Legal Aspects of Doing Business in Canada
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- Secured Lending
- Securities & Corporate Finance
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Preface

This booklet has been prepared by McLean & Kerr LLP for the assistance of foreign residents and others contemplating investing or conducting business in Canada. Many legal principles may affect such non-residents. This booklet is intended to provide an overview of some of the relevant legal considerations which may be of interest to such persons on matters such as the various forms of business organizations, the review by the Canadian government of investments by non-Canadians, family law, immigration law, commercial real estate law, commercial leasing and commercial leasing law, gaming law and general taxation principles. It is not intended to treat exhaustively the areas covered in this booklet nor should it be relied upon to form the basis of business decisions. Before embarking upon any Canadian business venture, it is recommended that legal advice be obtained.

The foregoing comments are of a general nature and are not intended, nor should they be used, as a substitute for legal advice or opinion, which can be rendered only with respect to specific fact situations.
The Canadian Political System

a. Introduction
Canada is an independent and self-governing member of the British Commonwealth and is comprised of ten provinces and three territories. The country operates under a federal system of government originally created under the Constitution Act, 1867 (formerly, the British North America Act, 1867), a statute of the British Parliament which united Canada's four original provinces. On April 17, 1982 the Canadian Constitution was "patriated", that is to say, re-enacted with certain amendments as a statute of the Parliament of Canada. The new Canadian constitution, contained in the Constitution Act, 1982, is discussed in greater detail in the following chapter.

A federal system represents, in essence, a division of powers and responsibilities between two autonomous levels of government - the federal or central government on the one hand and the provincial governments on the other. For a nation as large and diverse as Canada, the federal principle seems well suited to political exigencies. The federal and provincial governments are, within their appropriate spheres of jurisdiction, independent and sovereign. In functional terms, the federal system was designed to reconcile the need for national unity and a strong central government with the desire for local or regional autonomy.

However, federalism as experienced in Canada has evolved to meet the present needs of a nation which is significantly different from the one that existed in 1867. The demands placed on the government and the immense financial resources of the central authority have forced a co-operative form of federalism upon the two levels of government in Canada, in which revenue collection and government expenditures have become, in essence, joint ventures. In certain circumstances, law-making, theoretically divided between the federal government and the provinces along exclusive jurisdictional lines originally drawn in 1867 has become, in practice, the product of close contact between the federal and provincial governments.

b. Federal and Provincial Jurisdiction
In general, section 91 of the Constitution Act, 1867 grants the federal government legislative authority over all matters relating to the regulation of national and international trade and commerce, banking and currency, the conduct of foreign affairs, national defence, navigation, shipping, and criminal law. Section 92 of the Constitution Act, 1867 grants the provincial government legislative authority over matters relating to education, health, municipal affairs, property and civil rights and other matters of local concern. However, there are some areas of overlap. For example, courts have held that labour relations, an area which generally falls under provincial jurisdiction, will come under federal jurisdiction with respect to employees in federal enterprises such as banks, shipping concerns and other transportation companies. Further, most of the legislation respecting the sale or transfer of corporate securities and the regulation of stock exchanges has been enacted by the provinces, although the field of anti-combines or anti-trust legislation is the responsibility of the federal government.

To finance its responsibilities, the federal government was originally given, and still has, the right to levy taxes by any means, whereas a provincial government's power of taxation is limited to direct taxation within a particular province. However, the division of taxation powers has, in recent years, come under the stresses of social, technological and political changes that were unforeseen when the system was first established. A wide variety of social assistance programs, put into place by the provinces in areas of exclusive provincial jurisdiction, have escalated in expense. As a result, the provinces have had to seek federal assistance, usually by means of cost-sharing arrangements, to meet their increasing fiscal burden. At the same time, in order to finance its expenditures, the federal government sought greater revenues from the exploitation of natural resources, previously considered to be a provincial tax source. Some have argued that the current revenue and cost-sharing arrangements have obscured the traditional lines of federal/provincial jurisdiction. The reality is that the practical realities of managing a country the size and complexity of Canada have forced federal and provincial governments to engage in a different, perhaps more creative, form of federalism than that which the founders of the nation might have envisaged.

c. Federal Government
The current federal Parliament, or legislature, is a bicameral body that is comprised of two bodies, a lower chamber known as the House of Commons and an upper chamber known as the Senate. The present House of Commons has
308 members, who are popularly elected at irregular intervals of no more than 5 years pursuant to the electoral system. The Senate has 105 members, who are appointed by the Governor-General on the advice of the federal government of the day. The House of Commons is, by constitutional convention, the more influential of the two legislative bodies.

The Prime Minister is the head of government and is usually the leader of the majority political party in the House of Commons. If no party is able to fill a majority of seats with elected members, a minority parliament exists. In the case of a minority parliament, the party with the most seats in Parliament will usually depend upon the support of smaller parties on an issue-by-issue basis to govern. If two or more parties with a majority of the seats between them are willing to form a coalition, Parliament will be governed by a majority coalition. However, this is rare; since Confederation, there has only been one coalition government in Canada.

The federal cabinet is appointed by the Prime Minister from the members of his/her party then sitting in the House of Commons or the Senate. In a coalition government, members of cabinet are appointed from all parties in the coalition. Each cabinet minister usually heads a department or a ministry of the Government.

Canada's head of the state is the Sovereign of the United Kingdom (“Sovereign”), presently Queen Elizabeth II. The personal representative of the Sovereign in Canada is the Governor-General. However, the Governor-General is now only a ceremonial position, filled by a person recommended to the Sovereign by the Prime Minister and the Cabinet. Further, the Governor-General acts only on the advice of the Prime Minister and the Cabinet.

Canada's capital is the city of Ottawa, which is located in the province of Ontario. Ottawa is very close to the border between the provinces of Ontario and Quebec, Canada's two most populous provinces, which have historically had divergent interests.

d. The Territories

Canada's three territories, the Northwest Territories, the Yukon Territory and Nunavut, are located in the northern part of the country. While they have local administration, their affairs are to a great extent regulated by the federal government. There is an ongoing debate in Canada as to whether or not the territories should be accorded provincial status.

e. Provincial Government

Each provincial legislature consists of a one chamber, or unicameral, elected legislative assembly. Members are elected through the use of the plurality electoral system in each riding.

The provincial Prime Minister, more commonly referred to as the Premier, heads the provincial government. This position is usually filled by the leader of the political party which wins a majority of the seats in the legislative assembly. The cabinet is selected by the Premier from among the members of his/her party, except where a coalition government makes it necessary to appoint cabinet ministers from more than one party.

The head of the provincial state is the Sovereign of the United Kingdom. The Sovereign is personally represented in the province by the Lieutenant-Governor. However, this is now a largely nominal and ceremonial position, filled by a person recommended to the Sovereign by the federal government and acting only on the advice of the Premier and Cabinet.

f. Municipal Governments

Municipal governments in all provinces are established and regulated by provincial law. They are normally governed by elected councils and composed of a mayor, a board of control, and alderpersons. These councils are usually concerned with matters of local interest such as education and local services, including policing, fire-fighting and sanitation.
The Canadian Constitution

a. The Charter of Rights

Prior to the enactment of the Canadian Charter of Rights and Freedoms (the "Charter of Rights") as part of the Constitution Act, 1982, the Canadian constitutional system was based on the supremacy of the Parliament, like the British parliamentary system. In theory, the federal Parliament and the various provincial legislatures had, between them, absolute power to legislate with respect to all matters. In other words, the "legislative pie" was completely divided up between the two levels of government pursuant to the Constitution Act, 1867, which set out the areas of responsibility in relation to which each level of government was competent to legislate. There was no notion of basic rights and freedoms belonging to the people that were beyond the legislative reach of both levels of government. The rights and freedoms now enshrined in the Charter of Rights were not protected by constitutional entrenchment. Rather, there existed certain constitutional conventions whereby both levels of government, in their respective legislative capacities, would voluntarily respect fundamental individual rights and freedoms and would, in effect, restrain themselves from legislating in such a manner as to abrogate or diminish such rights.

Accordingly, before the enactment of the Charter of Rights, legislation (including regulations and orders-in-council) could be challenged only on the ground that it was beyond the legislative competence of the particular level of government that had enacted it. In other words, only legislation that encroached upon the legislative jurisdiction of another level of government could be challenged successfully. Subordinate legislation was also susceptible to challenge on the ground that it represented an improper delegation of the law-making power. However, such legislation could not be attacked on the basis that it infringed any of the basic rights of the people. Legislation can still be challenged on this jurisdictional basis.

The Constitution Act, 1982 did not change the division of the legislative powers between the federal government and the provinces. However, the inclusion of the Charter of Rights effected a revolutionary change in Canadian constitutional law by entrenching certain individual rights as part of the supreme law of Canada, thereby placing such rights beyond the legislative reach of any government, and providing recourse to the courts for remedies in the event that such rights are infringed.

Listed below are some of the more prominent sections of the Charter of Rights.

SECTION 1: "GUARANTEE OF RIGHTS AND FREEDOMS"

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

These freedoms include:

SECTION 2: "FUNDAMENTAL FREEDOMS"

Everyone has the following fundamental freedoms:

a. freedom of conscience and religion;
   b. freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
   c. freedom of peaceful assembly; and
   d. freedom of association;

SECTION 3: "DEMOCRATIC RIGHTS"

Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein;

Section 6: “Mobility Rights”
1. Every citizen of Canada has the right to enter, remain in and leave Canada;
2. Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
   a. to move to, and take up residence in any province; and
   b. to pursue the gaining of a livelihood in any province.

SECTIONS 7-14: "LEGAL RIGHTS"

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Everyone has the right to be secure against unreasonable search or seizure.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

10. Everyone has the right on arrest or detention:
    a. to be informed promptly of the reasons therefore;
    b. to retain and instruct counsel without delay and to be informed of that right; and
    c. to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

11. Any person charged with an offence has the right:
    a. To be informed without unreasonable delay of the specific offence;
    b. to be tried within a reasonable time;
    c. not to be compelled to be a witness in proceedings against that person in respect of the offence;
    d. To be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
    e. Not to be denied reasonable bail without just cause;
    f. except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
    g. not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international or was criminal according to the general principles of law recognized by the community of nations;
    h. if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
    i. if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings except in a prosecution for perjury or for the giving of contradictory evidence.

14. A party or witness in any proceeding who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.
SECTION 15: "EQUALITY RIGHTS"

1. Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

2. Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

SECTIONS 17, 19, 20: "OFFICIAL LANGUAGES"

Sections 17, 19 and 20 guarantee the right of every Canadian to use English or French in any debates or proceedings of Parliament, of the Legislature of New Brunswick, and in any pleading in or process issuing from any court established by Parliament or the Province of New Brunswick; and the right to communicate with, and to receive available services from any institution established by Parliament or the Province of New Brunswick; and the right to communicate and receive available services from the federal government and the Province of New Brunswick in English or French (subject to certain practical limitations).

Some of the issues that the Canadian courts will have to address in interpreting the Charter of Rights are of particular interest to the business person; they are discussed below.

b. Application of the Charter of Rights

1. Corporations

Under Canadian law, a corporation is a legal "person" and has the capacity, rights, power and privileges of a natural person. On reading the Charter of Rights, one is impressed by the range of subjects to whom the rights contained therein have been made available, as suggested by the use of the terms "every person", "everyone", "every citizen of Canada", or "every individual". The words "everyone", "every" or "any person" have been held to include corporations in some circumstances, but not in others, where the substantive provisions in the Charter of Rights describe rights that are, on their face, inapplicable to corporations. For example, subsection 11 (f) grants "every person" the right to a jury trial for an offence punishable by 5 years imprisonment. However, a corporation cannot be imprisoned and, therefore, notwithstanding subsection 11(f), a corporation will not be entitled to a jury trial. Similarly, the terms "every individual" (used in section 15) and "every citizen" (used in sections 3, 6 and 23) have been interpreted to exclude corporations. In sum, corporations are entitled to the fundamental freedoms and legal rights guaranteed by sections 2, 7 through 12, 14 and 17. insofar as they are practically applicable to corporations, but not the democratic, mobility, equality and minority language, and educational rights set out in sections 3, 6, 15 and 23.

Only the activities of the various levels of government and their respective agencies can be challenged under the Charter of Rights. It represents a compact between the various levels of government, on the one hand, and the people of Canada, on the other. It also represents a compact between the various levels of government. However, non-governmental bodies and private individuals are not obligated to comply with the Charter of Rights. Regulation of rights in the private sector is achieved through specific legislation by the federal and the provincial governments; for example, by the Human Rights Codes enacted by many of the provinces.

2. Competition Act

The right to be secure against unreasonable search and seizure, contained in section 8 of the Charter of Rights may have considerable impact on business corporations. This section applies to corporations as well as to individuals, and has been invoked to limit the wide powers of search granted to the Director under the predecessor to the Competition Act, the Combines Investigation Act. That Act permitted investigators to enter and search premises under the authority of a warrant issued by the Director of the Combines Investigation Branch. On the basis of the Charter of Rights, the courts have imposed the requirement that such a warrant must be issued by an independent judicial tribunal. The tribunal must be satisfied, based on sworn evidence, that reasonable and probable grounds exist for believing that an offence has, in fact, been committed, and that relevant evidence is likely to be found. This
requirement is now contained in the Competition Act. Upon obtaining a judicial warrant, the Director may enter upon the premises named in the warrant and may search for any records or other documentation and copy or seize the same for examination or copying. For a search warrant to be considered reasonable it must comply with the statutory requirements. However, mere technical breaches will not be of great assistance to persons subjected to such investigation because evidence, once it is obtained, is admissible in court even if the search and seizure was in violation of the Charter of Rights. This is true unless the circumstances are such that the court finds that to admit the evidence would bring the administration of justice into disrepute.

The Charter of Rights has impacted the Competition Act in other ways. The Competition Act once contained a provision permitting an accused to be found guilty despite the existence of a reasonable doubt as to the accused's guilt in the mind of the trier of fact. However, the courts have since struck down this provision as violating the Charter right contained in subsection 11(d), the presumption of innocence.

Subsection 2(b) of the Charter of Rights, which provides for freedom of expression, may also have an impact upon the Competition Act. Its application may cause certain provisions of the Competition Act, in particular the part that deals with Restrictive Trade Practices and which makes certain types of advertising and trade practices illegal, to be unconstitutional as they amount to an abridgement of freedom of expression. However, the courts have been reluctant to interpret business advertisement as true "expression" in this context, and the present judicial view would likely be to interpret these restrictions as "demonstrably justified in a free and democratic society," and thus permissible under section 1 of the Charter of Rights.

3. Income Tax Act

Representatives of the federal Minister of National Revenue have wide powers of investigation under subsection 231.4 of the Income Tax Act. Such investigations are often carried out by federal police who are granted authority to enter premises, and to examine, copy, and remove books, records, and documents. Similar considerations to those mentioned with respect to the Competition Act apply in the context of investigations under the Income Tax Act and these types of investigations may be held to be unreasonable if they are conducted without prior judicial authorization or if they go beyond the limited scope for which such authorization may have originally been granted.

4. Securities Acts

The various provincial securities acts permit the respective securities commissions to issue "cease-trading orders" in respect of the securities of any corporation where it is suspected that a violation of the act or regulations has occurred. Such orders, although made before there has been a determination of whether or not a violation has in fact occurred, can have a very serious effect on the corporation as well as on the owners of the securities in question. It was previously thought that such orders might be susceptible to the argument that they violate the right of the corporation in question to be presumed innocent until proven guilty. However, it is now clear that this right, together with other rights granted in section 11 of the Charter of Rights, only applies in criminal and quasi-criminal proceedings where an accused may potentially be imprisoned as a penalty; they are not applicable to regulatory activities, such as the issuing of a cease-trading order.

Subsection 11(d) of the Charter of Rights also requires that a finding of guilt be made only after a fair and public hearing occurs before an independent and impartial tribunal. In practice, securities commissions (as well as numerous other regulatory bodies) have different branches that carry out the functions of investigation and prosecution as well as adjudication, thus giving rise to an argument that they lack impartiality. Again, it appears to be established that proceedings before such bodies are not subject to constitutional challenge, as the rights contained in section 11 of the Charter of Rights have been interpreted as being applicable only to criminal or quasi-criminal proceedings in which the accused may potentially be imprisoned as a penalty.

5. Employment and Labour Relations

Various provincial statutes which regulate the professions (i.e. law, medicine, dentistry) and other regulated fields of work often contain a provincial residency requirement for persons seeking to be licensed to carry on those business or professional activities. Some of these requirements have been held to run afoul of subsection 6(2) of the Charter of Rights, which guarantees mobility rights and, in particular, the "right of all citizens and permanent residents to pursue a livelihood in any province. For example, a Quebec law that granted preference for jobs in construction and
hydro-electric industries to Quebec workers has been held to be invalid on the basis of this provision. However, subsection 6(2) has been held to apply only to mobility between provinces, and professional organizations (such as law societies) are permitted to limit membership in themselves to citizens or permanent residents of Canada.

With respect to labour unions, the *Charter of Rights* may affect one's right to choose to belong or not to belong to such bodies by virtue of the freedom of association provision contained in subsection 2(d). In addition, current rules regarding "secondary picketing" and "closed shops" may be affected. At present, it is unlawful for union members to picket an employer who is not directly involved in a dispute in respect of which the picketing is taking place. This prohibition has been upheld under the *Charter of Rights*, where the picketers sought to induce other employees to breach the terms of their employment contracts.

Pension schemes that provide for a minimum age for participation and different age requirements for men and women may come under attack as being in violation of subsection 15(1) of the *Charter of Rights*, which provides for equality regardless of age or sex. However, mandatory retirement provisions have been upheld as non-discriminatory and justifiable under section 1.

Employees who are transferred to a new province for work purposes may be interested in section 23 of the *Charter of Rights*, which provides that the children of such employees will have the right to be instructed in the language of their parents (that is, French or English), although that language may be that of the linguistic minority in their new province of residence.

c. Summary

As a result of the enactment of the *Charter of Rights*, a great number of issues of interest and significance to businesspersons can be expected to arise. The issues enumerated above represent merely a sample of those that may be anticipated in the future.
Forms of Business Organizations

a. Introduction

This chapter provides an overview of the different types of business entities which may be used for investment purposes by foreign businesspersons in Canada. These are as follows:

- a sole proprietorship;
- a partnership, including a general partnership and limited partnership;
- a corporation;
- a branch operation; and
- an unlimited liability company (ULC) (only available in the provinces of B.C., Alberta, and Nova Scotia).

Numerous combinations of these fundamental structures may be utilized as well. This discussion, however, will be limited to a description of these five basic forms of business organizations.

The business entity most suitable for a foreign businessperson in a particular set of circumstances will, of course, vary depending upon the nature of these circumstances and the individual businessperson's requirements. Factors such as exposure to liability, taxation, financing, management, control and continuity of business operations may influence the form of business entity that is ultimately selected. In our experience, the foreign businessperson will generally choose a corporation as the preferred vehicle to conduct business in Canada.

b. Sole Proprietorship

The simplest form of business entity is the sole proprietorship. A sole proprietorship, as the name implies, is a business entity owned by the proprietor. In essence, it is merely an extension of the legal rights and obligations of the individual owner. The owner is personally liable for all debts, obligations and losses of the business and is entitled to all the profits realized therefrom. Any profits realized from the business are taxed personally in the hands of the proprietor, at the proprietor's individual tax rates.

There is no federal or provincial requirement to register the sole proprietorship, unless it is carried on under a name other than the individual's name. If one intends to carry on a sole proprietorship under a name other than the owner's personal name or with the word "company" as part of its name, a declaration in prescribed form must be filed in accordance with the laws of the province where the business is conducted.

In keeping with the simplicity of this structure and the paucity of regulations governing this form of business arrangement, no auditor is required. Adequate financial books and records are to be maintained for tax purposes and to satisfy any regulations which might be applicable.

From the point of view of taxation issues, the foreign businessperson may choose to carry on business in Canada as a sole proprietor during the initial stages of the operations, when the business is expected to be unprofitable. In this manner, the proprietor may use business losses arising from the sole proprietorship as deductions from his or her taxable income.

c. Partnership

Partnership is another unincorporated form of business entity which may be utilized by the foreign businessperson to carry on business in Canada. A partnership is the relationship that subsists between two or more persons carrying on business in common with a view to profit. Most of the provinces of Canada have enacted legislation governing the formation, continuation and dissolution of a partnership.

A partnership may be used as a business entity for most commercial activities; however, federal and provincial legislation prohibit certain business activities, such as banking, savings, loans, and insurance, from being carried on in partnership form. Any person, including any incorporated business entity, with the legal capacity to enter into a binding contractual agreement may legally enter into a partnership.
A partnership may take the form of either a general partnership or a limited partnership. In a general partnership, each partner is the agent of the partnership and of his other partners in relation to the business of the partnership. The partners are jointly and severally liable for all debts and obligations of the partnership incurred while they are partners.

A limited partnership is composed of one or more general partners, who manage the business of the limited partnership and who are liable for the debts, liabilities and obligations of the limited partnership, and one or more limited partners, who take a passive role in the business of the limited partnership. In most provinces of Canada, the liability of each of the limited partners is limited to the amount of capital contributed by them to the limited partnership. In order to maintain this limited liability, limited partners may not operate or manage the limited partnership. The limited partnership will be operated and managed solely by the general partner and will be bound by all agreements made by the general partner on its behalf.

Both the general and limited partnership are required, in most provinces, to be registered with the requisite provincial authority after its formation by filing or registering a declaration or certificate in the prescribed form. Any changes with respect to the original partnership declaration or certificate must also be filed with the provincial authority. Subject to legislative requirements of certain provinces respecting registrations and failure to register, a general partnership may, in fact, be created and legal obligations and liabilities imposed upon its partners through their business conduct, even in the absence of registration with the provincial authority. In contrast, a limited partnership may only be formed when a declaration or certificate is filed with the appropriate provincial authority; if the declaration or certificate is not so registered, the limited partnership does not exist under its enabling legislation and all of the partners will be treated as general partners.

In the case of both the general partnership and the limited partnership, provincial legislation sets forth the duties and obligations among the partners. These provisions may be altered by a written agreement executed by all of the partners. In the absence of any written agreement to the contrary, the provisions contained in the provincial legislation will apply to the obligations and duties of the partners that form the partnership.

As in the case of the sole proprietorship, both the general partnership and limited partnership have no legal obligation to prepare audited financial statements. However, proper books and records of the business of the partnership must be maintained. The tax considerations governing partnerships are addressed in Chapter VIII.

d. Corporation

1. Formation Procedures

A limited company, or corporation, is a business entity whose owners (the shareholders) are not, in most instances, responsible for any debt, liability, act or default of the corporation for an amount which exceeds the amount paid by the shareholders for their shares in the capital stock of the corporation. The corporation is formed by incorporation under statute. In Canada, a business corporation may be incorporated either federally, under the Canada Business Corporations Act (the "CBCA"), or provincially, under the companies legislation of a particular province, such as the Ontario Business Corporations Act (the "Ontario Act"), or by special Act of either the Parliament of Canada or the legislature of one of the provinces. Generally speaking, incorporation grants a business entity the capacity, rights, powers, privileges, and responsibilities of a natural person.

Incorporation under federal or provincial companies legislation is accomplished by filing the constating documents, declaring the characteristics of the corporation, with the appropriate authority, and receiving a certificate or similar instrument issued by such authority evidencing the incorporation. The process of incorporation is, relatively speaking, quick and inexpensive. For example, in Ontario the constating document, the articles of incorporation, may be composed of as little as six pages prepared in response to ten inquiries. The corporation is incorporated by means of a Certificate of Incorporation obtained from the Ministry of Government Services, which can be issued shortly after filing the constating documents and upon payment of the required incorporation fee.

A corporation incorporated under the provisions of the CBCA may carry on business throughout Canada, subject to the laws of general application of any province in which it carries on business. Corporations incorporated under the provisions of the CBCA or under any provincial statute are entitled to carry on business in Ontario without obtaining an extra-provincial license. These corporations must, however, register themselves to carry on their business in
Ontario, which is a simple, administrative procedure. Corporations incorporated outside of Canada, however, are always required to obtain an extra-provincial license before beginning operations in Ontario.

2. Capital Structure
Under federal and provincial companies legislation, the authorized capital of a corporation must be set out in the constating documents or amendments thereto. The authorized capital may consist of one or more classes of shares which have no par value or, if permitted under the particular legislation, have a stated par value. If the authorized capital of the corporation consists of one class of shares, the rights of the holders are equal in all respects and include the rights to vote at all meetings of shareholders and to receive any dividend declared by the corporation upon dissolution. However, should the constating documents provide for more than one class of shares, one class of shares must have the right to vote at all meetings of shareholders and to receive the remaining property of the corporation upon dissolution. Also, the constating documents should provide, with respect to the other class or classes of shares, the rights, privileges, restrictions and conditions attaching to the shares of each such class or classes of shares. The rights, privileges, restrictions and conditions attaching to the other classes of shares may provide for preferential payment of dividends, preferential treatment on dissolution or liquidation of the corporation, right of redemption by the corporation, restriction on or prohibition from voting and the right to convert to another class of shares of the corporation; although private, or "non-offering", corporations (that is, corporations that do not offer their securities to the public) do have shareholder number limits.

3. Directors and Officers
Under the provisions of the corporate statutes, the mandate to manage or supervise the management of the business and affairs of the corporation is granted to the board of directors. The board of directors is elected by the shareholders. Most of the provincial statutes require that a majority of the directors of most corporations be resident Canadians. However, the CBCA was recently amended, and now requires that at least 25% of directors be resident Canadians. As well, no person may be a director of a corporation who is less than eighteen years of age, who is of unsound mind, or who has the status of a bankrupt.

The directors and officers of a corporation are required to exercise their authority and discharge their duties honestly and in good faith with a view to the best interests of the corporation and are required to exercise the care, diligence and skill that a reasonably prudent person would exercise.

Directors of a corporation have a responsibility not only to the shareholders of the corporation but also to the corporation's employees and creditors, the government, and even, in some cases, the public. For example, directors and officers of corporations who have participated or acquiesced in remitting late, or failing to remit, employees' Canada Pension Plan or Employment Insurance deductions are personally liable along with the corporation for the applicable penalties. Where a corporation commits an offence under the Income Tax Act, an officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in, or participated in the commission of the offence is a party to and guilty of the offence, and is liable to be punished for the offence whether or not the corporation has been prosecuted or convicted.

In Ontario, directors are jointly and severally liable to the employees of the corporation for all debts not exceeding six months' wages that become payable while they are directors for services performed for the corporation and for the vacation pay accrued while they are directors for not more than twelve months, whether under the Employment Standards Act and the regulations thereunder, or under any collective agreement made by the corporation. This liability for employee wages exists only if a director is sued while he or she is a director, or within six months after he or she ceases to be a director, and the action against the director is commenced within six months after the debts become payable, and the corporation itself is sued in the same action and execution against the corporation is returned unsatisfied in whole or in part. Also, the director is liable if before or after the action is commenced the corporation goes into liquidation, is ordered to be wound up or is to be wound up or makes an authorized assignment under the Bankruptcy and Insolvency Act, or a receiving order under the Bankruptcy and Insolvency Act is made against it, and in any such case the claim for the debts is proved.

Both the CBCA and the Ontario Act permit all of the shareholders of a corporation to enter into a written unanimous shareholder agreement with restrictions, in whole or in part, on the powers of the directors to manage or supervise the management of the business and affairs of the corporation. Where a unanimous shareholder agreement restricts
the powers of the directors to manage or supervise the management of the business and affairs of the corporation, the directors are relieved of their duties and liabilities to the extent of such restriction. However, parties to the unanimous shareholder agreement then assume the same duties and liabilities as if they were directors.

4. Auditors
The shareholders of a corporation are required, in most cases, to appoint an auditor in each fiscal year of the corporation for the purpose of examining the financial statements, which are required by the applicable corporation statute to be placed before the shareholders and prepared in accordance with generally accepted auditing standards. The auditor must be independent of the corporation, all of its affiliates, and of the directors or officers of the corporation and its affiliates. The corporation may be exempt from the audit requirements under certain conditions which are expressly stated in the applicable corporate statute. For example, under the Ontario Act, a corporation is exempt from the auditor requirements in respect of the fiscal year in which the corporation is a non-offering corporation and where all of the shareholders of the corporation consent to the audit exemption in writing in respect of that year. Also, under the Ontario Act, a corporation is required to retain accounting records for at least six years from the end of the period to which they relate.

Under the provisions of the CBCA, a corporation whose securities are or were part of a distribution to the public and remain outstanding, and are held by more than one person, is required to file a copy of its financial statements, auditor's report and any further information respecting the financial position of the corporation with the Director appointed by the Minister for the purposes of the CBCA. A wholly-owned subsidiary may apply for an exemption from this requirement if it falls within the exception provided for in the CBCA. The provincial statues do not require public disclosure of financial statements or auditors’ reports unless the corporation is an offering corporation.

5. Taxation
Unlike a partnership or a sole proprietorship, where the profits and losses realized from the business are taxed directly in the hands of the sole proprietor or in the hands of the individual partners, a corporation is a separate entity from its shareholders for income tax purposes.

The principles governing the taxation of corporations in Canada are described more fully in Chapter VIII.

e. Branch of Operation
As an alternative method for carrying on business in Canada, a foreign company may establish a branch operation. The branch must be registered or licensed in each province where it intends to carry on business activities. Each provincial statute varies in its definition of what constitutes "carrying on business". Proper books and records of the branch operation must be maintained and all taxes and reporting documents must be filed with the requisite federal, provincial and municipal regulatory authorities in the same manner as those required from corporations incorporated federally or provincially. The foreign company will, of course, be responsible for the liabilities and obligations of its branch operation in Canada with respect to all debts and contractual obligations entered into on behalf of the branch by its proper agents, representatives and managers.

f. Unlimited Liability Company ("ULC")
Nova Scotia was the first province in Canada to introduce the unlimited liability company ("ULC") under the Companies Act (the "NSCA"). Recently, British Columbia and Alberta introduced legislation permitting the incorporation of ULCs as well. Although the regulation of ULCs in all three provinces is very similar, there are several key differences that investors should consider before deciding where to incorporate a ULC. For example, there are no Canadian residency requirements for directors of a Nova Scotia ULC, whereas Alberta mandates that 25 percent of the directors of an Alberta ULCs must be Canadian residents.

A ULC is a body corporate under which the liability of the shareholders is unlimited. The use of a ULC to hold Canadian investments of United States investors may have certain favourable income tax consequences under United States law.
The U.S. Treasury Department’s current check-the-box regulations govern entity classifications for U.S. income tax purposes. They classify certain foreign entities (known as per se corporations) as corporations. Those not on the list of per se corporations are “eligible entities”. The aforementioned ULCs are expressly excluded from the list of per se corporations as a ULC is per se a partnership (if it has more than one member) or a member branch (if it has one member). A ULC must make an express election under the check-the-box regulations to be treated as a corporation for U.S. tax purposes.

For Canadian income tax purposes, a ULC is not treated any differently than a limited liability company incorporated in Canada under the federal or provincial companies acts. Accordingly, a ULC will be subject to Canadian income tax on its worldwide income.

There are a number of U.S. tax advantages to using a ULC, including the following:

1. The cross border flow-through of losses to U.S. shareholders. Under Canadian law, losses of a Canadian corporation cannot flow through to U.S. shareholders unless a “Canadian” corporation carries on the business. The restriction can be avoided by using a ULC because losses will flow through to the U.S. shareholders.

2. U.S. companies incorporated in Canada as ULCs may be able to take advantage of tax-credits that may otherwise be unavailable. In the United States, a U.S. corporation is entitled, within limits, to claim a foreign tax credit for Canadian income tax paid by its Canadian subsidiaries. However, the credit cannot be claimed if the Canadian subsidiary is more than three tiers below the U.S. corporation unless it is a controlled foreign corporation, in which case the maximum number of tiers is six. The credit also cannot be claimed if the U.S. member of the Canadian corporation owns between 10 and 50 percent of the shares of the Canadian corporation (the 10-50 basket limitation). ULCs can be used to obtain these tax credits.

3. The cross border flow-through of losses to U.S. individuals. A U.S. individual, unlike a U.S. corporation, cannot generally claim the underlying Canadian income tax paid by the Canadian corporation. Accordingly, if that individual wants to claim the underlying Canadian income tax as a foreign tax credit, a ULC could be used.

g. The Ontario Act

In the preceding paragraphs, we reviewed the principal business structures which could serve as the form of Canadian business operations carried on by a businessperson. We reviewed, in general terms, the Canadian legislative requirements in relation to corporations and, in particular, those with respect to formation procedures, capital structure, directors and officers, the appointment of auditors and taxation considerations. The following section focuses on the company legislation of Ontario as contained in the Ontario Act. Most of the provisions of the Ontario Act came into force on July 29, 1983 pursuant to the Business Corporations Act, 1982 (Ontario). It has been amended to provide a measure of uniformity between Ontario's business corporation statute and the companies legislation of Canada and the other provinces. The following discussion highlights certain significant sections of the current Ontario Act.

1. Rights of Dissent and Approval

The rights of minority shareholders may be of particular interest to the foreign businessperson who intends to establish his or her Canadian operation with the assistance of other investors who will become shareholders. Under the provisions of section 185 of the Ontario Act, dissent and appraisal rights are available, both with regard to offering and non-offering corporations, in a manner similar to those rights provided in the CBCA. Subsection 185 (1) of the Ontario Act provides a right of dissent for any holder of shares of any class or series entitled to vote on a resolution to:

- amend the articles to add, remove or change restrictions on the issue, transfer or ownership of shares of a class or series of the shares of the corporation;

b. amend the articles to add, remove or change any restriction upon the business or businesses that the corporation may carry on or upon the powers that the corporation may exercise;
c. amalgamate with another corporation under sections 175 and 176 of the Ontario Act;

d. be continued under the laws of another jurisdiction under section 181 of the Ontario Act; or

e. sell, lease or exchange all or substantially all of the property of the corporation under subsection 184(3) of the Ontario Act.

If a shareholder dissents and follows the procedure set forth in the Ontario Act, the shareholder will be entitled to be paid the "fair value" for the shares held by such shareholder in respect of which he or she dissents.

2. Compulsory Acquisitions and Take-Over Bids

Part XV of the Ontario Act applies to an offering corporation only. The Ontario Act provides for a compulsory acquisition where a corporation proposes to carry out a "take-over bid". Pursuant to subsection 188(1) of the Ontario Act, if within 120 days after the date of a take-over bid or issuer bid the bid is accepted by the holders of not less than 90% of the securities of any class of securities to which the bid relates, other than securities held at the date of the bid by or on behalf of the offeror, or an affiliate or associate of the offeror, the offeror is entitled, upon complying with this section, to acquire the securities held by the dissenting offerees. A dissenting offeree in a "take-over bid" situation may, at his or her option, be paid the "fair value" of his or her securities under section 188 of the Ontario Act.

3. Directors

Under the Ontario Act, to be eligible to act as a director of a corporation, a person must be at least eighteen years of age, must be of sound mind, must be an individual and must not be bankrupt. In addition, at least 25 percent of the directors of a corporation must be resident Canadians. However, where a corporation has less than four directors, at least one director must be a resident Canadian.

A "resident Canadian" is defined in the Ontario Act as an individual who is:

- a. a Canadian citizen ordinarily resident in Canada;
- b. a Canadian citizen not ordinarily resident in Canada who is a member of a prescribed class of persons; or
- c. a permanent resident within the meaning of the Immigration Act (Canada) and ordinarily resident in Canada.

Under the CBCA, a permanent resident who has been ordinarily resident in Canada for more than one year after the time at which he or she first became eligible to apply for Canadian citizenship cannot qualify as a director.

Although there is no limit to the maximum number of directors, the Ontario Act provides for a minimum of one director in the case of a non-offering corporation, and three directors in the case of an offering corporation.

A quorum is required to properly transact the business of the board of directors. The Ontario Act provides that a quorum shall not be less than two-fifths of the number of directors or minimum number of directors required by the articles or by-laws of the corporation, of which a majority of the directors present must be resident Canadians, in order to properly transact business at a meeting of directors. If a corporation has fewer than three directors, all directors must be present at any meeting of directors to constitute a quorum. Further, if a corporation has fewer than three directors, one of the directors present at the meeting must be a resident Canadian in order to properly transact business at the meeting. Since it may be difficult to comply with this requirement at all times, the Ontario Act permits directors to transact business at a meeting of directors where a majority of the directors present are not resident Canadians if a resident Canadian director who is unable to be present approves in writing or by telephone or other communication facilities the business transacted at the meeting, and a majority of resident Canadian directors would have been present had the absent resident Canadian director been present at the meeting.

The Ontario Act was recently amended to include certain provisions governing the constitution of the board of directors of an Ontario corporation. To ensure that the board of directors of an offering corporation remains independent of management, it is required that at least one-third of the directors of an offering corporation shall not be officers or employees of the corporation or any of its affiliates. A corporation is also permitted to have a floating
number of directors, with the minimum and maximum number of directors being established in the articles of incorporation.

Finally, it has been made possible for a corporation to purchase insurance to protect a director from the consequences of a failure to exercise a proper standard of care in exercising his or her duties as a director.

4. Unanimous Shareholder Agreement

The concept under the CBCA of a unanimous shareholder agreement has been introduced in the Ontario Act. A unanimous shareholder agreement may be entered into among all of the shareholders of a corporation, or among all of the shareholders and one or more persons who are not shareholders, restricting in whole or in part the power of the directors to manage or supervise the management of the business and affairs of the corporation. The statutory legitimization of shareholders’ right to assume or restrict the responsibilities of directors by unanimous shareholder agreement is a material departure from the common law in this area. Subsection 108(5) of the Ontario Act provides that:

"A shareholder who is a party to a unanimous shareholder agreement has all the rights, powers, duties and liabilities of a director of the corporation, whether arising under this Act or otherwise, including any defences available to the directors, to which the agreement relates to the extent that the agreement restricts the discretion or powers of the directors to manage or supervise the management of the business and affairs of the corporation and the directors are thereby relieved of their duties and liabilities, including any liabilities under section 131, to the same extent". Section 131 addresses the liability of the directors of a corporation to employees for wages.

5. Sale of Restricted Shares

An offering corporation may restrict the issue, transfer or ownership of its shares if a specified level of ownership is necessary, as a securities dealer, or if a level of Canadian ownership is necessary to assist the corporation to qualify to receive licenses or benefits under any Canadian statute which may be prescribed. The sale of these restricted shares is permitted where restrictions are attached in order to qualify the corporation for special grants, licenses, etc.

6. Remedies

There are a number of recourses made available in the Ontario Act for parties who wish to bring an action against, or on behalf of, a corporation or its board of directors. The first type of recourse is called a derivative action. This action allows a complainant, which includes a shareholder or a director (or a former shareholder or director) of a corporation, as well as any other interested party, to bring, or intervene in, an action on behalf of the corporation. If the action is successful, any judgments or damages made in favour of the corporation are paid directly to the corporation, and the complainant does not gain personally. For example, if a shareholder suspects that a director of a corporation has fraudulently misappropriated corporate funds, he or she may bring a derivative action on behalf of the corporation, seeking to have these funds accounted for. If the action is successful, the corporation itself would receive the damages, while the shareholder's only personal benefit is the possibility that this will have a positive effect on share value.

An oppression remedy is available for minority shareholders, creditors and others on application to the court by a complainant (as defined in the Ontario Act), and, in the case of an offering corporation, the Ontario Securities Commission. Unlike a derivative action, a complainant bringing about an action in oppression can benefit personally from the action. The complainant must prove that there has been some action or inaction on the part of the corporation or its affiliates that is oppressive or unfairly prejudicial; and the courts have a wide variety of orders that can be made if the action is proven. The oppression remedy is the broadest and most frequently used shareholder remedy.

h. The Canada Business Corporations Act (the "CBCA"

In our previous discussion of the Ontario Act, we noted that the Ontario Act was designed to effect a measure of uniformity between Ontario's companies legislation and the companies legislation of the federal and the other provincial governments. We have already observed that the Ontario Act is in many respects similar to the CBCA
and accordingly, we will confine our analysis to a review of how incorporating under CBCA may be more beneficial than under the Ontario Act to a foreign businessperson considering doing business in Canada.

1. Comparison of the CBCA & the Ontario Act

There are very few significant differences between the provisions of the CBCA and those of the Ontario Act. However, of particular interest to the foreign businessperson are the financial disclosure requirements under the CBCA and the different treatment under the two corporate statutes accorded to a minority shareholder of a public company which has undertaken a going-private transaction.

The CBCA, unlike the Ontario Act, requires the public filing of financial statements for certain corporations. Section 160 of the CBCA provides that a corporation which at any time made a distribution of its securities to the public shall file a copy of its financial statements at the public office of the Director of Corporations Canada, Consumer and Corporate Affairs. A corporation that fails to comply with these financial statement filing requirements is guilty of an offence and liable on summary conviction to a fine not exceeding $5,000.

The CBCA contains provisions similar to those of the Ontario Act respecting a compulsory acquisition where a corporation proposes to execute a going-private transaction. Unlike the CBCA, the Ontario Act also contains a provision for a compulsory acquisition at the option of the holder of shares of a class where 90% or more of such shares of a public corporation have been acquired by or on behalf of a person or any of its affiliates or associates. Under these circumstances, a holder of any of the remaining shares of that class may require the corporation to purchase its shares at their "fair value".

2. Jurisdiction of Incorporation

The foreign businessperson, after having considered the similarities and differences between the Ontario Act and the CBCA, must decide upon the jurisdiction of incorporation. It will be assumed for the purpose of this discussion that the choice of incorporation jurisdiction is between a federal corporation and an Ontario corporation. However, incorporation in another Canadian jurisdiction may be suitable or desirable in a wide variety of circumstances.

The foreign businessperson must consider several factors in determining where to incorporate. Such factors include the nature of the business to be conducted, the capacity to carry on business in various jurisdictions, or the prestige of having a federal company.

The nature of the business often will dictate the jurisdiction of incorporation. The nature of the business may be such that it is entirely within the legislative competence of either the provincial or federal government. For example, the incorporation of a bank must take place pursuant to the Federal Bank Act; and trust company operations are within the legislative competence of both the federal and Ontario governments and, therefore, the incorporation of a trust company can take place either under Canada’s Trust Companies Act or under Ontario’s Loan and Trust Corporations Act. The incorporation of a federal corporation would obviously take place under the CBCA; that of an Ontario corporation would occur under the Ontario Act.

Both CBCA and Ontario Act corporations have the capacities, powers, rights and privileges of a natural person. However, a CBCA corporation is entitled to carry on business in Ontario without an extra-province licence. A federal corporation can also hold an interest in land located in any of Canada’s provinces or territories. Finally, the foreign businessperson may prefer to incorporate under the CBCA because he or she may feel that when dealing with non-Canadians, a federal corporation has greater prestige and status and is better known than a provincial corporation.

i. Additional Business Considerations

1. Competition Act (Canada)

The Competition Act is a federal statute which establishes basic principles for the conduct of business that are designed to promote competition and efficiency in the Canadian economy.
The *Competition Act* contains both criminal offences for anti-competitive behaviour and non-criminal provisions regulating the review of certain trade practices and the review of certain merger transactions.

The current criminal offences include conspiracy and bid-rigging. On March 12, 2009, key changes to the Competition Act were implemented. Prior to these recent amendments, certain practices such as price discrimination, predatory prices and discriminatory promotional allowances were covered under the criminal provisions of the Competition Act. These acts are now only subject to review where they are committed as an abuse of power.

The provisions of the *Competition Act* may also apply when a dominant company uses its market power in a way that hinders competition. Hence, certain trade practices may be subject to review of the Competition Bureau. These practices include, but are not limited to, the refusal of a corporation to deal with a certain seller, consignment selling, exclusive dealing, tied selling, where a supplier of a product restricts its customer's ability to deal with the product, abuse of a dominant position in the marketplace, bait and switch selling, selling above advertised prices, and promotional contests. Note that a third party may commence a civil action for damages arising from a criminal offence or failure to comply with an order of the Competition Tribunal.

The *Competition Act* also provides for the review, and possible prohibition, of certain transactions, including amalgamations, acquisitions (shares or assets) and joint ventures, if the transaction prevents or lessens, or is likely to prevent or lessen, competition substantially. The Competition Act provides for a mandatory pre-notification procedure with respect to the proposed transaction. For the 2011 calendar year, the Competition Bureau must be notified where the assets or revenues of a target company in a proposed transaction exceed CDN $73-million, and when the combined assets or revenues of the merging parties and their respective affiliates exceed CDN $400-million. The threshold is subject to review at the end of 2011 in order to set the level for the 2011 calendar year.

In that regard, a foreign businessperson should be mindful that any acquisition or establishment, direct or indirect, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person may be subject to review under the Competition Act if the transaction prevents or lessens, or is likely to prevent or lessen, competition substantially.

2. PIPEDA

A businessperson looking to establish a business organization in Canada must be mindful of its personal information protection legislation.

As of January 1, 2004, the federal *Personal Information Protection and Electronic Document Act* (PIPEDA) applies to every Ontario organization in respect of personal information that (a) the organization collects, uses or discloses in the course of commercial activities or (b) is about an employee of the organization and that the organization collects, uses or discloses in connection with the operation of a federal work, undertaking or business.

For constitutional reasons, however, PIPEDA will not apply to the personal information of employees in Ontario collected by an employer of a non-federally regulated industry that does not engage in the collection, use or disclosure of this information in the course of a commercial activity (i.e., selling the information). PIPEDA will also not apply to (a) 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; or (b) 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.

PIPEDA requires every business organization to obtain an individual's consent when it collects, uses or discloses the individual's personal information. Personal information can only be used for the purposes for which it was collected.

Additionally, the business organization is responsible to ensure that all personal information which it collects is adequately and appropriately safeguarded. This includes personal information that passes into the hands of third party service providers (i.e. off-site storage facilities, computer services contracts, etc.).

Organizations must appoint a compliance officer to oversee the protection of the personal information and the internal safeguards and policies for its collection, retention and destruction by the business organization.
Upon the request of an individual, the organization must provide access to that individual to his or her personal information.

3. Trade-marks and Copyright
   i. Trade-marks

A trade-mark is a mark that is used by a person to distinguish the wares or services manufactured, sold, leased, hired or performed by one person or organization from those of others in the marketplace. Trade-marks legislation is federally regulated and applies to all business that use or require trade-marks for the operation of their business. Protection of unregistered trade-marks is possible on the basis of use. It is not a requirement to register a trade-mark, however, registered trade-marks give the holder a greater ability to enforce recognition of the ownership of such trademark. The registrant of a registered trade-mark has the exclusive right to use the mark across Canada for a period of 15 years, such registration being renewable every 15 years thereafter. The right of the owner of a registered trade-mark to its exclusive use is deemed to be infringed by a person not entitled to its use who sells, distributes or advertises wares or services in association with a confusing trade-mark or trade-name. An injunction, monetary damages or destruction of the material in question can be obtained as against a party who infringes the trade-mark rights.

   ii. Copyright

Copyright, in relation to a work, means the sole right to copy or allow someone else to copy a creative work. Copyright also includes the exclusive right to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof. Copyright arises automatically upon the creation of the work and the copyright is not required to be registered. Registration of such copyright, however, entitles the author of original work to hold copyright in the work in Canada for the life of the creator plus 50 years. Authors of the work hold moral rights, which includes the right to preserve the integrity of the work and the right to have one's authorship credited in the work and which cannot be assigned by the author. The protection of moral rights subsist for the same period as the copyright in the work. Under the Copyright Act, the Copyright Board certifies tariffs, which set out royalties payable for certain uses of copyright material. The Copyright Act also sets out civil and criminal remedies with respect to copyright infringement.

4. Employment Standards

Each province has enacted employment legislation that regulates various aspects of the employer-employee relationship. For example, in Ontario, the Employment Standards Act (ESA) mandates minimum wage, holiday pay, overtime pay, benefits, leave of absences, termination and severance.

If owning or operating a business where employees are unionized, the Canada Labour Code (CLC), a federal statute, will govern employment standards. Resolving employee grievances or disputes under the CLC differs from resolving these issues under provincial employment standards legislation in that grievances or disputes under the CLC are brought before arbitrators and not usually settled in traditional courts.

5. Accessibility for Ontarians with Disabilities Act

The Accessibility for Ontarians with Disabilities Act, 2005, (AODA) came into force in 2005 with the goal of making the province accessible for individuals with disabilities by 2025 through the implementation of accessibility standards. These standards set mandatory rules that businesses and organizations must comply with in five general areas: Customer Service, Information and Communications, Employment, Transportation and Built Environment. The AODA has outlined various deadlines for implementation of the standards depending on the size of the business and the standard in question.

For example, broadly stated, the Customer Service standard mandates that all providers of goods and services establish policies ensuring effective service to persons with disabilities by January 1, 2012.
The Employment standards outlined in the AODA govern matters such as recruitment, information and communication supports available to employees, documented individual accommodation plans, and return to work access plans. Employment standards apply to all organizations that have at least one employee in Ontario. Volunteers and other non-paid individuals are not considered to be employees for this purpose. Subject to a few exceptions, the compliance deadlines for the Employment standards are:

January 1, 2016 – for large private and not-for-profit organizations (50+ employees); and

January 1, 2017 – for small private and not-for-profit organizations (less than 50 employees).

Enforcement of AODA accessibility standards will occur through inspections, compliance orders and the imposition of administrative penalties. Failure to comply with the AODA may result in a fine of up to $50,000 for non-compliance by an individual or an unincorporated organization, and up to $100,000 for non-compliance by a corporation.

6. Labour Mobility in Canada

Canadians are generally able to work in their chosen occupation throughout Canada. However, there are some occupations that are regulated and require workers to be certified or licensed by provincial or territorial authorities. Individuals have traditionally faced regulatory barriers when attempting to procure employment outside the province where they were licenced or certified, and this was one of the central issues which the Agreement on Internal Trade has attempted to address.

The purpose of the Agreement on Internal Trade is to reduce market barriers at all levels between the provinces. Recent amendments to chapter seven of the agreement allow workers in regulated occupations to apply to be certified or licenced in the same occupation in another province or territory without having to undergo significant additional training, examination or assessment.

Although these amendments were a significant step towards greater labour integration across Canada, they were not all-encompassing. Provinces and territories retained the ability to maintain specific occupational standards and adopt exceptions to certification requirements. However, the agreement ensures that provinces cannot arbitrarily stifle labour mobility as exceptions to certification requirements must be based on legitimate objectives.
The North American Free Trade Agreement

a. Introduction

The 1980s and 1990s were a period of dynamic change for Canada. The last two decades have seen the establishment of a positive climate for foreign investment, growth in the manufacturing sector (aided by the Goods and Services Tax introduced on January 1, 1991, which replaced an outmoded manufacturers sales tax that hit exports and was harmful to the economy), the expansion and internationalization of the financial services sector and an increase in exports of both goods and services. By 2009, the share of Canada’s gross domestic product (GDP) attributable to exports had risen to almost 30%.

A striking achievement in creating the environment for these developments was the negotiation of the Canada/United States Free Trade Agreement (FTA), which became effective on January 1, 1989 and provided significant new opportunities for businesspeople to operate in the U.S. market by locating in Canada. The FTA has also offered new incentives for United States investors to establish new business in Canada. These opportunities were enhanced by the North American Free Trade Agreement (NAFTA) which, by adding Mexico, permits businesses operating in Canada to gain access to the entire North American market. NAFTA came into force on January 1, 1994.

The provisions of NAFTA regarding investment are closely modeled on the provisions of the FTA. The principal effect of NAFTA was to extend the FTA benefits to Mexico as well. There are, however, certain additional provisions which are included in NAFTA but which were not contained in the FTA. These include the principle of "most-favoured-nation treatment" obligating each NAFTA country to accord investors of each other NAFTA country treatment no less favourable than it accords in like circumstances to investors of another NAFTA country or of a non-NAFTA country. In addition, each NAFTA country is to accord investments of investors of each other NAFTA country treatment in accordance with international law, including fair and equitable treatment and full protection and security.

b. Performance Requirements

NAFTA contains additional provisions with respect to performance requirements. Requirements which tie the volume or value of imports into, or sales within, a territory either to the volume or value of exports from the host country, or to its foreign exchange earnings, are prohibited. As well, provisions were added relating to technology transfers and product mandating. NAFTA not only prohibits the imposition of such performance requirements in undertakings or commitments given by other NAFTA country investors, but also proscribes the enforcement of performance requirements. Accordingly, Industry Canada is unable to enforce, as against any NAFTA country investor, any undertaking constituting or containing a performance requirement, irrespective of when such undertakings were given. There is an exception, however, for any undertaking enforced in connection with a review under the Investment Canada Act (ICA), whereby an investor is to locate production, carry out research and development, train employees, or construct or expand particular facilities in Canada.

Similarly, NAFTA prohibits the imposition of performance requirements such as preferential domestic sourcing, export minimums or minimum domestic content on NAFTA investors as a condition of receiving or continuing to receive any advantage from the host NAFTA country.

NAFTA prohibits a host NAFTA country from requiring that an entity of another NAFTA country appoint to senior management positions individuals of any particular nationality. However, a NAFTA country may require that a majority of the board of directors, or of any committee of the board of such an entity, be of a particular nationality or resident in the territory of the host NAFTA country, so long as that requirement does not materially impair the ability of the investor to exercise control over its investment.

c. Exceptions

NAFTA’s principles respecting national treatment, most-favoured-nation treatment, performance requirements and nationality of senior management and boards of directors do not apply to any existing non-conforming measure (such as the Investment Canada Act) that is maintained by the federal government and described in a NAFTA annex. They similarly do not apply to inconsistent measures of states and provinces that were in effect as of April 1996,
thereby protecting such measures from challenge under NAFTA’s dispute settlement provisions. Measures instituted after April 1996 that establish new or increased discrimination against investors from other NAFTA countries, however, may be contested through the dispute settlement process.

NAFTA contains an explicit acknowledgment that when selling or disposing of its equity interests in, or the assets of, an existing state enterprise or an existing governmental entity, Canada and each province has the right to prohibit or impose limitations on the ownership of such interests or assets by investors of another NAFTA country or non-NAFTA country or their investments, and on the ability of owners of such interests or assets to control any resulting enterprise.

The national treatment, most-favoured-nation treatment and senior management principles are expressly stated not to be applicable to government procurement of goods or services or to subsidies and grants provided by a NAFTA country, including government supported loans, guarantees and insurance. This means that NAFTA may discriminate against the investors of other NAFTA and non-NAFTA countries in regard to government procurement of goods and services or to the granting of subsidies or other assistance (except as otherwise prohibited; for example, in NAFTA’s rules on government procurement).

1. Transfers

NAFTA obligates each NAFTA country to permit transfers and international payments relating to an investment of an investor of another NAFTA country in the territory of the first mentioned NAFTA country to be made freely and without delay. Such transfers include:

a. profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance and other fees, returns in kind and other amounts derived from the investment;

b. proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;

c. payments made under a contract entered into by the investor, or its investment, including payments made pursuant to a loan agreement; and

d. expropriation payments and awards made pursuant to the dispute resolution provisions of Chapter 11 ("Investment").

These provisions effectively prevent a party from taking steps to block the transfer of funds out of the country. In addition, NAFTA investors will be able to convert local currency into foreign currency at the prevailing rate of exchange for any such transfers. Each NAFTA country is responsible for ensuring that such foreign currency may be freely transferred. This is intended to enhance the security of investments by other NAFTA country investors in NAFTA countries in the event that their investment is expropriated, by requiring that the compensation to be paid will be realizable and will not be tied up in a blocked currency. NAFTA countries are also prohibited from requiring their investors to transfer, or from penalizing its investors who fail to transfer, the income, earnings, profits or other amounts derived from or attributable to an investment in the territory of another NAFTA country.

2. Special Formalities and Formations

i. requirements:

A further exception to the national treatment principle permits a NAFTA host country to impose a requirement on investors of another NAFTA country that they must be residents of the host country and that investments made by such investors must be legally constituted under the laws of the host country (e.g., be held in a locally-incorporated corporation) “provided that such formalities do not impair the substance of the benefits of any of the provisions” of Chapter 11. In addition, each NAFTA country is expressly permitted to require, from an investor of another NAFTA country or its investment, routine business information to be used solely for informational or statistical purposes concerning that investment.

ii. environmental measures:
As a general exception, NAFTA provides that nothing in Chapter 11 is to be construed as preventing a NAFTA country from adopting, maintaining or enforcing any measure that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns. In addition, it is expressly recognized that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. In this connection, the NAFTA countries have agreed to consult with one another if one of them considers that another may have offered such encouragement.

iii. other exempted matters

*Cultural Industries* - Under NAFTA, Canada preserves the exemption for "cultural industries" that is provided under the FTA. However, each NAFTA country reserves the right to take measures of equivalent commercial effect in response to any action regarding cultural industries which would have been a violation of NAFTA but for the cultural industries exemption. These compensatory measures are not limited by obligations imposed by NAFTA.

*National Security* - NAFTA does not limit a party's ability to take the following types of actions if it considers it necessary for the protection of its essential security interests:

- relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purposes of supplying a military or other security establishment;
- taken in time of war or other emergency in international relations; and
- relating to the implementation of nuclear weapons or other nuclear explosive devices.

3. Investor Dispute Resolution

Subchapter B of Chapter 11 of NAFTA sets out a comprehensive code for the resolution of investment disputes involving a breach or an alleged breach of NAFTA investment rules by a NAFTA country. A NAFTA investor may seek either monetary damages through binding investor-state arbitration or remedies that are available in the domestic courts of the host country. In contrast, the FTA contains no provisions specifically enabling investors to require the resolution of investment disputes directly with a host country.

Subchapter B establishes a mechanism to settle investment disputes that assures due process before an impartial tribunal. An investor of a party has the option to either resolve a claim against a party for breach of any of the provisions of Subchapter A before the tribunals of the party where the investment was made, or to submit the claim to arbitration. Three arbitration options are provided: the International Centre for Settlement of Investment Disputes Convention (ICSID) arbitration (if the two countries involved are parties to the ICSID); the Additional Facility Rules of ICSID (if only one country is a party to the ICSID) or arbitration under the rules of the United Nations Commission on International Trade Law ("UNCITRAL Arbitration Rules").

Accordingly, the NAFTA investor dispute resolution mechanism does not involve the establishment of a new arbitral process but instead confirms investors' rights to seek arbitration for violations of NAFTA investment rules under three existing international arbitration procedures.

Currently, only the United States is a signatory to the ICSID convention. Consequently, the option of arbitration pursuant to that convention will only become available if, as, and when, another NAFTA party signs on to it. However, the Additional Facility Rules of ICSID are intended for the purpose, among others, of specifically dealing with investment disputes between signatory and non-signatory countries. The UNCITRAL Arbitration Rules are rules which international parties frequently choose to govern disputes arising out of international contracts.

The investment dispute resolution process provided for by Subchapter B overcomes problems which have been encountered in connection with the more traditional approach to the resolution of foreign investment disputes in an international context. Generally speaking, international rights are recognized as between states and, where international law is violated with reference to an individual investor from a state, it is the state and not the individual investor that has the right to assert a claim in regard to the injury sustained. Therefore, individual investors, in dealing with a foreign state, have been constrained in their ability to petition directly for relief from a treaty breach by a host country. Instead, such investors were required to enlist the assistance of their own government to present their claims against the foreign state. Moreover, a further obstacle to the resolution of these kinds of disputes arose
from the requirement that a private party must first have exhausted the remedies available to it under the domestic laws of the host state before presenting its claim through the diplomatic channels of its own state.

The NAFTA investor dispute provisions represent a significant reform in this area as they grant an investor aggrieved by measures of a host government with standing to initiate dispute settlement directly against the host government without the involvement of its own government, using existing legal procedures for the resolution of international commercial disputes. If a breach of NAFTA investment rules and consequential injury to the investor can be made out, relief by way of damages and reversal of the offending measure may be available.

4. Exception for Disapproved Acquisitions

NAFTA specifically exempts from the application of these investor dispute resolution rules any decision by a NAFTA country to prohibit or restrict the acquisition of an investment in its territory by an investor of another NAFTA country for national security reasons or under a foreign investment screening process. Accordingly, decisions regarding the approval or non-approval of investments under the Investment Canada Act are not subject to NAFTA dispute settlement.

d. Country of Origin

In general terms, the country of origin of a good is the place where the good is grown, extracted, produced or manufactured. Where various steps in the processing or manufacturing of a particular good occur in different countries, rules of origin usually provide that the place where a threshold amount or more of costs of production were incurred, or where a prescribed classification change occurs, will be deemed to be the country of origin of the article upon its importation into Canada. Once country of origin is established, the tariff (the schedule of duty rates) accorded to that country is applied.

Where goods meet the rules of origin prescribed in NAFTA and can be so certified, they are entitled to enter Canada at the preferential duty rate accorded to U.S. and Mexican origin goods under NAFTA. Commencing in January 1998, all goods originating in the U.S. under the NAFTA rules of origin were entitled to duty-free entry. For Mexico, and some U.S-Mexico original goods, all duties were eliminated by January 1, 2008. Under the tariff rate reduction scheduling prescribed in NAFTA, the majority of commercial goods of certified U.S. origin are already duty free.

Where goods do not meet the NAFTA rule of origin requirements, although they have undergone processing in and were exported from the U.S. or Mexico, the (usually higher) "Most Favoured Nation" (MFN) duty rates apply. The final tariff reductions of MFN duty rates negotiated in the Uruguay Round were implemented on January 1, 1999.

Note that apart from NAFTA, Canada has also established preferential duty rates for goods of Chile and Israel pursuant to free trade agreements concluded with those countries.

e. Planning Issues

As a result of NAFTA, perhaps the least costly and administratively burdensome method of obtaining advantageous tariff treatment involves planning one's sourcing and production activity in light of tariff rules of origin. Development of sourcing arrangements or modifications of existing arrangements should be considered to ensure that one has access to the duty reduced or duty free treatment accorded to U.S. exports to Canada by NAFTA. For example, if an input component of a finished product is deemed to meet the rules of origin based on the Canadian, U.S. or Mexican origin of a preponderance of the component's content, the entire cost of such a component may be included in the calculation of the total Canada-U.S. value content of the finished product.

f. Marking and Labelling of Imported Goods

The Marking of Imported Goods Regulations provide that prescribed goods must be indelibly marked with their country of origin. Where non-NAFTA finished goods are made from components whose countries of origin differ, Canada Customs deems the finished article's origin to be the country where it essentially took the form in which it is imported into Canada. Since this rule of origin for marking purposes is different from other rules of origin which determine eligibility for tariff preferences, an imported article may, for example, need to be marked as originating in one country, but may not be eligible for that country's preferential duty treatment.
Under NAFTA, Canada, the U.S. and Mexico have established marking rules to identify the origin of goods in continental trade, which are similar to but not the same as the rules of origin which determine eligibility for lower NAFTA duties. This is particularly true in the textile and apparel sectors, so that inconsistencies of the sort noted above may continue to arise on NAFTA goods.

Canada Customs may review marking determinations for up to four years after accounting, where the Minister considers it advisable.
Investment Canada Act

a. Introduction

Canada is a resource-rich nation and, accordingly, requires massive amounts of capital to develop its economic potential. Foreign investors have always played a significant role in providing this necessary capital and today do so to an even greater extent. Non-Canadian investors in Canada are largely subject to the same rules that govern Canadian corporations. Canada has not had exchange control laws for over forty years and, as a result, foreign investors find it relatively easy to repatriate the profits from their investments in Canada.

By the standards of most developed industrial nations, Canada has relatively limited government regulation of foreign investment. Traditionally, such regulation has taken the form of:

1. withholding taxes due on dividends, interest or royalties leaving Canada;
2. special incentives under Canadian income tax legislation and other legislative programmes which are made available only to Canadian-controlled companies; and
3. limitations of the degree of foreign ownership and control allowed in particularly sensitive areas of Canada's economy.

The Investment Canada Act (the "ICA") came into force on June 30, 1985, and it acknowledges that increased capital and technology will benefit Canada. It operates from the stated premise that its purpose is to encourage investments by both Canadians and non-Canadians that contribute to economic growth and employment opportunities in Canada, and to provide for a review of significant investments in Canada by non-Canadians in order to ensure they benefit Canada.

b. Transactions Subject to Review Under the ICA

1. Establishment of a new Business

The ICA provides for a two-tiered system of regulation of foreign investments comprised of two processes: (1) notification and (2) review. Under the ICA, the only newly established businesses that are reviewable are those that carry on business activities related to Canada's cultural heritage or national identity. Thus, under the ICA almost all investments that involve the establishment of a new business are exempt from review, and, as a result, foreign investor need only notify the federal government. Where an investment is related to Canada's cultural heritage or national identity, the Director must decide within 21 days of receiving notice from the potential investor whether or not it wishes to review the investment.

Regulations published under the ICA attempt to define the types of business activities considered to be related to Canada's cultural heritage or national identity. Examples of such investments include the publication, distribution and sale of written material, films, video products, audio-video music recordings and sheet music. Notably, the business activities prescribed by the regulations as reviewable do not extend to the energy and technology industries. It is expected that the discretion exercised by the Director in reviewing investments relating to Canada's cultural heritage or national identity will be exercised with caution, consistent with the spirit and intent of the ICA.

2. Acquisition of Control

Where foreign investment involves the acquisition of control of an existing Canadian business, as opposed to the establishment of a new business, different considerations apply. An acquisition of control can be accomplished either directly or indirectly. A direct acquisition occurs when the non-Canadian acquires a majority of the voting shares of a corporation (or voting interests of a non-corporate entity), or acquires all or substantially all of the assets used in carrying on the business of a corporation. Under the ICA, such direct acquisitions are reviewable only where the value of the assets of the Canadian business acquired is $5,000,000 or more.

An indirect acquisition occurs when the non-Canadian acquires control of a foreign corporation or entity, which in turn controls a Canadian business. An indirect acquisition is reviewable under the following circumstances:

1. Where the value of the assets of the Canadian subsidiary is $5,000,000 or more, which represents more than one-half of the value of the assets acquired in the over-all transaction; or
2. Where the value of the assets of the Canadian subsidiary is $50,000,000 or more but represents less than one-half of the value of the assets acquired in the over-all transaction.

Similar rules apply in the case of acquisitions of foreign entities other than corporations having Canadian subsidiaries or businesses. The acquisition of the shares of a corporation, to which are attached one-third or more of the voting rights of that corporation, is deemed to constitute the acquisition of control of any business carried on by the corporation, unless it can be established that the acquirer does not in fact control the corporation through the ownership of the said voting shares. Under the ICA, no distinction exists between the acquisition of shares of a public corporation and those of a private corporation.

c. Net Benefit to Canada

Assuming that a particular investment is reviewable under the ICA, the test for determining whether or not the Director will grant approval for the investment is whether that investment is or is not likely to be of “net benefit” to Canada. Moreover, under the ICA, there are specified criteria to guide the Minister in the exercise of his discretion as to whether or not a particular investment meets the test for approval. By enumerating the factors to be taken into consideration by the Director, the ICA makes the review process less arbitrary and discretionary. The ICA provides that, in determining whether the test for approval is met in the circumstances, the Minister is required to take into account the following factors:

a. the effect of the investment on the level and nature of economic activity in Canada including, without limiting the generality of the foregoing, the effect on employment, on resource processing, on the utilization of parts, components and services produced in Canada and on exports from Canada;

b. the degree and significance of participation by Canadians in the Canadian business or new Canadian business and in any industry or industries in Canada of which the Canadian business or new Canadian business forms or would form a part;

c. the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;

d. the effect of the investment on competition within any industry or industries in Canada;

e. the compatibility of the investment with national industrial, economic and cultural policies, taking into consideration industrial, economic and cultural policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the investment; and

f. the contribution of the investment to Canada’s ability to compete in world markets.

In most cases, a potential investor will have very little difficulty satisfying this "net benefit" test. By its very terms, the ICA assumes that increased capital and technology is of benefit to Canada, and thereby creates a presumption in favour of the non-Canadian investor and, conversely, an onus on the Director to rebut this presumption.

d. Who is Subject to the ICA?

The range of persons subject to the ICA is also narrower than under previous legislation. The notification and review process set out in the ICA applies to investments made by "non-Canadians", that is to say, by persons who are not Canadians. An individual is a "Canadian" within the meaning of the ICA if (s)he is a Canadian citizen or if (s)he is a permanent resident (within the meaning of the Immigration and Refugee Protection Act) who has been ordinarily resident in Canada for not more than one year after first becoming eligible to apply for Canadian citizenship.

The ICA sets out rules for determining whether a corporation or other entity is Canadian controlled, in which case it will not be subject to the ICA. If it is not Canadian controlled, it will be subject to the notification and review provisions of the ICA. These rules may be summarized as follows:
a. If one Canadian or two or more Canadian members of a voting group own a majority of the voting interests of an entity, it is Canadian controlled.

b. If one non-Canadian or two or more non-Canadian members of a voting group own a majority of the voting interests of an entity, it is not Canadian controlled.

c. If Canadians own a majority of the voting interests of an entity, it is a Canadian-controlled entity. If it can be established that the entity is not in fact controlled through the ownership of voting interests by a non-Canadian or by a voting group where non-Canadians own one-half or more of the group's voting interests.

d. If less than a majority of the voting interests of an entity are owned by Canadians, it is presumed not to be a Canadian-controlled entity, unless it can be established that:

   1. the entity is controlled through the ownership of voting interests by one Canadian or by a voting group in which Canadians own a majority of those voting interests of the entity owned by the voting group, or

   2. in the case of an entity that is a corporation or limited partnership, the entity is not controlled in fact through the ownership of its voting interests and that Canadians comprise two-thirds of:

      i. the board of directors, in the case of a corporation,

      ii. the general partners, in the case of a limited partnership, or

      iii. the trustees, in the case of a trust.


e. If two persons, one of whom is a non-Canadian, own equally all of the voting shares of a corporation, the corporation is not Canadian controlled.

f. If, in the case of a corporation incorporated in Canada whose voting shares are publicly traded in the open market, the Minister is satisfied that the following conditions have existed for at least one year immediately preceding the submission of the following information and evidence:

   i. the majority of its voting shares are owned by Canadians;

   ii. four-fifths of the members of its board of directors are Canadian citizens ordinarily resident in Canada;

   iii. its chief executive officer and three of its four most highly paid officers are Canadian citizens ordinarily resident in Canada;

   iv. its principal place of business is located in Canada; and

   v. its board of directors supervises the management of its business and affairs on an autonomous basis without direction from any shareholder other than through the normal exercise of voting rights at meetings of the shareholders,

The corporation is deemed to be Canadian-controlled for up to two years, irrespective of the de facto control, for the purpose of all reviewable acquisitions except those in culturally related activities.

e. Review Process

Where an investment is reviewable under the ICA, the non-Canadian making the investment must file an application with the Director. Where the application contains all of the required information, the Minister must, within 45 days after the date upon which it acknowledges receipt of the application, send notice to the applicant indicating whether the Minister is satisfied that the investment is likely to be of net benefit to Canada. Where the Minister fails to send
such notice within that 45 day period, he is deemed to be satisfied that the investment is likely to be of net benefit to Canada, unless within the said 45 day period he sends a further notice that extends the initial 45 day period for a further 30 days.

f. Effects of International Treaties

Since 1994, the rules in the ICA pertaining to investments in Canada have been mostly replaced by the World Trade Organization ("WTO") Agreement between the former parties of the General Agreement on Tariffs and Trade ("GATT"). The WTO Agreement replaced the GATT on January 1, 1995.

The ICA rules have been altered by rules governing investments by a "WTO Investor", raising the review threshold far beyond the $5,000,000 level mentioned above. A WTO Investor is an individual, other than a Canadian, who is a national of a WTO Member, or who has the right of permanent residence in relation to that WTO Member.

The review thresholds for direct and indirect acquisitions by WTO Investors under the current ICA are adjusted each year. For 2011, this threshold has been set at $312 million.

g. Conclusion

When acquiring small businesses (i.e. acquisitions of Canadian business having less than $5,000,000 in assets) or establishing new businesses (except those in the cultural areas), non-Canadian investors need only notify the Director of their investment and no review is required.

Where a review is required, the approval process is fast and relatively simple because of the limited range of reviewable transactions and because the Director must meet certain specified deadlines.

Further, experience with the ICA confirms the tendency of the Government to approve the overwhelming majority of reviewable foreign investments. Thus, any non-Canadian investor looking at Canada now will have an excellent chance of carrying out his or her proposed investment.
The Family Law Act

a. Introduction

Since the mid-1970's spousal rights with respect to support and matrimonial property have undergone significant changes in Canada as a result of provincial legislation which generally reflects, among other things, a recognition of marriage as a form of partnership and the importance of non-monetary contributions to the economic well-being of the family.

While divorce and the provision of financial support in connection with divorce proceeding are matters governed exclusively by federal legislation (which is uniform throughout Canada), matters relating to the division of matrimonial property on marriage breakdown and child and spousal support in the absence of divorce proceedings fall within provincial jurisdiction and, therefore, may vary from province to province.

b. The Family Law Act

In 1986, the Province of Ontario introduced legislation known as the Family Law Act (the "FLA"). The FLA governs issues relating to the division of property upon the breakdown of a marriage, support for spouses and children, custody and access of children, the possession and disposition of the matrimonial home and domestic contracts governing these matters. Most corresponding legislation of the other provinces and territories governs the same matters.

The focus of this discussion is to introduce the provisions of the FLA that relate to the division of property upon the separation of spouses. These provisions may also apply in the case of the death of one of the spouses.

The property provisions of the FLA were enacted in recognition of the idea that marriage is a form of partnership. The FLA provides for the orderly and equitable settlement of the affairs of spouses upon the breakdown of the marital partnership, or alternatively upon the death of a spouse, by providing a scheme for the distribution of property. The FLA's definition of property is broad and includes business interests of a spouse such as a partnership interest or shares in a corporation.

Generally, the value of all assets acquired during the course of the marriage, together with any increase in the value of assets brought into the marriage, are equally divided among the spouses. This is accomplished by what the FLA refers to as a net equalization payment ("NEP").

The separation of spouses or death of a spouse does not give a non-titled spouse a proprietary interest in any particular asset. What is divided between the spouses is the total value of the assets owned by each spouse at the time of separation, not the assets themselves. The FLA, however, specifically empowers the court to order satisfaction of an NEP by the transfer of property from one spouse to another. This could include the issue or transfer of shares of a corporation from one spouse to another.

In order to arrive at an NEP, each spouse's net family property ("NFP") must be calculated. A spouse's NFP is the value of all the property that he or she owns on the date of separation or divorce, after deducting the spouse's debts and other liabilities and the value of property, other than a matrimonial home, that the spouse owned on the date of marriage. A husband's NFP would be $50,000.00 where on the date of marriage he had $50,000.00 in assets and on the date of separation had $100,000.00 in assets.

The spouse whose NFP is the lesser of the two NFPs is entitled to an NEP of one-half the difference between the respective spouses' NFPs. For example, if the husband's NFP was $100,000.00 and the wife's NFP was $50,000.00, the wife would be entitled to a NEP of $25,000.00.

Certain property is excluded from the calculation of a spouse's NFP. For example, property, other than a matrimonial home, that was acquired by gift or inheritance from a third person after the date of the marriage will not be included in the spouse's NFP. Similarly, property which spouses have agreed by a domestic contract is to be kept separate will not be taken into account in the calculation of their respective NFPs.
Unlike other assets brought into the marriage or acquired during the marriage by gift or inheritance, the home in which the spouses lived during the marriage (the "matrimonial home") is a special item of property and the FLA treats it differently from other assets. A spouse may not deduct the value of the matrimonial home on the date of marriage from its value on the date of separation in calculating NFP, even if the spouse owned the property prior to the date of marriage.

The application of the FLA may result in seemingly unfair consequences, particularly in view of the special treatment given to the matrimonial home. Moreover, the courts have the power, in appropriate circumstances, to order the transfer of shares in an operating business from one spouse to another. As a result, married couples or couples contemplating marriage may decide to contract out of the provisions of family law legislation. In fact, as indicated above, the FLA specifically provides spouses with the right to use a marriage contract to govern how they wish their property to be distributed in the event of separation or the death of either one of them.

In addition, the use of a shareholder agreement may alleviate concerns of a spouse, or his or her business associates, about the potential impact of a court order pursuant to the FLA on the management and operation of a business.

In view of the significant impact the FLA has upon the distribution of property, couples contemplating marriage in circumstances where one spouse has or is planning to acquire business interests would be wise to consult with a lawyer to familiarize themselves with the legislation and the potential consequences it may have for those business interests in the future.

In 1999, the FLA was amended to give same-sex partners the same rights regarding property division and support as heterosexual spouses. The word "spouse" was struck out and replaced with the words "spouse or same-sex partner" wherever the word "spouse" was found in the FLA.

Perhaps the most profound recent development in family law occurred in June 2003, when the Ontario Court of Appeal ruled that the common law definition of marriage, the "voluntary union of a man and a woman to the exclusion of all others", violated the equality provisions guaranteed under the Charter of Rights by excluding same-sex partnerships. This ruling followed similar decisions made by the Quebec and British Columbia Courts, however, whereas those Courts allowed the federal government (which has exclusive jurisdiction to define marriage) time to amend the law to make it consistent with the Charter of Rights, the Ontario Court immediately changed the definition of marriage to include the "voluntary union of two persons". Rather than taking the controversial step of appealing this decision to the Supreme Court of Canada, the federal government decided to introduce a bill to codify the definition of marriage to include both heterosexual and same-sex unions, and referred this draft bill to the Supreme Court so that its constitutionality could be assessed.
Immigration Law and Policy

a. Introduction

Of particular interest to non-residents contemplating the development of business activities in Canada is the impact of Canada's immigration law and policy. Inquiries are often made by non-resident corporations that are interested in transferring their personnel to Canada on a temporary basis, and by non-resident individuals seeking to commence employment or a business in Canada.

The following discussion of Canadian immigration law and procedure is primarily aimed at addressing the concerns of potential investors, entrepreneurs and employees and provides a general overview of the areas of interest to persons who may wish to immigrate to Canada or to non-resident corporations planning to employ workers in Canada on a temporary basis.

1. Jurisdiction

Both the Parliament of Canada and the legislatures of the provinces are competent to legislate in relation to immigration. However, the powers of Parliament are paramount. Any law of the Legislature of a province in relation to immigration is satisfactory, as long as it is not contrary to any Act of the Parliament of Canada. The province of Quebec was given far reaching powers in respect of immigration to it by an agreement with the federal government.

2. Current Policy

Immigration legislation and policies in Canada have, in recent years, been updated to promote the domestic and international interests of Canada and to foster the development and prosperity of a strong and viable economy throughout Canada. Immigrants have greatly benefited from the encouragement extended by legislators and administrative officials to business-related applications.

The statistics provided by Citizenship and Immigration Canada ("CIC") suggest that the procedures recently developed and implemented have been successful in attracting qualified businesspersons to Canada.

In 1991, approximately 215,000 immigrants were admitted to Canada. Actual immigration for 2011 had increased significantly, reaching a total of almost 280,681; 66.6% were members of the economic class (immigrants admitted for their potential to contribute to the Canadian economy), 21.59% were members of the family class (relatives of landed immigrants or permanent residents), 8.8% were of the refugee class and the remaining 3.1% were other immigrants. Business immigrants are a subclass of the economic class, representing investors, entrepreneurs and self-employed immigrants. They comprise roughly 5% of total immigrants each year.

b. Means of Entry into Canada

Anyone who is not a citizen or a permanent resident of Canada must obtain a visa in order to enter Canada. For most visitors, this is a simple matter of appearing before an immigration officer at a port-of-entry into Canada with a valid passport issued by their country of citizenship. However, citizens of many countries are required to take the additional step of obtaining a Temporary Resident Visa (TRV). A TRV cannot be obtained upon entry into Canada, and visitors should apply through their local Canadian Embassy or Consulate. For a list of which countries' citizens are required to obtain a TRV, visit: http://www.cic.gc.ca/english/information/applications/visa.asp. Most of Canada's main economic trading partners are not found on this list, and thus citizens of these countries are not required to obtain a TRV.

Under certain circumstances, a visitor into Canada will also have to undergo a medical examination. This is only the case where the visitor plans to stay in Canada for longer than six months, and has resided or sojourned in a designated country or territory for 6 consecutive months in the year immediately preceding entry into Canada. This list of designated countries and territories can be found at:
c. Working in Canada

A visitor into Canada is prohibited from working without first obtaining a work permit, unless he or she falls under one of the permitted exemptions. "Work" is defined as an activity for which wages or commission is earned, or that competes directly with activities of Canadian citizens or permanent residents in the Canadian labour market. The issue of whether an activity is "competing directly" with employment activities in Canada is decided by answering the following questions:

i. Will the individual be doing an activity that a Canadian or permanent resident should really have an opportunity to do?

ii. Will the individual be engaging in a business activity that is competitive in the market place?

1. Work Permits

Before a work permit can be granted, the visitor seeking the permit must have already been offered a job by a Canadian employer. A work permit will not be issued for someone entering Canada attempting to find employment. In many cases, the CIC will only grant a work permit after the applicant has had the offer of employment "confirmed" by Human Resources and Skills Development Canada (HRSDC). In other cases, this confirmation is not required, such as when the permit is granted pursuant to an international agreement.

A work permit may often be obtained at a point-of-entry into Canada in the following circumstances:

i. The applicant does not also require a Temporary Resident Visa (TRV).
ii. The work for which the permit is being sought does not require HRSDC confirmation (Note: US citizens are also excluded from this rule); or
iii. The applicant does not require a medical exam.

If any of these criteria are not met, the visitor must apply for a work permit from his or her home country before arriving in Canada.

(a) Work Requiring HRSDC Confirmation

Subject to the exceptions outlined below, HRSDC confirmation of the employment offer must be obtained before a work permit may be granted. This requires an applicant to submit details of the employment offer to the HRSDC department, so that it may give an opinion as to whether the visitor's potential employment would be a benefit to Canada. The following criteria have been enumerated as factors that the HRSDC will use in making this determination, though this list is not exhaustive:

i. Whether the work is likely to result in direct job creation or job retention for Canadian citizens or permanent residents;
ii. Whether the work is likely to result in the creation or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents;
iii. Whether the work is likely to fill a labour shortage;
iv. Whether the wages and working conditions offered are sufficient to attract Canadian citizens or permanent residents; and
v. Whether the employment of the foreign national is likely to adversely affect the settlement of any labour dispute in progress or the employment of any person involved in the dispute;

Once the HRSDC has confirmed the offer, the applicant may then apply to the CIC to obtain his or her work permit.

(b) Work not Requiring HRSDC Confirmation

There are a number of situations where an applicant need not receive confirmation from the HRSDC in order to obtain a work permit. The situations most applicable to business people are if the work permit is issued pursuant to an international agreement, such as NAFTA or the General Agreement on Trade in Services (GATS).
Eligibility to work in Canada under NAFTA requires that the applicant be a citizen of the United States or Mexico. Permanent residents or landed immigrants are not included. The following are the three types of employment in Canada that do not require HRSDC confirmation under NAFTA:

i. Professionals
To qualify to work in Canada as a professional under NAFTA, the applicant must be a member of one of the professions specifically listed in the Agreement (such as lawyers or accountants). This will often require the applicant to show proof of his or her professional credentials. This list is a complete list, and is not open to interpretation or expansion. The applicant must also have his or her employment in Canada pre-arranged prior to entry, proof and details which will need to be provided to an immigration officer. Self-employment by a foreign professional in Canada is not permitted under this category.

ii. Intra-Company Transferees
To qualify to work in Canada as an intra-company transferee under NAFTA, the applicant must have "specialized knowledge" in an executive or managerial capacity. Low-level employees with limited skills are not included in this category, because such a position could likely be filled by a Canadian citizen or permanent resident. The applicant must also have worked for his or her home enterprise for at least one year out of the preceding three years, and intend to work in an affiliate, branch, parent, or subsidiary of a U.S. or Mexican enterprise in Canada.

iii. Traders and Investors
To qualify to work in Canada as a trader or investor, the applicant must be an employee of a US or Mexican firm and be in a supervisory or executive position with essential skills or services. Trading activities must involve the trade in goods or services, while investing must involve funds or other capital assets.

As of 2008, there were 153 countries that were signatories to GATS, including most of the world's industrialized nations. The work permit exemptions under GATS are similar to those under NAFTA, though there are no separate categories of work. Rather, there are a number of general criteria that must be met, and the applicant must:

• possess citizenship of a member country;
• deliver services pursuant to a signed contract;
• possess professional qualifications;
• not provide services in the fields of education, health, recreation, culture, or sports;
• have qualifications recognized, where appropriate, by a professional association in Canada; and
• comply with existing immigration requirements for temporary entry (such as the TRV requirement).

2. Working in Canada without a Permit
There are a number of types of work or business activities that are exempt from the requirement of obtaining a work permit. Many of them are specifically enumerated such as performing artists or public speakers. In addition, there is a broad category of "business visitors" that may also be exempt from the work permit requirement.

The definition of a business visitor corresponds to the definition found in NAFTA. However, this exemption applies to all visitors into Canada and, therefore, US or Mexican citizenship is not a prerequisite.

A business visitor must be engaged in an activity for which the primary source of remuneration for the business activities is outside of Canada. Also, the principal place of business and actual place of accrual of profits must remain predominantly outside Canada. Examples of this type of activity include:

i. foreign nationals purchasing Canadian goods or services for a foreign business or government, or receiving training or familiarization in respect of such goods or services;

ii. foreign nationals receiving or giving training within a Canadian parent or subsidiary of the corporation that employs them outside of Canada, if any production of goods or services that results from the training is incidental; and

iii. foreign nationals representing a foreign business or government for the purpose of selling goods for that business or government, if the foreign national is not engaged in making sales to the general public in Canada.
Included under the Business Visitor’s category are workers performing after-sales services. Such services must be performed pursuant to a previously negotiated sales or lease agreement, while service contracts negotiated with third parties after the signing of the original sales or lease agreement are not covered by this exemption. Examples of after-sales service include repairing and servicing equipment, supervising installers, and setting up and testing commercial or industrial equipment (which includes computer software). This does not include hands-on installation generally performed by construction or building trades, such as electricians or pipe-fitters.

d. Applications for Permanent Residence in Canada

1. Scope

A person wishing to permanently reside in Canada must make an application for landed immigrant status at a Canadian visa office in his or her country of residence. Except in special cases, the Immigration and Refugee Protection Act prohibits any submission of an application for permanent residence from within Canada.

Under Canadian immigration law, there are various categories under which applications can be made by persons seeking a Canadian Permanent Resident Visa. Generally, persons who have an interest in being employed in Canada or conducting business activities or residing in Canada would likely be categorized as "economic immigrants". The economic immigrant applicant group includes the following categories:

   i. skilled workers/professionals, and

   ii. investors, entrepreneurs and self-employed persons (collectively referred to as “Business Immigrants”).

Although each of these categories falls under the "economic immigrant" grouping, it should be noted that the procedures and requirements with respect to the consideration and approval of each application for permanent residence vary greatly depending upon the category under which the application was made.

2. Evaluation of Applications

Before discussing the features of each type of application that may be made under the economic immigrant group, it is important to note that Canadian immigration law prescribes a comprehensive scheme for evaluating an application. In addition to the usual investigations into the applicant's background and health, he or she is personally evaluated through a point system, which addresses factors such as education, experience, age, knowledge of English or French, and personal suitability.

The point system is divided into the following six factors:

<table>
<thead>
<tr>
<th>FACTORS</th>
<th>MAXIMUM NUMBER OF POINTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Education</td>
<td>25</td>
</tr>
<tr>
<td>2. Official Languages</td>
<td>24</td>
</tr>
<tr>
<td>3. Work Experience</td>
<td>21</td>
</tr>
<tr>
<td>4. Age</td>
<td>10</td>
</tr>
<tr>
<td>5. Arranged Employment in Canada</td>
<td>10</td>
</tr>
<tr>
<td>6. Adaptability</td>
<td>10</td>
</tr>
<tr>
<td>--------------------------------</td>
<td>----------------------------</td>
</tr>
<tr>
<td>Total</td>
<td>100</td>
</tr>
</tbody>
</table>

Points are earned through the applicant's background in each factor. For example, under the Education factor, 25 points are awarded for applicants with a Master's or a Ph.D. degree and at least 17 years of full-time study, while 5 points are awarded to applicants with no more than a high school diploma. A successful applicant must qualify for enough points to reach a "Pass Mark" corresponding to each category of application.
3. Skilled Worker Class Applications

The Skilled Worker category is perhaps one of the most difficult to qualify for, requiring a Pass Mark of a minimum of 67 points. To qualify as a skilled worker, an applicant must be able to become economically established in Canada. In addition to this minimum number of points, the applicant must meet the following requirements:

   i. Minimum work experience

The applicant must have had at least one year of paid full-time employment within the preceding ten years in a qualified field or occupation. The list of these occupations is found in the National Occupation Classification (NOC) database, which also includes a list of duties and responsibilities associated with each occupation. The types of duties performed by the applicant in his or her previous employment must be substantially similar to those enumerated to qualify.

   ii. Proof of funds

The applicant must also prove that he or she already possesses sufficient funds to support him/herself, as well as any dependants, after he or she arrives in Canada. These funds cannot be borrowed from another individual, and must be in the form of cash, securities, or other negotiable interests, the proof of the existence of which will be required. The total amount of funds available must correspond with the number of members in the applicant's family, with $9,420 required for a single applicant, and $23,994 required for an applicant with 7 or more family members.

4. Business Immigrants

The Pass Mark for all business immigrants is a minimum of 35 points. An applicant must also satisfy the criteria specific to each sub-class.

   A) Investors

To be eligible to receive a permanent resident visa as an investor, the applicant must make an investment in Canada of $400,000. This amount is paid directly to the Canadian government through the Receiver General, and is allocated between the provinces and territories for job creation and economic development. The applicant is guaranteed to be repaid this investment, without interest, after approximately five years. In addition to this investment, the applicant must also have a legally obtained net worth of at least $800,000.

Investor applicants are also required to have a certain level of business experience for at least two years out of the preceding five years, either through managing and controlling a percentage of the equity of a qualifying business, or by managing at least five full-time employees per year in a business. A "qualified business" for these purposes must not have been operated primarily for the purpose of deriving investment income (such as interest, dividends or capital gains), and must meet at least two of the following criteria:

   i. the percentage of equity, multiplied by the number of full-time job equivalents, is equal to or greater than two full-time job equivalents per year;

   ii. the percentage of equity, multiplied by the total annual sales, is equal to or greater than $500,000;

   iii. the percentage of equity, multiplied by the net income for the year, is equal to or greater than $50,000; or

   iv. the percentage of equity, multiplied by the net assets at the end of the year, is equal to or greater than $125,000.

   B) Entrepreneurs

Canadian immigration law and policy is especially receptive to the submissions of applications by qualified entrepreneurs, without regard to the nature of their business activity. It has always been the position of Citizenship and Immigration Canada that applications of this nature, in addition to providing the applicant with the opportunity
to participate in Canada's economic development, offer a benefit to Canada by increasing the number of job opportunities available to Canadians.

Entrepreneurs are required to have managed and controlled a percentage of the equity of a qualifying business for at least two years within the preceding five years before the date of application. Further, they must intend and be able to manage and control a percentage of the equity of a qualifying Canadian business equal to or greater than 33.3%, and create at least one full-time job equivalent for Canadian citizens or permanent residents, other than the entrepreneur and his or her family members, for a period of at least one year within three years of arriving in Canada. The applicant must also have a legally obtained net worth of at least $300,000. The definition of "qualifying business" under this category is similar to that under the Investor category, and two of the following criteria must be met:

i. the percentage of equity, multiplied by the number of full-time job equivalents, is equal to or greater than two full-time job equivalents per year;

ii. the percentage of equity, multiplied by the total annual sales, is equal to or greater than $250,000;

iii. the percentage of equity, multiplied by the net income for the year, is equal to or greater than $25,000; or

iv. the percentage of equity, multiplied by the net assets at the end of the year, is equal to or greater than $125,000.

C) Self-employed persons

A self-employed person is defined as someone who intends and is able to establish a business in Canada that will create employment opportunities for that person and will make a significant contribution to the economy, or to the cultural or artistic life of Canada. This category is intended to allow the immigration of individuals who do not qualify as entrepreneurs or who are well known in the arts.

Applicants under this category must have at least two years of self-employed experience within the preceding five years. This type of employment must either involve a world-class level of cultural or athletic activities, or be related to farm management. The applicant must have the intention and ability to be self-employed in Canada and to make significant contributions to cultural activities or athletics, or to purchase and manage a farm.

e. Conclusion

This overview is aimed at providing a general understanding of some of the various procedures and requirements for immigration to Canada to persons interested in business activities or employment in Canada. The success achieved in each case will depend a great deal upon the completeness of the information submitted, the benefits to the Canadian economy, and the degree of success which the various officials involved in analyzing the contemplated activities believe the applicant will achieve. However, it may be said with some degree of certainty that there is a very favourable pre-disposition on the part of immigration officials towards applicants intending to carry on businesses and create employment in Canada and the promotion of such activities will certainly be given very favourable consideration.
An Overview of Taxation in Canada

a. Introduction

Canada levies income tax on employment, business, property income and capital gains. Residents of Canada are taxed on their world income from all sources. Non-residents of Canada, on the other hand, are taxed only on income from employment earned in Canada, income earned from the carrying on of a business in Canada, and income received from the disposition of taxable Canadian property. (See below for withholding taxes payable on various passive types of income remitted to non-residents of Canada.)

This section contains an overview of Canada's taxation system with emphasis on matters of interest to foreign residents. Canada's tax system is extremely complex and this overview is, by its nature, written in general and broad terms. It makes no attempt to cover such topics as tax and estate planning, deferred income plans, income splitting, tax shelters, corporate reorganizations or other tax-related topics.

b. Residence

The residence of an individual for income tax purposes is determined on the basis of a full consideration of relevant personal factors, subject to the terms of any existing reciprocal tax treaty between Canada and a foreign nation. It can be difficult to determine whether an individual is resident in Canada if that person travels a great deal, and it is possible for a person to be a resident of Canada for tax purposes, even though he or she is also a resident of another jurisdiction. Moreover, a person who sojourns within Canada for 183 days or more in a taxation year is deemed to be resident in Canada throughout that year. Should a person reside in Canada during part of the year, he or she will be taxed on his or her world income for the part of the year during which he or she was resident in Canada, but will be entitled to a pro rata share of the personal exemptions and deductions available to Canadian residents based on the number of days of his or her Canadian residence during the year.

The residence of corporations is determined by the location of their central management and control. In addition, the Income Tax Act (the "Act") contains a number of provisions by which a particular corporation may be deemed to be resident in Canada notwithstanding that its central management and control may be outside of Canada. For example, a corporation incorporated in Canada after April 26, 1965 is deemed to be resident in Canada.

c. Partnerships

A partnership is treated as a separate legal entity when calculating income for tax purposes under the Act. The income of the partnership is calculated at the partnership level but once partnership profits (including capital gains) are determined, and are apportioned to the partners on a source-by-source basis, each partner is allocated his/her proportionate share of income from each source in accordance with his/her partnership interest. Each individual partner is then taxed separately on his/her allocation of the partnership profits together with other income earned by him/her at the rates applicable to individuals.

d. Nature of Income

1. Individuals

One major factor in determining an individual’s total tax burden is the nature of the income received by the taxpayer.

Taxable income of a Canadian resident from all sources, whether earned in Canada or outside Canada, is taxed at the same marginal rates regardless of source. However, for the purpose of determining taxable income the Act distinguishes among the various sources from which such income was earned, and provides different exemptions, tax credits and deductions depending upon the source of such income.

For example, in calculating the income earned from property or from a business in a taxation year, the Act permits the deduction of all reasonable expenses incurred for the purpose of gaining or producing such income, including capital cost allowance (tax depreciation) and increases in the value of inventory. Income from office or employment is generally not subject to any deductions, rather a basic personal tax credit of $1,579 (Federal and Provincial
combined $2,296) is available for 2011, and this increases by indexation in future years. Dividend income is subject to a dividend tax credit, which has the effect of reducing the effective tax on such income. In addition, one half of an individual’s aggregate capital gains or losses that have been realized in the taxation year will be included in the taxpayer’s income.

An individual who is resident in Canada is eligible, under current law, for an exemption on capital gains arising on the disposition of qualified farm property or the shares of a small business corporation (defined essentially as being a Canadian-controlled private corporation all or substantially all of the assets of which are used in an active business carried on primarily in Canada). In both of these latter instances, up to $750,000.00 of capital gains arising on a disposition of such assets is to be exempt from tax.

Taxable income of an individual is subject to a federal tax at progressive rates. The following is a list of the federal and Ontario tax brackets for 2011:

<table>
<thead>
<tr>
<th>Taxable Income</th>
<th>Federal Tax Rate</th>
<th>Taxable Income</th>
<th>Ontario Tax Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 41,544</td>
<td>15%</td>
<td>Less than $37,774</td>
<td>5.05%</td>
</tr>
<tr>
<td>$41,544 up to $83,088</td>
<td>22%</td>
<td>$37,774 up to $75,550</td>
<td>9.15%</td>
</tr>
<tr>
<td>$83,088 up to $128,800</td>
<td>26%</td>
<td>More than $75,550</td>
<td>11.16%</td>
</tr>
<tr>
<td>More than $128,800</td>
<td>29%</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

As the tables above reveal, most provinces levy a tax that is less than federal tax payable. This percentage varies from province to province. In Ontario, the provincial tax rates for individuals in 2011 are 5.05% on the first bracket, 9.15% on the second bracket and 11.16% on the excess. Alberta levies its own income tax, calculated without reference to the federal tax, and other provinces may adopt such a system in the near future.

Provincial surtaxes may also be in effect from time to time. In Ontario, a 20% individual surtax applies to those paying Ontario income tax in excess of $4,078.00, and 36% surtax applies to those paying Ontario income tax in excess of $5,219.00. For example, if an individual owes $6,000 in Ontario income taxes, then the surtax will be 20% of $1,072 ($214.40) and 56% of $828 ($463.68) for a total surtax of $678.08. Prospective taxpayers should note that the surtax is applied to the provincial taxes owing, not to taxable income. Therefore, the tax has a relatively minor impact on taxpayers.

The federal government currently applies a form of minimum personal income tax, known as the Alternative Minimum Tax (“AMT”), applicable to high-income, low-taxpaying individuals. The AMT was introduced in December 1985, effective for 1986 and subsequent taxation years, in response to the public perception that an increasing number of high-income taxpayers were arranging their affairs so as to significantly reduce their income taxes. The effect of AMT is to limit the tax effect of so-called "tax preferences."

The AMT introduces a second computation of income and tax for individuals and trusts. Each taxpayer must calculate federal tax based on progressive marginal tax rates under the regular system, and then determines the AMT under a second calculation. In most cases the AMT will be lower than regularly-levied federal tax, and will therefore have no effect on total tax payable. However, if the AMT is higher, it will effectively become the basic federal tax payable for that taxpayer in that year. To the extent that the AMT is higher than the tax otherwise payable, such excess is available as a 7-year carry-forward to reduce the tax otherwise payable of a future year to the AMT payable of that year.

2. Corporations

The amount of federal corporate tax payable is calculated on the amount of taxable income earned by the corporation from a business carried on by it. In addition, all corporations are taxed on realized capital gains, income from property (e.g. interest income) and, in certain cases, on dividends received from other corporations.
Public corporations (that is, corporations that list their shares on a Canadian stock exchange), as well as private corporations, which do not qualify for preferential tax treatment as a small business (see below), are taxed at a net federal rate of 16.5%.

Most private corporations are taxed at the same rate as public corporations. However, if the corporation is a Canadian-Controlled Private Corporation (a "CCPC"), its active business income is eligible for a basic federal tax reduction called the "small business deduction", the first $500,000.00 of pre-tax income in the year ended December 31, 2011 is taxed at an effective federal tax rate of 11% (approx. 13.1% when including surtaxes). The small business deduction is phased out if the CCPCs taxable capital exceeds $10 million and is eliminated when taxable capital hits $15 million. A CCPC must be a private corporation (i.e. a corporation the shares of which are not publicly traded) which is not controlled by either non-resident persons or public corporations or any combination thereof.

Corporations engaged in manufacturing and processing will be eligible for a reduction on that portion of the active business income earned by them which is not eligible for the small business deduction. Such corporations will be taxed at an effective federal rate of 16.5% (including surtaxes) in 2011. A private corporation will not be able to claim both the small business deduction and the manufacturing and processing deduction.

Both private and public corporations are subject to provincial corporate tax rates which may range from 0 to 16% depending on factors such as the province levying the tax, whether the corporation is a small business, whether the corporation is entitled to a tax holiday, and whether its income is derived from manufacturing and processing. The basic Ontario corporate rate is 11.5% as of 2011, resulting in a combined federal and provincial corporate rate of 27% for Ontario corporations not claiming the small business deduction or the manufacturing and processing deduction.

To ensure that investment income (including income from property and the taxable portion of capital gains) earned by a private corporation will ultimately bear approximately the same tax as if earned directly by an individual shareholder, a refund of corporate tax occurs when dividend distributions are made to the shareholders. This refundable corporate tax is referred to as refundable dividend tax on hand (RDTOH). For CCPCs, 26.6% of the corporation's investment income will be credited to the RDTOH and be eligible for a refund. CCPCs are subject to an additional 6.6% tax on investment income, bringing the overall federal corporate rate on such income to 34.67%. The reason underlying the collection of tax at the highest corporate rate on investment income, followed by the refund of a portion of the tax when dividends are paid, is to reduce any tax deferral opportunities that would otherwise exist if such income were subject to lower corporate tax rates than those imposed at the personal level. Accordingly, investment income is taxed at the highest corporate rate but the corporation will be eligible for a tax refund of $1.00 for every $3.00 of dividends paid when such dividends are distributed to the shareholders.

The non-taxable portion of capital gains (50% for gains subsequent to October 2001) may be distributed by the corporation to its shareholders as a tax-free capital dividend.

Dividends may be paid by one Canadian corporation to another Canadian corporation on a tax-free basis. In the case of portfolio dividends received by a private corporation (i.e. where the recipient private corporation owns 10% or less of the shares of the payor Canadian corporation), a special 33.3% tax is payable on the amount of such portfolio dividends received after June 1995 (25% before June 1995). However, upon the distribution by the corporation of dividends to its shareholders, such private corporation receives a tax refund, again at the rate of $1.00 for every $3.00 of dividends paid. As with other types of investment income, the purpose of this scheme is to ensure that integration is achieved so that portfolio dividends received by a private corporation and then distributed to individual shareholders in the form of dividends will bear approximately the same total tax at the combined corporate and personal levels as would be the case if the portfolio dividends were received by such individual directly without the intermediary of the private corporation.

e. The General Anti-Avoidance Rule

The General Anti-Avoidance Rule ("GAAR") is a major weapon in the Canadian government's arsenal for fighting what it perceives as abusive and aggressive tax planning. While the government accepts the view, confirmed by the courts, that arranging one's affairs so as to attract the least amount of taxes is a legitimate and accepted part of Canadian tax law, it has argued that this does not mean that taxpayers should be permitted a license to abuse the tax
system. Critics of GAAR have stated that there is no need for such a rule since the Act currently contains a large number of specific anti-avoidance rules designed to curtail abusive tax planning. Moreover, critics allege that the government has successfully challenged tax avoidance transactions in the past, and the government may rely upon this favourable jurisprudence in attacking abusive transactions. The government is of the view that the specific anti-avoidance rules currently contained in the Act and the jurisprudence are insufficient to stop aggressive tax planning, such as commodities straddles, capital cost allowance strips, capital dividend strips, refundable dividend tax on hand strips and scientific research tax credit flips.

GAAR provides that where a transaction (defined as an arrangement or an event) is an "avoidance transaction," its tax consequences will be determined "as is reasonable in the circumstances so as to deny the tax benefit which would result, directly or indirectly, from the transaction or from a series of transactions".

An "avoidance transaction" is defined as "any transaction that ... would result, directly or indirectly, in a tax benefit (defined as a reduction, avoidance, deferral of tax or refund or interest or penalties) unless the transaction ... reasonably considered ... is undertaken or arranged for non-tax purposes." It is particularly important for taxpayers to be able to establish a paper trail evidencing bona fide non-tax purposes. In effect, GAAR has provided for a statutory business purpose test in Canadian tax law, a test which the courts had largely rejected previously.

As stated, under GAAR an avoidance transaction will be treated "as is reasonable in the circumstances." The determination as to what, in fact, is "reasonable in the circumstances" is an objective test and will depend upon a review of comparable transactions.

If a transaction is part of a series of transactions that results in a tax benefit, each step will have to satisfy the bona fide non-tax purpose test in order that the transaction not be viewed as an "avoidance transaction."

GAAR will not be applicable to an avoidance transaction unless the transaction results in a misuse or abuse of the Act as a whole. If the transaction is tax-motivated it will be necessary to demonstrate that the plan does not contravene the object and spirit of the Act. This may involve a review of the legislative history of a provision of the Act, applicable jurisprudence and possibly the government's own view of the legislation, as expressed in various bulletins and pronouncements.

If GAAR is applicable, the government may wholly or partially disallow a tax deduction, or it may allocate a deduction to different taxpayers. The nature of a payment or an amount may be re-characterized. The tax effects that would otherwise result may be ignored. If the application of GAAR results in double taxation, adjustments may be made to eliminate the double tax. Otherwise, there is an appeal procedure which taxpayers may use.

GAAR introduces great uncertainty in tax planning. It makes it difficult, if not impossible, for tax practitioners to provide unqualified tax opinions on a given transaction. In addition, tax professionals and the government may have altogether differing views on what constitutes misuse or abuse of the Act as a whole. Indeed, it has been suggested by at least one tax authority that the moment a client contacts a tax advisor, the transaction might appear to be an "avoidance transaction" for purposes of GAAR. One solution might be for a taxpayer to obtain an advance tax ruling from the government on whether or not GAAR will be applied to a particular transaction. However, a tax ruling is not binding unless it is given before the transaction has been completed, and the delay in receiving responses from the government on requests for such rulings (currently between two and six months) may make an application for a tax ruling impractical where a commercial transaction must occur by a given date. As a result, clients are faced with the option of either forgoing commercial transactions or relying upon the tax opinions of their professional advisors, who may not be in any position to give meaningful options in this regard.

f. Thin Capitalization Rules

Corporations resident in Canada which have non-resident shareholders are subject to special rules which place limits upon the deductibility of interest expenses from income in instances where the ratio of outstanding debt owed by the corporation to its non-resident shareholders is high in relation to its equity. The thin capitalization rules provide that where a non-resident shareholder holds 25% or more of the issued shares of the corporation, the deduction interest on the debt of the corporation owing to such shareholders, or to other persons dealing at non-arm's length with the corporation, will be proportionately limited where the debt to equity ratio exceeds 2 to 1. In such a case, all or a
portion of the interest expense charged by the non-resident will be disallowed as an expense of the Canadian corporation.

g. Branch Tax

A non-resident corporation which carries on business in Canada directly through a branch is subject to tax on the income earned by the branch. This branch tax attempts to equalize the total tax burden on the branch with that of a subsidiary corporation in that it is equivalent to the withholding tax taxable dividends paid by a Canadian subsidiary to its non-resident parent. Branch taxes are imposed at the rate of 25% of after-tax income of the branch. Where a tax treaty is in force, the rate of tax may be reduced to the rate of withholding tax applicable to dividends under the treaty or the treaty may afford a complete exemption from this tax. (For example the Canada-U.S. Tax Treaty reduces the withholding rate to 5% and exempts the first $500,000 of profits from all withholding taxes.)

h. Withholding Tax

The Act imposes a 25% tax on a wide variety of payments received by non-residents of Canada from persons resident in Canada. The tax applies irrespective of whether or not the payment is actually made from Canada. Moreover, the Canadian resident payor is required under the Act to withhold the amount of the tax from the amount paid or credited to the non-resident. The basic withholding tax rate of 25% may be reduced by tax treaty, and most of the recent treaties to which Canada is a party provide for a withholding tax of 15% for interest and 10% for dividends, where non-resident payee has a significant holding in the Canadian corporate payor.

Income payments, which are subject to Canadian withholding tax when paid to a non-resident of Canada, include dividends, rents, royalties or similar payments, management fees and estate or trust income. Certain types of payments are exempt from withholding tax. These include bonds, debentures, notes and mortgages issued or guaranteed by the governments of Canada or the provinces.

i. Tax Treaties

Canada has negotiated reciprocal income tax treaties for the avoidance of double taxation and the prevention of tax evasion with most of the major industrialized nations and many developing nations. In total, Canada has signed tax treaties with 89 countries (as of August, 2011). All of the treaties negotiated since 1971 are based upon the model treaty developed by the Organization for Economic Cooperation and Development (OECD) and Canada is expected to renegotiate the treaties concluded prior to 1972.

The following is a partial list of countries with which Canada has a tax treaty:

<table>
<thead>
<tr>
<th>Country</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>1980</td>
</tr>
<tr>
<td>Austria</td>
<td>1976</td>
</tr>
<tr>
<td>Belgium</td>
<td>1975</td>
</tr>
<tr>
<td>Denmark</td>
<td>1955</td>
</tr>
<tr>
<td>France</td>
<td>1975</td>
</tr>
<tr>
<td>Germany</td>
<td>1981</td>
</tr>
<tr>
<td>Israel</td>
<td>1975</td>
</tr>
<tr>
<td>Italy</td>
<td>1977</td>
</tr>
<tr>
<td>Japan</td>
<td>1986</td>
</tr>
<tr>
<td>Norway</td>
<td>1966</td>
</tr>
<tr>
<td>Pakistan</td>
<td>1976</td>
</tr>
<tr>
<td>Spain</td>
<td>1976</td>
</tr>
<tr>
<td>Sweden</td>
<td>1983</td>
</tr>
<tr>
<td>Switzerland</td>
<td>1976</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>1957</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>1978</td>
</tr>
<tr>
<td>United States</td>
<td>1980</td>
</tr>
</tbody>
</table>
j. Other Taxes and Duties

1. Land Transfer Tax

Certain provinces of Canada levy tax on transfers of land. In Ontario, the rates are as follows:

<table>
<thead>
<tr>
<th>Purchase Price</th>
<th>Calculation of LTT</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 - 55,000</td>
<td>(.005 x Amount)</td>
</tr>
<tr>
<td>55,001 - 250,000</td>
<td>(.01 x Amount) minus 275</td>
</tr>
<tr>
<td>250,001 - 400,000</td>
<td>(.015 x Amount) minus 1,525</td>
</tr>
<tr>
<td>400,000 +</td>
<td>(.02 x Amount) minus 3,525</td>
</tr>
</tbody>
</table>

In Ontario, non-residents pay Land Transfer Tax at the same rate as residents. An exception to this rule exists where the property in question is agricultural or recreational land, in which case the non-resident pays Land Transfer Tax of 20% of the purchase price. In certain municipalities, an additional land transfer tax will also be applicable.

2. Provincial Sales Tax

Every province except Alberta levies a consumption tax on most tangible personal property sold for consumption or use in the province. Certain services are also subject to these provincial sales taxes. Generally, the tax is based on the selling price or fair market value of the goods or services when sold at the retail level. The current sales tax rates in effect vary from province to province and range from a low of 5% in Saskatchewan to a high of 10% in Prince Edward Island.

On July 1, 2010, Ontario combined its Provincial Sales Tax with the federal Goods and Services Tax to implement the Harmonized Sales Tax (HST). The current HST rate in Ontario is 13 percent, consisting of a 5 per cent federal part and an 8 per cent provincial part.

3. Real Property and Business Taxes

Municipalities in Canada rely principally upon real property and business taxes for their revenue. In Ontario, real property taxes are levied separately for general municipal purposes and school fund purposes. The tax base in Ontario is based upon the capital value of land and buildings, which are assessed for municipal tax purposes under provincial legislation. Individual municipalities establish a tax or mill rate which is applied to the assessed value of real property within the municipality.

Business taxes in Ontario are also based upon real property assessment and the municipalities fix a separate business tax rate to be applied to the assessment of real property within the municipality occupied for business purpose. In addition, municipalities raise revenue through the imposition of various business license fees.

4. Employer Health Tax

Ontario and Quebec levy a payroll tax on employers based upon their total calendar year gross payroll at a maximum rate of 1.95%. In Ontario, this tax is called the Employer Health Tax (EHT). This tax was designed to replace revenues lost when health insurance premiums, which were often paid by employers for their employees, were eliminated in 1989.

Eligible employers are exempt from paying EHT on the first $400,000 of payroll. In general, eligible employers for the tax exemption include:
- private sector employers
- organizations that received financial assistance from any level of government but are not under control of government, and
Commercial Real Estate and Commercial Leasing

Generally, commercial real estate transactions involve industrial, office or retail properties, apartments, condominiums, hotels or recreational areas such as golf courses.

a. Commercial Real Estate Transactions

In the purchase and sale of a commercial real estate property, both the vendor and the purchaser will need to obtain information on applicable taxes to the sale of the property in question, the terms of the leases that may or not be absorbed, any defaults in rent payments by tenants and additional off title searches which may need to be made given the type of property being purchased or sold.

Businesses planning to enter the commercial real estate business in Ontario should be aware of the municipal property taxes that are imposed on owners of land in a municipality and that development charges exist in certain municipalities.

b. Commercial Leasing

Typically, most commercial leases last anywhere from three to ten years. Most commercial leases in Ontario are "net" leases. This means that the tenant will pay the costs of operating the building. Tenants usually cover the costs of realty taxes, insurance, utilities, and general maintenance costs. Tenants will usually try to exclude from a lease costs of restoring the building's structure and costs arising from the landlord's negligence. Controversy usually arises in respect of whether the landlord or the tenant will pay when structural repairs to the building are needed.

Clauses in respect of uses of the premises and future uses of the leased premises are also negotiated in most commercial leases. Landlords may try to control the types of businesses that operate in the leased space and the ability of a tenant to expand its business, relocate or sublet.

Certain provinces have enacted legislation that governs the landlord and tenant relationship. In Ontario, the Commercial Tenancies Act outlines the relationship between landlords and tenants in commercial buildings. The Commercial Tenancies Act provides rights to and imposes certain obligations on a commercial landlord. Obligations include notifying a tenant of specific breaches of a lease and providing a reasonable period of time to allow the tenant to comply with the lease. A commercial landlord can seek damages from a tenant for loss of income at the Ontario Superior Court of Justice or Ontario Small Claims Court.
Gaming Law

a. Introduction

The gaming industry is said to be one of the fastest growing segments of the world economy. Between 1999 and 2000, the number of software companies providing tools to bring gaming products to users increased from 40 to 60, and the number of Internet gaming sites found on the Worldwide Web increased from 647 to over 1,400.

In 1989, there were no casinos in Canada. Twelve years later, there are over 50 such casinos, located in 7 provinces and 1 territory. In 1989, there were no legal slot machines operating in Canada. Twelve years later, there are over 16,500 slot machines legally in use. Canadians spent over $7.5 billion on legal gambling activities in 2000, with Ontario's three commercial casinos taking in over $2 billion in combined revenue.

The commercial opportunities created by this activity can only be capitalized upon if care is taken to operate within the stringent regulatory regime created by Canada and the provinces and territories to govern its conduct.

Constitutionally, the federal Parliament has jurisdiction to legislate gaming throughout Canada, as an exercise of the federal power to deal with criminal law. The provinces have jurisdiction to legislate non-criminal gaming as an exercise of their powers relating to the enjoyment of property and civil rights. As will be seen later, the federal government has withdrawn from the field of regulating gaming activities in Canada (except for pari-mutuel betting on horse races), by way of an agreement with the provinces.

b. The Criminal Code

Generally, the federal government exercises its jurisdiction over gaming through the provisions of the Criminal Code. The relevant provisions of the Criminal Code will be examined briefly.

- Section 201 makes it an indictable offence to keep a common gaming or betting house and an offence punishable on summary conviction to knowingly lease or own such an establishment or be a person "found in" such establishment.

- Section 202 describes various offenses relating to betting, selling of pools, bookmaking and wagering.

- Section 203 makes it an offense to place bets on behalf of others and essentially prohibits certain types of off-track betting schemes.

- Section 204 provides that sections 201 and 202 do not apply to certain pari-mutuel betting enterprises which are organised and supervised under the auspices of the federal Minister of Agriculture. These provisions permit the traditional wagering on horse racing events.

- Section 206 essentially makes all forms of gambling or wagering illegal.

c. Legalized Gaming - Section 207 of the Criminal Code

Section 207 provides exceptions to the prohibited gaming activities described in section 206 and, with the exception of pari-mutuel betting on horse races, creates a range of permitted or non-criminal gaming activities under provincial regulation.

The Criminal Code provisions prohibiting gaming were relaxed in 1969 to permit Parliament and the provinces to engage in lottery schemes. Competitive tensions that subsequently arose between the two levels of government were settled in 1985 when the federal government agreed to leave the area to the provinces in return for a provincial contribution to the funding of the 1988 Winter Olympic Games. This agreement was implemented by the adoption of section 207.
Section 206 describes and prohibits practically all gambling games and activities that most people would consider "gambling." With some exceptions, not relevant for present purposes, Section 207(4) defines "lottery scheme" to include all activities prohibited by section 206 and specifically includes slot machines as well as the lottery ticket games available at corner stores.

Section 207 provides that the following activities are lawful notwithstanding the provisions of section 206:

- Section 207(1)(a) allows a provincial government, alone or with another provincial government, to conduct and manage a lottery scheme, in that and the other province, in accordance with any provincially enacted law. This permits the provinces to operate lottery ticket games and casinos.

- Section 207(1)(b) permits a charitable or religious organization to conduct and manage a lottery scheme provided a provincial license is obtained and the proceeds are used for charitable or religious objects or purposes. As a result of this provision we have seen, in addition to the more traditional bingo events, the proliferation of charity casinos and sales of "Nevada" type lottery tickets and the development of new businesses to service the needs of charities by providing one stop shopping for the selling of lottery tickets and for the organizing and running of a charity casino. Charity casinos have become especially prevalent as government funding of many charities have been eliminated and traditional donation sources are decreasing.

- Section 207(1)(c) allows designated fairs or exhibitions with a provincial license to operate and manage a lottery scheme. Hence, the advent of casinos at Ontario's various fall fairs.

- Section 207(1)(d) permits any person to operate lottery scheme at a place of public amusement provided prize value is $500.00 or less and the cost of "buying" a chance for a prize is less than $2.00. “Crown and Anchor" and similar midway games fit under this provision as well.

The Supreme Court has held that the delegation of the regulation of permitted gaming activities to the executive branch of the provincial governments (that is, permitting the Lieutenant Governors in Council to grant licenses) does not amount to an impermissible sub-delegation of the federal criminal law power. The court also noted that there were other heads of constitutional authority which would enable the provinces to enact legislation in relation to gaming.

d. Internet Gaming

The above provisions of the Criminal Code were enacted to deal with corporeal gambling operations, but they are clearly applicable to internet gaming as well. As such, it is illegal to operate an Internet "casino" in a manner that creates a substantial connection between the gaming operation and the Canadian jurisdiction.

The main exception to the general prohibition is created by subsection 207(4), which specifically provides that a provincial government may conduct and manage a lottery scheme on or through a computer. Accordingly, the provincial governments may establish and operate internet lotteries.

e. Provincial Law

In Ontario, there are two provincial statutes whereby the province exercises its regulatory jurisdiction over gaming activities that are noncriminal due to the operation of section 207 of the Criminal Code.

1. The Ontario Lottery and Gaming Corporation Act (THE "OLGCA")

The OLGCA incorporates the Ontario Lottery and Gaming Corporation (the "OLGC") as a corporation without share capital. Its objects are:

- To develop, undertake, organize, conduct and manage lottery schemes on behalf of Her Majesty in right of Ontario.

- To provide for the operation of gaming premises.
iii. To ensure that gaming premises are operated and managed in accordance with this Act and the *Gaming Control Act, 1992* and the regulations made under the Acts.

iv. To provide for the operation of any business that the Corporation considers to be reasonably related to operating a gaming premises, including any business that offers goods and services to persons who play games of chance in a gaming premises.

v. If authorized by the Lieutenant Governor in Council, to enter into agreements to develop, undertake, organize, conduct and manage lottery schemes on behalf of, or in conjunction with, the government of one or more provinces of Canada.

vi. To do such other things as the Lieutenant Governor in Council may by order direct.

A portion of the net profits of the OLGC are paid into the Consolidated Revenue Fund and are available for appropriation by the provincial legislature for:

i. the promotion and development of physical fitness, sports, recreational and cultural activities and facilities therefor;

ii. the activities of the Ontario Trillium Foundation;

iii. the protection of the environment;

iv. the provision of health care, including the operation of hospitals and the provision of programs for problem gambling;

v. the activities and objectives of charitable organizations and non-profit corporations; and

vi. the funding of community activities and programs.

Funds not appropriated for these purposes in any fiscal year must be used to finance the operation of hospitals.

The OLGC has the powers of a natural person save that it cannot acquire, hold or dispose of any interest in real property except with the approval of the Treasury Board. It may not borrow money on its credit nor give security against its property except with the approval of the Minister of Finance. The Lieutenant-Governor in Council and the Minister of Finance may guarantee on behalf of Ontario the repayment of any loan made to OLGC.

The OLGC provides that the local municipality must pass a resolution to approve the operation of a casino within the municipality and must hold at least one public meeting before such resolution is passed.

2. The *Gaming Control Act* (THE "GCA")

The GCA is similar in concept to other Ontario regulatory and licensing statutes and is the keystone statute regulating gaming in Ontario. It establishes the Gaming Control Commission and provides for the appointment of a Director of Gaming and a Registrar of Gaming. The GCA also created a special panel of the Commercial Registration Appeal Tribunal known as the Gaming Control Hearings Panel.

Essentially, no person can be employed in the gaming industry or supply goods and services in the gaming industry unless he/she is registered. The Registrar administers the registration process and can also undertake investigations in connection with the persons under the GCA and can refuse initial and renewal registrations. Persons denied registration are entitled to a hearing as prescribed in the GCA.

f. First Nations and Gaming

Even the briefest review of gaming law would not be complete without some mention of how Canada's First Nations (commonly referred to as "Indians") fit into the picture.
To date, so long as the provincial law does not single out Indians for special treatment nor conflict with the federal Indian Act or Regulations, the Courts have held that provincial gaming law applies to Indians. This is consistent with the provisions of the Indian Act that provides that Indians and Indian lands are subject to provincial laws of general application that are not otherwise inconsistent with the Indian Act and Regulations.

Band Councils have the power under the Indian Act to pass by-laws for the control or prohibition of public games, sports, races, athletic contests and other amusements, among other things. It is arguable that a Band Council's by-law regulating gaming would override the provincial law as the latter would be inconsistent with the By-law made under the Indian Act. However, the Minister of Indian Affairs has consistently used the Minister's veto power found in the Indian Act to override gaming by-laws passed by Band Councils.

When the scope of the Minister's veto was challenged, the Courts held that the Minister's veto power is necessarily broad in order to deal with matters of wider significance than those of the Band whose by-law has been vetoed. At the same time, however, it was also held that the veto is not without inherent limits. For example, it cannot be used to frustrate the purposes of the Indian Act.

It has been suggested that the blanket disallowance of Band Council gaming by-laws may in and of itself frustrate the Canadian government's objective of obtaining economic freedom for Indians and therefore frustrates a purpose of the Indian Act. If this argument succeeds, the Band Council's by-law arguably overrides the provincial gaming law.

On another front, recent decisions of the Supreme Court of Canada and the Ontario Court of Appeal concerning section 35 (1) of the Constitution Act, 1982 have held that federal or provincial legislation cannot impair inherent rights of Indians once the inherent right has been shown to exist unless the Crown can justify its legislative action. It remains to be seen whether this line of reasoning will be capable of supporting a claim for self-government. To date it has dealt with issues like fishing rights. It has not yet been raised to support self-regulation of gaming but some observers think the potential is there.

The very existence of these arguments may lead to expansion of gaming activities on Indian Lands through agreements between the First Nations and governments wishing to avoid the vagaries of litigation. New opportunities for business related to the development of these gaming activities should follow.

g. Business Opportunities

Under the current gaming regime in Ontario, there has been, as noted above, an explosion of businesses serving charities and non-profit groups who have turned to gaming activities and events as fund raisers. It remains to be seen whether there is enough of a market to be shared by the charity groups and the charity casino operators.

Local communities have benefited from the proceeds of lottery ticket sales of the Ontario Lottery and Gaming Corporation by means of grants to build new arenas and other community facilities. Opportunities for business in the casino area are obviously more limited but also potentially more lucrative. Such opportunities would involve construction of new casino facilities and related real estate developments consisting of hotels and shopping centers, as well as actual management and operation of the casino (likely under agreement with the OLGC). Finally, there is the opportunity to supply the various casinos with goods and services necessary to operate a large-scale gaming enterprise.

Apart from determining whether a license is required under the GCA, the legal considerations in engaging in such activities would be no different than those applicable to any development project.