DOING BUSINESS

in Northern Canada

LAWSON LUNDELL LLP

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DOING BUSINESS

in Northern Canada

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INTRODUCTION

Canada's natural resources, educated and skilled workforce, modern transportation and communications infrastructure and close proximity to the large and growing markets of the U.S. and the Pacific Rim all contribute to Canada's vibrant business community. Historically, foreign investment has played an important part in the Canadian economy and that continues today.

As in all developed economies, the conduct of business and investment activities in Canada is subject to various regulatory regimes that attempt to balance competing interests. The following is a general discussion of the federal and provincial laws in force as at February, 2004 that are applicable to investments made or businesses conducted in Canada, particularly northern Canada.

This paper, relating to general commercial matters, focuses on the federal laws of Canada and the territorial laws of the Yukon, Northwest Territories and Nunavut (Canada's territories). The laws of other relevant jurisdictions (in particular, Alberta) are discussed to the extent that certain specific commercial activity, such as resource extraction, is influenced by those laws. Given the significance of Ontario's capital markets in Canada, the laws of Ontario are discussed briefly where relevant under "Acquisition of Public Companies in Canada".

Canada's Legislative and Legal Systems

The development of business opportunities in Canada, through the establishment of a new enterprise or the acquisition of an existing one, occurs within a legislative and legal system that balances values and objectives shared by all modern developed societies.

Federalism

Like the U.S., Canada is a federal state. Legislative powers are divided between the federal government in Ottawa and the ten provincial governments. The three territories do not enjoy independent constitutional status and their lawmaking powers are limited to those delegated from the federal government. In addition, in the last two decades, the federal government of Canada has negotiated a series of agreements or treaties with several aboriginal peoples in the Northwest Territories, Nunavut and the Yukon Territory, effectively creating another level of administration.

The constitutional division of powers between the federal government, provincial governments and territorial government is complex, but generally matters of national and international importance are within the purview of the federal government while matters of a local nature are within the purview of the provincial governments. For example, the federal government has responsibility for international trade and commerce, banking, criminal law, shipping and interprovincial transportation, while the provinces are responsible for property law and the general law of contract.

Parliamentary System

Canada is a parliamentary democracy. The parliamentary system operates both federally and in the provinces and territories. The federal Parliament, located in Ottawa, consists of an elected House of Commons and an appointed Senate. However, the role of senators in the legislative

process is limited, so effective legislative power at the national level lies almost exclusively with the House of Commons. Each of the provinces and territories has only one legislative chamber, which is elected. The Legislative Assemblies of the Northwest Territories and Nunavut do not have a political party system, but rather govern by a "consensus" style of government which is unique in Canada.

Unlike the congressional system in the U.S., which is based on a strict separation of legislative and executive powers, the parliamentary system requires that the Prime Minister and other members of the executive Cabinet be members of the legislature. The development of political parties federally and in all provinces and territories, other than the Northwest Territories and Nunavut, concentrates power in the executive Cabinet. This has two consequences. First, this focus of authority makes the rules governing businesses more certain and predictable. Second, lobbying efforts are generally directed at Cabinet and Parliamentary committees at the policy formation stage rather than legislators at the voting stage. There is a registry for lobbyists targeting federal officials. The Yukon, Northwest Territories and Nunavut do not have a registry for lobbyists.

Judicial System

Independence of the judiciary from the legislative and executive branches of government is a fundamental tenet of the Canadian judicial system. All government actions, including statutes, regulations, rules and administrative action, are subject to scrutiny by the judiciary. The judiciary also enforces Canada's Constitution, including the Charter of Rights and Freedoms. Unlike the Bill of Rights in the U.S., the Charter has been applied only in a limited way in respect of economic rights. Generally, Canadian society has been less litigious than American society and, in Canada, civil matters are typically decided by judges rather than by juries as in the U.S. As a consequence, damage awards in Canada are more modest.

Two different legal systems govern private law in Canada. The Province of Quebec is a civil law jurisdiction, similar to that of France and other continental European countries. The rest of Canada follows the English model of common law. Historically, common law provinces have generally followed British jurisprudence; however, in recent years American case law has become increasingly influential with Canadian courts and legislators, particularly with respect to commercial matters.

FORMS OF BUSINESS ORGANIZATION

Introduction

A number of issues arise in choosing the appropriate form of business organization through which to carry out Canadian operations. Corporations have the choice of operating through a branch or through a subsidiary corporation. The possibility of operating through an unlimited liability corporation presents some unique tax advantages. The different jurisdictions under which a Canadian subsidiary can be incorporated have different requirements, which may be important to foreign businesses operating in Canada. Finally, the use of partnerships and joint ventures present advantages in some circumstances.

Branch versus Subsidiary

A non-resident may carry on business or conduct investment activities directly through a branch or indirectly through a Canadian subsidiary. There are many factors that a non-resident should consider before deciding to carry on business or conduct investment activities through a branch or a subsidiary.

Generally, the financial operations of a Canadian subsidiary may not be consolidated with those of other operations for foreign tax purposes. Consequently, one advantage to carrying on business or conducting investment activities through a branch of a foreign corporation rather than a Canadian subsidiary is the opportunity to offset losses in the Canadian branch against taxable profits earned by the foreign corporation in other jurisdictions, although an examination of the applicable foreign tax law should be made to determine the corporation's opportunities for such income tax offsets. This may be particularly important during start-up or reorganizations when losses may be expected.

A foreign corporation intending to carry on business as a branch in any province or territory in Canada is required to be extra-provincially or extra-territorially registered or qualified in that province or territory. Procedures to obtain such registration or qualification are straightforward, generally requiring only the filing of an application reciting factual matters about the structure of the applicant and designating an agent-for-service in the province or territory. It is, however, necessary to obtain the approval of the provincial or territorial authorities to the business or corporate name under which the corporation will operate.

The use of a branch would directly subject the foreign corporation to provincial and federal laws. If this is a concern, consideration should be given to first creating in the home jurisdiction a wholly owned subsidiary of the foreign corporation. That subsidiary could then carry on business in Canada as a branch. Depending on the laws in the home jurisdiction, the foreign parent might then avoid direct liability for actions of the Canadian operation and might still be able to consolidate the losses, if any, of the Canadian branch into its own financial statements for tax purposes.

It may be advantageous to conduct business or investment activities in northern Canada through a Canadian subsidiary if the jurisdiction of residence taxes income or gains from the Canadian business or investment activity at a higher rate than the Canadian tax rate. Even in cases where the foreign corporation's jurisdiction of residence taxes Canadian income and capital gains at a lower rate than Canada, it may be advisable to use a Canadian subsidiary since Canadian

withholding tax is imposed only in the year in which profits are distributed by a Canadian subsidiary to its non-resident shareholder. In contrast, branch tax is payable in the year in which the earnings occur regardless of whether those earnings are distributed to a non-resident, unless the earnings are invested in certain Canadian business assets. Since it is more difficult to control the timing of profits from investment income than it is to control the timing of dividend payments, the use of a Canadian subsidiary may result in a more efficient use of foreign tax credits that arise in foreign jurisdictions.

The thin capitalization rules do not apply to foreign corporations. Accordingly, more interest-bearing debt from shareholders and other related parties can be used to finance Canadian operations and deducted from income than would be the case if a Canadian subsidiary were used. The result is that the foreign corporation can pay to its shareholders, or other related parties, interest that is deductible for Canadian tax purposes, thus reducing the income and branch tax payable in Canada.

Also, while most government assistance programs are available to corporations whether Canadian or foreign controlled, some programs are restricted to federal or provincial corporations, and thus the choice of branch operation may result in an inability to obtain such assistance. The possibility of obtaining government assistance by using a Canadian subsidiary may then be a trade-off against the ability to deduct losses in Canada from income earned in the home jurisdiction if a branch of the foreign operation is used.

See also the discussion under "Taxation".

Incorporation – Choice of Jurisdiction

If the decision has been made to incorporate a Canadian subsidiary corporation, the subsidiary may be incorporated under the federal laws of Canada or under the laws of one of the provinces or territories of Canada. The *Canadian Business Corporations Act* ("CBCA") is the legislation applicable to federally incorporated business corporations. The following discussion relating to the choice of the federal or a provincial (or territorial) jurisdiction in which to incorporate focuses on the CBCA and the current legislation of the Yukon, the Northwest Territories and Nunavut. All ten provinces and the three territories have comparable legislation, although their laws differ in various respects. The *Business Corporations Act* of the Northwest Territories and Nunavut are virtually identically, and are substantially similar to that of the Yukon.

Certain Consequences of Federal Incorporation

Generally, a federal corporation has the capacity and the power of a natural person and may carry on business anywhere in Canada without having that capacity and power restricted by a province or territory. It can also use its name in any province or territory (subject to certain Quebec requirements noted below that mandate French names). However, all provinces and territories regulate in some manner the corporate activities of a federal corporation through laws of general application requiring registration, the filing of returns and the payment of fees by every corporation doing business in the province or territory.

To carry on business in any of the territories, a federal corporation must be extra-territorially registered there. A federal corporation having its registered office or carrying on business in any of the territories must, in addition to filing the annual returns and notices of change of directors

and registered office required by the CBCA, file in the Yukon, the Northwest Territories and Nunavut similar notices reporting basic corporate changes, as required under the Yukon *Business Corporations Act* ("Yukon Act"), the Northwest Territories *Business Corporations Act* (the "NWT Act") and the Nunavut *Business Corporations Act* (the "Nunavut Act").

Extra-provincial Qualifications

A company incorporated under the Yukon Act, NWT Act or the Nunavut Act is also required to be extra-provincially qualified under the laws of other provinces and territories in which it conducts business. Whether the corporation is a federal or a territorial corporation, if it is to carry on business in provinces or territories outside its home jurisdiction, it will be necessary to register or obtain an extra-provincial licence in each such province or territory. If the name of a territorial corporation is not acceptable in the province or territory where application for the registration or licence is being made, registration may not be granted. In the Province of Quebec, a corporation must either have a bilingual name or a French version of its name.

Incorporation

Incorporation is available as a matter of right and is accomplished by filing copies of Articles of Incorporation in the form prescribed to the appropriate government department together with the required supporting material and fee. Prior to incorporating, it is necessary to obtain a name search report relating to the desired corporate name to determine whether the name sought is available. The proposed name must not be the same as or similar to that of any known entity if the use of the name would be likely to confuse the public.

The authorized capital of a federal, Yukon, Northwest Territories or Nunavut corporation does not affect the incorporation fee or the corporation's capacity to carry on business. While no set percentage of authorized capital need be issued, the amount of subscribed or paid-up capital must be considered because of the "thin capitalization" provisions of the federal *Income Tax Act*. It is generally advisable to provide for a simple share structure (for example, consisting only of common shares) if the subsidiary is to be wholly-owned by the non-resident. The share structure may be easily amended in the future if desired.

Directors

A Yukon corporation, a Northwest Territories corporation and a Nunavut corporation must have at least one director, unless it is a "distributing corporation" (essentially, a public company), in which case it must have at least three directors, at least two of whom are not officers or employees of the corporation or its affiliates. None of Canada's territories have residency requirements for directors.

A federal or Alberta corporation that does not offer its securities to the public is not required to have more than one director. However, the one director must be a "resident Canadian". If a federal corporation has more than one director, at least 25% of the directors must be "resident Canadians". However, if a federal corporation has less than four directors at least one director must be a resident Canadian. If an Alberta corporation has more than one director at least half must be "resident Canadians". A "resident Canadian" is defined in the CBCA as:

- any individual who is a Canadian citizen ordinarily resident in Canada; or

- a Canadian citizen not ordinarily resident in Canada who is a member of a prescribed class of persons (e.g., a member of the Canadian armed forces); or
- a permanent resident, within the meaning of the Canadian *Immigration Act*, who is ordinarily resident in Canada, other than a permanent resident who has been ordinarily resident in Canada for more than one year after the time at which the permanent resident first became eligible to apply for Canadian citizenship (usually three years).

The definition of "resident Canadian" in the Alberta Act is similar to the CBCA definition except that the exception with respect to long-term permanent residents is not in the Alberta Act. Thus, in Alberta, a person with permanent resident status who is ordinarily resident in Canada continues to be qualified as a director as long as that status is retained.

Corporations incorporated under the laws of some Canadian provinces and the territories, for example the Yukon, the Northwest Territories, Nunavut and Nova Scotia, are not required to have a majority of "resident Canadian" directors. For this reason, many U.S. and other foreign corporations establishing a presence in Canada through a subsidiary choose to incorporate it under the laws of one of these jurisdictions.

Meetings of the directors of territorial corporations and federal and Alberta corporations may be held either in or outside Canada. The Yukon Act, the NWT Act and the Nunavut Act do not impose residency requirements with respect to meetings of the directors. In order for directors of a federal or an Alberta corporation to transact business at a meeting, the residency requirements referred to above must be met by the directors present at the meeting. Alternatively, a sufficient number of absent resident Canadians must subsequently approve the business transacted at the meeting such that if the absent resident Canadians had been at the meeting a majority of resident Canadians would have been present.

Unanimous Shareholder Agreements

The CBCA, the Yukon Act, the NWT Act, the Nunavut Act and the Alberta Act specifically permit "unanimous shareholder agreements" by all of the shareholders of a corporation. These agreements essentially remove from the directors of the corporation all or part of the general powers vested in the board to manage the business and affairs of the corporation. To the extent that the powers of the directors are limited by such an agreement, the directors are relieved of their duties and the shareholders assume such powers and the attendant liabilities. Non-Canadian tax implications of operating with a unanimous shareholder agreement should be considered prior to putting such an agreement in place.

Notwithstanding the existence of a unanimous shareholder agreement, it would still be necessary for the corporation to have at least one director (who must be a resident Canadian in the case of federal and Alberta corporations), although the director's duties and obligations would be substantially reduced. This streamlines corporate decision-making and may be particularly useful in the case of a Canadian subsidiary wholly-owned by a non-resident. Hence, while a majority of the board of directors of the subsidiary must be "resident Canadians", the business and affairs of the subsidiary can be controlled by non-resident shareholders rather than its directors.

Shareholders' Meetings

The Yukon Act, the NWT Act and the Nunavut Act require a corporation to hold its shareholders' meetings in the territory unless all the shareholders entitled to vote at that meeting agree to holding the meeting outside of the territory. CBCA and Alberta Act corporations may hold shareholders' meetings outside Canada if the articles so provide or if all shareholders entitled to vote at the meeting agree.

Accounting

Regulations under the Yukon Act, the NWT Act, the Nunavut Act and the CBCA and Alberta Act require that the financial statements of corporations governed by them be prepared annually in accordance with Canadian generally accepted accounting principles. Yukon, Northwest Territories, Nunavut, federal, and Alberta non-public corporations may avoid audit requirements simply by having all of their shareholders pass a resolution annually dispensing with the appointment of an auditor. Non-public corporations incorporated federally or under the laws of Canada's territories or Alberta are not required to file or make public their financial statements.

Partnerships and Joint Ventures

The use of the partnership or joint venture structure, in combination with one or more other persons or corporations in Canada, may be attractive in particular circumstances, primarily for tax reasons. Consideration must be given to whether a non-resident should hold its partnership or joint venture interest directly or through a subsidiary incorporated in Canada. If a subsidiary is used, the same considerations are relevant as those discussed immediately above. If participation is to be held directly due to foreign tax or other considerations, this will be equivalent to operating through a branch in Canada, requiring the non-resident partner to obtain extra-provincial licences in those provinces where the partnership or joint venture carries on business.

In the case of partnerships, it is customary for a detailed partnership agreement to be entered into, in part to avoid unwanted provisions of the partnerships legislation that otherwise apply. Limited partnerships are commonly used for investment purposes to permit the limited partners to obtain the benefit of tax deductions while retaining limited liability. If appropriately structured such that the general partner (with unlimited liability) is a corporation, all of the limited liability aspects of the corporate form may be preserved. The partnership acts of Canada's territories and Alberta are similar to comparable statutes in various states of the U.S.

True joint ventures or co-ownership arrangements, commonly involving one or more corporations, may be advantageous as an alternative to a partnership. This is particularly the case since they avoid the unlimited joint and several liability applicable to partners and permit the venturers or co-owners to regulate their tax deductions without being forced to use the same basis as other co-venturers, which would not be possible in the case of a partnership. A joint venture agreement must be carefully drafted to ensure that the joint venture is not considered to be a partnership.

REGULATION OF INVESTMENT IN CANADA

Introduction

There are few restrictions on foreign investment in Canada and those that exist relate to the following:

- restrictions in areas related to Canadian cultural heritage or identity (including broadcasting and publishing), telecommunications and banking;
- limitations on the degree of ownership in specified industries (for example, banking, telecommunications);
- those imposed by the *Investment Canada Act*; and
- those imposed by the *Competition Act*, which applies to Canadian and foreign investors.

The *Investment Canada Act*, a federal statute, subjects foreign acquisitions of Canadian businesses of a certain value to review in order to determine if the acquisition will benefit Canada. The *Competition Act*, while not specific to foreign investment, affects foreign investment to the extent that such investment could prevent or lessen competition substantially in Canada.

Canada, the U.S. and Mexico are parties to the *North American Free Trade Agreement*, which contains a number of provisions to protect investments in Canada by members of NAFTA countries.

Investment Canada Act

The *Investment Canada Act* requires acquisitions of existing Canadian businesses by foreign nationals to be reviewed by the Investment Canada division of Industry Canada when the value of the acquisition exceeds C$5 million in assets for a direct acquisition and C$50 million in assets for an indirect acquisition.

Under the agreement establishing the World Trade Organization ("WTO"), a special status is conferred upon nationals of WTO member states and entities controlled by them. The investment threshold limit applicable to WTO investors (which includes U.S. controlled companies) is currently C$223 million in assets for a direct acquisition. The threshold limit is adjusted annually based on the change to the Canadian GDP in each succeeding year. Any transaction below the current threshold is not reviewable unless the Canadian business is a "cultural business", provides any financial service, engages in the production of uranium or provides any transportation service. In addition, indirect acquisitions by WTO investors are not reviewable regardless of the value of the assets acquired.

In order for a reviewable transaction to be approved by Investment Canada, it must result in a "net benefit" to Canada. The *Investment Canada Act* sets out a number of factors that are to be taken into account in determining whether the proposed investment is of net benefit to Canada, including the effect of the investment on the level and nature of economic activity in Canada and the degree and significance of participation by Canadians in the existing and proposed businesses. Factors such as continued employment and infusion of capital by the acquiror are particularly significant to Investment Canada and assist in meeting the net benefit test.

Conversely, plans to downsize following a merger can be impediments to achieving approval for the investment.

Investments by non-Canadians in non-reviewable acquisitions and in the establishment of a new business are subject only to a notice filing requirement that must be made within 30 days following implementation of the investment.

Investment Review

If a proposed investment is subject to review, and is not in respect of a "cultural business", the Minister of Industry who is responsible for Investment Canada, will, on recommendation of Investment Canada, either approve or not approve the proposed investment. Investments in a business activity related to Canada's cultural heritage or national identity are the responsibility of the Minister of Canadian Heritage. The Minister of Industry has the power to order divestiture of control of a Canadian business that is the subject of an investment. The *Investment Canada Act* allows for negotiations to take place between Investment Canada and the investor to amend the terms of the application to provide for commitments, plans and undertakings, including with respect to the expenditure of certain amounts on capital or technology as well as the maintenance of employment levels or retaining head office functions in Canada so that the application is more acceptable to the Minister. Investment Canada, in the course of its review, will seek input from provincial governments, territorial governments or other government departments that they believe may be affected by, or have an opinion on, the investment. Investment Canada will always contact the Competition Bureau and advise of an application for review.

Waiting Periods/Fees

If a review is required, then Investment Canada must, within 45 days after receipt of a complete review application, advise the investor whether or not the investment is, in the view of the Minister, of net benefit to Canada. The Minister is entitled to a 30-day extension, on notice to the investor, for completion of the review. After such time, the Minister may request an extension, which must be mutually agreed to by the investor. The Minister has taken the position, although not supported by legislation, that if a proposed transaction is still in review by the Competition Bureau, then the Minister will not approve the investment as a net benefit to Canada until the Bureau has completed its analysis and does not propose to refer the merger to the Tribunal.

Unlike the Competition Bureau review described below, Investment Canada does not prescribe filing fees.

Competition Act

Mergers

The *Competition Act* defines a merger as any acquisition or establishment, direct or indirect, by one or more persons, by any means, of control over, or significant interest in, the whole or part of a business of a competitor, supplier, customer or other person. Therefore, a merger is broader than an acquisition of voting control.

The Commissioner of Competition may apply to the Competition Tribunal for a review of any merger or proposed merger. If the Tribunal determines that a merger or proposed merger prevents or lessens or is likely to prevent or lessen competition substantially, then the Tribunal has the power to prohibit or dissolve the merger or order divestiture of assets or shares. The Commissioner may make the application at any time up to three years after a merger has been consummated if, in the Commissioner's opinion, the merger raises concerns of substantial lessening of competition in the relevant market.

Approach to Merger Review Resolution

As the Commissioner has the power to determine whether or not to apply to the Tribunal for an order, the Commissioner will apply the substantive analysis to a proposed merger in the first instance.

Generally, mergers that raise concerns are dealt with by extensive negotiation between the Commissioner's staff and the parties involved. The Commissioner has the power and authority to accept undertakings or to request the Tribunal to issue a consent order where the Commissioner and the parties have reached agreement. Such case resolution methods are commonly used as an alternative to contested proceedings to avoid the expense of conducting a full Tribunal review.

Substantive Review

Whether a merger will be considered to substantially prevent or lessen competition depends on a number of criteria. The *Competition Act* does not define the concept of "substantial", but rather contains a non-exhaustive list of factors that the Tribunal may consider in an assessment of the likely competitive impact of a merger as follows:

- the extent of effective foreign competition;
- whether one of the merging parties is a failing business;
- the likely availability of acceptable product substitutes;
- the extent to which effective competition would remain in a market affected by the merger;
- the likelihood that the merger would result in the removal of a vigorous and effective competitor;
- any barriers to entry into a market including tariff and non-tariff barriers to international trade and any effect of the merger on such barriers;
- the nature and extent of change and innovation in a relevant market; and
- any other factor that is relevant to competition in a market affected by the merger.

In assessing whether a merger is likely to prevent or lessen competition substantially, the Tribunal will first identify the relevant markets from two perspectives: (i) the product or products with respect to which a merged firm acting alone or in concert with others is likely to be able to exercise market power; and (ii) the geographic area within which such power is likely to be exercised. Although market share is an indicator of the existence of market power, the *Competition Act* specifically prevents the Tribunal from finding a merger substantially prevents or lessens or is likely to substantially prevent or lessen competition solely on the basis of a concentration of market share.

Pre-Merger Notification

The parties to a proposed merger must notify the Competition Bureau prior to completion of the transaction where the transaction exceeds two threshold tests.

The first threshold is met if the parties to the transaction, together with their affiliates, have assets in Canada or gross annual revenues from sales in or from Canada, that exceed C$400 million. For the purposes of this test, the *Competition Act* deems the parties to a proposed acquisition of shares to be the person or persons who propose to acquire the shares and the corporation the shares of which are to be acquired.

The second threshold is met if the transaction is an acquisition, direct or indirect, of an operating business that has assets in Canada the value of which exceeds C$50 million or gross revenues from sales in or from Canada generated from those assets exceeding C$50 million. In the case of an amalgamation where at least one of the amalgamating corporations carries on, or controls a company that carries on, an operating business in Canada, the threshold is met if the continuing corporation (or corporations controlled by the continuing corporation) has assets in Canada the value of which exceeds C$70 million or gross revenues from sales in or from Canada generated from those assets exceeding C$70 million. Given the broad definition of merger, an acquisition of 20% of all outstanding publicly trading voting shares of a company or the acquisition of 35% of all outstanding voting shares of a private company that is, or controls, an operating business with assets or gross revenues that meet the prescribed threshold will require pre-merger notification.

Filing and Waiting Periods

Where pre-notification is required, one or more of the parties involved in the transaction must file a notice of the proposed merger and provide the prescribed information. There are two possible filings, a “long form” and a “short form”. The Competition Bureau will then determine whether a proposed transaction presents a review that is “non-complex”, “complex” or “very complex”. Very few transactions are “very complex”. Most pre-merger notifications are made on a short form basis, and those which are very complex require long form filings. In certain “complex” cases, the Competition Bureau may require a long form filing. The Bureau reserves the right to require a party submitting a short form filing to file the information contained in a long form filing. In “very complex” cases, the Bureau can and does exercise its statutory power to obtain court orders compelling the parties to the merger and other parties, including interested stakeholders, to produce documentation and to answer specific questions.

As a general guideline, where a merger results in a combined market share of 35% or more in a relevant product market, then the parties should consider the possible classification of the merger as “complex” or “very complex”.

If a short form is filed and accepted as complete by the Bureau, the parties may not complete the merger until 14 days after the short form notification has been receipted by the Bureau, provided that the Bureau does not require the applicant to file a long form. Generally speaking, if the short form has been correctly completed, the Bureau will issue its receipt within one business day following submission. However, the Bureau may notify the applicant that its application is

incomplete, and the waiting period will not commence until the Bureau is satisfied that all required information has been received.

If a long form is filed, and accepted as complete by the Bureau, the parties may not complete the merger until 42 days after the long form notification has been receipted by the Bureau.

Information supplied to the Commissioner in either a short form or long form is kept confidential, although the Commissioner is entitled to present the information to the Tribunal for purposes of challenging the proposed merger.

Notwithstanding the statutory waiting periods in the *Competition Act*, the Bureau's "Fee and Service Standards Handbook" provides that a review of "complex" cases will take the Bureau 10 weeks to complete and a review of "very complex" cases will take the Bureau five months to complete. These standards do not have the force of law, but can present significant tension between the merger parties and the Bureau.

As mentioned above, the Commissioner reserves the right to challenge the merger if the merger raises competition issues. In addition, the Commissioner has the right to apply to the Tribunal for an interim injunction preventing the completion of a merger where the Commissioner has had insufficient time to review the application. Such interim order is granted for no more than 30 days, provided that the Commissioner may apply for an extension, which cannot exceed a further 60 days.

A long or a short form filing must be accompanied by a filing fee of C$50,000 for the transaction. Although it has historically been the practice that the acquiror pays the fee, with the fairly recent increase of the fee to C$50,000, it is now common for the parties to negotiate the sharing of the fee. In addition, most applicants also file a submission or argument in support of the merger that provides the Bureau with the context and background for the merger.

Advance Ruling Certificates

Where the Commissioner is satisfied, upon application by a party or parties to a proposed transaction, that there would not be sufficient grounds on which to apply to the Tribunal for an order under the merger provisions regarding the transaction, the Commissioner may issue an advance ruling certificate ("ARC") to this effect. The Commissioner is required to consider any request for an ARC as expeditiously as possible.

If the transaction to which an ARC relates is substantially completed within one year after the ARC is issued, the Commissioner shall not apply to the Tribunal for a review of the transaction solely on the basis of information that is the same or substantially the same as the information on the basis of which the ARC was issued.

Generally, ARCs are sought in circumstances where the parties wish to avoid the extensive information requirements and time delays associated with pre-notification. However, an ARC can also be obtained when the parties desire a high degree of comfort that the Commissioner will not challenge their transaction.

The issuance of an ARC is entirely at the discretion of the Commissioner and will be issued only when the Commissioner is satisfied that there would not be sufficient grounds on which to apply

to the Tribunal for an order. The application fee for an ARC is C$50,000 (plus GST of C$3,500) and it takes approximately two to four weeks following an application for the Commissioner to issue an ARC.

Information supplied to the Commissioner for the purposes of obtaining an ARC is kept confidential, although the Commissioner is entitled to present the information to the Tribunal for purposes of challenging the proposed merger. Information provided to the Commissioner in an ARC application should include an overview of both parties to the merger and an analysis of the effect, if any, on the relevant competitive product and geographic markets as a result of the merger.

North American Free Trade Agreement

Canada, Mexico and the U.S. are parties to the *North American Free Trade Agreement* ("NAFTA"), which came into force on January 1, 1994. NAFTA includes provisions that prohibit a NAFTA country from discriminating against another member country's products in favour of domestic products ("national treatment") or any other country's product ("most-favoured-nation treatment"). In addition, NAFTA includes performance requirement prohibitions and prior management nationality prohibitions.

Performance Requirements Prohibitions

NAFTA prohibits member countries from imposing requirements that 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. It also contains provisions 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* 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.

Senior Management Nationality Prohibitions

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 must 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. As discussed above under "Forms of Business Organization – Incorporation – Choice of Jurisdiction – Directors", the corporate legislation of a number of Canadian jurisdictions imposes residency requirements for directors, however, this is not the case with Canada's territories.

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 that date that establish new or increased discrimination against investors from other NAFTA countries, however, may be submitted to dispute settlement.

NAFTA explicitly acknowledges that when selling or disposing of its equity interests in, or the assets of, an existing state enterprise or an existing government 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 to impose limits 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 countries 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).

Transfers

Where an investor of a NAFTA country has an investment in the territory of another NAFTA country, the country in which the investment is located must permit transfers and international payments relating to the investment to be made freely and without delay. Transfers include:

- profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance and other fees, returns in kind and other amounts derived from the investment;
- proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;
- payments made under a contract entered into by the investor or its investment, including payments made pursuant to a loan agreement; and
- expropriation payments and awards made pursuant to the dispute resolution provisions of Chapter 11 ("Investment").

These provisions effectively prevent a NAFTA country 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 undoubtedly intended to enhance the security of investments by other NAFTA country investors in NAFTA countries in the event that their investment is expropriated, so that the compensation required 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.

Special Formalities and Information 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, form an investor of another NAFTA country or its investment, routine business information to be used solely for informational or statistical purposes concerning that investment.

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.

Other Exempted Matters

Cultural Industries

Under NAFTA, Canada preserves the exemption for "cultural industries" that is provided under the Free Trade Agreement between Canada and the U.S. ("FTA"). However, each NAFTA country reserves the right to take measures of equivalent commercial effect in response to any action regarding cultural industries that 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 actions that it considers 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; or
- relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices.

Investor Dispute Resolution

General

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 either seek monetary damages through binding investor-state arbitration or pursue 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.

Choice of Arbitration Options

Subchapter B establishes a mechanism to settle investment disputes that assures due process before an impartial tribunal. An investor of in a country has an option either to resolve a claim against the country for breach of any of the provisions of Subchapter A before the tribunals of the country where the investment was made or to submit the claim to arbitration. Three arbitration options are provided: International Centre for Settlement of Investment Disputes ("ICSID") Convention arbitration (if the two countries involved are parties to the ICSID), the Additional Facility Rules of ICSID (if only one country is a party) 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 U.S. 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 that international parties frequently choose to govern disputes arising out of international contracts.

The investment dispute resolution process provided for by Subchapter B overcomes problems that 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. Until now, 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 in that an investor aggrieved by measures of a host government has 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.

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.

TAXATION

Introduction

Foreign companies operating in Canada face a variety of taxes. The federal, provincial and territorial governments impose a tax on income and capital gains. Some provincial governments impose a corporate capital tax. The federal government levies a goods and services tax, excise taxes and customs duties. Provincial and territorial governments may levy a provincial sales tax, a tax on the transfer of real property and a variety of other special taxes such as mining and logging taxes. Municipalities impose taxes on real property.

The following is an introduction to the most significant tax considerations that affect a person investing in the Yukon, the Northwest Territories or Nunavut.

Income and Capital Gains Tax

Residents and Non-Residents

The federal *Income Tax Act* imposes a tax on the worldwide income of corporations and individuals resident in Canada. For Canadian purposes, income includes business, property and employment income. One half of a capital gain is included in income for tax purposes and then taxed at the applicable income tax rates.

Generally, a corporation will be considered resident in Canada if it is incorporated in Canada or if the central management and control of the corporation is located within Canada. The latter situation will exist, for example, if meetings of the board of directors of the corporation are ordinarily held in Canada. Some limited sources of income are exempt from Canadian income tax such as certain international shipping income earned by foreign corporations whose central mind and management are located in Canada.

Non-residents of Canada are liable to pay tax on taxable income earned in Canada, not on their worldwide income as is the case for Canadian residents. Non-residents are taxed:

- at regular income tax rates on income from employment or business carried on in Canada;
- at withholding tax rates on income in the form of dividends, interest, royalties and rents from investments in Canada; and
- at one-half of income tax rates on capital gains from the disposition of taxable Canadian property, which includes real estate, capital property used in carrying on a business in Canada and shares in private (i.e., not Canadian publicly traded) Canadian corporations.

If a non-resident trust of which a Canadian resident is a beneficiary receives investment income, the trust will be deemed to have received the income for Canadian income tax purposes. An important exception to this general rule provides that upon becoming resident in Canada, an individual may put income-producing assets into a non-resident trust and for a five-year period after the individual becomes a Canadian resident, the income produced by the assets held in trust will not be subject to Canadian taxation. The establishment of such a trust, known as an "immigration trust", may significantly reduce Canadian income tax that would otherwise apply after a person immigrates to Canada.

Tax Rates

Provincial and territorial income tax rates vary. The relevant tax rates for 2005, including both federal and territorial income tax, were:

	Yukon	Northwest Territories	Nunavut
Highest marginal personal rate	42.40%	42.55%	40.50%
Basic corporate rate	37.1%	36.12%	34.12%
M&P rate	24.62%	36.12%	34.12

The highest marginal rate generally applies to income above C$105,000. The M&P rate applies to certain manufacturing and processing businesses.

Business income is allocated between provinces based equally on two factors: payroll and revenue.

Individuals who reside in the North (Yukon, Northwest Territories, Nunavut) are entitled to a deduction from taxable income known as the "Northern Resident Allowance". The allowance equals either 20% of the individuals' income or $7.50 per day, whichever is less. As well, northern residents may receive a tax-free travel allowance from their employer allowing them to travel south once a year without paying tax on this benefit.

Branch Tax

The after-tax earnings of non-resident corporations are subject to an additional tax, commonly referred to as a "branch tax", whether or not such earnings are distributed or retained in Canada, unless the earnings are reinvested in specified business-related assets in Canada.

The rationale for the branch tax is that if a Canadian subsidiary of a non-resident corporation distributed its after-tax earnings to its parent by way of a dividend, the dividend would be subject to withholding tax. Where a Canadian branch or division of a foreign corporation earns income, it is earned directly by the non-resident corporation and withholding tax does not apply when the profits are removed from Canada. The branch tax allows Canada to recover what would otherwise be collected as withholding tax if the same after-tax profit were distributed by a Canadian corporation to its non-resident shareholder by imposing a similar tax burden on income earned through a Canadian branch or division of a foreign corporation.

Under the *Income Tax Act*, the branch tax rate and the non-resident withholding tax rate on dividends are 25%. However, both of these rates are generally reduced under the relevant tax treaty. For example, the rates have been reduced to 5% under the terms of the Canada – U.S. Tax Treaty.

Thin Capitalization Rules

The "thin capitalization rules" restrict the amount of interest a corporation can deduct for tax purposes with respect to loans from its non-resident shareholders and other related parties. If a Canadian corporation's debt to such persons exceeds two times its equity, interest on that debt in excess of the prescribed limit will not be deductible for tax purposes.

These rules are designed to restrict the amount of interest that can be paid to non-resident shareholders or certain related persons and deducted from the corporation's Canadian income. Such a deduction would reduce corporate income tax at a rate of approximately 40% and allow the corporation to pay interest that would be subject to the 5% withholding tax applicable under the Canada – U.S. Tax Treaty.

In contrast to U.S. tax rules, the thin capitalization rules merely restrict the interest deduction and do not reclassify any portion of the debt as equity.

Entity Classification

The Canadian tax system does not have "entity classification" rules such as those contained in the Internal Revenue Code. The legal form of the entity (i.e., corporation, partnership or trust) will determine its status for Canadian tax purposes. Limited liability corporations do not exist under Canadian corporate law. The Province of Nova Scotia permits the incorporation of an "unlimited" liability company ("ULC"). These entities are taxed as corporations in Canada but are fiscally transparent for Internal Revenue Code purposes. ULCs are often the vehicle of choice for U.S. corporate investors because they permit U.S. consolidation of Canadian and U.S. source income. For individual investors, ULCs may unnecessarily expose Canadian source income to corporate tax in both Canada and the U.S. Individual investors often prefer limited partnerships. At the time of writing, the Province of Alberta has introduced ULC legislation, which is expected to become law in the fall. See "Forms of Business Organization – Unlimited Liability Company" above.

The Canadian tax system does not have consolidated return rules such as those found in the Internal Revenue Code. Moreover, the U.S. rules do not permit consolidation with a Canadian corporation. To achieve consolidation, a U.S. investor must operate in Canada directly through a branch or partnership or utilize various planning techniques such as a ULC.

Transfer Pricing

The Canadian tax system contains transfer pricing rules similar to those imposed in the U.S. Non-arm's length cross-border pricing must reflect fair market value computed using one of the accepted transfer pricing methodologies. Recently, the Canadian tax system introduced rules that penalize corporations that cannot justify their transfer price with a pricing study prepared contemporaneously with the relevant transactions.

Depreciation

Under the Canadian tax system, accounting depreciation is replaced with a system that permits permissive deduction known as capital cost allowance. Under this system, the costs of depreciable property of the same class are pooled together. The system then permits a deduction

based on the value of the class at the end of the year. The deduction is normally computed on a declining balance basis but certain classes permit a straight-line deduction. The proceeds of a sale of depreciable property are subtracted from the balance of the relevant class. A negative balance at the end of year must be included in income. A positive balance after the sale of the last property in the class may be deducted from income. The following chart lists the rates associated with the more significant classes:

Class	Rate	General Description
1	4%	Buildings
2	6%	Pipelines, gas, water and heat distribution equipment
6	10%	Oil and water storage tanks, greenhouses
7	15%	Boats, ships and marine railways (but not drill ships and offshore drilling platforms that are included in Class 41)
8	20%	Most machinery and equipment
10	30%	Automobiles, gas and oil well equipment
12	100%	Computer software
13	STRAIGHT LINE	Leasehold improvements, amortized over the life of the lease
14	STRAIGHT LINE	Patents, franchises and licenses for a limited period, amortized over the life of the property
41	25%	Resource extraction property

Resource Industry

The Canadian tax system contains a system that essentially eliminates the distinction between expenses incurred on account of capital and those of a current nature in the resource industry. Similar to the capital cost allowance system, resource expenses are pooled. A positive balance of the pool at the end of the year usually permits a deduction and a negative balance usually requires that an amount be included in income.

The resource pools are called the following:

- cumulative Canadian exploration expense (CCEE);

- cumulative Canadian development expense (CCDE); and
- cumulative Canadian oil and gas property expense (COGPE).

The main reason for the division of resource expenses into three pools is to accommodate different rules for deductibility of the expenses from each class. Generally, the *Income Tax Act* defines the type of expense included in each pool and the type of income against which a positive balance in the pool may be deducted. Canadian resource pools are subject to successor corporation rules, which permit unused pool balances to be passed to a successor when a taxpayer sells all of its resource properties.

Resource based corporations may be able to take advantage of Canada's flow-through share rules that permit, in certain circumstances, unused resource expenditures to be deducted by the corporation's shareholders.

"Flow-Through" Tax Structure

Introduction

In some situations, for U.S. tax reasons, it is desirable for a U.S. investor to hold its Canadian interests through a Canadian "flow-through" entity. While an ordinary Canadian or provincial corporation would not accomplish this objective, the Province of Nova Scotia permits the creation of an "Unlimited Liability Company", which is treated for Canadian tax purposes as an ordinary corporation but which is treated in the U.S. as the equivalent of a partnership or "check the box" flow-through entity.

Nova Scotia Unlimited Liability Companies ("NSULCs") have become useful vehicles for the acquisition of a Canadian business by a U.S. investor. The following summarizes the advantages of using an NSULC, the tax treatment of an NSULC in Canada and in the U.S. and the use of an NSULC in the acquisition of a Canadian business.

Formation of an NSULC

An NSULC is formed by filing a memorandum of association with the Nova Scotia Registrar of Joint Stock Companies. The *Companies Act* of Nova Scotia permits a company to be incorporated "with or without liability" and "not having any limit on the liability of its members". The memorandum of association will state that the liability of members is unlimited. Articles of Association will provide the governing rules and share rights and restrictions.

An NSULC is a separate legal entity and, like any other company incorporated in Nova Scotia, has the capacity, rights and powers of a natural person. Shareholders of an NSULC are immune from liability for the debts and activities of the company as they would be in the case of any other company; however, shareholders are liable if the creditors of the NSULC obtain a court order for the winding-up of the company or if it becomes bankrupt. Current or past shareholders are then required to contribute to the payment of the NSULC's debts and the cost of winding-up. Shareholders who disposed of their shares more than one year before the commencement of the winding-up are not liable.

When an NSULC is used, the interposition of an ordinary limited liability company or limited partnership between the NSULC and its shareholders may eliminate the risk of liability to the shareholders.

Nova Scotia Company Law Issues

In some ways, the company law of Nova Scotia is more flexible than some jurisdictions. For example, the Nova Scotia *Companies Act* does not have a solvency test for the payment of dividends. Articles of an NSULC may typically provide that dividends are only payable out of the profits of the company, which reflects the common law rule. The general view is that this test allows the payment of dividends out of accumulated profits from prior years even if the company is in a current deficit position.

In other respects the Nova Scotia company law is less flexible. For example, unlike the corporate law of most jurisdictions, the *Companies Act* of Nova Scotia requires that a court order be obtained in connection with certain amendments of a company's memorandum of association.

Canadian Tax Treatment of NSULCs

Under the Canadian *Income Tax Act*, an NSULC is treated like any other corporation. Depending upon its particular features, it could be taxable as a private corporation or public corporation, but practically speaking it will generally be a private taxable Canadian corporation. Like other Canadian corporations, an NSULC is eligible for protection under the Canada – U.S. Tax Treaty.

U.S. Tax Treatment of NSULCs

U.S. "check-the-box" regulations provide for two types of entities: "per se" corporations and "eligible entities". Per se corporations are those that are required to be treated as corporations for U.S. tax purposes. This includes all corporations under Canadian federal, provincial and territorial law except NSULCs. Eligible entities are those that are not per se corporations. Excluded from the list of per se corporations are corporations formed under Canadian federal or provincial law if the liability of its shareholders is unlimited. Thus, NSULCs are not per se corporations because shareholders have unlimited liability. As a result, for U.S. tax purposes, an NSULC is classified as a branch if there is only one shareholder or as a partnership if there is more than one shareholder. Note that an NSULC can elect to be treated as a corporation by checking the appropriate box on its return. If it is classified as a partnership or branch, then the NSULC is treated as a flow-through entity.

In the end result, the NSULC is a hybrid entity: a corporation for Canadian tax purposes and a flow-through entity for U.S. tax purposes.

Structuring U.S. Investments in Canada

The most straightforward approach to investing in Canada is a direct investment by a U.S. resident without interposing any legal entity. If the U.S. resident has a permanent establishment in Canada it will be subject to Canadian taxation in respect of business profits attributable to such permanent establishment. If the U.S. investor is a corporation, it will also be subject to a branch tax.

A U.S. resident who pays taxes in Canada in relation to profits attributable to a permanent establishment in Canada will generally be able to claim a foreign tax credit to offset its U.S. tax in relation to such profit.

If the U.S. resident forms a Canadian corporation to invest in Canada, the corporation will be taxed as such in Canada. A U.S. shareholder of a Canadian corporation is generally not taxed on the corporation's income until it is distributed to the shareholder in some fashion. However, note that the U.S. has a system that taxes sub-Part F income, which includes certain types of passive income, of a "controlled foreign corporation".

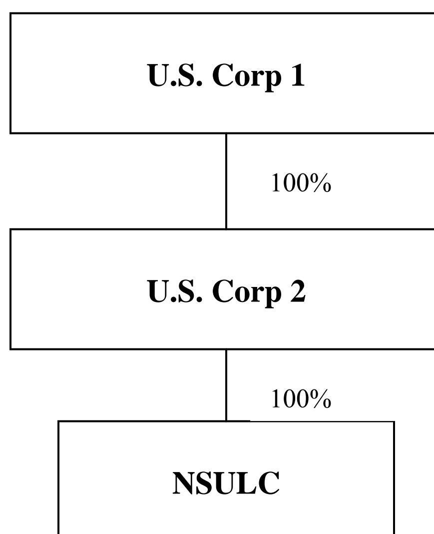
At such time as dividends are paid to a U.S. shareholder, they are subject to a 5% withholding tax in Canada. When a U.S. corporation receives a dividend from a Canadian subsidiary, it cannot deduct the dividend and it is treated as ordinary income. It can, however, claim a foreign tax credit for taxes paid by the subsidiary subject to a number of complex restrictions.

Corporations Using an NSULC to Invest in Canada

An important advantage to a U.S. corporation using an NSULC is that any Canadian source losses can be flowed through to the U.S. corporate shareholder. Also, any Canadian corporate tax will be available as a foreign tax credit to the U.S. parent.

In addition, the U.S. corporation is able to operate as if it were a branch in Canada without being subject to the branch tax. Withholding tax will be payable when profits are paid to the U.S. corporation by way of a dividend at the reduced treaty rate.

For example, the U.S. investor may be a "C" corporation, one that is taxed as a corporation rather than as a partnership. The "C" Corporation may interpose a second "C" corporation between itself and the Canadian subsidiary that is the NSULC, so that the corporate structure is as follows.



U.S. Corp 2 serves the purpose of limiting the exposure of U.S. Corp 1 to the liabilities of NSULC. The NSULC is treated as a foreign branch of U.S. Corp 2 for U.S. tax purposes but no Canadian branch tax will be payable. The two U.S. corporations can elect to file a consolidated return so that the income or losses of the NSULC flow through to U.S. Corp 1.

A "C" corporation that invests in an ordinary Canadian corporation is entitled to a "deemed paid" foreign tax credit for the underlying Canadian tax paid by its subsidiary in the year in which dividends are paid. However, there are some restrictions. For example, the credit cannot be claimed if the U.S. shareholder owns between 10% and 50% of the outstanding shares of the Canadian corporation. Such restrictions do not apply if the subsidiary is an NSULC. A direct credit is available to the U.S. corporate shareholder for taxes paid by an NSULC in the year that the Canadian taxes are paid.

Financing Issues

If the Canadian operation is to be financed with borrowed money, typically to get the interest deduction, a U.S. corporation prefers to borrow the funds and lend them to the Canadian subsidiary. If an NSULC is used, it can borrow the money needed to finance its operations and, for U.S. purposes, the U.S. parent is treated as the borrower and deemed to have paid the interest. This will enable the U.S. shareholder to deduct the interest expense and potentially also reduce its tax liability on U.S. source income. Borrowing at the NSULC level also allows the U.S. shareholder to avoid the application of the thin capitalization rules and the interest payments by the NSULC will be fully deductible in Canada. Some care has to be taken to plan around the possible application of U.S. withholding tax to interest payments by the NSULC to a Canadian resident lender.

Another approach to financing would be for the U.S. investor to lend funds to the NSULC up to the allowable limit under Canadian thin capitalization rules. Provided the interest rate approximates a market rate, the interest will be deductible by the NSULC for Canadian purposes. The interest payments, however, will not be income to the U.S. investor because this will be treated as an inter-branch transaction. Accordingly, the interest will be deductible against high Canadian corporate rates subject only to the 10% withholding tax. This has been referred to as the "poor man's double dip" because it achieves some of the benefits of a double dip without the implementation costs.

Another variation in financing is available if the Canadian subsidiary is an ordinary limited liability company and the U.S. parent does not want to convert it to an NSULC. An NSULC can be interposed between the Canadian subsidiary and the U.S. parent. The NSULC then borrows from an arm's length party and lends the money to the subsidiary. The subsidiary agrees to pay interest to the NSULC by issuing high paid-up capital shares, which are non-taxable for U.S. purposes. This achieves a deduction for the U.S. parent and for the Canadian subsidiary.

Transfer Pricing Advantage

To minimize Canadian tax, there is an incentive to set transfer prices for goods and services between a Canadian subsidiary and its parent higher on the Canadian side. If the Canadian subsidiary were an ordinary corporation and the Canada Customs and Revenue Agency reduced

the amounts paid to the U.S. parent under the Canadian transfer pricing rules, this would result in double taxation unless the IRS agreed to reduce the income inclusion for U.S. purposes.

If the Canadian subsidiary is an NSULC, any payments by it to its U.S. parent are disregarded for U.S. tax purposes; therefore, there is no risk of double taxation. In effect, the U.S. parent only has to be concerned with the Canadian rules on transfer pricing.

Acquisition of a Canadian Corporation by a U.S. Corporation

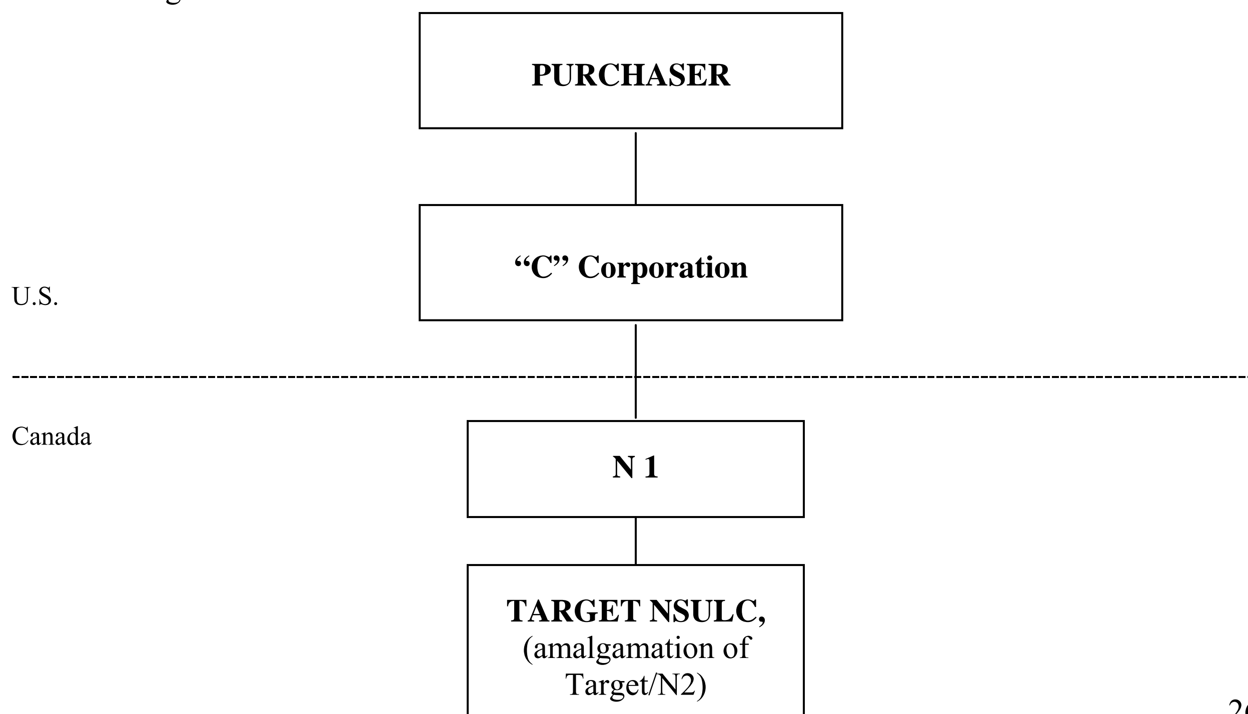
This is perhaps the most important use of an NSULC and should be considered whenever a U.S. corporation is contemplating the acquisition of a Canadian corporation.

Shareholders of a Canadian corporation ("Target") with an operating business in Canada may want to sell their shares, as opposed to the corporation's assets, for a number of reasons. For example, they may wish to obtain capital gains treatment or the corporation could be the lessee of property essential to its business. The assignment of the lease might trigger a consent clause, which would not be the case if control of the corporation changed. A U.S. corporate purchaser ("Purchaser") may want to acquire the assets of the Target to get a stepped up cost base of the assets. The use of an NSULC can meet the objectives of both parties as follows.

The Purchaser, a U.S. "C" corporation, forms a subsidiary in the U.S. as another "C" corporation. This provides a layer of liability protection and preserves the desired flow-through treatment for the Purchaser, as U.S. corporations may pay tax on a consolidated basis.

Two NSULC's ("N1" and "N2") are then formed in Nova Scotia. The Target is then continued into Nova Scotia and amalgamated with N2 to form Target NSULC. N1 is then capitalized by the purchaser using a combination of debt and share capital so as to stay within the thin capitalization restrictions on interest deductibility. N1 then proceeds to acquire the issued shares of Target NSULC.

The resulting structure looks like this:



Tax Aspects of Acquisition Structure

Canadian Tax Treatment

The continuation of the Target into Nova Scotia and its subsequent amalgamation with N2 are not a taxable events. Target NSULC inherits the cost base of the assets owned by the Target. Target NSULC could be wound up into N1 and a bump could be utilized in respect of non-depreciable property.

By establishing N1 to acquire the shares of Target NSULC, the Purchaser is able to step-up the paid-up capital of the target corporation for Canadian tax purposes because the purchase price will be reflected in the paid-up capital of N1.

Target NSULC will be a taxable Canadian corporation carrying on business in Canada through a permanent establishment in the country and will be taxable as such at the applicable corporate rates with no small business deduction.

U.S. Tax Treatment

Under the "check the box" regulations, the two NSULC's are disregarded for tax purposes so that the purchase of shares of Target NSULC is treated as a purchase of the assets of Target NSULC by the Purchaser under U.S. tax law. As a result, the Purchaser is treated the same way for U.S. purposes as if it had purchased the assets of the Target. The Purchaser gets a step-up in the cost base of the assets that it is considered to have acquired. The Purchaser is thereby able to claim depreciation on the assets on their new stepped-up basis and the cost base will be recognized upon a subsequent disposition.

Under U.S. law, the wholly-owned Canadian companies, N1 and Target NSULC, are tax "nothings" such that the U.S. parent is treated as owning the assets in Canada and carrying on business in Canada through a branch operation.

For U.S. purposes, all income, losses and foreign tax credits generated by the underlying business in Canada are considered to be the Purchaser's income, losses and foreign tax credits.

Repatriation of Funds by the NSULC

By capitalizing N1 with debt and preferred shares, the after-tax profits of Target NSULC can be repatriated to the U.S. parent by the redemption of preferred shares or the repayment of debt without incurring withholding tax in Canada. After the tax free repatriation of capital is complete, dividends may be paid to the "C" corporation subject to the 5% withholding tax.

Other Federal Taxes

Large Corporations Tax

The *Income Tax Act* imposes a "large corporations tax", which is a tax on corporate capital. The federal capital tax is being phased out and will be eliminated after 2007. Prior to 2004, it applied at the rate of 0.225% of the "taxable capital" of a corporation employed in Canada in excess of

C$10,000,000. For 2004, it applies at the rate of 0.200% of taxable capital in excess of $50,000,000.

Taxable capital is made up of share capital, retained earnings, surpluses, reserves and debt (other than accounts payable), less an allowance for investments in other corporations to ensure that the same capital is not taxed more than once. The large corporations tax obligation is reduced by the amount of surtax paid by the corporation as part of its regular income tax calculation. Therefore, profitable corporations are not generally subject to large corporations tax.

Goods and Services Tax

The federal government levies a 7% goods and services tax ("GST"). This is a consumption tax that applies at each stage of the production and distribution process. The vendor collects it on the sale price. The vendor is entitled to claim a credit for any GST paid on the goods or services acquired for the purpose of producing the product or service sold. As a result, only the ultimate consumer of the goods or service will bear the tax. The GST applies to both Canadian and non-Canadian producers who sell their goods or services in Canada, whether their products are produced within or outside of Canada.

Excise Taxes

Excise taxes at various rates are levied under the federal *Excise Tax Act* at the manufacturer's prices on specified luxury or non-essential goods such as jewellery, wines, liquor and tobacco, whether manufactured or produced in Canada or imported into Canada.

Customs Duties

The federal *Customs Act* levies duties on most goods imported into Canada at a variety of rates. Preferential rates are available in respect of imports from Commonwealth countries, imports from countries with which Canada has trade agreements and imports of specified commodities from certain developing nations. Since it came into force on January 1, 1994, NAFTA has either eliminated or will, over a period of time, eliminate duties on most items manufactured in Canada and exported to the U.S. or Mexico as well as on those items manufactured and imported into Canada from the U.S. and Mexico. The *Customs Act* provides for the repayment of duty on imported goods used in the manufacture of products in Canada for export and for imported materials used in the manufacture of goods otherwise exempt from import duties. Special dumping duties may apply to goods imported at less than fair market value in the country of origin if similar goods are made in Canada.

Other Territorial Taxes

Social Service Tax

The Yukon, the Northwest Territories and Nunavut do not levy a sales tax.

(Real Property) Transfer Tax

The Yukon, the Northwest Territories and Nunavut do not levy a property transfer tax.

Corporation Capital Tax

The Yukon, the Northwest Territories and Nunavut do not levy corporation capital tax.

Payroll Taxes

The current rate of the payroll tax in the Northwest Territories and Nunavut is 1%. The payroll tax is paid by the employer on its gross payroll before benefits. The Yukon does not levy such a tax.

Municipal Taxes

Generally, in northern Canada municipalities impose taxes on real property. These taxes are assessed annually upon the value of land and improvements owned within the municipality.

In the Northwest Territories within the "general taxation area" (being that area outside of the taxed based municipalities), the Government of the Northwest Territories imposes taxes on real property. Nunavut has adopted similar legislation to that of the Northwest Territories.

FINANCING A FOREIGN BUSINESS OPERATING IN CANADA

Introduction

A newly established business is usually funded by its shareholders, by debt, equity or a combination of the two.

Debt Financing

Capitalizing the Canadian subsidiary by way of debt may be preferable for a variety of reasons. Equity capital tends to be permanent in nature and, generally, no return has to be paid for the use of the equity capital. Debt capital, on the other hand, is usually limited in time and has an interest cost associated with the use of the capital. Furthermore, in a liquidation situation, debts (particularly if secured) will be paid out prior to the return of any equity. Except as discussed below, the subsidiary company may normally deduct interest payable on the debt for tax purposes, but dividends, being a distribution of profits, will not be deductible.

Thin Capitalization Rules

As discussed above under "Taxation", thin capitalization rules under Canadian tax law force non-residents setting up Canadian subsidiaries to provide a certain level of financing through equity rather than only debt by limiting the deductibility of interest paid to non-resident shareholders where the debt:equity ratio for the Canadian subsidiary is greater than 2:1.

Bank financing or other external debt financing may achieve debt financing while avoiding the limitations on interest deductibility resulting from the thin capitalization rules referenced above.

Debt Financing from Banks

Banks are often the most readily accessible source of debt funding. Although there are a sizable number of banking institutions authorized to carry on business in Canada, the Canadian banking system is dominated by a handful of very large domestic chartered banks that carry on branch banking operations throughout the entire country. As in the U.S., Canadian banks typically provide both operating and term financing.

Operating Loans

Operating loans are usually provided on a demand basis for day-to-day operating expenses, for the purchase of raw materials and inventory, the cost of production and the carriage of accounts receivable. The lending institution typically establishes such loans through the granting of a revolving line of credit. Operating loans are usually made by way of one or a combination of overdrafts, actual advances, letters of credit or bankers' acceptances. Typical interest rate options are based on the prevailing Canadian or U.S. prime rate, London Interbank Offer Rate ("LIBOR") or bankers' acceptance rate and can be advanced in most currencies, although Canadian or U.S. dollar loans are by far the most common.

Collateral security for operating loans typically consists of a security interest in the inventory and receivables of the borrowing company, and the amount of available credit under the operating line is customarily restricted to a percentage of the value of the inventory and receivables after

taking into account such things as the borrower's bad debts, age of receivables and obsolete inventory. As in the U.S., banks will

- attempt to obtain as much security as possible in order to reduce their exposure and will often request a charge over all of the assets, property and undertaking of a company;
- require that they be named as loss payee on any insurance policies (including "key man" insurance policies);
- seek personal guarantees from the shareholders; and
- require postponements of existing shareholder loans.

Term Loans

Term loans are advanced for a fixed period of time and are customarily used for the acquisition of capital or fixed assets by the borrower. Borrowers repay term loans over the term by an agreed schedule of payments, which the bank can accelerate only upon the occurrence of an event of default specified in the loan agreement or promissory note. Term loans are usually made by way of actual advances and interest rates on such advances can either float based on the Canadian or U.S. prime rate, be based on LIBOR or be fixed for longer periods of time through hedging contracts entered into with the bank. Collateral security usually consists of a charge on fixed assets, although the bank will frequently require a general charge on the borrower's assets, property and undertaking together with the other forms of security referred to above for operating loans.

Other Sources of Financing

In addition to the large domestic banks, borrowers may also obtain external financing from a significant number of foreign banks, many of which are based in the U.S., but which conduct commercial banking operations through branches located in one or more locations in Canada. Trust companies, mortgage brokers, capital finance companies, lease finance companies, insurance companies and other institutional lenders also conduct financing operations throughout the country.

Finally, if a U.S. company wishes to capitalize its Canadian subsidiary, for the purpose of funding an acquisition or for other corporate purposes, by using its own bank facilities or access to the markets in the U.S., there are a number of structures that have been developed to permit such cross-border financing and significantly reduce its after-tax cost of debt funding. One such structure involves the incorporation of an unlimited liability company ("ULC"), which qualifies for "check the box" treatment under IRS regulations but is treated as a corporation for Canadian tax purposes. The difference in the tax treatment of such ULC together with differences in the substance versus form doctrines in the U.S. and Canada permit monies borrowed by the ULC from U.S. banks or raised by the ULC in the U.S. markets (each with the support of the U.S. company) to be on-lent to the Canadian subsidiary (which funds the loan obligations by issuing shares to the U.S. parent company) and the interest on such monies can be deducted twice, thereby achieving a significant reduction in the after-tax cost of the debt funding. See "Forms of Business Organization – Unlimited Liability Company" above.

Equity Financing

Private Placements

The sale of equity securities or debt securities pursuant to exemptions from the prospectus requirements of Canadian securities laws is referred to as a private placement. See "Acquisition of Public Companies in Canada – Private Placements" below. This type of distribution is usually effected through brokers and investment dealers.

Public Offerings

As in the U.S., securities can be distributed to the public under a prospectus that is filed with, and reviewed by, the applicable regulatory authorities. Distributions of this kind almost always involve brokers and investment dealers. Since the fees and expenses for this type of offering tend to be substantial, this route is only suitable if large sums of money are to be raised.

INVESTING IN CANADIAN REAL ESTATE

Primary responsibility for property law rests with the provinces. In all provinces except Quebec, property law has developed through the English common law process. In Quebec, property law is governed by the Civil Code, a Napoleonic Code derivative.

There is no constitutional protection for property rights in Canada. Consequently, government authorities can expropriate property but must pay appropriate compensation. However, government expropriations are rare and generally reserved for circumstances where there is a significant public interest in the subject land and its acquisition by the government cannot be successfully negotiated. Where lands are expropriated, compensation will generally be payable at or near the fair market value of the property so expropriated. Where the parties cannot agree as to the amount of the compensation, the valuation will generally be determined by an independent tribunal.

Interests in land are generally held directly in fee simple or by leases as leasehold interests. Condominium or strata title ownership is also common throughout Canada. All provinces and territories maintain a system of public land titles registration through which interests in land are registered. In the territories, title to significant areas of land remain with the federal crown and responsibility for the administration of those lands lies with the federal government. Generally, this land remains outside the land titles registration system. Interests in such land is held by way of federal leases, land use permits or other such instruments. There are generally no restrictions on foreign ownership of Canadian land and there are generally no consents or government approvals required to buy or sell land. See "– Disclosure Requirements on Resale to the Public" below.

Investment Vehicles

Investment in Canadian real estate can be undertaken through a variety of legal structures, including:

- a partnership;
- a limited partnership;
- a co-ownership (joint venture);
- a corporation;
- a trust; or
- personal ownership.

The choice of an appropriate investment structure will be governed by various factors, including tax planning requirements, liability issues and business considerations.

Acquisitions

Real estate transactions are generally carried out as they are in the U.S., with negotiations by an agent leading up to an agreement of purchase and sale. Once the agreement of purchase and sale is signed, it is generally the responsibility of the purchaser, usually through counsel, to conduct due diligence with respect to the property being acquired, including title and zoning searches and a review of any leases and surveys of the property. The purchaser's counsel will also provide a

title opinion to the purchaser. Although title insurance is available in Canada, it is rarely utilized since the document of title is guaranteed under the land title systems in western and northern Canada. Title insurance is increasingly being utilized for leasehold interests in northern Canada.

Leasing

Ground Leasing

Property may be leased as well as purchased. One form of leasing arrangement is a long-term ground lease, in which a tenant leases vacant land and develops it. Once development is completed, the ground tenant will sublet space to office or industrial tenants, depending on the type of development. Ground leasehold interests may be bought and sold in a manner similar to fee simple property interests.

Commercial Leasing

Most commercial office and retail space and much of the standard industrial space in Canada is available only through a commercial lease. Most commercial lease transactions commence with an agreement to lease, which contains the business terms agreed upon by the parties, including the space, term, rent and any tenant inducements. Commercial leases in Canada are typically on a net/net rental basis, which requires a tenant to pay basic rent plus additional rent comprising a proportionate share of realty taxes, insurance, utilities and common area maintenance charges. In a retail lease, a tenant may also pay rent based on a percentage of its annual sales.

Residential Leasing

Residential leases are regulated by provincial and territorial legislation; in some cases, the applicable legislation will override the terms of the lease contract regardless of the intention of the parties. In some provinces, the ability of the landlord to increase residential rents is limited by provincial regulation.

Financing

Most real estate financing is arranged through institutional lenders such as banks, trust companies, pension funds, credit unions and insurance companies. Credit terms will vary from institution to institution and will be dependent on the nature of the transaction and the risks involved. Most institutions will not lend more than 75% of the appraised value of a property.

Interest rates are generally fixed for a specified period of time or variable based on the lending institution’s prime rate. The prime rate is based upon a rate announced by the central bank, the Bank of Canada, every week. A borrower may consider borrowing in other currencies and has a choice of interest rate pricing, including LIBOR and bankers’ acceptances. Certain fees, such as commitment and processing fees, are normally charged by lenders. Typically, it will be the borrower’s responsibility to pay for all of the lender’s legal and other costs in arranging property financing.

Lending institutions typically take both primary and collateral security in real property and related assets. Typical primary security includes a mortgage or charge, a debenture containing a fixed charge on real property or, in some cases where more than one lender is involved, a trust

deed securing mortgage bonds or debentures and including a specific charge over real property. Collateral security often includes assignments of leases and rents, general security agreements and personal guarantees.

Because many foreign lenders in Canada are subsidiaries of the world's major banks, they typically participate by way of syndicated loans, which are often arranged by major Canadian lending institutions.

Environmental Concerns

The owner of property has certain duties in connection with the discharge of contaminants and hazardous materials into the environment from the property. Liabilities associated with improper waste management practices can be inherited by subsequent owners of property.

A purchaser should assess the environmental risks involved in the property by inspecting the company and public records to ascertain the environmental status of the property. In many cases, a purchaser will wish to carry out an "environmental audit" of the property being purchased, which may include conducting scientific testing and technical analysis of the property. It should be noted that government officials in Canada do not "certify" that a property is free from environmental risk, and a purchaser must undertake its own investigations in this regard. Lending institutions will often require that an environmental audit of the property by obtained before advancing any funds.

See also the discussion under "Environmental Law".

Development Controls

Property development is provincially and territorially regulated, primarily at the municipal level, and municipalities typically control land use and development density through official plans and zoning by-laws. The ability of an owner to subdivide property is restricted and regulated in a number of provinces and in the territories. Development charges are also imposed by many municipalities on new developments within their jurisdiction.

Construction of new projects is also subject to provincial, territorial and municipal legislation. Building codes set specific standards for the construction of buildings and most municipalities require building permits before the commencement of construction.

Before commencing the development of any project, it is essential that all required regulatory approvals be obtained.

Disclosure Requirements on Resale to Public

Many provinces have legislation requiring the registration and distribution of a prospectus or disclosure statement where a person wishes to sell or lease or offer for sale or lease parcels of real estate to members of the public.

This disclosure document describes the material characteristics of the development of the subdivision. Exemptions often exist for commercial or industrial developments, small

subdivisions of less than five lots, for example, or sales of a large number of lots from one person to another. Significant penalties exist for the failure to comply with such legislation.

IMMIGRATION FOR BUSINESS PEOPLE

Introduction

As a general rule, a person who is not a Canadian citizen or a permanent resident must hold a valid work permit in order to work in Canada. Work permits are issued by Citizenship and Immigration Canada ("CIC"). Further, as a general rule, prior to the CIC issuing a work permit, it must receive a confirmation of employment from Human Resources and Development Canada ("HRDC"). Foreign workers may require a temporary resident visa to work in Canada; however, citizens and permanent residents of the U.S. are exempt from this requirement.

There are a number of exemptions from the requirements for work permits and confirmations of employment, particularly under NAFTA, the General Agreement on Trade in Services ("GATS") and the Software Pilot Program. These exemptions are so numerous that they create a system that is more often governed by exemptions than by the rule.

Work Permit

Under Canadian immigration law, it is the worker who must apply for and receive the work permit. The foreign worker must submit to CIC a copy of the HRDC confirmation of employment and a detailed description of the employment offer (provided by the employer). There is a non-refundable fee of C$150 for processing an application for an individual work permit.

A worker may apply for a work permit either before entering Canada, at a port of entry or from inside Canada, depending on the worker's status. Generally, temporary foreign workers must apply for a work permit before departing for Canada, although the actual work permit will be printed and given to the foreign worker at the port of entry when they enter Canada.

If the foreign worker is from the U.S., or if the foreign worker does not need a temporary resident visa to visit Canada and an exemption is available from the requirement to obtain confirmation of employment (see "Confirmation of Employment" below), the foreign worker is prohibited from applying for a work permit until his or her arrival at a port of entry.

In the following situations a foreign worker can apply for a work permit while already located in Canada:

- if the applicant or his or her parents already have a study or work permit;
- if the applicant has been working in Canada for at least three months under an exemption, other than as a business visitor, but wants a permit to do another job; or
- if the applicant has a Temporary Resident Permit that is valid for six months or more.

In assessing the work permit application, the CIC will, on the basis of the report issued by HRDC, ascertain whether the employment offer is genuine and "if the employment of the foreign national is likely to have a neutral or positive economic effect on the labour market in Canada."

Immigration officials cannot issue a work permit to a foreign national if:

- there are reasonable grounds to believe that the foreign national is unable to perform the work sought;
- the specific work that the foreign national intends to perform is likely to adversely affect the settlement of a labour dispute in progress; or
- the foreign national has engaged in unauthorized study or work in Canada or has failed to comply with a condition of a previous permit or authorization, subject to conditions.

Entry into Canada is subject to medical and security clearances, which vary according to the home country of the worker and the job sought. Any criminal record will preclude the issuance of a work permit, and the worker will be required to obtain Criminal Rehabilitation by an advance application.

The worker is expected to abide by the terms and conditions set out in the work permit. Work permits are valid only for a specified job, employer and time period. However, workers can apply to the CIC to modify or extend their work permit. An application to extend a work permit must be made at least 60 days prior to the permit's expiry. If the employer dismisses the foreign worker, he or she must return home.

Confirmation of Employment

As a prerequisite to issuing a work permit, an immigration officer will generally require a labour market opinion or a "confirmation of employment" from HRDC. An employer who wishes to hire a temporary foreign worker is responsible for having the job offer validated by HRDC.

HRDC will base its confirmation of employment on the following factors:

- whether the work is likely to result in direct job creation or job retention for Canadian citizens or permanent residents;
- 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;
- whether the work is likely to fill a labour shortage;
- whether the wages and working conditions offered are sufficient to attract Canadian citizens or permanent residents to, and retain them in, that work;
- whether the employer had made, or has agreed to make, reasonable efforts to hire or train Canadian citizens or permanent residents; and
- whether the employment of a 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.

If HRDC is satisfied that the employment offer to a foreign national will not adversely impact the Canadian labour market, it will issue a confirmation of employment to the employer and enter the confirmation of employment into a database that can be accessed by immigration officials.

The employer then generally sends the foreign worker a copy of the HRDC confirmation of employment, as well as a detailed employment offer to be presented to immigration officials upon the worker's arrival at a port of entry.

Upon receipt of the HRDC confirmation, immigration officials will decide if the foreign worker otherwise qualifies for a work permit. The confirmation process is a distinct stage from that of the work permit, and may involve lengthy application procedures. Whenever possible, individuals should attempt to qualify for an exemption from the requirement to obtain confirmation of employment as described below.

Exemptions from the Work Permit Requirement

Certain categories of workers are exempt from obtaining work permits. Individuals who meet the requirements of these categories can engage in work in Canada without a permit and are treated as visitors to Canada. The rationale for these exemptions is that the person would require entry into Canada regardless of the labour market and unemployment conditions in Canada at the time. The exemptions that relate most closely to trade and international business activities are business visitors, guest speakers and convention organizers; however, there are a number of other workers who are exempt from obtaining work permits.

Business Visitors

A "business visitor" is a foreign national who:

- purchases Canadian goods or services for a foreign entity or receives training or familiarization in respect of such goods and services;
- gives or receives training within a Canadian parent or subsidiary of the corporation that employs them outside Canada, if any production of the goods or services that results from the training is incidental;
- represents a foreign entity for the purpose of selling goods for that entity, if the visitor is not making sales to the Canadian public at large; or
- engages in international business activities in Canada without directly entering the Canadian labour market. This means that the primary source of remuneration for their business activities is outside Canada and their principal place of business and actual place of accrual of profits remain predominantly outside Canada.

Guest Speakers

Foreign guest speakers in Canada for the sole purpose of making a speech or delivering a paper at a dinner, graduation, convention or similar function, or as a seminar leader delivering a seminar that lasts five days or less, do not need a work permit.

Convention Organizers

Certain persons who are in Canada organizing a convention or meeting do not need a work permit.

Exemptions from the Confirmation of Employment Requirement

In some cases, a work permit application is required, but there is an exemption from the requirement to obtain HRDC confirmation of employment.

Examples of categories that require a work permit but not a confirmation of employment include workers who provide a significant benefit to Canada; spouses of temporary foreign workers; those who qualify for the Software Pilot Project and those who qualify for exemptions under NAFTA and GATS.

Benefit to Canada

Persons performing work that creates or maintains significant social, cultural or economic benefits or opportunities for Canadians do not need confirmation from HRDC.

Some types of entrepreneurs, intra-company transferees and other types of workers, who will provide significant benefit to Canadians or permanent residents by working in Canada do not need a confirmation of employment from HRDC.

Spouses

Spouses (including common-law partners) of temporary foreign workers can apply for a work permit without a confirmation from HRDC, provided that the principal applicant is authorized by a work permit to work in Canada for at least six months and the worker qualifies as a skilled worker in the National Occupational Classification. If these requirements are met, the spouse may apply for an open work permit, which allows the spouse to accept almost any job. The spouse's work permit will expire when the principal applicant's work permit expires.

Software Pilot Program

The Software Pilot Program was created in response to the need of employers to fill shortages in the software industry. In collaboration with HRDC, Industry Canada, and the Software Human Resource Council, CIC has developed a pilot project to streamline the entry of workers whose skills are in high demand in the software industry and whose entry into the Canadian labour market would have no negative impact on Canadian job seekers and workers. Under the Software Pilot Project, the job specific confirmation, where each applicant must individually apply for confirmation of a job offer, has been replaced by a national validation letter, which states that the following software positions cannot be filled by Canadian citizens or permanent residents:

- senior animation effects editor;
- embedded systems software designer;
- management information systems software designer;
- multimedia software developer;
- software developer – services;
- software products developer; and
- telecommunications software designer.

The national validation letter removes the delay associated with the job-specific confirmation of employment process. Note, however, that this expedited process is strictly targeted at workers entering the software sector on a temporary basis. It does not apply to individuals seeking permanent residence status in Canada.

NAFTA and GATS

The most common exemptions from the requirement for confirmation of employment used by Canadian businesses are those set out in NAFTA, traders, investors, professionals and intra-company transferees, and those set out in GATS, professionals and intra-company transferees.

The employment provisions of NAFTA are intended to assist temporary entry for citizens of the U.S., Mexico and Canada who are involved in the trade of goods or services or in an investment activity. NAFTA provisions apply exclusively to citizens of the U.S. and Mexico. They do not apply to permanent residents of those countries.

Those employees who are not U.S. or Mexican citizens and do not qualify under NAFTA may qualify as a citizen of one of the member nations listed in the GATS agreement.

GATS, developed under the auspices of the World Trade Organization, establishes world wide rules on trade and investment in services, including the temporary entry of business persons under specified sectors. More than 130 nations have ratified, or are in the process of ratifying, GATS with respect to specified sectors. Canada has agreed to the inclusion of the following service sectors in the GATS agreement: business services, communication services, construction services, distribution services, environmental services, financial services, tourism and travel related services and transport services.

Traders

A NAFTA trader is a U.S. or Mexican business person seeking to enter Canada to carry on substantial trade in goods or services with Canada. The applicant must work in a supervisory or executive capacity, or one involving essential skills.

Investors

A NAFTA investor is defined as a U.S. or Mexican business person seeking to establish, administer or provide advice or key technical services to the operation of an investment, to which the person has committed a substantial amount of capital. The applicant must work in a supervisory or executive capacity, or one involving essential skills.

Professionals

A GATS professional is one who seeks to engage, as part of a services contract, in an activity at a professional level, provided that the person possesses the necessary credentials and qualifications. There are nine accepted professions:

- engineers;
- agrologists;
- architects;

- forestry professionals;
- geomatics professionals;
- land surveyors;
- legal consultants;
- urban planners; and
- senior computer specialists.

More than 60 occupations are covered by the term professional under NAFTA.

Intra-company Transferees

The intra-company transferee category allows a foreign organization to transfer senior managers, executive employees or employees with specialized knowledge to Canada to continue employment with a branch, affiliate, subsidiary or parent of the organization. Under NAFTA, the employee must have worked for the company for at least one year within the three years prior to the application for transfer in a position that is executive, managerial or involves specialized knowledge. Under GATS, the individual must have been in similar employment for at least one year in the last three years.

Specialized knowledge is either special knowledge an individual has of a company's product or service (including research, equipment, techniques and management) and its application in international markets or an advanced level of knowledge or expertise in the organization's processes and procedures. A work permit under categories requiring "special knowledge" is granted only if the worker has unusual skills and it would be difficult to train another worker to do the work.

EMPLOYMENT AND LABOUR RELATIONS

Introduction

The regulation of employment matters in Canada is divided between federal and provincial or territorial jurisdictions. The vast majority of employment matters fall within the provincial or territorial jurisdiction although the federal government has jurisdiction in certain industries or areas such as transportation, banking, and communications.

The major pieces of federal legislation affecting employment in Canada are the *Canada Pension Plan Act*, the *Employment Insurance Act*, the *Employment Equity Act*, the *Canada Labour Code* and the *Canadian Human Rights Act*. The following discussion deals with employment relationships in the Yukon, the Northwest Territories and Nunavut. Employment relationships in these jurisdictions are governed primarily by the common law, and by one piece of federal legislation and three pieces of territorial legislation: Federally, this the *Canada Labour Code* while, in the Yukon, the *Employment Standards Act Human Rights Act* and the *Workers Compensation Act* .govern. In the Northwest Territories and Nunavut, the respective *Labour Standards Act* and *Fair Practices Act* apply as well as the *Workers Compensation Act*. .

However, each territory has its own unique legislation pertaining to employment matters that must be considered when planning businesses in Canada.

Federal Labour and Employment Legislation

Canada Pension Plan

Under the *Canada Pension Plan Act*, all employers in Canada must deduct a portion of an employee's pensionable earnings and remit it to the federal government. The employer must contribute an equal amount. There is a maximum contribution by each of the employer and the employee.

Employment Insurance

The *Employment Insurance Act* requires that all employers in Canada deduct employment insurance premiums from an employee's insurable earnings and remit it on behalf of the employee. Employers must contribute a greater amount. As with the Canada Pension Plan contributions, there is a maximum contribution by the employer and by the employee.

Employment Equity

Under the *Employment Equity Act*, all federally regulated companies must implement employment equity by removing employment barriers against designated groups and reasonably accommodating members of those designated groups.

Under the Federal Contractors Program, all companies in Canada with 100 employees or more who bid on federal government contracts for goods or services in excess of C$200,000 must implement employment equity plans that meet certain criteria.

Canada Labour Code

The *Canada Labour Code* ("CLC") applies to employment matters under federal jurisdiction. Federally regulated employers include those in industries such as interprovincial or international transportation, banking, radio or television broadcasting, grain elevators or seed mills. The CLC regulates such things as industrial relations, occupational health and safety, standard hours of work, minimum wages, vacations, holidays, various types of leave such as bereavement, illness, maternity, severance pay and the termination of employees in the federal sector. It also establishes the Canada Industrial Relations Board, which is the body responsible for adjudicating labour disputes within federal jurisdiction, and codifies labour relations in that jurisdiction.

Canadian Human Rights Act

Federally regulated employers are subject to the *Canadian Human Rights Act*, which prohibits employers from making distinctions on the basis of prohibited grounds, which include: race, national or ethnic origin, colour, religion, age, sex, marital status, family status, mental or physical disability, pardoned conviction or sexual orientation. This Act applies to various employment issues, such as differential treatment, harassment and systemic discrimination in the workplace.

Territorial Labour and Employment Legislation

Employment Standards

Employment standards legislation in the Yukon, the Northwest Territories and Nunavut establishes minimum standards in the workplace for territorially regulated employers. This legislation governs such things as the minimum wage, hours of work, overtime, statutory holidays, vacation, leaves of absence and termination. The legislation applies to almost all employees in each of the three territories respectively. It allows for the exclusion of its application to certain professions such as accountants and engineers by regulation where such regulation has been enacted. In addition, certain classes of employees, such as managers, are excluded from specific provisions.

In the Yukon, employment standards officers have a number of powers to investigate offences and enforce the *Employment Standards Act*. Similarly, in the Northwest Territories and Nunavut, labour standards officers have like powers under each of those territory's respective *Labour Standards Act*. Employers who have breached the requirements of the *Employment Standards Act* or the *Labour Standards Act* face stiff financial penalties.

Labour Relations

None of the three territories has jurisdiction over labour relations as such activity comes within the scope of the CLC. Hence, in matters relating to labour law or industrial relations, the Canada Industrial Relations Board is the body empowered to adjudicate disputes.

Human Rights

General

The Yukon, the Northwest Territories and Nunavut have each enacted human rights legislation which prohibits discrimination in employment based on certain enumerated grounds. All territorially regulated employers in the Yukon, the Northwest Territories and Nunavut are covered by the respective *Human Rights Act* in force in each jurisdiction, regardless of size.

Prohibited Discrimination and Accommodation

In each territory, an employer cannot refuse to hire or refuse to continue to employ a person, or discriminate against a person with respect to any term or condition of employment, on the basis of categories such as race, colour, ancestry, place of origin, religion, family or marital status, physical or mental disability, sex, or age. Additionally in the Yukon, discrimination is not permitted on the basis of political belief, sexual orientation, source of income or because of a criminal charge or record. In the Northwest Territories and Nunavut, there exists protection from discrimination based upon sexual orientation or based upon having a conviction for which a pardon has been granted. In the Northwest Territories, protection also exists for discrimination based upon family status or affiliation, political belief and social condition. In certain circumstances, discrimination based on a *bona fide* occupational requirement may be justified.

There is a three-step test for determining whether a *prima facie* discriminatory standard is justifiable. In order to uphold such a standard, an employer must establish:

1. That the standard that was adopted by the employer was rationally connected to the performance of the job;

2. That the standard was adopted in an honest and good faith belief that is was necessary to the fulfillment of a legitimate work-related purpose; and

3. That the standard is reasonably necessary to the accomplishment of the legitimate work-related purpose. To show the standard is reasonably necessary, it must be demonstrated that it would be impossible to accommodate that individual without undue hardship to the employer.

An employer must not discriminate or otherwise act against a person because that person complains or is named in a complaint, gives evidence or otherwise assists in a complaint or other proceeding under the *Human Rights Act* in any of the three territories.

Complaints, Investigations and Hearings

Complaints are currently filed with the Yukon or the Northwest Territories Human Rights Commissions, or the Nunavut Human Rights Tribunal. In each territory, the Commission or Tribunal may dismiss the complaint if it is determined that the complaint is frivolous or vexatious. If the Commission or Tribunal determines that the complaint has merit, attempts may be made to settle the complaint or it may be sent to a full hearing.

After a hearing, the adjudication panel in the Northwest Territories or the Yukon, or the Tribunal in Nunavut may dismiss the complaint or make an order against the employer. In addition, the panel or Tribunal may order the employer to cease the discrimination, to take steps to ameliorate the effects of the discrimination or to compensate the employee for losses and expenses resulting from the discrimination.

Workers' Compensation

Workers' compensation in Yukon, the Northwest Territories and Nunavut Alberta is a system of social insurance. Assessments are levied upon employers based on the type of industry sector in which the employer is classified. The assessments are paid into a common fund out of which benefits are paid to workers who are injured as a result a work-related illness or accident. Benefits are payable regardless of fault on the part of the employer or the worker. Moreover, the legislation bars employees from suing any other worker or any employer for injuries sustained in the course of their employment.

It is compulsory that all industries carrying on business in the Yukon, the Northwest Territories and Nunavut be registered under the *Workers Compensation Act*. The theory underlying workers' compensation is that the risk of economic loss through injury or occupational disease as a result of employment should be borne by the industry in which the worker is employed. In the Northwest Territories and Nunavut, employers are governed by the same Workers Compensation Board established under the Northwest Territories *Workers Compensation Act*, which existed prior to division of the two territories in 1999.

Assessments Levied upon Employers

The Workers' Compensation Boards of each territory use systems of classification according to industry sector to ensure a fair distribution of the costs of compensation. The basic assessment rate for each industry sector is set according to the collective liability of the sector. The cost of all claims in the industry sector is spread over all of the employers in that sector, with each employer contributing to the cost in the ratio of its payroll to that of the sector. The basic assessment rate is paid on the basis of a specified rate per C$100 of payroll. Given the wide range in applicable rates, it is very important that an employer be classified in the appropriate industry sector. The basic rate may be modified based on an employer's individual experience with its workers' claims.

Compensation

Compensation is payable for personal injury, disease, or death arising out of and in the course of employment. Compensation is also payable for occupational disease that is due to the nature of the worker's employment. In the Northwest Territories and Nunavut an entitlement adjudicator will decide whether a matter is compensable. That decision may be appealed a review committee and ultimately to the appeals tribunal. In the Yukon, a decision of an adjudicator about entitlement may be appealed to a Hearing Officer and Hearing Officer's decision may be appealed to the Workers' Compensation Appeal Tribunal.

Workplace Health and Safety

The Workers' Compensation Boards in each territory also have the authority to make regulations for the prevention of injuries and occupational diseases in places of employment. Employers are responsible for developing, implementing and maintaining programs to prevent injuries and diseases in the work place, including in the Northwest Territories, work place smoking. A breach of this responsibility may result in an order to remedy the breach, a penalty assessment being levied against the employer or prosecution of the employer or its officers and managers under the criminal justice system with possible fines, imprisonment or both.

Common Law Rules Affecting the Workplace

Entitlement to Notice of Termination

Unless dismissed for just cause, non-union employees in both the federal and provincial sectors are entitled to receive reasonable notice of the termination of their employment. An employer may provide an employee with "working notice", where the employee works until a specified date, or the employer may terminate the employee's employment immediately and provide the employee with a severance payment in lieu of the reasonable notice. An employer may provide a combination of working notice and payment in lieu of notice. Failure to give adequate notice of termination or severance pay in lieu thereof is called a wrongful dismissal.

The amount of severance must compensate the employee for the loss of salary that the employee would have earned during the notice period and reimburse the employee for costs or expenses incurred by the employee in replacing benefits that previously had been provided by the employer if the employer does not continue those benefits during the notice period.

An employee who has been given notice of termination must mitigate damages by seeking and obtaining, if possible, reasonable alternate employment. The employee must accept any reasonably comparable alternate employment offered during the notice period and thus reduce any damages suffered by virtue of the termination of his or her employment.

In determining what constitutes reasonable notice for an employee, the court considers the employee's age, position, remuneration and length of service, as well as the likelihood of the employee obtaining similar alternate employment.

The courts generally provide more notice than the minimum set out under the provincial employment standards legislation. The maximum notice period awarded by the courts tends to be 24 months. Higher notice periods are generally awarded to employees with a long service period who held senior managerial positions. Additional damages are awarded by the courts where the courts determine that the employer has acted in bad faith or unfairly dealt with the employee when terminating his or her employment.

An employee may also bring a claim for wrongful dismissal where there has not been a dismissal from employment but rather where the employer has unilaterally changed the terms and conditions of employment to such an extent that there is a fundamental change in the employment relationship. This is often referred to as a "constructive dismissal" and, in general, involves an employee being demoted to a position with less status in the organization or a reduction in salary.

The concept of reasonable notice only applies to non-union employees. For unionized employees, lay-offs and termination from employment are governed by the terms of the collective agreement.

Just Cause

If an employer dismisses an employee for just cause, the employee is not entitled to notice or severance pay in lieu of notice. It is only in exceptional circumstances that an employer may summarily dismiss an employee for a single mistake. Theft, serious dishonesty, wilful disobedience, assault, insubordination, competing with the employer's business and sexual harassment (depending on the nature of the work place) have all been found to be cause for dismissal. Incompetence can also constitute just cause, but mere unsatisfactory performance is not grounds for dismissal without notice. Economic reasons are not cause for dismissal. Whether an employer has just cause to dismiss an employee varies depending upon the specific facts of the situation.

Breach of a company policy or rule may also constitute just cause, but the employer must establish that the employee had received and knew the policy and was warned that a breach of the policy would result in dismissal. The employer must also show that the policy was reasonable and unambiguous, that the employer consistently enforced the policy and that the breach of the policy was sufficiently serious to justify dismissal.

If the employer is unable to prove just cause, the employee can to recover whatever he or she would otherwise have received had the employee continued to work during a period of reasonable notice, including salary, commissions, non-discretionary bonuses, retirement savings plan and pension contributions, the employer's portion of Canada Pension Plan premiums, the value of vested stock options, the taxable value of a company car, fringe benefits and, in some instances, short-term or long-term disability payments.

Fair Dealings with Employees

Courts now place an obligation of good faith and fair dealing on employers with respect to the manner of dismissal. Employers must be reasonable and forthright with their employees. They must not mislead or be unduly insensitive to their employees. Where a court finds that an employer acted in bad faith, it can award additional damages in the form of an extended period of notice, particularly where the employer's conduct made it more difficult for the employee to find a new job.

ENVIRONMENTAL LAW

Introduction

Any prudent corporation must incorporate environmental risks into its Canadian business plan. Assessing potential environmental issues is particularly important when a corporation is purchasing or leasing real property, or when its business involves the production or movement of toxic substances or hazardous waste.

Prior to conducting business in Canada, a corporation must assess which environmental laws apply to its activities, as the regulatory framework in Canada consists of three different levels, federal, provincial or territorial and municipal.

The provinces and territories have numerous pieces of legislation relating to environmental concerns arising from business activity. Provincial policy continues to evolve as new concerns such as cumulative effects are considered. Alberta, British Columbia and the territories all have numerous statutes regarding environmental issues.

As well, the federal government has become increasingly involved in this field with the introduction of the *Canadian Environmental Protection Act* ("CEPA") in 1988 and its replacement in 1999. CEPA was designed to prevent environmental problems by addressing environmental and human health and safety issues.

There is an additional layer to environmental regulation in Canada, as municipalities also regulate and manage the environment. Municipalities' powers include environmental powers, public health powers, planning and zoning powers, business licensing and regulation powers, dangerous substances powers and plenary powers. This includes responsibility for water and sewer systems and land use planning.

To do business in Canada, therefore, a corporation must give careful consideration to the impact regulation by the three different levels of government will have on its business activities.

Federal Regulation

Canadian Environmental Protection Act

CEPA governs activities such as cross-border air pollution, the regulation of toxic substances and the movement of hazardous waste. Pollution control is also addressed including regulation of disposal at sea, fuel regulations, vehicle emissions and international water pollution.

Import of New Substances to Canada

A "Domestic Substances List" was established under CEPA. The substances on this list are those that are currently in use in Canada. If any significant new information arises relating to substances on this list, manufacturers and importers must report this information to the government. New substances are on a separate list and are those not in current use or on the Domestic Substances List. Before importing a new substance, a corporation must notify the government and provide information about the nature of the substance, safety data, hazard identification information and its intended use.

Toxic Substances

A "Toxic Substances List" outlines management alternatives for toxic substances, including acceptable levels of concentrations for each substance, pollution prevention planning and programs for virtual elimination. This list includes such diverse substances as asbestos, lead, mercury, benzedrine and PCBs.

CEPA contains a comprehensive section on the release of toxic substances. A toxic substance is defined as a substance that in a particular quantity or concentration has a long-term harmful effect on the environment, or is a danger to human health. Numerous categories exempt particular substances from the prohibition on releases. Corporations must report unlawful releases of toxic substances and may be required to prepare an emergency plan for accidental releases.

Import and Export of Toxic Substances and Hazardous Waste

CEPA regulates the import and export of three categories of toxic substances. Substances on the "Prohibited Substances List" cannot be exported unless it is for the purpose of destroying the substance. For substances on the "Export Control List" and the "Restricted List", importers and exporters must notify the proper authorities and meet the requirements set out in the regulations.

Permits are required for the import, export and transit of hazardous waste. Hazardous waste includes dangerous goods, as defined in the *Transportation of Dangerous Goods Act, 1992*, and any substance on the "List of Hazardous Wastes". In addition to acquiring a permit, all importers and exporters of hazardous waste must provide notice to the relevant Canadian and foreign authorities of the hazardous waste shipment. For imports, there are also extensive notice provisions even where Canada is only a country of transit. The government can also require implementation of a reduction and phase-out plan for hazardous waste that is exported for final disposal.

Enforcement

Enforcement officers can inspect any place where there is a substance or activity regulated by CEPA and can seize evidence. Environmental protection orders can also be issued to halt illegal activity and require compliance with CEPA. Whistleblower protection is available, and it is an offence to dismiss, harass or discipline an employee who voluntarily reports a violation under CEPA. The maximum penalty under the Act is a fine of up to C$1 million dollars a day or five years' imprisonment.

Fisheries Act

The objective of the *Fisheries Act* is to protect fish habitat. It applies to all waters in the fishing zones of Canada, all waters in the territorial sea of Canada and all internal waters of Canada. To protect fish habitat, the Act prohibits the deposit of any deleterious substance in water frequented by fish. "Deleterious substances" is defined quite broadly as any substance that would degrade or alter the quality of the water and render it harmful to fish or fish habitat. Regulations prescribe certain substances as deleterious and also outline permitted levels for effluent discharges from industries such as petroleum refining, pulp and paper and mining. Any

industries located on watercourses must be aware of the impact their activities may have on fish and fish habitat.

Both active "depositing" and a lack of interference or a failure to prevent deposits constitute an offence. Penalties can be significant, including fines of up to C$100,000 per day.

Transportation of Dangerous Goods Act, 1992

The *Transportation of Dangerous Goods Act, 1992* prohibits any person from handling, offering for transport or transporting any dangerous goods unless the relevant safety requirements are met. Dangerous goods include several different categories of substances such as explosives, gases, poisons and nuclear substances. Each category has distinct labeling, packaging, documentation, safety and training requirements. Companies transporting dangerous goods must also develop an emergency response plan approved by the government. The provincial and federal governments have harmonized their approach to the transportation of dangerous goods. Typically provincial standards that govern the transportation of dangerous goods within the province incorporate the federal legislation by reference.

Canadian Environmental Assessment Act

The purpose of the *Canadian Environmental Assessment Act* is to ensure that the environmental effects of projects are considered before project approval to avoid or mitigate potential harm from the project. Only projects that involve federal approval, funds or land require an Environmental Assessment ("EA") under the Act. If a project is subject to both provincial and federal jurisdiction, some provinces have cooperative agreements with the federal government to assess the project under one regime. Two common triggers for EAs are *Fisheries Act* and *Navigable Waters Protection Act* approvals for work near or in bodies of water.

There are several levels of assessment that may be required, ranging from self-assessment to a comprehensive assessment. The extent of the assessment depends on the scope of activity and the type of area affected. Projects proposed for more ecologically sensitive or more populous areas will require a more extensive review. Currently, almost all EAs are screening level EAs, which do not require an in-depth review. However, as more EAs are required, the scope of federal environmental assessment requirements will become clearer.

Territorial Regulation

Yukon Environmental Legislation

Environment Act

For corporations, some of the relevant aspects of the *Environment Act* relate to approvals, the release of contaminants and the regulation of special waste and hazardous waste. Any person undertaking a development or activity must obtain a permit before construction or abandonment of the project. The permit application requires extensive information about the nature of the proposed activity and plans for addressing its impact on the environment.

The release of contaminants in a manner contrary to the Act is prohibited, and any release above the prescribed amounts must be reported. In addition, all spills of hazardous substances,

pesticides, contaminants or special waste must be reported. The person in charge of the substance has a duty to mitigate the effects of any spill.

The Act prohibits disposal of special waste without a permit and prohibits transportation of special waste except in a manner consistent with the Act. Special waste is any waste that requires special handling, storage or destruction and is prescribed as special waste in the regulations.

A risk assessment may be required prior to the release of hazardous waste and outlines detailed restrictions for the use, storage and disposal of pesticides.

Yukon Waters Act

The federal *Yukon Waters Act* prohibits the deposit of waste in a waste management area or in a place where the waste products may enter the waste management area. Waste is defined as any substance that degrades water quality in a manner that is detrimental to the use of the water by people, animals, fish or plants. Unlawful depositing of waste is an offence. To be able to deposit waste, a corporation must obtain a license from the Yukon Water Board.

Northwest Territories Environmental Legislation

Like CEPA and the B.C., Alberta and Yukon environmental acts, the *Environmental Protection Act* takes a preventive approach. It focuses on prohibiting the release of substances that would have an adverse effect on the environment.

The *Northwest Territories Waters Act*, a federal act, also addresses environmental matters. This Act mirrors the *Yukon Waters Act* in its regulation of the depositing of waste into waste management areas.

Nunavut Environmental Legislation

Nunavut has adopted the Northwest Territories' environmental legislation, although the Nunavut Land Claims Agreement contains several provisions to environmental matters and should also be consulted when doing business in most areas of Nunavut.

Other

The *Arctic Water Pollution Prevention Act* is federal legislation of which corporations conducting business in the Canadian North must be aware. The objective of this Act is to address developments relating to the exploitation and transportation of natural resources in the Arctic while ensuring that the welfare of the Inuit and other inhabitants of the North are maintained. It prohibits the deposit of waste except in a manner outlined in the regulations. For any work on the mainland or islands in the Arctic, the Governor-in-Council may require the person to provide a copy of plans and specifications relating to the work. In addition, the Governor-in-Council may order modifications or may prohibit the construction of the work. The Act also provides the government with the authority to regulate shipping, in particular ship specifications and navigation requirements.

Contaminated Land

Redevelopment of contaminated land is one of the most difficult environmental issues faced by landowners in Canada. Contaminated industrial sites must be cleaned up prior to redevelopment. A draft policy for the management of risks at contaminated sites in Alberta was released in 2000. Several other provinces have issued similar guidelines. British Columbia has adopted the *Contaminated Sites Regulation*, which provides for regulations and the establishment of a registry system in respect of contaminated sites. The approaches to contaminated land taken by the different provinces and territories continue to evolve. It is hoped that in the future a universal approach will be adopted. Guidelines, though imprecise, continue to be common and those responsible for clean up face uncertain obligations. As a result, it is important for purchasers to negotiate some level of clean up or warranty about the condition of the property in their purchase agreements.

Environmental Duties and Liabilities of Directors and Officers

Directors and officers of corporations face personal liability for causing or permitting harm to the environment under several environmental statues in Canada. Moreover, a director or officer can be personally prosecuted or named in statutory orders for the protection or restoration of the environment.

Under CEPA, an officer, director or agent who “directed, authorized, assented to, acquiesced in or participated in the commission of an offence” is guilty of the offence, whether or not the corporation is prosecuted. It is not clear whether active and passive conduct amounts to assent or acquiescence; however, it is clear that if the person had knowledge of the impugned activity, he or she will be liable. Under CEPA, every director and officer of a corporation is also responsible for taking reasonable care to ensure that the corporation complies with CEPA and its regulations as well as all orders and directions imposed by the federal Minister of the Environment. CEPA expanded the liability of directors from the previous legislation to increase personal exposure to penalties with the intent that personal penalties would induce corporate decision-makers to address environmental matters systematically and forthrightly. The provincial environment acts have very similar provisions.

Officers and directors may avoid personal liability by establishing the defence of due diligence. The threshold for establishing the defence differs for any given environmental offence. To be able to raise the defence of due diligence, directors should consider taking several steps. Directors should establish a pollution prevention system for the corporation. As well, directors should ensure that this system meets industry practices and complies with environmental laws. Directors should also direct officers to report any substantial non-compliance with the system in a timely manner. Directors are justified in placing reasonable reliance on reports provided to them by officers; however, if these reports raise concerns, or provide notice that the system is not working effectively, directors must take corrective measures immediately. The benefits of creating an environmental management system outweigh the costs, as such a system maximizes the directors’ and officers’ ability to defend against environmental actions that can arise regardless of how advanced the corporation’s pollution controls are.

Corporations in Canada are actively seeking methods to improve their environmental systems. Some of the tools for identifying problems and developing solutions include environmental

audits, training programs, the development of corporate policies and extensive reporting structures. As well, many corporations in Canada have established work committees to oversee their environmental management system.

Environmental Liabilities

There are three types of potential environmental liability of which corporations doing business in Canada should be aware:

- regulatory offences;
- administrative orders and penalties; and
- civil action.

Regulatory Offences

Prosecutions of individuals and corporations for violations of environmental legislation have risen dramatically in Canada. Legislative amendments have also increased the penalties for such offences. Fines of up to C$1 million or more for each day the offence occurs can be imposed. Moreover, individuals responsible for the offence can be imprisoned for up to five years.

Regulatory offences are generally strict liability offences, which only require the prosecution to show that the prohibited act was done; intent to commit the crime does not have to be proven. As discussed above, directors or officers may raise the defence of due diligence when charged with an environmental offence. As a result, the accused can avoid liability by proving that he or she took all reasonable care, for example by establishing due diligence through proof of an effective environmental management system.

Administrative Compliance and Enforcement Mechanisms

Canadian government authorities can utilize several different tools to ensure compliance with environmental legislation. If a person does not comply with a particular order, he or she may be prosecuted.

Reporting Obligations

Legislation, as well as the terms and conditions of a license or permit, often include reporting obligations for the operation of sites and facilities. Spills or contaminations, under most legislation, must be reported when they are likely to cause adverse effects or are out of the normal course of operations.

Inspections

Inspections are another tool utilized to ensure compliance with environmental obligations. Although powers vary under the different legislation, inspectors generally are authorized to enter premises, investigate possible statutory violations, verify compliance, identify problem areas and ensure proper use of pollution-control equipment. Inspectors may also conduct tests, take samples and interview and question employees and management. Inspectors may lay charges against the corporation and individuals directly involved in the offence.

Orders

Government authorities prefer to work cooperatively with corporations and encourage corporations to voluntarily undertake the necessary measures. However, if a corporation refuses to take voluntary action, the government has several different orders that it may issue.

There are numerous types of orders that may be issued against a corporation, ranging from termination of specified activities to a clean-up order. A clean-up order may be issued to the holder of a permit even if that holder did not cause the contamination. Corporations that are considering buying property in Canada or acquiring an interest in real property should be aware of this potential obligation. Such orders are usually issued by senior officials but may be appealed to a quasi-judicial board or court of law.

Officials may also issue a control order, requiring a designated party to take action to prevent the illegal discharge of contaminants. This may include monitoring obligations or a change in operational procedures.

Another type of order that may be issued is a stop order, which requires immediate compliance on the part of the person served with the order. These orders are used less frequently, as usually the issuing authority must have a reasonable belief that the release of a contaminant is an immediate danger to human health.

Preventive orders may also be issued. These require a corporation to minimize or prevent environmental damage. The issuing authority must have reasonable and probable grounds and such orders are generally subject to appeal.

In addition, remedial orders may be issued requiring restoration and clean-up of the land. These are often utilized in emergency situations.

As noted above, these orders may be issued to a person who is not responsible for the environmental damage. Government authorities have discretion to impose such obligations and may consider factors such as when the site became contaminated, whether the contamination was disclosed to the purchaser and whether the subsequent owner contributed to the problem. Although several owners may be responsible for the environmental damage, the government has the power to find one person solely responsible for the cost of clean-up. This is often referred to as “deep pocket” liability and corporations should note that this might include liability for directors, officers and employees, as well as lenders in possession and receivers and trustees in possession or control.

In the past, the government has not made extensive use of orders.

Ticketing

Administrative-monetary policies (“AMPs”) are another method governments utilize to ensure compliance with environmental legislation. These sanctions are for less severe breaches and were first introduced in Alberta. The objective of AMPs is the same as an administrative order: to encourage compliance and penalize non-compliance. AMP schemes generally involve a notification procedure, which details the violation and penalty, and an administrative review of the offence.

Civil Liability for Environmental Harm

In addition to actions that can be taken pursuant to legislation, Canadian law also allows personal recovery for damages. There are four potential claims that can be brought to recover damages of an environmental nature.

Negligence

Where a person's activity causes damage to another person, the person suffering the loss may be entitled to compensation. To recover, the person must show that the person causing the damage owed them a duty of care and failed to meet the relevant standard of care. Typically, such an action is brought where a person mishandles contaminants and damages an adjoining landowner's property. In such a situation, the person is responsible for the cost of restoring the adjoining owner's property.

Strict Liability

Where a person allows a dangerous substance to escape from his or her property and injure the lands of another, the resulting damage is compensable even if the person exercised reasonable care to prevent the escape. For example, a company that stores a large quantity of industrial chemicals may be liable where its chemical handling practices result in contamination of groundwater on the adjoining land, even if its handling practices are reasonable.

Fraud and Deceit

If a purchaser can establish that the vendor made false statements, and that it knowingly concealed a defect or failed to disclose a latent defect that is a potential hazard to occupants, the vendor may be liable in fraud or deceit. For example, a company that does not disclose its knowledge of contamination where the company warrants that the land is not contaminated may be liable for misrepresentation or deceit. As a result, the vendor may be responsible for compensating the purchaser for any damage it suffers as a result of the contamination.

Nuisance

A person whose use and enjoyment of land is unreasonably interfered with by the actions of another may bring an action in nuisance against the person causing the interference. Some examples of nuisance include complaints of interference from toxic fumes, unpleasant odours or excessive noise. A person that shows that their enjoyment of the property has been substantially and unreasonably interfered with may recover damages for any loss suffered.

There are several additional areas of civil liability, such as trespass or breach of statute. In Canada, civil action has not been as aggressively pursued for environmental problems as it has been in other jurisdictions such as the U.S. However, the use of civil actions has increased in recent years in Canada as citizens take steps to address environmental concerns. Therefore, corporations must carefully consider any potential civil liability arising out of their Canadian business activities.

Statutory Cause of Action

Some Canadian legislation specifically provides for or creates a private, civil cause of action. For example, under the British Columbia *Waste Management Act*, a current owner of Land may sue former owners of the land for recovery of costs to clean up contamination caused by the former owners. In addition, under the Canadian *Fisheries Act*, commercial fisherman has a cause of action against third parties for damages cause to a fishery by the deposit of any deleterious substance.

ACQUISITION OF PUBLIC COMPANIES IN CANADA

Introduction

The acquisition of equity interests in Canadian companies is governed by two sets of requirements: corporate law and securities regulatory requirements, including the rules imposed by stock exchanges. These requirements affect the way in which share acquisitions are structured.

Other requirements, relating to the threshold issue of whether one company will be permitted to acquire an equity interest in another as a matter of government policy, are set out in the *Investment Canada Act* and the *Competition Act.* See "Regulation of Investment in Canada" above.

The statute under which the target company is incorporated sets out the corporate law requirements governing its affairs. As discussed above under "Forms of Business Organization", companies can be incorporated federally under the *Canada Business Corporations Act* or under the similar legislation of a province or territory.

In Canada, there is no federal securities regulation; instead, each of the provinces and territories has enacted its own securities legislation. While these statutes are different, many of them are similar in material respects. Each province and territory has its own securities commission or other authority with jurisdiction over securities transactions having a connection to its jurisdiction. Despite the existence of different statutes and multiple regulatory authorities with overlapping jurisdictions, there is an emerging trend toward the harmonization of provincial securities laws.

The securities of Canadian public companies are principally listed on one of two exchanges, the Toronto Stock Exchange ("TSX"), the senior capital market, and the TSX Venture Exchange, the junior capital market. Although the listing requirements for these exchanges differ, the rules regulating the activities of listed companies are similar. Recently, the TSX has published for public comment a number of proposed amendments to the rules governing listed companies and significant changes may result.

If the target company is privately held, the regulatory framework governing the acquisition of its equity is generally simpler than if it is a public company. The following discussion applies to acquisitions of public companies that have a listing on the TSX.

Private Placements

In a private placement, an investor negotiates to acquire a treasury issue of securities from the target company. This investment may be intended to provide the investor with an initial interest in the target company after which further treasury investments or a tender offer or merger may follow. An investor in these circumstances should consider the regulatory requirements that may apply to subsequent acquisitions of this type. See "Related Party Transactions" below.

Requirement for Stock Exchange Approval

A company listed on the TSX is required to provide the TSX with advance notice of a proposed private placement and obtain TSX approval prior to the issuance of any of its listed securities or securities convertible into listed securities. In considering whether to give its approval, the TSX applies its published private placement rules, considering in particular the size of the issue and any proposed discount to the current trading price.

Size of Issue

The size of the private placement, when added to all previous private placements within the prior six-month period, must be limited to not more than 25% of the target company's undiluted outstanding share capital.

In circumstances where the proposed size of the private placement exceeds the 25% threshold (or in certain other cases where non-arm's length parties are involved or the TSX otherwise considers it appropriate), the TSX will require shareholder approval of the transaction, generally by a simple majority vote. This may significantly delay the completion of the transaction, since it typically takes at least 60 days to convene a shareholders' meeting. However, the TSX has adopted a working policy of allowing a company to meet any shareholder approval requirement by obtaining written consents to the proposed transaction from the holders of more than 50% of the outstanding voting shares, as long as such shareholders have no different interest in the transaction than the other shareholders.

Discount to Trading Price

The amount of the discount permitted by the TSX depends on the market price of the target company's shares. The permitted discount is based on the closing price of the target company's shares on the day before notice of the proposed private placement is given to the TSX and ranges from 15% (for share prices above C$2.00) to 25% (for share prices of C$0.50 or less).

In the course of negotiations regarding a private placement, a potential investor often finds that the stock price of the target company increases beyond what would be expected based on its business activities and prospects. This often suggests that news of the potential investment is "leaking" into the market. Given the TSX's maximum permitted discount rules, the effect of this may be that the private placement cannot be priced at the level intended by the investor. The TSX has generally adopted the practice of providing "price protection" where requested by a target company. In these circumstances, a target company involved in advance negotiations with an investor advises the TSX of this in writing on a confidential basis. The TSX will generally confirm that the transaction price may be based on the closing market price of the target's common shares the day before the request for price protection is made.

Warrants

The TSX will generally allow a listed company to attach warrants to purchase additional shares to a private placement of common shares, as a "sweetener" or inducement to the investor to make the investment. Under TSX rules, a company can issue no more than one warrant for each common share issued in the private placement and the exercise price for the warrants must be at

least equal to the undiscounted market price of the company's common shares. The exercise period for the warrants cannot exceed five years from the date of the private placement.

Prospectus Exemption

A target company issuing shares must comply with the prospectus requirements of applicable securities legislation unless an exemption from such requirements is available. The British Columbia, Alberta and Ontario securities commissions have recently implemented a new exemption for distributions to an "accredited investor", which includes a corporation with net assets of at least C$5 million. In general, most Canadian securities legislation also provides an exemption for investments of a minimum monetary amount, which varies between jurisdictions. In British Columbia and Alberta the amount is C$97,000. While there are numerous other exemptions, the accredited investor exemption and the minimum investment amount are the ones most typically used in transactions involving significant investments.

Resale Restrictions

There are restrictions on the resale of securities acquired under an exemption from the prospectus requirements of Canadian securities legislation. In very general terms, these restrictions prohibit the resale of the securities for a specified period (four months or one year, depending on the status of the issuing company) without the filing by the seller of a prospectus in connection with the resale. Although the seller can resell the securities during the hold period to another investor under a private placement exemption, including the minimum investment amount and accredited investor exemptions, the purchaser will inherit the hold period resale restriction. This tends to reduce the price a purchaser would pay for such securities.

Takeover Bids, Private Purchases and Mergers

The acquisition of a controlling interest in, or all of, the outstanding equity of a target company can be effected in three ways:

- by a tender offer, referred to in Canada as a "takeover bid";
- by private purchases from existing shareholders; or
- by a merger, usually effected by a statutory amalgamation or arrangement.

Generally, stock exchange approval is not required for takeover bids, private purchases or mergers unless the transaction involves the issuance of shares of a listed class, although it is necessary to advise the TSX of a pending takeover bid or merger and provide it with copies of all relevant documents.

Takeover Bids

General

A takeover bid is an offer to purchase voting or equity securities made directly to the holders of the securities where the securities offered to be purchased, together with the securities held by the bidder, constitute 20% or more of the target's outstanding securities of that class. In light of this definition, an investor's ability to make acquisitions by way of market purchases is restricted

once the 20% threshold is crossed. Unlike a merger, the approval of the target company is not required for a takeover bid and offers are frequently made on a "hostile" basis.

Canadian securities laws set out various requirements that apply to takeover bids, including:

- a bidder must prepare and send a takeover bid circular to the target's shareholders;
- the offer contemplated by the circular must remain outstanding for at least 35 days;
- within 15 days after the date of the offer, the directors of the target company must issue a directors' circular containing prescribed information; and
- the directors' circular must include a recommendation of the directors to accept or reject the bid (or a statement that no such recommendation can be made, along with the reasons no recommendation is being made).

Under Canadian securities legislation, it is possible to commence a takeover bid by a newspaper advertisement (similar to the way U.S. rules permit a tender offer to be commenced), provided that the takeover bid circular is then sent to the target's shareholders within two business days after the target provides a list of its shareholders to the bidder.

If a takeover bid is being made on a friendly basis, the bidder will often negotiate "lock-up" agreements with major shareholders under which the shareholders agree that they will tender their shares to a bid to be made by the bidder on specified terms. It is also common for a bidder to attempt to negotiate a "transaction support" agreement with the target company in these circumstances. Under such an agreement, the target would agree not to solicit competing offers and otherwise support the completion of the bid. It is common for a transaction support agreement to include a "break fee" payable by the target to the bidder if the transaction is not completed in certain circumstances. Canadian courts have generally upheld break fees, provided they are reasonable in amount. However, institutional investors have recently objected to several major transactions on the basis that the amount of the break fee had effectively discouraged competing offers.

The consideration offered for a target's shares under a takeover bid can be cash, shares of the bidder (or an affiliate) or both. If the consideration includes shares of the bidder, the takeover bid circular must include prospectus-level disclosure about the bidder and pro forma financial statements of the bidder reflecting the completion of the transaction.

Shares of the bidder will generally only be attractive to the target's shareholders to the extent that they may be easily resold. Since Canadian securities legislation generally restricts the resale of securities of a company that is not a Canadian public company, the shares of many U.S. issuers are not appropriate currency in takeover bids. One solution that has gained widespread acceptance in the market is for the U.S. issuer to incorporate a Canadian subsidiary that offers "exchangeable shares" of its issue as consideration under the bid. See "Exchangeable Shares" below.

Squeeze-outs of Minority Shareholders

Under the Canadian corporate law governing target companies, a bidder that acquires at least 90% of the outstanding shares for which the bid is made is generally entitled to "squeeze out" the remaining shareholders who did not accept the offer. Since these provisions constitute an

expropriation of a person's property without the person's consent, Canadian courts have insisted that the requirements for reliance on these provisions be strictly followed by the bidder. A squeeze-out can also be affected by way of a second-step amalgamation or arrangement. See "Mergers" below.

Hostile Takeover Bids

If a takeover bid is made on a hostile basis, more complicated issues can arise to the extent that the management of the target takes defensive measures in response. However, Canadian securities commissions have expressed the policy view that takeover bids "play an important role in the economy by acting as a discipline on corporate management and as a means of reallocating economic resources to their best uses". Accordingly, defensive tactics that effectively deny shareholders the right to make an informed decision and frustrate an open takeover bid process will be carefully scrutinized by the commissions and, if found to be abusive, enjoined.

As in the U.S., many Canadian public companies have adopted shareholder protection rights plans or "poison pills". Most of these plans now contain a "permitted bid" provision under which a bid that meets certain requirements, such as remaining open for consideration by shareholders for a certain period of time, will not trigger the pill. In hostile bids, the operation of a poison pill is typically the object of significant dispute between the bidder and the target's management. Unlike in the U.S., where the arena for resolving these disputes is generally the courts, in Canada most fights over poison pills occur before provincial securities commissions. Canadian securities commissions have consistently indicated that poison pills should be intended and will only be permitted to serve the purpose of allowing the directors of a target company to conduct an auction or other process for the sale of the company once a bid has been made. As such, the commissions will generally only allow a poison pill to remain in effect for a certain period of time. Once it has served its purpose, by enabling the directors to generate competing bids or to determine that there is no prospect for another bid, the directors of the target company must waive the operation of the poison pill and let the shareholders consider the bid that has been made.

Private Agreement Purchases

A person can acquire a significant equity interest in a target company by purchasing shares privately from existing shareholders. Provided that the purchases are made from no more than five shareholders in total and the purchase price for the shares is no more than 115% of their market price, such purchases are exempt from the takeover bid circular and related rules described above under "Takeover Bids".

Mergers

In Canada, mergers are generally implemented as either an "amalgamation" or an "arrangement", the two transaction structures contemplated by most Canadian corporate legislation. Arrangements, in particular, are very flexible and can typically be structured to achieve virtually any intended result.

A merger requires the agreement of the acquiror and the target company and must be approved by the shareholders of the target company by a supermajority of the votes cast at a shareholders' meeting called to consider the transaction. Corporate legislation generally provides that

shareholders may exercise dissent and appraisal rights if they do not vote in favour of the transaction at the meeting. Shareholders' meetings must be called and held in accordance with the requirements of corporate and securities legislation. The effect of compliance with these requirements is that, typically, the shareholders' meeting is held 60-90 days after the acquiror and target have agreed to the transaction.

While a number of factors are relevant to the selection of a transaction structure, acquirors often prefer mergers to takeover bids because of the lower level of shareholder support required to successfully conclude the transaction by acquiring all of the target company's outstanding equity. As noted, with a takeover bid a 90% acceptance (or tender) level is required to ensure a squeeze-out, whereas a merger generally requires only 66⅔% to 75% voting support, depending on the applicable corporate statute. On the other hand, a takeover bid can often be successfully concluded before a shareholders' meeting could be convened to consider a merger. Non-Canadian acquirors should also consider tax and other relevant cross-border issues that may influence the choice of a transaction structure.

Depending on the transaction structure and the jurisdiction involved, the governing corporate legislation may require court approval of a merger. The court considers whether the proposed transaction is fair to the shareholders of the target company. In making this determination, the court is generally influenced by the level of shareholder approval obtained at the shareholders' meeting held to consider the transaction. The court is also influenced by the existence of a fairness opinion from an investment dealer, which the board of directors of the target company usually obtains.

Consequences of Certain Ownership Thresholds

Reporting

A person that acquires more than 10% of the outstanding common shares of a target company becomes an "insider" of the company under Canadian securities legislation. There are a number of consequences of this status. An insider must file reports of changes in its holding of securities and may not purchase or sell securities while in possession of material undisclosed information about the company or "tip" another person about the existence of such information.

In addition, a person that acquires more than 10% of the outstanding common shares of a target company must promptly issue an "early warning" press release and file a report of the acquisition within two business days. Subsequent acquisitions of each additional 2% or more of the outstanding shares must be announced and reported in the same way.

Dispositions

A person that acquires more than 20% of the outstanding common shares of a target company becomes a "control person" with respect to the company. As a consequence, the person's ability to resell the securities will be subject to more significant restrictions under applicable securities legislation.

Related Party Transactions

Rule 61-501 of the Ontario Securities Commission (which applies to every listed company on the TSX and the TSX Venture Exchange) sets out various requirements that apply to transactions, including private placements, takeover bids and mergers, between a company and any significant shareholder. These requirements include:

- the preparation of a formal valuation of the target's shares by a qualified independent valuer and the communication of the valuation to the target's minority shareholders;
- in the case of a private placement or merger, the approval of the minority shareholders at a shareholders' meeting; and
- an enhanced level of public disclosure.

Exchangeable Shares

Shares of an acquiring company are frequently the "currency" used to acquire the shares of a Canadian target company whether the acquisition is made by a consensual take-over bid or a plan of arrangement or amalgamation. If the acquiring company is a Canadian company, the exchange of shares can occur on a tax-deferred basis. However, if the acquiring company is a U.S. company, the "roll-over" provisions of the Canadian *Income Tax Act* do not apply and the shareholders of the Canadian target company realize an immediate taxable capital gain on the exchange of shares. This can be burdensome to Canadian shareholders who may not have the cash to meet their tax obligations. The exchangeable share structure was developed to allow the shareholders of the Canadian target company to defer the realization of a capital gain on the disposition of their shares.

Exchangeable shares are issued by a Canadian subsidiary incorporated to facilitate the acquisition. Since a Canadian corporation issues the exchangeable shares, the rollover provisions of the *Income Tax Act* apply and the taxable capital gain is deferred until the holder elects to exercise the exchange right. The exchange right entitles the holder to acquire the shares of the U.S. parent company based on a predetermined formula.

In conjunction with the granting of the exchange right, the U.S. parent company reserves to itself or one of its subsidiaries a call right that can be exercised:

- after the passage of a predetermined period of time (e.g., seven years);
- when the number of outstanding exchangeable shares falls below a set threshold;
- whenever a holder of exchangeable shares purports or is deemed to exercise the exchange right; or
- if the U.S. parent company is the subject of a take-over bid or other business combination transaction.

In each case, the purchase price payable on exercise of the call right is payable only by the delivery of shares of the U.S. parent. In order to avoid material adverse tax consequences to the Canadian subsidiary, it is fundamentally important in the exchangeable share structure that the call right is exercised whenever a holder of exchangeable shares purports or is deemed to exercise the exchange right.

While the exchangeable shares are outstanding, they are intended to mirror the economic and voting rights of the U.S. parent company shares. Consequently, whenever a dividend or other payment is made by the U.S. parent, the same dividend or other payment is made by the Canadian subsidiary that issued the exchangeable shares. To provide the holders of the exchangeable shares with equivalent voting rights, the U.S. parent must issue to a trustee a class of special voting stock that has attached to it the number of votes equal to the number of shares of the U.S. parent company issuable in respect of the then outstanding exchangeable shares.

Although the exchangeable share structure can effectively achieve its tax deferral objectives, it can be expensive to implement and maintain and is not necessarily suitable for all Canadian acquisitions. Furthermore, the effectiveness of the exchangeable share structure has been called into question by recently proposed amendments to the federal *Income Tax Act* and significant consultation is required to properly determine whether an exchangeable share transaction is suitable for a specific acquisition.

ABORIGINAL TITLE AND RIGHTS

Introduction

Aboriginal groups, and matters involving their constitutionally protected rights, play a much more prominent role in northern Canada than they currently do in the south. This section provides a brief introduction to the issue, and describes some of the agreements that have been entered into with aboriginal groups in Nunavut, the Northwest Territories and the Yukon in an effort to clarify ownership of and rights to use lands and resources, and the land management processes that will be applied to make decisions about resource development in the North.

Aboriginal peoples make up a significant proportion of the population in Canada's north — approximately 84 percent of the population in Nunavut, 48 percent in the Northwest Territories and 25 percent in the Yukon. From a purely demographic perspective, aboriginal peoples are significant players in the development of policies and legislation in the North.

In addition, aboriginal peoples in the North have rights which enjoy special status under Canada's constitution. Under section 35 of the *Constitution Act, 1982*, the aboriginal and treaty rights of Canada's aboriginal peoples are "recognized and affirmed". The Supreme Court of Canada has interpreted this to mean that those rights cannot be infringed by government unless government can meet a stringent test for justification of the infringement.

Aboriginal rights are those common law rights of an aboriginal group which the group holds as a result of their traditional use and occupancy of lands and resources in their traditional territory. Treaty rights are those rights which are provided for in agreements between aboriginal groups and the Crown. Treaties in the North fall into two main categories — historic treaties, or those negotiated prior to 1930, and modern land claims agreements, which have been negotiated since the early 1970s and which continue to be negotiated today.

Companies doing business in the North need to take aboriginal and treaty rights, and the aboriginal groups who hold those rights, into account. In areas where modern land claims agreements have not been negotiated — primarily the southwest region of the Northwest Territories and the southeast region of the Yukon — the common law aboriginal rights and rights under historic treaties of the aboriginal groups in the area impose obligations on government to consult with the aboriginal groups in respect of activities that may affect their aboriginal rights. In areas where modern land claims agreements have been concluded, those agreements typically set out detailed land management regimes which govern the decision-making processes developers must follow in seeking approvals for their projects. Modern land claims agreements are in place in all of Nunavut, the north of the Northwest Territories and most of the Yukon.

Aboriginal Rights and Title in the North

Over the past 30 years, Canadian courts have begun to recognize and define the rights that aboriginal groups hold by virtue of their identity as aboriginal peoples and by virtue of their traditional use and occupancy of lands and resources dating back prior to contact with European settlers. Specific aboriginal rights have been recognized by courts in the context of litigation over hunting and fishing and other uses of land and resources. The courts have also recognized that aboriginal groups may be able to establish a form of title to land, known as aboriginal title, in certain circumstances. The courts have emphasized that aboriginal rights and title may vary

from one group to another depending on how they used lands and resources, and therefore must be determined on a case by case basis. Court cases have provided guidance on the tests aboriginal groups must meet to prove the existence of aboriginal rights or aboriginal title.

Although aboriginal rights enjoy legal protection under Canada's constitution, the courts have recognized that those rights are not absolute, and that governments, acting in the public interest, may limit or restrict the exercise of those rights. However, to ensure that aboriginal rights are protected, the courts have developed a legal test that governments must meet to demonstrate that any infringement of an aboriginal right is justified. Key components of that justification test include consultation with the affected aboriginal group, and accommodation of their interests in governmental decision-making.

The Duty to Consult

Substantial case law has developed in recent years focussing on the role of consultation with aboriginal groups in resource development decision-making. As noted above, government must show that it has consulted with affected aboriginal groups in order to demonstrate that any infringements of the groups' aboriginal rights is justified. The courts have held that the duty may apply even where rights have only been asserted, but not yet proved in court. In such cases, if there is a reasonable possibility that aboriginal rights may be affected, consultation is necessary.

Where a court finds that consultation obligations have not been adequately discharged, the implications can be significant for the private companies whose activities have prompted the need for consultation. Any authorizations or approvals granted by government without satisfying consultation obligations are vulnerable to legal challenge and have been quashed in past decisions and remitted to the responsible Ministers for reconsideration. In most cases, the remedies granted are aimed at encouraging proper consultations with aboriginal groups.

In light of the uncertainties surrounding the scope of aboriginal rights potentially affected, the ability of governments to carry out the necessary consultations and the potential impact on project timelines, developers in the North typically consult directly with affected aboriginal communities about their projects and in appropriate circumstances enter into benefits agreements with those communities aimed at addressing their concerns about the projects.

(a) Modern Land Claim Agreements in the North

Because of the legal uncertainty that aboriginal rights and title create with respect to the legal right to use and allocate lands and resources in the North, governments have been engaged in a process of negotiating modern land claims agreements aimed at replacing poorly-defined aboriginal rights and title with rights and title clearly set out in writing. Modern land claims agreements typically include provisions respecting ownership of lands by aboriginal groups, financial compensation for past infringements of their aboriginal rights, hunting, trapping, fishing and other resource use rights for members of the aboriginal groups, and land and resource management decision making processes including land use planning, environmental assessment and regulatory processes. Some land claims agreements also contain requirements that project developers enter into benefit agreements with the affected aboriginal group as a condition of government approval.

Self-government agreements are also being negotiated in the North. Self-government agreements define the governmental structures and law-making powers of aboriginal groups, and how those powers will interact with the powers of the federal and territorial governments. Self government agreements contemplate that aboriginal groups will assume responsibility and control over matters internal to their communities and integral to their unique cultures, identities, traditions, languages and institutions.

The following parts of this section examine modern land claims agreements that have been negotiated in Nunavut, the Northwest Territories and the Yukon.

(i) Nunavut

The *Nunavut Land Claims Agreement* was settled in 1993. It was the largest land claim ever settled in Canadian history. The settlement agreement confirms Inuit ownership of more than 350,000 square kilometres of land, of which 36,000 square kilometres include mineral rights. In addition, the land claim settlement provides for financial compensation payments to the Inuit totalling over $1 billion over 14 years, and guaranteed participation in making decisions for managing lands and resources.

In 1993, the Parliament of Canada passed the legislation enacting both the *Nunavut Land Claim Settlement* and the *Nunavut Land Claim Agreement* to create the territory of Nunavut. The creation of Nunavut changed the map of Canada for the first time since Newfoundland joined Confederation in 1949.

The *Nunavut Land Claim Agreement* contains provisions that relate to mineral development and the environment, in particular, assessment of impacts of development by the Nunavut Impact Review Board, water management, resource royalty sharing, natural resource development, and Inuit impact and benefit agreements.

Inuit impact and benefit agreements are of particular significance, since proponents are required to finalize Inuit impact and benefit agreements before commencing a “major development project.” Under the *Nunavut Land Claims Agreement*, a “major development project” includes any project involving development or exploitation of resources wholly or partly under Inuit Owned Lands, but does not include exploration.

Generally, all federal, territorial, and local government laws apply to the Inuit Owned Lands except in cases of conflict or inconsistency. Additionally, the federal government still has some overseeing role in certain areas covered under the *Nunavut Land Claim Agreement.*

The Inuit may not sell or dispose of Inuit Owned Lands, but the relevant Designated Inuit Organization may grant leases, licences and other interests less than fee simple. The management of Inuit Owned Lands is guided by a comprehensive set of directions as outlined in the *Rules and Procedures for the Management of Inuit Owned Lands.*

(ii) Northwest Territories

A. Final Agreements

To date, four final agreements have been concluded in the Northwest Territories. They are:

- Inuvialuit Final Agreement (1984)
- Gwich'in (Dene/Métis) Comprehensive Land Claim Agreement (1992)
- Sahtu Dene and Métis Comprehensive Land Claim Agreement (1993)
- Tlicho Agreement (2003)

I. The Inuvialuit Final Agreement

The first of these agreements, the Inuvialuit Final Agreement (the "IFA"), was concluded in 1984, to make way for what was then thought to be the imminent development of oil and gas resources in the Beaufort Delta.

The IFA applies throughout the Inuvialuit Settlement Region (the "ISR"), which extends along the Arctic coast from the Alaska border to the boundary with Nunavut. It is bounded on the south by the Gwich'in and Sahtu settlement areas and extends to the north across the Beaufort Sea to include Banks Island, parts of Victoria Island and the western Queen Elizabeth Islands. Under the IFA, the Inuvialuit hold fee simple title to certain lands along with the subsurface resources under these lands, including oil and gas (referred to as "s.7 (1)(a) lands").[1] The Inuvialuit hold title to 5,000 square miles of surface and subsurface lands. 4,200 square miles is near the six Inuvialuit communities. An additional 800 square miles is in the Cape Bathurst area.

The Inuvialuit also hold fee simple title to other lands not including oil and gas or other subsurface resources except sand and gravel (referred to as "s.7 (1)(b) lands").[2] The Inuvialuit hold title to 30,000 square miles of surface lands. These lands are distributed throughout the ISR.

The IFA immediately changed the legal landscape in the Northwest Territories. The Inuvialuit were now in a position to grant subsurface rights under s.7 (1)(a) lands outside of the pre-existing federal regime. In addition, if a resource developer needs access to ss.7(1)(a) or 7(1)(b) lands, they must deal directly with the Inuvialuit rather than with the federal government.

The IFA also contains provisions with respect to resource management. These provisions create institutions with various powers over land and resources including a requirement that certain developments go through an environmental impact review process. Notwithstanding this, from a structural perspective the IFA did not attempt to replace the pre-existing legal regime. The institutions created under the IFA are Inuvialuit institutions; they are not institutions of public government. Therefore, when the IFA was brought into force, the enabling legislation, the *Western Arctic (Inuvialuit) Claims Settlement Act*[3] (the "Inuvialuit Settlement Act"), did not expressly modify any existing Federal or NWT legislation. Instead, the Inuvialuit Settlement Act simply provides that where there is a conflict between it or the IFA and the provisions of any

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[1] IFA, s.7(1)(a).

[2] IFA, s.7(1)(b).

[3] S.C. 1984, c.24.

other law in the ISR, the Inuvialuit Settlement Act or IFA prevails to the extent of the inconsistency.[4]

While the IFA includes provisions that allow Inuvialuit institutions to manage the land and resources that were transferred to the Inuvialuit, it does not contain comprehensive provisions for self-government. There are negotiations underway to address self-government issues in the ISR.[5]

II. The Gwich'in and Sahtu Dene and Métis Comprehensive Land Claim Agreements

The IFA was followed in 1992 by the Gwich'in Comprehensive Land Claim Agreement and, in 1993, by the Sahtu Dene and Métis Comprehensive Land Claim Agreement (the "GFA" and "SFA", respectively). Due to the similarities between these agreements, they will be discussed together.

Like the IFA, the GFA and SFA provided for ownership of substantial areas of land by certain entities identified in those agreements.[6] These lands generally fall in one of three categories: Surface/Subsurface, in which the aboriginal group owns both the surface and subsurface including oil and gas; Surface Only, in which the aboriginal group owns the surface only; and fee simple lands. Generally, the latter are lands that were selected from previously titled lands in communities where title is held to the surface of these lands.

The Gwich'in hold title to 6,065 square kilometres (approximately 2,342 square miles) of Surface/Subsurface lands and 16,264 square kilometres (approximately 6,280 square miles) of Surface Only lands. The Gwich'in also hold title to 93 square kilometres (approximately 36 square miles) of lands including title only to the mines and minerals on those lands. The Sahtu Dene and Métis hold title to 1,813 square kilometres (approximately 700 square miles) of Surface/Subsurface lands and 39,624 square kilometres (approximately 15,299 square miles) of Surface Only lands.

The GFA and SFA also provide for the management of lands and resources transferred under these agreements. As a result, the GFA and SFA continued the changes to the pre-existing legal framework in the Northwest Territories by further dividing the ownership and control of land and resources between various parties.

Of perhaps greater significance, the GFA and SFA also contained provisions requiring the establishment of an integrated system of land and water management.[7] The agreements provide for a new land and water management system which apply throughout the Mackenzie Valley region, defined as the whole of the Northwest Territories with the exception of the ISR and

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[4] Ibid, s.4.

[5] DIAND, "NWT Plain Talk" Vol. 1, April 2000.

[6] GFA, Chapter 18 and SFA, Chapter 19.

[7] GFA, Chapter 24 and SFA, Chapter 25.

Wood Buffalo National Park.[8] Unlike the IFA model, the Agreements required the creation of new public institutions to implement the new land management regime, which replaced the existing institutions.

In addition to this land and water management system, each of the GFA and SFA contain requirements for consultation prior to the commencement of any oil and gas activity.[9] The GFA and SFA also provide for negotiations to take place with the federal government on self-government.[10] The matters for negotiation under these agreements are primarily internal. These negotiations have not been concluded.

Each of the GFA and SFA were brought into force under federal legislation.[11] These statutes did not expressly repeal or amend any existing legislation. They simply provided that where there is any inconsistency or conflict between the enabling legislation or the GFA or SFA, respectively, and the provisions of any other law, the enabling legislation or the GFA or SFA, as appropriate, prevails.[12]

The majority of the legislative changes necessary to put in place the land and water management regime under the GFA and SFA were made through the *Mackenzie Valley Resource Management Act* (the “MVRMA”).[13]

III. Tli'Cho Agreement

The Tli’Cho Agreement is the most recent of the modern land claims negotiated in the Northwest Territories. The Tli’Cho, or Dogrib people, occupy lands in the Northwest Territories south of the Sahtu settlement region. Under the Tli’Cho Agreement, the Tli’Cho Government now owns a single block of about 39,000 square kilometres in size, including both surface and subsurface rights. The Tli’Cho Government will receive approximately $100 million in financial compensation, which will be paid over a period of years. As well it will receive a share of resource royalties received by government annually from the Mackenzie Valley along with guaranteed harvesting rights in their traditional territory in the North Slave region.

The MVRMA regime applies to all development activities on Tli’Cho lands. In addition, consultation obligations like those set out in the GFA and SFA would apply to oil and gas exploration and development activities in the Tli’Cho territory.

The Tli’Cho Agreement also contains provisions regarding self-government which are discussed below.

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[8] GFA, s.2.1.1; SFA, s.2.1.1.

[9] GFA, Chapter 21 and SFA, Chapter 22.

[10] GFA, Chapter 5 and SFA, Chapter 5.

[11] *Gwich’in Land Claim Settlement Act*, S.C. 1992, c.53; *Sahtu Dene and Métis Land Claim Settlement Act*, S.C. 1994, c.27.

[12] *Gwich’in Land Claim Settlement Act*, supra, s.8; *Sahtu Dene and Métis Land Claim Settlement Act*, supra, s.8.

[13] S.C. 1998, c.25.

B. Self Government in the Northwest Territories

Tli'Cho

The Tli'Cho Agreement was the first comprehensive land claim in the north to explicitly extend section 35 constitutional protection to self-government rights as well as to land rights in the same agreement. The Agreement has been ratified under federal legislation.[14]

On the coming into force of the Agreement, the four member *Indian Act* First Nation communities ceased to exist and were succeeded by the Tli'Cho Government. The Tli'Cho Government consists, at a minimum, of a Grand Chief elected at large by Tli'Cho Citizens and the Chief and one other elected representative from each of the four Tli'Cho communities. The Tli'Cho Government has law-making power over government structure and management, use and management of Tli'Cho land and resources, prescribed fish and fish habitat matters on Tli'Cho lands, culture, language, traditional medicine, training, social assistance, child and family services and guardianship for Tli'Cho Citizens on Tli'Cho lands, direct taxation of Tli'Cho Citizens on Tli'Cho lands, and enforcement of Tli'Cho laws in these areas. Unless expressly limited to Tli'Cho Citizens, Tli'Cho laws may apply to persons other than Tli'Cho Citizens. The legislative powers of the Tli'Cho Government are concurrent with those of federal and territorial governments.

Where practical, the government and the Tli'Cho Government should exercise their respective powers so as to provide for coordinated program and service delivery, and may enter into agreements to that end. The first ten-year renewal intergovernmental services agreement signed by the Parties is intended to provide all residents on Tli'Cho lands with a single delivery system for programs related to health, education, welfare, family and other social programs and services. The first five-year renewable financing agreement signed by Canada and the Tli'Cho was negotiated taking into account Tli'Cho own-source revenue capacity, opportunities for economic and other financing provided to the Tli'Cho Government.

There will also be four Tli'Cho community governments established. Each community government consists of a Chief, and an even number of counsellors. Community governments may make laws for their operation, borrowing of money, granting of interest in community lands, and matters of a local nature specific to each community such as land use, planning, public work, housing, transportation and taxation.

Gwich'in and Inuvialuit

An Agreement-in-Principle has been reached with respect to the self-government of the Gwich'in and Inuvialuit First Nations. In 1993, the Gwich'in and Inuvialuit made a request to the Government of Canada to negotiate a self-government agreement. In 1995, the Government of Canada approved the *Inherent Right of Self-Government Policy*. This national policy development set the stage for self-government negotiations among Gwich'in, Inuvialuit, the

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[14] The *Tli'Cho Land Claim and Self-government Act* received royal assent on February 15, 2005, and was brought into force by regulation on August 4, 2005 (SI/2005-54).

Government of the Northwest Territories and the Government of Canada. A Process and Schedule Agreement, setting out the topics to be discussed in negotiations, was signed in 1996.

On October 3, 2001, negotiators for the Gwich'in and Inuvialuit, the Government of Canada, and the Government of the Northwest Territories initialled the Self-Government Agreement-in-Principle. On April 16, 2003, the Gwich'in and Inuvialuit leadership, the Government of Canada, and the Government of the Northwest Territories signed the Gwich'in and Inuvialuit Self-Government Agreement-in-Principle for the Beaufort-Delta Region. The Agreement-in-Principle sets the foundation for additional negotiations intended to lead to a final Self-Government Agreement.

The Inuvialuit Government will serve Inuvialuit. The Inuvialuit Government will protect matters that are internal to Inuvialuit communities, integral to Inuvialuit culture, identity, traditions, language and institutions, and with respect to their special relationship to their land and their resources. The Gwich'in Government will serve Gwich'in. The Gwich'in Government will protect matters that are internal to Gwich'in communities, integral to Gwich'in culture, identity, traditions, language and institutions, and with respect to their special relationship to their land and their resources. In addition, the agreement-in-principle contemplates the creation of a new regional government in the Beaufort Delta region, along with the restructuring of community governments. The regional and community governments will provide for guaranteed representation of Gwich'in and Inuvialuit.

Deline Self-Government Negotiations

In 1998, the Sahtu Dene and Métis of Deline signed a Process & Schedule Agreement with the Governments of Canada and the Northwest Territories. Chapter 5 of the Sahtu Dene and Métis Comprehensive Claim Agreement provides for negotiations of self-government agreements and the Process & Schedule Agreement set out the topics to be discussed in negotiations and the process for negotiations.

In August 2003 the parties signed the Deline Self-Government Agreement-in-Principle. The Agreement-in-Principle contemplates the creation of the Deline First Nation Government as the government exercising jurisdiction and authority set out in the final self-government agreement. The Agreement-in-Principle addresses government powers in respect of elections, citizenship, education, adoption, child and family services, community lands, health, social housing, income support, justice, language, and marriage.

Tulita Self-Government Negotiations

In 2002, the Dene and Métis of Deline made a request to the federal government pursuant to the Sahtu Dene and Métis Comprehensive Plan Claim Agreement to negotiate a self-government agreement. A society known as the Tulita Yamoria Secretariat was formed to conduct self-government negotiations.

In early 2005, negotiators for the Tulita Yamoria Community Secretariat, the Government of Canada and the Government of the Northwest Territories signed a Framework Agreement related to the Tulita Self-government process. The Framework Agreement will guide negotiations towards an Agreement-in-Principle.

C. Continuing Negotiations

Governments continue to negotiate agreements with aboriginal groups in the southern region of the Northwest Territories. To date no final agreements have been concluded, although a number of important milestone agreements have been reached. Those agreements include:

- Northwest Territory Métis Nation Framework Agreement (1996)
- Northwest Territory Métis Nation Interim Measures Agreement (2002)
- Akaitcho Territory Dene First Nations Framework Agreement (2000)
- Akaitcho Interim Measures Agreement (2001)
- Deh Cho First Nations Framework Agreement (2001)
- Deh Cho First Nations Interim Measures Agreement (2001)
- Deh Cho Process Interim Resource Development Agreement (2003)
- Manitoba Denesuline Interim Measures Agreement(2004)
- Saskatchewan Athabasca Denesuline Interim Measures Agreement (2004)

Northwest Territory Métis (formerly known as South Slave Métis)

The Northwest Territory Métis Nations (formerly known as the South Slave Métis) Framework Agreement was signed on August 29th, 1996. This Framework Agreement is aimed at guiding negotiations under the South Slave Métis Process for the purpose of governing the conduct of negotiations to reach an Agreement-in-Principle.

The Northwest Territory Métis Nation Interim Measures Agreement (2003) sets up a process whereby the Northwest Territories Métis Nation Tribal Council will pre-screen applications for activities such as licenses, permits and leases relating to the occupation, use and disposition of lands and resources provided for by statutes and regulations of Canada and the GNWT, pending the negotiation of these matters under the Northwest Territories Métis Process.

Akaitcho

In July 2000, the Akaitcho Dene First Nations signed a Framework Agreement with the governments of Canada and the Northwest Territories, setting out the process for negotiation of an Agreement in Principle and defining the issues that the parties will address in their negotiations. The Akaitcho Dene First Nations are signatories to Treaty 8, negotiated in 1900. As many of those provisions of the Treaty were never implemented, they are negotiating a land claims agreement to clarify their rights in their traditional territory.

In June 2001, the Akaitcho Dene First Nations signed an Interim Measures Agreement with the governments of Canada and the Northwest Territories. That agreement provides for the involvement of the Akaitcho Dene First Nations in the review of applications for various licences, permits and dispositions of land.

Deh Cho

In May 2001, the Deh Cho First Nations signed a Framework Agreement and an Interim Measures Agreement with the governments of Canada and the Northwest Territories. The Framework Agreement is intended to establish the basis for negotiation of an Agreement in

Principle and eventually a final agreement. The topics for negotiations include land, resources, harvesting rights and governance in the Deh Cho region.

The Interim Measures Agreement provides for Deh Cho involvement in resource management decision-making in their traditional territory, pending negotiation of a final agreement. The Deh Cho will be able to participate in the Mackenzie Valley Environmental Impact Review Board's work and the governments have agreed to establish a Deh Cho panel of the Mackenzie Valley Land and Water Board. The Interim Measures Agreement also requires consultation with the Deh Cho on certain land and resource activities in their region, and provides for negotiation of impact benefit agreements.

The Interim Resource Development Agreement is aimed at fostering resource development in the Deh Cho territory and to accrue benefits to the Deh Cho territory and to accrue benefits to the Deh Cho First nations from Canada in the interim of a Deh Cho Final Agreement.

Salt River

The Salt River First Nation is a signatory to Treaty 8. However, instead of negotiating a new land claims agreement, the Salt River First Nation has elected to rely on its rights under Treaty 8 to resolve its treaty land entitlement. In May 2000, it was announced that negotiations had commenced between the Salt River First Nation and the governments of Canada and the Northwest Territories to determine the First Nation's land entitlement under Treaty 8. The parties aim to negotiate a memorandum of intent, followed by a final agreement.

While historic treaties were concluded with some aboriginal groups in the early 1900s, those treaties were never fully implemented and governments have not attempted to rely upon them. As a result, in areas of the Northwest Territories where modern land claims agreements have not been concluded, issues of aboriginal rights and title may continue to exist, along with the consequent obligations on government to consult in respect of infringements of those rights.

Manitoba and Saskatchewan Denesuline

The Manitoba and Saskatchewan Denesuline have asserted Aboriginal and treaty rights to lands north of the 60th parallel in the Northwest Territories in the areas just north of the Saskatchewan border with the NWT. Canada and the Manitoba and Saskatchewan Denesuline have entered into negotiations regarding land and harvesting rights of the Manitoba and Saskatchewan Denesuline. In these areas, Canada agrees to consult with the Manitoba and Saskatchewan Denesuline with respect to applications for the sale, lease and lease with option to purchase of Crown lands (excluding lands where infrastructure already exists). Canada also agrees to consult prior to issuing any new prospecting permits, or initiating any new rights issuance cycle for oil and gas exploration licenses. The GNWT agrees to consult the Manitoba and Saskatchewan Denesuline with respect to any proposal for the establishment of a protected area pursuant to the NWT Protected Areas Strategy and with respect to applications for new tourism establishments and with respect to the establishment or expansion of territorial parks. The agreements establish a process for consultation and a timeline for response.

D. Devolution Framework Agreement

In March of 2004, a Devolution Framework Agreement was signed between the government of Canada, the government of the NWT and the Aboriginal Summit (which includes representatives from all Aboriginal groups in the Northwest Territories). The Devolution Framework Agreement governs the conduct of the negotiations and sets out the process and schedule for negotiations with a view to conclude an Agreement-in-Principle and a final Devolution Agreement.

Devolution negotiations are a process whereby Canada is prepared to devolve the administration and control of public lands and rights in respect of waters, which are currently administered by the federal government. The goal is to create a post-devolution land and resource management regime in which governments, including Aboriginal governments, share responsibility, decision-making authorities and resource revenues. The public lands under discussion include any interest in land onshore in the NWT that belongs to the federal government, including mineral resources, oil and gas resource and beds of bodies of water.

The subject matters for negotiation of an Agreement-in-Principle include the transfer by Canada of the administration and control of public lands and rights with respect to waters, post-devolution land and resource management, oil and gas, waste sites, human resources, and federal properties, assets, contracts and records. The Framework Agreement also contemplates negotiation of funding arrangements and resource revenue sharing.

(iii) Yukon

The *Yukon Umbrella Final Agreement* was signed by the Council for Yukon Indians, the Government of Yukon and the Government of Canada on May 29, 1993 and is the basis of negotiations for each of the 14 Yukon First Nations. To date final and self-government agreements have been concluded and implemented with the following Yukon First Nations:

- Vuntut Gwitchin First Nation (1993);
- the First Nation of the Nacho Nyak Dun (1993);
- the Champagne and Aishihik First Nations (1993);
- the Teslin Tlingit Council (1993);
- the Selkirk First Nation (1997);
- the Little Salmon/Carmacks First Nation (1997);
- the Trondëk Hwëch in First Nation (formerly Dawson First Nation) (1998);
- Ta'an Kwäch'än Council (2002); and
- Kluane First Nation (2004)

In March 2002, negotiations were concluded with six Yukon First Nations:

- Carcross/Tagish First Nation;
- Kwanlin Dun First Nation;
- Liard First Nation;
- Ross River Dena Council, and White River First Nation.

The Carcross/Tagish, Kwanlin Dun and White River First Nations are currently completing the legal and technical review to finalize their final and self- government agreements.

Each of the individual settlement agreements incorporates the *Yukon First Nations Umbrella Final Agreement* (the “Umbrella Final Agreement”), the provisions of which apply throughout the Yukon, along with specific provisions that apply only to that Yukon First Nation, such as land selections, economic opportunities, and designation of protected areas. Under the Umbrella Final Agreement, the lands which are included within the individual Yukon First Nations’ settlement agreements fall into three categories: Category A; Category B; and Fee Simple Settlement Land. A Yukon First Nation owns the subsurface of its Category A Settlement Land in fee simple, including oil and gas, and they hold all of the rights, obligations and liabilities “equivalent to fee simple ownership” to the surface of the land.[15] A Yukon First Nation owns the surface only for Category B Settlement Lands. Fee Simple Settlement Lands are primarily found within communities where First Nations selected previously titled lands. A Yukon First Nation holds the fee simple title to the surface of these lands (collectively “Yukon Settlement Lands”).

In addition to describing the Yukon First Nations’ land tenure, the Umbrella Final Agreement also requires the federal and Yukon governments to establish development assessment, land use planning, water management, surface rights and wildlife management processes. These processes apply on and off Yukon Settlement Lands, and provide for Yukon First Nation representation on these boards.

Finally, there are claims by First Nations that extend across provincial and territorial boundaries, and across the boundaries of other First Nation claims.[16] Trans-boundary agreements and provisions in land claim agreements will form an important part of the knowledge base for those interested in gaining access to oil and gas rights in the Yukon because they give rights, typically with respect to consultation and management of resources, to aboriginal groups that are outside the jurisdiction in which oil and gas activity is to take place.

In areas of the Yukon where final agreements have not been concluded, issues of aboriginal rights and title still exist. As in the Northwest Territories, this means that uncertainty continues to exist about the scope of aboriginal rights and title and about the governments’ obligations to consult in respect of infringements of those rights.

(b) Conclusion

In Nunavut, the Northwest Territories and the Yukon, modern land claims agreements are rewriting the legal regimes applicable to doing business in those jurisdictions, particularly for

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[15] The “equivalent to” qualification was to allow Yukon First Nations to retain their aboriginal title to the surface of Category A and B Settlement Lands to the extent that aboriginal title can coexist with the land tenure rules in the final agreements.

[16] For example under Appendix C of the Gwich’in Final Agreement, concluded in 1992, the Tetlit Gwich’in from the NWT hold fee simple title to the surface of 600 square miles (1,554 square kilometres) of land in the Peel River region of the northeastern Yukon. Those lands are treated as though they were Category B Settlement Land for most of the purposes of the Umbrella Final Agreement. The Umbrella Final Agreement provisions respecting surface rights, development assessment, water management, and land use planning all apply to Gwich’in lands in the Yukon. The IFA also has provisions that extend into the Yukon.

resource development companies. Companies are strongly advised to familiarize themselves with the terms of applicable land claims agreements and the implications of those agreements for their proposed activities.

In light of the significant legal and political rights and powers of aboriginal groups in the North, many companies are finding it advisable to build relationships with the aboriginal groups. Through appropriate consultations with aboriginal groups and governments, many of the unique challenges posed by aboriginal and treaty rights in the North can be successfully managed.