STEWART McKELVEY
LAWYERS • AVOCATS

DOING BUSINESS IN ATLANTIC CANADA

EMBRACING EAST COAST POTENTIAL

Welcome to the newest edition of *Doing Business in Atlantic Canada*. As a leading law firm with locations throughout Atlantic Canada, we have strong roots within this community and are proud to share our insights into its unique legal and economic landscape.

It is an exciting and challenging time for Atlantic Canada. Irving Shipyard, based in Halifax, Nova Scotia, was awarded a $25 billion government contract to build new naval vessels. Utility companies in Newfoundland and Labrador and Nova Scotia are investing in a multi-billion dollar project to develop hydro-electric capacity, the Lower Churchill project, and an underwater link to ship that electricity to markets all along the eastern seaboard. Newfoundland and Labrador and Nova Scotia are reaping the benefits of a growing offshore oil and gas industry, while Prince Edward Island and New Brunswick entrepreneurs in the technology, biotech, aerospace and defence sectors continue to demonstrate the strength of our region's start-up community.

We face some interesting new challenges as well. A report released in early 2014 by the Ivany Commission, called *Now or Never: An Urgent Call to Action for Nova Scotians* brought a spotlight to these challenges – ones we believe all of Atlantic Canada shares. They include immigration (specifically, attracting new entrepreneurs to our provinces), developing a stronger export culture, and diversifying beyond a traditional dependence on natural resources. Thanks to this report, these issues have re-emerged as priorities for both the public and private sectors.

At Stewart McKelvey, our single objective is the best results for our clients. We have the capacity, experience and size to assist, whether local clients aspire to expand in national and international markets, or national and international clients wish to explore Atlantic Canadian expansion. More on our firm and our team is provided on the next page and see our website for more details, www.stewartmckelvey.com.

We welcome your interest in Atlantic Canada. Should you wish to learn more, I am pleased to answer your questions or put you in contact with our team.

John Rogers, QC
CEO, Stewart McKelvey
jrogers@stewartmckelvey.com

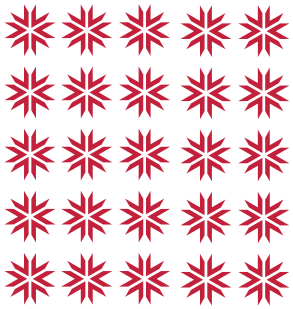
at a GLANCE

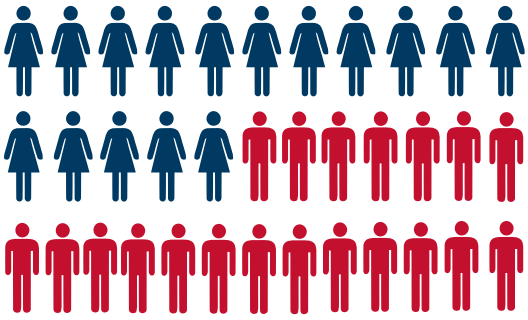
We have earned an established national and international reputation for delivering first-rate results for our clients. Over our years of practice, we have grown to become one of the **Top 20 Largest** law firms in Canada. Our legal team of more than **200** lawyers and **350** staff in six cities across Atlantic Canada share a single objective –

the best results for our clients.

25

Lawyers Listed as **Local Litigation Stars** or **Rising Stars** by ***Benchmark Litigation Canada***





36 Bilingual Lawyers

72

Lawyers Listed as **Leading Practitioners** in the ***Canadian Legal Lexpert Directory***

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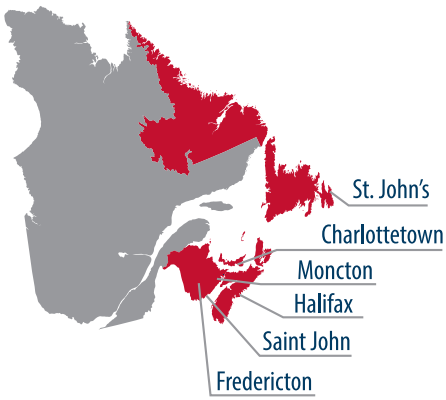
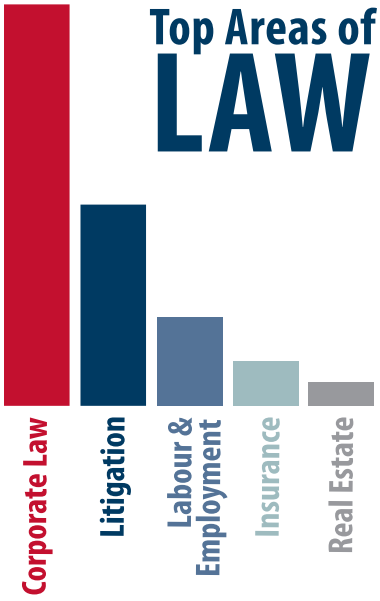


7 Lawyers hold **TEP** designations

57 Partners hold their **QC** designations

91 Lawyers Listed in ***Best Lawyers***

Top Areas of LAW



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By Aon Hewitt

1 of 3

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1st on the Third Quarter Equity Issuer Table, published by the Financial Post, December 2013

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- 1 Fellow International Society of Barristers
- 6 Fellows American College of Trial Lawyers
- 3 Fellows Canadian College of Construction Lawyers

Member

International Advisory Board of the **Association of Caribbean Corporate Counsel**

STEWART McKELVEY

LAWYERS • AVOCATS

Updated June 11, 2015

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CHAPTER 1

INTRODUCING STEWART MCKELVEY

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INTRODUCING STEWART MCKELVEY

At Stewart McKelvey, our single objective is to achieve **"the best results for our clients"**.

Since the last edition of *Doing Business In Atlantic Canada* prepared in 2009, this commitment to our clients has manifested itself in many ways. Some of our work includes acting as lead counsel for a large grocery chain that recently cemented its position as the second largest grocery retailer in Canada; we helped to open international markets for a large aquaculture company that now distributes products throughout the world; and we advised a local production company that has grown into a leading distributor and producer of children's entertainment.

Since our 2009 edition, we recognize our clients' definition of the *best result* has also evolved. It means much more than a successful business outcome and has grown to encompass a new definition of value.

We knew we must invest in leading edge technologies and learn more about legal processes which foster efficiency, improve clients' access to information and increase responsiveness. Therefore, we focused our attention on client-facing tools that support improved service and greater value. Members of our team are recognized as leaders in the development of eDiscovery protocols, and are certified in Legal Project Management. Where appropriate we apply this training and technology to deliver on our commitment of cost efficiency and the highest quality of service.

Value may also be seen in our commitment to the communities in which we live and work. Through sponsorships, donations or direct staff and lawyer participation, we give generously to local events and charities that help to improve the quality of life and strength of our communities. We foster diversity amongst our staff and we have initiated many green initiatives designed to reduce our environmental footprint.

Our *Doing Business In Atlantic Canada* publication is another way we add value and we are pleased to share our insights into this region.

Within this publication, we are pleased to provide you with specific detail with regards to areas of practice, greater detail on business and tax incentives designed to attract you to this region and some basic facts about our communities and the economic outlook for the region.

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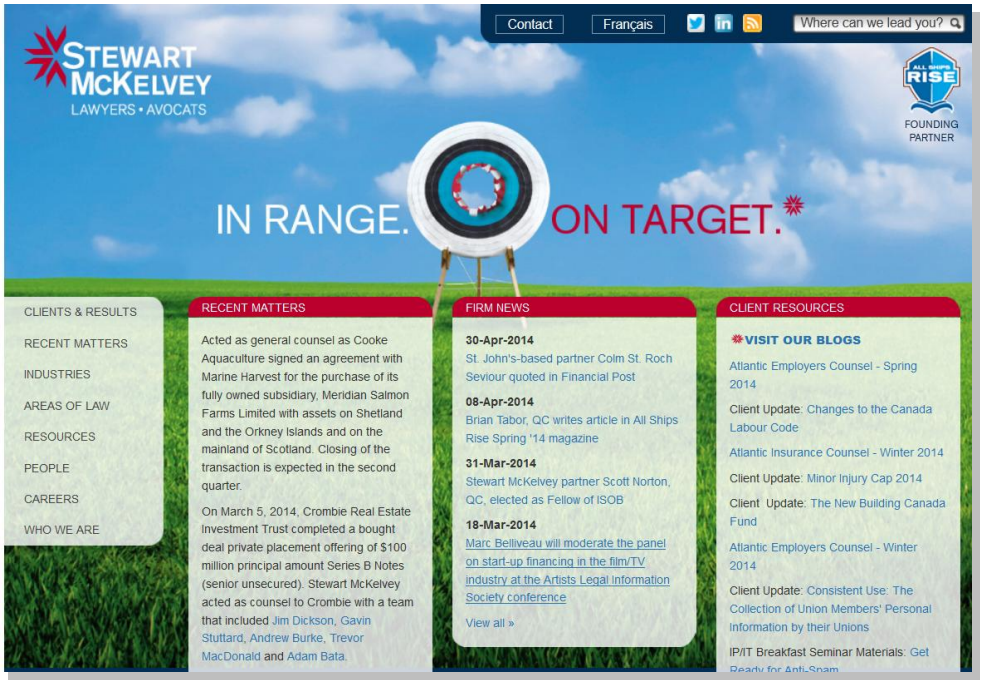
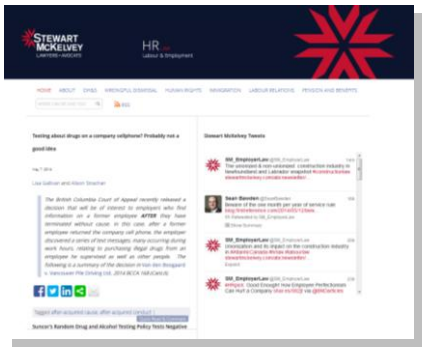


Visit **www.stewartmckelvey.com**



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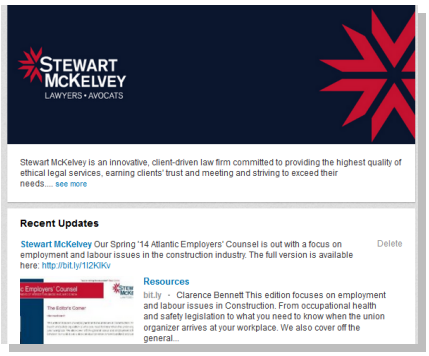

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WELCOME TO ATLANTIC CANADA

Quick Facts

- Canada, the world's second largest country, occupies the upper portion of the North American continent. Its boundaries stretch from the Pacific Ocean in the west to the Atlantic Ocean in the east, to the Arctic Ocean in the north and to the United States in the south.
- Canada has a federation of 10 provinces and three territories.
- It has a population of approximately 33 million people.
- Canada has two official languages, English and French, meaning that they have equal status in all federal institutions and are the languages used officially by the federal government.

ATLANTIC CANADA

Canada's four most easterly provinces form the region known as Atlantic Canada and has a population of approximately 2.3 million people. These provinces are (from west to east):

- New Brunswick
- Prince Edward Island
- Nova Scotia
- Newfoundland and Labrador

NEW BRUNSWICK

Quick Facts

- Population: 747,000 people.
- In the Atlantic Time Zone and observes Daylight Saving Time.
- Bounded by Quebec to the north west, Nova Scotia to the east and the state of Maine to the south west.
- More than 5,500 km of coastline stretching between the Gulf of St. Lawrence and the Bay of Fundy, making up more than 87% of the total New Brunswick boundary.
- The only province where both English and French are official languages, meaning that all provincial government services are required to be made available to the public in both languages.

Natural resources are an important part of the provincial economy. About 80% of the province is forested. Combined with fishing, agriculture and mining, these traditional natural resource based industries have long been the cornerstone of the provincial economy.

New Brunswick's dependence on these traditional resources is evolving. The province is rich in natural gas deposits and its proximity to markets in Quebec and the United States has helped to foster a growing natural gas industry. A proposed east-west pipeline, a project that promises to ship oil from Calgary to New Brunswick, would further bolster this province's strong natural resources sector. Many of the lead manufacturing industries are derived from the production of these resources and include food processing, pulp and paper, sawmills, oil refining and metal processing.

What is relatively new to the province is its strong start-up and entrepreneurial community. The Information and Communications Technologies sector contributes just under $900 million to the provincial GDP. Success stories such as Radian6's sale to tech giant Salesforce have helped to inspire further growth and investment, by both the government and angel investors from around the world. The province continues to invest heavily in R&D, and in partnership with its universities, has also helped to support a strong bio-med sector which benefits from this growing start-up community.

PRINCE EDWARD ISLAND

Quick Facts

- The smallest province of Canada, but with a population of 140,000 people it has the highest population density of any Canadian province.
- Lies in the Gulf of St. Lawrence and is surrounded by the other three Atlantic Provinces and the province of Quebec.
- The Confederation Bridge stretches 13 km across the Northumberland Strait, connecting Prince Edward Island to New Brunswick.
- No place in the province is more than 16 km from the sea.
- Prince Edward Island is in the Atlantic Time Zone and observes Daylight Saving Time.

The province is known as the “Garden of the Gulf” as 90% of the land is arable. It is a low level island and has red sandy clay which is excellent for agriculture. It is no surprise that the province is best known for its potatoes and that agriculture accounts for much of the provincial economy.

The service industry, including a large tourism industry, is pivotal to the Island’s economy. But like many, the Island is looking for ways to diversify and government investment in the millions of dollars has helped local companies in the aerospace and defence, information technology and communications sectors.

NOVA SCOTIA

Quick Facts

- It has a population of 938,000 people.
- Is almost completely surrounded by the Atlantic Ocean.
- It is comprised of a mainland peninsula and the island of Cape Breton.
- Its capital, Halifax, boasts the world's second largest natural ice-free harbour.
- In the Atlantic Time Zone and observes Daylight Saving Time.

In 2011, Irving Shipyard in Halifax, Nova Scotia won the $25 billion government contract to build supply and naval vessels, supporting the growth of a shipbuilding centre of excellence in this region. BP and Shell are involved in multi-million dollar offshore oil and gas exploration projects off the coast of the province and the hope for a new LNG shipment facility helps round out healthy projections for the province's future.

In addition to a healthy natural resources based economy, which includes fisheries, forestry and mining, the province has gained a reputation for its financial sector. Approximately 3,300 financial and insurance companies were operating in Nova Scotia in 2011.

Finally, the province has also fostered a healthy start-up community, partially building on the robust university sector and with significant investment in big data analytics centres and media and gaming industries. The sector now accounts for 34% of all private sector R&D spending and employs more than 21,000 people.

NEWFOUNDLAND & LABRADOR

Quick Facts

- It consists of the island of Newfoundland and the mainland of Labrador.
- It is the most easterly province in Canada, where you can find the most easterly point in North America.
- The population is 508,000 people, mostly concentrated on the Avalon Peninsula where the capital city of St. John's is located.
- It is in the unique position of having two time zones. Labrador is in the Atlantic Time Zone, which is one hour ahead of the Eastern Time Zone. Newfoundland has its own time zone, which is one-half hour ahead of the Atlantic Time Zone. So if it is 1 p.m. in Toronto it will be 2 p.m. in Labrador and 2:30 p.m. in Newfoundland. Both Newfoundland and Labrador observe Daylight Saving Time.

Newfoundland and Labrador's economy is currently one of the fastest growing in Canada. Oil and gas is leading this growth including well established projects at Hibernia, Terra Nova and White Rose, and new discoveries off the Flemish Pass Basin. The development of a multi-billion dollar hydro-electric project, the Lower Churchill project, further enhances the province's strong position in the energy markets.

Labrador's mineral development, particularly in iron ore, is also expected to rise. This remote area of the country is rich in mineral deposits and large mining companies from around the world have invested in its potential.

The City of St. John's, its capital, is also investing in its ocean technology. With 15 research and educational institutions in the surrounding area, the City aims to attract over $1 billion in private sector revenue by 2015. Private sector investment in R&D in this region is particularly strong, including the development of its manufacturing, oceans, technology and biotech sectors.

ECONOMIC EQUATION OF THE ATLANTIC ADVANTAGE

Atlantic Canada offers one of the most competitive business cost environments among the G7 countries.

We have one of the lowest annual facility costs in Canada. (see chart)

We boast a highly competitive tax environment. (see chart)

To encourage innovation, our region has some of the most favourable tax rates for R&D spending.

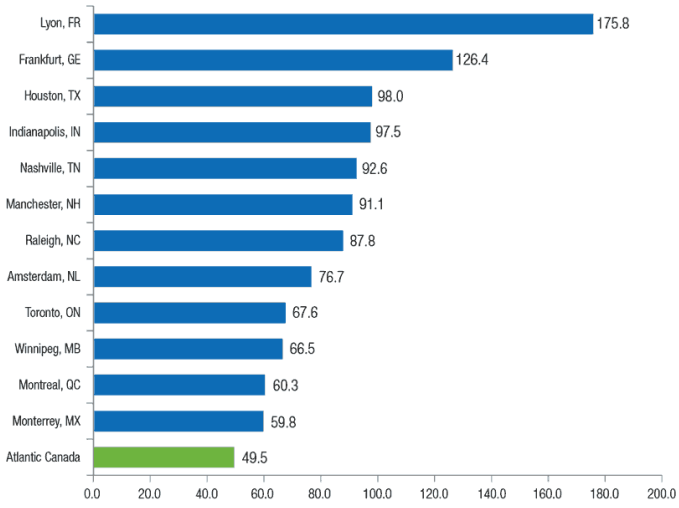
R&D is growing faster in Atlantic Canada than the rest of Canada.

We benefit from low utility, insurance and labour costs.

We offer easy access to North American and European markets, thanks to a convenient location, very strong transportation infrastructure and an advanced telecommunications network.

What does this mean?

Source: KPMG Competitive Alternatives: KPMG's Guide to International Business Location, 2008 Edition. Total gross lease costs for a sample web development studio.



Source: Competitive Alternatives: KPMG's Guide to International Business Location, 2010 Edition. TTI includes corporate income taxes, capital and sales taxes as well as miscellaneous local business taxes and statutory labour costs (wage-based taxes and mandated benefit payments).

When you add these up, it equals the Atlantic Advantage – a lower cost of doing business. These are direct, material savings which can be reinvested back into growth and development, benefit shareholders and help you gain a competitive advantage.

WORKFORCE

Atlantic Canada has one of the world's best labour markets, with a skilled workforce of 1.2 million people and among the lowest rates of turnover and absenteeism in North America. Atlantic Canada has more post secondary institutions per capita than anywhere else in Canada. As well, more than 200 different training programs are offered through Atlantic Canada's community college network. The result is a highly skilled and educated workforce, a considerable portion of which is bilingual in English and French.

QUALITY OF LIFE

The cost of living in Atlantic Canada is 25 to 65% lower than that of other major North American regions. It has the best *Housing Affordability Index* in Canada, and property taxes are 30% lower than the Canadian and United States average.

Canadian residents enjoy lower direct health care costs as a result of the publicly funded health insurance system, which covers a wide range of health, hospital and physician services. The existence of this system provides employers with a competitive cost advantage over those having to provide direct funding of private employee health insurance programs.

Atlantic Canada is also a very safe environment in which to live and do business, with lower rates of crime than most other industrialized nations. It offers safe, friendly, family-oriented communities, with an abundance of excellent schools, universities and colleges within the region.

INCENTIVES

Many of the incentives available in Atlantic Canada take the form of forgivable loans, interest-free repayable loans, equity participation, or combinations thereof. Training-related incentives, such as in the form of subsidized wages, are also commonly offered in the region.

For a detailed survey of available incentive programs in Atlantic Canada, please see the Appendix: Business Incentives.

THE CANADIAN POLITICAL AND JUDICIAL SYSTEMS

Canada has a parliamentary system of democratic government. A former dominion of Great Britain, Canada is a constitutional monarchy, its head of state being the Queen of Canada, Queen Elizabeth II, who is also Queen of Britain, Australia, New Zealand and a number of other Commonwealth nations.

Under the *Constitution Act, 1867*, powers and responsibilities are divided between the federal government and the 10 provincial governments, with the federal government retaining jurisdiction over the three territories. The federal list of powers under the *Constitution* generally relates to national matters, such as the regulation of trade and commerce, criminal law and procedure, direct and indirect taxation, banking, currency, defence, navigation and shipping, patents and copyrights. The provincial list of powers is generally concerned with local matters, such as municipal institutions, local works and undertakings, education, direct taxation, the administration of justice, property and civil rights, and matters of a merely local and private nature in the province (including internal trade issues). The *Constitution* also provides for concurrent federal and provincial jurisdiction in a number of areas, including health, the environment, agriculture and immigration.

An important element of the *Constitution* is the *Canadian Charter of Rights and Freedoms*, which was adopted in 1982. The *Charter* guarantees a series of rights and freedoms, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Among the rights and freedoms contained in the *Charter* are:

- Fundamental freedoms, including freedom of conscience and religion; freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; freedom of peaceful assembly; and, freedom of association;
- Democratic rights, such as the right of citizens to vote in elections for members of the House of Commons and legislative assemblies;
- Mobility rights, including the right to live and to seek employment anywhere in Canada;
- Equality rights;
- Legal rights, such as the right to be secure against unreasonable search or seizure;
- Language rights, such as the right to use either of Canada's official languages and the right of French and English linguistic minorities to an education in their language; and
- Protections for aboriginal peoples' pre-existing rights.

The *Charter* is particularly significant because unlike earlier Canadian human rights legislation, it is entrenched in the *Constitution*, which is the supreme law of Canada. Laws that are not consistent with the *Constitution* (including the *Charter*) may be found to be invalid.

Canada's system of government has three branches: legislative, executive and judicial. At the federal level, the legislative branch is represented by the Parliament, which consists of the House of Commons and the Senate. Members of the House of Commons are elected by direct, popular vote to serve for terms of up to five years. Members of the Senate are appointed by the Governor General (the Queen's representative in Canada), with the advice of the Prime Minister and serve until reaching 75 years of age. At the provincial and territorial level, the legislative branch is represented by a single chamber legislative assembly, whose members are elected by direct, popular vote.

The executive branch consists of the head of state (the Queen, as represented by the Governor General), the Prime Minister and the Cabinet. The Prime Minister is the leader of the party that forms the government in the House of Commons. This is usually the party that has the highest number of members elected. The Cabinet is comprised of the federal ministers chosen by the Prime Minister from among the members of his or her own party sitting in Parliament. The same executive structure exists at the provincial and territorial level, with the head of state (the Queen, as represented by the Lieutenant Governor), the Premier (being the leader of the party which forms the government in the legislature) and the Cabinet.

In Canada, unlike the United States, some elements of the executive and legislative branches are combined, in that the majority party in the legislature also controls the executive.

The judicial branch consists of the Supreme Court of Canada, the Federal Court of Canada, the Tax Court of Canada and the provincial courts. Each province has its own Court of Appeal, together with a number of lower level courts which function as the courts of first instance for most criminal and civil matters. In Canada, the judiciary enjoys complete independence from the other branches of government.

With the exception of Quebec, the laws of Canada are derived from two sources: the statute laws as enacted by the federal and provincial legislatures and the "common law", being the precedents established by the judiciary over time through court decisions. Unlike the rest of Canada, Quebec operates primarily under a civil code system rather than a common law system. The civil code is a written text defining civil laws in the province and has its basis in France's Napoleonic Code.

CHAPTER 2

FORMS OF BUSINESS ORGANIZATIONS

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CHAPTER 2

FORMS OF BUSINESS ORGANIZATIONS

Businesses in Atlantic Canada can operate through a variety of legal entities, including companies, sole proprietorships, partnerships, limited partnerships, joint ventures and co-operative associations.

COMPANIES

Overview of Incorporation

A company is a legal entity that is separate and distinct from the shareholders who contribute to the company's capital. The shareholders exercise ultimate control over the management of the company through the election of directors. The directors are responsible for the day-to-day management of the business and affairs of the company and have a duty to act honestly, in good faith and in the best interests of the company. Companies enjoy perpetual succession, meaning that the existence of the company continues despite the death of any or all of its shareholders. Furthermore, companies are afforded all the rights of a

natural person to own property and the rights to carry on business.

There are several advantages to using a corporate form of business organization as opposed to other available forms such as sole proprietorships and partnerships:

- An incorporated company offers investors access to a wide range of financing opportunities. The flexibility that exists with respect to a company's share structure under either provincial or federal corporations legislation provides investors with a number of investment options: shares can be voting or non-voting; can have limited or unlimited participation in equity; and can be redeemable for a fixed price at the option of the company or the holder. The effect of this flexibility is that various classes of shares and debt instruments may be utilized to provide different levels of shareholder and lender participation in the capitalization of the company and to provide varying degrees of risk or opportunity for profit.
- Generally speaking, the liability of a shareholder is limited to the amount of that shareholder's contribution to the company, although the Nova Scotia *Companies Act* provides for the incorporation of unlimited liability companies (discussed further below).
- The control of a company can easily be transferred through a transfer of shares.

Federal or Provincial Incorporation

Each province has its own companies legislation, being the *Business Corporations Act* ("NBBCA") in New Brunswick, the *Companies Act* ("PEICA") in Prince Edward Island, the *Companies Act* ("NSCA") in Nova Scotia, and the *Corporations Act* ("NLCA") in Newfoundland and Labrador. The federal companies legislation is the *Canada Business Corporations Act* ("CBCA"). Companies (referred to as "corporations" under the NBBCA and NLCA) may be incorporated either under one of the provincial companies statutes or under the federal CBCA. Currently there is little practical difference between the provincial and federal powers to incorporate a business. A company established under a provincial companies statute is entitled to carry on business in that province and generally will be required to register in all other jurisdictions in Canada in which it carries on business. A company incorporated under federal legislation is entitled to carry on business anywhere in Canada, but it may also be required to be registered in any province in which it carries on business.

There are certain practical factors that may affect the decision on where to incorporate. One important factor is the requirement for at least 25% of the company's directors to be Canadian residents for incorporation under the CBCA or the NLCA. To qualify as a resident, a person must be either a Canadian citizen or a permanent resident under the federal *Immigration and Refugee Protection Act*. Subject to some limited exceptions, a person must already be living in Canada in order to be considered to have resident status. It is possible to avoid these

residency requirements by incorporating in New Brunswick, Prince Edward Island or Nova Scotia, which have no residency requirements. Incorporation in these provinces can then be followed by extra-provincial registration in other provinces in which the company intends to conduct business.

Other factors to consider when determining where to incorporate include:

- The PEICA requires disclosure of all shareholders having more than 5% of the issued and outstanding shares of the company, both at the time of incorporation and subsequently on an annual basis. However, the identity of shareholders need not be disclosed under the NSCA, NBBCA, NLCA and CBCA, either at the time of incorporation or subsequently.
- Variations exist between the different jurisdictions with respect to corporate matters such as minority shareholder rights and dissenting rights. For example, shareholders having a grievance against other shareholders or directors of a federally incorporated company have their right to recourse set out in the CBCA, while shareholders under the PEICA must generally rely on the common law for protection of their rights.
- Directors of CBCA companies are personally liable for unpaid wages of employees of the company, to a specified maximum. There is no corresponding liability in any of the provincial companies legislation in Atlantic Canada. However, Newfoundland and Labrador's *Labour Standards Act* contemplates such liability in certain circumstances, as do pending amendments to the New Brunswick's *Employment Standards Act*.
- The provincial criteria for name clearance are generally less stringent than under the CBCA, and consequently an applicant is more likely to obtain a preferred corporate name under provincial legislation. On the other hand, there is slightly more name protection under a federal incorporation than under a provincial incorporation.
- The "unlimited liability" form of company continues to be in demand in recent years because of certain United States tax advantages that are only available to companies with unlimited liability. If it is necessary that the company have unlimited liability, Nova Scotia is currently one of only three jurisdictions in Canada that permit incorporation of such companies, the others being Alberta and British Columbia. Unlimited liability companies are discussed in more detail below.
- All of the Atlantic Provinces have enacted provincial legislation to deal with several important electronic commerce issues, including the ability to manage corporate governance issues quickly and efficiently using electronic methods such as email. In New Brunswick, the *Electronic Transactions Act* governs electronic commerce. In Nova Scotia, Prince Edward Island and Newfoundland and Labrador the relevant legislation is known as the

Electronic Commerce Act. Please see Chapter 5 – Trade and Business Conduct Regulation for further information.

Provincial Incorporation

The process for incorporating a provincial company varies somewhat from province to province. In New Brunswick and Newfoundland and Labrador, companies are incorporated through the delivery of articles of incorporation to the appropriate director and the issuance of a certificate of incorporation. In Nova Scotia, incorporation takes place through the delivery to the Registrar of a memorandum of association, together with articles of association in most cases. A certificate of registration is then issued. In Prince Edward Island, charters of incorporation are granted through the issuance of letters patent.

While the mechanisms for creating companies vary from province to province, they tend to follow the same general pattern. The process for incorporating a company under the NLCA is described below for illustrative purposes.

A company is registered under the NLCA by filing articles of incorporation with the registrar in the prescribed form. The constating documents of a Newfoundland and Labrador company consist of the Articles of Incorporation and, in most cases, By-Laws. The Articles of Incorporation contain the name of the company, the restrictions, if any, on the objects and powers of the company, the address of the registered office in the province, the classes and maximum number of shares which the corporation is authorized to issue, a statement as to the nature of restrictions on shares and the number of directors.

Companies are managed on a day-to-day basis by the directors and officers of the company. The shareholder's role is generally limited to matters prescribed by the NLCA, including electing directors and fundamental corporate changes. Certain matters, such as changes to the share capital or a change in the name of the company, are required to be dealt with by special resolution, which must be approved by at least a two-thirds vote of the shareholders or a unanimous written resolution.

Every Newfoundland and Labrador company must register with the Registrar of Companies pursuant to the NLCA. A name reservation is required prior to the registration of a company name. A company name is required to have both a descriptive and distinctive element. For example, ABC Inc. will not satisfy the Registrar of Companies, whereas ABC Software Inc. will likely be acceptable as it provides an indication of the nature of the company's business. Companies are also required to have a "registered office" in Newfoundland and Labrador where certain corporate (but not financial) records are required to be maintained.

Each year, the company must file an annual renewal of its registration together with an updated list of the directors of the company and their civic addresses. If a company is not in good standing under the NLCA it may not bring or maintain an action in any court in Newfoundland and Labrador. In addition, it is subject to a fine for non-compliance and

is susceptible to being struck from the Registry.

Newfoundland and Labrador has an Innu Business Registry which maintains a listing of all Innu Businesses. An Innu Business is a business organization in which the Innu or First Nations have at least 51% ownership or effective control. In addition, an Innu Business must commit to make best efforts to employ qualified Innu by providing either (i) a minimum of 20% of the full-time positions; or (ii) a minimum of 25 full time positions; and guarantee the Innu partner or partnership the greater of 5% of the gross business revenues or a net profit distribution in accordance with the partnership ownership percentages. All types of business organizations that meet the established criteria are eligible to be registered at the Innu Business Registry. Registration is a requirement in order to avail of certain business opportunities and there is no fee for registration.

Nova Scotia Unlimited Companies

An unlimited company is a distinct form of legal entity which may be formed under the NSCA. Like limited companies, unlimited companies are registered under the NSCA by filing signed constating documents with the Registrar of Joint Stock Companies. However, unlike a limited company, the shareholders of an unlimited company will, by definition, have unlimited joint and several liability for the obligations of the company upon its dissolution. Unlike the partners of a partnership (which is discussed below), the shareholders of an unlimited company have no direct liability to creditors of the company; their responsibilities only arise when the entity is liquidated with insufficient assets to satisfy its obligations.

Unlimited companies are useful from a United States ("U.S.") tax planning perspective. Under U.S. tax regulations, due to the unlimited liability nature of unlimited companies, they are eligible to elect partnership treatment (or elect to be disregarded) and as a result for U.S. tax purposes any income or losses of the unlimited company may thereby be taxed in the hands of the shareholders. It is important to note that Canadian withholding tax obligations on interest, dividends and other similar payment to the U.S. shareholders of an unlimited company may be more onerous than for limited companies. These complications should thus be carefully considered before using an unlimited company.

Prior to 2005, Nova Scotia was the only Canadian jurisdiction that permitted the formation of unlimited liability companies ("ULCs"). However, since then amendments to Alberta's *Business Corporations Act* in 2005 and British Columbia's *Business Corporations Act* in 2007 have permitted the formation of ULCs in Alberta and British Columbia as well.

The legislative regimes governing ULCs in Nova Scotia, Alberta and British Columbia have some substantive differences. The NSCA is derived from English partnership law. Nova Scotia ULCs ("NSULCs") are created under the NSCA and are governed by 150 years of case law in England and elsewhere. Alberta and British Columbia's *Business Corporations Act*s are similar to other modern Canadian corporate statutes. Because the unlimited liability concept is

novel in a statute of this kind, there are compatibility issues to be resolved and little applicable judicial authority. On the other hand, the Alberta and British Columbia statutes are better able to address modern Canadian corporate concepts than the NSCA.

One of the most significant differences between ULCs in the different jurisdictions is the nature of shareholder liability. Under the Nova Scotia legislation, shareholders have no direct liability to creditors of the ULC; rather, liability arises on a winding-up. For the shareholders to be liable, the creditors must establish a claim against the NSULC, and there must be the inability of the NSULC to pay. It is only at that point that the creditors may pursue shareholders of the NSULC by winding up the NSULC and claiming a deficiency.

Shareholders of an Alberta ULC ("AULC") are liable for an unlimited amount, on a joint and several basis, for any liability, act or default of the AULC, including actions commenced up to two years after the dissolution of the AULC. Liability also extends to non-monetary obligations (i.e. criminal liability).

Shareholders of a British Columbia ULC ("BCULC") are jointly and severally liable to satisfy the debts and liabilities of the BCULC as follows: (i) if the BCULC liquidates, from the commencement of the liquidation to its dissolution, to contribute to the assets of the BCULC for payment of the BCULC's debts and liabilities; and (ii) whether or not the BCULC liquidates, after dissolution, for payment to the BCULC's creditors of the BCULC's debts and liabilities.

Under the NSCA, "past members" of a NSULC may be liable upon winding-up in certain cases for one year after ceasing to be a shareholder. Past members cannot be held liable for obligations contracted after they ceased to be a member. Under Alberta's legislation, former shareholders of an AULC are not liable for any liability, act or default of the AULC that arises after the shareholder ceases to be a shareholder and may only be liable for other claims if an action to enforce that claim is brought within two years from the date on which the shareholder ceases to be a shareholder. The shareholders of a BCULC will not be liable for debts of the company unless it appears to the court that the current shareholders are unable to satisfy its debts and liabilities. Even if that is case, the BCULC shareholders will not be liable for any debts or liabilities that arose after they ceased to be shareholder, and on a liquidation or dissolution they will not be held liable if they ceased to be a shareholder one year or more prior to the commencement of that liquidation or dissolution.

Residency requirements for directors are also different. NSULCs and BCULCs have no residency requirements for their directors. Alberta's legislation requires that at least one quarter of the directors of an AULC be residents of Canada. U.S. parent corporations may find the lack of a directors' residency requirement for NSULCs and BCULCs to be an advantage, as it eliminates the need to find Canadian residents to serve as directors. It also avoids the operational inconveniences which result from having directors resident in different locations from that of the parent corporation.

Extra-Provincial Incorporations

Corporations which are validly incorporated and existing in one Canadian jurisdiction (including a federal incorporation) may register to carry on business in other Canadian jurisdictions. The process for registering as an extra-provincial corporation varies from province to province, but is fairly similar. For illustrative purposes, the process for registering as an extra-provincial corporation in Nova Scotia is described here. It is a relatively simple procedure, under which certain basic information, such as the name of the corporation and the names and addresses of the officers and directors, must be filed with the Registry of Joint Stock Companies. Furthermore, it is necessary for the extra-provincial corporation to have a recognized agent in the Province of Nova Scotia for the purpose of service of documentation within Nova Scotia.

OTHER BUSINESS STRUCTURES

Sole Proprietorship

A sole proprietorship is the simplest form of business enterprise. It consists of an individual who owns and operates a business. Unlike an incorporated company, in the case of a sole proprietorship the owner/operator personally owns all of the assets, and all obligations of the business are personal obligations of the sole proprietor. As such, all of the assets of the sole proprietor may be used to settle any outstanding debts of the business.

A sole proprietor, as a self-employed person, is not eligible for and does not pay employment insurance. Sole proprietors must report and pay tax on all proprietorship income in the calendar year in which the income is earned, and the proprietorship income (or loss) will be added to other sources of income of the proprietor.

One benefit of operating through a proprietorship is the low cost of organization. If start-up losses are expected, then proprietorship may offer the additional advantage of allowing the proprietor to claim those losses as a deduction for income tax purposes against other sources of income. To succeed in making such a deduction, the proprietor may be required to demonstrate that he or she has a reasonable expectation of earning a cumulative profit from the business enterprise.

Some, but not all, of the Atlantic provinces require sole proprietorships carrying on business under a name other than that of the proprietor to register that business name.

Partnership

A partnership is the relationship that exists between two or more persons carrying on a business in common with a view to a profit. A partnership can be a simple form of business structure, although the parties to the partnership can make it as simple or as complex as they desire. A partnership exists when two or more persons agree to carry on business together and share in the profits and losses of that business. As is the case with a sole proprietorship, a partnership is not a separate legal person distinct from the partners. The partners are personally responsible for all partnership obligations and jointly own all partnership property.

Each province has its own *Partnership Act*, but with few exceptions the provisions of those acts are subject to any agreement made between the partners. All the Atlantic provinces other than Newfoundland and Labrador require partnerships to register the name under which they will be carrying on business and to maintain an annual registration. They also require that a computerized name search be conducted prior to registering the name of a partnership.

Partners should have a written partnership agreement. If the partners do not enter into a written partnership agreement, the common law implicitly provides one for them, and it is unlikely that this unwritten agreement will be on the same terms and conditions as the partners would have agreed to if a written partnership agreement had been entered into. A written partnership agreement outlines the rights, interests and responsibilities of each partner and sets out the proportionate right to earnings or losses, whether or not a partner can be expelled from the partnership, and how the partnership can be terminated.

The primary disadvantage of a partnership is that each partner is held liable for all of the debts and liabilities of the partnership that are incurred while that person was a partner, including liability for wrongful acts or omissions of any partner in the partnership while that partner was carrying on business in the ordinary course.

Limited Partnership

A limited partnership is very similar to that of a general partnership described above, with the major distinction being that in a limited partnership certain partners (the general partners) contribute management efforts to the partnership while other partners (the limited partners) contribute only capital, which contribution can be either cash or other property, but not services.

Limited partnerships are governed by specific provincial legislation known variously as the *Limited Partnerships Act* or the *Limited Partnership Act*; however, the provincial *Partnership Act* statutes and the common law also apply to limited partnerships to the extent that they are not inconsistent with the specific limited partnerships legislation. As in the case with general partnerships, a computerized name search is required prior to registering the name of a limited partnership in Nova Scotia, New Brunswick and Prince Edward Island.

A limited partnership must have a minimum of one general partner and one limited partner, and each limited partner is liable for the obligations of the limited partnership only to the extent of its capital contribution. This protection can, however, be lost if the limited partner takes part in the control of the business, which can occur if the limited partner participates in the management of the business of the limited partnership.

A limited partnership is formed when either a certificate or declaration (depending on the province) is filed with the applicable provincial authority and recorded. This document contains the essential terms of the limited partnership, including the name of the partnership, the nature of its business, the names of all partners and, with the exception of New Brunswick, the amount of capital contributed by the limited

partners. The parties to a limited partnership should also enter into a written limited partnership agreement, which governs the relationship between the parties and the management of the partnership itself.

Joint Venture

Unlike the corporate structures described above, joint ventures are not governed by provincial or federal legislation. Instead, a joint venture is an association of persons engaged in a common undertaking for joint profit by combining capital, skill, experience and other resources without forming a partnership. This form of organization is common in building or construction undertakings.

It is important that the parties to a joint venture enter into a written agreement, and that the agreement explicitly states that the parties do not intend to be associated in partnership and that neither party is an agent of the other. If this step is not taken, the parties could be deemed to be acting in partnership, resulting in the application to their relationship of the *Partnership Act* and the common law principles regarding partnerships.

Co-operative Associations

A co-operative is a body corporate, but is a separate legal entity created under specific provincial legislation known variously as the *Co-operative Associations Act* or the *Co-operatives Act*. Co-operatives are associations whose primary purpose is to provide service to their members and which belong to the people who use the services, the control of which rests equally with all the members, and the gains from which are distributed among the members in proportion to the use they make of the services. Each member of a co-operative has one vote and no member is personally liable for the debts, obligations or acts of the co-operative except for the amount, if any, unpaid on the shares for which he or she has subscribed or the amount, if any, unpaid on the membership for which he or she has applied. There are a number of active co-operatives in the Atlantic Provinces.

CHAPTER 3

REGULATION OF FOREIGN INVESTMENT

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CHAPTER 3

REGULATION OF FOREIGN INVESTMENT

Both the establishment of a new Canadian business and the acquisition of an existing Canadian business by non-Canadians are regulated by the federal government under the *Investment Canada Act* ("ICA").

An individual who is neither a Canadian citizen nor a permanent resident of Canada will be considered a non-Canadian for the purposes of the ICA, while a corporation is considered to be non-Canadian if more than 50% of its shares are controlled or held by a person or corporation that is non-Canadian. Additionally, with respect to a widely held public company that is not controlled through the ownership of voting shares, the corporation is deemed to be Canadian if at least two-thirds of the board of directors is Canadian.

The stated purpose of the ICA is to provide for the review of significant investments in Canada by non-Canadians in a manner that encourages investment, economic growth and employment opportunities in Canada and to provide for the review of investments in Canada by non-Canadians that could be injurious to national security. In administering the ICA, the federal government has the dual function of promoting investment in Canada by non-Canadians, while at the same time reviewing any investment where the Minister has reasonable grounds to believe that foreign ownership or involvement in a Canadian business could be injurious to national security.

While the majority of acquisitions and establishments of Canadian businesses by non-Canadians are subject only to notification under the ICA, there are a number of investments which are subject to review by the relevant Minister. This review process is required when the acquisition by a non-Canadian entails:

- The direct acquisition of control (by way of acquisition of shares or assets) over a Canadian business with an enterprise value of $5 million or more;
- The indirect acquisition of control over a Canadian business (through the acquisition of its parent company outside Canada) with an enterprise value of $50 million or more, or $5 million or more if the Canadian business represents over 50% of the enterprise value of the foreign parent company being acquired;
- The acquisition of an existing business, or the establishment of a new or related business in a culturally sensitive industry such as publishing, film and music, regardless of its size; or
- Any investment which would be injurious to national security.

As a result of Canada's membership in the World Trade Organization ("WTO"), investors from the United States and other WTO member countries are subject to a more liberal set of rules under the ICA, including a higher threshold level for the acquisition of Canadian businesses.

Under these rules, indirect acquisitions by WTO investors are not reviewable, and direct acquisitions of Canadian businesses by WTO investors are only reviewable if the gross assets of the Canadian business surpass a certain threshold. Recent amendments to the ICA increased the threshold to $600 million, increasing to $1 billion over a four year period. These amendments come into force on a day to be fixed by the Governor in Council. These increased thresholds do not apply to cultural industries.

With respect to cultural industries, such as the creation or distribution of written, video or audio works, the Minister of Canadian Heritage has authority for the review and approval of foreign investments under the ICA and related regulations and guidelines. Similar to undertakings required for non-cultural industries, the Department of Canadian Heritage may seek commitments from the foreign investor to report on an undertaking using both contextual information and statistics, including breakdowns which delineate Canadian-created products from foreign-created products. In terms of operating in a cultural industry, it is incumbent upon companies to contribute to ongoing development of Canadian cultural life, and commitments of a behavioral nature will normally be of a lengthy duration.

Exemptions to the application of the ICA for certain transactions are also specifically carved out in the *Bank Act* (Canada).

"NET BENEFIT TO CANADA"

An application for approval may be filed at any time prior to the implementation of the investment or the acquisition. Generally speaking, the non-Canadian investor may not implement an investment or acquisition that is reviewable under the ICA until the investment or acquisition has been reviewed and the Minister responsible conducts a review to determine the "net benefit to Canada". In conducting the review, the ICA requires that the following factors be taken into account:

- The effect on the level and nature of economic activity in Canada, including the effect on employment, on resource processing, on the utilization of parts, components and services produced in Canada, and on exports from Canada;
- The degree and significance of participation by Canadians in the business;
- The effect on productivity, industrial efficiency, technological development, product innovation, and product variety in Canada;
- The effect on competition within any industry in Canada;
- Compatibility with national industrial, economic, and cultural policies; and
- The contribution to Canada's ability to compete in world markets.

Determination of the "net benefit to Canada" may be made based on undertakings made by the foreign investor in relation to the factors listed above.

Undertakings are legally binding commitments made by the foreign investor that usually remain in effect for three to five years. The undertakings are also subject to compliance reviews and audits during the period for which they are in force. Typically speaking, the government is mostly concerned with maintaining specific levels of Canadian employment, with particular attention to managerial positions, capital investment in the Canadian business and further development of Canadian-sourced technology. However, it should be mentioned that the specific focus of the undertakings varies with the nature of the business.

INVESTMENT REVIEW PROCESS

Following the filing of the application, the Investment Review Division of Industry Canada has 45 days to conduct a review. At the end of this review period, the investor is notified whether or not the Minister has approved the application. The Minister, as part of this response, may suggest changes to the acquisition proposal which would allow the acquisition to become satisfactory. Alternatively, the investor may be notified that the Minister requires an extra 30 days to review the proposed investment. While the ICA requires that all reviews occur within 105 days of the date the application was completed, the review process is usually completed within six weeks.

As part of the review process, the Minister generally consults with the province or provinces that would be significantly affected by the investment, as well as the Competition Bureau and other government departments with relevant expertise. The ICA preserves the confidentiality of all information filed as part of the review process, and government officials administering the ICA are subject to criminal prosecution if such information is illegally disclosed to third parties.

After the review process is complete, the government may either reject or approve the proposed investment. Most proposed investments are ultimately approved based on undertakings negotiated between the investor and the government.

There are several exemptions from the application of the ICA, including certain types of corporate reorganizations and securities transactions, certain financing transactions, and certain transactions within the insurance industry.

It is worth noting that since the inception of the ICA, no investment in Canada by a non-resident has been rejected under the review process, but in several instances applicants have accepted recommended structural changes.

OTHER RESTRICTIONS ON FOREIGN OWNERSHIP

In addition to the restrictions set out above under the ICA, there is also other industry-specific legislation which affects foreign ownership in Canada.

Both the federal *Bank Act* and the federal *Trust and Loan Companies Act* have regulations which restrict the ability of foreign banks and other non-residents to hold more than 25% of the shares issued by banks, trust companies and loan companies.

Under the federal *Broadcasting Act*, broadcasting licences may not be issued to companies that are owned or controlled directly or indirectly by non-Canadians, or to individual non-Canadians. Also, the federal *Telecommunications Act* requires that companies owning telecommunications transmission facilities used to offer service to the public must have at least 80% of their voting shares owned by Canadians, and not less than 80% of the members of their board of directors must be Canadians. In addition, these Canadian carriers must be controlled in fact by Canadians at all times.

The *Insurance Companies Act* limits foreign ownership in an existing Canadian-owned

life insurance company to 25% in the aggregate, and 10% for any individual non-resident. Provincial legislation also places restrictions on foreign investment in the insurance industry.

In addition to the more common restrictions set out above, on a provincial level there may be restrictions on the amount or type of land which may be owned by non-residents, and there are also federal regulations with respect to a number of other industries including aviation, fisheries and securities dealers.

CHAPTER 4

BUSINESS TRAVEL TO CANADA, WORK PERMITS AND IMMIGRATION LAW

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CHAPTER 4

BUSINESS TRAVEL TO CANADA, WORK PERMITS AND IMMIGRATION LAW

A foreign national's entry into Canada, whether temporary or permanent, is governed by Canada's *Immigration and Refugee Protection Act* and the corresponding *Immigration and Refugee Protection Regulations*. This legislative framework and the policies that underlie it create a complex system that regulates eligibility and admissibility criteria for those who seek to become temporary or permanent residents of Canada.

TEMPORARY ENTRY TO CANADA

Canada has specialized immigration streams that facilitate the entry of some international business travelers and foreign workers. Nonetheless, bringing foreign nationals into Canada still requires careful planning and preparation. If not, your employees or key service providers can be delayed at the border, or in some cases refused entry altogether. Companies can also be subject to fines and other penalties for not following immigration rules.

In recent years significant changes have been made to Canada's immigration requirements such that employers are now audited more frequently and there are more robust consequences for immigration violations. For these reasons, it is more important than ever to be familiar with the

immigration rules applicable to the cross-border movement of employees and other international business travelers into Canada, to avoid unfavourable consequences that could interfere with the operation of your business.

A best practice for any organization that regularly relies on the cross-border movement of personnel is to develop and implement an immigration policy that contemplates the many different groups who may need immigration support, including short- and long-term transferees, new hires, third-party contractors (both consultants and specialized service technicians) and business travelers.

International Business Travelers

International business travel has become so commonplace that many people will board an airplane or drive to the Canadian border for meetings, to provide services to a client, or to visit an affiliate office without carefully considering the immigration consequences of their cross-border business activities until they are questioned by an immigration officer. Whether a business traveler requires an immigration document (such as a work permit or visitor record) to engage in business activity in Canada should be carefully analyzed before an international business trip or secondment is arranged.

There are a lot of misconceptions about the application of Canada's immigration rules to short-term business travelers. For example, many foreign nationals and the companies bringing them to Canada incorrectly assume that specialized service providers and consultants who are coming to Canada for a short period of time do not require a work permit since they are not employed by a Canadian organization. This mistaken belief often comes from a traveler's past experience of being admitted to Canada as a visitor without fully disclosing (or being questioned about) the purpose of their trip.

The recent changes to Canada's immigration regime have led to a more enforcement-minded approach of ensuring that foreign workers will not negatively affect the Canadian labour market. As a result, there is much more scrutiny at the border by the Canada Border Services Agency in the assessment of both business visitor and work permit applications. This means that those international business travelers who managed to slip into Canada without the proper documentation in the past are unlikely to be as lucky in the future. Consequently, failure to assess the immigration requirements of a particular situation in advance and implement the appropriate strategy can translate into lost time and money.

Business Visitors

Foreign nationals who enter Canada to engage in international business activities do not require a work permit and will be admitted as business visitors provided they will not enter the Canadian labour market. Business visitors may enter Canada to take part in business activities which are international in scope if their place of employment and source of remuneration remain outside of Canada. Activities allowed under the business visitor category include attending board of directors meetings, negotiating contracts, looking for office space and giving or receiving intra-company training. Where a Canadian company has

retained a foreign company or individual to provide services in Canada, the individual performing the services will require a work permit and will not qualify for admission to Canada as a business visitor.

The business visitor category extends to those individuals performing after-sales service in Canada, provided the service to be performed was negotiated in the original or extended sales agreement, lease/rental agreement, warranty, or service contract. After-sales service does not include "hands-on work" generally performed by construction or building trades.

Work Permits

As a general rule, foreign nationals cannot work in Canada without first obtaining an immigration authorization called a work permit. Depending on a foreign worker's nationality, a work permit application can be made at a Canadian port of entry or a Canadian visa office abroad. Citizens of countries who require temporary resident visas ("TRVs") to enter Canada cannot apply for a work permit upon entering Canada. TRV-requiring nationals[1] must apply for their initial work permit in advance at the Canadian visa office responsible for their country of residence or nationality.

Work permits are valid for a specific period of time, anywhere from a few days to three years, and can be renewed provided the foreign worker continues to be eligible for the work permit category in question.

[1] The list of countries and territories whose citizens require a TRV can be found at: http://www.cic.gc.ca/english/visit/visas.asp.

LMO-Based Work Permits

Unless an exemption is available, obtaining a work permit is a two-step process. First, the foreign or Canadian employer must obtain Labour Market Opinion ("LMO") confirmation from Service Canada. An LMO confirms, among other things, that employing a foreign worker in Canada for a specific time frame will have a neutral or positive impact on the Canadian labour market. Subject to some exceptions for short-term specialized service providers and other unique situations, employers are normally required to demonstrate they have made unsuccessful efforts to recruit a Canadian or permanent resident of Canada for the job in question. Once an employer secures an LMO, the foreign worker must apply for a work permit.

LMO-Exempt Work Permits

There are various specialized work permit categories that are exempt from the LMO requirement. Here is a brief description of the most commonly used LMO-exempt work permit categories:

Intra-Company Transferees

This work permit category allows international companies to temporarily transfer qualified employees to Canada for the purpose of improving management effectiveness, expanding Canadian exports and enhancing the competitiveness of Canadian entities in overseas markets. Intra-company transferees are eligible for work permits without an LMO on the basis that their employment in Canada will provide significant economic benefit through

the transfer of their expertise to Canadian businesses.

To qualify as an intra-company transferee an employee must be: (1) employed full-time by a multi-national company outside of Canada (for at least a year) in a role similar to the role to be performed in Canada; (2) seeking temporary admission to Canada to work in a parent, subsidiary, branch or affiliate of that enterprise; and (3) transferred to a position in Canada where they will work in an executive, senior managerial or specialized knowledge capacity.

This work permit category can be used by international companies seeking to transfer employees to an established company in Canada, or specifically to start a company in Canada. In the case of a Canadian start-up, a company must show that physical premises in Canada have been secured, provide realistic plans to staff the new operation, and demonstrate the financial ability to commence business in Canada and compensate employees.

Initial intra-company transferee work permits can be issued for a period of up to one to three years, and may be extended to a maximum of seven years for senior executives and managers, and five years for specialized knowledge workers.

While intra-company transferee work permit applications for executives and senior managers are relatively straightforward, specialized knowledge worker applications are scrutinized much more closely at ports of entry and visa offices abroad. At the time of writing this chapter (April 2014), the Government of Canada is reviewing the program criteria for specialized knowledge workers and is expected to introduce changes that will restrict the application of this work permit category, especially as it applies to companies in the information technology industry.

Currently, immigration officers assess the following factors to determine whether a foreign worker has the requisite level of specialized knowledge:

- **Knowledge**

  The knowledge possessed by the applicant must be unusual and different from that generally found in a particular industry. It should be gained through extensive experience with the organization abroad.

- **Occupation**

  The position must be critical to the well-being of the operation, and should generally be a skilled position.

- **Education**

  The foreign worker should have the level of education typically required for the position in question.

- **Experience**

  The foreign worker's experience should support the claim of specialized knowledge in that the employee is expected to have held a key role abroad and in that capacity have been involved in significant assignments related to the

employer's productivity, competitiveness, image or financial position.

- **Salary**

  The salary should be similar to a typical Canadian salary for the occupation in question (geographical location is a consideration) and should support the claim of specialized knowledge in the context of the employee's specific experience.

- **Training**

  Generally, the applicant should possess training and experience consistent with his/her claim to specialized knowledge. The requisite training would be difficult for someone else to complete in the time available.

- **Supporting Documents**

  Applications should include the applicant's résumé, educational credentials, reference letter and letters of support from the foreign and Canadian entities.

Professionals (Under NAFTA and Other International Trade Agreements)

The North American Free Trade Agreement ("NAFTA"), other international free trade agreements (which Canada has in place with Chile, Peru and Colombia) and the General Agreement on Trade in Service ("GATS") all facilitate the temporary entry of business persons and certain professionals from member nations into Canada without the need for an LMO. The immigration provisions under NAFTA are the most expansive and apply to citizens of Mexico and the United States. Under these agreements, foreign nationals qualified in one of the professions named in the relevant agreement can obtain a work permit for a specified period for pre-arranged employment in Canada. Depending on the agreement, professional work permits can be issued for 90 days (under GATS) and up to three years (under NAFTA). NAFTA professional work permits can be renewed indefinitely provided the work permit holder can continue to demonstrate a temporary purpose for being in Canada. After repeat renewals, immigration officers may begin to doubt the genuineness of a foreign national's temporary intention and look to the individual to become a permanent resident of Canada.

To qualify for this type of work permit, professionals must meet the stated minimum educational requirements and alternative credentials. Over 60 professions are included in the NAFTA professional category such as engineers, geologists, accountants, computer system analysts, management consultants and university, college and seminary teachers. Similar lists of professions are included in Canada's free trade agreements with Chile, Peru and Columbia, and a more limited number of professions in GATS.

On October 18, 2013, Canada signed, in principle, a Comprehensive Economic Trade Agreement ("CETA") with the European Union ("EU"). CETA, which is expected to come into force in

approximately two years, will include provisions for facilitated entry to Canada for EU citizens. When these new LMO exemptions are available, employers will have a whole host of new expedited immigration options for EU nationals.

Emergency Repair Personnel

Foreign workers entering Canada temporarily to carry out emergency repairs to industrial or commercial equipment are eligible for LMO-exempt work permits, so long as it can reasonably be said that there will be a negative effect on the local labour market (i.e. a disruption in employment) if the worker is not admitted to Canada. This work permit category is normally used for contracted service providers attending client sites in Canada to conduct unscheduled emergency repair work. It can only be used for true emergencies, when there is insufficient time to obtain an LMO. This type of work permit is not available to foreign workers seeking admission to Canada to conduct scheduled maintenance on equipment.

Significant Benefit

Immigration officers are permitted to issue LMO-exempt work permits to foreign workers who are coming to Canada to perform work that will provide a significant social, cultural or economic benefit to Canada where an LMO cannot be obtained in a timely manner. This type of work permit is highly discretionary, and the threshold for demonstrating the necessary significant benefit is high. Any foreign worker applying for a significant benefit work permit should be armed with a well-documented application package clearly showing the significant benefit their admission will have on Canada. This work permit category can be useful as a last resort or in circumstances where it is impossible to obtain an LMO in the time available, and no other LMO-exemptions are available.

Reciprocal Employment

Reciprocal employment work permits can be issued to foreign workers whose employment in Canada will create or maintain reciprocal employment opportunities for Canadian citizens or permanent residents in other countries. Canada is willing to issue reciprocal work permits to inbound foreign workers if it can be shown that temporary opportunities also exist for Canadians overseas. This type of permit can offer flexibility to companies, especially those that send Canadians abroad for business purposes. Strict job-to-job reciprocity is not necessary, but applicants do need to show that opportunities for Canadians and permanent residents in similar positions exist in the reciprocal jurisdiction.

Spouses and Dependent Children

Spouses of foreign workers who hold a Canadian work permit valid for at least six months are eligible for an open work permit which allows them to work in Canada for any employer, in any occupation, subject to a few exceptions. Spousal work permits are tied to the principal foreign national's work permit and will expire on the same date, subject to an earlier passport expiry date.

Dependent children of foreign nationals who hold work permits valid for at least six months are eligible for a visitor record or

study permit that authorizes them to attend primary or secondary school in Canada.

Provincial Rules Governing the Recruitment and Hiring of Foreign Workers

Although immigration to Canada is largely a matter of federal jurisdiction, the provinces and territories are involved in immigration in a couple of ways. In addition to having delegated power to select a certain number of foreign nationals to immigrate to their province or territory each year through provincial and territorial nomination programs, each province and territory also has the ability to pass laws governing the recruitment and hiring of foreign workers. A handful of Canadian provinces have done so. At the time of writing (April 2014), Nova Scotia is the only province in Atlantic Canada that has enacted this type of legislation. Newfoundland and Labrador, New Brunswick and Prince Edward Island will likely follow suit eventually.

Nova Scotia's Foreign Worker Rules

Nova Scotia's *Labour Standards Code* includes provisions designed to protect foreign workers from exploitation by recruiters and employers. These protections require third-party recruiters to obtain a licence from the province when recruiting "vulnerable" foreign workers. They also require employers to register with the Labour Standards Division before employing certain foreign workers. The recruiter licensing process became mandatory on May 1, 2013, and employers of foreign workers have been required to register since August 1, 2013. Certain third-party recruiters and employers of foreign workers are exempt from the licensing and registration requirements.

Foreign Worker Recruiter Licence

Recruiters do not require a licence to engage in the following types of foreign worker recruitment activities on behalf of Nova Scotia employers:

1. Recruiting foreign workers for jobs with the following types of entities:
    a. Provincial "Government Reporting Entities" (i.e., provincial government departments, crown corporations, health authorities, the Nova Scotia Community College and school boards);
    b. Municipalities; and
    c. Universities.
2. Recruiting foreign workers for management and professional positions (occupations that fall within skill type 0 and skill level A occupations on the National Occupational Classification ("NOC") Matrix developed by Human Resources and Skills Development Canada and Statistics Canada). The occupations include:
    a. Management Occupations (NOC 0) – Management occupations in a variety of industries such as executive roles, senior managers, legislators, managers in health care, corporate sales managers, and managers in human resources, finance, construction, information technology and retail.

b. Professional occupations (NOC A) – Professional roles including accountants, physicians, lawyers, teachers, professors, dentists, librarians, translators, psychologists, engineers, mathematicians and scientists.

Third-party recruiters, however, are only exempt from the licensing requirement if their recruitment of foreign workers for employment in Nova Scotia is restricted to NOC 0 and A positions. Recruiters filling NOC B (high-skilled), C (semi-skilled) or D (low-skilled) positions with foreign workers must be licensed by Nova Scotia. Recruiters who conduct overseas recruitment efforts to fill NOC 0 and A roles are permitted to recruit domestically for NOC B, C and D positions without a licence.

Only members in good standing with a provincial or territorial bar society, the Chambre des notaires du Québec or the Immigration Consultants of Canada Regulatory Council are eligible to apply for a license.

Employer Registration Process

Certain employers are also exempt from the requirement to hold a registration certificate to hire foreign workers in Nova Scotia. These exemptions mirror the exemptions to the recruiter licensing regime. The following types of employers do not require registration certificates:

- Provincial government reporting entities, municipalities and universities; and
- Employers seeking to hire foreign workers in management (NOC 0) or professional (NOC A) occupations listed on the NOC Matrix.

Employers who fit into one of these exemptions and who use a third-party recruiter are also exempt from the requirement to use a licensed recruiter, provided the recruiter is also exempt from the licence requirement.

Employers who require a registration certificate can apply on an annual basis. The application can be made online. When the information upon which a registration certificate is issued changes significantly (e.g., working with a new third-party recruiter or recruiting foreign workers for employment in a different skill level than originally planned), employers are required to advise the Labour Standards Division.

Nova Scotia employers (and their third-party recruiters) must demonstrate compliance with the laws governing recruitment and employment of foreign workers before an LMO will be issued from Service Canada. Similarly, Citizenship and Immigration Canada and the Canada Border Services Agency also have authority to request proof of compliance with these laws when adjudicating LMO-exempt work permit applications from foreign workers. For these reasons, it is important to adhere to the employer registration and recruiter licensing process.

PERMANENT ENTRY INTO CANADA

There are several different classes under which a foreign national may qualify to immigrate permanently to Canada. Each class is reviewed separately below:

Economic Classes

Canadian Experience Class

The Canadian Experience Class ("CEC") allows individuals with one year of properly authorized skilled work experience in Canada to become permanent residents. In addition to having 12 months of Canadian work experience (in a NOC 0, A or B position) within the previous three years in Canada, applicants must also meet minimum language requirements and plan to live outside of the province of Quebec.

A maximum number of complete CEC applicants are accepted each year, with sub-caps for applications for certain NOC B occupations. Work experience in the following occupations does not qualify under CEC: cooks, food service supervisors, administrative officers/assistants, accounting technicians and bookkeepers, and retail sales supervisors.

Federal Skilled Worker Class

Skilled workers are eligible to become permanent residents because they are considered able to become economically established in Canada. Applicants are assessed on language skills, education, work experience, and other factors that have shown to help newcomers prosper in Canada. To be accepted as a skilled worker, applicants must have work experience in an eligible occupation, have a valid offer of arranged employment, or be a current/previous student of a Canadian PhD program. Applicants must also score a certain number of points under six selection criteria.

Federal Skilled Trades Class

Certain tradespeople are eligible to become permanent residents based on being qualified in one of a prescribed number of in-demand skilled trades. Applicants must have at least two years of work experience in a skilled trade, meet minimum language requirements, and have either an offer of employment or a certificate of qualification in their skilled trade issued by a provincial/territorial body. This program accepts a maximum number of applications annually, with a sub-cap for certain trades with only moderate Canadian labour market need.

Provincial Nominee Class

Most provinces and territories in Canada have an agreement with the Government of Canada that allows them to play a more direct role in selecting immigrants who wish to settle in that province or territory. People wishing to immigrate to one of Canada's provinces as a provincial nominee must first apply to the province where they wish to settle. The province will consider their application based on its immigration needs and the applicant's genuine intention to settle there.

Before applying to immigrate to Canada, provincial nominees must complete the provincial nomination process. After being nominated by a province, they must then make a separate application to Citizenship and Immigration Canada ("CIC") for permanent residence. A CIC officer assesses their overall admissibility to Canada.

The following provincial nominee programs are available in Atlantic Canada:

Nova Scotia Nominee Program ("NSNP")

At the time of writing the NSNP has three streams:

1. The Skilled Worker Stream accepts applications from individuals supported by a full-time permanent job offer from an established Nova Scotia employer. Applicants are assessed on education, language, work experience, adaptability and financial settlement support.
2. The Family Business Worker Stream is designed for individuals who have a full-time permanent job offer from an established Nova Scotia company that is owned by a close relative.
3. The Regional Labour Market Demand Stream does not require applicants to have a job offer from a Nova Scotian employer; however, they must meet labour market needs by pursuing employment in an in-demand occupation in Nova Scotia.

New Brunswick Provincial Nominee Program ("NB PNP")

At the time of writing the NB PNP has only one active stream because applicants under the Business Stream stopped being accepted as of September 6, 2013 until further notice.

1. The Skilled Worker Stream is for applicants with either employer or family support. Both categories require applicants to have a full-time permanent job offer from an established New Brunswick employer. Applicants with employer support must earn enough points under five selection criteria to be eligible. Applicants with family support must have a job offer from an established New Brunswick business operated by a close family relative.

Newfoundland and Labrador Provincial Nominee Program ("NL PNP")

The NL PNP currently has two categories:

2. The Skilled Worker category is for applicants with a full-time permanent job offer from an established Newfoundland and Labrador employer. Applicants are assessed on various factors including work experience, language, and settlement ability.
3. The International Graduate category is for international graduates of a recognized post-secondary educational institution in Canada who have a full-time permanent job offer from an established Newfoundland and Labrador employer in their field of study. Applicants are eligible to apply for this program within two years of completing their studies.

Prince Edward Island Provincial Nominee Program ("PEI PNP")

The PEI PNP currently has two categories:

1. The Labour Impact category is divided into two streams, the Skilled

Worker Stream and Critical Impact Stream.

a. Under the Skilled Worker Stream, applicants must have a full-time long-term job offer in a skilled occupation from an established Prince Edward Island employer.
b. Under the Critical Impact Stream, applicants must have a full-time long-term job offer from an established Prince Edward Island employer in one of the following semi/low skilled occupations: truck driver, customer service representative, labourer, food & beverage server or housekeeping attendant. Under both streams, applicants are assessed on various factors including work experience, language and settlement ability.

2. The Business Impact category is divided into three streams designed for experienced business managers and entrepreneurs: the 100% Ownership Stream, Partial Ownership Stream, and Work Permit Stream. To be eligible under these streams, applicants must have a minimum net worth and invest a minimum amount of money into the Prince Edward Island business.
   a. Under the 100% Ownership Stream, applicants must invest in and actively manage a Prince Edward Island business and sign an escrow agreement.
   b. Under the Partial Ownership Stream, applicants must invest in a Prince Edward Island business and be involved in its day-to-day operations.
   c. Under the Work Permit Stream, applicants obtain a work permit and become a sole or partial owner of a business by investing in and actively managing an eligible business.

Family Class

Canadian citizens and permanent residents living in Canada, 18 years of age or older, may sponsor the immigration to Canada of certain family members. Spouses, common-law partners and conjugal partners, and dependent children can be sponsored most easily. It is also possible to sponsor a parent or grandparent, but more restrictive rules apply and only a certain number of applications to sponsor parents and grandparents are accepted annually.

Sponsors must promise to support the relative or family member and their accompanying family members for a period of three to 20 years depending on the type of relative sponsored and the age of the sponsored person.

Immigration applications from members of the family class are assessed to confirm the genuineness of the relationship between the sponsor and the applicant.

OTHER CONSIDERATIONS

Taxes

There are tax issues associated with relocating to Canada. For example, a foreign national who moves to Canada temporarily or permanently may have an obligation to file a tax return in Canada and elsewhere.

There may also be tax considerations, including withholding and reporting obligations, for companies that transfer foreign workers to Canada or retain the services of non-resident service providers.

Provincial Health Insurance

International business travelers, foreign workers and prospective immigrants should confirm whether provincially-funded health insurance will be available for them and their family members upon arrival in Canada. If not, private health insurance should be purchased in advance of arrival in Canada. Each province has different rules, and in some provinces there is a three-month waiting period for coverage.

CHAPTER 5

TRADE AND BUSINESS CONDUCT REGULATION

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CHAPTER 5

TRADE AND BUSINESS CONDUCT REGULATION

INTERNATIONAL TRADE

International trade is a vital component of Canada's economy — Canada’s exports account for approximately 30% of its total gross domestic product.

Canada is a signatory to the *North American Free Trade Agreement* ("NAFTA") with the United States and Mexico, under which the world's largest free trade area was formed. Canada is also a participant in bilateral free trade agreements with several other countries.

North American Free Trade Agreement

Under NAFTA, tariffs and trade barriers on goods which meet "rules of origin" requirements have virtually disappeared.

The rules of origin basically stipulate that for goods to be traded free of tariffs, the materials and other components used in the manufacturing of the goods must originate in one of the member countries, and the manufacturing process itself must take place in a member country. The rules provide for the minimum amount of regional content required to qualify for the trade exemption, which varies depending on the particular product.

An important point to note is that ownership of the manufacturer of goods does not affect the application of NAFTA's rules, meaning that foreign-owned Canadian businesses are fully eligible to take advantage of the elimination of tariffs under NAFTA, provided that their goods satisfy the applicable rules of origin requirements.

NAFTA also contains rules governing the cross-border trade in services provided by enterprises located in member countries. It stipulates that each member must treat service providers from other member countries no less favourably than its own service providers. Service providers are not required to establish a local office or otherwise be resident in a member country as a condition for the cross-border provision of a service. However, certain restrictions on cross-border services can be maintained where such restrictions have been listed in an annex to NAFTA.

Other Free Trade Agreements

Canada is a participant in bilateral free trade agreements with Chile, Columbia, Costa Rica, Honduras, Israel, Jordan, Panama and Peru. Canada also has a free trade agreement with the European Free Trade Association, comprised of Iceland, Liechtenstein, Norway and Switzerland. These agreements have eliminated various barriers to the trade of goods and services between the participating countries. As of writing, full negotiations with the European Union have been completed in the form of a Comprehensive Economic and Trade Agreement which was signed October 18, 2013, but final ratification is still pending. Finally, Canada currently has on-going free trade agreement negotiations with many other countries, including India and Japan.

Importing Goods

The *Customs Act* establishes a self-assessment system under which all goods imported into Canada must be reported to the nearest customs office. The applicable duties are calculated according to the provisions of the *Customs Tariff*, which sets out a list of tariff provisions and establishes the rates of customs duties applicable to the various tariff items. It is the importer's responsibility to determine and pay the duties on the goods being imported and to report any errors within three years of the importation of the goods.

The penalties for infractions of customs legislation range from $100 to a maximum of $25,000 per infraction based on the type, frequency and severity of infraction. The penalties have largely replaced the use of seizure and ascertained forfeitures as enforcement tools. However, a seizure action may also be initiated in specific circumstances such as where goods are prohibited or controlled. Penalties and seizures also do not preclude the possibility of criminal prosecution, with maximum fines of up to $500,000 and maximum prison terms of five years.

The tariff treatment accorded to goods under the *Customs Tariff* varies according to the nature of the items and their countries of origin. Special tariffs are applicable to certain goods originating in Commonwealth Caribbean countries, Australia and New Zealand as well as those countries participating in free trade agreements with Canada and certain developing countries.

The customs value of imported goods is the price actually paid or payable for the goods when sold for export to Canada. That price is adjusted for a variety of factors including transportation costs, royalty fees, handling fees and insurance costs, referred to as the "transaction value". Other methods of valuation are available if the transaction value cannot be used. There are also special rules that apply when the importer and exporter are related parties.

In addition to duties which may be payable under the *Customs Act,* the *Excise Tax Act* requires importers to pay Harmonized Sales Tax ("HST") on the value of imported goods, although some goods are exempted from HST. Where goods are imported, the tax will generally be collected by customs officials at the time the goods are imported. HST may be exigible on imported services. An importer may be required to "self-assess" such HST where the services are not acquired for the purposes of "commercial activities" as defined in the *Excise Tax Act*. Input tax credits on imported goods are available to HST registrants to the extent that the goods are for use in the registrant's commercial activities. HST rates vary across provinces. Currently the HST rates in the Atlantic Provinces are: 15% in Nova Scotia, 14% in Prince Edward Island, 13% in New Brunswick and 13% in Newfoundland and Labrador. All importers and exporters must have an Import/Export account number issued by the Canada Revenue Agency.

Import and Export Controls

The *Export and Import Permits Act* requires that import permits be obtained for certain goods, such as certain agricultural products, that are subject to import quotas. Other items are subject to import restrictions based on country of origin, in compliance with UN Security Council sanctions or unilateral Canadian trade restrictions. Currently, for example, sanctions exist against imports from North Korea, Iran and Syria, among other countries. The *Export and Import Permits Act* also identifies certain goods which may not be exported (such as goods that could have both a civilian and a military application), and certain countries to which exports are prohibited, except under the authority of export permits. Currently, the only countries to which exports are completely prohibited without a permit are North Korea and Belarus. The Government of Canada can

and does change the list of restricted countries periodically.

Unlike the United States, there is no prohibition of trade with Cuba. Indeed, Canadian law prohibits Canadian subsidiaries of American corporations from complying with United States laws restricting trade with Cuba. American parent companies that try to prevent Canadian subsidiaries from exporting Canadian goods and services to Cuba could find themselves in breach of Canada's *Foreign Extraterritorial Measures Act*, thereby exposing the Canadian subsidiaries to penalties under that Act. Canada does apply American export controls on American goods bound for Cuba, in order to prevent Canada from being used as a "goods launderer" by American exporters seeking to avoid export controls applicable in the United States. However, it is possible to obtain an Individual Export Permit in order to sell goods of United States origin to Cuba.

Finally, trade in certain items may also be restricted pursuant to international agreements to which Canada is a party. For example, the *Nuclear Non-Proliferation Treaty* restricts the import and export of uranium and nuclear-related materials.

There may be provincial restrictions on the import of certain goods into a province. For example, each of the Atlantic Provinces has restrictions on the importation of alcohol and tobacco products.

Trade Remedies

Canadian producers are protected from unfair trade under the *Special Import Measures Act* ("SIMA"), which allows them to file complaints and to request relief when dumped or subsidized imports cause, or threaten to cause, material injury to a Canadian industry or material delay in the establishment of a Canadian industry. Dumped imports are goods sold to Canadian importers at prices lower than their selling price in the exporter's domestic market or at prices lower than the cost of the good. Canada's right to apply SIMA's provisions against imports from the United States and Mexico is not restricted by NAFTA but such decisions made under SIMA may be subject to a review under NAFTA.

Initially, the President of the Canada Border Services Agency determines whether dumping or subsidizing is occurring. If either is taking place, provisional anti-dumping or countervailing duties may be imposed pending the outcome of an inquiry by the Canadian International Trade Tribunal ("CITT"). The CITT's role is to determine if dumping or subsidizing has caused or threatens to cause material injury.

In limited circumstances, duties on fairly traded goods may be exigible under the *Canadian International Trade Tribunal Act* and the *Customs Tariff* if the imports in question cause or threaten to cause serious injury to a Canadian industry. Safeguard actions, such as the imposition of surtaxes or temporary quotas, may be implemented by the federal Minister of Finance on the recommendation of the CITT.

International Investment Dispute Resolution

The *Settlement of International Investment Disputes Act* (Canada) (the "SIID Act") was assented to March 13th, 2008, and came into force on November 1, 2013. The SIID Act applies to awards rendered, arbitration agreements entered into and conciliation proceedings commenced under the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (the "Convention"). As of November 1, 2013 the Convention has come into force in 149 countries.

The SIID Act establishes the International Centre for Settlement of Investment Disputes (the "Centre"). The Centre has the capacity of a natural person and is provided certain immunities and privileges. Immunities are also extended to the chair and members of the Administrative Council and to other persons such as parties to proceedings, counsel and witnesses.

The Centre maintains a panel of conciliators and a panel of arbitrators. Each contracting state designates four individuals to serve on each of the panels.

The jurisdiction of the Centre extends to all legal disputes arising directly out of an investment between a contracting state and a national of another contracting state. Parties to a dispute must consent in writing to submit the dispute to the Centre. Once a dispute has been submitted and consent is given by all parties involved, no party may then withdraw its consent unilaterally.

Consent of the parties to arbitration under the Convention is deemed to be consent to such arbitration to the exclusion of any other remedy. Awards are binding on the parties and are not subject to any appeal or to any other remedy.

The SIID Act provides that a provincial superior court has the jurisdiction to recognize and enforce an award made pursuant to the SIID Act by a tribunal established under the Convention. On application, such a court must recognize and enforce an award as if it were the final judgment of that court.

An arbitration tribunal will decide a dispute in accordance with the rules of law agreed to by the parties, except that in the absence of agreement, the tribunal shall apply the law of the contracting state party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

A growth in the number and significance of international investments has resulted in an increase in the quantity and complexity of investment disputes. The Centre offers Contracting States an alternative to litigation with the provision of a reputable and accessible international dispute mechanism.

Exchange Controls

Canada does not have any exchange controls, so there are no restrictions on the repatriation of profits to the foreign owners of businesses operating in Canada. However, the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* does establish reporting requirements for the export of currency or monetary instruments. The Act imposes three main obligations on businesses: keeping records

of certain types of transactions (e.g., large cash transactions); ascertaining the identity of clients; and making reports of suspicious transactions to the Financial Transactions and Reports Analysis Centre of Canada.

Provincial Laws

As a result of the jurisdictional division of powers within Canada, international agreements entered into by the federal government which affect matters under provincial jurisdiction cannot come into effect until they have received provincial approval. One of the areas of primary provincial jurisdiction is the regulation of property and civil rights, which includes the law of contracts. Accordingly, international agreements only come into force after provincial implementation. Two examples are the *United Nations Convention on Contracts for the International Sale of Goods* ("CCISG") and the UNCITRAL *Model Law on International Commercial Arbitration* ("MLICA"). The CCISG contains rules governing contract formation, breaches of contract and the obligations of sellers and buyers of goods. The MLICA governs the conduct of arbitrations between parties that have their places of business in different countries. Both the CCISG and MLICA (and the related United Nations *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*) have been enacted by all four Atlantic Provinces.

As each of the Canadian provinces has the power to regulate trade and commerce within its boundaries, differences in standards and licensing regimes can create interprovincial barriers to trade. Although many of these barriers have come down in recent years, when operating in the Atlantic Canadian market it is important to confirm the standards and licensing requirements in each of the four provinces.

DOMESTIC TRADE/FEDERAL REGULATION

Most business conduct in Canada is governed by the *Competition Act* which is intended to promote competition and efficiency in the Canadian marketplace. Under the Act, prohibited activities are categorized as either criminal offences or civilly reviewable conduct. Specific activities which attract criminal sanctions include bid-rigging, knowingly or recklessly making false or misleading representations to the public, deceptive telemarketing, deceptive prize winning notices, double ticketing (the charging of the higher of two prices indicated on a product), and pyramid selling schemes.

Predatory pricing, price discrimination and discrimination through promotional allowances have all been decriminalized by the recent amendments to the *Competition Act* which took effect in March 2010. However, the same behaviour has been included as "anti-competitive acts" and may be pursued by the Competition Bureau on a civil review basis. Although no criminal sanctions will be rendered, severe administrative monetary penalties will apply.

The amendments also introduced a two-track review for collaboration among competitors (i.e. conspiracies) - a criminal review for the most egregious acts, and a civil review for anti-competitive, but not criminal, activity. Arrangements with competitors to fix prices, allocate customers

or markets or control the production or supply of a product are "per se" criminal offences which do not require any actual lessening of competition to have resulted from the arrangement.

Most complaints regarding breaches of the *Competition Act* arise from business competitors and consumers. Complaints are filed with the Competition Bureau, which then examines them to determine if they raise a concern under the *Competition Act*. If the Bureau determines that there is evidence of a possible contravention, a formal inquiry may be opened. Based on the Bureau's determination, suspected criminal offences are referred to the Attorney General of Canada for possible prosecution before the criminal courts. Civil law matters are referred to the Competition Tribunal, a specialized administrative tribunal which is independent of government and is chaired by a judge. The Tribunal has the power to issue injunctions and remedial orders preventing practices that are likely to substantially reduce competition.

The *Competition Act* also establishes a number of trade practices and activities that can be reviewed by the Competition Tribunal. These activities include the refusal by a supplier to sell its product to another party, consignment selling, exclusive dealing, market restrictions, tied selling, abuse of dominant position and delivered pricing. Administrative monetary penalties of up to $10 million for the first offence and up to $15 million for subsequent offences have been recently introduced for abuse of dominant position offences. A civil action may also be commenced by a person who has suffered damage as a result of another party's breach of the provisions of the *Competition Act*.

Merger Regulation

The *Competition Act* (under its civil reviewable conduct provisions discussed below) applies to mergers involving the acquisition of control over, or significant interest in, the whole or part of an existing Canadian business (whether an incorporated or unincorporated business) of a competitor, supplier, customer or other person, whether directly or indirectly and whether by Canadian or non-Canadian entities, by share or asset purchase, or by amalgamation or otherwise ("Mergers").

Large proposed Mergers are subject to formal advance notification requirements (which must be accompanied by a $50,000 filing fee) that must be satisfied before the Merger can be completed where the so-called "size of the parties" and "size of the transaction" thresholds are both met. The "size of the parties" threshold is met if the parties to the transaction (together with their affiliates) have assets in Canada or an annual gross revenue from sales in Canada exceeding $400 million. The "size of the transaction" threshold is met if (1) the value of the acquired assets (or where shares are acquired the value of the target's assets in Canada) exceed $82 million, adjusted annually or (2) the annual gross revenue (in or from Canada) generated by those assets exceed $82 million, adjusted annually. As well, in the case of share purchase transactions, the proposed transaction must result in the acquiror holding at least 20% of the shares of a public corporation or 35% of the shares of a private corporation. There

are additional rules that apply for amalgamations and joint ventures.

A Merger meeting the above thresholds cannot be completed until the expiration of a 30 day statutory waiting period (subject to extension by supplementary information requests known as “SIRs”), unless waived by the Bureau. Failure to notify “without good and sufficient cause” is a criminal offence, liable on conviction to a fine of up to $50,000.

In determining if a Merger or proposed Merger will substantially lessen competition, a number of factors are considered including the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the Merger or proposed Merger; whether the business, or a part of the business, of a party to the Merger or proposed merger has failed or is likely to fail; the extent to which acceptable substitutes for products supplied by the parties to the Merger or proposed Merger are or are likely to be available; any barriers to entry into a market, including tariff and non-tariff barriers to international trade and any effect of the Merger or proposed Merger on such barriers; the extent to which effective competition remains or would remain in a market that is or would be affected by the Merger or proposed Merger; any likelihood that the Merger or proposed Merger will or would result in the removal of a vigorous and effective competitor; the nature and extent of change and innovation in a relevant market; and any other factor that is relevant to competition in a market that is or would be affected by the Merger or proposed Merger.

If the Commissioner refers a Merger to the Competition Tribunal, and the Tribunal determines that a Merger or proposed merger prevents or lessens competition substantially, or is likely to do so, it may order that the Merger be dissolved or not proceeded with, or allow it to proceed under certain conditions (such as requiring the sale of some or all of the assets acquired).

Where there are no competition issues related to a Merger, the parties may apply for an Advance Ruling Certificate (“ARC”). The Commissioner may issue the ARC where he or she is satisfied that a proposed Merger will not prevent or lessen competition substantially. This is the highest form of clearance for a proposed Merger and if issued exempts the parties from the pre-notification requirements and precludes the Commissioner from challenging the Merger. Typically, however, the Commissioner will instead issue a “no action letter” stating that the Bureau will not contest the completion of the Merger, but will maintain its ability to do so up to one year post-completion.

Marketing and Advertising

The *Competition Act* also applies to all forms of advertising (including contests and promotions) and any claims made in them. Criminal or civil penalties may be imposed on the makers of false or misleading advertising.

Knowingly or recklessly making false or misleading representations to the public, deceptive telemarketing and deceptive prize winning notices are all subject to criminal sanctions. If found guilty of a criminal offence, the penalties are:

- On summary conviction, a maximum fine of up to $200,000 or a term of imprisonment up to one year, or both; and
- On indictment, a maximum fine at the discretion of the court or a maximum term of imprisonment of 14 years, or both.

Among the practices that are subject to civil penalties are false and misleading statements to the public, misrepresentations regarding the ordinary price of a product, misrepresentations as to product test results or public testimonials, bait and switch selling (where a product is advertised at a bargain price but is not supplied in reasonable quantities), sales above advertised prices, and inadequate disclosure of the value of prizes in promotional contests.

If a civil offence is found to have been committed, possible remedies are: withdraw the offending advertising; publish a notice of compliance; and/or pay an administrative monetary penalty of up to $10 million (on first occurrence, individuals are subject to penalties of up to $750,000 and corporations to penalties of up to $10 million). For any subsequent offences, the penalty increases to a maximum of $15 million for corporations and $1 million for individuals. In certain situations, an order may be made requiring compensation for consumers who bought the advertised product, but this would normally only occur when the consumers are identifiable.

In addition to federal restrictions on misleading advertising, certain products and services are subject to provincial marketing limitations under consumer protection legislation, such as the costs of borrowing disclosure requirements imposed on lenders.

Confidential Information and Trade Secrets

Businesses in possession of confidential information can generally impose a legal obligation of confidentiality on other parties who are given access to that information. This may include employees and/or other businesses that obtained the information in the course of negotiating a business relationship, such as a joint venture. However, this legal right can only be enforced where there is a contractual obligation or other legally-recognized relationship imposing obligations of confidentiality. In order to protect a company's interests, it is prudent to ensure that parties who are given access to a company's confidential information sign a non-disclosure or confidentiality agreement before the information is disclosed.

The Canadian common law also provides businesses with protection against unauthorized acquisition and/or use of trade secrets. Trade secrets are defined as information that is used, or may be used, in business for any commercial advantage. For such information to qualify for legal protection as a trade secret, it must not be generally known to the public or to other persons who can derive economic benefit from its use or disclosure. Reasonable efforts must also be made by the possessor to prevent the information from being disclosed.

A trade secret is only protected as long as competitors are unable to duplicate it by legitimate and independent means, such as

examination of the product. If a competitor is able to discover the secret through legitimate means, they acquire the full right to use it. Unlike patents, trade secrets do not provide the right to prevent others from making use of the secret, if it is successfully discovered through means that are not wrongful. As with confidential information, non-disclosure or confidentiality agreements are an important tool that should be used to protect a company's trade secrets.

In some circumstances, businesses may fall victim to the disclosure of trade secrets despite taking appropriate precautions. This may be caused through unauthorized disclosure by a former employee or former director or officer of the business. As long as the possessor of the secret took reasonable steps to ensure that the information remained confidential, the courts will usually treat the disclosure of the secret as wrongful and may award damages against the offending party, injunctive relief, or both.

Advertising Standards Canada

Advertising Standards Canada is responsible for regulating advertising in Canada in accordance with the *Canadian Code of Advertising Standards* (the "Code"). The Code covers all forms of advertising except foreign advertising (unless made by a Canadian advertiser), election advertising and packaging and labelling. The Code states advertisements "must not, unfairly, discredit, disparage or attack other products, services, advertisements or companies, or exaggerate the nature or importance of competitive differences." The Code further prohibits advertisers from imitating the slogans or illustrations of another advertiser in a manner that would mislead the consumer. Advertising that compares the product or service characteristics, value, performance, consumer preference, market share, sales origin or availability of one advertiser's products or services with those of another identifiable organization is considered to be comparative advertising under the Code.

Product Standards and Codes

Products and services in Canada are subject to numerous technical standards which set minimum requirements for safety or performance. Many of these standards have been developed by industry associations on a voluntary basis. Federal and provincial governments have also established many mandatory standards, often by incorporating into law standards developed by industry organizations. One of the key federal statutes to be aware of is the *Hazardous Products Act*, which applies to the advertising, sale and importation into Canada of hazardous products and substances, and which sets out national safety standards for numerous consumer products, including toys, furniture, household and garden products.

The Standards Council of Canada is a federal Crown corporation with the mandate to promote efficient and effective standardization. It coordinates and oversees the efforts of the National Standards System, which includes organizations and individuals involved in voluntary standards development, promotion and implementation in Canada. Some of the more prominent standards developing organizations in Canada include the Canadian Standards Association (which

deals with electrical products, fire and safety equipment, plumbing fixtures, toys and other consumer goods), the Canadian General Standards Board (textiles) and the Underwriters Laboratories of Canada (fire hazards and detection).

Given the large number of standards in force, developers and importers of products should seek expert advice to ensure their products comply with applicable standards. Companies should also determine if their products are eligible to receive certification marks from accredited certification organizations.

Packaging and Labelling Requirements

The federal *Consumer Packaging and Labelling Act* applies to most products that are the subject of trade or commerce in Canada, including both food and non-food products. The Act provides that no prepackaged goods can be sold, imported to Canada or advertised without a label prominently displaying the net quantity of the product. Labels are required to identify the product's identity in both English and French, and quantities must normally be described using the metric system of measurement. The Act also regulates standard container shapes and sizes.

In addition to the *Consumer Packaging and Labelling Act*, there are a number of federal statutes that mandate additional packaging and labelling requirements, including the *Food and Drugs Act* (which deals with food products, drugs, cosmetics and medical devices), the *Canada Agricultural Products Act* (which regulates specific food and beverage products), the *Textile Labelling Act*, the *Hazardous Products Act*, the *Pest Control Products Act*, the *Precious Metals Marking Act*, the *Trade-marks Act*, the *Customs Tariff* (which mandates that the country of origin be indicated on certain imports) and the *Weights and Measures Act*.

Internet Regulation

The ability to regulate internet activities is shared by the federal government and the provinces. Regulation of the internet itself is strictly a matter of federal jurisdiction, overseen by the Canadian Radio-television and Telecommunications Commission ("CRTC"). Businesses that meet the definition of a "telecommunications common carrier" under the *Telecommunications Act* are subject to federal regulations which cover items such as rates and services, facilities, ownership and operations.

Generally speaking, internet activities are not extensively regulated in Canada, reflecting a 1999 announcement made by the CRTC that it did not intend to regulate internet content. However, a number of developments in the area of internet and wireless data regulation are on the horizon.

The 2014 federal budget, introduced on February 11, 2014, disclosed the federal government's intention to implement a number of measures designed to increase competition in the telecommunications industry and increase regulatory enforcement in the wireless sector. Notably, the budget announced that amendments to the *Telecommunications Act* and *Radiocommunications Act* will be proposed. The proposed amendments, if enacted, will provide the CRTC and Industry Canada with the authority to impose "administrative

monetary penalties" on companies that violate regulatory requirements, including violations of Canada's new *Anti-Spam Act* and the recently in-force *Wireless Code*. In addition to the proposed amendments, the budget also announced plans to allocate $305 million for the expansion of broadband services into rural and northern communities.

Anti-Spam Legislation

Federal legislation aimed at preventing malicious email communications (i.e. spam) comes into force on July 1, 2014. Once implemented, the legislation, commonly referred to as Canada's Anti-Spam Legislation ("CASL"), will prohibit the sending of a commercial electronic message ("CEM") to an electronic address unless certain form and consent requirements are satisfied (with certain limited exceptions). Under CASL, an opt-in system is created whereby consent must be obtained from the recipient prior to the CEM being sent. This is different than the approach taken in the United States, which uses an opt-out system whereby an email can be sent without prior consent subject to the recipient opting out from receiving further emails. There are also prohibitions relating to installation of computer programs and altering transmission data without consent.

Consent can be either implied or express. Consent is implied where there is an "existing business" or "non-business relationship" (as defined in CASL) between the sender and recipient within a two year or six month period (depending on the circumstances) prior to sending the CEM. Certain types of messages in specific circumstances are fully exempt from CASL (meaning there are no consent or form requirements), including some kinds of business to business communications, fundraising communications by registered charities, messages to family members, and other communications as set out in the regulations. Furthermore, for the first three years following implementation of CASL, there is an implied consent for sending CEMs to recipients where, as of July 1, 2014, there was an existing business relationship or non-business relationship regardless of when that relationship may have last been active (i.e. without reference to the two year or six month time periods), provided that the recipient does not withdraw consent and the relationship included the exchange of commercial electronic messages.

Also, unless subject to an exemption, all CEMs will need to contain certain information identifying the sender (or person on whose behalf the CEM is sent), including name, mailing address and either telephone or email address. As well, an unsubscribe mechanism must be included to allow the recipient to unsubscribe from future emails. Unsubscribes must be effected within 10 days after an unsubscribe request is made.

Potential penalties for contraventions of CASL are high, with a maximum penalty of $10 million for corporations and $1 million for individuals. There is also vicarious liability for violations by employees. A private right of action comes into force in July 2017 for recipients who have received non-compliant CEMs. A due diligence defence will be available where the sender has implemented polices aimed at compliance with CASL obligations.

DOMESTIC TRADE / PROVINCIAL REGULATION

E-Commerce

The basic legal framework governing e-commerce in Canada is outlined in the *Uniform Electronic Commerce Act* ("UECA"). The UECA was designed to implement the principles developed by the *United Nations Commission on International Trade Law*, a global initiative that has been highly influential in Canada and other international jurisdictions. The UECA is modeled after the United Nation's Model Law on e-commerce, which has developed a set of internationally acceptable rules and principles for e-commerce legislation.

A central tenet of the UECA is the principle of "Electronic Equivalence," which provides that on-line transactions and electronic contracts are given the same legal effect as their traditional paper-based equivalents, provided that certain requirements are met. Although the UECA sets out the model framework for e-commerce in Canada, enforcement of e-commerce laws and regulations is a matter of provincial jurisdiction.

All of the Atlantic Canadian provinces have enacted provincial legislation to facilitate electronic contracts and e-commerce. In New Brunswick, the *Electronic Transactions Act* governs electronic commerce. In Nova Scotia, Prince Edward Island and Newfoundland and Labrador the relevant legislation is known as the *Electronic Commerce Act.* Provincial e-commerce statutes across Canada are modeled after the UECA, ensuring relative consistency in e-commerce law across the provinces and federally. Some of the shared central features of Atlantic Canadian e-commerce legislation include:

- Electronic information and documents, including contracts, are legally recognized and are not invalid or legally unenforceable simply by virtue of being communicated electronically.
- Where there is a legal requirement that information be in writing, this requirement is satisfied by electronic information so long as the information is accessible and capable of being retained for subsequent reference.
- Where there is a legal requirement that information be in a specified non-electronic form, this requirement is satisfied by electronic information if it is provided in the same or substantially the same form as the non-electronic form and is accessible and capable of being retained for subsequent reference. In other words, the electronic information should be recognizable as the form required by law.
- A legal requirement for a signature will generally be satisfied by an electronic signature, with some exceptions.
- Electronic information is not considered to be capable of being retained where the person providing the electronic information prohibits the printing or storage of the information by the recipient.

Electronic Contracts and Signatures

In Canada, electronic contracts are recognized under both the common law and provincial e-commerce legislation. In addition to the enactment of provincial e-commerce statutes, more than 300 federal statutes have been amended to accommodate electronic documents, contracts and signatures and to remove barriers to e-commerce.

The federal and provincial statutes governing electronic transactions and e-commerce are essentially uniform in their treatment of the enforceability of electronic contracts. Most contracts made through electronic media are treated in the same way as traditional contracts, provided they meet the requirements set out in the applicable statutes and regulations. However, there are a number of documents including wills, powers of attorney and most negotiable instruments, which require original signatures and cannot be finalized in electronic format.

The validity and enforceability of electronic contracts are governed by the same basic principles of Canadian contract law that apply to traditional paper-based contracts (e.g., offer, acceptance, consideration). It is necessary that the terms of the contract are clear and unambiguous, and that the parties intend to be legally bound when they enter into the contract. E-contracts that are entered into between individuals and electronic agents (automated computer programs) are considered valid and enforceable unless the individual makes a material error.

Acceptance of the terms of electronic contracts can be communicated through electronic signatures. Electronic signatures are defined in the federal *Personal Information Protection and Electronic Documents Act* as a signature that consists of one or more letters, characters, numbers or other symbols in digital form incorporated in, attached to or associated with an electronic document. Provincial e-commerce statutes define electronic signatures similarly, and provide that electronic signatures are functionally equivalent to their paper counterparts.

Electronic documents and signatures are considered to be sent when they enter an information system outside of the sender's control. Once the sent information is capable of being retrieved and possessed by the addressee, it is presumed to be received.

Legally valid e-contracts can also be executed through clicking or touching a computer icon. Additional forms of electronic contracts that have been recognized by the common law include "clickwrap" agreements (agreements where acceptance is expressed by clicking or touching a computer icon), "shrink-wrap" agreements (where licences are placed inside the packaging of consumer software products) and "browse-wrap" agreements (where use of a website constitutes agreement to the terms and conditions of its use). However, the enforceability of such agreements depends on the specific facts and circumstances and is determined by the courts using the common law principles of Canadian contract law.

Franchising Regulation

In Atlantic Canada, both New Brunswick and Prince Edward Island have legislation named the *Franchises Act* that substantially determines the rights and obligations of the parties to a franchise agreement in those provinces. For example, both pieces of legislation impose a "duty of fair dealing" on all parties to a franchise agreement, and place fairly onerous disclosure requirements upon franchisors. Failing to supply a disclosure document according to the law or inadvertently including a misrepresentation in the disclosure document will expose a franchisor to statutory liability in these provinces.

Although Nova Scotia and Newfoundland and Labrador do not currently have franchise legislation, courts in Canada have stated that, even in provinces where there is no legislation pertaining to franchises, a franchisor still has a duty to "act in utmost good faith towards a franchisee." Furthermore, in all of the Atlantic Provinces, many laws of general application will apply to franchise operations, including statutes that deal with commercial tenancies, employment standards and personal property security.

Regulation of Gift Cards

All of the Atlantic Provinces have enacted legislation to regulate gift cards. Nova Scotia and Newfoundland and Labrador enacted *Gift Card Regulations* under their respective consumer protection legislation, while New Brunswick and Prince Edward Island enacted a *Gift Cards Act*. All of the provinces define "gift cards" as electronic cards, written certificates, or other vouchers or devices with a monetary value that are issued or sold in exchange for the future purchase or delivery of goods or services. Under the respective provincial legislation, gift cards cannot have an expiry date unless they are sold for a charitable purpose or issued for a marketing, advertising or promotional purpose. Also, a person who issues or sells a gift card must clearly disclose, at the time the card is issued or sold, all restrictions, limitations, terms and conditions imposed in respect of the use, redemption or replacement of the gift card, as well as information about the way in which the purchaser or holder of the gift card can obtain details about the gift card, including the remaining balance. This information must be provided in writing.

Warranties and Consumer Protection

All of the Atlantic Provinces have a *Sale of Goods Act* ("SGA"), and there exists a high degree of uniformity between the jurisdictions. The SGA sets out a complete and uniform set of rules which govern all situations where goods are bought and sold. The SGA contains implied terms as to the quality of goods, including implied warranties (e.g., of quiet possession and of free and clear title) and implied conditions (e.g., that the goods will be of merchantable quality, will correspond to the description and will be reasonably fit for the particular purpose for which they are acquired, provided that that purpose is made known to the seller). Its provisions do not supplant those of the contract, they merely supplement them, and the legislation specifically allows parties to explicitly contract out of some or all of its provisions, should they wish to do so. As well, the SGA only has application to sales of goods, and

does not cover an agreement to supply services, even if goods are incidentally involved.

In addition to the SGA, the Atlantic Provinces have passed a variety of other acts geared towards consumer protection. For example, Newfoundland and Labrador consolidated its consumer protection legislation into a single enactment, the *Consumer Protection and Business Practices Act*, which prohibits unfair and unconscionable business practices and provides a right of action against a supplier where a consumer has suffered damage as a result of an unfair trade practice. Prince Edward Island's *Business Practices Act* also prohibits unfair practices and allows the consumer to rescind an unfair agreement and seek damages, or to recover the difference between the amount paid and the fair market value of the goods or services where rescission is no longer possible or would deprive a third party of a right acquired in good faith and for value. Nova Scotia and Prince Edward Island both have a *Consumer Protection Act* which contains more implied terms and warranties for contracts of goods and services, and affects the rights of creditors and debtors.

In New Brunswick, the *Consumer Product Warranty and Liability Act* ("CPWLA") provides that any statement made by a supplier, whether written, oral or in advertising, becomes an express warranty if the buyer reasonably relies upon it in purchasing a product. The CPWLA also establishes a number of implied warranties covering title, quality and fitness, and contains a product liability section which imposes strict liability on a supplier for losses suffered by consumers as a result of defective consumer products, irrespective of any contract or negligence.

The other Atlantic Canadian provinces do not have legislation dealing with product liability. However, product liability claims may be maintained by parties under the common law principles of negligence and under the law of contract for breaches of contractual warranties or conditions. The normal measure of damages in negligence is for reasonably foreseeable losses. Personal injury and property damage awards are intended to be compensatory. On rare occasions, punitive damages may also be awarded. A recent development which may have an impact on product liability award levels is the emergence of class action lawsuits. In 2001, Newfoundland and Labrador passed its *Class Actions Act*, in 2006 New Brunswick passed its *Class Proceedings Act* and in 2007 Nova Scotia passed its *Class Proceedings Act*. To date, Prince Edward Island has not introduced similar legislation. Like other Canadian provinces, class action lawsuits in Newfoundland and Labrador have become more frequent over time. A similar experience is expected in New Brunswick and Nova Scotia. By making access to such lawsuits more affordable for individual claimants, it seems likely that overall awards for product liability claims will increase in the coming years.

Other consumer protection legislation can be found in provincial acts which specify borrowing cost disclosure requirements that must be complied with by businesses that extend credit. As well, all the Atlantic Provinces have enacted comparable *Unconscionable Transactions Relief Acts*, which provides relief to debtors in

circumstances where a court finds the cost of the loan to be "excessive" and the transaction to be harsh and unconscionable.

Still other forms of consumer protection are found in provincial statutes that regulate specific industries. Examples of such statutes (which often include licensing or permit requirements) include New Brunswick's *Real Estate Agents Act* and *Auctioneers Licence Act*; Nova Scotia's *Collection Agencies Act* and *Payday Lenders Regulations*; Prince Edward Island's *Collection Agencies Act*; and Newfoundland and Labrador's *Flea Markets Regulation Act*. Also of note is Nova Scotia's *Consumer Creditors' Conduct Act*, which protects consumers from certain kinds of inappropriate behaviour on the part of creditors.

CHAPTER 6

TAXATION LAW

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CHAPTER 6

TAXATION LAW

Since 2000, the government of Canada has steadily reduced corporate and personal income tax rates at all income levels, and has also introduced various tax measures to create a favourable tax environment to encourage investment and entrepreneurship in Canada. The current status of these initiatives is reflected below.

The primary basis for taxation in Canada is residence of the taxpayer; Canada does not impose tax on the basis of citizenship. Any resident of Canada, whether individual or corporate, pays tax on its worldwide income. The federal *Income Tax Act* ("ITA") does not define the term resident. Generally, residency is determined using common law principles, taking into consideration factors such as the dwelling place of individuals and the location of a corporation's central management and control. Certain deeming provisions in the ITA may also apply.

Non-residents pay tax on their Canadian source income, which will typically include income from employment or business carried on in Canada and the disposition of taxable Canadian property. Taxes on non-residents are subject to relief by way of rate reduction or, to a limited extent, elimination of Canadian tax, under a tax treaty. Canada has an extensive network of treaties, with approximately 90 treaties currently in force.

CORPORATE TAXATION

The entity chosen by a taxpayer to conduct its business activities will determine how the business will be taxed. For instance, a sole proprietor adds the business income earned from the business to his or her personal income. A partnership must compute its income as though it were a separate taxpayer and then a partner's share of the partnership income is taxed at the same rates applicable to other income earned by such partner. Hence, partnerships are generally flow-throughs for tax purposes. Special rules apply to limited partners that may, in certain circumstances, restrict their ability to claim losses of a limited partnership allocated to them.

Unlike partnerships, trusts resident in Canada are taxable entities under the ITA. However, certain trusts, including personal trusts and mutual fund trusts, may be eligible for an offsetting deduction in respect of amounts distributed to beneficiaries. The effect of such rules is to reduce (or eliminate) tax at the trust level. Such distributions are generally taxable in the hands of the beneficiaries.

An incorporated company is also taxed as a separate legal entity. Any corporation resident in Canada is liable for Canadian income tax on its worldwide income (subject to relief from applicable tax treaties to which Canada is a party). A corporation can establish Canadian residency by incorporating in Canada (or a province or territory within Canada) or by having its directing mind reside in Canada. The applicable federal corporate tax rate will vary, according to the nature of a corporation's business, its residency status and its affiliations.

Foreign Investment in Canada

Foreign corporations planning to invest in Canada may establish their Canadian operations either through a branch or a Canadian subsidiary company. The tax treatment of a branch versus a subsidiary varies significantly, so foreign investors should carefully consider which option will minimize their tax burdens before investing in Canada.

Carrying on Business Through a Branch

The Canadian operations of a branch will be subject to Canadian corporate income tax on the net income of the branch. It will also be subject to withholding taxes on property income earned by the branch. In addition, the foreign entity will be subject to a branch tax at a rate of 25% of the net profits not reinvested in Canada, unless such rate is reduced by an applicable tax treaty.

Carrying on Business Through a Subsidiary

The operations of a Canadian subsidiary will be taxed on its net income as a Canadian company. In addition, the subsidiary will be required to pay a withholding tax on interest, royalties and dividends paid to its parent. The rate of such withholding tax will vary according to the nature of the income and whether a tax treaty between Canada and the country of residence of the parent company is applicable.

Federal Corporate Taxes

The federal corporate tax rates as of January 1, 2014 are set out below. A corporation must meet the requirements of specific provisions contained in the ITA to qualify for these rates.

General Rate (Active Business Income or Investment Business Income)	15%
Small Business Rate (on Small Business Income, up to income threshold)	11%
Small Business Deduction Limit	$500,000
Small Business Rate (on Active Business Income or income in excess of $500,000)	15%
Manufacturing & Processing Rate	15%

The Canadian government ceased levying a capital tax on large corporations as of January 1, 2006. In addition, the Canadian government maintains several federal tax incentives to encourage investment in Canada. These include:

- *Scientific Research and Experimental Development Program:* Businesses involved in scientific research and experimental development can apply for tax credits applicable to expenditures such as wages, materials and equipment.
- *Film Tax Credit Programs*: The Canada Revenue Agency administers two film tax credit programs to help the film industry in Canada.
- *Natural Resources Tax Incentives*: Businesses involved in drilling, exploration, development and production of minerals, or oil and gas, may qualify for industry-specific tax incentives. Investors should also be aware that each of the four Atlantic provinces has established certain tax and royalty regimes targeted specifically at the natural resource sector.

Provincial Corporate Taxes

In addition to federal corporate income tax, corporations are subject to provincial corporate income tax. Where a corporation operates in more than one provincial jurisdiction, its taxable income must be allocated between the provinces based on federally-defined formulae. These formulae are proxy measures of the actual business activity generated and are intended to reflect the level of business conducted in a jurisdiction. The formulae are based on the existence of a "permanent establishment", which is determined by considering whether there is a body or activity in place within a particular province with an ability and authority to generate or contribute toward revenues or the business purpose of the corporation.

New Brunswick

New Brunswick corporate income tax rates and bracket structures are applied to federally-defined New Brunswick taxable income. Applicable rates for 2013 include the following:

Business Type	Tax Rate (on January 1, 2014)
General	12%
Manufacturing & Processing	12%
Small Business[2]	4.5%

The Province of New Brunswick eliminated the Large Corporations Capital Tax as of January 1, 2009.

Financial institutions are still subject to the Financial Corporations Capital Tax ("FCCT") at a rate of 4% on taxable capital in excess of $10 million as defined in the New Brunswick *Financial Corporation Capital Tax Act*. The FCCT rate increased from 3% to 4% effective April 1, 2012. The FCCT is deductible from taxable income for federal and provincial corporate income tax purposes.

Businesses subject to tax in New Brunswick may be eligible for (or individually benefit from) one or more tax credits, tax incentives or benefits offered by the New Brunswick government. These include:

- Dividend Tax Credit;
- New Brunswick Political Contributions Tax Credit;
- New Brunswick Labour-sponsored Venture Capital Tax Credit;
- Research and Development Tax Credit; and
- Small Business Investor Tax Credit.

Of significance for entrepreneurs, the New Brunswick Small Business Investor Tax Credit provides a 30% non-refundable personal income tax credit of up to $75,000 per year (for investments of up to $250,000 per investor) to individuals, and a 15% non-

[2] The New Brunswick Small Business Deduction Limit is $500,000 as of January 1, 2014.

refundable income tax credit of up to $75,000 per year (minimum investment of $50,000 to a maximum of $500,000) to eligible corporate and trust investors who invest in eligible small businesses in the province.

Prince Edward Island

The applicable corporate tax rate for a corporation operating in Prince Edward Island is dependent on the type of business undertaken by a corporation. Applicable rates for 2014 include the following:

Business Type	Tax Rate (on January 1, 2014)
General	16%
Manufacturing & Processing (certain corporations may be eligible for a manufacturing and processing profits deduction)	16%
Small Business[3]	4.5%

Financial Institutions must pay a Financial Corporations Capital Tax at a rate of 5% on taxable capital in excess of $2 million as defined in the Prince Edward Island *Financial Corporation Capital Tax Act*. The Financial Corporations Capital Tax is deductible from taxable income for federal and provincial corporate income tax purposes.

In order to stimulate economic development, the government of Prince Edward Island has instituted a number of tax incentives for corporations in specific industries. Invest PEI oversees an array of fiscal measures to attract investment from corporations involved in industries such as aerospace, bio-sciences, renewable energy and information and communication technologies. Further assistance may be available from the development arm of the provincial government, Innovation PEI.

For those businesses subject to corporate income tax in Prince Edward Island, various investment tax credits or rebates may be available. These include:

- Innovation and Development Labour Rebate;
- Enriched Investment Tax Credit;
- Specialized Labour Tax Credit; and
- Share Purchase Tax Credit.

Nova Scotia

The applicable corporate tax rates for corporations operating in Nova Scotia include the following for 2014:

[3] The Prince Edward Island Small Business Deduction Limit is $500,000 as of January 1, 2014.

Business Type	Tax Rate
General	16%
Manufacturing & Processing	16%
Small Business[4]	3%

As in New Brunswick and Prince Edward Island, financial institutions are subject to a provincial capital tax at a rate of 4% on taxable capital in excess of $2 million as defined in the Nova Scotia Corporation Capital Tax Act. The tax payable under this legislation is deductible from taxable income for federal and provincial corporate income tax purposes.

Businesses subject to tax in Nova Scotia may be eligible for (or individually benefit from) one or more tax credits, incentives and benefits programs offered by the provincial government. These include:

- Equity Tax Credit;
- New Small Business Tax Deduction;
- Film Industry Tax Credit;
- Digital Media Tax Credit;
- Labour-Sponsored Venture-Capital Tax Credit; and
- Research and Development Tax Credit.

<u>Newfoundland and Labrador</u>

The applicable corporate tax rates for corporations operating in Newfoundland and Labrador depend on the type of business undertaken by a corporation and include the following for 2014:

Business Type	**Tax Rate (as of January 1, 2014)**	**Tax Rate (as of July 1, 2014)**
General	14%	14%
Manufacturing & Processing	5%	5%
Small Business[5]	4%	3%

In addition to corporate income tax, businesses operating in Newfoundland and Labrador are also liable for a payroll tax, known as the Health and Post Secondary Education Tax. This tax is payable at a rate of 2% by employers whose annual employee remuneration payable in the province exceeds $1.2 million.

Further, unlike many Canadian provinces, Newfoundland and Labrador does not impose a general capital tax on large corporations.

Financial institutions with permanent establishments in Newfoundland and Labrador are subject to a 4% capital tax payable on an entity's taxable capital in the province. Financial institutions with taxable

[4] The Nova Scotia Small Business Deduction Limit is $350,000 as of January 1, 2014.

[5] The Newfoundland and Labrador Small Business Deduction Limit is $500,000 as of January 1, 2014.

capital of less than $5 million are exempt from the tax, and financial institutions with less than $10 million of taxable capital are subject to capital tax to the extent that the taxable capital exceeds $5 million.

Businesses subject to tax in Newfoundland and Labrador may be eligible for (or individually benefit from) one or more tax credits, incentives and benefits programs offered by the provincial government. These include:

- Direct Equity Tax Credit;
- Manufacturing and Processing Tax Credit;
- Small Business Tax Credit;
- Small Business Corporate Income Tax Holiday;
- Labour-Sponsored Venture Capital Tax Credit;
- Film Tax Credit;
- Resort Property Investment Tax Credit;
- Scientific Research and Experimental Development Tax Credit; and
- Economic Diversification and Growth Enterprises ("EDGE") Program.

Most significantly, corporations that qualify for the EDGE Program may receive a 10 or 15 year tax holiday from provincial corporate income and payroll taxes and a 50% tax rebate of federal taxes for the same period, followed by a five year phase-in of these taxes.

SALES AND SERVICES TAX

The federal government levies a 5% Goods and Services Tax ("GST") on the supply of most goods and services.

The Atlantic Provinces are parties to an agreement with the federal government under which separate GST and provincial sales taxes have been replaced by a single Harmonized Sales Tax ("HST"). The HST rate varies between provinces as follows:

Province	HST Rate
New Brunswick	13%
Prince Edward Island	14%
Nova Scotia	15%
Newfoundland and Labrador	13%

Regardless of the province, the federal portion of the HST is 5%, with the provincial portion comprising the difference, which is applied to the same goods and services as the GST.

The GST/HST which is paid or payable on purchases, expenses and property used for commercial activities may be recoverable by claiming input tax credits. As well, there are a variety of rebates available which may allow businesses and individuals to recover the GST/HST paid on certain goods and services.

Imports and exports are subject to various exceptions from GST/HST. For example, certain goods and services ordinarily taxable at 5% GST or 13% HST may be

taxed at zero percent if they are exported from Canada and certain other conditions are satisfied.

PROPERTY AND BUSINESS TAXES

Details on property and business taxes are contained in Chapter 16 – Municipal Law.

PROPERTY TRANSFER TAXES

The transfer of an interest in land may be subject to provincial transfer or registration fees, as well as to GST/HST. Provincial taxes and fees vary from province to province (and within the particular provinces), and there are varying exemptions available in each province.

PERSONAL INCOME TAX

Individual Canadian residents are taxed on a progressive basis – the higher the income, the higher the tax rate. For 2014, the federal tax rates payable are:

Taxable Income	Tax Rate
$0 - $43,953	15%
$43,954 - $87,907	22%
$87,908 - $136,270	26%
$136,271 and over	29%

In addition to federal tax, each of the Atlantic Provinces levies personal income tax directly on taxable income earned by residents of the particular province. Provincial taxable income is calculated using the same definition as federal taxable income. However, a separate set of tax brackets and tax rates are used to calculate provincial tax, and the tax credits available to an individual also vary from province to province. For 2013, the provincial tax rates payable are:

New Brunswick

Taxable Income	Tax Rate
$0 - $39,305	9.68%
$39,306 - $78,609	14.82%
$78,610 - $127,802	16.52%
$127,803 and over	17.84%

Prince Edward Island

Taxable Income	Tax Rate
$0 - $31,984	9.8%
$31,985 - $63,969	13.8%
$63,970 and over[6]	16.7%

[6] A surtax of 10% is applied on Prince Edward Island tax exceeding $12,500.

Nova Scotia

Taxable Income	Tax Rate
$0 - $29,590	8.79%
$29,591 - $59,180	14.95%
$59,181 - $93,000	16.67%
$93,001 - $150,000	17.5%
$150,001 and over	21%

Newfoundland & Labrador

Taxable Income	Tax Rate
$0 - $34,254	7.7%
$34,255 - $68,508	12.5%
$68,509 and over	13.3%

The provincial tax rates are added to the federal tax rate to compute the effective tax rate.

CHAPTER 7

REAL ESTATE LAW

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CHAPTER 7

REAL ESTATE LAW

GENERAL CONCEPTS

Canadian real estate law has roots that stretch back as far as the eleventh century English feudal system. As a result, the principles and concepts of land rights which apply in Canada are consistent with those that exist in many other countries, including the United States and England.

Fundamental to the property law system is the concept that land can be subject to different interests held by different people, some simultaneously.

The highest interest in land that can be held is a freehold estate. There are several categories of freehold estate, the uppermost being the fee simple, which loosely translated means an outright ownership of potentially infinite duration. Lesser interests are a life interest, which as the name suggests, is an interest which expires upon the death of the person holding it, and a remainder interest, which is an interest in land which will become a fee simple interest after the death of the life interest holder. No person can sell a greater interest in land then that which he holds. If, therefore, one wants to buy a fee simple interest in lands from someone who holds only a life interest, one must be sure to include in the transaction those holding the remainder interest. Furthermore, if one buys the life interest from the life interest holder, the purchaser has an interest only for the life of the person to whom the life interest was originally granted.

The next highest interest in land is a leasehold estate, which is a temporary right of possession enjoyed by one party (the tenant), to land owned by another (the landlord) pursuant to the terms of a written lease.

In addition to freehold and leasehold estates in lands, there are several lesser categories of interests including easements, licences, profits à prendre and restrictive covenants.

An easement is a burden which attaches to one piece of land for the benefit of another and which stays with the land even though the land changes ownership. Common easements are rights-of-way for access or utilities and the right to drain water onto the land of another (drainage easements). Except where permitted by statute, valid easements require a clear description of the right to be enjoyed, the lands burdened and the lands directly benefitted.

Licences are likewise rights to use the lands of another but in this case the right is in favour of a person rather than land. Thus, a particular business may have a licence to cross the land of a neighbour for the purpose of accessing a public road in a particular place. Generally speaking, licences expire when the ownership of the property over which the right is enjoyed changes or when the licence holder sells its land. If the licence is intended to outlive the current parties to it, it is very important that appropriate wording be included in the original grant of licence to accommodate this intention.

Profits à prendre are rights to go onto the lands of another to take something of value in the land itself (for example, crops, trees, gravel) and remove it.

Restrictive covenants come in three forms, two of which run with the land and one of which is contractual. Restrictive covenants set up under a building scheme attach to all of the lots within the particular subdivision created by the developer. Restrictive covenants in residential subdivisions have been common for many years and now they are appearing more frequently in commercial subdivisions also. Municipalities, for example, generally impose restrictive covenants on new industrial parks. The intention of the restrictions is to protect the value of the lands within the subdivision by imposing rules as to how the lands may be used.

Similarly, one land owner may subdivide his land in two and sell one portion of land subject to a restrictive covenant which is for the benefit of the land remaining with the land owner. An example of this type of restrictive covenant would be a restriction on building within a certain portion of the new lot so that the view from the remaining land is not affected. Because this restriction is for the benefit of the remaining land, this restriction will run with the two lots when the lands are sold.

The contractual restrictive covenant is a restriction on the use which may be made of land which is advantageous to the business of the party selling it. Thus for example, Company A may sell a piece of land to Company B with the restriction that Company B may not use the land for the purpose of carrying on a business similar to that of Company A. The lands to be benefited by the restriction must be

identified with the intention that if Company A ceases to carry on business at that location, the purpose for the restrictive covenant disappears. When challenged, courts have often held that these restrictive covenants can only be imposed for a certain "reasonable" period of time on lands within a "reasonable" distance from the business being benefitted, as determined by the facts of the particular case.

Title to land can be held by one or more people or entities for themselves or for the benefit of others.

Generally, persons and companies hold title to their own land. If two or more people take title, they can own as joint tenants or as tenants in common. joint tenants, who must hold equal interests obtained from the same grantor(s), have a right of survivorship, i.e.: if one dies then the other(s) automatically obtain the interest of the deceased, entirely if there is one joint tenant and in equal shares if there are more. Tenants in common can hold unequal shares of property, which shares can come from different people. When a tenant in common dies, his or her share goes into his or her estate and is distributed in accordance with the terms of the will or, if no will exists, according to the intestacy laws of the province where the land lies.

Executors and personal representatives are examples of people who hold title to land for the benefit of others, as of course, do trustees who take title pursuant to a trust instrument. These people have the "legal" title because the land is held in their name but the "beneficial" title lies with those who are supposed to benefit from the land, the so called beneficiaries. The powers of those who hold land in trust are determined by the instrument which set up the trust and sometimes by statute.

FEDERAL LAW

While jurisdiction over property and civil rights is allocated to the provinces under the constitution, some federal laws may affect property transactions. Statutes which commonly come into play are the *Excise Tax Act* (Harmonized Sales Tax/Goods and Services Tax in commercial transactions), the *Income Tax Act* (capital gains tax payable on the proceeds of lands sold by non-residents of Canada) and the *Bankruptcy and Insolvency Act*. Less frequently, but very important when relevant, one has to pay attention to federal laws relating to environmental standards, the regulation of lending institutions, navigable waters, railways and airports.

PROVINCIAL LAW

Each province has its own laws and procedures relating to the creation, protection and disposition of interests in land and one is therefore wise to consult a lawyer in the province where the land lies when legal advice is required.

Ownership

Generally speaking, there are no restrictions on the ownership of land in New Brunswick, Nova Scotia or Newfoundland and Labrador. However, New Brunswick and Newfoundland and Labrador require that corporations holding certain interests in land must be registered as extra-provincial corporations under their provincial corporation legislation.

The situation is different in Prince Edward Island. The *Land Protection Act* restricts land ownership by limiting the aggregate amount of land a person (resident or non-resident) may own to 1,000 acres and a corporation to 3,000 acres. In certain circumstances the Lieutenant Governor in Council ("Executive Council") controls the amount of land a non-resident or corporation may acquire. A non-resident or corporation must make an application to the Island Regulatory and Appeals Commission ("IRAC") for approval of a land acquisition if they have an aggregate land holding in excess of 5 acres or have shore frontage in excess of 165 feet. IRAC reviews the application and makes a recommendation to Executive Council. Executive Council may decide to approve, approve with identification, approve with conditions or deny an application for land acquisition.

Land Registration systems

All provinces have a public system of land registration administered by provincial authorities through which title to land can be investigated and transferred. Generally there are two systems of land registration: the "registry" system and the "land titles" system.

Registry Systems

Under the registry system the emphasis is on the names of the people owning lands. Grantor/Grantee indices list the names of the entities/persons named as parties to the documents filed in the registry. There is no listing of the lands themselves. Title is confirmed by searching back to a "good root of title", the characteristics of which differ according to the province the land is in, to ensure that there is an unbroken chain of valid conveyances from the "earliest" one to the current owner and to determine what valid encumbrances (easements, restrictions, mortgages, etc) may still affect the title. The title search determines whether the lawyer can certify the title.

Unfortunately, there are many different kinds of problems to be found. A fundamental problem is a gap in the title, either because no document exists (e.g., A conveyed to B and C conveyed to D but B did not convey to C), or because there is a problem with the document on record (e.g., B purported to convey to C but the legal description was defective or B did not have the interest which he purported to convey or B was legally incapable of executing the deed himself, to cite a few examples). There may be a restriction on the use of the land or an easement which affects the enjoyment of the land. A common problem is old unreleased mortgages.

Very often there are solutions to the problems. Sometimes the problem exists but the risk of it leading to an issue in the present is so small that it is simply accepted and not allowed to affect the current transaction. Sometimes title insurance will cover the risk, though it should be noted that if the underwriters think that there is a real possibility that the problem will lead to losses, then coverage will be denied.

Land Titles Systems

One of the advantages of the land titles systems is that the ownership of the lands and, to some extent, the benefits and burdens on title are warranted by the province. Under this system, the lands in

the province are mapped and assigned an identification number. Title and encumbrances are confirmed by looking up that number and reviewing the parcel register/information page, which typically lists the owner and any instruments which may affect the title: easements (both benefitting and burdening the land), restrictions and financial charges such as mortgages, debentures and liens. Judgments may or may not be found in the parcel register. Because of their nature there is usually a special judgment roll which lists the names of people who are judgment debtors.

When land titles systems replace registry systems a process has to be in place for the transfer, (sometimes referred to as "migration") of the information from one system to the other.

The land titles system is clearly more efficient and particularly suited to the computer age. The transfer of records is a time consuming process, however, and until the process is complete a province may have both a registry system and a land titles system operating in parallel from the same physical office space (the "LRO").

Again mixing the old and the new, some LROs have only electronic records for public viewing which may be accessed by authorized users from computers anywhere, while other LROs have only paper records and one needs to attend physically at the LRO to review them.

Recording Costs

Recording fees differ from province to province, not only in amount, which is to be expected, but also in character. In Nova Scotia, for example, there is a standard fee across the board for each document to be filed. In Newfoundland and Labrador, on the other hand, the fee for recording a mortgage depends on the amount of the mortgage and can be as high as $5,000.

Deed transfer taxes also differ from province to province and sometimes between municipalities within each province.

Documents

The form and content of documents which may be filed at the LROs, whether under the registry system or the land titles system, differ from province to province. For example, agreements of purchase and sale and caveats (documents intended to give notice that someone believes/claims he has an interest in someone else's land, but not sufficient to establish that interest) are not recordable in Nova Scotia though they are in other provinces. In New Brunswick and Newfoundland and Labrador a mortgage/notice of mortgage may set out the financial particulars but not all of the terms of the mortgage, which in New Brunswick are incorporated by reference to a set of standard terms recorded separately. In Nova Scotia and Prince Edward Island the complete mortgage is always recorded. In New Brunswick, registrable documents are restricted to certain forms prescribed by regulation under the *Land Titles Act*, which must be used for land titles registrations. The differences noted above underline the importance of having someone who is familiar with a given jurisdiction's requirements prepare your documents to

ensure they will be acceptable to the local registry.

Statutory Interests

In each province there are interests created by statute which do not have to be recorded in order to bind a property. Statutory liens include liens for unpaid property taxes, business occupancy taxes, workers' compensation levies and utilities. Again, the liens are not uniform across the provinces. Other statutory interests include short-term leases, certain unrecorded easements, certain rights of access, some rights of the Crown and municipal by-laws.

SALES

The sale of land between arms length parties is generally governed by the terms of a written agreement of purchase and sale. Verbal agreements for the sale of lands are generally unenforceable under provincial legislation. Sometimes the arms length parties enter into a letter of intent which sets out the major terms of the sale to be incorporated in the formal agreement but more frequently the parties simply enter into an agreement of purchase and sale negotiated between them, either with the assistance of a real estate agent or a lawyer. The more complex the transaction, the more advisable it is to have a lawyer involved at some point before the agreement of purchase and sale is executed by the parties.

The agreement of purchase and sale identifies the lands, sets out the purchase price, the due diligence investigations and inspections to be undertaken by the purchaser, any preconditions to the sale to be fulfilled by the purchaser or the seller prior to closing, the representations and warranties to be given by the seller with respect to the lands, the closing date and various standard terms which direct how the sale will be completed. Generally the purchaser is required to make a deposit to confirm his interest in the property. The amount of the deposit varies according to the amount of the purchase price, the nature of the lands being sold and the terms of the agreement itself. The greater the value of the land or the further away the closing date, for example, the greater the amount of the deposit. As a deposit (which is generally held either by the listing agent or the seller's lawyer) will be forfeited if the purchaser defaults under the terms of the agreement of purchase and sale, it is very important that the purchaser pay attention to the deadlines set out in the agreement with respect to due diligence and satisfaction of preconditions, or seek extensions, as required.

The onus is on the purchaser to make sure that the lands and any buildings on the lands are satisfactory to the purchaser in every respect (survey, zoning, title, value, suitability for the purpose intended, and physical condition - both structural soundness of buildings and environmental condition of the lands overall). It is, therefore, very important that the purchaser pay close attention to the due diligence and preconditions in the agreement and coordinate with the experts required to assist in the process. Apart from a lawyer, the purchaser may need a surveyor, a building inspector, a contractor, a soils engineer and/or an appraiser, depending on the complexity of the transaction and the availability of pre-existing information.

The lawyer's role in the transaction is to assist with the due diligence process by obtaining information and, if necessary, raising objections if acting for the purchaser or by providing information and answering objections if acting for the seller. The lawyer will also prepare documents for execution by the party for whom he is acting, review documents being prepared for execution by the other party, deal with any mortgage company involved in the transaction, assist with the calculation of adjustments, co-ordinate the closing itself and ensure any post-closing requirements are fulfilled in a timely manner (e.g., registration of documents, payouts of mortgages, provision of title reports, and registration of releases).

CHAPTER 8

SECURITIES LAW

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CHAPTER 8

SECURITIES LAW

REGULATORY OVERVIEW

Every province and territory in Canada has its own securities regulatory system, including separate securities legislation and governing authorities. As a result, national securities transactions require compliance with several regulatory schemes administered by different authorities. In recent years, the substantive requirements of these different regulatory schemes have largely been harmonized under a system of national instruments adopted as rules by the regulatory authorities in most or all of the jurisdictions. The federal government has proposed a single national securities regulatory system which provinces can voluntarily join, following a Supreme Court of Canada ruling that the federal government could not unilaterally impose a national securities regime.

Each of the four Atlantic Provinces has its own *Securities Act* which, while not identical, share many common features. Provincial securities legislation creates a "closed system" for the trading of securities and regulates both the issuance and distribution of securities by the issuing company, as well as secondary trading by security holders in the respective provinces.

The purpose of securities legislation is to protect investors, which is accomplished in two basic ways. First, securities legislation strives to ensure that all investors and security holders have as much information as possible concerning the securities that

they are acquiring or selling. This is accomplished by both initial and continuous disclosure requirements. Second, industry professionals must meet appropriate competency requirements and are required to be registered under the legislation. This ensures that investors can be advised by knowledgeable persons prior to making an investment.

DISCLOSURE OF MATERIAL INFORMATION

Companies that issue securities to the public ("reporting issuers") must provide both initial and continuous disclosure. The key to initial disclosure is the "prospectus" - a detailed document which describes the company's business, financial position and securities. Provincial securities legislation also requires that continuously updated information on the reporting issuer be made publicly available, including details on any material changes to the business of the company, insider trading information, early warnings for take-overs, and up-to-date

financial information. These disclosure requirements are generally consistent across the provinces.

PROSPECTUS PROCESS

Issuers filing a prospectus must do so electronically through licensed software known as “SEDAR”. The issuer must file a preliminary prospectus in each of the provinces in which securities will be offered. There is a review and comment process that is led by the securities regulator in the “principal” jurisdiction with the most significant connection to the issuer. After the securities regulators have cleared the prospectus for final filing, the issuer then files the final prospectus. A registered agent or underwriter is generally required to participate in this process and sign a certificate on the prospectus along with two officers and two directors of the issuer verifying that there is no misrepresentation in the prospectus.

LISTING REQUIREMENTS

Issuers who wish to list their securities for trading on stock exchanges must satisfy minimum listing requirements set by the stock exchange relating to their business, management, issued capital, distribution of securities and financial resources. Issuers must sign a listing contract with the stock exchange and agree to comply with the rules of the stock exchange.

Listed issuers must notify, and in some cases obtain the consent of, the stock exchange before making corporate changes or entering certain transactions, such as (i) changes in capital structure, (ii) material transactions such as business combinations, and (iii) issues of shares or options. Listed issuers must also make regular filings with the exchanges, pay annual fees and satisfy timely disclosure requirements in addition to the continuous disclosure requirements under provincial securities laws.

EXEMPT TRANSACTIONS

The general rule under securities legislation is that a company may not issue securities unless it files a prospectus. However, it is recognized that not all investors require such protection for all securities, so the legislation and rules adopted under the national instruments contain a number of exemptions from the prospectus requirements. Additional exemptions may be granted at the discretion of the various provincial securities regulatory authorities.

It is important to note that although one of the advantages of issuing securities under the exemptions noted below is that the issuer is not required to issue a prospectus, in some circumstances it is necessary to provide purchasers with certain disclosure documents when a company is attempting to sell its securities. Even if not mandated, it may be commercially necessary to have a disclosure document to give to prospective purchasers in order for them to have the information required to make an investment decision.

The following are a few of the more useful prospectus exemptions set out in provincial securities legislation, local rules, policies and/or national instruments adopted by the various provincial securities regulatory authorities.

Accredited Investor Exemption

Each of the Atlantic provinces has an exemption that allows a person or company to purchase the security of an issuer if the purchaser purchases the security as principal (i.e. not on behalf of someone else) and is an "accredited investor". To qualify as an accredited investor, the person or company must meet one of several sophistication or financial tests, including among others:

- An individual who, either alone or with a spouse, beneficially owns, directly or indirectly, financial assets having an aggregate realizable value that before taxes, but net of any related liabilities, exceeds $1 million;
- An individual whose net income before taxes exceeded $200,000 in each of the two most recent years or whose net income before taxes combined with that of a spouse exceeded $300,000 in each of the two most recent years and who, in either case, reasonably expects to exceed that net income level in the current year;
- An individual who, either alone or with a spouse, has net assets of at least $5 million; and
- An entity, other than an individual or investment fund, that has net assets of at least $5 million, as shown on its most recently prepared financial statements.

There are no limits on the number of accredited investor purchasers or the aggregate proceeds raised. Regulatory filings may be required post-transaction.

Private Issuer Exemption

Clearing a prospectus involves costs that rarely can be justified or borne by a small, private company. Accordingly, exemptions are provided for private issuers to sell securities to a specified category of purchasers. To qualify for this exemption, a company must:

- Have a restriction on the transfer of its securities in the company's constating documents or in a shareholders' agreement;
- Not be a reporting issuer or an investment fund;
- Not have more than 50 shareholders (not counting current or former employees); and
- Only sell (and have only ever sold) its securities to persons who either are within listed categories (including accredited investors, employees, directors, officers and certain relatives, close friends or business associates of directors and officers) or are not the "public".

Whether a person falls into the "public" category can be a difficult question to answer, and involves a mixture of fact and law. Generally speaking, the approach taken is based on the view that the public comprises those members of a community who need the protection of securities legislation and require the information contained in a prospectus to make an informed investment decision. A number of factors are relevant in determining whether a person is part of the "public" in respect of the trading of a particular security, including the number of offerees and purchasers in a transaction, the relationship of the

purchasers to the issuer, the sophistication or investment expertise of purchasers or their access to advice, the net worth or ability of the purchasers to risk a complete loss of their investment, the manner in which the offering is made, the purpose of the offering, and the circumstances relating to the issuer.

Because a private issuer is, by definition, not a reporting issuer, there is no public or liquid market for its equity securities, and there may be limited access to information about the company's business or finances. Investors generally must be prepared to be in for the long term. As a result, it can be difficult for the owners of the business to raise money using the private issuer exemption.

Family, Friends and Business Associates Exemption

All of the Atlantic provinces have adopted an exemption which allows for trades in the security of an issuer if the purchaser purchases the security as principal and is one of the following:

a. A director, executive officer or control person of the issuer, or of an affiliate of the issuer;
b. A spouse, parent, grandparent, brother, sister or child of a director, executive officer or control person of the issuer, or of an affiliate of the issuer;
c. A parent, grandparent, brother, sister or child of the spouse of a director, executive officer or control person of the issuer, or of an affiliate of the issuer;
d. Aa close personal friend of a director, executive officer or control person of the issuer, or of an affiliate of the issuer;
e. A close business associate of a director, executive officer or control person of the issuer, or of an affiliate of the issuer;
f. A founder of the issuer or a spouse, parent, grandparent, brother, sister, child, close personal friend or close business associate of a founder of the issuer;
g. A parent, grandparent, brother, sister or child of the spouse of a founder of the issuer;
h. A person or company of which a majority of the voting securities are beneficially owned by, or a majority of the directors are, persons described in paragraphs (a) to (g); or
i. A trust or estate of which all of the beneficiaries or a majority of the trustees or executors are persons described in paragraphs (a) to (g).

There are no specified limits on the number of purchasers or the aggregate proceeds under this exemption. Regulatory filings may be required post-transaction.

Offering Memorandum Exemption

Each of the Atlantic provinces has adopted an exemption for trades by an issuer in a security of its own issue if the purchaser purchases the security as principal and, at the same time or before the purchaser signs the agreement to purchase the security, the issuer delivers an offering memorandum in a specified form to the purchaser, and obtains a signed risk acknowledgement. The offering memorandum must contain

certain information about the issuer and other disclosures that are specified in the securities legislation and rules. The required disclosures are similar to, but generally somewhat less onerous than, the prospectus disclosure requirements. In Prince Edward Island, the purchaser must be an “eligible investor” or be investing less than $10,000. The eligible investor is similar to the accredited investor definition for individuals, but with lower thresholds. Unlike other exemptions, purchasers under an offering memorandum must also be granted rights to rescind purchase commitments and rights of action for misstatements in the offering memorandum comparable to those available to purchasers under a prospectus. There are no limits on the number of purchasers. Regulatory filings may be required post-transaction.

Minimum Purchase Amount Exemption

A transaction is exempt from the prospectus requirements of provincial securities legislation where the purchaser purchases, as principal, securities that have an aggregate acquisition cost of at least $150,000. There are no limits on the number of purchasers, but purchasers must not have been formed for the purpose of making the investment (i.e. investors may not pool their resources in a new entity to take advantage of this exemption). Regulatory filings may be required post-transaction.

CHAPTER 9

INTELLECTUAL PROPERTY

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CHAPTER 9

INTELLECTUAL PROPERTY

INTELLECTUAL PROPERTY RIGHTS

Intellectual property rights are intangible, exclusivity rights which provide their owners legal remedies to stop others from exploiting the fruits of their intellectual labour without permission inside a particular jurisdiction. They were created by government legislation to advance societal interests in cultural knowledge and science while compensating creators for their creativity and productivity. Unlike land or physical property, they cannot be seen or held in one's hands. However, they are often a very valuable asset and care must be taken to ensure that their value is both maximized and protected.

Most intellectual property rights (including patents, registered trade-marks and copyright) are created by statute; they exist as a result of legislation which both defines and limits the scope of protection afforded to the intellectual property right. Copyright,

patents and trade-marks are all governed by federal legislation and thus the rights associated with them do not vary between provinces and territories of Canada.

Other intellectual property rights (including trade secrets and unregistered trade-marks) are known as “common law rights”, because they have evolved over time as a result of common law court decisions but have not been codified in a statute like the *Patent Act* or the *Copyright Act*.

TRADE-MARKS

A trade-mark may be a word, symbol, slogan, design, sound or combination of words, designs, symbols, colours, or the “get-up” or unique shape of a package or product (or a combination of these features), used to distinguish the wares or services of one person or organization from those of others in the marketplace.

Trade-marks are important to any industry where products or services are significantly promoted or advertised. Once people become familiar with a particular trade-mark, they associate a certain standard with products or services that are marketed under that trade-mark. Trade-marks are an indication of source and represent not only actual wares and services, but also the reputation and goodwill of the producers who own them.

Trade Name vs. Trade-mark

A trade name is the name under which a business is conducted, whether it be one’s own name or the name of a corporation or a partnership or a name adopted for a segment of that business, such as a division of a company. A trade name can be registered under the federal *Trade-marks Act* only if it is also used as a trade-mark, namely if it is used to identify wares or services.

Provincial legislation in Nova Scotia and New Brunswick requires that any company that operates its business under a trade name rather than under the name of the incorporated entity must register its trade name. In Prince Edward Island, companies are not required to register their trade names, but may do so if they wish. Before a name can be registered, a computerized name search must be conducted. Names that closely resemble existing business names may not be registrable.

Unlike the other three Atlantic provinces, Newfoundland and Labrador does not have a trade names registry. The only registry for business names is the corporate registry maintained by the Registry of Companies Division of the Government of Newfoundland and Labrador. A company’s registered corporate name is not necessarily the same as its trade name. Accordingly, in Newfoundland and Labrador there is no way to know whether or not a trade name is being used by another party. It is advisable that businesses using a trade name register the name as a registered trade-mark if possible, as they otherwise run the risk of a dispute arising over the rights to the use of that trade name.

Registered Trade-mark vs. Unregistered Trade-mark

There are two ways to obtain and maintain trade-mark rights:

- By registering a trade-mark in the Trade-mark Registry in accordance with the *Trade-marks Act* (registered trade-mark rights); or
- By using a trade-mark in the marketplace (unregistered or common law trade-mark rights).

Common law trade-mark rights are created over time by the continued use of a trade-mark in association with goods or services in a geographic area. The strength of these rights will depend on the public recognition of the association between the trade-mark and the goods or services being sold. Common law trade-mark rights are only protected within the geographical areas where the goods or services are marketed.

Notwithstanding the existence of basic common law trade-mark rights acquired through use, securing registered trade-mark status is always recommended. Registration is primary evidence of ownership and becomes very useful in the event of an infringement dispute. In such a dispute, the registered owner does not have to prove ownership; the onus is on the party challenging the owner's rights to prove that the registered owner does not have the right to register or use the trade-mark. Use of an unregistered trade-mark can lead to a lengthy and expensive legal dispute over who has the right to use it.

Registered trade-mark rights give the owner the exclusive right to the use of the trade-mark in Canada, in respect of the goods and services associated with it, and the right to prevent others from using the same or confusingly similar marks for a period of 15 years, which can be renewed indefinitely. The registration process takes approximately 18 to 24 months provided that no objections are raised by the Registry and that no third party opposition to the trade-mark registration application arises. However, using a trade-mark prior to obtaining registration is very common and acceptable provided that adequate searching has been done to ensure that the trade-mark is not already being used by someone else and can be eventually registered.

Losing Trade-mark Rights

Trade-mark registrations may be renewed indefinitely subject to the continued use of the mark. A failure to use a trade-mark may expose a trade-mark owner to an expungement proceeding which, if successful, would result in the removal of the mark from the Registry. A failure to use a common law trade-mark erodes the strength and goodwill of the trade-mark and makes it more difficult to enforce against others.

It is also possible to lose a trade-mark right if the distinctiveness of the mark is lost and it becomes "generic". Examples of trade-marks that have become generic in some jurisdictions include "Thermos", "Aspirin" and "Margarine". It is incumbent upon a trade-mark owner to watch out for and prevent infringements of its trade-mark rights and enforce those rights to avoid losing distinctiveness of the mark.

Infringing Trade-mark

Using another party's trade-mark or using a mark that is confusingly similar to another party's trade-mark (e.g. "Appled Computers" vs. "Apple Computers") constitutes trade-

mark infringement. Passing off one's own goods or services so that they appear to be someone else's (e.g. labelling footwear "Nike" if it was not produced by Nike) is also an unlawful activity and can be enforced either at common law, as a tort, or pursuant to the specific rights and remedies contained in the *Trade-marks Act*.

COPYRIGHT

Copyright in Canada is governed exclusively by the federal *Copyright Act*. Copyright gives its owner, among other things, the sole right to produce, reproduce, copy or rent the protected work. It does not prevent other persons from viewing the copyrighted material. For example, copyright does not prevent you from reading a book you have purchased, or giving your copy of the book to another person. However, it would prevent you from photocopying the book and selling the copies to other parties.

Copyright protects many different kinds of "works". Copyright can subsist in any *original* literary, artistic, musical or dramatic work, or any substantial part thereof, in any material form whatsoever. It also protects software programs, broadcast signals, live performances, sound recordings and technological protections measures. The word "original" is key to defining a work that qualifies for copyright protection. Originality can be tricky to determine and many court cases revolve around the question of whether a work has been copied, even in part, from someone else's work. In order to be protected by copyright, the work also has to have some degree of fixation or permanency.

Copyright arises automatically upon the creation of the work and no registration is required, although, like trade-marks, the registration of copyright is useful and beneficial. A certificate of registration is primary, albeit rebuttable, evidence that the work is protected by copyright and that the registered party is the lawful owner. In the event of a legal dispute, the registered copyright holder does not have to prove ownership - it is presumed; the onus is on the opponent to disprove ownership.

Copyright protects the expression of an idea but not the underlying idea itself. As long as there is no actual copying involved, anyone can produce a similar work even if they are using the same underlying idea. For example, you may have a brilliant idea for a mystery plot but until the script is actually written, or the motion picture produced, there is no copyright protection. Copyright is restricted to the expression in a fixed manner (for example: text, recording, or drawing) of an idea; it does not extend to the idea itself. Facts, ideas, scientific formulae, titles and news are all considered part of the public domain; in other words, they are everyone's property to use without limitation or restriction.

Independent of the usual reproduction rights, authors also have moral rights in respect of their works. Moral rights include the right to be associated with a work either by name or by pseudonym; the right to remain anonymous; and most importantly the right to the integrity of the work, meaning that no one can, to the prejudice of the author's reputation or honour, distort, mutilate, modify or use the work for promotional purposes. Moral rights cannot be assigned because they are personal to

the author. They can, however, be waived irrevocably.

In Canada, the term of copyright protection generally subsists for the life of the author plus 50 years but there are exceptions depending on the type of work and whether it was authored by one or more persons. The general rule is that the author of the work is its first owner. However, when a work is created by an employee in the course of his or her employment, the copyright relating to that work is automatically owned by the employer unless there is an agreement to the contrary. A work created by an independent contractor is owned by the independent contractor unless there is an agreement to the contrary, despite the fact that the work in question may have been commissioned and paid for by someone else.

Exceptions to Infringement

There are certain uses that can be made of copyrighted material that do not constitute infringement and, as such, are legal defences to claims of infringement. Historically, such defences have been called “fair dealing” (in contrast to “fair use” in the US legislation, although the substantive differences are minor). However, as a result of a recent line of landmark decisions of the Supreme Court of Canada, fair dealing is now more appropriately described as “user rights” in Canada. User rights must be exercised fairly and must fall within one or more of the seven enumerated statutory purposes: (i) research; (ii) private study; (iii) education; (iv) parody; (v) satire; (vi) criticism or review; and (vii) news reporting. There are also a number of other specific exceptions to infringement contained in the *Copyright Act*, however they are extremely detailed, relatively narrow and beyond the scope of this summary.

PATENTS

Patent law in Canada is governed exclusively by the federal *Patent Act*. A patent gives the owner of the patent the exclusive right to manufacture, use and sell the invention claimed in the patent, and the ability to prevent others from doing the same. A patent protects the claimed invention only, and not just the expression of the inventive idea, like copyright. Thus, even if you independently develop inventions on your own, without any knowledge of an existing patent, you may still be barred from making, using or selling the invention until the patent that previously claimed the invention has expired.

Patents offer inventors monopolies on their creations for specific periods, and thus provide incentives for research and development. The length of time during which a patentee is able to exercise its exclusive rights is currently 20 years from the Canadian application date. Without the possibility of patent protection, many people might not take the risks or invest the time and money involved in devising and perfecting new products.

Patents are also a means of advancing technology. The patent discloses in clear and specific terms how the invention being patented works although no one else can use the information until the patent has expired. Because of the rigid tests and jurisprudence governing the patentability of inventions, patents are more difficult to

obtain than other forms of intellectual property rights and their applications can take many years and carry significant costs.

Requirements

In order to be issued a patent, the invention must meet all four of the following requirements:

- Patentable subject matter: Any new and useful art, process, machine, manufacture or composition of matter, or improvement, can be the subject of a patent. Scientific principles, mathematical equations and other like "inventions" are not patentable subject matter.
- Novelty: The invention must not have been disclosed in a manner such that it had become available to the public prior to the filing date of the application (if the disclosure was by a third party), or prior to one year before the filing date of the application (if the disclosure was by the inventor).
- Non-Obviousness: The invention must reflect some amount of inventive ingenuity; in other words, it must not be obvious to a skilled professional in the industry, having regard to all of the other information and knowledge of the industry that is available to him or her.
- Utility: The invention must serve some functional purpose and it must deliver the results promised in the patent, if any.

Because patent applications become public documents, the world at large is then able to know the details of an invention. After the patent expires, there is nothing to prevent others from making the invention themselves. Accordingly, inventors sometimes choose to maintain the invention as a trade secret instead.

TRADE SECRETS

A trade secret is information that is actually secret in an objective sense. For example, secret chemical formulae and proprietary recipes for are not patented or otherwise registered under some statute – they are trade secrets, unknown to anyone other than the companies that own the products and their employees who need to know. If the recipes were patented, anyone could use them after the patent expired in 20 years but as a trade secret, the rights are potentially perpetual.

However, there are inherent problems with attempting to protect an invention as a trade secret. There is no protection for the inventor if another person independently invents or discovers the subject matter of the trade secret and there is nothing to prevent that person from using or exploiting the information, applying for a patent or publishing the information. Furthermore, once the information becomes public, the trade secret loses all of its value. Although the owner of a trade secret may have a right of recourse against a third party who, through wrongful actions, discloses the trade secret, this may not compensate the owner for the loss in value or prevent innocent parties who receive the information from exploiting it.

INTEGRATED CIRCUIT TOPOGRAPHIES

Topographies are innovative, three-dimensional circuit designs used in many different products. The federal *Integrated Circuit Topography Act* ("ICTA") provides protection against the copying of registered topographies, but does not prevent others from developing integrated circuit products that use other topographies to provide the same electronic functions. Topography will qualify as original and receive protection under the ICTA if it is developed through the application of intellectual effort, and if it is not produced by the mere reproduction of all, or a substantial part, of another topography. The registration of the topography gives the creator an exclusive right in the topography for a period of 10 years. The ICTA does not protect pre-existing topographies that are commonplace among topography designers or integrated circuit product manufacturers.

INDUSTRIAL DESIGNS

An industrial design is a feature of an object, whether a shape, configuration, pattern or ornament or any combination of those features, that, in the finished article, are assessed by appearance as opposed to utility and functionality. Industrial designs that are original and not similar to existing designs may be registered under the federal *Industrial Design Act* and receive a monopoly on the design for a period of 10 years.

PLANT BREEDERS' RIGHTS

The federal *Plant Breeders' Rights Act* ("PBRA") gives plant breeders in Canada certain rights relating to the production of new plant varieties. The PBRA gives plant breeders the exclusive right to sell and produce the protected variety in Canada, to sell the variety's propagating material, to use the variety in commercially producing another variety, to use the variety in producing ornamental plants, and to license others to do any of the above, for a period of 18 years.

LICENCES AND ASSIGNMENTS

Frequently, the technology protected by intellectual property rights is licensed or assigned to others for use. An assignment is a transfer of ownership rights from one party to another; whereas a license does not transfer any property interest or title to the work to the licensee. A licence is a contract that allows someone to use the work on the terms and conditions set out in the licence. A licence can be structured so that it is non-exclusive allowing the licensor to grant as many licenses as it chooses to different parties. Limited time frames, usage rights, territorial restrictions and other terms and conditions can be placed on the licence. With an assignment, the original rights of the owner are generally lost. Federal registries such as the Trademarks Registry and the Copyrights Registry should be notified of transfers of ownership of registered intellectual property rights. Certain transfers must be documented in writing in order to be valid.

CHAPTER 10

PRIVACY LAW

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CHAPTER 10

PRIVACY LAW

FEDERAL LAWS

Personal Information Protection and Electronic Documents Act

The *Personal Information Protection and Electronic Documents Act* ("PIPEDA") is federal legislation that imposes statutory obligations and restrictions on private sector organizations for the collection, use and disclosure of personal information of others and applies in all provinces and territories, except Alberta, British Columbia and Quebec, which have enacted their own "substantially similar" legislation. In Newfoundland and Labrador, New Brunswick and Ontario, legislation dealing with health information has been deemed to be "substantially similar" to PIPEDA. As such, PIPEDA does not apply in those provinces to *health information*.

Private sector organizations in Atlantic Canada that collect, use or disclose personal information in the course of their commercial activities are required to comply with PIPEDA. Personal information means information about an identifiable individual, but does not include the name, title or business address or telephone number of

an employee of an organization. Under PIPEDA, organizations are required to comply with the key principles set out in the *Model Code for the Protection of Personal Information*, which include the following:

- Accountability: Organizations are responsible for personal information under their control and must designate an individual or individuals who are accountable for the organization's compliance with the principles set out in PIPEDA.
- Identifying Purposes: The purposes for which personal information is collected must be identified by the organization at or before the time the information is collected.
- Consent: The knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, except where inappropriate.
- Limiting Collection: The collection of personal information must be limited to that which is necessary for the purposes identified by the organization. Information must be collected by fair and lawful means.
- Limiting Use, Disclosure, and Retention: Personal information must not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as required by law. Personal information must be retained only as long as necessary for the fulfilment of those purposes.
- Accuracy: Personal information must be as accurate, complete and up-to-date as is necessary for the purposes for which it is to be used.
- Safeguards: Personal information must be protected by security safeguards appropriate to the sensitivity of the information.
- Openness: Organizations must make readily available to individuals specific information about their policies and practices relating to the management of personal information.
- Individual Access: Upon request, an individual must be informed of the existence, use, and disclosure of his or her personal information and must be given access to that information. An individual must be able to challenge the accuracy and completeness of the information and have it amended as appropriate.
- Challenging Compliance: An individual must be able to address a challenge concerning the organization's compliance with the above principles to the designated individual or individuals accountable for the organization's compliance.

The Privacy Commissioner of Canada is responsible for overseeing the administration of the legislation and investigating and adjudicating complaints. Complaints regarding an organization's compliance can be filed by any person or by the Privacy Commissioner. The Privacy Commissioner has broad powers, including the right to conduct audits, undertake investigations, issue subpoenas, compel persons to give evidence, and enter the premises of an organization and examine or obtain copies of records relevant to an investigation. There is an offence provision under PIPEDA with fines for obstructing the Privacy Commissioner in an investigation or

audit, destroying personal information after an access request has been made, and disciplining an employee for lodging a complaint against his or her employer for PIPEDA violations.

PIPEDA governs only personal information collected, used or disclosed in the course of an organization's "commercial activities" and does not otherwise apply to the employer-employee relationship, unless the organization is a federal work, undertaking or business. Provincial laws govern the treatment of employee information. Employers should, however, follow the general rules applicable in the collection of personal information - namely, obtain consent and limit collection and disclosure to only what is reasonably necessary.

What's on the Horizon

Bill S-4, known as the *Digital Privacy Act*, was introduced in federal Parliament on April 8, 2014. If passed, the legislation would result in numerous changes to PIPEDA with the stated goal of ensuring that Canadian businesses and consumers are more secure when transacting online. The *Digital Privacy Act* seeks to increase compliance with PIPEDA by establishing mandatory privacy breach notification with corresponding penalties.

The proposed Act would also increase protections for consumers by requiring more thorough record keeping by businesses. In addition, PIPEDA's consent requirements would be changed for some business transactions, thereby aiming to simplify the rules currently imposed. The Office of the Privacy Commissioner would be granted new powers to engage in compliance agreements with organizations in an attempt to foster cooperation. Thorough debate about the proposed changes is anticipated as the *Digital Privacy Act* proceeds through the legislative process and such debate could also provide a review of PIPEDA.

Access to Information Act

The federal *Access to Information Act* ("ATIA") provides a right of access to information in records under the control of a federal government institution and applies to any federal government institution that is a Crown corporation and any of its wholly-owned subsidiaries. Any Canadian citizen or permanent resident has the right to be given access to any record under the control of a federal government institution. The Governor in Council may extend the right of access to include people who are not Canadian citizens or permanent residents.

The ATIA provides protection to third parties by restricting the disclosure of any record that contains:

- Ttrade secrets of a third party,
- Financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party,
- Information that is supplied in confidence to a government institution by a third party for the preparation, maintenance, testing or implementation by the government institution of emergency management plans that concerns the vulnerability of the third party's

buildings or other structures, its networks or systems, or the methods used to protect any of those buildings, structures, networks or systems, or

- Iinformation that could reasonably be expected to interfere with contractual or other negotiations of a third party.

A third party may give its consent to the disclosure of the records in question.

With the exception of trade secrets, if the disclosure of information listed above would be in the public interest as it relates to public health, public safety or protection of the environment, the record may be released in whole or in part. Further, the record may be released if the public interest in disclosure clearly outweighs any financial loss or gain to a third party; any prejudice to the security of its structures, networks, or systems; any prejudice to its competitive position; or any interference with its contractual or other obligations.

The head of a federal government institution must make every reasonable effort to give the third party written notice of the request. The third party may, within 20 days after the notice is given, make representations to the head of the federal government institution as to why the record should not be disclosed. The head of the institution must then make a determination as to whether or not to disclose the record, and give written notice to the decision to the third party. The third party is entitled to request a review of the decision by applying to the Federal Court.

Any person who has been refused access to a record may apply to the Federal Court for a review of the decision. If the record in question affects third party interests described above, the head of the federal government institution, upon becoming aware of an application for review, must give the third party notice of the review. The third party may appear as a party to the review.

PROVINCIAL LAWS

Personal Health Information

Newfoundland and Labrador, New Brunswick and Nova Scotia have enacted personal health information legislation that applies to both the private and public sector ("Health Information Acts"). As noted above, the legislation in New Brunswick and Newfoundland and Labrador has been deemed substantially similar to PIPEDA. Nova Scotia's legislation has not yet been deemed to be "substantially similar". There is no health privacy legislation in Prince Edward Island.

The Health Information Acts apply to personal health information that is collected, used or disclosed by a custodian.

The terms "personal health information" and "custodian" are defined in each specific act. In general, "personal health information" includes information that relates to: the physical or mental health of an individual; the provision of health care to the individual; payments or eligibility for health care; and registration information. A "custodian" generally includes entities such as pharmacies, health care professionals, hospitals and health authorities.

Similar to PIPEDA, the Health Information Acts impose obligations on custodians in terms of providing access to information in records and ensuring safeguards for the collection, use and disclosure of the information.

Custodians are required to take reasonable and appropriate security measures for the protection of the personal health information in their custody. Appropriate security measures may include the use of physical security controls onsite, such as alarm systems and door locks; administrative security controls, such as policies, procedures and guidelines; and technological security controls, such as passwords, firewalls and encryption.

While there are some specific exemptions in Health Information Acts, the following principles normally apply:

- Consent is required for any collection, use or disclosure of personal health information;
- Collection, use and disclosure should be limited to the amount of information required for the specific task; and
- In the event of a privacy breach, the individual should be notified.

An individual's recourse regarding a custodian's collection, use and/or disclosure of personal health information is through the applicable Privacy Commissioner and/or through the provincial superior court.

The Privacy Commissioner has various powers including the authority to investigate, enter premises and compel production of evidence. The failure of a custodian to abide by the legislated requirements is an offence and can result in a fine and/or a term of imprisonment.

Information Held by Public Bodies

All four Atlantic Provinces have provincial legislation that deals with personal information under the custody and control of public bodies ("Access to Information Acts"). Such legislation is designed to create a culture of openness and accountability in the public sector. The term "public body" is defined in each specific act and includes such entities as government departments, government agencies, health boards, school boards and municipalities.

A "record" is defined very broadly under the Access to Information Acts to include information that is recorded in any form, including information that is written, photographed, recorded or stored in any manner whatsoever.

The Access to Information Acts are important to keep in mind when doing business with, or obtaining financing from, any of the provincial governments of the Atlantic Provinces or any of their related public bodies. Information provided to such bodies by individuals or companies may be liable to disclosure in accordance with the Access to Information Acts.

A request for access to information under the Access to Information Acts can be made at any time, by any person, and for any purpose. For this reason, businesses should keep in mind the limited number of exemptions from disclosure, such as disclosure harmful to a third party's business or financial interest, that are

extended to them under the Access to Information Acts, before doing business with public bodies in any of the Atlantic Provinces.

What's on the Horizon

Nova Scotia's Access to Information Act (*Freedom of Information and Protection of Privacy Act*) is approaching its 40th birthday. It has been noted by some groups that the legislation is overdue for an extensive modernization. Newly-elected Premier Stephen McNeil promised, as part of his election platform, to review access to information laws with the aim of making Nova Scotia "the most open and transparent province in Canada." Whether the legislation receives such a review and corresponding legislative updates remains to be seen.

Newfoundland and Labrador's Access to Information Act is in the initial stages of a review. The Review Committee has requested that individuals or organizations who are interested in making submissions to the Review Committee express their interest in doing so. The Review Committee plans to assess the level and type of interest and then develop its policies and procedures for the receipt of submissions. Ultimately, the Review Committee will submit a report to the provincial government in respect of its findings and recommendations.

PROVINCIAL CONSIDERATIONS

Newfoundland and Labrador

In Newfoundland and Labrador, the *Privacy Act* allows an individual to commence a legal action when that individual's privacy has been violated. The legislation provides examples of actions that, without the consent of the individual, will be presumed to be a violation of privacy: auditory and visual surveillance; listening to or recording of a conversation; the use of the name, likeness or voice of an individual for the purposes of advertising or promotion of sales; and the use of personal documents of the individual.

The *Privacy Act* outlines several defences to an action for invasion of privacy inclusive of: consent; an action incidental to the exercise of a lawful right of defence of person or property; and an action authorized by law. Of note is that the nature and degree of privacy in any situation is that which is reasonable in the circumstances, with regard to the lawful interests of others, the nature, incidence, and occasion of the act or conduct, and the relationship between the parties.

Business owners should be aware of the actions that constitute violations of personal privacy and furthermore mitigate these intrusions through consent, especially in the context of employee relations and with the use of personalities for advertising purposes.

Nova Scotia

Nova Scotia's *Personal Information International Disclosure Act* ("PIIDA") boosts the privacy protections offered by other provincial legislation, including its *Freedom of Information and Protection of Privacy Act* ("FOIPOP").

PIIDPA applies to all records in the custody or under the control of a public body, including court administration records. The scope of application is limited to personal information, as defined under FOIPOP.

Under PIIDPA, public bodies and municipalities are mandated to make sure that any personal information held by them (and by any service provider under their direction and/or authority), stays in Canada and is only accessed and disclosed in Canada.

However, several circumstances exist under PIIDPA that provide exceptions from the above standards. These exclusions should be examined in detail before public bodies take any action moving or storing information outside Canada. Private entities should also be aware of protections for personal information outside Canada when requesting international record releases from the Nova Scotia public sector.

Offences under PIIDPA include, but are not limited to:

- Mmalicious disclosure of personal information in contravention of the legislation by a director, officer or employee of a public body;
- Storage or access to personal information outside Canada by a service provider without satisfying an exception; and
- Collection or use of personal information by a service provider beyond what is necessary for its purpose, or failure to make reasonable security arrangements to protect that information.

Any individual employee who violates any of the above provisions is liable on conviction to a fine of up to $2,000 and/or six months' imprisonment. For businesses excluding corporations, the penalty will not exceed $25,000. Corporations are subject to a fine of not more than $500,000.

CHAPTER 11

EMPLOYMENT AND LABOUR LAW

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CHAPTER 11

EMPLOYMENT AND LABOUR LAW

It has been said that employees are the greatest asset of most businesses. At the same time, human resources usually constitute one of the major expenses of running a business.

Accordingly, it is important for businesses to understand the legal framework surrounding employment relationships, to foster and grow their greatest assets while at the same time managing costs.

EXECUTIVE SUMMARY

Like other common law Canadian provinces, employment relationships in Atlantic Canada are governed by both legislation and common law (i.e. judge-made law).

Regarding legislation, a business is either subject to federal or provincial labour and employment jurisdiction. The vast majority of businesses are subject to provincial jurisdiction – meaning they are subject to the labour and employment legislation of the province (or provinces) in which they employ their employees. Each Atlantic province has its own legislation that applies to unionized and non-unionized workplaces; however, the legislation generally regulates the same matters and is similar, although not identical. Each province has its own rules and particularities. Labour and employment legislation in the Atlantic provinces generally regulates minimum employment standards (including wages, vacation, overtime, etc.), occupational health and safety, workers' compensation, human rights, and labour relations (covering the process by which a union obtains bargaining rights, the collective bargaining process and the rights and responsibilities of unions and employers). In Newfoundland and Labrador and Nova Scotia, there are also special rules and legislation that govern employment in the offshore oil and gas industries.

Federal jurisdiction over labour and employment matters extends only to those works or undertakings that fall within the classes of subjects expressly exempt from the provincial heads of power and to those enterprises deemed vital, essential or integral to a core federal work or undertaking. Examples of federally regulated businesses include most navigation and shipping, inter-provincial transport, air transportation, communications, broadcasting and banking. Federal statutes include the *Canada Labour Code,* whose three parts govern employment standards, health and safety, and unionization, and the *Canadian Human Rights Act*.

While there are differences between legislation in Nova Scotia, New Brunswick, Newfoundland and Labrador, Prince Edward Island and the federal legislation, there are sufficient commonalities that we are able to provide a general overview (as set out below) of legislated employment requirements.

In addition to the legislation of the different jurisdictions, businesses are subject to the common law, which is the law as developed by judges or other decision makers. The common law interprets legislation and establishes other law, and governs employment relationships in all jurisdictions. This body of law also creates several important presumptions about employment relationships.

For example, the common law presumes that employees are hired for an indefinite term, unless a valid written contract of employment states otherwise. The consequence of this presumption, in conjunction with the laws set out in employment standards legislation, is that employees who are terminated without cause must be provided notice of termination or pay-in-lieu thereof. Unlike in the United States, there is no "at-will" employment in Canada. Employees terminated for "cause" are not entitled to notice or pay in lieu, but the burden of establishing "cause" rests with the employer and can be difficult to establish.

Practically, in order to manage liabilities, as well as establish clear expectations for all

parties to the employment relationship, our non-union clients generally prefer to have carefully written employment contracts that provide a clear termination provision (which meets the minimum statutory requirements), job duties, salary, hours of work, and benefits. Employers can also use written policies to govern and manage the workplace and establish best practices for the management of employees.

Our unionized clients generally focus on strategic bargaining to ensure a clear collective agreement is adopted, which, in addition to setting out employee benefits, establishes the employee responsibilities and employer rights, including a strong management rights clause. Subject to the terms of the collective agreement, unionized employers can also enact reasonable workplace policies to assist in managing the day-to-day issues of the workforce.

These above issues are canvassed more thoroughly in the pages that follow. However, as the legislation, rules, and precedents vary from province to province, employers should consult local counsel with respect to any specific labour or employment law issues.

EMPLOYMENT AND LABOUR LEGISLATION

Legislation in each jurisdiction is different and it is not possible to provide a detailed description in this publication. Accordingly, the summary below provides an overview of the type of legislation that exists and what it generally covers.

Employers should keep in mind that there also exist numerous regulations made pursuant to each statute establishing specific rights and responsibilities for employers and employees, and that courts, boards, adjudicators and arbitrators have had the opportunity to interpret meaning into the legislation. Specific legal issues will require specific advice.

Employment Standards

Each jurisdiction has employment standards legislation. This legislation governs many of the basic terms of the employment relationship, establishing minimum standards that employers must meet. Among other matters, this legislation governs:

- Minimum wage;
- Overtime pay;
- Hours of work;
- Vacation entitlements;
- Paid statutory holidays;
- Unpaid leaves; and
- Minimum notice of termination requirements.

With the exception of entering into a contract that provides a greater benefit to the employee, employers and employees cannot contract out of employment standards legislation and any contract that purports to do so may be void to that extent.

However, some businesses and types of employment are exempt from all or parts of employment standards legislation. Also, there may be exemptions for unionized employees, although the extent of the exemptions varies between jurisdictions (where the collective agreement would apply).

For example, in Nova Scotia, there is a special legislated rule that applies to employees with 10 or more years of service. Subject to some exceptions, an employee with 10 or more years of service in Nova Scotia cannot be discharged except for just cause. One important exception, however, is where there is a "lay-off" which involves a termination of employment due to a lack of work, including an elimination of position.

Another example is that in New Brunswick the legislation requires that an employer provide written reasons for dismissing an employee for cause, otherwise the dismissal for cause could be invalid.

Human Rights

Each jurisdiction has human rights legislation that provides for an individual's right to equal treatment with respect to employment and prohibits discrimination on the basis of an enumerated list of characteristics. Each jurisdiction has a distinct list of protected characteristics, but all prohibit discrimination based on the following (local legislation should be consulted for a complete list of all the protected characteristics):

- Age;
- Race;
- Colour;
- Religion;
- National origin;
- Physical disability;
- Mental disability;
- Marital status;
- Sexual orientation; and
- Sex (including pregnancy and child birth).

There are certain limited exceptions to the prohibition against discrimination, including where the employer can establish that the discriminatory treatment is based on a *bona fide* occupational requirement. In order to fall within this exception, an employer will need to establish the following:

- The discriminatory standard is rationally connected to the function performed;
- The standard was adopted in an honest and good faith belief that it is necessary to fulfill a certain purpose; and
- The individual cannot be accommodated without undue hardship to the employer.

Undue hardship is determined by considering different factors, which may vary from jurisdiction to jurisdiction, but could include the cost to the employer, health and safety implications and workplace morale. Canadian courts have commented that undue hardship is a high (but not impossible) standard for employers to meet.

Occupational Health and Safety

With a view to protecting the health and safety of workers, each jurisdiction has legislation that promotes safe work practices and imposes shared responsibility on the various stakeholders in the workplace. The identified stakeholders vary in each jurisdiction, but would include the employer and the employee, and could include others such as owners, constructors, contractors, suppliers, etc.

Duty to maintain a safe workplace

In each jurisdiction, employers have a general duty to maintain a safe workplace and to ensure that measures and procedures prescribed in their respective legislation are followed.

Investigators are, in most of the jurisdictions, permitted to conduct audits and send officers or investigators to workplaces and issue warnings or penalties to ensure enforcement of the legislation.

Employers and others may also be prosecuted for violation of occupational health and safety legislation. Such prosecutions are considered “strict liability offences”. This means that the prosecutor need only establish the facts of the offence – intent does not have to be proven. If the prosecution can establish the factual elements of the offence, it falls to the accused to establish a “due diligence defence”. This means that the accused has to establish that the offence was caused by the accused’s reasonable reliance on a mistaken belief or that it did everything that a reasonable person should do to prevent the incident.

Employers are not held to a standard of perfection, but they must have the required safety policies in place and also have a system to ensure those policies are followed and enforced. Employers should also proactively identify, assess and remedy or otherwise address hazards in the workplace, and this should be done on an ongoing basis.

Right to refuse work

All employees in workplaces covered by occupational health and safety legislation have the legal right to be informed by their employer about hazards in the workplace and to refuse to perform unsafe work, as long as that employee has a reasonable belief that the work or workplace is likely to endanger himself or herself, or another employee. Employees who, in good faith, exercise their statutory right to refuse to do unsafe work may not be disciplined by their employer.

Other requirements

Although not exhaustive, the following are some other requirements under the legislation in each jurisdiction:

- Employees must receive instruction and supervision with respect to health and safety issues.
- Appropriate protective equipment must be provided to and worn by employees;
- Depending on the size of the workplace, a health and safety representative or a joint health and safety committee may have to be established and maintained in workplaces; each jurisdiction has its own rules about the composition, responsibilities and requirements of the committee.
- Hazardous materials in the workplace must be properly labelled, stored and disposed of, and employees must be instructed about hazards in accordance with the Workplace Hazardous Materials Information System.

- Accurate records of the handling, storage, use and disposal of biological, chemical or physical agents must be maintained.
- Most jurisdictions have enacted specific regulations governing certain types of work and employers should become familiar with the regulations that apply to their workplaces.

Offshore

Special regulations and rules apply to the offshore industry. Both Newfoundland and Labrador and Nova Scotia have worked with the federal government in an attempt to establish a common approach to health and safety in their respective offshore industries.

Criminal negligence

In 2004, the *Criminal Code of Canada* was amended to make it easier to impose criminal liability on an organization or individual where that organization or individual fails to take reasonable steps to prevent workplace accidents. The *Criminal Code* does not oust the jurisdiction of provincial occupational health and safety legislation, so it is possible that proceedings may be brought both under the *Criminal Code* and applicable occupational health and safety legislation in respect of the same event. Thus far, there have been relatively few *Criminal Code* prosecutions. They have been reserved for the most egregious conduct.

Labour Relations

Each jurisdiction has legislation that regulates provincial trade union activities, generally known as labour relations or industrial relations legislation. This legislation governs both the process by which a trade union acquires bargaining rights and subsequent collective bargaining procedures between trade unions and employers.

Certification in most industries

In each jurisdiction, unions are required to seek certification from a statutory board (titled the "Labour and Employment Board" in New Brunswick, the "Labour Board" in Nova Scotia, the "Labour Relations Board" in Prince Edward Island and Newfoundland and Labrador, and the "Canada Industrial Relations Board" for businesses under federal jurisdiction). While there are differences in each jurisdiction, they all address the following:

- *Certification*: the process for acquiring bargaining rights and forming a bargaining unit. In determining whether a bargaining unit is appropriate for collective bargaining, the board may include or exclude employees based, for example, on whether the employees are management or not, and whether a certain class of employees belongs in the bargaining unit.
- *Statutory "Freezes"*: once a labour board is served with an application for certification, an employer is unable to alter wage rates, terms of employment or any other

employment privilege. The freeze remains in effect until the union's application is either dismissed or certified and notice to bargain is given. If the latter occurs a second, virtually identical, statutory freeze commences.

- *Strike/Lockout*: strike action is prohibited during the term of an existing collective agreement.
- *Decertification*: decertification is the process by which union members may apply to revoke a union's representational rights. Decertification may take place when the board is satisfied that the union has lost the support of the majority of the employees in a unit. The timelines and conditions for a decertification vary.
- *Successorship*: when an employer sells, leases or otherwise disposes of a business, the union's rights follow the business. An employer that purchases all or part of a business is bound by the collective agreement as if it is a party to it and inherits any incumbent unions' bargaining rights.
- *Unfair Labour Practices*: legislation in the various jurisdictions prohibits employer interference in the formation of trade unions, or interference in an employee's choice to become a member of a trade union. It also prohibits penalizing employees for becoming a union member or exercising other rights under labour relations legislation generally. Examples of unfair labour practices generally include:
    - Refusing to employ or continue to employ an individual because of his or her union activities;
    - Imposing conditions in an individual's contract of employment restricting union announcements;
    - Threatening dismissal, imposing a penalty, or intimidation by any other means due to union activity;
    - Illegal strikes and lockouts or threat of same; and,
    - Employer participation in or interference with the formation or administration of a trade union.

Consequences associated with unfair labour practices vary by jurisdiction. For instance, in New Brunswick and Nova Scotia, the legislation provides for certification at the discretion of the Labour Board (Nova Scotia) or the Labour and Employment Board (New Brunswick), where the board determines that employee rights have been violated to such an extent that it is unlikely that the employee's true wishes regarding certification can be ascertained. The PEI Labour Relations Board has the authority to make any order it considers just in the circumstances.

<u>Certification in the construction industry</u>

In each of the Atlantic provinces, the certification process in the construction industry is significantly different from certification in other industries. The construction industry is subject to specific regulation and authorities. Given the differences in each province and the complexities involved, our clients generally prefer to work closely with a local lawyer

who has significant experience in construction industry certifications, if certification becomes a possibility.

Workers' Compensation

Each province provides a no-fault insurance program to compensate workers in the event of work-related accidents or occupational illness. Compensation is funded through employer-paid premiums, assessed based on the payrolls of participant employers. The "trade-off" is that in return for receiving benefits employees give up their right to sue employers as a result of their injuries. The purpose of the legislation is also to promote healthy workplaces and facilitate the recovery and return to work of injured workers. The legislation applies to the majority of employers with some exceptions, which vary amongst jurisdictions.

Legislation in each province:

- Prohibits any discriminatory or disciplinary action against an employee who has been injured at the workplace, who is or may be entitled to workers' compensation benefits;
- Requires the re-employment of an employee who has been injured or who suffers from an occupational disease; and
- Imposes a duty to accommodate an injured employee, in accordance with human rights principles, to the extent that the accommodation does not cause undue hardship. The employer and employee must attempt to identify employment at the workplace that is consistent with the employee's functional abilities that will restore the employee's pre-injury earnings to the extent possible.

Most employers are required to register with provincial workers' compensation programs. Employers, including federally regulated employers, will want to check with the Workers' Compensation Board in the province they are operating in to determine their registration requirements. Employers can obtain additional information from the following websites:

New Brunswick:
www.worksafenb.ca

Prince Edward Island:
www.wcb.pe.ca

Nova Scotia:
www.wcb.ns.ca

Newfoundland and Labrador:
www.whscc.nf.ca

Offshore Industry

The offshore oil and gas industry in Atlantic Canada (Nova Scotia and Newfoundland and Labrador) is subject to joint management by the provincial and federal governments. However, labour relations on offshore platforms is subject to provincial law.

In the oil and gas industry in Newfoundland and Labrador, the offshore is subject to specific provisions of the *Labour Relations Act*, which mandate that for the purposes of certification and collective bargaining, there

is only one bargaining unit comprised of all employees employed on a particular offshore platform. As well, once certified, the operator and various employers are required under the legislation to form a mandatory employers' organization.

In Nova Scotia, special exemptions also exist under the *Labour Standards Code* in relation to offshore and refinery businesses.

Also, in both Newfoundland and Labrador and Nova Scotia, special regulations apply in relation to occupational health and safety requirements, which are, in part, aimed at furthering cooperation with the federal government on safety issues.

Special Projects (Natural Resources)

In Newfoundland and Labrador, the provincial government has the authority to designate an "undertaking for the construction of works designed to develop a natural resource or establish a primary industry that is planned to require a construction period exceeding two years" to be a "special project".

Currently, there are special project designations for the construction of the Vale processing facility, the construction of the Hebron platform and the construction of the Lower Churchill project. Special project designations create a unionized worksite with an employers' association, and an organization representing the various trades, who negotiate a site-specific collective agreement for the duration of the project.

Other Industry-Specific Statutes

Each Atlantic province has a number of industry-specific statutes that may govern how an employee is certified and/or registered with the province, how that employee maintains certification, and the responsibilities of employers to ensure that employees are properly certified and registered. Such legislation generally applies to workers in the health care sector, in the trades and in self-regulated professions (e.g., law, architecture, accounting, etc.).

Privacy Legislation

The federal *Personal Information Protection and Electronic Documents Act* ("PIPEDA") governs the collection, holding, use and disclosure of personal information. PIPEDA applies to federally-regulated employers, and purports to apply to all private employers in any province that does not have provincial privacy legislation.

Under PIPEDA, employers under federal jurisdiction must establish policies for the collection, use and disclosure of employee information.

Nova Scotia, New Brunswick and Prince Edward Island have not enacted provincial privacy legislation applicable to private-sector employers. Newfoundland and Labrador does not have legislation similar to PIPEDA, but its *Privacy Act* does allow claims against natural persons for violation of privacy.

Canada Pension Plan

Under Canada's Pension Plan, retired and disabled employees receive a pension income from the federal government. The Pension Plan is paid for through payroll deductions from employees and mandatory employer contributions. Employers are required to deduct the contributions from an employee's compensation, to match the contributions, and remit the total to the federal government.

Employment Insurance Act

The federal *Employment Insurance Act* provides temporary benefits to qualifying employees who are unemployed, or without income due to pregnancy, parental leave, temporary sickness or who are on compassionate care leave. It is a government-run insurance plan paid for through mandatory contributions from both employees and employers, remitted to the federal government by employers.

THE COMMON LAW

The "common law" is "judge-made" law, consisting of the decisions of judges and other decision makers. In the employment and labour context, precedents may be established by judges, adjudicators, arbitrators and statutory boards (e.g., labour boards, etc.). By interpreting and applying regulations, decision makers have created a body of common law setting out legal tests, exceptions, applications and precedents affecting the legal obligations of employers. While it would be impossible to highlight every aspect of the workforce that is touched by the common law, it is worthwhile highlighting a few of the most significant areas.

Implied Contractual Terms

Absent a written contract of employment providing for the contrary, certain terms have become "implied terms" of every non-unionized employment relationship. Such implied terms include:

- Employees are generally considered to be hired for an indefinite period;
- An obligation to provide reasonable notice of termination of employment, or pay in lieu of reasonable notice, in the absence of just cause for termination of employment; and
- Duties on employees, such as the duty of honesty, duty of confidentiality, and the duty to avoid a conflict of interest with the employer during the course of employment.

Reasonable Notice Periods

Courts have confirmed that the mandatory notice periods provided to employees under legislation are minimums; they are a "floor" and not a "ceiling". Accordingly, employees are generally entitled to greater notice of termination than is provided for in those statutes. This is known as "common law notice", which is determined on a "case by case" basis, but all of the Atlantic provinces generally consider three key factors, which are:

- The age of the employee (generally, older employees receive more notice);

- The employee's length of service (longer serving employees generally receive more notice); and
- The availability of similar work (if comparable employment is unavailable this may extend the notice period).

In Nova Scotia, Prince Edward Island and Newfoundland and Labrador, the position held by the employee is also a relevant factor (generally, more notice is awarded to managers or specialized trades). In New Brunswick, the Court of Appeal has ruled that is not a relevant factor except to the extent that the nature of the position affects the availability of similar work.

There is no fixed formula for determining the length of notice, however, generally it is only in exceptional circumstances that the reasonable notice period exceeds 24 months (e.g., a very long service employee or one who is long service and occupies a senior position).

For unionized businesses, notice periods may be set by the collective agreement.

PRACTICAL CONSIDERATIONS

The Hiring Process

The employment relationship begins to be defined before an employee is even hired. Each step that the employer takes during the posting, recruitment, interview and background check process can have implications for the future of the employment relationship. We have highlighted below a few considerations for employers to consider before beginning the hiring process.

Job postings

Job postings may be relied on if there is a dispute regarding the duties or expectations of the employees, the skills required for the position or the changes that have occurred in the position. In addition to being relevant to human rights complaints, job postings may be relevant in termination and constructive dismissal cases.

In unionized settings, job postings are often also relied upon during grievance arbitrations and hearings to determine, for example, whether a position should be included in the bargaining unit. A collective agreement may have specific requirements in relation to job postings.

It is important to pay careful attention to the content of job postings, ensuring accuracy and consistency, and making it clear that duties and requirements may be added or removed from to the position at the sole discretion of the employer.

Recruitment and inducement

In determining a notice award after termination, courts may consider whether an employee was induced to accept employment, and in particular whether the employee gave up secure employment, in assessing the amount of reasonable notice to be awarded when the relationship ends without just cause, particularly where the employment relationship is of a short duration.

Those responsible for the hiring process should be given instructions as to any permissible representations. In instances where employers are using the services of "head hunters", the retainer should clearly outline the scope of the individual's authority with respect to representations about the job.

Many of our clients include in their employment agreements an "entire agreement" clause, specifically negating any pre-contractual representations.

Background checks

Studies suggest that up to one-third of job applicants misrepresent themselves or their credentials on their applications and résumés. For this reason, background checks are an important tool for employers. It is reasonable to require proof of qualifications.

However, the ability to conduct background checks is not limitless, and to avoid intrusion on a candidate's privacy or accusations of discriminatory hiring practices, employers may want to consider:

- Ensuring the same background checks are conducted on all candidates;
- Stating on application forms that they will seek references;
- Obtaining express permission from the candidate prior to contacting references;
- Avoiding questions to references that ask for information or for conjecture about the applicant, and asking only structured and relevant questions that will enable the employer to gain accurate additional information about the candidate's abilities;
- Informing the candidate how the personal information provided will be handled and kept;
- What, if any, social media checks are required and whether it is appropriate to seek permission from the candidate prior to performing these checks;
- Whether it is permissible under applicable human rights legislation to perform a criminal background check or credit check (this varies amongst the jurisdictions and there can be specific legislation in relation to credit checks); and
- Performing background checks only after a conditional offer is made (this may limit both the costs associated with the hiring process – as fewer background checks will be conducted – and an employer's exposure to complaints).

When conducting any reference or background investigation, employers need to be aware of the risk of attracting a human rights complaint from a candidate who is not hired on the basis of the reference or background investigation. Employers have the responsibility to ensure that no unlawful discrimination occurs in the recruitment and selection process based on human rights protections. Equality of opportunity is an integral part of the recruitment and selection process and employers have an interest in developing and adhering to fair, non-discriminatory recruitment and selection policies.

Interviewing: asking the right questions (and avoiding the wrong ones)

Human rights obligations continue through the interview process.

The effect of human rights legislation is that employers are prohibited from eliciting information, directly or indirectly, about any protected characteristics (as previously mentioned, these characteristics vary amongst the jurisdictions). Questions relating to any of the prohibited grounds listed in the provincial legislation should be avoided in the pre-employment stage, since this could lead to a complaint of discrimination from a prospective employee who is not awarded the job. Inquiries that generally should be avoided, unless the situation involves an exemption from human rights legislation such as where *bona fide* occupational requirements exist, include:

- Questions about physical characteristics such as eye or hair colour or requests for photographs as this may elicit information related to an individual's race;
- Questions about religious affiliations, churches attended or customs observed;
- Questions regarding citizenship (however, an application or interviewer may ask whether the applicant is legally entitled to work in Canada);
- Questions about "maiden" or "birth" name, child care arrangements, marital status, or any information about a spouse that may discriminate on either the basis of sex or family status; and
- Questions about health, illness, mental disorders, medical history, workers' compensation claims, or accommodation of disability-related needs.

Employers should be aware that candidates who later make a human rights complaint may have the right to ask for copies of any notes made during the interview. Likewise, the employer may defend itself by depending on notes made during the interview.

The Employment Agreement

Parties to all employment relationships have an employment agreement whether written or not. Employment contracts can be in writing, oral or implied. The terms of an agreement may provide for matters such as duration and the parties' obligations upon termination of the relationship.

Our clients generally prefer to enter into carefully drafted written agreements with employees that define and limit entitlements. Employment contracts usually contain details of the duties expected of the employee, remuneration and other benefits. Such contracts may also contain confidentiality clauses, restrictive covenants, and provide for agreed-upon employee entitlements on termination.

Courts and other decision makers will carefully scrutinize employment agreements, in part because there is a concern that there is an imbalance of negotiating power between employers and employees. That said, a guiding principle of

contract law is that the parties should be held to the bargain they struck.

All employment agreements, materials and policies that address the terms and conditions of the employment of employees should be drafted in clear and unambiguous language. Employment materials should also be brought clearly to the attention of employees at the time of hiring and employees should be given time to carefully review them before accepting employment. Employees should execute their agreements before commencing employment.

Termination clauses: establishing a clear notice period to limit future liability

Employers who want to limit their liability for an employee's notice period may consider setting out a specific notice period in their employment agreements. When notice periods are not set in advance, termination can result in uncertain – and usually expensive – obligations (i.e. the common law reasonable notice period).

Where notice provisions of an agreement are drafted properly and satisfy minimum statutory obligations for termination, the employment agreement may prevail, notwithstanding what the employee might have been entitled to at common law.

Clauses that set notice periods must be carefully drafted with consideration for clarity, legality, and effectiveness to ensure that a reviewing judge or other authority upholds the intent of the parties. Where termination clauses are ambiguous or uncertain, they will not rebut the presumption of common law reasonable notice upon termination.

Restrictive covenants: non-competition and non-solicitation clauses

Covenants not to compete

Depending on the particular employment relationship, an employer may restrict former employees from becoming engaged by a competitor, or becoming a competitor, immediately following termination or resignation.

Courts have held that these clauses must be reasonable, and often refuse to uphold non-competition clauses where the nature of the employee's employment does not call for such a clause to protect the interests of the employer, where the clause covers too broad a geographic scope or where the clause restricts competition for an unnecessarily long period of time.

Non-compete clauses are more likely to be upheld where the employee was a fiduciary (i.e. one who held a senior position or who had access to sensitive information about the employer's business that might allow them to compete unfairly with their employer following employment), or where an employee was formerly an owner and sold the business to the employer.

Non-solicitation of employees and customers

Agreements containing non-solicitation clauses are more readily enforceable in Canada than non-competition clauses, as they are less restrictive in nature. Such clauses, however, will still be subject to a

"reasonableness" analysis by a court. Overly restrictive and unreasonable clauses will be unenforceable.

Confidentiality and trade secrets clauses

Under the common law, employees must not divulge confidential information or trade secrets that they acquire during their employment. This does not prevent employees from bringing general knowledge and skills they learned from their previous employer to a new employer. But generally, confidential information must not be divulged to third parties. Confidential information can include marketing strategies, personnel information, business practices of the employer, trade secrets (such as manufacturing processes), sales information, commercial contracts, computerized data and supplier and customer lists. However, trivial or self-evident matters or information otherwise available in the public domain is generally not confidential information.

Many of our clients prefer to spell out in the employment agreement the obligation to keep information confidential.

Managing the Employment Relationship

Workplace policies

Polices in the workplace not only set expectations for employees, but if drafted and communicated properly they provide evidence that expectations were made clear and can assist in justifying disciplining an employee who has violated a policy.

Polices can be developed on just about anything. No two workplaces need exactly the same policies or types of policies. Some of our clients prefer to have minimal, basic policies while others have dozens of specific polices tailored to their work environment.

In unionized environments, the right to enact workplace policies and rules is generally preserved in the management rights clause of the collective agreement, but generally policies and rules may be introduced (without agreement by the union) where they are shown to be:

- Consistent with the collective agreement;
- Reasonable;
- Clear and unequivocal; and
- Brought to the attention of the employee(s) affected, including notice of any consequences as a result of a failure to adhere to the policy or rule.

The policy or rule should be consistently enforced.

Statutory leaves of absence

Employment standards legislation provides employees with a variety of protected leaves of absence, such as:

- Maternity/pregnancy leave;
- Parental leave;
- Bereavement leave;
- Sick leave;
- Reservists leave; and
- Time off to meet child care responsibilities or due to the illness of family members.

The types of leave, time frames for notice and responsibilities of the employer vary by province. Generally, employers are not required to pay wages during a leave of absence. However, employers are required to reinstate the employee to his or her former position (or, if it is not available, to a comparable position) with the same salary and benefits, at the end of the leave. Employers may be required to continue to make contributions to certain benefits plans during the leave.

To minimize the risk of a human rights complaint, employers should ensure that employees on different types of leave are treated similarly, regardless of the reason for their leave of absence.

In the unionized environment, collective agreements may address leaves of absence and set out additional employee entitlements and employer responsibilities.

Accommodating the disabled employee

Employees who are temporarily or permanently disabled may require workplace accommodations. Employers are required under human rights legislation to accommodate employees to the point of undue hardship.

Employees requiring accommodation have a duty to self-identify, to request accommodation and to cooperate in the accommodation process.

In most cases, the employer can require proof of disability and an abilities assessment from the employee to ease the accommodation process.

Dealing with workplace violence and harassment

Occupational health and safety legislation generally provides a requirement that employers provide a safe work environment. Employers should ensure they have complied with any statutory requirements regarding workplace programs or policies to address harassment and violence; should address any problems or accusations that arise immediately, through a full and impartial investigation; and should take proactive steps to ensure a workplace culture of respect, including enacting a Respectful Workplace policy.

Ending the Employment Relationship

Mandatory retirement

Mandatory retirement policies may be considered invalid and unenforceable under Atlantic Canada's provincial human rights laws unless the policy falls under an exception in the legislation. For example, mandatory retirement may be allowed if age could be established to constitute a *bona fide* occupational requirement for employees, or if there is a *bona fide* pension plan that is adopted in good faith by an employer and not for the purpose of avoiding human rights protections.

Terminations for cause

Generally, employees can be summarily dismissed without notice if just cause for termination exists. Just cause takes into account not only the actions of the employee, but the seriousness of the behaviour, its impact on the workplace, the culture of the workplace, whether the

employee knew or was warned that his or her behaviour was wrong, as well as countless other factors. As what constitutes "just cause" varies with the circumstances, it is impossible to provide a list of behaviours that will justify the summary dismissal of an employee. However, clear evidence of the following behaviours can generally justify termination:

- Gross incompetence;
- Insubordination;
- Conflict of interest; and
- Theft.

Terminations without cause

When laying off employees or terminating without cause, employers must provide reasonable notice or pay in lieu of notice. Employers will have several decisions to make including how much notice to offer, how to structure the notice, and whether to require employees to re-pay the pay in lieu of notice if they obtain alternative employment during the notice period.

As noted above, a properly drafted employment agreement may provide for an employee's entitlement and an employer's obligations upon termination.

Additional Practical Considerations for Unionized Employers

While a number of minimum statutory requirements do apply to employers who are unionized, the rights and responsibilities of such employers are further defined by the collective agreement negotiated between the parties. In addition to understanding all of these rights and responsibilities, unionized employers may want to give some consideration to:

- strike planning and avoidance;
- strategic collective bargaining and the bargaining process; and
- the practicalities of managing grievances and grievance arbitrations.

SUMMARY

This chapter provides a broad overview of some of the laws that apply to employment relationships in Atlantic Canada. There are significant and complex issues that affect the workplace, but most, if not all, can be addressed and managed through the adoption of an appropriate legal and human resources strategy.

CHAPTER 12

ENVIRONMENTAL LAW

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CHAPTER 12

ENVIRONMENTAL LAW

REGULATORY FRAMEWORK

Businesses in Atlantic Canada should be familiar with various environmental laws and policies that may apply to their business activities, especially those involving purchasing or leasing real property in Atlantic Canada, industrial development, or the production, movement or disposal of dangerous goods, toxic substances or wastes in and around the region.

Environmental matters in Atlantic Canada are governed by statute and common law. All four Atlantic Provinces have their own sets of statutes and regulations that address environmental matters within each province. The federal government also legislates with

regard to the environment. In addition, some municipalities have enacted by-laws in relation to the environment through authority delegated to them by the provinces. An environmental matter, therefore, may be governed by federal, provincial, and/or municipal law depending on the circumstances. This generally reflects the constitutional division of powers in Canada.

The *Constitution Act, 1867,* does not assign exclusive jurisdiction over the environment to the federal government or the provincial governments. Rather, the power to legislate with regard to the environment falls under various heads of constitutional authority. Generally, when an environmental matter relates to a matter of federal jurisdiction or is of national or international concern and a compelling case exists for a national response, the federal government will have legislative authority. Where a matter is of local concern, the provinces are more likely to be the regulating authority. In other instances, one level of government many have jurisdiction, but will coordinate administration with the provinces.

FEDERAL ENVIRONMENTAL LAW

As noted, the federal government regulates aspects of the environment primarily when an environmental matter relates to an area of constitutional federal jurisdiction (e.g., sea coast and inland fisheries), or is of national or international concern (e.g., transportation of dangerous goods across provincial boundaries).

This section will first discuss in more detail federal areas of regulation, then examine certain key federal laws, and finally review the following aspects of federal environmental law that are often points of heightened interest for those doing business in Atlantic Canada: (i) enforcement; (ii) environmental assessments; and (iii) director & officer liability.

Federal Areas of Regulation

The primary areas of federal regulation that businesses should be aware of include:

- Air, water and land pollution;
- Toxic substances; and
- Transportation of dangerous goods and hazardous wastes.

Air Pollution

The federal government has enacted numerous air pollution regulations under the *Canadian Environmental Protection Act, 1999* ("CEPA"), to limit the concentration of a variety of industrial emissions, including: (1) asbestos emissions from asbestos mines and mills; (2) lead emissions from secondary lead smelters; (3) mercury from chlor-alkali mercury plants; and (4) vinyl chloride from vinyl chloride and polyvinyl chloride plants. Further regulations have been enacted to limit the manufacture, use, sale, and/or import or export of ozone-depleting substances (such as refrigerants), and to require the largest industrial emitters to annually report facility greenhouse gas emissions.

Water Pollution

Although CEPA regulates waste disposal, dumping in Canada's territorial seas, and international water pollution, and the *Canada Shipping Act, 2001* addresses

certain aspects of marine pollution related to ships, the federal government's primary regulatory power over water pollution is pursuant to the *Fisheries Act*.

The *Fisheries Act* prohibits the deposit of deleterious substances in any waters frequented by fish or areas constituting a fish habitat. The term "deleterious substance" means any substance that would degrade or alter the quality of the water and render it harmful to fish or fish habitat.

If an activity will cause harmful alteration to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery, approval must be obtained from the federal Minister of Fisheries and Oceans, or the activity must pre-authorized and be carried out in accordance with certain conditions.

Regulations under the *Fisheries Act* identify certain substances as being deleterious and establish permitted levels of effluent discharges for industrial facilities such as petroleum refineries, pulp and paper mills, meat and poultry processing plants, and mines. Industries located on watercourses must be aware of the impact their activities may have on fish and fish habitat.

Active depositing and a lack of interference or a failure to prevent deposits constitute an offence under the *Fisheries Act*. Penalties can be significant including fines of up to $12 million for corporations, and $2 million and three years' imprisonment, or both, for individuals.

Under the *Navigation Protection Act* a permit is required before the infill of navigable water or the construction of a structure in navigable water. The term "navigable water" is construed quite broadly and would generally include water that is sufficient to float a small boat or canoe.

Land Pollution

The pollution or contamination of land is generally dealt with by provincial authorities. The federal government is, however, responsible for all federally owned lands. In addition, the federal government works in conjunction with the provincial governments in developing national soil and groundwater cleanup guidelines.

Toxic Substances

Another aspect of the federal government's control over environmental matters is its regulation of toxic substances under CEPA.

A "toxic substance" is a substance that in a particular quantity or concentration has a long-term harmful effect on the environment, constitutes or may constitute a danger to the environment on which life depends, or constitutes or may constitute a danger to human health.

Under CEPA, the federal government maintains a Toxic Substances List which sets out all substances designated as toxic. Once a substance is added to the list, the government may make regulations which regulate every aspect of the substance, including restricting or banning its use. These conditions include specifying acceptable levels of concentrations that may be released or conditions prescribing the use, handling, manufacture, testing and transportation of the substance.

The federal government also maintains a Priority Substances List and a Domestic Substances List under CEPA. The Priority Substances List contains those substances deemed to be, or to have the potential of becoming, toxic. These substances are subject to assessment and investigation in order to determine if they are toxic and hence should be added to the Toxic Substances List. The competent ministers are responsible for compiling and amending the list, although any person may request for an addition to the Priority Substances List.

The Domestic Substances List identifies chemical and biotechnical substances currently used in Canada. Before new substances (i.e. substances not included on the Domestic Substances List) can be imported into Canada, manufacturers and importers must notify the federal government and provide detailed information concerning the nature of the substance, including its intended use, safety data and hazard identification. With that in mind, businesses intending to introduce a new substance into the Canadian marketplace should provide for sufficient lead time.

In the event of an unlawful release of a toxic substance, CEPA requires persons and organizations to immediately report the release and to take all reasonable emergency measures to contain the spill. These obligations are triggered when there is a release or there appears to be a reasonable likelihood of a release of the substance into the environment.

Transportation of Dangerous Goods and Hazardous Wastes

The federal government and the provincial governments have effectively harmonized their approach to the transportation of dangerous goods. Generally, provincial standards that govern the transportation of dangerous goods within the province incorporate the federal *Transportation of Dangerous Goods Act, 1992* ("TDGA") by reference. That being said, businesses involved in the transport of dangerous goods should be aware of both federal and provincial laws.

When dangerous goods are transported within Canada the federal TDGA applies. The TDGA does not expressly define "dangerous goods" but classifies substances into various classes of compounds listed in its accompanying schedules. Any substance listed in the schedules is designated as being dangerous.

Dangerous goods include explosives, compressed gases, poisons, flammable and combustible liquids and solids, nuclear substances, oxidizing substances, toxic and infectious substances, radioactive materials, corrosives and various miscellaneous products provided for in the regulations. The key requirement under the TDGA is that prescribed safety standards be complied with when transporting dangerous goods.

Pursuant to CEPA, the *Interprovincial Movement of Hazardous Waste Regulations* list special shipping requirements for the transportation of hazardous wastes. A prescribed "waste manifest" must be completed by the shipper, the carrier and

the receiver. Waste manifests are also required under provincial law and copies of the manifest must be sent to the appropriate provincial department for both the place of origin and destination. Where the place of origin or destination is outside Canada, a copy of the manifest must be sent to Environment Canada.

Permits are required for the import, export and transport of hazardous waste. Hazardous waste includes dangerous goods and any substance in the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*. All importers and exporters of hazardous waste must provide notice of the waste shipment to the relevant Canadian authorities.

Federal Environmental Legislation

Canadian Environmental Protection Act, 1999

CEPA's overall purpose is to set and enforce environmental quality standards. As indicated above, it contains provisions which regulate all aspects of the environment under federal jurisdiction, including air pollution, ocean dumping, the regulation of toxic substances and the movement of hazardous waste. CEPA also contains provisions that apply specifically to federal departments, agencies, crown corporations, works, undertakings and lands. The federal Minister of Environment has authority to appoint inspectors for the purpose of administering and enforcing CEPA.

Inspectors under CEPA have the power to inspect any place where there is a substance or activity regulated by the Act.

Where the owner or person in control takes no response measure, inspectors are authorized to take any actions required by CEPA to control the release of a regulated substance. Authorized actions include entering onto private property in order to take necessary measures, but do not include entering a private dwelling unless authorized by a warrant. In some circumstances, however, there is authority for a warrantless search. Seized goods can be detained under specific provisions of CEPA.

CEPA also provides for the issuance of environmental protection orders and includes penalties that can be imposed for a contravention of the Act or its regulations. Maximum penalties are a fine of up to $1 million and/or five years' imprisonment.

Fisheries Act

The *Fisheries Act* is administered by the federal Department of Fisheries and Oceans. The purpose of this legislation to protect Canada's fisheries and, by necessary extension, it applies to protect fish habitat. It applies to all waters in Canadian fishing zones, all waters in the territorial sea of Canada and all internal waters of Canada. Although this legislation mainly regulates the harvesting of commercial fisheries in Canada's territorial and inland seas, it has also been used to protect recreational and environmentally sensitive fish stocks as well as habitat for fish and other organisms.

Transportation of Dangerous Goods Act, 1992

The TDGA is administered by Transport Canada. It applies to all modes of transportation of dangerous goods within federal authority. This includes inter-provincial transport and goods carried by ship or aircraft. The TDGA prohibits any person from handling, offering for transport or transporting any dangerous goods unless applicable safety requirements are met. It establishes specific safety requirements for the packaging, labelling and documentation of dangerous goods, as well as for the notification and reporting of dangerous goods and the training of employees who handle dangerous goods.

Other Federal Statutes

- *Arctic Waters Pollution Prevention Act* and accompanying regulations;
- *Canada-Newfoundland Atlantic Accord Implementation Act* and accompanying regulations;
- *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act* and accompanying regulations;
- *Canada Shipping Act, 2001* and accompanying regulations;
- *Canada Oil and Gas Operations Act* and accompanying regulations;
- *Migratory Birds Convention Act, 1994* and accompanying regulations;
- *Navigation Protection Act* and accompanying regulations;
- *Species at Risk Act* and accompanying regulations; and
- legislation pertaining to public harbours and port authorities.

Enforcement

Current Status

The federal government utilizes various means of ensuring compliance with environmental legislation such as establishing reporting requirements, authorizing inspections and tests, issuing control orders, cleanup orders, remedial orders or stop orders, and in some cases prosecution under federal statute.

Most environmental offences are strict liability offences meaning the prosecution only has to show that the impugned act was committed regardless of intent. The defendant is then entitled to raise a "due diligence" defence, through which liability may be avoided if it can be shown that reasonable care was taken under the circumstances.

Penalties for offences under federal environmental legislation can be substantial, with serious contraventions attracting jail terms of up to five years and fines of up to $1 million per offence. Where an offence is committed or continued on more than one day, the person who committed the offence is in many cases liable to be convicted for a separate offence for each day on which it was committed or continued.

Offenders who are found to have shown wanton or reckless disregard for the lives or safety of other persons thereby causing death or bodily harm are subject to prosecution and punishment under sections 220 or 221 of the *Criminal Code*. The maximum penalty for causing death by criminal negligence is life imprisonment, while the maximum penalty for causing

bodily harm by criminal negligence is ten years' imprisonment.

Legislative Reforms Related to Enforcement

On May 13, 2009 Canada's Parliament passed Bill C-16, the *Environmental Enforcement Act* ("EEA"). The EEA is being implemented in three stages, the first of which began on December 10, 2010. These legislative changes include:

- Amending the penalty provisions of certain statutes by establishing distinct ranges of fines for different offences, by creating minimum fines for the most serious offences, by increasing maximum fines ($1 million for individuals, $6 million for corporations), by specifying ranges of fines for individuals, other persons, small revenue corporations and ships of different sizes and by doubling the fine amounts for second and subsequent offences.
- Amending the sentencing provisions of certain statutes by adding a purpose clause, by specifying aggravating factors that, if associated with an offence, must contribute to higher fines, by requiring courts to add profits gained or benefits realized from the commission of an offence to fine amounts, by requiring courts to order corporate offenders to disclose details of convictions to their shareholders and by expanding the power of the courts to make additional orders having regard to the nature of the offence and the circumstances surrounding its commission, and by doubling fines for second and subsequent offences.
- Adding to certain statutes a requirement that details of convictions of corporations be made available to the public and that all fines collected be credited to the Environmental Damages Fund and be available for environmental projects or the administration of that Fund.
- Creating the *Environmental Violations Administrative Monetary Penalties Act* which establishes an administrative monetary penalty scheme applicable to certain statutes.

Environmental Assessments

In June, 2012 the *Canadian Environmental Assessment Act* was amended with the passing of Bill C-38, the federal government's "omnibus" budget bill (the *Jobs, Growth and Long-Term Prosperity Act*). Bill C-38 repealed the previous CEAA ("CEAA 1995") and replaced it with the "new" *Canadian Environmental Assessment Act, 2012* ("CEAA 2012").

CEAA 2012 is significantly changed in some respects relative to the earlier CEAA 1995. The amendments were part of the government's *Responsible Resource Development Plan*, and were intended, in part, to increase the efficiency and timeliness of the approval of projects, and decrease administrative drag on applicants applying for environmental assessment ("EA") approvals.

CEAA 2012 grants the federal government the power to require an EA concerning the

environmental impact of new physical undertakings and alterations to existing undertakings. Certain projects listed in federal regulations could require registration with the federal government.

Once a project is registered, the Canadian Environmental Assessment Agency determines whether an EA is required. Projects under the control of the National Energy Board and the Canadian Nuclear Safety Commission automatically require an environmental assessment. However, the EA process can be substituted by a provincial EA, provided that the process meets federal standards.

Once an EA begins, the project cannot proceed until the assessment is complete. There are two types of assessment: a standard EA and a panel review. Under a standard EA, the responsible federal authority has one year to complete the assessment and the process could require public participation.

Within 60 days of the EA process, the responsible Minister can refer the EA to a panel review. This process can take up to two years and there is mandated public participation. If the EA takes longer than two years, it is referred to the Canadian Environmental Assessment Agency, which completes the process and files its report.

Liability of Directors and Officers

Various federal statutes, including CEPA and the *Fisheries Act*, impose personal liability on directors and officers of corporations for failing to take reasonable care to ensure that the corporation does not cause or permit harm to the environment.

Typically, directors and officers can avoid personal liability by establishing a defence of due diligence. The threshold for establishing due diligence differs for any given offence. One way of establishing a due diligence defence is by demonstrating that the company had an environmental management program in place and was adhering to it at the time of the offence.

Developing an environmental management program entails implementing corporate policies and reporting structures, establishing training programs and conducting regular environmental audits. Many corporations in Canada have also established work committees to oversee their environmental management system. Regardless of the program chosen, directors and officers must regularly review the program and are expected to act immediately when a problem occurs or is likely to occur.

OFFSHORE OIL & GAS REGULATION

The areas offshore from Nova Scotia and Newfoundland and Labrador are rich in energy resources and present valuable business opportunities. Although the offshore typically falls under federal jurisdiction, due to competing claims over the areas offshore Nova Scotia and Newfoundland the federal government and the provinces jointly administer the offshore regime. This is done through the Canada-Newfoundland and Labrador Offshore Petroleum Board and the Canada-Nova Scotia Offshore Petroleum Board (the “Boards”). The acts behind these regimes are essentially mirror images of each other, with a corresponding federal act.

Each Board consists of members appointed by the federal and provincial governments. The Boards' powers include the ability to mandate environmental assessments for proposed developments, consult with provincial agencies on environmental regulation and prohibit or shut down operations that may present a serious environmental problem.

Licensing

The Boards administer a multi-stage licensing regime which covers every stage of offshore development from exploration to commercial production. Every licence type is unique in terms of its rights and duration, so it is essential for operators to be aware of the timelines and how to progress from one licence to the next. There are three types of licences:

- An *exploration licence* is obtained through a bidding process with the Board on select offshore areas. It confers exploration rights for a period of nine years; however, the last three years of this period will only be activated if certain conditions are met during the first six years.
- Exploration licence holders can obtain a *significant discovery licence* once they demonstrate the existence of hydrocarbons in a geological feature that suggests the potential for sustained production. The licence confers developmental rights for an unlimited term.
- Exploration or significant discovery licence holders can obtain a *production licence* once they demonstrate the existence of petroleum reserves that justify the investment of capital and effort to bring the discovery to production. The licence confers commercial rights for a period of 25 years or for as long as commercial production continues.

Benefits Plans

To ensure that the people of each province benefit from offshore resource development, operators are required to submit a benefits plan before the Board will approve the project. Every benefits plan must:

- Give first consideration to provincial residents for training and employment;
- Give first consideration to services provided and goods manufactured in the province, so long as those services and goods are competitive in terms of fair market price, quality, and delivery; and
- Promote education and training as well as research and development on petroleum activities in the offshore area.

Liability

On January 30, 2014, the federal government introduced Bill C-22, the *Energy Safety and Security Act*. This bill will have an important impact on offshore resource development in terms of liability. Some key changes to the offshore regime include:

- Introducing director and officer liability for a corporation's failure to comply with an order;

- Raising the maximum fine for spills to $1 billion without proof of fault or negligence (up from $30 million in Newfoundland and Labrador and $40 million in Nova Scotia;
- Creating an administrative regime for monetary penalties, including fines of up to $25,000 for individuals and up to $100,000 for corporations for regulatory infractions; and
- Setting a minimum security of $100 million, which operators must post in advance of drilling. Regulators may increase this amount at their discretion.

PROVINCIAL ENVIRONMENTAL REGULATION

All four Atlantic Provinces have legislated extensively in the area of environmental protection. Further, as noted earlier, municipalities within each province have passed by-laws relating to the environment pursuant to authority granted them under provincial legislation (solid waste disposal, industrial discharge into the wastewater system, and pesticide regulation are common areas addressed by municipal by-laws).

The environmental legislation in the Atlantic Provinces, although different in significant respects, contains certain common features. One notable feature common to New Brunswick, Nova Scotia and Newfoundland and Labrador, for instance, is a broad approach to assigning responsibility for cleanup following the release of pollutants or contaminants. The responsibility for cleanup in these provinces extends beyond the person(s) who caused the contamination, to current owners/occupiers, current or past parties having care, management or control over the contaminant that has been released into the environment, and in some cases others as well. Responsibility for cleanup can be assigned to these varied parties regardless of actual fault or legal liability. A current owner of contaminated property may be ordered by the responsible minister to clean up the property even though the owner may not have owned the property when the contamination occurred.

For this reason, it is imperative for prospective purchasers to conduct appropriate due diligence investigations before acquiring property and to have appropriate protections to enable this to occur built into any agreements for the purchase of property. Due to the potential wide-ranging responsibility for contamination or a contaminated site, it is also essential that property owners or occupiers be aware of the notification requirements should a spill or release occur.

The Atlantic Provinces have also established numerous regulations under their primary environmental laws. The focus of these regulations is the management of environmental concerns identified in the statutes, including the following:

Air Pollution

- Regulation of airborne emissions
- Ozone layer protections
- Permit requirements for the operation of fuel burning equipment, incinerators and other industrial sources

Water Pollution

- Water quality testing
- Water well construction
- Drinking water guidelines
- Watercourse alteration
- Beach and coastline preservation
- Watershed protection

Land Pollution

- Solid waste disposal
- Hazardous waste disposal (e.g., used-oil, lead-acid batteries)
- Underground storage tanks (e.g., petroleum tanks)

The sections below will discuss in more detail each province's approach to environmental regulation, in particular as it relates to contamination/contaminated sites, enforcement, director and officer liability, and environmental assessments/approvals. This chapter will conclude with a review of other specific provincial legislation outside of these areas.

New Brunswick

In New Brunswick, environmental issues fall under the authority of the Department of the Environment and Local Government. The Department is responsible for the administration of several statutes, with the *Clean Environment Act*, *Clean Water Act* and *Clean Air Act* being central to the administrative scheme.

The Minister of the Department has the ability to designate as a "contaminant" anything that causes harm to the environment, the health and safety of a person or animal, or to property. Persons are prohibited from releasing any contaminant into the environment unless they are acting under and in compliance with authority or permission given under a provincial statute.

When contamination does occur, the person responsible must take steps to minimize the harm done by emission of the contaminants. The person must also notify the Minister immediately with a report which includes, among other things, the nature of the contamination and the remedial action taken to minimize the pollution and future reoccurrence.

In situations where the Minister finds that a person has violated or failed to comply with a provision of an act or regulation, an order may be issued directing compliance in accordance with what the Minister considers necessary. Where there is non-compliance or the Minister deems it necessary, remedial action can be taken with the associated costs becoming the liability of those who failed to comply with the order or whose act or omission caused the release of the contaminant.

The Minister may designate inspectors who can enter upon the lands or premises where they reasonably believe a contaminant was or will be produced and has been or will be released. The inspector can conduct the necessary tests and take samples of any substance or material in an attempt to collect evidence to show non-compliance with an act or regulation. An owner or person responsible for overseeing the area must reasonably assist the inspector and may not impede the inspection.

The issue of director and officer liability is not specifically addressed in the legislation. A person who violates any provision of an act or regulation, or fails to comply with a ministerial order, commits an offence. Upon conviction, they are liable to a fine of not less than $1,000 and up to $1 million. The fine can accrue for each day in which non-compliance continues. Where the offence is committed for financial advantage the fine imposed will be such that no advantage is gained from the offence. Costs incurred by the Minister are the liability of all persons who failed or refused to comply with any order which directed them to act or whose act caused the release of the contaminant.

Schedule A of the *Environmental Impact Assessment Regulation* outlines the undertakings that must be registered with the Minister, following which a determination will be made as to whether an environmental impact assessment is required. The Minister must either decide that the undertaking can be completed without an assessment or the provincial cabinet must approve the undertaking following the assessment. The environmental impact assessment involves multiple stages.

In May 2013, the province released a blueprint to help guide the oil and gas industry. The blueprint focuses on various principles including environmental responsibility, effective regulation and enforcement, community relations and First Nations engagement.

Prince Edward Island

The environmental regulatory scheme for Prince Edward Island is predominantly collected under the *Environmental Protection Act* ("EPA") and corresponding regulations, rather than in several discrete pieces of legislation. While the province previously lacked the more thorough legislation found in other jurisdictions in Canada, recent amendments in 2008 and 2009 have made its legislation more comparable. For example, watercourses and wetlands are now more heavily regulated, and persons deemed to be in contravention of legislation may now appeal environmental protection orders.

The EPA allows the Minister of Environment, Labour and Justice to control aspects of all surface, ground and shore waters, as well as beaches, sand dunes and wetlands within the province.

Contaminated sites are listed in the province's contaminated sites registry. A site may be designated as a contaminated site in defined circumstances, such as where an analysis of soil and groundwater on the property indicates it is contaminated in excess of acceptable cleanup criteria or where the site is an inactive or decommissioned landfill facility. Once an area has been designated, the person responsible for the area may not alter the site without authorization from the Minister.

The EPA is enforced primarily by the Minister and his or her delegates (i.e. employees of the Department of Environment, Labour and Justice). Environmental protection orders may require persons to do the following: meet with the Department; carry out inspection, testing, and sampling; clean, repair and restore affected areas; and take other specified actions to prevent danger to the

environment or the life, health, or property of a person. The contravention or violation of the EPA by any person or corporation will result in penalties, as specified in the EPA, including fines, imprisonment, payment of restitution, or a combination of these.

The EPA does not provide specifically for a due diligence defence in the event a person is charged with an offence. However, the offences in the EPA are public welfare offences and this defence may nevertheless be open to persons charged. Therefore, as in other jurisdictions, the importance of establishing an effective environmental management system cannot be understated.

As with many other provincial and federal environmental statutes, the EPA provides for certain types of director/officer liability, in particular where an officer or director "directs, authorizes, assents to, acquiesces in, or participates in" the commission of an offence carried out by the corporation. A director or officer may be liable on summary conviction to a fine not less than $200 or more than $10,000 or to imprisonment for 90 days, or both.

When initiating any undertaking (including construction, industry, operation or other projects), a written proposal must be filed with the Department and approval must be given before the undertaking proceeds. When considering proposals, the Minister may require an environmental impact assessment and statement to be carried out and submitted. During this process, the application for assessment will be reviewed and the public will receive an opportunity to review the proposed project and make comments or identify concerns. Following this process, the Minister will approve or deny the project.

Environmental Impact Assessment Guidelines and current projects under review can be found on the Government of Prince Edward Island website. A full list of applications for licences, certificates and permits is included on the provincial website. There are specific applications for pesticide vendors, petroleum storage tank contractors, water and wastewater facilities operators, persons handling and purchasing ozone depleting or regulated substances, and persons carrying on watercourse, wetlands and buffer zone activities, among others.

Nova Scotia

The *Environment Act* is the primary environmental legislation in Nova Scotia. The Act was amended in some significant ways in 2012. For instance, the amendments expanded the power of inspectors to issue directives as enforcement tools, and the Act now places a reporting obligation on *any* person who discovers or is aware of an unlawful release.

One of the biggest changes in the regulatory regime in Nova Scotia was the recent coming into force of new *Contaminated Sites Regulations* (in force July 6, 2013), and the related release of Ministerial Protocols that govern, among other things, notification of contamination and remediation of contaminated sites. The Regulations provide for a process that will lead to a form of regulatory closure, either a "Record of Site Condition" or a "Declaration of Property Condition". The Regulations

also create new duties and responsibilities, requiring a person responsible for a contaminated site to notify and take reasonable measures to remedy the damage caused, at their own expense.

Nova Scotia Environment ("NSE") is responsible for ensuring enforcement and compliance with the Act and Regulations. Enforcement is carried out through inspections and investigations by NSE inspectors, who have relatively broad powers to enter and inspect property, seize property, and issue directives. Unlike ministerial orders, directives are not appealable. Ministerial orders may require a person, at that person's expense, to remedy, clean up or rehabilitate adverse environmental effects, among other things. It is an offence to fail to comply with a directive or ministerial order.

Environmental assessments and approvals are regulated under the *Environment Act*, in conjunction with the *Activities Designation Regulations* and the *Environmental Assessment Regulations*. Environmental assessments are only required for undertakings listed in the *Environmental Assessment Regulations*. Likewise, the *Activities Designation Regulations* set out the activities for which an approval is required.

Under the *Environment Act* any officer, director or agent of a corporation can be found personally liable if they direct, authorize, acquiesce in or participate in a violation of the Act or Regulations, whether or not the corporation has been prosecuted. A director or officer who establishes that they exercised due diligence to prevent the commission of the offence or that their conduct was innocent in the circumstances cannot be convicted under the Act. As with other jurisdictions, directors and officers must ensure there are environmental management systems in place, and cannot turn a blind eye to environmentally damaging corporate activities.

The *Environmental Goals and Sustainable Prosperity Act* is legislation unique to Nova Scotia. It sets out the government's commitments to a cleaner and more economically sustainable province. The Act establishes far-reaching goals for the province that range from reduced air emissions and waste, to new energy standards for buildings, increased protection for water and land and encouragement of sustainable purchasing of goods and services.

Newfoundland and Labrador

Newfoundland and Labrador's principal environmental legislation is the *Environmental Protection Act* ("NLEPA"). The NLEPA and its accompanying regulations set environmental standards and procedures for business activities that may have significant environmental effect.

The NLEPA and its regulations specify the permissible amount, concentration and rate of release for substances released into the environment that may have an adverse effect, and impose reporting requirements in the event a release occurs that may have such an adverse effect. Persons responsible for unauthorized releases are required to remedy the adverse effects of the substance and/or dispose of the substance at their own cost. As with many other provincial statutes, "person

responsible" is a defined term, and casts a broad net.

Areas designated as contaminated sites require an environmental assessment and a remedial action plan to be submitted to the Minister of Environment and Conservation by the person responsible for the contamination. The Minister has the power to approve or reject the plan and to issue specific standards and criteria for rehabilitation of the contaminated site.

The NLEPA provides broad powers of inspection, particularly with respect to anything licensed under the Act. Inspectors may enter buildings or premises to ensure compliance with the Act and may also obtain warrants for search and seizure.

Persons charged and convicted of offences under the NLEPA are liable on summary conviction to fines ranging from $1,000 to $1 million for corporations, and fines of between $1,000 and $50,000 and/or a maximum term of three to six months' imprisonment for individuals, depending on the offence. Particularly egregious conduct can be subject to more severe penalties.

Ministerial orders are an additional form of enforcement under the NLEPA and can be issued regardless of whether or not a person was charged or convicted of an offence. These orders may require a person to stop or shut down an activity or undertaking or mandate the cleaning and restoration of contaminated areas. A whistleblower provision in the NLEPA prohibits employers from penalizing employees who report environmental offences by their employers.

Directors and officers of corporations conducting business in Newfoundland and Labrador should be diligent in ensuring corporate compliance with environmental legislation. Liability for corporate contravention of the NLEPA can be imposed on directors and officers in some circumstances, regardless of whether or not the corporation itself has been prosecuted or convicted. As with other provinces, the defence of due diligence is available.

It is also possible for directors and officers to be personally named in ministerial orders mandating the remediation of contaminated areas. The "person responsible" provisions of the NLEPA provide the Minister with a large degree of latitude in determining liability and do not necessarily preclude directors and officers.

Any business activity that may have a significant environmental impact is defined as an "undertaking." Although the NLEPA provisions apply to environmental matters falling under provincial jurisdiction, the province has a history of combining with federal processes to avoid duplication and will typically defer to the federal system when a merged assessment is done.

All undertakings must be registered for assessment and approval by the Minister before they commence. The Minister may mandate an environmental impact statement, environmental preview report, and issue orders containing additional terms and requirements that must be met prior to approval. The environmental assessment process may also involve consulting with interested governmental departments and holding public hearings to record and address concerns. Approved undertakings

may also be subject to monitoring to ensure compliance.

Additional Environmental Legislation

The provinces have also passed many other pieces of legislation that deal with narrower environmental issues. For example, all four Atlantic Provinces have passed specific legislation dealing with the intra-provincial transportation of dangerous goods. These statutes complement, and generally adopt, the safety standards, packaging and labelling requirements set out in the federal TDGA which applies to the inter-provincial transportation of dangerous goods.

Other examples of related environmental legislation passed by some or all of the Atlantic Provinces include the following:

- Oil and gas legislation, which regulates activities relating to the exploration and exploitation of petroleum and natural gas, and which imposes measures aimed at preventing spills or leakages of such substances into the environment.
- Pesticides control legislation, which regulates the use, storage and handling of pesticides.
- Emergency measures legislation, which provides for the coordination of emergency operations when a disaster occurs that may affect the environment or human health, safety or welfare.
- Endangered species legislation, which attempts to prevent any provincial species from becoming extinct as a consequence of human activities.
- Wildlife conservation legislation, which seeks to maintain the diversity of provincial species through forest management and the regulation of hunting and fishing.
- Legislation protecting wetlands and watercourses and restricting activity in mandated buffer zones around wetlands and watercourses.
- Legislation requiring that waste be source-separated into compostables, recyclables and waste materials.
- Delegated authority to municipalities to enact by-laws pertaining to diverse matters relating to the environment such as the use of pesticides, effluent quality for discharge into municipal sewers, topsoil removal and grade alteration, development adjacent to environmentally sensitive areas such as watercourses and wetlands, and prohibition of nuisances from smoke, dust, odours and the like.

CHAPTER 13

COMMERCIAL REORGANIZATION AND INSOLVENCY LAW

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CHAPTER 13

COMMERCIAL REORGANIZATION AND INSOLVENCY LAW

LEGISLATIVE REGIME

Bankruptcy and insolvency law falls under federal jurisdiction.[7] However, many factors which influence bankruptcy and insolvency proceedings and creditors' rights and remedies, such as securities law, property law and civil rights, fall under provincial jurisdiction.[8] As a

7 Please note that this chapter does not address consumer bankruptcies.

8 For more information on the rights and remedies available to creditors, please see Chapter 14 – Enforcement of Creditors' Rights

result, in a bankruptcy or insolvency proceeding, both federal and provincial statutes may need to be considered.

Federal Legislation

Federal legislation governing bankruptcy and insolvency proceedings include:

- The *Bankruptcy and Insolvency Act* ("BIA") and the General Rules made thereunder: The BIA establishes Canada's bankruptcy regime. It contains the rules and methods by which individuals, corporations and other persons may liquidate or reorganize.
- The *Companies' Creditors Arrangement Act* ("CCAA"): The primary aim of the CCAA is to allow financially distressed businesses to make a plan of compromise or arrangement with their creditors. The CCAA sets out a framework for corporations with debts totaling over $5 million to work with their creditors to reorganize or sell the business.
- The *Wage Earner Protection Program Act* ("WEPPA"): The WEPPA provides compensation for remuneration owing to employees in the case of the bankruptcy or receivership of their employer.
- The *Winding-up and Restructuring Act* ("WURA"): The WURA primarily applies to the wind up of regulated bodies (e.g., banks, insurance companies and trust corporations).

Provincial Legislation

Provincial legislation which may impact bankruptcy and insolvency proceedings includes:

- The *Personal Property Security Act* ("PPSA"): Each of the Atlantic provinces has enacted PPSA legislation that sets out how to create and perfect valid security interests, how to determine priorities among creditors and how to enforce security interests. The PPSA legislation is similar to the various Uniform Commercial Codes in effect in many jurisdictions in the United States.
- The *Judicature Act* and *Rules of Court*: Each of the Atlantic Provinces has enacted a *Judicature Act* and *Rules of Court* which set out the requirements for drafting materials and appearing before the court unless superseded by rules contained in the applicable federal statute or BIA rules.

COURT JURISDICTION

In Canada, there is no separate bankruptcy court. Pursuant to both the CCAA and BIA, authority to hear matters related to bankruptcy and insolvency is vested in the superior courts of each of the provinces. The judges of these courts are federally appointed and exercise general jurisdiction.

Because the BIA and CCAA are federal statutes, each contains provisions requiring that orders made by provincial superior courts sitting in bankruptcy are recognized and enforced by courts in other provinces. Nevertheless, an application to a provincial superior court may be necessary to give effect to the orders of another province's superior court.

REORGANIZATION

It is always open to debtors to informally agree with their creditors on a method to restructure the debt. However, the BIA and CCAA provide formal means by which debtors may propose arrangements (CCAA) or proposals (BIA) with their creditors.

BIA Proposal

A proposal pursuant to Part II of the BIA is a written document by which the debtor makes an offer to settle its creditors' provable claims. Under the BIA, a debtor's proposal must include an arrangement with both the preferred creditors and unsecured creditors. The proposal may also include secured creditors. Preferred creditors may include the trustee, employees and/or a landlord.

A trustee appointed under a proposal must call a meeting of the creditors of the debtor to be held within 21 days after the filing of a BIA proposal. All unsecured creditors and those secured creditors in respect of whose secured claims the proposal was made are entitled to vote. All creditors vote by class except that all unsecured claims shall constitute one class unless the proposal provides for more than one class of unsecured creditors.

CCAA Plan of Arrangement

Under the CCAA, a debtor is able to make a plan of arrangement with any particular class of creditors, although it is often the case that a plan will be proposed to most, if not all, of the creditors of the applicant.

Similarities between the BIA and CCAA

Once a proposal or arrangement is proposed, the debtor's creditors vote on the proposal or plan of arrangement. In order to be successful, both a majority in number of creditors and two-thirds of the value of the claims of each class voting in person or by proxy must be attained. If the vote on the proposal or plan of arrangement is successful, an application is made to the court for approval.

The restructuring of a debtor is monitored by a neutral party under both the BIA and CCAA. Under the BIA, the proposal must include provision for the appointment of a trustee. Under the CCAA, a monitor (who must be a licensed trustee in bankruptcy) is appointed. Both the trustee and monitor fulfill a similar role: monitoring the debtor's business and/or financial affairs during the restructuring process, reporting to the court (and also the creditors) on any material adverse changes affecting the debtor and reporting on the reasonableness of the debtor's cash flow statement.

Differences between the BIA and CCAA

As indicated above, there are many similarities between the BIA and CCAA. However, there are also important differences which may influence one's decision about which act to use:

- There are strict guidelines and timeframes under the BIA, including a maximum of six months within which to file a definitive proposal.
- The CCAA is less detailed and has been given a liberal interpretation by the judiciary. As such, the CCAA is more flexible.
- If a proposal made under the BIA is rejected by the unsecured creditors or the court refuses to approve it, the debtor is automatically declared to be bankrupt.
- If a plan of arrangement is rejected under the CCAA, either by creditors or the court, the debtor is not automatically declared a bankrupt.
- Under the BIA, a stay of proceedings is obtained when the debtor files a notice of intention with the Superintendent of Bankruptcy. Conversely, under the CCAA, a stay must be obtained by court order.
- The CCAA applies only to corporations or corporate groups that meet the $5 million debt threshold dictated by the Act.
- As indicated above, under the BIA a proposal must be made to unsecured creditors, whereas under the CCAA a plan of arrangement can be made to secured creditors alone, leaving unsecured creditors unaffected.
- A proposal under the BIA is generally less expensive than a plan of arrangement under the CCAA, as the BIA is more detailed and structured, with the result that fewer court applications are normally required than under the CCAA.

RECEIVERSHIP

In addition to the provisions noted above, the BIA also provides for the enforcement of security, a scheme of distribution among a debtor's creditors and the appointment of receivers. When a secured creditor decides to enforce its security on all or substantially all of the insolvent debtor's assets, the secured creditor must give the debtor prior notice unless a court orders otherwise. Following the provision of notice, the secured creditor must wait 10 days (unless the debtor consents or a court orders otherwise) to take further steps to enforce its security.

One of the common methods of enforcement of a creditor's security is the appointment of a receiver. A receiver is normally appointed by one of two methods: by a secured creditor according to a security agreement (private appointment), or by court order (court appointment).

Once appointed, the receiver must give notice of its appointment to all the debtor's creditors. The receiver must issue reports on a regular basis outlining the status of the receivership, prepare a final report and statement of receivership accounts when the appointment is terminated, and make those reports available to creditors upon request.

Private Appointment

When a receiver is appointed under a security agreement, the security agreement must also set out the powers the receiver is to have. These powers are typically broad and may include the power for the receiver to carry on the debtor's business and sell

the debtor's assets by auction, tender or private sale.

A private receiver's loyalties lie with the creditor that appoints it and the private receiver will work to maximize the recovery of the creditor. As a result, appointment of a private receiver provides the secured creditor with greater control over the enforcement process. It can also be more cost effective. In contrast, a court appointed receiver is an officer of the court and has duties to all creditors, not just the appointing creditor.

However, a court appointed receiver may be advisable in the following circumstances:

- Where there are disputes among the creditors;
- Where there is a dispute between the creditor and the debtor;
- Where the debtor opposes the appointment of a receiver and will not allow the receiver to take possession of the debtor's property;
- Where there is a clear sign that court assistance will be required; and
- Where the assets and operations of a debtor are complex and/or located in a number of jurisdictions and the various secured creditors are competing for priority.

Court Appointment

The court's jurisdiction to appoint a receiver is found in the BIA, provincial statutes and provincial *Rules of Court*.

An application to appoint a receiver is commonly made under all three sources to provide maximum flexibility to the receiver.

The order appointing the receiver normally also includes the following provisions:

- A stay of proceedings against the receiver;
- The receiver is granted control over the assets of the debtor;
- The receiver is authorized to carry on the debtor's business;
- The receiver is authorized to borrow money on the security of the debtor's assets; and
- The receiver is authorized to sell the debtor's assets with approval of the court.

Depending on the circumstances, the court may also consider it necessary to authorize the receiver to commence and defend litigation in the debtor's name.

BANKRUPTCY

A bankruptcy can happen in one of several ways:

- The debtor makes a voluntary assignment;
- An application by one or more creditors is made to the court and a receiving order against the debtor is issued;
- Either the debtor's unsecured creditors or the court refuses to approve the debtor's proposal; or
- The proposal is approved, but subsequently annulled by the court.

Once a person or corporation is declared bankrupt, a licensed trustee in bankruptcy is appointed and a stay of proceedings is imposed.

The bankrupt's property is vested in the trustee and the trustee is then responsible for the administration of the bankrupt's estate.

The bankrupt's unsecured creditors file claims for their debts with the trustee. As a secured creditor, it is important to ensure that your security is properly registered because the trustee is responsible to review the validity of the security over the bankrupt's assets and apply to the court to set aside security that is not valid. If the secured creditor has valid security, subject to a limited stay provision, the secured creditor is entitled to take possession and dispose of the secured property notwithstanding the bankruptcy. To the extent that the amount of a secured creditor's debt exceeds the value of the property subject to its security, a secured creditor may participate in the bankruptcy process and file a proof of claim for the unsecured portion of its claim.

Generally, creditors will elect one or more inspectors to guide the conduct of the bankruptcy proceedings. Where inspectors have been appointed the trustee must work with the inspectors and must obtain the consent of the majority of the inspectors to sell assets, carry on the business of the bankrupt, commence or continue legal proceedings, or settle any claims made by or against the bankrupt estate unless the decisions of the inspectors are overridden by the creditors or the court.

Priorities

The bankrupt's creditors may include secured creditors, preferred creditors and/or unsecured creditors.

Secured creditors rank in priority to unsecured creditors in a liquidation; however, there are certain statutorily prescribed super-priority claims (e.g., government claims for source deductions) that will rank ahead of secured creditors. Unsecured creditors are entitled to share pro rata in the realization of the bankrupt's assets after payment of preferred creditors and are subject to the claims of secured creditors.

Amendments made to the BIA and CCAA in 2009 allow for debtor in possession ("DIP") financing and recognize a "super-priority charge" for lenders who provide interim financing to debtor companies. Previously, courts invoked their inherent jurisdiction when authorizing DIP financing.

DIP financing is only allowed if it has been approved by court order. In order for DIP financing to be approved, the existing secured creditors must be provided notice. The DIP lender's super-priority will survive in a bankruptcy even if the DIP restructuring fails.

There are new super-priority claims created in the CCAA and BIA for wages and pension arrears, and the WEPPA provides for the payment of wage arrears in an insolvency.

Additionally, there are a number of other federal and provincial statutory liens and deemed trusts that have priority over

secured creditors outside of bankruptcy, but which are treated as ordinary unsecured claims following bankruptcy (e.g., liens for federal goods and services tax).

Once the super-priority claims and secured creditor claims are satisfied, the BIA sets out the priority scheme for distribution to unsecured creditors as follows:

1. The costs of administration of the bankruptcy;
2. A Superintendent of Bankruptcy's levy on all payments made by the trustee to creditors;
3. Preferred claims, secured creditors' claims in the amount equal to the difference between what they received and what they would have received but for the operation of the wage and pension super-priorities, and landlords' claims up to the maximum amounts prescribed by statute; and
4. Unsecured claims on a pro rata basis.

Avoidance Transactions

Pursuant to the BIA and various provincial statutes, the trustee may set aside fraudulent preferences, fraudulent conveyances and transfers under value made by the bankrupt. Keep in mind that limitation periods apply in each case. Furthermore, different rules and onuses of proof apply depending upon whether a transaction/payment was at arm's length.

Interim Receiver

Under the BIA, an interim receiver may be appointed to preserve and protect an estate pending the outcome of insolvency proceedings. An interim receiver may be appointed:

- On or after the filing of an application for a bankruptcy order;
- On the filing of a notice of intention to file or the filing of a proposal; or
- When an enforcement notice has been or is about to be sent by a secured creditor indicating its intention to enforce its security.

The appointment of an interim receiver is normally of short duration. In the order appointing the interim receiver, the court will specifically set out the powers of the interim receiver. Generally speaking, the interim receiver will be instructed to take possession of the assets and control the receipts and disbursements of the debtor, but not to otherwise interfere with the day-to-day business of the debtor.

Prior to the 2009 amendments to the BIA, interim receivers were often appointed with a mandate similar to that of a receiver. However, the 2009 amendments to the BIA ensure that the interim receiver only carries out an "interim" role.

LIQUIDATING UNDER THE CCAA

Once CCAA proceedings have begun, court approval is required before a sale of the debtor's assets can be effected. Under the CCAA, a court may authorize a sale of a debtor's assets notwithstanding the absence of a plan of compromise or arrangement. Where the sale of substantially all of the debtor's assets is contemplated (even when no plan is envisioned), the court will consider the

following factors when determining whether to approve the sale:

- Was the process leading to the proposed sale reasonable in the circumstances;
- Whether the monitor approved the process;
- Whether the monitor filed a report with the court stating that the sale would be more beneficial to creditors than a bankruptcy;
- Whether the creditors were consulted, and to what extent;
- What the effect of the proposed sale would be on the creditors; and
- Whether the amount to be received from the proposed sale is reasonable/fair considering the assets' market value.

CROSS-BORDER INSOLVENCY

The BIA and CCAA both contain provisions with respect to cross-border insolvencies. These provisions are largely based on the United Nations Commission on International Trade Law's ("UNICITRAL") Model Law on Cross-Border Insolvency.

For more information, please contact one of the professionals in our Commercial Litigation and Insolvency Practice Group.

CHAPTER 14

ENFORCEMENT OF CREDITORS' RIGHTS

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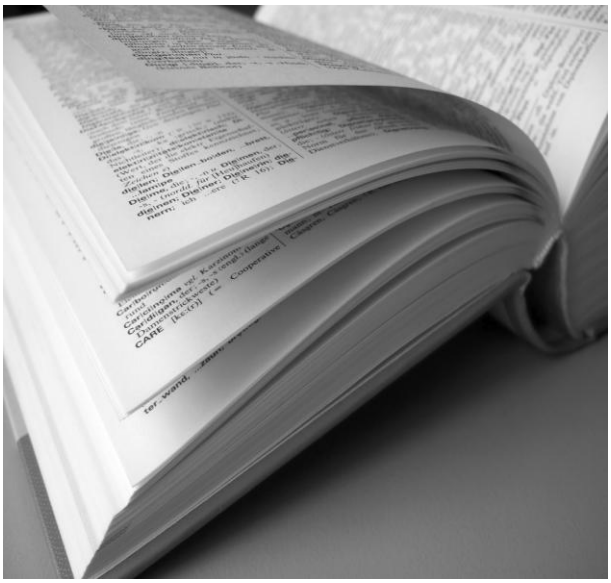
CHAPTER 14

ENFORCEMENT OF CREDITORS' RIGHTS



Creditors in Atlantic Canada benefit from a number of potential remedies. The available remedies will depend on whether creditors have security over the assets of the debtor.

SECURED CREDITORS

Perfection and Protection

Applicable laws in Atlantic Canada provide the means for secured creditors to perfect or otherwise protect their security interests in both real and personal property. The methods of perfection are described in Chapter 7 – Real Estate Law.

In order to protect the interests of secured creditors, it is necessary to ensure that the requirements for perfection and protection of security interests are carefully observed. Mortgages and other charging instruments securing real property must be properly registered in accordance with the applicable legislation in each province. For personal property, the perfection requirements will depend on the type of property involved. In most cases, all that is required is a timely registration under the *Personal Property Security Act* (the "PPSA") in the appropriate province. Each such statute provides a detailed set of rules which govern the jurisdiction in which a registration must be made based on the type of property involved.

The PPSA also includes special rules which impose additional requirements to properly perfect security interests in inventory and also with respect to certain serial-numbered goods. In addition to the registration

requirements under the PPSA, security interests in various types of investment property will be subject to the additional perfection requirements set out in the *Securities Transfer Act* (the "STA") applicable in New Brunswick, Newfoundland and Labrador and Nova Scotia. There is no STA in effect in Prince Edward Island. Additional registrations under federal legislation should also be considered in relation to security interests in various forms of intellectual property and aircraft. Registrations may also be required under legislation adopted in each of the Atlantic Provinces to ratify the international convention relating to aircraft security interests. Depending on the type and size of vessel involved, a registration may be required under the *Canada Shipping Act* as opposed to the PPSA.

With respect to certain classes of personal property (principally, inventory and accounts receivable) chartered banks have the option of perfecting security pursuant to the PPSA or under the *Bank Act* (Canada). Where a bank elects to take security under the latter, it will be necessary to make a timely filing at the appropriate office of the Bank of Canada.

Enforcement Requirements

Personal Property

The enforcement rights available to secured creditors are generally contained in the security documents themselves. Typically, such documentation will provide for the right of a secured creditor to seize personal property in the event of a default by a debtor (in payment or other breach of covenant) and the right to either sell such property or retain the property in satisfaction of the debt obligation. The security agreement may also provide for the manner in which a sale will be conducted (e.g., public auction, closed tender, etc.) or will allow the secured creditor to define the sale process at the time of enforcement.

The PPSA provides detailed requirements to be observed in relation to the enforcement of security interests in personal property governed by the PPSA. Specifically, the PPSA provides for various notices which must be delivered whenever a secured creditor (and also a receiver appointed by a secured creditor) elects to sell personal property subject to a security interest or retain such property in full satisfaction of amounts owing.

In addition to the notice requirements in the PPSA, compliance is also required with any notice or other requirements which may be found in the security documents.

Real Property

Similar to personal property, the remedies available to a mortgage lender are also typically found in the mortgage document.

The laws in the Atlantic Provinces provide detailed procedures which will govern the realization process against real estate. Unlike personal property, where the rules are substantially similar in the Atlantic Provinces, the rules relating to real property differ significantly from province to province.

New Brunswick - A court order is not required for the sale of mortgaged property in New Brunswick. Mortgage lenders are allowed, after default in payment, to sell the

mortgaged property through power of sale proceedings either by public auction or by private contract. If the public auction method is adopted, the mortgage lender is entitled to bid on and purchase the property. In either case, specific notice and advertising requirements must be fulfilled. The public auction, which is the remedy most often employed, is conducted by a licensed auctioneer at the court house or other public facility in the county where the property is located. Specific rules have been adopted by the New Brunswick courts with respect to a deficiency claim against the mortgage debtor in the event the sale proceeds are insufficient to retire the debt.

Newfoundland and Labrador - Enforcement of a real property mortgage can be pursued in two ways: (1) by way of foreclosure pursuant to the Rules of the Supreme Court, 1986; or, (2) pursuant to the power of sale provisions under the *Conveyancing Act*. The former is rarely utilized, whereas proceeding by way of power of sale is the most common and cost-effective means of enforcing on a mortgage. The power of sale process begins by providing a 30 day demand and notice to the mortgagor and any other registered encumbrancers or guarantors. If there is no satisfactory response to the 30 day notice, the mortgagee may then proceed to advertise the sale of the property. Prior to sale, the mortgagee is required to obtain an appraisal of the property. The appraisal must be disclosed to the mortgagor following the sale and be provided in tandem with a full accounting of the power of sale process. The sale itself can be conducted anywhere in the province by auction or sealed tender, and is usually conducted by the mortgagee or its legal counsel. If there remains a balance owing on the mortgage following exercise of the power of sale, the mortgagee can pursue a deficiency claim through the Supreme Court of Newfoundland and Labrador. Strict compliance with the power of sale provisions in the *Conveyancing Act* is required in order to preserve the mortgagee's rights to a deficiency claim.

Nova Scotia - Enforcement of a real property mortgage requires an order for foreclosure and sale from the Nova Scotia Supreme Court. The process requires the mortgage lender to commence a legal action against the mortgage debtor for the debt owing. The remedy usually adopted by mortgage lenders is to sell the mortgaged property at public auction. The sale is normally conducted by the sheriff in the county where the property is located. The foreclosure rules contain specific advertising requirements which must be strictly followed. Specific rules are also included to deal with a deficiency claim against the mortgage debtor in the event the sale proceeds are insufficient to retire the debt.

Prince Edward Island - Enforcement of a real property mortgage may be done in the manner described for Nova Scotia. Enforcement, however, is usually done according to power of sale provisions found in the mortgage document. The power of sale process requires the mortgagee to provide notice to the mortgagor of the default and impending sale. Generally, no power of sale may be exercised until four weeks' notice of such sale has been given and published in the local newspaper. The sale is usually done by public auction, but may be conducted by other means such as tender process or real estate listing. A

deficiency claim may be brought against the mortgage debtor in the event the sale proceeds are insufficient to retire the debt.

Receiverships

A secured creditor may elect to realize on its security by using its own personnel or may appoint an agent known as a receiver to manage the realization process. Where the secured creditor's security extends over the entire business of the debtor or a significant portion of the business, the receiver may be appointed to manage the business for a period of time until it can be sold as a whole. Alternatively, the receiver may simply be appointed to gather assets and prepare them for sale.

A receiver may be appointed in three ways:

1. Privately in the security instrument;
2. Under the Rules of Court of a province; or
3. Under the *Bankruptcy and Insolvency Act* (the "BIA").

A receiver appointed under a security instrument will generally be viewed as an agent of the appointing creditor. A receiver appointed in this manner will generally be responsible to enforce the security on behalf of the secured creditor. Where a receiver is privately appointed, the realization process will be determined by the receiver in consultation with the creditor.

Receivers appointed under either the Rules of Court or the BIA will initially be appointed by a court in a jurisdiction which generally has a substantial connection to the debtor and its business. The application is typically made on the instruction of the secured creditor. However, once appointed, the receiver will function as an officer of the court with responsibilities to all creditors of the debtor, not just the secured creditor who made the initial application. The court will supervise the receivership process. The sale process will be subject to court approval. The process for appointments under local court rules and the BIA will be similar. The distinction is largely based on whether the debtor's assets are located in one jurisdiction (which would favour an application under local court rules) or whether such assets are located in several jurisdictions (which would favour an application under the BIA).

Receivers, regardless of the method of appointment, must comply with notice and reporting requirements under the BIA and the PPSA.

Secured creditors should note that they may, in certain circumstances, be considered a receiver where they engage their own forces in the realization of a debtor's assets.

Builders' Liens

The liens on the debtor's assets discussed in the previous section are consensual liens (i.e. they have been provided with the agreement and consent of the debtor). Creditors who supply labour and materials (and, in some cases, assets) in relation to the improvement of the real or personal property of a debtor may also benefit from a statutory lien (usually described as a builders' or mechanics' lien) on such property in the event of non-payment. The establishment and perfection of such liens

in Atlantic Canada is strictly governed by applicable legislation.

UNSECURED CREDITORS

Right of Action to Enforce Claim

Under the Canadian constitution, the provincial legislatures (including those in each of the Atlantic Provinces) have authority over property and civil rights, including the responsibility for determining the rights and remedies of unsecured creditors.

By operation of the common law and the enactment of provincial legislation, courts in Atlantic Canada provide a right of action to unsecured creditors to enforce claims against debtors for the collection of debts. Proceedings are heard by a single judge.

Although it is common practice for a future plaintiff to send a demand letter prior to instituting court proceedings, it is not necessary. Each province prescribes its own time periods within which a proceeding must be commenced.

Where necessary, interim proceedings (known as motions) may be made to the court at any time, usually with notice to the other party, for additional related relief such as an injunction, preservation of property or other necessary interim orders.

Alternative dispute resolution, through mediation, is available between the parties to facilitate a settlement if all of the parties to the dispute agree to the terms of mediation and any settlement. Parties may also choose to resolve a dispute through arbitration. Arbitration can generally be agreed to by the parties subject to the *Arbitration Act* in each province.

Superior Court, Trial Division

With few exceptions, the civil court in each of the four Atlantic Provinces is the appropriate forum for an action for a collection of a debt. There is no maximum dollar limit with respect to any claim in civil courts and there are other strategic benefits pursuant to the Rules of Court in each of the provinces for proceedings in the superior courts. Actions in the Federal Court, Trial Division, offer a more limited forum but may be useful in certain circumstances. A right of appeal exists to the Court of Appeal in each province.

Simplified Procedures under Civil Procedure Rules

All of the Atlantic Provinces apart from Newfoundland and Labrador have adopted simplified procedures under their civil procedure rules for claims under a certain dollar value.

New Brunswick – The simplified procedure under Rule 79 provides for claims of $75,000 or less to be brought pursuant to that Rule, which is intended to be more cost effective for creditor collection. The simplified procedure eliminates oral examination for discovery but provides for documentary disclosure prior to trial.

Nova Scotia – There are two ways an alternative proceeding may be commenced in the Nova Scotia Supreme Court: (1) as an action for debt; or (2) as an action for damages under $100,000. Each type of proceeding is set out below.

- An Action for Debt

Rule 4 in Nova Scotia allows for an action for debt to be commenced by a party claiming only on a debt, with no interest other than prejudgment interest at a rate of 5% a year, to be calculated only from the time the debt became due. While an action for debt may be useful in certain circumstances, the limit on the amount of interest that may be claimed will not be attractive to many creditors, where the amount of interest owing is far in excess of the amount that can be claimed under Rule 4.

- An Action for Damages Under $100,000

Rule 57 in Nova Scotia provides a streamlined approach on claims for actions for damages under $100,000. In order for a claim to fall under Rule 57, three requirements must be met: (1) the claim must be for damages only (i.e. no other relief can be sought from the Court); (2) the claim for damages must be based only on debt, injury to property, personal injury, supply of goods and services, or losses caused by breach of contract or breach of trust; and (3) the total of all claims (excluding costs and future interest) must be less than $100,000.

The discovery examination process for actions under Rule 57 is shortened to a limit of three hours per party. Documentary disclosure is still required and Rule 57 allows trial dates to be sought once the pleadings have closed. A will-say statement must be filed for each witness who will be called at trial, with the exception of witnesses who have been examined on discovery or expert witnesses. A witness may, except in certain circumstances, be limited to the subjects set out in the will-say statements.

Prince Edward Island – The simplified procedure under Rule 75.1 provides for claims of $25,000 or less to be brought pursuant to that Rule, which is intended to be more cost-effective for creditor collection. The simplified procedure eliminates oral examination for discovery but provides for documentary disclosure prior to trial.

Newfoundland and Labrador – Instead of simplified procedures, the Rules of the Supreme Court, 1986 provide procedures for summary judgments and summary trials. These mechanisms are not based on the dollar value of a claim. Rather, they are based on the complexity of a matter. That is, if the Court is convinced that a matter is suitable for such an attenuated hearing and can be fairly determined with the assistance of only affidavit evidence, then the parties can proceed in a summary fashion. Consequently, these procedures are well suited for dealing with debt claims or simple breaches of contract.

<u>Small Claims</u>

In addition, “small claims” procedures are available in all of the Atlantic Provinces and are limited to claims under certain dollar values ($12,500 in New Brunswick, $8,000 in Prince Edward Island, $25,000 in Newfoundland and Labrador, and $25,000 in Nova Scotia).

Pre-Trial Disclosure Process

Oral Discovery and Document Disclosure

The nature of any dispute, including a collection action, is defined by the pleadings delivered by the parties, in writing, in the action. The pleadings define the facts and alleged issues that are relevant for trial.

The provincial Rules of Court provide for full disclosure of all relevant non-privileged documentation that is in the possession, custody or control of the parties to an action. They also provide for attendance at a recorded examination under oath, prior to trial. Sanctions are available pursuant to the Rules for refusal or neglect to attend such an examination and for refusal or failure to produce relevant documentation. Procedures also exist for written interrogatories or written examinations for discovery, but are less often employed.

Judgment Collection and Enforcement

Enforcement of a Judgment Recovered in the Province

Each of the provinces allows for registration of a court ordered judgment in real property and personal property registries and enforcement of a judgment for the payment of money through a process of seizure and sale. However, while a judgment may be recorded in the land registry office in Prince Edward Island, it does not need to be. Once issued and filed in the court it binds the real property of the debtor.

Registrations of judgments are effective for a certain term of years and are renewable to a maximum term. Registration operates as a lien to bind the real and personal property of the judgment debtor after registration.

Newfoundland and Labrador is a statutory lien regime. In order to enforce court judgments, they must be registered with the Judgment Enforcement Registry, which is governed by the *Judgment Enforcement Act*. Once registered, the judgment thereafter binds all real and personal property of the judgment debtor in the jurisdiction – there are no further filings required. The statute contemplates various enforcement mechanisms, such as asset seizures and garnishment of bank accounts. Funds seized and the proceeds from the sale of seized assets are subject to pro rata distribution amongst registered judgment creditors. All such seizures and garnishees are instituted or conducted by the Office of the High Sheriff upon written instruction from a registered judgment creditor.

In New Brunswick, Nova Scotia and Prince Edward Island, an Order for Seizure and Sale is delivered by a judgment creditor to a Sheriff in the jurisdiction where the judgment debtor is located, for enforcement by the Sheriff. Collection by a Sheriff may result in a pro rata distribution of sale proceeds, after payment of the costs of any sale, amongst all judgment creditors.

Garnishment of a judgment debtor's wages is available in all of the Atlantic Provinces except New Brunswick. In Prince Edward Island there is also a pre-judgment garnishment process where a claim is for a liquidated debt. Monies garnished under this process are paid into court pending resolution of the court action. An action must be commenced within five days of

issuing a pre-judgment garnishment process.

New Brunswick's *Enforcement of Money Judgments Act*, while not yet in force, is intended to streamline enforcement of money judgments and provide for a garnishee order against wages. This statute will consolidate the law with respect to the enforcement of judgments in New Brunswick and will involve the repeal of several other antiquated statutes, as well as amendments to numerous other statutes. It also contains provisions relating to preservation orders, judgment registration, examination of a judgment debtor, enforcement instructions to a Sheriff and enforcement actions in general.

Enforcement of Foreign Judgments

A judgment of the civil court in one province is not automatically enforceable in another province. There are well established common law principles and statutory procedures which enable a money judgment from a "foreign jurisdiction" (including a foreign country) to be made enforceable without re-litigating all of the case on its merits.

Examination in Aid of Execution

There currently exist in each of the Atlantic Provinces provisions for examination, under oath, of a judgment debtor or a representative of a corporate judgment debtor in aid of execution of a judgment.

In New Brunswick, two similar yet distinct procedures exist which provide for examination, under oath, of a judgment debtor. Both methods provide for an opportunity for full disclosure of the judgment debtor's ability to pay the judgment debt. The *Arrest and Examinations Act* provides for examination, under oath, by the clerk of the court and may result in a payment order enforceable by the court. Alternatively, examinations under the Rules of Court require attendance, under oath, before a court reporter. This method, which is most often employed, does not require a court order for attendance or the appearance or the involvement of the clerk of the court. A payment order is not available from an examination of a judgment debtor under the Rules of Court.

In Nova Scotia, a judgment debtor may be required to attend at a discovery examination in aid of execution. Such an examination requires attendance, under oath, before a court reporter. A judgment debtor who refuses to attend at a discovery examination in aid of execution, as is often the case, may be required to do so under subpoena.

In Newfoundland and Labrador, a judgment debtor may be examined under oath in court. If the judgment under which the examination is being conducted is out of the Supreme Court, then the examination is held in the Supreme Court before a clerk and is recorded. If the examination is based on a small claims judgment, the examination is held in Small Claims Court before a judge.

Fraudulent Conveyances and Preferences

Creditors have at their disposal two sets of statutory regimes to set aside a preference,

namely the federal *Bankruptcy and Insolvency Act* (the "BIA") and the following provincial statutes: the *Assignments and Preferences Act* in New Brunswick and Nova Scotia, the *Judgment Enforcement Act* in Newfoundland and Labrador, and the *Frauds on Creditors Act* in Prince Edward Island.

If a transaction with a debtor has the effect of giving a specific creditor a preference over other creditors it will, with respect to any suit or proceeding brought to impeach or set aside such transaction, be presumed to have been made with "fraudulent intent" and to be an unjust preference. In order to establish that a debtor committed a preference which is liable to be set aside under section 95 of the BIA, a creditor must first obtain a bankruptcy order against the debtor.

Under the *Assignment and Preferences Act*, a creditor must establish that the payment was made by the debtor at a time when he or she was in insolvent circumstances, was unable to pay his or her debts in full and was on the eve of insolvency.

In Prince Edward Island, where a debtor gives a preference to another person or creditor, for sixty days following the transaction that resulted in the preference there is a rebuttable presumption that the transaction was done to defeat, hinder or delay other creditors from enforcing their rights. A creditor may challenge a transaction after the sixty day period, but the onus is then on the creditor to show that the transaction was done to defeat, hinder or delay the creditor's collection efforts.

In Newfoundland and Labrador, impeachable transactions are dealt with pursuant to the *Judgment Enforcement Act*. These provisions apply to the enforcement of creditor rights under any other legislation or the common law. As such, a creditor need not have a registered judgment in place to benefit from the protection offered under this statute. Generally speaking, any transfer of property made by an insolvent person with the intent to defeat, hinder, delay or prejudice one or more of his or her creditors is void as against the creditor so injured, delayed or prejudiced.

In addition, Newfoundland and Labrador has a *Fraudulent Conveyances Act*, which defines certain transactions involving real or personal property as being void where there is intent to defeat, delay, hinder or prejudice creditors.

The *Statute of Elizabeth*, an act of parliament in England, laid the foundations for fraudulent transactions to be unwound and is part of the law of all the Atlantic Provinces except Newfoundland and Labrador. The *Statute of Elizabeth* may be applicable to set aside a conveyance of property made to defraud a creditor even if the debtor was not in insolvent circumstances at the time of the conveyance.

CHAPTER 15

MUNICIPAL LAW

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CHAPTER 15

MUNICIPAL LAW

Municipalities constitute a third level of government, below the federal and provincial/territorial levels. Through legislation, the provinces devolve some of their powers and responsibilities for local matters to municipalities.

The form of such legislation varies from province to province. In Prince Edward Island and Newfoundland and Labrador, some of the larger municipalities are subject to their own particular legislation (e.g. the *Charlottetown Area Municipalities Act* and the *City of St. John's Act*), with the remaining municipalities being covered by a general municipalities statute. In Nova Scotia, all legislation relevant to municipalities, including planning legislation, was combined into the *Municipal Government Act* ("MGA") in 1999. Halifax Regional Municipality ("HRM") has its own *HRM Charter*. All municipalities in New Brunswick are governed principally by a single municipalities act.

While the form of the legislation may vary, in substance, most municipalities across Atlantic Canada have very similar powers and responsibilities. Municipalities are governed by elected councils, which are generally empowered to enact regulations or by-laws governing matters such as water and sewage, land use, building construction, fire prevention, street lighting, parking, recreation, community economic development, animal control, heritage buildings, noise and other nuisances, and administration of the municipality, all of which are commonly referred to as "local" matters. Municipalities are also often consulted by the relevant provincial authority in the context of other areas of provincial jurisdiction, such as liquor licensing.

Municipal by-laws (and/or administrative orders) are available for examination at municipal clerk offices. Unofficial versions of municipal by-laws of most major centres are also published or available through each municipality's official website. However, the particular municipality should always be consulted directly, to confirm the nature of any relevant regulation or by-law that may exist.

DEVELOPMENT AND PLANNING

Land use planning and development control are governed by provincial planning legislation in all the Atlantic provinces. Planning legislation provides for the development by municipalities of municipal plans which set out statements of policy with respect to the future development and use of land, including such factors as conservation, abatement of pollution, development of communications and transportation systems, and provision of municipal services. Municipalities are generally prevented from undertaking future developments in a manner that is inconsistent with their municipal plans.

In Nova Scotia, the MGA includes six Provincial Interest Statements, and municipalities may not adopt a municipal planning strategy ("MPS") that is inconsistent with a provincial Statement. Nova Scotia also has provincial Subdivision Regulations which apply to every municipality and they set out the framework for subdividing land; municipalities may also enact their own subdivision by-laws.

In addition to the municipal plan, municipalities are often required to adopt a development scheme setting out in greater detail whether certain lands are to be designated for industrial, commercial, or residential use. Zoning by-laws adopted by municipalities must be consistent with their municipal plans and development schemes.

An MPS may also provide that certain types of development are enabled by a development agreement negotiated between a council and developer.

Development proposals that do not conform with zoning by-laws are prohibited, unless the use or structure is legally non-conforming or the developer is able to obtain a variation to the zoning by-laws for the proposed development. This process typically involves public notice to affected citizens and neighbours and the opportunity for them to state their objections. When granting a variance, municipal councils can impose reasonable terms and conditions. Municipalities are able to change their municipal plans, but the process is lengthy and requires public input and ministerial approval.

It is important to determine the zoning of property before commencing any type of development to ensure that it is compatible with the municipal plans and by-laws in use, siting and form. At a minimum, appropriate permits must be secured; more complex projects may require public hearings and council approval. Failure to seek and obtain municipal approval can result in stop work orders, as well as prosecution under the particular municipal legislation or regulation. Decisions made by municipal councils are subject to review (in certain specified circumstances) by local appeal boards or by provincial superior courts with the potential for further court appeals.

In some provinces, there may be provincial areas which are not within municipal boundaries and are not subject to municipal regulation. However, such lands may still be subject to development restrictions. For example, the use of Crown lands is subject to many limits; private development on First Nations reserves also has unique considerations. As well, lands may be subject to various licensing restrictions, such as those contained in forestry and mineral licences.

In Prince Edward Island, land holdings are regulated under the *Lands Protection Act*. Corporations and non-residents cannot hold more than five acres of land or 165 feet of shore frontage without first obtaining Executive Council approval. The Executive Council commonly approves acquisitions of parcels over five acres or in excess of 165 feet of shore frontage, but often imposes non-development conditions on the parcel to limit future subdivision and commercial use. The other Atlantic Provinces do not have similar legislation.

Development of condominium projects attracts additional considerations, requiring not only compliance with municipal plans and by-laws but also compliance with condominium legislation and, in some provinces, specific approval processes relating to condominium development. In Nova Scotia, the absence of air rights legislation presents certain challenges, particularly when developing an in-fill condominium. Specific legal advice from local counsel should therefore be sought regarding the development of any lands in the Atlantic region.

MUNICIPAL TAXATION

Municipalities are generally required and authorized by provincial legislation to impose real property taxes. The rate of taxation imposed on non-residential

properties is usually higher than for residential properties. These municipal taxes help pay for services offered by municipalities to their citizens, including policing and fire services, sidewalks, recycling and garbage collection.

Municipalities in the province of Newfoundland and Labrador are also required to impose an annual business tax on businesses operating in the municipality. In Nova Scotia, there are separate charges for residential and commercial properties (further classified as urban, suburban or rural in HRM) plus additional area rates within a district. There is also a special municipal taxation regime for wind energy.

Individual municipalities set their own municipal tax rate, arising out of their annual budgeting procedures. Property and business taxes are normally based on a set rate multiplied by the assessed value of a property. Rates and taxation practices vary from municipality to municipality, so inquiries should be made of the specific municipality to ascertain precise tax levels and obligations.

Property assessments for most municipalities are carried out by provincial bodies under provincial assessment legislation. Appeal mechanisms exist whereby property owners can challenge assessments, although appeal periods are exceedingly tight and stringently enforced.

Legislation often allows for businesses to enter into tax agreements with municipalities, specifying certain rates of taxation for certain years. Many larger companies will negotiate these agreements with municipalities, as it provides certainty from abrupt increases in rates. Tax agreements are certainly worth considering, especially if a business becomes the significant industry in a town, thus making the business the largest target for tax revenue. In Nova Scotia, municipalities are generally prohibited from entering such tax agreements but the provincial government has entered such arrangements whereby grants in lieu of municipal taxes are set for large enterprises.

CHAPTER 16

ABORIGINAL LAW

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CHAPTER 16

ABORIGINAL LAW

This chapter provides a brief introduction to the key issues concerning Aboriginal title and treaty rights in Atlantic Canada and examines how these issues may affect businesses in the region.

To understand the importance of Aboriginal law in Atlantic Canada it is helpful to first review the key constitutional and statutory provisions. It is also important to remember that this area of the law is anything but static, with new legislative developments, more movement towards Aboriginal self-government, and increased economic interaction between private industry and Aboriginal groups happening all the time. The intersection between general commercial law and Aboriginal law is not always considered, but a proactive approach may make for more streamlined, efficient, and cost-effective business dealings.

CONSTITUTIONAL AND STATUTORY FRAMEWORK

Constitution Act, 1867

Section 91(24) of the *Constitution Act, 1867* assigns exclusive legislative authority over "Indians, and Lands reserved for the Indians" to the federal government. Section 91(24) has been interpreted to include federal jurisdiction over the Inuit, as well as the jurisdiction to negotiate treaties with Aboriginal groups and exclusive jurisdiction over land held pursuant to Aboriginal title. But the jurisdiction under section 91(24) is narrower than it may appear, given the extensive provincial legislation that will also apply to First Nations.

To date, the federal government has taken the view that section 91(24) does not convey jurisdiction over the Métis, but the Federal Court of Appeal has recently held that the Métis *are* included in section 91(24), which could lead to changes in the federal government's relationship with the Métis. However, the decision will likely be appealed to the Supreme Court of Canada, so the constitutional status of the Métis may be in flux for the foreseeable future.

The more recent legislative efforts of the federal government appear geared towards delegating more authority to First Nations themselves.

Indian Act

The federal *Indian Act* is a specific exercise of the federal government's constitutional authority over "Indians, and Lands reserved for the Indians." The *Indian Act* defines who is an "Indian" and, with a few exceptions, it applies to all registered Indians and band governments across Canada.

It should be noted that the term "Indian" in reference to Aboriginal people is now considered to be an out-of-date term; however, the term "Indian" has yet to be replaced in the *Indian Act*, so it continues to be used in reference to that statute.

Although the Inuit are deemed to be "Indian" for the purposes of federal jurisdiction under section 91(24) of the *Constitution Act, 1867*, they are not subject to the *Indian Act*. The Métis and non-registered Indians are also not covered by the *Indian Act*. (Note, however, that status under the *Indian Act* may not necessarily coincide with an individual person's cultural identification with a particular band.)

Much of the *Indian Act* relates to reserve lands. The underlying title to reserve lands remains with the federal Crown, which strictly curbs the ability of First Nations bands to alienate their land. There are two main, legally authorized ways for non-band members to acquire a property interest on a

reserve: through a temporary permit or through a designation, which is a form of surrender. The *Act* provides procedures for both, and currently, each route requires the extensive involvement of Aboriginal Affairs and Northern Development Canada.

The *Act* also contains provisions on the distribution of property on death (wills and intestacy), "mentally incompetent Indians", guardianship of infants, financial management, taxation, education, band elections and the authority of band councils to make by-laws.

First Nations Land Management Act

The *First Nations Land Management Act* ("FNLMA") enables First Nations to develop their own regimes for managing land, resources and the environment, through a multi-stage process that can be quite lengthy.

The *FNLMA* regime is meant to promote First Nations economic development and business endeavours. No First Nations in Atlantic Canada currently have a land code in force, but several are either at the "developmental" or "interested" stage and evolution in this area is expected over the next few years. Where a First Nation has developed its own land code, the reserve-related provisions of the *Indian Act* no longer apply.

Constitution Act, 1982

Section 35 of the *Constitution Act, 1982* expressly "recognized and affirmed" existing Aboriginal and treaty rights, including rights stemming from historic treaties and modern land claims agreements. "Aboriginal peoples of Canada" is defined to include the "Indian, Inuit and Métis peoples of Canada."

Prior to 1982, Aboriginal rights existed at common law but were subject to extensive restriction by the federal Crown and could be extinguished unilaterally by the government where it had a clear and plain intention to do so. This changed in 1982 with section 35. The entrenchment of these rights in the Constitution, and the case law interpreting section 35, have afforded increased protection to distinctive features and customary practices of First Nations and made it more difficult for governments to intrude in these areas, as will be discussed more below. The Crown owes fiduciary duties to Aboriginal peoples under section 35, which means that the Crown will have to justify any legislation, regulations or conduct that infringes Aboriginal rights and/or Aboriginal title.

Canadian Charter of Rights and Freedoms

The *Canadian Charter of Rights and Freedoms* (the "*Charter*") as a whole applies to Aboriginal peoples in Canada, but certain provisions in particular should be highlighted.

Section 25 of the *Charter* states that the rights and freedoms guaranteed under the *Charter* are not to abrogate or derogate from any Aboriginal, treaty, or other rights or freedoms pertaining to Aboriginal peoples of Canada. The purpose of this interpretive provision is to protect Aboriginal rights from being infringed or impaired by *Charter* rights or freedoms. Section 15(2) of the *Charter* has a wider but similar function, protecting a "law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups" from being found discriminatory.

Section 25 does not stand alone, however, and must be read in conjunction with other sections of the *Charter*, including section 1 which provides that the rights and freedoms set out in the *Charter* are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Recent Federal Statutory Developments

This is another fluid area of Aboriginal law. The federal government has recently enacted legislation governing matrimonial property on reserves, and has also proposed legislation on First Nations education. Both aim to give First Nations more control over these areas.

The Application of Provincial Statutes

It has been discussed that section 91(24) of the *Constitution Act, 1867* gives Parliament the exclusive power to make laws related to "Indians, and Lands reserved for the Indians." Historically, one effect of this constitutional authority was to limit the application of certain provincial statutes to First Nations and to reserve lands.

Determining whether and which provincial statutes apply to reserve lands can be a complicated process. There are two options: provincial laws may apply "*ex proprio vigore*" (of their own force) – the usual route – or via section 88 of the *Indian Act*. It is difficult to provide a comprehensive list of which provincial statutes will or will not apply, and extra care should be taken where the provincial law relates to land. However, the law seems to be moving towards a general assumption that the provincial legislation applies, unless there is a specific interference with Aboriginal interests that cannot be justified.

This is certainly the case where the land is held under Aboriginal title. The Supreme Court of Canada has recently said that "provincial laws of general application" will be presumed to apply to land held under Aboriginal title, unless the provincial law breaches the Aboriginal right to the land. A breach will be proven if the provincial legislation is unreasonable; imposes undue hardship on the Aboriginal group; prevents the Aboriginal group from exercising its right over the land in its preferred manner; and cannot be justified by the province. It is unlikely that provincial laws governing matters like environmental protection would be found to unjustifiable infringe Aboriginal title, so legislation of that nature would likely apply.

ABORIGINAL TITLE

Sui Generis Land Interest

In Canada, Aboriginal title refers to a distinct type of proprietary land interest that arises from the occupation and use of land by Aboriginal societies prior to European settlement. It is often described as a *sui generis* interest, meaning that it is unique to Aboriginal people and Aboriginal culture.

Aboriginal title operates differently from typical proprietary land interests, in that:

- Title must be held by a community rather than an individual;
- The land interest is communal, where all members of an Aboriginal group have a collective right to the land interest;
- The root of Aboriginal title is not traced from a Crown grant but traced from the first occupancy of land by an Aboriginal group seeking entitlement; and

- The land interest cannot be sold, transferred or surrendered to anyone other than the Crown and third parties can only acquire an interest in such lands from the federal government with the consent of the Aboriginal group in question.

Once established, Aboriginal title confers the exclusive right to the land itself to an Aboriginal group, as well as the right to the economic benefit of the lands and resources and the right to decide how those lands will be used.

Aboriginal groups may use the land for a number of modern-day uses provided that the activity is reconcilable with the group's historical attachment to the land.

Establishing Aboriginal Occupancy

To successfully assert Aboriginal title, an Aboriginal group must satisfy the "exclusive occupation test" established in the Supreme Court of Canada decision of *Delgamuukw v. British Columbia*:

- The land must have been occupied by the Aboriginal group prior to British sovereignty;
- If present occupation is relied upon as proof of pre-sovereignty occupation, there must be continuity in the possession between the present and the pre-sovereignty occupation; amd
- At the time of sovereignty, the occupation must have been exclusive.

Proof of occupancy must be grounded in both common law and Aboriginal perspectives on the land, including any systems of law respecting the land that an Aboriginal society had in place at the time of sovereignty.

Factors such as the size of the Aboriginal group claiming entitlement, the group's manner of life, material resources, technological abilities and the character of the lands claimed are each considered when determining whether occupation is sufficient to ground title. Typically, exclusive occupancy is established by showing regular occupancy by a group or use of definite tracts of land for hunting, fishing or exploiting resources.

While at least one Canadian court has ruled that the existence of private interests on land cannot extinguish Aboriginal title, it is still uncertain how Aboriginal title will be reconciled with the interests of private land owners, since the courts are only beginning to deal with these types of issues.

Infringing on Aboriginal Title

The test for determining whether legislation or an action interferes with an existing Aboriginal or treaty right is comprised of three questions:

1. Is the limitation on the right by legislation or action reasonable?
2. Does it impose undue hardship?
3. Does it deny the rights of holders their preferred means of exercising the right?

The burden of infringement is low and will be established if any of these questions is answered in the negative.

Only the federal government has jurisdiction to extinguish Aboriginal title, but both the federal and provincial governments have

the power to infringe upon Aboriginal title provided the infringement is justifiable.

To be constitutionally justifiable, the Crown must demonstrate, in a two-part test, that:

- An infringement of Aboriginal title must be pursuant to compelling and substantial objectives. This includes development of agriculture, forestry, mining, hydroelectric power and other land resources; and
- The actions comprising the infringement must be consistent with the federal government's fiduciary duty toward Aboriginal people. These fiduciary obligations include the duty to consult with Aboriginal groups. A review of some of Atlantic Canada's current consultations with Aboriginal groups is included later in the chapter.

TREATY RIGHTS

Most of Atlantic Canada's Aboriginal treaties have existed for over 250 years. They raise many unique and complex historical and interpretative issues, and litigation over those rights tends to be prolonged and expensive.

In the last 25 years, Canadian courts have provided guidance on the nature and scope of the Aboriginal rights conferred by these treaties in several important cases. However, many questions about the extent of those rights and their implementation have yet to be answered. Negotiation processes designed to address these and other issues are underway in all the Atlantic Provinces, but they are in their early stages.

Under Canadian law, any written agreement between the Crown and competent representatives of an Aboriginal people which imposes mutually binding obligations is a "treaty". The Supreme Court of Canada has, however, emphasized that First Nations treaties are more than mere contracts – they contain an exchange of solemn promises of a special, public, nature – and must be interpreted broadly, in their full historical context, and in a manner most favourable to Aboriginal people.

All Aboriginal treaty rights existing as of April 17, 1982 are protected by s. 35 of the *Constitution Act*. To be covered by this section, a treaty right must not have been surrendered or expressly extinguished by the Canadian government before that date.

Even a constitutionally protected treaty right is not absolute. The Canadian and provincial governments can continue to enact statutes and regulations, and make decisions, that affect these rights as long as they can be "justified" (i.e. for conservation or other compelling and substantial public interest reasons). In order to establish justification, government must also fulfill its duty to consult.

There are two main types of Aboriginal treaties in Canada – "historic" and "modern". Between 1713 and 1779, the British Crown entered into several "historic" treaties with representatives of the Aboriginal communities which occupied Atlantic Canada at the time. Over the past 30 years, Canadian governments have also concluded several much more comprehensive and detailed "modern" Aboriginal treaties with First Nations across the country.

"Historical" Treaties

The region's historic treaties include a number of very similar "peace and friendship" treaties which were entered into by the British Crown and the Mi'kmaq and Maliseet people. In the 1700s, the Mi'kmaq occupied parts of Nova Scotia, New Brunswick, and Prince Edward Island, while the Maliseet resided along the St. John River in New Brunswick.

These treaties are brief and difficult to interpret. Their prime objective was to put an end to ongoing hostilities and to make way for British settlement in the region, and to ensure that Aboriginal peoples would be free to carry on their hunting, fishing and other traditional activities without interference.

Most notably, under these treaties (unlike those entered into later in the more western parts of Canada) the Aboriginals did not surrender any land or other resource claims. The application of these treaties within certain areas of Atlantic Canada is not free from doubt. For example, whether any such a treaty was signed by any authorized representative of the Mi'kmaq who occupied Prince Edward Island has been the subject of debate. The Newfoundland Court of Appeal has also denied a Mi'kmaq claim that they acquired a right to hunt, fish and trap in a reserve located in the northern part of that province under these treaties (*Drew*, 2006). In its view, these treaties do not apply in that province. The Supreme Court of Canada denied leave to appeal in that case.

In two landmark decisions which originated from Nova Scotia, the Supreme Court of Canada found that, under these treaties, the Mi'kmaqs acquired a communal right to engage in traditional 1760 trading (and associated harvesting) activities, to the extent required in order to sustain a moderate livelihood (*Marshall I*, 1999).

It did, however, emphasize that this right did not allow the open accumulation of wealth (*Marshall II*, 1999). The Supreme Court of Canada has also recognized that Aboriginals had a right to fish for food, social and ceremonial purposes on their traditional lands (*Sparrow*, 1996).

In another case, which involved New Brunswick and Nova Scotia, that Court refused to extend this right to include commercial logging. In its opinion, logs were not a product that the Aboriginals traditionally traded with the British in 1760. The Court pointed out that treaty rights are not "frozen in time" but the contemporary activity claimed must have logically evolved from a 1760 activity (*Marshall III*, 2005). This decision makes it unlikely that these treaties will be extended to cover resources such as mineral and offshore petroleum deposits.

"Modern" Treaties

"Modern" Canadian treaties typically contain some ceding of Aboriginal rights in exchange for hunting, fishing, trapping or other rights, participation in the management of resources, and compensation. The self-government of Aboriginal peoples may also be addressed. These agreements can have a significant impact on, for example, development projects in the region because they may affect land tenure and regulatory and permitting regimes. They may also impose additional requirements for consultation or negotiation with First Nations communities.

In conducting negotiations with Aboriginal peoples, government is under an obligation to uphold the "honour of the Crown" (e.g., to negotiate in good faith and to avoid sharp dealings).

The Supreme Court of Canada, in its decisions, has encouraged the settlement of treaty and other Aboriginal rights and claims by negotiation rather than litigation. In response, the governments of New Brunswick, Nova Scotia and Prince Edward Island (collectively, the "Maritimes") and Canada and have undertaken discussions with Mi'kmaq and Maliseet groups in their provinces.

Several agreements of a preliminary and procedural nature have been signed between the Mi'kmaq and the Nova Scotia and Prince Edward Island governments. Although the federal government did take steps to speed up the negotiation process in 2012, it is unlikely that these processes will conclude in the near future.

In Newfoundland and Labrador, the federal and provincial governments and the Inuit of Labrador, after 15 years of negotiations, successfully concluded a comprehensive agreement that covers a large area of northern and eastern Labrador in 2005. Negotiations are still underway with the Innu Nation of Labrador.

AN OVERVIEW OF THE DUTY TO CONSULT

The Supreme Court of Canada has held that the "honour of the Crown" imposes on the federal and provincial governments a duty to consult ("DTC") with Aboriginal groups in respect of any proposed action that could infringe upon a group's Aboriginal rights, treaty rights, and potential or established Aboriginal title. The DTC has given rise to a developing body of case law interpreting its exact content and meaning; mining and hydro projects have been especially contentious.

The case law requires the federal and provincial governments to give priority to Aboriginal and treaty rights and, as such, the duty to consult exists independently from other public consultation requirements. This means that simply including Aboriginal groups in a public review process in some circumstances may not be sufficient to discharge the governments' obligation to consult, and a separate and distinct consultation process may be required.

There are four main steps to the DTC process: the trigger; determination of the scope of the DTC; the actual process of consultation; and accommodation. What each step of the process will look like depends on the facts of the case, the nature of the project, the parties' interest in negotiating, etc.

There is a low threshold to trigger the DTC. In general, this will happen when the Crown contemplates certain conduct and it has the *actual* or *constructive* knowledge that this conduct *might* "adversely affect an Aboriginal claim or right," even if the claim or right has not yet been established in prior court proceedings. The scope of the duty is variable, however, and in circumstances where rights or title are claimed, but not yet proven in court, the manner and degree of consultation required may depend on the strength of the Aboriginal group's claim. In other words, there is a "spectrum" of consultation and accommodation.

In the specific context of Aboriginal *title*, the spectrum of required Crown conduct may

range from good faith consultation with a group claiming Aboriginal title and appropriate accommodation of its claimed interest (e.g., preserving the area until the claim is resolved), to the potential cancellation of a project where an Aboriginal group has established title to the land in question and the Crown conduct would unjustifiably infringe that title.

The Crown can only justify an interference with land held under Aboriginal title by proving that (a) it has fulfilled its DTC and (b) the proposed activity is *necessary* to achieve a legitimate government goal; the activity will *minimally impair* the Aboriginal interest in the land; and the expected benefits of the project are *proportionate*, meaning that they "are not outweighed by adverse effects on the Aboriginal interest." (This justification process will not be necessary if the Aboriginal group *consents* to the proposed Crown activity on the land.)

There is some indication that the Crown will have to contribute "capacity funding" to Aboriginal groups to facilitate their meaningful participation in the consultation process. Some provinces have established a direct funding mechanism for consultation, and in other cases, funding has been provided as part of the overall public consultation process for a project.

If the Crown breaches its DTC, the Aboriginal group has several possible remedies at its disposal: the group may try to get a government decision quashed; move for an injunction to suspend the Crown project; seek a court order forcing the Crown to consult; or sue for damages.

The Duty to Consult and Project Proponents

The most contentious area of late has been the role of private industry project proponents in the process of consultation, and whether and to what extent they share responsibility with the Crown to accommodate Aboriginal interests. There has been litigation by Aboriginal groups *against* proponents and, more recently, by proponents against the government. According to the Supreme Court of Canada, the Crown can delegate the operational/procedural "on the ground" aspects of the DTC, but the permissible extent of this delegation will continue to be fleshed out by the courts.

In practice, government regulators and decision makers are placing increased consultation obligations on private industry. Although the DTC is ultimately the Crown's responsibility and case law emphasizes the role of government in the consultation process, governments are placing increasing pressure on private companies to also consult with Aboriginal groups and to go beyond existing regulatory and corporate requirements. There are also several government policies in place, including in Atlantic Canada, that may outline duties of project proponents; these are an important source of information to review before embarking on projects that have the possibility of affecting Aboriginal groups.

Any authorizations or regulatory approvals granted by government without requisite satisfaction of consultation obligations are subject to legal challenge and can be quashed and remitted to the responsible government departments for reconsideration. Furthermore, a breach of the DTC may also entitle the First Nation to

injunctive relief, damages, or simply to further negotiations.

Disputes over the DTC process can cause delay and increase costs for project proponents. However, many proponents have willingly entered into negotiations as part of the DTC and worked with Aboriginal communities to reach Impact and Benefit Agreements ("IBAs"), which can lead to benefits on both sides, enabling proponents to continue with projects but also bolstering community and economic development for First Nations.

BUSINESS RELATIONS BETWEEN INDUSTRY AND ABORIGINAL GROUPS

An Overview

For practical and business reasons, private companies have been increasingly active in working with Aboriginal groups in situations where they are contemplating a significant project on lands traditionally claimed by an Aboriginal group. This has often involved the negotiation of IBAs between the company and the Aboriginal group, or other cooperative business relationships, including partnerships, corporate structures or joint ventures. In some cases, the existence of a comprehensive land claims agreement may specifically mandate the negotiation of an IBA, or other requirements, in order for a project to proceed on affected lands.

For the offshore oil and gas industry, for instance, there is no requirement for an IBA but the Offshore Accord legislation in place in Newfoundland and Labrador and Nova Scotia provides that the regulator may require developers to prepare benefits plans which include provisions that enable "disadvantaged groups" to have access to training and employment opportunities.

In many circumstances, the *Indian Act* will have a prominent role to play in determining the shape of any business relationship between industry and Aboriginal groups. This is because the *Indian Act* affects such matters as Aboriginal property ownership, commerce, and land possession, and as such, is likely to play a role in many proposed business opportunities involving Aboriginal groups.

In the Maritimes, which is broadly an area subject to historical rather than modern treaties between Aboriginal groups and government, there are unsettled Aboriginal land claims and the common law continues to evolve in response to questions of Aboriginal land rights in the development context. The "peace and friendship treaties" (1760-1761) signed by the Mi'kmaq and Maliseet people in the Maritimes have been found to have not ceded rights to land and other resources, so any business relationship between industry and Aboriginal groups must take this dynamic rights situation into account. Conversely, in Newfoundland and Labrador, more recent agreements between Aboriginal groups and governments have been negotiated. This is discussed in more detail in the following section.

Attempting to be as informed as possible about the specific historical and modern elements which will shape the business relationship between industry and Aboriginal groups is likely to lead to more successful relations between industry and Aboriginal groups.

Land Claims Agreements in Atlantic Canada

The Labrador Inuit Land Claims Agreement and the Labrador Innu Agreement-in-Principle

On the island of Newfoundland and Labrador, there is a vibrant Mik'maq community in the western, southern and central parts of the island, primarily concentrated in the Miawpukek First Nation reserve of Conne River, although the "landless" Qalipu Mi'Kmaq First Nation Band has also recently been created.

The greater proportion of the Aboriginal population in the province is found further north in Labrador, and Aboriginal consultation issues often arise here due to the extensive mining and hydro-electric development in the region.

In recent years, both the Labrador Inuit and Labrador Innu have negotiated comprehensive land claims agreements, which have many potential impacts for those developing ventures or carrying on business in the affected lands.

Presently, there is a concluded land claims agreement between the federal and provincial governments and the Labrador Inuit, known as the Labrador Inuit Land Claims Agreement, which provided for the creation of the Nunatsiavut Government as a self-governing body. The provincial *Labrador Inuit Land Claims Agreement* and its federal equivalent, the *Labrador Inuit Land Claims Agreement Act,* have been enacted to ratify the agreement. Since the conclusion of the agreement, various provincial and federal statutes have also been amended to honour the agreement to ensure that its contents maintain precedence over any subordinate legislation.

In addition, the Labrador Innu are in negotiations with the federal and provincial governments towards the completion of their own comprehensive land claims agreement and, on November 18, 2011, an Agreement-in-Principle was signed. While non-binding, this Agreement-in-Principle provides guidance as to the structure and content of the final comprehensive agreement.

Both the concluded Labrador Inuit Land Claims Agreement and the Labrador Innu Agreement-in-Principle provide for different levels of Aboriginal influence and rights in different designated areas, and each designates affected lands in a similar way. Two of the key categories of lands include the following:

- Lands and waters have been designated as forming part of the "Labrador Inuit Settlement Area" or "Labrador Innu Settlement Area" ("LISA"), wherein the Labrador Inuit and Labrador Innu will respectively have an enhanced set of rights; and
- Smaller subsets of Labrador Inuit and Labrador Innu lands have been designated respectively as "Labrador Inuit Lands" or "Labrador Innu Lands" (collectively, "LIL"). In LIL, the Labrador Inuit and Labrador Innu will not only have enhanced rights, but also the jurisdiction to make their own laws on certain subjects.

In addition to LISA and LIL, both agreements also designate certain areas as economic development areas, where the relevant group will have the right to certain negotiated benefits (under an IBA) in respect of major developments in the subject lands.

Other Aboriginal Interests in Labrador

Apart from the Labrador Inuit and Labrador Innu, other important Aboriginal interests in Labrador include the Aboriginal persons represented by NunatuKavut Community Council Inc. and various Québec-based Innu groups asserting rights in the province.

The Aboriginal persons represented by NunatuKavut Community Council Inc. have set out the basis for their claim in a detailed documented titled "Unveiling NunatuKavut". While this claim has not been finally accepted for negotiation by the federal or provincial governments, the Newfoundland and Labrador Court of Appeal has previously recognized a Crown duty to consult its predecessor, the Labrador Métis Nation, and it has been an active litigant in recent years.

Similarly, while the Québec-based Innu groups' claims have not been accepted for negotiation by government, some of these groups have been active litigants in recent years, and some project proponents in Western Labrador have negotiated agreements with them.

For more information on Labrador, please see Chapter 17.

Aboriginal Consultation Policies

In April 2013, the Government of Newfoundland and Labrador released its "Aboriginal Consultation Policy on Land and Resource Development Decisions" (the "Policy"). The Policy is the product of consultations with Aboriginal groups, industry stakeholders and the public and is widely seen as a result of consultation claims arising from the Labrador Trough mining projects and the Lower Churchill Hydro Project.

The Policy applies broadly to all "land and resource development decisions that have the potential to adversely impact asserted Aboriginal rights or asserted treaty rights". Its objective is for decisions to "minimize or, where reasonably practicable, eliminate adverse impacts on asserted rights".

The Policy applies to those Aboriginal groups that have asserted claims in Labrador that have not been recognized or accepted for negotiation. Such groups include the NunatuKavut Community Council, the Québec-based Naskapi Nation of Kawachikamach and the communities of Matimekush-Lac John, Uashat Mak Mani-Utenam, Ekuanitshit, Nutakuan, Unamen Shipu and Pakua Shipi (all of whom are specifically named in the Policy).

Under the Policy, key expectations for proponents include: discussing potential adverse impacts with key members of Aboriginal group(s); considering how to mitigate or eliminate impacts, in light of the obligation to "make reasonable efforts" to do so; and entering dialogue with Aboriginal groups to address project-specific opportunities, with the goal of achieving "a positive, sustainable, mutually beneficial outcome".

For Aboriginal groups, key expectations include: to outline specific rights/interests being affected; to respond to requests for input promptly; to share traditional land-use information; and to work with the government and proponents "to find solutions or constructive approaches" to address concerns raised.

The Policy contemplates the creation of detailed Consultation Guidelines which are expected to provide further guidance as to the Policy's application, but as of April 2014 they had not yet been released.

In New Brunswick, the official Duty to Consult Policy, released by the provincial government in November 2011, provides that "the Government of New Brunswick will consult with First Nations before an action or decision is taken that may adversely impact Aboriginal and treaty rights", as per section 35 of the *Constitution Act, 1982*. This policy is based on five governing principles for consultation, namely integrity and good faith, mutual respect, the government's duty to consult, reciprocal responsibility, and transparency and accountability. This policy also complements the Mi'kmaq, Maliseet, and Province of New Brunswick Relationship Building Bilateral Agreement, which was signed on June 22, 2007, which provides a framework for the Aboriginal communities of New Brunswick and the provincial government to deal with issues, including development, in a mutually respectful, productive manner.

There is currently an Interim Consultation Policy in Nova Scotia, released on June 19, 2007 and intended to govern the consultation work of provincial government departments. This interim policy applies where Aboriginal title, Aboriginal rights, and/or treaty rights are claimed. A final, more comprehensive policy was expected in 2013 but as of April 2014 had not yet been released.

In the meantime, there are three other documents that third parties should consider when about to embark on projects that could affect Aboriginal groups:

- The *Memorandum of Understanding* between Canada and Nova Scotia, signed in October 2012, which affirms federal-provincial plans to cooperate on matters regarding consultation;
- The *2010 Terms of Reference* for a Mi'kmaq-Nova Scotia-Canada Consultation Process, between the Mi'kmaq of Nova Scotia as represented by the Thirteen Mi'kmaw Saqmaq, Nova Scotia, and Canada and establishing an optional but preferred consultation process; and
- *The Proponents' Guide: The Role of Proponents in Crown Consultation with the Mi'kmaq of Nova Scotia*, which was most recently revised in 2012.

This Guide advises project proponents, identified as including "private industry, consulting firms, government departments and municipalities," on how to fulfill the procedural aspects of consultation that may be delegated to them in accordance with the case law on duty to consult (but is not meant to take the place of legal advice). It is clear that the provincial Crown maintains ultimate responsibility for the consultation process. The *Guide* stipulates that it will be especially relevant for proponents undertaking an Environmental Assessment under the Regulations to the *Environment Act*, but will also apply more generally.

The *Guide* sets out four *principles* of engagement – "mutual respect"; "early engagement"; "openness and transparency"; and "adequate time to review/respond" – and outlines six *steps* of engagement for proponents: notifying the relevant Mi'kmaq communities before beginning the project; providing as much

information as possible to the Mi'kmaq communities, including scope, location, and potential impacts of the project; meeting with the affected Mi'kmaq communities; completing a "Mi'kmaq Ecological Knowledge Study" ["MEKS"] if the province requires, in accordance with the Assembly of Nova Scotia Mi'kmaq Chiefs' MEKS Protocol; addressing potential impacts, which may include providing funding to the Mi'kmaq community to assist with their review of the proposal, and developing strategies to minimize potential adverse effects; and, finally, documenting the engagement process and updating the province on same. Proponents are advised that Benefit Agreements with Aboriginal groups are considered a "best practice."

As of publication, all of these documents were available on the Province of Nova Scotia's Aboriginal Affairs website [http://novascotia.ca/abor/]

In Prince Edward Island, the provincial government developed the Provincial Policy on Consultation with the Mi'kmaq in 2009, with the guiding principle that "policies or guidelines for consultations with Aboriginal peoples must ensure that the duty to consult is fulfilled in a way that is consistent with current legal decisions and will consider individual communities' traditions and consultation requirements". A landmark Consultation Agreement was signed by the Mi'kmaq, the Prince Edward Island provincial government and the federal government in August 2012, which established a consultation process with Prince Edward Island's Mi'kmaq.

CONDUCTING BUSINESS ON RESERVES

Various differences exist when conducting business in relation to Aboriginal reserves and Aboriginal groups as opposed to private land and private land owners. The key differences relate to taxation and financing.

Taxation

Despite what many Canadians may believe, Aboriginal people are not generally exempt from taxation. Exemptions which do exist extend only to status Indians as defined in the *Indian Act*. In addition, exemptions only apply in relation to reserve lands and personal property of Indians situated on a reserve. The relevant federal exemptions are provided for in the *Indian Act*.

Some provincial statutes make special provision for the exemption of Indians and Indian lands with regard to various types of provincial taxation. Provincial taxation laws must always be measured against the *Indian Act*, as any provincial law which imposes a tax where the federal act provides an exemption is invalid.

The tax treatment of status Indians has been somewhat fragmented. One of the more disputed issues with respect to taxation includes the treatment of employment income. Section 87 of the *Indian Act* generally exempts personal property of an Indian situated on a reserve and the courts have held that employment income of status Indians is property for the purposes of section 87. As such, employment income earned on-reserve may not be subject to income tax if the employee is a status Indian. Generally speaking, where pension or other benefits are associated with exempt employment

income, these other benefits will also be exempt.

The difficulty is in determining whether the employment income is "situated on reserve" for the purposes of section 87. While the courts have developed the "connecting factors" test to address this issue, and the Canada Revenue Agency has published certain guidelines outlining its treatment of the issue, the approach taken by the courts has not always been consistent. It is clear, however, that it will be very difficult to obtain a taxation exemption where employment duties are performed off-reserve, even if the employer is situated on-reserve, and it will be recalled that only status Indians under the *Indian Act* have access to such exemptions.

Section 87 of the *Indian Act* also has the effect of exempting personal property situated on a reserve from provincial and federal sales taxes. Where goods are purchased off-reserve but are delivered to the reserve and are to be consumed on-reserve, the general rule is that they are exempt. Examples of this include food, furniture, cars, etc. That being said, the federal and provincial governments frequently challenge the treatment of off-reserve purchases.

Services provided to an Aboriginal person living on-reserve and which are performed entirely on-reserve will be considered to have been situated on the reserve. As such, they are not subject to sales and services tax.

Various other tax exemptions exist for certain commodities purchased by Aboriginal people. For example, provincial gasoline taxes and tobacco taxes may not be imposed when these items are purchased by Indians on-reserve. Tax exemptions will not generally extend to Aboriginal persons who live off-reserve if they do not consume the goods or services on-reserve.

It is also notable that Aboriginal bands may make their own taxation by-laws for people and businesses on-reserve.

Businesses should always seek professional tax advice before dealing with situations involving tax exemptions.

Financing

Aboriginal people and bands living on-reserve often experience considerable difficulty in obtaining financing. This is mainly due to the fact that pursuant to section 89 of the *Indian Act*, the real and personal property of Aboriginal people or bands located on-reserve cannot be used as security or collateral, nor can it be seized by anyone other than an Aboriginal person or a band.

Section 90 of the *Indian Act* also exempts from seizure personal property which was given to Aboriginal people or bands by the Crown pursuant to a treaty or agreement between a band and the Crown. The courts have ruled that modern treaties and land claims agreements are covered by this section, meaning that any personal property conveyed by the Crown to an Aboriginal group under such a treaty or agreement will be exempt from seizure.

Accordingly, Aboriginal people living on-reserve may have a difficult time providing security for loans without the assistance of government or corporate guarantees.

There are, however, a number of exceptions which businesses should be aware of:

- Leasehold interests in land designated by an Aboriginal community for leasing purposes can sometimes be mortgaged.
- Personal property purchased under a conditional sales contract can be seized as ownership remains with the vendor until receipt of payment.
- Aboriginal people or bands may act as assignees or trustees for a non-Aboriginal financier.
- Corporate property is not exempt from seizure. As such, an Aboriginal person who seeks financing may be asked to incorporate a company. It should be noted, however, that the corporation is taxable.

CHAPTER 17

BIG LAND

STEWART McKELVEY
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CHAPTER 17

BIG LAND

Stewart McKelvey has had a long and historic connection with Labrador, the “Big Land”. Notably, our predecessor firm Higgins, Hunt and Emerson acted as counsel and solicitors to the colonial Government of Newfoundland in the 1927 Labrador Boundary Dispute with the Dominion of Canada.

In that case, the Judicial Committee of the Privy Council decided the Labrador boundary question in Newfoundland's favour, effectively granting the 112,000 square mile territory of Labrador to Newfoundland. Labrador was ultimately brought into Canada under the April 1, 1949 Terms of Union between Canada and Newfoundland. In 2001, in recognition of Labrador's importance, the Province of Newfoundland was renamed to be the Province of Newfoundland and Labrador.

Labrador hosts world-class natural resources, including mines, water powers and forests. Development of these natural resources has resulted in significant economic and business growth in the region.

Labrador's legal landscape is somewhat singular. Businesses planning any kind of resource-based undertakings will need to be familiar with its unique aboriginal rights regime. Labrador is the home of numerous indigenous aboriginal groups, many of whose rights have been recognized and formalized. Of primary importance to those planning to carry on business there will be awareness of and respect for legitimate aboriginal title and rights claims.

For the Labrador Innu and the Labrador Inuit, aboriginal title and rights have been formalized by, respectively:

- the *Labrador Inuit Land Claims Agreement Act*, which establishes the Nunatsiavut Government's jurisdiction over Labrador Inuit lands; and
- the November 18, 2011 *Labrador Innu Agreement-in-Principle*, which identifies Innu lands and provides for Innu self-government.

Resource-based enterprises operating in the Labrador Inuit lands will need to be familiar with the permitting and land use regime administered for the Labrador Inuit by the Nunatsiavut Government. Relevant Nunatsiavut Government legislation includes the *Nunatsiavut Labrador Inuit Lands Act*, the *Nunatsiavut Environmental Protection Act* and the *Exploration and Quarrying Standards Act*. A full understanding of the land use regime contemplated by the *Labrador Inuit Land Claims Agreement Act* will also require knowledge of the Regional Land Use Plan developed thereunder.

The Province's *Aboriginal Consultation Policy* has application to unresolved aboriginal title and rights claims to areas of Labrador which have been asserted by the Nunatukavut Community Council (formerly the Labrador Métis Nation) and by the Quebec-based Innu groups known and described as the Naskapi Nation of Kawawachikamach and the Innu communities of Matimekush-lac John, Uashat mac Mani Utenam, Ekuanitshit, Nutakuian, Unamen Shipu and Pakua Shipi. The *Aboriginal Consultation Policy* prescribes the nature of proponent-led consultations which will be necessary prior to undertaking natural resource projects in the areas of Labrador which are subject to such unresolved claims.

Nalcor Energy's Lower Churchill Development Project, the multi-billion dollar

hydroelectric generation mega-project being built to develop the waterpowers on the lower part of the Churchill River in Labrador, is one of Canada's most significant ongoing resource developments. For those businesses seeking to participate in this project, a knowledge of the *Energy Corporation Act* will be necessary, in addition to an understanding of conventional permitting and licensing requirements under the law of Newfoundland and Labrador and, possibly, under federal immigration law. These subjects are addressed in other chapters of this publication.

For prospectors and mining enterprises intending to carry on mineral exploration and development in Labrador's vibrant mining sector, there are a number of key provincial enactments of relevance, including:

- the *Mineral Act* and *Mineral Regulations*, which govern the issuance of mineral exploration and mining rights and titles, including related surface titles;
- the *Mining Act* and the *Mining Regulations*, which regulate the establishment and operation of mining operations;
- the *Quarry Materials Act*, *1998* and the *Quarry Materials Regulations*, which regulate the issuance of quarry licences and permits; and
- the *Revenue Administration Act*, which sets out the mining and mineral rights tax regime of the Province.

For those businesses planning to engage in the Labrador timber harvesting sector, a good understanding of the regulatory regime enacted by the Province's *Forestry Act* and *Forest Protection Act*, and the regulations promulgated under this legislation, will be necessary.

Resource-based Labrador projects will of course also require environmental assessment and permitting under the Province's *Environmental Protection Act* and *Water Resources Act* and (for certain categories of projects) the *Canadian Environmental Assessment Act, 2012.* These matters are also discussed in the chapter of this publication entitled Environmental Law.

In addition to mastering the legal regime described above, Labrador businesses will need to overcome the challenges presented by Labrador's shorter construction, exploration and development season, its limited transportation infrastructure, and the logistical difficulties in locating and housing workers in the north. Undertaking business activities in Labrador will require patience and careful planning.

Stewart McKelvey's Labrador Practice Group has been formed to specifically serve these needs.

APPENDIX: BUSINESS INCENTIVES

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APPENDIX: BUSINESS INCENTIVES

NEW BRUNSWICK

NEW BRUNSWICK INNOVATION FOUNDATION ("NBIF")

The mandate of the NBIF is to contribute to the development and enhancement of innovation capacity in New Brunswick. The NBIF supports targeted and leveraged investments in innovation, and in research and development in New Brunswick. The NBIF has identified priority areas for its funding initiatives, which include advanced manufacturing, energy and environmental technologies, the knowledge industry, life sciences and value-added natural resources. Among the funds and programs available through the NBIF are:

RESEARCH INNOVATION FUND ("RIF")

The RIF assists in building the innovation capacity of eligible organizations by supporting innovation projects that have the potential for transforming new ideas into new products, services, technologies or processes. The RIF focuses on, but is not restricted to, applied R&D and innovation activities performed in the province.

STARTUP INVESTMENT FUND ("SIF")

The SIF provides entrepreneurs located in New Brunswick with access to startup capital to support the formation, initial capitalization and development of new and innovative growth businesses in the province. The SIF is designed to provide entrepreneurial New Brunswickers with the unique opportunity to obtain the early-stage equity capital they require to transform their innovations and business concepts into commercially viable ventures. Companies may be eligible for up to $100,000 under the SIF.

NBIF INNOVATION VOUCHER FUND ("NBIF IVF")

The NBIF IVF encourages collaboration and partnerships between small and medium-sized enterprises ("SME"s) and research organizations. The NBIF IVF aims to accelerate innovation within SMEs by leveraging the talent, capacity and infrastructure of New Brunswick research institutions. The ultimate goal is to apply innovation in a way that improves the profitability and the competitiveness of SMEs in New Brunswick. Projects may range in size from $10,000 to $100,000. NBIF will fund 80% of the total project costs, up to a maximum of $80,000 per project. The company will be required to fund the remaining 20%.

VENTURE CAPITAL FUND ("VCF")

The VCF is an early stage venture capital investment fund designed to assist companies grow and prosper by providing access to venture capital, business expertise, support and networking opportunities. The objective of the VCF is to support promising innovative New Brunswick companies that are in the post-seed round of funding and have sound commercial products or services and need capital to grow. Support is typically provided to companies in the form of direct equity investments through the purchase of common stock, or in some cases in the form of indirect equity investments through the use of convertible debt. VCF investments may range from $50,000 to $1,000,000 per investment round; however, investments in pre-revenue companies are generally capped at $250,000. The Foundation may reinvest in subsequent rounds of funding.

SPECIAL REGIONAL FUNDING

The Northern Economic Development and Innovation Fund ("NEDIF") has been created to stimulate economic development in northern New Brunswick. Visit the Regional Development Corporation at http://www2.gnb.ca/content/gnb/en/departments/regional_development.html for program details.

EXPORT DEVELOPMENT PROGRAM

This program is intended to introduce New Brunswick companies to exporting, and to assist in the development of new export markets outside of Atlantic Canada. To be eligible, companies must process, manufacture or produce an exportable product, service, technology or intellectual property of a business-to-business nature. A maximum contribution of $5,000 per project is provided for, with a maximum assistance allowed per company of $20,000 per year.

WORKFORCE EXPANSION PROGRAM

This program provides financial assistance to eligible employers in order to stimulate the creation of long-term employment opportunities for unemployed individuals. The program also aims at encouraging the hiring of the province's post-secondary graduates. Funding is on the basis of a wage subsidy. The percentage of wage reimbursement varies from 50% to 70% of the hourly wage to a maximum reimbursement of $8 per hour.

ONE-JOB PLEDGE

A wage incentive is available to an employer based on existing eligibility criteria. The percentage of wage reimbursement for a recent post-secondary graduate is 70% of the wage up to $10 per hour, for a maximum of 40 hours per week. The duration of a subsidy for a recent post-secondary graduate is 52 weeks. The employee must be paid at least $4 per hour above

minimum wage. To be eligible, the employee must have graduated from a recognized post-secondary education institution in the last four years. The job must be for a minimum of 30 hours per week and related to the employee's field of study.

NB GROWTH PROGRAM ("NBGP")

The NBGP aims to create sustainable employment opportunities in New Brunswick by financially stimulating small businesses to pursue opportunities within targeted sectors of the economy and to stimulate capital investment for small business start-up, expansion, diversification, innovation and productivity improvement. Companies wishing to establish themselves can apply for up to $100,000 in non-repayable contribution for 50% of eligible costs. Already established companies seeking to expand, diversify or improve productivity can apply for up to $60,000 in non-repayable contributions for 30% of eligible costs. The "eligible costs" for these contributions include capital costs between $5,000 and $500,000 and salaries for newly created full-time employment positions.

FINANCIAL ASSISTANCE TO INDUSTRY PROGRAM

This program provides financial assistance towards the establishment, expansion or maintenance of new or existing manufacturing or processing industries, selected commercial service firms (business-to-business with focus on export activity or import displacement), tourism operations (consistent with the tourism strategy) and information technology companies (consistent with the information technology strategy). Financial assistance may be provided in the form of a loan guarantee or direct loan.

INNOV8 PROGRAM

INNOV8 funding is designed for New Brunswick companies that are developing intellectual property, specialized software, hardware, equipment, or performing research and development or prototyping. Funding is available only to those firms that are clearly identified as belonging to one of these six sectors: ICT, biosciences, industrial fabrication, aerospace & defence, value-added wood and value-added food. Through INNOV8, a company may be provided with up to $50,000 in funding per project to a limit of $100,000 per year.

ENERGY COSTS

NB Power offers very attractive electricity rates for commercial and industrial customers. Additionally, NB Power provides a "Declining Discount Firm Rate" for new facilities with firm load of at least 5000KW, which results in a 50% reduction in the demand charge for a period of one year. The discount decreases to zero in year six.

BUSINESS TAXATION

SMALL BUSINESS INVESTOR TAX CREDIT

This credit offers a 30% non-refundable personal income tax credit of up to $75,000 per year on eligible investments made by eligible investors.

RESEARCH AND DEVELOPMENT TAX CREDIT

New Brunswick's 15% R&D tax credit is fully refundable, meaning that the credit benefits New Brunswick corporations even if the corporation does not have provincial tax owing. The refund amount is equal to the amount of credit in excess of tax otherwise payable under the New Brunswick *Income Tax Act*. The credit does not have to be carried forward or back because it is fully refundable.

PROVINCIAL SALES TAX REBATE

Because New Brunswick has combined its provincial sales tax rate with the federal rate, the entire 13% sales tax on business inputs and purchases is a refundable tax credit for most businesses.

NEW BRUNSWICK MULTIMEDIA INITIATIVE

In support of New Brunswick-based production companies and, in an effort to encourage and facilitate training and hiring of New Brunswick human resources, the province is providing funding of 25% to 30% of eligible expenditures incurred in New Brunswick, depending on the project genre and company eligibility. Total provincial contributions will not exceed 30% on any production. Eligible costs are generally defined as expenditures where salaries, goods and/or services are paid for, purchased and consumed in New Brunswick, including airfare. In cases where a good or service is deemed essential to the production, but is not available in New Brunswick (such as film stock), an amount may be permitted given documented proof that the good or service in question is not available in New Brunswick.

DIGITAL MEDIA DEVELOPMENT PROGRAM ("DMDP")

To encourage the growth of New Brunswick's video game sector, the DMDP assists New Brunswick companies to develop intellectual property by providing an annual payroll rebate for eligible full-time positions. The assistance is in the form of a non-repayable annual payroll rebate. The DMDP provides a 30% salary rebate up to a maximum of $15,000 per full-time employee per year. The rebate is provided for production employees who are, for tax purposes, New Brunswick residents. The rebate is limited to a maximum of $500,000 per company per year.

There are a number of other programs available, such as industry-specific assistance for agricultural, fisheries and aquaculture operations. For further information on New Brunswick's investment programs and incentives, contact:

The Ministry of Economic Development,
Chancery Place
675 King Street
Fredericton, NB
E3B 1E9
Canada

Toll Free : 1.800.665.1800
Reception : 506.453.2277
Fax : 506.453.6389
Email : tradenb@gnb.ca
Web:
http://www2.gnb.ca/content/gnb/en/departments/economic_development.html

PRINCE EDWARD ISLAND

INNOVATION PEI

Innovation PEI is responsible for attracting out-of-province investment to Prince Edward Island. The current priority sectors for investment recruitment are advanced manufacturing and processing (including value-added food development and production), aerospace and defence, bioscience (including agriculture and fisheries), information and communications technology, financial services and renewable energy. Its programs include:

CAPITAL ACQUISITION SUPPORT PROGRAM

Businesses are most exposed to financial risk during start-up and expansion. This program assists Prince Edward Island businesses in acquiring the infrastructure needed to develop from start-up through to international exporting.

CRAFT DEVELOPMENT PROGRAM

PEI Business Development will provide assistance to individuals, businesses and groups engaged or planning to be engaged in craft production and who wish to exploit new market opportunities as a means to creating full-time employment.

ENTREPRENEUR LOAN PROGRAM

To stimulate small business activity throughout the province, PEI Business Development provides guarantees on traditionally-financed loans for use as an investment in eligible new and expanding businesses.

MARKETING SUPPORT PROGRAM

Marketing is a key component to any successful business start-up or expansion. This program provides a non-repayable contribution to Prince Edward Island businesses requiring marketing advice and support.

PROFESSIONAL SERVICE ASSISTANCE PROGRAM

Recognizing that today's entrepreneurs do not always have the time or expertise to respond effectively to all demands of their operation, PEI Business Development provides a non-repayable contribution to Island businesses requiring professional advisory support.

QUALITY IMPROVEMENT SUPPORT PROGRAM

This program provides financial assistance to Prince Edward Island businesses to acquire the professional expertise that will provide quality assurance documentation, auditing, registration and certification leading to the creation or enhancement of a Quality Improvement Program or a certified Quality Education Program for management and employees.

RENTAL INCENTIVE PROGRAM

To meet the occupancy needs of new and expanding businesses, the Rental Incentive Program provides financial assistance to businesses for leasing incremental space in any community in Prince Edward Island.

TRADE ASSISTANCE PROGRAM

This program provides financial assistance to Prince Edward Island businesses for eligible costs associated with participating in coordinated outbound trade missions and trade shows focused on new business opportunities in international exporting. Through this program, government will provide assistance to a business to participate in the areas of in-market business-to-business missions, in-market trade shows and in-market investigation and research.

WEB PRESENCE PROGRAM

Prince Edward Island is becoming one of the leading provinces for web presence in Canada. PEI Business Development provides a non-repayable contribution to Island businesses to assist them in establishing a presence on the internet.

WINTER PRODUCTION FINANCING PROGRAM

This program provides financial assistance to new and expanding craft and giftware manufacturers to allow them to increase the inventory of their products during the winter months for sale in the peak selling periods.

For more information about these and other financial assistance programs contact:

Innovation PEI
94 Euston Street
PO Box 910
Charlottetown, PE C1A 7L9

Tel: 902.368.6300
Fax: 902.368.6301
E-mail: innovation@gov.pe.ca
Web: http://www.innovationpei.com/

BUSINESS TAXATION

TAX HOLIDAYS

Under the Aerospace Tax Holiday, Prince Edward Island has created a tax-free zone for aerospace companies that locate in Slemon Park in Summerside. The tax rebate incentive program includes an annual 100% rebate of the provincial portion of corporate income tax and property tax to qualifying companies until the year 2022.

Similarly, companies in the biosciences industry may be eligible for the Bioscience Tax Holiday, exempting them from provincial corporate income tax for a period of 10 years.

INNOVATION AND DEVELOPMENT LABOUR REBATE ("IDLR")

The IDLR is a refundable labour rebate which may apply to projects in support of the development and/or commercialization of new products, processes and services that will be sold primarily beyond the borders of Prince Edward Island. A new product, process or service is one that has not previously been successfully developed in Prince Edward Island for commercial production or sale. The IDLR provides a rebate equal to 25% of eligible salaries and wages. Eligible salaries and wages are paid to Prince Edward Island residents for incremental, full time positions (1,850 hours per annum), and each position must have a gross wage of at least $30,000 per annum. Any individuals maintaining ownership in the company are not eligible.

ENRICHED INVESTMENT TAX CREDIT

This program provides an addition to the existing Investment Tax Credit of 10% applied to certain capital investments by manufacturing and processing companies. For high-productivity applications with a strong export focus, an enriched tax rebate of 25% will be available through a pre-approved certificate process.

SHARE PURCHASE TAX CREDIT

The Share Purchase Tax Credit provides a tax rebate on Prince Edward Island personal income tax in the amount of 35% of the value of an eligible investment in an eligible provincial corporation. The maximum credit that an individual may claim in any taxation year is $35,000.

SPECIALIZED LABOUR TAX CREDIT

The Specialized Labour Tax Credit is intended to help kick-start new business growth by providing an incentive for workers with specialized expertise or skills to accept employment in Prince Edward Island, where that knowledge or skill is not yet available in the provincial labour market. The 17% tax rebate applies to the personal income tax payable, for up to three years, on eligible income earned by the eligible individual.

For further details on available tax incentives and other incentive programs, contact:

Invest PEI
94 Euston Street
PO Box 910
Charlottetown, PE
C1A 7L9

Toll free: 1.866.822.5500
Tel: 902.368.6300
Fax: 902.368.6301
Email: askus@investpei.ca
Web: www.investpei.com

NOVA SCOTIA

SMALL BUSINESS FINANCING PROGRAM

This program gives small businesses access to capital through a loan guarantee program initiated by the Department of Economic and Rural Development, Credit Union Central, and the Nova Scotia Co-operative Council. Loans of up to $500,000 are available. The province will guarantee up to 75% of the loan, with the credit unions being responsible for the remaining 25%.

For further information, contact:

Department of Economic and Rural Development
Centennial Building
1660 Hollis St., Suite 600
Halifax, NS
B3J 1V7

Tel: 902.424.0377
Fax: 902.424.0500
Web: http://www.novascotia.ca/econ/

PAYROLL REBATE

Nova Scotia Business Inc.'s payroll rebate program is a performance-based incentive offered to eligible companies expanding in or locating to Nova Scotia. The rebate is a return (usually between 5 and 10%) on the company's eligible gross payroll. To receive the rebate, the company must create or retain a targeted number of jobs, at a minimum determined salary, within a set time-frame. The rebate is generally paid out annually over a term not exceeding five years. For further details on this program, contact:

Nova Scotia Business Inc.
World Trade & Convention Centre
1800 Argyle St., Suite 701
P.O. Box 2374
Halifax, NS
B3J 3N8

Toll free: 1.800.260.6682
Fax: 902.424.5739
E-mail: info@nsbi.ca

BUSINESS TAXATION

NEW SMALL BUSINESS TAX DEDUCTION

Nova Scotia's New Small Business Tax Deduction effectively eliminates the Nova Scotia Corporation Income Tax for the first three years for a new small business after incorporation. The Corporation must apply each year to the Nova Scotia Minister of Finance and Treasury Board for a Nova Scotia Tax Deduction Eligibility Certificate.

Eligible Corporations: All new businesses incorporated in Nova Scotia after April 18, 1986 that:

- have at least two employees, one of whom must be full-time and unrelated to any shareholder, for the specified taxation year; are not associated with another corporation(s);
- are not in a partnership or a joint venture with an ineligible corporation(s);
- are not a beneficiary of a trust where any beneficiary is ineligible;
- are not a previous active business with essentially the same owner(s) or related owner(s);
- are not a professional practice of an accountant, dentist, lawyer, medical doctor, veterinarian or chiropractor; and
- are not a business carrying on the same, or substantially the same, business activity as was carried on as a sole proprietorship, partnership or corporation.

RESEARCH AND DEVELOPMENT TAX CREDIT

Nova Scotia's Research and Development Tax Credit offers tax relief to incorporated Nova Scotia firms that incur qualified scientific research and experimental development ("SR&ED") expenditures made in Nova Scotia, as defined by the federal *Income Tax Act*.

R&D Rate: The credit rate for qualified expenditures is 15%. The rate is applicable to all corporations that incur SR&ED expenditures in Nova Scotia, regardless of size.

Refundability: Corporations that incur qualified SR&ED expenditures will be eligible for a refund of the tax credit where the tax credit exceeds Nova Scotia tax payable. The refund amount is equal to the amount of the credit in excess of tax otherwise payable under the Nova Scotia *Income Tax Act*. Refundability is available to all corporations that incur qualified SR&ED expenditures in Nova Scotia where the corporation has or would have taxable income allocated to Nova Scotia.

FILM TAX CREDIT

Nova Scotia's Film Tax Credit is a refundable tax credit for costs directly related to the production of films in Nova Scotia. The program encourages the development, training and hiring of Nova Scotia film personnel in all disciplines.

Eligibility: The tax credit is available to qualifying productions and co-productions produced and/or shot in Nova Scotia. Production companies applying for the tax credit must have a permanent establishment in Nova Scotia (a fixed place of business, a production office, a branch etc.) and must be incorporated under the laws of Nova Scotia, another province of Canada, or Canada.

There is no limit on the size of the production budget, no corporate or asset cap, and no Canadian content or copyright ownership requirements associated with the tax credit. The tax credit is not reduced by any other tax credits that the production may receive.

Calculations: As of November 30, 2010, the tax credit rate is 50% of eligible salaries, with an additional 15% available for films shot in eligible geographical areas and by production companies who have made three films in a two year period.

Further information on Nova Scotia's Film Tax Credit is available at:

Film Nova Scotia
P.O. Box 34104
Scotia Square, RPO
Halifax, NS
B3J 3S1

Toll free: 1.888.360.2111
Fax: 902.424.0617
Web: http://film.ns.ca/

DIGITAL MEDIA TAX CREDIT

The Digital Media Tax Credit is a refundable tax credit for costs directly related to the development of interactive digital media products in Nova Scotia. The tax credit amount is defined as the lesser of 50% of eligible labour expenditures or 25% of the total expenditures made in Nova Scotia.

NOVA SCOTIA EQUITY TAX CREDIT

The Equity Tax Credit is designed to assist Nova Scotia small businesses, co-operatives, and community economic development ("CED") initiatives in obtaining equity financing by offering a personal income tax credit to individuals investing in eligible businesses. Equity financing is an alternative to other forms of financing such as debt and traditional government assistance. The credit is not a grant nor is it considered to be a tax shelter.

Eligible Investors: The credit is available to residents of Nova Scotia who are over 19 years of age and who have *bona fide* reasons for making the investment, other than simply obtaining the tax credit. Each eligible issue of shares must have at least three eligible investors. It should be noted that any approval of shares issued under the program does not constitute an endorsement by government of the corporation or co-operative issuing the shares. The province does not guaranty any investment. The investor is at risk for his or her investment.

Eligible Investments: In the case of corporations, eligible investments must be newly issued common voting shares of the corporation that are non-redeemable, non-convertible and are not restricted in profit sharing or participation upon dissolution. The shares cannot be eligible for any other tax credit or deduction allowed under the *Income Tax Act*, except as a deduction for RRSP purposes. In the case of co-operatives, eligible investments must be a share that would, if it were the only share issued to the investor, allow the investor to be a member in the co-operative and allow the member to participate in the affairs of the co-operative. In addition, shares are not eligible if the investor disposed of any shares of the eligible business at any time after September 30, 1993 and before the specified issue of shares. The specified issue of shares means the shares that are specified in the application of the eligible business to which a Certificate of Registration applies.

Eligible Businesses: Eligible businesses include corporations and co-operatives incorporated pursuant to the laws of Canada, including CED corporations and co-operatives. CED corporations and co-operatives are those organizations created to assist or develop local businesses within the community. The CED corporation or co-operative raises capital by issuing shares to individuals and in turn invests that capital in local businesses. In addition, eligible businesses must meet the following criteria:

- be involved in active business or investing in other eligible businesses;
- have less than $25 million in assets;
- have at least 25% of salaries and wages paid in Nova Scotia;
- corporations must have authorized capital consisting of common voting shares;
- co-operatives must be marketing, producing or employee co-operatives; and
- corporations must have at least three eligible investors taking part in the specified issue.

Application: An eligible business must make application to the Department of Finance to obtain a Certificate of Registration prior to issuing shares to investors. This certificate makes the specified shares eligible for the tax credit. Pre-approval of eligibility is required. This eligibility does not constitute any approval that may be required from the Securities Commission under the *Securities Act*.

Prohibited Use of Funds: Funds raised by the eligible business must be used in an active business and cannot be used for any of the following purposes:

- lending, except under prescribed conditions;
- purchasing shares, other than shares in other eligible businesses;
- paying dividends or repaying shareholder debt to a director, shareholder or officer of the business or an associate of a director, shareholder or officer of the eligible business;
- purchasing services or assets from the province to carry on a business activity that is the same or similar to the activity carried on by the province where that eligible business has received any assistance from the province;
- the redemption of shares or the funding of the purchase of all or substantially all of the assets of a previously existing proprietorship, partnership, joint venture, trust or company, except where that firm is in receivership or bankruptcy; and
- the purchase of assets or services by the eligible business for a price greater than fair market value.

Tax Credit: The tax credit is calculated at 35% of the investment made by the individual to a maximum annual investment of $50,000 (maximum annual credit of $17,500). The investment may be made within the calendar year or within 60 days of the end of the taxation year. The credit is not refundable but may be carried forward for seven years or carried back three years. The maximum credit which can be claimed in a single taxation year (including current year and the carry forward or back amounts) cannot exceed $17,500.

Investors are required to hold the investment for at least five years. If an investment is disposed of within this five year period, the individual may be required to repay the tax credits earned.

For further information on available tax incentives, contact:

Nova Scotia Department of Finance and Treasury Board
Fiscal and Economic Policy Branch
Taxation and Fiscal Policy Division
1723 Hollis St.,
Halifax NS
B3J 1V9

Tel: 902.424.5554
Fax: 902.424.0635
E-mail: FinanceWeb@gov.ns.ca

NEWFOUNDLAND AND LABRADOR

BUSINESS ATTRACTION FUND

The Business Attraction Fund is designed to attract medium and large scale businesses to the province by providing customized financial assistance. The fund consists of allocations for loans or incentives as well as non-repayable contributions.

BUSINESS INVESTMENT PROGRAM ("BIP")

The BIP provides term loans and equity investments to SME in strategic growth sectors as identified by the Department of Innovation, Business and Rural Development ("IBRD"). The fund is also available to businesses that have export potential and require assistance to enter or expand in external markets. Funds are provided to complement funding from conventional sources, where a need has been demonstrated, and are also intended to increase the capital base of businesses allowing them to leverage new private-sector investments. The BIP is in the form of repayable term loans to a maximum amount of $500,000 per government fiscal year at the Department's base rate of 3%. Equity funding in the form of redeemable preferred shares to a maximum of $500,000 per project; maximum aggregate of $1 million is available.

BUSINESS DEVELOPMENT SUPPORT PROGRAM ("BDSP")

The BDSP assists Newfoundland and Labrador SMEs with opportunities to increase their productivity and improve their competitiveness. The BDSP supports SMEs that demonstrate a desire to develop and grow by improving the operations of their businesses, investing in their people, and focusing on trade opportunities. IBRD assistance will be targeted towards businesses in strategic sectors that normally focus on export markets and/or improve import substitution. Funding is available for productivity improvements, knowledge development, market development and/or professional technical advice. The BDSP is in the form of a non-repayable contribution(s) to a maximum amount of $100,000 per government fiscal year. The contribution level will be based on 50% of eligible costs, with the business identifying its source of the remaining 50% of funds required to complete the project(s).

ECONOMIC DIVERSIFICATION AND GROWTH ENTERPRISES PROGRAM ("EDGE")

The EDGE program provides a package of incentives to encourage significant new business investment in the province to help diversify its economy and stimulate new private sector job creation, particularly in rural areas.

Eligible Companies: A new business or an existing business interested in expanding in the province may apply for EDGE status if it meets the following criteria:

- It will create and maintain 10 new permanent jobs in the province;
- It is prepared to make a minimum capital investment of $300,000 or generate incremental annual sales of $500,000;
- It would not establish or expand in the province in the absence of the EDGE incentives;
- The EDGE incentives will not give it a direct competitive advantage over other existing businesses in the province; and
- The new business activity will have a substantial net economic benefit to the province.

EDGE Incentives: Companies approved for EDGE status are entitled to the following incentives and benefits:

- A 100% rebate on provincial corporate income tax and the provincial payroll tax;
- A 50% rebate on federal corporate income tax;
- A 100% rebate on municipal property and/or municipal business taxes in participating municipalities; and
- Access to unserviced Crown land for $1.00 where such land is required to implement the company's business plan.

For more information on these and other programs, contact:

Department of Business
Government of Newfoundland and Labrador
6th Floor, East Block Confederation Building
P.O. Box 8700
St. John's, NL
A1B 4J6

Tel: 709.729.3254
Fax: 709.729.3306
E-mail: business@gov.nl.ca
Web: www.nlbusiness.ca

BUSINESS TAXATION

Newfoundland and Labrador has one of the most favourable business tax climates in Canada. The Corporate Income Tax ("CIT") rates are amongst the lowest in the country. The Harmonized Sales Tax ("HST") has resulted in the removal of tax on business inputs. Unlike many provinces, Newfoundland and Labrador does not impose a general capital tax. While Newfoundland and Labrador imposes a 2% payroll tax, the exemption threshold relieves virtually all small businesses from this tax. A number of tax credits and incentives are designed to encourage economic growth in strategic areas.

MANUFACTURING AND PROCESSING PROFITS TAX CREDIT

This credit applies to corporations that carry out manufacturing and processing from a permanent establishment located in Newfoundland and Labrador. The credit allows a deduction

from CIT payable of 9% on taxable manufacturing and processing profits earned in the province. This results in an effective CIT rate of 5% for manufacturing and processing profits.

DIRECT EQUITY TAX CREDIT PROGRAM

The Direct Equity Tax Credit Program is designed to encourage private investment in new or expanding small businesses as a means of creating new jobs and diversifying the economy. An investment credit, in the form of a provincial income tax credit, is available to individuals and arm's length corporations that invest as shareholders in eligible small business activities. There are two tax credit rates. Where the qualifying activities are undertaken in the province outside the North East Avalon, a 35% rate applies. Where the qualifying activities are undertaken within the North East Avalon, a 20% rate applies. In cases where qualifying activities are undertaken in both areas, a reasonable proration applies.

FILM AND VIDEO TAX CREDIT

This refundable provincial CIT credit is provided for eligible local film projects. The credit is 40% of eligible local labour costs, but may not exceed 25% of production costs or a single corporation credit limit of $3 million. The corporation must also pay at least 25% of its salaries and wages to residents of the province. The corporation must first apply for eligibility to the Newfoundland and Labrador Film Development Corporation prior to the commencement of production.

For further information on available tax incentives, contact:

Department of Finance
Taxation and Fiscal Policy Branch
P.O. Box 8700
St. John's, NL A1B 4J6

Toll free: 1.800.729.6297
Fax: 709.729.2856
E-mail: taxpolicy@gov.nl.ca

More information on Newfoundland and Labrador business incentives can be found at the following website: http://www.fin.gov.nl.ca/fin/tax_programs_incentives/business/index.html

CANADA

ATLANTIC CANADA OPPORTUNITIES AGENCY ("ACOA") BUSINESS DEVELOPMENT PROGRAM

ACOA provides unsecured, interest-free loans towards the eligible costs of new establishments, expansions, modernizations or projects which improve business competitiveness. ACOA's contribution is repayable on a time schedule tailored to the circumstances. The maximum level of assistance under the program is 50% of eligible costs for start-ups, expansions and modernizations, and 75% of eligible costs for activities such as training and quality assurance.

ACOA'S ATLANTIC INNOVATION FUND ("AIF")

The AIF is a program designed to strengthen the economy of Atlantic Canada by accelerating the development of knowledge-based industry. The program focuses on R&D projects in the area of natural and applied sciences, as well as in social sciences, humanities and arts and culture, where these are explicitly linked to the development and commercialization of technology-based products, processes or services.

The Atlantic Innovation Fund can provide assistance of up to 80% of total eligible costs for non-commercial projects and up to 75% of total eligible costs for commercial, private sector projects.

For further details on these and other ACOA programs, please contact:

ACOA Head Office
Blue Cross Centre, 3rd Floor
644 Main Street
P.O. Box 6051
Moncton, NB
E1C 9J8

Toll free: 1.800.561.7862
Fax: 506.851.7403
Web: www.acoa-apeca.gc.ca

ATLANTIC INVESTMENT TAX CREDIT ("AITC")

The AITC is a 10% credit available for certain investments in new buildings, machinery and equipment used in the Atlantic region and the Gaspé Peninsula. Currently, the credit supports investments in farming, fishing, logging, manufacturing and processing, oil and gas, and mining.

This credit is currently in the process of being phased out. The credit will apply at a rate of 10% for assets acquired before 2014 for use in oil and gas and mining activities and at a rate of 5%

for such assets acquired in 2014 and 2015. The credit will not be available for such assets acquired after 2015. Certain projects may qualify for transitional relief until 2017.

SCIENTIFIC RESEARCH & EXPERIMENTAL DEVELOPMENT ("SP&ED")

The SR&ED Program is a federal tax incentive program, administered by the Canada Revenue Agency ("CRA"), that encourages Canadian businesses of all sizes and in all sectors to conduct research and development in Canada. The SR&ED Program gives claimants cash refunds and/or tax credits for their expenditures on eligible research and development work done in Canada. The SR&ED program is complex and professional tax advice should be sought by claimants wishing to take advantage of it. Visit the CRA website at http://www.cra-arc.gc.ca/sred/ for additional information.

FOREIGN TAX CREDIT

Corporations which have foreign source income and are resident in Canada at any time in the year are eligible for a credit on foreign taxes paid. A credit is allowed against Canadian tax payable for the lesser of the foreign tax paid and the Canadian tax on the foreign source income.

DUTY DEFERRAL PROGRAM

The Duty Deferral Program aims to improve the competitiveness of Canadian businesses by offering relief from the payment of most duties and taxes on imported goods that are ultimately exported, whether or not the goods are further manufactured in Canada. This program groups three sub-programs through which businesses can defer, relieve or refund the payment of duties on imported goods. These sub-programs are the following:

- The Duties Relief Program,
- The Drawback Program and
- The Customs Bonded Warehouse Program.

These three programs operate individually or in combination in the way that best suits business needs. If preferred, goods can even be moved between programs without paying duties. Overall, the Duty Deferral Program offers Canadian businesses many of the same duty and tax incentives as those in free trade zones around the world.

CANADIAN FILM OR VIDEO PRODUCTION TAX CREDIT ("CPTC")

The CPTC is a fully refundable tax credit for films and videos produced and owned by Canadian corporations. Under the CPTC program, the Canadian Audio-Visual Certification Office ("CAVCO") performs two distinct functions:

1. Canadian content certification, and
2. Estimation of the eligible expenses of production.

In order for a production to qualify as Canadian content for tax credit purposes through CAVCO, the production must meet specific criteria for key creative personnel and production costs, which are outlined in their guidelines. The CPTC is available at a rate of 25% of eligible salaries and wages. Eligible salaries and wages qualifying for the tax credit may not exceed 60% of the cost of the production, net of assistance, as certified by the Minister of Canadian Heritage. Therefore, the tax credit could provide a refund of up to 15% of the cost of production, net of assistance.

For further information, visit http://www.cra-arc.gc.ca/tx/nnrsdnts/flm/ftc-cip/menu-eng.html .

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