Atlantic Business Counsel
LEGAL DEVELOPMENTS OF INTEREST TO BUSINESS IN ATLANTIC CANADA

July 2010
Volume XI, Issue 2

Editor: Susanna P. Duke
Knowledge Manager
709.570.8844
sduke@smss.com

In this issue

The Atlantic Fishery after Saulnier: Not All Secured Creditors Are Alike

A New Condominium Act for NL – 35 Years in the Making

Immigration and Tax Considerations for Cross-Border Business Travel

Changes to Newfoundland and Labrador's Small Claims Act

Proposed Amendment of NI 43-101 Standards of Disclosure for Mineral Projects

The Gift Cards Act *in Prince Edward Island*

Business Disputes Corner
Personal Property Registrations in Atlantic Canada – What's in a (middle) Name?

The Atlantic Fishery after *Saulnier*: Not All Secured Creditors Are Alike

On October 24, 2008, the Supreme Court of Canada released its decision in *Saulnier v. Royal Bank of Canada*[1], arguably the most important decision for the commercial fishery since its 1997 decision of *Comeau Seafoods Ltd. v. Canada (Minister of Fisheries and Oceans)*. This decision represented a significant improvement in the ability for creditors to take a security interest in fishing licences. However, the policies issued by the Department of Fisheries and Oceans (DFO), as well as the inherent discretion afforded the Minister by the *Fisheries Act*, continue to affect the efficacy of such security, particularly for creditors which are not "Recognized Financial Institutions" under the policy.

In *Saulnier*, the Supreme Court dismissed an appeal by Mr. Saulnier, upholding the decisions of the Nova Scotia Supreme Court and the Nova Scotia Court of Appeal, though for somewhat different reasons. Mr. Saulnier was a typical fisherman with a vessel and licences which he financed through the Bank, executing a General Security Agreement. After having made an assignment in bankruptcy, the trustee sought to sell the licences to a third party but Mr. Saulnier refused to sign the necessary documents. The trustee in bankruptcy brought an application for a declaration forcing Mr. Saulnier to transfer the licences. Mr. Saulnier claimed that the licences did not constitute "property" under the federal *Bankruptcy and Insolvency Act* and under the Nova Scotia *Personal Property Security Act*, making them unavailable to both the trustee and a secured creditor.

The Court recognized that in spite of policy statements by the Minister of Fisheries and Oceans, the reality is that a commercial market operates on the basis that there is a reasonable degree of certainty in the transfer and renewal of licences and that the market attributes a reasonably high value to these licences. Nevertheless, the Court agreed with its previous statements from *Comeau Seafoods* that there was no indication in the *Fisheries Act* of any legal basis for the vesting of an interest in a licence beyond the rights which it gives for the year in which it was issued. Ultimately, the Court concluded that the licence holder not only acquires a right to engage in an exclusive fishery but also a proprietary interest in the wild fish harvested as well as the earnings from their sale. This was sufficient to constitute property under the *Bankruptcy and Insolvency Act* and personal property under the *Personal Property Security Act*. With respect to the transitory

1. 2008, S.C.C. 58

status of a licence, the Court acknowledged that the licence may expire, pointing out that "the trustee will have the same right as the original holder of an expired licence to go to the Minister to seek its replacement, and has the same recourse (or the lack of it) if the request is rejected. The bankrupt can transfer no greater rights than he possesses. The trustee simply steps into the shoes of the licence holder and takes the licence, warts and all". As a result, the trustee was entitled to require Saulnier to execute the appropriate documentation to effect transfer of the licence.

In substance, this decision provided some additional comfort to lenders with respect to the ability to take security over fishing licences and their related rights. However, the Supreme Court was careful to note that their finding does not fetter the discretion of the Minister with respect to setting policies. As noted below, the Minister has continued to issue policies with respect to these licences. A degree of uncertainty is a result of the ministerial discretion and there is no guarantee that a request for a transfer of licence to a lender's nominee will be accepted by the Department of Fisheries and Oceans ("DFO").

Subsequent Judicial Consideration

The limited application of the *Saulnier* decision in a fisheries context has been consistent to date. For example, in *Re Beothic Fish Processors Ltd.*, a judgment rendered by the Newfoundland and Labrador Supreme Court (Trial Division) on February 12, 2009, the Court followed *Saulnier*, ruling that the fishing licences in question confer property rights which a trustee in bankruptcy could take control of and sell for the benefit of the estate. In *Beothic*, the bankrupt did not include fishing licences in his assets listed on the statement of affairs. One of the creditors requested the trustee to take proceedings but the trustee refused. Ultimately, the Court concluded that "commercial fishing licences can be sold to satisfy outstanding debts and judgments and the Department of Fisheries and Oceans Canada will issue new licences if it receives the appropriate documentation relinquishing and requesting reissuance of fishing licences and the designated licence holder meets their criteria". The Court granted leave to the creditor to take proceedings against the licence holder with respect to licence assets.

Similarly, another recent decision of the Newfoundland and Labrador Supreme Court (Trial Division), *Re Caines*, was released on April 7, 2010. In this case, the bankrupt had been discharged from bankruptcy prior to the *Saulnier* decision. The fishing licence had been assigned no realizable value and the bankrupt had continued to hold it after the discharge. After *Saulnier*, the trustee took the position that the fishing licences were property of the bankrupt which remained vested within the trustee and were therefore subject to realization for the benefit of the creditors. Citing to *Saulnier*, the Court stated that "it is abundantly clear that the Fishing Licence of the Bankrupt in the case at bar is property of the Bankrupt which vests in the Trustee." Facing an argument that *Saulnier* did not have a retrospective effect and therefore could not alter the position of the bankrupt at the time of his discharge, the Court concluded that the decision did have retrospective effect, that it "constitutes clarification and a clear statement of the rule of law which applies in situations of this nature", and that "at the time of his assignment in bankruptcy, the Fishing Licence held by the Bankrupt was property under the *BIA* invested in the Trustee." The Court issued an order that authorized the trustee to sell or otherwise realize upon the interest in the licence for the benefit of the creditors.

As is evident, the decisions subsequent to *Saulnier* have not focussed on the nuances with respect to the property status of fishing licences but have been supportive of trustee and creditor rights.

DFO Licensing Policies Post-*Saulnier*

Shortly after the *Saulnier* decision, DFO recognized in a policy statement that the Supreme Court had ruled that a fishing licence was considered property for the purposes of the *BIA* and the *PPSA* while recognizing the Minister's discretion to issue licences. The policy purports to develop procedures for working with trustees in bankruptcy and secured creditors and their receivers. The policy states that DFO will accept requests respecting licences from trustees upon a certificate of appointment in bankruptcy. It also indicates that they will provide "information and policy advice" relating to security agreements upon submission of a copy of the security agreement, a search report of the applicable Personal Property Registry and a copy of the notice of appointment of a receiver or a court order appointing the receiver. They will also accept requests respecting licences from a secured creditor or receiver with either a court order or written consent of the licence holder. In theory, the policy applies to all secured creditors though the brief reference to a complementary policy providing for a Notice Acknowledgment System for a Recognized Financial Institution ("RFI") is telling.

The policy for Preserving the Independence of the In-shore Fleet in Canada's Atlantic Fisheries (PIIFCAF) espouses the goal of strengthening the Owner-Operator and Fleet Separation Policies to ensure that the in-shore fish harvesters remain independent, and that the benefits of fishing licences go to the fisher and to Atlantic coastal communities. This policy requires all licence holders to be free of Controlling Agreements by April 12, 2014, failing which they will, among other things, not be eligible to be issued new replacement licences. The policy states the following as the definition of Controlling Agreement:

> *Controlling Agreement means an agreement between a licence holder and a person, corporation or other entity that permits a person, other than the licence holder, to control or influence the licence holder's decision to submit a request to DFO for issuance of a "replacement" licence to another fish harvester (commonly referred to as a "licence transfer"). Agreements between a licence holder and a Recognized Financial Institution (RFI) are not Controlling Agreements if (i) there is no third party involvement in the Agreement or (ii) any co-signer, guarantor or other surety involved in an agreement does not control or influence the licence holder's decision to submit a request to DFO for the issuance of a "replacement" licence to another fish harvester.*

The exception referenced in the definition refers to a Notice and Acknowledgement System for Recognized Financial Institutions which are, in essence, banks, provincial loan boards and certain loan guarantee programs. This system provides that if a fish harvester has an agreement with an RFI, it can notify DFO of this agreement by filing a Notice. DFO then signs the Notice acknowledging receipt and the original Notice is filed with the fish harvester's licensing information. The fish harvester is then required to file a completed Acknowledgement RFI signed by the RFI whenever the licence holder submits a request for issuance of a replacement licence to another fish harvester. The licence holder also consents to DFO notifying the RFI when the licence holder fails to pay fees, does not apply to renew the licence or seeks to transfer it. Of note, DFO is careful not to limit the Minister's discretion stating that the "filed Notice RFI is a consideration that can be taken into account by DFO in determining whether to approve a request submitted by the licence holder for licence activity…".

Under PIIFCAF, each licence holder is required to file a Declaration stating that he or she is not party to a Controlling Agreement. If the licence holder fails to file a Declaration, DFO will not process requests for most licensing transactions from the licence holder. If the licence holder indicates in their Declaration that they have entered into a Controlling Agreement, they are required to divest it by April 12, 2014 in order to be eligible to continue to hold the licences.

Implications for RFIs

For RFIs, such as chartered banks, the current system is a marginal improvement in that the notices provide a greater degree of comfort. This, of course, assumes that the notice system functions as it is intended to. If so, the bank should have notice of any attempts to transfer the licences. The primary means of security over licences used by banks to date is either a broad form General Security Agreement or a specific Licence Assignment. The courts have recognized, in the *Saulnier* decision, that the *BIA* and *PPSA* are intended to capture rights which flow from licences as property which is subject to these Acts. This will allow a trustee or receiver to realize upon such security. However, it is important to recognize that some uncertainty remains. The trustee or receiver is subject to the same ministerial discretion that the licence holder was subject to. The RFIs rely upon there being no change in policy (which is a significant uncertainty) and general pressure upon the Minister by the industry to retain a reasonable degree of certainty.

One other note of caution for RFIs. They should ascertain whether the licences over which they take security are subject to Controlling Agreements. While, for the time being, this can be overcome by having both the corporate borrower and individual licence holders execute all security documents, current policy requires that licences be free of Controlling Agreements by April 12, 2014. After this date, if the licence holder continues to be subject to a Controlling Agreement, it will not be eligible to be issued new or replacement licences. For that reason, security is at risk after 2014 where a Controlling Agreement is or may be present. An RFI should ascertain, to the extent possible, whether a Declaration has been filed by the licence holder and take necessary covenants that no Controlling Agreement is in place. Where there is any possibility the Controlling Agreement is in place, consideration should be given to the value of the security after 2014.

Implications for other Secured Creditors

DFO policies refer to secured creditors as if only an RFI can be a secured creditor. Either the policy is poorly worded or it is simply a reflection of their desired view of the market given PIIFCAF. However, the reality is that a significant portion of the licences are financed privately through fishing corporations. These organizations strive to secure their interests in licences and ideally would do so in the same fashion as an RFI. DFO licensing policy post-*Saulnier* makes no overt exception and, in theory, recognizes the rights of all secured creditors taking enforceable interests in licences. However, PIIFCAF effectively neuters non-RFI secured creditors because the exception to Controlling Agreements applies only to RFIs. Recall that the definition of Controlling Agreement is an agreement that permits someone other than the licence holder to <u>control or influence</u> the licence holder's decision to submit a request to DFO for issuance of a replacement licence.

This is the intent of enforcing a security interest through most secured transaction instruments. If one cannot control or influence the ability to transfer the licence, the risk remains that the security can simply melt away. It is almost certain that enforcement provisions of a General Security Agreement would constitute such an agreement

to be a Controlling Agreement. The RFI exception allows banks to proceed in this fashion but private lenders create the risk of making the licence subject to a Controlling Agreement which the licence holder would need to declare. It is likely, given the objective of the PIIFCAF policy, that DFO would like to see this segment of the market disappear. The validity of such a policy is beyond the scope of this paper. However, there continues to be a strong will within the industry to group licences for more efficient operation or to operate through corporate entities for a variety of financial purposes. To that end, private lenders continue to seek effective means to operate within the policy but secure their interests in the licences.

A variety of methods are surfacing to assist private lenders in securing their interests. Some retain the traditional form of trust agreements but include a statement disclaiming any control over the ability to transfer the licence. There have been no judicial decisions, at this time, considering what comprises a Controlling Agreement but it is almost certain that a court will look beyond such a statement and focus on the effect of the provisions within the agreement.

Some of the other options which have appeared to date in the market are:

- The removal of the direct enforcement provisions from a security agreement, relying solely upon remedies in the PPSA, whether through a receiver or self-help. The question arises whether the application of statutory remedies constitutes control or influence with respect to the transfer of licence. Only time will tell and it will be interesting to see the Court's view on this.

- Structure an agreement such that consequences of the transfer of licence by the licence holder are so significant that it provides a disincentive. Essentially, "you transfer, you buy it". Such an arrangement can be structured either through a loan and/or taking of additional collateral security which comes due when the licence is transferred. While the licence holder is free to transfer the licence, the debt and other security will be fully engaged when the transfer occurs. This may overcome the control aspect of the definition but it is quite possible that the "influence" portion of the definition would affect this concept.

- The arrangement could be structured as a partnership where the partnership has an interest in the licence. The Newfoundland and Labrador Court of Appeal recognized in *Green v. Harnum*, 2007 N.L.C.A. 57 that licences could be owned or sold as partnership assets upon dissolution.

These are simply some of the potential options for structuring the interests of a private lender in a licence. The challenge is that, under the current policy, the title to the licence must essentially be held by the licence holder free of control or influence. While courts have not yet ruled upon what constitutes influence in this context, the term is so broad that it presents many challenges for structuring of private financing arrangements. Various actors within the industry are actively looking for creative options to work within the constraints of the policies but still allow a broader range of financing options for licence holders. There are many cunning and creative players in this industry who will develop and test new concepts for security over this valuable asset. Ultimately, the "absolute discretion" retained by the Minister under section 7 of the *Fisheries Act* will always leave some degree of uncertainty but so long as the rights which flow from a fishing licence, including the value of the catch, are of a reasonable magnitude, the industry will endeavour to find a broad range of means to finance the acquisition and operation of fishing enterprises.

David Henley – Partner
Halifax, NS
902.420.3381
dhenley@smss.com

A New Condominium Act for Newfoundland and Labrador – 35 Years in the Making

It was 35 years ago when the first Condominium Act was enacted in Newfoundland and Labrador. The old statute was intended to regulate Newfoundland and Labrador's fledgling condominium industry, which was mainly present in St. John's. Condominiums are now commonplace in many areas of this Province. There are important issues absent from the current statute that have become relevant, not the least of which is the introduction of various new types of condominiums. There was an obvious need to bring the statute in line with those of other Provinces.

In early 2008, the Government of Newfoundland and Labrador began the process of reforming the old Condominium Act. Consultation with industry stakeholders and with other jurisdictions took place over many months. In time, a new act: *The Condominium Act, 2009* (the "Act") was drafted. The Act was mainly modelled after the Nova Scotia and Ontario statutes. Royal assent was received for the Act on December 22, 2009; however, it has yet to be proclaimed which means it is not yet law. It is expected to be in force by the end of 2010. This article highlights some of the new provisions in the Act, although it is not a complete listing of all changes.

New Protections

The new Act is designed to better protect first time condo buyers and current unit owners. It also provides new obligations for vendors, condominium corporations, lenders and condominium developers. These obligations are intended to benefit purchasers, sometimes at the expense of these other parties.

- **Disclosure:** Vendors and developers are obligated to provide prospective purchasers with extensive information through a disclosure statement or estoppel certificate. An estoppel certificate is issued by the condominium corporation to a buyer of a condominium unit not owned by the initial developer. It provides details on the monthly fees, whether the unit is under any default of the fees; whether the condominium is insured; registration status of the by-laws; and confirmation that the common property has not been mortgaged or transferred. The Act creates a 10 day cooling-off period to allow for a prospective purchaser to review the disclosure material after the agreement of purchase and sale has been signed. Purchasers can rescind the agreement of purchase and sale within this period and have all deposit money returned. It is not necessary for the purchaser to provide reasons for the rescission.

- **Declarations**: A declaration is the founding condominium document of the condominium that details what constitutes common elements, establishes the percentage ownership for each unit and the percentage each unit owner has to contribute to the common expenses fees. Consent is no longer required of all encumbrancers for any amendments to a declaration (although it is still required for the initial declaration). This is a change which will affect lenders on a go forward basis.

- **Reserve Fund and Reserve Fund Study**: For condominiums of 10 units or more, the developer and/or condominium corporation must establish a reserve fund and carry out an initial reserve fund study. The study must be updated every 5 years and a new one completed after ten years. Fund money is to be used for major repairs and replacement of the common elements of the facility that are identified in the reserve fund study. This protects purchasers, owners and lenders while it obliges developers and condominium corporations to act. Existing condominiums will be given a 2 year period from the date of proclamation of this Act to carry out a reserve fund study.

- **Mediation and Arbitration**: Dispute resolution is allowed in the form of mediation or arbitration with the consent of both parties involved in the dispute.

- **Liens**: A priority ranking for liens duly registered relating to unpaid condominium fees on individual units is established by the Act. The lien is payable in priority to all other liens, charges or mortgages relating to the unit other than liens for taxes. This is a significant shift from the previous regime which gave such a lien no priority standing over existing registered encumbrances. This will have a significant effect on lenders who may register a mortgage against a property only to find out in the future that the owner has not paid their condo fees and suddenly the lien registered by the condominium corporation ranks ahead of the duly registered mortgage of the lender. This priority ranking scheme is currently in place in most other Canadian jurisdictions.

- **Composition of Board of Directors**: Condominium owners are now permitted to appoint a designate of the owner to represent himself or herself on the board of directors. This is a welcomed change for many older condominium owners who can now appoint a willing family member to act on their behalf. Designates are not limited to family members but must be at least 19 years of age.

- **Insurance**: While the old Act is silent on the issue of insurance, the new Act establishes that a condominium corporation *shall* carry insurance for damage to the units as well as the common elements. This new protection will be enjoyed by owners and lenders alike. Notwithstanding, owners may need or wish to carry additional insurance to cover condominium improvements or other losses.

- **New Types of Condominiums:** The following types of condominiums are established within the Act: 1. Phased-Development Condominium 2. Common Elements 3. Vacant Land Condominium. If you would like more information on these new types of condominiums, please contact us as per below.

The new Act is currently available on the Government of Newfoundland and Labrador website at http://www.assembly.nl.ca/Legislation/sr/statutes/c29-1.htm. It is anticipated that the Act will be proclaimed in the latter part of 2010 at which time it will become enforceable law in Newfoundland and Labrador. In the interim, it would be prudent for owners, lenders, condominium corporations and other stakeholders in the condominium industry to bring themselves in line with the new requirements.

If you would like to know how to carry out these and other changes to align yourself or your business with the provisions of the new Act or to learn how you may be affected as an owner or prospective buyer, please contact any of the lawyers in Stewart McKelvey's commercial property practice group.

Michelle Davis – Associate
St. John's, NL
709.570.8853
mdavis@smss.com

Immigration and Tax Considerations for Cross-Border Business Travel

International business travel is so common-place these days that many people think nothing of jumping on an airplane or driving across the border to attend a meeting, service a client or work temporarily outside the country without carefully considering the immigration and tax consequences of their cross-border business activities until unexpected questions are asked by an immigration official or tax authority.

Whether business travellers require an immigration document (such as a work permit) to engage in business activity in a foreign jurisdiction is just one of the many considerations that should be carefully analysed before an international business trip or secondment. The traveller's eligibility to cross an international border, and any personal or corporate income tax consequences of the international business activity, should also be examined.

This article highlights some of the potential Canadian immigration and tax consequences of business travel to Canada that may be relevant to your business. The potential immigration and tax consequences of business travel outside of Canada should also be considered but are beyond the scope of this article.

In this era of increased gathering and tracking of personal information from international business travellers and increased information sharing between foreign governments and Canadian government departments, it is more important than ever for Canadian companies that retain the services of foreign contractors or employees, and foreign businesses that send representatives across the Canadian border to be mindful of the considerations discussed below.

Business Visitor or Worker?

One of the first questions to consider before bringing or sending a business traveller into Canada is whether that person will require a temporary status document to authorize his or her activities in Canada. If the business person qualifies for admission to Canada as a business visitor, a work permit is not required. It may be required, or desirable, however for a business visitor to be issued a visitor record, depending on the length of his or her stay in Canada, and whether or not multiple visits to Canada will be necessary.

The business visitor category, enshrined in both the *North American Free Trade Agreement* ("NAFTA") and Canada's *Immigration and Refugee Protection Act*, ("IRPA") was designed to foster international business activity. It facilitates the temporary entry of foreign nationals to Canada for cross-border commercial purposes where there is no direct entry into the Canadian labour market. To qualify as a business visitor, a foreign national must continue to be paid from a source outside Canada and must maintain a principal place of employment outside the country. The determination of whether someone qualifies as a business visitor is fact specific and will ultimately be made by the immigration officer who examines the foreign national at the border. Some examples of business visitor activity include travel to Canada for quarterly board meetings, after-sales service work contemplated by an initial contract or purchase order, and training or installation of equipment for a Canadian affiliate of a foreign company.

International business travellers who do not qualify as business visitors will require a work permit to authorize the activities they will be doing in Canada. In some situations work permits can be issued at a Canadian port of entry as long as the foreign national has proper supporting documentation to establish his or her eligibility for a certain type of work permit. For example, senior managers or specialized knowledge workers who are being temporarily transferred to a related Canadian enterprise, and management consultants or other professionals from countries that have negotiated international trade agreements with Canada qualify for expedited work permit processing that does not require an opinion be in place confirming the positive impact their presence will have on the Canadian labour market.

Eligibility for labour market opinion-exempt work permits, however, is not always crystal clear. Consequently, unless it is patently obvious that an international business traveller you are bringing or sending to Canada will not require a work permit supported by a labour market opinion, it is advisable to consider the various steps required to obtain proper temporary immigration status for that person several weeks (or months) before their scheduled travel to Canada.

In practice, the distinctions between business visitors and temporary foreign workers are easily blurred. Consider a situation where two executives of a multi-national corporation based in the United States are required to spend several three- or four-month periods in Canada over two years directing and overseeing the development of a small but growing Canadian affiliate. At first blush these executives may appear to be business visitors. Even if they continue to be paid by the US parent company while they are in Canada, one immigration officer may determine they qualify as business visitors, and on a subsequent trip another officer may decide they are actually entering the labour market and as such require a work permit.

This type of secondment scenario has become a common business practice not only in North America, but around the world. In the current global business climate, however, business travellers on missions like this can be stopped dead in their tracks at international borders if they are not properly briefed and prepared to apply for the appropriate immigration document. For this reason, current best practices require that attention be paid to the risks and consequences that can flow from the cross-border movement of personnel.

Experienced international travellers who have been admitted to Canada in the past as business visitors may assume they can automatically enter Canada again under the same category by indicating the purpose of their trip is to attend "business meetings". But, if that description does not accurately reflect the activity they will be doing in Canada, the traveller exposes themselves, and potentially the business they represent, to consequences for misrepresentation and for working illegally in Canada. Moreover, an immigration officer may also look at a business traveller's pattern of prior visits to Canada and determine that s/he has moved beyond the realm of business visitor status and is actually entering the Canadian labour market and thus requires a work permit. In this type of scenario, the foreign national may only be admitted to Canada for a limited period of time, or turned around at the border until proper documentation to justify the issuance of a work permit can be obtained.

Immigration Admissibility Considerations

If your business frequently relies on services provided in Canada by foreign nationals, you should be familiar with some of the reasons that business travelers can be turned back at the border. In addition to the rules which govern eligibility for work permits and visitor records, a foreign national must also be admissible to Canada. Admissibility issues such as criminality and misrepresentation are becoming more prevalent than they were in the past for international business travellers. This is not because more crimes are being committed by this constituency, or because they are lying about their

reasons for crossing the border with any more frequency; more information is simply now readily available at the fingertips of immigration officers.

Criminality

Foreign nationals who have been charged with or convicted of a criminal offence anywhere in the world, at any time, may be inadmissible to Canada. While steps can often be taken to resolve criminal inadmissibility issues, it is important to canvass the subject of criminality with any foreign national you will be bringing or sending into Canada.

Criminal inadmissibility often arises for business travellers when their passport is swiped at the border and a long-ago forgotten indiscretion, such as an old impaired driving conviction, comes to light. This can even be true for business travellers who have crossed the Canadian border for years without incident because of improved reporting systems with other countries. Although minor convictions that are decades old are the easiest to deal with from an immigration standpoint, it can be both embarrassing and time consuming for business travellers to be held up at the border if and when a criminal record comes to light.

Misrepresentation

It is also important that any representative you seek to bring or send into Canada be well briefed on the procedure for crossing the border and applying for any necessary immigration document. A perhaps obvious obligation that must be underscored is the requirement to be honest and forthright with Canadian immigration officials about the purpose for which the foreign national is travelling to Canada. A surprising number of business travellers lie about their reason for crossing the border, by indicating they are coming to Canada to visit friends or take a vacation, when they will actually be consulting with clients or negotiating a contract. Whether this is done out of nervousness, or to save the time it can take to be referred to an immigration officer to apply for a work permit, there will be trouble when immigration officials discover evidence in a briefcase or on a laptop computer indicating that a foreign national purportedly coming to Canada for pleasure, is really crossing the border to work. This practice should be avoided at all costs because IRPA imposes significant consequences on individuals who misrepresent, directly or indirectly, their purpose for crossing the border or withhold material information. Specifically, a foreign national found guilty of misrepresentation is automatically barred from entering Canada for a period of two years and can also be fined or sent to prison. Similar sanctions can be imposed against a company who counsels a foreign national to misrepresent facts that are material to their admission to Canada.

Non-Compliance with Immigration Legislation

If you bring or send foreign nationals to Canada it is wise to ensure that their cross-border activity complies with Canadian immigration legislation. If you are in doubt about what is required of your company and the foreign national, you may wish to obtain the advice of counsel before the scheduled travel. Thereafter, it is advisable to obtain a copy of any immigration document issued to the foreign national so you will be aware of its terms and conditions and when it expires. If the foreign national's presence in Canada is required for longer than originally planned, an application to renew his or her document must be made in a timely manner to ensure s/he has uninterrupted status in Canada.

Foreign nationals who are working with or for your business must be authorized to engage in the activities they are doing in Canada. Anyone who "works" in Canada without authorization, or in violation of the terms and conditions of their work permit or visitor record, is technically working illegally and could be fined or subject to removal action at any time. Conversely, IRPA also imposes consequences on Canadian businesses who employ, even inadvertently, foreign nationals without proper authorization. Currently, those consequences include fines of up to $50,000 or two years in prison. These consequences are soon expected to become more severe when proposed regulatory changes to Canada's temporary foreign worker program are enacted. Under the proposed changes, expected to come into force before the end of 2010, a blacklist of employers not eligible to hire temporary foreign workers as a result of their non-compliance will be published on Citizenship and Immigration Canada's website.

Canadian Tax Considerations

Immigration issues are not the only thing you need to worry about when bringing or sending a business traveller or transferee into Canada. There are various personal and corporate taxation obligations that can be triggered if your business engages a non-resident individual or corporation to provide services in Canada. The purpose of the following section is to make you aware of some of the withholding and remittance requirements the *Income Tax Act* (Canada) prescribes in relation to non-residents.

Withholdings for Non-Resident Service Providers

All businesses that retain non-residents (individuals or corporations) to provide services in Canada must withhold and remit income tax from the payments made for those services. Full reporting of all payments made to non-resident service providers must also be reported, regardless of the amount paid or the taxes withheld. This obligation applies whether the payments are made by a Canadian source or not. In other words, even foreign

companies who retain non-resident service providers to do work in Canada must withhold and remit tax to the Canada Revenue Agency (the "CRA"). Under Canadian income tax regulations payments of fees, commissions or any other amounts for services rendered in Canada, except those paid to employees, are subject to a 15% withholding that must be deducted and remitted by the payor on the 15th day of the month after the payment was made. There is also a requirement to file an annual return with respect to these withholdings. The CRA interprets this withholding requirement broadly; payments do not necessarily have to be paid exclusively in respect of services for the withholding requirement to be triggered. Therefore, when in doubt, it is advisable to withhold.

Withholding tax from payments made to non-resident service providers is mandatory unless the non-resident obtains a waiver, or a reduction in the withholding tax. If the non-resident tax withheld turns out to be tax-exempt income, or more tax is withheld than necessary, the non-resident can apply for a refund. Failure to deduct or remit non-resident tax by the company paying for the services may result in an assessment of the outstanding amount, plus interest and penalties.

Source Deductions for Non-Resident Employees

The *Income Tax Act* also requires Canadian and foreign businesses to withhold and remit income tax, Canada Pension Plan contributions and Employment Insurance premiums for payments made to non-resident employees who provide services in Canada, unless these obligations have been formally waived. All amounts paid to non-resident employees must be reported to the CRA on the T4 Information Return which is required to be filed annually. Both resident and non-resident employers who fail to deduct and remit these amounts are liable for these amounts plus any interest and penalties.

Employer liability for source deductions from amounts paid to foreign workers can be murky in some situations such as the case of a short-term transferee who is working in Canada, but remains on the payroll of a foreign company. Even if this non-resident worker's income is tax-exempt as a result of a tax treaty between Canada and their home country, there may still be an obligation on the foreign company to register with the CRA to obtain a Business Number and to withhold source deductions from the remuneration paid for the work done in Canada.

Canadian Income Tax Obligations for Non-Residents

Residency for tax purposes is defined differently than it is for immigration purposes. Under the *Income Tax Act* a person becomes a resident of Canada when they establish certain residential ties, or have been in Canada for 183 days or more in a given calendar year. Unless and until a foreign national becomes a resident taxpayer of Canada, they are taxed as a non-resident. Generally, non-residents are required to report any income received from sources in Canada. Non-residents are subject to Canadian income tax on most Canadian-source income unless all or part of it is exempt under a tax treaty.

A foreign national who has been in Canada for more than 183 days in a year is deemed to be a resident of Canada and therefore liable to pay Canadian income tax on his or her worldwide income during the period s/he resided in Canada. This is known as the "sojourn rule" and could have unintended tax consequences for business travellers who are required to spend a significant amount of time in Canada in a given calendar year.

Conclusion

Any time a foreign national is required in Canada for a work-related purpose, both the immigration and the tax implications of that person's activity in Canada must be examined to avoid the risk of any unintended consequences that can be triggered by international business travel.

Andrea Baldwin – Associate
Halifax, NS
902.420.3370
abaldwin@smss.com

Matt Walters – Summer Student
902.420.3200
mwalters@smss.com

Andrea Baldwin practices business immigration law in our Halifax office.

Changes to Newfoundland and Labrador's *Small Claims Act*

The second reading of Bill 11, *An Act Respecting Small Claims*, occurred June 2, 2010 in the Newfoundland and Labrador House of Assembly. If enacted, the Bill will change the jurisdiction of the Small Claims Court.

Under the current regime a judge of the Small Claims Court has jurisdiction to hear a claim for a debt, "payable in money or otherwise, or for damages, including damages for breach of contract," as well as for the recovery of certain taxes or charges so long as the amount claimed does not exceed the limit prescribed by the Regulations. The maximum amount claimable is currently set at five thousand dollars.

The new regime promises an expanded jurisdiction of the Small Claims Court. Should Bill 11 become law, the Court will be able to grant remedies for "specific performance of an agreement in relation to personal property or services; or recovery of personal property," in addition to the above-mentioned remedies for debts or damages. An anticipated result of the Bill's enactment is a subsequent amendment to the Regulations to change the maximum amount claimable. While such an amendment cannot be made until the Bill has been enacted, a government press release indicates that the new limit may be $25,000. Comparable changes recently occurred in Nova Scotia and that province's regime may be indicative as to what we can anticipate will occur in Newfoundland and Labrador.

According to Nova Scotia's experience, we can anticipate regulations that may alter filing fees, the amount of which will depend on the nature of the remedy sought or the amount of the claim, and regulations that govern the fees payable to the Sheriff for execution or recovery of property orders. We may also expect additional amendments to the *Small Claims Act* that will enable parties to apply to transfer proceedings to the Supreme Court and enable a Judge of the Supreme Court to transfer proceedings to the Small Claims Court when the subject matter of the proceeding falls within the jurisdiction of both courts.

Changes anticipated as a result of the Bill are currently speculative and will remain so until the Regulations are amended to reflect the changes introduced in Bill 11. Legislative Counsel has indicated that the Bill may be enacted at the end of June. Consequently, we may not have to wait long to see what the likely impact of these changes will be.

Koren Thomson – Articled Clerk
St. John's, NL
709.722.4270
kthomson@smss.com

Proposed Amendment of National Instrument 43-101 Standards of Disclosure for Mineral Projects

The Canadian Securities Administrators ("CSA") recently proposed a number of amendments to the rules governing public disclosures by companies in the mining industry. The amendments are intended to increase flexibility and make the rules more practical, without significantly modifying the central principles of the rules.

National Instrument 43-101 *Standards of Disclosure for Mineral Projects* ("NI 43-101") was introduced in 2001 by the CSA following a number of scandals that adversely affected the mining industry in the late 1990s. The stated purpose of NI 43-101 was to enhance the accuracy and integrity of public disclosure in the Canadian mining industry. Prior to the most recently proposed amendments, the CSA amended NI 43-101 in 2005 to reflect developments in the industry and experience with the rule since implementation.

The scope of NI 43-101 is not limited to reporting issuers or their material properties and applies to all written and oral disclosure about mineral projects by Canadian issuers. However, despite its broad scope, many of the more onerous requirements only apply to material properties or are triggered by obligations that are applicable to reporting issuers.

The central principles of NI 43-101 are:

- that all disclosure of scientific or technical information made by an issuer on a material property be based upon information prepared by or under the supervision of a qualified person (who meets the regulatory definition of a qualified person and is a member of an acceptable professional association);

- to prohibit disclosure of any information about a mineral resource or mineral reserve unless the issuer uses the CIM Definition Standards on Mineral Resources and Mineral Reserves adopted by the CIM Council on December 11, 2005 (the "CIM Definition Standards") or acceptable foreign equivalents and meets certain other requirements;

- to prohibit disclosure that is seen to be misleading, but to allow, in certain cases, disclosure that would otherwise be prohibited when such disclosure is accompanied by the appropriate context and contains the required cautions; and

- that issuers prepare and file NI 43-101 compliant technical reports:

    - upon first becoming reporting issuers in Canada, and

    - in order to support written disclosure of scientific and technical information in certain circumstances (including, among others, on the filing of a preliminary long-form or short-form prospectus, an information circular relating to the acquisition of a mineral property, an offering memorandum (unless delivered solely to accredited investors), an annual information form, or a news release).

- The obligation to file a technical report will apply on the occurrence of a triggering event, unless the issuer has a current technical report that continues to support the scientific and technical information contained in the triggering document and provided that the issuer files updated certificates and consents of each qualified person who was responsible for preparing or supervising each portion of the technical report.

Proposed Amendments to NI 43-101

On April 23, 2010 the CSA published for comment further proposed amendments to NI 43-101 (including a revised form of technical report and revised companion policy). The central principles of NI 43-101, described above, remain substantially unchanged by the proposed amendment and the amendments are intended to be a fine tuning of NI 43-101 based on the ongoing experience of CSA members with NI 43-101 and reflecting the CSA's recent consultations with market participants. Some of the more notable proposed amendments are set out below.

<u>Technical Report Form</u>

The form of technical report has been revised, with the intention that it becomes less prescriptive and more adaptable for advanced stage development and producing properties. The changes include:

- providing qualified persons with more discretion regarding the amount of information and level of

detail required under each section of the technical report based on their assessment of the relevance and significances of the information in the context and stage of development of the company;

- adding a requirement that the qualified person comment on the adequacy of the data for purposes used in the technical report;
- allowing qualified persons to refer to information in previously filed technical reports to the extent that the information is still current and a summary of the quoted information is included in the technical report;
- allowing qualified persons to rely on and disclaim responsibility for certain information provided by the issuer and certain pricing and valuation information provided by experts who are not qualified persons; and
- exempting producing issuers from the requirement to provide an "economic analysis" for their producing properties unless the technical report includes a material expansion of current production.

Technical Report Trigger

The proposed amendments would remove "news releases" as a technical report trigger, but would expand the list of triggers to include "any first time written disclosure of mineral resources, mineral reserves, or preliminary economic assessments". There is no discussion in the proposed amendments of the CSA's intention with respect to this amendment or regarding the implications for reporting and non-reporting issuers of broadening the technical report trigger in this manner.

Short Form Prospectus Trigger

Concurrently with the proposed amendments, the CSA is seeking comment on whether it should retain, amend or eliminate the short form prospectus trigger from the list of disclosure documents the distribution or filing of which will require the filing of a technical report. NI 43-101 currently requires an issuer file a technical report if a preliminary short form prospectus includes material scientific or technical information about a mineral project on a material property that is not contained in a previously filed technical report. This requirement applies even if the new material information in question does not constitute a material change in the affairs of the issuer or a material change in the scientific or technical information. The CSA acknowledges that the requirement to prepare a new technical report imposes extra costs and limits an issuer's ability to complete short-form offerings on a timely basis, which may not be warranted in some cases.

Information Approved by a Qualified Person

Currently, NI 43-101 requires that all disclosure of scientific or technical information made by an issuer on a material property be based upon information prepared by or under the supervision of a qualified person. This provision has been revised so that disclosure can now either (i) be based upon information prepared by or under the supervision of a qualified person, or (ii) be approved by a qualified person.

Consents and Certificates of Qualified Persons

The proposed amendments include the elimination of the requirement to file updated certificates and consents of qualified persons for the disclosure of scientific or technical information supported by a previously filed technical report, provided that the technical report is still current (i.e., there is no new material scientific or technical information concerning the property not included in the previously filed technical report) and continues to meet applicable independence requirements for purposes of the new triggering event.

In addition, proposed consequential amendments to National Instrument 44-101 *Short Form Prospectus Distributions* ("NI 44-101") would permit an issuer undertaking a short form prospectus offering to obtain consent from the qualified person's firm rather than from the qualified person, subject to certain conditions. Currently, NI 44-101 requires an issuer to obtain an expert consent from the individual who served as the qualified person, which may result in delays for the issuer where the qualified person is no longer employed with the firm or is otherwise difficult to reach at the time of disclosure.

Foreign Qualified Persons, Foreign Codes and Specified Foreign Exchanges

The 2005 amendment to NI 43-101 allowed issuers to use specified foreign reporting codes for their foreign properties, provided that there was reconciliation to the CIM Disclosure Standards. The amended instrument proposes to remove the prescribed list of acceptable foreign mining codes and replace it with an objective test for determining which foreign codes are acceptable. In addition, the amendments propose to delete the requirement to reconcile foreign resources and reserve categories (under acceptable foreign codes) to the CIM Disclosure Standards.

The amended instrument proposes to replace the prescribed list of acceptable foreign professional associations to which a qualified person must belong, with a list of requirements that foreign professional associations must meet in order to be acceptable.

In addition, the proposed amendments would exempt producing issuers whose securities trade on certain "Specified Exchanges" (being the ASX, the JSE, the LSE (Main Market), NASDAQ, the NYSE, and the HKE) and who are required to file technical reports on becoming reporting issuers in a Canadian jurisdiction from the requirement that the initial technical report be prepared under the supervision of an independent qualified person.

These proposed amendments further recognize that many foreign issuers may satisfy foreign standards for scientific and/or technical disclosure that are comparable to NI 43-101. The CSA has stated that the proposed changes should facilitate additional Canadian stock exchange listings by foreign producing issuers.

Extension of Technical Report Deadline on Property Acquisitions

Currently, NI 43-101 requires an issuer to file a technical report within 45 days of disclosing a preliminary assessment, mineral resources or mineral reserves regarding a material property which it has acquired or intends to acquire. The proposed amendments would allow an issuer to delay the filing of a technical report for six months following the issuer's first disclosure of a preliminary economic assessment, mineral resources or mineral reserves, if another issuer previously filed a technical report on the acquired property and the report is still current. When the issuer files a new technical report on the expiry of the six month period, the issuer would have to concurrently file a news release disclosing the filing and reconciling any material differences between the preliminary economic assessment, mineral reserves or mineral resources in the two technical reports. Under the existing NI 43-101, the CSA has found that issuers commonly do not have the necessary information and data to prepare a technical report within the 45 day period, and many issuers have dealt with this issue, where possible, by treating the prior technical information as a historical estimate or by having the other issuer's previous filed technical report re-issued and re-addressed to the issuer.

Royalty Holders

The 2005 amendments to NI 43-101 required issuers who hold material royalty, net profit or similar interests to file technical reports. The proposed amendments soften this requirement by providing an exemption from filing technical reports for royalty holders if information about the mineral project is publicly available and was prepared by either (i) an issuer that is subject to NI 43-101, or (ii) a producing issuer listed on a specified exchange.

Preliminary Economic Assessments

The proposed amendments would allow issuers to disclose a preliminary economic assessment that includes or is based on inferred mineral resources, provided that the disclosure includes a discussion of the impact of the assessment on the results of any preliminary feasibility or feasibility study regarding the property. This amendment would allow the preparation of preliminary economic assessments after the completion of a preliminary feasibility or feasibility study and would allow for disclosure of the preliminary economic assessment even if the result of the assessment were not a material change or material fact.

Historical Estimates

Currently, NI 43-101 only permits disclosure of historical estimates prepared before February 1, 2001. The proposed amendments would allow issuers to disclose historical estimates of the quantity, grade or metal or mineral content of a deposit prepared at any time by a third party before the issuer acquired or agreed to acquire the property (i.e., regardless of whether the estimate was prepared before or after February 1, 2001). However, pursuant to the proposed amendments, when using historical estimates, issuers will now be required to comment on the work needed to update or verify the historical estimate as a current mineral resources or mineral reserve and to include additional disclaimer stating that a qualified person has not done sufficient work to classify the historical estimate as current mineral resources or reserves and that the issuer is not treating the historical estimate as current.

Companion Policy

The CSA proposes to amend the companion policy to NI 43-101 to reflect the proposed amendments to NI 43-101 and in order to:

- add further guidance on use of forward-looking information in technical reports;
- amend the current guidance with respect to determining if a property is a "material property", including a new description of the circumstances in which the CSA is likely to conclude that a property is material;
- expand the current guidance on the use of cautionary language, including further discussion of the requirement for equal prominence of cautionary language; and

- add guidance on certain technical report triggers and the "shelf-life" of technical reports.

Summary

The CSA published the proposed amendments to NI 43-101 with a request for comment on the proposals by July 22, 2010. Please contact us if you wish to discuss or have questions with respect to the current instrument, the proposed changes or if we can assist you with formulating comments on the proposed amendments for submission to the CSA.

Tauna M. Staniland – Associate
St. John's, NL
709.570.8842
tstaniland@smss.com

The *Gift Cards Act* in Prince Edward Island

New legislation has been passed in Prince Edward Island to regulate the use of gift cards, gift certificates and other vouchers of monetary value. The *Gift Cards Act* will prohibit expiry dates and regulate terms and conditions of consumer gift cards. This legislation answers the call for increased consumer protection in the growing market for consumer gift cards.

The *Gift Cards Act* was modelled after New Brunswick's legislation and introduced on the floor of the legislature on April 8, 2010. Expiry dates will be prohibited on gift cards issued or sold after the day the *Act* comes into force. Gift cards with expiry dates that are already on the market, or gift cards issued or sold after the *Act* comes into force, will be redeemable as if they had no expiry date. All gift cards will therefore be valid until fully redeemed or replaced.

Gift cards will be specifically prohibited from being issued for less than the value of payment made by the purchaser at the time of purchase. Service charges and other administration fees will also be prohibited under the *Act*. Any purchaser required to pay illegal fees may demand a refund of their money within one year of the date on which the fee was paid.

Regulations are expected to allow for expiry dates and certain administration fees for cards issued for charitable, marketing or promotional purposes or cards issued for a specific good or service. Activation fees, dormancy fees and other user fees may be permitted by regulation. A person who issues or sells a gift card will have an obligation to clearly disclose all restrictions, limitations, terms and conditions that are imposed in relation to its use. Expiry dates and administration fees permitted by regulation must also be clearly disclosed. Directions for a purchaser or holder to obtain additional information respecting the gift card, including any remaining balance, must also be clearly disclosed on the card. The *Act* does not go so far as to specify what type or size of font is required to meet disclosure requirements.

Contravention of the *Gift Cards Act* will constitute an offence under the *Act* and any natural person found guilty of such will be liable, on summary conviction, to a fine between $200 and $10,000, or imprisonment for 90 days, or both. Any corporation who contravenes the *Act* will be liable, on summary conviction, to a fine between $1,000 and $500,000. Corporate officers may also be found personally liable for offences by their corporation and subject to the same penalty as a natural person under the *Act*.

The *Gift Cards Act* received Royal Assent on May 19, 2010 but the proclamation date for the *Act* has yet to be announced.

Margaret Ann Walsh – Associate
Charlottetown, PEI
902.629.4547
mawalsh@smss.com

Business Disputes Corner

Personal Property Registrations in Atlantic Canada – What's in a (middle) Name?

Two recent trial decisions in Nova Scotia and Newfoundland & Labrador underline the inherent risk facing a secured creditor who fails to properly register notification of a security interest in the property of a debtor by failing to include the full and complete name of the debtor or the full serial number (where required) of collateral, in a registration in a Personal Property Registry in any of the Atlantic Provinces. These Court decisions, which have adopted the reasoning of the New Brunswick Court of Appeal in the 2003 decision of *GMAC Leasco Ltd. v. Moncton Motor Homes & Sales Inc. (Trustee of)*,[1] have both held that a registration which does not include the full name of the debtor is a seriously misleading error invalidating the registration pursuant to the Personal Property Security Acts of New Brunswick, Nova Scotia and Newfoundland.

In the leading case in New Brunswick a secured creditor registered notification of its security interest against the name "Moncton Motor Home **and** Trailer Sales Ltd." The full and proper name of the debtor was actually "Moncton Motor Home **&** Trailer Sales Ltd." A search of the registry made by the Trustee in Bankruptcy of the debtor under the correct name "Moncton Motor Home **&** Trailer Sales Ltd." disclosed no registrations. The Court of Appeal declared the failure by the secured creditor to properly register against the complete and true name of the debtor was a seriously misleading error where a search using the correct information failed to reveal an "exact" or "close" match. The result of the case was that the trustee in bankruptcy defeated the secured creditor's claim; the secured creditor lost its priority in the assets of the debtor and was unable to recover against those assets in the bankruptcy of the debtor.

In the 2009 Nova Scotia decision in *Robie Financial Inc. v. Pye*[2] the Personal Property registration against an all terrain vehicle leased by Barry Kevin Pye from Sunset Auto Sales, was registered using the correct serial number and, also, under the name "Barry Pye". Sunset Auto Sales assigned the lease to Robie Financial. The full and proper name of the debtor was Barry Kevin Pye. Upon the bankruptcy of the debtor, a search of the Personal Property Registry using the proper (full) name of the bankrupt, Barry Kevin Pye, did not disclose the registration against the name Barry Pye. This invalidated the registration of Robie Financial as against the Trustee in Bankruptcy. The fact that the registration could be found by using the serial number search did not cure that defect as the provisions under the Statute make it clear that a defect in the name of the debtor causes the registration to be invalid. The decision specifically refers to *GMAC Leasco Ltd. v. Moncton Motor Home & Sales Inc. (Trustee of)* where the Court stated that serial number searching was intended to be a supplementary mode of searching, not an alternative to debtor-name searching.

In a recent (unreported) decision in Newfoundland in the matter of the bankruptcy of Joan Elizabeth Owens and John Joseph Owens the secured creditor, a Credit Union, appealed the disallowance of its secured claim by the Trustee in Bankruptcy of Joan and John Owens. There, the registration against the collateral, a motorcycle, used only the names of the bankrupts, "John Owens" and "Joan Owens". There was no reference in the registration to the third (middle) names of the two debtors. The Credit Union had also attempted registration by entering the last five digits of the serial number of the motorcycle but failed to enter the full serial number. The judge dismissed the arguments of the secured creditor and ruled that either error was enough to invalidate the registration.

1. GMAC Leasco Ltd. v. Moncton Motor Homes & Sales Inc. (Trustee of) 2003 NBCA 26
2. Robie Financial Inc. v. Pye, 2009 NSSC 397

These cases demonstrate that the result from improper registrations such as these will likely be the same in any of the Atlantic Provinces. The Prince Edward Island *Personal Property Security Act* was amended in 2003 adding provisions similar to those at issue in *Robie* which were interpreted as adopting the reasoning in *GMAC Leasco*. The failure to register notification of a secured creditor's interest in a debtor's property in a Personal Property Registry against the full and complete name of the debtor, when challenged, will be found to be a seriously misleading error and will invalidate that creditor's registration.

Secured creditors and other users of the Personal Property Registries are warned to be exacting in their registrations or they risk losing the priority of their security interest in a debtor's goods.

(This article was written with the assistance of Graeme Blake – Student at Law.)

Hugh Cameron – Partner
Fredericton, NB
506.443.0120
hcameron@smss.com

Practice Contacts

Business

The firm provides comprehensive services in all aspects of company and commercial law including creation of corporate and other vehicles, shareholder agreements, partnerships, joint ventures, distribution, agency and other such agreements; franchising and licensing; all manner of commercial contracts; mergers and acquisitions including structuring, due diligence, bids, and associated financing and tax planning; MBOs, LBOs, amalgamations, and asset and share transactions; cross-border transactions and assisting foreign clients making investments in Atlantic Canada, including the establishment and expansion of operations; all aspects of business disputes, including commercial litigation, arbitration and mediation. Stewart McKelvey has expertise in using corporations and unlimited liability companies, as well as international trust companies formed in the jurisdiction in which we practice, to solve the unique requirements of our domestic and international clients.

Department Manager, Business

Maureen Ryan – Partner
709.570.8880
mryan@smss.com

Practice Group Leaders

Business Disputes
Colin Piercey
902.420.3345
cpiercey@smss.com

Commercial Real Property
Fraser MacFadyen
902.420.3365
fmacfadyen@smss.com

Intellectual Property/Information Technology/Entertainment
Rob Aske
902.420.3310
raske@smss.com

Lending & Insolvency
Lee Bell-Smith
506.632.2793
lbellsmith@smss.com

Mergers & Acquisitions
Deanne MacLeod
902.420.3313
dmacleod@smss.com

Natural Resources & Environmental
Greg Moores
709.570.5797
gmoores@smss.com

Owner Managed Businesses
Peter Klohn
506.632.2788
pklohn@smss.com

Securities/Public Companies
Gavin Stuttard
902.444.1709
gstuttard@smss.com

Tax, Estates & Trusts
Paul Festeryga
902.420.3302
pfesteryga@smss.com

Service First

Clients expect and have the right to receive full value for the fee charged. We have earned a reputation for providing value to business, the public sector and individuals. Service First defines the standards of client service at Stewart McKelvey. Our lawyers and staff hold themselves accountable to deliver the following standards of service to each of our clients:

1. We will work to provide you with the highest quality of confidential, ethical legal services.
2. We will work with you to develop a full understanding of your business / organization and expectations.
3. We will pursue your work conscientiously and without delay. We will work together with you to establish time specific goals and objectives that meet your needs.
4. We will delegate work to our lawyers who have the legal expertise and experience appropriate to both the nature and complexity of the matter and our understanding of your expectations. Where deemed appropriate by you, we will designate a qualified lawyer as an alternative service contact to ensure continuity of service when the lawyer responsible for your matter is not available. At your request, we will work with you to develop practical fee estimates. We will always strive to add value.
5. At your request we will provide documentation that outlines the scope of the legal services to be provided; the potential timeline for handling the matter; a list of the client team members and alternate service contact, with their fields of expertise; and our lawyers' contact information.
6. We will meet and strive to exceed your expectations and always welcome your feedback. We will from time to time, seek from you, either formally or informally, an assessment of our performance.
7. We will maintain effective channels of communications including keeping you informed of all significant developments in the legal matter and responding to your contact in a timely fashion.
8. Accounts will be easy to understand. We will always be receptive to client feedback on our billing practices. When issues arise, we will treat them seriously and respond promptly.
9. If you are dissatisfied with our services, or if you feel we have failed to meet any of these commitments, we ask that you call the service lawyer on your matter, the alternate service lawyer, Regional Managing Partner, Department Manager or Practice Group Leader to discuss your concern. We will honestly and fairly address your concerns.