, provincial governments delegate certain powers to municipal governments. A business may therefore be regulated at three levels, federal, provincial and municipal. It may also be affected by policies and decisions of administrative tribunals.

Canada is a constitutional monarchy. Although Queen Elizabeth II is Canada's official head of state, the governments of Canada are democratically elected by the population. At each level, the elections are independent, with the result that the same political party may not always govern at the federal and the provincial levels. In addition, Canada is governed by a Charter of Rights and Freedoms that guarantees certain rights of individuals as against the state.

All the provinces of Canada except Québec are common law jurisdictions, with strong historical ties to the British common law. Québec is a mixed common law/civil law jurisdiction in which private law matters, such as contract and property, are governed by a Civil Code.

Canada provides an attractive climate for foreign businesses. It has stable political and economic systems and is rich in both natural and human resources.

As a result of the North American Free Trade Agreement between Canada, the United States and Mexico, Canada offers foreign businesses improved access to the vast North American market.

TYPES OF BUSINESS ORGANIZATION

In the following pages we will endeavour to provide the reader with a general overview of the different types of business organizations in Canada.

SOLE PROPRIETORSHIPS

A business owned by one person is called a "sole proprietorship". This is the simplest form of business organization. The individual is responsible for all the obligations of the business. Accordingly, his or her personal assets may be seized to meet these obligations.

There is no commercial legislation dealing specifically with sole proprietorships; however, a sole proprietor may need to comply with federal, provincial and municipal regulations affecting trade and commerce, licensing and registration. For example, in Ontario a sole proprietor who carries on business or identifies his or her business to the public under a name other than the name of the owner must register the name under the *Business Names Act*. A substantially similar obligation is imposed in British Columbia under the *Partnership Act* (B.C.).

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

PARTNERSHIPS

Partnership is the relationship among persons carrying on business in common with a view to profit. The rights and obligations of the partners among themselves are usually set out in a written partnership agreement. In the absence of an agreement to the contrary, the rights and obligations of partners will be those stipulated by provincial legislation. Partners may be natural persons, corporations or other partnerships.

In Ontario, the governing statutes are the *Partnerships Act* and the *Limited Partnerships Act* which, in addition to setting out presumptive rules for the relationship among partners, govern the rights and obligations of the partnership towards third parties.

In British Columbia, the governing statute applicable to both general and limited partnerships is the *Partnership Act*. The provisions of the *Partnership Act* applicable to general partnerships are largely similar to those of the Ontario legislation.

Income and losses of a partnership, although assessed at the partnership level, are taxed in the hands of the partners. This tax treatment is the primary reason for using a partnership rather than a corporation, since each partner may offset its share of the partnership's business tax losses against income from other sources. Partnerships are also used by professionals such as lawyers who are not allowed, except in highly regulated circumstances, to practice their profession through a corporation.

General Partnerships

The main characteristic of a general partnership is the unlimited liability of each partner for the liabilities of the partnership. Contributions from each partner may be in money, property or services and, unless otherwise stated in the partnership agreement, all contributions are deemed to be equal. Each partner is jointly liable for all debts and obligations incurred by the partnership. However, a partner is generally not liable for obligations incurred before it became or after it ceased to be a partner. All partners may take an active role in operating a general partnership. As all partners are deemed to be agents of the partnership, each partner may bind the others unless there are restrictions in the partnership agreement of which third parties have notice.

The main disadvantages of a general partnership are the unlimited liability of the partners and the fact that each partner is an agent of the partnership and may bind the others.

In Ontario, all the partners of a general partnership must register the name of the partnership under the *Business Names Act* unless the business is carried on under the names of the partners.

In British Columbia, persons associated in partnership for trading, manufacturing or mining purposes are required to file a declaration in the prescribed form under the *Partnership Act* (B.C.).

Limited Partnerships

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

The general partner or partners manage the partnership. A limited partner may not take part in the management of the partnership without jeopardizing its limited liability, though it may act as an employee, agent or consultant.

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

To establish a limited partnership in Ontario, a declaration signed by the general partners on behalf of all the partners, must be filed under the *Limited Partnerships Act*. The declaration must be renewed every five years and when the partnership wishes to cease operations a declaration of dissolution must be filed.

In British Columbia, the *Partnership Act* requires the filing of a certificate, signed by each person who will be a general partner, that sets out the respective contributions of the limited partners, the term for which the limited partnership is to exist and the basis on which limited partners will be entitled to share profits.

JOINT VENTURES

A joint venture is an agreement entered into by two or more parties (individuals, partnerships or corporations) to pool capital and skills for the purpose of carrying out a specific undertaking. The interests and liabilities of each party are confined to the amount of that party's investment. Since a joint venture is not a recognized entity for tax purposes, income and losses for tax purposes are computed separately by each joint venturer rather than at the joint venture level. A joint venture is thus a means to carry out a single operation using common resources, with each party retaining a substantial degree of independence.

Joint venturers who do not want their joint venture to be a partnership should enter into a written agreement setting out their respective rights and obligations in detail. Otherwise there is a risk that the joint venture may be characterized as a general partnership. If so, each partner would be fully liable for partnership obligations and subject to tax as a partner rather than as a joint venturer.

CORPORATIONS

General

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

As a separate legal entity, a corporation has rights, powers, privileges and obligations similar to those of natural persons. It can hold property and carry on a business and it is subject to legal and contractual obligations.

Shareholders are the constituting members of a corporation, but they are not necessarily responsible for its management and normally cannot bind the corporation. Generally, the authority to bind the corporation rests with the directors, elected by the shareholders to manage the corporation. However, if the shareholders prefer to retain direct control of the corporation, the federal corporate statute and many provincial statutes allow them to enter into a unanimous shareholders' agreement. Such an agreement can effectively transfer responsibility for the management of the corporation from the directors to the shareholders.

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

The main advantages of the corporation as a business entity are the limited liability of the shareholders, the possibility of perpetual existence and the flexibility of the corporate form for financing and estate planning purposes. The disadvantages include the costs associated with the incorporation, operation and dissolution of the corporation and adherence to certain financial solvency tests. In addition, every corporation resident in Canada or carrying on business in Canada which deals with non-residents not at arm's length must file with Revenue Canada an annual information return containing information about such transactions.

Federal or Provincial Incorporation

The federal and provincial levels of government have each enacted legislation providing for the incorporation and regulation of corporations and the members can choose which statute they wish to govern the corporation. A company is incorporated federally under the *Canada Business Corporations Act* (CBCA).

In Ontario, the governing legislation is the *Business Corporations Act* (OBCA). The OBCA and CBCA prescribe essentially the same requirements, with some notable exceptions discussed below.

Under the CBCA, a federal corporation has the right to carry on business under its corporate name in any province of Canada, while under the OBCA and other provincial corporate statutes there is no such entitlement. An Ontario corporation applying for a license or registering in another province cannot be licensed or registered under its name if that name is already being used there by another corporation. If this is a concern, incorporation under the CBCA may be advantageous, although as a practical matter a CBCA corporation may need to operate under a different name in any province where its corporate name would be confusing.

Generally, only public corporations, whether federal or provincial corporations, must file financial statements.

In addition, the costs of incorporation are currently lower under the OBCA than under the CBCA.

Finally, although both the OBCA and the CBCA require a majority of directors to be Canadian residents, an OBCA corporation may have only one Canadian resident and one foreign director. Under the CBCA, a corporation with one foreign director needs at least two directors who are Canadian residents, although there are certain limited exceptions for holding companies.

In British Columbia, the principal act governing the incorporation and regulation of companies is the *British Columbia Company Act* (the "BCCA"). There are currently a number of significant differences between the CBCA and the BCCA, including the following:

- Unlike the CBCA, which prohibits the creation of par value shares, the BCCA authorizes the creation of shares with par value, without par value, or both;
- The BCCA currently provides more protection to shareholders of a private (under the BCCA, termed a "non-reporting") company against the dilution of their shareholdings as a result of the allotment of additional shares;
- A special resolution of shareholders must be passed by two thirds of the shareholders under the CBCA, but three quarters is currently required under the BCCA;
- The CBCA provides that directors are appointed for a term not exceeding three years. The BCCA allows directors to be appointed in accordance with the terms of the Company's articles, which may provide for a longer term;
- In addition to providing that the majority of directors must be Canadian residents, the BCCA currently requires that one director be ordinarily resident in British Columbia; and
- The BCCA permits the company's articles to modify the directors' powers, but makes no reference to unanimous shareholders' agreements. Shareholders of British Columbia companies use agreements that provide for the management of the affairs of the company but

these agreements are enforceable only as contracts, and cannot derogate from the directors' fiduciary obligations to the company.

A revised *Company Act* (B.C.) passed by the Government of British Columbia in July of 1999 modified certain of these and other provisions of the BCCA; however, it may be some time before the new legislation comes into force.

Both federally and provincially incorporated companies must fulfil the registration requirements of every province in which they intend to carry on business.

Subsidiary or Branch?

Business may be carried on in Canada by setting up a new corporation as a subsidiary or through a branch of an existing corporation. The choice will be based primarily on tax considerations discussed elsewhere, but the non-tax considerations discussed below may also be relevant.

If the incorporation of a subsidiary is chosen, constating documents required under the applicable statute must be filed, with the appropriate filing fee. The constating documents generally must set out the name of the corporation, its registered office, a description of the classes of shares and restrictions on share transfers, the number of directors, and any limitations on the corporation's activities. By-laws regulating the affairs of the corporation in general and its borrowing powers in particular must be passed. Then the corporation may begin its business activities.

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

Directors may incur personal liability for acts which contravene the statute under which the corporation was incorporated or under a myriad of other statutes, such as the *Employment Standards Act* in Ontario, the *Employment Standards Act* in British Columbia and the federal *Income Tax Act*. For example, they may be held personally liable for certain unpaid wages and wage-related deductions if the corporation becomes bankrupt.

Directors must act honestly and in good faith with a view to the best interests of the corporation. They must also exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. The corporation may purchase insurance to cover the personal liability of the directors; however, insurance will only cover those acts which were performed by the directors in good faith and within the scope of their duties.

The daily operations of a corporation are normally carried out by its officers. Officers can be non-residents of Canada, provided that they have complied with the requirements of the *Immigration Act* (see "Temporary Entry and Permanent Residence", below).

An unincorporated branch may be chosen as an alternative to a subsidiary. The foreign corporation must register in all provinces in which it wishes to carry on business. The corporation cannot register if the name of the foreign corporation is the same as or similar to one already in use in that province. Business names used by a branch should be properly registered and should not be the same as or similar to names used in the province. A foreign corporation which establishes a branch in Ontario must apply to the Minister of Consumer and Commercial Relations for a license under the *Extra-Provincial Corporations Act*. British Columbia requires a foreign corporation that carries on business in the province to be extra-provincially registered.

Tax considerations in choosing between a branch and a subsidiary are discussed under "Tax Considerations", below.

CONTRACTUAL ARRANGEMENTS

Although the following arrangements are not forms of business organization per se, they are alternatives to the forms already discussed.

Franchising

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

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

Licensing

Licensing is a contractual relation between two parties whereby a licensor grants a licensee the right to use a copyright, industrial design, patent, trademark, trade name or know-how. The relationship is governed solely by contract.

CONCLUSION

In deciding on the most appropriate form of business organization, the specific needs of the business must be assessed. Factors which require particular consideration include: the extent of liability, participation in management, separate legal existence, transferability of interest, financing aspects, complexity of organization, the nature of the business, and, perhaps most importantly, tax implications. ■

PRIVACY

BACKGROUND

Canada's new privacy legislation (the "*Act*") came into force on January 1, 2001. It establishes rules for the protection and management of person information that is collected, used or disclosed by private organizations during the course of commercial activities.

The fundamental tenets of the *Act* are:

(i) organizations that collect, use or disclose personal information during the course of commercial activity must do so only with the prior knowledge and consent of the affected individuals, and

(ii) such information may only be used for the purposes for which consent has been given.

The term "organization" includes partnerships, associations, persons (including corporations) and trade unions. "Commercial activity" is defined as any particular transaction, conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists. "Personal information" is broadly defined to mean any information about an "identifiable individual" whether recorded or not. This includes data such as race, ethnic origin, age, financial history, behavioural data, Social Insurance Numbers, blood type, viewpoints, and personal opinions. Finally, "record" is also broadly defined to include any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, video recording, and any other documentary material, regardless of physical form or characteristics, and any copy of any of those things.

APPLICATION

The *Act* limits the collection, use and disclosure of personal information to purposes that a "reasonable person" would consider appropriate in the circumstances. It applies to **any** private enterprise that collects, uses or discloses personal information and is **not** limited to businesses engaging in e-commerce or the electronic collection of data.

(a) When will the *Act* apply?

The *Act* will apply to different types of organizations and information in stages. Part 1 currently applies to:

(i) any organization involved in a commercial activity in Canada that is federally regulated (such organizations include banks, telecommunications companies, airlines, railways, inter-provincial trucking companies, national couriers, shipping companies and broadcasters), and

(ii) personal data disclosed by any organization across provincial or international boundaries for consideration.

On January 1, 2002, the *Act* will extend to personal health information for the organizations and activities covered in the first stage. Personal health information is defined as information about the physical or mental health of an individual, including information concerning health services provided to the individual whether living or dead, and information about tests and examinations.

On January 1, 2004, the *Act* will apply to the collection, use or disclosure of personal information by *any* organization in the course of commercial activity, whether within or outside of a province. The federal government may exempt organizations and/or activities in provinces that have adopted substantially similar legislation. However, inter-provincial and international transfers of personal information will remain subject to the *Act*.

(b) When will the *Act* not apply?

Personal information does not include the name, title, business address or telephone number of an employee. Moreover, section 7 of the *Act* states that certain publicly available personal information may be collected, used or disclosed without the knowledge or consent of the affected individual. This exemption covers information (i.e., name, address, and telephone number) found in publicly available telephone, professional or business directories (only directories that

allow subscribers to refuse to have the personal information appear in the directory are eligible), information found in a registry collected under statutory authority, a publicly available court record and information appearing in the media where an individual has provided the information.

The *Act* does not apply to:

(i) any government institution to which the *Privacy Act* (Canada) applies,

(ii) any individual in respect of personal information that the individual collects, uses or discloses for personal or domestic purposes and does not collect, use or disclose for any other purpose, and

(iii) any organization in respect of personal information that the organization collects, uses or discloses for journalistic, artistic or literary purposes and does not collect, use or disclose for any other purpose.

(c) Application to non-Canadian businesses

The *Act* covers data collection in Canada regardless of who is doing the collecting. However, as a practical matter, the Privacy Commissioner's ability to enforce the *Act* outside Canada will be limited at best.

PRINCIPLES OF THE *ACT*

The *Act* is based on the fair information principles set out in the *Canadian Standards Association's Model Privacy Code for the Protection of Personal Information*. These principles are:

1. Accountability
2. Identifying Purposes
3. Consent
4. Limiting Collection
5. Limiting Use, Disclosure and Retention
6. Accuracy
7. Safeguards
8. Openness
9. Individual Access
10. Providing Recourse

ENFORCEMENT

The Privacy Commissioner of Canada oversees the *Act*. The Commissioner may commence an investigation where he or she is satisfied that there are reasonable grounds to investigate a matter. An individual may also complain to the Commissioner.

The Commissioner has broad investigatory powers and may administer oaths, compel individuals to appear, testify and produce evidence, and enter premises (with the exception of residences) to examine and copy records.

The Commissioner may audit an organization's information management practices if he or she has reasonable grounds for believing that the organization is not complying with the *Act*. The Commissioner has the power to search and compel evidence during the course of an audit.

The Commissioner may disclose to the public any information relating to the personal information practices of an organization if the Commissioner considers that it is in the public interest to do so.

The *Act* imposes criminal liability on every person who knowingly (a) fails to retain personal information that is the subject of a request before remedies have been exhausted, (b) dismisses an employee who has, in good faith, reported his or her employer to the Commissioner for allegedly contravening the *Act* or (c) obstructs the Commissioner or the Commissioner's delegate in the investigation of a complaint or in conducting an audit. A person is liable to a fine of up to $10,000 on summary conviction or up to $100,000 for an indictable offence. ■

TAX CONSIDERATIONS

In Canada, income tax is imposed by the federal and all provincial governments. Both the federal *Income Tax Act* ("Tax Act") and provincial tax legislation impose tax on all income and most capital gains of Canadian residents, regardless of the country in which the income is earned. A non-resident is subject to withholding tax on most forms of passive income paid to him or her by a resident of Canada and to income tax on Canadian-source employment and business income, and capital gains realized on the disposition of "taxable Canadian property". Taxable Canadian property includes, among other things, real property situated in Canada, assets used in carrying on business in Canada, shares of a private corporation that is resident in Canada and interests in resident trusts. The definition of "taxable Canadian property" also includes interests in partnerships, resident or non-resident, where 50% or more of the value of the partnership was derived from taxable Canadian property. Interests in non-resident corporations and trusts where 50% or more of their value was derived from taxable Canadian property are also included in the definition of "taxable Canadian property". If applicable, an international tax treaty may reduce or eliminate a non-resident's liability for Canadian tax. Except where specifically mentioned, the tax rates in the following discussion do not take into account the effect of tax treaties. The following discussion takes into account proposed amendments announced in the February and October 2000 Federal Budgets.

INCOME TAX

Resident in Canada

The primary basis for taxation under the Tax Act is the residence of the taxpayer.

A corporation incorporated in Canada after April 26, 1965 (or, in certain situations, before this date) is deemed to be resident in Canada. A corporation incorporated outside Canada may also be resident in Canada if its central management and control is located in Canada. This is generally the case if the corporation's board of directors meets in Canada.

Whether an individual is resident in Canada depends on his or her particular circumstances. Generally, an individual who, in a settled routine, regularly or normally lives in Canada will be resident in Canada for Canadian tax purposes. In addition, an individual who sojourns in Canada for 183 or more days during a year will be deemed to be resident in Canada for the year.

A corporate or individual taxpayer who is considered under domestic law to be a resident of Canada and of another country may, by an applicable tax treaty, be deemed to be resident in only one country for tax purposes. Under the Tax Act an individual who became, after February 24, 1998, and is, under an agreement between Canada and another country, entitled to an exemption from, or a reduction of, its tax otherwise payable under the Tax Act, is deemed not to be a resident of Canada. To the same extent, any person who, under an international agreement, is exempt from tax in his or her country of residence because of his or her relationship to a Canadian resident will be deemed to be a resident of Canada.

A non-resident taxpayer who becomes a resident of Canada is deemed to have disposed of each property (other than, in most instances, taxable Canadian property, inventory and eligible capital property in respect of a business carried on in Canada) then owned for proceeds equal to the fair market value of the property at that time, and to have reacquired the same property at a cost equal to such proceeds. The taxation year of a corporation becoming a resident of Canada is also deemed to have ended immediately before the change in its status.

A taxpayer who ceases to be resident in Canada at any time is similarly deemed to have disposed of and immediately reacquired each property for its fair market value at that time. Where the taxpayer is an individual, this deemed disposition and acquisition usually does not apply to many assets, such as immovable property, assets used in carrying on business, stock options, certain pension and similar rights, interests in resident trusts, interests in non-resident testamentary trusts and interests in life insurance. The taxation year of a corporation and, in some instances, a business carried on by an individual is also deemed to have ended immediately before a change in the corporation's or individual's residence status, as the case may be.

The rules regarding departure from Canada take into account proposed modifications tabled by the Minister

of Finance in June 2000, which, if enacted, will take effect retroactively as of October 1, 1996.

Individual Income Tax

- **Federal Income Tax**

For the 2001 taxation year, an individual who is resident in Canada is subject to federal income tax on world-wide income at graduated rates varying between 16% and 29% (excluding surtaxes) depending on taxable income.

A federal surtax for the 2000 taxation year, calculated as 5% of federal income tax otherwise payable in excess of $15,500, is levied after taking into account any applicable credits. This surtax will be eliminated for the 2001 and subsequent taxation years.

Business and property income is generally equivalent to the profit from the business or property calculated in accordance with accepted accounting and commercial practice and adjusted as required by specific rules in the Tax Act. The individual is permitted to deduct reasonable expenses incurred to earn business and property income, as well as other specific deductions provided for in the Tax Act. Deductions in computing income from employment are very limited.

A non-resident individual is required to pay Canadian tax on employment and business income derived in Canada. An applicable treaty, however, may provide an exemption from Canadian tax in certain situations. For the 1998 and subsequent taxation years, a non-resident taxpayer's taxable income earned in Canada will be computed without reference to the taxpayer's income or loss from a business carried on in Canada or from a property, where any income or gain arising therefrom could, under an agreement between Canada and another country, be exempt from tax under the Tax Act.

A resident of Canada who realizes a gain on a disposition of capital property must also pay tax at normal rates on the taxable portion of the capital gain. For dispositions occurring prior to February 28, 2000, the portion of capital gains that is subject to federal income tax is ¾. The federal government has proposed to reduce the inclusion rate to 2/3 for dispositions occurring after February 27, 2000, and to further reduce it to ½ for dispositions occurring after October 17, 2000. The capital gain is computed by deducting the adjusted cost base of the property (roughly, the cost of acquisition adjusted as required by the Tax Act) and the costs of disposition from the proceeds of disposition. A non-resident is required to pay tax on capital gains arising from the disposition of "taxable Canadian property" as described earlier.

A person, whether or not a Canadian resident, who acquires taxable Canadian property from a non-resident is required, unless provided with a clearance certificate from the Canada Customs and Revenue Agency ("Revenue Canada"), to withhold an amount equal to 33 1/3% of the purchase price and remit such amount to the Canadian government on behalf of and on account of any tax payable by the non-resident. Proposed amendments to the Tax Act will, if enacted, reduce the applicable withholding rate to 30% for taxation years that end after February 27, 2000 and before October 18, 2000, and to 25% for taxation years ending thereafter. The applicable rate of withholding is increased to 50% of the purchase price with respect to certain types of taxable Canadian property (for example, depreciable property).

- **Provincial Income Tax**

Non-corporate income taxes in Ontario are collected by the federal government. In Ontario for the taxation year 2000, personal income tax is calculated based on graduated rates varying between 6.37% and 11.16%. The bottom limit of this range will drop to 6.2% for the 2001 taxation year. For the 2000 taxation year, the surtax will be calculated as 20% of Ontario income tax in excess of $3,561 plus 36% of Ontario income tax in excess of $4,468. For the 2001 and subsequent taxation years, the surtax will be applicable at $3,466 and $4,373 of Ontario tax respectively.

For 2000, the maximum combined federal/Ontario rate is 47.9%. The maximum combined rate will be reduced to 46.4% for the 2001 taxation year. The Ontario government has proposed to match the federal government's reduced capital gains inclusion rate to 2/3 for capital gains arising after February 27, 2000 and before October 18, 2000, and to further reduce the inclusion rate to 50% for dispositions occurring after October 17, 2000.

Non-corporate income taxes in British Columbia are collected by the federal government. In British Columbia for the 2000 taxation year, personal income tax is calculated on graduated rates varying between 8.4% and 14.35%. The maximum personal income tax rate for the 2000 taxation year is 51.3%. This rate will be reduced to 48.7% for the 2001 taxation year. British Columbia also imposes a two-tier surtax on provincial income tax. First, for 2000, a 30% surtax is levied against provincial income tax in excess of $5,300. An additional surtax is levied at 15% of provincial income tax in excess of $8,660.

Beginning in the taxation year 2001, British Columbia will tax income at graduated rates between 8.4% and 19.7%. The surtaxes will be eliminated and incorporated into the above rates.

Corporate Income Tax

- **General**

The basic rate of tax for a corporation carrying on business in Ontario, including a non-resident corporation, was reduced by the May 2, 2000 Ontario budget from 44.6% to 43.6% (a combination of the basic federal rate of 28%, a federal surtax of 4% and the Ontario rate of 14.5%). A blended rate of 43.95% will apply for the 2000 taxation year. For the 2001 taxation year the combined rate will be further reduced to 42.1%. The federal government proposes to reduce the basic federal rate to 21% by 2004, and the Ontario government proposes to reduce the Ontario rate to 8% by 2005. In British Columbia, the basic corporate tax rate for the 2000 taxation year is 45.6%. Both the federal tax and the Ontario tax are reduced in respect of profits from Canadian manufacturing or processing. British Columbia does not provide for such a reduction.

- **Canadian-Controlled Private Corporations**

A “Canadian-controlled private corporation” (“CCPC”) may claim a federal small business tax credit on the first $200,000 of income from an active business carried on in Canada. A CCPC is generally defined to be a private Canadian corporation which is not controlled (alone or in combination) by non-residents or public companies and, which would not, if each share of the capital stock of a corporation that is owned by a non-resident person or a public corporation were owned by a particular person, be controlled by the particular person and which has no class of shares of its capital stock listed on a prescribed stock exchange. A corporation that is owned equally by residents and non-residents and that is not controlled in law or fact by the non-residents may qualify as a CCPC and benefit from the tax credit. The federal tax credit is currently 16% of qualifying income of up to $200,000 (which must be apportioned among associated corporations). A CCPC will be subject to the basic federal corporate rate for income over this threshold amount. For the 2001 taxation year, the basic federal rate will be reduced from 28% to 21% for CCPCs on active business income between $200,000 and $300,000. The small business tax credit is gradually reduced for corporations having a taxable capital employed in Canada (including that of associated corporations) in excess of $10 million, and is completely eliminated where such taxable capital reaches $15 million.

The recent Ontario budget reduced the Ontario small business tax rate from 7.5% to 7.0% on the first $200,000 of Ontario source income (and, again, a blended rate will apply for the 2000 taxation year). This rate will be reduced by 0.5% in the year 2001 and in each subsequent taxation year until 2005, when it will be further reduced to 4%. An Ontario surtax is imposed on the taxable income of CCPCs which claim the Ontario small business deduction where their taxable income exceeds $200,000. This surtax currently eliminates the benefits of the small business deduction when the taxable income of the CCPC reaches $500,000. The recent Ontario budget has proposed to increase the limit at which such benefits are eliminated by $100,000 per year until 2005 when the limit will be $1 million. The surtax is allocated among associated corporations based on the allocation used by those corporations to share the small business deduction.

Ontario imposes a corporate minimum tax which applies to all corporations that are liable for Ontario corporate income tax and that, together with associated corporations, have either gross revenues in excess of $10 million or total assets in excess of $5 million. The rate of corporate minimum tax is 4% of the corporation’s net income otherwise calculated with certain specific adjustments.

British Columbia’s preferential corporate tax regime for small businesses is similar to the federal system. After

July 1, 2000, any corporate income subject to the federal small business tax credit, described above, will be taxed by British Columbia at a rate of 4.75% (rather than 16.5%). For 2000, a blended rate of 5.12% will apply. Effective January 1, 2001, the rate will be further reduced to 4.5%. Furthermore, small businesses incorporated between May 1996 and March 2001 may be eligible for a special two year tax holiday. During the first two years after incorporation, an eligible corporation will pay no provincial tax on income that would otherwise be subject to the special small business tax rate described above.

CAPITAL TAX

The federal government imposes a tax equal to 0.225% of the "taxable capital employed in Canada" in excess of $10,000,000 of any corporation that is resident in Canada or a non-resident that carries on business in Canada through a permanent establishment here. For these purposes, taxable capital employed in Canada of a resident is equal to its paid-up capital, retained earnings, contributed and other surpluses and debt, less the carrying value of certain investment assets. Non-residents having a permanent establishment in Canada compute capital employed in Canada on the basis of their assets used or held in the course of carrying on any businesses through a permanent establishment in Canada. The threshold of $10,000,000 is shared among associated CCPCs; non-CCPCs must share the threshold if they are related, whether resident or non-resident. There are special rules to determine the liability of financial institutions for capital tax.

Large corporations may deduct in computing their capital tax liability the total federal surtax payable (discussed above under the heading "Corporate Income Tax") for the relevant year and any "unused surtax credits" from other years within a certain carryover period. Generally, the "unused surtax credit" of a large corporation is the amount by which the corporation's federal surtax payable exceeds the capital tax payable for a given year.

In Ontario, capital tax is imposed on the taxable paid-up capital of any corporation carrying on business through a permanent establishment in Ontario. This tax is imposed at the rate of 0.3% of the taxable paid-up capital used in Ontario, with special rates for certain financial institutions. Paid-up capital includes paid-up capital stock, surpluses, reserves, shareholder loans and secured indebtedness, such as mortgages and bank loans. In general, capital tax is not payable if neither the total assets of the corporation nor its gross revenues exceed $1 million. For taxation years ending after May 4, 1999, corporations whose taxable paid-up capital is not greater than $2 million will be exempt from capital tax. For corporations whose taxable paid-up capital is greater than $2 million and less than $4 million, the full rate of capital tax will be phased in gradually over 5 years (e.g. the top threshold will be $3.2 million in 2001, $3.6 million in 2002 and $4 million in 2003).

A corporation that maintains a permanent establishment in British Columbia during a taxation year will be required to pay capital tax equal to 0.3% of the corporations "adjusted paid-up capital" allocated to such permanent establishment. Adjusted paid-up capital is calculated in much the same way as "taxable paid-up capital" is calculated in Ontario (see above). For 2000, capital tax will be levied against adjusted paid-up capital in excess of $3.5 million. This threshold increases to $5 million in 2001. Special rules apply for certain categories of financial institutions.

SUMMARY

The following table summarizes the different rates applicable in Canada for the 2001 taxation year:

		B.C.	Ontario
Combined maximum rates for individuals[1]	Income Tax	48.7%	46.4%
	Capital Gains	24.4%	23.3%
	Canadian Dividends	36%	31.3%

		B.C.	Ontario	Federal
Corporate Tax Rates	Basic Rate	16.5%	14%(2)	28.12%(3)
	Small Corporations	4.5%	6.5%(4)	13.12%
	Investment Income	16.5%	14%	28.12%(or 34.79%)(5)
	Capital Tax	0.3%(6)	0.3%(6)	0.225%

(1) Including, where applicable, surtaxes.

(2) This rate is reduced to 12% for Canadian manufacturing or processing corporations and additional reductions will reduce the rate to 8% by 2005.

(3) This rate is reduced to 22.12% for Canadian manufacturing or processing corporations.

(4) This rate will be further reduced to 4% by 2005.

(5) A CCPC is subject to an additional refundable tax of 6.67%, for a combined rate of 34.79%. The refund will be triggered to the extent the CCPC pays dividends.

(6) Special rates apply in respect of certain financial institutions.

Non-Residents - Special Rules

- **Withholding Tax**

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

Generally, withholding tax will be due whether or not the resident payer is related to or dealing at arm's length with the payee. Although the tax is imposed on the non-resident, the resident payer is required to deduct the tax and remit it to the Canadian tax authorities on behalf of the non-resident. A Canadian resident payer may obtain the consent of the Canadian tax authorities not to withhold tax in respect of any payment of property or investment income that is included in the business income of the non-resident's Canadian branch operations.

In certain circumstances, a non-resident of Canada will be deemed to be a resident of Canada for withholding tax purposes. For example, a non-resident which carries on business principally in Canada or manufactures or processes goods in Canada will be deemed to be resident in Canada and must withhold tax on any payment (such as interest) made by it to another non-resident if the payment is deductible in computing the payer's income for Canadian tax purposes.

There are certain exemptions from withholding tax, such as interest paid by a Canadian corporation on money borrowed from an arm's length lender where the borrower may not, under the terms of the loan, be required to repay more than 25% of the principal of the loan within five years from the date on which the loan was made. Other exemptions exist for management fees paid to arm's length non-residents.

- **Branch Operations in Canada**

In addition to liability for normal income tax on its Canadian source business income, a non-resident corporation that carries on business in Canada through an unincorporated branch is liable for a branch profits tax of 25% of an amount approximately equal to the after-tax earnings of the branch not reinvested in Canada. The rate of branch tax may be reduced by an applicable tax treaty.

- **Canadian Subsidiaries**

A Canadian incorporated subsidiary of a non-resident corporation is a Canadian resident for Canadian income tax purposes, and is therefore subject to tax in Canada on its worldwide income at the corporate tax rates discussed above.

Certain types of payments (including dividends, interest, management or administration fees and royalties) made by a subsidiary to its non-resident parent are subject to withholding tax as discussed above.

In Ontario, tax legislation effectively increases Ontario taxes payable by a Canadian subsidiary on management or administration fees, rents, royalties and other such

payments (but not dividends and interest) by disallowing the deduction of part of these amounts paid by the subsidiary to a non-resident parent corporation. There is no similar provincial legislation in British Columbia.

- **Capitalization and the Thin Capitalization Rule**

Equity of a Canadian subsidiary of a non-resident corporation may, to the extent of paid-up capital, be returned tax-free to the non-resident shareholder. However, any distribution of capital made to the non-resident shareholder in excess of paid-up capital is generally deemed to be a dividend and therefore subject to withholding tax.

Repayment of principal loaned to a Canadian subsidiary by its non-resident parent is not subject to withholding tax but tax must be withheld in respect of interest paid on the loan.

Subject to the thin capitalization rule discussed below, a Canadian subsidiary may, in accordance with the usual rules relating to interest deductibility, deduct interest paid by it to a non-resident in computing its income, provided that the amount of interest is reasonable in the circumstances and the borrowed money is used to gain or produce income from business or property. Accrued unpaid interest that has been deducted in certain non-arm's length cross border transactions will be added back to the income of the resident subsidiary for income tax purposes.

The "thin capitalization rule" is intended to prevent a Canadian incorporated subsidiary from reducing its taxable Canadian profits, and hence its liability for Canadian tax, by maximizing its interest expense to related non-resident creditors. The rule will deny the resident subsidiary's deduction of interest on that portion of its debt owed to non-arm's length non-resident shareholders (or other related persons) that exceeds three times the total shareholders' equity (i.e. retained earnings, contributed surplus and the paid-up capital of shares) of those persons in the subsidiary. The February 2000 Federal Budget proposes, for taxation years that begin after 2000, to reduce the ratio of debt to equity for the purposes of the limit on interest deductibility from 3:1 to 2:1. The February 2000 Federal Budget also proposes to apply an average ratio of debt to equity for the year in determining this limit. Borrowing from an arm's length source or from a lender who is resident in Canada is not subject to the thin capitalization rule. The rule does not apply to funds loaned to an unincorporated Canadian branch.

It should be noted that when a resident corporation lends money to a non-resident corporation which pays no interest for one year or more, interest is nevertheless added to the income of the lender. This rule is also applicable if the lender is a trust or a partnership in which a resident corporation has an interest.

- **Branch Operation or Canadian Subsidiary?**

Whether a company should carry on business in Canada through a Canadian subsidiary corporation or an unincorporated branch depends on many factors, including the tax considerations summarized below:

- **Branch Operation**

  Advantages:

  - The non-resident corporation may be able to utilize losses incurred by the Canadian branch.
  - Funds can flow freely between the head office and the branch (subject to the branch tax discussed above).

  Disadvantages:

  - A Canadian branch of the non-resident corporation will, subject to any treaty relief that may be applicable, be liable for the branch tax discussed above.
  - The non-resident corporation will have to file tax returns in Canada.
  - There may be difficulties in allocating income and expenses between the head office and the branch.
  - Opportunities to minimize taxes through intercompany transactions are limited.
  - The costs and practical aspects of transferring branch assets into a Canadian corporation

should be taken into account if this is contemplated.

- There is no direct control over the timing of the incidence of branch tax.

- **Canadian Subsidiary**

  - The Canadian subsidiary will not be liable for branch tax (but see withholding taxes noted below).

Advantages:

- The non-resident corporation will not be required to file tax returns in Canada, although the subsidiary will be under such an obligation.
- It is easier to separate income and expenses of the subsidiary from the non-resident corporation and transfer pricing (discussed in greater detail below) may provide flexibility to reduce Canadian tax, although this is subject to limits discussed below.
- The timing and incidence of withholding tax can be controlled by actual payment.

Disadvantages:

- The start-up losses and other losses of the subsidiary are not available to the non-resident corporation.
- The "thin capitalization" rule discussed above may apply with the result that a portion of the interest payable by the subsidiary may not be deductible.
- Withholding tax will apply to dividends, interest, royalties, and other forms of passive investment income- paid to a non-resident.

- **Transfer Pricing**

Whether a branch or a subsidiary is used, consideration should be given to the issue of transfer pricing. Transfer pricing, sometimes referred to as inter-company pricing, is the price or charge for goods or services transferred between related parties.

In a related party transaction, the price of goods and services is not generally determined by the dynamics of the market. Taxing authorities of the jurisdictions where the vendor and purchaser reside attempt to ensure that a reasonable profit is being earned and subjected to tax and that only reasonable deductions are claimed for tax purposes. Canada has tax provisions requiring that prices charged in related party transactions conform to prices charged in comparable arm's length transactions.

A taxpayer carrying on business in Canada is deemed, for purposes of computing the taxpayer's income, to pay a non-resident with whom it is not dealing at arm's length a reasonable amount as the price, rental or royalty for the purchase or use of any property or services. The "reasonable amount" is determined on the basis of what would have been payable on arm's length transactions.

Given that a non-resident corporation and its Canadian subsidiary would be deemed not to be dealing at arm's length, it is very important to pay particular attention to inter-company pricing issues. As mark-ups or profit margins cannot normally be recognized on intra-company transactions, transfer pricing is much less of an issue in determining the income of a Canadian branch. Payments that may raise this issue include management and administration fees, development charges, royalties and interest, and prices for the sale of goods.

Penalties related to the failure to establish transfer prices in accordance with the Tax Act are significant. However, when a corporation shows that it has made reasonable efforts to determine "arm's length transfer prices", the amount on which the penalty is calculated can be reduced. Efforts can qualify as "reasonable efforts" when the corporation keeps detailed books and documents.

An annual information return must be filed by every Canadian branch or corporation that engages in certain transactions with a related non-resident person (Form T106) if the total value of such transactions exceeds $1 million. Generally, these transactions include the purchase or sale of goods or services, the payment of rents, royalties, dividends and interest, and the lending

of money between the related parties. The branch or corporation must include in the information return, among other things, the name and principal business activity of the non-resident person and the amount of any consideration paid or received in respect of the transaction. The information return must be filed by the branch or corporation within six months after the end of its taxation year.

- **Partnerships Involving Non-Residents**

A non-resident corporation that belongs to a partnership which carries on business in Canada is generally subject to tax in Canada on its share of the partnership profits as if it carried on the partnership business directly as a Canadian branch of the non-resident corporation. A partnership that pays an amount to a non-resident person is considered to be a resident of Canada for the purposes of withholding tax to the extent that the amount paid is deductible in computing the income or loss of the partnership from a Canadian source.

- **General Anti-Avoidance Rule**

The Tax Act includes a broadly-worded anti-avoidance rule to prevent "avoidance transactions". The rule is not intended to apply to a transaction that is undertaken primarily for bona fide purposes other than to obtain a tax benefit, or that does not result in a misuse of the provisions of the Tax Act or an abuse of the Tax Act read as a whole. The Minister of National Revenue may determine the tax consequences of an avoidance transaction which he or she considers reasonable in the circumstances.

- **Tax Treaties and Conventions**

Canada has entered into bilateral income tax agreements or tax treaties with a number of other countries. These agreements are designed to avoid double taxation and to prevent tax evasion. They usually apply when the same income of a taxpayer is subject to both the Tax Act and the taxing legislation of another country. Generally, the country in which the income is earned has priority for tax purposes, while the country of residence permits the taxpayer to deduct tax paid in the other country from domestic tax on the same income by way of a foreign tax credit.

- **Non-Resident Trusts and Corporations**

Prior to 1972, trusts not resident in Canada established for the benefit of beneficiaries resident in Canada were not subject to tax in Canada and could be used to defer Canadian tax on accumulating income. However, where certain requirements as to the time of creation of the trust, the beneficiaries of the trust and the persons who have transferred property to the trust are met, the income of non-resident trusts is now subject to tax in Canada on a current basis except perhaps, for a limited period of time, for immigrants to Canada. The manner in which passive income earned by such a trust is taxable depends, in part, upon whether the trust is discretionary as to the payment of income or capital. If the trust is discretionary, the Tax Act contains rules which effectively tax the trust's passive income received by a Canadian beneficiary as if it had been received in the year it was earned by the trust.

On February 16, 1999, modifications to the Tax Act regarding non-resident trusts were first proposed. After lengthy consultations, these amendments are expected to be enacted in early 2001 and under the new provisions, all non-resident trusts will be subject to taxation as soon as a Canadian resident contributes to the non-resident trust, even though there are no Canadian beneficiaries. There are, however, some exceptions. For example, if a non-resident trust is subject to U.S. taxes, the new rule will not apply.

In many cases, the Tax Act provides that the income of the trust must be taxed even if this income has not been distributed to the beneficiaries. It is therefore impossible for taxpayers to defer the payment of taxes.

Similarly, accumulating passive income of certain non-resident corporations may be taxed in the hands of Canadian shareholders as if such income had been received in the year by such shareholders.

FISCAL INCENTIVES FOR SCIENTIFIC RESEARCH AND DEVELOPMENT ("SCIENTIFIC R&D")

Federal Government - Deduction from Income

The *Income Tax Act* allows a taxpayer doing business in Canada to deduct from its business income certain

amounts spent on Scientific R&D. A taxpayer may thus deduct expenses of the following nature:

(i) for Scientific R&D conducted by the taxpayer or on its account, with regard to that taxpayer or business;

(ii) payments to a corporation resident in Canada or other entity (universities, etc.) that conduct Scientific R&D in Canada related to the business of the taxpayer and to the extent that the taxpayer is entitled to exploit the results of such Scientific R&D.

A taxpayer can also deduct certain capital expenses (other than land of leasehold interest in land) for Scientific R&D carried on in Canada related to the business of the taxpayer.

Qualifying expenses for Scientific R&D can be claimed in the year they are incurred or deferred to another taxation year to the extent that the Scientific R&D expenses are identified as such in prescribed form (T-661) on or before the day that is 12 months after the taxpayer's filing due date for the year.

Definition of Scientific R&D

Scientific R&D is defined in general terms as a systematic investigation or research carried out in a field of science or technology through experiment or analysis, and includes pure research, applied research and experimental development. Also included in the definition of research and development activities are experimental development, namely, work undertaken to achieve technological advances for the purposes of creating new, or improving existing, materials, devices, products, or processes, including incremental improvements thereto or work with respect to engineering, design, operational research, mathematical analyses, computer programming, data collection, testing, and psychological research where such work is commensurate with the needs of pure or applied research or experimental development undertaken by the taxpayer in Canada.

Certain activities are excluded from the definition of Scientific R&D, such as:

- market research and sales promotion;
- quality control or routine testing of materials, devices, products, or processes;
- research in social sciences or the humanities;
- prospecting, exploring, or drilling for or producing minerals, petroleum, or natural gas;
- the commercial production of a new or improved material, device, or product, or the commercial use of a new or improved process;
- style changes; and
- routine data collection.

Scientific R&D expenses generally include, with certain exceptions, all expenses (or portion thereof) directly related to the research and development (such as salaries and equipment).

Generally, Scientific R&D expenses made in a year are fully deductible. However, those expenses that are not deducted in a year are placed in a pool and may be deducted in any future year in which the taxpayer carries on business in Canada.

A taxpayer can choose an alternative method for determining which expenditures incurred in Canada will qualify as Scientific R&D expenses to be included in the pool to be deducted in subsequent years. The alternative method, which is generally simpler, lists six types of expenditures to be considered as Scientific R&D expenses and included in the pool. All other expenses will generally be deductible in the year incurred as general business expenses. This method is simpler because it allows the taxpayer to avoid having to identify, item by item, the portions of general expenses directly attributable to Scientific R&D in Canada.

The Tax Act *provides a further incentive to invest in Scientific R&D activity in the form of an investment tax credit which is a direct reduction of the taxpayer's bill. This credit is discussed further below.*

It must be noted that the expenses incurred by members of an associated group of companies must be shared between them, and the expenses incurred with respect

to Scientific R&D contracts between related parties can generally not exceed the cost of the services rendered.

Tax Credits

The most important advantage flowing from the provisions of the Tax Act with respect to Scientific R&D consists of the possibility of claiming a tax credit with respect to these expenses.

(a) Rate of deduction

Taxpayers are permitted to claim an investment tax credit equal to 20% of allowable Scientific R&D expenses made during the taxation year.

Where the taxpayer is a CCPC and meets certain other criteria mentioned below, a tax credit equal to 35% of the first $2 million of Scientific R&D expenses made during the taxation year may be claimed.

The amount of the tax credit so calculated is generally refundable, meaning that any amount of the tax credit that is not applied to taxes otherwise payable for the taxation year in question will result in a cash refund to the taxpayer. The extent to which a refund is available is a function of the status of the taxpayer, the nature of the expenditure that gave rise to the credit and where the expenditure was made.

For example, expenditures made by a CCPC that exceed the limit of $2 million will be subject to a tax credit at the rate of 30% of such expenditures and the credit so calculated would generally be refundable to the taxpayer up to an amount of 40% of the total tax credit. Expenditures made by a CCPC that do not exceed the limit of $2 million will generally be subject to a tax credit at the rate of 35% and refundable up to an amount of 100% of the total tax credit.

(b) Conditions of application of increased tax credit of 35%

As mentioned above, CCPCs meeting certain prescribed conditions may claim a tax credit at an increased rate of 35%. The following conditions must be met:

- the taxpayer must be a CCPC;
- the taxable capital of the company (and that of associated companies) cannot exceed $10 million, otherwise the annual limit of $2 million will be reduced in a straight-line fashion until the taxable capital reaches the level of $15 million;
- the company must, for its previous taxation year, have had a taxable income of less than $200,000. When the amount of taxable income, including that of associated companies, exceeds the ceiling of $200,000, the expenditure limit of $2 million in annual Scientific R&D expenses is progressively reduced (by $10 for each dollar of income exceeding $200,000) to the point where the taxable revenue reaches $400,000, at which point Scientific R&D expenses incurred will only qualify for the general 20% tax credit.

Associated Companies

In very general terms, for the purposes of the rules herein described, two or more companies are associated when they are subject to the same direct or indirect control.

CCPCs

It should be noted that, for taxation purposes, "CCPC" is defined in negative terms, as a company that is not controlled, directly or indirectly, by one or more persons not resident in Canada or by one or more public corporations.

Tax Incentives in Ontario

Ontario provides a super-allowance for Scientific R&D in Ontario (the "super-allowance"). The super-allowance (as defined by law) for Scientific R&D in Ontario consists of an additional direct deduction in the calculation of taxable income. Because the super-allowance is only applicable to companies, the Scientific R&D expenses incurred by a partnership which would have been qualified expenditures had they been incurred by a corporation will be treated as if the partnership was a conduit for the purposes of the super-allowance. This has the effect of allowing corporate shareholders to benefit from the deduction in the same proportion as their participation in the partnership.

If the corporation is a limited partner in a limited partnership, the legislation limits the amount deductible by the corporation in respect of qualified expenditures made by the partnership to that portion of the income of the partnership that is included in the corporation's income in the taxation year.

(a) Qualified Expenditures in the calculation of the Super-allowance

The qualified expenditures are those which qualify for the purposes of the federal investment tax credit. The calculation of the amount of the super-allowance is done as follows:

- the calculation of the super-allowance is made on the basis of expenses incurred in the taxation year in question which do not exceed an amount equal to the "expenditure base", (calculated as the average yearly Scientific R&D expenditures during the three preceding years) and is claimed at the following rates:
  - 35% for CCPCs; or
  - 25% for all other corporations;
- and, with respect to the portion of expenses incurred in the year that exceed the expenditure base:
  - 52.5% for CCPCs; or
  - 37.5% for all other corporations.

The net qualifying Scientific R&D expenditures are reduced by government and non-government assistance, as well as federal investment tax credits related to qualified expenditures of the corporation.

The February 2000 Federal Budget proposes to treat provincial deductions for Scientific R&D that exceed the actual amount of the expenditures as government assistance for taxation years ending after February 2000, thus reducing the cost of the expenditure for the purposes of the federal investment tax credit.

Ontario Innovation Tax Credit

Ontario tax legislation provides a refundable innovation tax credit ("OITC") to small and medium-sized CCPCs with permanent establishments in Ontario. The OITC is applicable to expenses made for the purposes of Scientific R&D in Ontario.

The OITC is generally calculated as 10% of a qualifying corporation's qualifying expenditure pool. While 100% of a corporation's current expenditures that are Scientific R&D expenditures are generally included in this pool, only 40% of such capital expenditures will be included.

(a) Qualified Expenditures

The qualified expenditures for the OITC are those incurred for Scientific R&D in Ontario and which are admissible under the enhanced investment tax credit offered by the federal government to small CCPCs for Scientific R&D.

It is to be noted that governmental and non-governmental assistance and payments made under contracts will reduce the amount of qualified expenditures. However, governmental assistance does not include the OITC and federal investment tax credits. Furthermore, the payments obtained by a qualifying CCPC under contracts for Scientific R&D for the account of or in the name of a specified corporation will not reduce the amount of the qualified expenditures. (A specified corporation includes a corporation that does not qualify for the OITC or the super-allowance for Scientific R&D in Ontario and that does not receive payments for the purposes of Scientific R&D from persons that are eligible for the OITC or the super-allowance).

(b) Restrictions on Admissibility

Admissible corporations must be CCPCs throughout the entire taxation year in question. They must have taxable revenue (for the purposes of federal income tax), and taxable capital (for the purposes of tax on large corporations) not in excess of $200,000 and $10 million, respectively, during the entire course of the preceding taxation year. Where these limits are exceeded, Ontario provides a gradual reduction formula for admissibility based on the federal phase-out rules.

The qualified expenditures for OITC purposes are subject to a limit of $2 million on an annual basis, subject to being reduced under the federal enhanced investment tax credit rules.

Associated small business corporations must share the $2 million limit using the same allocation rules that apply to the federal investment tax credits.

(c) Refunds

Refunds for a taxation year are made following the evaluation of income tax returns and are first applied to Ontario tax liabilities, and any amount remaining is refunded to the corporation.

(d) Impact on the Federal Base Expense Amount

As distinct from the income tax credit incentives of other provinces, the tax savings that flow from Ontario's application of the super-allowance are not subject to federal tax. On the other hand, the OITC benefits claimed will serve to reduce the level of qualified expenditures for the purposes of the super-allowance. As previously noted, the February 2000 Federal Budget proposes to tread provincial deductions for Scientific R&D that exceed the actual amount of the expenditures as government assistance.

Ontario Business Research Institute Tax Credit

The Ontario Business-.Research Institute (OBRI) tax credit permits Ontario Corporations to claim a 20% refundable tax credit for R&D expenditures incurred in Ontario as part of an eligible research institute contract. An eligible research institute contract is an R&D contract between a corporation carrying on a business through a permanent establishment in Ontario and an eligible research institute (a university, a college of applied arts and technology or a non-profit research organization), where R&D is related to a business the corporation carries on in Canada and the Scientific R&D is undertaken by the eligible research institute on the corporation's behalf or the corporation makes payments to be used by the eligible research institute for the R&D which the corporation is entitled to exploit. In order to obtain a credit, the corporation must obtain an advance ruling that the terms of the contract meet the applicable criteria. To assist small businesses, qualifying expenditures will be eligible for both the 20% OBRI tax credit and the 10% Ontario innovation tax credit, for a combined tax credit of 30%.

Tax Incentives in British Columbia

British Columbia also provides additional tax relief for small businesses conducting R&D in British Columbia. Under these rules, a CCPC will be entitled to a non-refundable tax credit equal to 10% of the corporation's "SR&ED qualified BC expenditures". The credit is limited to expenditures not exceeding the corporation's expenditure limit, which is $2 million. The expenditure limit must be shared among associated corporations.

The term "SR&ED qualified BC expenditure" is defined by statute to include expenditures incurred by the corporation that (i) are in respect of scientific research and experimental development carried on in British Columbia (see the discussion of federal tax incentives); (ii) were incurred after August 31, 1999 and before September 1, 2004; and (iii) are incurred at a time when the corporation maintains a permanent establishment in British Columbia. Expenditures made by partnerships and trusts do not give rise to tax credits in the hands of the corporate members of such partnerships or the corporate beneficiaries of such trusts.

Tax Shelters and Credits for Film and Television Productions

Please ask for a copy of our publication, "Location Canada: A Guide to Producing in Canada and Doing Business with Canadians", for an overview of tax shelters and credits.

GOODS AND SERVICES TAX

Canada's federal sales tax system is a comprehensive, multistage, value added tax on the consumption of nearly all property and services in Canada. The tax, known colloquially as the "goods and services tax" (GST), generally applies at a rate of 7%. A parallel system of input tax credits (ITCs) is designed to ensure that tax is paid at every stage in the chain of supply on the value added at that stage until final consumption, when the final consumer effectively pays the aggregate GST.

General Rules

GST is imposed on every person who receives a "taxable supply" of property or a service "in Canada".

Property is broadly defined to include virtually every kind of real, personal, tangible and intangible property other than money. Service is also broadly defined to include anything other than property, money and, significantly, employment duties. A taxable supply of a property or service means the provision of the property or service by any means whatever (including by sale, transfer, lease, license, and gift) in the course of the supplier's commercial activities, unless the supply is expressly exempt (see below under "Exempt Supplies"). In short, every commercial provision of a property or service, with only relatively limited exceptions, is subject to GST.

Every person who carries on a commercial activity is required to register with the federal government. An exception is provided for "small suppliers", generally defined as persons whose aggregate annual supplies do not exceed $30,000. This $30,000 threshold is determined with reference to the value of a person's worldwide supplies. Therefore, any non-resident that makes a tangible supply in Canada and has worldwide sales of $30,000 or more (whether including Canadian sales or not) will be required to register for the GST.

A registrant is entitled to claim an ITC equal to all GST that the registrant has paid in connection with property or services acquired for consumption, use or supply in its commercial activities. Consumers or persons engaged in certain exempt activities are not entitled to claim ITCs and so bear the full incidence of the tax.

The tax, although imposed on the recipient, must in most cases be collected and remitted by the supplier to the federal government. If the supplier is a registrant, it may net its ITCs against the GST collected and remit only the balance (if any) to the government. The government will refund any overpayment to the supplier.

A simplified example shows how the GST system works. A shoe manufacturer purchases leather for $100, sells the finished shoes to a retailer for $125 who in turn sells the shoes to a customer for $200. Both the manufacturer and the retailer are "registrants". If the leather merchant has no ITCs the GST consequences will be as follows:Purchase of leather:

Manufacturer pays price	$	100.00
Plus GST @ 7%		7.00
Total paid to leather merchant	$	107.00
Manufacturer earns ITC=GST paid	$	7.00
Leather merchant collects GST	$	7.00
Deducts its ITC		0.00
Pays net GST	$	7.00
Sale of shoes to retailer:		
Retailer pays wholesale price	$	125.00
Plus GST @ 7%		8.75
Total paid to manufacturer	$	133.75
Retailer earns ITC=GST paid	$	8.75
Manufacturer collects GST	$	8.75
Deducts ITC		7.00
Pays net GST to government	$	1.75
Sale of shoes to customer:		
Customer pays retail price	$	200.00
Plus GST @ 7%		14.00
Total paid to retailer	$	214.00
Customer's ITC	$	0
Retailer collects GST	$	14.00
Deducts ITC	$	8.75
Pays NET GST to government	$	5.25

The total GST paid to the government of $14.00 ($7.00 + $1.75 + $5.25) is effectively borne by the final retail customer. The customer (even if a registrant) is not entitled to an ITC because it acquired the shoes for personal consumption and not in the course of its commercial activities. Each supplier in the chain recovers its own GST expense through its ITCs. If a supplier's ITCs in the reporting period were more than the GST collected, the government would refund the excess. Thus GST does not represent a net cost to suppliers, although the delay between payment of GST and recovery through ITCs may create a temporary cash flow problem.

Exempt Supplies

Supplies of certain types of property and services, known as "exempt" supplies, are expressly exempted from the GST. An exempt supply is not subject to GST and the supplier of an exempt supply is not entitled to claim any ITCs. An exempt supplier must therefore either recover its GST expense through its product pricing or bear the cost of GST itself. A supplier who makes both exempt and taxable supplies must prorate its GST expense reasonably between them, and claim ITCs accordingly.

The principal categories of exempt supplies are:

(a) supplies of financial services;

(b) supplies of used residential real estate; and

(c) supplies of most medical and dental services.

"Financial services" are broadly defined to include, among other things, any payment of interest or dividends, the issue or transfer of debt and equity securities and insurance policies, and the operation of a bank or other similar account.

Zero-Rated Supplies

Supplies of certain types of property or services are referred to as "zero-rated" supplies. A zero-rated supply is technically subject to GST, but at a notional rate of 0%. No GST is charged on a zero-rated supply but, unlike the supplier of an exempt supply, the supplier of a zero-rated supply can recover GST expenses incurred in the course of making the supply through ITCs. This means that zero-rated goods and services are effectively GST-free.

The categories of zero-rated supplies in part reflect Canadian political and social policy, and in part the basic theory that GST is intended only to tax consumption in Canada. The principal categories of zero-rated supplies are:

(a) supplies of most forms of property or services for export;

(b) supplies of prescription drugs and basic groceries;

(c) supplies of certain agricultural products; and

(d) supplies of most forms of financial services to a non-resident.

Compliance and Enforcement

GST and ITCs are calculated, reported, and paid or refunded on a regular periodic basis. The reporting period of a registrant may be monthly, quarterly or annually, depending upon the registrant's revenues from taxable and zero-rated supplies.

The GST legislation gives the federal government considerable investigative powers, and provides significant civil and criminal penalties for non-compliance. Subject to a defence of due diligence, a director of a corporation is personally liable for the full amount of the corporation's net GST liability. Certain members of an unincorporated organization are also personally liable for the organization's net GST liability.

Direct Sellers

For purposes of the GST, direct sellers have the option of determining their net GST liability as if sales of their exclusive products had been made by them directly to final purchasers, rather than through independent sales contractors, for the suggested retail price of those products. Where the direct seller and the distributor jointly elect, it is the distributor which calculates the GST liability as if the sales had been made directly to final purchasers for the suggested retail price of the exclusive products. In this case, the GST will not apply to shipping, handling and other processing fees relating to exclusive products of the direct seller or sales aids when charged by the direct seller to the independent sales contractor.

OTHER COMMODITY TAXES

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

Customs Duties

The rate of customs duty payable on imported goods depends upon both the country of origin of the goods and the classification of the goods.

The amount of duty is based on the "value for duty" of the imported goods, which is generally determined by the "transaction value" of the goods. The transaction value is the price paid or payable by the importer of the goods, subject to adjustment for such items as commissions, brokerage fees, royalties, packaging and transportation costs. There are special methods of valuation when the transaction value is not accepted or cannot be determined. This would be the case, for example, where a relationship between the vendor and the purchaser has affected the price or where the importer is a Canadian branch of the foreign exporter. Under certain circumstances, refunds, drawbacks and remission of duty are available.

The Canadian tariff classification system incorporates the principles of the Harmonized Commodity Description and Coding System, an internationally accepted system of classification.

Excise Duties and Taxes

Certain goods (including jewellery) manufactured in or imported into Canada are subject to an excise tax which applies at varying rates depending on the product manufactured or imported, in addition to the customs duties (where applicable).

Excise duties are a special form of federal tax applicable to specific goods, which are imposed in addition to GST and customs duties. Spirits, beer and tobacco products manufactured in Canada are subject to excise duties. Tobacco products are subject to both excise duties and excise taxes. Where such goods are imported fully manufactured, they are subject to the excise duty on importation. The amount of the excise duty is added to the value for duty when calculating customs duties payable on importation.

Goods can be held in bond in a customs bonded warehouse. In this case, customs duties, GST and excise duty liabilities are postponed until the goods are withdrawn from bond.

Provincial Sales Tax

Ontario and British Columbia impose varying forms of retail sales tax. Every vendor in the business of selling taxable goods or providing taxable services is required by provincial taxing legislation to obtain a vendor's permit.

The current retail sales tax rate in Ontario is 8%. This rate is applied to the retail sale price of goods and specified services at the time of purchase or import into Ontario and is payable by the consumer or user. If property is purchased in or imported into Ontario for subsequent resale, the retail sales tax is imposed not on the original purchase or importation but on the resale. For sales in Ontario, this tax is collected by the vendor as agent for the provincial tax authorities and remitted by the vendor.

British Columbia imposes a retail sales tax, called the Social Services Tax (the "SST"), in the amount of 7% of the amount paid on leases or purchases of tangible personal property for use or consumption. The SST is therefore designed only to apply to the end user of such tangible personal property. "Tangible personal property" is defined broadly by statute to include property that can be "seen, weighed, measured, felt or touched". Certain other specific transactions, including the lease/sale of computer software, telecommunications services and electricity, are subject to the SST.

FINANCING A BUSINESS OPERATION IN CANADA

Corporations may raise capital in several ways, the most common of which are equity and debt financings. Other alternatives include joint venture arrangements, which may allow the corporation to treat debt incurred through the joint venture as "off balance sheet" debt, improving the corporation's financial presentation.

"Equity" financing involves the issuance of shares of capital stock of a corporation. Each person who acquires shares becomes an owner of the corporation, in the proportion that his or her shares represents of the corporation's total issued share capital. Various classes of shares may be issued and the rights and privileges attaching to each class of shares will depend on the requirements of the corporation and the investors. It is important to note that an investment in shares is subordinate to all debt of the corporation, so that in the event of dissolution or insolvency, capital can be returned to shareholders only after all creditors of the corporation have been paid in full. The advantage to share ownership, however, is that the investor can share in the success of the corporation through the receipt of dividends or an appreciation in the value of the shares.

Debt financing may be provided to the corporation by the shareholders, in addition to capital provided by purchasing shares, or by third parties such as banks and other financial institutions. Financing is available in Canada from Canadian chartered banks, from Canadian subsidiaries of foreign banks and other financial institutions, such as merchant banks, loan and trust companies and life insurance companies. Lenders who do not have a personal interest in the company usually require that a certain level of equity investment be maintained by the corporation's shareholders. Lenders may also require personal guarantees from the shareholders of small private corporations.

There are two principal forms of financing available from third-party lenders: "operating" financing and "term" financing. Operating financing, as the name suggests, usually finances the ongoing operations of the business, and term financing is usually made available for capital investment. As a general rule, persons providing debt financing to a corporation, whether on an operating basis or on a term loan basis, require security for their loans. Operating financing is usually secured by inventory and accounts receivable of the borrower, and term financing is usually secured by capital assets, such as machinery and equipment, or by a floating charge covering all assets of the borrower. The exact nature of the security taken in each instance will depend upon the financial situation of the borrower and the nature of the assets available to secure the debt.

Operating financing is usually provided on a demand basis and generally bears interest at a fluctuating rate linked to the market. Term financing normally requires scheduled repayment over a defined period of time and bears interest determined in any of a number of ways. Term lenders often allow the borrower to choose between fixed or floating rates of interest and may allow the borrower to convert from one interest option to another.

SECURITIES LAW

The issuance of securities and trading in securities between investors is governed by legislation intended to create orderly markets and protect investors. Each province and territory of Canada has some degree of securities regulation which is generally comparable to that in effect in the United States. The securities acts, regulations and policies of securities commissions in Ontario and British Columbia are, generally speaking, similar.

A "security" is broadly defined to include any document, instrument or writing commonly known as a security, and 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". Depending on the circumstances, both equity and debt financing may come within the definition of "security" and may therefore be subject to the relevant provincial securities legislation.

Any person or corporation engaged in trading or giving advice regarding securities must be registered under the relevant provincial securities legislation. In addition, most distributions of securities must be qualified by a prospectus filed with and cleared by the relevant provincial securities commissions. A prospectus is a document of the issuer describing in detail the business

and affairs of the issuer, the type of security involved and other relevant information.

There are, however, a number of important exemptions from these registration and prospectus requirements. Perhaps the most useful for a person establishing a business in Canada are the following:

- The "private company" exemption: a company with no more than 50 shareholders (exclusive of employees or former employees) is a private company for the purposes of this exemption if the constating documents of the company restrict the right to transfer its shares and prohibit any invitation to the public to buy its securities;

- The "seed capital" exemption: this exemption has a number of very detailed requirements but is basically designed to allow a new enterprise to raise seed money from a small number of knowledgeable investors within a limited time period; the seed capital exemption can be used only once by any issuer; and

- The "private placement" exemption: this exemption is available provided that each purchaser of the securities invests no less than $150,000 (in some provinces this threshold may be lower).

The Ontario Securities Commission recently proposed a dramatic streamlining of the rules governing these exemptions. The proposal recommended replacing the aforementioned exemptions with two all encompassing exemptions called the "Accredited Investor" exemption and the "Closely Held Issuer" exemption. The "Accredited Investor" exemption would replace the $150,000 exemption by allowing a qualified list of investors to purchase securities without a prospectus based on the level of sophistication of the purchaser. The "Closely Held Issuer" exemption would permit issuers to raise up to a total of $3,000,000 through any number of financings, from up to 35 investors (excluding "Accredited Investors"), without regard to their level of sophistication, familiarity with the business or qualifications. These exemptions, if implemented, would provide issuers with much more freedom to raise capital from a small number of investors. However, it may be some time before this proposal is implemented.

In the case of certain exempt trades, it may be necessary to file a report with and pay a fee to the relevant securities commission and provide investors with a disclosure document called an "offering memorandum", a copy of which must also be filed with the relevant provincial securities commission.

Securities legislation also requires continuous disclosure of any material changes in the affairs of public companies (known as reporting issuers) and also includes provisions relating to activities such as insider trading and takeover bids.

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

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

Until recently, there were five stock exchanges in Canada: The Toronto Stock Exchange, the Montreal Exchange, the Vancouver Stock Exchange, the Alberta Stock Exchange and the Winnipeg Stock Exchange. In March of 1999, the Canadian stock exchanges announced a restructuring whereby each exchange specializes in a particular type of security in an effort to reduce market fragmentation and ensure a globally competitive market system. Pursuant to this initiative, the following changes have now been implemented:

- All senior equities are traded on The Toronto Stock Exchange;

- The Alberta Stock Exchange, the Vancouver Stock Exchange, the Winnipeg Stock Exchange, and the Canadian Dealing Network (an over-the-counter equities market) have merged to create the Canadian Venture Exchange (CDNX), a single, national junior equities exchange; and

- The Montreal Exchange is now the sole futures and options market in Canada and also offers trading in certain small capitalization, Quebec-based companies.

On April 26, 2000, the Quebec government and The Nasdaq Stock Market, Inc. announced that they had executed a memorandum of understanding to establish Nasdaq Canada, a new electronic exchange to be based in Montreal. The creation of Nasdaq Canada is expected to occur in three phases. In the first phase, terminals will be available for stock dealers in Montreal who are already members of Nasdaq. They will be able to make trades in Nasdaq-listed securities, in U.S. dollars, much as they currently do through U.S. brokerage firms. The second will establish a Canadian market on the Nasdaq trading platform. The third phase involves linking the Canadian market to Nasdaq's global electronic trading network that is expected to include Japan, Hong Kong and Europe. It remains to be seen what effect this development will have on the realignment of Canada's existing exchanges discussed above. ■

PERSONAL PROPERTY SECURITY

Property is categorized in two ways in Canadian law: real estate or immovables (land, buildings and movables which are permanently attached or joined to or incorporated to an immovable and ensures the utility of the immovable) on the one hand and personal property or movables (anything not attached to land, including vehicles, equipment, inventory, accounts receivable and other intangibles) on the other. This section deals with personal property or movables. In particular, it addresses the granting of security interests in personal property in Ontario and British Columbia.

A business wishing to protect its interest in personal property, or to grant or take a security interest in such property, is faced with a very complex legislative regime. This is partly because legislative authority is shared between 10 provinces and two territories and the federal government. Further, in contrast to real property, none of these jurisdictions has yet to develop a comprehensive title registration system for personal property.

Each of the Ontario and the British Columbia *Personal Property Security Act* (PPSA) is modelled on Article 9 of the U.S. Uniform Commercial Code.

The federal government has authority to legislate over personal property security in limited areas such as shipping and certain security taken by banks.

Ontario and British Columbia

In Ontario and British Columbia, the PPSA applies to every transaction which in substance creates a security interest including financing leases and conditional transfers of title. To protect its rights against third parties, a secured party must either take possession of the property secured or register a financing statement at a computerized central registry. Computer-based searches allow for ease of searching but require the secured party to ensure that its financing statements are correctly completed: even a minor technical error - such as an incorrect letter in the debtor's name - may invalidate the registration. Further registrations are required in certain circumstances, such as a debtor name change or a transfer of collateral and to effect a renewal.

The PPSA, while not perfect, is a significant improvement on earlier law because of the simplicity of registration, flexibility in the kind of instruments which may be utilized, and the advantage of the codification of priority rules and the remedies available to secured parties.

GOVERNMENT ASSISTANCE PROGRAMS

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

ACQUIRING OR ESTABLISHING A BUSINESS IN CANADA

THE INVESTMENT CANADA ACT

The purpose of the *Investment Canada Act* (the "ICA") is to encourage investment in Canada by Canadians and non-Canadians. The Investment Review Division of Industry Canada ("Investment Canada") is responsible for administering the ICA and for promoting and reviewing significant investments in Canada by non-Canadians. Any non-Canadian who proposes to establish a new business or acquire an existing business in Canada should be aware of the provisions of the ICA. (See also below under Cultural Industries)

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

Reviewable Transactions

The following acquisitions of control by non-Canadians are reviewable by Investment Canada:

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

The thresholds have been significantly increased or eliminated for WTO investors. A direct acquisition by a WTO investor is reviewable only when the assets exceed $218 million. This amount applies to transactions completed in 2002 and varies annually according to a GDP-based formula. Review of indirect acquisitions by WTO investors has now been completely phased out. Anyone acquiring a Canadian business controlled by a WTO investor will also benefit from these increased thresholds. "WTO investor" is a defined term in the ICA and would include, for example, an entity whose voting interests are ultimately controlled, directly or indirectly, in the United States. The ICA has detailed rules for determining the control of an entity.

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

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

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

There are other rules which may apply as well.

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

The factors which the Minister will consider include:

- The effect of the investment on the level and nature of economic activity in Canada;
- The degree of participation by Canadians in the Canadian business in particular and in the relevant industry in Canada in general;
- The effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;
- The effect of the investment on competition in the relevant industry or industries in Canada;
- The compatibility of the investment with Canadian industrial, economic and cultural policies, taking into account the policy objectives of affected provinces; and
- The effect of the investment on Canada's ability to compete in world markets.

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

Cultural Industries and Other Exceptions

There are special provisions in the ICA for investments which may affect "Canada's cultural heritage or national identity" ("Cultural Industries"). The establishment of a new business or the acquisition of control of a Canadian business which would not normally be reviewable under the ICA may be reviewable if it falls within this category. After a notice has been filed (see "Notification", below), the federal Cabinet, composed of the Prime Minister and the other ministers, has 21 days to decide whether the investment should be reviewed. The non-Canadian investor must be notified within that time period if a review is ordered.

In 1993, the ICA was amended in a manner which creates uncertainty in certain circumstances for investments in cultural industries. The amendment essentially gives the Minister discretion to make determinations which could result in investments which were not otherwise reviewable becoming reviewable. For example, an investor who thinks it is Canadian-controlled because it complies with the rules of the ICA might find that the Minister has determined otherwise. The amendment even allows the Minister to review investments retroactively to June 18, 1992. Unless appropriate steps are taken, investors must accept a certain amount of risk in proceeding with investments involving these kinds of businesses without review.

In 1999 the jurisdiction for investments related to cultural industries was transferred to the Ministry of Canadian Heritage. The Cultural Sector Investment Review Division of the Department of Canadian Heritage is the counterpart to Investment Canada for these investments. Jurisdiction is shared for investments which involve both cultural industries and other businesses.

Those businesses which have been prescribed as cultural industries include the following:

Publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine-readable form;

- Production, distribution, sale or exhibition of film or video products;
- Production, distribution, sale or exhibition of audio or video music recordings;
- Publication, distribution or sale of music in print or machine-readable form; and
- Radio communication in which the transmissions are intended for direct reception by the general public, any radio, television and cable television broadcasting undertakings and any satellite programming and broadcast network services.

There are also other types of businesses which do not benefit from the higher WTO thresholds for reviewable transactions, including uranium industries, businesses providing financial and transportation services and "cultural businesses". The definition of "cultural

businesses" is substantially similar to the cultural industries described above.

Notification

Subject to the important exceptions discussed above under "Cultural Industries and Other Exceptions", other investments by non-Canadians in Canada are not reviewable. Nevertheless, a non-Canadian investor must file a notice in the prescribed form with Investment Canada any time up to 30 days after establishing a new Canadian business or acquiring an existing business in Canada.

THE COMPETITION ACT

Other statutes may also affect the ability of a person to invest in Canada. A notable example is the federal *Competition Act*, the main antitrust statute in Canada. Among other things, it establishes a comprehensive legislative and regulatory framework for reviewing and controlling mergers and acquisitions in Canada. The *Competition Act* provides that the acquisition or establishment of a significant interest in a business in Canada may be subject to review by an administrative tribunal. Transactions which meet certain size thresholds may also be subject to pre-notification requirements and waiting periods.

Review by Tribunal

Any mergers (widely defined to mean the acquisition or establishment, direct or indirect, of control over a significant interest in all or part of a business of a competitor, supplier, customer, or other person) may be reviewed by the Competition Tribunal if an application is made by the Commissioner of Competition under the *Competition Act*. The Commissioner may bring such an application in connection with a proposed transaction or within three years of its completion. The Tribunal may issue a prohibition order with respect to all or any part of a proposed transaction, and may dissolve a completed transaction or order divestiture of assets or shares. The Tribunal may also make any other order to which the Commissioner and the parties to the transaction consent.

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

Pre-Notification

In addition to the substantive review procedure which may apply under the *Competition Act*, advance notification may be required for certain large transactions. Subject to certain exceptions, if a proposed acquisition of assets or shares, an amalgamation or other combination to establish an operating business in Canada, where one or more of those operate a business in Canada, exceeds certain size thresholds, the parties to the transaction are required to notify the Commissioner in advance. They are precluded from completing the transaction before the expiry of a review period. Notification to the Commissioner may be "short form" or "long form" (which provides more information about the transaction and the parties). If a long form notification is submitted, the review period is 42 days. If a short form notification is submitted, the review period is 14 days. However, the Commissioner can require a person who has submitted a short form notification to submit a long form notification, beginning a new 42-day review period. Anyone proposing a competitively sensitive transaction which is subject to pre-notification should therefore consider submitting a long form notification in the first instance.

In general, two size thresholds must be met for the pre-notification rules to apply. First, the parties to the transaction, together with their affiliates, must have total assets in Canada or total revenues from sales in, from or into Canada that exceed $400 million. Second, the transaction itself must be of a minimum size. For acquisitions of assets or the formation of an

unincorporated business combination, the Canadian assets acquired or contributed or the annual gross revenues from sales in or from Canada from such assets must exceed $35 million ($70 million for a corporate amalgamation). Share transactions are subject to pre-notification where the value of the Canadian assets or sales derived from the corporation whose shares are acquired and all other corporations controlled by that corporation would exceed $35 million ($70 million for a corporate amalgamation). In addition, a minimum percentage of shares must be acquired for the pre-notification rules to apply.

TEMPORARY ENTRY AND PERMANENT RESIDENCE

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

TEMPORARY ENTRY

With some exceptions, a person seeking entry to Canada for employment on a temporary basis must have an Employment Authorization to enter the country. This is done by obtaining a job offer validation from a Canada Human Resources Centre. An employment authorization, commonly called a work permit, is usually issued for an initial period of six months to one year but may be extended for a period of up to five years following the date of entry.

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

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

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

In addition, the Free Trade Agreement between the United States and Canada provides a streamlined procedure under which certain business persons who are U.S. citizens may enter Canada to work temporarily. Under the North American Free Trade Agreement, this procedure is extended to Mexican citizens. There are four categories of business persons for these purposes:

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

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

A trader is a business person who seeks temporary entry to carry on substantial trade in goods and services principally between the United States and Canada or Mexico and Canada under the North American Free Trade Agreement, and who will be employed in a supervisory or executive capacity.

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

A professional is a business person who will engage in one of a series of specifically listed professions while in Canada temporarily.

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

Although traders, investors, professionals and intra-company transferees who are U.S. or Mexican citizens coming into Canada temporarily must obtain work permits, they need not comply with the prior approval procedures, petitions, labour certification tests and

other similar procedures generally required to obtain a work permit. However, all business persons are subject to general security and health restrictions.

PERMANENT RESIDENCE

A person who wants to settle permanently in Canada can be admitted under one of three classes of immigrants: the family class, the Convention refugee class (which will not be discussed) or the independent immigrant class. A point system is used in the assessment.

Members of the family class include a spouse or fiancee, children under 19, children over 19 who are financially dependent on their parents and are either full-time students or disabled and, in certain circumstances, a parent, grandparent or other close relative. To be admitted under the family class, an applicant must be sponsored by a close family member who is a Canadian citizen or a permanent resident.

A relative may apply for permanent residency under the family business requirements. A Canadian citizen or permanent resident may bring to Canada a member of his/her family when it can be demonstrated that it is more sensible to employ a family member than to use normal recruiting practices to find an employee. Family business applicants form part of the independent immigrant class. Whether a member of the family class or a family business applicant, the applicant must not have a criminal record and must be in good health.

The independent immigrant class consists of all those who do not fit into the other two classes. Independent immigrants are assessed based on a point system involving a series of criteria including age, education, kinship ties, job experience, a job offer pending in Canada, occupational demand, specific vocational training, knowledge of French or English, personal suitability and demography. These criteria are given a total value of 107 points. To qualify, an independent immigrant (other than a family business applicant, an entrepreneur or an investor) should receive 70 points. A visa office has some discretion to approve an application for permanent residence even if the applicant fails to attain 70 points. A visa office may also refuse an application if the person has attained 70 points, if the office believes that the points do not reflect the applicants ability to become successfully established in Canada. If an applicant's occupation does not appear on the list of specific occupations prepared and revised from time to time by the immigration authorities, the applicant is ineligible for admission without pre-arranged employment. Certain independent immigrants, called investors, entrepreneurs, or self-employed immigrants, are governed by the Business Immigration Program described below.

The Business Immigration Program

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

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

Self-employed immigrants are those with the intention and ability to establish a business in Canada which will contribute to Canadian economic, cultural or artistic life and which will create a job for the applicants. This category consists mainly of artists, farmers, consultants and sole proprietors of small businesses. There is no minimum amount of capital required, nor is there a requirement that the person create employment for anyone other than her or himself. Factors considered in approving applications under this category include an applicant's managerial skills, his or her business experience, financial status and ability to provide a job for himself or herself.

Entrepreneurs are people with the intention and ability to purchase, establish, or make an investment in a business or commercial venture in Canada, and who plan to take an active role in its management. The entrepreneur is assessed on his or her track record, financial capacity to undertake a significant enterprise and experience in a specific sector. The business must contribute to the Canadian economy and provide employment for at least one individual. This class is

intended for people who operate small to medium sized businesses in the manufacturing or retail sectors.

Investors are people with a proven business record, who have accumulated some wealth and who are prepared to make an investment in Canada, but who do not wish to actively participate in its administration. An investor is required to have a net worth of more than $800,000 and to invest a minimum of $400,000 for at least five years.

LEGISLATION AFFECTING EMPLOYMENT

Employment legislation applies equally to Canadian and non-Canadian employers and employees. Most legislation in this area is provincial, but there are some federal statutes affecting employment in areas such as telecommunications, railways, banking and certain interprovincial enterprises.

MINIMUM STANDARDS

As well as the federal Canada Labour Code, each province has employment standards legislation setting out minimum entitlements for employees. The minimum standards cannot be contracted out of nor waived. Civil remedies by an employee against an employer are not affected.

The main topics covered by this type of legislation include wages, overtime, hours of work, vacation and holidays, pregnancy and/or parental leaves of absence and termination pay.

In both Ontario and British Columbia, employment standards legislation establishes certain minimum conditions of employment such as wages, vacation and notice of termination which cannot be waived by agreement. They can, however, be improved by agreement or, in the case of notice periods for dismissal without cause, by the courts. Both the Ontario and British Columbia Acts provide that where a purchaser of all or a substational part of a business employs any of the former employees, their employment and benefits are considered continuous and uninterrupted for the purposes of the Act. However, in Ontario an employee cannot bring an action for wrongful dismissal to the courts if he files a complaint under the *Employment Standards Act* alleging an entitlement to termination pay or severance pay unless that employee withdraws his complaint within two weeks after it is filed.

LABOUR RELATIONS

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

The federal *Canada Labour Code* and *Ontario Labour Relations Act* try to promote collective bargaining. Once a union has been certified and has given notice to the employer, the employer has a duty to bargain with the union in good faith to reach a collective agreement. A number of statutory conditions must be met before employees can lawfully strike or an employer can lawfully lock them out. Conciliation, arbitration and mediation are tools available in all three jurisdictions to help employers and employees settle disputes. Labour disputes are adjudicated in Ontario by the Ontario Labour Relations Board, in British Columbia by the Labour Relations Board and federally by the Canada Labour Relations Board. These specialized tribunals also deal with issues relating to the organization of unions and their representation of employees with a view to preventing unfair labour practices and encouraging good faith bargaining.

EQUALITY

Human Rights

The federal government and all the provincial governments have adopted human rights legislation with a view to removing discrimination in the workplace.

In both Ontario and British Columbia, the provincial Human Rights Codes provide that, subject to *bona fide* occupational requirements, an employer must treat people equally without discrimination on the basis of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status, physical or mental disability. Alcohol and drug dependence has been found to be a disability for the purpose of the Human Rights Code. The Ontario Human Rights Commission has been set up to administer the Ontario Human Rights Code and to investigate complaints of discrimination. It has the power to settle complaints or refer them to a board of inquiry, which can impose penalties and provide a civil remedy where it finds that a claim is justified. The British Columbia Human Rights Commission, with similar powers and duties, administers the *British Columbia Human Rights Code*.

Pay Equity

It is illegal in every province in Canada to pay a woman less for doing the same job as a man. Ontario has also adopted the principle of equal pay for work of equal value. Women in "female job classes" who perform jobs of similar value to employees in "male job classes" have the right to salary readjustments through the *Pay Equity Act*. This Act applies to all private sector employers in Ontario who employ 10 or more employees and all employers in the public sector.

The principle of pay equity in British Columbia is set out in the *Human Rights Code* which prohibits wage discrimination between male and female workers who perform similar or substantially similar work.

Employers must make job comparisons using a gender-neutral comparison system, taking into account: skill, effort, responsibility and working conditions. Remuneration to employees must be fair based upon the results of these job comparisons.

Employment Equity

The *Employment Equity Act* applies to anyone who employs 100 or more employees in connection with a federal work, undertaking or business; this includes any corporation established to perform a function or duty on behalf of the Canadian government. The legislation is an affirmative action/"hiring quota" system designed to encourage employers to hire and promote women, aboriginal people, people with disabilities and visible minorities.

EMPLOYMENT INSURANCE

Employers and employees in Canada are required by the *Employment Insurance Act* to contribute to the Employment Insurance Account administered by the federal government. An employee's premiums are calculated each year. As of January 1, 2001, the employee premium is 2.25% of insurable earnings. The employer must pay a premium equivalent to 1.4 times the employee's premium. The maximum annual insurable earnings upon which premiums are payable is $39,000 for 2001. The employer's contributions are deductible for tax purposes as a normal business expense.

The system is based on total insurable earnings and total insurable hours, starting from the first dollar and hour of work. The annual maximum premium for the employed is $877.50 for 2001.

Self-employed persons are ineligible. Unemployment insurance benefits are paid to employees who lose their jobs due to lay-off or termination. No benefits are paid to those who quit a job without cause or who are fired for misconduct. Employees on maternity leave, parental leave, or absent due to illness are also covered.

CANADA PENSION PLAN

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

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

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

Each of the employee's and employer's contribution for January, 2001 is 4.3% of earnings. The rates change every year according to a schedule of rates for every year up to the year 2016. The Canada Pension Plan provides that, every five years, the Minister of Finance and the ministers of the included provinces will review the schedule of rates and determine if the rates should be modified.

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

OCCUPATIONAL HEALTH & SAFETY AND WORKERS' COMPENSATION

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

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

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

The legislation is enforced internally by the workplace health and safety committees and externally by inspectors appointed by the Ontario Ministry of Labour. The penalties for offences under the Act are a fine and/or imprisonment. The maximum fine for a corporation is $500,000 for each offence. The maximum penalty for an individual for each offence is $25,000 and/or one year in jail. Directors and officers of a corporation may also be liable.

Ontario employers must register with the Workers' Compensation Board under the *Workplace Safety and Insurance Act*. The failure to do so within 10 days of becoming an "employer" is an offence. Some employers are liable individually to pay compensation and health care, and can be sued by injured employees. However, most workers injured in accidents arising from employment or suffering from an occupational disease may receive compensation from the fund established under this legislation; they cannot, however, sue the employer for damages arising from such injuries. An offence under the *Workplace Safety and Insurance Act* can mean a maximum $100,000 fine and up to 6 months imprisonment. Again, corporate directors and officers can be liable.

In British Columbia, the *Workers' Compensation Act* provides a no-fault insurance scheme similar to that of Ontario's discussed above, which generally displaces an employee's common law right to compensation from the employer for workplace injuries. British Columbia employers must also comply with standards established under the *Workplace Act* with respect to the health, safety and comfort of persons in the work place. The Act is administered by the Workers' Compensation Board and imposes lighting, heat and ventilation standards as well as standards for the handling and storing of hazardous materials.

Under the Workplace Hazardous Material Information System (WHMIS), which came into effect in 1988, employers in all provinces have an obligation to provide educational programs to employees who work with hazardous materials.

EMPLOYER HEALTH TAX

The Ontario Health Insurance Plan is funded by an employer health tax. Eligible employers will be exempt from employer health tax on the first $400,000 of Ontario payroll. A tax rate of 1.95% applies to any amount exceeding $400,000. Self-employed individuals do not pay health tax on their self-employment incomes.

TERMINATION OF EMPLOYEES

There is no concept of "termination at will" employment in Canada. In the absence of just cause for termination, all employees whether unionized or not are entitled to notice of termination. The notice may be by way of "working notice" or pay in lieu of such notice. The amount of notice is, at minimum, the statutory requirements as set out in the relevant employment standards legislation.

In addition to the statutory minimums, non-unionized employees are entitled to sue in court for greater notice of termination depending on what a court considers

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

Notice periods will range from very close to minimum requirements only to an approximate upper limit in most cases of 24 months, and more for senior executives. ■

IMPORTING OR TRADING GOODS

Businesses involved in importing or trading goods may be subject to legislation dealing with product standards, competition, import controls, and special import measures, such as antidumping duties. In addition, the North American Free Trade Agreement (NAFTA) and the Agreement Creating the World Trade Organization (WTO Agreement) affect trade in goods and services.

PRODUCT STANDARDS

Product standards legislation in Canada is intended to prevent deceptive labelling and potential health and safety problems. This legislation requires goods being imported into Canada to meet prescribed standards. Both the federal and provincial governments have legislated in this area. Non-governmental bodies are also involved in prescribing technical standards.

Federal Legislation

- ***Consumer Packaging and Labelling Act***

This Act regulates the packaging and labelling of pre-packaged consumer products, except for food, drugs and medical devices. Pre-packaged products that are produced or manufactured for commercial or industrial enterprises or institutions for their use without being sold to other consumers are exempt from the Act.

No dealer may sell, import or advertise a pre-packaged product that does not satisfy the Act's requirements. A "dealer" is a person who is a retailer, manufacturer, processor or producer of a product, or a person who is engaged in the business of importing, packing or selling any pre-packaged consumer product.

The Act defines three mandatory labelling requirements: (1) product identity; (2) product net quantity (in either numerical count or metric units, or other approved measure); and (3) name and principal place of business of the person by or for whom the product was manufactured or produced for resale. "Label" means any label, mark, sign, device, imprint, stamp, brand, ticket or tag. The label must clearly, legibly and prominently state the product's generic name or its function and other information about the nature, quality, age, size, geographic origin, material content, composition, performance, and use or method of manufacture, as may be prescribed by regulation.

The label must not contain a false or misleading representation. Packages must be manufactured, constructed, displayed and filled so that a consumer would not reasonably be confused about the product's quality or quantity.

Under the Act, the declarations of net quantity and product identity must be stated in both English and French. The identity of the person by or for whom the product was manufactured or produced for resale, however, need be in only one of those languages. In contrast to these federal legislative requirements, Quebec language legislation generally requires that all information shown on a product label appear in French, accompanied if desired by a translation that may be in English or any other language.

Depending on the provision of the Act contravened, the maximum fine is $10,000 and the maximum imprisonment term is one year.

- ***Food and Drugs Act***

This Act, among other things, specifies labelling and packaging standards for imported foods, drugs, cosmetics and medical devices. Whether a particular product is a food or drug depends on not only its uses but also the way in which the product is represented for use.

With certain exceptions, food products must be labelled to provide the name of the food, the net quantity, the identity and principal place of business of the person by or for whom the food was manufactured or produced for resale, the durable life date and storage instructions (for prepackaged products having a durable life of 90 days or less), and all the ingredients (listed in descending order of their proportion or percentage of the product). Generally, all the information other than the identity and principal place of business of the manufacturer or dealer must be in both English and French.

Drugs must generally be labelled to include on the main panel of the inner label and any outer (carton) label the name of the drug, the name and address of the manufacturer and any importer, a quantitative list of all medicinal ingredients, the Drug Identification Number

(DIN) (which is obtained from the Health Protection Branch of Health Canada), the lot number, directions for its use, and the expiration date if required. The outer label must also indicate the net contents of the drug. Health Canada's labelling guide contains a detailed summary of drug labelling requirements.

New drugs may not be sold or advertised unless the manufacturer obtains a notice of compliance from the Health Protection Branch for each new drug. The manufacturer must file with the Branch a new drug submission that establishes that the drug is safe and clinically effective before it may be sold or advertised for sale. The manufacturer must pay a fee for the Branch's assessment of whether the drug may be sold in Canada.

Narcotics (defined under the *Narcotic Control Act*), prescription or restricted (Schedule F) drugs and controlled (Schedule G) drugs are subject to particularly stringent controls, prohibitions and labelling requirements. The Act also provides for certain standards and controls respecting the manufacture and sale of cosmetics.

Under the Act, the maximum penalty is a $5,000 fine and three years imprisonment.

Other federal statutes generally apply to the labelling and advertising of consumer products, including the above. Further, provincial legislation may regulate the specific product. For instance, each province has its own legislative scheme regulating the practice of pharmacy, including specific provisions relating to the sale of drugs. Provincial legislation also controls such activities as inspecting, grading, labelling and marketing certain food products (e.g. margarine and edible oil products). This legislation may impose different and sometimes higher standards than those set federally.

- ***Hazardous Products Act***

The *Hazardous Products Act* regulates the labelling and packaging of most commonly used hazardous or potentially dangerous products for sale in Canada. The Act and its regulations prescribe information disclosure, cautionary language and hazard symbols for many products that, under normal conditions, can injure consumers or workers using a product. This Act should be read with the *Hazardous Materials Information Review Act*.

"Hazardous product" means any prohibited, restricted or controlled product. Prohibited products (those listed in Part I of Schedule I to this Act) may not be advertised, sold or imported into Canada. Restricted products (those listed in Part II of Schedule I) may only be advertised, sold or imported into Canada if authorized by regulation. They include products containing chemicals and petroleum distillates, to which the Act most broadly and frequently applies. For products containing chemicals and petroleum distillates, the Act has two distinct schemes: one for consumer-use products, and one for industrial/commercial-use products. The latter are controlled products (as classified in Schedule II).

Certain exemptions permit regulated products, as defined in the Chemicals Regulations, and controlled products to be imported into Canada without cautionary labelling first having been applied, provided that certain information is supplied to the regulator or inspector and the product is appropriately labelled before it is resold (for consumer-use hazardous products) or used or sold (for industrial/commercial-use hazardous products).

The Act does not apply to materials regulated by the *Explosives Act,* the *Food and Drugs Act*, the *Pest Control Products Act*, the *Atomic Energy Control Act*, and the *Tobacco Act*.

In 1988, the Workplace Hazardous Material Information System (WHMIS) came into effect with the object of protecting employees who work with hazardous materials. This national system combining federal and provincial initiatives, is implemented by the *Hazardous Products Act* and its regulations. It consists of the cautionary labelling of material containers, the supply of material safety data sheets and a worker education program.

- ***Pest Control Products Act***

This Act regulates pest control products by prohibiting their manufacture, storage, display, distribution and use under unsafe conditions. In addition, the Act prohibits false, misleading or deceptive packaging, labelling or advertising. The Pest Management Regulatory Agency was established in 1995 within Health Canada to consolidate the resources and responsibilities for pest management regulation. The Agency aims to protect

human health and the environment by minimising the risks associated with pest control products, while enabling access to pest management tools. The Pest Management Information Service is a government initiative that provides information on pesticide regulation and registered pesticides.

The provinces have jurisdiction to restrict sales as well as to issue licenses, permits and certificates for the sale, distribution and application of pesticides.

- **Other Specific Labelling and Marking under Federal Legislation**

Textile Labelling

The *Textile Labelling Act* and the *Textile Labelling and Advertising Regulations* provide labelling requirements for "consumer textile articles" that contain textile fibre, yarn or fabric. The legislation aims to protect consumers against misrepresentation in the labelling and advertising of textile fibre product and to let consumers choose textiles based on fibre content. Unless the consumer article is expressly exempt, the dealer must ensure that a textile disclosure label meets the criteria regarding fibre content, bilingual requirements, dealer identity and the label's form and application. Some non-required information that dealers might wish to display on a textile disclosure label include care information, trademarks and descriptive terms, and sizing.

The above legislation also applies to down and feather consumer textile articles. Upholstered or stuffed articles, such as furniture, pillows and outerwear, destined for sale in Ontario, Quebec or Manitoba fall under provincial legislation. This legislation regulates filling materials and requires special labelling.

Precious Metals Marking

The *Precious Metals Marking Act* regulates the use of a mark indicating that an article is made of a precious metal. A dealer is not required to mark a precious metal article for quality. If a mark is used, however, it must be factual and conform to the prescribed standards.

Imported Goods Marking

Regulations under the Customs Tariff require certain imported goods to be conspicuously and indelibly marked, stamped or labelled to indicate the country of origin in either official language before they are released from customs. These include goods for personal or household use, hardware, novelties and sporting goods, paper products and wearing apparel.

Weights and Measures

The *Weights and Measures Act* requires metric units of measurement (e.g. metres, grams. litres) to be used in Canada for all aspects of trade. This Act and its regulations specify the metric unit that must be used for a broad range of products. Older "Canadian units" (e.g. feet, pounds, gallons) may be used in addition to metric units.

Environmental Labelling

The *Consumer Packaging and Labelling Act* and the *Competition Act* contain broad prohibitions against false and misleading representations that apply to, among other things, environmental labelling. Legislative provisions regarding the placement of an environmental claim on a product label address such matters as general claims, removal of harmful substances, life cycle analysis, source reduction of material, reusable containers, recyclable materials, recycled content in materials, degradable materials, and compostable materials.

ENVIRONMENTAL LAW

Environmental law in Canada is regulated at the federal, provincial and local levels. Inevitably there is some overlap of the levels of government.

Compliance with environmental legislation should be a top level management priority. It is the responsibility of management to ensure compliance at all levels. The commitment must be sincerely enforced and backed up by monetary support. In Ontario, the *Environmental Protection Act* places positive obligations on officers and directors. All employees must recognize the importance of compliance.

Sanctions may be directed at the officers and directors of the corporation and not solely the corporation itself, whether or not the corporation is charged.

All provinces have their own environmental legislation. In Ontario, the *Environmental Protection Act*, is the primary environmental statute. Generally, there are two principal mechanisms, a prohibition to emit a contaminant and a system of permits or certificates required for activities which may impair the environment.

The *Environmental Protection Act* (Ontario) creates civil and quasi-criminal liability for the breach of its provisions, which include a broad prohibition on the release or discharge of a contaminant into the natural environment that causes or is likely to cause an adverse effect. The definitions of contaminant and adverse effect are open-ended and are not limited to a finite list or by reference to prescribed levels or concentrations. The *Environmental Protection Act* also grants broad powers to the Ministry of the Environment of Ontario to enforce the Act including the ability to bring criminal or civil proceedings and to issue orders, investigate, limit or prohibit releases or discharges and order remediation.

In Ontario, the public is encouraged to participate in environmental decision making through the *Environmental Bill of Rights* (“EBR”). The EBR provides protection to employees who have alerted authorities in respect of environmental harm. Ontario’s *Occupational Health and Safety Act* imposes obligations on employers in respect of the use, storage, handling and manufacturing of controlled substances. The *Canadian Environmental Protection Act* regulates toxic substances from development to disposal in an effort to contribute positively to sustainable development.

In British Columbia, a comprehensive statutory regime is established under the *Waste Management Act* and *Contaminated Site Regulations* for protection of the environment. The Act and Regulations are very broad and extend to virtually all activity which contaminates or has the potential to contaminate the “Environment” broadly defined to include air, land, water and all other external conditions which affect plants, animals and people. The Act and Regulations borrow heavily from the State and Federal Legislation in the United States to establish what is commonly known as a “Polluter – Pay” regime. This regime has significant practical implications for light and heavy industrial businesses, land developers, users and transporters of hazardous materials and many other commercial activities. The key elements of the British Columbia environmental legislation are:

(a) defining and identifying “Contaminated Sites” by establishing a public registry and a system of mandatory disclosure to increase the quality and the accessibility of environmentally-oriented information generally;

(b) identifying “ Responsible Persons” from among past and present owners, operators, producers and transporters to bear responsibility for the contamination and clean-up;

(c) to impose absolute, retroactive and joint and several liability on Responsible Persons for clean-up costs incurred privately or by regulatory authorities; and

(d) to establish a legislative basis for pollution abatement orders, remediation orders and cost recovery orders by which contaminating activity is controlled and paid for.

Penalties for contravention of the Act range between $2,000 and $1,000,000 per offence and persons who acquire a financial benefit as a result of contravention may be liable to account for the full amount of that benefit.

In addition to the *Waste Management Act*, the Minister responsible for the environment is also given extraordinary powers under the *British Columbia Environment Management Act* to declare states of environmental emergency and to take measures necessary to prevent impending hazardous events or to deal with environmentally hazardous events which have already occurred.

Provincial and federal environmental regulations under the *Canadian Environmental Protection Act*, the federal *Transportation of Dangerous Goods Act,* the provincial *Dangerous Goods Transportation Act*, and the *Hazardous Products Act* also affect the importing and transportation of goods and substances.

CANADIAN STANDARDS ASSOCIATION INTERNATIONAL

The Canadian Standards Association (CSA) International is a private, not-for-profit organization established in 1919. It provides standards development and applies these standards through product certification, management systems registration, and information products. CSA International tests and certifies products for sale in Canada, wherever produced. CSA International certification tells customers that a product or system has been evaluated in a formal process that includes examination, testing, and follow-up inspection, and that the product or system complies with all applicable standards.

Products and services that meet the safety or performance standards are permitted to bear the internationally-recognized CSA International mark. The CSA International program is voluntary. The burden of application and compliance is on the manufacturer or person wishing to apply the CSA International mark.

CSA International has a global scope. It can test and certify products for both U.S. and Canadian markets. Thus, duplicate testing is unnecessary. CSA International also helps exporters conform to the requirements for marketing products in the European Union. As a member of the International Certification Bodies (CB) Scheme, CSA International can test and certify a wide range of products. Testing is performed locally and is recognized in over 35 countries.

Compliance with CSA International standards or standards of other testing and certification companies (such as Intertek Testing Services, and Underwriters' Laboratories) or testing and approval authorities (such as Ontario's Electrical Safety Authority) is sometimes dictated by law (for example, in Ontario by the Electrical Safety Code and in Québec by the *Electrical Installations Act*).

COMPETITION ACT

The federal *Competition Act* governs trade practices affecting competition in Canada. The Director of Investigation and Research may conduct full inquiries into certain reviewable trade practices, prosecute certain criminal offences, and bring actions in relation to matters which are reviewable by the Competition Tribunal. The Tribunal is charged with reviewing a number of activities. Where it finds that conduct in relation to one or more of those activities substantially affects competition, it can make several remedial orders. Failure to comply with an order of the Tribunal is a criminal offence and may also be a basis for civil liabilities. Appeals may be made to the Federal Court of Appeal.

Many practices are reviewable by the Competition Tribunal. For instance, abuse of dominant position (formerly the criminal offence of "monopoly") occurs when those with substantial control of a class of business engage in activities that are likely to reduce competition. The Act provides a sample list of "anti-competitive" acts that would attract the attention of the Tribunal. The listed acts generally refer to conduct engaged in for the purpose of acquiring, augmenting or entrenching market power.

Other reviewable practices relate to the advertising or supply of products (defined to include articles and services). These practices include misleading advertising (where the advertisement is not the subject of criminal proceedings; see below), delivered pricing, refusal to deal (including refusal to supply by foreigners), price control in consignment selling, exclusive dealing, tied selling and market restriction. In addition, the Tribunal can make orders concerning the enforcement of foreign laws, directives, judgments, orders and other processes that would adversely affect competition in Canada.

Reviewable practices are criminal only if they are found to be anti-competitive and an order to stop the practice has been disobeyed. There are also offences under the Act which are criminal acts in themselves, including conspiracies and agreements to lessen competition (including bid-rigging), price discrimination, price maintenance, predatory pricing, misleading advertising (where the advertising is intentionally misleading or misleading due to recklessness) and deceptive telemarketing. Unfair marketing practices such as double ticketing, multi-level marketing, pyramid selling and "bait and switch" advertising are also criminal offences.

The Act prescribes a range of specific penalties for the various criminal offences. For instance, the maximum

penalty for conspiracy offences is a $10 million fine and five years' imprisonment.

In addition to the criminal offences and reviewable trade practices governed by the Act, common law actions regarding competition exist, such as conspiracy to injure and contracts in restraint of trade. As well, consumer protection statutes in most provinces have trade practices provisions.

The merger review provisions of the Act are discussed under "Acquiring or Establishing a Business in Canada", above.

IMPORT REGULATIONS

Canada is a signatory to the WTO Agreement, which became effective on January 1, 1995. The original GATT is carried forward, with some modifications, as GATT 1994.

Duties

The Customs Tariff imposes duties on imported goods. The *Customs Act* sets out the enforcement and administrative structure to levy these duties. The tariff imposed on imported goods depends upon the nature of the goods and their country of origin.

The Customs Tariff sets out a number of tariff structures, depending on country of origin. The country of origin is that country where the whole of the value of goods is produced. The Most-Favoured-Nation (MFN) Tariff applies to all goods of all countries that are members of the World Trade Organization (WTO). The General Preferential Tariff (which is lower than the MFN Tariff) applies to WTO members which are developing countries. The United States Tariff applies to U.S. goods satisfying NAFTA origin requirements. Goods from Commonwealth Caribbean countries and least-developed developing countries receive duty-free treatment. If a country is entitled to more than one tariff, the lowest applies.

NAFTA added a Mexico Tariff and a Mexico-United States Tariff. The Mexico Tariff will apply to goods of Mexico that satisfy NAFTA origin requirements. The Mexico-United States Tariff applies to NAFTA-originating goods (other than agricultural goods and textile and apparel goods) of mixed Mexican-U.S. origin. Canadian regulations set out rules to determine which goods qualify for the United States Tariff, the Mexico Tariff and the Mexico-United States Tariff.

Canada has entered into two additional free trade agreements, the Canada-Israel Free Trade Agreement ("CIFTA") which became effective on January 1, 1997 and the Canada-Chile Free Trade Agreement ("CCFTA") which became effective on July 2, 1997. Under CIFTA, tariffs on virtually all goods of Israel have been eliminated and tariffs on a number of agricultural and fish products have been eliminated or reduced. Under CCFTA, tariffs will be eliminated in stages.

The implementation of these trade agreements has resulted in the elimination of tariffs on many categories of goods. Goods from a country not falling under any of the foregoing are subject to a General Tariff of 35%.

The rate of duty that applies to goods depends upon their classification for tariff purposes. Schedule I of the Customs Tariff classifies thousands of types of commodities in accordance with the Harmonized Commodity Description and Coding System which has been adopted by Canada, the United States, Mexico, Chile, Israel and other WTO countries.

Duty Relief

There are various duty relief programs under Canadian customs law, such as duty drawback and duty deferral for imported inputs that are incorporated into finished exported goods. However, there is no equivalent in Canada to the U.S. foreign trade zone or the U.S. outward processing rules.

Import and Export Restrictions

Canada imposes quantitative import restrictions on some goods and tariff rate quotas on certain agricultural goods. The goods subject to quantitative import limitations and tariff rate quotas are listed in the Import Control List. The specifics of the quantities allowed under a particular import control program and the manner in which a particular program is administered are best determined by dealing directly with the officials of the department concerned.

Certain goods, such as counterfeit coins and obscene literature, are prohibited from entering Canada.

Canada maintains controls over the export of a wide range of goods. Goods to which export controls apply are listed on the Export Control List. Exports to certain countries are also prohibited.

The export of energy goods such as oil, natural gas and electricity is regulated by the National Energy Board. Imports of energy goods and their distribution within Canada are also regulated by the Board.

TRADE REMEDIES

The *Special Import Measures Act* (SIMA) empowers the federal government to protect Canadian producers from the competition of foreign goods priced artificially low due to dumping or subsidization. In addition, relief measures are available where Canadian industry is threatened.

Dumping occurs when the export price of a product is lower than that charged to buyers in the exporter's own domestic market or when the export price is consistently below cost. Antidumping duties can be imposed where dumping causes material injury to producers of like goods in Canada. Antidumping procedures in Canada are based on the rules established in the WTO Agreement respecting antidumping measures.

SIMA also allows countervailing duties to be imposed when it is found that imported goods have been subsidized so as to cause material injury to Canadian producers. As with antidumping duties, countervailing duty procedures in Canada follow the requirements of the WTO Agreement respecting subsidies and countervailing measures.

Certain final determinations in antidumping and countervailing duty actions involving other NAFTA countries may be reviewed by binational panels pursuant to NAFTA Chapter Nineteen.

Antidumping duties on a good of Chile may no longer be applied when tariffs on that good have been fully eliminated.

Canadian law provides for several other trade remedy procedures including surtaxes, retaliatory measures and emergency safeguard actions.

THE NORTH AMERICAN FREE TRADE AGREEMENT

NAFTA came into effect on January 1, 1994. Tariffs on originating goods traded between Canada and the United States were fully eliminated on January 1, 1998. Tariffs on goods imported from Mexico are free for many goods and will be completely eliminated on almost all remaining goods by January 1, 2003.

Under NAFTA, for a good to benefit from tariff elimination it must originate from within the free trade area. Whether a good is originating is determined under the NAFTA rules of origin. The NAFTA rules of origin are the same in all countries in the free trade area and do not distinguish between countries. The NAFTA rules of origin are administered in all three NAFTA countries in accordance with Uniform Regulations. These must be consulted by anyone working with the NAFTA rules of origin. There are separate procedures for making country of origin determinations that will be necessary during the tariff phase-out period and for some other purposes.

With some exceptions, NAFTA restricts duty drawback and duty deferral (inward processing rules) respecting goods exported to the United States. Similar restrictions take effect on January 1, 2001 for goods exported to Mexico.

NAFTA eliminates export taxes and imposes conditions (respecting proportionality and price) upon the reliance by either country on certain GATT 1994 exemptions under which export restrictions can be justified. These affect Canada's ability to restrict exports of oil, natural gas and electricity. The rules respecting export restrictions do not apply to Mexico. The quid pro quo for Mexico's exemption from these requirements was a corresponding exemption of Canada vis à vis Mexico.

Certain other trade restrictions were untouched by NAFTA. For example, Canadian restrictions respecting dairy products are unaffected. NAFTA confirms certain restrictions on the export of logs and east coast fish.

NAFTA contains provisions respecting technical standards and government procurement that bind all three NAFTA countries. Comparable provisions exist under the WTO. The WTO provisions respecting technical standards bind all three NAFTA countries. The WTO provisions respecting government procurement bind only Canada and the United States.

The NAFTA side agreement on the environment could affect lax enforcement of environment laws. The NAFTA agricultural provisions also set out sanitary and phytosanitary provisions that will affect standards relating to the protection of human, animal and plant life and health. There are comparable WTO provisions.

In addition, NAFTA sets out obligations affecting investment, services and financial services. As discussed under "Acquiring or Establishing a Business in Canada", Canada increased its screening thresholds under the *Investment Canada Act* for acquisitions of Canadian businesses by American investors and Mexican investors. The NAFTA investment provisions are based on a fundamental principle of non-discrimination and set out rules respecting such matters as performance and minimum equity requirements, repatriation and expropriation. NAFTA also sets out investor-state dispute settlement procedures that provide direct remedies to aggrieved investors. NAFTA permits each NAFTA country to take reservations respecting certain obligations. The reservations of the federal governments of the NAFTA countries are listed in annexes to the original NAFTA text. Non-conforming provincial and state measures have been grandfathered. NAFTA contains a financial services chapter with principle-based obligations analogous to the investment and services chapters.

THE CANADA-ISRAEL AND CANADA-CHILE FREE TRADE AGREEMENTS

CIFTA and CCFTA each set out rules of origin for determining eligibility for the preferential tariff treatment described above. Both agreements contain provisions respecting import and export restrictions similar to those in NAFTA. Export charges are prohibited but duty drawback and duty deferral are unaffected.

The provisions of CIFTA do not extend to investment, services or financial services. CCFTA, however, covers investment and services in much the same way as NAFTA. Financial services are not covered. Each agreement contains a cultural exemption.

Matters such as sanitary and phytosanitary measures, technical barriers, intellectual property and antidumping and countervailing duties are also covered by the relevant WTO agreements. As mentioned above, a special provision in the CCFTA prohibits antidumping duties on any good on which duties have been fully eliminated. Government procurement between Israel and Canada will be governed by the WTO Agreement on Government Procurement. Chile is not a signatory to this plurilateral agreement and there are no rules respecting government procurement in the CCFTA.

Dispute settlement procedures in each agreement are similar to those in NAFTA. The CCFTA also sets out investor/state dispute settlement procedures modelled on those in NAFTA.

INDUSTRIAL AND INTELLECTUAL PROPERTY

COPYRIGHT

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

Copyright arises automatically in Canada in respect of any original literary, dramatic, musical or artistic work, including a compilation thereof and in a sound recording, provided that the creator or author of the work is a citizen, subject or person ordinarily resident in a "treaty country". A "treaty country" means a country that is a party to the Berne Convention (or any one of its revisions), the Universal Copyright Convention (adopted on September 6, 1952 in Geneva, Switzerland, or its July 24, 1971 Paris revision) or a member of the World Trade Organization. Anyone using a work without the copyright owner's consent infringes the copyright. In addition, persons who rent, sell, distribute or import infringing works are indirect infringers of copyright under Canadian law. Under the *Copyright Act* infringers of copyright may be subject to civil remedies brought by copyright owners or subject to criminal penalties.

The *Copyright Act* provides a system for the registration of copyright interests and assignments of copyright interests. Registration is not necessary to create copyright in a particular work, but does serve as *prima facie* evidence of copyright ownership and strengthens the remedies available to a party whose copyright is infringed. In addition, an assignee of a copyright interest who fails to register his or her assignment, may risk losing his or her interest to a subsequent *bona fide* assignee for value without notice, who does register their assignment in respect of the work.

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

In most cases, copyright belongs initially to the author of the work. The most prominent exception to this rule is that copyright in works created in the course of employment belong initially to the employer, unless there is an agreement to the contrary.

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

The *Copyright Act* was modernized by various amendments made between 1988 and 1996. Among, other things, the amendments:

- Expanded the definitions of "copyright" to include the right to present certain artistic works created after June 7, 1988 for a purpose other than sale or hire at a public exhibition and the right to communicate a work to the public by telecommunication;
- Expanded the definition of "performance" and "musical work";
- Expanded the scope of moral rights protection;
- Dramatically increased the penalties for copyright infringement;
- Provided more explicit protection for computer programs in both source code and object code;
- Established a regime for the determination and collection of cable and satellite retransmission royalties;

- Provided that copyright protection may not be available to designs which can be registered under the *Industrial Design Act*;

- Introduced a rental right for sound recordings and computer programs;

- Granted protection from unauthorized “bootleg” recordings of copyrighted works and their importation into Canada; and

- Extended the protection of the *Copyright Act* to all World Trade Organization members.

A major reform of the *Copyright Act* was introduced in 1997 and was fully implemented and proclaimed in force on October 1, 1999, creating a wide range of new rights, including:

- Granting a performer or a producer royalties from any of the 50 countries who are party to the Rome Convention, Canada now being one of them;

- Granting a performer copyright in his or her performance;

- Granting a broadcaster copyright in its broadcast communication signals;

- Creating a new levy on recordable blank audio recording media such as cassettes and tapes, to remunerate creators;

- Exempting “home taping” from copyright infringement; and

- Establishing statutory damages for copyright infringement.

Canada is also a party to the World Intellectual Property Organization (“WIPO”) Copyright Treaty (1996) and the WIPO Performances and Phonograms Treaty (1996), each concluded in Geneva, Switzerland on December 20, 1996. In order to comply with these two WIPO treaties, the *Copyright Act* will be amended by the federal government to address, among others, the following issues:

- the provision of adequate legal protection and effective legal remedies against the circumvention of effective technological measures (such as data encryption, signatures, access codes and asymmetric key systems) that are used by authors in connection with the exercise of their rights;

- the provision of adequate and effective remedies against persons who tamper with electronic rights management information (e.g. information which identifies the work, the author of the work, the owner of any right in the work, etc.) without authority or copies works knowing that electronic rights management information has been removed or altered without authority;

- the provision of moral rights for performers in their performances on a basis similar to moral rights which are currently granted to authors in respect of their works protected under the *Copyright Act*; and

- the provision to sound recording producers of a specific right to make their phonograms available to the public in such a way that members of the public may access them from a place and at a time individually chosen by them.

Finally, in matters relating to the information highway, a recent case held that a copyright is not automatically conferred by obtaining an Internet address since this net-work is not a recognized agency under the terms of the *Copyright Act*.

DOMAIN NAMES

A Domain Name is the unique electronic address of a website on the internet for an individual, business or other entity. No two sites can have the same address on the internet.

The administrative organization which governs the Canadian .ca domain name regime is the Canadian Internet Registration Authority (“CIRA”). Its website is located at www.cira.ca.

The new system, implemented in November 2000, permits Canadian companies and Canadian individuals to register as many domain names as they wish. Recent changes to the rules introduced a "first come first served" system which does not require evidence of entitlement to a proposed domain name (i.e. by providing proof that the proposed domain name is a corporate/business name or a trademark).

More information is available on the CIRA website.

INDUSTRIAL DESIGN

The term industrial design generally refers to the pattern, shape or configuration of an article, which serves a strictly aesthetic purpose and not a functional purpose.

Original design features represent valuable intellectual property and are important business assets. The *Canadian Industrial Design Act* recognizes this fact and provides a procedure to protect an exclusive right to exploit those assets.

The *Canadian Industrial Design Act* provides for the registration by Canadians and non-Canadians of original features of shape, configuration, pattern, ornamentation, or any combination thereof applied to a finished article produced or intended to be produced in numbers greater than fifty. Unlike copyright which arises automatically upon creation, or trade-mark rights which may accrue through use, the owner of an industrial design may only obtain rights by registering the design with the Canadian Intellectual Property Office.

If an article is not useful, a design applied to it will not be registrable. Designs applied to articles that have no fixed appearance are similarly not registrable and features of shape, appearance, etc., which are invisible at the time of purchase or during normal use are generally not protectable.

If a design is an artistic work or was originally created as a work of art, it is automatically protected by copyright, and can be registered as such. However, if a design is used or intended to be used as a model or pattern to produce fifty or more manufactured articles, it can be protected only by industrial design registration. However, there are many exceptions and the legal distinction between copyright and industrial design is very fine. It is advisable to seek legal advice to best assess your potential rights.

Certain classes of designs are excluded from industrial design registration since they are protected under the *Copyright Act*. Designs that are functional only and not intended to provide any visual appeal are not registrable as industrial designs under Canadian law.

Once a design has been registered, it is important to determine if different aspects of an article can be protected by different laws; for example, patent or trademark protection or copyright.

An industrial design registration protects not only the specific design registered, but also any design not differing therefrom. The owner of the design is the only one who can apply for registration. The original creator or author of the design is the owner unless the design was created for another person for valuable consideration, such as in an employment situation, in which case the other person is the owner and should apply. The right to make, use and sell a design can be licensed within and throughout Canada.

The registration of an industrial design can usually be accomplished within six to twelve months. One important consideration, however, is that no registration can be obtained if the application is filed more than twelve months after publication of the design in Canada or elsewhere. "Publication" means making the design public or offering for commercial use and includes distributing samples of an article bearing the design, selling or exhibiting such articles for sale, publishing the design in advertising or other printed material of any sort, public use of articles bearing the design, etc.

Registration gives an exclusive right to make, sell, rent, or import for trade or business the design applied to any article for which it is registered for ten years.

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

PATENTS

The terms and conditions for receiving a patent in Canada are set out in the federal *Patent Act.* Amendments which came into force on October 1, 1989 brought Canada into line with the other members of the Patent Cooperation Treaty of 1970. To qualify as patentable, an invention must be novel and useful, and must constitute an unobvious step in the development of a new product. The invention may be any new and useful art, process, machine, manufacture, composition of matter, or improvement in any of the above categories.

The basic principle of the *Patent Act* is that a patent is only granted to an original inventor or to his or her legal representatives. In addition, the exclusivity of a patent is granted on the basis of a first-to-file system. Because of the importance of the filing date of an application, an applicant should make every effort to file at least the minimum information permitted under the Patent Rules as early as possible. Subject to the provisions of the *Patent Act*, an application for a patent for an invention filed in Canada by any person entitled to protection under the terms of any treaty or convention relating to patents to which Canada is a party, who has previously filed an application for the same invention in any other country that by treaty, convention or law affords similar protection to citizens of Canada, has the same force and effect as if filed in Canada, provided that the application is filed within 12 months after the date of filing in the other country.

For applications filed after October 1, 1989, the term of the patent is 20 years from the date of the filing of the application in Canada. A patent is infringed by the unauthorized trespass on the patentee's exclusive right to make, construct or use the invention or sell it to others for their use. A patentee may seek an injunction to stop the infringement and damages, or an accounting of the infringer's profits from the infringement.

No marking of the product is required to indicate the patent although it may be advantageous to do so. However, it is an offence to falsely mark an article as "patented" if it is not patented in Canada.

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

Patents are only available for inventions that have a practical application and whose function is not dependent upon the exercise of judgement or professional skill. For example, patents are not available for mere scientific principles, an abstract theorem, methods of medical treatment or, at least for the moment, methods of doing business.

While computer programmes *per se* are not patentable, many computer-software related inventions can be claimed as an integral part of another invention. In addition, there is recent jurisprudence which indicates that there may be copyright protection to the non-literal aspects of computer object or source code, for example in the structure or algorithm of the program.

For patented medicines, the Act provides that where a company seeks to market a drug containing a medicine previously marketed by a patentee who has listed patents that contain claims for the medicine or for the use of the medicine in the prescribed manner, the company must issue an allegation stating why its sale of the drug will not infringe any of the subject patents. The company will not obtain health and safety approval to market its drug until its allegations have been litigated. In addition, the Act provides price control powers to the Patented Medicine Prices Review Board. Thus, if the Board determines that a patentee obtained excess revenue by selling a drug at an excessive price, the Board will choose from among a list of remedies which can be directed against the patented or other medicine sold by the patentee.

TRADEMARKS

A trademark is a mark or name which distinguishes the goods or services of a particular business from those of other businesses. An unregistered mark may be protected against use by another person of a confusing mark, but only to the extent a reputation is shown for the trademark.

An applicant who registers a mark under the federal *Trade Marks Act* is granted the exclusive right to use the mark throughout Canada (irrespective of the extent of use), the right to prevent the use of a confusing mark and the right to register the mark in countries adhering to the Paris Convention and in the countries of the World Trade Organization. In addition, registration provides prima facie proof of ownership. There is no obligation to demonstrate a reputation in association with the trademark in order to sustain an action. The registration term is 15 years and may be renewed indefinitely. While there are no marking requirements, marking is prudent.

An application under the *Trade Marks Act* must show that the mark is in actual use in Canada or that the applicant proposes to use the mark in Canada. A foreign applicant may rely on foreign registration and use or, in appropriate circumstances, on the fact that the trademark used in the foreign country is becoming well known in Canada. Generally, once a trademark application has been examined, approved and advertised without successful opposition, it will be granted and the trademark registered. A certificate is then issued to the applicant.

Registration may be refused if the trademark is primarily merely the name or surname of an individual, the portrait or signature of a living person or one who has died within the preceding 30 years, if it is misleading as to the character and quality of the goods, if it is merely descriptive of the business it is associated with, if it is geographically descriptive or misdescriptive, if it is a name in any language of the relevant wares or services, if it is confusing with a registered trademark, if it is an official mark, or if it is scandalous. Descriptive trademarks, generally, may become registerable if they acquire a "secondary" meaning; that is, their use has become so extensive that they actually distinguish the wares or services in association with which they are used from wares or services offered by another.

Trademarks may be assigned and it is prudent that assignments of registered trademarks be filed with the Canadian Trademarks Office.

Trademarks may also be licensed to third parties. The *Trade Marks Act* only requires that use of a licensed trademark be subject to the direct or indirect control of the trademark owner. A written license is recommended. To the extent that the existence of the license is made public, there is a presumption that the use by the licensee of the trademark in question will not jeopardize the distinctiveness (strength) of the trademark. Use by a licensee without the "control" of the trademark owner or without disclosure of the license may result in the loss of the trademark's distinctiveness and the possible expunging of the mark.

Since the coming into force of the World Trade Organization Agreement, new rules concerning the registration of the names of wines and spirits have been enacted. Therefore, the use by a person who is not from that area of a protected geographical indication referring to a wine or a spirit is prohibited.

Any unauthorized use of a trademark may lead to civil liability and criminal remedies. ■

REAL ESTATE

Canada occupies an immense geographical area totalling 9,976,000 square kilometres, or 3,851,000 square miles, with varying population densities. Canada offers ample opportunity for those who wish to acquire or deal in land.

CAPACITY TO HOLD REAL PROPERTY

Natural persons, provided they are not minors or incapable of caring for themselves or administering their property (in which event the law provides for representation or assistance), and legal persons such as corporations can acquire real property in Canada.

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

In Ontario, the *Aliens' Real Property Act* grants aliens the right to hold or dispose of real property. However, under the *Extra-Provincial Corporations Act,* a corporation incorporated in another country must obtain an extra-provincial license to acquire, hold or convey real property in the province.

In British Columbia, the *Property Law Act* generally grants an alien individual or corporation the same capacity as a resident to acquire and dispose of land in British Columbia. But an extraprovincial company (i.e., a company that is not incorporated under British Columbia's *Company Act*) that also "carries on business" in British Columbia must register under the *Company Act* in British Columbia as a condition of owning interests in land or enforcing its contracts within the province. Whether a company "carries on business" in British Columbia is determined by a number of factors including the presence of an office, advertising, telephone listings and other indicia of commercial activity.

LAND USE PLANNING

In Ontario, the *Planning Act* provides the means for government to control the development and use of land. Land use planning is the responsibility of the provincial government and is supervised at the provincial level, but significant planning functions have been delegated to the various regional governments and municipalities. Land use is controlled through such instruments as the official plan (a long-range general plan for a region or municipality) and zoning by-laws (which regulate for each parcel of land in the municipality the uses permitted and other matters such as required parking and the type, size, height and location of buildings and structures). For a purchaser of land, both the official plan and particular zoning by-laws are crucial.

Most municipalities require that site plans be approved before the construction of any new development. Site plans set out the details of a development (including the location of buildings and related facilities, such as landscaping, services, driveways and parking spaces). Most municipalities require the developer to enter into an agreement ensuring construction and ongoing maintenance in accordance with the site plans. In addition, municipalities in Ontario may impose charges against land to pay for increased capital costs of servicing development. When considering development in a particular municipality, it is advisable to determine whether a development charge bylaw has been, or is in the process of being, enacted.

In Ontario, any subdivision of land requires the consent of the local, municipal or regional authority. This requirement also applies to a mortgage or the grant of any other interest in land (such as a lease) for 21 years or more, where the mortgage or interest is granted over only part of a landholding. Anyone wishing to subdivide land in Ontario or to subdivide and sell lots must obtain governmental consent and may be required to submit a draft plan of subdivision for approval. Normally, the municipality will require the developer to enter into development agreements with it, whereby the developer agrees to provide sewers, roads and other services for the subdivision, the dedication of certain lands for public use and certain other public benefits.

In British Columbia, the *Municipal Act* (B.C.) is the basic provincial legislation governing the operation of

municipalities. Other provincial acts, such as the *Land Title Act,* provide for various aspects of land development and the mechanical process that one must go through to achieve the orderly development and use of land. However, to a very large extent, the planning functions and control of the development process are within the exclusive ambit of the various regional governments and municipalities. Most municipalities, and in some cases regional districts, have their own official community plans and zoning by-laws that govern the development of land within that municipality or district. The control of land development generally includes regulation of the subdivision of land, the use and density of the project, the size and location of buildings and the provision of basic services. Development approval often involves some negotiation with planning departments. It is therefore essential that a developer work closely with the planning officials in each municipality. For most commercial and other large developments, professional consultants are retained at an early stage to assist in this process.

ENVIRONMENTAL CONCERNS

Canada, like other industrialized countries, has experienced an increase in environmental problems and in government regulation aimed at solving these problems. Anyone intending to purchase real estate in Canada should be aware of the variety of legal regimes that can affect the use of the property.

Regulation of environmental matters is primarily carried out at the provincial level. In Ontario, the principal statutes regulating environmental matters are the *Environmental Protection Act* ("EPA") and the *Ontario Water Resources Act* ("OWRA"). The EPA imposes a duty not to pollute (or discharge contaminants other than in accordance with relevant requirements and permits), a duty to report a spill immediately and a duty to pay for the cleanup of the spill. Since 1990, these duties have been extended to include, and administrative orders can be issued against, present and past owners and occupiers of land, even if such persons did not cause the contamination of the property. The range of regulated contaminants is very broad, including such things as odour, noise and vibration in addition to solids, liquids and gases. In accordance with Ontario's *Environmental Assessment Act*, an assessment of environmental impact may be required in relation to large scale developments and infrastructure projects.

While the law itself did not fundamentally change in the mid to late 90's with respect to real property, there has been a shift by the Ontario government toward a policy that remediation of "contaminated real estate" proceed on a self-initiated and self-directed basis. New guidelines for the clean up of contaminated sites were published in 1996 and revised in 1997. These guidelines provide increased guidance on environmental site assessments, sampling procedures and restoration standards for a much wider variety of substances. Due largely to staff reductions in the Ministry of the Environment, the Ministry has shifted away from detailed supervision of remediation, issuing orders and prosecuting offenders. Responsibility for these things is also being downloaded to municipalities.

In British Columbia, the *Waste Management Act* and the *Contaminated Site Regulations* create a systems of compulsory disclosure, public registration and civil liability for past and present owners, operators and occupiers of affected land as well producers and transporters of hazardous goods, all of which is carefully defined in the Act and Regulations. Environmental due diligence has become an important part of acquiring, developing and disposing of land in British Columbia. Specialized consultants are often retained to carry out site investigations and to assist with the development approval process. The same environmental concerns often arise in connection with financing of real estate acquisition and development.

PROPERTY TAXES AND FEES

Land Transfers

Under the *Ontario Land Transfer Tax Act*, registration of a transfer of real property is subject to land transfer tax. The tax also applies to the registration of a notice of lease if the expired term of lease (including revisions and extensions) exceeds 50 years. The transfer tax is 1/2% of the value being paid for the property up to $55,000, 1% of the next $195,000 in value, and 1.5% of the value over $250,000. If the property consists of at least one and not more than two single family residences, a 0.5% surtax on the amount of the value which exceeds $400,000 is imposed.

The *Land Transfer Tax Act* also provides that any transfer of a beneficial interest in land gives rise to land

transfer tax. There are exceptions under the regulation, such as for certain tax-driven intercorporate transfers.

In British Columbia, the *Property Transfer Tax Act* levies a tax on registration of most transfers of title to real estate regardless of the commercial, industrial or residential use of the land. Tax is payable at the time of registration at the rate of 1% on the first $200,000 of fair market value and 2% on the balance. Registration of long term leases with terms (including renewal options) exceeding 30 years is also subject to tax computed by a valuation formula set out in regulations to the Act.

Goods and Services Tax

Canada's goods and services tax (GST), discussed in more detail under "Tax Considerations", applies to all supplies of Canadian real estate other than the residential resale market. Special filing rules are generally applicable to the purchase and sale of commercial real estate that enable the purchaser to satisfy its GST obligation through "input tax credits " rather than cash.

Transfers to Non-Residents

In Ontario and British Columbia, there are no restrictions or special taxes on the transfer of lands to non-residents.

Profits from the Sale of Land

A non-resident is taxed in Canada on the same basis as a Canadian resident on certain types of income, including gains realized on the disposition of real estate in Canada. To ensure that tax on the disposition of land is collected, a purchaser of real estate from a non-resident will normally require the vendor to provide a clearance certificate from the Receiver General of Canada in advance of closing. Otherwise, the purchaser must withhold one-third of the price and remit it to the Receiver General on behalf of the non-resident vendor.

A non-resident is deemed to be carrying on business in Canada in connection with business income derived from the disposition of Canadian real estate held as inventory. Consequently, any gain realized by a non-resident that derives from the sale of Canadian real estate held as inventory is subject to Canadian tax.

Municipal Taxes

Each year an owner of real property in Ontario or British Columbia must pay municipal realty taxes based upon the assessed value of the property. The tax rates are set by municipal authorities and local school boards. In British Columbia, every parcel of land is reassessed annually for municipal tax purposes. Up until December 31, 1997, business taxes in Ontario, which were based upon a legislated percentage of a property's municipal taxes depending on the type of use, were paid by all businesses occupying real property. In January of 1998, a province-wide reassessment took place in Ontario which: 1) established a uniform current value assessment system premised on a June 30, 1996 base year market value, and 2) eliminated the practice of levying business taxes against occupants of real property by recouping the lost business tax revenue through a higher realty tax rate imposed against the property. As a result of subsequent legislation which phases in significant changes resulting from the province-wide reassessment, property taxes for 1998, 1999 and 2000 have been set having reference to the actual realty and business property taxes levied against individual properties in 1997. Further province-wide reassessments took place in 2001, based upon a June 30, 1999 market value base year; and are scheduled to occur again in 2003 based upon a June 2001 market value base year; and thereafter on an annual basis based upon a market value of June 30 of the prior year.

RESIDENTIAL RENT: VACANCY DE-CONTROL AND RENT CONTROL GUIDELINE

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

The rent control guideline is the percentage that a landlord may increase the rent of the tenant or the assignee during their tenancy. The guideline is determined by the Minister of Municipal Affairs and

Housing for each calendar year (for instance, the guideline for 2000 was 2.6% and for 2001 it was 2.9%).

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

Some exceptions are: (i) the landlord and the tenant may have agreed to a higher increase because of unit-specific capital expenditure work or new services provided by the landlord; or (ii) the landlord may have successfully applied to the Ontario Rental Housing Tribunal for an order for an above-guideline increase to cover certain additional costs.

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

In British Columbia, a landlord, including a new purchaser, is generally precluded by the *Residential Tenancy Act* from directly or indirectly increasing rent until twelve months after the last rental increase. A landlord who makes improvements to the land or premises may, subject to a tenant's right of appeal to the Rent Review Commission, increase the rent before the expiry of 12 months. Although the amount of rent increases is not currently controlled in British Columbia, rent increases may not be used for the indirect purpose of evicting tenants.

Vacancy rates in larger population centres such as Vancouver are relatively low, and the effect of combined provincial and municipal regulation is to limit or prohibit the conversion of rental accommodation to individual strata lots for resale.

REGULATION OF REAL ESTATE BROKERS

Real estate brokers in Ontario are governed by the *Real Estate and Business Brokers Act* and its regulations. The Act is administered by the Real Estate Council of Ontario ("RECO") on behalf of the Ministry of Consumer and Commercial Relations.

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

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

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

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

In British Columbia, the *Real Estate Act* requires an individual applicant for a real estate license to be resident in British Columbia, over 21 years old, of good reputation, to have served as an agent or salesman for two of five preceding years, and to have passed the required courses and exams. A corporate applicant must be financially responsible, have an approved corporate applicant must be financially responsible, have an approved corporate name, and submit the name of an individual nominee who has the qualifications required of an individual broker who is actively engaged in the work of the corporation. Only licensed real estate agents and sales persons may collect rents, negotiate real estate security or offer land owned by another person for sale or lease in British Columbia, and arrangements for sharing commissions and fees are regulated.

REGULATION OF MORTGAGE BROKERS

Mortgage brokers in Ontario and British Columbia are governed by the provincial mortgage brokers acts and their regulations.

In Ontario and British Columbia, a mortgage broker is a person who carries on the business of lending money on the security of real estate, whether the money is the person's money or that of another, and includes a person who holds out or advertises as being a mortgage broker or who carries on the business of dealing in mortgages. Excluded from most provisions of the Acts are insurance and trust companies, banks, credit unions, liquidators and trustees in bankruptcy.

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